CASES

ARGUED AND ADJUDGED

IN

The Supreme Court

OF

THE UNITED STATES.

DECEMBER TERM, 1866.

REPORTED BY

JOHN WILLIAM WALLACE

VOL. V.

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JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE.

SALMON PORTLAND CHASE.

ASSOCIATES.

Hon. James M. Wayne,
Hon. Robert Cooper Grier,
Hon. Noah H. Swayne,
Hon. David Davis,
Hon. Samuel Nelson,
Hon. Nathan Clifford,
Hon. Samuel F. Miller,
Hon Stephen J. Field.

ATTORNEY-GENERAL.

Hon. Henry Stanbery.

CLERK.

Daniel Wesley Middleton, Esquire.

ALLOTMENT, ETC., OF THE JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

AS MADE APRIL 8, 1867, UNDER THE ACTS OF CONGRESS OF JULY 23, 1866, AND MARCH 2, 1867.

NAME OF THE JUDGE, AND STATE WHENCE COMING.	NUMBER AND TERRITORY OF THE CIRCUIT.	DATE AND AUTHOR OF THE JUDGE'S COMMISSION.
CHIEF JUSTICE.	FOURTH.	1864.
HON. S. P. CHASE, Ohio.	MARYLAND, WEST VIRGINIA, VIRGINIA, NORTH CAROLINA, AND SOUTH CAROLINA.	December 6th. PRESIDENT LINCOLN.
ASSOCIATES.	FIFTH.	1835.
HON. JAS. M. WAYNE, Georgia.	GEORGIA, FLORIDA, ALABAMA, MISSISSIPPI, LOUISIANA, AND TEXAS.	January 9th. PRESIDENT JACKSON.
	SECOND.	1845.
HON. SAML. NELSON, New York.	NEW YORK, VERMONT, AND CONNECTICUT.	February 14th. PRESIDENT TYLER.
	THIRD.	1846.
HON. R. C. GRIER, Pennsylvania.	PENNSYLVANIA, NEW JERSEY, AND DELAWARE.	August 4th. PRESIDENT POLK.
	FIRST.	1858.
HON. N. CLIFFORD, Maine.	MAINE, NEW HAMPSHIRE, MASSACHUSETTS, AND RHODE ISLAND.	January 12th. PRESIDENT BUCHANAN.
	SIXTH.	1862.
HON. N. H. SWAYNE, Ohio.	OHIO, MICHIGAN, KENTUCKY, AND TENNESSEE.	January 24th. PRESIDENT LINCOLN.
	EIGHTH.	1862.
HON. S. F. MILLER, Iowa.	MINNESOTA, IOWA, MISSOURI, KANSAS, AND ARKANSAS.	July 16th. PRESIDENT LINCOLN.
	SEVENTH.	1862.
HON. DAVID DAVIS, Illinois.	INDIANA, ILLINOIS, AND WISCONSIN.	December 8th. PRESIDENT LINCOLN.
	NINTH.	1863.
HON. S. J. FIELD, California.	CALIFORNIA, OREGON, AND NEVADA.	March 10th. PRESIDENT LINCOLN.

TABLE OF CASES.

DECISIONS

IN THE

SUPREME COURT OF THE UNITED STATES,

DECEMBER TERM, 1866.

The Springbok.

1. Though invocation, in prize cases, is not regularly made on original hearing, but only after a cause has been fully heard on the ship's documents and the preparatory proofs, and where suspicious circumstances appear from these; yet where the court below, in the exercise of its discretion, has allowed it on first hearing, the decree will not necessarily be reversed; decrees of condemnation having passed in both the cases invoked, one *pro confesso* and the other by a decree of the highest appellate court.
2. Where the papers of a ship sailing under a charter-party are all genuine and regular, and show a voyage between ports neutral within the meaning of international law; where there has been no concealment nor spoliation of them; where the stipulations of the charter-party in favor of the owners are apparently in good faith; where the owners are neutrals, have no interest in the cargo, and have not previously in any way violated neutral obligations, and there is no sufficient proof that they have any knowledge of the unlawful destination of the cargo,—in such a case, its aspect being otherwise fair, the vessel will not be condemned because the neutral port to which it is sailing has been constantly and notoriously used as a port of call and transshipment by persons engaged in systematic violation of blockade and in the conveyance of contraband of war, and was meant by the owners of the cargo carried on this ship to be so used in regard to it.
3. The facts that the master declared himself ignorant as to what a part of his cargo, of which invoices were not on board (having been sent by mail to the port of destination), consisted,—such part having been contraband; and also declared himself ignorant of the cause of capture, when his mate, boatswain and steward all testified that they understood it to be the vessel's having contraband on board,—*held* not sufficient, of

themselves, to infer guilt to the owners of the vessel, in no way compromised with the cargo. But the misrepresentation of the master as to his knowledge of the ground of capture, *held* to deprive the owners of costs on restoration.

4. A cargo was here condemned for intent to run a blockade, where the vessel was sailing to a port such as that above described, the bills of lading disclosing the contents of 619 packages of 2007, which made the cargo, the contents of the remaining 1388 being not disclosed; where both they and the manifest made the cargo deliverable to order, the master being directed by his letter of instructions to report himself on arrival at the neutral port to H., who "would give him orders as to the delivery of his cargo;" where a certain fraction of the cargo whose contents were undisclosed was specially fitted for the enemy's military use, and a larger part capable of being adapted to it; where other vessels owned by the owners of the cargo, and by the charterer, and sailing ostensibly for neutral ports were, on invocation, shown to have been engaged in blockade-running, many packages on one of the vessels, and numbered in a broken series of numbers, finding many of the complemental numbers on the vessel now under adjudication; where no application was made to take further proof in explanation of these facts, and the claim of the cargo, libelled at New York, was not personally sworn to by either of the persons owning it, resident in England, but was sworn to by an agent at New York, on "information and belief."

APPEAL from a decree of the District Court of the United States for the Southern District of New York, respecting the British bark Springbok and her cargo, which had been captured at sea by the United States gunboat Sonoma during the late rebellion, and libelled in the said court for prize.

The vessel was owned by May & Co., British subjects, and was commanded by James May, son of one of the owners.

She had been chartered 12th November, 1862, by authority of May, the captain, to T. S. Begbie, of London, to take a full cargo of

"Lawful merchandise, and therewith *proceed to Nassau, or so near thereunto as she may safely get, and deliver same*, on being paid freight as follows, &c.: The freight to be paid one-half in advance on clearance from custom-house, subject to insurance, and the remainder in cash *on delivery*. Bills of lading are to be signed by master at current rate of freight, if required, without prejudice to this charter-party. It being agreed that master or owners have absolute lien on cargo for all freight, dead freight,

demurrage, or other charges. The ship is to be consigned to the *charterer's agent at port of unloading*, free of commission. Thirty running days are allowed the freighter for loading at port of loading and *discharging at Nassau.*"

This document had an indorsement on it by Speyer & Haywood, persons hereinafter described.

The letter of instructions to the master was thus:

"LONDON, December 8, 1862.

"CAPTAIN JAMES MAY.

"*Dear Sir*,—Your vessel being now loaded, you will proceed *at once to the port of Nassau, N. P., and on arrival report yourself to Mr. B. W. Hart there, who will give you orders as to the delivery of your cargo* and any further information you may require.

"We are, dear sir, &c.,

"SPEYER & HAYWOOD,

"For the Charterers."

The letter to the agent of the consignee, directed "B. W. Hart, *Nassau*," and from these same persons, Speyer & Heywood, was thus:

"*Under instructions from Messrs. Isaac, Campbell & Co.*, of Jermyn Street, we inclose you bills of lading for goods shipped per Springbok, consigned to you."

The London custom-house certificate was "from London *to Nassau;*" the certificate of clearance declared the "destination of voyage, *Nassau, N. P.;*" and the manifest was of a cargo from "London *to Nassau.*"

The log-book was headed, "Log-book of the bark Springbok, on a voyage from London *to Nassau.*"

The shipping articles, November, 1862, were of a British crew, "*on a voyage from London to Nassau, N. P.;* thence, if required, to any *other port* of the West India Islands, *American ports*, British North America, east coast of South America and back to the final port of discharge in the United Kingdom or continent of Europe, between the Elbe and Brest, and finally to a port in the United Kingdom; voyage probably under twelve months."

The cargo, valued at £66,000, was covered by three bills of lading (of which two were duplicated, the duplicates marked Captain's copies), as follows:

Bill of lading marked No. 2, showed "666 packages merchandise," shipped by Moses Brothers, to be delivered, &c., at port of Nassau, N. P., unto order —— or to —— assigns, he or they paying freight, *as per charter-party.* It was indorsed by Moses Brothers in blank. This bill of lading on its face showed 150 chests and 150 half-chests tea, 220 bags coffee, 4 cases ginger, 19 bags pimento, 10 bags cloves, and 60 bags pepper—in all, 613 packages. The remaining 53 were entered as *cases*, *kegs*, and *casks.* These 53 packages were found, when the cargo was more closely examined, to contain *medicines* and *saltpetre;* matters at that time much needed in the Southern States, then under blockade.

Bill of lading No. 3, showed one bale and one case shipped by Speyer & Haywood, to be delivered at Nassau, unto order —— or to —— assigns, &c., paying freight as per *charter-party.*

Bill of lading No. 4, showed 1339 packages shipped by Speyer & Haywood to Nassau, as above. These 1339 packages were also described as *cases*, *bales*, *boxes*, and *a trunk.* This was also indorsed in blank.

The manifest gave no more specific description of the character of the cargo. It was signed Speyer & Haywood, brokers, and showed that the whole cargo was consigned to "order."

An examination of the packages in bills Nos. 3 and 4 showed 540 pairs of "gray army blankets," like those used in the army of the United States, and 24 pairs of "white blankets;" 360 gross of brass navy buttons, marked "C. S. N.,"* 10 gross of army buttons, marked "A.,"† 397 gross of army buttons, marked "I.,"‡ and 148 gross of army buttons, marked "C.,"§ being in all 555 gross; all the buttons were stamped on the under side, "Isaac, Campbell &

* Confederate States Navy?
† Artillery?
‡ Infantry?
§ Cavalry?

Co., 71 Jermyn st., London." There were 8 cavalry sabres, having the British crown on their guards; 11 sword bayonets, 992 pairs of army boots, 97 pairs of russet brogans, and 47 pairs of cavalry boots, &c.

The vessel set sail from London, December 8th, 1862, and was captured February 3d, 1863, making for the harbor of Nassau, in the British neutral island of New Providence, and about 150 miles east of that place. The port, which lay not very far from a part of the southern coast of the United States, it was matter of common knowledge had been largely used as one for call and transshipment of cargoes intended for the ports of the insurrectionary States of the Union, then under blockade by the Federal government.* The vessel when captured made no resistance; and all her papers were given up without attempt at concealment or spoliation.

Being brought into the port of New York, and libelled there as prize, February 12, 1863, a claim was put in on the 9th of March following, by Captain May for his father and others as owners of the vessel. On the 24th of the same month a claim for the whole cargo was put in for Isaac, Campbell & Co., and also for Begbie, through one Kursheet, their "agent and attorney;" Kursheet stating in his affidavit in behalf of these owners, that "it is impossible to communicate with them *in time to allow them to make the claim and test affidavit herein.*" His affidavit stated farther,

"That, as he *is informed and believes*, it was not intended that the barque should attempt to enter any port of the United States, or that her cargo should be delivered at any such port, but that the only destination of such cargo was Nassau aforesaid, where the said cargo was *to be actually disposed of, and proceeds remitted to said claimants.*

"That, as he *is informed and believes*, the cargo was not shipped in pursuance of any understanding, either directly or indirectly, with any of the enemies of the United States, or with any person or persons in behalf of or connected with the so-called Con-

* See the Bermuda, 3 Wallace, 514.

federate States of America, but was shipped with the full, fair, and honest intent to sell and dispose of the same absolutely in the market of Nassau aforesaid.

"That *his information is derived from letters and communications very lately received by this deponent from the aforesaid claimants,* and from documents in deponent's possession, placed there by said claimants, and that *such* communications *authorize this deponent to intervene and act as agent as well as proctor and advocate for the said claimants as to the above cargo.*"

The master, mate, and steward, were examined as witnesses *in preparatorio:*

The master stated, that the goods were to be delivered at Nassau for account and risk of Begbie & Co., London, the charterers; that he did not know that the laders or consignees had any interest in the goods; that he knew nothing of the qualities, quantities, or particulars of the goods or to whom they would belong if restored and delivered at the destined port; that he was not aware that there were goods contraband of war on board; that, as he believed, *invoices* and duplicate bills of lading were sent to Nassau by mail steamer; that there were no false bills of lading, nor any passports or sea-briefs other than the usual register and ship's papers, which were entirely true and fair; that *he did not know on what pretence she was captured;* that there were no persons on board owing allegiance to the United States; that on the vessel's previous voyage, she went from London to Jamaica, carrying general merchandise, and returned direct, carrying principally logwood.

The mate, who to a greater or less extent confirmed these statements, swore that the cargo was a general cargo; casks, bales, boxes, and bags; that he had no knowledge, information, or belief as to what was contained in them, and had never heard. He knew of no goods contraband of war; no arms or munitions of war that he knew of. "The seizure," he stated, "was made on *the supposition that the cargo was contraband of war.*"

The boatswain testified to the same purpose of the voyage; that the vessel had no colors but English aboard; that the

cargo was general, in bales, cases, and bags, that he did not know their contents and never had heard them stated; and that *he* "understood the seizure was made because the bills of lading *did not show what was in some of the cases on board.*"

The steward, that he "understood the vessel was captured *because we had goods contraband of war aboard;* had heard no other reason given."

Upon the hearing in the District Court, the counsel for the captors invoked into the case the proofs taken in two other cases, on the docket of that court for trial at the same time with the present one, the cases, namely, of *United States* v. *The Steamer Gertrude*, and *United States* v. *The Schooner Stephen Hart.*

The Hart was captured on the 29th of January, 1862, between the southern coast of Florida and the Island of Cuba. The claimants of her whole cargo were the firm of Isaac, Campbell & Co., the same persons who claimed, jointly with Begbie, the cargo of the Springbok. It also appeared in the case of the Hart, that the brokers who had charge of the lading of her cargo were Speyer & Haywood, the same parties who appeared as brokers of the cargo in the present case, and as shippers of a part of it, and as agents for Begbie and for I., C. & Co. It appeared, in the case of the Hart, that I., C. & Co. were dealers in military goods, and that the entire cargo of that vessel, consisting of arms, munitions of war, and military equipments, was laden on board of her in England, under the direction of I., C. & Co., in co-operation with the agents, at London, of the "Confederate States," with the design that the cargo should run the blockade into a port of the enemy, either in the Hart, or in a vessel into which the cargo should be transshipped at some place in Cuba, and that I., C. & Co. intrusted to the agent of the "Confederate States" in Cuba, the determination of the question as to the mode in which the cargo should be transported into the enemy's port. The cargo of the Hart had been condemned by the Supreme Court, as lawful prize, at the last term.*

* 3 Wallace, 559.

Statement of the case.

The Gertrude was captured on the 16th of April, 1863, in the Atlantic Ocean, off one of the Bahama Islands, while on a voyage ostensibly from Nassau to St. John's, N. B. The libel was filed against her on the 23d of April, 1863, and she was condemned, with her cargo, as lawful prize, on the 21st of July, 1863. No claim was put in to either the Gertrude or her cargo. The testimony showed that she belonged to Begbie; that her cargo consisted, among other things, of hops, dry goods, drugs, leather, cotton cards, paper, 3960 pairs of gray army blankets, 335 pairs of white blankets, linen, woollen shirts, flannel, 750 pairs of army brogans, Congress gaiters, and 24,900 pounds of powder; that she was captured after a chase of three hours, and when making for the harbor of Charleston, her master knowing of its blockade, and having on board a Charleston pilot under an assumed name.

The marshal's report of the contents of the packages on board of the Springbok, and of the prize commissioners' report of the contents of the packages of the Gertrude, disclose the following facts:

The report in the case of the Springbok specified "18 bales of army blankets, butternut color," each marked *A*, *in a diamond*, and numbered 544 to 548, 550, 552, and 555 to 565. The report in the case of the Gertrude showed a large number of bales of "army blankets," each marked *A*, *in a diamond*, and numbered with numbers, scattered from 243 to 534, and then commencing to renumber again at 600.

In the cargo of the Springbok was found a bale marked *A*, *in a diamond*, and numbered 779; while in the cargo of the Gertrude were found bales each marked *A*, *in a diamond*, and numbered 780, 782, 784, 786, 788, 789 to 799.

In the Springbok were found 9 cases, each marked *A*, *in a diamond*, and numbered 976 to 984, and 4 bales, each marked *A*, *in a diamond*, and numbered 985 to 987 and 989, by the same marks; the 4 bales being stated to be "men's colored travelling shirts." In the Gertrude were found 5 bales, each marked *A*, *in a diamond*, and numbered 998, 990, to 992 and 998, and described as "men's colored travelling

shirts." In the Hart were 4 cases of men's white shirts, each marked *A*, *in a diamond*, and numbered 994 to 997.

So, also, in the Springbok were found packages, each marked *A*, *in a diamond*, *S. I., C. & Co.*, and numbered irregularly and with considerable *hiatûs*, from 1221 up to 1440. But there was no 1285 among them, the *hiatûs* being from 1266 to 1289, which last was the first of several having "shirts." On the Gertrude were packages marked *A*, *in a diamond*, numbered from 1170 to 1214, also one numbered 1285, and found to contain "shirts."

On board of the Springbok was found 1 bale of brown wrapping paper, marked *A*, *in a diamond*, *T. S. & Co.*, and numbered 264. On board of the Gertrude a large number of bales of wrapping paper and other paper, marked *A*, *in a diamond*, *T. S. & Co.*, and numbered with numbers scattered between 1 and 170.

In only one instance, apparently, so far as the testimony showed, was the same number found on a package in each cargo.

On the other hand, many marks were found on the one vessel not found on the other.

No application was made in the court below for leave to furnish further proofs.

The court below condemned *both vessel and cargo.*

Messrs. Carlisle and Edwards for the appellants, claimants in the case:

1. *As to the invocation.*—The papers in the cases of *The Hart* and *The Gertrude* were introduced against well-established principles of international law. For the well-settled rule of practice in prize is, that exclusively upon a ship's papers and the examinations *in preparatorio* the cause is to be heard in the first instance.* "The evidence to acquit or condemn, with or without costs or damages, must," says the highest English authority, "in the first instance, come merely from

* The Dos Hermanos, 2 Wheaton, 76; The Pizarro, Id. 227; The Amiable Isabella, 6 Id. 1.

the ship taken, viz., the papers on board and the examination on oath of the master and other principal officers."*

The English cases of invocation† are all cases *after* further proof. The cases in our own courts coupled with invocation are to the same effect: *The George*‡ was one for further proof,—"permission to make further proof." *The Experiment*§ was of the same character. "The captors," says the case, "have had full notice of the difficulties of their case, and *after an order for further proof*, which should awaken extraordinary diligence," &c., &c.

And even further proof, which is the portal through which invocation must come, is rarely allowed, unless there be something in the original evidence which lays a suggestion for prosecuting the inquiry further.‖ Where the case is not liable to any just suspicion, the disposition of the court leans strongly against the introduction of extraneous matter, and against permitting the captors to enter upon further inquiry. The most ordinary cases of further proof are where the cause appears doubtful upon the original papers and the answers to the standing interrogatories.

Aside from rules, the principle, in cases of invocation, is that the suit invoked from should be between the same parties.¶ In this case there is invocation of two *ex parte* reports of cargoes, made by United States prize commissioners, in the absence of claimants; and also a United States libel.

"It is essential," says Story, J., in *The Don Hermanos*, in this court,** "to the correct administration of prize law, that the regular modes of proceeding should be observed with the utmost strictness."

Even depositions taken on further proof in one prize case,

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* Report of Sir George Lee, Dr. Paul, Sir Dudley Ryder, and Mr. Murray (Lord Mansfield), contained in the letter of Sir William Scott and Dr. Nicoll to John Jay, Esq. Wheaton on Captures, Appendix, 310.

† The Sarah, 3 Robinson, 330; The Vrendschap, 4 Id. 166; The Romeo, 6 Id. 357; The Zulema, 1 Acton, 14.

‡ 1 Wheaton, 408.

§ 8 Id. 261.

‖ The Sarah, 3 Robinson, 330.

¶ Dearle *v.* Southwell, 2 Lee, 93.

** 2 Wheaton, 80.

cannot be invoked in another;* by parity, the documents invoked in the present case ought to be excluded.

2. *As respects cargo.*—The suit stands clear of blockade and of enemy property. The ship's papers are genuine; in perfect order.

It is not asserted that the bills of lading do not tally with the marks, &c. Invoices were to be sent forward, as is now customary, by steamer. An invoice is not a "ship's paper;" a manifest is. The former is made out by a shipper to and for his own agent and consignee, so as to show price and charges. The master has no control over an invoice. Whenever it happens to be on board, it is inclosed in a sealed letter from shipper to consignee. The captain cannot know anything of cargo which is boxed up or contained in bales, save so far as they are mentioned in bills of lading, upon which he wisely puts "Contents unknown." The charter-party in this case was made free of commissions, so there was less requirement for an invoice. And invoices carry with them little authenticity, being easily fabricated where fraud is intended.

Even where all necessary and ordinary ship's papers are not on board (an invoice is not strictly one of them), a court will look into all circumstances before condemnation, or will allow of further proof.†

It is not to be forgotten that as the Springbok was going from a British port and bound to another English port, an invoice was in no way required. No duties were payable, and, therefore, an invoice was not wanted in connection with them. And the reason why the articles of tea, coffee, ginger, pimento, cloves, and pepper are specified on bills of lading was, that these articles are foreign to England, and are, by rule and custom, to be designated, from the fact of being dutiable, and the country requires to know, through periodical returns, the quantity of goods, subject to duty, which have been transshipped.

* The Experiment, 4 Wheaton, 84.

† Pratt's Law of Contraband, Introd. xii; Story, Justice, in The Amiable Nancy, 3 Wheaton, 561.

A neutral, it must be remembered, has a right to carry any kind of merchandise from one neutral port to another neutral port. It may consist of warlike weapons and their appliances. The substance of the article does not make it contraband. It does not even get its name "contraband" until it is going, positively moving, to an enemy's port—a hostile port. In order to constitute contraband of war, two elements must concur, viz., a hostile quality and a hostile destination. If either of these elements is wanting, there can be no such thing as contraband. Hostile goods, such as munitions of war, going to a neutral port, are not contraband.

"It would be too high for any such court of justice as this," said Sir George Hay, in *The Hendric and Alida*,* "to assert that the Dutch may not carry, in their own ships, to their own colonies and settlements, everything they please, whether arms or ammunition or any other species of merchandise, provided they do it with the permission of their own laws. And if they act contrary to them, I am no Judge of the laws of Holland. I cannot enforce them."

Although contraband does not arise, still, supposing that the case could be tortured into a something which might have a color of contraband: what would the alleged contraband amount to?

Contraband, says Hautefeuille,† affects those articles only destined immediately to become in the hands of the possessors a direct means of attack and defence, that is, articles suited solely for warlike purposes, without requiring to undergo any industrial preparation or transportation to render them so; and that contraband of war is limited expressly to arms, instruments, and munitions of war, fashioned and fabricated exclusively to serve in war; and all other articles, without excepting even those substances suited for the manufacture of such prohibited articles and the instruments even

* Hay and Marriot, 127.

† Droits et Devoirs des nations neutres, t. ii, p. 83; and see Halleck s International Law p. 570, ch. 24, § 9.

which, without having a direct use in hostilities, can, however, be indirectly employed in them, continue the objects of free commerce on the part of neutrals, either with both the belligerents or with one of them.

The cloth in bale and the two small boxes of buttons are consequently not contraband. The buttons were made in England, and a court will not speculate upon their initials, and certainly not assume to condemn through any such mere assumption. There are British troops in Nassau; and the Island of New Providence, on which it is, had probably an Artillery, Infantry, Cavalry, and, perhaps, a Coast Survey. The letters C. S. N., A., I., and C., may mean many things innocent as well as one thing guilty.

The few kegs of saltpetre might reasonably be intended for ordinary sale, or for domestic use in Nassau: for instance, in the curing of provisions. At any rate, it would not be in quantity or value sufficient to affect a large cargo of dry goods, even if this particular article was standing alone in a gross prize case, connected with running a cargo direct to a belligerent. This small quantity, with all the rest of the cargo, was going to Nassau.

The dozen swords having the British crown upon their guards were evidently English cavalry swords, ordered by military men in Nassau. The twelve sword-bayonets were also in court, and were made for English Enfield rifles, and most probably for the use of British troops in Nassau: and they were only a dozen in all.

A reference to our treaties—our treaty with New Grenada,* with Guatemala,† with Peru‡—show what our nation looks upon as contraband. And while "clothes made up in the form and for military use," may become contraband, the mere cloth uncut, in the bale, is not so construed; nor buttons.

In the treaty between the United States and the Republic of Colombia, and in that with the Republics of Chili, of

* Art 17 9 Stat. at Large, 87.
† Art. 16, Id. 880.
‡ Art. 23, id. 937.

Venezuela, and of the Peru-Bolivian Confederation and Equador, it is provided that contraband articles shall not affect the rest of the cargo or the vessel.

But the question of contraband cannot arise; the cargo was destined wholly for Nassau. The invocation does not materially help the case. The proof derived from the "dovetailing" of a few parcels on the Springbok and Gertrude is of very little significance. The whole source of the evidence is interested. The marshal and prize commissioners make out their elaborated lists with the very purpose to procure condemnation. Besides, the amount of dovetailing is far too small, to infer as a necessity a guilty purpose. Condemnations cannot be made on presumptions.

3. *As to the vessel alone.* There is not a fact which connects the Springbok herself with wrong. Where a neutral vessel is going near the shore of a belligerent, it may be best, for the sake of protection, that the master know the character of the cargo he carries;* but there can be no motive or object, save so far as he has chosen to make himself liable for its safety through bills of lading, to know its character, when taking it from and having to deliver and get rid of it in another port of his own country.

In this case, its particulars were not known by the master or mate, or any one on board.

The master is the agent of the shipowner only; he has nothing to do with the cargo.†

Even where a cargo is made contraband by going to the enemy, the vessel, if not belonging to the owner of the cargo, will go free.

All the papers show that the master had no control of the cargo after getting to Nassau. He was to drop it there; his vessel was to be cleared, as to this cargo, at that place; and the charter-party ended there, at Nassau.

The owners of the ship had no interest in the cargo.

* The Oster Risoer, 4 Robinson, 199.

† Washington J., in Ross *v.* The Active, 2 Washington's Circuit Court, 226.

They were mere common carriers, to receive freight for the performance of an ordinary and honest duty.

The modern rule is that the ship shall not be condemned for carrying even contraband goods.*

The penalty is applied to the vessel and its owner only where there has been some actual co-operation in a meditated fraud upon a belligerent by covering up the voyage under false papers, and with a false destination.†

Mr. Ashton, Assistant Attorney-General, with a brief of Mr. Coffey, contra, for the United States.

1. *As to the invocation.* No case decides that a decree will be reversed because an invocation has been made on original hearing; the suits invoked being like those where judgments have gone against the captors, and in one suit was taken *pro confesso.* In such a case, even if not technically regular, the maxim of *Quod non fieri debet factum valet,* would apply.

2. *As respects cargo.* The bills, &c., of Speyer and Haywood, "as agents" for Isaac, Campbell & Co., written "under instructions," to Hart, at Nassau, show no purpose to deliver the cargo at Nassau, as the end of the voyage, and taken in connection with the fact that they are to order, were indorsed in blank, and that no invoices were found on the ship, sustain the conclusion that there was an ulterior destination, and that Nassau was but a port of transshipment.

That Begbie had an interest in the whole cargo appears by the fact that all the bills of lading call for the payment of freight as by the charter-party; and the vessel was undoubtedly chartered by him to carry the cargo, all of which was owned by him and Isaac, Campbell & Co. The numbers of the parcels on the Springbok and the Gertrude are complements, and the voyages of all the vessels were parts of a single transaction.

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* The Neutralitet, 3 Robinson, 295; and see Carrington *v.* The Merchants' Ins. Co., 8 Peters, 519; The Imina, 3 Robinson, 167; The Caroline, 6 Id. 462

† Carrington *v.* The Merchants' Ins. Co., *supra.*

In the commercial enterprise, therefore, in which ship and cargo were captured, they were proceeding with false papers to a false destination; a valuable part of the cargo was what, notwithstanding the quotation, on the other side, from Hautefeuille, was certainly contraband of war, manufactured expressly for, and proceeding directly to, enemy use; all of the ship's papers were prepared to conceal the fact that part of the cargo was contraband.

This purpose of concealment appears, too, from the absence of the invoices of cargo. The invoices and duplicate bills of lading were not carried on the vessel, but were to be sent to Nassau by mail steamer. That the whole cargo was owned in common, is also shown by the letters of Speyer & Haywood to Captain May and W. S. Hart; by their indorsement on the charter-party, and by their signature to the manifest.

Isaac, Campbell & Co., who, it is plain, by what is stamped on the buttons, are manufacturers and dealers in military goods in London, were the owners of the whole cargo of the Hart, condemned as prize of war; the proceedings in which case have been invoked into this. Speyer & Haywood were the brokers who had charge of the lading of the Hart. The cargo of that vessel consisted of arms, equipments, and munitions of war, laden in England under the direction of I., C. & Co., in co-operation with agents, at London, of the rebel authorities, for the purpose of running the blockade, the question of transshipment to be decided by a rebel agent at Cuba.

That case, with the case of the Gertrude, show that the cargoes of the Springbok, the Hart, and the Gertrude, were, in fact, parts of a single commercial venture, divided by shipments on different vessels, but having a common ownership and destination. The dates and places of capture of all three vessels must be adverted to. The Hart was captured 29th of January, 1862; the Springbok, February 3d, 1863; the Gertrude on the 16th of April, 1863, all in guilty or suspicious regions. That the want of some of the regular

ship's papers, is strong presumptive evidence against a ship in time of war is shown by many writers.*

The force of this presumption is increased when the vessel, laden with contraband of war, with some of her usual and important papers missing, and all of them concealing the fact of contraband cargo, is found, in time of war, on the usual route of such trade, proceeding towards the enemy country.

The master was the son of one owner, and the vessel was chartered for this voyage by *his* authority. He denied, on his examination, that he knew that she had any goods contraband of war on board, and stated that she carried "a cargo of general merchandise." He also stated that he did not know on what pretence the capture was made.

This testimony is obviously false. The latter part of it is contradicted by the testimony of the mate, boatswain, and steward.

The fact that the master attempted, by falsehood, to conceal the true ground of capture, well known to his subordinates, shows a design to withhold the truth as to the facts of the voyage, and justifies the inference that he knew, in fact, what he was bound in law to know, that part of his cargo was contraband.†

He signed bills of lading for 1394 packages of merchandise, the contents of only 613 of which were disclosed by the bills of lading, all of those so disclosed being innocent articles. His manifest, identifying the packages by their marks and numbers, described them only as cases, bales, boxes, chests, bags, &c. He knew of the existence of invoices, but sailed without them. These facts show that his ignorance of the character of his cargo, if real, was his own fault. But they show still more strongly that his ignorance was not real, but affected. A reason for this affectation of

* See Halleck's Int. Law, chap. 25, sec. 25, p. 622, and cases; 1 Kent's Com. 157; The Richmond, 5 Rob. 328, where Sir Wm. Scott animadverts on the concealment on the ship's papers of contraband articles.

† See the Oster Risoer, 4 Robinson, 199; Mosely on Contrabands, 97, 98

ignorance was, doubtless, that he hoped thereby to save his father's ship.

These facts implicate the vessel in the guilt of the cargo.

None of the claimants of either vessel or cargo have ventured to vindicate the innocence of the voyage by a test oath.

The master swears to the claim of the claimants of the vessel, nearly a month after the libel was filed. No reason is assigned why the claim and the facts stated therein are not verified by the oath of one of the owners.

As a trustworthy source of information to a prize court, Mr. Kursheedt's affidavit is entitled to no respect whatever; not because Mr. Kursheedt is unworthy of belief, but because he has, and can have, no personal knowledge on the subject about which he swears; and because those who have the requisite personal knowledge refuse to subject themselves to the test of an oath, even to save a cargo so valuable, and attempt to palm upon the prize court their unsupported statements at secondhand. And this insult to the court is aggravated by the excuse offered, that in six weeks it was impossible to communicate with them (at London) in time to allow them to make the claim and test affidavit.

The case rests on the following propositions of fact and law, which, it is submitted, the evidence and authorities sustain.

1. *The cargo* was prize, because the Springbok, when captured, was pursuing a voyage laden with a cargo intended to be transshipped to the enemy's blockaded port at its port of real destination.

Because the cargo was largely contraband of war, consisting of articles all of which were specially suited for enemy use, and destined to an enemy port for such enemy use, by transshipment at Nassau, but without any sale or change of ownership at Nassau.

Because, therefore, the cargo was taken on a voyage having, so far as the cargo was concerned, its *terminus a quo* at London, and its *terminus ad quem* at the blockaded and enemy port, and any existing purpose to touch and transship

the cargo at Nassau, in prosecution of that voyage, did not, as to the cargo, break the continuity of its voyage to the blockaded and enemy port.*

That part of the cargo not contraband of war was good prize, not only for the foregoing reasons, but for the further reason that it was owned by the owners of the contraband part.†

2. *The vessel was good prize*, because she was in the sole act of transporting the cargo destined for the blockaded port one stage of its route to that port. For this purpose she was chartered by the owner of the contraband and other goods, and, when captured, was sailing on the route by which trade to the blockaded and enemy port was then usually conducted, in pursuance of the charter and in furtherance of that purpose, under the exclusive orders of the charterer.‡

Because she was carrying contraband of war destined for enemy use, under a charter made for that purpose, and, of course, with the knowledge of the owner of the vessel; carrying it also with a false destination. These facts make the owner of the vessel a party to the fraud, and implicate it in the guilt of the cargo. See *The Neutralitet*,§ where the owner chartered the ship for contraband trade; *The Franklin*,‖ where the ship was carrying contraband, with a false destination, and where Sir William Scott said that the relaxation of the ancient rule, which condemned the ship with the cargo, can only be claimed by *fair* cases; *The Ranger*,¶ where he said, "If the owner (of the ship) will place his property

* The Maria, 5 Robinson, 365; The William, Id. 385; The Thomyris, Edwards, 17; The Minerva, 3 Robinson, 229; The Richmond, 5 Id. 325; The Commercen, 1 Wheaton, 382; Jecker *v.* Montgomery, 18 Howard, 110–115; The Nancy, 3 Robinson, 122; The United States, Stewart's Adm. Rep. 116.

† Halleck's Int. Law, chap. 24, § 6, p. 573, and authorities cited; 3 Phillimore, Int. Law, § 277; 2 Wildman, Int. Law, 217; The Sarah Christina, 1 Robinson, 237.

‡ See cases cited to third point; also, The Maria, 6 Robinson, 201; The Charlotte Sophia, Id. 204, note 1; Instructions of Navy Department of 18th August, 1862; Upton's Prize. 450, 3d ed.

§ 3 Robinson, 296. ‖ Id. 217. ¶ 6 Id. 126.

under the absolute management and control of persons who are *capable* of lending it to be made an instrument of fraud in the hands of the enemy, he must sustain the consequences of such misconduct on the part of his agent;" *The Baltic*,* where the ship was condemned because "the owner must have been aware of the fraud intended, if not a confidential party to it."†

The CHIEF JUSTICE delivered the opinion of the court.

We have considered the case with much care, not only upon the ship's papers and the preparatory proofs, but upon the documents invoked on the hearing in the District Court from the two causes, *United States* v. *The Steamer Gertrude*, and *United States* v. *The Schooner Stephen Hart*, then pending in that court.

The invocation of these documents appears to have been made at the original hearing, and we cannot say that this was strictly regular. It would have been more in accordance with the rules of proceeding in prize if the cause had been first fully heard on the ship's documents and the preparatory proofs, and if invocation had been allowed, especially to the captors, only in case of the disclosure of suspicious circumstances on that hearing. But there was no such irregularity as was inconsistent with the lawful exercise of the discretion of the court, and none which would justify us in reversing the decree below because of the allowance of the invocation, or in refusing to look at the documents invoked and now part of the record. Especially should we not be justified in such refusal, after being made aware by the record that the steamship Gertrude was so manifestly good prize that no claim was ever interposed for her or her cargo, and after

* 1 Acton, 25.

† The Jonge Margaretha, 1 Robinson, 189; The Mercurius, Id. 288, and note; The Jonge Tobias, Id. 329; The Neptunus, 3 Id. 108; The Eenrom, 2 Id. 1; The Edward, 4 Id. 68; The Oster Risoer, Id. 200; The Carolina, Id. 260; The Richmond, 5 Id. 325; The Charlotte, Id. 275; The Ringende Jacob, 1 Id. 89; Carrington *v.* The Merchants' Insurance Co., 8 Peters, 520

having, at the last term, condemned the Stephen Hart and her cargo by our own decree.

We have, therefore, looked into all the evidence, and will now dispose of the case.

We have already held in the case of the Bermuda, where goods, destined ultimately for a belligerent port, are being conveyed between two neutral ports by a neutral ship, under a charter made in good faith for that voyage, and without any fraudulent connection on the part of her owners with the ulterior destination of the goods, that the ship, though liable to seizure in order to the confiscation of the goods, is not liable to condemnation as prize.

We think that the Springbok fairly comes within this rule. Her papers were regular, and they all showed that the voyage on which she was captured was from London to Nassau, both neutral ports within the definitions of neutrality furnished by the international law. The papers, too, were all genuine, and there was no concealment of any of them and no spoliation. Her owners were neutrals, and do not appear to have had any interest in the cargo; and there is no sufficient proof that they had any knowledge of its alleged unlawful destination.

It is true that her shipping articles engaged the crew for the voyage, not only from London to Nassau, but also from thence, if required, to any other port of the West India Islands, American States, British North America, and other named countries, and finally to a port in the United Kingdom; and it is also true that this engagement would include, should the master undertake it, a continuance of the voyage for the conveyance of the cargo from Nassau to a blockaded port; but there is no proof that there was any engagement for such continuance of the voyage. On the contrary, the charter-party, which has the face, at least, of an honest paper, stipulated for the delivery of the cargo at Nassau, where, so far as is shown by that document, the connection of the Springbok with it was to end.

The preparatory examinations do not contradict but rather sustain the papers.

The testimony of the master was that the vessel was destined to and for Nassau to deliver her cargo and return to the United Kingdom, and that her papers were entirely true and fair. And his testimony in this regard is corroborated by that of the other witnesses.

It is said, however, that the master, upon his examination, declared himself to have been ignorant of the real ownership of the cargo, and that this indicates unlawful intent. But it must be remembered that the master of the Springbok had a clear right to convey neutral goods of all descriptions, including contraband, from London to Nassau, subject to the belligerent right of seizure in order to confiscation of contraband, if found on board and proved to be in transit to the hostile belligerent. On the hypothesis, therefore, that the cargo was to be actually delivered at Nassau, without an ulterior destination known to and promoted by the master or owners, in bad faith, we cannot say that the master's ignorance of its ownership is an important circumstance in the case.

There is more weight in the argument for condemnation derived from the misrepresentation of the master concerning his knowledge of the cause of seizure. The master testified that he did not know when examined on what pretence the capture was made, while the mate and the steward deposed that they understood that the vessel was captured under the supposition that the cargo was contraband, and the boatswain testified that it was because the bills of lading did not show the contents of some of the cases.

The master must have known as much about the cause of capture as either of the witnesses; and his misrepresentation of the truth in this instance brings his statements concerning the real destination of the ship and the intention to deliver her cargo at Nassau into some discredit. Frankness and truth are especially required of the officers of captured vessels when examined in preparation for the first hearing in prize. And the clearest good faith may very reasonably be required of those engaged in alleged neutral commerce with a port constantly and notoriously used as a port of call and

transshipment by persons engaged in systematic violation of blockade and in the conveyance of contraband of war. That Nassau was such a port is not only known from evidence before the prize courts, but from the official correspondence between the English and American governments, and the fact was distinctly stated by Earl Russell, then Foreign Secretary in the British ministry, in an answer, dated July 5th, 1862, to a communication from the shipowners of Liverpool.*

If, therefore, the case of the claimants of the ship depended wholly upon the testimony of the master, we should find it difficult to resist the argument for condemnation. But it does not depend wholly or mainly on that statement. The fairness of the papers, the apparent good faith of the stipulations of the charter-party in favor of the owners, and the testimony of the other witnesses, restrain us from harsh inferences against the owners of the vessel, who seem to be in no way compromised with the cargo, except through the misrepresentations of the master, and are not shown to have been connected with any former violation of neutral obligations.

In consideration of the master's misrepresentation, however, and of the circumstance that he signed bills of lading which did not state truly and fully the nature of the goods contained in the bales and cases mentioned in them, we shall, while directing restoration of the ship, allow no costs or damages to the claimants.

The case of the cargo is quite different from that of the ship.

The cargo was shipped at London in November and December, 1862, in part by Moses Brothers and the remainder by Speyer and Haywood.

The bills of lading, three in number, show no interest in any other person.

The charter-party was made by the master with one Begbie, and stipulated that the ship should take on board a cargo

* July 19th, 1862, Lawrence's Wheaton, 719.

of lawful merchandise goods and deliver the same at Nassau to the charterers' agent at that port.

On completion of the lading on the 8th of December, Speyer and Haywood, subscribing themselves as agents for the charterers, addressed a note to the master directing him to proceed at once to Nassau, and on arrival report himself to B. W. Hart there, who would give him orders as to the delivery of the cargo and any further information he might require.

The bills of lading disclosed the contents of six hundred and nineteen, but concealed the contents of thirteen hundred and eighty-eight, of the two thousand and seven packages which made up the cargo. Like those in the Bermuda case they named no consignee, but required the cargo to be delivered to order or assigns. The manifest of the cargo also, like that in the Bermuda case, mentioned no consignee, but described the cargo as deliverable to order. Unlike those bills and that manifest, however, these concealed the names of the real owners as well as the contents of more than two-thirds of the packages.

Why were the contents of the packages concealed? The owners knew that they were going to a port in the trade with which the utmost candor of statement might be reasonably required. The adventure was undertaken several months after the publication of the answer of Earl Russell to the Liverpool shipowners already mentioned. In that answer the British foreign secretary had spoken of the allegations by the American government that ships had been sent from England to America with fixed purpose to run the blockade, and that arms and ammunition had thus been conveyed to the Southern States to aid them in the war; and he had confessed his inability either to deny the allegations or to prosecute the offenders to conviction; and he had then distinctly informed the Liverpool memorialists that he could not be surprised that the cruisers of the United States should watch with vigilance a port which was said to be the great entrepôt of this commerce. For the concealment of the character of a cargo shipped for that entrepôt, after such a

warning, no honest reason can be assigned. The true reason must be found in the desire of the owners to hide from the scrutiny of the American cruisers the contraband character of a considerable portion of the contents of those packages.

And why were the names of those owners concealed? Can any honest reason be given for that? None has been suggested. But the real motive of concealment appears at once when we learn, from the claim, that Isaac, Campbell & Co., and Begbie were the owners of the cargo of the Springbok, and from the papers invoked, that Begbie was the owner of the steamship Gertrude, laden in Nassau in April, 1863, with a cargo corresponding in several respects with that now claimed by him and his associates, and despatched on a pretended voyage to St. John's, New Brunswick, but captured for unneutral conduct and abandoned to condemnation, without even the interposition of a claim in the prize court; and when we learn further from the same papers that Isaac, Campbell & Co., were the sole owners of the cargo of the Stephen Hart, consisting almost wholly of arms and munitions of war, and sent on a pretended destination to Cardenas, but with a real one for the States in rebellion. Clearly the true motive of this concealment must have been the apprehension of the claimants, that the disclosure of their names as owners would lead to the seizure of the ship in order to the condemnation of the cargo.

We are next to ascertain the real destination of the cargo, for these concealments do not, of themselves, warrant condemnation. If the real intention of the owners was that the cargo should be landed at Nassau and incorporated by real sale into the common stock of the island, it must be restored, notwithstanding this misconduct.

What then was this real intention? That some other destination than Nassau was intended may be inferred, from the fact that the consignment, shown by the bills of lading and the manifest, was to order or assigns. Under the circumstances of this trade, already mentioned, such a consignment must be taken as a negation that any sale had been

made to any one at Nassau. It must also be taken as a negation that any such sale was intended to be made there; for had such sale been intended, it is most likely that the goods would have been consigned for that purpose to some established house named in the bills of lading.

This inference is strengthened by the letter of Speyer & Haywood to the master, when about to sail from London. That letter directs him to report to B. W. Hart, the agent of the charterers at Nassau, and receive his instructions as to the delivery of the cargo. The property in it was to remain unchanged upon delivery. The agent was to receive it and execute the instructions of his principals.

What these instructions were may be collected, in part, from the character of the cargo.

A part of it, small in comparison with the whole, consisted of arms and munitions of war, contraband within the narrowest definition. Another and somewhat larger portion consisted of articles useful and necessary in war, and therefore contraband within the constructions of the American and English prize courts. These portions being contraband, the residue of the cargo, belonging to the same owners, must share their fate.*

But we do not now refer to the character of the cargo for the purpose of determining whether it was liable to condemnation as contraband, but for the purpose of ascertaining its real destination; for, we repeat, contraband or not, it could not be condemned, if really destined for Nassau and not beyond; and, contraband or not, it must be condemned if destined to any rebel port, for all rebel ports were under blockade.

Looking at the cargo with this view, we find that a part of it was specially fitted for use in the rebel military service, and a larger part, though not so specially fitted, was yet well adapted to such use. Under the first head we include the sixteen dozen swords, and the ten dozen rifle-bayonets, and

* The Immanuel, 2 Robinson, 196; Carrington *v.* Merchants' Insurance Co., 8 Peters, 495.

the forty-five thousand navy buttons, and the one hundred and fifty thousand army buttons; and, under the latter, the seven bales of army cloth and the twenty bales of army blankets and other similar goods. We cannot look at such a cargo as this, and doubt that a considerable portion of it was going to the rebel States, where alone it could be used; nor can we doubt that the whole cargo had one destination.

Now if this cargo was not to be carried to its ultimate destination by the Springbok (and the proof does not warrant us in saying that it was), the plan must have been to send it forward by transshipment. And we think it evident that such was the purpose. We have already referred to the bills of lading, the manifest, and the letter of Speyer & Haywood, as indicating this intention; and the same inference must be drawn from the disclosures by the invocation, that Isaac, Campbell & Co., had before supplied military goods to the rebel authorities by indirect shipments, and that Begbie was owner of the Gertrude and engaged in the business of running the blockade.

If these circumstances were insufficient grounds for a satisfactory conclusion, another might be found in the presence of the Gertrude in the harbor of Nassau with undenied intent to run the blockade, about the time when the arrival of the Springbok was expected there. It seems to us extremely probable that she had been sent to Nassau to await the arrival of the Springbok and to convey her cargo to a belligerent and blockaded port, and that she did not so convey it, only because the voyage was intercepted by the capture.

All these condemnatory circumstances must be taken in connection with the fraudulent concealment attempted in the bills of lading and the manifest, and with the very remarkable fact that not only has no application been made by the claimants for leave to take further proof in order to furnish some explanation of these circumstances, but that no claim, sworn to personally, by either of the claimants, has ever been fi'ed.

Upon the whole case we cannot doubt that the cargo was

originally shipped with intent to violate the blockade; that the owners of the cargo intended that it should be transshipped at Nassau into some vessel more likely to succeed in reaching safely a blockaded port than the Springbok; that the voyage from London to the blockaded port was, as to cargo, both in law and in the intent of the parties, one voyage; and that the liability to condemnation, if captured during any part of that voyage, attached to the cargo from the time of sailing.

The decree of the District Court must, therefore, be reversed as to the ship, but without costs or damages to the claimants, and must be affirmed as to the cargo; and the cause must be remanded for further proceedings

IN CONFORMITY WITH THIS OPINION.

THE PETERHOFF.

1. A blockade is not to be extended by construction.
2. The mouth of the Rio Grande was not included in the blockade of the ports of the rebel States, set on foot by the National government during the late rebellion; and neutral commerce with Matamoras, a neutral town on the Mexican side of the river, except in contraband destined to the enemy, was entirely free.
3. *Semble* that a belligerent cannot blockade the mouth of a river, occupied on one bank by neutrals with complete rights of navigation.
4. A vessel destined for a neutral port with no ulterior destination for the ship, or none by sea for the cargo to any blockaded place, violates no blockade.

   Hence trade, during our late rebellion, between London and Matamoras, two neutral places, the last an inland one of Mexico, and close to our Mexican boundary, even with intent to supply, from Matamoras, goods to Texas, then an enemy of the United States, was not unlawful on the ground of such violation.
5. The trade of neutrals with belligerents in articles not contraband is absolutely free unless interrupted by blockade: the conveyance by neutrals to belligerents of contraband articles is always unlawful, and such articles may always be seized during transit by sea.
6. The classification of goods as contraband or not contraband, which is best supported by American and English decisions, divides all merchandise into three classes.

Syllabus.

i. Articles manufactured, and primarily or ordinarily used for military purposes in time of war.

ii. Articles which may be and are used for purposes of war or peace according to circumstances.

iii. Articles exclusively used for peaceful purposes.

4. Merchandise of the first class destined to a belligerent country or places occupied by the army or navy of a belligerent is always contraband; merchandise of the second class is contraband only when actually destined to the military or naval use of a belligerent; while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of blockade or siege.

8. Parts of a cargo described in a ship's invoices as cases of "artillery harness," as "men's army Bluchers," as "artillery boots," and as "government regulation gray blankets," come within the first class.

9. Contraband articles contaminate the parts not contraband of a cargo if belonging to the same owner; and the non-contraband must share the fate of the contraband.

10. In modern times conveyance of contraband attaches in ordinary cases only to the freight of the contraband merchandise. It does not subject the vessel to forfeiture.

11. But, in determining the question of costs and expenses, the fact of such conveyance may be properly taken into consideration with other circumstances, such as want of frankness in a neutral captain engaged in a commerce open to great suspicion and his destruction of some kind of papers in the moment of capture,—and this although it seemed almost certain that the ship was destined to a port really neutral, and with a cargo for the most part neutral in character and destination.

12. The captain of a merchant steamer, when brought to by a vessel of war, is not privileged by the fact that he has a government mail on board, from sending, if required, his papers on board the boarding vessel for examination; on the contrary, he is bound by that circumstance to the strictest performance of neutral duties and to special respect of belligerent rights.

13. Citizens of the United States faithful to the Union, who resided in the rebel States at any time during the civil war, but who during it escaped from those States, and have subsequently resided in the loyal States, or in neutral countries, lost no rights as citizens by reason of temporary and constrained residence in the rebellious portion of the country.

APPEAL from a decree of the District Court for the Southern District of New York, condemning for attempt to break blockade, a vessel ostensibly on a voyage from London to the mouth of the Rio Grande, with a cargo documented for a neutral port.

The case was thus:

The territory of the United States, as is generally known, is separated on one part of its boundary from the republic of Mexico by the *Rio Grande*, a large stream, entering by a broad mouth, and by a course at that point nearly east, the Gulf of Mexico. At the mouth of the river a bar prevents the passage of vessels drawing over seven feet of water. By treaty between the two nations the boundary line begins *in* the Gulf three leagues from land opposite the mouth of the river, and runs northward from the middle of it. The navigation of the stream is also made free and common to the citizens of both nations, without interruption by either without the consent of the other, even for the purpose of improving the navigation.

About forty miles up the river, *on the United States bank of the stream*, in the State of Texas, stands the American town of Brownsville; and nearly opposite, *on the Mexican bank*, the old Spanish one of Matamoras, separated but by the river. The natural facilities of intercourse between the two places are thus extremely easy. [See sketch *infra*, p. 173.]

Both towns are approached from the Gulf by the Rio Grande, but Brownsville may be also approached through places more on the northern coast of the Gulf, and wholly within the Federal territory, to wit, by the *Brazos Santiago* and the *Boca Chica*.

In this state of geographical position and of treaty with Mexico, the President, on the 19th April, 1862, during the late rebellion in the Southern States, and with the purpose, as declared to foreign governments, to "blockade the *whole* coast from the Chesapeake Bay *to* the Rio Grande," declared the intention of the National government to set on foot a blockade of those States "by posting a competent force *so as to prevent the entrance or the exit of vessels;*" and a naval force was soon after stationed near the mouth of the Rio Grande. No force of any kind was placed along the Texan bank of the river, that region being then in rebel possession, as the opposite was in Mexican.

Nothing was said in these proclamations of the port of

Statement of the case.

Brownsville being blockaded, though in a subsequent proclamation (February 18, 1864), relaxing the blockade, it was recited as a matter of fact that that place had been blockaded.

With this blockade above mentioned, as made by the proclamation of 19th April, in force, the Peterhoff, a British built and registered merchant screw-propeller, drawing sixteen feet of water, not a fast sailer, set sail from London upon a voyage documented by manifest, shipping list, clearance, and other papers, for the port of *Matamoras*.

The bills of lading, of which there were a large number, all stipulated for the delivery of the goods shipped "off the Rio Grande, Gulf of Mexico, *for Matamoras;*" adding, that they were to be taken from alongside the ship, providing lighters can cross the bar.

With the exception of a portion consigned to the orders of the captain, which was owned by the owners of the vessel, the cargo was represented in agency or consigneeship chiefly by three different persons on board the vessel as passengers—Redgate, Bowden, and Almond—all natives of Great Britain. Redgate stated that a large portion was consigned to him as a "merchant residing in Matamoras," and that, "had the goods arrived there, they were to take the chances of the market." Bowden testified to the same effect, that, had they arrived, the portion represented by him would have taken the chances of sale in the market, and the proceeds been returned to the shippers. Almond, that it was his intention to settle in Matamoras, and to sell the goods represented by himself, "taking my chance in the market for the sale."

At the time of this voyage Mexico was at war with France; that is to say, France was endeavoring to place Prince Maximilian on the throne of Mexico, against the wishes of its people and of its legitimate President, Juarez, and was supporting its pretensions by force of arms in the *Mexican* territory.

The cargo of the Peterhoff, valued at $650,000, was a miscellaneous cargo, and was shipped by different shippers, all

British subjects except one, Redgate, hereafter described. *A part of it was owned by the owner of the vessel.*

Of its numerous packages, a certain number contained articles useful for military and naval purposes in time of war. Among them, as specially to be noted, were thirty-six cases of artillery harness in sets for four horses, with two riding-saddles attached to each set. *The owner of this artillery harness owned also a portion of the non-military part of the cargo.* There were 14,450 pairs of "Blucher" or army boots; also "artillery boots;" 5580 pairs of "government regulation gray blankets;" 95 casks of horseshoes of a large size, suitable for cavalry service; and 52,000 horseshoe nails.

There were also considerable amounts of iron, steel, shovels, spades, blacksmiths' bellows and anvils, nails, leather; and also an assorted lot of drugs; 1000 pounds of calomel, large amounts of morphine, 265 pounds of chloroform, and 2640 ounces of quinine. There were also large varieties of ordinary goods.

Owing to the blockade of the whole Southern coast, drugs, and especially quinine, were greatly needed in the Southern States.

During the rebellion, Matamoras, previously an unimportant place, became suddenly a port of immense trade; a vast portion of this new trade having been, as was matter of common assertion and belief, carried on through Brownsville, between merchants of neutral nations and the Southern States. And it was stated at the bar that the Federal government had, for reasons of public policy, even granted several clearances from New York to Matamoras during the rebellion, though only on security being given that no supplies should be furnished to persons in rebellion.

The Peterhoff never reached the Rio Grande. She was captured by the United States vessel of war Vanderbilt on suspicion of intent to run the blockade and of having contraband on board. When captured she was in the Caribbean Sea south of Cuba, and in a course to the Rio Grande, through the Gulf of Mexico; having some days previously been

boarded, but not captured, by another Federal cruiser, the Alabama

She had on board when captured a British mail for Matamoras, closed under official seal. The officer of the Vanderbilt, on boarding her, asked her captain to take to that vessel his papers. This the captain of the Peterhoff refused to do, assigning as the ground of refusal that he was in charge of her Majesty's mail, and requiring that all papers should be examined on the Peterhoff itself.

In addition it appeared that papers or articles of some kind had been destroyed in view of capture. A "package" was thrown overboard. The captain of the Peterhoff, having in a general way presented a similar statement on the examination *in preparatorio*, gave, on a supplemental examination, this circumstantial account of the matter:

"Before leaving Falmouth I received a telegram from the owner of the ship, instructing me to question the passengers as to whether they had any documents in their possession. I immediately called them together. They, one and all, including a passenger named Mohl, declared that they had nothing in their possession of such description. After the ship left Falmouth, Mr. Mohl came to me, and stated that he had a small packet of white powder—'patent white powder' he called it—in which he and some of his friends were interested. I said, 'You had better deliver it up to me, for it is a dangerous article to have on board.' He gave it to me and I locked it up in my state-room. I asked him why he had not mentioned this before leaving Fal mouth. He replied, that as it was neither papers or writings of any kind, he did not think it requisite. When the Alabama approached us I called Mr. Mohl and told him that I did not like having this packet of powder on board, and that if the ship was likely to be searched it must either be opened or destroyed, and then gave it in charge of one of my officers, the second officer, with orders to throw the package overboard if I instructed him. Our vessel not being examined by the Alabama, it was not then destroyed. After we were boarded by the Vanderbilt I called Mr. Mohl again and requested him to let me see the contents of the package. To this he objected, saying it was a *patent*, and could not be seen by any but himself and friends. So

I ordered it to be thrown overboard, fearing it might jeopardize the ship in some way, and it was accordingly thrown overboard. I believe it to have been white powder as stated by Mr. Mohl, and had no reason to believe otherwise, and do not think any one knew the contents of this packet but this same Mr. Mohl."

One of the seamen, however, testified that the package thrown overboard was a box into which the captain put papers, and that giving it to the second officer he told him to put something in the box to sink it, and on raising of his finger to let it go overboard.

Another seaman, that the package was "a sealed parcel wrapped in brown paper."

A third, that it was a package sewed up in canvas weighted with lead so as to sink it, and was spoken of by the captain as "despatches;" "that after sending for Mr. Mohl to witness the necessity for throwing the package overboard, he then ordered the second officer to throw it over from a part of the ship where it would not be observed by the Vanderbilt; which he did; and that Mr. Mohl appeared very much depressed at the necessity."

Mohl was permitted by the government after the capture to go at large.

The captain admitted that he had torn up some letters, which he swore were letters from his wife and father; swearing also that no other papers were destroyed.

A small portion of the cargo, about £150, was owned by, and a large part, about £20,000, was consigned to a person named Redgate, already referred to. In the part consigned he was interested by way of commission. Redgate was a native of England, but had come to Texas while it was a Mexican province, and was a resident there when it was annexed to the United States. He made this statement, not disproved, of his conduct during the rebellion.

"Since the annexation of Texas to the United States, the deponent has borne true allegiance to the United States in every matter and thing. In every way and shape possible for him to act, he opposed the secession of the State of Texas from the

Union. At the time of the passage of the so-called secession ordinance of that State, he was a member of its legislature. After the passage, he, together with fourteen members of the house of representatives, four senators, and six protesting delegates of the secession convention, signed an address to the people of Texas, urging them to resist the ordinance and to remain in the Union. That address was printed and circulated, as far as possible, throughout the State. He contributed to the circulation of the said address a very considerable amount of money. [Address produced.] Owing to the state of public feeling in Texas at the time of the publication and circulation of the address, the lives of the signers of the same were greatly perilled; one of them has since been murdered, and another is now in duress, as the deponent is informed and believes; and the remainder of the said twenty-four senators, members, and protesting delegates (amongst the latter this deponent), are all, or nearly all, in exile from the State of Texas as political refugees. After the promulgation of the said address, and before leaving the State of Texas, as he has reason to believe, he narrowly escaped assassination, and he knows that his life was conspired against by the secessionists in consequence of his political opinions and of his opposition to secession."

After leaving Texas, Redgate became a resident of Matamoras, trading there and thence. He was on board the vessel when captured, superintending his interest.

The vessel having been taken into New York, was there libelled in the District Court as prize of war. Claim was filed by the captain, intervening for the interest of his principals the "owners of the steamer and cargo;" also by Redgate as "owner, agent, and consignee of a large portion of the cargo," and by Almond as "owner, agent, and consignee" of another portion.

The District Court condemned the vessel and cargo as lawful prize of war.

The case was now before this court, on the appeal of Jarman, professing to represent the vessel and cargo, and on the appeals of Redgate and Almond, professing to represent their respective portions of the cargo.

Argument for the captors.

Mr. Coffey, special counsel, and Mr. Ashton, Assistant A. G., for the United States, and in support of the decree:

I. The fact that if the vessel went to the Rio Grande at all, all her cargo would have to be taken off in lighters, and if taken to Matamoras, would have to be transported on these for no less a distance than forty miles, raises some presumption that the cargo was not destined to go up or even to the Rio Grande at all; but that the ostensible destination was a simulated one, and that really, the blockade was meant to be broken at any point of the Southern coast which should be found most practicable; or, at farthest, broken on the Gulf *coast* of Texas, which, it will be conceded, that our blockade covered.

The idea is confirmed by the various facts, as that

1. The cargo was of a character and extent, wholly unadapted to the insignificant port of Matamoras and the Mexican market which centres there, but perfectly adapted in all respects to the enemy market, everywhere, and by *that* market urgently demanded.

2. That the master refused to convey his papers aboard the Vanderbilt, and most of all,

3. That, under circumstances of aggravation, he destroyed papers in the moment of capture.

We advert to these last two points hereafter.

II. Admitting, however, that the cargo was destined to go up the Rio Grande and to Matamoras specifically as documented, and was meant *bonâ fide* for its use, the destination was unlawful.

1. That a blockade of the *mouth* of the Rio Grande was in fact included in our blockade of the Southern coast, cannot, we think, be rightly denied. The purpose of the government, both unquestionable and clearly expressed, was to blockade the rebellious States, in a specific manner. And how? "By posting a competent force *so* as to *prevent* the *entrance* or *exit* of vessels" into or out of those regions: "*so*," of course, as to prevent such entrance or exit in any form; including, of necessity, perhaps primarily, that form in which vessels usually, in common parlance, *do*, or, in strict par-

lance, *can* alone *enter* a country; that is to say, by sailing into it by its navigable rivers.

A blockade of the mere *Gulf coast* of Texas was no blockade. That coast has few or no ports. The vast stream of the Rio Grande, was the best place of entrance into Texas, and if the blockade was to be a blockade made "so" as to prevent entrance of vessels into that State, then Matamoras, Brownsville, and the whole banks of the river, as far as navigable for vessels, was blockaded of irresistible inference. And that this was the way in which the blockade was understood by its author to have been made, is shown by the proclamation relaxing it. This recites that Brownsville had been blockaded; which implied that the whole mouth of the Rio Grande, like the whole mouth of other rivers on the rebel coast had been: a blockade of half a river being of no value to the blockading government, and not to be presumed.

We assume then that the river mouth was intended by our government to be blockaded.

Had our government a right so to blockade it?

It had.

This proposition rests on the principle that the belligerent has a right to make his blockade absolutely effective.

To allow vessels or their cargoes to cross the bar at the mouth of the Rio Grande and pass up the river under the pretext of going to Matamoras, was to render the blockade of the Texan side of the river nugatory. No watchfulness or energy in the blockading squadron outside the bar could prevent unlimited supplies from reaching Brownsville, and through it the whole confederacy, if they might with impunity be carried up to Matamoras, only a few yards distant from Brownsville, and far beyond the reach of the blockaders.

The Maria,* decided by Sir William Scott, asserts the principle which we put forth. There the river *Weser*, one bank of which was held by the French (enemy), and on the

* 6 Robinson. 201, 204.

other bank of which was the neutral city of Bremen, was blockaded by the British. The cargo was shipped from Bremen on the Weser to the Jahde in lighters, and there transshipped, and was on its way to America in the vessel when captured. It was contended by the captors that the exportation from Bremen was a violation of the blockade of the Weser. Sir William Scott said:

"I have had frequent occasion to observe how severely the neutral cities connected with the Weser and the Elbe are pressed upon by the blockade of those rivers. At the same time it is my duty to apply to those operations of blockade the principles that belong to that branch of the law of nations generally, and by which only such measures can be maintained. The principles themselves cannot differ; although it will undoubtedly be the disposition of the court to alleviate the situation of those towns as much as possible by attending to any distinctions that can be advanced in their favor, not inconsistent with the sound construction of the general principles of law. A blockade imposed on the Weser must in its nature be held to affect the commerce of Bremen; because if the commerce of all the towns situated on that river is allowed, it would be only to say, in more indirect language, that the blockade itself did not exist. It cannot be doubted, then, on general principles, that these goods would be subject to condemnation, as having been conveyed through the Weser; and whether that was effected in large vessels or small would be perfectly insignificant. That they were brought through the mouth of the blockaded river for the purpose of being shipped for exportation would subject them to be considered as taken on a continued voyage, and as liable to all the same principles that are applied to a direct voyage, of which the *terminus a quo* and the *terminus ad quem* are precisely the same as those of the more circuitous destination. . . . . If, therefore, nothing had passed between the government of this country and the city of Bremen, it appears to me that these goods would be subject to condemnation, and that I should be unable to distinguish the port of Bremen from any other place liable to the general operations of a blockade."

The Zelden Rust,* by the same judge, seems to be to the

* 6 Robinson, 93.

Argument for the captors.

like effect. There a cargo of Dutch cheese was taken on an asserted destination from Amsterdam to Corunna. The captors argued that a destination to Corunna was, in fact, a destination to Ferrol (the enemy port), since those ports were both in the same bay, and so situated as to render it impossible to prevent supplies from going immediately to Ferrol for the use of the Spanish navy if they were permitted to enter the bay unmolested on an asserted destination to Corunna. Having held that cheese, going to a place of naval equipment and fit for naval use, was contraband, Sir William Scott said:

"Corunna is, I believe, itself a place of naval equipment in some degree; and if not so exclusively, and in its prominent character, yet from its vicinity to Ferrol it is almost identified with that port. These ports are situated in the same bay, and if the supply is permitted to be imported into the bay, it would, I conceive, be impossible to prevent it from going on immediately, and in the same conveyance, to Ferrol."

He adds:

"I think myself warranted to consider this cargo, *on the present destination, as contraband, and, as such, subject to condemnation.*"*

His language in *The Neutralitet*,—not indeed that of a solemn judgment, but, as *his*, still much to be listened to,—is equally in support of our position:

"I am disposed to agree to a position advanced in argument, that a belligerent is not called upon to admit that neutral ships can innocently place themselves in a situation where they may with impunity break the blockade whenever they please. If the belligerent country has a right to impose a blockade, it must be justified in the necessary means of enforcing that right; and if a vessel could, under the pretence of going further, approach, *cy pres*, close up to the blockaded port, so as to be en

* 6 Robinson, 94.

abled to slip in without obstruction, it would be impossible that any blockade could be maintained. It would, I think, be no unfair rule of evidence to hold as a presumption *de jure*, that she goes there with an intention of breaking the blockade; and if such an inference may possibly operate with severity in particular cases, where the parties are innocent in their intentions, it is a severity necessarily connected with the rules of evidence, and essential to the effectual exercise of the right of war."

Other cases—as *The Charlotte Sophia*, *The Charlotte Christine*, and *The Gute Erwartung*,* decided, all, by Sir William Scott, all tend to a similar conclusion.

We do not assert that *all* neutral commerce with Matamoras was interdicted by the blockade of the Rio Grande, but simply commerce *of a contraband character*. The principle declared by Lord Stowell was applied by him to all neutral trade of Bremen, and, in reason, may safely extend that far. But we have preferred to restrict its application to trade of a contraband character, because the case of the Peterhoff requires no more, and because, so stated, it seems to us to be within the authority of *The Zelden Rust*.

2. If our position just presented is not a true one, still as a matter of fact the ulterior destination of the cargo was Texas, and the other Southern States then in insurrection, and this ulterior destination was a breach of the blockade.

The whole case proves the destination which we allege.

We must advert here to the late familiar history of the straits to which the Southern armies and people were reduced by our stringent blockade of their whole coast. The sudden elevation of the petty port of Matamoras into a great centre of commercial activity rivalling the trade of New York or Liverpool, because its territorial neutrality, and its proximity to Texas, seemed to secure to trade with the rebels almost absolute immunity from danger, and to set at complete defiance the efforts of our blockaders; the remarkable spectacle of first-class ships, laden with cargoes of va-

* 6 Robinson, 205, 101, and 182.

riety and value, arrested off an almost uninhabited coast by a bar which compelled them to transfer their cargoes to lighters in the open sea, many miles from their pretended port of destination, and which even prevented their approaching that port after they were unladen; the sudden accession to the population of Matamoras of large numbers of eager speculators, most of whom were, like Redgate, inhabitants of rebel States, and the establishment of numerous and extensive importing houses with branches at London, Liverpool, and Glasgow, who achieved both "entrance" and "exits" of vessels: all this is matter of present judicial knowledge.

Under the stimulus of fancied exemption from danger, this new rebel trade "rose like an exhalation," and Matamoras became the commercial outpost of the rebellion. For the new trade was not with the country in which Matamoras is situated, nor even with that town itself, but with the territory on the other side of the river, only a stone's throw across. The market, which was called Matamoras, was the whole population of our Southern States, extending to the Potomac, and the Southern armies on both sides of the Mississippi. And the supplies thus got from Matamoras were paid for in *cotton*.

Was this sort of commerce a breach of our blockade?

Practically, without any doubt whatever, it was.

And it was so in law. *The Bermuda* is in point. There the voyage, as documented, was to the neutral port, Nassau. There was no reason to suppose that the vessel itself, the Bermuda, meant to run our blockade. The cargo was, perhaps, meant to be landed at the neutral port. But it was unsuited for that port. "The character of the cargo," said Chase, C. J., who gave the opinion of the court, "made its *ulterior*, if not direct destination, to a rebel port, quite certain." Counsel argued much in favor of what were set up as neutral rights. But the court, defining with clearness and precision, all rights that were really neutral, said that "if it was intended to affirm that a neutral ship may take on a contraband cargo *ostensibly* for a neutral port, but des-

tined *in reality* for a belligerent port, either by the same ship *or by another*, without becoming liable, from the commencement to the end of the voyage, to seizure, in order to the confiscation of the cargo, we do not agree to it."

And acting on this view, a decree of condemnation was affirmed.

The decree below ought, therefore, to be "affirmed;" affirmed *in toto*, and in form; but if it is not so affirmed, it should be affirmed in its main parts severally: and this in the result is nearly tantamount to an affirmance simply.

(*a*) *As to the contraband, and also as to the whole part owned by the owner of that contraband portion.* Both are confiscable. A large part of the cargo was contraband of war by any definition of contraband of war ever made. It cannot be doubted that *this* part was meant for the Southern army. If this was so, then even if really shipped for Matamoras and meant to be landed and sold to the enemy there, it is confiscable, and it contaminates all owned by the owner of it.

(*b*) *As to the part claimed by Redgate.* This is confiscable as enemy's property. Redgate was a citizen of Texas, an enemy's country; and irrespective of any personal dispositions in law, an enemy. This is the doctrine as settled by the court, even under circumstances of the greatest hardship.* Now restitution cannot be made to an enemy. He has no standing in court. The decree as to that part of the cargo claimed by him, must stand.†

Nor can the court go behind the claim of Redgate to seek neutral owners whom he may represent, and who are not disclosed either by him or by themselves. They have no legal existence except in him, and we may safely infer that they have no existence at all.

Besides, the legal effect of the consignment of these goods to Redgate, into whose actual possession they were delivered

* Mrs. Alexander's Cotton, 2 Wallace, 404.

† Halleck's International Law, chap. 31, § 23, p. 772; 3 Philimore on same, § 461; The Falcon, 6 Robinson, 199.

at the time of shipment, was to vest the title in him, and so make them lawful prize, no matter by whom they were shipped.*

(*c*) *The vessel.* This must also be condemned.

1. The refusal of the master when boarded by the Vanderbilt, to exhibit his papers on board that vessel, was a grave offence against public law. The case is like that of *The Maria*, condemned for refusal by Sir William Scott.†

2. But the crowning and conclusive act was the destruction of papers in the moment of capture; and the various falsehoods,—afterthoughts, in a good degree,—in concealment of the fact of destruction, or of the character and importance of the papers. As evidence of intent to run the blockade, this, indeed, should condemn both vessel and cargo. But as a rule of policy it equally holds as respects a vessel, where all the cargo may not be involved. The case comes within *The Pizarro*,‡ where it is said by this court that if the explanation be not prompt and frank, or if it be weak and futile, condemnation ensues from defects in the evidence; defects which the party is not permitted to supply. It falls still more within the case of *The Two Brothers*, where Sir William Scott says, that "if neutral masters destroyed papers, they were not at liberty *to explain away such suppression by saying they were only private letters;* that it was *always* to be supposed that such letters relate to the ship or cargo, and that it was of material consequence to some interests that they should be destroyed."§

It is a presumption of law that with such an immense body of contraband on board the destination, direct or through Matamoras, of *it*, was known to the owners of the vessel. This is the law to be gathered from numerous cases: as, for example, from among them, *The Neutralitet*,‖ where the owner chartered the ship for contraband trade; *The*

* The Packet de Bilboa, 2 Robinson, 133.

† 1 Robinson, 340, 360.

‡ 2 Wheaton, 227.

§ 1 Robinson, 131; see also The Rosalie and Betty, 2 Id. 343–353; The Rising Sun, Id. 104.

‖ 3 Robinson, 296.

Franklin,* where the ship was carrying contraband, with a false destination, and where Sir William Scott said that the relaxation of the ancient rule which condemned the ship with the cargo could only be claimed by *fair* cases; *The Ranger*,† where he said, "If the owner of the ship will place his property under the absolute management and control of persons who are *capable* of lending it to be made an instrument of fraud in the hands of the enemy, he must sustain the consequences of such misconduct on the part of his agent;" *The Baltic*,‡ where the ship was condemned because "the owner must have been aware of the fraud intended, if not a confidential party to it."§

Messrs. Marvin, Sherwood, and A. F. Smith, contra, for the claimants:

I. There is really no ground to suppose intent to do anything but what was ostensibly presented as the purpose of the voyage. The vessel was a slow sailer, not at all suited by speed for a blockade-runner. The cargo was needed by Mexico for her war with France as much as by the rebel army for its resistance to the Federal power. The vessel, drawing as much water as she did, had necessarily to anchor off the mouth of the Rio Grande. She could not go into it. We speak of the master's disinclination to take his papers aboard the Vanderbilt and of his alleged throwing overboard of papers hereafter. The destination then was not simulated, and the cargo was destined to go up the Rio Grande.

II. This destination was lawful—

1. Because in point of fact the mouth of the Rio Grande was not meant to be blockaded. We at times had cruisers at its mouth, but they did not assert a right to blockade a

* 3 Robinson, 217. † Id. 126. ‡ 1 Acton, 25.

§ And see the Jonge Margaretha, 1 Robinson, 189; The Mercurius, Id. 288 and note; The Jonge Tobias, Id. 329; The Neptunus, 3 Id. 108; The Eenrom, 2 Id. 1; The Edward, 4 Id. 68; The Oster Risoer, Id. 200; The Carolina, Id. 260; The Richmond, 5 Id. 325; The Charlotte, Id. 275; The Ringende Jacob, 1 Id. 89; Carrington *v.* The Merchants' Insurance Co., 8 Peters, 520.

river which was one-half Mexican. As hereafter stated, vessels almost daily cleared from Northern ports, with the acquiescence of the government, for the port of Matamoras.

2. Because, if it had been blockaded, the blockade would have been void; our government having had no right to prevent trade by neutrals with Mexico; not even with those ports separated from us by a boundary river. None of the cases cited are *adjudications* of the point. *The Zelden Rust* is not so, for both the ports there of Corunna and Ferrol were enemy's ports, and the question was whether the cargo was contraband.*

Upon principle, we insist that the courts of the United States will not add new restrictions to neutral trade.

It is argued that the real destination of the cargo was Texas, through Matamoras. This is not clear; the cargo having been suited for Mexico while at war with France as much as for our Southwestern States, then in insurrection against the National government. But if the destination were as alleged, it would be after a sale at Matamoras and an incorporation into the stock of commerce. The law laid down in *The Bermuda* would protect, not condemn, this. But the voyage of that ship was so different from that of the Peterhoff that the decision in *The Bermuda* does not apply.

Whatever might be the law on the case as existing elsewhere or under other circumstances, is not our government estopped from capture and condemnation here? As a matter of fact it may be stated that between the 1st November, 1862, and the date of this capture, fifty-nine vessels with cargoes have cleared from the port of New York alone to the port of Matamoras [the dates were given], under the sanction of the Treasury Department and the custom-house officers. This commerce was permitted to go on certainly from the city of New York, and we suppose from other seaports of note in the Northern States. Our own country and other countries have participated in it without hindrance alike; and having done so in a manner that gave notice to

* See the Frau Margaretha, 6 Robinson, 92; The Jonge Pieter, 4 Id. 79.

the world that this course of commerce was free, how can our government set up the right of capture? In truth the government has been placed in an awkward position by the act of the naval forces now under consideration, and its law officers will add to the awkwardness of its position by endeavoring to justify the captors; a thing impossible, we think, when the controlling circumstances of the case are considered.

The state of commercial things just alluded to was brought to the attention of the President and War Department during the war, by the Union refugees of Texas and others, and the necessity of taking military possession of the left bank of the Rio Grande, with a view of cutting off this trade, urged upon the government. But for reasons of public policy the trade was not cut off. The government desired, perhaps, to alleviate the "cotton famine" in England and France, and so to take away from those countries one excuse for their threatened "intervention" in behalf of our Southern States. Whatever was the reason, it was a satisfactory one to our government at the time.

Finally, giving up the correctness of a condemnation *in toto*, it is argued that the vessel and parts of the cargo should be condemned.

(*a*) An argument is made that some part of the cargo was contraband.

The mere fact that contraband of war imported into Mexico for *trade there* might be again sold, and so come to the use of the belligerent, would have no effect upon the question at issue. It is trade *with the belligerent* in contraband that subjects to capture. Trade between neutrals in contraband of war is legitimate, although they both know or believe that, eventually, the contraband may be sold to the belligerent. This was admitted even in *The Bermuda.**

Of course it is not pretended that the concealment of the

* See also The Commercen, 1 Wheaton, 382, 388-9; The Ocean, 3 Robinson, 297; The Jonge Pieter, 4 Id 79; Treaty with Great Britain, 1794, Art. 18, 8 Stat. at Large, 125.

real destination by the interposition of a simulated one would protect the trade, where the real destination was the belligerent port or the enemy's army.

But how much contraband was there? for the contraband must be in considerable quantities to make an offence.* The "Blucher boots" are formidable features at first view. But every one acquainted with the habits of the people of Mexico, and especially of those much in the saddle, is aware of the extensive use of what are here thus called. In travelling over a country where there are neither ferries nor bridges, every man's horse is his means of transit, and in fording and swimming streams this sort of boots is used as a protection to the limbs and feet. So as to the supposed *military* blankets. In a country where nearly the whole travelling is done on horseback, a horse and saddle, a lariat at the saddle-bow, and a pair of blankets behind, are the traveller's equipment. These blankets are his shelter from the storm, and whether in the cabin or on the prairie, with his saddle for a pillow, they make his bed for the night.

But what is contraband by the law of nations as recognized and insisted by the government of the United States? This appears by reference to the various treaties and state papers.†

In view of the law of nations as settled by the authorities cited in the note, there was nothing contraband on board but the artillery harness.

If it were proved that any contraband on board was designed directly for the rebels, that would not subject to condemnation either the ship or the rest of the cargo.‡

* Wheaton's International Law, 565 ; The Atalanta, 6 Robinson, 440, 455; Hazlett's Manual, &c., 222.

† Treaty with Great Britain of 1794, Art. 18, 8 Stat. at Large, 125 ; see, also, Mr. Pickering, Secretary of State, to Mr. Pinckney, at Paris, June 12th, 1797, 2 Elliot's Diplomatic Code, 524–5. Mr. Pickering, Secretary of State, to Mr. Monroe, Minister at Paris, September 12th, 1795, 1 American State Papers, 596–7. Mr. Pickering to Messrs. Pinckney, Marshall, and Gerry, Ministers to French Republic, July 15th, 1797, 2 Id. 153–4. Messrs. Pinckney, Marshall and Gerry to the French Ministers, 27th January, 1798, Id. 169, 174, 175.

‡ Wheaton's International Law, 567–8 ; 1 Kent's Com. 142, 143 (margin).

Trade in contraband, even with the enemy, is legitimate; it only subjects the contraband to condemnation and the ship to loss of freight.*

(*b*) *Redgate's former residence in Texas.* This cannot subject his portion of the cargo to condemnation even under the too hard rule set up. He no longer resided in Texas, and the case is not within the rule, nor the reason of the rule stated in the case cited.

(*c*) *As to the vessel.*

1. The refusal of Captain Jarman, if he did refuse, to go on board the Vanderbilt, giving as a reason that he was "in charge of her Majesty's mails," and offering also the papers and ship for search, was no resistance of the "right of search" to subject the ship or cargo to condemnation.

The Maria, relied upon by the other side, is no authority for so tyrannical a right; that was a case of absolute resistance to search.

2. *Spoliation of papers* is in itself no ground for condemnation.† It is only evidence, more or less convincing according to the circumstances of the case and the character of the papers destroyed, of the existence of some other ground for condemnation, such as a purpose to break blockade, or the carrying of contraband, to the enemy. In the present case, apparently, no papers were destroyed, nothing was thrown over but a packet believed by the master to contain powder brought on board by a passenger without the master's knowledge or consent. The passenger had no interest in the ship or cargo, and he was permitted by the captors without the consent of the claimants, to depart and go where he pleased, without being examined as a witness. Had he been examined he would in all probability have proved it to have contained white powder as he alleged it to contain. The throwing overboard of the packet was an unwise act. That is all.

And there is no evidence that the owners of the ship

* The Santissima Trinidad, 7 Wheaton, 283.

† The Pizarro, 2 Wheaton, 227.

came within the cases cited of parties "who lent themselves as an instrument of fraud in the hands of the enemy."

The CHIEF JUSTICE delivered the opinion of the court.

This case is of much interest. It was very thoroughly argued, and has been attentively considered.

The Peterhoff was captured near the island of St. Thomas, in the West Indies, on the 25th of February, 1863, by the United States Steamship Vanderbilt. She was fully documented as a British merchant steamer, bound from London to Matamoras, in Mexico, but was seized, without question of her neutral nationality, upon suspicion that her real destination was to the blockaded coast of the States in rebellion, and that her cargo consisted, in part, of contraband goods.

The evidence in the record satisfies us that the voyage of the Peterhoff was not simulated. She was in the proper course of a voyage from London to Matamoras. Her manifest, shipping list, clearance, and other custom-house papers, all show an intended voyage from the one port to the other. And the preparatory testimony fully corroborates the documentary evidence.

Nor have we been able to find anything in the record which fairly warrants a belief that the cargo had any other direct destination. All the bills of lading show shipments to be delivered off the mouth of the Rio Grande, into lighters, for Matamoras. And this was in the usual course of trade. Matamoras lies on the Rio Grande forty miles above its mouth; and the Peterhoff's draught of water would not allow her to enter the river. She could complete her voyage, therefore, in no other way than by the delivery of her cargo into lighters for conveyance to the port of destination. It is true that, by these lighters, some of the cargo might be conveyed directly to the blockaded coast; but there is no evidence which warrants us in saying that such conveyance was intended by the master or the shippers.

We dismiss, therefore, from consideration, the claim, suggested rather than urged in behalf of the government, that

the ship and cargo, both or either, were destined for the blockaded coast.

But it was maintained in argument (1) that trade with Matamoras, at the time of the capture, was made unlawful by the blockade of the mouth of the Rio Grande; and if not, then (2) that the ulterior destination of the cargo was Texas and the other States in rebellion, and that this ulterior destination was in breach of the blockade.

We agree that, so far as liability for infringement of blockade is concerned, ship and cargo must share the same fate. The owners of the former were owners also of part of the latter; the adventure was common; the destination of the cargo, ulterior as well as direct, was known to the owners of the ship, and the voyage was undertaken to promote the objects of the shippers. There is nothing in this case as in that of the Springbok to distinguish between the liability of the ship and that of the merchandise it conveyed.

We proceed to inquire, therefore, whether the mouth of the Rio Grande was, in fact, included in the blockade of the rebel coast?

It must be premised that no paper or constructive blockade is allowed by international law. When such blockades have been attempted by other nations, the United States have ever protested against them and denied their validity. Their illegality is now confessed on all hands. It was solemnly proclaimed in the Declaration of Paris of 1856, to which most of the civilized nations of the world have since adhered; and this principle is nowhere more fully recognized than in our own country, though not a party to that declaration.

What then was the blockade of the rebel States? The President's proclamation of the 19th April, 1862, declared the intention of the government "to set on foot a blockade of the ports" of those States, "by posting a competent force so as to prevent the entrance or exit of vessels."* And, in explanation of this proclamation, foreign governments were

* 12 Stat. at Large, 1259.

informed "that it was intended to blockade the whole coast from the Chesapeake Bay to the Rio Grande."*

In determining the question whether this blockade was intended to include the mouth of the Rio Grande, the treaty with Mexico,† in relation to that river, must be considered. It was stipulated in the 5th article that the boundary line between the United States and Mexico should commence in the Gulf, three leagues from land opposite the mouth of the Rio Grande, and run northward with the middle of the river. And in the 7th article it was further stipulated that the navigation of the river should be free and common to the citizens of both countries without interruption by either without the consent of the other, even for the purpose of improving the navigation.

The mouth of the Rio Grande was, therefore, for half its width, within Mexican territory, and, for the purposes of navigation, was, altogether, as much Mexican as American. It is clear, therefore, that nothing short of an express declaration by the Executive would warrant us in ascribing to the government an intention to blockade such a river in time of peace between the two Republics.

It is supposed that such a declaration is contained in the President's proclamation of February 18th, 1864,‡ which recites as matter of fact that the port of Brownsville had been blockaded, and declares the relaxation of the blockade. The argument is that Brownsville is situated on the Texan bank of the Rio Grande, opposite Matamoras; and that the recital in the proclamation that Brownsville had been blockaded must therefore be regarded as equivalent to an assertion that the mouth of the river was included in the blockade of the coast. It would be difficult to avoid this inference if Brownsville could only be blockaded by the blockade of the river. But that town may be blockaded also by the blockade of the harbor of Brazos Santiago and the Boca Chica, which were, without question, included in the block-

* Lawrence's Wheaton, 829, *n.*

† 9 Stat. at Large, 926.

‡ 13 Stat. at Large, 740.

ade of the coast. Indeed, until within a year prior to the proclamation, the port of entry for the district was not Brownsville, but Point Isabel on that harbor; and, in the usual course, merchandise intended for Brownsville was entered at Point Isabel, and taken by a short land conveyance to its destination.

We know of no judicial precedent for extending a blockade by construction. But there are precedents of great authority the other way. We will cite one.

The Frau Ilsabe* and her cargo were captured in 1799 for breach of the British blockade of Holland. The voyage was from Hamburg to Antwerp, and, of course, in its latter part, up the Scheldt. Condemnation of the cargo was asked on the ground that the Scheldt was blockaded by the blockade of Holland. But Sir W. Scott said, "Antwerp is certainly no part of Holland, and, with respect to the Scheldt, it is not within the Dutch territory, but rather a coterminous river, dividing Holland from the adjacent country." This case is the more remarkable inasmuch as Antwerp is on the right bank of the river, as is also the whole territory of Holland; and, though no part of that country was part of Flanders, then equally with Holland combined with France in a war with Great Britain. "It was just as lawful," as Sir W. Scott observed, "to blockade the port of Flanders as those of Holland," and the Scheldt might have been included in the blockade, but he would not hold it necessarily included in the absence of an express declaration.

This case seems to be in point.

It is impossible to say, therefore, in the absence of an express declaration to that effect, that it was the intention of the government to blockade the mouth of the Rio Grande. And we are the less inclined to say it, because we are not aware of any instance in which a belligerent has attempted to blockade the mouth of a river or harbor occupied on one side by neutrals, or in which such a blockade has been recognized as valid by any court administering the law of nations.

* 4 Robinson, 63.

The only case which lends even apparent countenance to such a doctrine, is that of *The Maria*,* adjudged by Sir W. Scott in 1805. The cargo in litigation had been conveyed from Bremen, through the Weser to Varel, near the mouth of the Jahde, and there transshipped for America. The mouth of the Weser was then blockaded, and Sir W. Scott held, that the commerce of Bremen, though neutral, could not be carried on through the Weser. This, he admitted, was a great inconvenience to the neutral city, which had no other outlet to the sea; but it was an incident of her situation and of war. It happened in that case that a relaxation of the blockade in favor of Bremen warranted restitution. Otherwise there can be no doubt that the cargo would have been reluctantly condemned.

But it is an error to suppose this case an authority for an American blockade of the Rio Grande, affecting the commerce of Matamoras. Counsel were mistaken in the supposition that only one bank of the Weser was occupied by the French, and that Bremen was on the other. Both banks were in fact so held, and the blockade was warranted by the hostile possession of both. The case would be in point had both banks of the Rio Grande been in rebel occupation.

Still less applicable to the present litigation is the case of *The Zelden Rust*, cited at the bar. That was not a case of violation of blockade at all. It was a question of contraband, depending on destination. The Zelden Rust, a neutral vessel, entered the Bay or River De Betancos, on one side of which was Ferrol, and on the other Corunna. Counsel argued on the supposition that Ferrol was a belligerent and Corunna a neutral port, whereas both were belligerent; and the cargo was condemned on the ground of actual or probable destination to Ferrol, which was a port of naval equipment; though nominally destined to Corunna, also a port of naval equipment, though not to the same extent as Ferrol. There was no blockade of the bay or river or of either town.

It is unnecessary to examine other cases referred to by

* 6 Robinson, 201.

counsel. It is sufficient to say that none of them support the doctrine that a belligerent can blockade the mouth of a river, occupied on one bank by neutrals with complete rights of navigation.

We have no hesitation, therefore, in holding that the mouth of the Rio Grande was not included in the blockade of the ports of the rebel States, and that neutral commerce with Matamoras, except in contraband, was entirely free.

If we had any doubt upon the subject, it would be removed by the fact that it was the known and constant practice of the government to grant clearances for Matamoras from New York, on condition of giving bond that no supplies should be furnished to the rebels—a condition necessarily municipal in its nature and inapplicable to any clearance for a foreign port. These clearances are incompatible with the existence of the supposed blockade.

We come next to the question whether an ulterior destination to the rebel region, which we now assume as proved, affected the cargo of the Peterhoff with liability to condemnation. We mean the neutral cargo; reserving for the present the question of contraband, and questions arising upon citizenship or nationality of shippers.

It is an undoubted general principle, recognized by this court in the case of *The Bermuda*, and in several other cases, that an ulterior destination to a blockaded port will infect the primary voyage to a neutral port with liability for intended violation of blockade.

The question now is whether the same consequence will attend an ulterior destination to a belligerent country by inland conveyance. And upon this question the authorities seem quite clear.

During the blockade of Holland in 1799, goods belonging to Prussian subjects were shipped from Edam, near Amsterdam, by inland navigation to Emden, in Hanover, for transshipment to London. Prussia and Hanover were neutral. The goods were captured on the voyage from Emden, and the cause* came before the British Court of Admiralty in

* The Stert, 4 Robinson, 65.

1801. It was held that the blockade did not affect the trade of Holland carried on with neutrals by means of inland navigation. "It was," said Sir William Scott, "a mere maritime blockade effected by force operating only at sea." He admitted that such trade would defeat, partially at least, the object of the blockade, namely, to cripple the trade of Holland, but observed, "If that is the consequence, all that can be said is that it is an unavoidable consequence. It must be imputed to the nature of the thing which will not admit a remedy of this species. The court cannot on that ground take upon itself to say that a legal blockade exists where no actual blockade can be applied. . . . . It must be presumed that this was foreseen by the blockading state, which, nevertheless, thought proper to impose it to the extent to which it was practicable."

The same principle governed the decision in the case of *The Ocean*,* made also in 1801. At the time of her voyage Amsterdam was blockaded, but the blockade had not been extended to the other ports of Holland. Her cargo consisted partly or wholly of goods ordered by American merchants from Amsterdam, and sent thence by inland conveyance to Rotterdam, and there shipped to America. It was held that the conveyance from Amsterdam to Rotterdam, being inland, was not affected by the blockade, and the goods, which had been captured, were restored.

These were cases of trade from a blockaded to a neutral country, by means of inland navigation, to a neutral port or a port not blockaded. The same principle was applied to trade from a neutral to a blockaded country by inland conveyance from the neutral port of primary destination to the blockaded port of ulterior destination in the case of the *Jonge Pieter*,† adjudged in 1801. Goods belonging to neutrals going from London to Emden, with ulterior destination by land or an interior canal navigation to Amsterdam, were held not liable to seizure for violation of the blockade of that port. The particular goods in that instance were con-

* The Stert, 3 Robinson, 297.

† 4 Id. 79.

demned upon evidence that they did not in fact belong to neutrals, but to British merchants, engaged in unlawful trade with the enemy; but the principle just stated was explicitly affirmed.

These cases fully recognize the lawfulness of neutral trade to or from a blockaded country by inland navigation or transportation. They assert principles without disregard of which it is impossible to hold that inland trade from Matamoras, in Mexico, to Brownsville or Galveston, in Texas, or from Brownsville or Galveston to Matamoras, was affected by the blockade of the Texan coast.

And the general doctrines of international law lead irresistibly to the same conclusion. We know of but two exceptions to the rule of free trade by neutrals with belligerents: the first is that there must be no violation of blockade or siege; and the second, that there must be no conveyance of contraband to either belligerent. And the question we are now considering is, "Was the cargo of the Peterhoff within the first of these exceptions?" We have seen that Matamoras was not and could not be blockaded; and it is manifest that there was not and could not be any blockade of the Texan bank of the Rio Grande as against the trade of Matamoras. No blockading vessel was in the river; nor could any such vessel ascend the river, unless supported by a competent military force on land.

The doctrine of *The Bermuda* case, supposed by counsel to have an important application to that before us, has, in reality, no application at all. There is an obvious and broad line of distinction between the cases. The Bermuda and her cargo were condemned because engaged in a voyage ostensibly for a neutral, but in reality either directly or by substitution of another vessel, for a blockaded port. The Peterhoff was destined for a neutral port with no ulterior destination for the ship, or none by sea for the cargo to any blockaded place. In the case of the Bermuda, the cargo destined primarily for Nassau could not reach its ulterior destination without violating the blockade of the rebel ports; in the case before us the cargo, destined primarily for Matamoras,

could reach an ulterior destination in Texas without violating any blockade at all.

We must say, therefore, that trade, between London and Matamoras, even with intent to supply, from Matamoras, goods to Texas, violated no blockade, and cannot be declared unlawful.

Trade with a neutral port in immediate proximity to the territory of one belligerent, is certainly very inconvenient to the other. Such trade, with unrestricted inland commerce between such a port and the enemy's territory, impairs undoubtedly and very seriously impairs the value of a blockade of the enemy's coast. But in cases such as that now in judgment, we administer the public law of nations, and are not at liberty to inquire what is for the particular advantage or disadvantage of our own or another country. We must follow the lights of reason and the lessons of the masters of international jurisprudence.

The remedy for inconveniences of the sort just mentioned is with the political department of the government. In the particular instance before us, the Texan bank of the Rio Grande might have been occupied by the national forces; or with the consent of Mexico, military possession might have been taken of Matamoras and the Mexican bank below. In either course Texan trade might have been entirely cut off. Sufficient reasons, doubtless, prevailed against the adoption of either. The inconvenience of either, at the time, was doubtless supposed to outweigh any advantage that might be expected from the interruption of the trade.

What has been said sufficiently indicates our judgment that the ship and cargo are free from liability for violation of blockade.

We come then to other questions.

Thus far we have not thought it necessary to discuss the question of actual destination beyond Matamoras. Nor need we now say more upon that general question than that we think it a fair conclusion from the whole evidence that the cargo was to be disposed of in Mexico or Texas as might be found most convenient and profitable to the owners and

consignees, who were either at Matamoras or on board the ship. Destination in this case becomes specially important only in connection with the question of contraband.

And this brings us to the question: Was any portion of the cargo of the Peterhoff contraband?

The classification of goods as contraband or not contraband has much perplexed text writers and jurists. A strictly accurate and satisfactory classification is perhaps impracticable; but that which is best supported by American and English decisions may be said to divide all merchandise into three classes. Of these classes, the first consists of articles manufactured and primarily and ordinarily used for military purposes in time of war; the second, of articles which may be and are used for purposes of war or peace, according to circumstances; and the third, of articles exclusively used for peaceful purposes.* Merchandise of the first class, destined to a belligerent country or places occupied by the army or navy of a belligerent, is always contraband; merchandise of the second class is contraband only when actually destined to the military or naval use of a belligerent; while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of blockade or siege.

A considerable portion of the cargo of the Peterhoff was of the third class, and need not be further referred to. A large portion, perhaps, was of the second class, but is not proved, as we think, to have been actually destined to belligerent use, and cannot therefore be treated as contraband. Another portion was, in our judgment, of the first class, or, if of the second, destined directly to the rebel military service. This portion of the cargo consisted of the cases of artillery harness, and of articles described in the invoices as "men's army bluchers," "artillery boots," and "government regulation gray blankets." These goods come fairly under the description of goods primarily and ordinarily used

* Lawrence's Wheaton, 772–6, note; The Commercen, 1 Wheaton, 382; Dana's Wheaton, 629, note; Parsons' Mar. Law, 93–4.

for military purposes in time of war. They make part of the necessary equipment of an army.

It is true that even these goods, if really intended for sale in the market of Matamoras, would be free of liability: for contraband may be transported by neutrals to a neutral port, if intended to make part of its general stock in trade. But there is nothing in the case which tends to convince us that such was their real destination, while all the circumstances indicate that these articles, at least, were destined for the use of the rebel forces then occupying Brownsville, and other places in the vicinity.

And contraband merchandise is subject to a different rule in respect to ulterior destination than that which applies to merchandise not contraband. The latter is liable to capture only when a violation of blockade is intended; the former when destined to the hostile country, or to the actual military or naval use of the enemy, whether blockaded or not. The trade of neutrals with belligerents in articles not contraband is absolutely free unless interrupted by blockade; the conveyance by neutrals to belligerents of contraband articles is always unlawful, and such articles may always be seized during transit by sea. Hence, while articles, not contraband, might be sent to Matamoras and beyond to the rebel region, where the communications were not interrupted by blockade, articles of a contraband character, destined in fact to a State in rebellion, or for the use of the rebel military forces, were liable to capture though primarily destined to Matamoras.

We are obliged to conclude that the portion of the cargo which we have characterized as contraband must be condemned.

And it is an established rule that the part of the cargo belonging to the same owner as the contraband portion must share its fate. This rule is well stated by Chancellor Kent, thus: "Contraband articles are infectious, as it is called, and contaminate the whole cargo belonging to the same owners, and the invoice of any particular article is not usually admitted to exempt it from general confiscation."

So much of the cargo of the Peterhoff, therefore, as actually belonged to the owner of the artillery harness, and the other contraband goods, must be also condemned.

Two other questions remain to be disposed of.

The first of these relates to the political status of Redgate, one of the owners of the cargo. It was insisted, in the argument for the government, that this person was an enemy, and that the merchandise owned by him was liable to capture and confiscation as enemy's property.

It appears that he was by birth an Englishman; that he became a citizen of the United States; that he resided in Texas at the outbreak of the rebellion; made his escape; became a resident of Matamoras; had been engaged in trade there, not wholly confined, probably, to Mexico; and was on his return from England with a large quantity of goods, only a small part of which, however, was his own property, with the intention of establishing a mercantile house in that place.

It has been held, by this court, that persons residing in the rebel States at any time during the civil war must be considered as enemies, during such residence, without regard to their personal sentiments or dispositions.*

But this has never held in respect to persons faithful to the Union, who have escaped from those States, and have subsequently resided in the loyal States, or in neutral countries. Such citizens of the United States lost no rights as citizens by reason of temporary and constrained residence in the rebellious portion of the country.

And to this class Redgate seems to have belonged. He cannot, therefore, be regarded as an enemy. If his property was liable to seizure at all on account of his political character, it was as property of a citizen of the United States, proceeding to a State in insurrection. But we see no sufficient ground for distinguishing that portion of the cargo owned by him, as to destination, from any other portion.

* Prize Cases, 2 Black, 666, 687–8; The Venice, 2 Wallace, 258; Mrs. Alexander's Cotton, Id. 404.

The other question relates to costs and expenses.

Formerly conveyance of contraband subjected the ship to forfeiture; but in more modern times, that consequence, in ordinary cases, attaches only to the freight of the contraband merchandise. That consequence only attaches in the present case.

But the fact of such conveyance may be properly taken into consideration, with other circumstances, in determining the question of costs and expenses.

It was the duty of the captain of the Peterhoff, when brought to by the Vanderbilt, to send his papers on board, if required. He refused to do so. The circumstances might well excite suspicion. The captain of a merchant steamer like the Peterhoff is not privileged from search by the fact that he has a government mail on board; on the contrary he is bound by that circumstance to strict performance of neutral duties and to special respect for belligerent rights.

The search led to the belief on the part of the officers of the Vanderbilt that there was contraband on board, destined to the enemy. This belief, it is now apparent, was warranted. It was therefore the duty of the captors to bring the Peterhoff in for adjudication, and clearly they are not liable for the costs and expenses of doing so.

On the other hand, not only was the captain in the wrong in the refusal just mentioned, but it appears that papers were destroyed on board his ship at the time of capture. Some papers were burned by a passenger named Mohl, or by his directions. A package was also thrown overboard by direction of the captain. This package is variously described by the witnesses as a heavy sealed package wrapped in loose paper; as a box of papers; and as a packet of despatches sealed up in canvas and weighted with lead. By the captain it is represented as a package belonging to Mohl, and containing a white powder. We are unable to credit this representation. It is highly improbable that, under the circumstances described by the captain, he would have thrown any package overboard at such a time, and with the plain intent of concealing it from the captors, if it contained

nothing likely, in his opinion, to prejudice the case of the ship and cargo.

We must say that his conduct was inconsistent with the frankness and good faith to which neutrals, engaged in a commerce open to great suspicion, are most strongly bound. Considering the other facts in the case, however, and the almost certain destination of the ship to a neutral port, with a cargo, for the most part, neutral in character and destination, we shall not extend the effect of this conduct of the captain to condemnation, but we shall decree payment of costs and expenses by the ship as a condition of restitution.

DECREE ACCORDINGLY.

UNITED STATES v. WEED ET AL.

1. When the record presents a case in this court which has been prosecuted exclusively as prize, the property cannot be here condemned as for a statutory forfeiture.
2. When the record presents a case prosecuted below on the instance side of the court, for forfeiture under a statute, it cannot here be condemned as prize.
3. In either of these cases, if the facts disclosed in the record justify it, the case will be remanded to the court below for a new libel, and proper proceedings according to the true nature of the case.
4. In the present case, which was prosecuted as prize of war exclusively, the facts did not prove a case of prize, nor did they show a probable case of violation of any statutes. A decree of the court below dismissing the libel and restoring the property was therefore affirmed.
5. Permits granted during the late rebellion by the proper licensing agents to purchase goods in a certain locality, are *primâ facie* evidence that the locality is properly within the trade regulations of that department.

APPEAL from the District Court of the United States for the Eastern District of Louisiana; the case being thus:

On the 15th of April, 1864, the steamer A. G. Brown was boarded in the Atchafalaya River, while on her way to Brashear City, by the United States gunboat Wyanza, Cap-

tain Washburne, and after some investigation the cargo of the Brown was pronounced prize of war. She followed the gunboat into Brashear City, her cargo was landed there, and put on the railroad which connects that place with New Orleans, and sent to the latter city in charge of a person calling himself a prize-master. No attempt was made to detain the A. G. Brown. About a week afterwards she landed at Brashear City, on her return from another expedition, and as soon as she touched the shore Captain Washburne came on board of her, declared her cargo prize of war, and sent that also to New Orleans by railroad. These cargoes consisted of sugar and molasses.

At New Orleans the first cargo arrived in two instalments. On the arrival of the first a libel was filed against it, *in prize*, in the District Court for the Eastern District of Louisiana, by the attorney of the United States for that district. Shortly after this the second instalment of the first capture, and all of the second capture, arrived at New Orleans, whereupon an amended or supplemental libel, *equally in prize*, was filed against all the goods of both seizures.

The property, on its arrival, was placed in the hands of prize commissioners, depositions *in preparatorio* were taken, and the litigation pursued and ended as if it were a single capture. It was only by the most diligent search of the record that one was enabled to discover what goods were taken in the first capture and what in the second.

As soon as the case was fairly begun in the District Court, C. A. Weed filed his claim for the sugar and molasses of the first capture, alleging that he was the owner of it; that he was a loyal citizen of New Orleans; that he had purchased the property in the Parish of *St. Mary*, Louisiana, under a license from the proper treasury agents, and was transmitting it to New Orleans, when it was seized. F. Blydenburgh filed a claim, with similar statements, for the sugar of the second capture, stating, however, that he had bought it under a license which authorized him to "transport the same from the Parish of *St. Martin's*." Both claims, which were sworn to, were quite full in stating the circumstances con-

cted with the purchases and loyalty of the region where made and through which the property passed.

During the progress of the case the claimant made a motion to dismiss the proceedings in prize, and transfer the case to the instance side of the court. This motion was disregarded; but, on final hearing, the District Court dismissed the libel and ordered restitution of the property. From that decree the United States appealed to this court.

The vessel on which the goods were seized was the property of the government of the United States, in the employment and control of the quartermaster's department of General Banks's army at the time of the seizure,—the government receiving $3000 for the use of the vessel. An officer of this department accompanied the expedition, which went from Brashear City for the goods, and was on board when she was overhauled by the gunboat. The vessel was manned by officers and men in the service of the government. There was also on board a file of United States soldiers, under the command of a captain of the army, who were detailed for the expedition by order of the colonel in command. The only person known to be on board not in the service of the government was the person who acted as agent for the claimant of the goods. Brashear City was in possession of our forces, and had been for several months, and the vessel was only returning to her proper place when she was captured in the first instance, and was lying there when boarded, in the second. Her voyage did not, in either case, extend beyond the region of country which was under the control of the military authorities of the government at that time.

As to the cargoes.

Weed's had been brought from the parish of St. Mary. Blydenburgh's came from the parish of *St. Martin*, on the shore of the Grand River, a little below a place called *Butte la Rose*. The Grand River was apparently the boundary between the two parishes. The district is on the Gulf of Mexico, and is indented on the Gulf side by several bays, with numerous islands, creeks, &c., divided by two or three

navigable rivers, broken by swamps and lakes, and traversed in every direction by numberless bayous and watercourses; facts which rendered the absence of a public enemy a fact not so easy to be ascertained.

It appeared, however, in this case that the district was in the control of the United States; that the President had designated by proclamation, on the 1st of January previous, the parish of St. Mary and apparently the whole region through which that cargo was to pass, as not in rebellion. Various places in the parish of St. Mary had been named by the commanding general as the places where delegates from the State were to assemble on the 22d February, 1864, to appoint State officers, and on the first Monday of April following, to make a State constitution.

The licenses, which were produced in court, and had all usual *indicia* of regularity, were to purchase within "the country known as the parish of St. Mary, Louisiana," and both had at the top of them the words, "This permit will accompany the shipment, and be surrendered at the custom-house." No papers were found with the goods.

Mr. Ashton, Assistant Attorney-General, for the United States, appellants:

Conceding, for the sake of argument simply, that the property was not enemy property, and so liable to confiscation as prize of war, it is yet so for violation of municipal law, and the court below should not have ordered restitution.

Licenses of this character are strictly construed. The rule against constructive license is probably the sternest principle known to the law.* Even where the licensee was deceived by the course of the captor's government, a persuasive equity could not relieve him.† The party who uses a license "engages not only for fair intentions, but for an accurate interpretation of the permit."‡ The claimant in a prize court is

* The Hoop, 1 Robinson, 216.

† The Charlotta, 1 Dodson, 387–393.

‡ Lord Stowell, The Cosmopolite, 4 Robinson, 13.

an actor, and must make out his case.* During the late rebellion, for the best of reasons, the doubt seems to have gone in this court against the individual, in deference to controlling public objects.†

Now in this case there are various difficulties.

1. The first words of the documents are these: "*This permit will accompany the shipment and be surrendered at the custom-house.*" The case shows that the license did not accompany the merchandise; nor did any other papers. This was a violation of the conditions of the license, which, by its own terms, was thus avoided.

2. The merchandise in suit is not identified with the alleged permits, or as the property of the claimant. The onus of an intervenor is nowhere more pressing than on this point Quantity is one of the elements of identity where a lot of merchandise is in question. In this case the property claimed here by Weed is of a quantity precisely stated in the libels.

3. As respects Blydenburgh's license. The permit was to purchase in and transport from "*St. Mary's* parish." Blydenburgh's own statement in his claim shows that the whole transaction was in "*St. Martin's* parish." For this he does not pretend to have had any license

Mr. Coffey, contra, for the claimant.

Mr. Justice MILLER delivered the opinion of the court.

If this case is to be disposed of here, upon the answer to be given to the question of prize or no prize, there can be no doubt that the decree of the District Court must be affirmed.

There can on the facts be no pretence that there was any attempt to break a blockade, nor can it be held that the cargoes were enemy property. No person hostile to the United States is mentioned in argument or otherwise as probable owner of any part of them. Can the places from

* The Amiable Isabella, 6 Wheaton, 77.

† The Reform, 3 Wallace, 628.

which the goods were brought impress upon them the character of enemy property? They were the products of those islands of Louisiana found in the bayous of that region, and were undoubtedly taken by the vessel from near the places of their production. These places, as we have seen, were under the military control of our authorities; and the parishes of St. Mary and St. Martin were then represented in a convention of loyal citizens, called to frame a constitution under which a government was organized for the State, hostile to the rebellion, and acceptable to the military commander of that department.

The regularly authorized agents of the Treasury Department were also issuing licenses to trade in these parishes, under the act of July 13th, 1861, and the regulations of the Treasury Department made under that act and other acts of Congress. It is not possible to hold, therefore, that property arriving from these parishes was, for that reason alone, to be treated as enemy property, in the sense of a prize court.

Whether it is liable to forfeiture for an illegal traffic, as being in violation of those regulations and acts of Congress, will be considered hereafter; but the question must be determined upon other considerations than those which govern a prize court.

The question of prize or no prize must therefore be answered in the negative.

But it is said, in behalf of the government, that if the property in controversy is not subject to condemnation as prize of war, it is liable to confiscation as having been purchased in violation of the acts of Congress, and the trade regulations established in pursuance of those acts.

Before entering upon this inquiry a preliminary question of some importance presents itself, which must be first disposed of.

The pleadings, the testimony, and the conduct of the case have been governed exclusively, from its commencement, upon the idea of prize proceedings. The libel is a very general allegation of property captured as prize. Not a word is found in the pleadings of the case which alleges any

fact rendering the property liable to confiscation under the acts of Congress. A large part of the testimony consists of depositions taken *in preparatorio*, where the claimants had no opportunity of cross-examination. If, under these circumstances, there is found in the testimony sufficient evidence to convince us that the property is liable to statutory confiscation, can we condemn it in this proceeding? Or, if we cannot condemn, must we, on the other hand, restore it to the claimants?

It would seem to violate all rules of pleading, as well as all the rules of evidence applicable to penal forfeitures, to hold that in such circumstances we can proceed to condemnation. The right of the claimant to be informed by the libel of the specific act by which he or his property has violated the law, and to have an opportunity to produce witnesses, and to cross-examine those produced against him, are as fully recognized in the admiralty courts, in all except prize cases, as they are in the courts of common law.

In the case of *The Schooner Heppet*,* the vessel was proceeded against for a forfeiture under the act to interdict commercial intercourse with France, and this court, by C. J. Marshall, says, that the first question made for its consideration is whether the information will support a sentence of condemnation. After stating the substance of the pleading, and the rule which governs the common law courts, he proceeds: "Does this rule apply to informations in a court of admiralty? It is not contended that all those technical niceties, which are unimportant in themselves, and standing only on precedents of which the reason cannot be discerned, should be transplanted from the courts of common law in a court of admiralty. But a rule so essential to justice and fair proceeding, as that which requires a substantial statement of the offence upon which the prosecution is founded, must be the rule of every court where justice is its object, and cannot be satisfied by a general reference to the provisions of the statute." He then asks if this defect of the

* 7 Cranch, 389.

pleading can be cured by any evidence showing that in point of fact the vessel and cargo are liable to forfeiture and holds that it cannot.

In the case of *The Brig Caroline*,* this case is affirmed, and the principle applied to a libel filed against a vessel for violating the act of Congress concerning the slave trade.†

The claimants, on the other hand, insist that as the evidence does not sustain a case within the prize jurisdiction of the court, the libel must be dismissed, and the property restored.

This might be true if the prize court of this country was a court sitting under a special commission, as it is in England, for that commission must then be the limit of its power. But such is not the case here. The District Court holds both its prize jurisdiction and its jurisdiction as an instance court of admiralty from the Constitution and the act of Congress, and it is but one court, with these different branches of admiralty jurisdiction, as well as cognizance of other and distinct subjects.

The case of *Jecker* v. *Montgomery*,‡ in this court, is instructive, if not conclusive, on the point we are now considering.

In that case Captain Montgomery had, during the Mexican war, taken as prize the Admittance, an American vessel, and her cargo, for illegal trade with the enemy on the coast of California. He had carried his capture before a court claiming prize jurisdiction in that region, organized by the authority of the commanding general, and she was by that court condemned and sold. After this the owners of the vessel and cargo filed a libel in admiralty, in the instance side of the court, in the District of Columbia, against the captor; alleging that the capture was wrongful, and the condemnation illegal, and they prayed for restitution of their property, or that Captain Montgomery might be compelled

* 7 Cranch, 496.

† See, also, The Samuel, 1 Wheaton, 9; The Mary Anne, 8 Id. 380.

‡ 13 Howard, 498.

to bring the captured property into that court, or some other court of competent jurisdiction, and institute there the proper proceeding for its condemnation. Captain Montgomery answered, and insisted that his capture was lawful prize, and that the proceedings in the prize court in California were valid. Demurrers to the answer were filed, and on these pleadings the libel was dismissed.

On appeal to the Supreme Court, it was held that the prize court of California was without authority and its decree void. But, although the parties were before the court, and sufficient cause for the capture was stated in the answer, and sufficient excuse shown for not proceeding to a valid adjudication—all of which was admitted by the demurrer of the claimants—this court reversed the decree dismissing the libel, and remanded the case, with directions that the captor should institute proceedings in prize for the condemnation of his capture, and if he did not do so within a reasonable time the court should proceed against him on the libel of claimants for a marine trespass.

The court said that "the necessity of proceeding to condemnation in prize does not arise from any distinction between the instance court of admiralty and the prize court. Under the Constitution of the United States the instance court of admiralty and the prize court of admiralty are the same court, acting under one commission. Still, however, the property cannot be condemned as prize under this libel, nor would its dismissal be equivalent to a condemnation, nor recognized as such by foreign courts. The libellants allege that the goods were neutral, and not liable to capture, and their right to them cannot be divested until there is a sentence of condemnation against them as prize of war. And, as that sentence cannot be pronounced against them in the present form of the proceeding, it becomes necessary to proceed in the prize jurisdiction of the court, where the property may be condemned or acquitted by the sentence of the court, and the whole controversy finally settled."

In that case it was determined that the case must be remitted to the court in prize, because, under the libel and

mode of proceeding in the instance side of the court, the question of prize or no prize could not be definitely settled The case before us is the converse of that. We have here a case where all the proceedings are in prize, and according to the mode of proceeding in prize courts, but the case for the government, if it can be sustained at all, is not a case of prize, but of forfeiture under municipal law. We think the reasons are quite as strong why this court should not condemn the property in this proceeding, even if liable to forfeiture on the facts, as they are for refusing to condemn a prize on a libel filed on the instance side of the court. What, then, shall be done with the property, if the facts in the record prove a liability to forfeiture under the statute?

In the case of *The Schooner Adelaide*,* where this precise question was raised, it was not found necessary to decide it, because the proceeding being in prize, this court held that the facts proved it to be a prize case. But Mr. Justice Story, in delivering the opinion of the court, responding to the argument that the case was salvage and not prize, and therefore the libel should be dismissed, said: "If, indeed, there were anything in this objection, it cannot, in any beneficial manner, avail the defendants. The most that could result would be, that the case would be remanded to the Circuit Court, with direction to allow an amendment of the libel. Where merits clearly appear on the record, it is the settled practice in admiralty proceedings not to dismiss the libel, but to allow the party to assert his rights in a new allegation."

This practice was also followed in the case of *Mrs. Alexander's Cotton*.† In that case the cotton had been libelled as prize of war. This court was of opinion that it was not a case of prize, but that it came within the statute covering captured and abandoned property. The court did not, for that reason, affirm the decree of the District Court, which had restored the property, or its proceeds, to Mrs. Alexander, but reversed that decree, and remanded the case to the Dis-

* 9 Cranch, 244.

† 2 Wallace, 404.

trict Court, that it might dispose of the proceeds of the sale of the property, then in the registry, according to the opinion of the court.

Our inquiries into this subject, guided and supported by the decisions of this court, lead to the establishment of two propositions:

1. That when a case has been prosecuted as prize in the modes in use in the prize courts, which the facts in the record show not to be prize, but a case of forfeiture under statute, this court will remand the case for further proceedings in the court below.

2. That where a case has been in like manner prosecuted in the instance court, which, on the facts presented, this court is of opinion is a case for a prize court, it will be remanded for proceedings in prize.

We have already seen that the present is not, on the facts, a case of prize. The first of the above propositions establishes the rule that we cannot, under this proceeding, condemn the property for a forfeiture under the statute. It remains to be determined whether we shall affirm the decree of the District Court restoring the property, or remand the case for further proceedings on the question of municipal forfeiture. For this purpose we must examine, for a moment, the testimony before us.

We have already seen that the goods were purchased in those parishes of Louisiana which were occupied by our military forces, and which were under their control, and which were also represented in the effort to establish a loyal State government. It also appears that the legally appointed agents of the Treasury Department were in the habit of issuing permits to trade in those parishes.

The claimants allege that they made the purchases under licenses obtained from these agents, that they were fair and honest transactions, and that they themselves are loyal citizens of New Orleans. The facts of the purchase are stated with particularity, and under oath. The permits, or licenses, are produced and filed in court, and seem to us to be regu-

lar in form and properly issued. It cannot be supposed that this court can take judicial notice of the varying lines of the Federal army of occupation in those remote regions, but the fact that the proper officers issued these permits for certain parishes, must be taken as evidence that they were properly issued, until the contrary is established. The facts, also, that the goods were brought in by a government vessel, for the use of which government received $3000, commanded by government officers, and guarded by government troops, ordered for the purpose by the post commander, are circumstances not to be disregarded in a matter of this kind.

It is objected that the permits were not found with the goods, as the regulations direct. This was merely directory, and would not of itself work a forfeiture of the goods. But they probably were on board with the goods when the latter were seized, and the holder of them may have felt justified in not delivering this evidence of his good faith to a gentleman who seemed willing to let the *vessel* do all she could in this traffic, so long as he could stand on the shore when she landed her goods, and seize them as prize of war.

It is said there is no proof identifying these goods as those purchased under the permits; but the affidavits of claimants are full to this point, and are uncontradicted by any testimony in the record. Other witnesses also prove the purchase and payment of these goods by Weed, about the time mentioned in the first of two permits issued to him.

It is said that Blydenburgh's permit was to purchase in the parish of St. Mary, and that his purchase was made in the parish of St. Martin. It is not shown precisely where the purchase was made. The sugar was taken from the shore of Grand River, a little below Butte la Rose. This Grand River seems to be the boundary between the parishes of St. Mary and St. Martin. However, there seems no reason to suppose that Blydenburgh intended to violate the terms of his permit, nor sufficient proof that he did so, in making his purchase. There is much contradictory testimony as to the existence of guerrillas near where the sugar was obtained about the time of its transportation; but this would seem

to show the necessity for its speedy removal, if the purchase had been honestly made.

On the whole, we see no reason to suppose that a case of forfeiture would be made out by the testimony on another trial, as much of that taken *ex parte* by the captors would probably be modified favorably for the claimants on cross-examination.

The decree of the District Court is therefore

AFFIRMED.

WATSON *v.* SUTHERLAND.

The absence of a *plain* and *adequate* remedy at law affords the only test of equity jurisdiction, and the application of this principle to a particular case must depend altogether upon the character of the case, as disclosed in the proceedings.

Hence where a creditor of A. levied on goods, a miscellaneous stock in retail trade, suitable for the then current season, and intended to be paid for out of the sales—in the possession of B., a young man recently established in trade and doing a profitable business, alleging that they had been conveyed to B. by A. to defeat his creditors—the court, upon being satisfied that they had not been so conveyed, held that the execution had been rightly enjoined; that as at law the measure of damages, if the property were not sold, could not extend beyond the injury done to it, or, if sold, to the value of it, when taken, with interest from the time of the taking down to the trial—loss of trade, destruction of credit, and failure of business prospects—commercial ruin, in short—collateral or consequential damages, which might nevertheless ensue, would not be compensated for at law, but were properly prevented in equity.

APPEAL from the Circuit Court of the United States for the District of Maryland; the case being this:

Watson & Co., appellants in the suit, having issued writs of *fieri facias* on certain judgments which they had recovered in the Circuit Court for the District of Maryland against Wroth & Fullerton, caused them to be levied on the entire stock in trade of a retail dry goods store in Baltimore, in the possession of one Sutherland, the appellee. Sutherland, claiming the exclusive ownership of the property, and in-

sisting that Wroth & Fullerton had no interest whatever in it, filed a bill in equity, to enjoin the further prosecution of these writs of *fieri facias*, and so to prevent, as he alleged, irreparable injury to himself. The grounds on which the bill of Sutherland charged that the injury would be irreparable, and could not be compensated in damages, were these: that he was the *bonâ fide* owner of the stock of goods, which were valuable and purchased for the business of the current season, and not all paid for; that his only means of payment were through his sales; that he was a young man, recently engaged on his own account in merchandising, and had succeeded in establishing a profitable trade, and if his store was closed, or goods taken from him, or their sale even long delayed, he would not only be rendered insolvent, but his credit destroyed, his business wholly broken up, and his prospects in life blasted.

The answer set forth that the goods levied on were really the property of Wroth & Fullerton, who had been partners in business in Baltimore, and who, suspending payment in March, 1861, greatly in debt to the appellants and others, had, on the 27th October, 1862, and under the form of a sale, conveyed the goods to Sutherland, the appellee; that Sutherland was a young man, who came to this country from Ireland a few years ago; that when he came he was wholly without property; that since he came he had been salesman in a retail dry goods store, at a small salary, so low as to have rendered it impossible for him to have saved from his earnings any sum of money sufficient to have made any real purchase of this stock of goods from Wroth & Fullerton, which the answer set up was accordingly a fraudulent transfer made to hinder and defeat creditors.

It further stated that the legislature of Maryland had passed acts staying executions from the 10th of May, 1861, until the 1st of November, 1862; that previous to the 1st November, 1862, Wroth & Fullerton had determined to pay no part of the judgments rendered against them; and that from the 10th May, 1861, until the 1st November, 1862, judgments, amounting to between $30,000 and $40,000, had

been rendered against them; that between the date of the suspension, March, 1861, and the 27th October, 1862, they had sold the greater portion of their goods, and collected a great many of the debts due them, but had paid only a small portion of those which they owed; secreting for their own use the greater portion of the money collected, and with the residue obtaining the goods levied upon.

It added that there was no reason to suppose that the levy aforesaid, as made by said marshal, would work irreparable injury to the appellee, even if the goods so levied on were the property of the complainant, as property of the same description, quantity, and quality, could be easily obtained in market, which would suit the appellee's purpose as well as those levied upon, and that a jury would have ample power, on a trial at common law, in an action against the respondents, now appellants, or against the marshal on his official bond, to give a verdict commensurate with any damages the said appellee could sustain by the levy and sale of the goods aforesaid.

On the filing of the bill a temporary injunction was granted, and when the cause was finally heard, after a general replication filed and proof taken, it was made perpetual.

These proofs, as both this court and the one below considered, hardly established, as respected Sutherland, the alleged fraud on creditors.

The appeal was from the decree of perpetual injunction.

Messrs. Mason Campbell and McLaughlin, for the defendants.

We admit that there are cases in which a court of equity would interfere to prevent the sale of personal property, or to cause its delivery; but these cases must have some peculiarity in the character of the property; a peculiarity of value to its owner, or the peculiarity of the right in which it has been held.

The rules governing courts of equity in England in such cases are laid down in all text-writers. One of these clearly states them:*

* Story, 1 Equity Jurisprudence, § 709.

Argument for the defendants.

"But there are cases of personal goods in which by the remedy at law damages would be utterly inadequate, and leave the injured party in a state of irremediable loss. In all such cases courts of equity grant full relief by requiring a specific delivery of the thing. This may occur when the thing is of peculiar value and importance; and the loss of it cannot be fully compensated in damages where withheld from the owner. Thus where the lord of a manor was entitled to an old altar piece made of silver, and remarkable for a Greek inscription and dedication to Hercules, as a treasure trove within his manor, and it had been sold by a wrongdoer, it was decreed to be delivered up to the lord of the manor as a matter of curious antiquity, which could not be replaced in value, and which might, by being defaced, become greatly depreciated. So where an estate was held by the tenure of a horn, and a bill was brought by the owner to have it delivered up to him, it was held maintainable, for it constituted an essential muniment of his title. The same principle applies to any other chattel whose principal value consists in its antiquity, or in its being the production of some distinguished artist; or in its being a family relic or ornament, or heirloom, such for instance as ancient gems, medals, and coins, ancient statues and busts, paintings of old and distinguished masters, or even those of a modern date having a peculiar distinction and value, such as family pictures and portraits and ornaments, and other things of a kindred nature."

Need we say that all other classes,—such as the ordinary muslins, flannels, and other items, the common stock of a retail drygoods shop,—are to be considered as excluded.

The bill contains no averments of the marshal's inability to respond in damages. Besides, he has given an efficient bond with sureties.

The good-will of a business, "or the probability that the old customers will resort to the old place,"* has nothing in it so peculiar as to warrant the interference of Chancery for its protection. Damage adequate to the injury done to it is recoverable at law.†

* Cruttwell *v.* Lye, 17 Vesey, 335.

† Zeigler *v.* Sentzner, 8 Gill and Johnson, 158; Baxter *v.* Conolly, 1 Jacob and Walker, 556; Bozon *v.* Farlow, 1 Merivale, 459.

The books are full of cases brought at law against sheriffs for taking the goods of a stranger on execution; and they show that ample damages are recoverable by the injured plaintiff, according to the circumstances of each case.*

But should the court differ with us on the question of jurisdiction, we still insist that the levy by the marshal was lawful, as the goods levied on were the property of the firm. [The counsel then argued the question of fact.]

Messrs. Wallis and Alexander, contra.

Mr. Justice DAVIS delivered the opinion of the court.

There are, in this record, two questions for consideration. Was Sutherland entitled to invoke the interposition of a court of equity; and if so, did the evidence warrant the court below in perpetuating the injunction?

It is contended that the injunction should have been refused, because there was a complete remedy at law. If the remedy at law is sufficient, equity cannot give relief, "but it is not enough that there is a remedy at law; it must be plain and adequate, or in other words, as practical and efficient to the ends of justice, and its prompt administration, as the remedy in equity."† How could Sutherland be compensated at law, for the injuries he would suffer, should the grievances of which he complains be consummated?

If the appellants made the levy, and prosecuted it in good faith, without circumstances of aggravation, in the honest belief that Wroth & Fullerton owned the stock of goods (which they swear to in their answer), and it should turn out, in an action at law instituted by Sutherland for the trespass, that the merchandise belonged exclusively to him, it is well settled that the measure of damages, if the property were not sold, could not extend beyond the injury done to it, or, if sold, to the value of it, when taken, with interest from the time of the taking down to the trial.‡

* Lockley *v.* Pye, 8 Meeson and Welsby, 133; Whitehouse *v.* Atkinson, 14 Eng. Com. Law, 339; 3 Carrington & Payne, 344.

† Boyce's Exrs. *v.* Grundy, 3 Peters, 210.

‡ Conard *v.* Pacific Ins. Co., 6 Peters, 272, 282.

And this is an equal rule, whether the suit is against the marshal or the attaching creditors, if the proceedings are fairly conducted, and there has been no abuse of authority. Any harsher rule would interfere to prevent the assertion of rights honestly entertained, and which should be judicially investigated and settled. "Legal compensation refers solely to the injury done *to the property taken*, and not to any collateral or consequential damages, *resulting to the owner*, by the trespass."* Loss of trade, destruction of credit, and failure of business prospects, are collateral or consequential damages, which it is claimed would result from the trespass, but for which compensation cannot be awarded in a trial at law.

Commercial ruin to Sutherland might, therefore, be the effect of closing his store and selling his goods, and yet the common law fail to reach the mischief. To prevent a consequence like this, a court of equity steps in, arrests the proceedings *in limine;* brings the parties before it; hears their allegations and proofs, and decrees, either that the proceedings shall be unrestrained, or else perpetually enjoined. The absence of a plain and adequate remedy at law affords the only test of equity jurisdiction, and the application of this principle to a particular case, must depend altogether upon the character of the case, as disclosed in the pleadings. In the case we are considering, it is very clear that the remedy in equity could alone furnish relief, and that the ends of justice required the injunction to be issued.

The remaining question in this case is one of fact.

The appellants, in their answers, deny that the property was Sutherland's, but insist that it was fraudulently purchased by him of Wroth & Fullerton, and is subject to the payment of their debts. It seems that Wroth & Fullerton had been partners in business in Baltimore, and suspended payment in March, 1861, in debt to the appellants, besides other creditors. Although the appellants did not recover judgments against them until after their sale to

* Pacific Ins. Co. *v.* Conard, 1 Baldwin, 142.

Sutherland, yet other creditors did, who were delayed in consequence of the then existing laws of Maryland, which provided that executions should be stayed until the 1st of November, 1862. Taking advantage of this provision of law, the answer charges that Wroth & Fullerton, after their failure, collected a large portion of their assets, but appropriated to the payment of their debts only a small portion thus realized, and used the residue to buy the very goods in question, which Sutherland fraudulently purchased from them on the 27th of October, 1862, in execution of a combination and conspiracy with them to hinder, delay, and defraud their creditors. The answers also deny that the injury to Sutherland would be irreparable, even if the stock were his, and insist that he could be amply compensated by damages at law. After general replication was filed, proofs were taken, but, as in all contests of this kind, there was a great deal of irrelevant testimony, and very much that had only a remote bearing on the question at issue between the parties. It is unnecessary to discuss the facts of this case, for it would serve no useful purpose to do so. We are satisfied, from a consideration of the whole evidence, that Wroth & Fullerton acted badly, but that Sutherland was not a party to any fraud which they contemplated against their creditors, and that he made the purchase in controversy, in good faith, and for an honest purpose.

The evidence also shows conclusively, that had not the levy been arrested by injunction, damages would have resulted to Sutherland, which could not have been repaired at law.

The decree of the Circuit Court is, therefore,

AFFIRMED.

PARMELEE *v.* SIMPSON.

1. Where a deed to A., though executed before a mortgage of the same property to B., is not delivered until after the execution and record of the mortgage, the mortgage will take precedence of it.
2. The placing of a deed to a party on record, such party being wholly ignorant of the existence of the deed, and not having authorized or given his assent to the record, does not constitute such a delivery as will give the grantee precedence of a mortgage executed between such a placing of the deed on record and a formal subsequent delivery.
3. As a general thing a ratification of a grantor's unauthorized delivery can be made by the grantee; but not when the effect would be to cut out an intervening mortgage for value.

APPEAL from the Supreme Court of the Territory of Nebraska; the case being thus:

Parmelee filed a bill of complaint against Megeath, Bovey, and one Simpson, in the District Court for Douglas County, Nebraska Territory, sitting in chancery, for foreclosure and sale under a mortgage.

The bill set forth a mortgage executed by Megeath and Bovey, duly acknowledged *on the 17th April*, 1858, and duly recorded on the same day. It stated that Simpson claimed some interest in the mortgaged premises, and prayed that he also be made a defendant.

The bill was taken *pro confesso* against Megeath and Bovey.

Simpson admitted the making and recording of the mortgage, as alleged in the bill, but set up this defence:

"That he (Simpson) is the lawful owner of a portion of the premises and lands [defining it] described, *and was such lawful owner at the time* the mortgage and note were executed, *and for some time before;* that he was so seized of said premises in fee simple on the 15th day of April, 1858" (two days before the mortgage), "by virtue of a deed from Bovey, and that on the same day the deed was duly recorded, after having been duly acknowledged, &c.," before one Sayre, a notary public. *And that this defendant paid to the said Bovey a valuable and adequate consideration therefor, as is expressed in said deed.*

"That some time in the month of August, A. D. 1860, he learned

for the first time that a pretended deed, purporting to have been made and executed by him to Bovey, conveying the premises, dated April 17th, 1858, but without being duly acknowledged, was upon the records of the register's office, but that the same was a forgery; that he never executed such or any other deed conveying the premises; that he never received any consideration for the deed from Bovey, or anybody else; nor did he ever authorize any one to execute the said deed for him."

A proved copy of the deed of April 17th, 1858, set up, from Bovey to Simpson, was produced from the office of the recorder of deeds of the county, but not an original.

The testimony of Simpson himself showed the following facts: He had come from California to Nebraska, arriving there for the first time in his life, April 18th, 1858 (three days after the date of the deed). He first there saw Bovey, who was an acquaintance of his, on the afternoon of that day. On the following day, the 19th, Bovey took him out to the land and showed it to him, stating that he had conveyed it to him in consideration of certain money previously received; showing Simpson, then, for the first time, the deed. Simpson had no knowledge of any intention on Bovey's part thus to convey the land further than a letter from him written at Chillicothe, Ohio, early in December, 1857; that he "intended conveying some property he had pre-empted." Simpson took the deed and put it in his trunk at his hotel, from which, in June, 1858, he missed it along with other papers. Bovey had been allowed access to the trunk to look for another paper. Simpson wrote to Bovey in the winter of 1860 about it, but received no answer. A diligent search failed to discover it.

The official index at the register's office stated that the deed had been indexed as received for record, April 15, 1858. But two witnesses, one of whom had been requested to attend to the drawing of the mortgage, and another who had gone with him as a friend to examine the records in the register's office, testified, in a positive way, that they had examined very carefully records and indexes on the morning of the 17th, and that nothing was then on record; that they

had made the examination carefully, because, in a previous transaction, Bovey had been found "tricky and unreliable," and was "pretty well known for turning sharp corners." Sayre, the notary, before whom the deed purported to be acknowledged, testified that he had not taken any acknowledgment of a deed from Bovey.

No deed from Simpson to Bovey, it seemed pretty clear, had ever been executed at all.

The District Court decreed for the complainant, directing a sale. The Supreme Court of the Territory reversed the decree; and on appeal from such reversal the case was now here.

Mr. Carlisle, for the mortgagee, appellant:

It is impossible to read the case without being satisfied that the pretended conveyance from Bovey to Simpson, on the eve of the execution of the mortgage, where the terms doubtless had been already agreed upon, was a mere trick of Bovey, of which Simpson was then wholly ignorant (he not having arrived in Nebraska till several days afterwards), but of which he subsequently took advantage.

Independently of actual fraud, however, merely executing a deed, and delivering it to the register for registry, is no delivery, unless the grantee so direct it or subsequently agrees to it.*

But even if the deed were recorded, it was not acknowledged, and so passed no title. The deed itself is not produced by Simpson, but a copy only. Simpson says he has lost the original. But Sayre, the notary public, proves that he never took such an acknowledgment.

For some unexplained reason, Bovey placed on record, on the same day of the execution of the mortgage, a reconveyance from Simpson. Doubtless he knew that he was the real owner all the time, and perhaps he thought, by this ingenious contrivance, to cut out the mortgage, executed in the interim between the two days, and while the title was

* Younge *v.* Guilbeau, 3 Wallace, 636.

apparently in Simpson. This reconveyance is proved to be a forgery.

Upon the whole case, Bovey and Simpson appear to be confederates in the attempt to defraud the mortgagee, and to have the land between them, free of its obligation.

Messrs. Redick and Briggs, contra:

The deed from Bovey to Simpson was in law properly delivered on the 15th of April, 1858.

There are two kinds of delivery.

1. An *express* delivery, as where the deed is placed directly in the grantee's hands, or in the hands of his agent.

2. *Implied* or *constructive* delivery, as where a deed is placed in the hands of the recorder for the use and benefit of the grantee, or when it is transmitted by mail to the grantee, or otherwise. The same is in law a good delivery. The delivery of the deed in question comes within the latter class.*

3. In the case at the bar the arrangement for the sale of the land was made in December, 1857, by letter from Bovey to Simpson. It appears that Bovey was indebted to Simpson, who then resided in California, and that to pay that debt Bovey wrote to Simpson that he would convey the land to him. In view, perhaps, of this fact Simpson left California and arrived in Nebraska on the 18th of April, 1858, and on the next day went with Bovey to the land to see it. Now what was the *intention* of Bovey in this matter? Was it not to make a complete conveyance of the land to Simpson? And this intention is what the authorities point to as decisive of the delivery. If this is wanting, then there is no delivery, even though the deed may be put into the hands of the grantee; and if the grantee intends to pass the title, it is wholly immaterial whether the grantee ever obtains the cor-

* Verplank et al. *v.* Sterry et al., 12 Johnson, 536, 545; Dawson *v.* Dawson, 1 Rice's Eq. 243; Ingraham *v.* Porter, 4 McCord, 198; Tate *v.* Tate, 1 Devereux and Battle, 26; Merrils *v.* Swift, 18 Conn. 257; Lady Superior *v.* McNamara, 3 Barbour's Ch. 375; Rathbun *v.* Rathbun, 6 Barbour, 98; Lessee of Mitchell *v.* Ryan, 3 Ohio, New Series, 377.

poreal possession of the instrument or not. It would be wholly unsafe for persons living at a distance from each other to do business affecting the title to real estate, if the rule set up by the appellee were to obtain.

The deed was properly recorded on the 15th day of April, 1858, two days before the mortgage was executed. The index, which was exhibited to the court below, shows the entry fairly made, and in its order.

But the appellants seek to impeach and set aside a public record, by the oral testimony of witnesses years after the transaction. All this testimony is incompetent. If public records can be set aside in this cheap way, what safety can there be in dealing in real estate? What avail are recorded titles if this kind of testimony be permitted to overturn them! If the register has failed to do his duty, he is liable on his bond to the party injured.

Mr. Justice DAVIS delivered the opinion of the court.

There is no difficulty in this case. It is claimed by Simpson, that he holds, free from the obligation of the mortgage, the lands, which Bovey conveyed to him, two days before its execution. The mortgagors, Megeath and Bovey, owned in severalty the lands mortgaged, and Parmelee seeks to sell, whatever is embraced in the mortgage, in order to make his debt. He denies that Simpson's deed can take precedence of the mortgage, because, if given for a valuable consideration, executed and recorded in conformity with the laws of Nebraska, it was never delivered until long after his security was taken. If this position is sustained by the evidence, there is an end of the controversy, for nothing passes by a deed until it is delivered.

It is a circumstance of great suspicion that the original deed was not produced on the trial, as the date of its registry was disputed, and Sayre, the notary public, denied having taken the acknowledgment. It is very clear that Bovey was capable of any fraud, as it is proved that the pretended reconveyance from Simpson to him, which was placed on record

the same day the mortgage was executed and recorded, was a forgery.

But, conceding that there is not proof enough to discredit the record, and that Sayre is mistaken, still, the deed cannot defeat the mortgage, because the delivery—one essential part to its due execution—did not occur until after the mortgage was admitted to registry. Simpson was on his way from California, when Bovey, without his knowledge or authority, delivered it to the register of deeds for record, and he did not arrive in Nebraska until three or four days afterwards, when he first learned what had been done. The only information which Simpson had concerning the matter was contained in a letter from Bovey, informing him of his intention to convey to him some pre-empted lands in Nebraska on his arrival there, in the spring of 1858. To this letter there was no reply, and there is nothing to show that Simpson knew the quantity or value of the lands, or ever agreed to receive a conveyance for them in satisfaction of Bovey's indebtedness to him. And there is not a particle of evidence that any one was authorized to receive the deed for him. The placing the deed on record was Bovey's own act, and done without the assent of Simpson. Under this state of facts there was manifestly no delivery. The execution and registration of a deed, and delivery of it to the register for that purpose, does not vest the title in the grantee.*

If Simpson had agreed to accept the deed in liquidation of his debt, and constituted the register his agent to receive it, then the delivery of the deed to the register would have been in legal contemplation a delivery to him. But it is said that he could ratify the acts of Bovey and the register. This is true, but he did not do this until after the execution and registration of the mortgage; and this ratification cannot relate back so as to cut out the mortgage. Simpson acquired no title until after the rights of the mortgagee had accrued, and he holds it encumbered with the lien of the mortgage.

* Maynard *v.* Maynard, 10 Massachusetts, 456; Samson *v.* Thornton, 3 Metcalf, 281; Younge *v.* Guilbeau, 3 Wallace, 641.

Statement of the case.

The decree of the Supreme Court of the Territory is REVERSED, and this case is remanded to that court with directions to enter an order

AFFIRMING THE DECREE OF THE DISTRICT COURT.

WOODWORTH v. INSURANCE COMPANY.

Where, in case of a collision, one of two parties injured institutes proceedings against the vessel in fault, and at his own expense prosecutes his suit to condemnation of the vessel, or of the proceeds of her sale in the registry, another party injured by the same collision, who has contributed nothing to the litigation to establish the vessel's liability, but has stood by during that contest, and taken no part in it, cannot share in the proceeds of the sale of the vessel, until the claim of the first party is satisfied in full.

THIS was a question involving the proper disposition of the surplus proceeds of the sale of the schooner Harriet Ross in the Admiralty Court of the Northern District of Illinois.

The schooner had been libelled in that court for supplies furnished, to the value of $72, and sold for about $5000.

While the surplus proceeds of this sale were still in the registry, the Corn Exchange Insurance Company filed a libel against them. The libellant alleged that shortly before the schooner was seized at Chicago by the process of the District Court, a collision had occurred on Lake Ontario, between her and the schooner Flora Watson; that the Flora and her cargo were sunk by the collision; that this was caused solely by the want of care and skill on the part of the crew of the Harriet Ross; and that the libellant had taken risks on the Flora and her cargo, which it had been compelled to pay, to an amount exceeding $8000.

Bradley, owner of the Harriet Ross at the time of the collision, appeared as claimant of the proceeds of her sale, and defended this suit. An answer was filed by him and testimony taken, and the matter litigated on a considerable body

of testimony between the Corn Exchange Company and Bradley.

Some time after the Corn Exchange Company had filed *its* libel against the proceeds of the sale, one Woodworth, who was mortgagee of the Harriet Ross for a large sum prior to the collision; and who, when she was sold, under the decree, for $72 for supplies, had become the purchaser of her, filed a similar libel, claiming as assignee of the *Columbian* Insurance Company, which had also paid a loss upon a part of the cargo of the Flora Watson. This libel was filed April 1, 1863, but no further proceeding was had in regard to it until February 2, 1864, when the libellant asked leave to amend his libel.

On the 14th April, 1864, still, however, before final decree in the matter between Bradley and the Corn Exchange Company, this same Woodworth filed another libel against these same proceeds and remnants, claiming as assignee of the *Security* Insurance Company, for similar loss paid on the hull of the Flora.

In the meantime, though as mortgagee of the vessel, Woodworth was entitled to these proceeds, unless the Harriet Ross should prove to be liable for the sinking of the Flora, he did nothing; deferring action on his part until that matter was litigated by Bradley, the former owner.

A decree, however, having been rendered in favor of the Corn Exchange Company, in December, declaring the proceeds of the Ross liable, Woodworth then proceeded with his libels.

The District Court was of opinion that he was not entitled to be paid the claims which he held as assignee of the Columbian and Security Companies until the Corn Exchange Company had been paid the full amount of its claim; and the Circuit Court was of the same opinion. The matter was now here on appeal.

Mr. Hibbard, for the appellant:

Woodworth is entitled to have his claims paid out of the proceeds in the registry, although the libel of the Corn

Exchange Company was first filed, as his libel was filed before any decree of any kind was made in the other case.* Had Woodworth, indeed, delayed filing the libel until after decree in the other case, the result might be different.† But that is not the case, and an error would be made if the rule of that case were applied, as a suit in admiralty is against all the world, and as a decree binds all the world.

Mr. Rae, contra.

Mr. Justice MILLER delivered the opinion of the court.

The litigation to establish the liability of the Ross was troublesome and expensive to the Corn Exchange Company. Mr. Woodworth did not, in any manner, aid, or offer to aid in it. His interest was against the liability which the company sought to establish; for, if the Ross was declared not liable, he received these proceeds and remnants as mortgagee of that vessel. But, after permitting his own libel to sleep during this struggle, he attempts, when it is over, to revive that libel, and claims to share in the fruits of a victory won without his aid, and against his wishes. The District and Circuit Courts both thought he was not entitled to do this, so long as the Corn Exchange Company remained unpaid. In this view we concur.‡

Our remarks are meant to apply to the libel filed April 1, 1863. But all that we have said in reference to that libel applies with additional force to the one filed 14th April, 1864, arising from the longer delay in asserting the claim.

DECREES AFFIRMED WITH COSTS.

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* Cobb *v.* Howard, 3 Blatchford, 524.

† The Steamboat America, 2 Western Law Monthly, 279; The Desdemona, 1 Swabey, 158.

‡ See The Saracen, 6 Moore P. C. 56; The Clara, 1 Swabey, 1.

RAILROAD COMPANY *v.* BARRON.

1. A railroad company, which grants the use of its road to another company, is responsible for accidents caused to passengers which it itself carries, by the negligence of the trains of the other company thus running by its permission.
2. When a statute—giving a right of action to the executor of a person killed by such an act as would, if death had not ensued, entitled such person to maintain an action for damages—provides, that the amount recovered shall be for the exclusive benefit of the widow, and next of kin, in the proportion provided by law in the distribution of personal property left by persons dying intestate; and that "in every such action the jury may give damages as *they shall deem a fair and just compensation with reference to pecuniary injuries resulting from such death, &c.*, not exceeding, &c.,"—it is not necessary to the recovery that the widow and next of kin should have had a legal claim on the deceased, if he had survived, for their support.
3. *Semble*, that statutes of this kind are enacted, as respects the measure of damages, upon the idea that as a general fact the personal assets of the deceased would take the direction given them by the law governing the case of intestates. Hence any damages given must, as a general thing, be so distributed, even though the party have left a will not so devoting his property.
4. The damages in these cases must depend very much upon all the facts and circumstances of the particular case. And as when the suit is brought by the party himself, for injuries to himself, there can be no fixed measure of compensation for the pain and anguish of body and mind, nor for the loss of time and care in business, or the permanent injury to health and body, so when it is brought by the representative for his death, the pecuniary injury resulting from the death to the next of kin is equally uncertain and indefinite. In the latter and more difficult case, as in the former one, often difficult also, the result must be left to turn mainly upon the sound sense and deliberate judgment of the jury, applied, as above stated, to all the facts and circumstances.

ERROR to the Circuit Court for the Northern District of Illinois, the suit below having been one against a railroad company to recover damages for the death of a passenger killed by its negligence.

A statute of Illinois enacts:

"SECT. 1. That whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default, is such as would, if death had not ensued, have entitled

the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or company or corporation which, would have been liable if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount to *felony*.

"SECT. 2. Every such action shall be brought by and in the name of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the *exclusive benefit of the widow and next of kin of such deceased person*, and shall be distributed to such widow and next of kin, in the proportion provided by law, in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem a fair and just compensation *with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person*, not exceeding the sum of five thousand dollars."

With this statute in force, Barron's executor brought a suit against the Illinois Central Railroad Company, to recover damages for the death of his testator, occasioned by the negligence of the company in conveying him as a passenger.

The deceased was killed while in the act of leaving the car in obedience to the orders of the conductor, who apprehended an immediate collision with an express train that was coming up behind with great speed, and which struck the car with such violence in the rear as to split and drive it on each side of the baggage car in front. The Illinois company owned the road, but had granted or leased to the Michigan Central Railroad Company, of which the express train was one of the line, the privilege of running their trains on this part of the road.

The testator was a bachelor, thirty-five years old, and had an estate of about $35,000, all of which, as it was stated in the argument, he left by his will to his father. He was an attorney by profession, but for four years prior to his death had been judge of the county court of Cook County, Illinois. His term of office having then recently expired, he had resumed, or was about to resume, the practice of his profes-

sion, with a fair promise, as the evidence tended to show, of doing as well as before he was elected judge. His professional income, prior to his election as judge, had been about $3000 dollars per annum.

The plaintiff was his father, and he left brothers and sisters; one of whom had formerly received some assistance from him for support.

The defendant's counsel asked the court to charge the jury as follows

"1st. That the statute under which the action was brought intends to give no damages for the injury received by the deceased, but refers wholly to the pecuniary loss which the next of kin may be found to have sustained. That it makes their pecuniary loss the sole measure of damages, and that the satisfaction of that loss is therefore the sole purpose for which an action of this kind can be instituted, there being nothing to be allowed for bereavement. And that it is incumbent on the plaintiff, before he can recover anything more than nominal damages, to show by the evidence that there are persons in existence entitled to claim the indemnity given by the law, and that they have sustained a pecuniary loss justifying their claim.

"2d. That to entitle the plaintiff to recover anything beyond merely nominal damages, the parties for whose benefit the action is brought must be shown by the evidence to have had at the time of the death of Barron a legal interest in his life, and that by his death they have been deprived of something to which they had a legal right.

"3d. That if the persons for whose benefit this action is brought have received in consequence of the death of said Barron, and out of this estate inherited by them from him, a pecuniary benefit greater than the maximum amount of damages which could, under any circumstances, be recovered in this action, then, as a matter of law, they have by the death of said Barron sustained no actual pecuniary injury for which compensation can be recovered in this action.

"4th. That if the collision of the two trains of cars in question, and the death resulting therefrom, was occasioned solely by the carelessness or default of the persons in charge of the express train, and that the defendant had no authority or con-

trol over such persons, but that they were wholly under the authority and direction of the Michigan Central Railroad Company, then the defendant is not liable in this action, even for nominal damages."

But the court refused so to charge the jury; and charged as follows:

It is contended by the defendant that as Barron was never married, the next of kin, being his father, brothers, and sisters, had no claim on him for support or services, and therefore there could have been no pecuniary loss to them by his death.

We cannot adopt this construction of the law, but charge you that there can be a recovery if the deceased left no kin surviving him who had any legal claim on him if living, for support.

The cause of action is given in the first section of the act in clear and unmistakable terms. If the injured party, by the common law, had a right to sue if he had lived, then if he dies his representatives can bring an action.

Many individuals who lose their lives by the fault of persons and corporations are of age, unmarried, and have no next of kin dependent on them for support. We cannot suppose that the statute intended to give the representatives of such persons the right to sue in one section and make that right nugatory in the second section, by depriving them of all damages.

The policy of the law was evidently to make common carriers more circumspect in regard to the lives intrusted to their care. They were responsible at common law if through their fault broken limbs were the result, but escaped responsibility if death ensued. To remedy this evil and provide a continuing responsibility, was in the opinion of the court, the object of the law.

We do not think it requisite to prove present actual pecuniary loss. It can rarely be done. The attempt to do it would substitute the opinion of witnesses for the conclusions of the jury. The facts proved will enable the jury to decide on the proper measure of responsibility. Some cases are harder than others, and the law intends that the jury shall discriminate in different cases. There is no fixed measure of damages, and no artificial rule by which the damages in a given case can be computed.

The jury are not to take in consideration the pain suffered by the deceased, or the wounded feelings of surviving relatives, and no damages are to be given by way of punishment.

In this case the next of kin are the parties who were interested in the life of the deceased. They were interested in the further accumulations which he might have added to his estate, and which might hereafter descend to them.

The jury have a right, in estimating the amount of pecuniary injury, to take into consideration all the circumstances attending the death of Barron—the relations between him and his next of kin, the amount of his property, the character of his business, and the prospective increase in wealth likely to accrue to a man of his age with the business and means which he had. There is a possibility in the chances of business that Barron's estate might have decreased rather than increased, and this possibility the jury may consider. The jury also have a right to take into consideration the contingency that he might have married, and his property descended in another channel.

And there may be other circumstances which might affect the question of pecuniary loss, which it is difficult for the court to particularize, but which will occur to you. The intention of the statute was to give a compensation for the pecuniary loss which the widow (if any) or the next of kin might sustain by the death of the party; and the jury are to determine, as men of experience and observation, from the proof what that loss is.

In order to render a verdict for the plaintiff it is necessary that the defendant should have been in fault.

The Illinois Central Railroad Company engaged to carry Judge Barron safely from Hyde Park to Chicago, and as a common carrier was bound to the most exact care and diligence required for the safety of passengers. . . . .

It is not a question which train was mostly in fault, but whether the train of the defendant was in fault at all. It is for the jury to say from the evidence whether the employees of the Illinois Central road used the necessary degree of care and diligence in the management of their train on that morning. . . . .

We understand that the road on which the accident occurred belonged to the defendants, and by its charter was under its sole control to carry passengers and property, and if it allowed the trains of the Michigan Central to run over it under the management of the agents of the Michigan Central, it should be done in such a manner as not to interfere with the safety of the passengers of the defendant, and as to such passengers the fault

of the Michigan Central road in running their train is the fault of the defendant.

Verdict and judgment for $3750 damages. The case was now here on exceptions to the charge as made, and on the refusal to charge as requested.

Mr. Tracy, for the railroad company, plaintiff in error:

1. The court erred in declining to charge as requested in the first proposition.

The intention of the act was *to compensate* the widow and next of kin of the person killed *for the pecuniary injury* to them occasioned by his death. If the death caused them no pecuniary injury, the act gave them no damages, for the compensation for that was to measure the damages.

The statute is in form like one passed in New York,* and frequently considered in the courts of that State. The decisions of these courts are pertinent then to this case. In *Dickins* v. *New York Central Railroad*,† it was held, that a husband as administrator of his wife, whose death was caused by the act of another, and who had no children, and no near relatives but sisters, could not recover for damages resulting by her death to him, and only for pecuniary damages sustained by her next of kin.

So in *Tilley* v. *Hudson River Railroad*,‡ that in an action by a husband, as administrator of a wife whose death was caused by the act of another, leaving children, the possibility that the children would have received an estate increased by their mother's earnings, could not be considered.

So in *Oldfield* v. *New York and Harlem Railroad Company*,§ where a little girl of six years old was killed, leaving a mother, the court charged in the words of the statute, and by explanation told the jury that the damages were to be a sum which, in their opinion, would be the pecuniary loss of the next of kin.

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* Revised Statutes of New York, vol. iii, p. 589, § 4.

† 23 New York, 158. ‡ 24 Id. 471. § 3 E. D. Smith, 103.

Argument for the railroad company.

In the case at bar, there was no one of the next of kin who could properly be said to sustain any pecuniary loss by the testator's death. None of his next of kin had any pecuniary interest in his life. No one stood in the relation to him that the mother did to her child, and whose duty it would be to furnish it care and nurture. No one in the relation that the minor child did to its mother, who could receive the benefit of its services until it became of age. His father was not dependent upon him,—not entitled to his future earnings, nor were his brothers and sisters, and, indeed, instead of a pecuniary loss to them his death gave them, or one of them, an estate of $35,000, which otherwise he could not then receive, and which he might never receive

In Pennsylvania, under a statute not unlike the one now before us, the Supreme Court of that State seems to have held* that the pecuniary damages to be assessed in the case of the loss of a minor son of the plaintiff's was to be estimated by the value of his services during his minority, together with the actual expenses of his care while suffering from the injury before his death, and the funeral expenses incurred.

And in a case† where a widow brought her action for the death of her husband, the same court held that although the jury might be charged that "much is left, and much always must be left to your sound discretion," it was because this was but an addition to the instruction that "what the plaintiff had lost in a pecuniary point of view by the death of her husband, namely, a reasonable support and subsistence for herself," was the rule to be observed.

The courts of Illinois have also examined the statute.

In *Chicago and Rock Island Railroad Company* v. *Morris*,‡ there was no averment in the declaration of any facts showing a pecuniary loss. The court held, that as no other loss

* Pennsylvania Railroad Company *v.* Kelly, 31 Pennsylvania State, 373; Same Plaintiff *v.* Zebe et ux., 33 Id. 318.

† Pennsylvania Railroad Company *v.* Ogier, 35 Pennsylvania State, 72.

‡ 26 Illinois, 400.

could be shown, the declaration should have alleged facts showing it.

2. The court erred in refusing to charge, as requested by the second prayer, that the plaintiff could recover only nominal damages until he had shown that the decedent's next of kin had some *legal interest* in his life, and that, by his death, they had been deprived of something to which they had a legal right.

A "*compensation* with reference to the *pecuniary injuries* resulting from such death," is within the discretion of the jury; but not a compensation for the affliction the death occasions, nor for the *possibility* that the deceased might, if he had lived, make presents to the relatives. If it had been shown that his next of kin were paupers, and he bound to support them, and that he could, and would do so from his earnings, and that his death deprived them of this support, *and had this been pleaded*, the jury would had something upon which to exercise their judgment in estimating a pecuniary loss. But no such thing was either alleged or shown. No one of his next of kin was alleged or shown to be dependent upon him.

As a matter of fact, it is plain that had the defendant lived and added to his property and then died unmarried, the whole would have gone to the father, not to the other relatives.

3. The court erred in refusing to charge, that so far as the next of kin of the testator inherited from him a greater pecuniary benefit than the maximum which they could recover, they cannot have sustained pecuniary injury by his death.

The ground upon which the recovery must be had, is pecuniary injury to the next of kin, occasioned by his death. If his death necessarily and directly involved no pecuniary loss, and it did directly put money in their pocket, or that of any of them, they, or such of them, have sustained no pecuniary injury.

4. The court erred in refusing to charge as requested in

regard to the cause of the death and its effect in discharging the Illinois Central road.

If the jury believed that the death was occasioned solely by the carelessness or default of the company in charge of the express train,—the Michigan Company,—and that the defendants had no control over them, the very fact would preclude the idea of any negligence or carelessness of the defendant. Yet, by the refusal to charge as asked, the jury were left, notwithstanding such their belief, to find a verdict against the defendant for a negligence of which its servants were not guilty.

If the Michigan Company's servants in charge of the express train were guilty of the entire fault of causing the collision, their negligence was a gross one, and the Illinois Central Company's servants were innocent of any actual or permissive wrong; they violated no duty to the deceased. The company was not a warrantor of the lives of passengers against negligent or wilful acts wrongfully committed by another.

As to the charge actually given.

It was directly calculated to withdraw the provisions of the act from the jury's consideration, and to leave them at liberty to assess damages arbitrarily, in the nature of punitive damages for the killing of the deceased, and irrespectively of any pecuniary injury to his next of kin.

It in effect instructed the jury that the father and brothers and sisters of an unmarried man of thirty-five years of age—one whose death, supposing him to reach the ordinary age of "threescore years and ten," was still thirty-five years distant—would be his next of kin at his death; a presumption strongly against probabilities; and that they thus had a pecuniary interest in his further accumulations, and his prospective increase of wealth.

It invited the jury into a speculation as to whether he would or would not increase his means, would or would not marry, and would or would not have and leave issue; in short, into a speculation resting on uncertainties compounded with uncertainties, and probabilities not depending upon

any facts before them; and about which neither sense nor science could form any conclusion whatever. How far less precise and scientific is this than the view of the courts of New York, which have held that a supposed interest in the savings which a mother might by her exertions make to the increase of her husband's estate, was not an element in assessing the *pecuniary injuries* sustained by her children in her death!

Mr. Lincoln Clark, contra, for the executor:

By the law as it was before the statute was passed, injury to the person might be compensated in damages if it was less than fatal: if death resulted, no action for damages would lie. There was a remedy for the lesser evil, but none for the greater. The object of the statute clearly was to declare that a provision of law so unreasonable should no longer exist. The statute embraces no new idea or theory in reference to damages. It only extends the right of action for the purpose of securing compensation for the same kind of injuries, and imposing penalties for the same character of negligence; and to this all the provisions of the statute look.

Opposite counsel plant themselves upon this provision in the second section, "And in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the *pecuniary injuries resulting from such death to the wife and next of kin, &c.*" But if the action were at common law for injuries to the person, would not the rule as to damages be precisely the same? If it would, then the statute introduces no new rule, and damages would be given in the case of death upon the same principle, and for the same reasons as in case of injuries to the person only. But it has never been pretended in any case, nor is it in this, that had the deceased been injured to any extent short of his life, pecuniary damages might not have been adjudged to him, though he was a man of wealth and leisure, and not dependent even upon the improvement of his estate for the necessaries or the luxuries of life. It would not be said that

he had suffered no pecuniary injury because of no such dependence.

The statute gives damages to the next of kin. What damages? Damages of the same kind and for the same reasons as in case of injury to the person. Damages not dependent upon the necessities of the individual, but damages made up of all the facts and circumstances which would naturally tend to prevent the accumulation of his estate, and deprive the individual of the means of doing better for his next of kin than otherwise he might do, and in presumption of law would do.

Opposite counsel took below the distinction, in the charges which they asked the court to give, between substantial and nominal damages. The language of the act is, "in every such case the jury may give such damages as they shall deem a fair and just compensation." Is the court to presume that mere nominal damages would, in any case, be a fair and just compensation, in so far that it might, as a matter of law, instruct the jury that they could give no more? If not, then the jury are the judges as to what a fair and just compensation is.

Can it be inferred from the language of the act that the case is destitute of merits because the next of kin have no legal claim for support? If this were so, then the *children* of a father killed could not have the benefit of the action if they had passed their majority and his guardianship and tutelage; and especially if they had separate estates, and were better able to support themselves than the father was to support them; for, in such a case, there would be no legal claim for support. The next of kin is a comprehensive term, and must often include those who have no claim for support, and stand in distant relationship to the individual.

We thus infer that a recovery is not founded upon the idea of a legal claim for support, by showing that the action given by the statute is of the same nature as that given by the common law for mere injuries to the person, and is to be governed by the same reasons; that pecuniary injuries result in both cases in kind, though they may not in degree. And whether

the damages recoverable go to those who have a claim for support makes no difference. Those having no claim may be as palpably injured as those who have.

But the statute upon which the action is based has received a construction by the Supreme Court of Illinois. In the *City of Chicago* v. *Major*,* the death was of a child four years of age, and the objection to a recovery was substantially the same as in this case, to wit, that the verdict of the jury must be for the present pecuniary loss, and that as the child left no widow nor next of kin who were directly injured by the death, in a pecuniary point of view, therefore no recovery could be had. But such was not the view taken by the court.

In a New York case, *Oldfield* v. *The New York and Harlem Railroad Company*,† the death was of a girl twelve years of age. The court refused to grant a nonsuit on the ground that there was no special damage.

The proposition of the plaintiffs in error, that "no recovery can be had in this case because the plaintiffs, or those for whom the action is brought, gain more by the death than the maximum of damages which can be recovered," assumes what is untrue in fact. None of the beneficiaries of this action received anything by the death, except the father, who was the plaintiff and sole legatee.

But can it be supposed that the legislature designed to place the right to recover damages upon so uncertain a condition? A man is killed in a railroad collision; he has property; he leaves children; by his will he leaves all his property to others. According to the argument, the children may have damages as for pecuniary injuries, because by the death they suffer pecuniary injury; that is to say, the man killed has, by the death, been deprived of the power to direct that his property should go to his children; but if he dies without a will, so that his property goes in the regular course of descent, or if having made a will, he bequeaths his property

* 18 Illinois, 349.

† 3 E. D. Smith, 103.

to his children, no recovery can be had, because by the death they have been benefited beyond the maximum of damages recoverable; that is to say, if the property descending or bequeathed is greater than that maximum. To this result the argument leads.

But the right to recover can be placed upon no such fortuitous circumstances. The presumption of law is, that a man's next of kin are benefited by his life; that he can do better for them alive than dead; that his gains will accrue to them. These may be in greater or less degree; they may be none at all. However these things may be, the facts will speak for themselves, and produce their proper effects on the trial.

In *Pym* v. *The Great Northern Railway Company*,* the plaintiff's husband was killed. He was in the enjoyment of a life estate in land yielding an annual income of £3864. Upon his death the estate passed under the entail to the eldest son, subject to a charge of £1000 per annum to the plaintiff (the wife), and £800 a year to the children. The deceased also left personal property to the amount of £3390, which was divided between the widow and the children. Now it may be that the widow and children derived a greater benefit by the death than they would by the life of the husband and the father. By the death they came to the enjoyment of ascertained amounts; but the jury gave damages in the sum of £13,000, and that, too, although the deceased was of no profession or business, and had no income or property other than that already mentioned. Upon what principle were such damages awarded? Clearly upon the principle that had the father lived he might have used his income for the benefit of his family, though it would have been in his power not to do it. Had he lived and thus prevented his property from going to the entail, he could have done better for his family than was done in the event of his death. And this is the presumption in every case, subject to the fullest inquiry as to the facts. Had Barron lived, his next of kin

* 2 American Law Register, N. S. 234.

might have realized by his life more than they did by his death; and this, no doubt, was the view which the jury took of the case under the instructions of the court. Was it wrong?

The rule of the statute which gives damages for the value of the life lost, may be regarded as loose and indefinite. But the rule as to other injuries is equally loose and indefinite, as in the case of defamation of character, assault and battery of the person, breach of promise of marriage contract; and yet juries find no difficulty in awarding damages, and no doubt the injury and damages will be found to vary according to the dignity, character, and position of the person.

In *The Pennsylvania Railroad Company* v. *McCloskey*,* the court say:

"The damages must necessarily be measured by the value of the life lost, and not by the pecuniary loss which the representatives shall have thereby sustained. The sanction of the law lies in the duty of compensation for the value of the life destroyed, measured according to its own merits, and not according to the necessities of the kindred."

The Pennsylvania statute does not essentially differ from that of Illinois.

In *Dickins* v. *The New York Central Railroad Company*,† the court say:

"An action can be maintained by the personal representatives of a deceased person, whose death has been wrongfully caused by the defendant, though the deceased left no husband or wife or next of kin surviving who could ever have any legal claim upon such person if living, for services or support."

As to the proposition of the plaintiff in error, that "no recovery can be had if the colliding train was the most or chiefly to blame," little need be said.

The contract on the part of the deceased was with the Illinois Central road, the defendant below. They owed him

* 23 Pennsylvania State, 530.

† 28 Barbour, 41.

the duty of safe conduct; they had a direct responsibility to him, and in this case no doubt exclusive; and that responsibility they cannot avoid by leasing their road, or granting a license to another corporation to use it. It has been repeatedly decided that a railroad corporation can not avoid their responsibilities by leasing their road.*

Mr. Justice NELSON delivered the opinion of the court.

There are only two questions raised in the course of the trial in the court below that it is material to notice.

It was insisted on the trial, in behalf of the defendants, that the express train was wholly in fault, and responsible for the injury. But the court ruled, that, considering the facts to be as claimed, still the defendants were liable; and this presents the first question in the case.

It will be observed the defendants owned the road upon which they were running the car in which the deceased was a passenger at the time of the collision, and that the train in fault was running on the same road with their permission.

The question is not whether the Michigan Company is responsible, but whether the defendants, by giving to that company the privilege of using the road, have thereby, in the given case, relieved themselves from responsibility? The question has been settled, and we think rightly, in the courts of Illinois holding the owner of the road liable.† The same principle has been affirmed in other States.‡

The second question is, as to the proper measure of damages.

The only direction on this subject in the statute is, that the jury may give such damages as they shall deem a fair

* Chicago & Rock Island Railway Co. *v.* Whipple, 22 Illinois, 105; Ohio & Mississippi Railroad Co. *v.* Dunbar, 20 Id. 623.

† The Chicago and Saint Paul Railroad Co. *v.* McCarthy, 20 Illinois, 385; Ohio, &c., Railroad Co. *v.* Dunbar, Id. 623; Chicago and Rock Island Railroad Co. *v.* Whipple, 22 Id. 105.

‡ Nelson *v.* The Vermont, &c., Railroad Co., 26 Vermont, 717; McElroy *v.* Nashua, &c., Railroad Co., 4 Cushing, 400.

and just compensation, regard being had to the pecuniary injuries resulting from the death to the wife or next of kin, not to exceed five thousand dollars.

The first section gives the action against the company for the wrongful act, if death happens, in cases where, if the deceased had survived, a suit might have been maintained by him. The second restricts the damages in respect both to the principles which are to govern the jury, and the amount. They are confined to the pecuniary injuries resulting to the wife and next of kin, whereas if the deceased had survived, a wider range of inquiry would have been admitted. It would have embraced personal suffering as well as pecuniary loss, and there would have been no fixed limitation as to the amount.

The damages in these cases, whether the suit is in the name of the injured party, or, in case of his death, under the statute, by the legal representative, must depend very much on the good sense and sound judgment of the jury upon all the facts and circumstances of the particular case. If the suit is brought by the party, there can be no fixed measure of compensation for the pain and anguish of body and mind, nor for the loss of time and care in business, or the permanent injury to health and body. So when the suit is brought by the representative, the pecuniary injury resulting from the death to the next of kin is equally uncertain and indefinite. If the deceased had lived, they may not have been benefited, and if not, then no pecuniary injury could have resulted to them from his death. But the statute in respect to this measure of damages seems to have been enacted upon the idea that, as a general fact, the personal assets of the deceased would take the direction given them by the law, and hence the amount recovered is to be distributed to the wife and next of kin in the proportion provided for in the distribution of personal property left by a person dying intestate. If the person injured had survived and recovered, he would have added so much to his personal estate, which the law, on his death, if intestate, would have passed to his wife and next of kin; in case of his death by the in-

jury the equivalent is given by a suit in the name of his representative.

There is difficulty in either case in getting at the pecuniary loss with precision or accuracy, more difficulty in the latter than in the former, but differing only in degree, and in both cases the result must be left to turn mainly upon the sound sense and deliberate judgment of the jury.

It has been suggested frequently in cases under these acts, for they are found in several of the States, and the suggestion is very much urged in this case, that the widow and next of kin are not entitled to recover any damages unless it be shown they had a legal claim on the deceased, if he had survived, for support. The two sections of the act taken together clearly negative any such construction, as a suit is given against the wrong-doer in every case by the representative for the benefit of the widow and next of kin, where, if death had not ensued, the injured party could have maintained the suit. The only relation mentioned by the statute to the deceased essential to the maintenance of this suit, is that of widow or next of kin; to say, they must have a legal claim on him for support, would be an interpolation in the statute changing the fair import of its terms, and hence not warranted. This construction, we believe, has been rejected by every court before which the question has been presented. These cases have frequently been before the courts of Illinois, and the exposition of the act given by the learned judge in the present case is substantially in conformity with those cases.*

JUDGMENT AFFIRMED.

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* City of Chicago *v.* Major, 18 Illinois, 349; Chicago and Rock Island Railroad *v.* Morris, 26 Id. 400; 21 Id. 606?; Pennsylvania Railroad Company *v.* McCloskey, 23 Pennsylvania State, 526; Oldfield *v.* New York and Harlem Railroad Company, 3 E. D. Smith, 103.

Statement of the case.

HADDEN *v.* THE COLLECTOR.

1. The title of an act cannot be used to extend or to restrain any positive provisions contained in the body of the act. It is only when the meaning of these is doubtful that resort may be had to the title, and even then it has little weight.
2. What is termed the policy of the government with reference to any particular legislation is too unstable a ground upon which to rest the judgment of the court in the interpretation of statutes.
3. On the 14th of July, 1862, Congress passed "An act increasing temporarily the duties on imports, and for other purposes." The fourteenth section of the act provides that after the first day of August, 1862, "there shall be levied, collected, and paid on *all* goods, wares, and merchandise of the growth or produce of countries beyond the Cape of Good Hope, when imported from places this side of the Cape of Good Hope, a duty of ten per cent. *ad valorem*, and in addition to the duties imposed on any such articles when imported directly from the place or places of their growth or production." Upon the construction of the section,

   Held;—that the latter clause does not qualify the general language of the first clause "on *all* goods, &c.," so as to exclude from it the articles previously exempt It only provides that the duty laid by the first clause shall be in addition to existing duties imposed on such articles when imported directly from their places of growth or production; in other words, that such articles as already pay a duty when imported directly from these places shall pay a further duty if imported from places this side of the Cape; its object being to increase the duty upon the articles when not imported directly from their places of growth or production. The words "any such articles" do not mean all the articles embraced in the first clause, but only such of them as were already subject to duty.
4. The section in question does not make a discrimination in favor of the ports of the Pacific, and thus contravene that clause of the Constitution which requires that "all duties, imposts, and excises shall be uniform throughout the United States." The terms "beyond the Cape of Good Hope" are employed as descriptive of the locality of certain countries, not their relative position with respect to ports of import. They indicate the locality of certain countries with reference to the position of the law-makers at the national capital.

ON the 14th of July, 1862, Congress passed "an act increasing temporarily the duties on imports and for other purposes." The 14th section was as follows:

"*And be it further enacted*, That from and after the day and

year aforesaid [August 1st, 1862], there shall be levied, collected, and paid on all goods, wares, and merchandise of the growth or produce of *countries beyond the Cape of Good Hope, when imported from places this side of the Cape of Good Hope, a duty of ten per. cent. ad valorem, and in addition to the duties imposed on any such articles when imported directly from the place or places of their growth or production.*"

With this act in force the plaintiffs imported into New York from Liverpool several packages of raw silk, the growth or produce of Persia and China, upon which the ten per cent. duty was exacted. This duty was paid under protest, and a case being agreed on, the present action was brought in the Circuit Court for the Southern District of New York against the collector to recover back the amount.

The matter was the proper interpretation of the above section of the act of Congress, previously to the date of which it is admitted that the goods described were free of duty.

The following section of the act of 3d of March, 1863, was introduced into the argument as throwing light, perhaps, on the former:

"SEC. 2. *And be it further enacted*, That section fourteen of an act entitled 'An act increasing temporarily the duties on imports, and for other purposes,' approved July fourteenth, eighteen hundred and sixty-two, be, and the same hereby is modified, so as to allow cotton, and raw silk as reeled from the cocoon, of the growth or produce of countries beyond the Cape of Good Hope, to be exempt from any additional duty when imported from places this side of the Cape of Good Hope, for two years from and after the passage of this act."*

The questions were:

1. Whether the 14th section of the act of July, 1862, was applicable to goods hitherto free of duty; and

2. Whether this statute is reconcilable with the Constitution of the United States, which requires that "all duties,

* 12 Stat. at Large, 557.

imposts, and excises shall be uniform throughout the United States."

The court gave judgment for the defendant, and the plaintiffs thereupon brought the case here on error.

Messrs. Slosson and Hutchins, for the plaintiffs in error.

Mr. Stanbery, A. G., and Mr. Ashton, Assistant A. G., contra.

Mr. Justice FIELD delivered the opinion of the court.

This case arises upon the fourteenth section of the act of Congress of July 14th, 1862, entitled "An act increasing temporarily the duties on imports, and for other purposes." That section provides that after the first day of August, 1862, "there shall be levied, collected, and paid on all goods, wares, and merchandise of the growth or produce of countries beyond the Cape of Good Hope, when imported from places this side of the Cape of Good Hope, a duty of ten per cent. *ad valorem*, and in addition to the duties imposed on any such articles when imported directly from the place or places of their growth or production."*

Soon after the passage of this act the plaintiffs made several importations into the port of New York from Liverpool, England, of packages of raw silk, the product of Persia and China, upon which the ten per cent. duty was exacted. This duty was paid under protest, and the present action was brought against the collector to recover back the amount.

At the time the act was passed raw silk was not subject to any duty, and it was contended by the plaintiffs in the court below, and is contended by them here, that the fourteenth section only applied to such articles, the growth and product of countries beyond the Cape of Good Hope, as were then liable to duty, and did not embrace articles upon which no duty was imposed.

In support of this construction reference is made to the language of other sections of the act, where a duty is laid

* 12 Stat. at Large, 557.

upon articles previously exempt; to the title of the act; and to the supposed policy of the government.

It is true that some of the other sections, when providing for a duty upon articles previously exempt, express the intention of the legislature in this respect in language free from doubt. This fact, however, does not necessarily control the construction of a distinct and independent section. The fourteenth section relates to articles different from those covered by the other sections, and necessarily differs from them in its language, as it makes a discrimination, which they do not, in the duty imposed, according to the place from which the articles are exported.

The title of an act furnishes little aid in the construction of its provisions. Originally in the English courts the title was held to be no part of the act;—"no more," says Lord Holt, "than the title of a book is part of the book."* It was generally framed by the clerk of the House of Parliament, where the act originated, and was intended only as a means of convenient reference. At the present day the title constitutes a part of the act, but it is still considered as only a formal part; it cannot be used to extend or to restrain any positive provisions contained in the body of the act. It is only when the meaning of these is doubtful that resort may be had to the title, and even then it has little weight. It is seldom the subject of special consideration by the legislature.

These observations apply with special force to acts of Congress. Every one who has had occasion to examine them has found the most incongruous provisions, having no reference to the matter specified in the title. Thus the law regulating appeals in Mexican land cases to the District Courts of the United States from the board of commissioners, created under the act of March 3d, 1851, is found in an act entitled "An act making appropriations for the civil and diplomatic expenses of the government for the year ending June 30th, 1853, and for other purposes."† The law declaring that in the courts of the United States there shall be no exclusion

* Mills v. Wilkins, 6 Modern, 62.

† 10 Stat. at Large, 98.

of any witness on account of color, nor in civil actions when he is a party to or interested in the issue tried, is contained in a proviso to a section in the appropriation act of 1864, the section itself directing an appropriation for detecting and punishing the counterfeiting of the securities and coin of the United States.*

During the past session, whilst a bill was pending before Congress entitled "A bill granting the right of way to ditch and canal owners over the public lands, and for other purposes," all after the enacting clause was stricken out, and provisions establishing a complete system for the possession and sale of interests in mines were substituted in its place. And thus the most important act in our legislation relating to the mining interests of the country stands on the statute-book under a title purporting that the act grants a right of way to ditch and canal owners over the public lands, and for other purposes.† The words "for other purposes," frequently added to the title in acts of Congress, are considered as covering every possible subject of legislation.

The supposed policy of the government is stated to be the encouragement of manufactures by imposing restrictions on goods manufactured in whole or in part abroad, and hence it is argued that it was against such policy to impose duties on the raw material.

Little weight can be given to considerations of this character in the construction of the act. The encouragement of manufactures does not appear to have been the object of the act; but, on the contrary, its object was manifestly to increase the revenues of the country, and it may well have been supposed by the law-makers that in many cases the raw material could bear a duty without decreasing the importation, or injuriously affecting the manufacturing interests.

What is termed the policy of the government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant

* 13 Stat. at Large, 351.

† 14 Id. 251.

from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes.

Looking to the section by itself, we find no little difficulty in its construction. The first clause declares that upon *all* goods, wares, and merchandise, the growth or product of countries beyond the Cape of Good Hope, when imported from places this side of the Cape, a duty of ten per cent. *ad valorem* shall be levied, and the latter clause does not qualify this general language so as to exclude from it the articles previously exempt. It only provides, as we construe it, that the duty laid by the first clause shall be in addition to existing duties imposed on such articles when imported directly from their places of growth or production; in other words, that such articles as already pay a duty when imported directly from these places shall pay a further duty if imported from places this side of the Cape; its object being to increase the duty upon the articles when not imported directly from their places of growth or production. The words "any such articles" do not mean all the articles embraced in the first clause, but only such of them as were already subject to duty.

The amendatory act of March 3d, 1863, passed a few months afterwards, indicates very clearly the understanding of Congress that the ten per cent. was imposed as an additional duty, though in fact raw silk, as already stated, was at the time exempt. Its language is that the fourteenth section shall be modified so as to allow "cotton and raw silk, as reeled from the cocoon, to be exempt from any *additional* duty when imported from places this side of the Cape of Good Hope for two years" from the passage of the act.*

The objection to the statute that it makes a discrimination in favor of the ports of the Pacific, and thus contravenes that clause of the Constitution† which requires that "all duties, imposts, and excises shall be uniform throughout the United States," is not tenable. The ground of the objection is that

* 12 Stat. at Large, 742.

† Art. 1, § 8.

with reference to the Atlantic ports, goods which are the growth or product of Persia or China, are from countries beyond the Cape of Good Hope, and are thus chargeable with duty, but with reference to the Pacific ports, they are from countries this side of the Cape, and thus not within the terms of the statute.

The answer to the objection is obvious and conclusive. The terms "beyond the Cape of Good Hope" are employed as descriptive of the locality of certain countries, not their relative position with respect to ports of import. They are used to avoid the necessity of enumerating the countries which lie east of the Cape. "Beyond the Cape" and "east of the Cape" are often used in the acts of Congress as equivalent expressions. They indicate the locality of certain countries with reference to the position of the lawmakers at the national capital. In a similar manner would the words "beyond the Mississippi" be construed if found in an act of Congress. They would be held to refer to the country west of the Mississippi, which, with reference to the legislators at Washington, would lie beyond that river.

JUDGMENT AFFIRMED.

SHELTON *v.* THE COLLECTOR.

1. Where merchandise receives damages during a voyage, proof to ascertain the damage must be lodged at the custom-house of the port where the goods are landed within ten days after the landing.
2. The damages must be ascertained before the goods are entered.

THIS case, which was brought up by a writ of error to the Circuit Court of the United States for the District of Massachusetts, was submitted to the court below upon an agreed statement of facts, substantially as follows:

Shelton & Co.—the plaintiffs in error, who were also the plaintiffs below—imported a quantity of molasses from the island of Cuba into the port of Boston. At the time of the

exportation from Cuba it was sound and sweet. Upon reaching Boston it was soured, having become so during the voyage. There was a material difference between the value of sweet and sour molasses both at the port of exportation and the port of importation,—sweet molasses being of the greater value. The molasses in question *was entered at the full value of sweet molasses.* The plaintiffs demanded to have the damage appraised and allowed in the computation of duties. The defendant caused the damage to be appraised, but afterwards (under instructions from the Secretary of the Treasury) refused to allow them, and duties were exacted by the defendant, *and paid by the plaintiffs, under protest, upon the full value of the molasses.*

It was agreed that if the court should be of opinion that damage by souring during the voyage of importation was a damage on the voyage, within the meaning of the provision of the fifty-second section of the act of March 2d, 1799, judgment was to be entered for the plaintiffs—otherwise for the defendant.

Upon this agreement the court below gave judgment for the defendant, and this writ of error was prosecuted to reverse it.

The fifty-second section of the act of March 2d, 1799, above-mentioned, enacts:

"That all goods, wares, and merchandise of which entry shall have been made incomplete, or *which shall have received damage during the voyage*, to be ascertained by the proper officers of the port or district in which the said goods, &c., shall arrive, shall be conveyed to some warehouse or storehouse to be designated by the collector, in the parcels or packages containing the same, there to remain at the expense and risk of the owner or consignee, under the care of some proper officer, until the particulars, cost, or value, as the case may require, shall have been ascertained: *Provided*, That no allowance for the damage on any goods, wares, and merchandise that have been entered, and on which the duties have been paid or secured to be paid, and for which a permit has been granted to the owner or consignee thereof, shall be made, unless proof to ascertain such damage

shall be lodged in the custom-house, &c., *within ten days after the landing of such merchandise.*"*

As having a certain bearing on the subject, reference may be made also to the twenty-first section of an act of March 1, 1823, as follows:†

"That *before* any goods, wares, or merchandise which may be taken from any wreck shall be admitted to an entry, *the same shall be appraised* in the maner prescribed in the sixteenth section of this act; *and the same proceedings shall be ordered and executed in all cases where a reduction of duties shall be claimed on account of damage which any goods, wares, or merchandise shall have sustained in the course of the voyage;* and in all cases where the owner, importer, consignee, or agent shall be dissatisfied with such appraisement, he shall be entitled to the privileges provided in the eighteenth section of this act."

The manner of appraisement referred to as provided in the sixteenth section, and the privileges provided in the eighteenth section, were not material to the issue in this case.

Mr. Stanbery, A. G., and Mr. Ashton, Assistant A. G., for the collector:

Goods which have been completely entered, under whatever circumstances such entry has been made, are not entitled to any allowance for damage, from whatever cause, unless proof of such damage has been furnished within ten days after the landing of the goods, and other action had.

Without a statutory exception, the general law regulating entries of goods and assessments of duties would of course disallow such damage; and the exception claimed in this suit withholds, by express terms, its benefits where "proof to ascertain such damage" has not been "lodged in the custom-house" of the port "within ten days after the landing of such merchandise." Here is a condition precedent, which the case, by its omission to mention it, shows has not

* 1 Stat. at Large, pp. 665, 666.

† Id. 736.

been fulfilled by the importer. The entry was regular and complete, and it follows that the entire fifty-second section is inapplicable, except as by its proviso it prohibits the allowance claimed.

But any provision of the act of 1799 favorable to the plaintiffs was repealed by the act of 1823.

The act of 1823 declares that "*no entry shall be admitted* until *after appraisement* of goods taken from any wreck; and the *same* proceedings shall be ordered and executed in *all cases where a reduction of duties shall be claimed on account of damage which any goods, wares, or merchandise shall have sustained in the course of the voyage.*"

If, therefore, under section fifty-two of the act of 1799 the importers could have claimed the benefit of *any* appraisement of damages to their goods, "sustained in the course of the voyage," after they had procured them to be entered at the custom-house (with or without the lodgement therein of proof within ten days after landing), under the terms of this section, it is manifest they could not have the benefit of such an appraisement *now*, since the act of 1823 thus expressly prohibits the admission of the very entry they made. Therefore, if the importers chose to forego this prohibition of entry, by entering the goods according to invoice, they must submit to the consequences of their voluntary action.

Whenever, in fact, the invoice has been the basis of an entry at the custom-house, complete or incomplete, or whenever an entry has been made with a specific valuation, there is no power to reduce the corresponding assessment of duties.

As an importer is not, in any case of damage in the course of the voyage, imperfect data, wreck, &c., obliged to make entry before appraisement, under the statutes cited, the reason of the rule binding him to abide his entry is palpable.

No opposite counsel appeared.

Mr. Justice SWAYNE delivered the opinion of the court.

The question presented for our determination in this case

is a purely statutory one, and it must be decided by the light of the laws of Congress, which relate to the subject.

The 52d section of the act of March 2d, 1799, declares that goods, of which an incomplete entry has been made, or which shall have received damage during the voyage, to be ascertained by the proper officers, shall be conveyed in the parcels or packages containing them to some warehouse, to be designated by the collector, and that they shall remain there at the expense of the owner or consignee, under the care of some proper officer, "until the particulars, cost, or value, as the case may be, shall be ascertained." The proceedings touching the appraisement, in case of damage during the voyage, are particularly prescribed. The proper deduction is also provided for, whether the goods are chargeable with a duty *ad valorem*, or a specific duty. The section concludes with a proviso, that no allowance shall be made for the damage on any goods and merchandise which have been entered, and on which the duties have been paid, or secured to be paid, and for which a permit has been granted, unless the proof to ascertain the damage shall be lodged in the custom-house within ten days after the merchandise was landed.

The act of the 3d of March, 1823, provides that, before goods taken from a wreck shall be entered, they shall be appraised in the manner prescribed by the 16th section of the act, and that the same proceedings shall be had, in all cases, where a reduction of duties is claimed on account of the damage which any goods may have sustained in the course of a voyage.

It provides further, that in all cases, when the owner or consignee is dissatisfied with the appraisement, he may avail himself of the privileges given by the 18th section of the act.

It is not necessary to advert to the 16th and 18th sections more particularly. They embrace details in nowise material to the question under consideration. In so far as they are inconsistent with the mode of ascertaining the damage to the goods prescribed by the act of 1799, the former act

must yield to the latter, and it is to that extent repealed. But this in no wise affects the limitation of the time, fixed by the act of 1799, within which the proof of the damage must be lodged in the custom-house.

The plaintiffs were clearly not entitled to recover, because it did not appear that this requirement of that act had been complied with. It was neither agreed nor made to appear *aliunde* that any proof was filed within the ten days.

There is another objection, which is equally conclusive. The statute of 1823 requires the damage to be ascertained before the goods are entered at the custom-house. This order of proceeding was attempted to be inverted by the plaintiffs. They entered the molasses regularly at the invoice price, and then insisted upon an appraisement of the damage, and a corresponding reduction of the duties, and the latter being refused, paid the full amount under protest. The protest was unavailing. The claim for an appraisement, and for the consequent reduction of the duties, came too late. The door to relief was then closed, and no power but the legislature could reopen it. The right was one which the importers might assert or waive at their option. The entry of the goods was such a waiver, and it was final. There was no power in the executive department of the government competent to restore it. We place our decision upon two grounds:

One—that the requisite proof was not lodged in the custom-house within the time prescribed by the act of 1799.

The other—that the molasses was completely entered before the proceedings authorized by the act of 1823 were demanded and taken.

The judgment below is

AFFIRMED.

STANLEY *v.* COLT.

1. Whether words in a devise constitute common law conditions annexed to an estate, a breach of which or any one of which, will work a forfeiture, defeat the devise, and let in the heirs, or whether they are regulations for the management of the estate, and explanatory of the terms under which it was intended to have it managed, is a matter to be gathered, not from a particular expression in the devise, but from the whole instrument.
2. The word *Provided*, though an appropriate word to constitute a common law condition, does not invariably and of necessity do so. On the contrary, it may give way to the intent of the party as gathered from an examination of the whole instrument, and be taken as expressing a limitation in trust.

   Ex. Gr. Where a testator devised real estate to an ecclesiastical society for its use or benefit: "*Provided*, that said real estate be not hereafter sold or disposed of," and in connection and continuation added numerous minute directions in the nature of regulations for the guidance of trustees whom he appointed to manage it, and with a view to the greatest advantage of the Society—

   Held, that the latter, being to be regarded as mere limitations in trust, the former was a limitation in trust also; not a common law condition.
3. Where, under a will, in some respects peculiar, a devise was made to a society for its use and benefit, but the possession, superintendence, and direction of the estate, and the letting, leasing, and management of the same, was given to trustees who were invested with power to perpetuate their authority indefinitely—the only active duties of the society being to receive the rents and profits for its use and benefit—

   Held, that the legal estate was in the trustees, not in the society.
4. The legislature of Connecticut has the powers of an English court of chancery to direct a sale of real estate devised to charitable purposes—even though it be provided by the devise, that the estate shall never be sold—in cases where lapse of time, or changes in the condition of the property, or circumstances attending it, make it prudent and beneficial to the charity, to alien the specific land, and invest the proceeds in other securities; taking care, however, that no diversion of the gift be permitted.
5. Where the legislature, setting out reasons at large for the exercise of such a power, directs a sale of land so devised, and provides for the secure reinvestment of the proceeds to the same uses as directed by the will as to the estate sold, this court cannot revise the facts upon which the legislature has exercised the power.

ERROR to the Circuit Court for the District of Connecticut, the case being this:

From the year 1702 or earlier, and down to the year 1818,

and afterwards, with some unimportant alterations, there existed and was in force in Connecticut a statute thus:

"That all such lands, tenements, hereditaments, and other estates, that either formerly have been, or hereafter shall be, given and granted, either by the General Assembly of this Colony or by any town, village, or particular person or persons, for the *maintenance of the ministry of the Gospel* in any part of this Colony, or schools of learning, or for the relief of poor people, or for any other public and charitable use, shall forever remain and be continued to the use or uses to which such lands, tenements, hereditaments, or other estates, have been, or shall be, given and granted, according to the true intent and meaning of the grantors, and to no other use whatsoever; and also be exempted out of the general lists of estates, and free from the payment of rates."

This act being thus in force, William Stanley, of Hartford, Connecticut, in October, 1786, made his will in the material parts as follows:

"*Imprimis.* I give and bequeath unto the Second Church of Christ, in Hartford, such sum, to be paid *out of the profits or rents of my real estate* as hereafter mentioned, as shall be necessary to purchase a silver tankard of the same weight and dimensions, as near as conveniently may be, of that one formerly given said church by Mr. John Ellery, deceased; *the same to be procured by my trustees*, hereafter named, and presented to the officers of said church, to be kept forever for the use and benefit of said church, and my said trustees are to cause my name, coat of arms, the time of my death and my age, thereon to be engraved.

"*Item.* I give and devise unto my niece, Elizabeth Whitman, one piece of land, &c., also one other piece of land lying, &c., and is part of the farm that formerly belonged unto my honored father, Colonel Nathaniel Stanley, deceased, and lies in the southeast corner of said farm, and butts on a highway, unto the said Elizabeth, and to her heirs and assigns forever, *provided* she shall not make any claim upon my estate for any services done for me.

"*Item.* I do also give and devise unto my sister Abigail the

use and improvement of all my real estate (except that part thereof given unto her daughter Elizabeth) during her natural life, with this reserve, that she shall not cut any of the trees growing in that lot called Rocky Hill lot.

"*Item.* After the decease of my said sister, Abigail Whitman, I give and devise *the whole* of my real *estate*, of every kind and description, except which is hereinbefore given unto my niece, Elizabeth Whitman, unto the Second or South Ecclesiastical Society, in the town of Hartford, to be and remain to the use and benefit of said Second or South Society and their *successors forever;* PROVIDED that said real estate be not *ever hereafter sold or disposed of, but the same be leased or left*, and the annual rents or profits thereof applied, to the use and benefit of said Society, and the *letting*, *leasing*, and *managing* of said estate to be *under the management and direction of certain trustees* hereafter named by me, and their successors to be appointed in manner as hereafter directed. And it is my will that the first rents, profits, or avails issuing from said real estate shall, *by my trustees after it comes to their possession*, be applied to the purchasing of the aforesaid tankard. And it is my will that so much of the rents, profits, or avails next issuing out of my real estate, my said *trustees shall reserve in their own hands* as shall be sufficient to purchase and pay for the one-half part of the price of a proper bell for the meeting-house in said Second Society, of the same weight and dimensions of that in the North Meeting-House, in said town of Hartford, and be applied by my said trustees for that purpose; *provided* that the other part be procured by subscription or otherwise without taxing the inhabitants of said society; and in case said Second Society shall *ever hereafter* be divided, it is my will that *my said real estate* be not divided, but remain entire and *forever* to the said Second Society, and such part of said society as shall hereafter secede or be divided therefrom are hereby excluded from all the use and benefit of my said estate so devised as aforesaid to said Second Society.

"And for the best management and direction of *my said real estate* I do hereby appoint my friends, W. Ellery, &c., *trustees* to *superintend*, *direct*, and *manage said real estate* for the use and benefit of said Second Society in manner as above directed, and unto them, my trustees, I do give authority and power to nominate their successors to said trust, which is to be done in the manner and form following, viz.: That immediately after my

decease, they shall nominate and appoint some meet person or persons, as occasion may require, into *said* trust and office; so be it that at no time more than three persons shall act in said trust or office or belong thereto at the same time. And all persons successors hereafter to said trust and office shall at all times in future have like power to *superintend, direct, and manage said estate* for said society, and in like manner to nominate and appoint their successors in said trust and office, and to *perpetuate* said *trust* for the benefit and use of said society as occasion may from time to time require. And the aforesaid real estate or any part thereof shall not be rented or let for a longer term or lease than thirty years before the expiration of the same, and said trustees and their successors shall have full power to *let and lease said estate*, and to do *all other legal acts for the well ordering and management of said estate under the limitation and restrictions as herein is before expressed.*"

The ecclesiastical society named in the devise above quoted was established by authority of the State of Connecticut for the support of the Gospel ministry and the maintenance of public worship, and with power, for that purpose, to hold real estate.

After the death of Stanley and his sister Abigail, who had the life-estate, and whose death occurred prior to the year 1800, it took possession of the premises, and down to 1852 the society and trustees managed them in the manner directed in the will, appropriating the income from time to time to the purposes of the society. During the whole time the premises were untaxed, the only ground for the exemption being the provision in the act of 1702, quoted on p. 120. In the year 1852 the legislature of Connecticut, upon the application of the society and of the trustees, passed a resolution reciting a memorial by the church and trustees, showing the will, possession of the land, &c.

"Also showing that the said land has on it a great number of buildings, owned by the tenants, built of wood, and in a decayed state; that the land on which they stand has, by the lapse of about three-fourths of a century, become valuable, some of which is in the central part of the city of Hartford, and too

valuable to be improved profitably in any other way than by the erection on them of permanent brick or stone blocks of buildings; that the lessees cannot safely erect such buildings, because of the uncertainty of their tenure, and because they would thereby place themselves in the power of the owners, and that the owners have not the means, and could not lawfully contract debts for the purpose of building; that other parts of the estate are subject to other embarrassments arising from the restrictions of the will, so that said property has become unproductive, and the income greatly reduced, and the object of the testator in devising the property to the society frustrated; that those embarrassments, both to the owners and occupants, consequent on the restrictions in the will, are not likely to be removed, but will be increased by time, unless said land can be sold and conveyed in fee simple, and the proceeds suitably invested.

"And praying the Assembly to authorize a sale and conveyance of said land, under such guards and provisions as will secure the application of the proceeds according to the true intent and meaning of said will, as per petition on file."

This legislative record thus proceeded:

"This Assembly having inquired into the facts stated in said memorial, find the same to be true; and do further find that the most valuable portion of said estate is situated in a central part of said city of Hartford, is covered with unsuitable wooden buildings, and it is *for the interest of the people of said city* that more useful and valuable buildings should be built thereon, and do grant the prayer thereof; and it is therefore

"*Resolved*, That the said trustees and their successors, together with D. F. Robinson, as agent, shall have power, and they are hereby authorized, to sell and convey the said lands in said memorial mentioned, and such parts or proportions thereof as may from time to time be advantageously sold, and to execute good and sufficient deeds thereof in fee simple, with or without covenants of seizin and warranty, on the part of said society, subject to liens or incumbrances, if any shall lie upon said property, &c. And the proceeds of such sales shall be, by the trustees and agent, invested in good and sufficient bonds and mortgages of real estate, of double the value of the amount invested; and the interest of said proceeds shall be paid over to the treasurer of

said society, and shall be appropriated to the use of said society in the same manner, and subject to the same use, as the rents or income of said property are by said will required to be appropriated, and for no other uses or purposes whatever. And all mortgages or investments made as aforesaid from time to time, and whenever such loans or investments shall be shifted or changed, the securities shall be taken in the name of such trustees and their successors, and expressed to be for the use and benefit of said society, according to the will of William Stanley, deceased: *Provided, however*, That before any person or persons shall proceed to make sale of said lands, or any part thereof, he or they shall become bound, in a good and sufficient bond, to the judge of probate for the district of Hartford, conditioned for the faithful performance of his duty in the premises; and said trustees shall also give the like bonds for the faithful performance of their trust."

The heirs at law of Stanley had no notice of any of these proceedings.

The trustees and agent accordingly, in August, 1852, by deed reciting the legislative proceeding, and purporting to be made in virtue of their said capacity of trustees and agent, and of the powers conferred by the act, sold and conveyed, with special warranty, to one Colt, "all the right, title, and interest that said Second Ecclesiastical Society, &c., have or ought to have in or to the above-described tract of land," one of the tracts devised.

Colt having entered into possession, the heirs at law of Stanley now brought ejectment against him for the premises. The court instructed the jury that on the case presented the defendant was entitled to their verdict; and judgment having gone accordingly, the case was now here on error.

Messrs. W. M. Evarts and C. E. Perkins, for the heirs at law:

The case is of general importance. A full argument will be allowed.

Three questions arise:

I. Had the society power under the will itself, to sell and convey this property to Colt without incurring a forfeiture?

II. If it had not such power under the will, was it enabled so to do by the act of the legislature of 1852?

III. If the society had no power to convey from either source, what consequence results from its violation of the condition of the devise?

That the legal estate is in the church must, we suppose, be conceded. The devise is, in plain terms, to it in fee: "I give and devise the whole of my *estate* . . . *unto the Second or South Ecclesiastical Society* . . . to be and remain to the use and benefit of said Second or South Society and their successors forever." No legal estate is given to the trustees. They are but to "superintend, direct, and manage." This is exactly what any mere agent of restricted powers would do in regard to any estate, of which confessedly the fee would be in his constituent. Mere directions to one person to superintend, direct, and even to manage, cannot carry to *him* the legal estate given in plain, appropriate, and even technical terms to another in fee; even assuming that it might do so, if the legal estate were left undisposed of;—which we do not admit. Inference cannot control direct expression. The trustees were to have no powers but what were necessary to the office of superintendence, direction, and management of an estate that was never to be "divided," but which was "to remain entire and forever to the said Second Society." The legal estate then was given to the church.

The heirs of Stanley say then:

I. The society, under the provisions of the will, could not sell without violating the condition upon which they held the property, and thus incurring a forfeiture of their title.

Both by the obvious *intent* of the testator and by the legal effect of the words used, this devise is of an estate upon condition subsequent, a breach of which destroys all right of the society in the property.

1. The will shows that the testator *meant* to deprive the society of the power to sell. He meant that this property should *always* remain in the hands of the society. He believed that the property would increase in value, and from

a sure increasing fund would supply the society's increased wants, while if the land was sold and the money invested, the society would receive no larger amount a hundred years thereafter, than at that day. He also desired that he should be remembered in connection with this society forever. He had an obvious pride of family name and estate, and an attachment plainly to this particular Second or South Church. He desires his "arms" and name to be put upon a sacramental tankard, "to be kept forever." He leaves to his niece a piece of land that belonged to his "honored father, Colonel Nathaniel Stanley, deceased." To his sister, he leaves for life another piece, "but she shall not cut any of the trees."

The bulk of the real estate he leaves in fee to the church, separating the real estate from all power to manage it, and giving neither to the devisee nor to the trustees a power to sell the estate; but, on the contrary, showing that he meant it should never be sold or disintegrated. He looks forward to the possibility of a division of the religious body, and provides against any *division* of his estate from even that cause; declaring that if the society should "*ever* hereafter" be divided, his real estate left to the existing body should "be not divided, but remain entire and *forever* to the said Second Society."

The courts in Connecticut have held, that where land was devised to an ecclesiastical society, the intent of the donor is shown *by that very act* to be that it should not be sold.*

The means adopted by the testator to accomplish this intent, are the most effectual that could be conceived for his purpose. He did not intrust the accomplishment of his object to the society, to the legislature, or even to courts of equity. He determined to make it the *interest of the society and its members* to use the gift as he directed, by causing a forfeiture to follow their misuse.

He used apt words to carry out this intention.

In construing wills, courts are governed by certain well-

* Brainard *v.* Colchester, 31 Connecticut, 411.

settled rules. One of these rules, the seventeenth in Mr. Jarman's series, is:*

"Where a testator uses technical words, he is presumed to employ them in their legal sense, unless the context clearly indicates the contrary."

The obligation of the rule is nowhere more recognized than in Connecticut, where in *Gold* v. *Judson*,† the court say: "We are *bound* to suppose the testator used language in its usual legal sense."

The word *Provided* is a technical word: its meaning has been settled by innumerable decisions, and it has always been held that a devise to A., *provided* he should or should not perform certain acts, is a devise upon a condition subsequent, and the estate vests in A., subject to being divested if he does or does not perform the acts specified.

This is the rule in Connecticut.

In *Wright* v. *Tuttle*,‡ Swift, J., says:

"There is no word more proper to import or express a condition, than the word *provided*, and it shall always be so taken unless it appear from the context to be the intent of the party that it shall constitute a covenant."

These words were cited and approved in the subsequent case of *Rich* v. *Atwater*,§ and in *Wheeler* v. *Walker*.‖

This decision is the more obligatory, as it has been affirmed by subsequent Connecticut decisions,¶ and has, ever since they were made, been considered as fixing the law in the State of Connecticut on this subject.

The case at bar being in relation to the construction of a will devising real estate, this court will govern itself by the decisions of Connecticut on this point.**

* Jarman on Wills, vol. ii, p. 526 (side page 744).
† 21 Connecticut, 625.
§ 16 Connecticut, 419.
‡ 4 Day, 326.
‖ 2 Id. 201.
¶ Judd v. Bushnell, 7 Id. 205; Lloyd v. Holly, 8 Id. 491, and others
** Jackson v. Chew, 12 Wheaton, 167.

But this construction of the word *provided* is not confined to Connecticut; it has always been so held both in England and this country from the earliest time.

Comyns, in his Digest,* says:

"Divers words *of themselves* make an estate upon condition, as '*sub conditione*,' '*proviso semper*,' and the word *proviso* makes a condition, though joined with other words, as 'provided always and it is covenanted,' 'provided and it is agreed,' and therefore if the word *proviso* be the speaking of the grantor and obliges the grantee to any act, it makes a condition in whatever part of the deed it stands, and though there be covenants before and after, it is not material."

This is in relation to deeds. In relation to wills, he says:†

"So words in a will make a condition which will not make it in a deed. So a devise to A. *provided, and my will is that he keep it in repair*, makes a condition; so there shall be a condition in a will though there be no words that the estate shall cease, as a devise to a wife, *provided that she shall have a rent only if she departs out of London*."

Similar decisions as to the effect of the word "provided" have been made in most if not all the States, and in England.

In *Hooper* v. *Cummings*, a case in Maine,‡ the expression was "*provided* they (the grantees) fence the land and keep it in repair." The question arose whether this word created a condition, and the court say:

"We may assume that the *proviso* in the deed created a condition subsequent, and in this we are sustained by most if not all the authorities ancient and modern."

In the New Hampshire case of *Chapin* v. *School*,§ the court say:

"The usual words of a condition subsequent are 'so that' 'provided,'" &c.

* Vol. 3, p. 86, Condition A 2. † Page 88, A 4.

‡ 45 Maine, 359; and see Marston v. Marston, 45 Id. 412.

§ 35 New Hampshire, 450.

In another case, *Wiggin* v. *Berry*, from the same State,* a devise was to a town "provided" they would pay the taxes on the land and devote the net profits to keeping a school for the benefit of the inhabitants. The town did not comply with these conditions, and the court held that this was a devise upon condition, that the town had forfeited their title, and the land went to the testator's devisees. This case seems to be directly in point.

In Massachusetts, *Attorney-General* v. *Merrimack County*,† the court say:

"The words 'provided,' 'so that,' and 'upon condition that,' are the usual words to make a condition."

In *Hayden* v. *Stoughton*,‡ a case in the same State, the devise was to a town for a school-house, "*provided* said school-house is built by said town within one hundred rods of the place where the meeting-house now stands."

In this case the school-house was not built, and the court held that the land upon entry by the heirs reverted to them.

It is an important case in many respects, and will be referred to hereafter.

So in *Hadley* v. *Hadley*,§ the court held that the words "provided" and "on condition," had the same effect in making a devise conditional.

And in *Rawson* v. *School District*,‖ in speaking of a conditional estate, they say:

"The usual and proper technical words by which such an estate is granted by deed are 'provided, so as, or on condition.'"

To the same effect are cases in New York and Pennsylvania.¶

In the English case of *Tattersall* v. *Howell*,** the same word

* 2 Foster, 114.
† 14 Gray, 612.
‡ 5 Pickering, 534.
§ 4 Gray, 145.
‖ 7 Allen, 128.
¶ Caw *v.* Robertson, 1 Selden, 125; Pickle *v.* McKissick, 21 Pennsylvania State, 232; McKissick *v.* Pickle, 16 Id. 140.
** 2 Merivale, 26.

"provided" was used, and the court held it created an estate upon condition.

The usual and legal effect of this word "provided," being therefore to create a conditional estate, subject to forfeiture by a breach of the condition, this court will give it such a construction here.

There is another rule of construction—the eighteenth of Mr. Jarman's series,* and strongly enforced, as a true rule of law, in an important case† by Lord Chancellor Sugden—applicable to this question.

"Where a word is used in one devise in a will with a particular meaning, and is again found in a subsequent devise used in the same manner, it is to have the same effect."

In one devise in this will, the testator devises certain lands to Elizabeth Whitman, "*provided* she shall not make any claim upon my estate for any services done for me."

There can be no doubt but that this is a devise upon condition subsequent, upon the breach of which a forfeiture would ensue.‡

Will it be argued, that this condition is void, as a restriction of the power of alienation? The law is not so.

1st. It has always been held in Connecticut by an uninterrupted chain of decisions, that under the act of 1702, such a restriction is valid.

In *New Haven* v. *Sheffield*,§ decided in 1861, the court say:

"The chief object in the enactment of that statute was not so much to exempt certain estates from taxation as to *confirm and perpetuate* the estates referred to in it."

And this expression was affirmed and approved in the very latest case on the subject, *Brainard* v. *Colchester*,‖ decided in 1863, and see *Hamden* v. *Rice*.¶

* Jarman on Wills, vol. 2, p. 527 (side page 744).

† Ridgeway *v.* Munkittrick, 1 Drury & Warren, 84.

‡ Rogers *v.* Law, 1 Black, 253; Sackett *v.* Mallory, 1 Metcalf, 355; Egerton *v.* Brownlow, 4 House of Lords Cases, 1–183.

§ 30 Connecticut, 171. ‖ 31 Id. 407. ¶ 24 Id. 356

This court will hold itself bound by the decisions of the State of Connecticut on this subject.*

2d. Apart from this statute of 1702, it is conceived that such a devise to an ecclesiastical society is good.

In many of the cases hereinbefore and hereinafter cited, similar devises were held to be valid.

In *Brattle Square Church* v. *Grant*, a Massachusetts case,† the devise was on condition that the land should *never* be sold, but the minister should always reside on it. In considering the question whether the devise was void as violating the rule against perpetuities, the court say:

"A grant of a fee on condition only creates an estate of a base or determinable nature in the grantee, leaving the right or possibility of revester vested in the grantor. Such an interest or right in the grantor, as it does not arise and take effect upon a future uncertain or remote contingency, *is not liable to the objection of violating the rule against perpetuities*, in the same degree with other conditional and contingent interests in real estate of an executory character. The possibility of reverter, being a vested interest in real property, is capable at all times of being released to the person holding the estate on condition or his grantee, and if so released vests an absolute and indefeasible title thereto. The grant or devise of a fee on condition does not therefore fetter and tie up estates so as to prevent their alienation, and thus contravene the policy of the law, which aims to secure the free and unembarrassed disposition of real property."

This view was again taken by the same court in *Austin* v. *Cambridgeport*,‡ where there was a grant of land to a parish on condition that it be forever used as a site for a church in part and in part for the support of the minister.

3d. But this point is not an open one here.

In *Perin* v. *Carey*,§ in this court, an important case, fully argued, one point taken was, that the devise to a charity providing that none of the land should ever be sold, was void as *making a perpetuity* contrary to law; but the court unan-

* Perin v. Carey, 24 Howard, 465.
† 3 Gray, 148.
‡ 21 Pickering, 215.
§ 24 Howard, 507

imously held that a devise to a charity could be made in perpetuity, and say:

"The direction in the will that the real estate should not be alienated, makes no perpetuity in the sense forbidden by the law, but only a perpetuity allowed by law and equity in the case of charitable trusts."

Similar decisions exist in New York,* North Carolina,† Kentucky,‡ and other States.§

II. This act of 1852 was void upon three grounds:

1st. No State legislature has power to alter the express conditions of a will. Such an attempt is contrary to the principles of natural right and justice which no legislature can contravene.

In *Hooker* v. *Canal Co.*,‖ a Connecticut case, the court say:

"The fundamental maxims of a free government require that the right of personal liberty and private property should be held sacred."

They cite and approve the expressions of Marshall, C. J., in *Fletcher* v. *Peck*:¶

"And it may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power," &c.

This whole subject is fully treated in the late decision of *Booth* v. *Woodbury*,** where it is expressly held that the legislature can pass no laws contrary to the "principles of natural justice."

All these cases, and the jurisprudence of Connecticut on

* Williams *v.* Williams, 4 Selden, 535, 554, 555.

† State *v.* Gerard, 2 Iredell's Equity, 210.

‡ Curling *v.* Curling, 8 Dana, 38.

§ See Wiggin *v.* Berry, 2 Foster, 114; Brown *v.* Hummell, 6 Pennsylvania State, 86; Grissom *v.* Hill, 17 Arkansas, 483; Franklin *v.* Armfield, 2 Sneed, 305.

‖ 14 Connecticut, 152; and see Gas Co. *v.* Gas Co., 25 Id. 38, and Hotchkiss *v.* Porter, 30 Id. 418.

¶ 5 Cranch, 185.

** 32 Connecticut, 118.

this subject, are in harmony with and in fact founded upon the case of *Calder* v. *Bull*,* a case which went from Connecticut to this court; and the expressions in *Goshen* v. *Stonington* are almost identical with those of Mr. Justice Chase, where he says:

"I cannot subscribe to the omnipotence of a State legislature, or that it is absolute and without control, although its authority should not be expressly restrained by the constitution or fundamental law of the State."

But both in this court and many of the State courts the same rule is applied.†

A case quite in point is *Brown* v. *Hummel*,‡ in the Supreme Court of Pennsylvania. There a devise of land was made to an orphan asylum, with a provision that the land be never sold, but the rents and profits only be applied to the use of the asylum. The legislature, by a special act, directed that part of the land be sold.

The court held unanimously that the act was void and unconstitutional.

If the legislature can, by a special act, dispense with the performance of one condition of a devise, they can with any.

Such an act as this is different from those enabling or healing acts often passed, such as those authorizing a sale of minors' lands, or those of lunatics, &c. In all such cases they merely remove a *personal disability*.§ Acts, too, will be cited on the other side in which power has been given to corporations to sell, where in the gifts to them no such power was expressly given. Such cases are from the pur-

* 3 Dallas, 386.

† Terrett *v.* Taylor, 9 Cranch, 43; Wilkinson *v.* Leland, 2 Peters, 627; Irvine's Appeal, 16 Pennsylvania State, 256; Shoenberger *v.* School District, 32 Id. 34; Railroad Co. *v.* Davis, 2 Devereux & Battle, 451; Hatch *v.* Vermont Railroad, 25 Vermont, 49; Benson *v.* Mayor, &c., 10 Barbour, 223; Regent's University *v.* Williams, 9 Gill & Johnson, 365; Billings *v.* Hall, 7 California, 1.

‡ 6 Pennsylvania State, 86.

§ Powers *v.* Bergen, 2 Selden, 358; Shoenberger *v.* School District, 32 Pennsylvania State, 34; Leggett *v.* Hunter, 5 E. P. Smith, 445.

pose. To say nothing about the constitutionality or safety of this sort of legislation in general, it may be noted that in many cases the legislature has only aided an intent of a donor left unexpressed or but insufficiently given, or cases in which perhaps the legislature was itself the donor. But can any case be found where, *without the assent of the heirs*, a power to destroy the identity and substance of the gift has been given in any case where it was plain that the testator meant to keep the land *in specie*, forever undivided in the corporation, beneficiary, and devisee? What is proper to be done in any case where heirs may have an interest, and what the legislature of Connecticut itself has done, may be seen in the Acts of Connecticut, May Sessions, 1850, at page 82. There Thaddeus and Eunice Burr, she owning it, had granted a lot for a parsonage. An act reciting that the land was not now and never could be wanted for a parsonage, and that a sale was desirable and expedient, authorized a sale. But how? It declares the sale is to be made "with the assent of the *heirs of the said Eunice;*" and the act authorized the heirs to release a condition in the deed, *in the presence of witnesses;* and such release, it was enacted, "shall operate to forever estop said heirs, and all claiming under them." This is the right way; and in no other way, assuredly, in a case like the present, could a sale be authorized and the right of property in the heirs be duly respected.

It will be argued that a legislature has power as *parens patriæ* to interfere and authorize a sale of land in cases like the one at bar; but the authorities say that the legislatures in this country have no such power.

In *Moore* v. *Moore*,* a Kentucky case, the court say:

"We do not admit that the commonwealth as *parens patriæ* can rightfully interfere, unless there has been an escheat to her, and then she can become absolute and beneficial owner. Rights here are regulated by law, and if any person has a claim to property ineffectually dedicated to charity, the commonwealth has

* 4 Dana, 366; and see Lepage *v.* McNamara, 5 Clarke (Iowa), 124, and White *v.* Fisk, 22 Connecticut, 31 (54).

no prerogative right to decide on that claim and dispose of the property, as the King of England has been permitted to do."

2d. This act of 1853 is void, as depriving the plaintiffs of property, contrary to the constitution of the State of Connecticut.

That instrument declares that no person shall be "deprived of property but by due course of law."

It is not pretended that in this case any compensation was made, nor were any of the plaintiffs cited to appear, or informed by notice in any way, of the proceedings.

By this act, property was taken from the heirs. They had a *conditional* or contingent interest, being a right to enter upon and hold this property for a breach of condition, which right this act would deprive them of.

The case of *Hayden* v. *Stoughton*,* in Massachusetts, affirmed in *Austin* v. *Cambridgeport*,† and in *Proprietors* v. *Grant*,‡ is in point. In that case there was a devise to a town upon condition that they erect a school-house, which they neglected to do, and the land was thereby forfeited. An action to recover it was brought by the heirs of the residuary devisee, and the court held that there was a *contingent interest* left in the devisor, which by the residuary devise he gave to the residuary devisee.

This accords with the law in Connecticut.

In *Smith* v. *Pendell*,§ in that State, the court say:

"The right of H., therefore, was more than a naked possibility like that of an heir apparent; *it was an interest in the estate*, though a contingent one. Such an interest is descendible."

These heirs, therefore, had an interest in this real estate, and under the *State* constitution this act is void.

3d. We say further that it is void as contrary to the

* 5 Pickering, 528.

† 21 Id. 215.

‡ 3 Gray, 147; see also Underhill *v.* Railroad Co., 20 Barbour, 455; and Robertson *v.* Fleming, 4 Jones's Equity, 387.

§ 19 Connecticut, 112.

Constitution of the United States, which prohibits a State from passing any law impairing the obligation of contracts.

It has been held from an early day in Connecticut that by the law of 1702, the State made a contract with all devisors of lands for the purposes mentioned in that act, and that all acts of the legislature affecting such devises in any way contrary to such act are void.

This question first arose in 1826, in the case of *Atwater* v. *Woodbridge*.*

The last clause of the act of 1702, exempts the property named in the act from taxation, and the question was whether an act of the legislature taxing such property was valid. The court say:

"The government (by this act) made a *contract* with all such persons as might be disposed to give their property to these religious purposes and charitable uses, that it should be forever exempted from taxation."

The question again arose in 1829 in *Osborne* v. *Humphrey*,† and was again argued at great length by some of the ablest counsel in the State. The court held, in a very well-considered opinion, that an act affecting this exemption from taxation was contrary to this clause of the Constitution of the United States, and based their opinion upon the case of *New Jersey* v. *Wilson*,‡ in this court, and quote and affirm the words above cited from *Atwater* v. *Woodbridge*.

These cases have been affirmed by decisions in Connecticut down to the present time.§

The decisions of this court equally establish the proposition, especially the case of *Dartmouth College* v. *Woodward*,‖ where Marshall, C. J., says:

"These gifts were made not indeed to make a profit for the donors or their posterity, but for something in their opinion of

* 6 Connecticut, 230. † 7 Id. 335. ‡ 7 Cranch, 164.

§ Parker *v.* Redfield, 10 Connecticut, 490; Landon *v.* Litchfield, 11 Id. 251; Hart *v.* Cornwall, 14 Id. 228; Seymour *v.* Hartford, 21 Id. 481; New Haven *v.* Sheffield, 30 Id. 160; Brainard *v.* Colchester, 31 Id. 407.

‖ 4 Wheaton, 642.

inestimable value, for something which they deemed a full equivalent for the money with which it was purchased. The consideration for which they stipulated is the perpetual application of the fund to its object *in the mode prescribed by themselves.*"

The act of 1852, in fact *destroyed* this contract. The contract was that the land when so given, should forever remain and be continued to the use or uses to which such lands, &c., have been or shall be given and granted, *according to the true intent and meaning of the grantors.* This was the principal object in view in passing the act.

In *New Haven* v. *Sheffield*,* the court says,—its words being cited and approved in *Brainard* v. *Colchester*,† the last case on this subject in Connecticut,—

"The chief object in the enactment of that statute was not so much to exempt certain estates from taxation as *to confirm and perpetuate* the estates referred to in it with certain attending privileges."

Now the "true intent and meaning" of the testator was as expressed in his will, that the land "should not ever thereafter be sold or disposed of," and if so sold it should revert to his heirs.

In the Dartmouth College case, Marshall, C. J., referring to the substitution, made in that case, of the will of the State for the will of the donors, says:

"This change may be for the advantage of this college in particular, and may be for the advantage of literature in general, *but it is not according to the will of the donors*, and is subversive of that contract on the faith of which their property is taken."

Will it be argued that this devise does not come within the provisions of the act of 1702, because it is not for such purposes as are mentioned therein? Let us consider that point.

* 30 Connecticut,

† 31 Id. 407.

The objects specified are "*for the maintenance of the ministry of the Gospel* in any part of this colony, or schools of learning, or for the relief of poor people, *or for any other public and charitable use.*" This *is* a devise for the "maintenance of the ministry of the gospel." It is a devise to an Ecclesiastical Society, established "for the support of the gospel ministry and the maintenance of public worship." The lands are always to be kept by the society, and the rents are to be applied in the first place to purchase a tankard (obviously for sacramental purposes); to assist in purchasing a bell to summon the congregation to religious exercises; and the remainder of the annual rents and profits were to be applied during all time to the "use and benefit of said society."

Now as the sole object for which said society was established was the support of the Gospel ministry and the maintenance of public worship, and the rents were to be applied by the society for its *use* and benefit, they must necessarily be applied for the maintenance of the Gospel, as the society *could not* apply them to any other use.

But this expression of the statute has received a construction by the courts of Connecticut, and words much less apt than those in the will have been held to come within its fair meaning and intendment.

The question first arose in *Parker* v. *Redfield.** The words there used were "for the support and maintenance of the *church.*" It was objected that this expression did not bring the case within the statute, but the court decided that it did. And the view was even more strongly taken in *Landon* v. *Litchfield*,† where the expression was "one lot with the divisions and commons to be and remain forever *to and for the use and improvement of the first minister and his successors in the work of the ministry in said place.*"

There are decisions in other States in similar cases which sustain this construction.

In a case entitled *In re Trustees*,‡ in New York, the case was a devise to trustees to support scholars of a school, and

* 10 Connecticut, 490. † 11 Id. 257–8. ‡ 31 New York, 574.

it was held to be a devise to the school within the meaning of the act of 1806, which speaks of property devised for the use or benefit of a school; citing the well-known case of *Attorney-General* v. *Tancred*, from Ambler,* where it was held that a devise to a trustee for sundry students of Christ College was valid under the mortmain acts as in effect a devise to the college.

In *McDonogh's Executors* v. *Murdoch*,† this court say:

"All the property of a corporation like Baltimore is held for *public* uses, and when the capacity is conferred or acknowledged to it to hold property, *its destination to a public use is necessarily implied.*"

So in Massachusetts, *Brown* v. *Porter*,‡ and in Pennsylvania, *McGirr* v. *Aaron*.§

The decision in *Seymour* v. *Hartford*, in 21st Connecticut,‖ will be relied on as opposed to this view, and to show that a devise must follow the exact words of the statute to come under it.

In that case the conveyance of the land was made to the society in fee, and expressly stated to be "*without any manner of condition.*" It was asserted that *the mere conveyance to an ecclesiastical society* brought the land within the act, so that it could not be taxed.

The court first say that they affirm all the preceding cases and the principles upon which they are founded. They then say, that this being a question of exemption from taxation, they shall construe the conveyance strictly and so as not to extend such exemptions. And they find a distinction between this and the former cases, that in them "the donor had, by the express terms of the grant, impressed upon the property a perpetual sequestration for the maintenance of the ministry, &c." They say:

"Nothing of this is to be found in the deed of Mrs. Burnham, but, on the other hand, the deed expressly declares the gift is a

* Page 351.
† 15 Howard, 413.
‡ 10 Massachusetts, 93
§ 1 Pennsylvania, 49.
‖ Page 481.

sure and absolute fee simple, without any manner of condition. Of course the grantor does not require that the property should be sequestered, or kept, or used for the maintenance of the ministry, nor does she declare any particular intent whatever, unless the general character and corporate powers of the society imply one, which we think is not the case. . . . We are unable to distinguish this grant from any absolute purchase made by the society generally, or from any unqualified gift made to it. . . . We discover in Mrs. Burnham's deed nothing but an unqualified transfer of property, which may be used at the pleasure of the grantees; no restriction, no sequestration, for any public object. The society may do with it as they please; they may sell it, or use it, or give it away, without being liable to any one."

The case at bar differs therefore entirely from the case of *Seymour* v. *Hartford* in the very points mentioned by the court as the ones in which that case differed from those theretofore decided. *This* property *was* sequestered and restricted. If the donor had any intent, it was that this land should be perpetually sequestered for the use of the society. If Mr. Stanley had merely devised this property *to the society*, saying no more, it might be argued that *Seymour* v. *Hartford* applied, especially if he had said that he devised it "without any manner of condition," instead of annexing, as he has done, this express condition to it, and repeating it over and over.

But if this devise does not come under the expression, "for the maintenance of the ministry of the Gospel," it certainly does under that of "other public and charitable use."*

III. This devise being upon condition that the society should not sell and convey this land, and they having broken the condition, what is the effect of such violation?

Of course, that the heirs of the devisor may enter, declare the devise forfeited by the breach, and recover the property devised.

In *Hayden* v. *Stoughton*,† already cited, and affirmed in

* Hamden *v.* Rice, 24 Connecticut, 355.

† 5 Pickering, 528.

Brigham v. *Shattuck*,* and again in *Austin* v. *Cambridgeport*,† land was given for a school-house, provided it was built in a certain spot. It was not so built, and the residuary devisee entered for breach, and brought this action to recover the land. The court held the devise conditional, and found that there had been a breach, and thereby the estate was forfeited and went to the claimants.‡

It may be argued that even if the society have broken the condition of the devise, the land is not thereby forfeited, but that a court of chancery, either under the principle of *cy pres* or its authority over trusts, is the only power that can interfere with the sale. But in Connecticut the courts of chancery have not adopted and do not apply the principle of *cy pres*.§ And this court will follow the rule in Connecticut.‖

Nor would the principle of *cy pres*, or its jurisdiction over trusts, ever empower a court of chancery to authorize or relieve against a breach of the condition of a devise.¶

Messrs. B. R. Curtis and W. W. McFarlane, contra, for the purchaser:

The importance of the case, spoken of on the other side, is admitted; and the invitation to argue it fully is accepted.

The heirs cannot recover, unless they can show that the devise was upon some condition, or that there was some limitation made in the will in their favor.

It is not sufficient to show that the lands have been diverted from the use for which they were devised, or that they had not been enjoyed by the beneficiaries in the particular manner described by the testator; for where lands have been devised to a charitable use in fee simple, the heir

* 10 Pickering, 306. † 21 Id. 215.

‡ Phillips *v.* Medbury, 7 Connecticut, 568; Rogers *v.* Law, 1 Black, 253; Sackett *v.* Mallory, 1 Metcalf, 355; Wiggin *v.* Berry, 2 Foster, 114; Princeton *v.* Adams, 10 Cushing, 129.

§ White *v.* Fisk, 22 Connecticut, 31 (54).

‖ Fontain *v.* Ravenel, 17 Howard, 384.

¶ Dolan *v.* Baltimore, 4 Gill, 394; Gilman *v.* Hamilton, 16 Illinois, 225; De Themmines *v.* De Bonneval, 5 Russell, 289.

has no more interest in and no more right to the lands than he has when they are devised to an individual in fee simple, either directly or in trust. The public have an interest in the execution of public charities, and the beneficiaries have an interest, and if the directions contained in the will of the testator, either as to the manner of enjoyment or the objects who are to be benefited by his bounty, are departed from, either the public or the beneficiaries, if they are sufficiently certain, and have a sufficient vested interest, may have a remedy.

But the heir has no interest and no right, and therefore can have no remedy.

There are certain elementary rules that are to be applied in order to determine whether such a condition has been created.

1. That it depends upon the intention of the testator, to be gathered, not from particular phrases having a technical import, but from an examination of all the provisions of the will which can have any bearing on the matter in question.

2. That although the law allows testators to impose conditions subsequent, a breach of which will create a forfeiture, yet the law deems it improbable that testators will do so, and therefore leans against any construction which would result in such a condition. Courts will not give it that effect by construction.*

Words of proviso and condition will be construed into words of covenant when such is the apparent intention and meaning of the parties.†

Formerly courts of law did not recognize or admit the power of the court of chancery to enforce the performance of covenants and the execution of trusts, and therefore words which would not now be construed to import a strict

* Mary Portington's case, 10 Coke, 42 a; Worman *v.* Teagarden, 2 Ohio (N. S.) 380; Newkerk *v.* Newkerk, 2 Caines, 345; Wright *v.* Wilkin, 3 Law Times, 507; S. C., 4 Id. 221.

† Clapham *v.* Moyle, 1 Levinz, 155; S. C., 1 Keble, 842; Huff v. Nickerson, 27 Maine, 106; Shepherd's Touchstone, 122; 2 Parsons on Contracts, 23.

condition were allowed to have that effect when such a construction was necessary to give a remedy.*

Charities are favored in law, and they have always received a more liberal construction than the law will allow in gifts to individuals; and the same words in a will, when applied to individuals, may require a different construction when applied to a charity.†

But there is a preliminary question which, if answered one way, would seem to be decisive of the case in any aspect of it, and that question is, In whom was the legal title to the estate which was devised vested by the will?

We contend that the legal estate vested in the *trustees*, for the following reasons:

1. It is a rule of law that where trustees are named in a will it is not necessary that the testator should say in terms that he gives the legal estate to them. Nor that he should describe the quantity of legal estate which he intends to give them. If trustees are named the law looks to see what powers are conferred upon them and what duties are required of them, and then considers that it was the testator's intention to give them such a legal estate as would enable them to execute those powers and discharge those duties.‡

2. Such powers are conferred upon these trustees and such duties required of them as to make it necessary that they should take a legal estate, to enable them to execute those powers and perform those duties.

This will is inartificial, and, perhaps, confused, but reading the whole instrument,—taking all its provisions together,—we find that the testator appoints three of his friends *trustees*, that to these trustees he gives the possession of this real estate. The tankard is to be bought from the first rents issuing from his lands, "by my trustees after it comes to their possession." . . . He provides that they are to hold the estate and to rent the same, and receive the rents and profits, and to do all other legal acts for the well ordering

* Wright *v.* Wilkin, 9 Jurist, 715.
† Story's Equity, § 1165.
‡ Webster *v.* Cooper, 14 Howard, 499.

and management of said estate. The office, powers, and duties of the trustees, like the trust, are made perpetual.

The trustees, and they alone, are to have the possession of this estate. The trustees, and they alone, are to have the power to lease and manage it. They are to collect the rents. They are to pay them over to the society; and, of course, to enable them to discharge these duties, and execute these powers, "and to do all other legal acts for the well managing of the property," it was necessary that they should take the legal estate, and therefore the law will presume that the testator intended them to take it, and will declare accordingly.

In order to show that there has been any breach of condition by reason of the alienation of this land, the plaintiffs themselves must show that the legal title was vested in trustees.

The conveyance of this land purports to have been made by four persons, three of whom were trustees under this will, and a fourth was a gentleman nominated by the legislature, to represent the public interest. Upon these four persons, the legislature, by their act, undertook to confer the authority to make this conveyance, and when they make the conveyance they say they act by force of authority conferred upon them by the legislature.

The defendants contend that this act of the legislature was unconstitutional and void.

They are obliged to say so, for if the act was constitutional, then the sale was legal, and passed a title to the property.

If the act was unconstitutional and void, and the legal title was in the corporation, it still remains there, and there has been no sale, and consequently no breach of condition.

The corporation could be divested of the legal title only by a conveyance made in the name of the corporation, and under the seal of the corporation, by some person expressly authorized by the corporation to make it.

The agents of the corporation, as such, have no power to convey the real estate of the corporation. But this convey-

ance was not made by these persons under any authority conferred on them by the corporation. They did not affix the seal of the corporation. They say in the deed that they act by virtue of authority conferred upon them by the act of the legislature.

If then, by the terms of the will, the legal title vested in the society, and if the act of the legislature is void, the legal title still remains in the society, and there has been no breach of condition.

We have said that the plaintiffs, in order to recover, must show that the devise was upon some condition, the breach of which would be attended by a forfeiture.

We submit now, that upon the whole will, and looking at all its provisions, no such condition can be found. It is true that the word "*Provided*," in certain connections, and under certain circumstances, is competent to raise a condition, and it is equally certain that the same word, used in a different connection, and under different circumstances, will not create a condition. The court will therefore seek to discover the intention of the testator in this particular, not by considering what legal force some particular word in the will might have in the abstract, but by looking at all the provisions of the will, and the connection in which the word is used, and thus from an examination of the whole, will ascertain the sense in which the word was probably employed by the testator.

On the face of this will, it is plain that the Second or South Ecclesiastical Society were the objects of the testator's bounty, in respect to this land, and that he intended this bounty to be perpetual.

Now, if we keep in view this intention to create and perpetuate a trust for this society's benefit, a trust which he expected would endure forever, and consider that it was also his purpose to give very particular directions for the administration of it, and then observe the connection in which this word "provided" is used, it will be evident, that the testator could not have used the word in the sense set up by the plaintiffs.

The testator, in the beginning of the will, after the decease of his sister, Mrs. Whitman, devises his real estate except, &c., to the Second or South Ecclesiastical Society, "to be and remain to the use and benefit of said Second or South Ecclesiastical Society, forever." But the society is not to have the management and control of this property: no power to lease it and receive the rents and profits directly. The entire management of it the testator gives to certain trustees to be appointed by him, and these trustees are to execute their trust according to his directions; therefore the testator, after the words last quoted, and in the same sentence, proceeds to give those directions, and says:

"Provided, that said real estate be not ever hereafter sold or disposed of, but the same be leased or let, and the annual rents or profits thereof applied to the use and benefit of said society, and the letting, leasing, and managing of said estate to be under the management and direction of certain trustees hereafter named by me, and their successors, to be appointed in like manner as hereinafter directed."*

It will be observed that every word here quoted is directly and essentially connected with this word "provided," which is supposed to create the condition. If there is *any* condition here, then it is plain that there are *several* conditions, and if a breach of one would cause a forfeiture of the estate, it must be admitted that the same result would follow from a breach of any other. The plaintiffs say there is a condition against alienation, the breach of which will cause a forfeiture of the estate. If so, there is a condition that the estate shall be leased or let, and also that the annual rents and profits shall be paid to the society, and also that the leasing, letting, and managing of the estate shall be under the direction of trustees appointed by the testator, "*in manner as hereinafter directed*," the breach of either of which conditions would likewise cause a forfeiture of the estate; yet it is most improbable that the testator should have devised

* The directions are found in the next paragraph. See *supra*, p. 121.

this estate to this society, and endeavored to impress upon his bounty perpetual duration, and should have hedged it about by so many careful and minute directions as to its control and management, and should at the same time have intended that the society should forfeit the estate in case his trustees whom he had appointed to control and manage the estate, and in whom the legal title was vested, should be guilty of a breach of trust in violating any of these provisions. Such could hardly have been the intention. The true interpretation, in this particular, is this: The testator here creates a trust for the letting, leasing, and managing of this estate, and appoints trustees. It was his intention to give directions to those trustees for the management of it; they were not to sell but only to lease it, and the language which is supposed to raise the condition, occurs in the course of the directions he gives to his trustees, and was not used with any intention of creating a forfeiture in case the trustees should fail to obey those directions, or commit a breach of trust. Thus we find these words:

"And said trustees and their successors shall have full power to let and lease said estate, and to do all other legal acts for the well ordering and managing of said estate, under the *limitations and restrictions* as hereinbefore expressed."

Now these limitations and restrictions are, that they should not sell, that the estate should not be divided in case part of the society should secede, that they shall lease the estate, but shall not give a lease for more than thirty years. Undoubtedly he desired that these directions should be strictly obeyed, but that the testator intended that the society should forfeit the estate in the event that the trustees should disobey any of these directions, cannot be maintained with any plausibility.

Let us advert to precedents. In the recent Massachusetts case of *Chapin* v. *Harris*,* a writ of entry was brought to recover certain real estate and water power, the title to which

* 8 Allen, 594.

the plaintiff claimed had reverted to him by reason of the breach of a condition annexed to the land. The clause in the deed which was claimed to raise the condition, was as follows:

"Provided said draw shall be so built as to answer for a street to the railroad, and Spring Street is to be opened three rods wide across said farm, to the south line of said railroad, and the said Stearns is to make the road."

The court decided that this clause did not raise a condition, the breach of which would be attended by a forfeiture of the estate, and among other things they say:

"It is true, as the demandant contends, 'provided' is an apt word to create a condition, and it is often used by way of limitation or qualification only, especially when it does not introduce a new clause, but only seems to qualify or restrain the generality of a former clause."

Such is the connection in which the word is used, and such its office in the case at bar.

A recent English case is *Wright* v. *Wilkin.** A testator, after bequeathing legacies, devised to the defendant and to his heirs, &c., "all the real estate," and all the "residue of his personal estate," *upon this express condition:*

"That if my personal estate should be insufficient for the purpose, they do and shall within twelve months after my decease, pay and discharge the legacies before bequeathed, and I feel confident that he will comply with my wish, it being my particular desire that the above legacies shall be paid, and I hereby make chargeable all my said real and personal estate with the payment of the aforesaid legacies."

It was held in the K. B.,† and afterwards on appeal in the Exchequer Chamber, that the devise was not upon a condition, the failure to comply with which created a for-

* 2 Best & Smith, 232, and see Mayor, &c., of South Molton *v.* Attorney-General and others, 5 House of Lords Reports; 14 Bevan, 357.

† 2 Best & Smith, 232.

feiture, but merely a charge or trust in favor of the legatees, and that although the words "upon this express condition," if they had stood alone, would have created one, yet when the testatrix went on to say, that she trusted to his good faith and honor to pay them, and very much desired that they should be paid, and when afterwards she said she made them a charge upon her personal and real estate, that was inconsistent with the idea that she intended the property should be taken away by condition, because there was a trust to be fulfilled, and that inconsistency was so great that they held that these words, "upon this express condition," must yield, and the trust must be fulfilled, but the legal estate must remain unaffected by the words of condition.

Important deductions are to be drawn from these decisions. They say (as we submit the law clearly is),

1st. That the case is not to be decided by looking to particular provisions in the will, but by looking at the whole will to ascertain the intention of the testator.

2d. That words much stronger than those used in the will in question, will be controlled, if the court can see that there was an intention to create a trust, and that the trust will be defeated if the words shall be held to create a condition instead of a trust.

That there was an intention to create a trust here, does not admit of controversy. The testator appoints trustees and provides for perpetuating the trust, for the use and benefit of the society. Could it then have been his intention at the same time that he created this trust, and said it was to be perpetual, to insert a provision by which it could be defeated at the will of the trustees?

II. If this is a condition it is void as being in restraint of alienation.

If this was an ordinary devise, either to an incorporation or an individual, a condition against any alienation of the property devised would be merely void as contrary to the policy of the law.

This is not a devise under the statute of Connecticut, as

argued on the other side. If it were, that statute has not empowered devisors to make such conditions.

1. Upon the question whether this devise is within the statute of Connecticut we rely upon *Seymour* v. *Hartford*.* That was the case of a deed of land to this same society by Anne Burnham, dated July 7th, 1762. The land was conveyed in these words:

"I therefore by these presents fully, freely, and absolutely give, grant, release and confirm unto the said South Church or Society called Congregational, and to their successors forever, all the aforesaid house, homestead, and premises, with their appurtenances, to have and to hold unto them and their successors forever, as a good, sure and indefeasible estate in fee simple, without any manner of condition."

A part of the land included in this deed came by sundry conveyances to the plaintiff. The town of Hartford had laid a tax on it, and compelled him to pay the tax. The plaintiff then brought this action to recover back the money thus paid, claiming that this land was not liable to taxation, on the ground that by the deed of Anne Burnham it was granted "for the maintenance of the ministry of the gospel," or for some other public and charitable use, within the meaning of the statute of 1702, and therefore by the express terms of that statute was exempt from taxation.

This claim was not sustained by the court, and it was decided that the mere fact that the conveyance was to an ecclesiastical society did not bring it within the provisions of the statute. That the statute requires the grantor to dedicate the property to some of the particular uses therein specified, and the general character and corporate powers of an ecclesiastical society do not imply that it is dedicated to any of those uses; for whatever implication might be drawn from the general character and limited powers of the corporation at the time when the grant is made, yet that character and those powers might be thereafter essentially

* 21 Connecticut, 481.

changed by the legislature. That the statute requires the grantor to declare the use, and he cannot leave it to the law to do it for him.

It was therefore decided in that case that a grant of land to this society, or to any ecclesiastical society, without any other declaration of the use than may be implied from the character of the grantee, is not within the statute, because it is not a dedication or sequestration of land to any of the uses specified in the statute. That case is decisive of the case at bar, for the material facts are the same in both.

But if the devise were within the statute of Connecticut, a condition in restraint of alienation would not be a valid condition, the breach of which would work a forfeiture, because that statute does not authorize a grantor or devisor to impose such a condition.

In order to show that it does, the plaintiffs must maintain and must show to the court that this statute not only repealed the statutes of mortmain existing in England before the emigration of our ancestors, and which upon general principles would be brought over to this country by them, but authorized any proprietor of land to sequester it forever, to render it inalienable forever, and to take it out of commerce forever.

This, we submit, cannot be shown.

In *Bible Society* v. *Wetmore*,* it was decided that this statute of 1702 was virtually a re-enactment of the statute of Elizabeth.

Under the statutes of mortmain a devise to a corporation or to the use of a corporation, whether lay or ecclesiastical, was void.†

The Connecticut statute, commonly called the statute of 1702, was passed at the October session of the General Court, 1684, and was as follows:

"For the encouraging of learning and the promoting of publique concernments, it is ordered by this court, that for the

* 17 Connecticut, 181.

† 2 Kent's Com., 10th ed., 342; Shelford on Mortmain, 350.

future, that all such houses and lands as are, or shall, by any charitable persons, be given or purchased for, or to help on, the maintenance of the ministry or schools, or poor, in any part of this colony, they shall remayne to the use or uses for which they were given forever, and shall be exempted out of the list of estates, and be rate free, any former law or order notwithstanding."

The history of this law is instructive upon the question of its interpretation, and shows, we think, that we are correct as to the object of it.

The charter granted by Charles II constituted the only title of the colony to the lands within its limits, the Indian titles which they had acquired from time to time previous to the grant of the charter being, as Governor Andross said, no better than "the scratch of a bear's paw."

The colonial legislature or General Court had, however, before the grant of the charter, assumed to make numerous and large grants of land to townships, individuals, and for public, charitable, and pious uses. The charter conveyed to the colony in fee simple all the lands within its boundaries, but at the time the statute in question was passed, the grants made by the colonial legislature before the charter was granted had not been confirmed. The efforts which were being made to deprive them of their charter created the greatest anxiety and alarm in the colony. While they were in no danger of losing their charter, a confirmation of these grants by the colonial legislature was not deemed important; as soon as the people discovered that they were in danger of losing their only muniment of title, they deemed it important to confirm them by law, while they yet had power to do so.

Under these circumstances the statute in question was passed, at the session of the General Court held in October, 1684.

In February of the ensuing year, James II succeeded to the crown, and at the following May session of the General Court, another statute was passed, of the following tenor:

"This court, for the prevention of future trouble, and that

every township's grants of lands, as it hath been obtained by gift, purchase, or otherwise, of the natives, or grant of this court, may be settled upon them, their heirs, successors and assigns forever, according to our charter granted by his late majesty of happy memory; this court doth order that every township in this colony shall take out patents for their said grants of the Governor and Company, &c.

"The like course may be taken for all farms granted to any person or persons whatever within this colony."*

The fears of the colony were well founded, for in June of the same year, a *quo warranto* was issued to the Governor and Company of Connecticut, citing them to appear before the king within eight days of St. Martin, but this writ was not served until after the day named for their appearance had passed. On the 21st of December of the same year another writ was issued, citing them to appear before the king within eight days of the Purification of the Blessed Virgin.

These facts, some of which are matter of history and others gathered from the records of the colony, show beyond any question, that the object of this statute was to confirm existing grants to the uses specified in the statute, and to authorize future grants to the same uses by exempting them from the operation of the English statutes of mortmain, and placing them on the same footing merely as grants of land to individuals, or for any other lawful purpose, and not with any view to render lands so granted forever inalienable.

It is said that because this statute was in conflict with the English statutes of mortmain, and might on that ground be made an additional cause of complaint against the colony, it was not recorded with the other public acts at the time it was passed, but withheld from record for several years, until the agitation in respect to the charter had ceased. It first appeared among the public acts in the revision of 1702, and thus came to be called the statute of 1702. In the revision the phraseology of the act was slightly changed.†

* 3 Trumbull's Col. Rec. 179.

† See *supra*, p. 120. REP.

The words of perpetuity employed in it are those only which in substance are employed in all deeds and grants, and such as it is customary and proper to employ where titles are to be confirmed by statute, and where natural or artificial persons incapable of holding lands are authorized by law to do so.

Our views in regard to the object and true construction of this statute are further confirmed by the history of a case that arose very soon after the act was passed.

In 1689, John Liveen, of New London, died, leaving a will made just before his decease, by which he bequeathed and devised the greater part of his estate to the "ministry of New London," to be improved for them by his executors who were General Fitz John Winthrop and Major Edward Palms. The executors treated the devise as void, on the ground that it was within the English statutes of mortmain, and they contended that the Connecticut statute of 1684 was void, because in conflict with the laws of England.

A suit was brought against the executors by the town of New London on behalf of the ministry, and the town recovered judgment. The cause was taken by appeal to England, and was in litigation there for several years, but the records of the colony do not disclose the result.

We have already shown that the Connecticut statute of charitable uses has been held by the Supreme Court of that State to be substantially a copy of the statute of Elizabeth concerning charitable uses. Both should therefore receive the same construction; but it has never been held in England that lands given to charities were thereby rendered inalienable. On the contrary, it has always been the practice of the Court of Chancery to order a sale of such lands when a sale is shown to be for the interest of the beneficiaries.*

The Connecticut statute being a re-enactment of the statute of Elizabeth, should, as we have said, upon general prin-

* Parke's Charity, 12 Simons, 329; Ex parte the Governor, &c., 13 English Law and Equity, 145; Attorney-General *v.* Hungerford, 2 Clark & Finelly, 145; Attorney-General *v.* Kerr, 2 Bevan, 428; Archbishop of York's Case, 17 Id. 495; Re Colsten Hospital, 27 Id. 17.

ciples receive the same construction, and it always has received the same construction by the legislature of the Colony and of the State, in the exercise of the jurisdiction in regard to the sale of charity lands, exercised in England by the Court of Chancery.

The records of the State show that between the years 1670 and 1862, five hundred and seventy-five private acts, authorizing the sale of lands, were passed. A great number of these acts were for the sale of charity lands.

Charities are under the perpetual guardianship of the sovereign power. The general superintendence of them in England is delegated to the Court of Chancery.*

In Connecticut this superintendence is mainly exercised by the legislature. In Connecticut, as in England, it is a rule of public policy to require trustees for a charity to obtain the assent of the public authority exercising this guardianship to a sale of charity estates, in order to protect the charity against imprudent sales. This alone is the object of the law. It is a rule established for the protection of the *cestui que trust.*

Lands, as we have endeavored to show, are not rendered inalienable by being given to charitable uses, but set apart as constituting a fund to be used in a provident and judicious manner, to promote the object for which they are given, and this provident and judicious manner as much requires a sale, when by chance of circumstances the property has become unproductive, but can be made productive by a sale, as under other circumstances it requires the property to be preserved and kept.

When the statute says, therefore, that lands given to charitable uses "shall forever remain to the uses to which they have been or shall be given or granted, according to the true intent and meaning of the grantors, and to no other use whatever," it is to be understood not as meaning that the land should never be sold, not as giving the donor power to say that, but as providing and declaring that the fund shall never be diverted from the use to which it may be dedi

* Vidal *v.* Girard's Executors, 2 Howard, 195.

cated, subject, however, to such changes from time to time as the interest of the society may require.

A statute which rendered all charity lands forever inalienable, or which gave the donor power to render them so by imposing conditions against alienation, would be so clearly contrary to public policy, that the court would never so construe it if it admitted of any other rational interpretation.

We say in the next place that it cannot be presumed that this testator intended to impose a condition against a legislative sale, even if he did against a sale by his trustees or by the society.

When this will was made the charter of Charles II was the organic law of the State. Under this charter the General Assembly had the same power of legislation as the Parliament of Great Britain.*

The testator knew that whatever his wishes might be in regard to a sale, the legislature had power to authorize a sale, and that a sale by authority of law would not work a forfeiture.

It must therefore be assumed that he made his will and imposed this condition (if it be a condition) in subordination to the power of the legislature to order a sale.†

III. Assuming that this was a conditional devise, and that the condition was valid if, as we have endeavored to show, at the time when this will was made, and when the trusts of the will took effect, the legislature had power to authorize a sale, and to control, in this respect, the intention of the testator, it must be admitted that the legislature possessed the same power when it did authorize a sale, unless in the meantime it had been deprived of it by some constitutional restriction. It is for the plaintiff to show that by some provision in the Constitution of the United States or of the State of Connecticut, the legislature of Connecticut was prohibited from the exercise of this power, and that the act in question was therefore void.

* Starr *v.* Pease, 8 Connecticut, 548; Pratt *v.* Allen, 13 Id. 119.

† Clark's Executors *v.* Hayes, 9 Gray, 429.

Courts will not declare an act of the legislature void, unless it is a clear and unequivocal violation of the Constitution.*

The constitution of the State of Connecticut is not a grant of legislative power; it is merely a limitation imposed upon pre-existing power.†

Assume that it is beyond the scope of legislative power to pass a law taking away or impairing a vested right of property, and that upon general principles, such a law would be void, the question remains, whether the act in question is of that character.

A right of property, in order to be within the protection of this principle, must not only be a vested right (not a mere possibility), but it must also be a beneficial interest. If, as we assert, the legal title of the land vested in the trustees, the heirs of the testator could have no beneficial interest in a breach of condition by the trustees.‡

Suppose there had been no act of the legislature, and the heir at law had entered for condition broken, all he would gain by an entry would be the naked right to hold the legal estate for the beneficiaries till a court of chancery should exercise the power of appointing new trustees.

Therefore, if the court should come to the conclusion that the legal estate was vested in these trustees to hold upon trust, and that there was a breach of a condition attached to that legal estate, and an entry by which the heir vested himself with that legal estate, but for the act of the legislature, there cannot be the least difficulty in saying that the legislature might control that interest either before or after breach.

But if the court should come to the conclusion that the legal estate vested in the society, and not in the trustees, we insist that the heirs at law of the testator, by virtue of a condition against alienation, would not in that case, before con-

* Cooper *v.* Telfair, 4 Dallas, 114; Sharpless *v.* The Mayor, 21 Pennsylvania State, 160.

† Starr *v.* Pease, 8 Connecticut, 548; Pratt *v.* Allen, 13 Id. 119.

‡ Sanderson *v.* White, 18 Pickering, 333.

dition broken, have an interest in the property beyond the control of the legislature.

Admitting that the power of the legislature is so far limited and restricted by general principles of law that it cannot, by any act of legislation, destroy or impair a vested and beneficial right in property, it would not follow that the act in question was void.

The plaintiffs, in order to show to the court that this act was void, must go much further than this, and maintain that the power of the legislature is so limited and restricted that any act is void, the effect of which would be to destroy or impair (for whatever cause) not a vested and beneficial interest in property, but the most remote and contingent interest. The interest of which they say this act deprives them was both contingent and remote, a mere possibility of reverter, and so little regarded by the common law that it could not be conveyed or devised.*

This the plaintiffs cannot show.

It cannot be maintained that the legislature of Connecticut has any less power to unfetter estates by cutting off remote and contingent interests of this character than the Court of Chancery in England.

Yet in *Platt* v. *Sprigg*, reported by Vernon,† trustees were ordered to join in cutting off a contingent remainder to the heir at law. Again: In *Fruwin* v. *Coulton*, in 1st Equity Cases Abridged,‡ also in *Winnington* v. *Foley*, in 1st Peere Williams.§ *Tipping* v. *Piggot*, in 1st Equity Cases Abridged,‖ is a very strong case. There the trustees, without any order of the court, joined in making a new settlement, thereby cutting off a contingent remainder to the heir at law. On a bill filed by the heir at law to have this new settlement set aside the court declined to set it aside, the chancellor saying, that although it was an imprudent thing for the trustees to do without the sanction of the court, yet as he approved of the settlement he would not disturb it.

* Smith *v.* Pendell, 19 Connecticut, 111; 4 Kent's Com. 11, 127, 447.
† Vol. 2, p. 303. ‡ Page 386. § Page 536. ‖ Page 385.

In these cases the right of which the heir at law was deprived by the court was a mere naked possibility.

In this case the right of which he has been deprived by the legislature was the same.

In this country, laws affecting such contingent rights in property have never been held to be beyond the scope of legislative power. Cases sustaining such laws are very numerous. We shall refer to only a few of them.

Thus it has been held that the legislature might take away a contingent right of dower or courtesy.*

Also, the contingent right of the husband in the choses in action of the wife.†

Also, the possibility of reverter to the owner of the fee, in land taken for a street in a city, on the ground that the interest thus taken is too remote to be deemed an interest, in property of any value.‡

So an act of the legislature by which an estate in fee tail was declared to be a fee simple in the grantees of the tenant in tail, who were infants, and which authorized a sale of the land, was declared valid.§

So a law empowering a court of equity to order the sale of real estate owned in common, where partition would not, in the opinion of the court, be advantageous to the owners.‖

And so, a statute validating the levy of execution in cases where the levy was void, for the reason that the officer had included in his return fees not allowed by law.¶

It must be admitted that the act under consideration in the last case was not only retrospective, but affected essentially vested rights of property; yet inasmuch as those rights of

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* Strong *v.* Clem, 12 Indiana, 37; Thurber & Stevenson *v.* Townsend & Wilbur, 22 New York, 517.

† Barbour *v.* Barbour, 46 Maine, 9; Clarke *v.* McCreary, 12 Smedes and Marshall, 347.

‡ People *v.* Kerr, 27 New York, 188.

§ De Mill *v.* Lockwood, 3 Blatchford, 56.

‖ Richardson *v.* Monson, 23 Connecticut, 94.

¶ Beach *v.* Walker, 6 Id. 190, and see Goshen *v.* Stonington, 4 Id. 209; Mather *v.* Chapman et al., 6 Id. 54.

property were not unjustly affected, the act was declared to be valid.

So a private act of the legislature, divorcing a woman from her husband, was held to be valid, though its effect was to deprive a creditor of the husband of a vested estate in the lands of the wife acquired by the previous levy of an execution on the husband's estate therein.*

These last three cases arose in Connecticut. In Massachusetts and in Pennsylvania† it has been decided that a law which changed the tenure of estates by declaring all joint tenancies to be tenancies in common, was constitutional and valid.

Private acts authorizing tenants for life and trustees to support remainders, to sell real estate devised, and convert the same into personal estate, to be held subject to the same provisions and trusts as the land, are numerous, and have always been sustained, though in opposition to the will of the testator; and although the effect was to compel those in remainder to take personal estate instead of the real estate devised, and in which they had both a vested and valuable interest.‡

It cannot be denied that in each of the cases just referred to, and given in the note below,‡ the law took away or modified and controlled interests in property more immediate and tangible than any which the plaintiffs had under the will in question.

From the whole tenor of Mr. Stanley's will it is apparent that this society was the sole object of the testator's bounty in respect to the land in question, and that this condition (if there be a condition) was imposed for the purpose of protecting the society in the enjoyment of it, and not to enable the heir at law to deprive them of it.

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* Starr *v.* Pease, 8 Id. 541.

† Holbrook *v.* Finney, 4 Massachusetts, 568; Annable *v.* Patch, 3 Pickering, 363, and Bambaugh *v.* Bambaugh, 11 Sergeant & Rawle, 191.

‡ Norris *v.* Clymer, 2 Barr, 284; Blagg *v.* Mills, 18 C. C. R. 427; Sohier *v.* Massachusetts General Hospital, 3 Cushing, 483; Rice *v.* Parkman, 16 Massachusetts, 326; Clarke *v.* Van Sarlay, 15 Wendell, 436.

There is no limitation in favor of his heirs at law, no devise over, nor any other provision in the will tending to show that the testator ever intended or expected that his heirs at law would succeed to the estate in any event.

From the authorities already cited it appears that it is the constant practice of the legislature where the power has not been delegated by the legislature to the courts, and of the courts where the power has been delegated, to authorize a sale of the lands of infants, idiots, lunatics, and others, who are not *sui juris*. This is done in the exercise of a tutelary authority on the part of the legislature as *parens patriæ*. C. J. Parker, of Massachusetts, says that "this power must rest in the legislature in this commonwealth, that body being alone competent to act as the general guardian and protector of those who are incompetent to act for themselves."*

Now the power to authorize the sale of the lands of a charity is derived from the same source, and rests upon the same principles. A charity is never, so to speak, *sui juris;* it is under perpetual guardianship, and its guardian is the State. It is for this reason that the trustees are *primâ facie* guilty of a breach of trust in selling the estate of a charity without authority derived from the State. And we submit that it is not in the power of a donor to a charity so to fetter the State as to prevent the sovereign power from authorizing a lawful disposition of the estate given to the charity, its ward, when it is clearly made to appear that it will be for the interest of the charity. This never has been done, and we contend that it cannot be done. We do not mean to assert that the State may divert the fund from the use to which it is given. What we say is, that the State may authorize such modal changes in the property from time to time as may be found to be necessary and proper, and that

* Rice *v.* Parkman, 16 Massachusetts, 328; and see Sohier *v.* Massachusetts General Hospital, 3 Cushing, 483; Blagge *v.* Mills, 1 Story, 426; Davison *v.* Johonnot, 7 Metcalf, 388; Clarke *v.* Van Surlay, 15 Wendell, 436; Cochran *v.* Van Surlay, 20 Id. 365; Bambaugh *v.* Bambaugh, 11 Sergeant & Rawle, 191; Estep *v.* Hutchman, 14 Id. 435. See also Leggett *v.* Hunter, 19 New York, 445.

it is not in the power of a donor to provide that this shall not be done.

Even if this were a law impairing the obligation of any contract, how could it avail the plaintiffs? If there is any compact it is that the land shall forever be devoted to pious or charitable uses. Is the heir at law asking to have this compact observed and performed? Is he intending to devote the land to those uses? Clearly not; he is seeking to recover the land, not for the use of the society, in order that the supposed compact may be executed, but for his own private use.

The courts of Connecticut, in some early cases, involving the right of the State to tax such land, may speak of the exemption contained in the statute as a compact or pledge on the part of the State that lands given should be forever exempt from taxation. These decisions have, we think, recently been overruled, and in *Brainard* v. *Town of Colchester*,* the court say, that "there is nothing in the language of the statute which makes it differ from ordinary statutes specifying what should or should not be subject to taxation."

The notion that any general law of the State is in the nature of a compact between the State and the citizen, is erroneous, and there is no force in the suggestion that this statute of 1702 created anything in the nature of a compact between the State and any one.

The power which the legislature of Connecticut exercised in this case it has exercised unquestioned for two hundred years, and this in itself would be a sufficient vindication of its right to continue to exercise it.

There is an additional consideration, growing out of the long-continued practice of the legislature in passing such acts as this, of so much importance as to have been deemed worthy of special consideration by courts in similar cases. That consideration is the effect which a decision against the validity of this act would have in unsettling other titles to land. In *Davidson* v. *Johonnot*,† the court declares that

* 31 Connecticut, 409.

† 7 Metcalf, 388.

the vast amount of property now held under titles derived from similar legislative acts should lead us to proceed most cautiously in the investigation of this subject, and to deal with it in a liberal spirit when called upon judicially to declare that this course of legislation conflicts with the constitution, and that all the special acts of this character are of no validity. And in *Norris* v. *Clymer*,* a case in the Supreme Court of Pennsylvania, Chief Justice Gibson, speaking of the consequences in his own single State, says:

"It is not above the mark to say that ten thousand titles depend on legislation of this stamp, for many of those statutes contained provisions for more than twenty distinct estates, and could not the ruin that would be produced by disturbing them be arrested by anything less than a convention to effect a constitutional sanction of them, the consummation would not be dearly bought."

Mr. Justice NELSON delivered the opinion of the court.

This is an action of ejectment by the heirs of William Stanley to recover for breach of condition a tract of land, situate in the city of Hartford, devised by the ancestor to an ecclesiastical society and their successors, on the 7th October, 1786; and one of the principal questions in the case is whether or not the devise was upon a condition, which, when broken, would let in the heir, or was a limitation or trust, the breach of which would work no such consequence.

The material parts of the will are as follows:

"I give and devise the whole of my real estate, of every kind and description, . . . unto the Second or South Ecclesiastical Society, in the town of Hartford, to be and remain to the use and benefit of said Second or South Society and their successors forever." Then comes the condition or limitation upon the devise: "Provided, that said real estate be not ever hereafter sold or disposed of, but the same be leased or let, and the annual rents or profits thereof applied to the use and benefit of said society, and the letting, leasing,

* 2 Barr, 284.

and managing of said estate to be under the management and direction of certain trustees hereafter named by me, and their successors, to be appointed in manner as hereafter directed." And, after appointing three trustees, and prescribing the manner of the appointment of their successors, and prescribing also their authority and duties, the testator adds: "And the aforesaid real estate, or any part thereof, shall not be rented or let for a longer term or lease than thirty years before the expiration of the same." And another part of the will is as follows: "And, in case said Second Society shall ever hereafter be divided, it is my will that my real estate be not divided, but remain entire and forever to the said Second Society; and such part of said Second Society as shall hereafter secede or be divided therefrom are hereby excluded from all the use and benefit of my real estate, so devised as aforesaid to the said Second Society."

These are the several clauses in the will relating to the management of the estate, following the proviso, and which, taken together, constitute the conditions, limitations, or qualifications annexed to it, and to the enjoyment of the estate by the society.

All of them may not be equally important, but we are bound to assume that each and all of them were regarded by the testator as material in the regulations which he has seen fit to adopt and carry into his will.

These conditions or limitations following the proviso are briefly—

1. The estate is not to be sold or disposed of, but to be leased by trustees, and the rents paid over to the society.

2. The leases are not to exceed thirty years in any one term.

3. The estate is not to be divided in the event of a division of the society; and—

4. It is to be managed and directed exclusively by trustees who are appointed in the will, and by their successors; the surviving trustees to appoint when a vacancy happens.

The question is, whether these are strict common law conditions annexed to the estate, a breach of which, or of

any one of them, will work a forfeiture, defeat the devise, and let in the heir; or, whether they are regulations for the guide of the trustees, and explanatory of the terms under which he intended the estate should be managed, with a view to the greatest advantage in behalf of the society?

The difference between the two interpretations and the consequences flowing from them, is very material. As we have seen, a condition, if broken, forfeits the estate, and forever thereafter deprives the society of the gift; and not only this, but the heirs become seized of the first estate, and avoids, of course, all intermediate charges or incumbrances, and takes also free and clear all the expenditures and improvements that may have been laid out on the property.

On the other hand, if these limitations are to be regarded as regulations to guide the trustees, and explanatory of the terms upon which the devise has been made, they create a trust which those who take the estate are bound to perform; and, in case of a breach, a court of equity will interpose and enforce performance. The estate is thus preserved and devoted to the objects of the charity or bounty of the testator, even in case of a violation of the limitations annexed to it. A fraudulent or unfaithful trustee will be removed, and another appointed to his place. A diversion of the fund will be arrested, and an account compelled for any waste or improvident use of it.

Mr. Sugden, speaking of conditions, observes, that what by the old law was deemed a devise upon condition would now, perhaps, in almost every case, be construed a devise in fee upon trust, and, by this construction, instead of the heir taking advantage of the condition broken, the *cestui que trust* can compel an observance of the trust by a suit in equity.*

In the recent case of *Wright* v. *Wilkin*, in the Queen's Bench, the court approved of this observation of Mr. Sugden, and in that case construed a devise, *on express condition in terms*, looking through the whole will, and regarding the intent of the testator as falling within this rule. The court

* 1 Sugden on Powers, 123, 7th London ed.

relied very much upon the words following the condition as explaining away the strict common law meaning of the term, and as importing a meaning inconsistent with a strict interpretation. This judgment was affirmed in the Exchequer.

It is true that the word "proviso" is an appropriate one to constitute a common law condition in a deed or will, but this is not the fixed and invariable meaning attached to it by the law in these instruments. On the contrary, it gives way to the intent of the parties as gathered from an examination of the whole instrument, and has frequently been thus explained and applied as expressing simply a covenant or limitation in trust. Several cases were referred to, on the argument, to this effect, and many more might have been added.

In looking at the explanatory part of the will in this case, it will be seen that the testator had in his mind a settlement of the estate in trust for the beneficiaries, and with this view established a code of regulations to guide the trustees in the management of it that would continue through all time, and which is wholly inconsistent with the idea that the estate might be defeated by a breach of any one of them. After appointing the three trustees, he adds: "I do give authority and power to nominate their successors to said trust, which is to be done in the manner following: That immediately after my decease they . . . shall appoint some meet persons, . . . as the occasion may require, into said trust or office, so be it that at no time more than three persons shall act in said trust or office; . . . and all persons, successors hereafter to said trust and office, shall at all times in future have like power to superintend, direct, and appoint their successors in said trust and office, and to perpetuate said trust for the benefit and use of said society, as occasion may from time to time require." And he closes by saying that the said trustees and their successors shall have full power to lease the estate, and "do all other legal acts for the well-ordering and management of said estate, under the limitations and restrictions as hereinbefore expressed."

This interpretation of the devise was sought to be avoided

on the argument, by separating all the limitations and restrictions in respect to the enjoyment of the estate from *that* forbidding the sale or disposal of it, thereby conceding that they were limitations in trust, but insisting that the other constituted a condition for a breach of which a forfeiture was incurred. But the difficulty in the argument is that the same clause embraces not only the prohibition to sell, but enjoins the duty to lease, and the application of the rents to the use of the society, and also the management of the estate by the trustees, and which management contains the prohibition to lease for terms not exceeding thirty years. The separation is, therefore, not only arbitrary, but in disregard of the express words of the testator. The injunction to lease is as positive as that not to sell, and both are embraced in the same clause; and if the term "proviso" is to be construed as a condition in respect to the one, it must consistently be so construed in respect to the other. And the same observations are also applicable to the other limitations.

This devise to the Ecclesiastical Society is in some respects peculiar. The possession, management, and control of the estate are given exclusively to the trustees, who, according to the regulations, are invested with power to perpetuate their authority indefinitely. The only active duties of the society—the beneficiaries—is to receive the rents and profits for their own use and benefit. Of course, the trustees, subject to the limitations and restrictions annexed to the enjoyment of the estate, possess all the power and dominion over it that belongs to an owner, and are bound to take the same care of it and exercise the same attention, skill, and diligence in its management that a prudent and vigilant owner would exercise over his own. They are bound to rent the property, collect the rents, and pay them over to the society, to protect the possession, prevent waste, see that the taxes are paid, and, in the words of the testator, "do all other legal acts for the well-ordering and management of the estate." Being thus in the exclusive possession and control of the property, and having devolved upon them

the manifold duties incident thereto, it is quite clear that the trustees are clothed with the legal estate.

Mr. Jarman states the general principle: "The mere fact that they are made agents in the application of the rents is sufficient to give them the legal estate, as in the case of a simple devise to A. upon trust to pay the rents to B.; and it is immaterial, in such case, that there is no direct devise to the trustees, if the intention that they shall take the estate can be collected from the will. Hence, a devise to the intent that A. shall receive the rents and pay them over to B. would clearly vest the estate in A."* The same effect where the duty is devolved upon them to pay taxes and make repairs.† And it is laid down generally that whenever a trust is created a legal estate sufficient for the execution of the trust shall, if possible, be implied.‡ Indeed, it would be very difficult, if not impossible, for the trustees in the present case to execute their various and multiplied duties over this property without being clothed with the legal estate, under a mere naked power.

The distinction between a power and a trust is marked and obvious. Powers, as Chief Justice Wilmot observed, are never imperative; they leave the act to be done at the will of the party to whom they are given. Trusts are always imperative, and are obligatory upon the conscience of the party intrusted.§

Our conclusion is, that the construction urged by the plaintiffs, of the will, importing a condition, a breach of which forfeits the devise, is not well founded.

There is another ground of defence to this action that we are of opinion is equally conclusive against the plaintiffs.

On an application of the society and trustees to the legislature of Connecticut to be permitted to sell the premises in question, setting out the reasons at large in support of it, the application was granted, and an act passed accordingly.

* 2 Jarman on Wills, 202, Perkins's Ed. † Id. 201, and cases cited.

‡ Lewin on Trusts and Trustees, 164.

§ 2 Sugden on Powers, 588.

This act authorized the trustees, together with a third person, to sell the lands in the manner therein prescribed, and to invest the proceeds at interest, in bonds and mortgages of real estate of double the value of the amount invested, appropriating the interest to the use of the society, in the same manner, and subject to the same use, as the rents or income of said property are by the will required to be appropriated.

The defendant is in possession under the title derived from a sale in pursuance of this act of the legislature.

In England, and in this country where a court of chancery exists, a charity of the description in question is a peculiar subject of the jurisdiction of that court, and in cases of abuse, or misuse of the charity by the trustees or agents in charge of it, this court will interpose to correct such abuses, and enforce the execution of the charitable purposes of the founder. So, by lapse of time, or changes as to the condition of the property and of the circumstances attending it, have made it prudent and beneficial to the charity to alien the lands, and vest the proceeds in other funds or in a different manner, it is competent for this court to direct such sale and investment, taking care that no diversion of the gift be permitted. Lord Langdale, the master of the rolls, observed, in *The Attorney-General* v. *The South Sea Company*,* "It is plain that in ordinary cases a most important part of this duty is to preserve the property, but it may happen that the purposes of the charity may be best sustained and promoted by alienating the specific property. The law has not forbidden the alienation, and this court, upon various occasions, with a view to promote interests of charities, has not thought it necessary to preserve the property *in specie*, but has sanctioned its alienation."†

This power, in the State of Connecticut, it appears, is exercised by its legislature, as in the present instance. Many acts of the kind have been referred to in the argument, ex-

* 4 Bevan, 458.

† See also Lewin on Trusts and Trustees, 373, and cases; and Shelford on Law of Mortmain, 687.

tending through a long series of years down to the present time.

We cannot doubt that the power exists in the legislature, and it is not for this court to revise the facts upon which it has seen fit to exercise it.

Mr. Justice DAVIS dissented.

JUDGMENT AFFIRMED.

THE DASHING WAVE.

1. A neutral, professing to be engaged in trade with a neutral port, under circumstances which warrant close observation by a blockading squadron, must keep his vessel, while discharging or receiving cargo, so clearly on the neutral side of the blockading line as to repel, so far as position can repel, all imputation of intent to break the blockade. Neglect of that duty may well justify capture and sending in for adjudication; though, in the absence of positive evidence that the neglect was wilful, it might not justify a condemnation.
2. Where a party, whose national character does not appear, gives his own money to a neutral house, to be shipped with money of that house and in their name, to a neutral port in immediate proximity to a blockaded region, and an attorney in fact, on capture of the money and libel of it as prize, states that such neutral house are the owners thereof, and that "no other persons are interested therein," the capture and sending in will be justified; though in the absence of proof of an enemy's character in the party shipping his money with the neutral's, a condemnation may not be.
3. On a capture of a vessel unobservant, through mere carelessness, of the duty first above mentioned, and containing money shipped under the circumstances just stated, a decree was made restoring the vessel and cargo, including the money; but apportioning the costs and expenses consequent on the capture ratably between the vessel and the coin, exempting from contribution the rest of the cargo.

DURING the late Rebellion, and while the coast of the Southern States, including that of Texas to the mouth of the Rio Grande, was under blockade by the United States, the Dashing Wave, a British-owned brig, was captured at anchor by a United States gunboat, off the mouth of that river, the di-

viding stream between the United States and Mexico, a neutral, and libelled as prize of war in the District Court of New Orleans. The vessel was employed as a general ship on a voyage from Liverpool to Matamoras, a Mexican town on the Rio Grande, directly opposite to Texas. She had been freighted at Liverpool in 1862 with an assorted cargo, consigned by ten or more shippers to various persons and firms described as resident at Matamoras. There was no contraband aboard. The most remarkable shipment was one of £12,000 gold coin, in the name of Lizardi & Co., British subjects of Liverpool. By claim put in after the libel filed for Lizardi & Co., by their agent at New Orleans, it was claimed as their property, it being stated that no other persons were interested therein. Correspondence found on board the captured vessel showed, however, that £7000 of the £12,000 were owned by one H. N. Caldwell, and had been shipped to the Matamoras consignee for the purchase of cotton either in Texas or Matamoras on the joint account of Lizardi & Co. and Caldwell.

The residence and business of Caldwell were not fully disclosed in the record. It did not appear that he was a British merchant, nor that he had any commercial domicil in Mexico, nor yet that he was a rebel enemy. He had apparently married in England shortly before the vessel sailed, and was on board with his wife and servant at the time of capture. The nationality of the wife and servant the captain stated to be English; but he did not know what that of Caldwell was. They were all permitted to go ashore with their luggage by the boarding officer. Caldwell had, apparently, no interest in the vessel or cargo. He appeared, by the letters, to have been engaged in cotton transactions, and to have proposed to Lizardi & Co. the plan of shipping all the gold to Mexico as their own property. Caldwell made no claim for any part of the gold, nor did he personally appear in any way in the case.

On the proofs *in preparatorio* the place of capture, as respecting the middle or dividing line of the Rio Grande, appeared doubtful.

The testimony of naval witnesses, examined under an order which had been obtained by the captors for further proof as to the place of capture and the character of the cargo, asserted that the vessel, when seized, was on the northern, that is to say, the American side, of the boundary line, and in our waters. The master swore to the contrary.

In point of fact, as appeared by a Coast Survey chart, on which her exact position was marked by a witness of the captors, the master was wrong. The vessel was in waters actually blockaded. The position of the vessel made access to our coast, then in possession of enemy rebels, and under blockade, as easy as to that of Mexico, a neutral. (See chart opposite, inserted for convenience, laterally.)

The District Court at New Orleans made two decrees: one restoring the vessel and cargo—a decree from which the United States now appealed; the second refusing damages and ordering payment of costs and charges (exceeding $12,000) by the claimants—from which decree the claimants appealed.

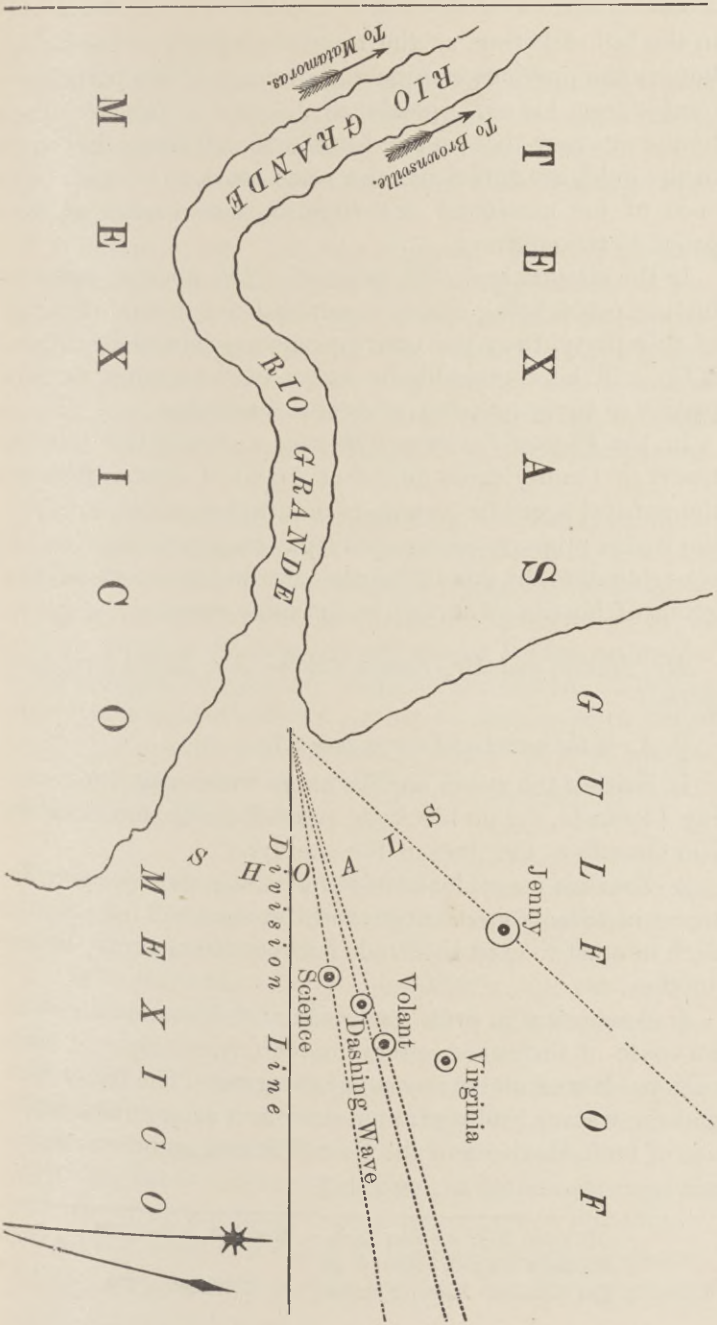
Mr. Ashton, Assistant Attorney-General, for the United States:

1. The position of the vessel, even if in Mexican waters, was so dubious as justly to expose her and her cargo to condemnation for violating blockade. She had no right to put herself in a position where she could, by night or in a moment when the blockading fleet was distant, land her cargo on the coast of Texas, a coast unquestionably blockaded.

2. There should be no final decree of restitution without *further proof* adduced by the claimants touching the commercial domicil and nationality of Caldwell.

The record contains no evidence in favor of the neutral character of Caldwell, but, on the contrary, it strongly suggests that he was a hostile person. His presence on board the captured vessel with his wife and servant; the professed ignorance of the master and mates of the nationality and business of the party; the suggestion, in his correspondence with Lizardi & Co. that the gold,—of which he himself owned the largest part,—should be covered and consigned,

Sketch showing the position of vessels.



in the bill of lading, as the neutral property of the British house; the previous commercial dealings of the party as inferable from his correspondence; the rash or false statement by the attorney that no one but the Lizardis were interested in the gold, are sufficient, in a prize court, to warrant inference of his unneutral character, in the absence of clear proof to the contrary.

If the claimants should neglect or fail, upon an order for further proof being made, to establish the neutral character of this party, then the entire property claimed by Lizardi & Co. will be confiscable by reason of the attempt of those parties to cover property of hostile ownership.

In the *Phœnix Insurance Company* v. *Pratt*,* the Supreme Court of Pennsylvania held that a neutral master, who was the general agent for a cargo of neutral ownership, subjected the whole property of the principal on board the vessel to condemnation, by attempting to cover in his own name other goods of hostile ownership in the same vessel.

Mr. Marvin and Mr. Evarts, contra; Mr. Evarts for Lizardi & Co.:

I. *As to the vessel and cargo generally.*

1. Neither the vessel nor the cargo was engaged in breaking blockade, for no blockade existed at the mouth of the Rio Grande at the time of the capture.†

2. There is no evidence of the existence of any enemy interest in either ship or cargo, and the court will not presume such interest to exist in a trade between one neutral port and another.

3. Anchoring in even American waters would of itself be no cause of forfeiture, either under any principle of international law or under any act of Congress. The Rio Grande and the waters leading into and from it are common to the use of both Mexico and the United States, and their use has not been prohibited to neutrals.‡

* 2 Binney, 308; see also Earle *v.* Rowcroft, 8 East, 126.

† See the Peterhoff, *supra*, p. 28.

‡ The Schooner Fame, 3 Mason, 147; 5 Wheaton, 374.

Argument for the claimants.

II. *As to the* £12,000 *gold coin.*

1. There is no support for a surmise that the consignment was not what the documents show it to be; one, namely, from the shippers, Lizardi & Co., to their consignee, at Matamoras, there to be employed as the means of commercial transactions intrusted to him.

It is not perceived that any question of *enemy property* arises upon the special employment or application of this capital, indicated in the correspondence; which, on the contrary, confirms the integrity of the transaction of the consignment of the specie, and its employment as destined to the actual and active care of the commercial house at Matamoras, to which it was addressed, and in the commerce of that place.

That this money might be applied by the consignee under his instructions from, and accountability to, Lizardi & Co., to trade in cotton, and for account of Caldwell, seems unimportant in its bearing on the question of prize or no prize. Trade in cotton at Matamoras was wholly lawful, no matter what the origin, or who the vendor of the cotton. Nothing appears to expose Caldwell, or his connection with or interest in the possible transactions in which the specie might be used, to any other construction or consequences than would apply to Lizardi & Co.

The opportunity for further proof has been asked for and obtained by the captors, and no damnatory evidence has been produced by them.

2. The capture was wholly unjustifiable, and the restitution decreed should have been attended with damages and costs.

When captors intercept an open prosecution of an apparently lawful trade, and visitation exhibits every trait of honest neutrality, and the commerce thus indicated is not only lawful, but is constantly engaged in by our own vessels, the integrity of the prize courts demands the infliction of damages and costs as a check to the speculative cupidity of captors. The features of this case are not distinguishable

from those of the Magicienne, intercepted in her voyage to Matamoras, and brought into Key West. She was promptly restored, the diplomatic claim for damages immediately recognized, and, upon adjustment, paid by authority of an act of Congress.*

The CHIEF JUSTICE delivered the opinion of the court.

Two decrees were rendered in the District Court for the Eastern District of Louisiana, the first, directing restitution of the vessel and cargo; the second, refusing damages, and ordering payment of costs and charges by the claimants. The United States appealed from the first; the claimants took an appeal from the second.

The proofs show that the Dashing Wave was a neutral vessel, bound from Liverpool to Matamoras, with a cargo of general merchandise and coin, no part of which was contraband.

It is clear, therefore, that the decree of restitution must be affirmed.

The only question which requires much consideration relates to the rightfulness of capture. And this question resolves itself into two:

1. Was there anything in the position of the Dashing Wave, at the time of capture, which warranted the opinion of the captors that she was engaged in breaking the blockade? and—

2. Was there anything in the papers on board the brig, relating to the cargo, which justified the seizure?

It is claimed for the captors that she was taken in Texan waters, lying convenient to the blockaded coast. The preparatory evidence left her position in much uncertainty, but the testimony taken under the order for further proof, in connection with the chart upon which her position is marked by one of the witnesses, establishes it beyond reasonable doubt. She was anchored north of the line between the

* Diplomatic Correspondence, 1863, Part 11, pp. 511, 513, 565, 587, 588, 636.

Mexican and Texan waters, with as easy access to the land on the rebel as on the Mexican side.

We think it was the plain duty of a neutral claiming to be engaged in trade with Matamoras, under circumstances which warranted close observation by the blockading squadron, to keep his vessel, while discharging or receiving cargo, so clearly on the neutral side of the boundary line as to repel, so far as position could repel, all imputation of intent to break the blockade. He had no right to take, voluntarily, a position in the immediate presence of the blockading fleet, from which merchandise might be so easily introduced into the blockaded region.

We do not say that neglect of duty, in this respect, on the part of the brig, especially in the absence of positive evidence that the neglect was wilful, calls for condemnation; but we cannot doubt that under the circumstances described, capturing and sending in for adjudication was fully warranted.

The other question relates wholly to the papers concerning the shipment of coin. There is no evidence which affects with culpability any other part of the cargo.

The coin is claimed by Lizardi & Co., neutral merchants of Liverpool; but the proof shows that one H. N. Caldwell was the real owner of the larger part of it. A letter, dated August 17th, 1863, and addressed by Caldwell to Lizardi & Co., states his intention, in view of "the uncertain state of our political affairs," to take gold to purchase cotton, instead of taking goods to Mexico, if he can arrange for an advance of £5000, making, with certain credits in his favor with Lizardi & Co., and £3000 which he had in bank, a total of £12,000, with which to operate.

In the same letter he further proposed that the whole amount should be shipped to J. Roman, of Matamoras, as the property of Lizardi & Co. The next day Lizardi & Co. acknowledged the receipt from Caldwell of a check for the £3000 in bank, and agreed to his proposals. Three days later Lizardi & Co. addressed a letter to Roman, advising him of the arrangement with Caldwell, and distinguishing expressly the £5000 advanced by them from "the other

£7000 of the said gentleman." These letters were found on board the brig.

Caldwell was a passenger on the brig, but was allowed to leave before any question of his character was made. What was that character in fact? Was he a rebel enemy or a neutral?

The tenor of his letter to Lizardi & Co., his proposal that the specie should be shipped as their property, when seven-twelfths of it belonged to himself; and especially the circumstance that he has never made claim in this suit to any part of it, except through Lizardi & Co., indicates that he was not a neutral, but an enemy.

On the other hand, there is no positive proof of his enemy character, though further proof was allowed to the captors.

This evidence, in our judgment, does not warrant condemnation of the specie, but it does, as we think, justify the capture.

We shall therefore affirm the decree of the District Court, restoring the vessel and cargo, but direct that costs and expenses consequent upon the capture, be ratably apportioned between the brig and the shipment of coin, and that the residue of the cargo be exempted from contribution.

DECREE AND DIRECTIONS ACCORDINGLY.

NOTE.

At the same time with the preceding appeal and cross-appeal, and by the same counsel, were argued two cases; one an appeal and cross-appeal, as the preceding, from the District Court of the United States for the Eastern District of Louisiana; the other, an appeal from the same court.

The first case was that of

THE SCIENCE.

The Science had been captured by the American war steamer Virginia, on the same day as the Dashing Wave, and the same decrees were entered in the District Court in respect to vessel and cargo, and similar appeals were taken.

Statement of the case.

Mr. Ashton, Assistant Attorney-General, for the captors; Mr. Marvin contra, for the claimants.

The CHIEF JUSTICE delivered the opinion of the court.

The evidence is clear that the vessel and her outward cargo were neutral property, destined to neutral consignees at Matamoras, and that the cargo had been actually delivered as consigned.

Some of the proof tended to show that a portion of this cargo consisted of confederate uniform cloth; but there was none showing destination to enemy territory or immediate enemy use.

There was, therefore, nothing in the character of the vessel or of the outward cargo which warrants condemnation.

At the time of capture, the bark had the whole or a great part of her homeward cargo on board. It consisted of cotton and a small quantity of copper. The captain had not signed bills of lading, and, upon his preparatory examination, assigned this circumstance as a reason for not being able to give the names of the shippers at Matamoras or of the consignees at Liverpool. The presumption, arising upon the facts proved, is that it was neutral property, which must be restored.

The position of the Science, when her cargo was put on board, and when she was captured, is left in doubt by the depositions of the master and mate; but the testimony of two officers of the Virginia, read as further proof, is explicit that she was in Texan waters,* and no excuse is offered for being there.

The principles just declared in the case of the Dashing Wave require, therefore, the affirmation of both decrees of the District Court.

AND THIS IS ORDERED.

The second case was that of

THE VOLANT.

THE brig Volant had been captured, near the mouth of the Rio Grande, on the 5th of November, 1863, by the United States

* See chart, *supra*, p. 173.—REP.

steamer Granite City, and, with her cargo, was condemned, by the decree of the District Court for the Eastern District of Louisiana. The case came before this court upon the appeal of the claimants.

Mr. Ashton, Assistant Attorney-General, for the United States; Mr. Marvin, contra, for the claimants.

The CHIEF JUSTICE delivered the opinion of the court.

The proof shows that the brig was the property of a neutral merchant of the island of Jersey, fully documented as a British merchantman, and regularly cleared from London to Matamoras.

The cargo was shipped by the charterers of the vessel for neutral owners, and consigned to neutrals at Matamoras, but had not been discharged at the time of capture.

It consisted in part of bales of confederate uniform cloth, of the same mark and of corresponding numbers with like goods found on the Science; but there is no proof of unlawful destination.

The brig, however, anchored in Texan waters, near the coast, and remained there until captured.*

This circumstance alone did not warrant condemnation, though, in connection with the character of the cargo, it justified capture.

The decree of the District Court must be reversed; and a decree of restitution, on payment of costs and charges, must be entered instead of it.

REVERSAL AND DECREE ACCORDINGLY.

THE TERESITA.

1. A neutral vessel, at anchor, completely laden with a neutral cargo, on the neutral side of a river dividing neutral from hostile water, washing a blockaded coast, was captured as being subject to just suspicion of an intent to break the blockade.
2. The captain of the vessel (who was, however, absent at the time of cap-

* See chart, *supra*, p. 173.—REP.

ture), and the mate, being examined *in preparatorio*, testified that she was in neutral waters when captured. A stevedore, yet on board, that she had drifted to the place where she was taken, under stress of weather; he not knowing whether when captured she was in neutral waters or not.

Held, that this preliminary testimony warranted restoration.

3. Further proof having been allowed, it appeared that the vessel when captured was a quarter or a half mile within the hostile waters; the mate admitting this fact, but testifying that the vessel had drifted to the spot, its anchor and chain being too light, and he expressing as one reason for not returning to the former anchorage as soon as the wind became fair, that the captain was in port (about 36 miles distant), with the ship's papers, and that he did not like to move the vessel without orders; and, as another, that the ship was fully laden and ready to sail, and had been seen by two blockading men-of-war, which did not disturb her, and that he thought the vessel might safely remain where she was till the captain returned; the mate proposing, also, if not captured, to return at once to the anchorage from which he had drifted. On this,

Held, that the case for the captors was not improved by the further proof; and that with the restitution costs and expenses to be paid by the captors, was to be decreed.

APPEAL from the District Court of the United States for the Eastern District of Louisiana.

Mr. Ashton, Assistant Attorney-General, for the United States.

Mr. Reverdy Johnson, contra, for the claimant.

The CHIEF JUSTICE stated the case and delivered the opinion of the court.

The bark Teresita was captured near the mouth of the Rio Grande, on the 16th of November, 1863, by the United States steamer Granite City. The cargo consisted of one hundred and fifty-eight bales of cotton.

She was brought into New Orleans for adjudication; and, upon hearing, the District Court directed restitution of the vessel and cargo.

There was no question of the neutrality of the ship or her cargo; but it was claimed for the captors that she was in Texan waters when captured, and therefore subject to just suspicion of intent to break the blockade.

The captain and the mate of the ship, in their preparatory

depositions, testified that she was in Mexican waters; but the captain being on shore at the time, could not be certainly informed as to this. A stevedore, who had been employed on board the vessel and had not been discharged, testified that she had drifted to the place where she was taken, under stress of weather. He did not know whether she was then in Texan or American waters. Her full cargo had been taken in at her former anchorage.

The preliminary hearing took place on this evidence, which, doubtless, warranted restitution.

Further proof, however, was allowed. It consisted of depositions by the captain and some other officers of the Granite City to the effect that the Teresita when captured was a quarter or half a mile north of the line, according to the bearings by the compass, and that the mate admitted that she was in Texan waters. But the same deposition showed that the mate declared that his vessel had drifted to the spot, his anchor and chain being too light; and assigned, as one reason for not returning to the former anchorage as soon as the wind became fair, that the captain was at Matamoras with the ship's papers, and he did not like to move the vessel without orders; and, as another, that the ship was fully laden and ready to sail, and had been seen by two American men-of-war, which did not disturb her, and he thought, therefore, that she might safely remain where she was till the captain returned. It appeared, also, that the mate proposed if not captured, to return at once to the anchorage from which he had drifted.

We are of opinion that, under such circumstances, temporary anchorage in waters occupied by the blockading vessels, does not justify capture, in the absence of other grounds. The case for the captors was not improved by the further proof. The decree of restitution must be affirmed, and we shall direct the costs and expenses to be paid by the captors.

DECREE AND DIRECTION ACCORDINGLY.

THE JENNY.

1. A vessel sailing through blockaded waters may be properly seized on suspicion of intent to break the blockade, when, in addition to the manifest bearing date as of a day when only a part of the cargo is laden, the bills of health and clearance point to one port as her port of destination, while the captain's letter of instructions require him to stop at another not in the direct line to that place, for instructions; when both the vessel's bills of health specify six men and no passengers, there being, in fact, one passenger; when the provisional certificate of registry represents as sole owner one person, and other papers another.
2. Condemnation decreed where a vessel, with a changed name and with papers open to suspicion, as above stated, and whose master had ten months before commanded a blockade-runner, was found sailing from the immediate proximity of the line separating neutral from blockaded waters (in fact from within the line), with an ownership which a complicated, obscure, and apparently contradictory history, left in doubt, where also the ostensible ownership was apparently but a mere cover; no claim for her being put in after capture and libel otherwise than by her captain, who put it in for the ostensible owners; he acting without instructions from them and only in his capacity of master; a part of the cargo being, moreover, more plainly still, enemy's property.
3. In proceedings in libel against a ship and cargo as prize of war, the burden of proving neutral ownership of them is upon the claimants. When there is no proof of such ownership, and still more when the weight of the evidence is that the ownership is enemy ownership, condemnation will be pronounced.

APPEALS from the District Court of the United States for the Eastern District of Louisiana, decreeing restitution of the schooner Jenny and cargo, and decreeing costs and charges against their claimants; the questions involved being of fact chiefly.

Mr. Ashton, Assistant Attorney-General, for the United States; Mr. Marvin, contra.

The CHIEF JUSTICE delivered the opinion of the court; in which the case is stated.

The schooner Jenny, with a cargo of one hundred and fifty-four bales of cotton, was captured by the United States war steamer Virginia, in Texan waters, north of the Rio

Grande, on the 6th of October, 1863, and was brought into New Orleans.

She was libelled as prize of war in the District Court for the Eastern District of Louisiana on the 16th of October.

On the 7th of November John Johnson, the master of the schooner, put in four separate claims: one in behalf of Hale & Co., for the schooner; one in behalf of H. Fernstein, for forty-four bales of cotton; one in behalf of Ruprecht & Fortner, for thirty-nine bales, and one in behalf of J. Rosenfeld, for seventy-one bales. On the 10th of December two other claims were filed: one by Charles Andre, in behalf of Augustine Stark, for the thirty-nine bales, and the other by Conrad Seiler, in behalf of R. M. Elkes, for the forty-four bales. No personal claim or test-affidavit was made by any of the parties alleged to have title in the vessel or cargo; and no evidence was put in of any authority in Andre or Seiler to represent Stark or Elkes. The authority of Johnson was derived from his character as master.

The seizure was made because she sailed from the blockaded coast of Texas, and because of the unsatisfactory nature of her papers.

Her manifest was dated September 17, 1863, at which time her log-book showed that she had only part of her cargo on board; it appeared also from her manifest, her bill of health from the American consul, and her Mexican clearance, that she was bound for New York, whereas the captain's letter of instruction required her to stop at Nassau and conform to the instructions of Saunders & Co., of that place; both her bills of health specified six men, and no passengers, whereas, in fact, a passenger by the name of Mund was found on board; the provisional certificate of registry represented Hale & Co., of Matamoras, as sole owners of the vessel, whereas, the captain's instructions and other papers showed that C. F. Jenny was the owner.

These facts, doubtless, justified suspicion and warranted seizure. We must then inquire into the true character and ownership of the vessel and cargo, as shown by the preparatory evidence.

It appears that the vessel was American built, and that her original name was Southron; and a paper found on board showed that Johnson, her master, had commanded in December, 1862, a schooner engaged in running the blockade from Mobile to Havana.

The Southron was sold under order of the United States sequestration commission in New Orleans to one P. A. Fronty, and a register was issued to him on the 18th of March, 1863.

She was probably soon after sold by Fronty, though he still remained master, to one Julius Schlickum; for this person, on the 21st of April, made a bill of sale of her at Matamoras, to Hale & Co., of that place.

Hale & Co. do not seem to have taken possession of her; for, on the same day, an irrevocable power of attorney was made by that firm to one Jacob Rosenfeld, of Houston, in Texas, giving him or his substitute absolute control over the management and disposition of the schooner by sale or otherwise.

This paper was not signed by Hale & Co., but was drawn in their name, and signed by one John P. Molony, who, in a declaration of membership in the firm, dated six days later, represented himself as a partner.

These documents were not framed and executed in this irregular way by accident. In a letter to Johnson & Co., at Nassau, Jenny called Hale & Co. "the pretended owners," and complained that Molony refused to make out the papers, as he, Jenny, wished, simply remarking to him, "You have full and irrevocable power of attorney to do or not to do with the schooner whatever you please. I shall never interfere with you or your acts."

On the same day that the declaration of ownership was made, a British provisional certificate of registry representing Fronty as master, and Hale & Co. as owners, was issued by the British vice-consul.

On the 12th of September, 1863, Rosenfeld transferred to Charles F. Jenny, of Matamoras, as his substitute, all the powers vested in him by the irrevocable power of attorney.

And on the 17th of the same month, Jenny made a like transfer to Saunders & Co., of Nassau, as his substitute.

Jenny appears to have exercised control over the vessel much earlier; for he appointed Johnson in place of Fronty, on the 27th of May; after which the schooner made a voyage to Havana and back, with Rosenfeld as supercargo.

In all transactions connected with the last voyage, Jenny acted as apparent owner; while Rosenfeld appeared only as a shipper of cotton. In the letter to Saunders & Co., already quoted, Jenny authorized the sale of the schooner at Nassau, and directed the remittance of the proceeds to his firm in Switzerland. In case sale could not be effected at Nassau, he directed that the power and the papers of the ship should be transferred to Schlesinger & Co., of New York, the consignees there of the vessel and cargo, to whom he also wrote instructing them to sell the schooner, or, if not, to obtain a return cargo for her. In this letter he spoke of the vessel as "my schooner Jenny."

This testimony leaves the ownership of the schooner in some doubt. The sale to Hale & Co. was most probably a mere cover. It is clear that, except in obtaining the British provisional registry, they never acted or held themselves out as owners; nor did they appear personally in this court to make claim for the vessel, or otherwise than through Johnson, who acted without instructions from them, and merely in his capacity as master. And he, in his preparatory deposition, said only, that the Jenny belonged to them, as far as he knew, but he did not know exactly.

Their irrevocable power of attorney to Rosenfeld, vested in him all the powers of owner, and made him owner in effect. After the transfer of the power, Rosenfeld was constantly connected with the schooner as supercargo and shipper of cotton. On the other hand, the conduct of Jenny and his apparently absolute control, indicates ownership of her. He may have acted, and probably did act under some arrangement with Rosenfeld, or they may have been connected in ownership. The former supposition is strengthened by the circumstance that Jenny disappeared from all apparent

connection with her, immediately after capture; while Hale & Co., the grantors of the Jenny to Rosenfeld, were brought forward as ostensible owners.

Thus far as to the vessel. We have already referred to the claims for the cargo.

One of the claims was in behalf of Rosenfeld, who was presented in a new character. In the power of attorney executed at Matamoras, he was described as a resident of Texas. In the claim made in New Orleans, he was represented as a resident of that city, absent in Matamoras. The claim in his behalf was for the seventy-one bales. It is remarkable, if he was in fact a resident of New Orleans, that he has never claimed otherwise than through Johnson, and never made any test affidavit at all. The truth, we apprehend is, that he was what the power of attorney declared him to be,—a resident of Texas,—and therefore, at that time, a rebel enemy of the United States.

The remainder of the cargo seems to have been shipped in good faith at Matamoras.

We are next to inquire what was the course, position, and conduct of the vessel at the time of capture, as shown by the preparatory evidence and the further proof.

She had recently come down the Rio Grande from Matamoras. She was observed two days before the capture anchored in Texan waters, near the coast of Texas.* She was probably there when she took on board the seventy-one bales belonging to Rosenfeld, which she received from lighters. When she left her anchorage, the Virginia sent a boat to intercept her, and she was brought to by a shot or two from this boat. The mate of the Jenny says she was at this time about a mile from the shore. The officers of the Virginia make her distance from shore three miles or more, and her place from three to five miles south of the Rio Grande.

What are the conclusions of law from these facts? In strictness the Jenny, having taken on part of her cargo off

* See chart, *supra*, p. 173.—REP.

the blockaded coast and having sailed from that coast, was attempting to run the blockade when captured.

But we are not inclined to condemn the vessel on this ground, much less the forty-four bales and the thirty-nine bales, which were taken on board at Matamoras.

But it is an undoubted principle that in a case of libel as prize of war, the burden of proving the neutral ownership of the ship and cargo is upon the claimants. In this case satisfactory proof is made of neutral ownership in the cotton laden at Matamoras. But there is no proof at all of such ownership in the seventy-one bales put on board from lighters; and no satisfactory proof of such ownership in the schooner. On the contrary, the weight of the evidence is that these bales were owned by a rebel enemy; and that the same rebel enemy, either alone or in association with Jenny, who makes no claim, owned the schooner.

It results that the forty-four bales and the thirty-nine bales must be restored to the claimants represented by the master, without contribution to costs or expenses, and that the seventy-one bales and the schooner must be condemned.

The decree below must be reversed and a decree entered

IN CONFORMITY WITH THIS OPINION.

EX PARTE THE MILWAUKEE RAILROAD COMPANY.

1. A case being properly in this court by appeal, the court has a right to issue any writ which may be necessary to render its appellate jurisdiction effectual.
2. Accordingly, it will issue the writ of *supersedeas* if such writ be necessary for that purpose; the circumstances otherwise making it proper.
3. It will issue this writ rather than attain the same end by issuing a *mandamus* to the court below, in a case where the issuing of a *mandamus* would control judicial action in a matter apparently one of discretion; as *ex gr.* the approval or rejection of a bond offered for the court's approval.
4. Hence, where, after an appeal to this court, the judge below refused to approve a bond for a *supersedeas*, because all the sureties were non-residents of the district, this court (though not agreeing with such judge in

the opinion that mere non-residence within the district was a sufficient reason for rejecting a bond, if, in all other respects, it were unobjectionable) declined to issue a *mandamus* to compel the judge to approve the bond and allow a *supersedeas*, considering its right to do this doubtful; but ordered that on filing a bond to be approved by the clerk of this court, a *supersedeas* should issue from this court.

Petition for a writ of *mandamus*.

The Circuit Court for the District of Wisconsin having rendered a decree in favor of J. T. Soutter, survivor, &c., against the La Crosse and Milwaukee Railroad Company and the Milwaukee and Minnesota Railroad Company, on the 5th March, 1867, for $40,000, and ordered a sale of the road mortgaged to secure the debt, the last-mentioned company prayed an appeal to this court, which was allowed. For the purpose of staying proceedings on the decree, they offered a bond, in the penalty of $50,000, within the ten days allowed for that purpose, which the district judge declined to approve, but upon which he made the following indorsement:

"March 16, 1867.

"The counsel of complainant having objected to the allowance of this bond for *supersedeas*, on the ground that all the sureties are *non-residents of the district, for this reason this bond is not approved for a supersedeas.*

"A. G. Miller,
District Judge."

The record of the case having been brought into this court on the appeal taken, the appellants now petitioned the court for a *mandamus* to compel the district judge to approve the bond and allow a *supersedeas*, or for such other relief in the premises as this court could give.

Messrs. Cram and Cushing, in favor of petition; Mr. Cary, contra.

Mr. Justice MILLER delivered the opinion of the court.

Although this court does not concur in the opinion of the district judge, that the fact of the non-residence of the sure-

ties within the district is a sufficient reason for rejecting a bond which is in all other respects unobjectionable, we are not inclined to interfere by *mandamus* with the discretion of that judge in approving or rejecting a bond offered for his approval. If we had the right to do this, which is extremely doubtful, it is unnecessary, as the remedy which is in our own hands is ample. The case being properly in this court by appeal, we have, by the fourteenth section of the Judiciary Act, a right to issue any writ which may be necessary to render our appellate jurisdiction effectual. For this purpose the writ of *supersedeas* is eminently proper in a case where the circumstances justify it, as we think they do in the present instance. *Hardeman* v. *Anderson*,* is an example of the exercise of this power precisely in point.

We shall therefore make an order, that upon the filing of a bond for the sum of $50,000, with the usual conditions, at any time within thirty days from this date, which shall be approved by the clerk of this court, a *supersedeas* will issue from this court to the judge of the Circuit Court of the United States for the District of Wisconsin, and to the marshal of the United States for said district, commanding a stay of proceedings on said decree until the further order of this court,

THE SAME BEING SUPERSEDED.

BARTON *v.* FORSYTH.

1. The appellate jurisdiction of this court on writs of error, under the twenty-second section of the Judiciary Act, is confined by the express words of the section to final judgments, and the writ of error should be addressed to the final judgment accordingly.
2. A judgment on a motion made by the plaintiff to set aside a writ of restitution which had been issued in favor of the defendant, and to grant a writ of restitution to the plaintiff in a case, is not a final judgment within the terms of the said section; in fact is but an order of court.

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* 4 Howard, 640.

Hence no jurisdiction exists of a writ of error based on such a proceeding.

IN error to the Circuit Court of the United States for the Northern District of Illinois.

Mr. Ballance, for the plaintiff in error; Mr. Gondy, contra.

Mr. Justice CLIFFORD delivered the opinion of the court.

Action was ejectment for a certain parcel of land situated in the county of Peoria, State of Illinois, and particularly described in the declaration. Parties waived a jury and went to trial upon the general issue before the court, and the judgment was for the defendant; but a new trial was granted, on motion of the plaintiff, and at the second trial, which was to the jury, the verdict and judgment were for the plaintiff.

All the taxed costs having been paid by the defendant, he moved the court that the judgment be vacated, and that a new trial be granted, and the motion was allowed. Third trial was also to the jury, and the verdict and judgment, as before, were for the plaintiff. Defendant excepted and sued out a writ of error and removed the cause into this court.

Mandate of this court, which is in the record, shows that the judgment of the Circuit Court was affirmed here at the December Term, 1857, and the cause remanded for execution and such proceedings as right and justice and the laws of the United States required. Judgment of affirmance was accordingly rendered on the seventh day of July, 1858, and an order entered that the plaintiff have execution against the defendant for his costs. Record also shows, that on the nineteenth day of July, in the same year, a writ of *habere facias possessionem* issued on the judgment in favor of the plaintiff, and the return of the marshal shows that he, on the third day of September following, put the plaintiff in possession of the premises, as commanded by the writ. Due execution, therefore, followed final judgment, and there was an end of all regular proceedings in the suit. Dissatisfied with

the result, however, the defendant, on the thirteenth day of May, 1862, moved the court for a writ of restitution, and on the fifteenth day of May following the court awarded the writ, as prayed in the motion.

Writ of restitution in favor of the defendant bears date on the twenty-seventh day of May, 1863, and it appears to have been duly served by the marshal.

Turned out of possession of the premises which he had recovered by the judgment of the Circuit Court, duly affirmed in this court, the plaintiff in turn moved the court for a writ of restitution to restore him to the possession of the premises. Affidavits were filed and both parties were duly heard. Conclusion of the court was that the first writ of restitution had been improvidently issued, and that the possession of the premises belonged, under the judgment as affirmed by this court, to the plaintiff.

Foundation of the application for the first writ of restitution was a supposed tax title held by the defendant, not pleaded or in any manner brought to the notice of the Circuit Court in the trial of the cause; and the foundation for the second application was, that the hearing of the first was without any notice whatever to the party in possession.

Exceptions were taken by the defendant to the order of the court setting aside the first writ of restitution and awarding the second to the plaintiff. Based on those exceptions the defendant sued out this writ of error, in which it is alleged in substance and effect that a manifest error has happened in the rendition of a certain judgment on a certain motion, and the proceedings under it, made by the plaintiff to set aside a certain writ of restitution which had been issued out of said court in favor of the defendant, and to grant a writ of restitution to the plaintiff in a case between these parties.

Evidently the writ of error is addressed not to the judgment in the case, but to the order of the court in setting aside the first writ of restitution and in granting the second, as specified in the bill of exceptions.

Writs of error, under the Judiciary Act, could only issue

from the clerk's office of this court, but it was provided by the ninth section of the act of the eighth of May, 1792, that the form of a writ of error approved by any two judges of the Supreme Court should be forthwith transmitted to the clerks of the Circuit Courts, and the provision was that they may issue writs of error agreeably to such form as nearly as the case may admit, under the seal of such courts, returnable to the Supreme Court.*

Appellate jurisdiction of this court in writs of error, under the twenty-second section of the Judiciary Act, is confined to final judgments by the express words of the section, and of course the writ of error should be addressed to the final judgment. All the forms of a writ of error furnished to the clerks of the Circuit Courts are to that effect, and those clerks have no right to change the form without the sanction at least of two justices of this court. Present writ of error is not, on its face, addressed to the final judgment in the case, but to an order of the court made on a motion filed by the plaintiff long after the writ of possession had been issued and served. Such an order is not a final judgment in any sense within the meaning of the twenty-second section of the Judiciary Act.

First order of the court in awarding the writ of restitution was irregular, because it was inconsistent with the mandate of this court, which affirmed the judgment of the Circuit Court that the plaintiff was entitled to the possession of the premises. Opposite party was not notified of the application, which doubtless led to the error, as the hearing was *ex parte*. Service of the process gave the plaintiff notice of what had transpired, and he immediately applied to the court to set the proceedings aside.

Second application was clearly addressed to the discretion of the court, as it was in the nature of a petition to correct an order manifestly irregular, for the reason already suggested, and because it had been passed without notice to the party asking to set it aside.

* 1 Stat. at Large, 278.

Direct decision of this court in the case of *Smith* v. *Trabue's Heirs*,* was that such an order was no more than the action of a court on its own process which is submitted to its own discretion, and that it was not a final judgment in a civil action nor a decree in a court of equity.

Where a case is brought into this court from the Circuit Courts by a writ of error, regular in form, if there is no error in the record the judgment will be affirmed. Affirmance in such a case is the proper judgment, because the writ of error, being addressed to the record, brings up the whole case, and the court, under the twenty-second section of the Judiciary Act, has jurisdiction to re-examine the record in such cases and to reverse or affirm; and if there is no error in the record, of course the judgment must be affirmed.†

Present case, however, does not fall within that rule, because the writ of error is special in form and is addressed to a mere order of the court, passed nearly six years after the final judgment of the Circuit Court was affirmed, the writ of possession issued, and the possession of the premises given to the plaintiff, as commanded by the writ.

The case is

DISMISSED FOR THE WANT OF JURISDICTION.

CAMPBELL *v.* CITY OF KENOSHA.

1. Where the legislature of a State passes two acts, one (which by the constitution it had the power to pass) authorizing a city to subscribe a *limited* amount ($150,000) of stock to a railroad, another (which, by the constitution, it had no power to pass) authorizing it to subscribe an *un*limited amount, and the city, professing to act under the one which authorized the *un*limited amount, subscribes the limited amount ($150,000), a subsequent recognition by the legislature of the subscription as legal, validates the subscription.
2. The legislative recognition may be made by implication.
3. A statute which, in the case of such an issue, creates as part of the municipal government an officer whose duty it is to attend to the city's in-

* 9 Peters, 7.

† Taylor *v.* Morton, 2 Black, 484

terests and concerns, in regard to the railroad subscribed to, and who, the act declares, "*shall* redeem all scrip which has been issued for it," constitutes a ratification of the originally irregular issue.

ERROR to the Circuit Court for the District of Wisconsin; the case being this:

The constitution of Wisconsin ordains:

"*It shall be the duty* of the legislature, and they are hereby empowered, to provide for the organization of cities and incorporated villages, *and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments and taxation, and in contracting debts by such municipal corporations.*"

With this provision in force, the legislature of the State, on the 22d March, 1853, authorized the city of Kenosha "to issue the corporate bonds of the said city to the Kenosha & Beloit Railroad Company for the payment of *a sum not exceeding* $150,000." It was provided, however, that no bonds should be issued under this act unless a majority of the legal voters voted in favor of it.

By section 8 of an act passed the next day, "An act to amend the charter of the city of Kenosha,"—approved March 23d, 1853, the legislature enacted as follows:

"The city council shall have power to levy and collect special taxes for *any purpose* (aside from what may be specially provided for in the city charter) *which may be considered essential to promote or secure the common interest of the city; or may borrow on the corporate credit of the city for such purposes, any sum of money for any term of time, at any rate of interest not exceeding ten per centum, and payable at any place that may be deemed expedient.*"

This act also provided that no tax should be levied or money borrowed, unless in accordance with a certain section—"section 44 of 'An act to incorporate the city of Kenosha,'" (the original city charter),—a section which, like one in the first-named act, provided for a submission of the matter to a vote of the people; when the amount and object

of the proposed tax or loan to be voted upon should be specifically stated.

In this state of statutory enactments, the city, in August, 1855, passed an ordinance:

"That *under and in accordance with section* 8 *of* '*An act to amend the charter of the city of Kenosha*,' *approved March* 23*d*, 1853, *and section* 44 *of the* '*Act to incorporate the city of Kenosha*,' a question shall be submitted to the legal voters whether a tax to the amount of one hundred and fifty thousand dollars shall be levied and collected for the promotion of the common interest of the city in aid of the Kenosha and Beloit Railroad."

The question of the tax and loan was thus submitted, the reader will observe, under the act of March 23d, amendatory of the charter, and not under that of March 22d, authorizing a subscription for a specific sum, $150,000.

A majority of the voters having voted for the subscription, under the ordinance just quoted, the city issued scrip, in the form of small drafts, by the mayor and clerk, on the city treasurer, for different sums of money payable "out of any funds in the treasury belonging to the city, the same having been allowed for scrip *in aid of the Kenosha and Beloit Railroad Company*."

In 1857, the next year after the city had thus subscribed for stock and issued its scrip, and so become a stockholder in the new railroad, the legislature passed an act giving a revised charter to the city, which it accepted. This new charter provided that a railroad commissioner should be annually elected thereafter as a city officer, and, prescribing his duties, proceeded:

"He shall have, generally, the charge and control of all interest the city of Kenosha now has, or may hereafter have, in the Kenosha and Beloit Railroad. He shall receive all funds paid into the hands of the city treasurer, on account of the tax for the benefit of the Kenosha and Beloit Railroad Company, *and shall hereafter redeem all scrip which has been issued to said railroad company, as the same becomes due, making such provision therefor,*

or recommending such measures to the common council as he may deem necessary for the benefit of the tax-payers of the city."

The scrip issued as above-mentioned was not paid at its maturity, and, in 1859, the city councils of Kenosha made arrangements by which the city obtained from the holders of it an enlargement of the time of payment. Being at the efflux of the enlarged term still unpaid, one Campbell, who held a quantity of it, brought suit in the Circuit Court for Missouri against the city.

On the trial the holder of the scrip offered the same in evidence. The city objected to its reception on the ground that section 8 of the act to amend the charter of the city of Kenosha, approved March 23d, 1853, and also the ordinance and other proceedings under it, were void, as being in contravention of the constitution of the State of Wisconsin. And that the scrip had not been validated either by the subsequent act of 1857, making it the duty of the railroad commissioner to redeem the scrip, nor by the proceeding of the city council in 1859, procuring an enlargement of the time; inasmuch as it was not in the power of either the city council or of the legislature itself, to give validity to that which was, by the constitution, void.

The court sustained the objection, and judgment was given for the city.

Mr. Cary, for the city and in support of the judgment:

It will be conceded that under no act of legislature in this case, could the bonds be valid without a previous submission of the question of their issue to the people, and an approval of such issue by them. Now the only question of this sort submitted to them was "under and in accordance with section 8 of an act to amend the city of Kenosha, &c., approved March 23d, 1853."

This act, therefore, of March 22d, 1853, authorizing the city to subscribe to "a sum not exceeding $150,000," has no reference to the matter in dispute, and is out of the case.

That section 8 of the act of March 23d, is a violation of

the provision of the constitution which says, that it shall be the *duty* of the legislature to *restrict* the power of cities to contract debts, so as to prevent abuses in that matter by them, is clear. It looks as if it were made in studied defiance of the constitution. Over and above what the charter authorizes, cities, under the act, may borrow *any* sum for *any* time, payable *anywhere*, and pretty much at *any* rate of interest.

As an original proposition, it would be the duty of this court to hold this section unconstitutional and void.

But the question is not an open one in this court. It has already been passed upon by the Supreme Court of the State of Wisconsin.

In *Foster* v. *The City of Kenosha*,* a party sought to enjoin the city of Kenosha from collecting a certain tax levied upon real estate in the said city, for the purpose of paying this identical scrip and the remainder of the same issue, and an injunction was obtained, restraining its collection. On appeal to the Supreme Court of the State the judgment was affirmed, on the ground that the section was in conflict with the constitution of Wisconsin and void.

We need not say that the construction given to a statute of a State by the highest judicial tribunal of such State is regarded as a part of the statute, and is binding upon the courts of the United States. This is settled law.†

The issue of the scrip then was not the case of a power granted by the legislature, and defectively or improperly executed, but was a void act, an act void *in toto;* void in its inception, execution, and result.

If this is so, certainly no ratification of it by the *city council* would make it valid. The council could give no more validity to the scrip by ratifying it than they did by issuing it. What *they* meant and wished was plain by the latter act; but their meanings and wishes are of no importance, the constitution intervening.

But could they ratify the scrip even had the legislature attempted to confer upon them the power? Could they, by

* 12 Wisconsin, 616. † See Christy *v.* Pridgeon, 4 Wallace, 197

mere ratification, make valid what was before void *in toto* and of no binding force whatever?* Did mere change of the scrip change its character in respect to obligation? Void in its inception, would not nullity follow all its mutations?

But did the legislature ever ratify or direct the councils to ratify the debt? The act of the legislature providing for the election of a railroad commissioner certainly does not ratify the debt expressly.

And in regard to a debt which, by the constitution, was forbidden to be contracted, and was void *in toto*, how can a ratification be implied merely?

The meaning of the act was, that the commissioner "shall pay it;" assuming it, of course, to be valid; issued according to law, held by honest holders, and having the other requisites required by courts to give force to obligations: not to say that he "*shall* pay" all the drafts which, by being signed, were "scrip," constitutional or unconstitutional, legal or illegal, honestly held or dishonestly held. Such a construction would be very forced.

The provision of the constitution is in restraint of municipal corporations embarking in wild schemes of adventure under the fancy of improvements, and is a wise one. It has become a necessary protection to holders of property and payers of taxes. It ought not to be made nugatory by judicial legislation.

The judgment should therefore be affirmed.

Mr. Lynde, contra, for the creditor.

Mr. Justice DAVIS delivered the opinion of the court.

The species of securities on which this suit is brought has been frequently before this court for consideration, and there are very few questions connected with them that have not been decided. This action involves the validity of the bonds or scrip issued by the defendant in aid of the Kenosha and Beloit Railroad Company. In Wisconsin there is nothing in the organic law restraining the legislature from

* Town of Rochester *v.* Alfred Bank, 13 Wisconsin, 432.

conferring on municipal corporations the power to subscribe for stock in a railroad or other work of public improvement; and the highest court of the State has sustained the validity of securities given for such purposes by towns and cities benefited by their construction, where the power to do so had been granted by the General Assembly.*

But it is insisted the bonds in controversy were executed and issued without the authority of law previously conferred, and therefore the city of Kenosha must be relieved from their payment.

The question presented is an important one; but, in our opinion, easily solved, when the whole legislation on the subject is taken into consideration. On the 22d day of March, 1853, an act of the legislature was passed authorizing the city, if a majority of the people voted for it, to issue its corporate bonds, not exceeding $150,000, to aid in the construction of the Kenosha and Beloit Railroad, and to levy taxes to pay for them; and provision was made that the railroad company should secure the city, by a lien on its property, when the bonds were executed and delivered to them. This law conferred full power on the city to contract an indebtedness (limited in amount) for the promotion of a work of internal improvement, of common benefit to all its inhabitants. A majority of the people did vote to extend the required aid, and the city issued its obligations and delivered them to the company, taking in exchange certificates of stock and indemnity against loss. All parties rested in the belief that these proceedings were according to law, and the securities were negotiated in good faith, and the city received the benefit of them. So far as the corporate authorities could ratify them, they have done it, by a series of unmistakable acts: by voting to levy taxes; redeeming a portion of the securities first issued, and exchanging the residue for new ones; issuing scrip in settlement of unpaid interest, and selling the securities obtained from the company by way of indemnity.

* Clark v. City of Janesville, 10 Wisconsin, 136; Bushnell v. City of Beloit, Id. 195.

The city also, in pursuance of an express act of the legislature, evidently passed to protect the very interests created by the subscription to the capital stock of the road, elected a commissioner to represent it in the meeting of the board of directors, vote its shares of stock, and exercise a general oversight over its affairs in connection with the road.

But it is insisted, that the holders of these bonds or *scrip* (which is the form the securities assumed) cannot recover, because the common council, in submitting to the legal voters the question of whether a tax of $150,000 should be levied and collected to aid the Kenosha and Beloit Railroad, declared, by ordinance, that the question was submitted in accordance with the provisions of section eight of "an act to amend the charter of the city," approved March 23, 1853, and section forty-four of "an act to incorporate the city," approved February 8, 1850. It is unnecessary to notice the latter-named section, as the consideration of the first one is alone material to the subject of this inquiry.

Section eight of the amended charter authorizes the city council of Kenosha to levy and collect special taxes to any amount, and for any purpose, which may be considered essential to promote or secure the common interest of the city; and it is contended that *it* is in conflict with the third section of the eleventh article of the Wisconsin constitution, and that the proceedings of the common council under it cannot be sustained. The Wisconsin constitution provides that the legislature, in organizing municipal corporations, shall restrict their power to tax, assess, borrow money, contract debts, and loan their credit. The provision was a wise one, and has undoubtedly tended to prevent abuses on the part of incorporated cities and villages, in levying taxes and raising money.

The Supreme Court of the State, in the interpretation of the foregoing provision of the constitution,* has declared that the legislature could not confer on a municipal corporation unlimited power to levy taxes and raise money, beyond

* Foster v. City of Kenosha, 12 Wisconsin, 616.

what was proper for purely municipal purposes; and as this was attempted to be done in section eight of the amended charter of the city of Kenosha, that the taxes levied under it, to aid the Kenosha and Beloit Railroad, were unauthorized, and the city authorities could be restrained from collecting them at the instance of a party interested. This is the extent of the decision. The learned court expressly declined to decide whether the scrip issued by the common council to aid the road was valid or not.

In fact, the whole decision is based on the unconstitutionality of section eight, above referred to, which, as it purported to confer upon the city unlimited powers to levy taxes and borrow money, was in violation of the constitution of the State. The court say that "the suit was by Foster in his own behalf, and in behalf of other land-owners, to restrain the city of Kenosha from collecting a special tax of $18,625, levied by the city upon the real estate therein situated, for the purpose of paying a debt originally contracted by the stock subscriptions of the city to the Kenosha and Beloit Railroad Company." This is all that appears in the report of the case as to the character of the suit. It is apparent that the special act of the legislature authorizing the subscription, and the further amendment to the charter of the city substantially ratifying it, were not before the court. They are not referred to in the opinion of the court, and the fair presumption is, that they were not referred to in the pleadings, as the purpose which the complainant had in view did not require that they should be. We are, therefore, unembarrassed by any adverse decision upon the character of the securities in suit, and the question of their validity is an open one for discussion and decision.

It is manifest, that the common council of Kenosha did not attempt the exercise of the unlimited power to raise money conferred on them, because they limited the amount to be raised to the exact sum, which the legislature, by an express act, authorized. Under the provisions of this act, ample power was given to accomplish the object which the city had in view—aiding to build a railroad which would

bring trade and travel to it. By the very terms of this act, the subscription of $150,000 could be made, and taxes levied to pay for it, if the people voted in favor of it. It is conceded, if the submission had been in words under the special act, instead of the amended charter, all controversy would be at an end.

It is argued, notwithstanding there was complete authority to raise the money and levy the taxes under a valid law, yet, as the common council, in taking the vote, named a provision of their charter, which is invalid, that, therefore, not only the payment of the tax can be avoided, but also the payment of the scrip.

Whether this position is well taken or not the necessities of the case do not require to be decided, for, in our opinion, subsequent legislation has cured all antecedent irregularities.

In 1857, after the scrip had been issued to the railroad company, under the proceedings of the common council, the legislature passed a revised charter for the city. Among other things, provision was made for the election of a rail road commissioner, annually, as a city officer. There had been previous legislation in relation to this officer, but his duties and powers by the revised charter were much enlarged. He was constituted, ex-officio, a member of the board of directors of the Kenosha and Beloit Railroad, with power of voting as an individual stockholder, and, in addition, was required to receive from the city treasurer all moneys which were paid on account of the tax for the road, and commanded to redeem all scrip which had been issued to the company as the same became due, making such provision for it, or recommending such measures to the common council as he should deem necessary for the benefit of the tax-payers of the city.

This is not in terms a curative act, but it has that effect by fair implication. It is not doubted the legislature could, by a direct act of confirmation, legalize the issue of this scrip, notwithstanding the submission of the question to the vote of the people was under the wrong law. If by a direct

act, equally in any other way, if the intention of the legislature to legalize, clearly appears.

It is conceded the legislature had the right to authorize the city of Kenosha to take stock in a railroad, issue bonds to pay for it, and provide for their redemption by the levy and collection of a tax. It did authorize these things to be done, if the people approved them; but as their sanction was obtained in the wrong way, thereby involving the legality of their proceedings, good faith and sound policy required, at the hands of the legislature, a full legislative recognition of the legality of the subscription and the issue of the scrip. This was done by the provisions of the revised charter of 1857.

Of such importance did the legislature consider the interests of Kenosha in the railroad to Beloit that a commissioner, of the dignity of a city officer, was deemed necessary to look to them. And that the legislature intended to ratify the proceedings of the common council, which resulted in the subscription of stock to the railroad and issue of scrip, is very clear, else why was the commissioner directed to provide for the payment of the scrip as it matured? The words of the law are imperative. The commissioner *shall* redeem the scrip. Surely the legislature would not command this to be done unless it intended to recognize the validity of the scrip.

"To redeem all scrip which had been issued to said railroad company as the same became due"—the very words of the law—can mean nothing else than that such issue of scrip had received legislative sanction, and, in the opinion of the law-makers, ought to be paid.

If this is so, the ratification of the disputed proceedings of the common council is as complete as if they had been particularly named, and their issue of scrip is relieved from all taint of illegality.

After the revised charter was given to the city, the common council, at different times, and in various ways, recognized the validity of the scrip, and finally, in June, 1859, settled with some of the holders of it, who were willing to

extend the time for payment—taking up the old securities and issuing new.

This suit is brought upon the scrip received on that settlement, and we think the learned court below erred in excluding it from the jury.

The judgment of the Circuit Court is reversed with costs, and the cause is remanded to the court below, with instructions to issue

A VENIRE DE NOVO.

MYERS *v.* FENN.

The practice of permitting judgment creditors to come in and make themselves parties to a creditor's bill, and so obtain the benefit, assuming at the same time their portion of the costs and expenses of the litigation, is well settled. And a proceeding of this sort will not be reversed because the party so coming in has not obtained an order of court to come on; the want of such order not being objected to and the proceeding having gone on to its conclusion as if it had been obtained.

Semble that in Illinois, in the case of a perfectly fair assignment for the benefit of creditors, where the trust will give considerable trouble and property assigned is of a sort that little or no cash will pass into the hands of the assignee, a payment by the debtor previously to the assignment's being made, of a certain sum on account of commissions, need not of necessity vitiate the assignment.

MYERS, Kinsly, and Stout, having obtained judgment against Fenn, filed a bill against him and three other persons named respectively, Thompson, Green, and Roberts,—which last-named person had been Fenn's general assignee, charging a fraudulent transfer of property by him to them. Before issue was had on this bill, one Bowen, having a judgment against Fenn for $3260.96, and a certain Reed having one for $3916.75, upon each of which execution had been returned unsatisfied, united by petition in the bill of Myers, Kinsly, and Stout. The petitions were filed without any order of court; but no objection was made, and the hearing went on as if an order had been granted. The bill set forth that Fenn, being hopelessly insolvent, had conveyed large

quantities of property both to Thompson and to Green, receiving therefor payment in county bonds and other securities then so greatly depreciated as to make it plain that a fraud was intended. And as respected Robbins (the general assignee), that the assignment was not made in good faith, but in order to place the property beyond the reach of executions, and it prayed that it might be set aside.

After Bowen and Reed filed their petitions the proceeding as respected Thompson and Green was dismissed by consent of parties, the matter of the general assignment being thus the only matter remaining charged as fraudulent.

As respected this it appeared by the testimony of Robbins, the general assignee, called by the complainants, and the only witness examined, that Fenn was wholly insolvent and had transferred all his property of every sort to him, for the benefit of his creditors exclusively. It appeared also, however, on cross-examination, that before the assignment was resolved on, Fenn, by the advice of his friends, had come to Thompson, asking him to become the assignee; that Thompson had declined; that being still urged, Thompson had gone to counsel and ascertained that upon an estate such as Fenn's he would be entitled to six per cent. commission; that examining Fenn's affairs he found that the amount of debt to be collected would be about $100,000, but that so very large an amount of it would be paid by counter demands on Fenn himself, that there would not be sufficient money to pay the commissions. Thompson therefore refused to accept the office of assignee unless Fenn paid him a "bonus," which Fenn paid him, accordingly, in the shape of three county bonds for $1000 each, and worth actually about $2300. This sum was apparently meant to be on account of commissions.

The Circuit Court for the Northern District of Illinois (in which the bill was filed) dismissed it. Appeal.

Mr. E. S. Smith, for the appellants:

The giving of the bonds to Robbins, vitiated the assignment.

A debtor cannot fix compensation for an assignee, much less can he pay a large sum in advance for labor to be performed. If the debtor could do this, he might as well give to the assignee discretionary power which he could exercise against the will of the creditors.

In *Nichols* v. *McEwen*,* the assignment provided for the payment of a counsel fee to the assignee, who was a lawyer, over and above the expenses of the commission for executing the trust. The assignment was held void for that provision. Our case is stronger than that one. There the provision was made upon the face of the assignment and was open for the creditors to know what the provision was. Here nothing appeared until the parties were compelled to answer and testify.

Mr. Van Armam, contra.

Mr. Justice NELSON delivered the opinion of the court.

The complainant, Bowen, by petition, united in a creditor's bill which had been filed against the defendants, before it was at issue. Subpœnas were issued and served on him; and, although no order appears to have been entered permitting the joinder of the petitioner in the suit, all the subsequent proceedings were carried on as if such order had been entered. No objection was made to the joinder, but, on the contrary, the court and all parties seem to have acquiesced.

The practice of permitting judgment creditors to come in and make themselves parties to the bill, and thereby obtain the benefit, assuming at the same time their portion of the costs and expenses of the litigation, is well settled.

The judgment, which is set forth in his petition against Fenn, the common debtor, is for the sum of $3260.96, upon which execution had been issued and returned. At the same time another judgment creditor, T. B. Reed and others, joined in the proceedings without objection. This judgment had been rendered against Fenn for the sum of

* 17 New York, 22.

$3916.75. The case went to a hearing on the pleadings and proofs, and a decree was entered dismissing the bill. It is now here on appeal.

Although the bill was originally filed against four parties, while the suit was progressing, and after the above judgment creditors had become parties to the proceedings, it was dismissed by the stipulation and consent of the complainants as to two of them—Thompson and Green—who were charged in the bill as having become the owners of large parcels of the estate of Fenn, the debtor, after his insolvency and before he made an assignment for the benefit of his creditors. The dismissal of these parties narrowed the litigation and confined the issue between the judgment creditors on the one side, and the debtor and Robbins, his general assignee, on the other, and who was the only witness examined in the case. He was called on the part of the complainants. His testimony shows, that Fenn was heavily in debt and hopelessly insolvent. That he had divested himself of all his property in his endeavors to adjust his debts, and by the assignment for the benefit of his creditors. There was no concealment of any of his assets, or attempted appropriation of any part of them for his own benefit or the benefit of his family. All that he possessed appears to have been devoted by the assignment to the use of his creditors, and we perceive no reason for dissenting from the conclusion at which the court below arrived in its disposition of the case.

DECREE AFFIRMED.

SEAVER *v.* BIGELOWS.

In a creditor's bill—several creditors joining—to set aside a conveyance of property as fraudulently made, this court has no jurisdiction on appeal if the judgment of the creditor appealing do not exceed $2000. The fact that the fund in litigation exceeds it is not sufficient.

SEAVER filed a creditor's bill against the defendants, in the Circuit Court for the Northern District of Illinois, setting forth a judgment against one of the defendants, for the

sum of $839.48, and, *he* being insolvent, seeking to get satisfaction of it from a fund *exceeding* $2000 in the hands of another of the defendants who, it was charged, was in possession of the fund by fraud. Plimpton, who joined in the bill, set out a judgment for the sum of $988.47. The suit went to issue, and was heard on the pleadings and proofs, and a decree entered dismissing the bill. The case being now here on appeal, a question arose whether this court had jurisdiction, as the statute limiting appeals from the Circuit Court is confined to cases where the sum in dispute exceeds $2000, exclusive of costs.*

Mr. E. S. Smith, in support of the jurisdiction:

The act of Congress allows appeals in equity, when the matter in dispute shall exceed the *sum or value* of two thousand dollars. The *judgment* is not the amount, as that is not in dispute, it having been fixed by the court at law. Therefore, the value of the property must be the sum in controversy. A decree, in cases of this kind, need not state the amount to be paid. The prayer in the bill, is to apply the property, fraudulently disposed of, to pay the sums fixed by the judgments. *Freeman* v. *Howe*† is decisive. It was there held, that a bill filed on the equity side of the court to restrain or regulate judgments, or suits at law, in the same court, and thereby prevent any injustice or inequitable advantage, under mesne or final process, is not an original suit, but ancillary and dependent; supplementary merely to the original suit, out of which it had arisen.

The bill, in this case, was not filed as an original suit, but to aid the judgment at law.

Mr. Thomas Hoyne, contra.

Mr. Justice NELSON delivered the opinion of the court.

The judgment creditors who have joined in this bill have separate and distinct interests, depending upon separate and

* 2 Stat. at Large, 244, § 2, chap. 40.

† 24 Howard, 460

distinct judgments. In no event could the sum in dispute of either party exceed the amount of their judgment, which is less than $2000. The bill being dismissed, each fails in obtaining payment of his demands. If it had been sustained, and a decree rendered in their favor, it would only have been for the amount of the judgment of each. We say nothing as to the costs, as the statute excludes them on the question of jurisdiction.

It is true, the litigation involves a common fund, which exceeds the sum of $2000, but neither of the judgment creditors has any interest in it exceeding the amount of his judgment. Hence, to sustain an appeal in this class of cases, where separate and distinct interests are in dispute, of an amount less than the statute requires, and where the joinder of parties is permitted by the mere indulgence of the court, for its convenience, and to save expense, would be giving a privilege to the parties not common to other litigants, and which is forbidden by law.

The case is analogous to proceedings in admiralty in behalf of seamen for wages, and salvors for salvage, where the practice of the court is well settled.

In the case of the seaman, though the contract is separate and not joint, all may join in the libel and carry on the proceedings, in form, jointly, to the decree, which assigns to each severally the amount due. If the sum thus assigned is under $2000, neither party can appeal.* So in respect to the case of salvage, where the amount charged upon the goods of each of the several claimants is less than this sum.†

The case of *Rich* v. *Lambert*‡ furnishes another illustration. There, several owners of cargo, having separate and distinct interests, filed a libel against the vessel for damage done to the goods on the voyage. The court decreed damages in their favor, but with the exception of two of the cases the amount was under $2000. The court dismissed the appeals for want of jurisdiction.

* Oliver *v.* Alexander, 6 Peters, 143.

† United States *v.* Carr, 8 Id. 9; Spear *v.* Place, 11 Howard, 522.

‡ 12 Howard, 347.

Syllabus.

The only plausible ground upon which the jurisdiction can be sustained in the case before us is, that the several judgment creditors are proceeding against a common fund, which each is interested to have applied to the payment of his demand. But the same ground for the jurisdiction existed in the case of the seaman, salvors, and owners of cargo for damages. The answer is, that the interest of the judgment creditors in the common fund could not exceed the amount of their several and separate judgments, and if these are under the $2000, the same reason exists for cutting off the appeal as if the suit had been separate and not joint. Indeed, the joinder of parties complainant in the case of creditors' bills is so much a matter of form, that new parties may come in at almost any stage of the proceedings on a proper application; and, under special circumstances, even after decree, if they can show an interest in the common fund. And the party first instituting proceedings may do so on behalf of himself and all other creditors who may come in and assume their share of the costs and expenses.

DISMISSED FOR WANT OF JURISDICTION.

NOTE.—Similar decree made for the same reason in the case of *Field* v. *Bigelow*, and in one branch of *Myers* v. *Fenn*.

UNITED STATES *v.* REPENTIGNY.

1. On a conquest by one nation of another, and the subsequent surrender of the soil and change of sovereignty, those of the former inhabitants who do not remain and become citizens of the victorious sovereign, but, on the contrary, adhere to their old allegiance and continue in the service of the vanquished sovereign, deprive themselves of protection or security to their property except so far as it may be secured by treaty.
2. Hence, where on such a conquest, treaty provided that the former inhabitants who wished to adhere in allegiance to their vanquished sovereign, might sell their property, provided they sold it to a certain class of persons and within a time named, the property, if not so sold, became abandoned to the conqueror.

Syllabus.

3. Where a British Canadian subject has conveyed to a citizen of the United States, lands in what are now the United States, which lands such subject holds under a grant made to a French ancestor by the King of France in 1750 before Canada passed to Great Britain under its conquest in 1760, and while it yet was a French province, and embraced that part of what is now the United States containing them, the title is no longer a French, or English, but an American title, held under the laws of the United States, and subject to them.

4. *Semble*. Where Congress authorizes a court to hear a question of title, such as is above described, to which the United States is a party, and in adjudicating it to be governed by the law of nations and of the country from which the title was derived; by principles of natural justice and according to the law of nations and the stipulations of treaties, an objection of mere alienage and consequent incapacity to take or hold, must be regarded as waived.

5. A grant in the nature of a fief and seigniory was made to private individuals by the French government in 1750, of a tract of 214,000 acres at the Saut de St. Marie, in what is now Michigan, but was then called Canada, on condition of improvement and occupancy; one of the objects of the grant having been to afford a refuge for travellers in a region then a wilderness and inhabited by Indians only. In 1760, the region passed by conquest from France to Great Britain, and in 1783 in the same way from Great Britain to the United States. The grantees took possession immediately after the grant, occupying and improving the tract to a certain extent for four years, but no longer. They then came away, leaving there a person who had gone out and been there with them, but who did not claim under them. One of them went away from this continent in 1764, and died in France; apparently abandoning all interests on this continent: his heir (a French subject and in the naval service of France) received and considered in 1790, 1796, and 1804, offers of purchase more or less definite for his half, and in 1800 had made an *acte de notoriété*, or solemn declaration *in perpetuam memoriam rei*, of his claim to the estate; *doing however nothing more*. The other grantee was killed in 1760, and the alienee of his descendants sold, in 1796, the land to British subjects who had been always resident abroad, and who never in any way looked after the land. In 1824 or 1825, forty-two years after the territory within which the lands are situate had come into her possession, the parties in interest by derivation from the original grantees, made a claim to the United States for the land; this having been the first notice which the United States had of any title adverse to her own. In the meantime the United States had, in 1823, built a fort there for the protection and encouragement of settlers; her laws had been extended over it, the Indian title extinguished, the lands surveyed and put on sale, and were now and had been in a large part for years, covered with inhabitants.

Held, that even under an act of Congress which directed an adjudication to be made, among other ways, on principles of natural justice, the claim could not after such a lapse of time, and so considerable a failure to com-

ply with the conditions on which the grant was made, be sustained against the United States.

6. Where a tract on our Northern Lakes, containing over two hundred thousand acres of land, was granted in 1750 by the crown of France as a fief and seigniory, and on condition of improvement and occupancy, and with a view of its being a refuge and protection for travellers against Indians then inhabiting the region,—improvements which, besides a stockade fort, consisted in nothing but the erection of three or four temporary huts for laborers, the clearing of a few acres of land around the fort, planting the same with Indian corn, and the placing upon the tract of seven head of cattle and two horses, are an insufficient compliance with the conditions of improvement and occupancy; there not having been after 1754 (over a century before the commencement of the suit), any possession or occupancy by the grantees, or their descendants, tenants, or assigns, or further improvement.

7. Under the treaty of 1783 with Great Britain, at the close of our revolutionary war, the United States succeeded to all the rights, in that part of old Canada which now forms the State of Michigan, that existed in the King of France prior to its conquest from the French by the British in 1760; and among these rights, with that of dealing with the seigniorial estate of lands granted out as seigniories by the said king, after a forfeiture had occurred for non-fulfilment of the conditions of the fief. And under our system, a legislative act—after forfeiture from non-fulfilment of the seigniorial conditions,—directing the appropriation and possession of the land,—which is equivalent to the "office found" of the common law,—is sufficient to complete its reunion with the public domain.

APPEAL by the United States from a decree of the District Court of the United States decreeing to the representatives of the Chevalier de Repentigny and of Captain Louis De Bonne, a large tract of land at the Saut de St. Marie, under a grant from the French government, in the year 1751. The proceedings and case were thus:

On the 19th April, 1860, the Congress of the United States, at the instance of certain persons, representatives of the Chevalier de Repentigny and of Captain Louis De Bonne, ancient citizens of French Canada, one of whom had died in 1760, and the other in 1786, passed a law authorizing the District Court of the United States for Michigan to examine a claim which these representatives set up to certain land at the Saut de St. Marie in the State of Michigan, under an alleged grant made in the year 1750, by the French government to the said Repentigny and De Bonne.

Statement of the case.

Under this act of Congress, Louise de Repentigny and others, all females, and resident in Guadaloupe, the representatives by descent of the Chevalier de Repentigny, with one Colonel Rotton, the representative by purchase and devise of Captain De Bonne, filed their petition on the 9th January, 1861, in the nature of a bill in equity against the United States in the said District Court of Michigan. The bill set forth a grant, with certain conditions of occupancy, as a fief or seigniory, on the 18th October, 1750, to Repentigny and De Bonne, by the Marquis de la Jonquière, Governor of Canada, then a French province called New France, and by Monsieur Bigot, intendant of the same, of a large tract at the Saut de St. Marie, describing its nature and extent; a subsequent ratification by Louis XV, and the descents and purchases by which it was now vested in the petitioners. It set forth further that the Chevalier de Repentigny had entered upon the fief in October, 1750, and remained there till 1754; had caused clearing to be done there, put cattle on it by himself or his tenants, and had occupied the place as required by the terms of his grant, and that when withdrawing, about the year 1755, had left agents of the grantees in possession, who or whose representatives were still in occupancy of some parts of the tract; that the claim had never been abandoned; though, owing to the domicil of the parties in foreign countries, and occupations in the armies and navies of such countries, and in remote public service, the owners had not been aware of any mode in which their rights could be defined and specifically assured; that they had from the first relied implicitly upon the faith of treaties existent, as they averred, in the case, and upon the justice of the government of the United States to protect their rights and shield them from wrong; and, as respected some of the petitioners, women, descendants of Repentigny, that owing to their helplessness and the helplessness of their ancestors in respect to pecuniary means, they had been utterly unable to come to the United States and assert their rights, but had been obliged to remain absent and to trust to such exertions as their friends had

from time to time voluntarily made in their behalf to recover the said lands.

The answer of the United States denied generally most of the allegations of the bill; asserted more particularly that the claimants were all aliens; that the conditions of the alleged grant had not been fulfilled by the grantees; and that by the laws of ancient Canada the land had become reunited to the king's domain; that the fief had moreover been abandoned and deserted in fact, and stood possessed by the United States, no judicial forfeiture thereof having been, under the circumstances, necessary; that none of the parties in interest had ever complied with any of the acts of Congress, prescribing in what way claimants of lands in that region should indicate their possessions; that thus, in fact, as well as of right, the fief so abandoned and deserted was reunited to the supreme domain, vested in the people of the United States of America; and that the burden and cost of bringing the same into a productive and profitable estate by the general administration, survey, and settlement thereof, by extinguishing the Indian title thereto, by improvements in the way of public works, and otherwise, had ever since, that is to say, for sixty years and upwards, been thrown upon and borne by the United States. And it set up, moreover, that the land was incapable of identification, and the grant void, owing to the vagueness of the description.

The case, as made out by the evidence, was thus:

On the 18th of October, 1750, the Marquis de la Jonquière, Governor of Canada, then a French province, called New France, and Monsieur Bigot, intendant of the same, by instrument,—reciting that the Chevalier de Repentigny and Captain De Bonne, officers of the French army, entertaining the purpose of establishing a *seigniory*, had cast their eyes upon a place called the Saut of St. Marie; that settlements in that place would be most useful, as travellers from the neighboring ports, and those from the western sea, would there find a safe retreat, and by the care and precautions which the petitioners proposed to take, would destroy in

those parts the trade of Indians with the English,—made to the said Captain De Bonne and the said Chevalier de Repentigny a concession at the Saut, in what is the present State of Michigan, of a tract of land, "with six leagues front upon the portage by six leagues in depth, bordering the river which separates the two lakes," to be enjoyed by them, their heirs, and assignees, in perpetuity, by title of fief and seigniory, with the right of fishing and hunting within the whole extent of said concession, upon condition of doing faith and homage at the Castle of St. Louis at Quebec, of which they should hold said lands upon the customary rights and services according to the *coutume de Paris*, followed in that country, &c.; to hold and possess the same by themselves, to cause the same to be held and possessed by their tenants, and to cause all others to desert and give it up; *in default whereof it should be reunited to his majesty's domain*, &c.

The tract contained about 335 square miles, or 214,000 acres.

On the 24th of June, 1751, Louis XV, then King of France, by instrument or *brevet* of ratification, soon after duly registered at Quebec, confirmed the concession.

The instrument of concession orders that the grantees shall enjoy, in perpetuity, the land; and, among other things enjoined are, that they *improve* the said concession, and use and *occupy the same by their tenants; and that in default thereof the same shall be reunited to his majesty's domain.* . . . His majesty ordering that the said concession shall be subject to the conditions above expressed, "without thereby meaning to admit that they had not been stipulated for in the original grant."

A map of the military frontier, on which the tract was marked, was made by the government surveyor, Franquett, in 1752, and returned to the proper office in Paris.

The purposes of the Marquis La Jonquière, the Governor of Canada, in making the grant, and the views of the ministry at home, were set forth in certain contemporary correspondence between the marquis and the ministry, as follows:

THE GOVERNOR OF NEW FRANCE TO THE MINISTER OF MARINE AND THE COLONIES.

QUEBEC, CANADA, October 5th, 1751.

MY LORD: By my letter of the 24th August, of last year, I had the honor to let you know that in order to thwart the movements that the English do not cease to make in order to seduce the Indian nations of the North, I had sent the Sieur Chevalier de Repentigny to the Saut St. Marie, in order to make there an establishment at his own expense; to build there a palisade fort to stop the Indians of the northern posts who go to and from the English; to interrupt the commerce they carry on; stop and prevent the continuation of the "talks," and of the presents which the English send to those nations to corrupt them, to put them entirely in their interests, and inspire them with feelings of hate and aversion for the French.

Moreover, I had in view in that establishment to secure a retreat to the French travellers, especially to those who trade in the northern part, and for that purpose to clear the lands which are proper for the production of Indian corn there, and to subserve thereby the victualling necessary to the people of said post, and even to the needs of the voyagers.

The said Sieur de Repentigny has fulfilled, in all points, the first object of my orders.

[A part of the letter here omitted is given further on, at pages 219–20.]

In regard to the *second* object, the said Sieur de Repentigny has neglected nothing.

I beg of you, my lord, to be well persuaded that I shall spare no pains to render this establishment equally useful to the service of the king and to the accommodation of the travellers.

I am, with a very profound respect, &c.,

LA JONQUIERE.

THE MINISTER OF FOREIGN AFFAIRS, AT PARIS, TO THE MARQUIS DUQUESNE, GOVERNOR-GENERAL OF CANADA.

VERSAILLES, June 16, 1752.

TO MR. LE MARQUIS DUQUESNE:

I answer the letters which Mr. Le Marquis de la Jonquière wrote last year on the subject of the establishment of divers posts

I begin by a general observation.

It is that such sort of establishments ought not to be undertaken but with a great deal of reflection and consideration upon the motives of well-established necessity or sufficient utility. Those who propose them are never short of specious and plausible reasons for their adoption. They always have in view the good of commerce, or the importance of restraining some Indian nation, but the most often it has been proved that they act under private interest. These posts however cost a great deal to the king as well for their establishment as for their keeping, and serve sometimes only to occasion movements and disorders. Thus the king desires not only that you should not bind yourself to any new establishment of that sort except after having well recognized its advantages, but also that you should examine if among those which have been made for some years past there are not some that it will be good to suppress. And his majesty recommends you the greatest attention on that subject.

By one of my despatches, written last year to Mr. de la Jonquière, I intimated to him that I had approved of the construction of a fort at the Saut St. Marie, and the project of cultivating the land there, and raising cattle there. We cannot but approve the dispositions which have been made for the execution of that establishment, *but it must be considered that the cultivation of the lands and the multiplication of cattle must be the principal object of it*, and that trade must be only the accessory of it.

As it can hardly be expected that any other grain than corn will grow there it is necessary, at least for awhile, to stick to it, and not to persevere stubbornly in trying to raise wheat.

The care of cattle at that post ought to precede that of the cultivation of the lands, because in proportion as Detroit and the other posts of the south shall be established, they will furnish abundance of grain to those of the north, which will be able to furnish cattle to them.

I am perfectly, &c., T.

The Sieur de Repentigny went to the place soon after the grant, and fixed himself at a spot where Fort Brady has since stood. He remained here during the years 1751, 1752, 1753, and 1754. What he did there appears best from the contemporary letter of the Marquis de la Jonquière to the

Minister of Marine and the Colonies, already quoted, describing the matter, and from which a part omitted on page 217, is now, as more in order of subject, here given.

As soon as he arrived at Missilimakinac, the chief of the Indians of the Saut St. Marie gave to him four strings of wampum, and begged of him to send them to me, to express to me how sensible they were for the attention I had for them by sending to them the Sieur de Repentigny, whom they had already adopted as their nephew (which is a mark of distinction for an officer amongst the Indians), to signify to them my will in all cases to direct their steps and their actions.

I have given order to said Sieur de Repentigny to answer at "the talk" of that chief by the same number of strings of wampum, and to assure him and his nation of the satisfaction I have at their good dispositions.

The Indians received him at the Saut St. Marie with much joy. He kindled my fire in that village by a neckless, which these Indians received with feelings of thankfulness. He labored first to assure himself of the most suspected of the Indians. The Indian named Cacosagane told him, in confidence, that there was a neckless in the village from the English: the said Sieur de Repentigny succeeded in withdrawing that neckless, which had been in the village for five years, and which had been asked for in vain until now. This neckless was carried into all the Saulteux villages, and others at the south, and at the north of Lake Superior, in order to make all these nations enter into the conspiracy concerted between the English and the Five Nations, after which it was put and remains in deposit at the Saut St. Marie. Fortunately for us, this conspiracy was revealed and had not any consequences. The Sieur de Repentigny has sent me that neckless, with the "talk" of Apacquois Massisague, from village the head of Lac Ontario, to support that neckless, which he gave to the Saulteux of the foot of the rapids of Quinilitanon.

He sent me also "the talk" given by the English in the autumn of 1746 to form this conspiracy. I have the honor to send you inclosed, my lord, a copy of those two "talks," by which you will see to what excesses the English had pushed their malignity for the destruction of the French, and to make themselves masters of our forts. The said Sieur de Repentigny

forbid the Indians of his post to go and winter at Saginaw, which is not little to say, for these nations go thence from there very easily, and in a short time to the English, who load them with presents. These Indians kept the promess which I required from them; they all stayed at Lake Superior, whatever were the inducements the English made to attract them to themselves.

He arrived too late last year at the Saut St. Marie to fortify himself well; however, he secured himself against insults in a sort of fort large enough to receive the traders of Missilimakinac.

The weather was dreadful in September, October, and November. Snow fell one foot deep on the 10th October, which caused him a great delay. He employed his hired men during the whole winter in cutting 1100 pickets, of 15 feet, for his fort, with the doublings, and the timber necessary for the construction of three houses, one of them 30 feet long by 20 feet wide, and the two others 25 feet long, and the same width of the first.

His fort is entirely finished, with the exception of a redoute of oak, which he is to have made 12 feet square, and which shall reach the same distance above the gate of the fort. As soon as this work shall be completed, he will send me the plan of his establishment. His fort is 110 feet square.

As for the cultivation of the lands:

The Sieur de Repentigny had a bull, two bullocks, three cows, two heifers, one horse, and a mare, from Missilimakinac. He could not, on his arrival, make clearing of lands, for the works of his fort had occupied entirely his hired men. Last spring he cleared off all the small trees and bushes within the range of the fort. He has engaged a Frenchman, who married at the Saut St. Mare an Indian woman, to take a farm; they have cleared it up and sowed it, and without a frost they will gather 30 to 35 sacks of corn.

The said Sieur de Repentigny so much feels it his duty to devote himself to the cultivation of these lands, that he has already entered into a bargain for two slaves, whom he will employ to take care of the corn that he will gather upon these lands.

On the 24th April, 1754, Governor Duquesne addressed a letter to the Chevalier "commanding at the Saut St. Marie," in which he says:

"Besides the *private advantage* you will derive from the care you give to the culture of your lands, the court will be very thankful to you, and I exhort you to give yourself entirely to it by the interest I take in you. . . . . Continue to keep me informed of what is passing at your post and the progress of the cultivation of the land, of which I shall make proper use."

So the same Governor writes to Machault, the Colonial Minister, dating from Quebec, 13th October, 1754, saying:

"The Chevalier de Repentigny, who commands at the Saut St. Marie, is busily engaged in the settlement of his post, which is essential for stopping all the Indians who come down from Lake Superior to go to Choueguen (Oswego), but I do not hear it said that this post yields a great revenue."

Repentigny remained at this place till 1755.

In that year, or somewhat before, war broke out between Great Britain and France; the possessions of France in America being one of the matters which Great Britain sought to gain. The British arms were victorious; and peace being concluded in 1760, Canada, which was considered as embracing the land in question, was surrendered to Great Britain.

By the capitulation made at Montreal, September 8th, 1760, it was declared that "the military and civil officers, and all other persons whatsoever, shall preserve the entire peaceable right and possession of their '*biens*' (property), movable and immovable; they shall not be touched, nor the least damage done to them, on any pretence whatsoever, and shall have liberty to keep, let, or sell them, as well to the French as to the English."*

By the preliminary articles of peace between the Kings of Great Britain and France, of November 3d, 1762,† it was agreed,—

* Mr. Bancroft (History of the United States, vol. iv, p. 361), remarks that this capitulation included all Canada, which was said to extend to the crest of land dividing the branches of Erie and Michigan from those of the Miami, the Wabash, and the Illinois Rivers.

† Entick's History, &c., 439, 440.

"That the French inhabitants, or others, who would have been subjects of the Most Christian King in Canada, *may retire in all safety and freedom wherever they please, and may sell their estates, provided it be to his Britannic Majesty's subjects*, and transport their effects, as well as their persons, without being restrained in their emigration under any pretence whatsoever, except debts and criminal prosecutions; the term limited for this emigration being fixed to the space of eighteen months, to be computed from the day of the ratification of the definitive treaty."

The same clause was copied into the definitive treaty of Paris, of 10th of February, 1763, between the same powers.

By these two treaties severally, Canada was ceded and guaranteed to the crown of Great Britain, and thus that power maintained its conquest.

This war and the peace had different results in the personal and family history of De Bonne and De Repentigny. De Bonne was killed in 1760, at the battle of Sillery, during the attempt of the French to recapture Quebec, after its taking by Wolfe in the celebrated battle on the Plains of Abraham. He left an infant son, Pierre, who was born in 1758, and was therefore two years old at the time of his father's death. Pierre remained in the province after its cession to the English, and, thus choosing a British domicil, became a British subject; rising in fact to judicial and other civil honors under the British crown. Having reached manhood, he presented himself, in 1781, "at the Castle of St. Louis, at Quebec, to render faith and homage to his most gracious majesty King George III, as owner of the land of the Saut de Sainte Marie, conceded, in 1750, to his father and to Monsieur de Repentigny, jointly."

In 1796, he sold for £1570 sterling, his interest in the seigniory to James Caldwell, of Albany, who, in 1798, made a deed of quit-claim of the same interest to Arthur Noble, a citizen of Ireland, then residing temporarily in New York. Noble returning to Ireland, by his will, made in 1814, devised the interest to his nephew, John Slacke, of Dublin John Slacke, by his will, dated in 1819, devised it to his wife.

Mrs. Slacke, in 1839, conveyed the same to her son, John Gray Slacke. He, in 1841, devised to Henry Battersby, of Dublin, who, in May, 1861, conveyed to Colonel Rotton, an officer in the British service, and the party in this case to whom by the decree below one-half the land had been adjudged.

So far as respects the moiety of De Bonne. Now as to Repentigny.

About the year 1755, and with the necessities of the crown, Repentigny, whom we left on his seigniory at the Saut de St. Marie, returned to Quebec and entered into the military service of the King of France, in which he remained until the surrender of the French forces, having like De Bonne been engaged in the battle of Sillery, in 1760, for the recapture of Quebec. On coming away from the Saut in 1755, he left there one Jean Baptiste Cadotte, a Frenchman, who had gone out there with him apparently as an attendant, and who had married an Indian woman.

In 1756, at Montreal, he entered into a partnership with De Langy and another person for carrying on the fur trade at the Saut and other posts in that region. The Chevalier "puts in all his merchandise at the said posts." The partnership at all the posts was to last until the spring of 1759, and as to that at the Saut might, at the option of the parties, be continued until the autumn of 1762. The two partners of Repentigny were not to be at liberty to quit their posts.

In 1759, at Montreal, he gave to his wife a general power of attorney to carry on, govern, and transact all his affairs; and under it, in 1761, Madame de Repentigny authorized one Quenel to go to the Saut and the other posts held by the partnership, and receive "the third part of the packages of furs which are at the Saut St. Marie arising from the partnership between, &c.; and those furs which the Sieur Cadotte may have in his hands, as well as other effects of whatever nature they may be, and give receipts, also to take away all that may be due to said Sieur de Repentigny."

In 1762, the British garrison being now in possession of the fort—the country having changed sovereigns—all the

houses at the fort except Cadotte's were burned by the Indians. The furs escaped.

The Chevalier remained in Canada till 1764; that is to say, until Canada had completely ceased to be a French province. The British Governor, Murray, now made to him the most flattering offers of promotion to induce him to stay. "The knowledge which I have of your military talents," he writes from Quebec, March 6th, 1764, "and the esteem I have for yourself, induces me, by every sort of reason, to try to attach you to this country, the country of your birth. Although it has passed under another dominion, it ought to be always dear to you. You are attached to it by too many bonds to be able easily to detach yourself from it." Repentigny preferred, however, to follow the fortunes and standard of his king, and in 1764, as above said, returned to France, leaving Madame de Repentigny, his wife, temporarily behind him, with her power of attorney. Under this power she sold, in April, 1776, to Colonel Christie, a British officer, an estate called La Chenay, which the Chevalier de Repentigny owned, above Montreal, reciting that she was "intending to leave and quit Canada." The deed contained covenants for further assurance, which, in October, 1766, was given by Repentigny himself, now styled "of Paris, in the Kingdom of France." In 1769 he was appointed commandant of troops at the Isle de Re, on the coast of France, where he remained till 1778, in which year he was sent to Guadaloupe, in command of the *Regiment d'Amérique*. He remained at Guadaloupe with his regiment till 1782; a part of it having participated in the operations of the American army in Georgia during the war of Independence. Receiving the rank of brigadier, he returned, in 1782, to France, and having been now forty years in service, and not being willing to retire on half pay, was appointed by the crown, in 1783, Military Governor of Senegal, on the coast of Africa. His health failing him after two winters in that climate, he asked, in the autumn of 1785, for a furlough, and returning to Paris, died there October 9th, 1786.

He left one son, Gaspard, born at Quebec in 1753, who, in

1777, entered the naval service of France, was made lieutenant in 1780, and in that year married in Guadaloupe. He continued in the naval service of France at Guadaloupe, and after having made eleven campaigns at sea, and been engaged in two sea-fights and wounded, died at that place in 1808.

Gaspard had also a son, Camille, born in 1789. He married in Guadaloupe in 1814, died there in 1820, leaving children. These, with grandchildren, male and female, the issue of a deceased child, were parties to the present proceeding, and the persons, along with the representatives of De Bonne, in whose favor the decree appealed from had been made.

As respected the amount of claim made to this estate after the Chevalier left Canada in 1764, to return to France, and as to how far he or his heirs considered it his and their property still, or retained possession by their agent or tenants, the case presented some contradictions of evidence.

On the one hand, ancient witnesses, still resident at the Saut de St. Marie, were produced.

One of them, named Biron, testified that a nephew of Jean Baptiste Cadotte (the Frenchman already mentioned, p. 223, as having gone with Repentigny to the Saut in 1751, and been left there when the Chevalier returned to the army at Quebec) had told him, the witness, that his uncle, old Cadotte, had informed him that there was an officer at the Saut in the times of the French, named Repentigny; that the Saut was a seigniory, including the old fort and a great distance below and above the same; that it belonged to De Bonne; that he (old Cadotte) was not sent here to take charge of the fort, but *got possession* after he came, and commanded the fort; that De Bonne transferred it to some one; he did not know to whom.

A second witness, Gornon, a granddaughter of the same Jean Baptiste Cadotte, testified that she had heard her father or mother say that old J. B. Cadotte, her grandfather, came to the country as a "*voyageur*;" that two French officers, one by the name of Repentigny and the other of De Bonne, came there about the same time; that she had heard her parents

or some others say that the said officers built a fort or post, and that they went away, leaving her grandfather in possession; that her grandfather retained possession till he gave it to her father; that her father went away about the year 1810, leaving her mother in possession.

A third witness, husband of the last one, testified that he had heard his father-in-law, J. B. Cadotte the younger, say that old Cadotte came to the Saut about the same time that a French officer by the name of De Repentigny came there; that they were in some way connected about the fort, which the officer had built, and that after the officer went away old Cadotte took possession and ever afterwards held it until it was taken possession of by his son, J. B. Cadotte the younger, the father-in-law of witness, and after his death by Madame Gornon's mother, the widow of J. B. Cadotte the younger.

Coming, in the next generation, to the son of the Chevalier, it appeared that in the year 1790 an English gentleman had proposed to Gaspard de Repentigny to buy the property, this being, apparently, the first information Gaspard had of it, or, at least, of its value. Gaspard declined to sell. So again, in August, 1796, he was applied to, through an agent of the Mr. Caldwell who had bought De Bonne's half, to sell this other half also, the price offered being $8100. Gaspard replies:

"Escaped from the wreck of Guadaloupe with means which supply the wants of my family, I think you will approve the determination I take of not hastening to sell a tract of land which cannot but acquire value in the future. My title-papers, well proved by his care and the measures that Madame de la Vigne assured me her husband had taken, . . . all put me in the greatest security. The proposition that Mr. Caldwell makes does not seem to me tempting. From what Madame de la Vigne told me, he paid more than $8100 for the portion which he has, and I don't believe that the remaining half is now worth less than that which he bought. Although at a distance from New England, the relations which we have with that country enables us to learn that every day gives value to these lands. I beg you

to continue your cares upon a matter which will terminate sooner or later, and to give me any information you may acquire either as to the value of the lands or the persons who desire to purchase."

So, four years later, that is to say, in the year 1800, this same Gaspard, then residing in the Island of Martinique, made, before two notaries there, what in France and its colonies is known as an *acte de notoriété*, a solemn and recorded declaration of right, intended to keep alive a claim not capable of enjoyment at the moment. This *acte de notoriété* declared the fact, date, nature, and confirmation of the grant by Louis XV; that by various treaties the property was now included in the United States; that the Chevalier de Repentigny had been attached to the marine service of Rochefort, in France, and of Guadaloupe and Martinique, and governor in Africa, &c., and had died in France; that he, Gaspard, was his only heir; "that the remoteness of the place and other circumstances have, until this day, prevented him from having his rights recognized, *but that he desires to exercise them, and that for this he need only establish his heirship.*"

In 1804 the matter of a sale to Caldwell was again brought up, but was not carried through.

In 1825, the original deed of ratification signed by the King of France was presented to Mr. Graham, the Commissioner of the General Land Office, by an agent of the parties in interest, to prevent, as he says, "the issuing of patents" to the claimants at the Saut St. Marie under the act of February 21st, 1823. On the 7th of December, 1826, Mrs. Slacke's caveat was filed in that office, showing the grounds of the claim. On the 15th of the same month, Mr. Cambreling, member from New York, presented to Congress the petition of Mrs. Slacke, praying a recognition of the claim; and this petition continued to be presented from time to time to Congress down to 1841, when the De Repentigny heirs also presented their petition for the same purpose Agents were employed by both the De Bonne and

De Repentigny representatives, at great expense, to obtain a recognition of the claim by Congress, down to the 19th of April, 1860. On that day Congress, referring to their claim under an "alleged grant in 1750," passed a private act, authorizing them to present their case by petition to the District Court for the District of Michigan, and authorizing that court to examine and adjudicate the same.

On the other hand, documents and letters from the Chevalier de Repentigny, produced from the French archives, rather tended to show that he considered himself, when leaving the province of Canada after the conquest, to have abandoned all claim to this grant. As exhibiting not only this fact, but the character of the writer in point of standing, intelligence, and capacity to judge of his concerns (a matter spoken of by the court), full extracts are given. They were thus:

About the year 1773, being then at the Isle de Re, and desiring promotion in rank, he forwarded to the minister of the colonies by that minister's desire, a memoir or statement of facts on which he based his solicitation. It ran thus:

'I entered the service at 13 years of age; I made my debut by a campaign at a thousand leagues from my garrison; I have been for 33 years in the service; sixteen campaigns or expeditions of war; twelve battles, affairs, or hot actions, in four of which I commanded in chief, with success. Two sieges; six years employed with the approbation of the generals in command, and negotiations among different nations of Canada. Such, my lord, are my services. In 1632, my great-great-grandfather went to Canada, with the charge of accompanying families of his province, in order to establish that colony, in which he himself settled. Since that epoch we have furnished to the corps of troops which served there fifty officers of the same name, of which more than one-half has perished in the war; my father augmented the number of them in 1733. My grandfather was the eldest of 23 brothers, all in the service. My son alone remains of that numerous family.

"*The cession of Canada, my native country, has overturned a fortune more than moderate, which I could preserve only by an oath of fidelity to the new master, which was too hard for my heart.*

"The offers of the English ministry made to my eldest brother to retain us in their service are an unequivocal proof of the consideration we enjoyed in Canada, a consideration augmented, and I dare say merited, in the last campaigns.

"In fine, two hundred thousand francs in drafts upon the treasury, a hundred thousand francs in bills of exchange, of which I was bearer, drawn upon the king in 1761, reduced to one hundred thousand francs in 1764, to fifty thousand francs in 1770, by the reduction at 2½ per cent., have just brought me thirty-two thousand five hundred francs last month, by the negotiation that I have made of it, fearing to lose all. *Such are my sacrifices and my misfortunes in abandoning my country.* You made me forget them, my lord; your ministry has given me existence; you have granted me several military favors; my ambition is only to deserve, and be judged worthy of their continuation.

"REPENTIGNY,
"Colonel of the Reg't de l'Amerique."

So in letters on the same subject of his promotion, written, one in January, 1770, and one in April, 1772:

"My claim is based, my lord, upon thirty-one years of services, ending in the month of May next, commenced at about fourteen years of age, upon sixteen campaigns, twelve battles or actions, four in which I commanded in chief with success enough to deserve the confidence and approbation of the generals who employed me.

"I made two sieges, one fight at sea commanding a detachment of 200 men with six officers for Newfoundland in 1762, when the Duke of Choiseul honored me with that command.

"I was taken by a man-of-war (vaisseau) of 74 guns, the Dragon.

"After 30 years of service performed with honor in the colonies, *and the sacrifice of a future more than reasonable in leaving Canada, my native country, I should be able at* 45 *years of age to claim a regiment in the colonies without too much ambition.*"

A letter written from Paris, September 28, 1782, not long before his appointment to the Governorship of Senegal, on the coast of Africa, and in reply, apparently, to one from the

crown offering him retirement on half pay, contained similar expressions.

"The permission which the king gives me to retire implies that I have asked it; but I am very far, my lord, from wishing to profit by it. The word retirement always made me shudder. Two years ago I entered upon my sixth engagement, and I hope you will appeal to the goodness of the king to permit me to continue my services, which may be for a long time useful to his majesty. *If I had not calculated upon dying in the service, I should not have sacrificed more than four-fifths of my fortune, my well-being, that of my family, in abandoning Canada, my country.*

"In fine, my lord, you are just; you would avoid having to censure yourself with having maltreated an old officer, without reproach, who has presented with honor and distinction a career of more than forty years, and with causing him to lose all consideration. Truth is one; it cannot escape your observation."

By the definitive treaty of peace of 1783, between Great Britain and the United States after the war of Independence, Great Britain relinquished all claim to the proprietary and territorial rights of the several United States, repeating the boundaries agreed upon in a provisional treaty of 1782, by which the seigniory was found to be included within the limits of the United States, and fell within those of Virginia.

This tract remained within the acknowledged limits of Virginia, until the final cession of the territory northwest of the Ohio, on the 1st of March, 1784, to the United States.

The region about the Saut de St. Marie remained occupied by Indians chiefly, until 1820, when by treaty between them and the United States, their title was extinguished. After this date the United States caused the whole district to be surveyed, and at the time that the bill below was filed, had sold to private persons who were in possession under patents, 108,000 acres more or less, of the 214,400 originally granted to Repentigny and De Bonne.

In 1805, the legislature of Michigan passed an act allowing foreigners to take and hold lands.

Numerous jurists of high standing in Canada were ex-

amined on both sides, as experts, to prove the nature of a fief and seigniory under the laws, ancient and modern, of Canada, the *coutume de Paris*, &c., and as to whether, under certain royal arrêts of France, one of March 15th, 1732, another of 1711, called the arrêt of Marly, the land originally granted had or had not become united to the king's domain; and how far a judicial proceeding in the nature of an "office found" was necessary to make the reunion effective, supposing that the facts justified one.

The arrêt of 1732 declared that "all owners of unimproved seigniories shall improve them and place their settlers upon them, otherwise the seigniories shall be united, in virtue of this statute, without recourse to any other *statute*," and there seemed to be no doubt that if the proprietors made no improvements, and put no tenants in occupancy (*qui n'ont point de domaine defriche et qui n'y ont point d'habitants*), they could be reunited; though perhaps the testimony left a case like the present not so entirely clear as the other. As to the necessity of some proceeding, Mr. Justice Badgley, of the Superior Court of Canada, and for more than thirty years connected with the profession of the law, testified that under the arrêt of 1711, the proceedings were strictly judicial.

The arrêt of 1732 contained a provision relating apparently to the sale of wooded land, and by which, as the counsel of the United States interpreted it, it was declared that on any attempt to sell such land they should be—

"In like manner reunited—*de pleno jure* . . . in virtue of the present decree, and without there being need of another."	"*Pareillement* reunie de plein droit . . . en vertu du present arrêt, et sans qu'il *en* soit besoin d'autre."

The act of Congress of 1860, authorizing the District Court for Michigan to take cognizance of the case, enacted that in adjudicating the question of the "*validity of the title*" as against the United States, "the court was to be governed" by the laws of nations and of the country from which the title was derived, and also by the principles, so far as they are applicable, which are recognized in the act of Congress approved

the 26th of May, 1824, "enabling the claimants to lands within the limits of the State of Missouri and Territory of Arkansas to institute proceedings to try the validity of the same;" an act which directed that the claims should be heard and determined in conformity with the principles of justice, and according to the laws and ordinances of the government under which the titles originated; also, according to the law of nations and the stipulations of treaties.

The act limited the time of bringing the suit to two years, and provided that "in case of a final decree in favor of the *validity of the grant*, it shall not be construed to affect or in any way impair any adverse sales, claims, or other rights which have been recognized by the United States within the limits of the said claim, or which, under any law of the United States, may have heretofore been brought to the notice of the land commissioners or of the land officers in Michigan, or any of the land granted to the State of Michigan, or occupied by it, for the Saut St. Marie canal, its tow-path and appurtenances, but for the area of any such adverse claims the legal representatives of the said De Bonne and Repentigny shall receive from the Commissioner of the General Land Office warrants authorizing them or their assigns to enter any other lands belonging to the United States, and subject to entry at private sale at one dollar and twenty-five cents per acre."

The court below, as already said, decreed for the petitioners, and the case was now here for review, on appeal by the United States.

Mr. J. M. Howard, for the appellees, representatives of De Bonne and Repentigny:

I. AS TO THE REPENTIGNY MOIETY.

It will be argued on the other side that Repentigny, by abandoning Canada and adhering to his old allegiance, lost, *ipso facto*, all right in this grant.

But, without relying upon treaties, we assert that the articles of capitulation of Montreal secured to him "the entire

peaceable property and possession of his goods, movable and immovable, which were not to be touched—*i. e.*, taken possession of, nor any damage done to them under any pretence whatever."

The subsequent treaties of 1762 and 1763 are both based upon this capitulation; and Great Britain could not, in honor, deprive them of their property. This guarantee of the British crown was in favor of its conquered subjects. It followed the title when Great Britain and the United States settled their boundaries in 1782 and 1783. The right to emigrate within eighteen months was a personal privilege, to prevent the inhabitants becoming British subjects, as they would have done by remaining longer.

Besides, by the laws of war, the conqueror is bound to protect the property of his conquered subjects.*

The common law of England as to alienage did not prevail in Canada, but the French laws of the colony were preserved by the Quebec act of 1774, annexing the region in question to the province of Quebec, to be held at the king's pleasure; by the third section of which all rights of property in land were declared "to remain and be in force and to have effect as if this act had never been made."†

Those French laws allowed aliens to purchase and hold lands during their lifetime; and alienage can only be established upon a judicial proceeding and sentence. De Repentigny was also signior of La Chenay. The crown never disturbed him, and in 1766 he sold the estate to Major Christie, of the British army.

II. AS TO BOTH CLAIMS.

1. *Alienage.*—The answer sets up that Noble, the purchaser from Caldwell of De Bonne's half, and all subsequent owners of that half, are aliens. The same objection would apply to the descendants of Repentigny.

If the fact were as alleged, they all had capacity to take. Independently of the Michigan act of 1805, an alien can

* Johnson *v.* McIntosh, 8 Wheaton, 543.

† British Statutes at Large, vol. xxx, p. 549.

take by purchase or devise and hold till office found; and till then he can sell and convey or devise.*

2. *Non-fulfilment of conditions; Lapse of time; Abandonment; Extinguishment of Indian title; Reunion to the crown; Want of certainty in description, &c.*

The paper title being complete, the petitioners are bound to do no more, as against the United States and under the act of Congress, than to prove that the title, which emanated from New France, was valid.

The terms of the act providing for adjudicating the question of "the *validity of the title*" indicate that the validity of the title is to be tested as it stood at the time of its derivation, by the laws then in force.

But the court is to be governed also by the principles, so far as they are applicable, recognized in the act of 1824. Those "principles" can mean only the provisions of the act and the legal consequences flowing from them. That act did not apply at all to cases where the title was complete and perfect under the foreign government, but only to inchoate or unperfected titles.† But it applied to cases of *concessions*, and plainly embraced the concession in this case, but only the concession. The act of 1860 does not refer to the *ratification*, which was dated in 1751, but only to the "*alleged grant* in 1750," *i. e.*, the concession.

In passing upon the present validity of the title, the court is not allowed to consider whether, since its emanation, anything had occurred to defeat it, such as lapse of time or other matter of defeasance. Congress intended the title should be judged of as of the date of its emanation. Why else would they have subjected it to the test only of the laws of nations and of the country from which it was derived?

The construction which Congress and their commissioners

* Mooers *v.* White, 6 Johnson's Chancery, 365; Fox *v.* Southack, 12 Massachusetts, 149.

† Clarke *v.* Courtney, 5 Peters, 354, 373; United States *v.* Reynes, 9 Howard, 144–147; Glenn *v.* United States, 13 Id. 259; United States *v.* Roselius, 15 Id. 31–35.

have placed upon similar language in other acts of a nature similar to this one of 1860, affords argument in support of our view.

Thus the act of March 26, 1804, for the adjustment of private claims at Detroit, &c.,* gave the commissioners power to decide "according to justice and equity" upon claims depending solely upon "*legal grants.*" They found only six such; and they confirm these six grants for the reason, as they remark in their report,† that they "consider the government right as completely transferred by these grants, and affirm the claims grounded upon them, with reservation of individual rights in contested cases."

The act of 1804 involved no inquiry respecting possession or occupation, and it nowhere appears that the board entertained any such inquiry, but simply the question whether the title was "legal." The ground of confirmation was, that it transferred all the government right. Accordingly, no inquiry was made into the fulfilment of the conditions embodied in the grant, nor into the effect of lapse of time, of non-occupation, of alienage, or any such objection dehors the title-papers by which the title passed to the claimant. And this construction is binding on the government.‡

Could the present claim have been acted upon by them, it is impossible to perceive a reason why it would not have been confirmed, as the six others had been.

It should be noticed that the original brevets of ratification, under which the land was claimed in those cases, imposed certain conditions upon the grantees, feudal in their character, "upon pain of the nullity of these presents." In the ratification in the present case it is "in default thereof the same shall be reunited to his majesty's domains." There can be no difference in meaning and effect.

On the report of the commissioners, Congress, by their act

* 1 Stat. at Large, 277, §§ 3, 4.

† 16 American State Papers, 308, Malcher's Claim; Beaubien's do. 305; N. Gouin's, 341; F. Peltier, 342; Morass, 343; G. Meldrum, 344.

‡ United States v. Arredondo, 6 Peters, 713.

of March 3, 1807,* confirmed these six decisions, and thus made known their views of what was a "legal grant" and what was a decision "according to justice and equity."

So, under the Missouri act of 1824, the petitioner's claim was founded upon some French or Spanish grant, concession, warrant, or order of survey, legally made, and which might have been perfected into a complete title under the former laws; and the act provides that the validity of such title or claim may be inquired into by the court; which, however, had no jurisdiction in cases of complete title. Yet, in *Chouteau's Heirs* v. *United States*,† this court held that the power of the District Court was confined to the "validity of the grant," and would not allow the United States to go back of the warrant of survey to prove that Chouteau had not complied with the government regulations.

If we are right in supposing that it is the validity of the grant as made which is to be judged, then all that can be said about abandonment, escheat, &c., is of no pertinence.

But the United States took as assignee, chargeable with notice of the grant, and liable in justice to recognize whatever Great Britain or Virginia was. They found white persons, descendants of Cadotte and others, in possession of the seigniory. They had no ground to presume that these persons were there without right. Finding them there, they were bound to presume they held, or claimed to hold, under a legal grant from some sovereignty, either British or French, and that the persons in possession held under that grant either as tenants or assignees of the original grantees, to whose grant the possession was referable. Such is the presumption of law.‡

If this be so, with what justice can the United States set up to be the owners by lapse of time?

Again: the act of 1860 saves from the effect of a decree in favor of the validity of the grant three classes of lands, including lands which have been sold, as those which cannot be recovered by the petitioners.

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* 1 Stat. at Large, 347. † 9 Peters, 154. ‡ 4 Kent's Com. 179

Argument for the claimants.

Of course the court has not the means of designating these lands. That duty belongs to the General Land Office, which, having designated them, is required to perform its other duty of issuing warrants for the same area of land. The whole extent of the court's power is to ascertain the representative character of the petitioners and the validity of the title or grant.

Now, had it been the intention of Congress to claim by abandonment and prescription, would they have made this saving? They knew the claim dated back more than a hundred years, for the act speaks of the "alleged grant in 1750;" and they knew, therefore, that no claimant in possession could, by a private suit, be ousted or disturbed by these representatives. All claimants in possession could set up lapse of time successfully against the suit now authorized, and therefore needed no such exception for their protection. Congress knew, also, that if mere non-occupation by the grantees and their representatives afforded the United States a good ground for continuing to hold possession, they themselves were protected by the same state of facts; indeed, if they intended to avail themselves of it, this great lapse of time and non-occupancy was a defence, and the passage of the act was a worse than useless ceremony; for it invited and led parties to undertake a lawsuit which Congress *knew* must fail.

Such could not have been the intention of Congress.

Many of the claims protected by this exception were of very ancient date, and were acted upon by the commissioners under the act of February 21, 1823, as will be seen in the seventh volume of the Report of the Commissioners on the "*Claims at Saut St. Marie*," all founded on occupancy, which, in some instances, was asserted to have commenced nearly a century before the passage of the act.*

Now, look at the posture of the case after proof of the validity of the grant has been made, if the defence of aban-

* See Rep. No. 42, 20th Cong., 1st Sess., Com. Pub. Lands, H. Rep's, p. 451, and particularly the claim of the Messrs. Warren, pp. 463, 464, and the testimony of John Johnston and Michael Cadotte.

donment and prescription by the United States is entertained. The court is well satisfied that the original grant was valid and perfect, giving a complete right of possession and enjoyment "in perpetuity," as the grant expresses it.

But the court proceeds to allow the grant to be defeated by an alleged act of abandonment of indefinite subsequent date, and declares that although thus satisfied, the claimants have lost their once valid title, and are, therefore, not authorized "to receive the warrants."

Is it not clear that, if such a defence is permitted and successfully made out by proof, the question of "the validity of the title" becomes an immaterial question? and that the question of possession is the only true one? Is not the paper title thus treated as of no importance?

It may be said that by the terms "validity of the title" Congress intended the present and not merely the former validity of the title, and that to make out a valid title the proof must show that the ancient formal title has been kept alive and in vigor.

But such is not their language; such was not their policy in the Michigan act of 1804, nor in the Missouri act of 1824.

Advert to historical facts. Virginia, it is known, took actual possession of the Northwest Territory in 1778 and 1779, under Colonel George Rogers Clark. He captured Fort Vincennes in February, 1779, made a prisoner of Hamilton, the British Governor of Detroit, and sent him to Virginia.* The United States have claimed the region as rightful owners since the cession by Virginia, and were in *actual possession* of it from July, 1796, when the British garrison was withdrawn from the fort at the Saut, a *de jure* possession of seventy-six and an actual possession of sixty-four years—using the tract for their own purposes.

The construction contended for implies that possession by the grantees or their representatives was and is essential to this present valid title. But how absurd to enact such a law in their own favor while the United States well knew that

* 1 Marshall's Life of Washington, 284; Allbach's Western Annals, 263-295.

they, and not we, had possession for three-quarters of a century, they using it and selling it in spite of us, the lawful owners.

Besides, the most natural meaning of the expression "validity of the title," is the legal regularity and force of the original title-papers referred to. We say, both in common and legal parlance, that a deed, barred by a statute of limitations or matter *ex post facto*, is not good; but seldom say that it is not valid. The term "valid," as used in the expressions a "valid deed," a "valid bond," a "valid note," a "valid agreement," a "valid contract," refers usually to the effect of the instrument at the time it is made, and not to its effect when destroyed or impaired by subsequent matter.

Is it not inconceivable that Congress, with the full knowledge of all the facts of the case, except as to the validity of the original grant, about which they wished judicial decision, intended to rely upon abandonment and prescription, when not one word is contained in the act indicating such a purpose—a purpose which, as we have said, if sustained by law and fact, utterly defeats us? Did they intend to say to the claimants: "We well knew you had the legal title, but we knew, at the same time, that we held the land, not by grant or cession, but by mere *lapse of time?* Such is our reply, and our only reply, to your legal grant."

It is not easy to conceive of an artifice so little worthy of a government, a plea so wanting in frankness and fair dealing.

Moreover, we deny that there is any law of the United States assuming to give to the government this right to the lands of private owners, growing out of lapse of time. Under the laws of nations there is no prescription as between a government and its subjects, although in municipal codes it is allowed as between private persons for the sake of repose. Ordinarily, it is the sovereign political power that gives the title. How strange would be the anomaly of its retaining the right to use its omnipotent power to turn the grantee out and resume the possession as against his heirs at law.

But, in point of fact, the grantees entered into possession and held and cultivated the tract for several years.

It is an historical fact that from the treaty of Aix-la-Chapelle, in 1748, there had been disturbances of a threatening character between the English and French colonies in America, which ended in the formal war known as the "French" or "Seven Years' War," of which England did not make her declaration until May, 1756, the year after the battle of the Monongahela, under Braddock and the then Colonel Washington.*

The Chevalier de Repentigny was ordered to the Saut St. Marie by Governor La Jonquière in 1750. The purpose of his being sent there was to afford an asylum to the French travellers who were constantly passing from Quebec and Montreal up the Ottawa River, crossing over the portage to Lake Huron, and coasting along its northern shore to the Saut St. Marie, one of the central points for intercourse with the natives, and which had been taken possession of by the French nearly a century before; and thence visiting the missionary and trading-posts on Lake Superior at Point Iroquois, Missipocoton (on the northern shore), Point St. Esprit (now La Pointe), Green Bay, and other places settled by the Jesuits. The time and manner of making these ancient and remote settlements are minutely given in "Les Relations des Jesuites."†

The letter of Governor de la Jonquière of October 5, 1751, is a full admission by the Governor of Canada that the Chevalier had in good faith entered into possession and at *his own expense* built the fort and three houses for the public accommodation, cleared and planted land on the seigniory, and brought there eight head of cattle and two horses.

The receipt of this letter is acknowledged by the minister, and the establishment of that place approved by him, under date June 16, 1752.

Franquet's map bears date the same year, 1752, and would,

* 4 Bancroft's History of the United States, 233; Johnson *v* McIntosh, 8 Wheaton, 543.

† Vols. 1, 2, 3.

perhaps, tend to show that the minister had directed him to make an actual survey of this seigniory and of the fortification on it.

The letters of Governor Duquesne of 24th April, 1754, to the Chevalier de Repentigny, and of the same governor to Machaut, the colonial minister, dated Quebec, 13th October, 1754, are to the same effect as the other correspondence. He was not there simply as an agent of the government. His own "private advantage" in the culture of lands, called "*your* lands," is spoken of in the above-quoted letters as one of the objects for which he went out; it being mentioned also that he was "busily engaged in the settlement of his post."

Thus we have a direct admission from the French government itself that the Chevalier was at the Saut St. Marie from some time in 1749 to October, 1754, engaged in cultivating the fief and building a fort, houses, &c. But the articles of partnership with De Langy and others for the management of the trading-post till 1762, his putting in all his merchandise at said post, the stipulation that his partners were not at liberty to quit the post, the power of attorney to his wife to manage all his business, her authority to Quenel to receive one-third part of all the packages of peltries belonging to her husband at the Saut, and also those which the Sieur Cadotte might have in his hands,—Cadotte being here treated as a mere agent, a tenant, or *employé* of the Chevalier, and it being here shown that the partnership was still in existence under the continuation clause,—all prove that, through his partners and his wife, the Chevalier was in personal possession in the autumn of 1762.

For the further proof of continuation of possession we have the narrative of intelligent travellers, not stated as a part of the case, but very proper to be so stated; certainly proper to be read and relied on by the court.

On the 19th of May, 1762, Alexander Henry, the traveller, as he tells us in his travels,* visited the post and found Cadotte

* See Henry's Travels, p. 57 to 63.

there with his Indian wife and his family. Henry describes the fort, and says he found four houses there, one for the governor, one for the interpreter Cadotte, and the other two used for barracks. The only family was Cadotte's, whose wife was a Chippeway woman. Henry staid with Cadotte during the winter of 1762–63, and he says that during the season a small detachment of troops under command of Lieutenant Jemet arrived to garrison the fort;—he states also that on the 22d of December, 1762, while Cadotte was in possession as interpreter, a fire broke out and consumed all the houses (except Cadotte's), a part of the stockade, all the provisions for the troops, and part of the fish Henry himself had taken.*

During the spring of 1763, Henry was made a prisoner at Michillimackinac, in the "Pontiac War," but was liberated by a friendly Indian, and returning to the Saut in company with Madame Cadotte, found Cadotte there.†

In July, 1765, Henry arrives at the Saut from Michillimackinac with goods for the Indians, and took Cadotte in as partner.‡

When Mr. Alexander McKenzie§ was there in 1787 or 1788, he found there a Canadian trader, receiving, forwarding, and storing goods. Was not this Cadotte?

The evidence of Gornon and his wife, and of Biron, is admissible to show the traditionary existence of the seigniory, and that old Cadotte was the employé of the Chevalier.‖

The letter of La Jonquière to the minister in France, October 5th, 1751, establishes that the Chevalier had "engaged," or employed a Frenchman, whose wife was an Indian woman, to take a piece of land and raise Indian corn. We hear of no other *such* Frenchman, and this statement of Governor Jonquière corroborates the testimony of the three Saut St. Marie witnesses.

In a transaction so ancient this proof of the identity of

* See Henry's Travels, p. 57 to 63. † Id. 164.

‡ Id. 192, 193. § McKenzie's Voyages, 36, 37.

‖ Ellicott *v.* Pearl, 10 Peters, 434; Stockton *v.* Williams, 1 Douglass, Michigan, 571.

old Cadotte with the husband of the Indian woman ought to be considered satisfactory; and if so, it follows that his possession was our possession, and we are entitled to the benefit of it and of that of the grantees or claimants under him. For it is quite manifest that old Cadotte assumed rights which belonged to the grantees, knowing them to be such, if his granddaughter and her husband and Biron are to be believed; for they all testify that he was a voyageur, and obviously but a mere servant of the Chevalier.

Thus the fact of actual possession, improvement, and occupation, by himself, for six years commencing in 1749, is proved by the direct as well as the historical and traditionary evidence; and it was a fulfilment of the *condition subsequent* contained in the ratification, relating to possession.

Authorities show that the "abandonment" must be on the part of the owner a complete renunciation and giving up of the thing, with intent not henceforth to reassert any dominion over it.*

There never was an intention to abandon here on the part of either grantee. This appears from all the actings of the claimants and their ancestors; and the circumstances of their situation excuse their actual occupation after the time that they did actually occupy it.

Both grantees were officers in the French army. The post was very remote and exposed. The French war had been brewing all along the frontier for years, as history shows, rendering occupation difficult and dangerous. Captain De Bonne, one of the grantees, was killed in De Levi's attempt to retake Quebec in 1760. The Chevalier was in the same battle.

De Bonne left his only child and heir at law, then an infant not two years old. By the act of the Provincial Parliament of January 1, 1783, this child did not come of age till 1779, during the Revolutionary war, during all of which he

* Grotius, B. II, ch. 4, § 5, 1–5; § 6, 1–2; § 7, 1–2; § 8, 4; § 9, 1–2, Kluber's Droit des Gens (Paris ed. of 1861), §§ 6, 125, 126, 128; Vattel, B. 2, ch. 11, §§ 144, 145, 146.

was of course an alien enemy of the United States. But he was not indifferent to his rights. Before the close of the war, and on the 13th of February, 1781, he did faith and homage for the tract. That act was strong evidence, not perhaps of title, but against abandonment, and shows clearly an intention not to renounce the claim, and it was, under the circumstances, all De Bonne could do. Its acceptance by the British governor was clear evidence of an official recognition of his title.

The Chevalier was engaged in active service during the French war, and long before its declaration.

In the spring of 1763 the Pontiac war broke out, in which the whole frontier was desolated by the Indians, from Lake Superior to the wilds of Western Pennsylvania and the Mississippi River, and almost all our frontier posts captured. The garrison at Michillimackinac, within forty miles of the Saut St. Marie, was cruelly butchered, at which time there was no white man at that post but old Cadotte, whose wife was an Indian woman.* Parkman† says, that, except the garrison at Detroit, not a British soldier now remained in the region of the Lakes.

These Indian troubles did not cease to agitate the frontier during the whole of the Revolutionary war; nor did they cease with the war. It is well known that the British government, desirous to bring the boundary of Canada down to the river Ohio, as defined by the Quebec act of 1774 for the province of Quebec, persisted in withholding from us the Western posts, and stirring up the savages against us; and that the Indian wars were incessant down to the conclusion of the treaty of Greenville, August 2d, 1795.‡

It would be absurd to require the grantees to have held possession of this remote and exposed point during all this

* See 5 Bancroft's History of the United States, ch. 7; Parkman's History of Pontiac's Conspiracy, chs. 16, 17, 19, 20, 21; Henry's Travels; Allbach's Annals of the West, 161 to 168.

† Page 322.

‡ Allbach, 656, 661; 16 American State Papers, 562, 583; 7 Statutes at Large, 49, for the treaty.

dangerous period. The Indians loved the French. The protection of that government was withdrawn, and from 1763 down to 1796 (the date at which, by the second section of the treaty of commerce of 1794, Great Britain withdrew her troops and surrendered the posts), the place was in the actual possession of the English, whom the Indians disliked. Here was a term of thirty-three years during which it was plainly unsafe to attempt to hold and occupy the tract.

While the Revolutionary war was in progress it was unreasonable to expect young De Bonne, a British subject, or the Chevalier, a French subject, to occupy it.

In 1783, the year of the peace, he was sent off Governor of Senegal on the coast of Africa. He remained there till 1785, when he asked a furlough to return to France for his health. In 1786, he died at Paris. On his leaving Canada for France, in 1764, his wife remained behind, with a general power of attorney executed in 1759. And under this power she acted in 1766.

Gaspard, the son of the Chevalier, from 1786 until his death was in the marine service of France, fighting its battles and being wounded in its cause, yet from 1798 we find him giving his attention to the property, as well as a French sailor in distant parts of the world possibly could do to such a sort of estate. He makes an *acte de notoriété*, a *caveat* and solemn declaration of rights, which should remain *in perpetuam memoriam rei.*

The Saut St. Marie, Michillimackinac, and other feeble settlements on the upper lakes, were unknown, and so remained until Schoolcraft visited them in 1820. He found them merely fur-trading establishments. He says of the Saut, "The dwelling-houses on the north side of the Strait, six or seven in number, belong to the French and English families."

McKenzie,* who visited the Saut between 1787 and 1793, says, that "the village on the south shore, formerly a place of great resort for the inhabitants of Lake Superior, and

* Voyages, p. 28, London ed. of 1812.

consequently of considerable trade, is now dwindled to nothing."

In their memorial to Congress of December, 1811, the principal citizens of Detroit do not even enumerate the Saut as a settlement of Michigan. They say the whole population of the territory then amounted to 4762 souls, of whom four-fifths were French.* There was no means of reaching the Saut from the lower lakes except through immense pathless forests, or by means of bark canoes.

In June, 1812, war broke out between the United States and Great Britain, and continued until December 24th, 1814. The first blow in this war was struck at Mackinac, which at once fell into the enemy's hands; and that point, as well as the Saut, were held by the British troops until they left the country, in 1815. In point of fact, the Saut had been under British authority from the time Jemet, in behalf of British arms, then victorious over France, took possession in 1762, down to 1815. The attention of our own government seems not to have been directed to this remote spot until 1820, when the Secretary of War, Mr. Calhoun, in a letter to Governor Cass, of April 5th, instructed him to acquire a small piece of land from the Indians for military purposes. And there is no historical evidence that the American jurisdiction was exercised there until the organization of the County of Chippeway, in 1827,† the year after the caveat on behalf of De Bonne was filed in the General Land Office, and the memorial of Mrs. Slacke was presented by Mr. Cambreling.

The whole region was an unreclaimed wilderness, and the place inaccessible save by means of canoes, and wholly occupied by the Northwestern Fur Company and their agents. No one then but old Cadotte and his family had any knowledge of the grant to De Bonne and De Repentigny. Such was the condition of the Saut.

The British thus held it in their possession for more than sixty years—wrongfully, from 1783 to 1796 (if they left

* 5 American State Papers, 781. † Territorial Code of 1827, p. 592.

it then, which they did not), and wrongfully from 1814 onward. Did Congress, in passing the act of 1860, intend to avail themselves of this wrongful possession of Great Britain?

It cannot be pretended that the United States were in actual possession longer than from 1796 to 1812 (16 years), and from 1815, the close of the war, down to 1825 (10 years), when the king's grant was presented; making an actual occupancy of only 26 years.

But in this very act the United States limit the claimants to two years for the institution of their suit. Was not this a yielding up of all objection on account of the lapse of time, during which the alleged abandonment and prescription had run?

The fact that the government of the United States has extinguished the Indian title is without weight. It was the duty of the government to extinguish it. Private persons could not treat with the Indians.*

As to non-fulfilment of the condition to improve the fief and cause it to be held and possessed by the tenants of the grantees,—that was a condition subsequent. And it was fulfilled.

We have as we think proved our personal possession till 1754, and that old Cadotte, who was in possession afterwards, was really our agent or tenant. If his heirs or grantees were in court insisting upon their individual claims as against us, they could not be allowed to change, by mere intention and without notice to us, the character of the original possession; and we should be able to insist that that possession was ours; for where the possession is jointly held by the owner and the tenant, the statute of limitations does not begin to run until the tenant's adverse possession has become notorious, precluding all doubt of the character of the holding and all want of knowledge in the owner.†

In point of fact the seigniory has never been vacant. The

* Johnson *v.* McIntosh, 8 Wheaton, 543; United States *v.* Fernandez, 10 Peters, 302.

† Zeller *v.* Eckert, 4 Howard, 295, &c.

original possession under the grant was ours, and the government were bound to take notice of the fact that the grant was made, and bound by the legal presumption that the possession was under and by virtue of it. They could not presume that the white settlers there were mere "squatters" claiming by tortious entry.

We have a right to claim not only that the grantees actually took possession and made improvements, but that all persons subsequently in possession held under them; and that therefore not only the condition of taking possession under the grant but also that of continuing it, has been performed. Thus the title becomes absolute by the performance of the condition.*

In the case of *United States* v. *Arredondo*,† where the grant was a perfect grant conveying the fee of the land, the condition was that the grantee should establish on the land 200 Spanish families, with all the requisites, &c., and should carry this into effect in three years, this court held the condition void by the act of the grantor, Spain, by whom Florida was ceded to the United States within the two years. The Florida treaty of 1820‡ provided that the lands should be confirmed to persons in possession of them. And the court say:

"The law deems every man to be in legal seizin and possession of land to which he has a perfect and complete title. The seizin and possession is coextensive with his right and continues until he is ousted thereof by an actual adverse possession. This is a settled principle of the common law recognized and adopted by this court."

If, in our case, the grantees failed in continuing in possession, they failed because France herself failed to hold possession of the country. Such failures should be excused.§

By the laws of nations the conqueror acquires only the public and political rights belonging to the sovereign whom

* 2 Cruise's Dig. 24. † 6 Peters, 693. ‡ 8 Stat. at Large, 258.

§ United States *v.* Arredondo, 6 Peters, 745; Glenn *v.* United States, 13 Howard, 257.

he opposes. The rights of private property do not pass to him by the conquest, and he is bound to respect and protect them.*

As respects reunion to the king's domain, which the answer alleges under the royal arrêt of 1732 relating to the sale of wooded or timbered lands, and the arrêt of Marly, the decrees never contemplated the reunion of lands cleared, occupied, and stocked, as these were. Independently of which, Judge Badgley, at present perhaps the most learned jurist in the province, tells us that under the arrêt of 1711, the proceedings were strictly judicial. And so Chief Justice Lafontaine, discussing the subject in a printed work,† says:

"I have already stated that under the operation of the different arrêts of retrenchment it seemed to me necessary, to proceed regularly, previously to pronounce the reunion to the crown domain, even when the word *reunion* was not written in the arrêt."

[The learned counsel then, in reply to the allegation of the answer, argued that the grant was abundantly certain and could be located, the Franquet map of 1752, with the description of the grant and ratification, indicating it sufficiently.]

Mr. Stanbery, Attorney-General, and Mr. Alfred Russel, District Attorney for the Eastern District of Michigan, contra:

If the construction of the act of Congress set up by the other side is the true one, that is to say, if the only question which was to be passed upon, was the original validity of the grant, nine-tenths of the discussion have been irrelative; and there neither is nor ever has been any question in the case. It required no courts to settle whether the deed was a genuine one; and the strong attempt to place the matter on such a view concedes away, in fact, the case. It admits that the difficulties, if any other view be taken, are insurmountable.

It is no such question that the act meant that the courts

* Vattel, 574, 575.

† Seigniorial Questions, vol. B, p. 389 a.

should settle. We are not here to resuscitate a dead title, but to inquire whether there is one now existing. We are discussing an actual thing, considering not what *was* a century and a quarter ago, but what *is* at this time. Blackstone,* adopting Coke's definition, tells us, "*Titulus est justa causa possidendi id quod nostrum est.*" And Congress never meant that its courts were to recognize as "a title" that which now is defective in law, defective in equity, defective in moral justice, defective every way, merely because the deed which conveyed it one hundred and sixteen years ago was genuine. We admit that the act of 1824, enabling claimants of lands in Missouri and Arkansas to try the validity of those titles, did not apply to perfect titles; but Congress, by putting this claim, in the act of 1860, under that act, declared this title not to be a perfect one.

The questions, then, of lapse of time, abandonment, nonfulfilment of conditions, extinguishment of Indian titles, reunion to the crown, &c., are most proper to be inquired into.

As to limitations by prescription, the case of *United States* v. *Arredondo* settles that this proceeding is substantially a bill in equity. The petitioners are barred by the rules of equity proper, which are in strict "analogy with the rules of law, whenever any statute has fixed the period of limitation."†

This court has repeatedly held that reasonable diligence is necessary, even if no statute of limitations exists which is applicable.‡

This claim had its origin when George II was King of England, and Louis XV King of France, twenty-six years

* 2 Commentaries, 195.

† Cholmondeley *v.* Clinton, 2 Jacob and Walker, 138–174; Bonny *v.* Ridgard, 1 Cox, 145; Andrew *v.* Wrigley, 4 Brown's Chancery, 138; Smith *v.* Clay, Amblar, 645; Bond *v.* Hopkins, 1 Schoales and Lefroy, 429; Medlicott *v.* O'Donel, 1 Ball and Beatty, 164; Davie *v.* Beardsham, 1 Chancery Cases, 39.

‡ Bowman *v.* Wathen, 1 Howard, 189; McKnight *v.* Taylor, Id. 161; United States *v.* Moore, 12 Id. 222; Maxwell *v.* Kennedy, 8 Id. 210; Piatt *v.* Vattier, 9 Peters, 405.

before the United States took their place in the family of nations; and the reports, English and American, may be searched in vain for an instance of the upholding of a claim of one-half the age of this.

A lapse of forty years and change of value renders a claim stale, though there be no fraud.* And possession which would bar an ejectment will also bar an equitable title.†

Now, De Bonne never had possession at all, and of the Chevalier de Repentigny we never hear again in this region after his improvements were burned in 1762. The British crown took possession in that year.‡

De Bonne rendered homage in 1781, but that was not a substitute for actual seizin, still less for compliance with the conditions subsequent; and at all events it could not enure to the benefit of his co-grantee.

De Bonne's representatives first petitioned Congress in December, 1826. De Repentigny's representatives in May, 1841. No *effectual* proceedings were had by either before Congress until 1860.

Under these circumstances, a possession acquired by the government of the country, existing for a century, and acquiesced in for so many years by those whose interest and duty it was to disturb it, if it had been wrongful, is not now to be *presumed*, in the absence of all proof, to have been wrongfully or illegally, or even irregularly acquired.

Does Cadotte's occupancy affect the case? There is, it appears, partly from public records and ancient printed books of travels, and partly from the depositions of living witnesses, evidence that between 1750 and 1762 the French and English governments, and at a date subsequent to 1762, among others a person named Cadotte, and his descendants, through whom the petitioners do not claim, were seized of the most prominent and important part of the lands; but there is no evidence of Cadotte's being the agent of De Repentigny's descendants, and still less of any privity of title of any kind

* Wagner *v.* Baird, 7 Howard, 234.

† Hunt *v.* Wickliffe, 2 Peters, 201.

‡ Henry's Travels, p. 61.

between De Repentigny and him. It was customary for the French settlers in general to take Indian wives; in fact, their lives were insecure otherwise; and it is almost as likely that Cadotte was *not* the person referred to in the mention of the Frenchman who had married an Indian as that he *was*. Certainly the court cannot so strongly presume that this Frenchman was Cadotte as to give a decree on the strength of it.

1. *The tract was not occupied*, and reverted, by natural law, to the superior domain. The only occupation alleged, and the only effort to comply with the conditions, was on the part of the Chevalier de Repentigny, one of the grantees, and who, it may be added, appears from a very early period to have held his share in severalty.

Yet De Repentigny's was only a temporary, and to some extent a mere *official* occupation. Henry* says that under the French government there was kept a small garrison, commanded by an officer who was called *the Governor*, but was in fact a clerk, who managed the Indian trade on government account.

The letter of October 5th, 1751, from La Jonquière to the Minister of Marine and the Colonies (see it, *supra*, pp. 219–20), shows that Repentigny went more as an ambassador from the French to the Indians than in any other manner. The letter from Versailles of June 16th, 1752, and signed T. (see it, *supra*, pp. 217–19), shows as clearly that settlement on private account was a thing that was specially guarded against by the French crown.

The most liberal interpretation of the case will not warrant the court in assuming more than that from 1751 to 1755, 1100 pickets were got out and a stockade fort built, that some few acres were cultivated and some six or eight head of cattle purchased; while, on the other hand, it is certain that the whole was abandoned by Repentigny in or about 1755, and if our idea of Cadotte's relation to the matter is a true one, has remained so ever since; De Bonne's moiety never having been entered at all.

* Travels, p. 58.

To hold that such improvement of the land, and then ceasing to improve, satisfies the condition of the grant, would effectually render null those considerations of public policy which prompted the grant in the first place.

On the treaty of 1783, between Great Britain and the United States, the land, assuming it to have been once occupied, had then been for twenty-eight years wholly unoccupied, and being thus derelict, an *hereditas jacens*, it passed with the rest of Michigan to the United States. Even if not previously, it then reverted to the public domain of the United States by right of eminent domain *independently of the provisions of the grant.*

2. *It was in form, as well as fact, abandoned.* Certainly so, as respects De Repentigny.

Every owner of property, whether real or personal, *may* abandon it.* The abandonment of a perfect title can, indeed, never be presumed and is proved with difficulty; an imperfect one rests on a different base. The abandonment may be by matter *in pais.*† So, too, the question of whether one has been made may be considered in examining "the validity" of titles.‡

The Chevalier deliberately declined the requirements of the British Governor-General. "He could preserve his property only by an oath of fidelity to his new master, which was *too hard for his heart.*"

His *own* interpretation of the treaty of 1763, therefore was that, if he did not take the oath of allegiance to the King of England, he would absolutely and altogether lose his property, and that he had actually lost it, because he would not take the oath.

He preferred French allegiance and French military service, and does not appear to have even in form become a British subject, or complied with the 4th article of the treaty of 1763 (which was an *enabling* instrument in regard to the

* Kinsman *v.* Loomis, 11 Ohio, 479, and see Taylor *v.* Hampton, 4 McCord, 96, 102.

† United States *v.* Moore, 12 Howard, 222.

‡ United States *v.* Fossatt, 21 Id. 445.

sales it contemplated), by selling his estate to a British subject.

His descendants all trod in his steps. They were by birth and otherwise to all intents and purposes aliens; they were thus, under the laws of Canada, between 1763 and 1783, incapable of devising and taking by devise as well as of inheriting, if not also of *holding*, land.*

3. *It reverted for breach of condition.*

Why did the King of France grant out this principality—335 square miles of territory? He granted much and expected much. The grantees gave no money, they rendered no service. The king's purpose was to found a colony. He contemplated sub-grants. The concessees held by homage. They had from time to time to renew that homage. They were to make a place of refuge for travellers. None of the ends were accomplished, or for more than four years were attempted to be. The substance of the consideration has thus been withheld.

The case of *United States* v. *Arredondo*, relied on by the opposite counsel, only goes so far as to declare a grant discharged of conditions when their performance becomes impossible by the act of the grantor, but that is not the case here; there was no necessity whatever for either De Repentigny or De Bonne or their successors neglecting the performance of the conditions; the true reason appears from the evidence. Repentigny, like a gallant soldier, was not willing to desert his king. It was "too hard for his heart" to swear allegiance to the new master. He deliberately made a sacrifice of his property to his sense of loyalty. As for the alienees of De Bonne, it seems to have been a matter of selfish calculation simply. They calculated that, under the rule of the United States and by the energy and enterprise of its citizens, it would be more profitable for them to wait, as absentees, the development of the resources of the estate.

* Donegani *v.* Donegani, Stuart's Reports (Canada), 460, 605; Pacquet *v.* Gaspard, Id. 143.

Argument against the claim.

The case falls completely within the expressions in *Fremont* v. *United States*,* where it is said that, "if there were any unreasonable delay or want of effort to fulfil the conditions, it may be justly presumed that the claimant . . . . is now endeavoring to resume his ownership after the lands have become enhanced in value under the government of the United States."

And thus—after a century's absence by the grantees from the soil on which they could be sued, a century's repudiation of their duties, a century's abandonment of their rights, and a century's acquiescence in adverse possession, they found a claim for restitution; they now wish to realize the result of the calculations, by which the inaction of some of the parties is sought to be excused, and to reap the fruits of the exertions of others in promoting the settlement, developing the resources, and increasing the value of the property during their absence; exertions to which, though bound before and beyond all persons to contribute most, they have, of all persons, contributed the least.

The intention of De Repentigny to abandon is evident from his documents and letters.

4. *The fief reverted, by feudal law and the custom of Paris.*

The grant, as we have said, was subject strictly to feudal conditions, a class of conditions, as we know, common by the laws of France in the time of Louis XV. They were obviously founded in the nature of such a vast gift. We need not quote authorities to show that by the feudal law,—a law of France as much or more than of England, for the feudal system came to England from France,—the lands would revert for condition broken. The answer against this reversion is:

1st. That by the feudal laws of Canada, no forfeiture could take place under the practice or without the judgment of a peculiar court.

2dly. That this judgment has never been obtained.

* 17 Howard, 555.

3dly. That until it shall be obtained they are entitled to the benefit of the grant of 1751.

The petitioners assume, gratuitously, perhaps, that no legal proceedings were ever taken by the British government to obtain a judicial decree or judgment of reunion or forfeiture; it being to be remarked, that the records on which the proof of this depends were never at any time under the control of the United States.

We do not acknowledge the practice of Canada to be as stated. The fief, we suppose, upon being deserted in 1755, reverted to the crown, *ipso facto*. It would certainly have done so by our own law. In a case quite similar to this, the mere fact of leaving the country and becoming domiciled abroad was held to work forfeiture *ipso facto* without necessity for adjudication of forfeiture.*

But if the formality of a judgment is necessary, the court in adjudicating has power to make this decree of forfeiture and reunion now, and without any substantive suit or pleading in the nature of a cross-bill for the purpose. A judgment of reunion is matter of form, and may be pronounced at the present as well as any past time.

These remarks apply to both moieties. But as we have seen that the Chevalier de Repentigny's half was lost, because, in form and with deliberation, abandoned after the conquest, so another cause operated upon the residue: the arrêt of 1732, whereby any attempt to sell wooded lands, such as these then were, absolutely reunited the fief by operation of law to the superior domain. Thus De Bonne's share in A. D. 1796, and A. D. 1798 upon his and Caldwell's attempts to sell it, stood reunited *pleno jure* (*demeurait réunie de plein droit*), by that sale, without any special judicial decree, previously made, being necessary.

5. [The learned counsel then went into an argument to show that the description was so vague, that the land never having been severed from the royal domain, the grant could not be located.]

* Bowmer *v.* Hicks, 22 Texas, 155.

Opinion of the court.

Mr. Justice NELSON delivered the opinion of the court.

The bill in this case was filed in the court below to recover possession of a large tract of land of six leagues square, fronting on the River St. Marie, at the Saut, which connects the waters of Lake Superior with those of Lake Huron, in the State of Michigan. The grant of the land was made on the 18th October, 1750, by the governor and intendant-general of Canada (then called New France), to Louis De Bonne, a captain of infantry, and Count Repentigny, an ensign, in the French army. The complainants derive title under them. It was confirmed by the King of France the next year, on the 24th June, 1751.

The grant was to De Bonne and Repentigny, their heirs and assigns, "in perpetuity by title of feof and seigniory," with all the customary rights belonging to that species of estate. Repentigny went into possession about the date of the grant, at the Saut, having about the same time received an appointment to command the military post established there. He constructed a small stockade fort, and made some improvements in connection with it, such as the clearing of a few acres of land and the erection of huts for the people with him, and continued thus engaged till 1754. When war broke out between France and England he was called away into active military service of the government, and never afterwards returned. De Bonne never took personal possession, or possession of any other character, except that derived from the transient occupation of his co-tenant.

The bill was filed on the 9th January, 1861, one hundred and ten years since the date of the grant.

We will now refer to the act of Congress, passed April 19th, 1860, under which the bill was filed.

It provides that the legal representatives of the original grantees may present their petition to the District Court of the State of Michigan, setting forth the nature of their claim to certain lands at the Saut St. Marie, under an alleged grant in 1750, with evidence in support of it, and praying that the validity of the title may be inquired into, and the court is authorized to examine the same; and, in adjudicating upon

the validity as against the United States, to be governed by the law of nations and of the country from which the title was derived, and also by the principles, so far as they are applicable, which are recognized in the act of Congress of the 26th May, 1824. This act, which was passed to enable claimants to lands situate within the State of Missouri to try their titles before the United States District Court, directed that the claims should be heard and determined in conformity with the principles of justice, and according to the laws and ordinances of the government under which the titles originated; also, according to the law of nations and the stipulations of treaties.

This act of 1860, which authorizes the institution of these proceedings, was passed in pursuance of petitions to Congress by the representatives of the original grantees. The first notice to this government of any claim to the lands on their behalf was in the year 1825 or 1826, some seventy-five years after the date of the grant. Since then the subject has, from time to time, been brought to the attention of Congress, and finally disposed of by the passage of the act in question. The act, as we have seen, refers the claimants to the judiciary for relief, and prescribes the principles which shall govern it in hearing and adjudicating upon the case. They are—

1. The law of nations.
2. The laws of the country from which the title was derived.
3. The principles of justice.
4. The stipulations of treaties.

In the light of these principles, we shall proceed to an examination of the claim; and, first, as to the claim of the representatives of Repentigny. He was a native of Canada, and a captain in the French army at the close of the war, which terminated in the surrender of that province to the British forces, in 1760. His family was among the earliest emigrants to the country after possession had been taken by the King of France, and held high and influential positions in the government. Soon after the execution of the definitive treaty of peace of 1763, the Governor of Canada opened

a correspondence with Repentigny to induce him to remain in the province, and become a subject of Great Britain, promising him protection and advancement in his profession. He was then about thirty-eight years of age. But he declined all the advances made to him, and soon after left the country, by order of his superior officer, to take a command on the Island of Newfoundland, where the Indians were disturbing the settlers, and spent the rest of his life in the military service of France, having risen to the rank of Major-General and Governor of Senegal, on the Island of Goree, and its dependencies. He died in 1786, leaving a son, Gaspard, an officer in the French naval service, from whom the present claimants descended, and who reside in the Island of Guadaloupe. The preliminary treaty of the 3d November, 1762, at the surrender of Canada, provided in the second article, in behalf of his Britannic majesty, that the French inhabitants, or others who would have been subjects of the Most Christian King, in Canada, may retire in all safety and freedom, wherever they please, and may sell their estates, provided it be to his Britannic majesty's subjects, and transport their effects, as well as their persons, without being restrained in their emigration, under any pretence whatsoever, except debts or criminal prosecutions,—the term limited for this emigration being the space of eighteen months, to be computed from the day of the ratification of the definitive treaty. The definitive treaty of the 10th February of 1763 contained a similar article.

The articles of capitulation at Montreal, dated 8th September, 1760, when the Canadas were given up to the British forces, secured to the inhabitants their property movable and immovable; and the proclamation of the king, under date of 7th October, 1763, pledged to his loving subjects of Canada his paternal care for the security of the liberty and property of those who are, or should become, inhabitants thereof. These pledges, both before and after the treaty, were but the recognition of the modern usages of civilized nations which have acquired the force of law, even in the case of an absolute and unqualified conquest of the enemy's

country. But the rule is limited, as in the pledge of the king, in his proclamation to the inhabitants of the conquered territory, to those who remain and become the subjects or citizens of the victorious sovereign,—those who, in the language of Chief Justice Marshall, change their allegiance, and where the relations to their ancient sovereign are dissolved. Speaking of the cession of Florida, he observed: "Had Florida changed its sovereign by an act containing no stipulation respecting the property of individuals, the right of property in all those who became subjects or citizens of the new government would have been unaffected by the change."*

Another rule of public law, kindred to this one is, that the conqueror who has obtained permanent possession of the enemy's country has the right to forbid the departure of his new subjects or citizens from it, and, to exercise his sovereign authority over them. Hence the stipulation in the capitulation and treaties of cession providing for the emigration of those inhabitants who desire to adhere to their ancient allegiance, usually fixing a limited period within which to leave the country, and frequently extending to them the privilege, in the meantime, of selling their property, collecting their debts, and carrying with them their effects.

Now, in view of these principles, it is apparent that Repentigny, having refused to continue an inhabitant of Canada, and to become a subject of Great Britain, but, on the contrary, elected to adhere in his allegiance to his native sovereign, and to continue in his service, deprived himself of any protection or security of his property, except so far as it was secured by the treaty. That protection, as we have seen, was limited to the privilege of sale or sales to British subjects, and to carry with him his effects, at any time within eighteen months from its ratification. Whatever property was left unsold was abandoned to the conqueror. Repentigny acted upon this view of his rights. Besides the prop-

* United States v. Percheman, 7 Peters, 51–87.

erty in question, he owned and possessed a seigniory situate above Montreal, on the River St. Lawrence, called La Chenay, which he sold to Colonel Christie, a British officer, and in the deed it is recited that he had a mind to go to France, and therefore, as allowed by the late treaty of peace, was disposed to sell, &c. This was in 1766, although it appears that steps had been taken in respect to the sale at an earlier day. It is evident, also, that he had been engaged in negotiating for the sale of the seigniory in question, as in a memorial of his services presented to the chief of the bureau of the French colonies, he states, under date of 1765, that the establishment,—referring to that at the Saut St. Marie,—was burnt in 1762 by the Indians, at the time his attorney was negotiating at Montreal with the English for the sale of it. And, in 1772, in a communication to the French authorities on the subject of military services and sacrifices, he observes: "I thought that after a lease of thirty years of services, fulfilled with honor in the colonies, and the sacrifice of a fortune more than reasonable, in leaving Canada, my native country, I should be able at forty-five years of age to claim a regiment in the colonies without too much ambition." And again, in answer to an intimation that the king would give him permission to retire, he observes: "If I had not calculated upon dying in the service, I should not have sacrificed more than four-fifths of my fortune, my well-being, and that of my family, in abandoning Canada, my country."

And, further, in a communication to his government, supposed to be about 1773 or 1774, he observed: "The cession of Canada, my country, has overturned a fortune more than moderate, which I could preserve only by an oath of fidelity to the new master, which was too hard for my heart. The offers of the English ministry made to my eldest brother to retain us in their service are unequivocal proofs of the consideration we enjoyed in Canada."

Repentigny was a gentleman of education and high intelligence. He rose to the rank of general in the army, and aspired to that of Marshal of France; was Governor of Sen-

egal and its dependencies, and, as is obvious from his correspondence with his government, comprehended fully the principles of public law which forfeited all his property left unsold at the time he retired from Canada, under the provisions of the treaty.

He died in 1786, twenty-three years after the date of the treaty; and, during all this time, not only set up no claim to this seigniory, but, on the contrary, repeatedly, as we have seen, urged the patriotic sacrifice of it to his government, as a merit for her favorable consideration of himself and family. And we may add that his only son, an officer in the French navy, and who died in 1808, at the age of fifty-five, also never set up any claim or right to it to this government, and the first notice she had of it, so far as the record discloses, was in 1824 or 1825, from the descendants of this son residing in the Island Guadaloupe, and who are the complainants in the suit.

We will now examine the other branch of this case,—the moiety claimed under De Bonne. He was a captain in the French service, and fell in the battle of Sillery, in 1760, under Count de Levi, in an attempt to recapture Quebec. He left a son, P. A. De Bonne, who was then only two years old. The family were inhabitants of Canada, remained after the treaty of 1763, and became subjects of Great Britain. He was of age in 1779, and, in 1781, rendered faith and homage at the Castle of St. Louis, in Quebec, before the governor, as required by one of the conditions of the grant of the seigniory, and which was accepted, and a record made of it. He became an eminent barrister in the lower province of Canada, was attorney-general, and afterwards one of the justices of the King's Bench. In 1796 he sold his interest in the seigniory to James Caldwell, of Albany, New York, a citizen of that State, and conveyed to him the title. In 1798, Caldwell quit-claimed the premises to Arthur Noble, an Irish gentleman and an alien, who resided at the time in the State of New York. He afterwards returned to Ireland, and died in 1813 or 1814, leaving a will, by which he devised all his lands in the United States to his nephew, John Slacke,

a barrister in the city of Dublin. Slacke devised the same, in 1819, to Agnes, his wife, with power to dispose of this and other property as she might think fit, and by sundry deeds and devises, the estate passed to John Rotton, the present claimant, and a lieutenant-colonel in the British army. All of these parties were British subjects and aliens. The territory within which the premises in question are situate, passed from France to England by the treaty of 1763, and from England to the United States by the definitive treaty of 1783, according to the boundaries there agreed upon. And assuming, for the sake of the argument, that the ninth section of the subsequent treaty of 1794 protected the interest of P. A. De Bonne in the seigniory, the question arises, whether the present claimant has established any valid title to it?

The conveyance by De Bonne to Caldwell, a citizen of the United States, passed out of him whatever title he may have had, and vested it in the grantee. It was no longer a French or English, but an American title, held under the laws of the United States, and subject to them. The transmission by deed, devise, or descent, must be according to these laws, and not according to the laws of France or of England. Caldwell held the lands as he held other real property, under the laws of the government within which they were situate, the same as if they had been conveyed to him by a native citizen. The intention of the parties to the treaty was, that the citizens and subjects of each should be quieted in the enjoyment of their estates, in the same manner as if they and their heirs had been native citizens and subjects. And having conveyed to Noble, who, together with those claiming under him, were aliens, the complainant is met with the objection of alienage.

It appears, however, that since 1805 laws have been passed, first, by the legislature of the Territory of Michigan, and afterwards by the State, conferring upon aliens the right to hold lands "by purchase, devise, or descent," which, it is insisted, remove the objection. Whether or not these laws apply to lands claimed by the United States as a part of the

public domain, is a question we shall not enter upon; as we are inclined to think, upon a liberal construction of the act of Congress under which this suit is brought, this objection may be regarded as waived.

We have thus far stated, somewhat in detail, the present state of this branch of the title,—the moiety claimed by Rotton, as derived from De Bonne. And it appears that more than a century has elapsed since the original grant; and, during all this time, there has been but some four years' actual possession or occupation by the grantee or those claiming under him, and that immediately succeeding the grant. The seigniory has been held under and subject to the laws of three governments—thirteen years under the French, twenty under the English, and seventy-seven under the United States. The first notice this government had of the title or claim was in 1824–5, forty-two years since the territory within which the lands are situate came into her possession. In the meantime her laws have been extended over it, the Indian title extinguished, the lands surveyed and put on sale, and are now, and have been for years, covered with inhabitants. As early as 1823, before this claim was presented to the government, as appears from the record, a large part of this tract was possessed and occupied by settlers, and the possession afterwards confirmed by Congress, and a military post established at the Saut for their protection and encouragement in that remote section of the country. If these grantees, their descendants or assignees had fulfilled the conditions of the grant, introduced and established tenants upon the seigniory, and thus occupied and improved the lands, they would have been among these cherished inhabitants, and their titles and possessions alike protected.

The purposes for which this grant was made, and the conditions annexed to it, are specifically stated upon its face. It recites that Repentigny and De Bonne — entertaining the purpose of establishing a seigniory — had cast their eyes upon a place called the Saut St. Marie; that a settlement in that place would be most useful for voyageurs from the

neighboring ports and those from the western sea, who could there find a safe retreat, and by proper precautions, which the petitioners proposed to take, would destroy in those parts the trade of Indians with the English; and (after the words of concession of six leagues in front on the river at the Saut, and six in depth) it provides that the grantees shall hold and possess the same by themselves, and cause the same to be held and possessed by their tenants, and cause all others to desert and give up the land, and "in default thereof the present concession shall be and shall remain null." In the deed of confirmation, by the king, is the following clause: "That they (the grantees) improve the said concession, and use and occupy the same by their tenants. In default thereof the same shall be reunited to his majesty's domain;" and, in a subsequent clause: "His majesty ordering that the said concession shall be subject to the conditions above expressed, without any pretext that they should not have been stipulated in the said concession."

There is a letter in the record from the Governor-General of Canada, under date of October 5, 1771, to the government at Paris, giving the reasons for this concession. He writes: "I had the honor to let you know (by a former letter) that in order to thwart the movements that the English do not cease to make to seduce the Indian nations of the North, I had sent Sr. Chevalier Repentigny to the Saut of St. Marie, to make there an establishment at his own expense, and to build a palisade fort to stop the Indians of the northern posts, who go to and from the English, to intercept the commerce they carry on, and to stop and prevent the talks, and also the presents which the English send these nations to corrupt them and get them in their interests. Moreover, I had in view in that establishment to secure a retreat to the French voyageurs, especially those who trade in the northern parts, and for the purpose to clear the lands which are proper for the production of Indian corn, and to sustain thereby the victualling the people of the said post, and even to the needs of the voyageurs."

And in a letter, by the minister at Paris, to a high official in Canada, he alludes to that of the governor above referred to, and observes, "In one of my despatches last year to the governor, I had intimated to him that I had approved the construction of a fort at the Saut of St. Marie, and the project of cultivating the land there, and raising cattle. We cannot but approve the dispositions which have been made for the execution of that establishment, but it must be considered that the cultivation of the lands, and the multiplication of cattle must be the principal object, and that trade must be only accessory. As it can hardly be expected, he observes, that any other grain than corn will grow there, it is necessary, at least for a while, to stick to it, and not to persevere stubbornly in trying to raise wheat."

The purposes and conditions of the grant are too obvious to require further comment.

It is admitted by the learned and intelligent jurists of Canada, who have been examined as witnesses in this case, that the legal liabilities to seignioral reunion to the royal domain exists in cases of the non-fulfilment of the conditions of settlement, and which is rigorously enforced if there be no cleared lands and no settlers on the seigniory. That the right to resume the grant applies only to unimproved seigniories, to all those that have been neglected, as it respects the establishment of tenants upon the lands, and the consequent absence of cultivation, such as clearing the forests, converting them into fruitful fields, laying out and working public roads, building mills for the convenience of the tenants, and the like.

We agree to this interpretation of the conditions. We cannot, however, assent to the next position taken, namely, that the possession and improvement of Repentigny, during the four years that he occupied the seigniory at the Saut, should be regarded as a fulfilment of this condition. It contained over two hundred thousand acres of land, and the whole of the improvements claimed in his behalf, besides the stockade fort, consisted in the erection of three or four temporary huts for laborers, the clearing of a few acres of land

around the fort, and planting the same with Indian corn. His stock consisted of seven head of cattle and two horses, and, since 1754, over a century before the commencement of this suit, there has been no possession or occupancy by either of the grantees, or their descendants, tenants, or assigns, or further trace of improvements. The primeval forest remained unbroken till settlers entered upon it and established themselves under the protection of the laws, and regulations in pursuance thereof, of the United States.

It is argued, however, that according to the customs and usages of France in respect to these conditions of settlement, that no reunion to the royal domain could be asserted except by a judicial determination; that the king was disabled by his own ordinances from decreeing a reunion. We think, upon the proofs in the record, this may well be doubted, in the case of such prolonged neglect to conform to the conditions of settlement, as in the instance before us. It furnishes cogent, if not, irresistible evidence of the abandonment of the duties and obligations arising out of the conditions of the grant, and consequently of the grant itself; and invites a direct resumption by the sovereign, the lord paramount. Assuming De Bonne's title to have been valid under the treaty of 1794, thirty-one years elapsed before this government had any notice of its existence, and in the meantime neither De Bonne nor those claiming under him had taken any steps in fulfilment of the conditions. They could at least have applied to the government for the privilege of fulfilling the conditions, or to obtain a remission of them.

But we do not intend to put this branch of the case on this ground. The United States succeeded to all the rights to this territory that existed in the King of France, under the treaty of 1783, with Great Britain, at the close of the Revolution. The United States then became the lord paramount of this seigniory, and were thereby invested with the power to deal with the seigniorial estate, the same as the King of France, had it continued under his dominion; and we agree that before a forfeiture or reunion with the public domain could take place, a judicial inquiry should be instituted, or,

in the technical language of the common law, office found, or its legal equivalent. A legislative act, directing the possession and appropriation of the land, is equivalent to office found. The mode of asserting or of assuming the forfeited grant, is subject to the legislative authority of the government. It may be after judicial investigation, or by taking possession directly, under the authority of the government, without these preliminary proceedings.* In the present instance we have seen the laws have been extended over this tract, the lands surveyed, and put on sale, and confirmed to the occupants or purchasers, and, in the meantime, an opportunity given to all settlers and claimants to come in before a board of commissioners and exhibit their claims. This is a legislative equivalent for the reunion by office found.

Upon the whole we are quite satisfied that, consistent with the principles, in the light of which we are directed by the act of Congress to examine into the validity of this title, the complainants have failed to establish it. We have felt justified in applying to the case these principles with reasonable strictness and particularity, as it is nearly, if not wholly, destitute of merit.

Decree of the court below reversed, and case remanded with directions to

DISMISS THE BILL.

CROXALL *v.* SHERERD.

1. As a general thing, any legal conveyance will have the same effect upon an equitable estate that it would have upon the like estate at law; and whatever is true at law of the latter is true in equity of the former. The rule, in Shelley's case, applies alike to equitable and to legal estates; and an equitable estate tail may be barred in the same manner as an estate tail at law.
2. A use limited upon a use is not affected by the statute of uses. The statute executes but the first use. In the conveyance by deed of bargain and

* Fairfax *v.* Hunter, 7 Cranch, 603, 622, 631; Smith *v.* Maryland, 6 Id

Statement of the case.

sale the whole force of the statute is exhausted in transferring the legal title in fee simple to the bargainee, and the second use remains as a trust.

3. A private act of the legislature of New Jersey (passed in 1818), by which an estate meant to be settled in apparently some sort of tail, but over the deed settling which (executed in 1793) doubts and difficulties of law hung, making the rights of the several parties uncertain,—the object of which private act was to dock the entail, unfetter the estate, and divide it equally between children in fee,—was held to be a proper exercise of the legislative power to effect an assurance of title through a private statute, and valid; all parties in interest *in esse* at the time having been before the legislature, and having either asked for the act or consented that it should pass, and there being no ground for imputation on any of them of fraud, indirection, or concealment; the partition, moreover, having been made by disinterested commissioners, having been equal and fair, and all parties *in esse* in interest having confirmed it by conveyances and releases mutually made.

4. A purchaser *bonâ fide* holds adversely to all the world, and may disclaim the title under which he entered, and set up, even as against his vendor, any title whatever.

5. A remainder is to be considered as vested when there is a person in being who would have an immediate right to the possession upon the ceasing of the intermediate particular estate. And it is never to be held contingent when, consistently with intention, it can be held vested.

6. Under the act of the New Jersey legislature, of June 5, 1787 (§ 2), declaring that thirty years' actual possession, where such possession was obtained by a fair and *bonâ fide* purchase of any person supposed to have a legal right and title, shall vest an absolute right and title in the possessor and occupier, no qualification is made as to issue in tail; and where a special verdict found that the defendant obtained possession by a *bonâ fide* purchase from a party in possession, and supposed to have a valid title, and the court held that the estate in remainder of the party in possession, and supposed to have the valid title, was a vested remainder,—not a contingent one,—the case was considered to be brought within the meaning of the statute as within its letter.

THIS was a writ of error to the Circuit Court of the United States for the District of New Jersey.

Robert Morris Croxall, the plaintiff in error, in September, 1863,—the year is important,—brought ejectment in that court to recover certain premises in New Jersey. The jury found a special verdict, in substance thus:

On the 15th of November, 1793, Robert Morris, being seized in fee simple of certain lands in the State just named, an indenture tripartite was made between him, of the first part, Charles Croxall and Mary, his wife, of the second, and

Robert Morris, Jr., Adam Hoops, and Aaron Dickinson Woodruff, of the third. The deed set forth that for the better settling and assuring of the lands therein described, and intended to be conveyed and settled upon the uses and subject to the trusts, and for the purposes thereinafter limited, and in consideration of ten shillings paid to the said Robert Morris by the said Robert, Jr., Adam, and Aaron, the said Robert Morris thereby conveyed to the parties of the third part, and to their heirs, the land situated, &c. The habendum was thus:

"To have and to hold the said messuage, lands, &c., to the said Robert, Jr., Adam, and Aaron, their heirs and assigns, to the uses, trusts, intents, and purposes hereinafter mentioned, limited, expressed, and declared of and concerning the same; that is to say, to the use and behoof of the said Charles Croxall and his assigns, for and during the term of his natural life; and from and immediately after the decease of the said Charles to the use and behoof of the said Mary, his wife, and her assigns, for and during the term of her natural life, in case she shall happen to survive the said Charles; and from and after the determination of the said estates so limited to them, the said Charles and Mary, his wife, for their several and respective lives, to the use and behoof of the said Robert, Jr., Adam, and Aaron, and their heirs, for and during the lives of them, the said Charles and Mary, his wife, and the life of the longer liver of them, upon trust to preserve the contingent uses and remainders thereof, hereinafter limited, from being destroyed, and to and for that purpose to make entries as occasion shall require, but not to convert any of the profits of said premises to their own uses, but nevertheless in trust to permit and suffer the said Charles, and his assigns, during his natural life, and after his death, the said Mary, his wife, and her assigns, during her natural life, to receive and take the rents, issues, and profits of all and singular the said premises, with the appurtenances, to and for their respective uses and benefits; and from and immediately after the death of the survivor of them, the said Charles and Mary, his wife, then to the use and behoof of the heirs of the body of the said Mary, by her present husband lawfully begotten, or to be begotten, and to the heirs of his, her, and their

bodies lawfully to be begotten; and in default of such issue, then to the use and behoof of the said Robert Morris, party of the first part to these presents, and of his heirs and assigns forever, and to or for or upon no other use, trust, intent, or purpose whatsoever."

The grantees thereupon became seized of the premises, and Charles Croxall and his wife, and their assigns, occupied and possessed them, and received and enjoyed the profits until the premises were divided as hereinafter stated among the children of the said Charles and Mary; Charles Croxall, prior to 1817, having erected a mansion-house upon that part of the premises now in dispute.

Mary, the wife of Charles Croxall, was the daughter of the grantor, Robert Morris, and was married to the said Charles long prior to the making the indenture, and had by him before, as well as after it was executed, several children, all of whom died unmarried and without issue in the lifetime of their parents, except four, namely: *Thomas*, Daniel, Ann Maria (who intermarried with Claudius Legrand), and Morris Croxall, who severally survived their parents, the said Charles and Mary,—the said Thomas being the eldest, and having been born prior to the execution of the said deed.

Mary Croxall died in July, 1824, and Charles Croxall in November, 1831. Thomas Croxall was married in the year 1813, and had nine children,—three of whom died without issue in the lifetime of their father. The remaining six, of whom one was *Robert Morris Croxall*, the plaintiff, survived the said Thomas, and were still living. This Robert Morris Croxall, the only surviving son, was born on the 19th of March, 1821.

Thomas Croxall died in October, 1861.

On the 26th June, 1798, Charles Croxall and Mary, his wife, for the consideration of five shillings, conveyed the land by deed of bargain and sale to J. and W. Gallagher, their heirs and assigns, for and during the life of the said Charles, and after his death during the life of the said Mary, if she should survive him, in trust out of the rents

and profits to pay certain debts of the said Charles, and to enable the said Mary to receive any sum, not exceeding four hundred dollars per annum, and after the debts were satisfied and the trustees reasonably compensated, to convey back the premises to the said Mary, her heirs and assigns.

On the 11th July, 1804, the Gallaghers conveyed the lands to Mary Croxall, to hold the same during life.

In December, 1807, the Court of Errors and Appeals of New Jersey, in a suit in chancery, wherein the Gallaghers were complainants, and Charles and Mary Croxall were respondents, decreed that the appellants, upon certain terms and conditions set forth, should deliver possession of the entire estate to Charles and Mary Croxall, and that they should convey the same to the said Mary, her heirs and assigns, pursuant to their agreement of June 26th, 1798. The conditions of the decree were complied with, and the Gallaghers conveyed to Mary Croxall accordingly.

On the 1st of July, 1814, Charles and Mary Croxall executed to their two sons, Thomas and Daniel, a deed of bargain and sale for one undivided half of the property, with a covenant that they had done nothing to encumber the estate, and that they would warrant and defend against all persons claiming under them, or either of them. There was also a covenant for further assurances.

On the 9th of May, 1808, all the interest of Charles Croxall in the premises was sold under execution to William McCullogh, and a sheriff's deed executed. On the 17th of May, 1808, McCullogh sold and conveyed to one Milner, who on the next day, conveyed the premises to A. D. Woodruff, Peter Gordon, and Jonathan Rhea, their heirs and assigns, to hold them during the natural lives of Charles and Mary Croxall, in trust, for the sole and separate use of Mary during life, and also to preserve the same from waste, so that after her death the same might enure to the heirs of her body by the said Charles Croxall, to the uses declared by the deed tripartite of 15th November, 1793, for the same premises. Shortly after the execution of the deed last mentioned, and before the application to the legislature of New Jersey,

by Thomas Croxall, hereafter mentioned, Woodruff and Rhea died, leaving Gordon the sole surviving trustee, under the deed executed by Milner. Before that application also, Thomas, Daniel, and Anna Maria Croxall had arrived at majority, and Anna Maria had married, as before stated. Morris Croxall arrived at majority in 1820. Prior to that time and to the application to the legislature, Gordon was his guardian.

In November, 1817, Thomas Croxall presented a petition to the legislature, asking for the partition of the premises. The petition stated that the title and right of possession for life had become vested in Mary Croxall; and that in the year 1814, she had, under the advice of counsel, conveyed to the memorialist all her right and title to the undivided part of the estate to which he, as an heir, laid claim. The aid of the legislature was invoked for the reason, as stated, that difficulties had arisen among the different branches of the family in relation to the property, that the estate was so situated as not to produce to its respective owners the income which it ought to yield, and that causes of litigation frequently occurred. Charles and Mary Croxall, Daniel Croxall, Legrand and wife, and Morris Croxall, by Peter Gordon, his guardian, submitted a remonstrance. The remonstrance was afterward withdrawn, and with the consent of all the parties, *an act of the legislature* was passed February 14, 1818, *which appointed three commissioners, with power to divide the estate into four equal parts, and to set off and apart to each of the children of Charles and Mary Croxall, one equal fourth part by metes and bounds and in severalty. This was accordingly done. The premises in dispute in this case are a part of the share set off to Morris Croxall.* The heirs afterwards mutually released and quit-claimed to each other according to the partition so made. Charles and Mary Croxall joined in the deeds. The deeds from Morris Croxall, and the deed to him, were executed after he arrived at the age of twenty-one years. Charles and Mary Croxall reserved for their use, during their lives, a part of his share. This was not embraced in their deed to him. The premises in dispute are a

part of what was reserved. Thomas and Daniel Croxall, with Legrand and wife, in 1819, upon the execution of the deeds to them respectively, took possession in severalty of their respective shares, and held and enjoyed the same until they severally sold and conveyed to Garrett D. Wall, as hereafter stated. Morris Croxall did the same with respect to his share, except as to the part reserved for the use of his father and mother, which they occupied—he living with them. Their occupancy continued until the death of Mary, in 1824. Charles continued his occupancy after her death, until he also sold and conveyed to Wall. *The deeds of the several parties to Wall were all executed in the year* 1825. The deed of Morris includes the land in dispute in this case. At the time of the conveyance by Thomas Croxall, Wall held three mortgages upon the premises constituting his share, and had also bought the same, at a sale upon execution, and received a deed from the sheriff. When Daniel conveyed, Wall held a mortgage upon his share, and had also bought in the property at a sale under execution, and received the sheriff's deed accordingly. Wall had also taken up a mortgage executed by Morris Croxall before Morris conveyed to him. Wall is dead. The mortgages are held by his family as muniments of title. On the 13th of September, 1825, Charles Croxall, his wife being then dead, released and quit-claimed to Wall, all his interest in the entire premises so conveyed to Wall, whether that interest was in his own right or in right of his deceased wife. Wall paid the full value of the several parcels of the property at the times when the same were respectively conveyed. The lands have since been greatly increased in value, by improvements put upon them by Wall, and those who purchased from him. A large portion of the town of Belvidere now stood upon them.

On the 25th January, 1827, *Wall conveyed to Shererd*, the defendant in the case, by deed of bargain and sale, for the consideration of $2200, the full value of the property at the time, a portion of the premises. They now made part of the town of Belvidere. *Upon the making of the several deeds to Wall he immediately entered into possession under the con-*

veyances; and Shererd, upon the making of the deed of conveyance to him by Wall, immediately entered into possession as the owner, and has ever since been in possession, and for one year prior to the making of the deed he had been in possession as the tenant of Wall. Possession was obtained by the defendant by a fair bonâ fide purchase of the property in question, of a party in possession, and supposed to have a legal right and title thereto.

Upon this special verdict, the court below gave judgment for the defendant. The case was now on error in this court.

To understand the case fully, it is necessary to state that in New Jersey the legislature, by a statute of August 25th, 1784* (explained by one of March 3d, 1786, and repealed apparently by one in 1820), had enacted that—

"All devises heretofore made in tail as aforesaid, which have not already passed through one descent since the death of the testator, and also all such devises which shall hereafter be made in tail of any kind, shall be deemed, taken, and adjudged to vest in and entitle the person to whom the same may descend, agreeably to the devise or entailment, after the decease of the first devisee, to all the estate in the devised premises which the testator was entitled to and might or could have devised; and that *no entailment of any lands, or other real estate, shall continue to entail the same, in any case whatever, longer than the life of the person to whom the same hath been or shall be first given or devised by such entailment.*"

Also, that an act to abolish fines and recoveries was passed June 12th, 1799,† as on the following day an act‡ declaring that from that day "no statute of the Parliament of England or Great Britain should have force within the State of New Jersey."

Also, that (by act of June 5th, 1787, section 2d), §

"Thirty years' actual possession of any lands, tenements, or other real estate, uninterruptedly continued as aforesaid, . . . wherever such possession was obtained by a fair *bonâ fide* purchase of such lands, tenements, or other real estate, of any

* Paterson's Laws, 53, 78. † Id. 411. ‡ Id. 436. § Id.

person or persons whatever in possession, and supposed to have a legal right and title thereto, or of the agent or agents of such person or persons, shall be a good and sufficient bar to all prior locations, rights, *titles, conveyances, or claims whatever*, not followed by actual possession as aforesaid, and shall vest an absolute right and title in the actual possessor and occupier of all such lands, tenements, or other real estate."

The act had the usual exceptions in favor of infants, feme coverts, &c., but not others.

The case was argued at much length, and most interestingly, on the whole learning of estates tail, contingent remainders, the rule in Shelley's case, and how far affected by the statutes of New Jersey of 1786, 1799, and 1820, the different qualities of legal and equitable estates in connection with the particular subject, the effects of the different sorts of assurances at common law and under the statute of uses, as also on the more usual learning of the private statute of 1818 and the statute of limitations of 1787. The fact that the court apparently deemed it proper to rest its judgment on these last grounds chiefly, and "not to go beyond them," will be a sufficient excuse for a very slight or no report of so able and learned a discussion at the bar.

Messrs. Reverdy Johnson, Brent, and Merrick, for the plaintiff in error:

The plaintiff, Robert Morris Croxall, is the great-grandson of Robert Morris, and claims the benefit of the tripartite deed of settlement, made in 1793. Mr. Morris, known as the financier of our Revolution, settled the property in question by this trust upon his son-in-law, Croxall, for life, and after his death, if his wife survived, then upon his said wife, who was Mary Croxall, the daughter of Mr. Morris, for life, and in case of the determination of said life estates, to trustees to preserve contingent remainders, and after the death of the survivor of Charles and Mary Croxall, for the use of the heirs of the body of said Mary by Charles, and the heirs of his, her, or their bodies forever, and upon the failure of such issue, to the heirs of said Robert Morris.

Argument for the plaintiff in error.

Mary Croxall did not survive her husband, but died in July, 1824, leaving her son Thomas, the heir of her body begotten by Charles, and in whom, as we maintain, the contingent remainder vested at her death subject to the outstanding life estate in Charles Croxall, who did not die until 1831.

The New Jersey statute of 26th August, 1784, does not abolish entails or enable the tenant to do so. It only provides that estates tail shall only continue during the life of the first taker who dies seized of the entail as held by the courts of New Jersey, and the next heir takes *per formam doni*, but takes in fee.

The questions arising on this record will be—

1. Whether, by the deed of settlement, Thomas was not the first tenant in tail? If so, as he survived until 1861, his son, the plaintiff in error, would inherit the property by primogeniture, taking, however, a fee, under the statutes of New Jersey.

2. If Mary Croxall, and not her son Thomas, became the first tenant in tail under the rule in Shelley's case, whether, as she survived until 1824, and the act of 26th August, 1784, restricting the entail, was itself repealed in her life by the act of 1820, the entail of which she was seized under the deed of 1793, did not continue and pass at her death in 1824 to her son Thomas, as second heir in tail, and at his death in 1861 to his son, the plaintiff in error, no act of the previous tenants in tail having destroyed the entail?

3. Whether, in the absence of a good paper title in the defendant in error, his possession, taken and held under the deeds of the tenants of the precedent estates, can operate to bar the plaintiff, whose title *per formam doni* accrued only in 1861, after the death of Thomas Croxall, the first or second tenant in tail, as he may be held to be?

The deed of settlement is in form a bargain and sale for a nominal consideration, and therefore it raises the *first* use *impliedly* in the trustees, and they took the legal title.

[The counsel then went into a learned argument to show

that Thomas Croxall was the donee or first tenant in tail, and that he took a legal estate.]

Assuming our positions here to have been made out, conceding that Thomas would have been the first heir in tail, it will probably be said that the private act of February 14th, 1818, authorizing a partition, virtually annulled the entail and invested the heirs apparent with a title where none existed before.

We deny the legality of that act.

If the act be a legal one, then the legislature not only destroyed the entail created by the grantor, but confiscated the reversion in his heirs at law, and all this on the petition of private parties, some of whom only represented life estates, and others represented not even a "*scintilla juris.*"

The legislature, we must think, were imposed on by *ex parte* allegations made in the proceedings which led to the enactment of this private act.

The parties protesting withdraw their opposition, and the act passed for a division of Belvidere, as if all parties in interest had assented.

This act assumes, incorrectly, a clear estate tail in Charles and Mary Croxall, if the rule in Shelley's case applies, and is obviously based on their assent, they being, according to the assumption in the act, the tenants of the inheritance, and willing that it should go *at once* to their children by an act of partition in consideration of the annuity mentioned.

The legislature, it is to be observed, use no language to prejudice the rights of third parties, but merely authorize a partition among the parties before them, assuming that they represented a vested inheritance.

There are certain rules about this class of acts—a dangerous class, perhaps, in this country—well settled, and necessary to be remembered.

The presumption of law is, that in private acts the legislature only bind the parties before them, and not strangers or third parties. The presumption must be made certainly in regard to this act, which on its face breathes no aggressive spirit towards other parties.

Argument for the plaintiff in error.

No greater title can be conferred on the parties by a private act than they possessed before.*

Private acts passed on petition of parties are to be construed merely as private agreements.†

Blackstone shows that consent of all parties having remote interest should be obtained.‡

Private statutes do not bind strangers, unless they have a clause to that effect.§

In this case no party representing the inheritance was privy to the private act; nor were the trustees, or their representatives, under the deed of 1793, consulted. Gordon was not a substituted trustee.

It was decided, indeed, in *Westby* v. *Kiernan*, reported by Ambler,‖ that a private act passed to enable a tenant in tail to raise money out of the entailed estate, bound the issue in tail and the remainder, because tenant in tail could have effected the same object by a common recovery. But, in New Jersey, the tenant tail cannot bar his issue, and he has no power to alienate but during his life; nor was there, according to our construction, any person before the legislature, representing any estate or interest, greater than a life interest.¶

In New Jersey, especially, the courts have gone far to restrain legislative control over private property, and *in no form* can it take A.'s property and give it to B. The case of *Scudder* v. *Trenton Delaware Falls Company*** announces most conservative views on this topic.

Nor could this private act change the estates as held under the old deed of 1793. *Thistle* v. *The Frostburg Company*†† seems to be much in point.

* Hesse *v.* Stevenson, 3 Bosanquet & Puller, 578.

† Perchard *v.* Heywood, 8 Term, 472. ‡ 2 Commentaries, 345.

§ Barrington's case, 8 Reports, 136; Jackson *v.* Catlin, 2 Johnson, 263; Jackson *v.* Cory, 8 Id. 388; Hornby *v.* Houlditch, cited in Ludford *v.* Barber, 1 Term, 93, *n.*; Coolidge *v.* Williams, 4 Massachusetts, 140.

‖ Vol. ii, p. 697.

¶ Den *v.* Van Riper, 1 Harrison, 11. And see the State *v.* Reed, 4 Harris & McHenry, 6, as to fraud in the obtention of a private act of the legislature.

** 1 Saxton, 694.

†† 10 Maryland, 144.

We do not deny the power of the legislature to abolish the entail, but we deny that they have so intended or expressed that intention by this act of legislation. And certainly courts will not strain a private act to make it divest the right of parties not uniting in obtaining the act.

But we must recover even if Mary Croxall was first tenant in tail. [The learned counsel then argued at length in support of this position, not necessary, in view of the concessions made by the court in its opinion, to be more than presented.]

Then, too, it will be said that the defendant in error is protected by the New Jersey statute of limitations. But the statute does not bar our right under the thirty years' limitation, because our title did not accrue until 1861, when Thomas, the first tenant in tail, died.

The English case of *Tolson* v. *Kay** establishes, indeed, that an adverse possession of twenty years against the first tenant in tail will bar the next heir, but that does not reach our case, inasmuch as the defendant holds merely as assignee of Wall, who was assignee by deeds of quit-claim (or bargain and sale, if you choose), of the tenants for life, and the first tenant in tail, under our title paper.

Undoubtedly such an assignee cannot set up his possession as adverse, when his grantor held in conformity with and under our title, being in fact only the occupier of a precedent estate.

Messrs. J. P. Bradley and F. T. Frelinghuysen, contra, for the purchasers.

Mr. Justice SWAYNE delivered the opinion of the court.

Whether under the deed of Robert Morris of the 15th November, 1793, Charles Croxall was tenant for life, remainder to Mary Croxall his wife, for life, remainder to their son Thomas Croxall in tail—whether Mary Croxall was not the donee in tail under the rule in Shelley's case, and if so, whether her estate was a legal or equitable one—and whether

* 3 Broderip & Bingham, 217; 7 English Common Law, 420.

Thomas Croxall was not the donee or first tenant in tail, and if he were the first or the second tenant in tail, whether he took a legal estate by the operation of the statute of uses, then in force in New Jersey, or whether he took an equitable estate, the statute not executing the use created by the deed for his benefit, are questions not without difficulty, and upon which the views of some members of the court are not in harmony with those of others. As there are grounds of decision, not involving these inquiries, upon which we are all united in opinion, except one member of the court, as to one of the propositions, it is deemed proper to place our judgment upon those grounds and not to go beyond them. If Thomas Croxall, and not his mother, was the first tenant in tail, taking under the deed by purchase, and not by limitation, it is immaterial whether his estate was legal or equitable. In the law, if real property, the principles which apply to estates of both kinds, with a few limited exceptions not affecting this case, are the same. In the consideration of a court of equity, the *cestui que trust* is actually seized of the freehold. He may alien it, and any legal conveyance by him will have the same operation in equity upon the trust, as it would have had at law upon the legal estate.*

The trust like the legal estate is descendible, devisable, alienable, and barrable by the act of the parties, and by matter of record. Generally, whatever is true at law of the legal estate, is true in equity of the trust estate.†

The rule in Shelley's case applies alike to equitable and to legal estates;‡ and an equitable estate tail may be barred in the same manner as an estate tail at law, and this end cannot be accomplished in any other way.§

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* Burgess *v.* Wheate, Eden, 226; Boteler *v.* Allington, 1 Brown's Chancery, 72.

† Cholmondeley *v.* Clinton, 2 Jacob & Walker, 148; Walton *v.* Walton, 7 Johnson's Chancery, 270; Doe *v.* Laming, 2 Burrow, 1109; Philips *v.* Brydges, 3 Vesey, 127.

‡ Garth *v.* Baldwin, 2 Vesey, Sr., 655; Pratt *v.* McCawley, 8 Harris, 264; Fearne on Remainders, 121.

§ Saunders on Uses, 280; Williams on Real Property, 155.

In *Doe* v. *Oliver** the testator had devised lands to his wife for life; remainder to the children of his brother who should be living at the death of his wife. But one child, a daughter, was living at that time. She with her husband, in the lifetime of the devisee of the life estate, levied a fine, and declared the use to A. B. after the death of the first devisee, and the termination of her life estate.

A. B. brought an action of ejectment for the lands, and recovered. It was held that the fine had a double operation, that it bound the husband and wife by estoppel or conclusion, so long as the contingencies continued, and that when the contingency happened, the estate which devolved upon the wife fed the estoppel, that the estate by estoppel created by the fine, ceased to be an estate by estoppel only, and became an interest, and gave to A. B. exactly what he would have had if the contingency had happened before the fine was levied. If Mary Croxall took under the deed an equitable contingent remainder for life, and Thomas at her death would have taken a legal estate tail, if the estate still subsisted, the statute in his case, executing the use, then the estates could not coalesce, one being legal and the other equitable, and the rule in Shelley's case would not apply. In that view of the subject Thomas and not his mother was the donee in tail.

A use limited upon a use, is not executed or affected by the statute of uses. The statute executes only the first use. In the case of a deed of bargain and sale, the whole force of the statute is exhausted in transferring the legal title in fee simple to the bargainee. But the second use may be valid as a trust, and enforced in equity according to the rights of the parties.†

But without pursuing the subject, let it be conceded, for

* 14 Barnewall & Creswell, 181.

† Doe *v.* Passingham, 6 Barnewall & Creswell, 305; Gilbert on Uses, Sugden's note, 1; Jackson *v.* Cary, 16 Johnson, 304; Franciscus *v.* Reigart, 4 Watts, 108; Williams on Real Property, 181; Roe *v.* Tranmarr, 2 Smith's Leading Cases, 511, note.

the purposes of this case, that Thomas Croxall was the donee or first tenant in tail, and that he took a legal estate, as contended by the counsel for the plaintiff in error.

Taking this view of the subject, the first inquiry to which we shall direct our attention is as to the effect of the act of the legislature of the 14th of February, 1818, and of the proceedings which were had under it. All the parties in interest then *in esse*, were before the legislature, and asked for the act, or consented that it should be passed.

There is no ground for the imputation upon either of them of any fraud, indirection, or concealment. It is not denied that the act was deliberately passed, nor that the partition made under it by the commissioners was fair and equal; all the parties testified their approbation, and confirmed it by their subsequent conveyances. The legal doubts and difficulties which hung over the deed, the uncertainty of the rights of the several parties; the learned and elaborate arguments, and conflicting views of the counsel, and our differences of opinion in this litigation, evince the wisdom and the equity of the act. It is as clear by implication as it could be made by expression, that the object of the legislature was to dock the entail, and unfetter the estate. What is implied is as effectual, as what is expressed.* If it were possible for the parties and the legislature to accomplish this object, it was thus done. Had they the power? When the deed was executed, the statute *de donis* was in force in New Jersey, but modified by the acts of her legislature of the 25th of August, 1784, and of the 3d of March, 1786. Fines and recoveries, as known in the English law, were then a part of her judicial system. They were abolished by the act of June 12th, 1799. By the act of 13th of June, 1799, it was declared that no British statutes should thereafter have any force within the State. The plaintiff's lessor was the son of Thomas Croxall, and was born on the 29th of March, 1821. Estates tail, under the statute *de donis*, were, before the passage of the statute, known in the common

* United States *v.* Babbit, 1 Black, 55.

law as conditional fees. Like estates tail, they were limited to particular heirs to the exclusion of others. The condition was, that if the donee died, without leaving such heirs as were specified, the estate should revert to the grantor. According to the common law, upon the birth of such issue, the estate became absolute for three purposes:

1. The donee could alien, and thus bar his own issue and the reversioner.

2. He could forfeit the estate in fee simple for treason. Before he could only forfeit his life estate.

3. He could charge it with incumbrances. He might also alien before issue born, but in that case, the effect of the alienation was only to exclude the lord, during the life of the tenant, and that of his issue, if such issue were subsequently born, while if the alienation were after the birth, its effect was complete, and vested in the grantee a fee simple estate.*

In this state of the law it became usual for the donee, as soon as the condition was fulfilled by the birth of issue, to alien, and afterwards to repurchase the land. This gave him a fee simple, absolute, for all purposes. The heir was thus completely in the power of the ancestor, and the bounty of the donor was liable to be defeated by the birth of the issue, for whom it was his object to provide. To prevent such results, and to enable the great families to transmit in perpetuity the possession of their estates to their posterity, the statute *de donis* of the 13 Edward I, known as the Statute of Westminster the 2d, was passed. It provided, "that the will of the donor, according to the form in his deed of gift manifestly expressed, should be observed, so that they to whom a tenement was so given upon condition, should not have the power of alienating the tenement so given, whereby it might not remain after their death to their issue, or to the heir of the donor, if the issue should fail." Under this statute it was held that the donee had no longer a conditional fee governed by the rules of the common law,

* Plowden, 241.

but that the estate was inalienable, and must descend "*per formam doni*," or pass in reversion. The evils arising from the statute were found to be very great. Repeated efforts were made by the Commons to effect its repeal. They were uniformly defeated by the nobility, in whose interest the statute was passed. It remained in force and was administered without evasion for about two centuries. In the reign of Edward IV it was held in *Taltarem's case*,* that the entail might be destroyed by a common recovery. The effect of this process was to bar alike the issue, the reversioner, and all those to whom the donor had given other estates expectant on the death of the tenant in tail without issue. The demandant took an absolute estate in fee simple.† Fines were subsequently resorted to for the same purpose. A statute of 32 Henry VIII declared a fine, duly levied by the tenant in tail, to be a complete bar to him and his heirs, and all others claiming under the entail. Other incidents were subsequently, from time to time, annexed to such estates. By a statute of Henry VII, they were made liable to forfeiture for treason. At a later period they were made liable for the debts of the tenant to the crown, due by record or special contract; and still later they were made liable for all his debts in case of bankruptcy. The power to suffer a common recovery has been invariably held to be a privilege inseparably incident to an estate tail, and one which cannot be restrained by condition, limitation, custom, recognizance, or covenant.‡

Private acts of Parliament are one of the modes of acquiring title enumerated by Blackstone. They are resorted to when the power of the courts of justice is inadequate to give the proper relief and the exigencies of the case require the interposition of the broader power of the legislature. They were very numerous immediately after the restoration of Charles II. The validity of statutes affecting private inter-

* Year Book, 12 Ed. IV, 14, 19.

† 2 Blackstone's Comm. 360; Cruise on Recoveries, 258.

‡ Knowles's Argument in Taylor *v.* Horde, 1 Burrow, 84; Dewitt *v.* Eldred, 4 Sergeant & Rawle, 421.

ests in specific real property has been repeatedly recognized by this court.*

Blackstone says: "Nothing also is done without the consent expressly given of all parties in being, and capable of consent, that have the remotest interest in the matter, unless such consent shall be perversely and without any reason withheld."† Here all who were interested consented. No interest vested or contingent of the lessor of the plaintiff in error was involved; and no consent was asked of him, for the reason that he was then unborn.

In *Westby* v. *Kiernan*,‡ it was held that a private act passed to enable the tenant in tail to raise money bound the remainder. This involved the power to destroy the estate by incumbering the property to the full amount of its value.

We entertain no doubt that the act in question was valid, and that the partition made under it, and the deeds subsequently executed, vested in each grantee a fee simple estate. This was the necessary result, whatever the quantity and character of the estates of Mary and Thomas Croxall at that time.

It remains to consider the effect of the statute of limitation relied upon by the defendant in error. The second section of the act of the 5th of June, 1787, declares that thirty years' actual possession, where such possession was obtained by a fair and *bonâ fide* purchase of any person in possession and supposed to have a legal right and title, shall vest an absolute right and title in the possessor and occupier. The deed of Morris Croxall to Garrett D. Wall bears date on the 30th of September, 1825. Wall conveyed to Shererd, the defendant, on the 5th of January, 1827. The special verdict finds that Wall took possession at the date of the deed to him from Morris Croxall, and held it until he conveyed to Shererd on the 5th of January, 1827, and that Shererd was continuously in possession from that time down to the commencement of the suit, "and that possession was obtained

* Stanly v. Colt, *supra*, 119.

† 2 Commentaries, 345.

‡ 2 Ambler, 697.

by the defendant by a fair and *bonâ fide* purchase of the lands in question of a party in possession and supposed to have a legal title thereto." The finding of the jury brings the case exactly within the terms of the statute. And there had been uninterrupted possession for more than the statutory period of thirty years when the action was commenced.

It is said that the possession of the defendant was subordinate to the ultimate right and title of the plaintiff's lessor, and was in effect his possession. This is not so. The defendant was a *bonâ fide* purchaser. Such a party holds adversely to all the world. He may disclaim the title under which he entered, and set up any other title and any other defence alike against his vendor and against others.*

It is said also that the remainder to Thomas Croxall was contingent and expectant until the death of his father and mother; that nothing passed by his deed to Wall, and that the statute could not, under these circumstances, affect the rights of his heir in tail. Laying out of view the act of the legislature of 1818, and what was done under it, this is still an erroneous view of the subject. Thomas was living at the time of the execution of the deed of 1793, and took at once an estate vested in right, and deferred only as to the time of possession and enjoyment. It was in the latter respect only contingent and expectant. If this were not so, upon the death of the remainderman before the vesting of the possession his children could not inherit.†

The struggle with the courts has always been for that construction which gives to the remainder a vested rather than a contingent character. A remainder is never held to be contingent when, consistently with the intention, it can be held to be vested. If an estate be granted for life to one person, and any number of remainders for life to others in succession, and finally a remainder in fee simple or fee tail,

* Watkins *v.* Holman, 16 Peters, 54; Blight's Lessee *v.* Rochester, 7 Wheaton, 548; The Society *v.* The Town of Pawlet, 4 Peters, 506; Jackson *v.* Huntington, 5 Id. 402; Willison *v.* Watkins, 3 Id. 43; Voorhies *v.* White's Heirs, 2 Marshall, 26; Winlock *v.* Hardy, 4 Littel, 274.

† Goodtitle *v* Whitby, 1 Burrow, 228.

each of the grantees of a remainder for life takes at once a vested estate, although there be no probability, and scarcely a possibility, that it will ever, as to most of them, vest in possession.*

Chancellor Kent says the definition of a vested remainder is thus fully and accurately expressed in the Revised Statutes of New York. It is, "when there is a person in being who would have an immediate right to the possession of the lands, upon the ceasing of the intermediate precedent estate."

It is the present capacity to take effect in possession, if the precedent estate should determine, which distinguishes a vested from a contingent remainder. Where an estate is granted to one for life, and to such of his children as should be living after his death, a present right to the future possession vests at once in such as are living, subject to open and let in after-born children, and to be divested as to those who shall die without issue. A remainder, limited upon an estate tail, is held to be vested, though it be uncertain whether it will ever take effect in possession.† A vested remainder is an estate recognized in law, and it is grantable by any of the conveyances operating by force of the statute of uses.‡

Such an estate, if the entail had not been destroyed, passed by the deed of Thomas Croxall to Morris Croxall, by the deed of Morris Croxall to Garrett D. Wall, and by the deed of Wall to the defendant, Shererd. Whatever interest Charles Croxall had in the property after the death of his wife, passed by his deed of the 20th of September, 1825, to Wall, and from Wall, under the covenant of warranty in his deed, to Shererd.

The special verdict having found that the defendant obtained possession by a *bonâ fide* purchase from a party in

* Williams on Real Property, 208.

† Goodtitle *v.* Whitby, 1 Burrow, 228; Wendell *v.* Crandall, 1 Comstock, 491; Doe *v.* Lea, 3 Durnford & East, 41; Moore *v.* Lyons, 25 Wendell, 119, Doe *v.* Underdown, Willes, 293; Etter's Estate, 23 Pennsylvania State, 381; Vanderheyden *v.* Crandall, 2 Denio, 18; Boraston's Case, 3 Coke, 51; 4 Kent's Com. 202; Williams on Real Property, 207.

‡ Fearne on Remainders, 216; 4 Kent's Com. 205.

possession, and supposed to have a valid title, the case is thus, in this view of the state of the title, brought again within the letter, and, as we think, within the meaning of the statute. The statute provides expressly that possession for the period of limitation shall vest in the occupant "an absolute right and title to the land." Such a title thus became vested in the defendant, Shererd. This would have been the effect of the bar without such a provision in the statute.*

The statute contains no qualification or exception as to issue in tail, and we can interpolate none; nor can we review or reverse the finding of the jury. In *Inman* v. *Barnes*,† Mr. Justice Story said: "I take it to be well settled that if the time limited has once run against any tenant in tail, it is a good bar, not only against him, but also against all persons claiming in descent *per formam doni* through him." In *Wright* v. *Scott*,‡ this same statute came under the consideration of the court. The case involved entailed property. The court gave the same construction to the statute which we have given. Mr. Justice Washington remarked that if such were not the proper construction the issue in tail could never be barred. In cases of this class, as in all others, when the statute has begun, it continues to run until its effect is complete. It proceeds to throw its protection over the property, and does not stop by the way for any intermediate right which may have arisen during the period of its progress. It allows no immunity beyond the savings which it contains. Such statutes are now favorably regarded in all courts. They are "statutes of repose," and are to be construed and applied in a liberal spirit.

Our construction of this statute is sustained by the analogies of the English and Massachusetts decisions respecting writs of formidon in descender under the statute of the 21 James I, and other statutes containing similar provisions.§ The law presents other analogies which tend strongly in the same direction. As between trustee and *cestui que trust*—a

* Leffingwell *v.* Warren, 2 Black, 605. † 2 Gallison, 315.

‡ 4 Washington Circuit Court, 24. § Angel on Limitations, § 360.

joint tenant and a tenant in common, and their co-tenants, the bar becomes complete when the period has elapsed, which the statute prescribes, after the commencement of open and notorious adverse possession.* We think the special verdict sustains conclusively this defence.

The judgment below was properly given for the defendant in error, and it is affirmed.

Mr. Justice MILLER. I concur in the judgment of the court, and in its opinion as to the first ground on which the judgment is based.

In that part of the opinion which declares the statute of limitation to be a good defence, I cannot concur. The facts conceded by both parties show, that until the death of Thomas Croxall, in 1861, the defendants and those under whom they claimed, had a lawful possession; and were at no time liable to an action to disturb that possession until that event; and I do not believe that the statute of limitations of New Jersey, or of any other country, or any rule of prescription, was ever intended to create a bar in favor of parties in possession, who were not liable to be sued in regard to that possession.

It was unnecessary to decide this proposition, as the court were unanimous in the opinion that defendants had a good title, in fee simple, which needed no statute of limitation to protect it.

JUDGMENT AFFIRMED.

CHRISTMAS v. RUSSELL.

1. A State statute which enacts that "no action shall be maintained on any judgment or decree rendered by any court without this State against any person who, at the time of the commencement of the action in which such judgment or decree was or shall be rendered, was or shall be a resident of this State, in any case where the cause of action would have been barred by any act of limitation of this State, if such suit had been brought therein"—is unconstitutional and void, as destroying the right of a party to enforce a judgment regularly obtained in another State, and

* Angel on Limitations, §§ 425, and 419 to 436.

Statement of the case.

as conflicting therefore with the provision of the Constitution (Art. IV, § 1), which ordains that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State."

2. A plea of fraud in obtaining a judgment sued upon, cannot be demurred to generally because not showing the particulars of the fraud set up. Going to a matter of form, the demurrer should be special.

3. Subject to the qualification that they are open to inquiry as to the jurisdiction of the court which gave them, and as to notice to the defendant, the judgment of a State court, not reversed by a superior court having jurisdiction, nor set aside by a direct proceeding in chancery, is conclusive in the courts of all the other States where the subject-matter of controversy is the same.

IN March, 1840, Christmas, being a citizen and resident of *Mississippi*, made at Vicksburg, in that State, and there delivered to one Samuel, a promissory note, promising to pay to his order in March, 1841, a sum certain. This note was indorsed by Samuel to Russell, a citizen and resident of *Kentucky*. By statute of Mississippi, action on this note was barred by limitation, after six years, that is to say, was barred in March, 1847. In 1853, the defendant, who was still, and had continuously been, a resident of Mississippi, having a mansion-house therein, went into Kentucky on a visit, and was there sued in one of the State courts upon the note.

Defence was taken on a statute of limitations of Mississippi and otherwise, and the matter having been taken to the Court of Appeal of Kentucky and returned thence, judgment was entered below in favor of the plaintiff.

A transcript being promptly carried into Mississippi, the place of the domicil of Christmas, an action of debt was brought upon it in the Circuit Court of the United States for the Southern District of Mississippi; the action which was the subject of the writ of error now before this court.

The transcript above referred to, was one duly authenticated under the act of Congress of 26th May, 1790, which provides that records authenticated in a manner which it prescribes, shall "have such faith and credit given to them in every other court in the United States, as they have by law or usage in the court from which they are taken;" an act passed in pursuance of Section 1 of Article IV of the Con-

stitution of the United States, declaring that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings in every other State;" and that "Congress may by general laws prescribe the manner in which such records shall be proved, and the effect thereof."

In the action brought as above said, in the Circuit Court of Mississippi, the defendant filed six pleas—of which the second was to this effect:

"That at the time the cause of action accrued, and thenceforth until suit was brought in Kentucky, and at the time when said suit was brought, he was a resident of Mississippi, and that the cause of action would have been barred by an act of limitation of that State, if the suit had been brought therein, and so by the law of Mississippi, no action could be maintained in said State upon the said judgment."

He also pleaded

4th. "That the judgment set forth was obtained and procured by the plaintiff by fraud of the said plaintiff."

And

6th. "That the said suit in which judgment was obtained, was instituted to evade the laws of Mississippi, and in fraud of said laws."

The second and sixth pleas were intended to set up a defence under a statute of Mississippi, adopted in February, 1857, and which went into effect on the 1st day of November of that year.* That statute enacted:

"No action shall be maintained on any judgment or decree rendered by any court without this State against any person who, at the time of the commencement of the action in which such judgment or decree was or shall be rendered, was or shall be a resident of this State, in any case where the cause of such action would have been barred by any act of limitation of this State, if such suit had been brought therein."

* Revised Code, pp. 43, 400.

To these pleas the plaintiff below demurred. The demurrer was sustained, and judgment having gone for the plaintiff, the question on error here was, as to the sufficiency of these pleas, or either of them, to bar the action.

Messrs. Carlisle and McPherson, for the plaintiff in error:

We will, for convenience, discuss the fourth plea first, and then the second and sixth together.

I. The fourth plea offered to prove, in bar to the action, that the judgment sued on was obtained and procured by the plaintiff by his fraud.

1. Fraud by the plaintiff in procuring the judgment, if well and sufficiently pleaded and proven, would have barred the action.

This is the established rule of law, and was so laid down by this court in the case of *Webster* v. *Reid.**

It is also the rule in Kentucky, where the judgment now sued on was rendered.†

2. Fraud was well and sufficiently pleaded.‡

II. As to the 2d and 6th pleas. The manifest policy of the State of Mississippi in passing the statute set up by the defendant in his second plea below was to protect its citizens from unjust and harassing litigation under circumstances such as those under which the present one is brought on. And the question is, whether this statute, having such intent and policy, was within the constitutional competency of the State to enact.

It will be maintained on the opposite side that such a power cannot be exercised without violating that clause of the Constitution, respecting the full faith and credit due to the records and judicial proceedings of the several States.

Without here examining the authorities on this subject in detail, it is sufficient to observe that on the one hand they clearly establish that "the full faith and credit" which is

* 11 Howard, 441, 460.

† Talbott *v.* Todd, 5 Dana, 194–6.

‡ 3 Chitty's Pleading, 1184.

guaranteed to the records and judicial proceedings of the several States, has relation to them only as instruments of evidence,* while on the other all the cases concede that the whole subject of *remedies* by action or suit at law or in equity, is within the undoubted competency of the respective States. In *Bronson* v. *Kinzie*,† Chief Justice Taney says:

"Undoubtedly, a State may regulate at pleasure the modes of proceeding in its courts in relation to past contracts as well as future. It may, for example, shorten the period of time within which claims shall be barred by the statute of limitations. It may, if it thinks proper, direct that the necessary implements of agriculture, or the tools of the mechanic, or articles of necessity in household furniture, shall, like wearing apparel, not be liable to execution on judgments. Regulations of this description have always been considered, in every civilized community, as properly belonging to the remedy to be exercised or not by every sovereignty, according to its own views of policy and humanity. *It must reside in every State to enable it to secure its citizens from unjust and harassing litigation, and to protect them in those pursuits which are necessary to the existence and well-being of every community.* And although a new remedy may be deemed less convenient than the old one, and may, in some respects, render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. *Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract.*"

Now, in the present case, the only contract between the parties in form or in substance, which is pretended to have had any existence at the date of the Mississippi statute, was that the plaintiff in error, being a citizen and resident of Mississippi, on the 10th day of March, 1840, in that State, made and delivered his promissory note to a certain Samuel, promising to pay to his order a certain sum of money at a certain day thereafter. Neither the statute in question, nor any other statute of Mississippi purports to

* Mills *v.* Duryee, 7 Cranch, 481.

† 1 Howard, 315

impair, or is pretended to have impaired the obligation of this contract. After the passage of the disputed statute, as well as before, there was a statute of limitations which barred the remedy in this contract in six years after the cause of action accrued, but this it is conceded was within the constitutional power of the State.

All that had occurred after the making of this contract was, that a new and higher instrument of evidence, establishing the same contract with greater solemnity, had been imposed upon the debtor, by a proceeding *in invitum*, in another State of the Union, where he happened to be found temporarily sojourning. But the contract between the parties remained the same in its substance, although it had changed its form by operation of law, in which form its substance is distinctly repeated and adjudicated.

Will it be maintained that when a contract has assumed a new shape by extra-territorial judicial proceedings it may be immediately brought back into the State where it was made, and where in its original form it was a mere nullity, because against public policy, in violation of express law, and there, through the courts, in spite of the statute, be compulsorily enforced? This surely will not be contended.

The statute of Mississippi, alleged to be unconstitutional, did not deny to the Kentucky record the full faith and credit guaranteed to it by the Constitution. In the present case, full faith and credit and effect as evidence were given to the Kentucky record, as conclusive of every matter and thing which thereby appeared. And it did thereby appear that the judgment had no other foundation than a certain Mississippi contract therein set forth, which fell within the purview of the Mississippi statute in question, the cause of action therein having been long barred by the limitation acts of said State in force at the date of the contract.

This question rises far above any mere technical criticism of the provisions of the Constitution; it involves the sovereign competency of the State to enforce its own laws within its own limits in regard to subjects of litigation arising

there between its own citizens. In the case at bar the statute invoked by the plaintiff was passed, manifestly, in the just and reasonable exercise of that power, which in the language of this court, above cited, must reside in every State to enable it to secure its citizens from unjust and harassing litigation. It does not disregard or discredit the Kentucky record; but giving that record full faith and credit, it declares that upon the facts thereby appearing, the obligation thereby attempted to be imposed upon the defendant is contrary to the public policy of the State, and shall not be enforced within its limits.

Mr. Ashton, contra:

I. *In regard to the fourth plea.* The plea, even admitting for argument's sake that the judgment was procured by fraud, is perhaps defective in not setting out by what fraud; in not showing, we mean, how, particularly, the fraud set up generally was perpetrated.

But waiving this matter of form, the plea is defective substantially, fraud being no plea in one State to a judgment standing in full force, unreversed, and never set aside, in another; and this being true, both by common law principles and by the provision of the Constitution on the subject of the faith and credit due in each State to the judicial proceedings of every other.

The judgments of the courts of one State are, as respects other States, very much in the nature of domestic judgments. Certainly under our Federal system, and in a country where one sovereignty is made of States, they cannot be regarded as foreign judgments.

As to domestic judgments, it is matter of "horn-book learning," that these cannot be called in question collaterally, supposing that the court which gave them had jurisdiction.

And even as to foreign judgments, while the earlier common law,—the law of a day when intercourse between nations was difficult, limited, and suspicious,—held them open to a plea of fraud, the disposition in this present day of the brotherhood of nations is to disallow such plea. Certainly

we would be disposed to pay as much respect to a solemn judgment of the King's Bench, or Common Pleas of England, as we should to one of our own courts. And no less respect would be due from that bench to a judgment of this high tribunal; and none less we presume would now be paid.

But all this is quite useless discussion. The question is simply, "What faith and credit is due in one State to a judicial proceeding had in another?" And the Constitution answers the question; for it declares that it shall be "*full* faith and credit." How is full faith and credit, or any faith and credit at all, given when you can plead that the judicial proceeding was fraudulently procured? If, indeed, any matter has supervened; that is to say, if the judgment has been paid, it may in a proper form, as that of *payment*, be pleaded; though not in a form, as that of *nil debet*, which would leave it uncertain whether the plea was meant to go to matter anterior to the date of the judgment, or to matter posterior to it. This is reason, and a matter settled by authority so well known to the bar as almost to dispense with our referring to the cases.*

II. *As to the second and sixth pleas.* The act of Mississippi is clearly unconstitutional. The Constitution declares that full faith and credit should be given in each State (including Mississippi) to the judicial proceedings in every other (including Kentucky). The act of the Mississippi legislature says that no faith or credit at all shall be given to a judicial proceeding in Kentucky in any case where the cause of action there held not barred would in Mississippi be held barred. The conflict is palpable. Under numerous authorities† the statute of Mississippi set up as a plea is no plea. In short, no plea to a suit on such a record as this suit was brought

* Mills *v.* Duryee, 7 Cranch, 481; Hampton *v.* McConnel, 3 Wheaton, 234; McElmolye *v.* Cohen, 13 Peters, 320; Bank United States *v.* Merchants' Bank, 7 Gill, 432; 2 American Leading Cases, 763 to end.

† Bronson *v.* Kinzie, 1 Howard, 315; McCracken *v.* Hayward, 2 Id. 608; Murray *v.* Gibson, 15 Id. 421; Tarpley *v.* Hamer, 9 Smedes & Marshall, 313; West Feliciana Railroad Company *v.* Stockets, 13 Id. 397.

on, is good, except *nul tiel record*, *payment*, or some plea in abatement touching the rights of the parties to sue in the court of the United States, or some limitation to the right of suing on the record founded on reasonable time from the date of the judgment.

Mr. Justice CLIFFORD delivered the opinion of the court.

Wilson, on the eleventh day of November, 1857, recovered judgment in one of the county courts in the State of Kentucky, against the plaintiff in error, for the sum of five thousand six hundred and thirty-four dollars and thirteen cents, which, on the thirty-first day of March, 1859, was affirmed in the Court of Appeals. Present record shows that the action in that case was assumpsit, and that it was founded upon a certain promissory note, signed by the defendant in that suit, and dated at Vicksburg, in the State of Mississippi, on the tenth day of March, 1840, and that it was payable at the Merchants' Bank, in New Orleans, and was duly indorsed to the plaintiff by the payee. Process was duly served upon the defendant, and he appeared in the case and pleaded to the declaration. Several defences were set up, but they were all finally overruled, and the verdict and judgment were for the plaintiff.

On the fourth day of June, 1854, the prevailing party in that suit instituted the present suit in the court below, which was an action of debt on that judgment, as appears by the transcript. Defendant was duly served with process, and appeared and filed six pleas in answer to the action. Reference, however, need only be particularly made to the second and fourth, as they embody the material questions presented for decision. Substance and effect of the second plea were that the note, at the commencement of the suit in Kentucky, was barred by the statute of limitations of Mississippi, the defendant having been a domiciled citizen of that State when the cause of action accrued, and from that time to the commencement of the suit.

Fourth plea alleges that the judgment mentioned in the

declaration was procured by the fraud of the plaintiff in that suit. Plaintiff demurred to these pleas, as well as to the fifth and sixth, and the court sustained the demurrers.

First plea was *nul tiel record*, but the finding of the court under the issue joined, negatived the plea.

Third plea was payment, to which the plaintiff replied, and the jury found in his favor.

II. 1. Resting upon his second and fourth pleas, the defendant sued out this writ of error, and now seeks to reverse the judgment, upon the ground that the demurrers to those pleas should have been overruled. Views of the defendant were, and still are, that the second plea is a valid defence to the action on the judgment, under the statute of Mississippi passed in February, 1857, and found in the code of that State which went into effect on the first day of November of that year. By that statute it was enacted that "no action shall be maintained on any judgment or decree rendered by any court without this State against any person who, at the time of the commencement of the action in which such judgment or decree was or shall be rendered, was or shall be a resident of this State, in any case where the cause of action would have been barred by any act of limitation of this State, if such suit had been brought therein."*

Material facts are that the defendant, being a citizen and resident of Mississipi, made the note to the payee, who indorsed the same to the plaintiff, a citizen and resident of Kentucky. Such causes of action are barred by limitation, under the Mississippi statute, in six years after the cause of action accrues. Some time in 1853 the defendant went into Kentucky on a visit, and while there was sued on the note. He pleaded, among other pleas, the statute of limitations of Mississippi, and, on the first trial, a verdict was found in his favor; but the judgment was reversed on appeal, and at the second trial the verdict and judgment were for the plaintiff.

2. Undoubtedly, the second plea in this case is sufficient in form, and it is a good answer to the action if the statute

* Mississippi Code, 400.

under which it was framed is a valid law. Plaintiff in error suggests that it should be considered as a statute of limitations; and, if it were possible to regard it in that light, there would be little or no difficulty in the case. Statutes of limitation operating prospectively do not impair vested rights or the obligation of contracts. Reasons of sound policy have led to the adoption of limitation laws, both by Congress and the States, and, if not unreasonable in their terms, their validity cannot be questioned. Consequently, it was held by this court, in the case of *Elmoyle* v. *Cohen*,* that the statute of limitations of Georgia might be pleaded to an action in that State founded upon a judgment rendered in the State Court of South Carolina. Cases, however, may arise where the provisions of the statute on that subject may be so stringent and unreasonable as to amount to a denial of the right, and in that event a different rule would prevail, as it could no longer be said that the remedy only was affected by the new legislation.†

3. But the provision under consideration is not a statute of limitations as known to the law or the decisions of the courts upon that subject. Limitation, as used in such statutes, means a bar to the alleged right of the plaintiff to recover in the action created by or arising out of the lapse of a certain time after the cause of action accrued, as appointed by law.‡

Looking at the terms of this provision, it is quite obvious that it contains no element which can give it any such character. Plain effect of the provision is to deny the right of the judgment creditor to sue at all, under any circumstances, and wholly irrespective of any lapse of time whatever, whether longer or shorter. No day is given to such a creditor, but the prohibition is absolute that no action shall be maintained on any judgment or decree falling within the conditions set forth in the provision. Those conditions are addressed, not to the judgment, but to the cause of action

* 13 Peters, 312.

† Bronson *v.* Kinzie et al., 1 Howard, 315; Angell on Limitations, 18.

‡ Bouvier's Dictionary, title Limitation

which was the foundation of the judgment. Substantial import of the provision is that judgments recovered in other States against the citizens of Mississippi shall not be enforced in the tribunals of that State, if the cause of action which was the foundation of the judgment would have been barred in her tribunals by her statute of limitations.

Nothing can be plainer than the proposition is, that the judgment mentioned in the declaration was a valid judgment in the State where it was rendered. Jurisdiction of the case was undeniable, and the defendant being found in that jurisdiction, was duly served with process, and appeared and made full defence. Instead of being a statute of limitations in any sense known to the law, the provision, in legal effect, is but an attempt to give operation to the statute of limitations of that State in all the other States of the Union by denying the efficacy of any judgment recovered in another State against a citizen of Mississippi for any cause of action which was barred in her tribunals under that law. Where the cause of action which led to the judgment was not barred by her statute of limitations the judgment may be enforced; but if it would have been barred in her tribunals, under her statute, then the prohibition is absolute that no action shall be maintained on the judgment.

4. Article four, section one, of the Constitution provides, that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may, by general laws, prescribe the manner in which such records shall be proved, and the effect thereof." Congress has exercised that power, and in effect provided that the judicial records in one State shall be proved in the tribunals of another, by the attestation of the clerk, under the seal of the court, with the certificate of the judge that the attestation is in due form. 2. That such records so authenticated "shall have such faith and credit given to them in every other court in the United States as they have by law or usage in the courts of the State from whence the said records were or shall be taken."*

* 1 Stat. at Large, 122; D'Arcy v. Ketchum et al., 11 Howard, 175.

When the question of the construction of that act of Congress was first presented to this court it was argued that the act provided only for the admission of such records as evidence; that it did not declare their effect; but the court refused to adopt the proposition, and held, as the act expressly declares, that the record, when duly authenticated, shall have in every other court of the United States the same faith and credit as it has in the State court from whence it was taken.*

Repeated decisions made since that time have affirmed the same rule, which is applicable in all similar cases where it appears that the court had jurisdiction of the cause, and that the defendant was duly served with process, or appeared and made defence.† Where the jurisdiction has attached the judgment is conclusive for all purposes, and is not oper to any inquiry upon the merits.‡ Speaking of the beforementioned act of Congress, Judge Story says it has been settled, upon solemn argument, that that enactment does declare the effect of the records as evidence when duly authenticated. . . . "If a judgment is conclusive in the State where it was pronounced, it is equally conclusive everywhere" in the courts of the United States.§

5. Applying these rules to the present case, it is clear that the statute which is the foundation of the second plea in this case is unconstitutional and void as affecting the right of the plaintiff to enforce the judgment mentioned in the declaration. Beyond all doubt the judgment was valid in Kentucky and conclusive between the parties in all her tribunals. Such was the decision of the highest court in the State, and it was undoubtedly correct; and if so, it is not competent for any other State to authorize its courts to open the merits and review the cause, much less to enact that such a judgment shall not receive the same faith and

* Mills *v.* Duryee, 7 Cranch, 483.

† Hampton *v.* McConnel, 3 Wheaton, 332; Nations et al. *v.* Johnson et al., 24 Howard, 203; D'Arcy *v.* Ketchum, 11 Id. 165; Webster *v.* Reid, Id. 460

‡ Bissell *v.* Briggs, 9 Massachusetts, 462; United States Bank *v.* Merchants' Bank, 7 Gill, 430.

§ 2 Story on Constitution (3d ed.), § 1313.

credit that by law it had in the State courts from which it was taken.

II. 1. Second error assigned is that the court erred in sustaining the demurrer to the fourth plea, which alleged that the judgment was procured by the fraud of the plaintiff. First proposition assumed by the present defendant is, that the plea is defective and insufficient, because it does not set forth the particular acts of the plaintiff which are the subject of complaint. But the substance of the plea, if allowable at all, is well enough under a general demurrer, as in this case. Whether general or special, a demurrer admits all such matters of fact as are sufficiently pleaded, and to that extent it is a direct admission that the facts as alleged are true.*

Where the objection is to matter of substance, a general demurrer is sufficient; but where it is to matter of form only, a special demurrer is necessary. Demurrers, says Chitty, are either general or special: general, when no particular cause is alleged; special, when the particular imperfection is pointed out and insisted upon as the ground of demurrer. The former will suffice when the pleading is defective in substance, and the latter is requisite where the objection is only to the form of the pleading.† Obviously the objection is to the form of the plea, and is not well taken by a general demurrer.

2. But the second objection is evidently to the substance of the plea, and therefore is properly before the court for decision. Substance of the second objection of the present defendant to the fourth plea is, that inasmuch as the judgment is conclusive between the parties in the State where it was rendered, it is equally so in every other court in the United States, and consequently that the plea of fraud in procuring the judgment is not a legal answer to the declaration. Principal question in the case of *Mills* v. *Duryee* was whether *nil debet* was a good plea to an action founded on a judgment of another State. Much consideration was given

* Nowlan *v.* Geddes, 1 East, 634; Gundry *v.* Feltham, 1 Term, 334; Stephens on Pleading, 142.

† 1 Chitty's Pleading, 663; Snyder *v.* Croy, 2 Johnson, 428.

to the case, and the decision was that the record of a State court, duly authenticated under the act of Congress, must have in every other court of the United States such faith and credit as it had in the State court from whence it was taken, and that *nil debet* was not a good plea to such an action.

Congress, say the court, have declared the effect of the record by declaring what faith and credit shall be given to it. Adopting the language of the court in that case, we say that the defendant had full notice of the suit, and it is beyond all doubt that the judgment of the court was conclusive upon the parties in that State. "It must, therefore, be conclusive here also." Unless the merits are open to exception and trial between the parties, it is difficult to see how the plea of fraud can be admitted as an answer to the action.

3. Domestic judgments, under the rules of the common law, could not be collaterally impeached or called in question if rendered in a court of competent jurisdiction. It could only be done directly by writ of error, petition for new trial, or by bill in chancery. Third persons *only*, says Saunders, could set up the defence of fraud or collusion, and not the parties to the record, whose only relief was in equity, except in the case of a judgment obtained on a cognovit or a warrant of attorney.*

Common law rules placed foreign judgments upon a different footing, and those rules remain, as a general remark, unchanged to the present time. Under these rules a foreign judgment was *prima facie* evidence of the debt, and it was open to examination not only to show that the court in which it was rendered had no jurisdiction of the subject-matter, but also to show that the judgment was fraudulently obtained. Recent decisions, however, in the parent country, hold that even a foreign judgment is so far conclusive upon a defendant that he is prevented from alleging that the promises upon which it is founded were never made or were obtained by fraud of the plaintiff.†

* 2 Saunders on Pleading and Evidence, part 1, p. 63.

† Bank of Australasia *v.* Nias, 4 English Law and Equity, 252.

4. Cases may be found in which it is held that the judgment of a State court, when introduced as evidence in the tribunals of another State, are to be regarded in all respects as domestic judgments. On the other hand, another class of cases might be cited in which it is held that such judgments in the courts of another State are foreign judgments, and that as such the judgment is open to every inquiry to which other foreign judgments may be subjected under the rules of the common law. Neither class of these decisions is quite correct. They certainly are not foreign judgments under the Constitution and laws of Congress in any proper sense, because they "shall have such faith and credit given to them in every other court within the United States as they have by law or usage in the courts of the State from whence" they were taken, nor are they domestic judgments in every sense, because they are not the proper foundation of final process, except in the State where they were rendered. Besides, they are open to inquiry as to the jurisdiction of the court and notice to the defendant; but in all other respects they have the same faith and credit as domestic judgments.*

Subject to those qualifications, the judgment of a State court is conclusive in the courts of all the other States wherever the same matter is brought in controversy. Established rule is, that so long as the judgment remains in force it is of itself conclusive of the right of the plaintiff to the thing adjudged in his favor, and gives him a right to process, mesne or final, as the case may be, to execute the judgment.†

5. Exactly the same point was decided in the case of *Benton* v. *Burgot*,‡ which, in all respects, was substantially like the present case. The action was debt on judgment recovered in a court of another State, and the defendant appeared and pleaded *nil debet*, and that the judgment was obtained by fraud, imposition, and mistake, and without consideration.

* D'Arcy *v* Ketchum et al., 11 Howard, 165; Webster *v.* Reid, Id. 437.

† Voorhees *v.* United States Bank, 10 Peters, 449; Huff *v.* Hutchingson, 14 Howard, 588.

‡ 10 Sergeant & Rawle, 240.

Plaintiff demurred to those pleas, and the court of original jurisdiction gave judgment for the defendant. Whereupon the plaintiff brought error, and the Supreme Court of the State, after full argument, reversed the judgment and directed judgment for the plaintiff. Domestic judgments, say the Supreme Court of Maine, even if fraudulently obtained, must nevertheless be considered as conclusive until reversed or set aside.* Settled rule, also, in the Supreme Court of Ohio, is that the judgment of another State, rendered in a case in which the court had jurisdiction, has all the force in that State of a domestic judgment, and that the plea of fraud is not available as an answer to an action on the judgment. Express decision of the court is, that such a judgment can only be impeached by a direct proceeding in chancery.†

Similar decisions have been made in the Supreme Court of Massachusetts, and it is there held that a party to a judgment cannot be permitted in equity, any more than at law, collaterally to impeach it on the ground of mistake or fraud, when it is offered in evidence against him in support of the title which was in issue in the cause in which it was recovered.‡ Whole current of decisions upon the subject in that State seems to recognize the principle that when a cause of action has been instituted in a proper forum, where all matters of defence were open to the party sued, the judgment is conclusive until reversed by a superior court having jurisdiction of the cause, or until the same is set aside by a direct proceeding in chancery.§ State judgments, in courts of competent jurisdiction, are also held by the Supreme Court of Vermont to be conclusive as between the parties until the same are reversed or in some manner set aside and annulled. Strangers, say the court, may show that they were collusive or fraudulent; but they bind parties and privies.‖

* Granger *v.* Clark, 22 Maine, 130.

† Anderson *v.* Anderson, 8 Ohio, 108.

‡ B. & W. Railroad *v.* Sparhawk, 1 Allen, 448; Homer *v.* Fish, 1 Pickering, 435.

§ McRae *v.* Mattoon, 13 Pickering, 57.

‖ Atkinsons *v.* Allen, 12 Vermont, 624.

Syllabus.

Redfield, Ch. J., said, in the case of *Hammond* v. *Wilder*,* that there was no case in which the judgment of a court of record of general jurisdiction had been held void, unless for a defect of jurisdiction. Less uniformity exists in the reported decisions upon the subject in the courts of New York, but all those of recent date are to the same effect. Take, for example, the case of *Embury* v. *Conner*,† and it is clear that the same doctrine is acknowledged and enforced. Indeed, the court, in effect, say that the rule is undeniable that the judgment or decree of a court possessing competent jurisdiction is final, not only as to the subject thereby determined, but as to every other matter which the parties might have litigated in the cause, and which they might have had decided.‡ Same rule prevails in the courts of New Hampshire, Rhode Island, and Connecticut, and in most of the other States.§

For these reasons our conclusion is, that the fourth plea of the defendant is bad upon general demurrer, and that there is no error in the record. The judgment of the Circuit Court is, therefore,

AFFIRMED WITH COSTS.

GREEN *v.* VAN BUSKIRK.

1. Where personal property is seized and sold under an attachment, or other writ, issuing from a court of the State where the property is, the question of the liability of the property to be sold under such writ, must be determined by the law of that State, notwithstanding the domicil of all the claimants to the property may be in another State.
2. In a suit in any other State growing out of such seizure and sale, the effect of the proceedings by which it was sold, with title to the property, must be determined by the law of the State where those proceedings were had.
3. The refusal of the State court in which such suit may be tried, to give

* 23 Vermont, 346.

† 3 Comstock, 522.

‡ Dobson *v.* Pearce, 2 Kernan, 165.

§ Hollister *v.* Abbott, 11 Foster, 448; Rathbone *v.* Terry, 1 Rhode Island, 77; Topp *v* The Bank, 2 Swan, p. 188; Wall *v.* Wall, 28 Mississippi, 413.

to the proceedings of the court, under which the property was sold, the same effect in their operation upon the title, as they have by law and usage in the State where they took place, constitutes a proper case for review in this court, under the twenty-fifth section of the Judiciary Act.

MOTION to dismiss a writ of error to the Supreme Court of the State of New York.

The Constitution of the United States declares (Section 1, Article IV) that *full faith and credit* shall be given in each State to the public acts, records, *and judicial proceedings* of every other State; and that Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the *effect* thereof.

Under the power here conferred, Congress, by act of 1790,* provides that records, authenticated in a way which it prescribes, shall "have such faith and credit given to them in every other court of the United States, as they have by law or usage in the court from which they are taken."

With this provision of the Constitution and this law in force, Bates being the owner of certain iron safes at Chicago, in the State of Illinois, on the 3d day of November, 1857, executed and delivered, in the State of New York, to Van Buskirk and others, a chattel mortgage of them. On the 5th day of the same month Green caused to be levied on the same safes a writ of attachment, sued by him out of the proper court in Illinois, against the property of Bates. The attachment suit proceeded to judgment, and the safes were sold in satisfaction of Green's debt. Van Buskirk, Green, and Bates, were all citizens of New York. Green's attachment was levied on the safes as the property of Bates, before the possession was delivered to Van Buskirk, and before the mortgage from Bates to him was recorded, and before notice of its existence.

Van Buskirk afterwards sued Green, in the New York courts, for the value of the safes thus sold under his attachment, and Green pleaded the proceeding in the court of Illinois in bar of the action. In this suit thus brought by him

* May 26: 1 Stat. at Large, 122.

in the New York courts, Van Buskirk obtained judgment, and the judgment was affirmed in the highest court of the State of New York. From this affirmance Green took a writ of error to this court, assuming the case to fall within the twenty-fifth section of the Judiciary Act, which gives such writ in any case wherein is drawn in question a clause of the Constitution of the United States, and the decision is against the title, right, or privilege specially set up. His assumption was that the faith and credit which the judicial proceedings in the courts of the State of Illinois had by law and usage in that State, were denied to them by the decision of the courts of New York, and that in such denial, those courts decided against a right claimed by him under the above-mentioned Section 1, Article IV, of the Constitution, and the act of Congress of May 26th, 1790, on the subject of it.

Mr. Carlisle, for the defendant in error, now moved to dismiss the writ of error, because the record did not present any question within the twenty-fifth section of the Judiciary Act relied on by the plaintiff in error.

The record of the case, it should be said, contained the pleadings in the case, the facts which the court had found, and their conclusions of law on them. Among the latter, the court decided "that by the law of the State of New York the title to the property passed on the execution and delivery of the instrument under the facts found in the case, and overreached the subsequent attachment in the State of Illinois, and actual prior possession under it, at the suit of defendant, although he was a creditor, having a valid and fair debt against Bates, and had no notice of the previous assignment and sale. And that the law of the State of New York is to govern the transaction, and not the law of the State of Illinois, where the property was situated."

Messrs. Carlisle and Gale, in support of the motion to dismiss:

The record neither shows that the construction of any clause of the Constitution was drawn in question by the plaintiff in error, in the State court, nor that any right was

claimed under any such clause, nor that any decision was made against any such right.

In fact the case did not admit of any constitutional question.

The defence set up in the State court was only that the safes, at the time of the seizure and sale, belonged to Bates, and that by such seizure and sale the plaintiff in error acquired Bates's title. The only issue thus formed was as to the right of property and possession at the time of such seizure; and this was the only issue tried and determined.

Messrs. Turnbull and A. J. Parker, contra.

Mr. Justice MILLER delivered the opinion of the court.

The section of the Constitution discussed in this case, declares that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And that Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the *effect* thereof."

The act of 1790 was intended to be an exercise of the power conferred upon Congress by this section. In the leading case of *Mills* v. *Duryee*,* this court held that the act in question did declare the effect of such judicial records, and that it should be the same in other States as that in which the proceedings were had. In the case of *Christmas* v. *Russell*,† decided at the present term of the court, we have reaffirmed this doctrine, and have further declared that no State can impair the effect thus to be given to judicial proceedings in her sister State, by a statute of limitation intended to operate on demands which may have passed into judgment by such proceedings, as though no such judgment had been rendered.

The record before us contains the pleadings in the case, the facts found by the court, and the conclusions of law arising thereon. And notwithstanding the inverted manner in

* 7 Cranch, 481.

† *Supra*, last preceding case, p. 290.

which the court has stated its legal conclusions, it seems clear that it did pass upon the effect of the judicial proceedings in Illinois upon the title of the property in contest. The case is not varied by declaring that the mortgage made and delivered in New York *overreached* the subsequent attachment in Illinois. According to the view taken by that court, Van Buskirk, the plaintiff, had title to the property under the laws of New York by virtue of his mortgage, and the question to be decided was whether the proceedings in Illinois were paramount in their effect upon the title to the New York mortgage.

It is said that Van Buskirk being no party to the proceedings in Illinois was not bound by them, but was at liberty to assert his claim to the property in any forum that might be open to him; and, strictly speaking, this is true. He was not bound by way of estoppel, as he would have been if he had appeared and submitted his claim, and contested the proceedings in attachment. He has a right to set up any title to the property which is superior to that conferred by the attachment proceedings, and he has the further right to show *that the property was not liable to the attachment*—a right from which he would have been barred if he had been a party to that suit. And this question of the liability of the property in controversy to that attachment is the question which was raised by the suit in New York, and which was there decided. That court said that this question must be decided by the laws of the State of New York, because that was the domicil of the owner at the time the conflicting claims to the property originated.

We are of opinion that the question is to be decided by the effect given by the laws of Illinois, where the property was situated, to the proceedings in the courts of that State, under which it was sold.

There is no little conflict of authority on the general question as to how far the transfer of personal property by assignment or sale, made in the country of the domicil of the owner, will be held to be valid in the courts of the country where the property is situated, when these are in different sove-

reignties. The learned author of the Commentaries on the Conflict of Laws, has discussed the subject with his usual exhaustive research. And it may be conceded that as a question of comity, the weight of his authority is in favor of the proposition that such transfers will generally be respected by the courts of the country where the property is located, although the mode of transfer may be different from that prescribed by the local law. The courts of Vermont and Louisiana, which have given this question the fullest consideration, have, however, either decided adversely to this doctrine or essentially modified it.* Such also seems to have been the view of the Supreme Court of Massachusetts.†

But after all, this is a mere principle of comity between the courts, which must give way when the statutes of the country where property is situated, or the established policy of its laws prescribe to its courts a different rule. The learned commentator, already referred to, in speaking of the law in Louisiana which gives paramount title to an attaching creditor over a transfer made in another State, which is the domicil of the owner of the property, says: "No one can seriously doubt that it is competent for any State to adopt such a rule in its own legislation, since it has perfect jurisdiction over all property, personal as well as real, within its territorial limits. Nor can such a rule, made for the benefit of innocent purchasers and creditors, be deemed justly open to the reproach of being founded in a narrow or a selfish policy."‡ Again, he says: "Every nation, having a right to dispose of all the property actually situated within it, has (as has been often said) a right to protect itself and its citizens against the inequalities of foreign laws, which are injurious to their interests."

Chancellor Kent, in commenting on a kindred subject,

* Taylor *v.* Boardman, 25 Vermont, 589; Ward *v.* Morrison, Id. 593; Emmerson *v.* Partridge, 27 Vermont, 8; Oliver *v.* Townes, 14 Martin's Louisiana, 93; Norris *v.* Mumford, 4 Id. 20.

† Lanfear *v.* Sumner, 17 Massachusetts, 110.

‡ Story on the Conflict of Laws, § 390.

namely, the law of contracts, remarks:* "But, on this subject of conflicting laws, it may be generally observed that there is a stubborn principle of jurisprudence that will often intervene and act with controlling efficacy. This principle is, that where the *lex loci contractus* and the *lex fori*, as to conflicting rights acquired in each, come in direct collision, the comity of nations must yield to the positive law of the land."

In the case of *Milne* v. *Moreton*,† the Supreme Court of Pennsylvania says, that "every country has a right of regulating the transfer of all personal property within its territory; but when no positive regulation exists, the owner transfers it at his pleasure."

The Louisiana court, in a leading case on this subject, gives, in the following language, a clear statement of the foundation of this principle: "The municipal laws of a country have no force beyond its territorial limits, and when another government permits these to be carried into effect within her jurisdiction, she does so upon a principle of comity. In doing so, care must be taken that no injury is inflicted on her own citizens, otherwise justice would be sacrificed to comity. . . . If a person sends his property within a jurisdiction different from that where he resides, he impliedly submits it to the rules and regulations in force in the country where he places it."

Apart from the question of authority, let us look at some of the consequences of the doctrine held by the court of New York.

If the judgment rendered against the plaintiff in error is well founded, then the sheriff who served the writ of attachment, the one who sold the property on execution, any person holding it in custody pending the attachment proceeding, the purchaser at the sale, and all who have since exercised control over it, are equally liable.

If the judgment in the State of Illinois, while it protects all such persons against a suit in that State, is no protection

* 2 Commentaries, 599.

† 6 Binney, 361.

anywhere else, it follows that in every case where personal property has been seized under attachment, or execution against a non-resident debtor, the officer whose duty it was to seize it, and any other person having any of the relations above described to the proceeding, may be sued in any other State, and subjected to heavy damages by reason of secret transfers of which they could know nothing, and which were of no force in the jurisdiction where the proceedings were had, and where the property was located.

Another consequence is that the debtor of a non-resident may be sued by garnishee process, or by foreign attachment as it is sometimes called, and be compelled to pay the debt to some one having a demand against his creditors; but if he can be caught in some other State, he may be made to pay the debt again to some person who had an assignment of it, of which he was ignorant when he was attached.

The article of the Constitution, and the act of Congress relied on by the plaintiff in error, if not expressly designed for such cases as these, find in them occasions for their most beneficent operation.

We do not here decide that the proceedings in the State of Illinois have there the effect which plaintiff claims for them; because that must remain to be decided after argument on the merits of the case. But we hold that the effect which these proceedings have there, by the law and usage of that State, was a question necessarily decided by the New York courts, and that it was decided against the claim set up by plaintiff in error under the constitutional provision and statute referred to, and that the case is therefore properly here for review.

MOTION TO DISMISS OVERRULED.

Mr. Justice NELSON, with whom concurred Mr. Justice SWAYNE, dissenting.

I am unable to concur in the opinion that has just been delivered. The litigation is one of the most common occurrence growing out of the business affairs of life. It presents

the case of a race of diligence among creditors after the property of a failing debtor to get the first security for the payment of their debts. There is no question here as to the *bona fides* of the creditors. The simple point between them is as to which party in the race acquired the better title to the property. All the parties, debtor and creditors, were citizens and residents of the State of New York. The property was in Chicago, Illinois, consisting of iron safes.

In the race of diligence, the defendants here and plaintiffs below, Van Buskirk and others, obtained from Bates, the debtor, on the 3d of November, an assignment of the property as security for their debt. It was executed at Troy, New York. But, before the agent reached Chicago to take actual possession, Tillinghast & Warren, the other creditors, on the 5th of the month, two days after the assignment, instituted proceedings in a court in Illinois against Bates, the debtor, and attached the safes, subsequently obtained a judgment by default, and sold them on execution.

The present suit was instituted by Van Buskirk and others against Tillinghast & Warren, the attaching creditors, claiming title to the property under and by virtue of their prior assignment. As the two classes of creditors were equally honest, the only question, as we have said, would seem to be which had obtained the better right to their debtor's property; and this appears to have been the view taken by the judge and counsel in the court below.

The trial before a jury was waived, and the case was heard before the judge, who gives a statement of the facts. He found the proceedings in the attachment as set forth. The execution of the assignment, that it was executed in good faith, and not fraudulent. He then states his conclusions of law—

1. That the assignment was a legal and valid instrument, and operated to transfer the property in the safes to the assignees.

2. That by the laws of New York the title thus acquired overreached the title by attachment, being prior in point of

time, though the attaching creditors had no notice of the sale or assignment; and—

3. That the laws of New York governed the case.

The defendants excepted to the rulings, and contended—

1. That the assignment was fraudulent and void on its face, and conveyed no title to the plaintiffs against the attachment.

2. That the rights of the parties must be governed by the law of the State of Illinois, and not by the law of the State of New York; and

3. That the plaintiffs have shown no ownership or right of possession to the safes superior to that of the defendants.

A judgment was entered for the plaintiffs, which was taken, on this bill of exceptions, to the higher courts in the State, and was affirmed. It is now here under the twenty-fifth section of the Judiciary Act; and it is claimed that this court has jurisdiction, on the ground that the court below denied full faith, credit, and effect to the Illinois judgment in the attachment proceedings. It is only on this ground that this attachment can be maintained. We have seen that no such point was made on the trial or ruled by the court These proceedings were in evidence without objection either as to regularity or effect. It was conceded that the attachment bound the goods from the time it was levied. Certainly no greater effect could be given to it; that is, whatever interest Bates, the debtor, had in them at that time. This effect was not disputed. But it was claimed, on the other side, that they had a prior right to the property under the assignment made two days before the levy.

Now, it must be admitted that, as between Bates and the assignees, they became vested with the title; and as the attachment was subsequent, and would only reach the interest of Bates, it would seem to follow that the assignees had the better title; and, if this were all of the case, there could not be two opinions upon it; the title under the attachment must fail. But it is not all, for it is said that this prior assignment was ineffectual to transfer the title to the property, and prevent the operation of the attachment, for the reason that it

was fraudulent against creditors, and, being so fraudulent, the seizure under the attachment gave the better title.

The question, therefore, that arose in the case, and the only question, was as to the validity or invalidity of this assignment. If valid, then the title of the safes passed out of Bates to the assignees on the 3d November. If invalid, then it remained in him *quoad* creditors till the 5th, when the attachment was levied. Now, this question was one simply of law, and it turned upon this: whether the assignment was to be governed by the law of New York, where the instrument was made, and in which State all the parties resided, and of which they were citizens, or by the law of Illinois, the *situs* of the property. In New York the immediate delivery of the possession, as is said, is not essential to the validity of the assignment; in the State of Illinois it is. The continuance in the possession by assignor or vendor after the transfer of the title is regarded in that State as evidence of fraud, and renders the instrument inoperative as against execution or attaching creditors.

The court below decided that the instrument was to be governed by the law of the State of New York, where it was made, and which was the domicil of the parties. Now, whether the court erred or not in this decision is not the question, for this court has no jurisdiction to determine that. The question here is, whether, in so deciding, the court denied full faith, credit, and effect to the judgment in Illinois. In other words, did the court, in holding that the prior assignment was not fraudulent and void, but valid and effectual to transfer the title, thereby discredit the Illinois judgment? The answer to the question, I think, is obvious. These assignees were not parties to the judgment. It could not bind them. They were free, therefore, to set up and insist upon this prior title to the property; and, if there was nothing else in the case, it is clear the junior attachment could not hold it. It became necessary, therefore, for the attaching creditors to displace the assignment, and this they attempted, by insisting that it was fraudulent and void, as not having been accompanied by possession; and this they

were obliged to establish before the attachment could take effect.

The assignment being prior in time, in the absence of fraud, actual or constructive, the title passed to the assignees, and was out of Bates, when the attachment was levied. This is familiar law. The question in the case, therefore, and the one litigated in the court below, was this question of fraud, upon which the validity of the assignment depended, and the finding of which was necessary to give a preference to the claim under the attachment. This question was not only consistent with the full force and effect of the attachment proceedings, but wholly independent of them.

I agree, if the attachment had been levied before the assignment, and the court had given effect to this instrument over the levy, it might be said that full faith and credit had not been given to it; but, being posterior, these proceedings could not have the effect *per se* to displace the assignment as against a stranger. Another element must first be shown, namely, fraud or other defect in the instrument, to render it inoperative.

My conclusion is, that the regularity of the attachment proceedings was not called in question in the court below; but, on the contrary, full force and credit were given to them, and the case should be dismissed for want of jurisdiction.

DWYER *v.* DUNBAR.

1. A letter to a third person, appended to a deposition and professing to give an account of a particular transaction, but not sworn in the deposition to have given a true account of it, is not admissible as part of the deposition or at all.
2. A deposition which, stating the contents of a particular letter, attempts to prove that such a letter was sent from one party to another—the letter itself not being produced, and no proof being given of its loss—is inadmissible.
3. A court is not bound to give instructions which are not called for by the facts of the case; and which, therefore, have no practical application

Statement of the case.

Ex. Gr. Where no proof has been given of an authority to an agent to bind a principal to a compromise of a specific debt, but the reverse of it, a court cannot, on a suit by the creditor against the debtor, be asked to charge that "if any person publicly acts with the knowledge of another and without objection, as the general agent or manager for such other, then such principal will be bound by the act of such agent, although he may not approve of the particular acts of such agent."

4. On a suit by the holder of promissory notes against the maker, who sets up as his only defence that such holder had made a compromise of them—showing, however, no such compromise, but the reverse of it—it is no error to charge—along with other instructions, appropriate, given—that if the jury find that the defendant executed and delivered the notes and that he has not paid the same, they will find for the plaintiff.

ERROR to the District Court for the Eastern District of Texas, the case being thus:

William Dunbar, assignee of George C. Dunbar, brought suit against T. A. Dwyer, on certain notes given by the said Dwyer. Dwyer, who had other creditors, and had become embarrassed, set up as a defence, that after the maturity of the notes, one Smyth, *by W. Dunbar's authority and acting for him*, had made and carried into effect a general settlement of his, Dwyer's, indebtedness to his other creditors, and to Dunbar, and had signed and given to him an acquittance, as follows:

"Received of T. A. Dwyer, $35,500 in merchandise, in full for the annexed amounts to date, which amount includes the amount of William Dunbar, assignee of George Dunbar, whose power of attorney I do not hold, but *whose agent said that William Dunbar was willing to do what the balance of New York creditors were.* In case said Dunbar declines acceptance of the above composition, the *pro rata* due him is to be held subject to the order of said Dwyer."

The defence set up further that before this receipt was given, the plaintiff, W. Dunbar, by a letter dated on the 23d of May, 1856, and written and signed and sent to the defendant, Dwyer, by one J. T. Ray, *acting for and by the authority of him, Dunbar*, had authorized him, Dwyer, to make the settlement set forth in the receipt, and had thereby approved

it in advance. And it averred that Dunbar had not declined acceptance of the settlement, &c., but, on the contrary, had ratified the same.

On the trial, the notes having been put in evidence, the defendant offered a deposition of Smyth, to which was attached a letter written by Smyth himself, some time previously, to one Charles Russell, an agent of Dwyer. This letter professed to give an account of the assent of Dunbar to the compromise set up; spoke of a letter "from Dunbar to Dwyer, shown me by the latter," and which Smyth stated that he regarded as "the authority of Dwyer to adjust Dunbar's claim on the same basis that the other claims were arranged."

To the same deposition was attached, also, the letter of Ray. This letter ran thus:

NEW YORK, May 22, 1856.

T. A. DWYER, Esq.

DEAR SIR: Yours of April 26th has been received. Mr. Dunbar, the assignee, being absent at the time, I could not join with the other creditors in their arrangements without consulting him. Since then I have seen Mr. Dunbar. He is disposed to arrange your indebtedness the same as other creditors.

Respectfully,

J. S. RAY,

For W. DUNBAR, assignee of G. C. Dunbar.

The deposition to which these letters were attached, after stating that at a meeting of Dwyer's creditors, sundry of them nominated him, Smyth, attorney to adjust their claims against Dwyer, and that among those who came to the meeting was a person "who represented himself as appearing for Dunbar," and who stated that Dunbar "was willing to do what other creditors were," and that the other creditors had acceded to the settlement made—went on to say in reference to the letter of Smyth above referred to (this being all, however, which it said in reference to it):

"The letter of this affiant to Charles Russell, was written in reply to a letter of said Russell, wishing to know the circum-

stances respecting the settlement made in the Dunbar claim by me."

The admission of the letter to Russell being objected to, on the ground that Smyth had nowhere stated in his deposition, that what he said in his letter was true, the court below excluded the letter.

The defendant then read the deposition, as also, Ray's letter attached; and read the power of attorney of the other creditors to Smyth, to compound and compromise things with Dwyer; Dwyer's receipt of the $35,000 merchandise; and after reading these, and a deposition of one Green, who testified that he had understood from the representatives of William Dunbar, as also from George Dunbar himself, that Dunbar was a party to the arrangement—offered in evidence a deposition from Russell. The deposition ran thus:

"While acting as the agent of T. A. Dwyer, the defendant, in June, 1856, I received a number of letters, among which there was one addressed to Mr. Smyth from Mr. Ray, agent of Mr. Dunbar, which I forwarded to Mr. Smyth. The contents of said letter were, to the best of my recollection, in substance as follows: 'Mr. Dunbar has returned to New York, and after conversing with him relative to the Dwyer claim, he says, any settlement you make with Dwyer will be satisfactory to him.'"

To this *deposition* the plaintiff objected that it did not show that the letter of Ray, mentioned in it, was sent by the plaintiff's authority, and that therefore the deposition was irrelevant. And it was accordingly excluded.

Ray himself then testified that he had been employed by William Dunbar, assignee of George Dunbar, to assist him in settling the indebtedness of the said George; that at the meeting he stated that he was present for W. Dunbar, assignee; that he had written the letter already read as his; that the letter was written by him (Ray) on his own responsibility, and without consulting Dunbar at all; and that Dunbar expressed dissatisfaction with the settlement made by Smyth, so soon as made known to him.

On this case the defendant asked the court tc charge—

"That if the jury find that Ray was permitted by Dunbar, and, with his knowledge, to act for him and represent him in his business; and find also that Ray, in the name of Dunbar, did authorize Smyth to settle with the defendant Dwyer, then Dunbar will be bound by such act of Ray, notwithstanding that Dunbar may not have expressly authorized said Ray to do so, or may have disapproved of said act afterwards.

"That, if any person publicly acts with the knowledge of another, and without objection, as the general agent or manager for that other, such principal will be bound by the act of such agent, although he may not approve of the particular acts of such agent."

But the court refused thus to charge, and charged:

"That to bind the plaintiff by the acts of Smyth, the authority of Dunbar to Smyth must be proved.

"That the representations of any person not proved to have been authorized by Dunbar, are not evidence against him.

"That the power of attorney is not evidence against Dunbar, unless signed by him.

"That if the jury find that the defendant executed and delivered the notes, and that he has not paid the same, they will find for the plaintiff.

"That to bind Dunbar by the compromise, the defendant must prove an acceptance by Dunbar of the settlement."

Verdict and judgment having been entered for the plaintiff, the correctness of the court's action in excluding the testimony excluded, and in charging and refusing to charge as it did, were the matters now before the court on bill of exceptions taken.

Mr. Carlisle, for the plaintiff in error:

1. It appears, by Ray's deposition, that he was employed by William Dunbar as the assignee of George, in the capacity of agent to assist him in settling up the indebtedness of George; and that on the meeting of Dwyer's creditors Ray represented and was present for W. Dunbar. Green deposes,

in effect, to the fact that Dunbar was a party to the arrangement that Smyth should settle the claims of the New York creditors against Dwyer; and Ray himself deposes as to the letter of May 22, 1856, written by him to Dwyer. In this state of the evidence the court erred in excluding Russell's deposition. Conceding that whether there was sufficient proof of the agency to warrant the admission of the deposition was a preliminary question for the court to determine, it is insisted that here the proof was sufficient.* The deposition should have been read so soon as there was evidence of authority or acquiescence sufficient to be weighed by the jury.†

2. The court erred in excluding Smyth's letter from the jury. His agency being proved by evidence *aliunde*, the letter does not fall within the rule which excludes *res inter alios acta*, but is to be regarded as *Smyth's* act and the defendant's voucher;‡ or as so illustrating and characterizing the principal fact as to constitute the whole one transaction. It was necessary to exhibit the principal fact in its true light and give it its proper effect.§

3. The court erred in not giving the instructions asked by defendant, and also erred in instructing the jury, on plaintiff's motion, that to bind Dunbar by the compromise, defendant must prove an acceptance by Dunbar of the settlement. There is a wide distinction between general and particular agents. In the former case the principal may be bound by his agent's acts, though exceeding his authority.‖

* United States *v.* Gooding, 12 Wheaton, 469–70; American Fur Co. *v.* United States, 2 Peters, 358; Brockelbank *v.* Sugrue, 5 Carrington & Payne, 21.

† Cliquot's Champagne, 3 Wallace, 140; Philadelphia, &c., Railroad Co. *v.* Howard, 13 Howard, 333; Barreda *v.* Silsbee, 21 Id. 165; Law *v.* Cross, 1 Black, 538–9.

‡ Hunter *v.* Campbell, 1 Spear, 55; Wilkinson *v.* Candlish, 5 Welsby, Hurlstone & Gordon, 91.

§ Beaver *v.* Taylor, 1 Wallace, 642; Allen *v.* Duncan, 11 Pickering, 308; Law *v.* Cross, 1 Black, 539.

‖ Whitehead *v.* Tuckett, 15 East, 408; Todd, &c., *v* Robinson, Ryan & Moody, 217; Gillman, &c., *v.* Robinson, 1 Carrington & Payne, 642; Andrews *v.* Kneeland, 6 Cowan, 357; Jeffrey *v.* Bigelow, 13 Wendell, 520.

4. The court erred in instructing the jury, on the plaintiff's motion, to find for him if they should find from the evidence that the defendant executed and delivered the notes and had not paid the same.* The law, with respect to defences founded on compositions between a debtor and his creditors, appears not to have been distinctly defined until the case of *Good* v. *Cheesman.* It used to be sometimes laid down that a right of action once vested could only be barred by a release or by accord and satisfaction. But since the decision of that case the law has been regarded as settled that a composition agreement by several creditors, although by parol, so as to be incapable of operating as a release, and although unexecuted so as not to amount in strictness to a satisfaction, will be a good answer to an action by a creditor for his original debt, if he accepted the new agreement in satisfaction thereof; and that for such an agreement there is a good consideration for each creditor, viz., the undertaking of the other compromising creditors to give up a part of their claim.‡

Mr. Justice SWAYNE delivered the opinion of the court.

The suit was founded upon two promissory notes executed by Dwyer to George C. Dunbar, and by him indorsed to the defendant in error, who was the plaintiff in the court below.

Dwyer, in that court, set up, as a defence to the action, that he had made a compromise and composition with his creditors, and that the plaintiff was a party to the arrangement and bound by it. The plaintiff denied that he was in anywise a party to the agreement.

The cause was tried by a jury, and a verdict and judgment were rendered for the plaintiff. Upon the trial, Dwyer took exceptions to the ruling out of certain testimony which he

* Bradley *v.* Gregory, 2 Campbell, 383; Boothby, &c., *v.* Sowden, 3 Id. 175; Cork *v.* Saunders, 1 Barnewall & Alderson, 46; Good *v.* Cheesman, 4 Carrington & Payne, 513; Seager, &c., *v.* Billington, 5 Id. 456; Fellows *v.* Stevens, 24 Wendell, 300.

† 4 Carrington & Payne, 513.

‡ Williams, J., in Boyd *v.* Hind, 1 Hurlstone & Norman, 947.

offered, and to the refusal of the court to give instructions which he submitted.

A bill of exceptions was taken, setting forth these rulings, and they are relied upon in this court to reverse the judgment.

We will consider them in the order in which they are presented in the record.

1. The rejection of the letter of Smith. The letter, of itself, was clearly not evidence. There being no proof of the truth of its contents, it was within the definition of *res inter alios acta.* It was simply a narrative to a third person of a past transaction, in relation to which the writer was a competent witness, and gave his deposition. All that he says upon the subject of the letter is as follows:

"The letter of this affiant to Charles Russell was written in reply to said Russell wishing to know the circumstances respecting the settlement made of the Dunbar claim by me. This affiant is not acquainted with J. S. Ray or his signature."

The letter was properly excluded from going to the jury.

2. The ruling out of Russell's deposition. This deposition was offered to prove the contents of the letter from Ray. The evidence was entirely secondary in its character. Without the excluded letter there was no foundation for its introduction. The ruling of the court was correct.

3. The instructions asked by the defendant below to be given to the jury were not called for by the facts of the case as disclosed in the evidence. Under the circumstances, they were abstractions. They had no practical application, and the court was not bound to give them.

The instruction given, which was complained of, was in conformity with the practice of the courts of the United States, when a clear case is made out by the plaintiff and no defence, or only one clearly invalid, is shown by the defendant. The court below proceeded upon this principle, and as the case is disclosed in the bill of exceptions, did not err in its application.

The judgment below is AFFIRMED WITH COSTS.

TOWNSEND ET AL. v. GREELEY.

1. The treaty of Guadalupe Hidalgo between the United States and Mexico does not divest the pueblo, existing at the site of the city of San Francisco, of any rights of property or alter the character of the interests it may have held in any lands under the former government. It makes no distinction in the protection it provides between the property of individuals and the property held by towns under the Mexican government.
2. The act of March 3d, 1851, does not change the nature of estates in land held by individuals or towns. By proceedings under that act, imperfect rights,—mere equitable claims,—might be converted by the decrees of the board created by the act or of the courts, and the patent of the government following, into legal titles; but if the claim was held subject to any trust before presentation to the board the trust was not discharged by the confirmation and the subsequent patent. The confirmation only enures to the benefit of the confirmee so far as the legal title is concerned. It does not determine the equitable relations between him and third parties.
3. By the laws of Mexico, in force on the acquisition of the country, pueblos or towns in California were entitled, for their benefit and the benefit of their inhabitants, to the use of lands constituting the site of such pueblos and towns, and of adjoining lands, within certain prescribed limits. The right of the pueblos in these lands was a restricted and qualified right to alienate portions of the land to its inhabitants for building or cultivation, and to use the remainder for commons, for pasture lands, or as a source of revenue, or for other public purposes. This right of disposition and use was, in all particulars, subject to the control of the government of the country.
4. Lands thus held by pueblos or towns, under the Mexican government, are not held by them in absolute property, but in trust for the benefit of their inhabitants; and are held subject to a similar trust by municipal bodies, created by legislation since the conquest, which have succeeded to the possession of such property.
5. The municipal lands held by the city of San Francisco, as successor to the former pueblo existing there, being held in trust for its inhabitants, are not the subject of seizure and sale under judgment and execution against the city.

ON the 20th of June, 1855, the common council of the city of San Francisco, the legislative body of that city, passed "An ordinance for the settlement and quieting of the land titles in the city of San Francisco." This ordinance is generally known in San Francisco as "The Van Hess ordi-

nance," after the name of its reputed author. By the second section of the ordinance the city relinquished and granted all her right and claim to the lands within the corporate limits, as defined by the charter of 1851, with certain exceptions, to the parties in the actual possession thereof, by themselves or tenants, on or before the 1st day of January, 1855, and to their heirs and assigns forever, provided such possession continued up to the time of the introduction of the ordinance into the common council; or, if interrupted by an intruder or trespasser, had been or might be recovered by legal process. This ordinance was ratified by the legislature of the State on the 11th of March, 1858.

At the time this ordinance was passed the city of San Francisco asserted a claim to four square leagues of land, as successor of a Mexican pueblo, established and in existence at the site of the present city, and had presented her claim for the same to the board of commissioners created under the "act to ascertain and settle the private land claims in the State of California," of March 3d, 1851, for confirmation, and the board had confirmed the claim for a portion of the land and rejected the claim for the rest. The portion confirmed included the premises in controversy.

One Greeley, having acquired title to certain premises from parties who were in the actual possession of them at the time mentioned in the ordinance, brought the present action, ejectment, in one of the District Courts of the State of California, against two persons whom he found in occupation,—Townsend and Powelson, defendants below,—to oust them. The defendants filed separate answers.

Townsend, after pleading a general denial, averred as a separate answer, in substance, "that by the treaty of peace between the United States and Mexico, dated at Guadalupe Hidalgo, February 2d, 1848, the ownership and title in fee simple of the lot passed to and became vested in the United States, and that the United States afterwards, by force and effect of the act of the Congress thereof, passed March 3d, 1851, entitled 'An act to ascertain and settle the private land claims in the State of California,' and by force and

effect of the final decision and decree of the board of commissioners of said United States, appointed and acting thereunder (upon the petition and claim of the city of San Francisco, presented to and filed before said board in favor of said city), the ownership and title in fee so acquired and held by the United States passed to and vested in the city of San Francisco, and that by divers mesne conveyances, and by force of divers ordinances of the said city, and an act or acts of the legislature of California, the title in fee had, prior to the 28th day of March, A. D. 1862, become, and then was, vested in and held by one Mumford, who executed a lease of the premises to the defendant Powelson, under which Powelson entered and took possession, and has ever since continued, and still is, lawfully, peaceably, and rightfully in possession thereof." And that all acts done by the defendant Townsend with reference to the premises, have been done as the agent and attorney of the said Mumford, and by his authority, and by the license and permission of the said Powelson, his lessee.

The answer of the other defendant, Powelson, was substantially the same, except that he averred that he held as tenant under Mumford.

On the trial various exceptions were taken to the ruling of the court upon matters relating to the possession of the plaintiff, but the manner in which the matters arose are not stated, because the rulings made thereon are not noticed by the court, for the reasons given in its opinion.

The defendants offered in evidence a certified copy of the petition of the city of San Francisco, filed on the second day of July, A. D. 1852, before the board of United States Land Commissioners, appointed and sitting under the already mentioned act of Congress of March 3, 1851; the said copy being certified to be a true copy of said petition by the United States Surveyor-General of California.

Also, in connection with the said petition, a certified copy of the decree of said board of land commissioners thereupon made, and filed in the office of the secretary of said board on the 21st of December, A. D. 1854, confirming to

the city a tract of land therein described; the said last-mentioned copy being likewise certified by said surveyor-general to be a true copy of the said decree.

The court then inquiring of the defendants and requiring them to state by what proof they intended to follow the said documentary evidence, they offered to prove that the premises in controversy were a part of the land described in the decree of confirmation; that the appeal for the decree was dismissed by the District Court of the United States, March 30, 1857, and that the decree had become final; and they also offered to deraign title to the premises in dispute under said confirmation, from the city to Mumford, by conveyances executed and delivered since the decree of confirmation, and since the dismissal of the appeal therefrom, and prior to the 28th day of March, A. D. 1862, and offered to justify the acts of Townsend done in reference to the premises, by proving authority for his acts as agent and attorney for Mumford, and to justify the entry of the defendant Powelson by proving a lease to him of the premises from Mumford.

The court then inquiring further of the defendants, and requiring them to state by what means, and in what particular manner they expected to deraign title to Mumford from the city, they offered to show the recovery of a judgment against the city, the issue of an execution thereon, and the sale by the sheriff of the county thereunder of the premises in controversy, and the purchase of the same by one Wakeman, the delivery of a sheriff's deed to him, and his conveyance of his interest to the said Mumford.

Thereupon the plaintiff objected to the admission of the evidence offered, or of any part of it, on various grounds, and among others, on the ground that the premises in controversy were not subject to seizure and sale under execution upon a judgment against the city; and hence that the title could not be affected in any way by the introduction of the evidence offered. The court sustained the objection and excluded the evidence. The defendants excepted to the ruling. The plaintiff had judgment, and the Supreme Court

of the State having affirmed it, the case was here upon writ of error, under the twenty-fifth section of the Judiciary Act.

Messrs. Ewing and Vanarman, for the plaintiffs in error:

The court below erred in excluding from the jury the evidence offered by the defendants of the final confirmation of the premises in controversy by the United States to the city, and of the deraignment of title thereto from the city to Mumford, under whom they undertook and claimed the right, to justify their possession.

1. By the treaty of February 2, 1848, between the United States and the Mexican Republic, commonly known as that of Guadalupe Hidalgo, the title to all lands then vested in the Mexican Republic within what is now the State of California, passed to and became vested in the United States.*

2. By *presumption of law* all lands within this State are deemed public lands, and the title thereto vested in the United States until the title is shown to be elsewhere.† And this presumption applies as well to lands situated within the limits of a "pueblo" as elsewhere.‡

3. The confirmation, therefore, by the United States of the premises in dispute to the city of San Francisco, by decree of the United States Commissioners, dated December 21, 1854, made final March 30th, 1857 (which the defendants offered to prove by the evidence excluded by the court), operated to vest the title of the United States, from that date, in the city.§

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* Art. V of the Treaty.

† Act of Congress admitting California, § 3; California Statutes, 1856, p. 54, § 1; People *v.* Folsom, 5 California, 377; Burdge *v.* Smith, 14 Id. 383.

‡ Brown *v.* San Francisco, 16 California, 459, 460; Chouteau *v.* Eckhart, 2 Howard, 344; Les Bois *v.* Bramell, 4 Id. 464.

§ Act to Settle Private Land Claims in California, § 15, 9 Stat. at Large, 634; Stoddard *v.* Chambers, 2 Howard, 316; Les Bois *v.* Bramell, 4 Id. 463, 464; Bryan *v.* Forsyth, 19 Id. 335, 336, 337; Waterman *v.* Smith, 13 California, 419; Moore *v.* Wilkinson, Id. 488; Gregory *v.* McPherson, Id. 574; Natoma W. & M. Co. *v.* Clarkin, 14 Id. 550, 551; Soto *v.* Kroder, 19 Id. 96; Estrada *v.* Murphy, Id. 272–274.

4. The title so acquired was one upon which an action of ejectment could be maintained, and, of course, defended.*

5. The title so acquired was a *complete American title* under the act of Congress, though derived from Mexico through the United States, and was *the legal title in fee simple absolute.*†

6. *No trust* attached upon this title. If any holding in trust could be predicated of lands being "situated within the limits of a pueblo," or of their being "reserved or set apart for the uses of a pueblo," nothing of either kind was shown in this case, and neither this court nor the court below could acquire any knowledge of either of those facts, except *by proof.*

Messrs. W. M. Stewart and C. Burbank, contra, for the defendant in error:

The court below, in the trial of the action, properly excluded the decree of the United States Land Commissioners confirming the title of the city of San Francisco to the pueblo lands and the evidence offered of the deraignment of the title of the city to Mumford; because—

I. The defendants only proposed to connect themselves with the title of the city by showing a judgment against the city and an execution sale under it. This would not show title in them; because—

1st. San Francisco was a pueblo at the date of the conquest and cession of California, with the municipal rights of such a body.

2d. The city, as successor to such pueblo, has a right and title to the uplands within her limits, and holds those undisposed of in *trust for the uses and purposes* of the municipality.

3d. The lands thus held in trust are not subject to seizure and sale under execution against the city.‡

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* Strother *v.* Lucas, 12 Peters, 452–454; Stoddard *v.* Chambers, 2 Howard, 316, 317; Stanford *v.* Taylor, 18 Id. 412; Bryan *v.* Forsyth, 19 Id. 336, 337.

† See Opinion of United States Land Commissioners in the City Case; Bissell *v.* Penrose, 8 Howard, 331; Strother *v.* Lucas, 12 Peters, 453, 454; Stoddard *v.* Chambers, 2 Howard, 316, 317; Les Bois *v.* Bramell, 4 Id. 464

‡ Hart *v.* Burnett, 15 California, 615; Fulton *v.* Hanlow, 20 Id. 450.

II. The decree of confirmation did not, as asserted by the defendants, give an American title to the city. It only established the fact that San Francisco was a pueblo, and that the lands within her limits were not a portion of the public lands of the United States. It followed, as an inevitable conclusion, that the pueblo held the lands within its limits for the uses and purposes of the municipality.

Mr. Justice FIELD delivered the opinion of the court.

This is an action of ejectment to recover the possession of a tract of land situated within the corporate limits of the city of San Francisco, in the State of California. The plaintiff in the court below, the defendant in this court, claims to be owner in fee of the premises, by virtue of an ordinance of the common council of the city, passed on the 20th of June, 1855, and an act of the legislature of the State, confirmatory thereof. At the time this ordinance was passed the city of Francisco asserted title, as successor of a Mexican pueblo, established and in existence on the acquisition of the country by the United States, to four square leagues of land, embracing the site of the present city, and had presented her claim for the same to the board of land commissioners, created under the act of March 3d, 1851, for recognition and confirmation, and the board had confirmed the claim to a portion of the land and rejected the claim for the residue. The portion confirmed included the premises in controversy in this case.

By the second section of the ordinance the city relinquished and granted all the title and claim which she thus held to the land within her corporate limits, as defined by the charter of 1851, with certain exceptions, to the parties in the actual possession thereof, by themselves or tenants, on or before the first day of January, 1855, provided such possession was continued up to the time of the introduction of the ordinance into the common council, or if interrupted by an intruder or trespasser, had been, or might be recovered by legal process.

The party through whom the plaintiff in the court below

traces his title was in such actual possession of the premises in controversy at the times designated by the ordinance; at least the jury must have found, under the instructions of the court, that he was in such actual possession, and in this court the finding must be taken as conclusive.

We have not looked into the rulings of the court below upon this matter, and therefore do not intimate, nor have we any reason to suppose that error intervened. We have not looked into those rulings, because if error was committed, it would not constitute ground of reversal.

The twenty-fifth section of the Judiciary Act of 1789, under which alone this court has jurisdiction to review the final judgments and decrees of the highest courts of a State, provides for such review only in three classes of cases:

First. Where is drawn in question the validity of a treaty or statute of, or authority exercised under the United States, and the decision is against their validity;

Second. Where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; and

Third. Where is drawn in question the construction of any clause of the Constitution, or of a treaty or statute of, or commission held under 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 Constitution, treaty, statute, or commission. And in these cases no error can be regarded as ground of reversal except it appear on the face of the record, and relate to these questions of validity or construction.

The inquiry then is, whether error was committed in the disposition of any questions of this character arising upon the record.

The defendants in the court below alleged in their answer to the complaint—the designation applied in the practice of California to the first pleading in a civil action, whether at law or in equity—in substance as follows: that by virtue of

the treaty of Guadalupe Hidalgo, between the United States and the Republic of Mexico, the ownership and fee of the premises in controversy passed to the United States; that by force of the act of March 3d, 1851, to ascertain and settle private land claims in California, and the final decree of the board of commissioners created under that act, the ownership and fee of the premises vested in the city of San Francisco; and that by various mesne conveyances and ordinances of the city, and acts of the legislature of the State, they passed to one Mumford, under whom one of the defendants holds as tenant, and for whom the other has acted as agent.

On the trial the defendants produced the petition of the city of San Francisco to the board of land commissioners for confirmation of the claim asserted to four square leagues; the decision of the board confirming the claim to a portion of the land; the dismissal of the appeal on the part of the United States by order of the District Court, in March, 1857; the recovery of a judgment against the city; the issue of an execution thereon; the purchase of the premises by one Wakeman; the delivery of a sheriff's deed to him; and the transfer of his title by sundry mesne conveyances to Mumford.

Upon objection the evidence thus offered was excluded on various grounds, and among others that the title of the city to the premises was not the subject of seizure and sale under execution. This ruling denied the position assumed by the defendants in their answer respecting the operation of the treaty, the act of Congress, and the decision of the board in passing a fee simple title to the city; for if the city had in this way, or in any other way, become invested with a title in fee simple at the time the judgment was docketed or the execution was issued, there could be no question that the title passed by the sheriff's sale and deed.

The treaty of Guadalupe Hidalgo does not purport to divest the pueblo, existing at the site of the city of San Francisco, of any rights of property, or to alter the character of the interests it may have held in any lands under the former government. It provides for the protection of the

rights of the inhabitants of the ceded country to their property; and there is nothing in any of its clauses inducing the inference that any distinction was to be made with reference to the property claimed by towns under the Mexican government. The subsequent legislation of Congress does not favor any such supposition, for it has treated the claims of such towns as entitled to the same protection as the claims of individuals, and has authorized their presentation to the board of commissioners for confirmation.

Nor is there anything in the act of March 3d, 1851, which changes the nature of estates in land held by individuals or towns. One of the objects of that act was to enable claimants of land, individual or municipal, by virtue of any right or title derived from Spain or Mexico, to obtain a recognition of their claims, and, when these were of an imperfect character, to furnish a mode for perfecting them.

Thus the government provided for discharging the obligation of protection cast upon it by the stipulations of the treaty, and at the same time for separating private lands from the public domain. By proceedings under that act, imperfect rights — mere equitable claims — might be converted by the decrees of the board or courts, and the patent of the government following, into legal titles; but whether the legal title thus secured to the patentee was to be held by him charged with any trust, was not a matter upon which either board or court was called upon to pass. If the claim was held subject to any trust, before presentation to the board, the trust was not discharged by the confirmation and the subsequent patent. The confirmation only enures to the benefit of the confirmee so far as the legal title is concerned. It establishes the legal title in him, but it does not determine the equitable relations between him and third parties. It is true if a claim were presented by one designating himself as trustee, executor, or guardian, or if such relation of the claimant to others appeared in the examination of the case before the board or courts, the decree might declare that the confirmation was to the claimant in such fiduciary character. But if the trust was not stated, and did not

appear, the legal title was none the less subject to the same trust in the hands of the claimant.

By the laws of Mexico, in force at the date of the acquisition of the country, pueblos or towns were entitled, for their benefit and the benefit of their inhabitants, to the use of lands constituting the site of such pueblos and towns, and of adjoining lands, within certain prescribed limits. This right appears to have been common to the cities and towns of Spain from an early period in her history, and was recognized in the laws and ordinances for the settlement and government of her colonies on this continent. These laws and ordinances provided for the assignment to the pueblos or towns, when once established and officially recognized, for their use and the use of their inhabitants, of four square leagues of land.

It may be difficult to state with precision the exact nature of the right or title which the pueblos held in these lands. It was not an indefeasible estate; ownership of the lands in the pueblos could not in strictness be affirmed. It amounted in truth to little more than a restricted and qualified right to alienate portions of the land to its inhabitants for building or cultivation, and to use the remainder for commons, for pasture-lands, or as a source of revenue, or for other public purposes. This right of disposition and use was, in all particulars, subject to the control of the government of the country.

The royal instructions of November, 1789, for the establishment of the town of Pictic, in the province of Sonora, were made applicable to all new towns which should be established within the district under the Commandant General, and that included California. They gave special directions for the establishment and government of the new pueblos, declared that there should be assigned to them four square leagues of land, and provided for the distribution of building and farming lots to settlers, the laying out of pasture-lands, and lands from which a revenue was to be derived, and for the appropriation of the residue to the use of the inhabitants.

It is evident from this brief statement that these lands were not assigned to the pueblos in absolute property, but were to be held in trust for the benefit of their inhabitants.

This is the view taken by the Supreme Court of the State of California after an extended and elaborate consideration of the subject.*

This view was also taken by the Circuit Court of the United States, in the final decree confirming the claim of the city to her municipal lands. Since the trial of the present cause in the court below, the appeal taken by the city from the decree of the board of commissioners has been heard by the Circuit Court of the United States, to which the case was transferred under the act of July 1st, 1864.† That decree declares that the confirmation "is in trust for the benefit of the lot-holders, under grants from the pueblo, town, or city of San Francisco, or other competent authority, and as to any residue, in trust for the use and benefit of the inhabitants of the city." From this decree the United States and the city of San Francisco appealed, the United States from the whole decree, and the city from so much thereof as included certain lands reserved for public purposes in the estimate of the quantity confirmed; but during the present term of this court both parties have, by stipulation, withdrawn their objections, and their respective appeals have been dismissed. It is therefore now the settled law that the municipal lands held by the city of San Francisco, as successor to the former pueblo existing there, are not held in absolute property, but in trust for its inhabitants. Trust property, thus held, is not the subject of seizure and sale under judgment and execution against the trustee, whether that trustee be a natural or an artificial person.

JUDGMENT AFFIRMED.

NOTE.

Another case—*Townsend* v. *Burbank*—substantially the same in question and principle with the one preceding and like it from

* Hart v. Burnett, 15 California, 530; Fulton v. Hanlow, 20 Id. 480.

† 13 Stat. at Large, 333; 3 Wallace, 686.

the Supreme Court of California, was decided in the same way with it: the CHIEF JUSTICE delivering the judgment of this court

AFFIRMING THE JUDGMENT BELOW.

FRANCIS v. UNITED STATES.

Although, under the act of 6th August, 1861, "to confiscate property used for insurrectionary purposes," an informer may file an information *along* with the Attorney-General, and so make the proceeding enure, under the act, to his own benefit equally as to the benefit of the United States, yet, after the proceeding has been instituted by the Attorney-General alone, and wholly for the benefit of the United States, and after issue has been joined and proofs furnished by other parties, no person can come in asserting himself to have been the informer, and so share the benefit of the proceeding.

ERROR to the Circuit Court of the United States for the District of Missouri.

The record showed a libel of information against certain bales of cotton marked C. S. A., as belonging to persons in insurrection against the United States, and the confiscation of which was demanded under the act of 6th August, 1861, entitled "An act to confiscate property used for insurrectionary purposes." [For the sake or distinction this case was numbered 939.] The act just referred to provides (by its third section, which indicates the persons who may institute proceedings)—

"That the Attorney-General or any District Attorney of the United States in which said property may at the time be, may institute the proceedings of condemnation; and *in such case they shall be wholly for the benefit of the United States.* Or any person may file an information with such attorney, *in which case the proceeding shall be for the use of such informer and the United States, in equal parts.*"

The order for the detention of the cotton was dated 18th October, 1862, and recited that it appeared, on the return of a warrant of arrest issued in case No. 934, that the marshal

had previously arrested the said property. He was therefore ordered to detain it to answer the information now filed in No. 939. During the month of November and December some three or four claimants came forward and were permitted to file their several claims, take exceptions, plead and take issue as to ownership of the cotton.

On the 22d of January, 1863, the plaintiff in error, Francis, for the first time appeared and filed a petition, not as owner or claimant of any portion of the cotton, but "that he may be admitted to appear in said case No. 939, as a party to the record *as informer.*"

His petition set forth, as a foundation of his claim, that he gave information to the Board of Trade at Memphis on the 2d October, 1862, *and also sent a written statement to R. S. Howard, collector of the port of St. Louis, containing information on which the said cotton was seized by the said collector in the case No.* 934, *and on the* 10*th October filed an information in writing with the District Attorney, upon which information the said cotton was subsequently libelled in case No.* 939.

The District Attorney moved to strike this petition from the files of the court. The motion was overruled, and the petitioner was allowed to make proof of his right to be admitted as informer. A hearing was then had by witnesses, *ore tenus*, before the court, by request of the proctor of Francis.

Mr. Howard, collector of the port, resisted the claim of the petitioner. After hearing witnesses the petition was dismissed, and the petitioner ordered to pay costs.

A jury was afterwards ordered to try the issues of fact as to the ownership of the several claimants, and their verdict was, "That the allegations in the libel are true, and that we find for the United States." After divers motions for a new trial and in arrest of judgment, a decree was entered for the government. In this trial of the issue by the jury, and the judgment of the court thereon, Francis, the plaintiff in error, was of course no party on the record; his petition to become such having been refused, and he having acquiesced in that decree of the court without appeal. However, the

next entry in the record was, that on the 9th day of June, 1863, "The claimants herein, and *the petitioner Francis*, filed in the clerk's office *their* bill of exceptions in the case." Why exactly the court permitted Francis thus to place himself on the record, was not clearly explained. However, the record showed an exception to the charge sealed in his part of the case:

"Whereupon the court declared the law to be, that the taking of said written statement, by the said Francis, to the United States Attorney, at the *request of said Howard*, after the same had been addressed to the surveyor of the port, and delivered to said surveyor, did not constitute the said Francis an informer under the act of 6th August, 1861."

The question here was accordingly the correctness of this view of the court below, as stated in this exception.

The case was submitted by *Messrs. Knight and Krum, for Francis, the plaintiff in error, and by Mr. Stanbery, A.-G., and Mr. Ashton, Assistant A.-G., contra.*

Mr. Justice GRIER delivered the opinion of the court.

Although the consideration of this case might be dismissed, as the plaintiff in error is no party to the record, yet it may not be improper to notice the decision of the court below as stated in the exception taken.

In reference to that, it is to be observed, that the proceedings in this case were not instituted for the joint benefit of the informer and the United States. Francis did not offer to interpose in the case till three months after the proceedings had been instituted "*wholly* for the benefit of the United States," after issue joined with the claimants on proof furnished by others. An unofficial informer is liable for costs and damages in case of judgment in favor of the claimants. The informer should come forward and have the information made in his own name. He cannot thus intrude himself on the record after the case is prepared and about to be tried by a jury, and when a condemnation is imminent, and when he has avoided responsibility for costs in thus keeping back.

If the claimants had succeeded they could have no judgment against the United States for costs, nor against him as not being a party to the suit.

The information given to the collector of the port is under the act of July 13, 1861, which is an act for the *collection of duties on imports*. By the supplement of May 20, 1862, to that act, the penalties are to be distributed according to the 91st section of the act of March 2, 1799, an act to regulate the collection of duties on imports.

Now, the act of August 6, 1861, differs entirely in its scope and character from that of July 13th, in the same year. It is not an act for the collection of revenue. The collector of customs is not the seizing officer, nor as such entitled to a share in the fines and penalties inflicted by the act and its supplement.

In this case the property is seized as liable to *capture;* and it is made the duty of the President to cause "the same to be seized."

The act for regulating process in the courts of the United States, passed May 8, 1792, sections 5 and 6, provides for the taxation and payment of costs by informers.

So the act of 28th of February, 1799, section 8, providing for compensation of marshals, &c., provides for cases of informers on penal statutes, as to payment of fees and costs.

All the laws on the subject are based upon the supposition that the informer should be a party to the original proceeding. He cannot thrust himself into a proceeding instituted by the Attorney-General, for the sole use of the government, when it is resisted by such officer, who denies all his allegations, and refuses any further partnership with him.

Even if the plaintiff in error had been a party to the litigation, which he was not, and entitled to be heard, it is evident that he could not support his case.

JUDGMENT AFFIRMED.

Syllabus.

THE GRAY JACKET.

MERITS.)

1. The proclamation of President Lincoln made December 8th, 1863, granting to all persons (with certain exceptions) who had participated in the then existing rebellion, a full pardon, with restoration of all rights of property except in slaves and in property cases, where rights of third persons shall have intervened, has no application to cases of maritime capture, and therefore does not extinguish the liability of a vessel and cargo seized *flagrante delicto*, while running the blockade then declared against our southern coast, from the consequences of condemnation by a prize court.
2. A claimant's own affidavit that he is not within the exceptions of the proclamation, is insufficient to establish the fact in setting up the proclamation as an extinguishment of the liability above described.
3. A remission by the Secretary of the Treasury under the act of July 13th, 1861, providing (§ 5) that all goods, &c., coming from a State declared to be in insurrection "into the other parts of the United States," by land or water, shall, together with the vessel conveying the same, be forfeited to the United States; and also (§ 6) any vessel belonging in whole or in part to any citizen or inhabitant of such State, "found at sea;" but enacting also (§ 8) that the forfeitures and penalties incurred by virtue of the act may be mitigated or remitted in pursuance of the authority vested in the said Secretary by an act approved 3d March, 1797, or in cases where special circumstances may seem to require it, &c., does not reach a case where the vessel and cargo were not proceeding to a loyal State.
4. The statute does not give the Secretary power to remit in any case of property captured as maritime prize of war.
5. The liability of property, the product of an enemy country, and coming from it during war, is irrespective of the *status domicilii*, guilt or innocence of the owner. If it come from enemy territory, it bears the impress of enemy property. If it belong to a loyal citizen of the country of the captors, it is nevertheless as much liable to condemnation as if owned by a citizen or subject of the hostile country or by the hostile government itself. The only qualification of these rules is, that where, upon the breaking out of hostilities or as soon after as possible, the owner escapes with such property as he can take with him, or in good faith thus early removes his property, with the view of putting it beyond the dominion of the hostile power, the property in such cases is exempt from the liability which would otherwise attend it.
6. Where the war (a civil war) broke out in April, 1861, a removal on the 30th December, 1863, said to be too late.
7. An order for further proof in prize cases is always made with extreme

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caution, and only where the ends of justice clearly require it. A claimant forfeits the right to ask it, by any guilty concealments previously made in the case.

APPEAL from the District Court of the United States for the Eastern District of Louisiana, the case being thus:

The steamer Gray Jacket, and her cargo, consisting of 513 bales of cotton, 25 barrels of rosin, some turpentine and tobacco, were captured during the late rebellion, by the United States war vessel Kennebec, on the morning of 31st December, 1863, *on the high seas*, about forty miles south of Mobile Bay and beyond the limits of the blockade then established of that port, by the Federal government. The steamer had gone out of Mobile Bay on the previous night in the dark, and endeavoring, as the captors alleged, to escape, was pursued and on the next morning captured by the Kennebec for breach of blockade. She was, at this time, in a disabled condition owing to a storm in the night, and on the firing of a gun across her bows hove to, without resistance, and without having changed her course.

Being sent into New Orleans for adjudication, her captain (one Meaher), who owned her; the mate, named Flynn, and her chief engineer, were examined *in preparatorio*, *on the standing interrogatories*. These were all the witnesses thus examined.

In reply to these interrogatories, Meaher, the captain, stated that he was born in Maine, but had lived thirty years in Mobile. "I am a citizen," he continued, "of the *State of Alabama, to which I owe my allegiance.*" He stated that the vessel came out of harbor with the American flag flying; that he was owner of the vessel and *of the cargo;* "that the voyage began at Mobile, and was to have ended at Havana;" that in case the vessel had arrived there, he thought that he should have reshipped the cargo to some place where he could have received a better price for it than he could in Havana.

Flynn, the mate, examined after Meaher had been, made the same statement as to the destination of the vessel and cargo. He stated, however, that the vessel sailed "under

English colors and had no other." As to their ownership, he said:

"The owners of the vessel were Captain Meaher and *brother*. They also owned *half* the cargo. *The balance was for Confederate government account.* The greatest part of the cotton was produced upon Meaher's lands. I understood they had built the Gray Jacket expressly to carry their own cotton to Havana, but they had to allow the government an interest of one-half; otherwise they would not have been permitted to leave Mobile. The Gray Jacket on the trip in which she was taken had attempted to sail covertly from the port of Mobile, then under blockade. She could not have left it otherwise than secretly."

The cotton, it appeared, was the product of Alabama.

The depositions in which these statements were made, were taken on the 26th of February, 1864. About a month afterwards, Meaher filed what he called a "claim, and *answer* to the libel." It presented a narrative in its material parts, as follows:

"That he, the said Timothy, is the true and *bonâ fide* owner of the said steamer, and of the cargo thereon, and that no other person is the owner thereof.

"That he was living in Mobile, at the time the rebellion broke out, and that he had resided there for upwards of thirty years prior thereto; that after the breaking out of the said rebellion he gave no aid to the same; that he had previously, by a life of industry and economy, and the prosecution of legitimate business, acquired a large amount of property; that after the breaking out of the rebellion he became anxious to adopt some measure by which he might be able to withdraw the same to a place of security; that with that object he built the said steamer with his own means, and loaded her with the goods constituting her cargo, and then procured a clearance from the so-called Confederate authorities, exercising all the powers of a government *de facto* in Mobile, State of Alabama, from the said port of Mobile to the port of Havana, in the island of Cuba, then and now a port of a country in amity with the United States, as the only means by which he could be enabled to effect the withdrawal of his property from the limits of the so-called Confederacy.

"And he now avers the truth to be that his right of property in the said steamer and in her *cargo*, which was *full and complete while the same were in the port of Mobile*, continued to be full and complete after he had gotten upon the high seas with the intent of escaping from the power and control of the States in rebellion to a port in a country in amity with the United States, and that the said steamer and cargo were not at any time after their escape from the said port of Mobile, rightfully subject to capture, &c.

"And further answering, he says that the President by a proclamation dated the 8th December, A. D. 1863, declared to all persons who had participated in the existing rebellion except as thereinafter excepted, that a full pardon is granted to them and each of them, with restoration of all rights of property except as to slaves and *in property cases where rights of third parties shall have intervened*, upon the condition that every such person shall take and subscribe an oath, as prescribed in the said proclamation, and shall thenceforward keep and maintain said oath inviolate; that he, the defendant, is not embraced in the exceptions made by the said proclamation; that on the 18th day of March, 1864, he took and subscribed the oath, as prescribed. That in the premises a full pardon is extended to him, even if he had directly or by implication participated in the existing rebellion, and that he therefore now pleads the pardon as a bar to any further proceedings."

On a subsequent day the court, on motion of the District Attorney of the United States, ordered so much of the claim and answer as was in the nature of an answer to be stricken from the record. The captors then offered in evidence the proofs *in preparatorio* and a paper found on board the captured vessel, as follows:

"*Memo. of agreements made between Messrs. Meaher & Bro., owners of the st'r Gray Jacket, and Henry Meyers, major and ch'f ord. officer, acting for the gover't of the C. S.:*

"The gover't will furnish the whole cargo of cotton, and will make over to the owners of the vessel one-half of the cotton, in consideration of which the owners do agree to deliver the other half, belonging to the government, at Havana, free of

further charge, except the one-half of the expenses of compressing and storing incurred at Mobile.

"It is understood and agreed that the said steamer is to return to Mobile, if practicable; if not, then to some other confederate port; and the gover't is to be allowed at least one-half of the carrying capacity of the steamer in the return voyage, at a freight of £25 per ton, and for any excess over the one-half required by the gover't, at £30 per ton, payable in cotton, at the rate of 6*d*. per pound for middling, and other grades in proportion, on delivery of the freight.

"It is further understood and agreed that in the event of a partial loss of the outward cargo, the portion of cotton saved is to be equally divided between the parties at the port of destination, and any loss on the inward cargo is to be settled on the principle of general average, as far as the cargo is concerned.

"HENRY MEYERS,
Major and Ch'f Ord. Officer, Dep't of the Gulf.

"MOBILE, Oct. 22, '63."

On the other side, the claimant put in evidence the oath referred to in his claim and answer. It was an oath of loyalty, promising thereafter faithfully to support the Constitution of the United States, &c., being an oath prescribed in the proclamation of President Lincoln of December 8th, 1863, referred to in the answer, and by which the said President, reciting that it was desired by some persons heretofore engaged in rebellion, to resume their allegiance to the United States, "proclaimed and made known to all persons who had directly, or by implication, participated in the existing rebellion, except as hereinafter excepted, that a full pardon is granted to them, and each of them, with restoration of all rights of property, except as to slaves, and *in property cases where rights of third parties shall have intervened*, and upon the condition that every such person shall take and subscribe an oath," &c. Certain classes of persons were excepted. After the giving of this oath in evidence the claimant moved for an order to take further proof. The matter was held open.

All these proceedings, including the giving in evidence

of the paper above-named found on board, took place 5th April, 1864. On the 25th May following, the claimant made a new affidavit, which was subsequently filed. It presented a narrative as follows:

"That he, the said Timothy, is a loyal citizen of the United States, born in the State of Maine; that he was late of the city of Mobile, in the State of Alabama, and that he is the true, lawful, and sole owner of the steamer Gray Jacket, and of the cotton constituting her cargo; that he was living in the city of Mobile at the time the existing rebellion broke out, and that he had resided there upwards of thirty years prior thereto; that during the period which preceded the breaking out of the rebellion he opposed secession and did all in his power to prevent the same, and to preserve and maintain the Union; and that after the said rebellion broke out he gave it no aid or assistance in any way whatever.

"And he further says: that after the breaking out of the rebellion he was anxious to adopt some course by which he might be enabled to withdraw the property he was in possession of, or as considerable a portion of it as was practicable, from the so-called Confederate States, to a place of security, and get it into such a position that he might realize the value of it and return to the State of Maine, where his mother now lives and where he has property and many relations and friends; that with this object and intention, well known to several of his confidential friends, he built the said steamer Gray Jacket with his own means, with the design of lading her with cotton belonging to himself; that while he was engaged in building said steamer, and she was approaching completion, the Confederate authorities at Mobile manifested a determination to make use of the steamer to advance their own purposes, and proposed to load her with cotton furnished by them and to give him one-half of the cargo as the owner of the steamer, on condition that the other half was landed at Havana, free of charge for freight, and that he would bind himself to return to Mobile or to some other Confederate port, and give to the so-called Confederate government a certain portion of the carrying capacity of the said steamer on certain terms and conditions; that situated as he was, with his property and himself and his family in the power and under the control of the rebel authorities, he had no freedom

of action, and could only by his manner manifest his repugnance to any proposal without venturing on an absolute refusal to it; that he did manifest great dissatisfaction to the proposed arrangement, and that no such contract was entered into by him with the rebel authorities, and that no such arrangement by them with him was carried into effect, either wholly or in part; that although the said rebel authorities had seemed to abandon the attempt of carrying out the said proposal, not having found any cotton to be laded aboard of the said steamer, yet he found that when he was ready to begin to lade his own cotton aboard of her that the said rebel authorities had not abandoned all idea of deriving an advantage from exercising a forced control over his property.

"That an officer exercising authority at Mobile visited him and said that he, Meaher, could not take the cargo out unless he consented that one-half of the cargo to be put on board of the steamer should be for the account of the so-called Confederate government, and that if he, Meaher, did not comply, he, the officer, would take possession of the steamer and put a government crew on board of her; that he, Meaher, finding that it was impossible for him to have any control over his property if he refused to comply with the requisition on the part of one armed with physical power to despoil him altogether, *apparently submitted to and complied with the requisition, with the secret determination to assert and maintain his real rights over the entire cargo so soon as he had escaped beyond the authority and control of the rebel States;* that all the cotton laden on said steamer at the time of beginning her voyage, and found on board of her at the time of her capture, was his own property, and had been produced on his own plantation, or had been bought and paid for by him, with a view to its being laded on board of said steamer for transportation to Havana on the contemplated voyage, on his own account, and that before he obtained a clearance of the said steamer Gray Jacket and her cargo, he was required to pay and did pay the export duty imposed on all cotton exported, by authority of an act of the Congress of the so-called Confederacy, upon the entire amount of cargo embarked on the said steamer.

"That neither the so-called Confederate States, or any person or persons in rebellion against the United States, or their factors, or agents, or any others, had at the time of the shipment of the said cotton on the said steamer Gray Jacket, or at the

time of the capture of the said steamer, on the 31st day of December, 1863, or now have any right, title, or interest in the said cotton or in the siad steamer Gray Jacket.

"That it was at first his intention to have taken his wife and children with him on board the said steamer on the said proposed voyage to Havana, but that he was afterwards deterred from attempting to do so lest it should strengthen the suspicion which already existed against him in the minds of the rebel authorities, and prevent his getting away at all, and that he at last unwillingly abandoned the idea and left them after *having made an arrangement with his brother, J. M. Meaher, to send them as soon afterwards as he could find a suitable opportunity, to Havana, where they were to place themselves under the care of the commercial house of Santa Maria, with whom he, Timothy Meaher, was to have made an arrangement.*

"That after lading the steamer, he procured a clearance from the so-called Confederate authorities, exercising all the powers of a government *de facto* in the said city of Mobile, in the State of Alabama, from the port of Mobile to the port of Havana, as the only means by which he could be enabled to effect the withdrawal of his said steamer with its cargo from the limits of the so-called Confoderacy and beyond the powers and control of the States in rebellion against the government of the United States. And he further says that the President of the United States, by a proclamation, dated the 8th day of December, 1863, declared," &c. [setting forth the proclamation and pardon, as in the former affidavit on pp. 344–5.]

The court condemned the vessel and cargo.

The case being now in this court, Mr. B. F. Butler, in behalf of the claimant Meaher, moved for an order to take further proof; its purpose being, in effect, to establish the truth of the facts set forth in the second affidavit of the claimant; to show also in substance—

"That he sailed out past Fort Morgan, in the evening of the 30th of December, with the full intent to deliver himself up to the blockading squadron, if he met it, or, failing to so do, to go to Havana; that during the night his vessel was partially disabled, bursting a steam pipe, but he refused to return to Mobile

although, owing to the storm, he had difficulty in keeping off shore, and was obliged to make all the offing he could.

"That, seeing the Kennebec, he did not alter his course or attempt to get away from her, although he might have run ten knots, his machinery being repaired, but kept at the rate of four knots till the Kennebec came up.

"That he was sailing under the American flag hoisted on his vessel, being the only one he had on board, and one which he had preserved through the war, at the hazard of his life or liberty, before he was captured.

"That when boarded he told the officer why his vessel was in this predicament, and demanded protection for himself and property, but was *seized as prize.*

"That he answered the interrogatories put to him without any knowledge of the object, and before he had any opportunity to make any explanations or statements in his own behalf.

"That as soon as he was permitted, to wit, on the 18th of March, 1864, he went before the proper officer and took the oath of amnesty prescribed by the President's proclamation of December 8, 1863, with full intention to keep the same, and has ever kept his oath inviolate; that this was more than a year before the war ended, and would have precluded his return to Mobile while the Confederacy existed.

"That he has proved all these facts to the satisfaction of the Secretary of the Treasury, who has remitted to him all the forfeitures prescribed by the act of Congress of July 13, 1861, and acquited him of all intention of violating the laws of the United States or of aiding or abetting the rebellion."

Under the form of further proof he desired also to bring before the court the remission by the Secretary of the Treasury above referred to, and made under the act of July 13, 1861.

This act, it is necessary to state, declares (§ 6) that any vessel belonging, in whole or in part, to any citizen or inhabitant of a State whose inhabitants were declared to be in a state of insurrection [as those of Alabama had been declared], "found at sea," should be forfeited to the United States; and also, by another section (§ 5), "all goods and chattels, wares and merchandise, coming from said State or

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section, *into the other parts of the United States*, . . . by land or water, together with the vessel or vehicle conveying the same."

The act, however, declared (§ 8) that the forfeitures incurred by virtue of it might be remitted in pursuance of the authority vested in the Secretary of the Treasury by an act entitled, &c.

The act of remission under the seal of the Secretary, and sought to be put in proof, bore date March 21st, 1866, and ran thus:

"Whereas a petition has been made before me by Timothy Meaher, a citizen of the State of Alabama, for the remission of the forfeiture of the steamer Gray Jacket, and her tackle and cargo, incurred under the statute of the United States entitled, &c., approved July 13, 1861:

"And . . . it appearing to my satisfaction that the said forfeiture was incurred without any intent on the part of the petitioner to violate the laws of the United States, or to aid or abet the insurrection against the government of the United States, and that the petitioner is a loyal citizen, and that said steamer and cargo were condemned by the United States District Court for the Eastern District of Louisiana as prize of war:

"Now therefore know ye, that I, the Secretary of the Treasury, in consideration of the premises, and by virtue of the power and authority to me given by the said eighth section of the said act of July 13, 1861, do hereby decide to remit to the petitioner all the right, claim, and demand of the United States to the said forfeiture, upon payment, &c., *so far as such forfeiture was incurred under the provisions of the act of July* 13, 1861, *but not otherwise.*"*

It appeared that as originally drawn, Meaher's petition to the Secretary of the Treasury recited in the foregoing act of remission, set forth that Meaher "would satisfy the honorable Secretary of the Treasury that he was a loyal man, attempting to escape from the Confederacy, which he had never aided with his property [*and to take the same into the loyal States, by*

* 12 Stat. at Large, 255.

way of Havana, if his vessel should prove fit for the voyage], in order to meet his wife and family, whom he had sent out of the Confederacy by another channel, and for whom he had arranged to live at the house of his mother, in the State of Maine;" that the petition thus drawn, and without the words in italics and brackets, was filed and submitted by the Secretary of the Treasury to the Attorney-General, who objected to it, to that officer, "that it contained no allegation so as to bring it within the act of July 13, 1861, that the cargo was proceeding, when captured, from a revolted State *into other parts of the United States.*" The requisite words, indicated above in the brackets and italics, appeared as an interlineated amendment.

The court allowed this remission by the Secretary to be received as part of the case; which therefore, as it now stood before this court, presented three questions:

1. How far the judgment should be affected by Meaher's oath of loyalty, in connection with the proclamation of the President giving full pardon and with restoration of all rights of property, except "in property cases where rights of third parties shall have intervened?"

2. How far it should be affected by the remission now allowed to be read and relied on, from the Secretary of the Treasury?

3. Whether, if it was unchanged by these, the case was one for further proof?

Mr. Ashton, Assistant Attorney-General, for the United States, and Mr. Eames, for the captors:

I. Meaher declares that he was at all times a loyal citizen of the United States, and yet relies on the proclamation of President Lincoln in favor of those "who have participated in the existing rebellion;" declares that he has ever acted a patriotic part, and then sets up a "full pardon" for treason.

The proclamation and pardon was never meant for persons such as Meaher describes himself to be.

But for whomever meant, it excepts "property cases where

the right of third parties had intervened." Here the right of the captors, by the act of seizure, intervened. The case is in terms excepted.

Neither has Meaher proved that he is not within the classes excepted from the benefit of the proclamation. He asserts, indeed, in his *ex parte* affidavit, that he is not; but that is no proof of the fact.

II. The case is no better on the remission from the Treasury. The vessel was not "found" at sea within one section of the act of July 13, 1861. She was captured when sailing, a flag flying, her officers and crew aboard; nothing derelict about her; seized, not found. Neither were the vessel and cargo coming from a rebellious State or section "into the other parts of the United States" so as to come within the other section. The voyage was unquestionably to Havana. Going from Mobile to Maine, *viâ* Havana, the plan finally set up, was plainly all an afterthought.

Besides, the present condemnation was incurred by virtue of the public law of war, and not under the statute of July 13, 1861, and is therefore, by the terms of the warrant, excluded from its operation.

Even if this were not so, the Secretary's power to remit forfeitures incurred by virtue of the statute of 1861 is limited by the words of the statute to cases of seizure and proceedings to enforce forfeitures *under the statute*, and does not extend to and cannot be exercised in cases of maritime captures of vessels and cargoes under the law of war, adjudicated under that law, and in the prize jurisdiction, and then condemned as prize of war on account of breach of blockade.

Recent cases in this court show vessels captured and condemned as prize of war, though at the time of capture, and until so captured, liable also to seizure and forfeiture under the statute of 13th July, 1861, as belonging, in whole or in part, to citizens or inhabitants of the insurrectionary States, and found at sea. Among these, the Baigory and the Andromeda;* the Cornelius and the Bermuda.†

* 2 Wallace, 481, 489.

† 3 Id. 214, 553.

III. *Is the case one for further proof?*

1. Whatever Meaher's general feelings or views were in regard to the rebellion, there is no doubt, we submit, that this voyage was a speculation, a fraud on the blockade. He was captured on the high seas, outside the line of the blockading vessels, steering to Havana, trying, as the captors report, and, as seems obvious, to escape. If he could bring a host of witnesses to show what he was and what he meant before sailing; that he was then a loyal man, wishing to return to loyal regions and loyal friends, these facts contradict them all, in a way past any power of refutal. Why did he not first *seek* the blockading squadron? Indeed, the matters set up in his affidavits seem to have been quite an afterthought. There is nothing even in *his* deposition taken *in preparatorio*, which so much as adumbrates the scheme subsequently set up as the true history. If ever a claimant showed a character and a case where further proof ought *not* to be allowed, it is Meaher. He has shown that he can make proof *ad libitum*. He first gives evidence and files an answer, showing one case, sufficient, as he supposes, for the then necessity. But the mate contradicts him as to ownership, and the government produces the document found on board, which confirms what the mate had declared. He then files a second affidavit, setting up a further case, and explaining away the evidence against him. He next petitions the Secretary of the Treasury, setting forth his case as he thought needful. Objection is made by the Attorney-General that his case is radically defective in its facts, the non-existing facts being pointed out. And lo! Meaher immediately interlines and states the required facts. Allowance for further proof in such a case would be a direct encouragement to perjury. Courts of admiralty are most careful not to lay snares in this way for defective consciences.

We may, moreover, well doubt whether Meaher was an honest or a loyal man at all. He confesses that he meant to cheat the Confederacy for his own benefit, not for the nation's. And why does he state that his allegiance was due

to the State of Alabama? Did he not know that Alabama was then in rebellion against the nation? But—

2. If he were ever so loyal, and if his narrative, in its last elaborated and interlineated form, were true, it would be no defence:

(*a*) The law of war denounces, as being a trading with the enemy, the withdrawal by a citizen of this country of any property without license, from the enemies' territory after a considerable time has elapsed since the beginning of hostilities.* In that case, this court held that goods purchased in England before hostilities, and shipped to the purchaser in this country by his agent, eleven months after the declaration of war, were confiscable in a prize court.

(*b*) In Meaher's affidavits his purpose of removing this property "*to a place of security*, beyond the power and control of the States in rebellion," is presented in such a way as that an intention to return to his residence and business in Mobile is consistent with it; nor are there any facts alleged in that document tending to show a dissolution of the commercial establishment and domicil in Mobile (proved by Flynn's deposition *in preparatorio* to have existed), prior to or at the time of his sailing on this voyage, or any suspension of the mercantile pursuits in which he had been engaged during the entire period of war. If the claimant was a member of a house of trade in Mobile, engaged in the enemy's commerce, then, independently of personal residence, a continued connection with such a house would operate in law to prevent any divestiture of that enemy quality impressed upon him by residence and commerce during the war in Alabama.

(*c*) Meaher alleges that this cotton, "had been produced on his own plantation." Now, no doctrine is better settled than that the produce of a person's own plantation in the enemy's country is considered, in a prize court, as the property of the enemy, independent of his own personal residence and occupation.

Every way the case is against the claimant.

* Penniman's claim, The St. Lawrence, 9 Cranch, 121.

Mr. B. F. Butler, for the claimant: Mr. C. Cushing, being allowed leave to appear for the Treasury department:

I. *The proclamation of December 8th*, 1863, was a proclaimed license to every sort of enemy within its terms, *those by construction* as well as those in fact, those who by mere presence and necessity had participated in the rebellion as well as to those who were actual belligerents, to come within the Union lines, with full restoration of all rights and property.*

No "*right* of third parties"—neither *jus ad rem* nor *jus in re*—had "intervened" by a simple seizure; nor could any intervene, at best, before a decree of condemnation. The case was not "a property case." Even if "a right" had intervened it was initiate only, and defeasible by the party's taking the oath of loyalty as soon as he could and, certainly, before decree should fix the right.

Indeed the government has power to release all penalties and forfeitures and all maritime captures, irrespective of the claims of captors or informers, up to the moment of distribution of proceeds. Such is the settled doctrine of the prize courts.†

II. *The remission by the Secretary of the Treasury.*

1. The vessel was "found at sea" and the property of an inhabitant of an insurgent State. When found, *eo instanti*, by force of the statute she became forfeited to the United States, and the title of the United States could not be divested either by capture or by sale to an innocent purchaser.‡ There is no indication of the acts referring to derelict or abandoned vessels only. The *vessel* then comes within the terms of the act.

But the cargo must go with the vessel and partake of its character, especially where there is the same owner to both.

The remission is a license coupled with a final adjudica-

* The Herstelder, 1 Robinson, 117.

† The Elsebe, 5 Robinson, 172; H. M. S. Thetis, 3 Haggard, 231; French Guiana, 2 Dodson, 156–158; The Diligentia, 1 Id. 404; The Nassau, Blatchford's Prize Cases, 601; Fifty-two Bales of Cotton, Id. 310.

‡ United States *v.* 1960 Bags of Coffee, 8 Cranch, 398; Same *v.* Grundy, 3 Id. 351.

tion of the *bona fides* of the licensee in his acts under it, and must relate back to the inception of the voyage.

All licenses, either express or implied, are to be construed with the greatest liberality.* Such is the present doctrine, though not the old one.

2. This is a case of Treasury forfeiture, and not of maritime prize.†

This power of making remissions has been exercised by every Secretary of the Treasury since the war. In the Florida, by Secretary Chase; in the Cyclops, by Secretary Fessenden; in the case at bar, by Secretary McCulloch.

In the Revolution of 1775 the British Parliament passed an act of non-intercourse and forfeiture of rebel property, from which the act of July 13th, 1861, was drawn, and its necessity was argued from the same consideration as in this rebellion.‡

The British act contained no relief from forfeitures under it, so that there was the strongest disposition to hold the captures maritime prizes; yet in every instance the forfeitures were adjudged to the Exchequer and not to captors, or as "Droits of Admiralty," save in the first case arising;§ and in that case, the judge, Sir George Hay, publicly declared that he repented of that decision.‖ Ever after the decisions were made as forfeitures. We have caused the "Paper books of the Appeals to the Lords" to be examined, and find all cases were brought on the Instance side of the court, although the act denominates the property as that of "open enemies," and to be proceeded against "*as lawful prize.*"

The blockade, which was declared by proclamation of April 19, 1861, is a *pacific*, and not a *belligerent*, blockade. It is made so in terms:

* The Jonge Klassina, 5 Robinson, 265; The Clio, 6 Id. 67; The Eolus, 1 Dodson, 300; Duer on Insurance, 595.

† See on this subject generally the opinion of Treat, J., of the Eastern District of Missouri, 8vo. pp. 78; Washington, Treasury Department, 1866.

‡ See letter of Mr. Secretary Chase explanatory of act of 1861. Cong. Globe, 37th Cong., 1st sess., p 55.

§ The Dickenson, Marriot's Decisions, page 1.

‖ Marriot, 74, 197, 222.

"To the protection of the public peace, and the lives and property of quiet and orderly citizens pursuing their lawful occupations, until Congress shall have assembled and deliberated on the said unlawful proceedings, or until the same shall have ceased, have further deemed it advisable to set on foot a blockade of the ports within the States aforesaid, in pursuance of the laws of the United States, and of the law of nations in such case provided."

The blockade was made specifically "under the laws of the *United States* and the laws of nations." A *belligerent* blockade could have been only under the laws of nations, *jure belli*, in such case provided.

Congress did deliberate thereon, and the act of July 13, 1861 (already quoted), was one result of these deliberations, with authority to the President to make a new proclamation on the subject of commercial intercourse with the rebellious States.*

A proclamation was issued August 16, 1861, reciting the act of July 13, and declaring, among other things, that "all ships and vessels belonging in whole or in part to any citizen or inhabitant of any of said States, found at sea, &c., will be forfeited to the United States." It proceeded:

"And *I hereby enjoin upon all district attorneys, marshals, and officers of the revenue, and of the military and naval forces of the United States*, to be vigilant in the execution of *said act*, and in the enforcement of the penalties and forfeitures imposed or declared by it; leaving any party who may think himself aggrieved thereby to his application to the Secretary of the Treasury for the remission of any penalty or forfeiture, which the said Secretary is *authorized* by law to grant, if, in his judgment, the special circumstances of any case shall require such remission."

From notification of that proclamation the blockading fleet became, by the authority of Congress and by order of the President, employed on the revenue service, so far as the acts of trade of the insurgents were concerned, and

* 12 Stat. at Large, 257; Id. 319.

a "blockading force" *quoad* neutral or hostile nations; the rights and wrongs of the rebels to be adjudged by the municipal laws of their country, which alone were applicable to them, and the neutral or hostile offenders to be tried by the prize courts of the country under the law of nations, to which alone they were amenable. This course was taken by Congress in order to meet meritorious cases like that at bar, instead of leaving the citizen to the rigors of blockade and prize capture; "and when hardships shall arise provision is made by law for affording relief under authority much more competent to deal in such cases than this court ever can be."*

The Executive has ordered "all military and naval officers, district attorneys, and marshals, to be vigilant in enforcing that act." Can a naval officer and a district attorney, by colluding to bring the cause on the prize side instead of the instance side of a United States Admiralty Court, thus avoiding their proclaimed duty, oust the United States of its forfeiture and property, and involve it perhaps in serious inconvenience?

On this whole subject Sir William Scott speaks with force and clearness in *The Elsebe*:†

"Prize is altogether a creature of the crown. No man has, or can have, any interest but what he takes as the mere gift of the crown. Beyond the extent of that gift he has nothing. This is the principle of law on the subject, founded on the wisest reasons. The right of making war and peace is exclusively in the crown. *The acquisitions of war belong to the crown*, and the disposal of these acquisitions may be of the utmost importance for the purposes both of war and peace. This is no peculiar doctrine of our constitution; it is universally received as a necessary principle of public jurisprudence by all writers on the subject. *Bello parta cedunt republicæ.*

"And I must add, that though I have suffered a party to stand before the court for the purpose of arguing the question, I do not know the party who can legally stand before it, pray-

* Per Johnson, J., 1960 Bags of Coffee, 8 Cranch, 405.

† 5 Robinson, 173–192.

ing a condemnation to the crown, which the crown itself publicly renounces.

"When I state the position contended for on the part of the captors to be in effect this, that it shall be in the power of every man who has made a capture,—of the pettiest commander of the pettiest privateer,—to force on, in spite of all the prudence of the crown, opposed to such an attempt, the discussion and decision of the most delicate questions, the discussion and decision of which may involve the country in the most ruinous hostilities, I state a proposition that must awaken the apprehension of every man who hears me as to the extent of the danger which would attend the establishment of such a principle."

III. *Is the case one for further proof?* Opposing counsel argue that it is now attempted to show a different case from that presented by the proofs *in preparatorio*. This is not so; though we may wish to show a fuller one.

The standing interrogatories are not adapted to reach the facts in all cases of capture, in a war so special as ours. What are these standing interrogatories?

To ascertain the legal *status* of a vessel in relation to her neutrality, a limited number of questions called "standing interrogatories" were prepared many years ago by Sir William Scott, and have been adopted by the courts of the United States without substantial change. No better illustration of their occasional ill adaptation to elicit the facts necessary to the understanding a capture arising under a rebellion, such as was ours, can be had than the answer they cause Meaher to give in reply to the first interrogatory when the question is not read in connection therewith. On that answer the captors found an argument of disloyalty. The answer which the witness makes is:

"I was born in Maine; I live in Mobile, and have lived there thirty years; I am a citizen of the State of Alabama, to which I *owe my allegiance*."

The matter is explained when you see to what question the answer is made. It is:

"Where were you born, and where do you now live, and how long have you lived there? Of what prince or *state* are you a subject or citizen, and to which do you owe allegiance?"

So it is with all the proofs *in preparatorio*. They are responsive to specific questions, and are not adapted to get out a history in a case where a history may well exist. Any exfoliation of the responsive facts—that which would make the history—would, as responsive to these interrogatories, be irregular.

We concede that, in a foreign war and a blockade of a foreign port, where there are no circumstances of license or withdrawal of friendly property to be proved, there would be no such doubtful *status* of the *res* as would allow further proof. But the case, we repeat, is not one of this sort. It is the case of an insurrection by certain people in certain parts of one nation; a case where many people in the insurrectionary district remained loyal, and wished to leave the district. Certainly a capture here presents a different case from one of an enemy's vessel, and enemy property, of a claimant enemy by domicil in enemy country, pursuing a voyage in the interest of the enemy government.

The few discrepancies in the testimony are easily reconcilable. Meaher testifies that he owns the whole vessel and cargo. Flynn testifies that it belongs to Meaher, that the owners were Meaher & Brother. The explanation is that Meaher knew the fact that he was sole owner, and that Flynn did not know. Meaher knew that he put his own cotton on board, and, although forced to consent to ship half on government account, this did not change the ownership, and it, in fact, was all his own. This he now offers to prove, and has proved, to the satisfaction of the Secretary of the Treasury.

So as to the paper found on board.

The document is not signed by the claimant, and therefore ought not to affect him unless it is shown that he agreed to it. It is an offer by the Confederate government to furnish the whole cargo on joint account with Meaher Brothers, upon certain conditions. This was under date of October

22d, 1863, more than two months before the voyage, while the vessel was fitting out. That this contract was not accepted nor acted on is shown by Flynn:

"I understood they built this vessel expressly to carry their own cotton to Havana, but they had to allow government an interest of one-half in the cargo, otherwise they would not have been permitted to leave. Meaher had necessarily to *appear* to accept it."

The claimant makes no contradictory cases. The facts which he seeks to prove are only those which he set forth in his claim and answer, explained, and by proper filling up, enlarged. No one of them is contradictory to anything he testified to in his deposition *in preparatorio*.

IV. *Is the history, if it were in proof, no defence?* We submit, in opposition to the captor's counsel, that it is:

(*a*) The right of withdrawal of person and goods by a citizen from hostile territory, has always been recognized, and applauded as an act of loyalty. The only question has been, what is a *reasonable* time? That question must always be decided by the circumstances of each case. Nothing can be deduced from rules in a foreign war, as applicable to this rebellion. The citizen had a right to suppose that his government would put down the rebellion within a reasonable time, so that he would not be obliged to quit home and property, as was hoped by all, and so wait. The Confederacy did not allow their citizens to leave it if the intention so to do was known. All were retained for conscription and taxation. Undeniably, a reasonable time is to be given to collect property, but here the very collection of it tended to lead to suspicion and confiscation. The war was carried on by the rebels in an unusual and barbarous manner towards persons disposed to be loyal. If this course of the rebels furnishes no reason for relaxation of the rule by the courts, it certainly tends to excuse delays, and accounts for inconsistencies in the conduct of the claimant not to be judged by the rules of foreign warfare.*

* The Ocean, 5 Robinson, 84.

In the case of *The St. Lawrence*, cited on the other side, although eleven months, under the facts, was considered an unreasonable delay, it being a foreign war, yet the Supreme Court granted motion for further proofs. In the case of a rebellion the rule should be that it is a reasonable time, whenever the *withdrawal is made in good faith;* an issue to be determined by the facts of each case.

(*b*) The captors assert that "an intention on the part of the claimant to return to his residence and business in Mobile is consistent with the contents of this affidavit; and that there are no facts in the affidavit tending to show any dissolution of the claimant's commercial establishment and domicil in Mobile prior to or at the time of his sailing on this voyage, or any suspenson of the mercantile pursuits in which he had been engaged during the war."

But the affidavit does set forth that the claimant desired to "withdraw the property he was in possession of, or as considerable a portion of it as was practicable, from the so-called Confederate States, to a place of security, and get into such a position that he might realize the value of it and return to the State of Maine, where his mother now lives, and where he has property and many relations and friends; that with this object and intention, as well known to several of his confidential friends, he built the steamer Gray Jacket with his own means, with the design of lading her with cotton belonging to himself."

And "that it was at first his intention to have taken his wife and children with him on board the said steamer, on the said proposed voyage to Havana, but that he was afterwards deterred from attempting to do so lest it should strengthen the suspicion which already existed against him in the minds of the rebel authorities, and prevent his getting away at all, and that he at last unwillingly abandoned the idea, and left them, after having made an arrangement with his brother, J. M. Meaher, to send them as soon afterwards as he could find a suitable opportunity to Havana, where they were to place themselves under the care of the com-

mercial house of Santa Maria, with whom he, Timothy Meaher, was to have made an arrangement."

(c) *The res is not enemy property.* Being simply domiciled in rebellious territory, without any act shown, does not make a loyal citizen an enemy, within the legal definition of enemy, without some declaratory act by his sovereign; certainly not so as to remit his rights to be tried by the laws of nations in a prize court.*

The property of rebels is not confiscable as prize of war, but by forfeiture.†

Being, at worst, only an enemy by construction of domicil—a *quasi* enemy—his *status* changed as soon as he formed the intention of returning to his allegiance, and did any act carrying out that intention.‡ He had escaped from the enemy country with his property, and was on the high seas, on his own deck, under the American flag, which he had a right to raise, having protected it through the rebellion. His domicil *eo instante* changed; he was no longer an enemy, even by construction, but an American citizen. His property, being enemy only because of his *status*, partook of the change with him. The flag determined the character of the vessel and cargo in absence of all papers.§

The question, in short, is, "Shall the court be left to grope among inferences, circumstances, misrecollections, or misconceptions of witnesses, to find facts upon which to confiscate a loyal man's property, when, by admitting further prōof, the claimant will prove, to the satisfaction of the court, as he has done to one branch of the government, that every answer or allegation that he has made is true, and that he was a loyal citizen, trying to take his property from the grasp of the enemies of the government, who ought to

* Judge Treat's opinion, p. 24, citing opinions of Nelson and Swayne, JJ.; The Dickenson, Marriot's Decisions, 1-46; The Venus, 8 Cranch, 280, 294, 301.

† The William and Grace, Marriot, 76; The Rebecca, Id. 197-210; The Renard, Id. 222-225.

‡ Lawrence's Wheaton, 564-567; The Indian Chief, 3 Robinson, 17-22; The Venus, 8 Cranch, 280.

§ The Vrow Elizabeth, 5 Robinson, 11.

be aided and protected in so doing, and not an alien enemy, whose property is to be condemned under the law of nations?"

Mr. Justice SWAYNE delivered the opinion of the court.

This case comes before us by appeal from the District Court of the United States for the Eastern District of Louisiana.

In the night of the 30th of December, 1863, the steamer Gray Jacket was discovered running out of Mobile Bay by the gunboat Kennebec, one of the blockading fleet. The darkness of the night enabled the steamer to avoid the pursuing vessel. In the morning she was seen endeavoring to escape to the southward and eastward. The Kennebec fired a gun across her bows. She hauled down her colors and hove to. The captors took possession of her. Her cargo was found to consist of about five hundred bales of cotton and a few other articles of small value. She was put in charge of a prize crew and sent to New Orleans for adjudication. The claimant, Meaher, was examined *in preparatorio*. He states that he was born in Maine; he had lived thirty years in Mobile; he was a citizen of Alabama, and owed his allegiance to that State; he was captain of the Gray Jacket, and owned the vessel and cargo; the vessel was bound for Havana; he built her near Mobile; the cotton with which she was loaded was raised in Alabama.

Flynn, the mate, was also examined. According to his affidavit, she sailed under English colors; her machinery had broken down, and she was in a disabled condition when captured. He says, "She was taken running the blockade." . . . "The owners of the vessel were Captain Meaher and brother." . . . "They also owned half the cargo. The balance was for Confederate government account." . . . "I know the Gray Jacket, on the trip on which she was captured, had attempted to sail covertly and secretly from Mobile, then under a blockade. She could not have left otherwise than secretly." . . . "J. M. and T. Meaher

owned the vessel and half the cargo. The Confederate government owned the other half."

Among the papers found on board was an agreement between the claimant and Meyers, a military officer and agent of the rebel government, whereby it was stipulated that "the government will furnish the whole cargo of cotton, and will make over to the owners of the vessel one-half of the cotton, in consideration of which the owners do agree to deliver the other half belonging to the government at Havana, free of charge, except half of the expenses of pressing and storing incurred at Mobile."

That "the said steamer is to return to Mobile, if practicable; if not, then to some other Confederate port; and the government is to be allowed one-half of the carrying capacity of the steamer on the return voyage," at rates specified.

And that "in the event of a partial loss of the outward cargo, the portion of cotton saved is to be equally divided between the parties at the port of destination; and any loss on the inward cargo to be settled on the principle of general average, so far as the cargo is concerned." Meaher's affidavit *in preparatorio* was taken on the 26th of February, 1864. It ignored the interest of his brother in the vessel and cargo, and alleged the property of both to be in himself. It concealed the ownership of half the cargo by the rebel government and the contract between him and the rebel military agent. Upon these subjects not a word was uttered. On the 21st of March he filed an answer and claim, which do not differ materially from his affidavit *in preparatorio*.

The court ordered the paper to be stricken from the files, but gave him leave to file an affidavit, which was accordingly done on the 29th of August following. This affidavit sets up an entirely new state of facts. According to its averments, he never sympathized with nor gave any aid to the rebellion; the steamer was built to enable him to get away with as much as possible of his property; he did not take his family with him, lest it might excite suspicion and defeat his object; the rebel government furnished none of the cot-

ton with which his vessel was laden; he was compelled to agree that one-half of it should be taken on account of that government, and also to assent to the provisions of the contract with the rebel military agent; otherwise, he would not have been allowed to depart; it was his intention, upon reaching Havana, to claim all the cotton as his property, and to appropriate the proceeds entirely to himself; on the 18th of March, 1864, he took the oath prescribed by the President's proclamation of the 8th of December, 1863; he is not within any of its exceptions, and is entitled, by its provisions, to the restoration of the property.

The court below condemned the vessel and cargo as prize of war, and the decree is before us for review.

In this court a motion was made at the hearing, and argued at length, for an order for further proof, to enable the claimant to establish the facts set forth in the affidavit as to his loyalty to the United States, and the motives and object of his departure from Mobile with the vessel and cargo, and also to enable him to bring before this court the remission by the Secretary of the Treasury, bearing date of the 26th of March, 1866, of all right and claim to the property as forfeited to the United States, "so far as such forfeiture was incurred under the provisions of the act of July 13, 1861, and not otherwise."

The court consented at once to receive this paper without further proof, and it is properly in the case.

The questions for our consideration are:

The effect of the amnesty proclamation of the 8th of December, 1863, in connection with the oath of the claimant?

The propriety of making an order for further proof?

And whether the remission by the Secretary of the Treasury entitles the claimant to the restoration of the vessel and cargo?

The proposition as to the proclamation and oath was not pressed in the argument here. If it were relied upon, the answers are obvious and conclusive.

There is no satisfactory proof that the claimant is not in

one of the classes of excepted persons. His own affidavit under the circumstances, is clearly insufficient to establish the negative. "Property cases, where the rights of third persons shall have intervened," are excluded in terms by the proclamation.

The proclamation is founded upon the act of July 17, 1862, and has reference only to property subject to confiscation as there denounced.

Both the statute and proclamation are wholly silent as to maritime captures like the one before us, and neither has any application to that class of cases. In no view of the subject can this proclamation be held to extinguish the liability of a vessel and cargo running the blockade, and seized *in flagrante delicto*. It would be a strange result in such a case if the subsequent oath of the claimant were allowed to establish his innocence and compel the restitution of the property.

This is not a proper case for an order for further proof. The order is always made with extreme caution, and only where the ends of justice clearly require it. The claimant forfeited all right to ask it by the guilty concealment in his first affidavit, and in his subsequent affidavit and claim. The allowance would hold out the strongest temptation to subornation of perjury. There is nothing to warrant such an exercise of our discretion. We are entirely satisfied with the testimony in the case, and entertain no doubt of the correctness of the conclusions we draw from it. If the allegations of the claimant are true, he postponed his effort to escape too long to derive any benefit from it. The law does not tolerate such delay. The motion is overruled.

The order of the Secretary of the Treasury does not affect the case. It is limited in its terms to the rights of the United States, arising from forfeiture under the act of July 13, 1861. That act provides "that all goods and chattels, wares, and merchandise, coming from a State or part of a State in rebellion" into the other parts of the United States, ... "by land or water," . . . . "shall, together with the

vessel or vehicle conveying the same," . . . . "be forfeited to the United States." It contains nothing as to goods and vessels going from a rebel to a foreign or neutral port.

The Gray Jacket was not proceeding to a loyal State. It is true that after this objection was taken by the Attorney-General to the authority of the Secretary to interpose, the claimant amended his petition by interlining the averment that he was attempting to take the property "into the loyal States by way of Havana, if his vessel should prove fit for the voyage." But this does not recall what he had before sworn, nor change the facts as they are disclosed in the record. In his first affidavit he said, "The voyage began in Mobile and was to have ended at Havana." "In case we had arrived at our destined port, I think I should have reshipped the cargo to some port where I could have obtained a better price for it than I could obtain there." The mate also testified "that the voyage began at Mobile and was to have ended at Havana." The claimant in his affidavit speaks of going to Havana, but was silent as to going beyond there, to any of the loyal States; and nowhere disclosed such a purpose until he amended his petition to the Secretary under the pressure of the occasion. We are satisfied that at the time of the capture no such intention existed. This brings the vessel and cargo within the exception prescribed by the Secretary. The order does not reach the case. But if the order of the Secretary were unqualified that the property should be released and discharged, the result would be the same. The power of the Secretary to remit forfeitures and penalties is defined and limited by law. The jurisdiction is a special one and he may not transcend it. If he do, his act is void. He has no power to remit in any case of property captured as maritime prize of war. The subject lies wholly beyond the sphere of his authority. The liability of the property is irrespective of the *status domicilii*, guilt or innocence of the owner. If it come from enemy territory, it bears the impress of enemy property. If it belong to a loyal citizen of the country of the captors, it is nevertheless as much liable to condemnation as if owned by a citizen or sub-

ject of the hostile country or by the hostile government itself. The only qualification of these rules is, that where, upon the breaking out of hostilities, or as soon after as possible, the owner escapes with such property as he can take with him, or in good faith thus early removes his property, with the view of putting it beyond the dominion of the hostile power, the property in such cases is exempt from the liability which would otherwise attend it.

Such, with this limitation, is the settled law of this and of all other prize courts.

The case before us, as we view it, has no redeeming feature. It has no claim to the benefit of the exception we have mentioned. The vessel and cargo were properly condemned as enemy property and for breach of the blockade. There is nothing persuasive to a different conclusion.

The decree of the court below is

AFFIRMED.

THE GRAY JACKET

(MOTION.)

As a general rule, where the United States is a party to a cause and is represented by the Attorney-General, or the Assistant Attorney-General, or by special counsel employed by the Attorney-General, no counsel can be heard in opposition on behalf of any other of the departments of the government.

The rule departed from in this instance, the circumstances being special.

THE case of the Gray Jacket, reported on the last preceding pages, was argued partly on one occasion and partly on another, *Mr. Eames*, who spoke for the captors, having been taken suddenly and, as the unfortunate issue proved, fatally ill while addressing the court, and the case having been adjourned in the midst of the argument.

The case being subsequently called with a view of seeing how far counsel were ready to go on, it was mentioned that

Mr. Cushing would appear in behalf of the Treasury Department, to justify the remission, which the preceding report shows had been granted, of the right accrued to the United States and captors *by a decree* of condemnation of the vessel as prize. Some remark being made by the court as to the circumstance that the United States were on the side of the captors while the Treasury Department appeared in an antagonistic position, and a doubt being expressed whether it was quite allowable that the Treasury should thus appear, *Mr. Cushing* referred the matter of his taking part to the pleasure of the court; observing only that he was prepared to speak in support of the act of the Secretary of the Treasury, if desired.

Before the case came to be finally argued in conclusion—

The CHIEF JUSTICE delivered the opinion of the court on this point:

The court has considered the question whether counsel shall be heard in this cause on behalf of the Treasury Department, and has instructed me to say that in causes where the United States is a party, and is represented by the Attorney-General or the Assistant Attorney-General, or special counsel employed by the Attorney-General, no counsel can be heard in opposition on behalf of any other of the departments of the government.

In the present case, however, the argument has doubtless proceeded under the impression at the bar that counsel would be heard on behalf of the Treasury Department, and the court is desirous of all the light that can be derived from the fullest discussion. The counsel for the Treasury Department may be heard, therefore, if he sees fit, on behalf of the claimant, and two hours will be allowed for the argument, without prejudice to the time which remains to the counsel who opened the cause, for reply to the Attorney-General and the counsel for the captors.

Statement of the case.

THE HAMPTON.

1. In proceedings in prize, and under principles of international law, mortgages on vessels captured *jure belli*, are to be treated only as liens, subject to being overridden by the capture, not as *jura in re*, capable of an enforcement superior to the claims of the captors.
2. Neither the act of July 13th, 1861, providing (§ 5) that all goods, &c., coming from a State declared to be in insurrection "into the other parts of the United States," by land or water, shall, together with the vessel conveying the same, be forfeited to the United States; but providing also (§ 8) that the forfeiture may be remitted by the Secretary of the Treasury, &c.; nor the act of March 3, 1863, "to protect the liens upon vessels in certain cases," &c., refers to captures *jure belli;* and neither modifies the law of prize in any respect.

AN act of Congress of July 13, 1861,* passed during the late rebellion, enacted that goods, chattels, wares, and merchandise coming from or going to a State or section in insurrection, by land or water, along with the vessel in which they were, should be forfeited,—but gave the Secretary of the Treasury a right to remit. And another, passed March 3, 1863,† "that in all cases now, or *hereafter* pending, wherein any ship, vessel, or other property shall be condemned in any proceeding, by virtue of the *acts above mentioned*, or of any *other* laws on that subject, the court rendering judgment shall first provide for the payment of *bonâ fide* claims of loyal citizens."

In January, 1863, the schooner Hampton and her cargo were captured by the United States steamer Currituck in Dividing Creek, Virginia, and having been libelled in the Supreme Court for the District of Columbia, were condemned as prize of war. The master of the vessel was her owner, but interposed no claim; nor did any one claim the cargo. One Brinkley, however, appeared and claimed the vessel as mortgagee. The *bona fides* of his mortgage was not disputed; nor that he was a loyal citizen. But it was set up that neither by the laws of war nor under the acts of

* 12 Stat. at Large, 256. † Id. 762.

Congress, could the claim be allowed. After a hearing the claim was dismissed by the court; the question involved, however, being certified by it to this court, as one of difficulty and proper for appeal. The matter was accordingly now here on appeal, taken by Brinkley, from the order dismissing his claim.

Mr. W. S. Waters, for the appellant and in support of the mortgage claim:

The question is, "Does the mortgage as a claim prevail against the forfeiture?" We think it does.

The mortgage is a *jus in re*, and not a mere lien.*

Even then, if the case was unaffected by the act of Congress of March 3, 1863, the mortgage would prevail. This claim was not a secret one. Any fair and open claim existing at the time of capture upon property captured in war is valid, by the law of nations, if the claim amounts to a *jus in re*.†

The forfeiture in this case, however, was really for breach of municipal law, though the condemnation may have been through pleadings in prize. The act of July 13, 1861, was in force when the capture was made, and applicable to the facts of this case and controlled it. The general law of nations, as applicable to the question, was repealed to the extent of the provisions of this statute. Even therefore if, on principles of international law, the mortgage claim would not be allowed, we submit that under the statute of July 13, 1861, it would. For undoubtedly all *municipal* forfeitures are subject to claims such as this when accruing before the act which causes the forfeiture.

But finally, the act of March 3, 1863, is applicable, whatever ground of forfeiture may be assumed. The vessel, it will hardly be denied, was condemned by virtue of laws applicable to the rebellion; and the act provides, that out of

* Conard *v.* Atlantic Ins. Co., 1 Peters, 441–447; Thelusson *v.* Smith, 2 Wheaton, 396.

† The Sally Magee, 3 Wallace, 451; The Tobago, 5 Robinson, 194; The Marianna, 6 Id. 24.

the proceeds of the property so condemned, the claim of any *bonâ fide* loyal citizen of the United States shall be paid.*

Mr. Ashton, Assistant Attorney-General, contra.

Mr. Justice MILLER delivered the opinion of the court.

The decree of condemnation of vessel and cargo stand unaffected, and the only question presented for our decision is, whether appellant is entitled to have the amount of his mortgage paid to him out of the proceeds of the sale of the vessel.

1. The first ground on which appellant relies is, that the mortgage being a *jus in re*, held by an innocent party, is something more than a mere lien, and is protected by the law of nations.

The mortgagee was not in possession in this case, and the real owner who was in possession admits that his vessel was *in delicto* by failing to set up any claim for her. It would require pretty strong authority to induce us to import into the prize courts the strict common law doctrine, which is sometimes applied to the relation of a mortgagee to the property mortgaged. It is certainly much more in accordance with the liberal principles which govern admiralty courts to treat mortgages as the equity courts treat them, as mere securities for the debt for which they are given, and therefore no more than a lien on the property conveyed.

But it is unnecessary to examine this question minutely, because an obvious principle of necessity must forbid a prize court from recognizing the doctrine here contended for. If it were once admitted in these courts, there would be an end of all prize condemnations. As soon as a war was threatened, the owners of vessels and cargoes which might be so situated as to be subject to capture, would only have to raise a sufficient sum of money on them, by *bonâ fide* mortgages, to indemnify them in case of such capture. If the vessel or cargo was seized, the owner need not appear, because he would be indifferent, having the value of his property in his

* See The Sally Magee, 3 Wallace, 451.

hands already. The mortgagee having an honest mortgage which he could establish in a court of prize, would either have the property restored to him, or get the amount of his mortgage out of the proceeds of the sale. The only risk run by enemy vessels or cargoes on the high seas, or by neutrals engaged in an effort to break a blockade, would be the costs and expenses of capture and condemnation, a risk too unimportant to be of any value to a belligerent in reducing his opponent to terms.

A principle which thus abolishes the entire value of prize capture on the high seas, and deprives blockades of all dangers to parties disposed to break them, cannot be recognized as a rule of prize courts.

2. The second ground on which appellant relies is based upon the fact that the vessel was liable to confiscation under the act of Congress of July 13, 1861, and that the act of March 3, 1863, protects his rights in the premises.

This latter statute provides, "that in all cases now or hereafter pending wherein any ship, vessel, or other property shall be condemned in any proceeding, by virtue of the acts above mentioned, or of any other law on that subject, the court rendering the judgment" shall first provide for *bonâ fide* claims of loyal citizens. Although there is nothing in this act, or in its title, to show what the acts above-mentioned were, it may be conceded that the act of July 13, 1861, was one of them. But as the vessel in the case before us was not condemned in any proceeding, by virtue of that act, or of any law on that subject, but was condemned under the international laws of war by which she became lawful prize, it is difficult to perceive how the act of 1863 can have any application to the case. It is certainly not covered by its terms, and we think still less by its provisions.

Congress had, by several statutes, of which the act of July 13th was one, defined certain acts, or conditions growing out of the rebellion, which would render property liable to confiscation to the United States. It became evident that in many of these cases loyal citizens might have rights and interests in such property which justice required to be pro

tected. Hence the passage of the act of March, 1863, and the eighth section of the act of July 13, 1861, the latter of which gives to the Secretary of the Treasury the power of remitting forfeitures and penalties incurred by virtue of that act.

We are quite satisfied that in neither of these provisions did Congress have reference to cases of condemnation as prize *jure belli.*

It is further said that because the vessel in this case was liable to condemnation under the act of July, 1861, although actually condemned under a principle of international law, the court is bound to apply the statute as though she had been condemned in a proceeding under it. We do not see the force of the argument. Both laws are in force. The vessel was liable under both. The government chose to proceed against her under that law which prescribed the harder penalty. Its right to do so seems to us undeniable. The argument to the contrary would enable a person found guilty of a murder committed by burning down the house of his victim, to plead that he should only be sentenced to the penitentiary instead of being hung, because he was guilty of arson in addition to murder. The case of *The Sally** is a direct decision of this court, that a statute creating a municipal forfeiture does not override or displace the law of prize.

We do not deny the full control of Congress over the law of prize as it may be administered in the courts of the United States whenever they choose to exercise it. But in the statutes relied on by appellant in this case, we see no evidence of any intention to modify that law in any respect.

There seems to be no reason to doubt the loyalty of appellant, or the fairness of his debt, and we regret our inability to provide for his claim. But until international treaties, or an act of Congress, shall mark another stage in the meliorations of the rigors of war, we are not at liberty to interpolate a principle which would tend so materially to destroy the right of prize capture in time of war.

DECREE AFFIRMED.

* 8 Crauch, 382

Syllabus.

THE WILLIAM BAGALEY.

1. Personal property left in a hostile country by an owner who abandons such country in order to go to the other belligerent, and so to return to his proper allegiance and soil, becomes, unless an effort is made with promptitude to remove it from such country, impressed with its character, and as such liable to the consequences attaching to enemy's property.
2. The presumption of the law of nations is against an owner who suffers such property to continue in the hostile country for much length of time.
3. The effect of war is to dissolve a partnership subsisting between citizens of nations at war; and if the person abandoning the hostile country, have had his property in partnership with citizens of the enemy country, it is his duty to dispose of, and withdraw his interest in the firm. If he do not, such interest is subject to the rule above stated with regard to individual property.
4. Ships in time of war are bound by the character impressed upon them by the government from which their documents issue and under whose flag and pass they sail. The share of a citizen in a ship sailing under an enemy's flag and papers, and who has had ample time and every facility to withdraw his effects from the enemy country, or dispose of such interests as could not be removed, but who has not attempted so to withdraw or dispose of them, is accordingly subject to capture and condemnation equally with the shares of enemies in the same ship. And where the cargo and ship are owned by the same person, the cargo follows the fate of the ship.
5. During the late rebellion, a loyal citizen domiciled at the time it broke out in one of the rebellious States, and trading there as a member of a commercial firm, abandoned it and removed to a loyal State. He never in any way aided or abetted the rebellion, but there was no evidence that he ever attempted or desired to withdraw his property from the rebellious region. In a year, more or less, after the rebellion broke out, the rebel authorities professed by one of their decrees to confiscate his interest in the firm; and the partners resident in the rebellious States—*he* having no connection with or knowledge of their action—loaded a ship which he alleged belonged to his firm when he left it, and which, in attempting, under papers, flag, officers, and crew of the Confederate States, to run the blockade established by the United States, two years before, of the Southern coast, was captured by a Federal cruiser.

Held, that so much time having elapsed after the proclamation and before the confiscation and the capture, without effort on the part of the loyal owner to get it away from the rebellious region, his share in vessel and cargo was rightly condemned with the shares of the partners in rebel-

lion; that the alleged confiscation was no excuse for his not having previously made an effort to withdraw or dispose of his interest in the firm and that neither his loyal domicil during the rebellion, nor, under the circumstances, the confiscation, nor his want of connection with or knowledge of the enterprise, nor all combined, defeated the right of the captors.

6. In proceedings in prize, parties who were not in any way parties to the litigation in the District Court, and are neither appellants nor appellees, cannot come into this court and be heard as "intervenors."

APPEAL from the District Court for the Eastern District of Louisiana.

The steamer William Bagaley,—with a register issued at Mobile, June 16, 1863, under the authority of the "Confederate States," and reciting a previous enrolment in 1857 and a present ownership,—"property having changed,"—by Waring and others ("citizens of the Confederate States" and "trustees of association of stockholders)," with a master appointed by these trustees, and bearing the Confederate flag,—sailed from Mobile, July 17, 1863, during the blockade of that port, proclaimed April 19, 1861, by the United States, for Havana. Her cargo was of cotton, turpentine, &c. No papers were on board, for "fear of being captured." The "cotton was shipped for the benefit of the owners in Mobile." All the officers and crew were, with one exception, "citizens of the Confederate States." The master had instructions to escape the blockading vessels, but not to resist.

Being perceived by the blockading squadron, she was pursued, and, after a brisk chase, captured. Being brought into New Orleans and libelled for condemnation, a claim for one-sixth of the vessel and cargo was interposed by Joshua Bragdon, and of this sixth he prayed restitution.

The facts upon which he grounded his claim were, that he was, and for many years had been, a resident of the State of Indiana, a loyal State; that the firm of Cox, Brainerd & Co., of Mobile, Alabama, a rebel State, were the sole owners of the captured vessel and her cargo, of which firm the claimant had been for several years a member, and owned one-sixth interest in all the property of the copartnership, which in-

terest he had never in any way transferred. That he was, and always had been, a true and loyal citizen of the United States, and that he had never, in any way, aided or abeted the rebellion, and after the breaking out of the same had never exercised any act of ownership or control over the property or the captured steamer, and that he had no connection with, or knowledge of, the unlawful voyage of the steamer which occasioned her capture. That in consequence of his loyalty, the so-called Confederate government seized all his interest and property in said firm of Cox, Brainerd & Co., and by a decree and process of one of her pretended courts, "at some time during the year 1862,—the exact date not known,"—confiscated the same. That all such acts and proceedings of the insurrectionary government were void, and that the title of the claimant to his property remains unimpaired.

On the trial these facts were admitted of record by the District Attorney as true. The court dismissed the claim with costs, and condemned both vessel and cargo.

No other claim having been interposed in the proceedings in the lower court for any portion of the captured property or its proceeds, the only question presented by the appeal was the legal sufficiency and merit of the claim of Bragdon for his one-sixth.

After the case came into this court by appeal, however, the owners of the remaining five-sixths filed a petition asking to intervene for *their* interests. Their excuse for not appearing or putting in any claim in the District Court, it may be here stated, was, that they were residents of a State hostile to the United States, and had therefore no standing in that court; that this disability continued till after the case was removed into this court by appeal. And they set up, as reason for the restitution of their shares to them, that since the appeal they had received from the President "a full pardon and amnesty for all offences by them committed arising from participation, direct or implied, in the said rebellion."

Argument in support of the claim.

Messrs. Henry Crawford, S. S. Cox, and J. J. Lewis, for the appellants and for the petitioners:

There is no dispute about the facts. The case is to be taken as a special verdict or case agreed on and stated.

I. We have, then, a question of good prize or lawful property—a contest between the government and a citizen, whom she admits to have been unshaken in his allegiance during a long rebellion, as to the right of the former to forfeit his property, or her duty to restore the same upon his application.

If the United States has warrant as against the admitted rightful owner to forfeit this property as good prize, it can only be on account of the commission of some offence against the law of nations. There are only two such offences which can be relative to the present case. We will treat them in their order.

1. *The claimant's property in vessel and cargo cannot be forfeited as enemy's property.*

To justify condemnation of property for such reason it is necessary to establish (*a*) the domicil of the owner in the enemy's country, or (*b*) the employment of the property, either actually or constructively, by him in illegal trade with the enemy.

(*a*) Since it is not the place where a thing is, which determines the nature of that thing, but the character of the person to whom it belongs, the general principle upon the subject has always been, that the domicil of the party is the true test of national character and determines the nature of property.* And so the property of one resident in the enemy's territory is *res hostilis*, and the lawful subject of maritime capture.†

The question presented by this claim cannot be injuriously affected by the principle thus announced. The claimant here was not domiciled on the south side of what Grier, J.,‡ calls "the boundary marked by lines of bayonets, which can be

* The Emanuel, 1 Robinson, 296; Upton's Laws of War, 113, 150.

† The Venus, 8 Cranch, 253; The Hoop, 1 Robinson, 196.

‡ Prize Cases, 2 Black, 635.

crossed only by force;" nor had he at any time been "a citizen or subject of any State or district in insurrection against the United States;" but, on the contrary, as the government admits, was, and long had been, a resident loyal citizen of the State of Indiana.

(*b*) The other criterion of "enemy's property" is equally powerless to work a forfeiture. That test is thus defined by an eminent writer: "All the property of enemies found afloat, and all property of citizens or subjects conducting themselves as belligerents, may be lawfully captured."*

This rule has been applied in such a multitude of cases that a cursory reference to the language employed by courts cannot fail to give a correct appreciation of its true meaning and limitation. In the leading case of *The Rapid*,† it is said:

"A citizen or ally may be engaged in a hostile trade, and thereby involve his property in the fate of those in whose cause he embarks."

Again, in another case:

"He incorporated himself into the permanent interests of the enemy."‡

In a third case, Sir William Scott says:

"By intendment of law, all property condemned is the property of enemies; that is, of persons so to be considered in the particular transaction."§

Text-writers proceed in the same way:

"He who clings to the profits of a hostile connection must be content to bear its losses also."‖

Story, J., thus speaks:

"When a person is engaged in the commerce of the enemy

* Phillimore, International Law, vol. 3, § 345.
† 8 Cranch, 155.
‡ Thirty Hogsheads of Sugar *v.* Boyle, 9 Cranch, 191.
§ The Elsebe, 5 Robinson, 172.
‖ Upton's Maritime War, 110; 1 Kent's Commentaries, 82.

upon the same footing and with the same advantages as native resident subjects, his property employed in such trade is deemed incorporated in the general business of that country, and subject to confiscation, be his residence where it may."*

In the case of navigating under the pass or flag of the enemy, the party who uses them "is not at liberty," it is said in *The Fortuna Verissimo*, "when they turn to his disadvantage, to deny the character which he has worn for his own benefit."†

All these instances,—sailing under the enemy's pass or flag; breach of blockade; carriage of contraband; establishment or continuance of a house of trade in the enemy's country; illegal traffic with the enemy,—are cases of a *criminal voluntary adoption of the enemy character* by the citizen, odious violations of his duty to his government; and justice requires that all his ventures so employed be the rightful subjects of capture and condemnation as enemies' property.

The application of this principle to the facts of the case at bar is not difficult. The claimant never was, at any time, within the insurrectionary lines; he had no dominion over his property after the inception of the rebellion, and he had no participation in, connection with, or knowledge of, the transaction of his former copartners.

Instead, therefore, of the claimant's involving his property by "embarking in the cause" of the rebellion, within the meaning of the rule as laid down in *The Rapid*, he maintained his loyalty with such firmness that the rebel government confiscated his property as that of an alien enemy. He did not in any manner "incorporate himself into the permanent interest of the enemy." He is not seeking, as was the claimant in *The Fortuna Verissimo*, "to deny the character which he has worn for his own benefit," but he is striving

* San Jose Indiano, 2 Gallison, 268; and see Maisonaire *v.* Keating, Id. 338; and The Friendschaft, 4 Wheaton, 105.

† 1 Dodson, 87; and see The Success, Id. 131; The Hiram, 1 Wheaton, 440; The Vigilantia, 1 Robinson, 13.

to maintain, as best he may, the character of a consistently loyal citizen. Other than this he has neither sought nor worn. He has not been, in the language of Judge Story, "engaged in the commerce of the enemy, upon the same footing, and with the same advantages, as resident subjects," nor upon any footing or terms whatever. From the commencement of the rebellion, he stood aloof from his rebellious associates; he maintained his proper fealty; he turned his back upon his property situated within the control of the insurrectionary forces, trusting in the power of the government to reassert its supremacy, and in its honor to restore. He has "not clung to, nor received the profits of, any hostile connection," but in thought and act has remained true to his obligations as a citizen. He has not, in any manner, "conducted himself as a belligerent."

2. *The claimant's property cannot be decreed good prize for any breach of blockade, unless the offence was committed in his interest and in person or by agent.*

The breach of blockade is viewed in all cases as a criminal act. This necessarily implies a criminal intent, and, of course, a knowledge of the existence of the blockade and the determination to violate it.*

The books bear testimony to the frequency with which the courts have enforced this discrimination between those who are wholly innocent, and those who are tainted with the corrupt design, and commit the overt act: the property of the one being restored, while full forfeiture is visited upon the latter. No doubt, it is a presumption of the law of prize, that a breach of blockade is committed in the interest of the cargo; and hence, *prima facie*, both vessel and cargo are subject to condemnation. Still if it be admitted that the owners of the cargo stood clear from even a possible intention of fraud, their property will be excepted from the penal consequence.†

The leading authorities upon this point will be found col-

* The Betsy, 1 Robinson, 92; The Nancy, 1 Acton, 59.

† United States *v.* Guillem, 11 Howard, 62; The Exchange, 1 Edwards, 43; The Neptunus, 3 Robinson, 173; The Adonis, 5 Id. 228.

lated in *United States* v. *Guillem*, in this court.* There the vessel had been guilty of an undoubted violation of the law and was condemned accordingly, but upon the intervention of an innocent owner of a portion of the cargo, it was holden, that "if the owner can show that he did not participate in the offence, his property is not liable to forfeiture."

It is notable, also, how indulgently the courts construe the law in certain cases in favor of the personally innocent, even as against the wilful action of their agents. As when orders have been given for goods prior to the existence of a blockade, and it appears that there was not time for countermanding the shipment afterwards, the courts hold that the owner of the cargo is not responsible for the act of his enemy agent, who might have an interest in sending off the goods, in direct opposition to the interests of his principal.† Under similar circumstances‡ the cargo of an innocent neutral was restored; Sir William Scott saying:

"The rule that a principal is bound by the acts of his agent is obviously too rigid to be applied to a case where it is the interest of the agent to get the goods off, and run the risk of capture, while the principal is wholly innocent of the risk."

This broad distinction between guilty property which may be, and the goods of innocent owners which cannot be forfeited, is recognized throughout all the administration of the law of prize. The case of the carriage of contraband furnishes an illustration. Formerly, under a less refined dispensation of the international code, the presence of contraband articles worked a forfeiture of the ship, but this too rigid rule has been relaxed in modern times to a forfeiture of freight and expenses only, save in aggravated cases, or when the contraband articles belong to the owner of the vessel.§ To escape from the contagion of contraband, the in-

* 11 Howard, 62. † The Exchange, 1 Edwards, 39.

‡ The Neptunus, 3 Robinson, 173; and see The Adelaide, 3 Id. 281.

§ The Mercurius, 1 Robinson, 288; The Jonge Tobias, Id. 329; The Franklin, 3 Id. 217

nocent articles must belong to a different owner,* for the penalty of forfeiture extends only to all the property of the same owner involved in the same unlawful transaction.†

The distinction is also approved in the case of carriage of despatches, which works a forfeiture of the ship which conveys them, and *ob continentiam delicti* of the cargo *if they belong to the same owner.*‡

Also, in the case of the carriage of enemy's goods in the ship of a neutral, when although the specific property is subject to capture, the lien of the neutral for his freight cannot be divested or forfeited.§

While the accepted doctrine is, that a deliberate and continued resistance to search is followed by the legal consequence of forfeiture, this consequence cannot be visited upon the cargo when the owner is innocent of any participation in the unlawful resistance.‖

Determined by these tests the interest of the claimant is obviously beyond the reach of forfeiture. He comes fairly within the exception stated in *United States* v. *Guillem*, as "he did not participate in the offence."

There is, however, another principle touching the law of blockade, borrowed from the general admiralty practice, and of frequent application. Recognizing the full force of the maxim *qui facit per alium facit per se*, the law of nations holds the owners of vessels to be accountable for the acts of those to whom they have intrusted the vessel, and in such cases decrees forfeitures or awards restitution of the owner's property according to the criminal or lawful conduct of their agents.

Phillimore thus notices the doctrine of agency :¶

"It is a general rule that ship and cargo are both confiscated

* The Staadt Embden, 1 Id. 26; Halleck's International Law, 573.

† 3 Phillimore's International Law, 372; The Floreat Commercium, 3 Robinson, 178; The Sarah Christina, 1 Id. 242.

‡ The Atalanta, 6 Id. 460.

§ The Frances, 8 Cranch, 418; The Marianna, 6 Robinson, 25.

‖ The Nereide, 9 Cranch, 388.

¶ 3 International Law, 306.

for a breach of blockade, but then an important distinction must be taken, viz., whether the owners of the cargo are, or are not identical with the owners of the ship. If they are not, the cargo is not confiscable, unless, before the goods were shipped, the owners were, or ought to have been, apprised of the existence of the blockade, or *unless it be shown that under the circumstances the act of the master personally binds them.*"

Sir William Scott in judicial decision holds similar language:*

"In a case of breach of blockade, in order to make the conduct of the vessel affect the cargo, it is necessary that the owners were or might have been cognizant, or *to show that the act of the master of the ship personally binds them.* The master is the agent of the owners of the vessel, and can bind them by his contracts or misconduct, but he is not the agent of the owners of the cargo unless specially so constituted."

The reason for this rule of the owner's liability for his agent's conduct, is thus stated in one case by that great judge:†

"If the owner of the ship will place his property under the absolute management and control of persons who are capable of lending it to be made an instrument of fraud in the hands of the enemy, he must sustain the consequences of such misconduct on the part of his agent."

And elsewhere,‡ thus:

"Owners of cargo must answer to the country imposing the blockade, *for the acts of the persons employed by them.*"

So again, in the case of *The Columbia.*§

"This vessel came from America, as appears, with innocent

* The Mercurius, 1 Robinson, 82; and see The Mary, 9 Cranch, 126; The Neptunus, 3 Robinson, 173.

† The Ranger, 6 Id. 126. ‡ The James Cook, 1 Edwards, 261.

§ 1 Robinson, 154; and see The Calypso, 2 Id. 161.

intentions on the part of her American owners, for it was not known in America that Amsterdam was blockaded, and therefore there is no proof immediately affecting the owners. But a person *may be* penally affected by the misconduct of his agent as well as by his own acts; and *if he delegated general powers to others and they misuse their trust*, his remedy must be against them."

It is safe to assume that the authorities cited above, establish that no forfeiture can be incurred unless the offence was committed by some agent appointed by the owner, and touching the identical property intrusted to his care. If this be correct, it follows that the government fails to make out any case against the property of this appellant. It will be remembered that she admits, not only that he was personally innocent of all wrongful practices, but that since the beginning of the rebellion, he, "in no way exercised any act of ownership or control over his property, and that he had no connection with or knowledge of the unlawful conduct and voyage of the vessel, for which she was condemned as prize." He had appointed no agents; no one was upon the vessel representing or pretending to represent him, or whose wrongful conduct could in the estimation of a wise and just code be justly imputed to him. Neither was the voyage planned or prosecuted in his interest, for his rebellious copartners had the exclusive control of the property, while his interest was attempted to be divested by the rebellious government, and no matter how remunerative the illegal voyage might have proven if successful, it stands upon the record that "the claimant had no connection with or knowledge" of it. He had "employed" no one; "had constituted no one master," and so far as his property was concerned, their possession and use of it was wrongful as to him, for he had not intrusted it "to any one." Since the relation of principal and agent did not exist between him and any one on board the vessel, it is simply impossible, under the authorities quoted, and the evident justice and reason of the thing, that the claimant should be clothed with great responsibilities, and visited with heavy forfeiture for the conduct

of those, in whom he has reposed no authority whatever, to whom he had intrusted no property, and whose every action was utterly beyond his control, and in direct denial of his rights.

So far as concerns Bragdon's interest in this property he was clothed by law with both the right of property and the right of possession, while his copartners had the naked possession of his interest without right, and under the decree of a false court, whose authority cannot for a moment be recognized. It would be preposterous to contend, that for the deeds of persons guiltily in the possession of property, the true and innocent owner is to be held responsible. "Possession and use," says this court in the early case of *The Resolution*,* "ought upon a question of property to have the same influence in courts of admiralty as in courts of common law. It ought to be considered as a good title and as conclusive upon all mankind *except the right owner*. If the papers affirm the ship and cargo to be the property of an enemy, there must be a condemnation, unless those who contest the capture can produce clear and unquestionable evidence to the contrary."

"Upon a piratical capture," it declared in the later case of *The Josefa Segunda*,† "the property of the original owners cannot be forfeited for the misconduct of the captors in violating the municipal laws of the country where the vessel seized by them is carried."

An English case in point with the present, is *The Vriendschap*,‡ where a British ship having been captured by the enemy, was again captured by a British cruiser for a flagrant breach of blockade by a neutral in possession; but the court adhering to the doctrine above quoted, ruled that the illegal acts of those illegally in possession did not divest the title of the rightful owner, and awarded restitution upon his intervening in the proceedings for condemnation.

If an opposite doctrine was conceded, no case could ever

* 2 Dallas, 1. † 5 Wheaton, 338. ‡ 6 Robinson, 38

occur in which restitution could be awarded, and the *jus postliminii* would remain to the mockery of the citizen an unmeaning fiction of the law.

3. *The fact that the claimant owns only a portion of the captured property instead of the whole, will not exclude him from the protection of the legal principles above established.*

Courts discriminate between the guilty and innocent coowners of the same property, restoring one portion to the citizen and forfeiting the other as the property of enemies and subject to capture.

The exact case is thus put by Sir William Scott, in *The Jonge Tobias.**

"Formerly, according to the old practice, the carriage of contraband worked a forfeiture of the ship, but in later times the rule has been relaxed to the forfeiture of the ship only when owned by the same person. *If he owns a share of the vessel, his share only will be condemned.*"

In Graham's claim,† Judge Story decides:

"I hold this shipment to be on joint account. I therefore hold William Graham as entitled to one-third part of the present shipment, and as he is a domiciled British merchant I condemn it as lawful prize to the captors. The other two-thirds belonging to citizens, I order to be restored."

In another instance,‡ when a cargo was shipped from Malaga to St. Petersburg in an English vessel, by a Spanish house on joint account with a London firm, the same judge held, that while the share of the enemy was good prize, the interest of the neutral Spanish house could not be subjected to condemnation.

In *The San Jose Indiano and Cargo*, partners' interests were distinguished, the enemy's interests being condemned and citizens' restored, in divers instances.§

It remains to direct the attention of the court to certain

* 1 Robinson, 329.

† 1 Gallison, 618.

‡ The Betsy, 2 Id. 210.

§ 2 Id. 284, 298, 300, 301, 303, 304, 305.

other rules of the international code, which authorize and require its restoration.

4. *The claimant having established an indefeasible legal title to this property, was entitled, as soon as it was rescued from the enemy, and came within the dominion of the United States, to full restitution thereof.*

The record shows, that long prior to the rebellion, the claimant was the owner of this property. That being within the insurrectionary district, he exercised no control over it, and it was continually within the rebellious territory and under the exclusive authority of rebellious citizens. That in the year 1862, the so-called Confederate government seized his property *jure belli*, and undertook to extinguish the title of the claimant, by a condemnation and sale. A new register appears to have been taken out after the sale, "property having changed." Then follows the capture by our cruisers.

There is then property; an illegal capture by a government neither *de facto* nor *de jure*, but only a rank usurpation; an illegal and void condemnation and sale, and then a restoration of the property to the power of the country of the rightful owner. It being conceded that no taint of fraud or disloyalty can be imputed to the claimant, it would seem to be a proposition almost too plain for argument, that the title of the original proprietor has not been divested by any of these transactions. That the seizure of his property by the insurgent government was illegal and criminal, and that the sentence of condemnation and the proceedings subsequent thereto, were without the semblance of authority and void, are statements which it were idle to elaborate.

The obligation of the government under such a state of affairs, is clearly defined by the French writer Vattel:*

"The sovereign is bound to protect the persons and property of his subjects, and to defend them against the enemy. When, therefore, a subject or any part of his property has fallen into the enemy's possession, should any fortunate event bring them

* Page 385, 391.

again into the sovereign's power, it is undoubtedly his duty to restore them to their former condition, to re-establish the persons in all their rights and obligations, to give back their effects to the owners, in a word, to replace everything on the same footing on which it stood previous to the enemy's capture."

Our American author Halleck* redeclares the same thing:

"This right of postliminy is founded upon the duty of every state to protect the persons and property of its citizens against the operations of the enemy. When, therefore, a subject is rescued by the state or its agents he is restored to his former rights and condition under his own state, for his relations to his own country are not changed, either by the capture or the rescue. So of the property of the subject recaptured from the enemy by the state or its agents, it is no more the property of the state than it was before it fell into the hands of the enemy. It must therefore be restored to its former owner."

This doctrine was recognized many years ago in England.†

When a British ship had been captured by the French, condemned as prize and fitted out by them as a vessel of war, and was then recaptured by a British cruiser, it was held that a British subject had always a right, not barred by any given duration of time, to restitution of his property.‡

During the war of the rebellion, this right of the citizen to his property and the obligation of the government to restore, have been conceded and enforced and restitution awarded to the true owners.§

* International Law, 866, § 2; and see, The Acteon, 2 Dodson, 48.

† Woodward *v.* Larking, 3 Espinasse, 286.

‡ The Renard, Hay & Marriott, 222; and see, the Vriendschap, 6 Robinson, 38.

§ The Mary Alice; The H. C. Brooks; Lizzie Weston, M. S. Decisions of South. Dist. of New York; Claims of Lear & Sons and Irvin & Co., approved and allowed.

Outside the doctrine of postliminy, which rests upon its own peculiar principles, the courts of admiralty have been diligent in restoring property in all cases where the original owner's title has not been lawfully divested, and it is now a doctrine of universal acceptance, that the original title must prevail, unless the property was captured by a lawful enemy, in a lawful manner, and a sentence of condemnation by a competent court has intervened.

It is not essential for the operation of this rule that the capture should be piratical. "A capture, though not piratical, may be illegal and of such a nature as to induce the court to award restitution."* If property be retaken from a captor clothed with a lawful commission, but not an enemy, it must be restored. For the act of taking being a wrongful act could not change the property. And so our courts have invariably decided that where a capture is made of the property of the subjects of a nation in amity with the United States, by a vessel, built, owned, equipped, and armed in the United States, it is illegal, and if the property is brought within the jurisdiction of this country, it will be restored to the original owner.†

The absence of a valid sentence of condemnation is considered equally fatal as an illegal capture.

If a neutral state seize and sell the vessel, there being no sentence of condemnation, the title is not changed.‡

Where a British ship had been captured, carried into Norway, and condemned before a French consul, it was held that the sentence was invalid, and the property should be restored.§ A case is cited at the end of *Assievedo* v. *Cambridge*, in 1695, reported by Lucas,‖ where restitution was decreed after a long adverse possession, two sales, and several voyages.

* Talbot *v.* Janson, 3 Dallas, 133.

† La Conception, 6 Wheaton, 235; The Arrogante Barcelones, 7 Id. 496; The Santa Maria, 7 Id. 490; The Monte Allegre, 7 Id. 520; The Fanny, 10 Id. 658; The Bello Corrunes, 6 Id. 152; The Vrow Anna Catharina, 5 Robinson, 20.

‡ Wilson *v.* Forster, 6 Taunton, 25.

§ The Kierlighett, 3 Robinson, 99.

‖ 10 Modern, 77.

Inasmuch as in the case at bar, the original seizure by the insurgents was unlawful, and the sentence of condemnation utterly invalid, the application of these authorities is obvious. Upon the general doctrine of restitution, the reasoning of this court in *The Resolution* is very appropriate:

"All the authorities cited on cases of capture authorized by the rights of war are where the property captured was the property of an enemy. Not an instance has been produced where a capture not authorized by the rights of war has been held to change the property. To say that a capture which is out of the sanction and protection of the rights of war can nevertheless derive a validity from the rights of war, is surely a contradiction in terms. The rights of war can only take place among enemies, and therefore a capture can give no right unless the property captured be the property of an enemy."

5. *The object of the war against rebellion as prosecuted by the government, and its policy repeatedly declared by the legislative and executive departments and followed by the judiciary, require the restoration of this property.*

By the rebellion of 1861, it "became necessary," "for the general government to vindicate by arms its own rights and the rights of its citizens."

These words comprehend in and of themselves the whole scope and object of the war of self-defence in which the nation has been engaged for the past few years.

Congress resolved early in the struggle that the war was not waged for conquest or oppression, but "to defend and maintain the supremacy of the Constitution, and to preserve the Union."*

By the acts of July 13, 1861, and July 29, 1861, to provide for the suppression of the rebellion, and under the authority of which the war has been mainly carried on, it is enacted that whenever it becomes impracticable to enforce the laws of the United States by the ordinary course of judicial proceedings, it shall be lawful to call out the militia,

* Mr. Crittenden's resolution, July, 1861.

and employ the army and navy "*to enforce the faithful execution of the laws, and suppress such rebellion.*"

The President says, in his proclamation of September 22, 1862:

"I do hereby proclaim and declare that hereafter as heretofore, the war will be prosecuted for the object of practically restoring the constitutional relation between the United States and each of the States and people thereof, in which State that relation is or may be disturbed."

These declarations of the object of the war have been followed by the courts. "The war, so far as the government has been an actor," says Betts, J., in *The Hiawatha*, "has been defensive, and in protection of the existence and property of the government, and the welfare of its citizens." "In a civil war," says Sprague, J., in *The Amy Warwick*, "the military power is called in only to maintain the government in the exercise of its legitimate civil authority."

But, while the object of the war was thus clearly defined, the condition of affairs was so anomalous, the contest of such gigantic size, and extended over such a vast territory, that any measures which the government might take to defend its existence and restore its supremacy, would necessarily affect the deserving,—the loyal as well as the disloyal.

It is instructive, however, to note with what jealous care Congress and the Executive so ordered and wielded the belligerent power of the nation, that while it was a weapon against treason, it was as far as possible a shield for the loyal and the oppressed. Whiting* says upon this subject:

"The President having adopted the policy of protecting loyal citizens, wherever they may be found, all seizure of their property and all interference with them have been forborne."

The President, in his proclamation of September 22, 1862, declares:

"The Executive will in due time recommend that all loyal

* War Powers, 59.

persons shall be compensated for all losses they may have incurred by acts of the United States."

The letters of Admiral Porter to the Secretary of the Navy, of May 11 and 31, 1864, touching the Red River cotton, and the proclamation of General Butler* on taking possession of New Orleans, are but reiterations of the general policy of the government.

By legislation in every form, the legislative department of the nation has recognized the same distinction and provided for the protection of all who have in fact maintained their allegiance.

Section 1, of the act of August 6, 1861, "to confiscate property used for insurrectionary purposes," enacts that if any person shall knowingly use his property, or suffer it to be used in aiding, abetting, or promoting the insurrection, such property shall be the lawful subject of prize and capture.

The act of July 31, 1861, appropriates two millions of dollars to purchase arms "to place in the hands of the loyal citizens residing in any of the States, of which the inhabitants are in rebellion against the government of the United States."

Section 9, of the act amending an act regulating commercial intercourse, July 2, 1864, prohibits all further intercourse "except to supply the necessities of loyal persons residing in the insurrectionary States."

Section 3 of the act to provide for the collection of abandoned property, March 3, 1863, ch. 120, provides, that when the property of any one resident in the seceded States has been seized and sold by virtue of the act, the owner may go before the Court of Claims within two years after the suppression of the rebellion, and, upon proof of his loyalty, will be entitled to receive the proceeds arising from the sale of his property.

Section 7 of the Confiscation Act, July 17, 1862, enacts that "if said property shall be found to have belonged to a

* See 2 Wallace, 264.

person engaged in rebellion, or who has given aid or comfort thereto, the same shall be condemned as enemy's property."

An act to protect certain liens, March 3, 1863, provides that if any loyal citizen holds a lien upon any vessel or other property, that the same shall be preferred to the claim of the government for condemnation.

Section 7 of the act regulating the collection of direct taxes in insurrectionary districts, allows any loyal citizen having a lien upon any real estate which has been sold for taxes to redeem the same. February 6, 1863.

It would seem, therefore, from the testimony of these measures, that both the executive and legislative branches of the government have declared the settled policy of the nation to be, that no forfeitures shall be inflicted in this war on any but the rebellious, and that under all contingencies the truly loyal citizens South and North shall be protected and secured in the enjoyment of their rights of person and of property. To put any other construction upon these enactments and the general conduct of the war, would be to shut our eyes against their obvious and accepted meaning. Such policy is in recognition of the obligations which a just government owes to its faithful citizens, and may well be called *the policy of justice.*

The policy of magnanimity pursued by the government to its rebellious citizens is embraced in the proclamations of protection, amnesties, pardons, and restorations to property and privileges, which are familiar to all, and are in strict conformity with the declared object of the war. Touching the latter, this court, in the late case of *The Venice,** has approvingly said:

"The same policy may be inferred from the conduct of the war. Wherever the national troops have re-established order under national rule, the rights of persons and property have been in general respected and enforced. Officer Farragut and General Butler expressed in proclamation the general policy of

* 2 Wallace, 274.

the government. Both were the manifestation of a general purpose which seeks the establishment of the national authority, and the ultimate restoration of States and citizens to their national relations under better forms and firmer guarantees, without any views of subjugation by conquest."

Keeping in view the declared object of this war, how is it possible to say that the condemnation of the property of a loyal citizen of a loyal State is a warrantable exercise of belligerent right; that it would conduce in the remotest degree to the accomplishment of the desired end? For any such purpose it would be wholly impotent. Contributing nothing to "the reparation of injury, the re-establishment of right, and the restoration of order," such action on the part of government would of itself be an injury to the citizen, a palpable denial of his common and constitutional right, and the sure promoter of disorder and discontent. Against any such forfeiture the government has deliberately set its face. She has pledged herself to her loyal citizens in every form by which a government can express its deliberate purpose,—by legislative enactments, executive proclamations, judicial decisions, the consistent management of war,—that this conflict has been waged for the protection, and not the destruction, of those rights. This claimant alike with every other true citizen has the right to demand, as he does now demand, that the government shall make good her pledges by according to him the full measure of his rights.

II. *As to the remaining owners, now petitioners in this court.*

Though ordinarily an appellate court receives no evidence which was not presented on the hearing in the court below, in all admiralty causes the rule is different. The case, when an appeal is taken and perfected, is heard *de novo*, and there is no final decree till the appellate court has acted and determined by *decree* the rights of the claimants to the fund.*

In the case of *The Schooner Pinkney*, the vessel was condemned in the District Court for violation of the act of Con-

* Boone *v.* Chiles, 10 Peters, 177; United States *v.* Schooner Peggy, 1 Cranch, 103.

gress prohibiting commercial intercourse with certain parts of the Island of St. Domingo. An appeal was taken first to the Circuit Court, and afterwards to this court. Pending the last appeal the act expired by its own limitation. In delivering judgment, Chief Justice Marshall says:

"The majority of the court is clearly of opinion that in admiralty cases *an appeal suspends the sentence altogether*, and that it is not *res adjudicata* until the final sentence of the appellate court is pronounced. The cause in the appellate court is to be heard *de novo*, as if no sentence had been passed. This has been the uniform practice, not only in cases of appeal from the District to the Circuit Court of the United States, but in this court also. In prize causes the principle has never been disputed."*

In *The Venus*, a prize case, the court says, "The cause is before us as if in the inferior court."

Under this rule it is allowable to allege and prove what was not alleged or proved in the court below.†

And, until a decree has been actually made, the court is bound to consider every claim against the fund in court.‡

The case stands, therefore, upon the same footing as though the condemnation had not been decreed in the District Court; and the question presented is, whether this court, having a grasp upon the fund, and being called on to make distribution, will not, sitting in admiralty as in equity, make an order of distribution as justice and equity shall appear to require.

The rights of these claimants, as distributees, depend on the force and effect of the several pardons granted them by the President. [The counsel then went into a consideration of the effect of the pardons.]

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* Yeaton *v.* United States, 5 Cranch, 281. And see Penhallow *v.* Doane, 3 Dallas, 87, 119; United States *v.* Preston, 3 Peters, 57.

† Malley Shattuck, 3 Cranch, 458; Brig James Wells, 7 Id. 22; The Clarissa Claiborne, Id. 107; The Samuel, 1 Wheaton, 9, 112; The Marianna Flora, 11 Id. 1; The Sally Magee, 3 Wallace, 459.

‡ Constancia, 10 Jurist, 849.

Mr. Ashton, Assistant Attorney-General, contra:

I. *As to the claim of Bragdon for the one-sixth.*

Giving the fullest effect to the case as stated by the claimant, it is, on its face, a case of enemy property and breach of blockade.

1. The partnership of Cox, Brainard & Co., of which the claimant was a member, was established and *domiciled* in the enemy country.*

2. Such a partnership is, by the law of war, treated throughout as a *hostile establishment*, and the whole partnership property is liable to capture and condemnation as enemy's property, notwithstanding one or more of the partners may be domiciled in a neutral country; *à fortiori*, if some of the partners are domiciled in one of the hostile countries and the rest in the other, the partnership is hostile, and the partners are also personally enemies.†

3. The courts of prize, in the language of Lord Stowell, in *The Vrow Elizabeth*,‡ regard vessels as having "a peculiar character impressed upon them by the special nature of their documents, and they have always been held to the character with which they are so invested to the exclusion of any claims of interest that persons living in neutral countries may actually have in them."

During the war with Russia, Dr. Lushington, in England, had occasion to consider and apply the doctrine enunciated in *The Vrow Elizabeth*, in the cases of two vessels, *The Primus* and *The Industrie*, under the Russian flag, portions of which belonged to Russian subjects, the other shares being owned by neutral Danes.§ These cases both occurred at the beginning of hostilities, and the neutral part-owners were *bonâ fide* entitled to their shares at a period antecedent to the war and up to the time of seizure.

* The San José Indiano, 2 Gallison, 286.

† The Friendschaft, 4 Wheaton, 107; The Antonia Johonna, 1 Id. 167; The Franklin, 6 Robinson, 127.

‡ 5 Robinson, 11.

§ The Primus, 29 English Law and Equity, 589; The Industrie, 33 Id 573.

He held that the claims were not maintainable, and that the neutral as well as the hostile shares were confiscable; that the flag and pass are binding on all persons having property in the ship; that whoever embarks his property in shares of a ship is bound by the character of that ship, *whatever it may happen to be;* that where a vessel is sailing under a neutral flag, the captors may show that the property is not neutral, but part of it belongs to an enemy, and in that case you divide it and condemn the part which is hostile, and not that part which is neutral; and that the proposition is not true *vice versa*, that where a vessel is sailing under a *hostile flag* you can claim on behalf of the neutral the property under an enemy's flag; and that no distinction could be made between the flag being adopted prior to the commencement of hostilities, and when there was no reason to suppose that hostilities would have taken place, and the flag being adopted *flagrante bello.*

These two cases were cases of *part-owners*, whereas the present case is one of alleged ownership by a *partnership*, to which the doctrines just stated are, *à fortiori*, applicable.

4. This court has in recent cases confiscated the interests of Northern persons in vessels engaged in commerce with the rebel ports for *illicit trading with the enemy*, altogether irrespective of any agency or complicity, on the part of such owners, in the guilty voyages.

In the case of *The Pilgrim*,* the vessel was owned, two-thirds in New Orleans, and one-third in New York and Connecticut, and was captured for breach of blockade of New Orleans. Grier, J., said that "the cargo and two-thirds of the vessel were liable to confiscation as enemy property, and the remainder for illicit trading with the enemy."

In the case of *The Herald*,† a British vessel was partly owned in New York, and the court held that "the shares of the vessel owned in New York might be condemned for trading with the enemy, but it is enough that vessel and cargo were equally involved in breach of blockade."

* December Term, 1863, No. 113.

† 3 Wallace, 768.

In neither of these cases was there any imputation of guilty knowledge of the breach of blockade on the part of the loyal Northern part-owners.

5. Admitting the allegation of the partnership and of the ownership of this vessel by the firm at the time of capture, the claimant of course has no interest, right, or share, in any of the property of the firm, except what remains after the discharge and payment of all the debts and liabilities of the partnership, and therefore cannot claim or receive restitution of any particular portion of such property as representing the value of his interest therein.

A court of prize has no means of settling the accounts of the firm and determining the particular interests of the several members in the property. The ownership of this vessel was in the firm, and the resident members at Mobile, who were in possession of her, had authority to divest their own interests, as well as the interest of the Northern member, in virtue of their general power and agency as recognized by the law of partnership.

6. A transfer of the vessel had been effected before the present voyage to other persons, who obtained the register found on board, which divested the interest of the firm who may have owned her before the war. But all interests and rights in both the vessel and the cargo are confiscable for breach of blockade. It is not competent for owner of either vessel or cargo, in such case, to protect his property from condemnation by showing innocence in the transaction. All parties are concluded by the illegal act of the master, though it may have been done without their privity, and even contrary to their wishes. It is the act and intention of the master which determine the guilt or innocence of the property and its liability to confiscation; and this applies equally to vessel and cargo.*

7. A hostile character is impressed upon the vessel by the specifically hostile character of the *trade* in which she had

* Baltazzi *v.* Ryder, 12 Moore's Privy Council, 184.

been engaged during the war, independently of the *domicil* status, or relations of the owners.*

When a vessel is engaged *de facto* for a period of two years exclusively in the navigation and trade of the enemy's country, in the possession and control of enemies, and under their flag, the question of ownership does not arise, and she is confiscable in consequence of the hostile taint which such use and employment affix upon the property.

II. *As to the petitioners, rebel owners of the five-sixths.* Conceding, *argumenti gratiâ*, that they had a right to be heard in this court, not having appeared in the other, the effect of the pardon is not sufficiently clear in a case of seizure like the present.†

Mr. Justice CLIFFORD delivered the opinion of the court.

The steamer and cargo were captured as prize of war on the 18th day of July, 1863, and, having been duly libelled and prosecuted as such in the District Court, on the 17th day of August following, they were both condemned as forfeited to the United States. Monition was duly published, but no one appeared as claimant, either for the steamer or cargo. Directions of the decree of condemnation were, that the steamer and cargo, after ten days' public notice, should be sold by the marshal, and that the proceeds of the sale should be deposited in the registry of the court for distribution, according to law. Return of the marshal shows that the notice was duly given, and that the sale was made as directed by the decree. Proceeds of the sale were paid to the marshal, but before the amount was actually deposited in the registry of the court the appellant filed his petition of intervention, claiming one-sixth of the proceeds, upon the ground that he was the true and lawful owner of one-sixth part of the vessel and cargo. Allegations of the petition of intervention were, in substance and effect, as follows:

* The Vigilantia, 1 Robinson, 1; The Embden, Id. 16; The Endraught, Id. 22; The Planter's Wensch, 5 Id. 227; The Bermuda, 3 Wallace, 545.

† See The Gray Jacket, *supra*.

1. That the petitioner was, and for many years had been, a citizen of the State of Indiana; that at the breaking out of the rebellion he was a member of the firm of Cox, Brainard & Co., at Mobile, Alabama; that the partners of the firm, as such, were the sole owners of the steamer and cargo; and that he had never parted with his share or in any way transferred his interest in the partnership

2. That the steamer, after the rebellion broke out to the time of the capture, was continually in the waters of the rebellious States, and under the control and management of those engaged in the rebellion, which rendered it impracticable and unlawful for him to proceed to the place where the steamer was, or to exercise any control over the steamer or any part of the partnership property.

3. That he was, and always had been, a true and loyal citizen; that he had never given any aid, encouragement or assistance to the rebellion, and that he had no connection with, or knowledge of, the unlawful voyage of the steamer on account of which she was condemned as lawful prize.

4. That some court of the Confederate States, so called, at some time in the year 1862, had condemned and confiscated his interest in the partnership, but he averred that the decree was wholly nugatory and void, and that his interest in the steamer and cargo had never been extinguished or destroyed.

Basing his claim upon these allegations of fact, he prayed that he might be paid out of the proceeds of the sale one-sixth of the amount required to be paid into the registry of the court.

Exceptions were filed to the petition of intervention, but they were overruled by the court, and the District Attorney appeared and admitted that all the facts therein alleged were true. Parties were heard as upon an agreed statement, and the District Court entered a decree that the intervention and claim of the petitioner be rejected and dismissed, with costs. Appeal was taken by the intervenor from that decree, and he now seeks to reverse it, upon the ground that he, as

owner of one-sixth part of the steamer and cargo, is entitled to one-sixth of the proceeds of the sale.

1. Captors contend that the steamer and cargo were both rightfully condemned as enemy property, and also for breach of blockade. Appellant denies the entire proposition as respects his interest in the captured property, and insists that the one-sixth of the same belonging to him cannot properly be condemned on either ground, because he was never domiciled in the rebellious States, and because he never employed the property, either actually or constructively, in any illegal trade with the enemy, or in any attempt to break the blockade.

Projected voyage of the steamer was from Mobile to Havana, and the master testified that she sailed under the Confederate flag. Proofs show that she left her anchorage in the night-time, and that she was captured, as alleged in the libel, after a brisk chase by several of our blockading squadron, more than two hundred miles from the port of departure. When captured, she had on board a permanent register, issued at Mobile under Confederate authority, and which described her owners as trustees of a certain association, and citizens of the Confederate States.

Testimony of the master showed that the cargo, which consisted of seven hundred bales of cotton, three thousand two hundred staves, and one hundred and twenty-five barrels of turpentine, was consigned to parties in Havana, and that the shipment was for the benefit of owners residing at the home port. Except an informal manifest, the steamer had no papers on board relating to the cargo, and the master testified that she carried none for the consignee, "for fear of being captured." He was appointed by the trustees, and he also testified that his instructions were to elude the blockading vessels if possible, but not to resist in case he was unable to escape. Ship's company consisted of thirty men, and all the officers and crew, with one exception, were citizens of the enemy country. Direct admission is made by the master in his testimony that he stole out of the harbor, and that the steamer and cargo were captured for breach of

blockade. Such an admission was hardly necessary to establish the charge, as every fact and circumstance in the case tended to the same conclusion. Five-sixths of the steamer and cargo were confessedly enemy property, and the whole adventure was projected and prosecuted for the benefit of resident enemy owners. None of these facts are controverted by the appellant, but he insists that inasmuch as he was domiciled in a loyal State, and had no connection with the adventure or the voyage, his interest cannot properly be held liable to capture.

2. War necessarily interferes with the pursuits of commerce and navigation, as the belligerent parties have a right, under the law of nations, to make prize of the ships, goods, and effects of each other upon the high seas. Property of the enemy, if at sea, may be captured as prize of war, but the property of a friend cannot be lawfully captured, provided he observes his neutrality. Public war, duly declared or recognized as such by the war-making power, imports a prohibition by the sovereign to the subjects or citizens of all commercial intercourse and correspondence with citizens or persons domiciled in the enemy country.*

Neutral friends, or even citizens, who remain in the enemy country after the declaration of war, have impressed upon them so much of the character of enemies, that trading with them becomes illegal, and all property so acquired is liable to confiscation.†

Part-owners of ships are seldom partners in the commercial sense, because no one can become the partner of another without his consent, and because if they acquire title by purchase, they usually buy distinct shares at different times and under different conveyances, and even when they are the builders they usually make separate contributions for the purpose. Generally speaking, they are only tenants in

* Jecker *v.* Montgomery, 13 Howard, 498.

† The Hoop, 1 Robinson, 196; Maclachlan on Shipping, 473; The Rapid, 8 Cranch, 155; Potts *v.* Bell, 8 Term, 561; Wheaton's International Law by Lawrence, 547.

common; but the steamer, in this case, belonged to the partnership, and throughout the rebellion to the time of capture was controlled and managed by the partners in the enemy country.*

Even where the part-owners of a ship are tenants in common the majority in interest appoint the master and control the ship, unless they have surrendered that right by agreeing in the choice of a ship's husband as managing owner.†

Admiralty, however, in certain cases, if no ship's husband has been appointed, will interfere to prevent the majority from employing the ship against the will of the minority without first entering into stipulation to bring back the ship or pay the value of their shares. But the dissenting owners, in such a case, bear no part of the expenses of the voyage objected to, and are entitled to no part of the profits. Such are the general rules touching the employment and control of ships; but unless the co-owners agree in the choice of a managing owner, or the dissenting minority go into admiralty, the majority in interest control the employment of the ship and appoint the master.‡

Tenants in common of a ship can only sell their own respective shares, but where the ship belongs to a partnership one partner may sell the whole ship.§

3. Proclamation of blockade was made by the President on the nineteenth day of April, 1861, and on the thirteenth day of July, in the same year, Congress passed a law authorizing the President to inderdict, by proclamation, all trade and intercourse between the inhabitants of the States in insurrection and the rest of the United States.‖

Provision of the sixth section of the act is, that after fifteen days from the issuing of such proclamation, "any ship or vessel belonging in whole or part to any citizen or inhabitant" of a State or part of a State, whose inhabitants shall

* Helme *v.* Smith, 7 Bingham, 709.

† Smith's Mercantile Law, 6th ed. 197.

‡ Maude & Pollock on Shipping, 67, 72.

§ 3 Kent's Com., 11th ed. 154; Wright *v.* Hunter, 1 East, 20; Lamb *v.* Durant, 12 Massachusetts, 54.

‖ 12 Stat. at Large, 1258, 257.

be so declared to be in insurrection, if found at sea or in the port of any loyal State, may be forfeited. Reference is made to those provisions, as showing that our citizens were duly notified that Congress as well as the President had recognized the undeniable fact that civil war existed between the constitutional government and the Confederate States; and that seasonable notice was given to all whose interests could be affected, and that ample opportunity and every facility were extended to them, which could properly be granted, to enable them to withdraw their effects from the States in rebellion, or to dispose of such interests as in the nature of things could not be removed.

Open war had existed between the belligerents for more than two years before the capture in this case was made, and yet there is not the slightest evidence in the record that the appellant ever attempted or manifested any desire to withdraw his effects in the partnership or to dispose of his interest in the steamer. Effect of the war was to dissolve the partnership, and the history of that period furnishes plenary evidence that ample time was afforded to every loyal citizen desiring to improve it, to withdraw all such effects and dispose of all such interests. "Partnership with a foreigner," says Maclachlan, "is dissolved by the same event which makes him an alien enemy;" and Judge Story says, "that there is in such cases an utter incompatibility created by operation of law between the partners as to their respective rights, duties, and obligations, both public and private, and therefore that a dissolution must necessarily result therefrom, independent of the will or acts of the parties."*

Executory contracts with an alien enemy, or even with a neutral, if they cannot be performed except in the way of commercial intercourse with the enemy, are *ipso facto* dissolved by the declaration of war, which operates to that end and for that purpose with a force equivalent to that of an act of Congress.†

* Maclachlan on Shipping, 475; Story on Partnership, sec. 316; Griswold *v.* Waddington, 15 Johnson, 57; Same case, 16 Id. 438.

† Exposito *v.* Bowden, 7 Ellis & Blackburne, 763.

Duty of a citizen when war breaks out, if it be a foreign war, and he is abroad, is to return without delay; and if it be a civil war, and he is a resident in the rebellious section, he should leave it as soon as practicable and adhere to the regular established government. Domicile in the law of prize becomes an important consideration, because every person is to be considered in such proceedings as belonging to that country where he has his domicile, whatever may be his native or adopted country.*

4. Personal property, except such as is the produce of the hostile soil, follows as a general rule the rights of the proprietor; but if it is suffered to remain in the hostile country after war breaks out, it becomes impressed with the national character of the belligerent where it is situated. Promptitude is therefore justly required of citizens resident in the enemy country, or having personal property there, in changing their domicil, severing those business relations, or disposing of their effects, as matter of duty to their own government, and as tending to weaken the enemy. Presumption of the law of nations is against one who lingers in the enemy's country, and if he continue there for much length of time, without satisfactory explanations, he is liable to be considered as remorant, or guilty of culpable delay, and an enemy.†

Ships purchased from an enemy by such persons, though claimed to be neutral, are for the same reasons liable to condemnation, unless the delay of the purchaser in changing his domicile is fully and satisfactorily explained. Omission of the appellant to dispose of his interest in the steamer, and his failure to withdraw his effects from the rebellious State, are attempted to be explained and justified, because the same were, as alleged in the petition, confiscated during the rebellion under the authority of the rebel government. More than a year, however, had elapsed after the proclama-

* The Vigilantia, 1 C. Robinson, 1; The Venus, 8 Cranch, 288; 3 Phillimore's International Law, 128.

† Maclachlan on Shipping, 480; The Ocean, 5 Robinson, 91; The Venus, 8 Cranch, 278.

tion of blockade was issued before any such pretended confiscation took place. Members of a commercial firm domiciled in the enemy country, whether citizens or neutrals, after having been guilty of such delay in disposing of their interests or in withdrawing their effects, cannot, when the property so domiciled and so suffered to remain, is captured as prize of war, turn round and defeat the rights of the captors by proving that their own domicile was that of a friend, or that they had no connection with the illegal voyage.

Property suffered so to remain has impressed upon it the character of enemy property, and may be condemned as such or for breach of blockade. Prize courts usually apply these rules where the partnership effects of citizens or neutrals is suffered to remain in the enemy country, under the control and management of the other partners who are enemies. But there are other rules applicable to ships owned under such circumstances which must not be overlooked in this case.

5. Courts and text-writers agree that ships are a peculiar property, and that such peculiarity assumes more importance as a criterion of judicial decision in war than in peace. They have a national character as recognized by the law of nations, because they regularly carry the flag of the nation to which they belong. Evidences of ownership are also peculiar, but vary somewhat according to the laws of the country in which the ships were built, or in which they are owned.*

Commercial nations generally have, for the advancement of their own individual prosperity, conferred great privileges upon the ships belonging to their own citizens, and, in consideration thereof, have imposed upon their owners certain special duties and obligations. Usually they are required to be registered at the home port, and they are not allowed to sail on any voyage, foreign or coasting, without such papers as the laws of the country to which they belong require.†

American vessels sailing for a foreign port are, in all cases, required by law to carry a passport, and it is generally ad-

* Wheaton's International Law, by Lawrence, p. 580.

† Abbott on Shipping, 72.

mitted that such a document is indispensable in time of war.* When a ship is captured as prize of war she is bound by the flag and pass under which she sailed. Owners are also bound by those insignia of national character. They are not at liberty when they happen to be evidence against them to turn round and deny the character the ship has assumed for their benefit.†

Established rule is that when the owners agree to take the flag and pass of another country they are not permitted, as matter of convenience, in case of capture, to change the position they have voluntarily chosen, but others are allowed to allege and prove the real character of the vessel. Meaning of the rule is that the ship is bound by the character impressed upon her by the authority of the government from which all her documents issue; and Chancellor Kent says this rule is necessary to prevent the fraudulent mask of enemy's property.‡ Adopting that rule, Dr. Lushington held, in the case of *The Industrie*,§ that the share of a neutral in ownership, though purchased before the war, was subject to condemnation equally with the shares of enemies in the same ship. Principle of the decision is that whoever embarks his property in shares of a ship is in general bound by the character of the ship, whatever it may be, and that principle is as applicable to a citizen, after due notice and reasonable opportunity to dispose of his shares, as to a neutral.‖

6. Decision of Lord Stowell, in the case of *The Mercurius*,¶ was that violation of blockade by the master affects the ship, but not the cargo, unless it is the property of the same owner, or unless the owner of the cargo was cognizant of the intended violation.

Proofs show that the cargo in this case was the property of the same owners, and, therefore, the case being within the principle of that decision, the cargo must follow the fate

* 1 Stat. at Large, 489. Maude & Pollock on Shipping, 95.

† Story on Prize, 61; The Elizabeth, 5 C. Robinson, 3; The Fortuna, 1 Dodson, 87; The Success, Id. 132.

‡ 1 Kent's Com., 11th ed. 91.

§ 33 Eng. Law & Eq. 572.

‖ The Primus, 29 Eng. Law & Eq. 589.

¶ 1 C. Robinson, 80.

of the ship. Subsequent cases, however, decided by the same learned judge, appear to have carried the rule much further, and to have established the doctrine in that country that when the blockade was known, or might have been known, to the owners of the cargo at the time when the shipment was made, the master shall be treated as the agent of the cargo, as well as of the ship, and that the former, as well as the latter, is liable to capture and condemnation.*

Latest reported decision in that country is that of *Baltazzi* v. *Ryder*,† which was heard on appeal before the privy council, and the determination, both in the admiralty court and in the appellate court, was that where the cargo belonged to the same owners as the ship, the owners of the cargo, as well as the ship, were in general concluded by the illegal act of the master.

Giving full effect to the admissions in this case, the appellant shows no just ground for the reversal of the decree made by the District Court.

7. Since the appeal was entered in this court the other partners have filed a petition here, asking leave to intervene for their interests, and claiming the other five-sixths of the vessel and cargo. They were not parties in the court below, having never appeared in the suit or made any claim whatever, and of course did not, and could not, appeal from the decree. Substance of their excuse for not appearing in the District Court is that they were residents in a State hostile to the United States, and consequently that they had no standing in that court, by reason of such disability. Statement of the petition also is that those disabilities continued till after the case was removed into this court by appeal; but they allege that since that time they have severally received the pardon of the President for all pains and penalties incurred for breach of blockade, and for all offences committed by them in the rebellion, and by reason of the premises they pray that their proportion of the proceeds of

* The Alexander, 4 C. Robinson, 94; The Adonis, 5 Id 259; The Exchange, 1 Edwards's Adm. 39; The James Cook, Id. 261.

† 12 Moore's Privy Council, 183.

the sale of the steamer and cargo may be restored to them. Irrespective, however, of any question which might otherwise arise as to the effect of the pardon, it is quite clear that the case is not properly before the court. Settled rule in this court is that no one but an appellant in such a case can be heard for the reversal of a decree in the subordinate court.*

8. Appellees are always heard in support of the decree, but they cannot have any greater damages than were assessed in the court of subordinate jurisdiction. Intervenors here, however, are neither appellants or appellees, as they did not appear as claimants in the District Court, and were not in any way made parties to the litigation. Original jurisdiction in prize, as well as in all other admiralty causes, is vested exclusively in the district courts. Property captured, where appeals are allowed to the Circuit Court, follows the cause into that court, but it does not in any case follow the cause into this court, because this court has no original jurisdiction in such cases.†

Evidently the application in this case is in its nature original, and not appellate, and it is well settled that this court has no original jurisdiction in prize causes.‡ Such an application cannot be first presented in this court and allowed, because it would be assuming jurisdiction not granted either by the Constitution or the laws of Congress.

Petition of intervention is dismissed, and the

DECREE OF THE DISTRICT COURT AFFIRMED.

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* Harrison *v.* Nixon, 9 Peters, 484; Canter *v.* Am. Ins. Co., 3 Id. 318; Stratton *v.* Jarvis, 8 Id. 4; Airey *v.* Merrill, 2 Curtis's C. C. 8; Allen *v.* Hitch, 2 Id. 147; Buckingham *v.* McLean, 13 Howard, 150.

† Jennings *v.* Carson, 4 Cranch, 28; The Collector, 6 Wheaton, 194.

‡ The Harrison, 1 Wheaton, 298; Marbury *v.* Madison, 1 Cranch, 173.

EWING *v.* CITY OF ST. LOUIS.

1. With the proceedings and determinations of inferior boards or tribunals of special jurisdiction, courts of equity will not interfere, unless it should become necessary to prevent a multiplicity of suits or irreparable injury, or unless the proceeding sought to be annulled or corrected is valid upon its face, and the alleged invalidity consists in matters to be established by extrinsic evidence. In other cases the review and correction of the proceedings must be obtained by the writ of *certiorari*.

   Therefore, to a bill filed to enjoin the enforcement of certain judgments rendered against the complainant by the mayor of St. Louis for the amount of alleged benefit to his property from the opening of a street in that city, and setting forth, as grounds of relief, want of authority in the mayor, and various defects and irregularities in the proceedings, a demurrer on the ground that a court of equity had no jurisdiction of the matter, and that the complainant had a plain, adequate, and complete remedy at law, was sustained.

2. A non-resident complainant can ask no greater relief in the courts of the United States than he could obtain were he to resort to the State courts. If, in the latter courts, equity would afford no relief, neither will it in the former.

THIS was a bill in equity, filed in the Circuit Court for Missouri, to enjoin the enforcement of certain judgments rendered against the complainant by the mayor of St. Louis for the amount of alleged benefit to his property from the opening of Wash Street, in that city, and to obtain compensation for the property of the complainant appropriated by the city for the use of the street.

The bill, after averring the complainant's ownership of certain lots in that city, alleged that the mayor, at the instance of the city, and by its authority, issued a notice and summons against the complainant and others as defendants, addressed to the marshal of the city, with the object of notifying to them proceedings thereby instituted "*for the purpose of condemning private property in order to open Wash Street,*" and summoning them to appear before him on a day named, to show cause why the city should not proceed to open the street, &c.

That a jury was sworn at the instance of the city to assess the damages and benefits against and for the said city and

against and for all persons whose property was benefited or taken by the said street being opened, and retu ned, as their verdict (in so far as regarded the complainant), that in order to open Wash Street, it would be necessary to take a parcel of land (described) belonging to the complainant, and the actual value of which, without reference to the proposed improvement, was found to be $1027; also, two other parcels (described), the actual value of which was found to be $5825. The jury also found that the entire value of the ground necessary to be taken for the said purpose, including that above named of the complainant, was $18,492. To pay which the jury assessed against the city $100, against the complainant as owner of certain blocks and lots $7993.58, and the residue against other owners, $10,398.42. Total, $18,492.

That this verdict was afterwards entered on the journal of proceedings kept by the mayor, and was not set aside, but was, within four months after being rendered, reported by the mayor to the city council, and within three months thereafter, to wit, on the 9th day of November, 1858, the city council, by ordinance, appropriated the sum of $100 to pay said assessment against the city; but that the mayor did *not*, at any time within twenty days after said appropriation was made, render judgment in favor of said city against the complainant, for the said sums assessed against him as aforesaid by the verdict of the jury.

That the mayor was not vested in law with power and authority to render such judgment against him at any time, and had not any color or pretence of authority by any ordinance or provision of law to render any such judgment at any time after the expiration of twenty days after the appropriation was so made by the council. Nevertheless, that at some long time after the expiration of twenty days thereafter, there was written upon the journal of proceedings of the mayor, where the same still remains, an entry, set forth in the bill *in extenso*, the substance of which is, that "Now, on the 20th day of November, 1858, the city council having, on the 9th day of November, 1858, confirmed the award of

the jury in the matter of opening Wash Street," &c., "and made an appropriation to pay the sum awarded by said verdict against the city, it is therefore ordered, adjudged, and decreed that *the city* do recover of the said parties and of the said property set forth and described in said verdict the several sums and amounts assessed and allowed by way of benefits in said verdict, on account of," &c., "in manner and form following, to wit," &c. (reciting, so far as regards the complainant, the substance of the verdict), "amounting, in the aggregate, to the sum of $7993.58 damages by way of benefits, and $1.25 costs, and have execution therefor." The name of O. D. Filley, mayor, being subscribed at the foot of said entry upon the said journal.

That the said entry, although of no legal validity, nevertheless tends to, and does, materially injure and prejudice the complainant in this, that the said city, by its officers and agents, gives it out in speeches, and insists that the entry is, in legal effect, a judgment, and as such is conclusive against the complainant as evidence of debt, to the amount therein set forth, to the said city; and that the several parcels of the complainant's property in reference to which said assessments were made are bound and liable for the payment of said alleged debt, to be sold on execution, threatened to be issued in behalf of the city on the pretended judgment; by reason whereof the complainant is injured in the use and enjoyment of his said property, and hindered and prevented from selling and disposing thereof by reason of the cloud cast upon his title thereto, &c.

The bill then proceeded to allege that the verdict and judgment were invalid, void, and ineffectual in law to deprive him of his said property or to raise against him a debt to the city or otherwise, and set forth various grounds of alleged illegality in the proceedings. The principal of these grounds were, that the proceedings were taken without notice to the complainant or any entry of his appearance in person or by attorney; that the notice required was not published according to law; that no provision was made for compensation for the property taken; that the mayor was not

clothed with authority to render the judgment in question by the legislature, and that the city was not empowered to invest him with any such authority; and that the statutes under which the proceedings purported to have been commenced were repealed before the proceedings were completed.

To this bill the defendant demurred, on the ground, among other things, that it did not contain facts constituting or giving to the complainant any equitable cause of action, or coming within the equity powers of the court; that on the contrary, it appeared that the court as a court of equity had no jurisdiction or authority to take cognizance of any such matters as those described and complained of in the bill; and that it appeared that the complainant had for his alleged grievances, a plain, adequate, and complete remedy given him by law.

The court sustained the demurrer and dismissed the bill, and the complainant appealed to this court.

Mr. T. Ewing, Jr., for the appellant:

1. This is a proper case for equity jurisdiction. Numerous cases show this.*

2. Our standing in court being established, we are entitled to a decree setting aside the pretended judgment and enjoining execution thereof, on the ground that the mayor had no authority in law to render judgment or issue execution.

3. The scheme for taking private property for public use, in the execution of which this verdict arises, provides no compensation for the property taken, and is therefore unconstitutional and void.†

* Frewin *v.* Lewis, 4 Mylne & Craige, 254; Simpson *v.* Lord Howden, 3 Id. 97; Belknap *v.* Belknap, 2 Johnson's Chancery, 463; Burnet *v.* City of Cincinnati, 3 Ohio, 86; Anderson and wife *v.* Commrs., 12 Ohio State, 635; Walker *v.* Wynne, 3 Yerger, 62; Am. Ins. Co. *v.* Fisk, 1 Paige, 90; Oakley *v.* Trustees, &c., 6 Id. 265; Whitlock *v.* Duffield, 2 Edwards, 366; Page *v.* City of St. Louis, 20 Missouri, 136; Lockwood *v.* St. Louis, 24 Id. 20; Fowler *v.* St. Joseph, 37 Id. 240.

† Gardner *v.* Newburgh, &c., 2 Johnson's Chancery, 162; McArthur *v.* Kelly et al., 5 Ohio, 139; Lamb & McKee *v.* Lane, 4 Ohio State, 167; 2 Kent's Commentary, 334.

4. The proceedings had by the jury were void as to appellant, for want of notice, actual or constructive.

5. The court having jurisdiction of the parties and the subject-matter, will determine all rights and equities growing out of the case, and will decree compensation for the lands actually appropriated and in the use and permanent occupancy of the defendants.

C. D. Drake, contra:

1. The case is not one for the exercise of the equitable jurisdiction of the court, because if the court could take jurisdiction at all of the revision of the mayor's proceedings, there is a plain, adequate, and complete remedy at law, by *certiorari.**

2. The review and correction of all errors, mistakes, and abuses in the exercise of subordinate public jurisdictions, and in the official acts of public officers, belong exclusively to a court of law, and has always been a matter of legal, and never of equitable, cognizance.†

Mr. Justice FIELD delivered the opinion of the court.

The object of this suit is twofold—

1st. To enjoin the enforcement of certain judgments rendered against the complainant by the mayor of St. Louis for the amount of alleged benefit to his property from the opening of Wash Street, in that city.

2d. To obtain compensation for the property of the complainant appropriated by the city for the use of the street.

The bill details the steps taken by the city and the mayor, at the instance and as the servant of the city, for the opening of the street, the finding of the jurors summoned before that officer, and the estimates made by them of the value of the property appropriated, and of the benefits which would

* Heywood *v.* Buffalo, 14 New York, 534; Nichols *v.* Sutton, 22 Georgia, 369; Myers *v.* Simms, 4 Iowa, 500; Longfellow *v.* Quimby, 29 Maine, 196.

† Mooers *v.* Smedley, 6 Johnson's Chancery, 28; Brooklyn *v.* Meserole, 26 Wendell, 132; Van Doren *v.* New York, 9 Paige, 388; Heywood *v.* Buffalo, 14 New York, 534.

flow from the improvement, both to the public and to the owners of adjoining property, and sets forth various grounds of alleged illegality in the proceedings.

Of these grounds the principal are, that the proceedings were taken without notice to the complainant, or any appearance by him; that the notice provided by law was not published as required; that no provision was made for compensation for the property taken; that no power to render the judgments was vested in the mayor by any act of the legislature, or could be invested in him by the city authorities under any clause of the city charter; and that the statutes under which the proceedings purported to have been taken were repealed before the proceedings were completed. These grounds are by the demurrer admitted to be true, and being true no reason exists upon which to justify the interposition of a court of equity.

If the statutes and ordinances under which the mayor undertook to act did not invest him with any authority to render the judgments against the complainant, the judgments were void, and could not cast a cloud upon his title, or impair any remedies at law provided for the protection of his property, or the redress of trespasses to it.

On the other hand, if the statutes and ordinances invested the mayor with authority, when new streets in the city were to be opened, to render judgments for the amount of benefits assessed against the owners of adjoining property, and in this instance he failed to follow their provisions, or exceeded the jurisdiction they conferred, the remedy of the complainant was by *certiorari* at law, and not by bill in equity.

With the proceedings and determinations of inferior boards or tribunals of special jurisdiction, courts of equity will not interfere, unless it should become necessary to prevent a multiplicity of suits or irreparable injury, or unless the proceeding sought to be annulled or corrected is valid upon its face, and the alleged invalidity consists in matters to be established by extrinsic evidence. In other cases the review and correction of the proceedings must be obtained by the writ of *certiorari*. This is the general and well-established

doctrine. Examples in which this is asserted are found in *The Mayor, &c., of Brooklyn* v. *Meserole*,* and in *Heywood* v. *The City of Buffalo*,† and in the cases there cited.‡

The complainant can ask no greater relief in the courts of the United States than he could obtain were he to resort to the State courts. If in the latter courts equity would afford no relief, neither will it in the former.

The second object of the bill—the obtaining of compensation for the property actually appropriated by the city—falls with the first. If the proceedings for its appropriation were void, the title remains in the complainant, and he can resort to the ordinary remedies afforded by the law for the recovery of the possession of real property wrongfully withheld.

Decree affirmed.

De Groot v. United States.

1. In bringing appeals to this court from the Court of Claims, the record must be prepared strictly according to the General Rules announced on the subject of that class of appeals at December Term, 1865, and printed at large in 3 Wallace, vii–viii.

   Hence only such statement of facts is to be sent up to this court as may be necessary to enable it to decide upon the correctness of the propositions of law ruled below; and this statement is to be presented in the shape of the facts found by that court to be established by the evidence in such form as to raise the question of law decided by the court. It should not include the evidence in detail.

2. Where a resolution of Congress authorized one of the executive departments to settle, on principles of justice and equity, all damages, losses, and liabilities incurred or sustained by certain parties who had contracted to manufacture brick for the government, *Provided* "that the said parties first surrender to the United States all the *brick made*, together with all the *machines* and *appliances*, and other *personal* property prepared for executing the said contract, and that said contract be cancelled," an award is not within the resolution, which, taking a surrender of *real* estate—the brick-yard—where the brick, machinery, and appliances were, makes allowance for *it*. Nor will another award be brought within the submission, because the party, being dissatisfied with the first award, Congress has referred the matter to another executive de-

* 26 Wendell, 132.

† 4 Kernan, 534.

‡ See also Scott *v.* Onderdonk, Id. 9.

partment, directing *it* to settle the claim, but prescribing for the mode of settlement essentially the same principles by which the settlement was to be made by the department first authorized.

3. Although, as a general rule, where an award exceeds the submission, it is not invalid if the part which is in excess can be separated from the residue; yet where, on a submission of a claim for compensation for breach of contract, an award is made of one gross sum—this embracing an allowance for matters that are not within the submission, as well as for matters that are, and where it is impossible for the court to apportion the parts,—the case is not within the rule. Such an award is not obligatory on the party disadvantageously affected by it.

4. Where the head of one of the executive departments, appointed by resolution of Congress to settle a claim made against the government, exceeds, in making his award, the powers conferred upon him, Congress may revoke, by a repeal of the resolution appointing him, the authority conferred on him. And if, by the repealing act, it refer the case to the Court of Claims, it comes to that court with whatever limitations Congress by its resolution may prescribe; and the court must accept the resolution as the law of that case.

APPEAL from the *Court of Claims*. The case was, in substance, thus:

The United States being engaged in building a large aqueduct at Washington, D. C., De Groot entered into a contract with it to furnish it with several millions of bricks, and to commence the preparation of a *brick-yard* and machinery within a time named, so as to perform the contract of delivery. Some delay or difficulty arising as to the completion of the work, and De Groot having laid out a good deal of money in his enterprise (which, it seemed, included the *purchase of a large brick-yard*), applied to Congress for relief. Congress accordingly, on the 3d March, 1857, passed a joint resolution, "that the Secretary of the Treasury shall settle and adjust with all the parties interested therein, *on principles of justice and equity*, all damages, losses, and liabilities incurred or sustained by said parties respectively on account of their contract for manufacturing brick for the Washington aqueduct;" and he was directed to pay the amount found due out of an appropriation specified. This joint resolution contained, however, the following *proviso:*

"*Provided*, That the said parties *first surrender to the United States all the brick made*, together with *all* the *machinery* and *ap-*

pliances and other *personal* property prepared for executing the said contract, and that the said contract be cancelled."

Soon after the passage of this resolution De Groot made, by deed, a surrender to the United States of "all the brick made, together with all the machinery and appliances and other personal property prepared for executing the contract for manufacturing brick for the Washington aqueduct; which property so surrendered is situated upon the tract of land, containing fifty acres, known as Hunting Park," &c. The deed then recited—

"And whereas the said land was purchased, a brick-yard thereon opened, sheds and kilns erected, a steam engine put up, and machinery and appliances prepared for executing the said contract: And whereas the said premises, with the brick-yard, shed, kilns, engine, and machinery thereon, and the use of the clay and material thereof, are valuable and useful to the United States for manufacturing brick for the Washington aqueduct, and Captain M. C. Meigs, engineer in charge of the Washington aqueduct, has requested possession of said premises, with the use of the clay and materials thereof, for the United States, and possession thereof hath accordingly been given to him:"

And it concluded with a *lease of the brick-yard, sheds, kilns, and appurtenances, to the government for ten years, or until the completion of the aqueduct, together with the privilege of digging and using the clay, &c.*

This being done, the Secretary of the Treasury awarded $29,534.

De Groot received $7576 on account of this award, but being dissatisfied with it as too small, petitioned Congress again on the subject. That body then passed (June 15, 1860) another joint resolution:

"That in the *further execution of the joint resolution of the 3d of March*, 1857, relative to the settlement of the damages, losses, and liabilities incurred by certain parties interested in the contract for furnishing brick for the Washington aqueduct, the Secretary of War is directed and required to settle the account of

W. H. De Groot on principles of justice and equity, allowing to the said De Groot *the amount of money actually expended by him in and about the execution of the said contract;* and also to indemnify him for *such* losses, liabilities, and damages *as by virtue of the said joint resolution he was entitled to receive;* the amount, &c., to be paid out of the fund named in said joint resolution, or if that has been diverted to other purposes, out of any money in the Treasury," &c.

Under this resolution the then Secretary of War, Mr. J. B. Floyd, made an award. After estimating the probable profits of the contract and the price of the brick delivered and surrendered by De Groot under the *proviso*, Mr. Floyd proceeded:

"But it must be remembered that when Mr. De Groot's contract was surrendered, he delivered to the United States the brick-yard at Hunting Park, with its appurtenances, machinery, and improvements. All these he would have retained had his contract been carried out. But this property was surrendered to the United States in compliance with the requirements of the joint resolution of March 3, 1857. It was, I think, clearly the intention of Congress to make compensation for the loss which he thus sustained. And accordingly, in addition to the damages already allowed, it is proper to refund to Mr. De Groot such items of expenditure as were necessarily involved in the purchase and improvement of his brick-yard and its appurtenances. These are stated on the schedule, which is supported by vouchers,

"Amounting to, ...	$29,323 22
Add estimated profits, ...	86,922 81
Add price of brick delivered and surrendered by De Groot,	28,606 34
Total amount, ...	$144.852 37"
[From this amount were deducted the $7576 received by De Groot, and certain other items, amounting, in all, to], .	25,617 91
Leaving a balance of, ...	$119,234 46

This award, for some reason, was not paid; and on the 21st of February, 1861, Congress passed a joint resolution:

"That the joint resolution approved June 15, 1860, for the relief of W. H. De Groot, be, and the same is hereby, repealed; and that the Secretary of War be, and he is hereby, directed to transmit all the papers in his department relating to the case of the said W. H. De Groot to the Court of Claims for adjudication."

In that court De Groot filed his petition, setting forth a history of the case, and stating that he had surrendered the whole entire property to the United States, which the United States had since been using and now occupied. That under the resolution of June 15, 1860, the Secretary of War, after a careful examination of the case and of all the evidence in it, had adjudged that there was due to him $119,234.46. That this award was made August 17, 1860; that it was fairly made, and that the amount still remained due to the claimant. He averred that the joint resolution of 21st February, 1861, repealing the resolution under which the award had been made, was passed after the award had been made and published, and after he had a vested right in it—a right, therefore, of which Congress could not deprive him; and he set up that the said repealing resolution was accordingly void and inoperative.

Without, therefore, submitting any evidence to sustain his original cause of action, De Groot rested his case entirely upon the validity and conclusiveness of the award made by Mr. Floyd, the Secretary of War; giving proof, however, to show that the case was carefully examined by Mr. Floyd, and that his award was given fairly and without interest, corruption, or bias. De Groot accordingly claimed *the amount of the award.*

To the petition presented as above stated the United States demurred.

A majority of the Court of Claims was of opinion "that from the showing of the plaintiff, as alleged in his petition, the Secretary of War had transcended his authority in undertaking to award for the value of the real estate; which was not embraced in the resolution of the 3d of March, 1857, among the property which the parties were required

to surrender, and that the finding of the Secretary was therefore void as an award, because it exceeded the submission." But the court also thought that the facts and circumstances alleged constituted a cause of action independent and irrespective of the award; and that as the repealing resolution referred the case to that court for adjudication, that it would stand there on its merits, unaffected by the award, and to be decided on any proofs submitted. Stating the matter in its own more specific way, the court held and decided, among other things—

"1st. That by including in the award the value or price of the real estate upon which the brick-yard was located, Floyd exceeded the powers conferred upon him by the joint resolutions of Congress.

"2d. That having commingled such allowances with the general finding in such manner as to be incapable of separation, it thereby vitiated the whole award.

"4th. Floyd having thus exceeded the powers conferred upon him, it was competent for Congress to disaffirm his acts and revoke the authority conferred upon him by a repeal of the resolution under which he acted."

And they added as another point: "That no sufficient evidence having been given to sustain any part of the claim, irrespective of Floyd's award, which they had held invalid, judgment had been rendered for the defendants."

The case being thus decided in the Court of Claims, De Groot made known to it his desire to bring it here for review.

The judgment of the Court of Claims was rendered in December, 1865. Subsequently to that date, to wit, at December Term, 1865, the Supreme Court announced among its General Rules,* certain "Regulations," as follows:

* 3 Wallace, vii.

Statement of the case.

Regulations under which appeals may be taken from the Court of Claims to the Supreme Court.

RULE I.

In all cases *hereafter* decided in the Court of Claims in which, by the act of Congress, such appeals are allowable, they shall be heard in the Supreme Court upon the following record, and none other:

1. A transcript of the pleadings in the case, of the final judgment or decree of the court, and of such interlocutory orders, rulings, judgments, and decrees as may be necessary to a proper review of the case.

2. A finding of the facts in the case by the said Court of Claims, and the conclusions of law on said facts on which the court founds its judgment or decree.

The finding of the facts and the conclusion of law to be stated separately, and certified to this court as part of the record.

The facts so found are to be the ultimate facts or propositions which the evidence shall establish, in the nature of a special verdict, and not the evidence on which these ultimate facts are founded. See *Burr* v. *Des Moines Company*.*

RULE II.

In all cases in which judgments or decrees have *heretofore* been rendered, when either party is by law entitled to an appeal, the party desiring it shall make application to the Court of Claims by petition for the allowance of such appeal. Said petition shall contain a distinct specification of the errors alleged to have been committed by said court in its ruling, judgment, or decree in the case. The court shall, if the specification of alleged error be correctly and accurately stated, certify the same, or may certify such alterations and modifications of the points decided and alleged for error as in the judgment of said court shall distinctly, fully, and fairly present the points decided by the court. This, with the transcript mentioned in Rule I (except the statement of facts and law therein mentioned), shall constitute the record on which those cases shall be heard in the Supreme Court.

* 1 Wallace, 102.

Under a supposed conformity with these rules, the record in the case had been made. As it came before this court, it consisted of 244 pages. The first forty were occupied by De Groot's petition for appeal. This document contained the petitioner's statement of his case, copies of contracts; of the different resolutions, already mentioned, of Congress; of the awards made by the Secretaries of the Treasury and of War; of pleadings and opinions in the court below and of some other papers.

At the close of the document there was an entry by the court below, that the petition not being, in the opinion of the court, in accordance with the rules prescribed by the Supreme Court of the United States regulating appeals, that the Court of Claims had certified "the following alterations and modifications of the points decided and alleged for error."

The Court of Claims then, itself, made a statement of facts, adding,—the same being presented (*supra*, at p. 424),—what it held and decided upon them; all this occupying only about fourteen pages.

As appearing in the printed transcript before the court, this statement by the court was set pretty much in the body of the book, and was not very distinguishable to the eye from its other various contents. The opinions of the court were annexed at large. The several matters specified occupied the first seventy-two pages of the book. Following this were all the proofs that had been filed in the Court of Claims—these occupying one hundred and seventy-six pages; and, being returned, as it was certified, by request of counsel, in order "to enable the Supreme Court to judge whether plaintiff proved any claim independent of the award, and to review the ruling refusing to strike out defendant's evidence."

On this record the case was now here for review.

Messrs. How, D. D. Field, and Henry Bennett, for the appellant.

Mr. Weed, Assistant Solicitor of the Court of Claims, contra.

Mr. Justice MILLER delivered the opinion of the court.

This is the first appeal from the Court of Claims which we have been called upon to consider since the rules framed by this court regulating such appeals; and the inconsistency between the record presented and the requirements of those rules calls for some observations in this place.

This case, having been decided before they were published, comes under the provisions of the second rule. The object of that rule, as well as of the first, is to present in simple form the questions of law which arose in the progress of the case, and which were decided by the court adversely to appellant. Only such statement of facts is intended to be brought to this court as may be necessary to enable it to decide upon the correctness of the propositions of law ruled by the Court of Claims, and that is to be presented in the shape of the facts found by that court to be established by the evidence (in such form) as to raise the legal question decided by the court. It should not include the evidence in detail.

We have here, beside this simple statement, a record of two hundred and forty pages of printed matter, of which it is fair to say that two hundred are details of evidence excluded by the rule. We were inclined at first to dismiss the appeal for want of a proper record, but upon a closer examination it was discovered that the court below had in good faith complied with the rule, so far as to give the certified statement of the facts found, and of their legal conclusions thereon, and this, with the pleadings, judgment, and other orders in the case, enables us to examine the alleged error in the rulings of the court within the principles we have stated.

The court, however, has, at the request of claimant's counsel, returned the evidence on both sides, which makes the bulky and useless part of the record.

We take this occasion to say that we shall adhere strictly to the rules we have prescribed, and shall regard no other matter found in the transcripts sent to us than what they allow, and that in proper cases the costs of the useless part of the record will be taxed against the party who brings it here.

With these preliminary remarks, we proceed to examine the merits of the case.

It is a claim against the United States founded on an award. The statement of facts by the court below informs us that "the claimant has not seen proper to submit any evidence to sustain his original cause of action, but rests his case entirely upon the validity and conclusiveness of the award made by the Secretary of War."

Among other conclusions of law, the court held the following in reference to this award, which, as they dispose of the case, are all that we need consider.

"1st. That by including in the award the value or price of the real estate upon which the brick-yard was located, Floyd exceeded the powers conferred upon him by the joint resolutions of Congress.

"2d. That having commingled such allowances with the general finding in such manner as to be incapable of separation, it thereby vitiated the whole award.

"4th. Floyd having thus exceeded the powers conferred upon him, it was competent for Congress to disaffirm his acts and revoke the authority conferred upon him, by a repeal of the resolution under which he acted."

That part of the record which is here decided not to be within the submission is thus stated in the award itself:

"It must be remembered that when Mr. De Groot's contract was surrendered he delivered to the United States the brick-yard at Hunting Park, with its appurtenances, machinery, and improvements. All these he would have retained had his contract been carried out. But this property was surrendered to the United States in compliance with the requirements of the joint resolution of March 3, 1857. It was, I think, clearly the intention of Congress to make compensation for the loss which he thus sustained. And, accordingly, in addition to the damages already allowed, it is proper to refund to Mr. De Groot such items of expenditure as were necessarily involved in the purchase and improvement of his brick-yard and its appurtenances.

"These are stated on the schedule, which is supported by vouchers, amounting to	$29,323 22
Add estimated profits, ...	86,922 81
Add price of brick delivered and surrendered by De Groot, .	28,603 34
Total amount, ...	$144,852 37"

The award then deducts certain payments made, leaving a balance of $119,234.46.

The joint resolution above mentioned of March 3, 1857, lies at the foundation of this claim.

And it is pretty clear that, without the *proviso* at the close of the resolution, the Secretary could have acted on no other principle than that of compensating the parties interested for losses and damages growing out of a suspension or abandonment of the contract by the government, and that this must have been based upon the position of the parties as they stood at the time the resolution passed. What brick the claimants had delivered would have been the property of the United States. All the brick they had on hand not delivered, with the materials, tools, machines, and grounds, would have been the property of claimants, and the damages growing out of this branch of the inquiry would have been the loss sustained by these being rendered useless or less valuable to their owners, because no longer required in fulfilling the contract to make brick.

In what respect, then, does the proviso change this basis of estimating damages? It changes it by requiring the claimants to transfer to the United States certain things they were using in the manufacture of brick for the government, and allowing compensation for the value of those things, instead of damages for their deterioration. The things thus to be surrendered were "all the brick made, together with all the machinery and appliances, and other personal property prepared for executing the contract."

It is not possible to hold that the land on which the bricks were made, or any improvements on it which had become part of the realty, comes within any of the classes of property here enumerated. It was not bricks; it was not machinery or appliances, and it was not personal property. The

phrase "other personal property" implies that only personal property had been previously described.

It is true that the Secretary of War, in making his award, did not derive his power to act as arbitrator from the joint resolution which we have been construing, but from another joint resolution of June 15, 1860. The first resolution referred the matter to the Secretary of the Treasury, and that officer having made his award, Mr. De Groot, after receiving under it $7576, refused to abide by it, and applied to Congress for further relief. That body referred his claim to the Secretary of War by the resolution of June 15, 1860, but directed him to proceed in the further execution of the resolution of March 3, 1857, and to indemnify De Groot for such losses, liabilities, and damages as by virtue of said joint resolution he was entitled to receive. It will thus be seen, that while the tribunal was changed, it was to be governed by the principles prescribed by the resolution which we have just construed.

The Secretary of War, then, manifestly exceeded his powers as arbitrator when he awarded to claimant the value of the real estate on which the brick-yard was located, and the money involved in the purchase of it by said claimant.

It is, however, not always that an award is invalid because in some respects it exceeds the submission, for it is said that if the part which is in excess can be clearly separated from the remainder which is within the submission, the latter may stand.

This, as a general rule, is true, but it is subject to some qualifications, one of which is expressed by Chief Justice Marshall, speaking for this court in the case of *Carnochan* v. *Christie*,* to the effect, that the award to be valid ought to be in itself a complete adjustment of the controversies submitted to the arbitrators.

There is no means by which the sum allowed by the Secretary for this land can be separated from the other allowances made for the personal property, machines, and appli-

* 11 Wheaton, 446.

ances transferred by claimant to the United States. They are all summed up in one grand item of $29,323.22. What proportion of this item is for the land it is impossible to tell. If we reject the whole of this item, then the claimant has no allowance for the machines, appliances, and personal property transferred to the government, and for the real loss in the purchase of land, and improvements placed on it for this specific purpose, the value of which must be much diminished by diverting it from that use.

It thus appears that the arbitrator has exceeded his authority in some respects, that he has failed to award as to other matters submitted to him, and that in the award made, these matters cannot be distinguished from each other.

The United States cannot, after having twice referred these matters to arbitration—the second time on account of the dissatisfaction of the claimant with the result of the first—be bound now to accept an award which clearly does not dispose of part of the demands submitted, and which allows large sums for matters not submitted.

If these views be sound, the two first propositions of law decided by the Court of Claims were well decided.

We think the fourth proposition equally clear.

The government of the United States cannot be sued for a claim or demand against it without its consent. This rule is carried so far by this court, that it has been held that when the United States is plaintiff in one of the Federal courts, and the defendant has pleaded a set-off which the acts of Congress have authorized him to rely on, no judgment can be rendered against the government, although it may be judicially ascertained that on striking a balance of just demands the government is indebted to the defendant in an ascertained amount. And if the United States shall sue an individual in any of her courts, and fail to establish a claim, no judgment can be rendered for the costs expended by the defendant in his defence.

If, therefore, the Court of Claims has the right to entertain jurisdiction of cases in which the United States is defendant, and to render judgment against that defendant, it

is only by virtue of acts of Congress granting such jurisdiction, and it is limited precisely to such cases, both in regard to parties and to the cause of action, as Congress has prescribed.

It is true that ordinarily, when we seek for the foundation of this jurisdiction, we look to the general laws creating the court, and defining causes of which it may have cognizance. But it is equally true that whenever Congress chooses to withdraw from that jurisdiction any class of cases which had before been committed to its control, as it has done more than once, it has the power to do so, or to prescribe the rule by which such cases may be determined. Its right to do this in regard to any particular case, as well as to a class of cases, must rest on the same foundation; and no reason can be perceived why Congress may not at any time withdraw a particular case from the cognizance of that court, or prescribe in such case the circumstances under which alone the court may render a judgment against the government.

The Court of Claims, in the adjudication of the case before us, has been acting under one of these special acts of the legislative department. A third joint resolution on the subject of this claim was passed by Congress and approved July 21st, 1861, some months after the award of the Secretary of War was published. This resolution declares "that the joint resolution approved June 15th, 1860, for the relief of W. H. De Groot, be, and the same is hereby, repealed, and that the Secretary of War be, and he is hereby, directed to transmit all papers in his department relating to the case of said W. H. De Groot to the Court of Claims for examination."

The case being thus transferred from the Secretary of War to the Court of Claims, with a repeal of the resolution under which the Secretary had acted, must be considered as coming into that court with the limitations prescribed by that resolution. This shows very clearly that Congress intended that no judgment should be rendered against the government on the award of the Secretary of War, but that the examination to be made by the Court of Claims should be

free from that embarrassment. Could that court entertain jurisdiction of the case, and violate this requirement?

It is said by claimant that the case did not come into that court under that resolution, but was brought there by his own petition. But, however it may have come there, the rule prescribed by Congress adheres to it, if Congress had the right to prescribe it. Entertaining no doubt of the power of the legislative body to define the terms on which judgments may be rendered against the government as to classes of cases, or as to individual cases, we think the Court of Claims was bound to accept the resolution of February, 1861, as the law of the case in that court. The effect of this resolution on the award, if it should ever come in question in a court not limited by the restrictions which govern that court, we need not decide.

As we can only consider here, what judgment that court should have rendered, we conclude that its judgment was right, and it is therefore

AFFIRMED.

NICHOLS *v.* LEVY.

1. Where a State court,—interpreting a statute of its own State, which gave such court jurisdiction to subject legal and equitable interests in real estate to the claim of creditors,—decided that the statute embraced trusts like one in question (which judgment creditors were seeking to set aside), and that it exempted the property embraced by the trust from liability to such creditors—this court followed that construction of the statute and sustained the trust, though they remarked that if the question had been to be treated by them on general principles of jurisprudence, and independently of the State decision on the statute, the judgment would necessarily have been the other way.
2. An estate in vested remainder is liable to debts the same as one in possession. *Hence*, where creditors seek to subject, by bill in equity, to their claims an estate in such vested remainder, and it is decided that they cannot do it, the matter will be considered as *res adjudicata*, if they afterwards try to levy, by execution, on the same property, when, by the death of the tenant for life, it has become an estate in possession.

THIS was an appeal from the Circuit Court of the United States for the Middle District of Tennessee.

In that court, James Beal Nichol and John Nichol, Jr

filed a bill for an injunction to restrain Levy and *thirty-six* others, different mercantile houses, from selling, under executions at law, which these houses had obtained against them, certain lands in which they, the said J. B. and J. Nichol, were interested; the ground of the bill being, that the said lands were not liable to be sold to satisfy the judgments in question. The court refused to grant the injunction, and this appeal was taken.

The questions made in the case were:

1st. Whether the matter of the liability of said lands was not *res adjudicata* in favor of the Nichols in a certain other proceeding hereinafter mentioned, in which they were defendants? and

2d. Whether, as an original question, they had any such estate in the lands as was liable to execution at law?

The case was thus:

The appellants were grandsons of one Beal Basley, and having been engaged in mercantile business, and failing in it, had become heavily, if not hopelessly, indebted. Their grandfather, desiring to provide for his grandsons, these young men, but unwilling that his bounty should go simply to pay their debts, executed, in 1849, a deed, conveying certain lands (including one tract of 308⅜ acres) to one John Nichol, Sr., upon trusts that the trustees should permit the said Beal Basley to occupy and enjoy the lands, &c., during his life—

"And after his death that the said John Nichol, Sr., will *permit* the said J. B. Nichol and John Nichol, Jr., jointly or in severalty, according to any division into two equal parts that may hereafter be made between them, to *have, possess, use, occupy,* and *enjoy* the said property, and receive the rents, issues, and profits thereof, *so that* neither the said *property* nor the *rents, issues, and profits thereof shall ever be liable for any of the present now existing debts,* whether due or not due, or *now existing contracts* of the said J. B. Nichol or John Nichol, Jr., or either of them, or to *any incumbrance, liability, or lien that they or either of them or their property are now subject to for said debts or contracts, or by any acts, defaults, or transactions of their own, whereby they*

may attempt to make the same liable for said debts or contracts, and after the present debts and liabilities of the said J. B. Nichol and John Nichol, Jr., shall have been extinguished and they entirely discharged therefrom, then the said John Nichol, Sr., shall hold said property, and every part thereof, in trust, *to convey* the same to the said J. B. Nichol and John Nichol, Jr., in fee and absolutely, either as tenants in common or in severalty, and in such manner as may be agreed on by and between the said J. B. Nichol and John Nichol, Jr."

John Nichol, Sr., the trustee, died, and the legal estate in the lands descended to his nine children, two of whom were James Beal Nichol and John Nichol, Jr.

Subsequently, and during the lifetime of the grandfather, in August, 1854, *certain* creditors (in number *thirty*) of the two grandsons having obtained judgments upon debts existing after the conveyance was made, filed bills in chancery against them and the heirs of the deceased trustee, in Tennessee, praying a sale of their interest in the lands so conveyed. These suits were consolidated and tried together. The bills having set forth the deed, judgments, and the case of the creditors on them, concluded:

"From the foregoing statement of facts your honor will readily perceive that said James B. and John Nichol, Jr., are invested with at least a remainder interest in fee in said tract of 308⅝ acres allotted to them as aforesaid; that the legal title to said tract being in John Nichol, Sr., or his heirs, the same is not subject to execution at law."

The prayer was, that the premises being considered, and as the complainants had no remedy at law, the "interest" of the two grandsons Nichol in the property should be sold, and the proceeds applied to the payment of the judgments.

The chancellor decreed that the property could not be thus applied, either under the general jurisdiction of the court, or under an act of the legislature of Tennessee by which it was sought to render it liable, notwithstanding the terms of the deed. And the Supreme Court of Tennessee affirmed this decree.

The statute of Tennessee referred to, authorized certain proceedings to subject equitable interests to the payment of judgments obtained against the defendant, at law. It declared:

"*Section* 1. That a bill might be filed 'to compel the discovery of any bank stock, or other kind of stock, or any property, or thing in action, held in trust for him, and to prevent the transfer of any such stock, property, money, thing in action, or the payment or delivery thereof to the defendant, except where such trust has been created by, or the fund has proceeded from, some person other than the defendant himself, and is declared by will duly recorded, or by deed duly proved and registered.'

"*Section* 2. That the court might decree payment of the judgment out of 'any property, stock, money, or things in action, belonging to the defendant or held in trust for him, with the exception above stated, which shall be discovered by the proceedings in chancery.'

"*Section* 4. That when service could not be made at law, and a judgment obtained, and also where the demand was of a purely equitable nature, a court of equity should have jurisdiction to subject legal and equitable interests in every species of stock and other property, with the exception hereinbefore stated, and also in real estate."

In March, 1861, the two grandsons made partition of the land by deed, and in April, 1860, sold portions of it.

In May, 1860, the grandfather, Beal Basley, died, and immediately thereafter the same thirty judgment creditors above-mentioned, and *seven others, who had not joined in the former proceedings*, caused executions to be levied upon the entire tract of land in question, and it was accordingly advertised for sale. Whereupon in August, 1860, James Beal Nichol, and John Nichol, Jr., the grandsons provided for as above mentioned, filed a bill in the Circuit Court of the United States, for an injunction to prevent the sale, setting forth the proceedings hereinbefore mentioned by which they contended the creditors were estopped, and also relying upon the exemption of the property, according to the terms and conditions of the trust under which they held.

Upon final hearing, in 1864, the court being of opinion that the defendants were not estopped by the decree of the Supreme Court, and "that the terms of exclusion of the donees' creditors not amounting to a limitation of the estate, can no more repel the creditors than a restraint upon alienation can in the hands of the donee himself," dissolved the injunction and dismissed the bill. From this decree the present appeal was taken to this court.

Messrs. Carlisle and McPherson, for J. B. and J. Nichol, appellants:

I. *The decree of the Supreme Court of Tennessee estops the parties to the proceedings in which it was rendered, as to the matter in question.*

The subject-matter was the same in both cases. The only difference was that caused by the death of the tenant for life, Beal Basley. When the decree was rendered, these appellants had a vested remainder in the lands, after the death of Beal Basley. No change took place after this decree and before the executions were issued, except that by his death the remainder vested in possession. But his death did not change the case. A remainder is as much liable for the satisfaction of judgments as an estate in possession; for a legal estate in remainder may be sold under execution, and an equitable remainder may be subjected, by proceedings in equity, to be sold for debt.

The suit in the Chancery Court was between the same parties. It is true that not all the defendants in this cause were parties to the cause in the Chancery Court (thirty of the thirty-seven being parties), but this latter suit was upon a creditor's bill, to which all had a right to be made parties upon motion, and are, consequently, bound by the decision. If this be not so, still those who were parties are bound.

II. *If the appellees are not estopped, and the question is to be treated as an original one in this suit, still the estate of the appellants in the lands was not subject to be taken in execution.*

On this question the decision of the Supreme Court of Tennessee, if not an estoppel, is a controlling authority, be-

ing a decision upon the construction of a statute of that State, and laying down a rule of real property therein.

The intent and legal effect of the deed was to vest the legal estate in the trustee until the debts of the *cestui que trust* should be paid, and upon the happening of that event to convey the lands to the *cestui que trust*, and in the meantime the lands should be enjoyed by those persons described in the deed. During the continuance of the trust it was made the duty of the trustee to protect the possession of the lands against a specified class of persons, and to defeat any attempt on the part of the *cestui que trust* to apply the property or its proceeds to a certain specified and prohibited object. It was clearly the requirement of the donor that the trustee should in certain contingencies interfere actively in the execution of his intentions—to eject, for instance, former creditors, to whom the *cestui que trust* should have conveyed the land in satisfaction of a then existing debt, or even the purchasers who might buy at sheriff's sale, under the executions which it is now sought to enjoin. Moreover, the trustee was to ascertain when a certain event had occurred—the final extinguishment of certain debts of the *cestui que trust*—and upon the happening of that event he was to make a conveyance in one or the other of the two modes prescribed by the deed of gift. These provisions and conditions, *if valid*, constitute a *special trus* .*

These provisions and conditions were valid, and especially that providing for a future conveyance of the land.†

These positions do not conflict with the authorities which hold that all a debtor's property must be liable to his debts. But the remedy is in equity, where the interest of the debtor *under the trust* can be reached—not by execution at law, whereby the trust is destroyed.‡

The trust in this case being executory, and the trusts im-

* Mott *v.* Buxton, 7 Vesey, 201.

† *As to liability for debts*, see Fisher *v.* Taylor, 2 Rawle, 33; Vaux *v.* Park, 7 Watts & Sergeant, 19; Braman *v.* Stiles, 2 Pickering, 460. *As to future conveyance*, see Bank *v.* Forney, 2 Iredell's Equity, 181.

‡ Mebane *v.* Mebane, 4 Iredell's Equity, 131; Dick *v.* Pitchford, 1 Devereux & Battle's Eq. 480.

perfectly declared, equity will carry the intentions of the parties into effect.

Messrs. Bradley and Wilson, contra:

I. *The decree of the Supreme Court of Tennessee is not an estoppel.*

The essential qualities of an estoppel are that the judgment shall be between the same parties, upon the same subject-matter, and this must appear by the record, or be proved, and is not to be inferred by argument.*

The parties are not the same.

We have here thirty-seven creditors as parties. In the suit in the State court of Tennessee there were but thirty. If the decree is a bar, it is a bar only as to the parties to the suit in the State court. The matter must be passed on here for the remaining seven.

It was not on the same subject-matter.

In those cases an effort was made by certain judgment creditors to create a lien in equity upon and subject to sale certain property in which it was alleged the defendants had an equitable interest. The court decided in substance that they had no estate at *that time* cognizable in a court of equity.

It was a bare possibility. The donees took no interest *in presenti*. It was to depend on their surviving the donor. He reserved a life estate to himself, and after his death a use to the donees for their lives, to be enlarged upon a certain contingency into a fee. It was a use for life limited upon a use for life and dependent on their surviving the donor. It was an interest too remote, depending on a possibility only, and did not vest any estate in the donee. It was not an estate or interest in the donees which could pass by assignment, whether voluntary or involuntary. It could not pass even

* Duchess of Kingston's case, 20 State Trials, 355; Hitchin *v.* Campbell, 2 W. Blackstone, 830; Martin *v.* Kennedy, 2 Bosanquet & Puller, 70; Robinson's case, 5 Reports, 32; Outram *v.* Morewood, 3 East, 346.

by will, because no estate could arise on which the devise could operate.*

The Supreme Court therefore was right in the decision which it made in the *then* condition of the title.

But on the death of the donor, the donees surviving, the interest of the donees becomes a vested interest, subject to the disposition of a court of equity and subject to execution at law.

II. *As an original question.*

This being a voluntary conveyance by the donor in trust for the donees to "have, possess, use, occupy, and enjoy said property, and receive the rents, issues and profits thereof," upon the termination of the life estate of the donor they became seized in fee of the lands, and by virtue of the statute of 29 Charles II, the same became liable to levy and sale upon execution.

The condition annexed to the estate made it inalienable except on a contingency, which was too remote and uncertain and against public policy. It was a contingency which not only might never happen, but which was so uncertain that it could not control the enjoyment and transferable character of the estate.

There is no restraint of alienation in the deed of trust, nor any limitation over to defeat the estate in the event of a conveyance by the *cestui que trust* before the payment of the debts provided against by the said deed. If then the *cestui que trust* had united with the trustee after the death of the grandfather in a conveyance of the property in fee, before execution levied, the purchaser would have taken unincumbered title. It follows that the *cestui que trust* took the full interest and estate as the land, subject only to the outstanding legal title, and such estate and interest was necessarily subject to sale under execution.

Where a grant or devise is made of the rents, issues and profits of an estate, the legal estate being vested in a trustee, with a condition annexed, that they shall not be subject to

* Preston on Estates, 75.

present or future debts, whether the estate granted or devised be an estate for life or in fee, the condition is void as against public policy.*

This is not a special trust. The trustee had nothing to do but to *hold* the legal title, *permit* the parties to occupy, and when the trust was ended, *convey* the legal title to them in such manner as *they* might determine. A more passive trustee can hardly be conceived of.

Mr. Justice SWAYNE delivered the opinion of the court.

If the determination of this case depended upon the general principles of jurisprudence, the result must necessarily be in favor of the appellees. It is a settled rule of law that the beneficial interest of the *cestui que trust*, whatever it may be, is liable for the payment of his debts. It cannot be so fenced about by inhibitions and restrictions as to secure to it the inconsistent characteristics of right and enjoyment to the beneficiary and immunity from his creditors. A condition precedent that the provision shall not vest until his debts are paid, and a condition subsequent that it shall be divested and forfeited by his insolvency, with a limitation over to another person, are valid, and the law will give them full effect. Beyond this, protection from the claims of creditors is not allowed to go.*

According to these principles the restrictions in the deed of Beal Basley as to the creditors of the appellants are wholly void.

But the case does not turn upon these considerations.

Two other questions are presented, and our judgment must be determined by their solution.

One of these questions is, whether the appellees, who were complainants in the bills filed to reach the interests of the

* Graves *v.* Dolphin, 1 Simon, 66; Mebane *v.* Mebane, 4 Iredell's Eq., 131; Bank *v.* Forney, 2 Id. 181, 184; Snowden *v.* Dales, 6 Simon, 524; Foley *v.* Burnell, 1 Brown's Ch. 247; Brandon *v.* Robinson, 18 Vesey, Jr., 429; Piercy *v.* Roberts, 1 Milne & Keene, 4; Dick *v.* Pitchford, 1 Devereux & Battell's Eq. 484; 2 Story's Eq., § 974.

appellants in the property in question, are not concluded by the decree rendered in those cases by the Supreme Court of Tennessee. The cases were consolidated in that court, and decided together. The bills were filed in the Chancery Court of Davidson County, and addressed to the presiding chancellor. They contained this averment:

"From the foregoing statement of facts your honor will readily perceive that said James B. and John Nichol, Jr., are invested with at least a remainder interest in fee in said tract of 308⅜ acres allotted to them as aforesaid; that the legal title to said tract being in John Nichol, Sr., or his heirs, the same is not subject to execution at law."

Hence the aid of a court of equity was invoked. The prayer of the bills was that the "interest" of the appellants in the property should be sold, and the proceeds applied to the payment of the judgments.

The chancellor decreed against the complainants, upon the grounds, that the restriction in the trust as to the liability of the property for the debts of James B. and John Nichol was valid; that the creditors could not compel the conveyance of the legal title when the beneficiaries themselves were not in a condition to demand it; and that "the provisions of the deed were within the purview of the act of 1832;" and the property thus protected from the claims of the creditors.

The complainants appealed to the Supreme Court. That court held "that said property is not liable for such debts and judgments of the complainants, and that the same may not be subjected to the payment and satisfaction of said debts and judgments," and the decree of the chancellor was affirmed. As regards the complainants in that case, who are defendants in this, the parties were the same, and the question to be determined was the same. But it is said that Beal Basley was living when that litigation was begun, and dead when this bill was filed. That Basley was living could have made no difference in the result of the former suits, and cannot affect the bar arising from them in this suit. As averred in the bill, the beneficiaries had a vested re-

mainder in fee. Their right to the property was as perfect then as it is now. Their estate was an equitable one, but alienable and descendible, and subject to be conveyed by the same instruments as a legal estate. It was not then vested in possession. The time of possession was dependent upon the termination of the life estate of Beal Basley. But this only lessened its value for the time being. Its liability to their creditors was not in the least affected. It is impossible that the Supreme Court of Tennessee should have held otherwise, and the decree have proceeded upon a different view of the subject. The language of the decree repels the suggestion. We cannot give any weight to an objection which assumes as its basis such a reflection upon that enlightened tribunal. The decree as to the property and questions here in controversy is *res judicata*, and it has every element of conclusiveness as to those who were parties to it.

Several defendants in this suit were not parties to that litigation, and hence are not bound by the decree.

This brings us to examine the second question presented for our consideration. It relates to the effect of the act of 1832, referred to by the chancellor in his decree.

The Supreme Court of Tennessee held that it had no power to subject stocks, choses in actions, or equitable interests, to the payment of judgments at law. The legislature of the State thereupon passed the act in question.*

The first section declares that a bill may be filed "to compel the discovery of any bank stock, or other kind of stock, or any property, or thing in action, held in trust for him" (the defendant), "and to prevent the transfer of any such stock, property, money, thing in action, or the payment or delivery thereof to the defendant, except where such trust has been created by, or the fund has proceeded from, some person other than the defendant himself, and is declared by will duly recorded, or by deed duly proved and registered."

The second section authorizes the court to decree payment of the judgment out of "any property, stock, money,

* Session laws of 1832, p. 22; Ewing *v.* Cantrell, Meigs, 364.

or things in action, belonging to the defendant or held in trust for him, with the exception above stated, which shall be discovered by the proceedings in chancery."

The fourth section provides that when service cannot be made at law, and a judgment cannot be obtained, and also where the demand is of a purely equitable nature, "a court of equity shall have jurisdiction to subject legal and equitable interests in every species of stock and other property, with the exception hereinbefore stated, and also in real estate."

The Supreme Court of the State decided, in the suits referred to, that this statute embraces trusts of real estate, and that it exempted the property in question from liability to the judgment creditors. There can be no doubt of the power of the legislature to pass the statute. Its wisdom and policy are considerations with which we have nothing to do. Being a local statute and involving a rule of property, we adopt the construction which has been given to it by the highest judicial tribunal of the State.

This is decisive of the case as to those of the appellees who were not parties to the former suits.

The decree of the Circuit Court is REVERSED, and the cause will be remanded to that court with directions to enter a decree

IN CONFORMITY TO THIS OPINION.

UNITED STATES v. ARMIJO ET AL.

1. The motives which may actuate parties intervening in a California land case to appeal, or the fact that an inconsiderable interest in the grant is represented by them, can have no influence upon the decision of the matter presented. The holder of the slightest interest, if properly before the court, has the right to insist upon a fair location of the quantity granted, however much such location may clash with the wishes of his co-owners.

2 Where two grants in California, made by the Mexican government, were both for specific quantities without designation of location or bounds,

Statement of the case.

except that they were within the same general outboundaries, which included a much larger quantity of land than was specified in both grants, the location by occupation and settlement of the second grantee under a provisional license of an earlier date than the first grant was properly respected in the survey of his land after his grant was confirmed. The equity created by the prior occupation and settlement under the provisional license, was superior to that of the other grantee, although the formal title was first issued to the latter.

3. Where a grant was of a specified quantity within exterior limits embracing a much larger quantity, there was no obligation on the part of the former government, nor is there on that of the present government, to allow the quantity to be selected in accordance with the wishes of the grantee. The duty of the government is discharged when the right conferred by the grant to the quantity designated is attached to a specific and defined tract.

4. Under our system the grantee is allowed the privilege of directing a selection of the quantity granted, subject only to the restriction that the selection be made in one body, and in a compact form. It is a privilege given by the generosity of the government; but its exercise is not permitted, so as to defeat the equitable prior rights of others.

5. As compactness of form depends, in many instances, upon a variety of circumstances, such as the character of the country, its division into different parcels by mountains, rivers, and lakes, and sometimes by its relation to neighboring grants, it will be sufficient if the survey be in reasonable conformity with the decree of confirmation.

APPEAL from the District Court of the United States for the Northern District of California.

The question presented for determination in the case related to the location of the southwestern line of the survey of a grant of land in California, made to one Francisco Armijo, which survey was approved by the District Court. The Armijo grant adjoined another grant in California made to one Francisco Solano; and, to understand the question presented, a statement of the origin and nature of both of the grants is necessary.

In January, 1837, Francisco Solano, a chief of an Indian tribe, presented a petition to the commanding general of the northern frontier of California, and director of colonization, for a grant of a tract of land of about four square leagues in extent, known by the name of Suisun. In his petition he represented that the land belonged to him by hereditary right from his ancest rs, and that he was in its actual posses-

sion, but that he desired to "revalidate" his rights; that is, to obtain a new recognition of their validity, in accordance with the existing laws of the Republic and the recent law of colonization decreed by the supreme government. The commanding general soon afterwards, during the same month, acceded to the petition so far as to give Solano a provisional grant of the land, "as belonging to him by natural right and actual possession," but accompanied it with a direction to him to ask from the government the usual title, in order to give validity to his rights, in conformity with the new law of colonization. In accordance with this direction, Solano applied, in January, 1842, to Alvarado, then Governor of California, for a full grant, accompanying his application with the above petition to the commanding general and the provisional grant of that officer.

On the 20th of the same month a formal grant was accordingly issued to him by the Governor, which was afterwards approved by the departmental assembly.

This grant was presented to the board of land commissioners created under the act of March 3, 1851, by Archibald C. Ritchie, who had become interested in the land, and the same was confirmed to him by the board, and afterwards by the District Court, and the decree of confirmation was affirmed by this court at its December Term, 1854.*

In the following year the four square leagues were surveyed under the directions of the Surveyor-General of the United States for California, and the survey was approved by that officer. In conformity with this survey, a patent was issued by the United States to Ritchie in January, 1857, and his representatives (heirs or vendees) have been in possession of the premises ever since.

In November, 1839, more than two years after the application of Solano to the commanding general, Francisco Armijo also presented a petition to that officer for a grant of a tract of land of about three leagues in extent, known by the name of Tolenas, representing that the land solicited ad-

* 17 Howard, 525.

joins the Suisun tract. The general immediately gave the petitioner permission to occupy the land thus situated, as it was vacant and was not private property. The order granting this permission enjoins upon the petitioner, as a duty, to avoid molesting the Indians or other neighbors, to endeavor to win their confidence, to give information of any attempt at rebellion, and, in every case, to act in accord with the chief of the Suisun, and directs him to apply, with this order, to the political authorities for the necessary title-papers. Application was accordingly made to the prefect of the district, and by him the application was transferred to the governor of the department, who, on the 4th of March, 1840, issued to Armijo a formal grant of the premises. One of the conditions annexed to the grant provided that on no account should the grantee molest the Indians nor his immediate neighbors. This grant was also presented to the board of land commissioners, and was rejected. On appeal to the District Court, the decision of the board was reversed and the grant confirmed, and at the December Term of 1859 the decree of the District Court was affirmed by this court.

The survey made by the Surveyor-General of the United States for California of the tract thus confirmed located the land adjoining the tract patented to Ritchie, and was approved by the decree of the District Court in July, 1863, and the case came before this court on appeal from this decree. The appeal was prosecuted by two intervenors, claiming under the Armijo title. All the other representatives of the original grantee approved of the location made, and desired its confirmation.

The United States were also appellants on the record, but they did not press their objections urged in the court below. The specific quantity granted was not described by metes and bounds in either of the two grants, but in each reference was made to a map indicating the exterior limits within which the quantity was to be taken. Both maps represented, to a great extent, the same general tract, and the intervenors sought to include within the survey of the Armijo

grant a portion of the land patented to Ritchie, and thus to be enabled to retain the land occupied by them, either as pre-emptors or holders of warrants issued by the State for the five hundred thousand acres given by Congress under the act of September 4, 1841.

Messrs. J. B. Williams and J. A. Wills, for the appellants, and Messrs. Carlisle and Stanley, for the respondents.

Mr. Justice FIELD, after stating the case, delivered the opinion of the court, as follows:

The motives which may actuate the intervenors appealing, or the fact that an inconsiderable interest in the grant is represented by them, can have no influence upon the decision of the matter presented. The holder of the slightest interest, if properly before the court, has the right to insist upon a fair location of the quantity granted, however much such location may clash with the wishes of his co-owners.

The intervenors appealing rest their claim principally upon two grounds:

1st. Upon the alleged priority of the grant to Armijo; and

2d. Upon the alleged priority of occupation and settlement.

The priority of the grant consists only in the date of the former title-papers. The grant to Armijo bears date on the 4th day of March, 1840; that to Solano on the 20th of January, 1842. But the rights of Solano are recognized by Armijo in his petition, and in the order of concession by the commanding general, and are specially referred to in the formal grant issued by the governor. The concession to Armijo assumes, and correctly assumes, that the land known as Tolenas was vacant and unappropriated. It is clear, therefore, that the political authorities intended that Armijo should take his grant in subordination to the previously existing, or, at least, previously asserted, rights of the Indian chief.

There can be no doubt, as observes the district judge, that, under these circumstances, the rights of Solano, according

to Mexican usages, would have been recognized as superior to those of Armijo in any contest, notwithstanding the formal title issued first to Armijo. And, as he justly adds, "the archives abound in instances where not only the equity created by a prior occupation and cultivation under a provisional license to occupy, but even that created by a prior solicitation, has been recognized and enforced."

This is not all. Where a grant was of a specific quantity within exterior limits embracing a much larger quantity, there was no obligation on the part of the former government, nor is there any obligation on the part of the present government, to allow the quantity to be selected in accordance with the wishes of the grantee. The duty of the government is discharged when the right conferred by the grant to the quantity designated is attached to a specific and defined tract.

Under our system the right of the grantee to direct a selection of the quantity granted is admitted, subject only to the restriction that the selection be made in one body, and in a compact form. This right, we say, is admitted, though strictly it is not a right; it is only a privilege given by the generosity of the government.

The law of Mexico, as stated by Galvan, was otherwise. It was as follows: "No person, though his grant be older than others, can take possession for himself, or measure, or set limits to his landed property, unless it is done by judicial authority, with the citation of all those who bound upon him; for whatever is done contrary to this will be null, of no validity or effect."*

And to the same purport is the language of this court in the case of *Fremont* v. *United States*.† "Under the Mexican government," said the court, "the survey was to be made or approved by the officer of the government, and the party was not at liberty to give what form he pleased to the grant. This precaution was necessary, in order to prevent the party from giving it such a form as would be inconveni-

* See Ordenanzas de tierras y aguas, by Galvan, ed. of 1855, p. 185.
† 17 Howard, 542.

ent to the adjoining public domain and impair its value. The right which the Mexican government reserved to control this survey passed, with all other public rights, to the United States, and the survey must now be made under the authority of the United States, and in the form and divisions prescribed by law for surveys in California, embracing the entire grant in one tract."

The exercise of the right of selection given to the grantee is not permitted by the political authorities, and when a location is subject to the control of the courts is never permitted by them so as to defeat the equitable prior rights of others.

2. The alleged priority of occupation and settlement consists in the fact that Armijo, after obtaining his grant, built a house upon a portion of the land included in the patent to Ritchie, and occupied it. But this fact is met by the further fact that the erection of the house gave rise to a suit between the owners of the two grants as to the boundary between them, which finally led to an arbitration of the matter. The award, as we construe it, fixed the Sierra Madre as the common boundary of their respective claims. The patent of the Suisun tract does not embrace any land situated on the Armijo side of this boundary, and cannot, therefore, be justly a ground of objection by the claimants under the Armijo title.

The objection that the survey does not locate the land in a compact form cannot be sustained. Compactness of form must depend, in many instances, upon a variety of circumstances: such as the character of the country, its division into different parcels by mountains, rivers, and lakes, and sometimes by the relation of the tract to neighboring grants. In this case, the Tolenas tract is surrounded by three grants, confirmed, surveyed, and patented. The survey is made so as to avoid collision with any of the elder patents, and, under these circumstances, is in reasonable conformity with the decree of confirmation—the only conformity which the law requires.

DECREE AFFIRMED.

SERRANO v. UNITED STATES.

Long-continued and undisturbed possession of land in California, whilst that country belonged to Spain or Mexico, under a simple permission to occupy it from a priest of an adjoining mission, or a local military commander, did not create an equitable claim to the land against either of the governments of those countries; nor is a claim based upon such possession entitled to confirmation by the tribunals of the United States under the act of Congress of March 3d, 1851.

THIS was a proceeding, under the act of March 3d, 1851, for the confirmation of a claim to a tract of land in California known as the rancho of "Temescal," of four square leagues in extent. The petition to the board of land commissioners asked for the confirmation on two grounds:

1st. By virtue of an alleged grant of the premises by the authorities of the King of Spain to Leandro Serrano, the testator of the claimants; and

2d. By virtue of long-continued and uninterrupted possession of the premises.

The proof negatived the existence of a grant, but showed that Serrano had received the written permission of the priest of the mission of San Luis Rey (to which mission the land originally belonged), or of the military commander of San Diego, to occupy the premises, and that under such permission he took possession of them, and occupied them, or a portion of them, from about 1818 or 1819, until his death, which occurred in 1852.

The present claim was presented by his executrix (the widow), and his executor.

The deceased Serrano, made some improvements on the premises, consisting principally of two or three adobe houses, and he had a vineyard and fruit orchard. He had also several acres under cultivation, and was the owner of cattle, horses, and sheep, in large numbers, which roamed over and grazed on the hills and in the valleys surrounding his residence, to the extent of the four leagues claimed by him.

His possession was continuous and undisputed until the cession of the country to the United States.

The land commission rejected the claim, but the District Court, on appeal, reversed the action of the board, and by its decree adjudged the claim valid, and confirmed it to the extent of four leagues. From this decree the United States appealed to this court.

Mr. Stanbery, A. G., and Mr. Wills, for the United States:

I. *There is no archive evidence of the existence of a grant by Spain or Mexico to Serrano.*

There is no petition, no diseño, no informe, no concession, no titulo, no confirmation by the departmental assembly, and no act of juridical possession. In short, there is not a single link in the ordinary chain of title for grants of land in California by the Spanish or Mexican governments, either before or after the passage of the colonization law of 1824 and the regulations of 1828.

The claim must, therefore, be rejected, on the authority of a long line of cases.*

II. *Serrano's possession did not originate and continue under such circumstances as to bind the faith of Spain or Mexico, or to create an equity against the United States.*

According to his own statement, these lands were originally occupied by the mission San Luis Rey, of which Serrano was the mayor-domo. The priest of that mission permitted him to settle on and occupy a portion of the lands claimed by it. Now, it is well settled that the mission had no title, and consequently could give no binding title or possession.†

According to his own statement, he was allowed to continue his possession by the military commandante. Military

* See, among the more recent, Romero *v.* United States, 1 Wallace, 721; White *v.* United States, Id. 660; Pico *v.* United States, 2 Id. 281.

† United States *v.* Ritchie, 17 Howard, 525, 540; United States *v.* Cruz Cervantes, 18 Id. 553; Nobili *v.* Redman, 6 California, 325.

commandantes had no authority to make grants, except in *pueblos*.

Messrs. J. Hartman and Cornelius Cole, contra, for the respondents:

The positions taken for the claimants are, that Serrano, having entered in good faith under what he believed and may be presumed to have been competent authority, and having continued to occupy and improve the land under the governments of Spain and Mexico until the acquisition of this country by the United States and till this time, a period of about forty-eight years, has acquired thereby a title by prescription against this government as the successor of the former ones; and if this position be untenable, that the facts of the case present an equitable title, which should be confirmed.

I. The Spanish law of prescription is laid down in *Escriche*.*

Attention need be directed only to those provisions which declare a possession of twenty years, without title but in good faith, induced by the acts of others with the knowledge of the proprietor, to be good as a prescription even against the absent, and ten years against the present; and continuous possession of thirty years, *however acquired*, without suit brought against it, to constitute a prescription, even if it were acquired by violence or robbery; good faith not being exacted in a prescription of thirty years.†

By the Spanish law prescription of forty years is good against the king.

In the Recopilacion,‡ will be found a royal decree, which, after reciting that persons hold cities, towns, and villages without title, and that it is doubted whether the same could be acquired against the crown, ordained,

* Vol. ii, pages 741–2, tit. Prescripcion de Dominio.

† Siete Partidas, title xxix, L. 18, 19; see Moreau & Carlton's translation, vol i, pages 382–3; Feb Mejicano, vol. i, lib. 2, cap. 2, § 41 to 45.

‡ L. 1, B. 4, title 16.

"That immemorial possession, proved in the manner and under the conditions required by the law of Toro,* be sufficient to acquire against us and our successors any cities, towns, use, jurisdiction, civil or criminal, and thing or part thereof annexed or belonging thereto, provided the time of said prescription be not interrupted by our command, naturally or civilly."

The law of Toro, above referred to as defining the conditions on which property is acquired by prescription, is as follows:

"The time in which things are prescribed is comprehended under two kinds of prescription, immemorial and temporal; the first is proved by witnesses of good fame and character, who depose to having seen the person in possession of the thing or property for forty years, and having heard their ancestors say they never saw or heard anything to the contrary."†

In *Landry* v. *Martin*,‡ the Supreme Court of Louisiana decided that the Spanish government recognized verbal as well as written grants to lands; and that after a long possession, for nearly half a century, a written grant, if necessary, would be presumed.

In *Barclay* v. *Howell's Lessee*,§ this court held that an uninterrupted possession for thirty years would authorize the presumption of a grant. "Indeed, under peculiar circumstances," they say, "a grant has been presumed from a possession of less than the number of years required to bar the action of ejectment by the statute of limitation." It seems that the common law rule (that the presumption derived from possession is that the possessor owns absolutely), is applicable to possession before the introduction of the common law.‖

* Which is law 1, title 7, b. 5, of the Recopilacion.

† White's Recop., 1 vol. 95; see Lewis *v.* San Antonio, 7 Texas, 288, where the above law is cited.

‡ 15 Louisiana, 1.

§ 6 Peters, 498.

‖ Herndon *v.* Casiano, 7 Texas, 322; New Orleans *v.* United States, 10 Peters, 734.

In *United States* v. *Castro*,* where the grant was not produced, but the claimant had occupied the land for twenty years, the court says:

"An occupation so long-continued and notorious, with a claim of ownership so universally recognized, might of itself be deemed sufficient evidence of ownership."

Serrano undoubtedly always believed he was lawfully in possession, and had a right to the possession; and that belief was induced and fully justified by the acts of the Mexican authorities for a long course of years.

It is difficult, if not impossible at this day, to ascertain exactly what discretionary authority was vested, by the governors under the Spanish regime, in the priests of the mission, and the military commandantes in remote and thinly settled districts. Rockwell, in his Spanish and Mexican Law,† gives us some "instructions of the viceroy (dated Mexico, August 17th, 1773), to be observed by the commandante appointed to the new establishments of San Diego and Monterey."

Among them were:

"*Article* 12*th*. With the desire to establish population more speedily in the new establishments, I, for the present, grant the commandante the power to designate the common lands, and also even to distribute lands in private to such Indians as may most dedicate themselves to agriculture and the breeding of cattle; for having property of their own, the love of it will cause them to radicate themselves more firmly; but the commandante must bear in mind that it is very desirable not to allow them to live dispersed, each one on the lands given to them, but that they must necessarily have their house or habitation in the town or mission where they have been established or settled.

"*Article* 13*th*. I grant the same faculty to the commandante with respect to distributing lands to the other founders (*pobladores*), according to their merits and means of labor. They also

* 1 Hoffman, 125.

† 444 Appendix, No. 1; see Halleck's Report, California Correspondence, 119, where also these instructions are to be found.

living in the town and not dispersed, declaring that in the practice of what is prescribed in this article and in the preceding twelfth, he must act in every respect in conformity with the provisions made in the collection of the laws respecting newly acquired countries and towns (*reducciones y poblaciones*), granting legal titles for the owner's protection, without exacting any remuneration for it, for the act of possession."

Here is authority conferred upon the commandante, whose successor, at San Diego, placed Serrano in possession, for the distribution and granting of lands, with full discretion as to quantity, outside of the towns and missions; for it provides that the grantees shall not live dispersed on the lands granted, but in the towns and missions, for mutual defence.

The commandantes sometimes acted as the informing officers, when there was no civil officer in the vicinity, and grants were made upon their informations; and in pueblos, at least, they had full power to put parties in possession of land.

Similar functions were exercised by the priests, and they could give permission to occupy. It is not assuming anything to say that Serrano entered into possession lawfully, and not as a trespasser.

At common law the general rule with regard to prescriptive claims is, that every such claim is good, if by possibility it might have had a legal commencement,* and for upwards of twenty years' enjoyment of an easement, or *profit a prendre*, a grant, or, as Lord Kenyon is reported to have said, even a hundred grants, will be presumed, even against the crown, if by possibility they could legally have been made.† In *Parker* v. *Baldwin*,‡ Lord Ellenborough recognizes the right to presume a grant after twenty years, and asserts the practice of the courts to do so. And this doctrine has been repeatedly affirmed in our own country.§

The law will presume anything which would make the

* Lord Pelham *v.* Pickersgill, 1 Term, 667.

† Roe *v.* Ireland, 11 East, 284. ‡ Id. 490.

§ Gayetty *v.* Bethune, 14 Massachusetts, 49; Kirk *v.* Smith, 9 Wheaton, 241; Rowland *v.* Wolf, Bailey, 56; Hogg *v.* Gill, 1 McMullan, 329.

ancient appropriation good, for whatever may commence by grant is good by prescription.

This court has passed upon the validity of permission to occupy lands where no grant had ever issued. It did so in the case of *Berdugo et al.* v. *United States*, for the San Rafael rancho, and in that of *Yorba et al.* v. *United States*, for the rancho of Santana, in both of which the claims were confirmed and appeals dismissed. The court has also uniformly held that the term "grants" in a treaty comprehends not only those which are made in form, but also any concession, warrant, or permission to survey, possess, or settle, whether evidenced by writing or parole, or presumed from possession,* and that in the term "laws," is included custom and usage, when once settled, though of recent date.†

II. The equities of this case are sufficient to sustain the claim for a decree of confirmation. In *Mitchel* v. *United States*,‡ this court, in referring to the Florida cases, uses this language:

"Another objection is of a more general nature, that the grantees did not acquire a legal title to the land in question. But it must be remembered that the acts of Congress submit these claims to our adjudication as a court of equity, and, as often and uniformly construed in its repeated decisions, confer the same jurisdiction over imperfect, inchoate, and inceptive titles, as legal and perfect ones, and require us to decide by the same rules on all claims submitted to us, whether legal or equitable. Whether, therefore, the title in the present case can partake of the one case or the other, it remains only for us to inquire whether that of the petitioner is such, in our opinion, that he has, either by the law of nations, the stipulations of any treaty, the laws, usages, and customs of Spain, or the province in which the land is situated, the acts of Congress and the proceedings under them, or a treaty, acquired a right which would

* Strother *v.* Lucas, 12 Peters, 436.

† Renner *v.* Bank, 9 Wheaton, 585.

‡ 9 Peters, 733; see, also, the opinion of the court in Strother *v.* Lucas, 12 Peters, 446, for a full discussion of the equity jurisdiction over inceptive titles.

have been valid if the territory had remained under the dominion of Spain."

The same construction has been placed upon the rights of claimants, under the act of Congress by which this case is brought within the jurisdiction of this court. In *United States* v. *Alviso*,* where the claimant had only taken the preliminary steps for the acquisition of title, and had obtained, pending his application, a mere permission to occupy, under which he had occupied the land since 1840, had improved and cultivated it, and his family had resided on it, the court says:

"The claimant appears to have been a citizen of the department, and no objection was made or suggested why he should not have been a colonist of that portion of the public domain he has solicited; no imputation has been made against the integrity of his documentary evidence, and no suspicion exists unfavorable to the *bona fides* of his habitation, or the continuity of his possession and claim. He has been recognized as the proprietor of this land since 1840."

The documentary evidence referred to in that case, consisted only of the petition and permission to occupy; of no legal effect as a grant, but showing the *bona fides* of his occupancy, and the knowledge and assent of the authorities, which, coupled with his continuous possession, gave him, in the opinion of the court, an equitable title which they felt bound to recognize.

In *United States* v. *Wilson*,† where the claim rested upon a general order of Governor Alvarado, in 1842, to the alcalde of the mission of Obispo, to distribute the mission lands among the resident Indians, according to the merits of each, under which order the alcalde made a general distribution, giving to one Romualdo much more than to the others, upon a special order of the governor, in reward for meritorious services, Romualdo having lived on the land for many years, the court says:

* 23 Howard, 318.

† 1 Black, 267.

"The title seems to be in conformity with the practice and usages of the Mexican Government. . . . In the present instance the possession and cultivation were of considerable duration, and the distribution was intended to be permanent, and as a home for the occupant. The claim appears to be an honest one, unaccompanied by suspicion, and under the circumstances, we think, was properly confirmed."

The decision of the court does not recognize the order of Alvarado as competent to convey title, but as merely creating an equity recognized by Mexican usages, which, coupled with a long possession and cultivation, constituted "an honest claim," which the court did not feel it could disregard.

Mr. Justice DAVIS delivered the opinion of the court.

The court below confirmed the claim of the appellees to the rancho known as "Temescal," embracing five leagues, and situated in the county of San Bernardino.

It is insisted by the United States that this judgment was wrong, because Leandro Serrano, under whom the appellees claim, had no title, legal or equitable, to the land in controversy.

It can serve no useful purpose to review the voluminous testimony in the record, for there is no substantial difference in it on any point material to the decision of the cause, and hardly any portion of it but what can be readily reconciled. It is clear that Serrano occupied a portion of the property which was confirmed to his widow and heirs continuously, from 1818 or 1819 until his death, which occurred in 1852. The improvements on the place consisted of two or three adobe houses, a small vineyard and fruit orchard, and a few acres in actual cultivation. At different periods of his occupancy he was the owner of cattle, sheep, and horses, which subsisted on the uninclosed valleys and hills that surrounded his residence. That his possession and occupation were undisturbed and undisputed during the whole period of Mexican sovereignty in California until our acquisition of the country, is fully established. It is not so easy to determine

the extent of his possession, but in the view we take of the case, the question is unimportant.

The petition presented to the board of land commissioners asked for the confirmation of this claim on two grounds,—first, because a provisional grant was made; and, second, by virtue of long-continued and uninterrupted possession. The proof not only negatives the existence of a grant, but clearly shows that Serrano occupied the premises by a written permission from the priest of the mission, or the commandante of San Diego, or from both conjointly. The only witness who pretends ever to have seen a paper concerning a grant was Villia, an ignorant man, unable to write, with very little knowledge of reading, and who, on being shown some writing, in order to test his ability to read, was unable to tell what it was. It is impossible to escape the conclusion that this witness was mistaken, without discrediting all the remaining evidence, including the repeated declarations of Serrano that he had no title. Villia evidently saw a paper in the hands of Serrano in relation to this land, but it was not a title of concession by Governor Sala, but the written permission to occupy given by the commandante and priest. The archives of the country are totally silent on the subject of this pretended grant, and there is no record evidence even of an application for a grant, which exists in ordinary cases. If Serrano even thought he had such a grant, why did he reply to Wilson (who was his friend and relative by marriage), on being advised of the necessity of perfecting his title, if he had any, "that he had no title, but had been living on the place ever since the settlement of California, and everybody respected his claim."

It is apparent, from the testimony produced by the claimants, without considering that offered by the United States, that the grant was a fiction, and that Serrano occupied by a written permission given to him by the priest, and perhaps by the commandante. It is equally certain that this permission was the paper sent by him to Governor Echandea for the purpose of obtaining from him a title. Under the government of Spain, in California, the commandante or priest

had no authority to grant lands, or to make contracts that could bind the Spanish government to grant them. The governors of the country only had this power. If Serrano had an imperfect grant, it would show that he was in possession, claiming title, but a possession under a simple permission to occupy could not raise even an equity against the government.*

It is clear, therefore, that there was nothing done which estopped the Spanish government from denying Serrano's title, and his bare possession did not bind the Mexican government, during its dominion in California, from 1823 to 1846, not to deny it. The colonization laws of Mexico were exceedingly liberal, and yet they were never invoked by Serrano to aid him in getting a title.

If, then, Spain and Mexico never granted this land, or contracted to grant it, or were under obligations to grant it, the claim has surely no validity as against the United States.

But it is insisted that if the legal title fails, yet the notorious and long-continued possession establishes an equitable one.

The actual possession in this case was limited to a very small quantity of ground; but, conceding that it embraced five leagues, no equities attached to it, considering the manner in which it was obtained and continued. There is no adverse holding here, but the possession was a permissive one, and consistent with the proprietary interest of Spain and Mexico; and the fact that those governments did not terminate the possession, which was a mere tenancy at will, cannot create an equity entitled to confirmation. Serrano held under a license to occupy, and that license could be revoked at any time. The failure to revoke it cannot change the original character of the possession into an adverse one. If Serrano had entered into possession under a claim of right, and had title-papers, though imperfect, he might say that the length of his possession entitled him to the favorable consideration of the court. Not so, however, where he had

* Peralta case, 19 Howard, 343; United States v. Clarke, 8 Peters, 436.

no interest in the land, never applied for any, either to Spain or Mexico, and was content with a permission to occupy it for the purposes of pasturage.

The judgment of the court below is reversed, and the case remanded to the District Court of California, with directions to enter an order

DISMISSING THE PETITION.

Mr. Justice FIELD did not sit in this case, nor take any part in its decision.

LICENSE TAX CASES.

UNITED STATES *v.* VASSAR.
" *v.* SCHUREMAN.
" *v.* GREEN.
" *v.* BEATTY.
" *v.* SHELLY.
" *v.* BOWEN.
" *v.* SWAIN.
" *v.* CRAFT.
" *v.* CRAFT.

1. Licenses under the act of June 30, 1864, "to provide internal revenue to support the government, &c." (13 Stat. at Large, 223), and the amendatory acts, conveyed to the licensee no authority to carry on the licensed business within a State.
2. The requirement of payment for such licenses is only a mode of imposing taxes on the licensed business, and the prohibition, under penalties, against carrying on the business without license is only a mode of enforcing the payment of such taxes.
3. The provisions of the act of Congress requiring such licenses, and imposing penalties for not taking out and paying for them, are not contrary to the Constitution or to public policy.
4. The provisions in the act of July 13, 1866, "to reduce internal taxation, &c." (14 Stat. at Large, 93), for the imposing of special taxes, in lieu of requiring payment for licenses, removes whatever ambiguity existed in the previous laws, and are in harmony with the Constitution and public policy
6. The recognition by the acts of Congress of the power and right of the

States to tax, control, or regulate any business carried on within its limits is entirely consistent with an intention on the part of Congress to tax such business for National purposes.

CONGRESS, by an internal revenue act of 1864, subsequently amended, enacted that no persons should be engaged in certain trades or businesses, including those of selling lottery tickets and retail dealing in liquors, until they should have obtained a "license"* from the United States.

By an amendatory act of 1866, the word "*special* tax" was substituted in the place of the word license in the former act.

A party exercising any business for which a "license" was necessary, or on which the "special tax" was imposed, without having obtained the former or paid the latter, was made liable, under the acts respectively, both to the tax and to fine or imprisonment, or both. By the two principal acts, respectively, it was provided that no license so granted, or special tax so laid, should be construed to authorize any business within a State prohibited by the laws thereof, or so as to prevent the taxation by the State of the same business.

In New York and New Jersey, selling lottery tickets, as in Massachusetts retailing liquors (except in special cases, not important to be noted), is, by statute, wholly forbidden. Such selling or dealing is treated as an offence against public morals; made subject to indictment, fine, and imprisonment; and in one or more of the States named, high vigilance is enjoined on all magistrates to discover and to bring the offenders to justice; and grand juries are to be specially charged to present them.

In this condition of statute law, National and State, seven cases were brought before this court.

They all arose under the provisions of the internal revenue acts relating to licenses for selling liquors and dealing in lotteries, and to special taxes on the latter business.†

The first came before the court upon a certificate of di-

* See 13 Stat. at Large, 248, 249, 252, 472, 485; 14 Id. 113, 116, 137, 301.
† 13 Stat. at Large, 252, 472, 485, and 14 Id. 116, 137, 301-2.

vision from the Circuit Court of the United States for the Northern District of New York.

It was argued at the last term, with the five next cases, which came here upon writs of error to the Circuit Court of the United States for the District of New Jersey.

During the present term another case of the same general character, coming from the Circuit Court for the District of Massachusetts, was argued, with two others, similar, except in one particular, to the New York and New Jersey cases, and coming here upon a certificate of division from the Circuit Court for the Southern District of New York.

In the first case, Vassar, a citizen and resident of the State of New York, was indicted for selling lottery tickets in that State without having first obtained and paid for a license under the internal revenue acts of Congress. He demurred to the indictment, and the division of opinion arose upon the question presented by the demurrer and joinder.

In the five cases from New Jersey, citizens and residents of that State were severally indicted for the same offence. They set up, by way of plea, the statute of New Jersey prohibiting the business, for carrying on which, without obtaining a license and payment of the required duty, they were indicted. The district attorney demurred to each of these pleas, and in each case there was a judgment for the defendants upon demurrer and joinder.

In the case from Massachusetts, the defendant was indicted for carrying on the business of retailing liquors without license, to which indictment there was a demurrer. A statement of facts was agreed on to the effect that the defendant was a retail dealer as charged, and that this business was prohibited by the laws of the commonwealth. And the division of opinion occurred on the question presented by the pleadings and this agreed statement.

The general question in these cases was: Can the defendants be legally convicted upon the several indictments found against them for not having complied with the acts of Congress by taking out and paying for the required licenses to

carry on the business in which they were engaged, such business being wholly prohibited by the laws of the several States in which it was carried on?

In one of the two remaining cases the defendant was indicted for being engaged in the business of a lottery dealer, and in the other for being engaged in the business of a lottery ticket dealer, in New York, without having paid the special tax required by law. In each case there was a demurrer and joinder in demurrer. The division of opinion occurred upon the pleadings, and the question certified was the same in each case.

In these two cases, therefore, the general question was: Could the defendants be legally convicted upon an indictment for being engaged in a business on which a special tax is imposed by acts of Congress, without having paid such a special tax, notwithstanding that such business was, and is, wholly prohibited by the laws of New York?

The different cases were argued here for the different defendants by different counsel, *Mr. W. M. Evarts* representing the defendants in the New York cases, *Mr. Senott* the defendant in the case from Massachusetts, and *Mr. Woodbury* (by brief), one of the defendants in the cases, each like the other, from New Jersey.

Argument for the defendants:

The provisions of the acts of Congress under which these indictments are found, if regarded as *legislation for the suppression and punishment of crime*, which selling lottery tickets is regarded in New York and New Jersey to be, as retailing liquor is also regarded in Massachusetts, would be consistent with morality, but, being beyond the competency of Congress, under the Constitution of the United States, would be void; for no question can be made that the whole jurisdiction over domestic crimes and misdemeanors within its territory rests with each State.

The validity and the construction, therefore, of the acts of Congress, the violation of which, within the States of New York, New Jersey, and Massachusetts, is imputed to

the defendants as a crime, must depend upon considerations appropriate to these acts as *Revenue Laws.*

How, in this aspect, are they to be regarded?

1. Congress cannot, constitutionally, punish for a refusal to pay for a license to commit crime, or constitutionally levy a tax for the privilege of committing it. Such a mode of raising revenue would be palpably against public policy. It matters not whether the crime or offence was *malum in se* or *malum prohibitum.* Vending lottery tickets and vending liquors appear to be regarded in some of the States,—perhaps from the consequences to which vending them often lead—as *mala in se.* But whether or not, with the States,—not with Congress,—rests (confessedly, we suppose) a complete and exclusive right to say whether such acts are criminal or not.

2. The various acts of New York, New Jersey, and Massachusetts, on the subject of dealing in lotteries and retailing liquor, were perfectly known to Congress; and it is apparent that the frame and purpose of the scheme of taxation made by Congress in regard to the two matters now before the court, assume the business of lotteries and vending liquors to be open and lawful pursuits, in the gains of which the Federal government may rightfully participate, and which can endure the regulation in protection of the tax imposed, which these provisions of law establish, and yet yield the revenue sought.

But such a scheme of taxation applied to communities whose exclusive and paramount legislation proscribes the taxed pursuit as common and public nuisances, imputes every step in such pursuit as a crime, and punishes every transaction out of which the tax is raised by fine and imprisonment, and requires every grand jury to be specially charged to inquire into every perpetration of these crimes, is an absurdity.

If the acts of Congress had, in terms, provided "that no person should, within the different States of New York, New Jersey, and Massachusetts, perpetrate the crime of selling lottery tickets or liquor, without having first paid to the

United States $100, and registered his name and the place where he intended to perpetrate these crimes, and given bond that he would account to the United States for a fair share of the lucre which the crimes brought him," &c.,—of all this were expressed in the acts of Congress, it would have been no more a taxation of crime than it is now asserted to be in reference to these different States by the attempts made in the courts below to punish for the non-impetration of a license or to enforce the collection of the tax.

Suppose that a State, while proscribing and punishing all dealing in liquor or in lottery tickets, should enact as its law the scheme of taxation upon selling liquor and upon lotteries which Congress has adopted. Could a more absurd example of cross-purposes in legislation be imagined?

But the absurdity is in the absolute repugnancy of the two courses of legislation, and is inherent in them. This repugnancy is equally great, though the Federal government is the author of one and the State government of the other of the opposing laws.

In this repugnancy between an act of Congress raising a revenue from crime in a State, and the legislation of the State suppressing the crime, there can be no doubt of the supremacy of the State legislation.

Whatever room for argument there may be as to the competency of State legislation to extinguish material products, as sources of internal revenue to the United States, by proscription of their *legal* use while their *actual* use continues, it can never be tolerated that personal vice and guilt constitute a fund for Federal taxation, which ousts the States of police and penal regulation of the personal conduct of their inhabitants.

Hence, upon the natural construction of these acts of Congress, not less than upon the foregoing reasons, it is to be inferred that this revenue is sought to be raised only when and where the pursuit taxed is a lawful occupation, and admits of the methods for its regulation and the collection of the tax prescribed by Congress.*

* See act June 30, 1864, §§ 78, 111, last clause; 13 Stat. at Large, 250, 279; McGuire *v.* Commonwealth, 3 Wallace, 387.

3. If this is not a correct view; if Congress meant to exact the license and lay the tax wherever lotteries or liquors were dealt in,—whether declared crimes by the States or not,—there remains another argument:

A license to carry on a particular business is an authority to carry it on. The licensee pays a valuable consideration and gets, or rather "purchases, a right" to do what he is licensed to do.* The trades or businesses here licensed were part of the internal trade of the States; a sort of trade over which, as we have said, Congress has no jurisdiction. And the States have declared them nuisances and crimes, and forbidden them to be carried on at all. The license proffered, and the special tax attempted to be laid, were thus void, and no penalty could be imposed for refusing either to accept the license or pay the tax

Indeed, it is obvious that if a State, by prohibitory legislation, withdraw a large class of articles from taxation, Congress must either lose the revenue or protect the citizen in its violation of the State law.

But Congress, as we have said, cannot dictate the domestic law of any State. And this court has decided, recently,† that a license from the United States is no protection to the licensee against acts forbidden by the State laws.

Mr. Speed, A. G. (at the last term), Mr. Stanbery, A. G. (at this), with the former of whom was Mr. Reed, A. G. of Massachusetts, contra.

The CHIEF JUSTICE, having stated the case, delivered the opinion of the court.

In the argument of all the cases here before the court, it was strenuously maintained by counsel for the defendants that the imposition of penalties for carrying on any business prohibited by State laws, without payment for the license or special tax required by Congress, is contrary to public

* Brown *v.* Maryland, 12 Wheaton, 419.

† McGuire *v.* The Commonwealth, 3 Wallace, 387.

policy; and illustrations of this supposed contrariety were drawn from hypothetical cases of the license of crime for revenue.

We will dispose of this objection before proceeding to consider the other important questions which these cases present.

It is not necessary to decide whether or not Congress may, in any case, draw revenue by law from taxes on crime. There are, undoubtedly, fundamental principles of morality and justice which no legislature is at liberty to disregard; but it is equally undoubted that no court, except in the clearest cases, can properly impute the disregard of those principles to the legislature.

And it is difficult to perceive wherein the legislation we are called upon to consider is contrary to public policy.

This court can know nothing of public policy except from the Constitution and the laws, and the course of administration and decision. It has no legislative powers. It cannot amend or modify any legislative acts. It cannot examine questions as expedient or inexpedient, as politic or impolitic. Considerations of that sort must, in general, be addressed to the legislature. Questions of policy determined there are concluded here.

There are cases, it is true, in which arguments drawn from public policy must have large influence; but these are cases in which the course of legislation and administration do not leave any doubt upon the question what the public policy is, and in which what would otherwise be obscure or of doubtful interpretation, may be cleared and resolved by reference to what is already received and established.

The cases before us are not of this sort. The legislature has thought fit, by enactments clear of all ambiguity, to impose penalties for unlicensed dealing in lottery tickets and in liquors. These enactments, so long as they stand unrepealed and unmodified, express the public policy in regard to the subjects of them. The proposition that they are contrary to public policy is therefore a contradiction in terms, or it is intended as a denial of their expediency or their propriety. If

intended in the latter sense, the proposition is one of which courts cannot take cognizance.

We come now to examine a more serious objection to the legislation of Congress in relation to the dealings in controversy. It was argued for the defendants in error that a license to carry on a particular business gives an authority to carry it on; that the dealings in controversy were parcel of the internal trade of the State in which the defendants resided; that the internal trade of a State is not subject, in any respect, to legislation by Congress, and can neither be licensed nor prohibited by its authority; that licenses for such trade, granted under acts of Congress, must therefore be absolutely null and void; and, consequently, that penalties for carrying on such trade without such license could not be constitutionally imposed.

This series of propositions, and the conclusion in which it terminates, depends on the postulate that a license necessarily confers an authority to carry on the licensed business. But do the licenses required by the acts of Congress for selling liquor and lottery tickets confer any authority whatever?

It is not doubted that where Congress possesses constitutional power to regulate trade or intercourse, it may regulate by means of licenses as well as in other modes; and, in case of such regulation, a license will give to the licensee authority to do whatever is authorized by its terms.

Thus, Congress having power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes, may, without doubt, provide for granting coasting licenses, licenses to pilots, licenses to trade with the Indians, and any other licenses necessary or proper for the exercise of that great and extensive power; and the same observation is applicable to every other power of Congress, to the exercise of which the granting of licenses may be incident. All such licenses confer authority, and give rights to the licensee.

But very different considerations apply to the internal commerce or domestic trade of the States. Over this commerce and trade Congress has no power of regulation nor

any direct control. This power belongs exclusively to the States. No interference by Congress with the business of citizens transacted within a State is warranted by the Constitution, except such as is strictly incidental to the exercise of powers clearly granted to the legislature. The power to authorize a business within a State is plainly repugnant to the exclusive power of the State over the same subject. It is true that the power of Congress to tax is a very extensive power. It is given in the Constitution, with only one exception and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion. But it reaches only existing subjects. Congress cannot authorize a trade or business within a State in order to tax it.

If, therefore, the licenses under consideration must be regarded as giving authority to carry on the branches of business which they license, it might be difficult, if not impossible, to reconcile the granting of them with the Constitution.

But it is not necessary to regard these laws as giving such authority. So far as they relate to trade within State limits, they give none, and can give none. They simply express the purpose of the government not to interfere by penal proceedings with the trade nominally licensed, if the required taxes are paid. The power to tax is not questioned, nor the power to impose penalties for non-payment of taxes. The granting of a license, therefore, must be regarded as nothing more than a mere form of imposing a tax, and of implying nothing except that the licensee shall be subject to no penalties under national law, if he pays it.

This construction is warranted by the practice of the government from its organization. As early as 1794 retail dealers in wines or in foreign distilled liquors were required to obtain and pay for licenses, and renew them annually, and penalties were imposed for carrying on the business without compliance with the law.* In 1802 these license-taxes and

* 1 Stat. at Large, 377.

the other excise or internal taxes, which had been imposed under the exigencies of the time, being no longer needed, were abolished.* In 1813 revenue from excise was again required, and laws were enacted for the licensing of retail dealers in foreign merchandise, as well as to retail dealers in wines and various descriptions of liquors.† These taxes also were abolished after the necessity for them had passed away, in 1817.‡ No claim was ever made that the licenses thus required gave authority to exercise trade or carry on business within a State. They were regarded merely as a convenient mode of imposing taxes on several descriptions of business, and of ascertaining the parties from whom such taxes were to be collected.

With this course of legislation in view, we cannot say that there is anything contrary to the Constitution in these provisions of the recent or existing internal revenue acts relating to licenses.

Nor are we able to perceive the force of the other objection made in argument, that the dealings for which licenses are required being prohibited by the laws of the State, cannot be taxed by the National government. There would be great force in it if the licenses were regarded as giving authority, for then there would be a direct conflict between National and State legislation on a subject which the Constitution places under the exclusive control of the States.

But, as we have already said, these licenses give no authority. They are mere receipts for taxes. And this would be true had the internal revenue act of 1864, like those of 1794 and 1813, been silent on this head. But it was not silent. It expressly provided, in section sixty-seven, that no license provided for in it should, if granted, be construed to authorize any business within any State or Territory prohibited by the laws thereof, or so as to prevent the taxation of the same business by the State. This provision not only recognizes the full control by the States of business carried on within their limits, but extends the same principle, so far

* 2 Stat. at Large, 148. † 3 Id. 72. ‡ Id. 401.

as such business licensed by the National government is concerned, to the Territories.

There is nothing hostile or contradictory, therefore, in the acts of Congress to the legislation of the States. What the latter prohibits, the former, if the business is found existing notwithstanding the prohibition, discourages by taxation. The two lines of legislation proceed in the same direction, and tend to the same result. It would be a judicial anomaly, as singular as indefensible, if we should hold a violation of the laws of the State to be a justification for the violation of the laws of the Union.

These considerations require an affirmative answer to the first general question, Whether the several defendants, charged with carrying on business prohibited by State laws, without the licenses required by acts of Congress, can be convicted and condemned to pay the penalties imposed by these acts?

The remaining question is, Whether the defendant, indicted for carrying on a business on which a special tax is imposed by the internal revenue law, but which is prohibited by the laws of New York, can be convicted and condemned to pay the penalty imposed for not having paid that tax?

What has been already said sufficiently indicates our judgment upon this question.

Congress, in framing the act of 1866, has carefully guarded against any misconstruction of the legislative intention by substituting throughout the term "special tax" for the word "license." This judicious legislation has removed all future possibility of the error which has been common among persons engaged in particular branches of business, that they derived from the licenses they obtained under the internal revenue laws, an authority for carrying on the licensed business independently of State regulation and control. And it throws, moreover, upon the previous legislation all the light of a declaratory enactment. It fully confirms, if confirmation were needed, the view we have already expressed, that the requirement of payment for licenses under former laws was a mere form of special taxation.

The act of 1866 contains the same provision in respect to the effect of special taxes which the original act of 1864 contained in respect to licenses. It provides expressly that the payment of the taxes imposed by it shall not exempt any person carrying on a trade or business from any penalty or punishment provided by State laws for carrying on such trade or business, or authorize the commencement or continuance of any such trade or business contrary to State laws, or prevent the imposition of any duty or any tax on such trade or business by State authority.

It was insisted by counsel that whatever might be the power, it could not have been the intention of Congress to tax any business prohibited by State laws. And the argument from public policy was much relied upon in support of this view.

We think it unnecessary to repeat the answer already made to this argument, when urged against the requirements of licenses. It is, if possible, less cogent against the direct imposition of a tax on a prohibited business than against the indirect imposition.

It may, however, be properly said that the law of 1866 was enacted after the arguments of the last term, and that Congress imposed these special taxes with the distinct understanding that several branches of business thus taxed were prohibited by State legislation. This is conclusive as to the intention. The hypothesis we are asked to adopt would nullify some of the plainest provisions of the act, and is inadmissible. The question must be answered affirmatively.

Upon the whole, we conclude—

1. That licenses under the act of 1864, and the amendatory acts, conveyed to the licensee no authority to carry on the licensed business within a State.

2. That the requirement of payment for such licenses is only a mode of imposing taxes on the licensed business, and that the prohibition, under penalties, against carrying on the business without license is only a mode of enforcing the payment of such taxes.

3. That the provisions of the acts of Congress requiring

such licenses, and imposing penalties for not taking out and paying for them, are not contrary to the Constitution or to public policy.

4. That the provisions in the act of 1866 for the imposing of special taxes, in lieu of requiring payment for licenses, removes whatever ambiguity existed in the previous laws, and are in harmony with the Constitution and public policy.

5. That the recognition by the acts of Congress of the power and right of the States to tax, control, or regulate any business carried on within its limits, is entirely consistent with an intention on the part of Congress to tax such business for National purposes.

It follows: That in the case from the Northern District of New York, the question certified must be answered in the affirmative.

That in the five cases from the District of New Jersey, the several judgments must be reversed, and the several causes remanded to the Circuit Court for new trial, in conformity with this opinion.

That in the case from the District of Massachusetts, the two questions certified must be answered in the affirmative; and—

That in each of the two cases from the Southern District of New York, the following answer must be returned to the Circuit Court, namely: "That the law imposing the special tax in the indictment mentioned, and for the non-payment of which, said indictment was preferred and found, is valid, and not unconstitutional."

ALL WHICH IS ORDERED ACCORDINGLY.

PERVEAR *v.* THE COMMONWEALTH.

1. A license from the Federal government, under the internal revenue acts of Congress, is no bar to an indictment under a State law prohibiting the sale of intoxicating liquors. The *License Tax Cases*, *supra*, p. 462, herein affirmed.
2. A law of a State taxing or prohibiting a business already taxed by Con-

gress, as *ex. gr.*, the keeping and sale of intoxicating liquors,—Congress having declared that its imposition of a tax should not be taken to abridge the power of the State to tax or prohibit the licensed business,—is not unconstitutional.

3 The provision in the 8th article of the amendments to the Constitution, that "excessive fines" shall not be "imposed, nor cruel and unusual punishments inflicted," applies to National not to State legislation; the court observing, however, that if this were otherwise, a fine of $50 and imprisonment at hard labor in the house of correction, during three months—the punishment imposed by a State for violating one of its statutes, forbidding the keeping and sale of intoxicating liquors—cannot be regarded as excessive, cruel, or unusual.

THIS cause was brought before the court by writ of error to the Supreme Court of the Commonwealth of Massachusetts, under the 25th section of the Judiciary Act.

Pervear, the plaintiff in error, was indicted in the State court for keeping and maintaining without license a tenement for the illegal sale and illegal keeping of intoxicating liquors.

In bar of this indictment he pleaded specially three matters of defence:

(1) That he had a license from the United States under the internal revenue acts of Congress to do all the acts for which he was indicted:

(2) That he had paid a tax or duty on the intoxicating liquors, for keeping and selling which the indictment was found, in the same packages, and in the same form and quantity in which he sold the same; and

(3) That the fine and punishment imposed and inflicted by the law of Massachusetts for the acts charged in the indictment were cruel, excessive, and unusual, and that the State law was therefore in conflict with the Constitution of the United States [the 8th article to the amendments of which, proposed in 1789, declares that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted].

This plea was overruled, and Pervear declining to plead further, a plea of not guilty was entered for him. He was then put on trial, and the court instructed the jury that the

plea was no defence to the indictment; to which instruction exception was taken. A verdict of guilty was thereupon found, and Pervear was sentenced to pay a fine of fifty dollars and to be confined at hard labor, in the house of correction, for three months.

The writ of error brought this sentence under review, and the general question now was, Did the State court err in instructing the jury that the plea was no defence to the indictment?

Mr. Sennott for Pervear, plaintiff in error:

I. Congress, in the exercise of its power to lay and collect taxes, duties, imposts, &c., has constantly taxed *imported articles*. Such articles, so taxed, have been protected from State interference by this court because they were taxed by Congress to raise revenue. The same body, in its internal revenue acts, has of late taxed domestic spirits and beer by measure, for the purpose of raising a revenue.

Now, if the payment of the first impost protects imported brandy from State laws, why does not the payment of the second impost protect the plaintiff's domestic spirits and beer?

In *Brown* v. *Maryland*,* Chief Justice Marshall declares that, "by the payment of the duty to the United States, the importer *purchases a right* to sell his merchandise, a State law to the contrary notwithstanding." If this be true, the plaintiff, by paying *his* duty, purchased a similar right to sell his goods, notwithstanding a State law.

II. The end of government is the protection of the persons and the property of men, and not to enforce morality or to teach religion, or to carry on farming, or the lumber trade, or to monopolize the liquor traffic. Laws passed by government, which it has no right to pass, are not laws. Punishments inflicted in pursuance of them are illegally inflicted.

The punishment, in this case, being for doing a lawful

* 12 Wheaton, 419.

act, was excessive, cruel, and unusual, and therefore against the eighth amendment of 1789.

Mr. Reed, Attorney-General of Massachusetts, contra:

The only distinction which it can be pretended exists between *McGuire* v. *Commonwealth** and *The License Tax Cases*,† already decided by this court, and the case now under consideration is, that in the present case the tax paid was upon the articles sold instead of upon the business carried on. But the distinction is not one of essence, and, notwithstanding it, the rule established in the cases cited must apply.

The CHIEF JUSTICE, after stating the case as already given, delivered the opinion of the court.

We have already decided at this term that the first proposition of the plea in this case is no bar to an indictment under a State law taxing or prohibiting the sale of intoxicating liquors.

The second proposition of the plea is nothing more than a different form of the first. Both are identical in substance.

The case of *Brown* v. *Maryland* was referred to in argument as an authority for the general proposition that the sale of goods in the same packages on which a duty had been paid to the United States cannot be prohibited by State legislation. But this case does not sustain the proposition in support of which it is cited.

The discussion in *Brown* v. *Maryland* related wholly to imports under National legislation concerning commerce with foreign nations. A law of Maryland required importers of foreign goods to take out and pay for a State license for the sale of such goods in that State; and under this law the members of a Baltimore firm were indicted for having sold certain goods in packages as imported, without having taken out the required license. The defence was that the duty on the goods, imposed by the act of Congress, had been paid to the United States; that the license tax was, in

* 3 Wallace, 388. † *Supra*, last preceding case, p. 462.

effect, an additional import duty, which could not be constitutionally imposed by State law.

This court sustained the defence then set up. It held that, by the terms of the Constitution, the power to impose duties on imports was exclusive in Congress; and that the law of Maryland was in conflict with the act of Congress on the same subject, and was therefore void.

But the defence set up in the case before us is a very different one. It is not founded on any exclusive power of Congress, nor any act of Congress in conflict with State law. It is founded on the general power to levy and collect taxes, admitted on all hands to be concurrent only with the same general power in the State governments; and upon an act of Congress imposing a tax in the form of duty on licenses, but expressly declaring that the imposing such a tax shall not be taken to abridge the power of the State to tax or prohibit the licensed business.

The defence rests, then, in this part, on the simple proposition that a law of a State taxing or prohibiting business already taxed by Congress is unconstitutional. And that proposition is identical in substance and effect with the first proposition of the plea, and has been held in the *License Tax Cases** to be no bar to the indictment.

The circumstance that the State prohibition applies to merchandise in original packages is wholly immaterial. Even in the case of importation, that circumstance is only available to the importer. Merchandise in original packages, once sold by the importer, is taxable as other property. But in the case before us there was no importation. So far as appears the liquors were home-made, or, if not, were in second hands. And the sale of such liquors within a State is subject exclusively to State control.†

The third proposition of the plea is that fines and penalties imposed and inflicted by the State law for offences charged in the indictment are excessive, cruel, and unusual.

Of this proposition it is enough to say that the article of

* *Supra*, last preceding case, p. 462. † License Cases, 5 Howard, 504

the Constitution relied upon in support of it does not apply to State but to National legislation.*

But if this were otherwise the defence could not avail the plaintiff in error. The offence charged was the keeping and maintaining, without license, a tenement for the illegal sale and illegal keeping of intoxicating liquors. The plea does not set out the statute imposing fines and penalties for the offence. But it appears from the record that the fine and punishment in the case before us was fifty dollars and imprisonment at hard labor in the house of correction for three months. We perceive nothing excessive, or cruel, or unusual in this. The object of the law was to protect the community against the manifold evils of intemperance. The mode adopted, of prohibiting under penalties the sale and keeping for sale of intoxicating liquors, without license, is the usual mode adopted in many, perhaps, all of the States. It is wholly within the discretion of State legislatures. We see nothing in the record, nor has anything been read to us from the statutes of the State which warrants us in saying that the laws of Massachusetts having application to this case are in conflict with the Constitution of the United States.

The judgment of the Supreme Court of the Commonwealth must be

AFFIRMED.

NOTE.

The same order was made in four other cases,† "presenting," as the Chief Justice said, "substantially the same facts and governed by the same principles."

At a later day of the term, to wit, April 30th, 1867, several other cases on this same subject, coming here in error to the Supreme Court of Iowa,‡ were submitted to the court on the rec-

* Barron *v.* Baltimore, 7 Peters, 243.

† Lynde *v.* The Commonwealth of Massachusetts; Salmon *v.* Same; Cass *v.* Same; Armstrong *v.* Same.

‡ Carney *v.* State of Iowa; Munzenmainer *v.* Same; Bachman *v.* Same; Bahlor *v.* Same; Newman *v.* Same; Stutz *v.* Same; Bennett *v.* Same.

ords and briefs of *Mr. Riddle, for the plaintiffs in error, and Mr. Cooley, contra.*

On the following 7th of May the CHIEF JUSTICE delivered the opinion of the court, that the cases resembled, in all essential features, cases already decided at this term, which presented the question of the constitutionality of State laws prohibiting, restraining, or taxing the business of selling liquors under the internal revenue licenses of the United States; that the brief of the learned counsel for the plaintiff in error calling upon the court to review its decisions affirming the validity of those laws, the court had done so, and was satisfied with the conclusions already announced.

The several judgments of the Supreme Court of the State of Iowa were therefore

AFFIRMED.

THE EDDY.

1. Contracts of affreightment are maritime contracts over which the courts of admiralty have jurisdiction. Either party may enforce his lien by a proceeding *in rem* in the District Court.
2. In the absence of an agreement to the contrary, the shipowner has a lien upon the cargo for the freight, and may retain the goods after the arrival of the ship at the port of destination until the payment is made. The master cannot, however, detain the goods on board the vessel. He must deliver them.
3. An actual discharge of the goods at the warehouse of the consignee is not required to constitute delivery. It is enough that the master discharge the goods upon the wharf, giving due and reasonable notice to the consignee of the fact.
4. Where the goods, after being so discharged and separated into their different consignments, are not accepted by the consignee or owner, the carrier discharges himself from liability on his contract of affreightments by storing them in a place of safety and notifying to the consignee or owner that they are so stored, subject to the lien of the ship for the freight and charges.
5. A frequent and even general but not at all universal practice in a particular port, of shipowners to allow goods brought on their vessels to be transported to the warehouse of the consignee and there inspected before freight is paid, is not such a "custom" as will displace the ordinary maritime right to demand freight on the delivery of the goods on the wharf.

Statement of the case.

6. On a libel by the consignee of goods against a vessel for non-delivery of the same—the defence being that the goods were subject to the lien of the vessel for freight and that the libellants improperly refused to pay it—any supposed misconduct of a bailee of the goods, not before the court, with whom the goods had been stored on the refusal of the consignee to pay freight and take them away, is a question not involved in the pleadings. And if on such a state of pleadings the defendants prove their defence, they are entitled to a decree in their favor irrespective of any such supposed misconduct of the bailee.

ERROR to the Circuit Court for the District of South Carolina; the case being thus:

On the 25th March, 1854, the master of the schooner Mary Eddy, then at New Orleans, received on board his vessel 102 hogsheads of sugar and 21 of syrup, to be carried by sea to Charleston, South Carolina, and there delivered to Mordecai & Co., merchants of that place. The bill of lading contained the usual clause as to the payment of freight. The vessel reached Charleston safely on the 31st of March, and the master gave notice to Mordecai & Co. of her arrival and of the sugar and syrup on board for them; offering to deliver them on the payment of the freight.

Owing to some misunderstanding between the parties on the occasion of a former shipment, where, after payment of the freight, a part of the cargo had been discovered to be damaged, Mordecai & Co. were not willing to pay the freight, unless the sugars and syrups were all delivered and *in their store*, and after inspection by them *there*, were found not to have suffered injury in the voyage. They alleged that, by the usage of the port of Charleston, they had a right to have them so stored and so to examine them, before they could be called on to pay the freight. The master did not agree with them in this view of their rights; conceiving that he had a right to be paid his freight "*on the wharf*," when the sugars were put there, and to retain possession until he was paid. Conference and some partial understandings were had between the parties; and under these all the syrup, with three hogsheads of the sugar, were taken to the storehouse of Mordecai & Co. They declining, however, to pay freight on the parts as thus distributively in

their possession, but insisting upon having the whole in their storehouse first, the master, who was now unlading the sugars, and had a large part of it on the wharf,—after 2 o'clock on the afternoon of the 4th of April,—gave them notice that the sugars (some of the hogsheads containing which had been more or less compressed or staved in on the voyage, and needed to be coopered) were now in good order; but that to avoid difficulty in collecting the freight he requested them to pay the amount as by the bill of lading; adding, that the sugars "will not be delivered without settling the amount due." He concluded:

"Should you not accede to the above, and settle the matter, the sugars will remain *on the wharf* until sunset, and then be stored at your expense and risk."

Mordecai & Co. replied:

"We are prepared to give you satisfactory security for your freight-money, to be paid to you *in accordance with the usages of this port*, and upon your delivery of our property in compliance with your contract. If you refuse to do so we shall hold you responsible for all damages. We would add, that we are informed that there are a large number of hogsheads of sugar on the wharf. A notice of their being landed, at this late hour, will not give us time to dray them away and store them; and therefore we hold you responsible for any damage to those that are landed."

The larger part of the 99 hogsheads of sugar remained on the wharf until sundown, and were then stored by the master in the storehouse of one Brown. A few yet in the ship were landed and stored on the next day. No agreement as to the rate of storage was made. On the evening of this same day (4th April) Messrs. Brown & Porter, the attorneys-at-law of Mordecai & Co., sent a note as follows to the master:

"We are instructed by Messrs. Mordecai & Co. to inform you that they consider their whole consignment of sugar—that or

the wharf as well as that in the ship—at the risk of the schooner Mary Eddy and her owners; and that they are ready to pay you the freight upon your delivery to them of the entire consignment in accordance with the bill of lading; that from your own admission and conduct, they have reason to believe that part of the consignment is not in the condition you received it; and they have further reason to believe that this damage is not included within the dangers and accidents of the seas and navigation; that they are willing to give any security for the freight, but will not consent to pay the freight as you have demanded in your letter, when a larger portion of the consignment is in your possession, under circumstances which authorize them to believe that they may sustain considerable damage. We are also instructed to inform you that unless this matter is adjusted to their satisfaction by 10 o'clock to-morrow, they will proceed to libel the vessel."

The master did nothing more in the way of delivery of the hogsheads. He himself averred, in an answer subsequently made in the case, "that the sugars were examined next day in store and on the wharf by the agents of Mordecai & Co.; but that no demand was made nor any freight tendered."

At the time the sugars were thus stored,—4th of April, 1854,—they were worth $6901. The claim for freight was $641. On the 21st November, 1855, Brown, the storehousekeeper, without the assent of Mordecai & Co., sold, to satisfy his account of storage, 51 hogsheads of the 99 stored. From the proceeds, $2314, he deducted his claim, $1919, for storage, at the rate of 25 cents a hogshead per *week*, and paid the balance to the schooner's agent. The remaining hogsheads were detained till January, 1856, when they likewise were sold by order of the schooner's agent, who paid $204 out of the proceeds for storage at the former rate, reserved $759 for freight and interest, and tendered $2400 for the consignment of the sugars.

When Brown, in whose stores the sugars had been placed, was about to sell to pay his storage, Mordecai & Co. applied to him to permit them, with some two gentlemen, to exam-

ine into their condition. Brown acceded to their wish, but subsequently informed Mordecai & Co. that the agents of the schooner objected to an *ex parte* survey, and directed him to refer Mordecai & Co. to them or their counsel. Mordecai & Co. then addressed, through their proctors, the same request to the proctor of the master of the vessel, and reply was made that before it could be consented to it was but fair that they should be advised of its purpose and of the use that might be intended to be made of it hereafter. The terms were not acceded to, and the inspection was not allowed.

Soon after the sugars were stored Mordecai & Co. informed the agents of the master that storage could be procured by them at the rate of 25 cents per hogshead *per month*, and they replied that the owner of the store in which it was would make the rate agreeable to Mordecai & Co. Subsequently, when the owner of the store demanded storage at the rate of 25 cents per week for each hogshead, instead of 25 cents per month, there was no objection on the part of the agents. Witnesses testified that 25 cents per *week* was an excessive charge; though the "wharf rates" allowed 23 cents where there was no agreement.

A libel having been filed on the 5th of March, testimony was taken as to the custom of the port of Charleston as to place of payment of the freight.

Two witnesses were examined in behalf of Mordecai & Co.; one of them, a merchant in the habit of receiving consignments, stated, that with his house it had always been customary to deliver the goods on the wharf, and then to call for the payment of the freight at a reasonable time after; that this was the general practice with merchants; that Mordecai & Co. were merchants of very good reputation; that he himself had never paid freight on the wharf, and if any man were to ask him to do so, he would take it as an insult. On cross-examination he added, that he thought that by commercial law the master would have a *right* to demand freight on the wharf, if the party were doubtful as regarded their ability to pay, or if he expected to receive any trouble in the collection of the freight; that as to the right to demand

freight on the wharf, he thought it a question of law; that as to the fact, he had never heard of a case in which it was done. The other witness stated, that he thought it was the prevailing practice to discharge and collect freight afterwards; but that though such was his practice, he would, if he ever anticipated difficulty in the collection of freight, have stored the cargo in the name of the consignee, subject to his order and the payment of freight. In opposition to this testimony, four witnesses were examined in behalf of the shipowners. One stated that he had known instances where refusals were made to deliver the cargo without payment of freight. Another, that he knew of instances where consignments were not delivered without payment of freight on the wharf; that it was his custom so to collect it, if he doubted the solvency of the house, or feared difficulty in the collection of it. A third, that in the case of small bills, to save the trouble of collecting the freight, he had ordered it to be paid on the wharf before delivering the cargo; and the fourth, that in one instance, he was refused a consignment unless he paid freight on the wharf, but that the general usage was otherwise—the practice being to call for the freight at any time before the vessel was ready for sea.

Upon this case the District Judge in whose court the libel was filed—considering that no sufficient custom had been proved—concluded his opinion as follows:

"It is evident that on both sides there was a proclivity to an extreme estimate of their rights, from the occurrence previously of some matter between them which was unpleasant. In the detention of the cargo to secure the lien of his freight the master exercised a lawful right. In continuing the exercise of that detention upon property undergoing deterioration, without submitting the property to such control as could rightfully dispose of it, if he was not satisfied that under the circumstances he could not do so himself, he acted wrongfully and is liable to the consequences. And all the evidence which is before me in relation to the conduct of the master while detaining the property supports me in the conclusion that the respondent should be made liable. I pass over the fact that with property capable

of division, and of which he had the right to retain a part for the freight of the whole, he insisted on retaining the whole; and that in so doing he retained an amount ten times greater than his claim, and subjected the owner to ten times the expense that was necessary. I pass this over, because in speaking of the power to retain, the language is general. But when the master in the exercise of his right did detain, it was nevertheless the property of another which he had in his possession. That possession he transfers to another—the owner of the store in which he placed the property. And it was there placed subject to the order of the master or his agent. There was no recognition of any other owner, nor discretion allowed the storekeeper to deliver the property to any person but the master or his agent. Now, it is quite clear that the right which the carrier was entitled to was simply that of detention until freight was paid. And the importance of the mode in which the goods were stored is only made to appear from subsequent events.

"It is obvious that it was forgotten that when the master retains the control of the cargo to secure his lien for freight, he is regarded as the agent of the owners of the cargo. And the conduct of the master in the management of the property in this case was inconsistent with the duties which the law in such cases devolves upon him.

"Let a report set out the value of the property at the port of delivery; from this amount let the freight be deducted; and let a farther deduction be made for the storage of the goods for sixty days; which, under the circumstances of the case, I consider a reasonable time for the master to make application for the aid of the court, in making his lien available; the balance then remaining with interest from that date, will be the amount due the libellants. As to the costs, I will divide them in the following manner. I do not sustain the libellants in what they did previous to the storage of the goods and the filing of their libel. I do not sustain what the respondents have subsequently done."

A decree, after a report made by a master on this basis, was entered accordingly.

On appeal to the Circuit Court this decree was reversed, and it was ordered that there be allowed to Brown, for the storage of the merchandise, compensation according to a re-

port of a master, which had been made under a reference of the Circuit Court, and which allowed 40 cents a hogshead per *month*. That the residue of the fund in the hands of Brown, should be paid into court. That the libellants should be at liberty at any time to apply to take it out, and that, subject to such leave, after the fund was paid into court, the libel should be dismissed with costs.

It appearing afterwards, however, on a return to this rule, that the sugars never were in the custody of the Circuit Court, the decree of the District Court was in all things reversed, and the libel dismissed with costs.

Appeal was now taken by Mordecai & Co., to this court.

Mr. Carlisle, for the appellants:

The evidence shows that the goods had been more or less damaged on the voyage; and though the libellants may have originally acted on the assumption that they had the right to the possession of the goods before the freight was demandable, yet subsequently, upon consultation with their counsel, Brown & Porter, it is plain that they receded from this. The letter of the 4th April, which they, through those counsel, addressed to the master, states that "they are ready to pay you the freight upon your delivery to them of the entire consignment, *in accordance with the bill of lading.*" *No reply was ever made to this offer.*

We concede the right of lien for freight upon the cargo; but we submit that the consignee has the right to inspect the whole consignment before he can be called upon to pay the freight, and that the master is not entitled to detain the goods in any such way as to deprive the consignee of this opportunity of inspecting them, and of ascertaining whether they have been injured by the master's fault.

This was the rule, under the Empire, of the Ordinance, and is under the Code of Commerce. In England the same law obtains,* and the decisions in this country are to the same effect. "The shipper," says Story, J.,† "has the right,

* Abbott on Shipping, 285.

† Certain Logs of Mahogany, 2 Sumner, 601.

as it should seem by the maritime law, to insist upon examining the goods after they are delivered, in order to ascertain whether they are damaged or not, before he makes himself liable, at all events, for the freight."

We admit, too, that where the transportation is by vessel, and the consignee *refuses to receive*, the carrier may discharge himself from further responsibility by placing the goods in store with some responsible person, for and *on account of the owner*. But in such case, the storehouse-keeper becomes the agent or bailee of the *owner of the property*.* Here the property was stored by the captain, and subject to *his order alone*. The appellants were not even allowed to inspect the same, though two applications were made for that purpose. The goods were stored without even an agreement for the storage. In consequence of this gross negligence, the enormous charge of one dollar per month was levied on the sugars, which consumed the greater part of their value, though the agents of the master had been informed by letter that storage could be procured at 25 cents, and the report of a master shows that but 40 cents should be allowed.

The case then stands thus: The master having property in his possession ten times greater than his own demand, has so dealt with it as to render it almost valueless to the owner. He has acted on the assumption that his lien gave him the right to sell, and made two sales against the protest of the owner.

Whether by the law he had this right of sale need not, therefore, be inquired into. He clearly had the right to apply to the court for the purpose of enforcing his lien for the freight. But when is this to be done? Has the master the right to detain the goods for an indefinite time? We assert that when he assumes to keep possession and control, he must act as a prudent administrator, and in good faith to the owner of the goods. He could have sold the goods as soon as the parties refused to pay the freight, or procured an order of the court, if he preferred it, and thus secured his

* Fisk *v.* Newton, 1 Denio, 45.

own rights and protected the interests of the owner. If he had applied to the court, the property would have been delivered to the claimant upon a proper stipulation, preserving the rights of the master. If the consignee had been dead or absent, the case might be more palpable, but the rules of law applicable would be the same. The reasons urged on this point by the district judge on decreeing for the libellants should be conclusive of the rights of the parties in this litigation.

No opposite counsel appeared.

Mr. Justice CLIFFORD delivered the opinion of the court.

Substance of the allegations of the libel setting forth the cause of action was, that certain merchants at New Orleans, on the 25th day of March, 1854, shipped on board the schooner Mary Eddy, then lying in that port, one hundred and two hogsheads of sugars, for which the master gave a bill of lading to the shippers, and that he contracted to transport the sugars from that port to the port of Charleston, and there to deliver the same to the appellants, in good order and condition, saving and excepting only the dangers and accidents of the seas and navigation; and the libellants averred that the vessel departed on the voyage, and that the master had neglected and refused to deliver the sugars.

Answer of the respondents admitted the reception of the sugars, the contract of affreightment as set forth in the bill of lading, and the arrival of the schooner at the port of destination with the sugars on board, in good order and condition.

Principal defence set up in the answer was that the contract to deliver the sugars was subject to the lien of the respondents for the payment of the freight, as stipulated in the bill of lading; and they averred that the vessel proceeded on her voyage, and arrived safely at the port of destination with the sugars on board, in good order and condition, and that the master gave immediate notice of those facts to the con-

signees, and offered to deliver the sugars to them, according to the bill of lading, but they utterly neglected and refused to pay the freight.

First appeal of the libellants to this court was dismissed, it appearing that neither this court nor the Circuit Court had jurisdiction of the case, as no final decree had been entered in the District Court where the libel was filed.* Such being the fact, this court dismissed the appeal, and remanded the cause to the District Court, in the same condition in which it was before the appeal was taken to the Circuit Court, in order that the District Court might proceed with the case to a final decree. Pursuant to the mandate of this court, the District Court completed the hearing, and still being of the opinion that the claim of the libellants was well founded, entered a final decree in their favor; but the Circuit Court reversed the decree, on the appeal of the respondents, and the libellants appealed to this court.

1. The record shows that the controversy in this case, in its origin, grew out of a difference of opinion between the parties as to the respective rights and duties of the master of the schooner, as a carrier by water, and the shipper of the cargo, in respect to the delivery of the goods, or rather of the shipowners and the consignees and owners of the cargo, under the usual bill of lading stipulating for the delivery of the goods upon payment of the freight. Appellants, as the consignees and owners of the cargo, conceded that the owners of the schooner had a lien for the freight, but insisted that they, as consignees and owners of the cargo, had a right to inspect the sugars before paying the freight, as stipulated in the bill of lading, and that it was the duty of the master, under the usages of the port, to discharge the entire consignment before exacting the payment of freight, and to allow them, as the consignees, to take possession of the sugars, and transport the same to their store, in order that they might be enabled satisfactorily to make such examination and inspection.

* Mordecai et al. *v.* Lindsay et al., 19 Howard, 199.

Acting for the owners of the vessel, the master admitted that it was his duty to discharge the entire consignment, and to permit the same to be inspected by the consignees, but he denied that it was his duty to allow the sugars to be transported to the warehouse of the consignees until the freight was paid. On the contrary, he insisted that it was his right to retain possession of the sugars as the means of preserving the lien of the vessel, to which the sugars were subject for the payment of the freight. When the agent of the libellants first went to the vessel, shortly after her arrival, and asked for the sugars, he was duly notified by the master that the lien of the vessel for the payment of the freight would not be waived. Subsequently, one of the libellants went on board and had some conversation with the master in respect to the payment of the freight and the delivery of the consignment. They came to an understanding that all the sugars which were in good order should be sent to the store of the libellants, but that the freight on all so sent should be paid on the wharf.

The whole consignment consisted of one hundred and two hogsheads of sugars and twenty-one barrels of syrup. Libellants' clerk sent the twenty-one barrels of syrup and three hogsheads of the sugar to their store, under that arrangement, but the libellants refused to furnish the money to pay the freight, and the master declined to permit any more to be sent, except upon payment of the freight, as it had been understood in that arrangement. Finding that they were unable to agree, the master notified the libellants that he should exact the payment of freight on the wharf; and they, in reply, notified the master that they should hold him responsible for any injury the sugars should receive on the wharf. Correspondence took place between the parties in respect to the delivery of the sugars and the payment of the freight, which is exhibited in the record, together with the testimony of various witnesses who were examined upon the subject.

The vessel arrived at Charleston on the last day of March, 1854, and the cargo was discharged on the third and fourth

days of April following. Notice was given to the libellants early in the afternoon of the latter day, to the effect that the consignment was ready to be delivered in good order and condition, on payment of freight, but that if they refused to pay freight, as stipulated in the bill of lading, the sugars would remain on the wharf until sunset, and would then be stored at their expense and risk. Their response was that they would give security for the freight to be paid, in accordance with the usages of the port, upon the delivery of the consignment. They also objected to the notice as too late in the day to enable them to transport the sugars from the wharf and store them in their warehouse.

Throughout the correspondence it is obvious that the libellants denied all obligation to pay the freight until the entire consignment was discharged and delivered without qualification, so that they could store the goods and inspect them in their own warehouse. Refusing to accede to those terms the master discharged the sugars, and after waiting a reasonable time stored them, and notified the libellants that they were stored at their risk and cost, to be delivered to them upon payment of freight and charges. Proofs also show that the libellants examined the sugars the next day—both those on the wharf and those in store—but no demand was made nor was any freight tendered.

2. Undoubtedly the shipowner has a lien upon the cargo for the freight, and consequently may retain the goods after the arrival of the ship at the port of destination until the payment is made, unless there is some stipulation in the charter-party or bill of lading inconsistent with such right of retention and which displaces the lien.* Text-writers usually state the rule as follows: *Le batel est obligé à la marchandise et la marchandise au batel.*†

Unquestionably the general rule of law is well expressed in that maxim, but it is subject to an important exception

* Bags of Linseed, 1 Black, 112.

† Cleirac, p. 597; Abbott on Shipping, 8th ed., p. 248; Maude & Pollock on Shipping, 254.

as applied to the cargo, that the lien may be displaced by an inconsistent and irreconcilable provision in the charter-party or bill of lading, making it the duty of the master to deliver the goods unconditionally before the consignee is required to pay the freight. Saving that exception, the rule is universal that the ship and freight are bound to the merchandise and the merchandise to the ship. Shipowner contracts for the safe custody, due transport, and right delivery of the merchandise, and the shipper, consignee, or owner of the cargo contracts to pay the freight and charges. These are reciprocal duties, and the law creates reciprocal liens for their enforcement, but the lien of the shipowner may be displaced, as before explained, or it may be waived.

Such a lien—that is, the lien of the shipowner—is not "the privileged claim" of the civil law, but it arises merely from the right of the shipowner to retain the possession of the goods until the freight is paid, and therefore it is lost by an unconditional delivery of the goods to the consignee. Subject to this explanation, the maxim that the ship is bound to the merchandise and the merchandise to the ship for the performance of all the obligations created by the contract of affreightment, is the settled rule in all the Federal courts.*

3. Contracts of affreightment, notwithstanding it is held that the lien of the shipowner is nothing more than the right to withhold the goods, and is inseparably associated with his possession, are regarded by the courts of the United States as maritime contracts over which the courts of admiralty have jurisdiction, and consequently that either party in a proper case may enforce his lien by a proceeding *in rem* in the District Court. Where the ship is in fault, the usual remedy of the consignee is by the proceeding *in rem;* but where the shipper, owner, or consignee of the cargo is in fault, the shipowner usually finds an adequate remedy by retaining the goods until the freight and charges are paid. His right to do so is beyond doubt, but he cannot detain the goods on board the ship until the freight is paid, as the con-

* Dupont *v.* Vance, 19 Howard, 168.

signee or owner of the cargo would then have no opportunity of examining their condition. Practice in England is to send such goods as are not required to be landed at any particular dock to a public wharf, and order the wharfinger not to part with them till the freight and other charges are paid; and it is held that in such cases the lien of the master continues, as the goods remain in his constructive possession.*

4. Delivery on the wharf in the case of goods transported by ships is sufficient under our law, if due notice be given to the consignees and the different consignments be properly separated, so as to be open to inspection and conveniently accessible to their respective owners.† Where the contract is to carry by water from port to port an actual delivery of the goods into the possession of the owner or consignee, or at his warehouse, is not required in order to discharge the carrier from his liability. He may deliver them on the wharf; but to constitute a valid delivery there the master should give due and reasonable notice to the consignee, so as to afford him a fair opportunity to remove the goods, or put them under proper care and custody. When the goods, after being so discharged and the different consignments properly separated, are not accepted by the consignee or owner of the cargo, the carrier should not leave them exposed on the wharf, but should store them in a place of safety, notifying the consignee or owner that they are so stored, subject to the lien of the ship for the freight and charges, and when he has done so he is no longer liable on his contract of affreightment.‡

5. Parties may agree that the goods shall be deposited in the warehouse of the consignee or owner, and that the

* Chitty & Temple on Carriers, 222; Ward *v.* Felton, 1 East, 512; Machlachlan on Shipping, 369.

† 2 Parson on Contracts, 5th ed. 195; Ship Middlesex, 21 Law Rep. 14.

‡ Richardson et al. *v.* Goddard et al., 23 Howard, 39; 1 Parson's Maritime Law, 153; Machlachlan on Shipping, 367; Hyde *v.* T. & M. Nav. Co., 5 Term, 389; 2 Parsons on Contracts, 5th ed. 191; Brittan *v.* Barnaby, 21 Howard, 532.

transfer and deposit shall not be regarded as a waiver of the lien, and where they so agree the courts of admiralty will uphold the agreement and support the lien; but there was no agreement in this case. The appellants refused to pay the freight, and the master declined to part with the possession of the goods. He discharged the cargo upon the wharf, gave due notice to the consignees, and they refused to pay the freight, claiming that they had a right, by the usages of the port, to remove the goods to their store for inspection, without paying freight. They examined witnesses upon that subject, but it is sufficient to say that they failed to prove any such usage. Relying on proof of such a usage, they refused to accept the goods, and the master stored them in a place of safety and gave due notice to the libellants.

6. Misinterpreting the mandate of this court, the district judge came to the conclusion that the interlocutory decree entered in the cause before the former appeal could be supported by proof of the subsequent misconduct of the bailee of the goods, who sold certain portions of them to pay the charges for storage. All we think it necessary to say upon the subject is that none of those questions are involved in the pleadings in this record. Present libel was *in rem* against the vessel for the non-delivery of the consignment of the libellants. Respondents appeared and set up the defence that the goods were subject to the lien of the vessel for the freight, and that the libellants, without just cause or excuse, refused to pay the freight, and they fully proved their defence. Having proved their defence, they were entitled to a decree in their favor, wholly irrespective of any subsequent misconduct of the bailee of the goods, who was not before the court.

The decree of the Circuit Court is therefore

AFFIRMED WITH COSTS.

HANSBROUGH *v.* PECK.

1. Where in part performance of an agreement a party has advanced money, or done an act, and then stops short and refuses to proceed to its conclusion, the other party being ready and willing to proceed and fulfil all his stipulations according to the contract, such first-named party will not be permitted to recover back for what has thus been advanced or done.
2. By the statutes of Illinois, as existing in January, 1857, a contract for a rate of interest exceeding six per cent., did not invalidate the contract.
3. Where a parol promise is, in substance, but the same with a written one, which the party is already bound to perform, and where all that is done on the former is in fact but in fulfilment of the latter,—no new consideration passing between the parties,—the existence or enforcement of the parol contract cannot be set up as a rescission of the written one.

ERROR to the Circuit Court for the Northern District of Illinois.

In January, 1857, Hansbrough and Hardin agreed with one Peck to buy certain lots in Chicago for $134,000. The purchase-money was made payable in nine instalments, each being for $4300, except the last, payable April 28th, 1861, which was for $90,000. The lots had on them at the time two wooden houses and a barn.

By the contract it was agreed "*that the prompt performance of the covenants, and payment of the money shall be a condition precedent, and that* TIME IS OF THE ESSENCE OF THE CONDITION."

And also "that in case default shall be made in the payment of any or either of said notes, or any part thereof, at the *time* or any of the *times* above specified for the payment thereof, for thirty days thereafter, the agreement, and all the preceding provisions thereof, shall be null and void, and no longer binding, at the option of said vendor. And all the payments which shall have been made, absolutely and forever forfeited to said vendor, or at his election the covenants and liability of the purchasers shall continue and remain obligatory."

And also "that in case of default in the payments promptly on the days named by the purchasers, that it is also the right

of said vendor to declare the contract ended, and prior payments forfeited, and to consider all parties in the possession of the premises at the time of such default, *tenants at will of said vendor at a rent equal to ten per cent. on the whole amount of said purchase-money.* And the vendor from that time is declared to be restored, with the possession and right of possession in the premises, to the exercise of all powers, rights, and remedies provided by law or equity to collect such rent, or remove such tenants, the same as if the relation of landlord and tenant were created by an original, absolute lease for that purpose on a special rent payable quarterly on a tenure at will, and that the said tenants will not *commit or suffer any waste or damage* to said premises or the appurtenances; but, on the termination of such tenancy, will deliver the premises in as good order and repair as they were at the commencement of such tenancy."

By a statute of Illinois*—

"The rate of interest upon the loan or forbearance of any money, goods, or things in action, shall continue to be six dollars upon one hundred dollars for one year.

"Any person who, for any such loan, discount, or forbearance, shall pay or deliver any greater sum or value than is above allowed to be received, may recover in an action against the person who shall have taken or received the same threefold the amount of money so paid, or value delivered above the rate aforesaid, either by an action of debt in any court having jurisdiction thereof, or by bill in chancery in the Circuit Court, which court is hereby authorized to try the same: PROVIDED, said action shall be brought or bill filed within two years from when the right thereto accrued."

Under this contract, and in the state of the law above stated, the purchasers went into possession, and laid out $18,000 in improving the property by building on it. They paid $10,000, also, on account of the notes, and about two years' interest. After erecting these improvements, and

* 1 Purple's Statutes, p. 633.

paying the two years' interest, the purchasers becoming embarrassed, or dissatisfied with their contract, were desirous of surrendering it, but were persuaded by the vendor to remain, and they paid the interest for another year, 1859, making in all about $28,000 of interest paid. *The last payment of interest was made 31st January*, 1860. After that, no further payments were made, and on the 1st April, 1861, the vendor filed a bill in chancery in one of the State courts to prevent the threatened removal of the buildings from the premises, and to get possession of the property. On the 23d August, 1862, a decree was entered to this effect, and the vendor put into the possession. The decree restrained the purchasers from removing the buildings, declaring them to be fixtures; and for the default in the payment of the purchase-money the plaintiff, the vendor, was put in possession, and all the tenants were required to attorn to him. It declared further, that he was entitled to the estate and interest in the lots, the same as before the contract. And to remove any doubt in the title by reason of the contract and the default in the payments, it declared that the premises should be discharged from any incumbrance or charge in respect to the contract of sale; and that the purchasers, or any one claiming through them, should be forever debarred from having any estate, or interest, or right of possession in the premises, having lost the same by wilful default; and that the articles of agreement were to be held, in relation to the title and possession, as of no effect and void, as it respected the vendor and all claiming under or through him.

In this state of facts, the purchasers filed, August 23, 1862, a bill in the Circuit Court for the Northern District of Illinois, to recover back the moneys paid upon the contract, and also for the value of improvements made on the premises; the ground of the bill being that the contract had been rescinded by the defendant.

In regard to the matter before mentioned of the purchasers' having been desirous of surrendering, and of being persuaded by the vendor to stay, the bill alleged:

Argument in support of the decree.

"That the contract became and was so intolerably oppressive, that in November, 1859, they proposed a relinquishment of the same unless it should be modified or made less rigorous and exacting. That the vendor thereupon proposed to them that if they would not abandon the same, but would pay certain taxes, assessments, and charges, and interest then accrued, the whole amounting to ten thousand dollars, within sixty days from the first day of December, 1859, he would thereafter so accommodate and indulge them that they could carry on said contract, and to this end he would, until there should be a revival of trade and business in Chicago, take the net income from the property over and above taxes and insurance, in lieu of interest on the purchase-money, until such revival of trade and business. That your orators accepted said proposition, and in accordance with his request, in order to comply with the proposition, sent an agent from Kentucky to reside in Chicago aforesaid, to take charge of the property and collect and get in the rents and pay the same to said vendor, less the taxes and insurance. And also your orators, on or about the 31st day of January, A. D. 1860, paid said taxes, assessments, and other charges, and accrued interest, the whole amounting to ten thousand dollars as aforesaid, in compliance with his said proposition, and thereafter were ready and willing, and, from time to time, offered to pay the vendor the net income from the premises after deducting the taxes and insurance as aforesaid; but he declined to abide by his said proposition, and thereafter continued to enforce the said contract of January 29th, 1857, and all its provisions, with the most exacting rigor, notwithstanding there was no considerable increase of income from the property, nor a revival of trade and business in Chicago."

Upon this case, which in substance was the one set forth, the defendant in the case, the original vendor, demurred; and the court below dismissed the bill.

Mr. Thomas Hoyne, for the appellee and in support of the decree:

I. The bill is not maintainable as a bill to recover back money paid or laid out in part performance of a contract,

because the appellants are themselves in default, and refused to perform their contract with the appellee.*

II. The court will not entertain jurisdiction of the bill, because it seeks compensation in the nature of damages only.†

III. The bill shows, on its face, that the same matters have before been litigated between the same parties in a court of competent jurisdiction, and that a *former decree* was rendered thereon forever determining the rights of the parties, and in which the appellants might have litigated, if they did not, and have had decided all matters put in controversy by them in this cause.‡

IV. Irrespective of all other questions in this cause, the appellants being in default, and not only so, but refusing to perform the contract, in fact *repudiating* its terms, without any pretence of fraud, mistake, or accident, to excuse them, they are entitled to no relief whatever.§

Mr. Arrington, contra:

I. As to the return of the money, more than $28,000, paid by the appellants to the vendor.

That the vendor should be allowed to keep this large sum, and the land too, is revolting to conscience.

The equity of the appellants rests upon the definite rule of law and justice, which prescribes that the parties, upon the rescission of a contract, shall be replaced in *statu quo ante.*‖

The vendor seeks to escape from this legal and equitable

* Haynes *v.* Hart, 42 Barbour, 58.

† Kempshall *v.* Stone, 5 Johnson's Chancery, 193; Hatch *v.* Cobb, 4 Id. 559; Morss *v.* Elmendorf, 11 Paige, 277; Mayne *v.* Griswold, 3 Sandford, 463.

‡ Le Guer *v.* Gouverneur & Kemble, 1 Johnson's Cases, 491, 2d ed., published in 1846; Marriot *v.* Hampton, 7 Term, 269; Hopkins *v.* Lee, 6 Wheaton, 110; Gray *v.* Gillilan, 15 Illinois, 456; Dalton *v.* Bentley, Id. 421.

§ Stinson *v.* Dousman, 20 Howard, 466; Kemp *v.* Humphreys, 13 Illinois, 573; Anderson *v.* Frye, 18 Id. 94; Chrisman *v.* Miller, 21 Id. 236; Wynkoop *v.* Cowing, Id. 571; Milnor *v.* Willard, 34 Id. 41; Sanford *v.* Emory, Id. 468.

‖ Hunt *v.* Silk, 5 East, 449; Norton *v.* Young, 3 Greenleaf, 30; Buchenau *v.* Horney, 12 Illinois, 338; Jennings *v.* Gage, 13 Id. 613.

rule by interposing that monstrous provision of the contract which authorized him, upon declaring a forfeiture of the agreement, "to retain the money previously paid."

To this objection we answer—

1. The provision for the retention of the payments made previously to the forfeiture is strictly a penalty.* In fact, even if the provision in question had specified that the money should be retained as liquidated damages, it would be, in contemplation of law, a penalty, and nothing more.†

The rule of law and equity has ever been compensation, and not forfeiture. And parties cannot be permitted to annul a principle of such eternal justice by a mere stroke of the pen.

That equity will relieve against penalties is an axiom as old as the Court of Chancery.‡ And it exists now in the State from which this appeal comes. In *Glover* v. *Fisher*,§ the Supreme Court of Illinois say:

"It would be unconscionable to let the defendant keep the land as well as the money already advanced."

2. The entire contract has been cancelled—first, by the election of the appellee; and secondly, by a judicial sentence, passed at his own instance.

Therefore, he cannot plead an agreement as a defence, which he himself has caused to be declared void. He cannot treat the contract as dead, to the prejudice of the appellants, and yet as alive, to his own advantage.‖

Hence, as the case stands, the vendor received this money upon a consideration which has failed, and he must restore it. The law of every civilized nation would compel him to do so.¶

* Sloman *v.* Walter, 2 Leading Cases in Equity, 907; Tayloe *v.* Sandiford, 7 Wheaton, 17.

† Kemble *v.* Farren, 6 Bingham, 141

‡ 2 Leading Cases in Equity, 907; Clark *v.* Lyons, 25 Illinois, 107; Hackett *v.* Alcock, 1 Call, 535.

§ 11 Illinois, 677.

‖ Ford *v.* Smith, 25 Georgia, 679.

¶ 2 Pothier, by Evans, 349.

II. As to the money which the vendor obtained from the appellants by promises of forbearance.

He received the money, in fact, under a new agreement, resting in *parol;* one, therefore, void by the statute of frauds. And hence, according to all the authorities, he must refund.*

III. As to the claim of the appellants to recover the value of the improvements made by them, while in legal possession of the premises.

The appellants may be considered as *bonâ fide* purchasers, having made valuable improvements, while in lawful occupancy of the land; and as such, they have an equitable right to compensation for the additional value conferred upon the premises by their money and labor, the rents and profits being at the same time deducted.†

But the claim stands on a stronger ground than that of an ordinary *bonâ fide* purchaser. For here, of course, the improvements were erected with the appellee's knowledge and consent, and under an agreement which he himself has since rescinded. Hence, according to all the cases, since he has chosen to rescind the contract, he must restore whatever benefit he received under it.

Nor does the agreement itself contain any provision, that upon forfeiture, the appellee may keep the improvements without payment of their value.

The decree of the State court merely adjudged that the improvements had become annexed to the freehold as "fixtures," and therefore could not be removed. It said nothing as to the right of the appellants to claim the value of the improvements. That question was not in issue; and hence, could not be determined by the decree.‡

As to the claim of payment for the improvements, it is clear that no remedy could be had at law.§

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* Rice *v.* Peet, 15 Johnson, 503; Burlingame *v.* Burlingame, 7 Cowen, 92; King *v.* Brown, 2 Hill, 485; Hellman *v.* Strauss, 2 Hilton, 11 and 12.

† Bright *v.* Boyd, 1 Story, 478; Inst. Lib. ii, Tit. 1, Law 30; Dig. Lib vi, Tit. 1, Laws 38, 48.

‡ 2 Smith's Leading Cases, 504.

§ Anthony *v.* Leftwich, 3 Randolph, 265.

IV. As to usury; a question which we raise:

It is obvious, on its face, that the limitation imposed by the statute of Illinois, applies to suits for the threefold penalty, and to nothing else. But we are not seeking to recover the penalty. We seek merely the money wrongfully exacted.

Reply:

I. The doctrine that courts can relieve against penalties or forfeitures does not apply in this case. Here there is nothing to be relieved against. The rights of the parties are fixed and determined by law; and no compensation in damages can be made by this court now to the appellee, in lieu of benefits and rights which he has surrendered by releasing the appellants on their liability under the contract, and relinquishing the advantages of his sale, upon finding that the appellants were *obstinate in their default* and refusal to perform the contract and pay up the purchase-money.*

II. As to the alleged promise to grant further delay or forbearance. Confessedly the promise was never reduced to any writing. The money was justly due and in arrear at the time it was paid. It had no new consideration; it was based solely upon the obligations of the contract. Surely no citation of authority before this tribunal can be necessary to show that a promise so made was never of any binding force or effect.

III. As to usury; the question being raised. It is not alleged that the contract was a contrivance to cover the usury on *any loan or discount of money.* Besides which, the statutes of Illinois provide that any action brought by bill in chancery to recover back more than the lawful amount of interest paid on any loan or forbearance of money, shall be brought or filed *within two years from the time when the right thereto accrued.*†

If no other objection were raised in bar of the claim made

* Sanders *v.* Pope, 12 Vesey, 290; Skinner *v.* Dayton, 2 Johnson's Chancery, 535; Robinson *v.* Cropsey, 2 Edwards, 148.

† Revise l Statutes, chap. liv.

to recover back the usurious interest, the lapse of time of itself is sufficient.

Mr. Justice NELSON delivered the opinion of the court.

It will be seen from the facts in this case that the plaintiffs were in default on account of the non-payment of the interest for more than a year, and also that the principal fell due a few days after the filing of the bill in chancery in the State court, on account of this default in the payments. The contract was a very stringent one. Time was, in terms, made the essence of it, in respect to the payments, and, further, in case of a default in any one payment, for thirty days, the agreement was to be null and void, and no longer binding, at the option of the vendor, and all payments that had been made were to be forfeited to him; and also in case of default in any of the payments it was agreed that the contract, at the election of the vendor, was to be at an end, and the purchasers deemed to be in possession as tenants at will, liable for a rent equal to the amount of interest of the purchase-money.

The decree in chancery in the State court is relied on as having rescinded the contract at the instance of the defendant, by reason of which the plaintiffs have become entitled to recover back the purchase-money paid, together with the value of the improvements. The position is, that there is no longer a subsisting contract, as an end has been put to it by the vendor, and he has in consequence resumed the possession, and claims to hold the estate the same as if no contract had ever existed, and that in such case the purchaser, upon settled principles of law and equity, is at liberty to recover back the consideration paid and the value of the improvements. But the difficulty is, that the vendor has only availed himself of a provision of the contract, which entitled him to proceed in a court of chancery, by reason of the default of the purchaser in making his payments, to put an end to it and be restored to the possession. It is a proceeding in affirmance, not in rescission of it, by enforcing a remedy expressly reserved in it. Indeed, without such clause or

reservation, the remedy would have been equally available to him. It is a right growing out of the default of the purchaser, as the law will not permit him both to withhold the purchase-money and keep possession and enjoy the rents and profits of the estate; nor will it subject the vendor to the return of the purchase-money if he is obliged to go into a court of equity to be restored to the possession.

In case of a default in the payments there are several remedies open to the vendor. He may sue on the contract and recover judgment for the purchase-money, and take out execution against the property of the defendant, and among other property, the lands sold; or he may bring ejectment, and recover back the possession; but in that case, the purchaser, by going into a court of equity within a reasonable time and offering payment of the purchase-money, together with costs, is entitled to a performance of the contract; or the vendor may go in the first instance into a court of equity, as in the present case, and call on the purchaser to come forward and pay the money due, or be forever thereafter foreclosed from setting up any claim against the estate. In these contracts for the sale of real estate the vendor holds the legal title as a security for the payment of the purchase-money, and in case of a persistent default, his better remedy, and under some circumstances his only safe remedy, is to institute proceedings in the proper court to foreclose the equity of the purchaser where partial payments or valuable improvements have been made. The court will usually give him a day, if he desires it, to raise the money, longer or shorter, depending on the particular circumstances of the case, and to perform his part of the agreement.

This mode of selling real estate in the United States is a very common and favorite one, and the principles governing the contract, both in law and equity, are more fully and perfectly settled than in England or any other country. The books of reports are full of cases arising out of it, and every phase of the litigation repeatedly considered and adjudged. And no rule in respect to the contract is better settled than this: That the party who has advanced money, or done an

act in part-performance of the agreement, and then stops short and refuses to proceed to its ultimate conclusion, the other party being ready and willing to proceed and fulfil all his stipulations according to the contract, will not be permitted to recover back what has thus been advanced or done.*

The same doctrine has been repeatedly applied by the courts of Illinois, the State in which this case arose.†

This principle would of itself have defeated the plaintiffs in this suit, independently of the decree foreclosing their equity in the contract.

It appears in the case that the parties agreed upon the rate of ten per cent. interest for the forbearance of the purchase-money unpaid, when, at the time, as is admitted, it was only six per centum. But this law did not invalidate the contract. It authorized the party to recover of the party taking usury threefold the amount above the legal rate, at any time within two years after the right of action accrued. This bill was filed the 23d August, 1862. The last payment of interest was made 31st January, 1860. More than two years, therefore, had elapsed before the suit was brought.

We should add, it is not admitted by the defendant that this arrangement had the effect to make the contract usurious; and would not, according to the case of *Beete* v. *Bidgood*,‡ if the excess of interest stipulated for was in fact a part of the purchase-money.

After the default of the purchasers, and when they were disposed to surrender the contract, the vendor proposed to them, if they would abandon the idea, and pay up the taxes in arrears and interest that had accrued, he would indulge them, and to that end, and until a revival of business in Chicago, he would be satisfied with the net income from the property over and above the taxes and insurance; and it is

* Green *v.* Green, 9 Cowen, 46; Ketchum *v.* Evertson, 13 Johnson, 364, Spencer, J.; Leonard *v.* Morgan, 6 Gray, 412; Haynes *v.* Hart, 42 Barbour, 58.

† Chrisman *v.* Miller, 21 Illinois, 236, and other cases referred to in the argument.

‡ 7 Barnwell & Cresswell, 453.

averred that they agreed to the propositions and paid the taxes and interest, but that the vendor declined to carry out the agreement and enforced the contract, though there had not been any considerable increase of income from the property or revival of trade and business in Chicago. This provisional arrangement is very loosely stated in the bill, but is, of course, admitted by the demurrer. It admits the revival of business, to some extent, before the enforcement of the contract. There is great difficulty, however, in determining the extent of increase contemplated by the arrangement from the statement in the bill. It was entered into in November, 1859, and this suit was not instituted till August, 1862, some two years and nine months afterwards.

But the true answer to this part of the case is, that the arrangement was not in writing, nor any consideration passing between the parties that could give validity to it. The promise by the purchasers was but in affirmation of what they were bound to perform by their written agreement, and all that was done was but in fulfilment of it.

We have thus gone carefully over the case as presented, and considered every ground set up on the part of the plaintiffs for the relief prayed for; but, with every disposition to temper the sternness of the law as applicable to them, we are compelled to say that, according to the settled principles both of law and equity, a case for relief has not been established.

The truth of the case is, that these plaintiffs improvidently entered into a purchase beyond their means, and, doubtless, relied very much upon the rise of the value of the estate, and of the income, to meet the payments and expenditures laid out upon it. Their anticipations failed them, and a heavy debt was the consequence, beyond their ability to meet. Of the $93,000 purchase-money, they have paid only $10,000. Of interest, some $28,000. They expended for improvements $18,000. There still remained due against them $83,000 purchase-money and over $20,000 interest, at the time the vendor went into possession. The plaintiffs

themselves had been in the possession and enjoyment of the premises for a period exceeding that for which the interest on the purchase-money had been paid, which, at least, must be regarded as an equivalent for the money thus paid.

DECREE AFFIRMED.

INSURANCE COMPANY *v.* CHASE.

One of five trustees of a church edifice, being the agent of an Insurance Company, accepted a risk in it from another of the trustees to whom the church was indebted, the policy being in the individual name of the insuring trustee, with a proviso that in case of loss the amount should be paid to a creditor of him the insuring trustee, to whom, however, the church was not indebted. The insuring trustee paid the premiums out of his own funds but on account of the parish, and with the assent of the trustees; and the fact of two previous insurances in other companies, where the insurance was made in the name of the proprietors of the church generally, was recited in this policy made in the individual name of the one trustee. A loss having occurred—

Held, that the creditor of the insuring trustee was entitled to recover on the policy; the case showing that the insurance in the form in which it was made, was made with the assent of all the trustees, and it being a matter immaterial to the company (supposing the risk to be the same) whether the person appointed by the insuring trustee to receive the money retained it to his own use or paid it to the trustees.

ERROR to the Circuit Court for the District of Maine.

This controversy arose on a policy of insurance. The underwriter admitted the loss by fire, but denied the obligation to pay, chiefly because the party insured, had not an insurable interest in the property which was destroyed.

The case was this: William Chase, Sewall Chase, J. F. Day, John Yeaton, and J. W. Munger were the trustees of the Congregational Church on Congress Street, in Portland, and held the legal title to it, in trust for the society. Munger, one of the trustees, was also the agent at Portland of two insurance companies created by the laws of Massachusetts,—the Howard and the Springfield. On the 25th of November, 1859, he took fire risks for each company to the

amount of $5000 on the church property—the party assured in the Springfield Company being described in the policy as "The proprietors of the Union Church, Portland, Maine," and in the Howard Company as "William Chase, of Portland, Maine, payable, in case of loss, to Grenville M. Chase." Each policy contained a statement of the several sums for which the property was insured in the different companies.

Prior to these contracts of insurance, the Continental Insurance Company of New York had insured the church for an equal amount, in the name of the proprietors; but the policy, although dated in 1857, recites the risks taken by the Springfield and Howard Companies in 1859. The reasonable explanation of this, being, that when the policy was afterwards renewed, these additional risks were incorporated into it.

William Chase, the assured in the Howard policy, was the treasurer of the parish for several years, and paid the premiums on the policies and the renewals of them. The premiums on the Springfield and Continental policies were charged to the parish; the Howard premiums were not, but were paid out of his private means, on account of the parish, which was done with the assent of the trustees. The society was indebted to William Chase in the sum of $15,000, but not to G. M. Chase. William Chase was, however, indebted to G. M. Chase, and obtained the Howard policy to secure him.

All this appeared by William Chase's own testimony, he having been called by the defendants in the case, and the only witness in it.

The church was badly damaged by fire on the 15th of March, 1862, and the Springfield and Continental Companies, recognizing their liability, paid to the trustees two-thirds of the loss sustained by the fire. The Howard Company declining to pay, were sued by G. M. Chase, the payee in the policy, for the remaining third.

The declaration set forth that "William Chase was the owner and possessor in trust of the Union Congregational brick and slated Church," &c., and that "said Insurance

Company in consideration of a premium in money then and there paid to them therefore by said William, made a policy of insurance, and thereby agreed to and with said William to insure upon said property," &c.

Under instructions of the court a verdict and judgment were given for the plaintiffs, and the case was now brought here on error.

Messrs. Fessenden and Butler, for the plaintiff in error:

I. There is a fatal variance between the allegation of interest in the declaration and the proof.

The allegation is, that William Chase was "the owner and possessor in trust."

The proof offered was, that William Chase was one of five trustees.

An averment of an entire interest is not supported by proof of a joint interest.*

The legal title to the church was vested in five trustees, and to give validity to their acts, it was necessary that they should act jointly in what concerned the joint property.

II. Regarding the insurance as "for the parish," the plaintiff is limited by the proof of the interest of William Chase, as trustee—viz.: one-fifth, as he was only one of five trustees.

1. Because he had no other interest.

2. Because he does not aver that anything more than his individual interest was insured, and the policy contains no formal words—as "for whom it may concern."†

III. If the preceding point is sound, then, as there were two other policies on the same property to an equal amount each, for the benefit of the same parties, the plaintiff in this

* Graves *v.* Boston Mar. Ins. Co., 2 Cranch, 419; Phillips on Insurance, 3d ed., vol. 2, §§ 20, 21, p. 614; Bell *v.* Ansley, 16 East, 141; Cohen *v.* Hannam, 5 Taunton, 101; Catlett *v.* Keith, 1 Paine, 594; Burgher et al. *v.* Col. Ins. Co., 17 Barbour, 274.

† Cases cited under 1st point: Phillips on Insurance, 1, § 380; Dumas *v.* Jones, 4 Massachusetts, 647; Pearson *v.* Lord, 6 Id. 81; Finney *v.* Warren Ins. Co., 1 Metcalf, 16; Same *v.* Bedford Ins. Co., 8 Id. 348; Turner *v.* Burrows, 5 Wendell, 541.

action can recover only one-fifth of one-third, on the same principle.

IV. The proof shows that William Chase, having no other interest than as trustee, in fact insured the property for his individual benefit, and not "for the parish."

Having had no other interest than as trustee, and having insured the property in terms for his individual benefit, he could not recover.

Such insurance is void, either with or without notice to insurers.

1. Because insurance is simply a contract of indemnity, and the insured had no personal interest for the loss of which he could be indemnified.

2. Because if without notice to insurers, it is a fraud upon them. One of the first elements, entering into the question of *risk*, is the interest of the assured to protect the property. If he has no pecuniary interest in the trust property, as in case of a mortgage, it is for his interest that a loss should occur, for he is thereby benefited. Had instructions to this effect been given, the jury would have found a different and proper verdict.

3. Whether with or without notice, such insurance is void, because against public policy, tending to create an interest in the destruction of the property, and adverse to the interest of the *cestui que trust.*

Mr. John Rand, contra.

Mr. Justice DAVIS delivered the opinion of the court.

A recovery in this case is strenuously resisted, because it is said the individual interest of William Chase was insured, and not his interest as a trustee; and, as his only interest was that of a trustee, it follows that the contract of insurance was a gaming one, and void from considerations of public policy.

A contract of insurance, is intended to indemnify one who is insured against an uncertain event, which, if it occurs, will cause him loss or damage. The assured must therefore have

an interest in the property insured; otherwise, there is a temptation to destroy it, which sound policy condemns.

If, then, the Howard Company did not insure the interest of William Chase as a trustee (it is conceded he had no other), the policy is void, although he was a creditor of the church, paid a fair premium for the policy, and disclosed everything to the underwriter. But the recovery in this case, is based on the ground that William Chase had an insurable interest as trustee, and insured the property for the benefit of the society. The declaration expressly avers that William Chase, being the owner and possessor in trust of the Union Congregational Church, for a premium paid in money, effected an insurance on the property in the Howard Insurance Company. If this were true, and the proofs sustained it, the verdict and judgment of the Circuit Court cannot be disturbed. It is unnecessary in this case to discuss the general law of insurance with reference to what interests are, or are not insurable. The courts of this country, as well as England, are well disposed to maintain policies, where it is clear that the party assured had an interest which would be injured, in the event that the peril insured against should happen.

That a trustee having no personal interest in the property may procure an insurance on it, is a doctrine too well settled to need a citation of authorities to confirm it. As early as 1802, the judges of the Exchequer Chamber, in the case of *Lucena* v. *Craufurd*,* held, that an agent, trustee, or consignee could insure, and that it was not necessary that the assured should have a beneficial interest in the property insured, and the rule established by this case, has ever since been followed by the courts of this country and England.†

* 3 Bosanquet & Puller, 75.

† Columbian Insurance Company *v.* Lawrence, 2 Peters, 25; S. C. 10 Peters, 510; Swift *v.* Mutual Fire Insurance Company, 18 Vermont, 313, note by Redfield, J.; Goodall *v.* New England Fire Insurance Company, 5 Foster, 186; 2 Greenleaf's Evidence, § 379; Parsons's Mercantile Law, chapter 18, § 3; Putnam *v.* Mercantile Insurance Company, 5 Metcalf, 386; Angell on Life and Fire Insurance, §§ 56, 57, 73; Craufurd *v.* Hunter, 8 Term, 13.

A trustee, therefore, having the right, is justified in insuring the property, even to its full value, although there is no obligation on him, in the absence of express directions, to insure at all.*

But it is argued, that the legal title to the Congregational Church was vested in five trustees, and that to give validity to their acts, they must act jointly in whatever they do for the benefit of the property.

It is true, that in the administration of the trust, where there is more than one trustee, all must concur, but the entire body can direct one of their number to transact business, which it may be inconvenient for the others to perform, and the acts of the one thus authorized, are the acts of all, and binding on all. The trustee thus acting is to be considered the agent of all the trustees, and not as an individual trustee.† If, within the scope of his agency, he procures an insurance, it is for the other trustees, as well as himself. If he does it without authority, still it is a valid contract, which the underwriter cannot dispute, if his co-trustees subsequently ratify it.‡ In fact, so liberal is the rule on this subject, that where a part-owner of property effects an insurance for himself and others, without previous authority, the act is sufficiently ratified, where suit is brought on the policy in their names.§

It is contended that the contract of insurance, being in the name of William Chase, could only cover his individual interest, or, at the furthest, but the fractional part of the interest which he had as trustee. But the law of insurance is otherwise; for, as any one having any legal interest in property can insure it as his own, and in his own name, without specifying the nature of his interest, it follows that if Wil-

* Lewin's Law of Trusts and Trustees, 383; Page *v.* Western Insurance Company, 19 Louisiana, 49; 1 Phillips on Insurance, 163; Angell on Fire and Life Insurance, § 73.

† The Law of Trusts and Trustees, by Tiffany and Ballard, pp. 539, 540, and the cases there cited.

‡ Blanchard *v.* Waite, 28 Maine, 59.

§ Finney *v.* The Fairhaven Insurance Company, 5 Metcalf, 192.

liam Chase insured the church with the assent of his co-trustees, for the benefit of the *cestui que trust*, that the insurance company cannot complain, that the character of the interest was not incorporated in the policy, unless, if described, it would have had an influence on them not to underwrite at all, or not to underwrite except at a higher premium than the one actually paid by the insurer.* It has been held in some cases, that the party applying for insurance need not disclose his interest, unless asked by the insurer.

Whether the disclosure of the interest was material to the risk incurred, and would have enhanced the premium, is always a question of fact for the jury.

Applying these rules and principles of mercantile law, to the facts of this case (for evidence is properly receivable *aliunde* the policy, to explain the character of the interest insured), is it not apparent, that the defences interposed cannot avail the insurance company? Could Munger, who issued the policy, and was a co-trustee with William Chase, have been in ignorance, that the property was insured for the benefit of the parish? If so, why was he not called to contradict William Chase, who testified that although he paid the premiums on the original policy, and for each renewal, out of his private funds, yet it was done for the parish and with the assent of the trustees.

If this statement was untrue, and Munger did not authorize the payments of the premium on account of the parish, it was surely his duty to the company he represented to have denied it. Not having done so, the inference is irresistible that William Chase told the truth. If he did, there is an end of the controversy, for an assent on the part of the trustees to the payment of the premiums, is an assent to the procurement of the policy of insurance. Besides, this authority was a continuing one, for the policy was several times renewed, and each time for the benefit of the parish. The jury had no right to disregard the evidence of William

* Parsons on Mercantile Law, chapter 19, § 3; 1 Phillips on Insurance, 165, 30; Columbia Insurance Company *v.* Lawrence, 10 Peters, 516.

Chase, for he was called by the defence, and was the only witness sworn on the trial. And why was the sum for which each policy was given, inserted in the other, unless to show that it was one and the same transaction? If the insurance to William Chase was not a part of the general plan of the trustees to insure the church property, it is not easy to see why the fact of such insurance is recited in the policies issued by the other companies. On what ground, then, can the Howard Company resist the payment of this demand? William Chase swears he acted for the parish with the assent of the trustees; confirmatory evidence is furnished by the policies of insurance, and there is not a particle of countervailing testimony. Why the trustees, in insuring the church for fifteen thousand dollars, allowed one policy to issue in the name of William Chase, payable, in case of loss, to G. M. Chase, is not disclosed by the record; but it is a fair inference, from the evidence, that it was designed, if the peril insured against should occur, to appropriate the money to the use of William Chase, and thus discharge in part the indebtedness of the society to him; and that William Chase, under the direction of the trustees, chose to have the money paid to his creditor, furnishes no defence to the insurer.

As we have seen, William Chase, with the assent of the trustees, could insure the trust title in his own name, and whether the party appointed by him to receive the money, after having recovered it, can retain it to his own use, or must pay it to the trustees, is wholly immaterial to the insurer. This depends on the private arrangement between the trustees, William Chase and Grenville M. Chase, with which the Howard Company has no concern.*

If the trust property was insured, and the benefit of the insurance goes to the society, and there was no concealment or unfair dealing which could avoid the risk, then the underwriter is concluded from any further inquiry. That there could have been no undue concealment, is very evident, because Munger, the agent of the underwriter, was a co-trustee

* King v. The State Mutual Fire Insurance Company, 7 Cushing, 7.

with William Chase, and had equal knowledge with him of the whole transaction.

The foregoing views dispose of this case, and it is unnecessary to refer in detail to the charge of the Circuit Court, because it was in conformity to them.

The instructions asked by the insurance company were properly refused. A portion of them were right in the abstract, but would have misled the jury, there being no evidence in the case applicable to them. The rest were inconsistent with the law of the case as given in this opinion.

The judgment of the Circuit Court is

AFFIRMED WITH COSTS.

Mr. Justice MILLER dissented.

THE SIR WILLIAM PEEL.

1. Regularly, in cases of prize, no evidence is admissible on the first hearing, except that which comes from the ship, either in the papers or the testimony of persons found on board.
2. If upon this evidence the case is not sufficiently clear to warrant condemnation or restitution, opportunity is given by the court, either of its own accord or upon motion and proper grounds shown, to introduce additional evidence under an order for further proof.
3. If, preparatory to the first hearing, testimony was taken of persons not in any way connected with the ship, such evidence is properly excluded, and the hearing takes place on the proper proofs.
4. If a ship or cargo is enemy property, or either is otherwise liable to condemnation, the circumstance that the vessel at the time of capture was in neutral waters, would not, by itself, avail the claimants in a prize court. It might constitute a ground of claim by the neutral power, whose territories had suffered trespass, for apology or indemnity. But neither an enemy, nor a neutral acting the part of an enemy, can demand restitution of captured property on the sole ground of capture in neutral waters.
5. Where several witnesses stated facts which tended to prove that a vessel was in the employment of an enemy government; and that part, at least, of her return cargo was in fact enemy property; while the statements of others made it probable that the vessel was in truth what she professed to be, a merchant steamer, belonging to neutrals, and nothing

more; that her outward cargo was consigned in good faith by neutral owners for lawful sale; that the return cargo was purchased by neutrals, and on neutral account, with the proceeds of the cargo or other money; the court directed restitution, without costs or expenses to either party as against the other.

APPEAL from the decree of the District Court for the Eastern District of Louisiana, respecting the steamship Sir William Peel and cargo, which had been captured September 11, 1863, at the mouth of the Rio Grande, on the Mexican side, as it seemed, thereof, by the United States war vessel Seminole, during the late rebellion, and libelled in the said court for prize of war.

A claim to the vessel was put in by Corry & Laycock, of Manchester, England; and for the cargo, by Henry & Co., of the same place.

On the examination *in preparatorio*, the only persons on board the ship who were examined were the master, mate, and one seaman. From these, the charter-party on board, and a survey of the vessel, it appeared that the vessel had been sold 24th April, 1863, by certain persons, British subjects, who had bought her a week before, to Corry & Laycock; that the vessel (one of 1500 tons burden) had been built in 1855 as a war vessel for the Portuguese government, and at the time of the sale had been employed in the British transport service; that her marine engines were six feet below the water line; that three days after the sale, *i. e.*, on the 27th April, the new purchasers chartered her to Duranty & Co., "for the conveyance of lawful merchandise between Liverpool and Mexico and any other lawful ports; *the vessel not to attempt to break any blockade. No injurious cargoes to be shipped* as ordered by the charterers;" that Henry & Co. had shipped upon her a general cargo; gambier, sumac, boots in cases, bar, wrought, and hoop iron, baled goods, and a number of axes; that the vessel began to unlade and relade at the same time. When captured she had on board her a keg (25 lbs.) and a flask of gunpowder, 72 cannon cartridges, 48 rifle cartridges, 24 blue lights, 16 rockets, 47 muskets ready for action, 4 boarding pistols, 11 toma-

hawks for boarding, 46 boarding cutlasses, and several other military accoutrements placed in the companion-way or in a room amidships; also among the dunnage, partly hidden, a lot of solid round shot, and a quantity of grape-shot loose, and between decks two casks of iron rings used for artillery harness. These articles, it was testified by one or more of the persons above mentioned, had been on the ship when in the transport service, and had followed her as she passed to the new owners. The captain testified that there was "no other warlike material aboard; that when the vessel was loaded at Liverpool everything like contraband had been excluded; and that Corry & Laycock owned the ship, and Henry & Co. the cargo; that all the owners were Englishmen, and had always lived at home; that the voyage was from Liverpool to Matamoras and back; that the outward cargo was to be delivered to Milmo & Co., a firm of Matamoras, for the benefit of Henry & Co."

It appeared also, from the testimonies just mentioned, that the vessel cleared from Liverpool direct to Matamoras, but had stopped, as the mate testified (the captain saying nothing about this), at Jamaica to take in coal; and that she arrived at the mouth of the Rio Grande, the dividing river between Mexico and the United States, June 24, 1863, and anchored well on the Mexican side; that she began to unlade her outward cargo and to take a return cargo of cotton at the same time; the outward cargo being discharged in lighters and taken by steam from thence to Matamoras, about thirty miles from the mouth of the river; the return cargo of cotton being brought down in lighters and so put on the Sir William Peel; and that, about 950 bales being on board, the vessel was captured. That the ship's papers had been given to her consignees at Matamoras, and were therefore not on board, the vessel not being yet fully laden or ready to return.

In addition to this testimony of the captain, mate, and seaman, the testimony of two other persons, loyal citizens of the United States, one resident in Brownsville, a place in the State of Texas, and then in possession of the Confederacy;

the other a mate of a merchant vessel of New York, then at anchor near the Peel, was taken, *in preparatorio*, along with that of the witnesses from the ship. The testimony of these witnesses went to prove that the rebel authorities or rebel citizens were interested in the vessel and the cargo both outward and return.*

On the case coming to hearing, the court, on motion of counsel of the captors, excluded the testimony of such of the witnesses as were not found on board the captured vessel, but subsequently gave leave to both parties to take further proofs. Further testimony, including that of one of the persons whose evidence had been excluded, as taken *in preparatorio*, was accordingly taken on both sides. It was contradictory.

On the one hand it was testified that the consignees, Milmo & Co., of Matamoras, had the general reputation of being agents of the Rebel Confederacy, that they had a branch house in Brownsville, nearly opposite, in Texas, and were engaged in receiving cargoes from Europe which they disposed of to the military authorities of the Confederacy, receiving and lading, in return, cotton which the Confederacy had seized, and over which it exercised the right of property.

One witness of the captors said:

"I crossed over (from Texas to Mexico) between five and six hundred bales, Confederate cotton, that was to go on to the Sir W. Peel, but I cannot swear that it went on board her." . . "This cotton had been turned over by a Confederate States agent to Milmo & Co., for account of the Confederate government. . . . Milmo & Co. hurried me up, as they were anxious to ship it on the Sir W. Peel." "I shipped the cotton even during nights and on Sundays." "I was fully confident at the time that this cotton was shipped for the Peel, and had no doubt of it whatever."

Another witness of the captors, resident for many years in Brownsville and its vicinity, testified:

* For the suspicious character of all the trade between neutrals and Matamoras, see the statement of the case in The Peterhoff, *supra*, p. 30, and the chart, *supra*, p. 173.

Statement of the case.

"It was generally known in Matamoras that the Peel was at the mouth of the Rio Grande. This public notoriety was as to her size; second, as to the cargo she had; and third, as to the disposition to be made of that vessel after leaving the port of Matamoras. Her size was unusual for a vessel in those waters; her cargo, comprising arms and munitions of war. It was the general rumor that she was to receive her cargo of cotton, go to Havana and Nassau, and there discharge her cargo, and then become a privateer. I very often met with Texan and rebel officers. I remember two with whom I had conversations with regard to the Peel. The adjutant, Dr. Riley, at the time of the seizure of cotton by the Confederacy, told me, when I inquired of him the cause of this impressment of cotton, that certain vessels had arrived from England belonging to parties with whom he had contracts, and they found it necessary to impress cotton if they were to receive these cargoes; accordingly the cotton was impressed, in order that they could receive these cargoes.

"The Sir William Peel was spoken of in connection with these cargoes in a conversation with J. K. Spear, quartermaster's clerk in Brownsville, in reference to the amount of arms the people of Western Texas had. He stated that they received all the arms they desired from vessels at the mouth of the Rio Grande, and that for a week previous he had been engaged in crossing arms for the quartermaster. I inquired of him where he had the arms from, whether from the Mexican shore or direct from the Gulf. He answered he got them in both ways, direct from vessels and from the other side, the Mexican shore. At the same time he stated that a particular friend of his was interested in the Sir William Peel, and that he had been receiving goods from the Sir William Peel."

On the other hand, the testimony of one of the partners of the firm of Milmo & Co. was as follows:

"The vessel belonged and still belongs to Messrs. Corry & Laycock, merchants, living in Manchester, England, and British subjects.

"The cargo on board the vessel when captured, was and is the *bonâ fide* property of Henry & Co., residing in Manchester, British subjects, purchased by us in this port for them; the cargo landed here belonged to the same parties. I derive this knowl-

edge from the consignment, and *correspondence* relative to the consignment of the said cargo to us, by the said Henry & Co. Their ownership was absolute and exclusive of all other interest.

"We had full instructions to invest the entire proceeds of the inward cargo in cotton, and to fill up the Sir William Peel for Liverpool. If the proceeds did not furnish cotton enough, then to take any freight offering for that port, sufficient to load the vessel at the ruling rate of freight. We accordingly had ready for the Sir William Peel, three thousand bales of cotton, the quantity thought to be necessary to fill her. Our instructions also directed us to give her as quick despatch as possible for Liverpool; and her cargo was engaged for, and the nine hundred and four bales on board were destined for that port."

The instructions referred to by this witness were not produced.

The further proofs showed that there was machinery aboard, apparently not on the manifest, which had been landed; bales of blankets, &c., &c., and also tended to show that the vessel when first anchored, was in American water; but that she had shifted her position to the spot at which she was captured.

The testimony as a whole, satisfied the mind of the court below that the vessel was captured when anchored south of the line dividing the waters of the Rio Grande, and when, therefore, she was in neutral waters. On that ground, it decreed her restitution; but entertaining grave doubts as to the object of her voyage, "so grave, indeed, that but for this consideration that she was captured in neutral waters, the court should have decreed her condemnation, it ordered that the costs and charges consequent upon the capture, be paid by the claimants, and that damages be refused." Both parties appealed.

Messrs. Evarts and Marvin, with whom was Mr. A. F. Smith, for the claimants:

I. The order made in the court below, granting to the captors time to procure further evidence, was improper; the captors not being entitled, under the circumstances of

the case, to any such order; and, particularly, not entitled to an order granting them leave to produce further proof in the case generally, without specifying any particular matter or point to which the further proof should be directed.

The evidence to acquit or condemn, with or without costs or damages, must, in the first instance, come merely from the ship taken, viz., the papers on board, and the examination, on oath, of the master and other principal officers. If there do not appear from thence ground to condemn as enemy's property, or contraband goods going to the enemy, there must be an acquittal, unless from the aforesaid evidence the property shall appear so doubtful that it is reasonable to go into further proof. The claimant is often allowed to supply further proof of his neutral ownership. The captor is rarely allowed to produce other proof than what is furnished by the ship's papers, and the testimony of persons on board; and when he is allowed to produce further proof, the order should confine such proof to a particular point or matter.*

We assert, therefore, that the cause shall be heard and decided in this court, as it ought to have been in the court below, upon the claim itself, upon the papers found on board the vessel, and the depositions of the master and persons on board the vessel at the time of the capture; that is to say, in this case, of the master, the mate, one seaman, and none others.

On these testimonies it is impossible to find justification even of seizure.

II. (*Mr. Evarts.*)—1. The claimants in this case are *neutrals*, subjects of Great Britain, and as such have a *persona standi* in the prize court to allege, according to the regular procedure of the prize jurisdiction, whatever is pertinent and significant on the question "of lawful prize of war," under the law of nations, as bearing upon the sentence of restitution or condemnation to be passed in the cause. Whenever,

* Letter of Sir William Scott and Sir John Nicholl to John Jay, 1 Robinson, 389; The Sarah, 3 Id. 330; The Haabet, 6 Id. 54; The George, 1 Wheaton, 408.

therefore, upon the contestation of these competent litigants, any fact appears to the court exhibiting the capture to be unlawful and void, that fact is to have its consequence in a sentence of restitution, as necessarily as upon any other form of presentation to or cognizance by the court of the fact in question. It is impossible for the court to *ignore* such fact, for it is alleged and proved by a litigant, to whom it is open to allege and prove whatever is pertinent and is true, bearing upon the question of prize or no prize. If the fact thus before the court, under the rules of the law of nations, requires the restitution of the prize, sentence of condemnation cannot pass without a violation of the law of nations.

2. The Sir William Peel with her cargo, when lying at anchor within the neutral territory of Mexico, was captured, in violation of the *absolute* immunity from belligerent visitation, search, or capture, enjoyed by neutral property within neutral territory.

Upon this fact appearing, the capture is, by the law of nations, illegal and void, carrying no rights to the captors, involving the neutral property or its neutral owners in no amenability to the prize jurisdiction on the merits, and exposing the captors to exemplary damages from the justice of the prize court, and to personal punishment from their belligerent government, which their misconduct has compromised with the neutral nation of the injured neutral owners, not less than with the neutral nation whose territory has been violated.

As between belligerents, the rights of war are substantially measured by their power. But as between neutrals, the mere power of the belligerents carries no right whatever. The whole scope and measure of the rights of a belligerent towards neutrals, are determined by the conceded or adjusted rules and limits of interference fixed by the law of nations. These rules and limits relate either to the theatre or region within which *any rights whatever* are conceded to the belligerents towards neutrals, or to the restrictions upon such rights *within the theatre or region where, to any degree,* such rights are conceded.

By the law of nations, within the region invaded by this belligerent capture, *the belligerent had no right whatever* as towards or against neutral nations, nor the property of their subjects. "The rights of war," says Mr. Wheaton, "can be exercised only within the territory of the belligerent powers, *upon the high seas*, or in a territory belonging to no one. Hence it follows that hostilities cannot lawfully be exercised within the territorial jurisdiction of the neutral state which is the common friend of both parties."*

"The maritime territory of every state extends to the ports, &c. The general usage of nations superadds to this extent of territorial jurisdiction a distance of a marine league, or as far as a cannon-shot will reach from the shore, along all the coasts of the state. Within these limits, its rights of property and territorial jurisdiction are absolute, and exclude those of any other nation."†

Every exercise of belligerent right, whether of visitation, search, or capture, within neutral territory, is absolutely unlawful, and every capture within such territory is absolutely void. "There is no exception to the rule, that every voluntary entrance into neutral territory, with hostile purposes, is absolutely unlawful."‡ "All captures made by the belligerent within the limits of this (neutral) jurisdiction are absolutely illegal and void."§ "When the fact is established," says Lord Stowell, "it overrules every other consideration. The capture is done away; the property must be restored, notwithstanding it may actually belong to the enemy; and if the captor should appear to have erred wilfully, and not merely through ignorance, he would be subject to further punishment."‖

The government of the United States, in the most definite and vigorous manner, and in the most public and authentic form, recognized these limitations of belligerent rights, and enjoined upon our cruisers a strict observance of them,

* Dana's Wheaton, § 426.
† Id. § 171.
‡ Id. 429.
§ Id. § 428.
‖ The Vrow Anna Catharina, 5 Robinson, 18, cited and approved, Dana's Wheaton, § 429.

under penalty of its displeasure. Upon a suggestion from the British minister, that the cruiser Adirondack had pushed the chase of a British vessel within the line of neutral maritime jurisdiction, the Secretary of State, under date of August 14, 1862, communicated to the Secretary of the Navy the views of the government in the following terms:

"The President desires that you ascertain the truth of this fact with as little delay as possible, since, if it be true, the commander of the *Adirondack has committed an inexcusable violation of the law of nations, for which acknowledgment and reparation ought to be promptly made.* To guard against any such occurrence hereafter, the President desires that you at once give notice to all commanders of American vessels of war, that this government adheres to, recognizes and insists upon the principle that the maritime jurisdiction of every nation covers a full marine league from the coasts, and that acts of hostility or of authority within a marine league of any foreign country, by any naval officer of the United States, are strictly forbidden, and will bring upon such officer the displeasure of his government."*

Indeed, the *commission* to cruisers, by the law of nations and by the practice of our government, accepts and enforces these limitations on belligerent rights towards neutrals. Thus, the "instructions to private armed vessels," during the last war with Great Britain, enforced this limitation:

"The *tenor of your commission*, under the act of Congress, entitled 'An act concerning letters of marque, prizes, and prize goods,' a copy of which is hereunto annexed, will be kept constantly in your view. The *high seas*, referred to in your commission, you will understand generally to refer to low water mark, *but with the exception of the space within one league, or three miles, from the shore of countries at peace both with Great Britain and with the United States.* You may, nevertheless, *execute your commission* within that distance of the shore of a nation at war with Great

* Lawrence's Wheaton, n. 215, p. 715.

Britain, and even upon the waters within the jurisdiction of such nation, if permitted so to do."*

Accordingly, the Secretary of the Navy, in a communication to the Secretary of State, in answer to the remonstrance of the British minister against the violation of the law of nations by this and other captures in neutral waters, as made known to the Secretary of the Navy by the Secretary of State, expressly disclaims either the right or the purpose to make such captures. He said:

"I do not understand our government to claim the right of, &c., *nor the right of capturing ships in Mexican waters*, or in any neutral waters."

"It is not improbable that the commanders of some of our cruisers in the Gulf are not accurately informed of the extent of the national rights herein referred to, and the department will lose no time in placing the matter properly before them."†

3. As, then, the capture was made in the neutral waters of Mexico, and upon that mere statement, was—

(*a*) In excess of the cruiser's commission from our government;

(*b*) In excess of exercise of belligerent rights, conceded and submitted to by the neutral nation whose subjects are the owners of the captured property;

As it had been—

(*a*) In terms "strictly forbidden" to our cruisers, and brings upon the captors "the displeasure of the government;"

(*b*) Pronounced by the government "an inexcusable violation of the law of nations, for which acknowledgment and reparation ought to be promptly made—"

The vessel and cargo are not lawful prize of war, and the decree of restitution must be affirmed.

The prize court is but a judicial scrutiny or inquisition, in behalf of the government, to ascertain and adjudicate

* Wheaton on Captures, Appendix, 341.

† Mr. Welles to Mr. Seward, March 5, 1864, Diplomatic Correspondence, p. 548.

whether the *res* is subject to condemnation, as captured within and in pursuance of the belligerent right of the government, conformably to the law of nations.

When the contrary appears, restitution follows, and in no case can the treasury be enriched, and the captors rewarded, by condemnation, when the capture is "an inexcusable violation of the law of nations, for which reparation must be promptly made," and brings upon the captor "the displeasure of his government," provided this character of the capture is before the prize court.

4. It is submitted that no case can be found in which the property of *neutral claimants*, admitted to allege and prove the invalidity of a capture in neutral waters, has been condemned. The case of *The Lilla* (in Sprague's Decisions).* in the District Court of Massachusetts, is no exception to this proposition. The court held the *fact* not made out, and the very brief observation of the court, that, if made out, the objection was not open to the neutral claimant, was but *obiter*.

5. The rule, supposed to be established, and the cases in support of it, that, though actual enemy property captured in neutral waters is not good prize, and must be restored, upon that fact appearing, yet the enemy owner cannot be heard to make the objection, but only the neutral nation whose waters have been entered, rest upon the reason that *no* wrong can be done to an *enemy*, and *no* allegation can be heard in *his* behalf. In other words, that in the case of enemy's property, the fact of invalid capture cannot come before the prize court, except upon the representation of the neutral nation. "It is a *technical rule* of the prize courts," says Mr. Wheaton, "to restore to the individual claimant, in such a case, only on the application of the neutral government whose territory has been thus violated. This rule is founded upon the principle that the neutral state alone has been injured by the capture, and that the *hostile claimant has no right to appear for the purpose of suggesting the invalidity of the capture.*"†

* Vol. ii, p. —.

† Dana's Wheaton, § 430.

The *Anne*,* the only case in this court upon the question, was of an *enemy ship*, and so far from disturbing, confirms the position contended for in behalf of neutral claimants. "A capture made within neutral waters," said Story, J., in that case, "is, *as between enemies*, deemed, to all intents and purposes, rightful." "*The enemy has no rights whatsoever;* and if the neutral sovereign omits or declines *to interpose a claim*, the property is condemnable, *jure belli*, to the captors." This case is subject to the further criticism, as an authority on this point, that the facts show, and the court so hold, that the protection of neutrality had been forfeited by the captured ship having commenced hostilities against the captor, so that no claim by the neutral sovereign could have been interposed.†

The *Richmond*,‡ was the case of a municipal forfeiture of a vessel of the United States, the seizure having been made in St. Mary's River, within the Spanish territory of Florida.

On such a case, it is obvious that the violation of Spanish territory could never come in issue, judicially, nor could it in anywise protect the vessel against the municipal justice of its own government.

Upon an examination of the decisions of Sir William Scott, it will be found that the cases in which condemnation has passed, for want of the intervention of the neutral government, have been upon actual enemy's property where no claimant could appear.

III. If, however, this neutral property represented by neutral claimants, shall be held amenable to the prize jurisdiction upon the merits, it is apparent that neither the vessel nor the cargo captured is good prize of war.

1. As to the VESSEL.

Its sincere and permanent neutral ownership is unquestionable, either upon the preparatory, or the further proofs. The "general rumors" to the contrary come to nothing in the face of the positive testimony.

It had violated, or attempted to violate no blockade.

* 3 Wheaton, 435.

† Id. 447–8.

‡ 9 Cranch, 102

Matamoras could not be, and Brownsville was not, blockaded.*

The Navy Department expressly excluded Brownsville from the blockade of Texas. "The whole coast of Texas, *except such part as may be necessary for access to the port of Brownsville*, is to be regarded as under blockade."†

If its inward cargo included any contraband, it had all been landed before the capture, and so the ship was free from interference on that ground.

But if contraband had been found on board, the *ship* would not have been involved in condemnation therefrom. There was no connection between the ship or its owners and the cargo or its owners, except that of carriers under the charter-party.

But further. Upon the proofs it is impossible to contend that contraband formed any part of the inward cargo.

Again. If any part of the inward cargo was contraband in its nature, as the voyage was between neutral ports in its project, and was consummated by the delivery of the whole cargo at Matamoras, no offence is predicable of a trade in contraband not seeking an enemy port.

2. As to the CARGO.

The inward cargo captured was neutral property, and was not contraband.

Its value was so trivial as to deserve little attention, and the outward cargo consisted of 904 bales of cotton, and as it was not contraband in its nature, and, whatever its nature, it could not be contraband from its outward destination; as, besides, it was not being exported in violation of blockade, it can be condemned only *as enemy property*.

Upon the proofs it is impossible to contend that any imputation goes beyond the fact, that some undesignated and unmeasured part of this cotton *had been*, before lading, enemy property. But as trade by neutrals with the enemy, and the purchase of enemy property, except in violation of block-

* See The Peterhoff, *supra*, p. 28.

† Mr. Welles to Mr. Seward, Diplomatic Correspondence, 1864, Part II. 548.

Argument for the captors.

ade, are wholly lawful, no consequence of condemnation, *from enemy origin*, can be pretended.*

Finally. The capture was wholly unjustifiable, and the restitution decreed should have been attended with damages and costs.

The innocence of the vessel and her voyage and cargo, was apparent upon visitation, and there was no justification for suspicion or surmise to their prejudice.

When captors thus intercept an open prosecution of an apparently lawful trade, and visitation exhibits every trait of honest neutrality, and the commerce thus indicated is not only lawful, but is constantly engaged in by our own vessels, the integrity of the prize courts demands the infliction of damages and costs as a check to the speculative cupidity of captors.

The features of this case are not distinguishable from those of *The Labuan*, intercepted in her trade at Matamoras, and brought into New York. She was promptly restored, the diplomatic claim for damages immediately recognized, and an adjustment proceeded with.†

The decree of restitution should be affirmed, and the decree charging the claimants with costs and refusing them damages, should be reversed.

Mr. Ashton, Assistant Attorney-General for the United States, and Mr. Eames, for the captors, contra:

I. We could argue, perhaps, that the testimony of all the witnesses taken *in preparatorio* might, in the discretion of the court, have been well received in furtherance of justice. One of them was a person stationed on a New York vessel, temporarily in the harbor, and could not be subsequently procured. We need not so argue. But undoubtedly the further proofs must be heard. There was enough in the mere character of an armed vessel to excite suspicion, even if the court had no right to *look at* all the depositions.

* The Bermuda, 3 Wallace, 557.

† Diplomatic Correspondence, 1863, Part I, p. 476, Lord Lyons to Mr. Seward.

II. The locality of the capture, admitting it to have been made in Mexican waters, is unimportant. Mexico makes no remonstrance; in no way objects. We admit the ingenuity and force also of the opposing argument made by Mr. Evarts. But all the authorities agree that capture within neutral territory can only be averred in support of a claim for restoration by the accredited agent of the government whose neutral immunity has been thus infringed. Neither the enemy claimant, who has no standing in the prize courts, nor the citizen claimant, who has made his property liable to condemnation in prize for unlawful trading with the enemy, nor the neutral claimant, who, at the time of capture, is found in the predicament of having laid aside his neutral character, and having, by unneutral conduct, made himself *pro hac vice* an enemy, can set up for defence against decree of condemnation so incurred, the fact of capture within neutral limits. No case has been or can be produced giving warrant for such allegation. All the adjudged cases state, with equal explicitness and emphasis, first, that the claim of neutral immunity, when properly pleaded by the aggrieved neutral government, is conclusive and effectual in all cases as a defence against a decree of condemnation, and, secondly, that such claim on such ground can be made only by and in behalf of such government whose territorial rights have been infringed.

In *The Purissima Concepcion*,* the leading British case upon the subject, Lord Stowell stated, in the plainest words he could use, that "it is a known principle of this court that the privilege of territory will not itself enure to the protection of property, unless the state from which that protection is due steps forward to assert the right."

The same doctrine is maintained in the other British cases,† and in *The Anne*, in our own.‡

In no one of these cases does the court attempt to make

* 6 Robinson, 45.

† The Etrusco, cited 3 Robinson, 31; The Eliza Ann, 1 Dodson, 244; The Diligentia, Id. 412.

‡ 3 Wheaton, 435.

any distinction between the case of a captured non-combatant *enemy* and a captured *neutral* who has forsaken his neutrality, and by his conduct made himself liable to be captured and condemned as an enemy.

The order issued by the Navy Department to our naval vessels on the 14th of August, 1862, prohibiting the capture of any vessel within the territorial waters of a friendly nation, has no application to a case like this, where the captors proceeded upon the best observations which could be made, and so determined the position of the prize to be such as to make her capture not only lawful, but obligatory upon them in the performance of their duty. The order is intended to protect the territorial immunity of neutral nations, and not to save blockade-runners and contrabandists, in doubtful positions near the neutral line, from the lawful and rightful penalty of their conduct.

III. The testimony brings out the fact made known in other cases, that the whole system of traffic during our rebellion between Matamoras and the British ports, was but a fraudulent pretence of honest and legitimate neutral trade, and that the plan and scheme of the voyages were organized with the purpose of concealing enemy property, and in a manner peculiarly offensive both to the belligerent and the sovereign rights of the United States.

As matter of public law, any neutral vessel engaged and arrested in the prosecution of a traffic so suspicious and demoralizing as that with a neutral along the line of a river on which lay a blockaded and suffering enemy, should be held in a prize court to conclusive proof of her innocence. In the absence of such proof, the inference must be that she is guilty.

The selection of a steamer of the size, strength, and armament of the Peel for the Matamoras trade; the touching at Jamaica,—suppressed by the master, but confessed by the mate,—material, when the ship is afterwards found clandestinely discharging machinery, no machinery being upon the *manifest:* the universal belief at Matamoras that the vessel and cargo were owned by rebel parties, and that the for-

mer was not meant to return to Liverpool, but was intended, after discharging her cotton at Havana and Nassau, to be turned into a rebel privateer; the munitions, arms, and cannon she had on board, suitable only for war service, and not at all excused, but the contrary, by the fact that they were on board when the vessel was bought; the admissions by rebel agents that they had goods aboard; the unexplained failure of Milmo & Co., testifying through their partner, under the order for further proof, to produce the instructions from Henry & Co. as to the disposition of the outward cargo and purchase of the return cargo; the employment by Henry & Co., claimants, of Milmo & Co. to act as their agents, when they were the notorious and advertised commercial agents of the rebel authorities in Texas, known to have little, if any, other business than the obtaining of cotton from those authorities for exportation, as return cargo, through the port of Brownsville, where they had a branch house,—all mark a dishonest purpose on the part of those concerned in this adventure; and the decree of restoration in the court below should be reversed, and both ship and cargo condemned.

They would, indeed, have been so but for the idea of the judge below, that the capture in neutral waters saved them; an idea which, though so ably supported on the other side, we have shown has no foundation in law.

The CHIEF JUSTICE delivered the opinion of the court.

Regularly in cases of prize no evidence is admissible on the first hearing, except that which comes from the ship, either in the papers or the testimony of persons found on board.

If upon this evidence the case is not sufficiently clear to warrant condemnation or restitution, opportunity is given by the court, either of its own accord or upon motion and proper grounds shown, to introduce additional evidence under an order for further proof.

In the case now before us some testimony was taken, preparatory to the first hearing, of persons not found on board

the ship, nor, indeed, in any way connected with her. This evidence was properly excluded by the district judge, and the hearing took place on the proper proofs.

Upon that hearing an order for further proof was made, allowing the libellants and captors, on the one side, and the claimants, on the other, to put in additional evidence; and such evidence was put in accordingly on both sides.

The preparatory evidence on the first hearing consisted of the depositions of the master of the ship, the mate, and one seaman. No papers were produced, for none were found on board; a circumstance explained by the statement of the master, that all the papers belonging to the vessel, except the lightermen's receipts for the cargo, were with the English consul and the consignees of the ship at Matamoras.

The depositions established the neutral ownership of the ship and cargo. They proved that the Sir William Peel was a British merchantman; that she had brought a general cargo, no part of which was contraband, from Liverpool to Matamoras; that this cargo, except an inconsiderable portion, had been delivered to the consignee at the latter port; that the cotton found on board was part of her return cargo; that it was owned by neutrals, and had a neutral destination; and that the ship, when captured, was in Mexican waters, well south of the boundary between Mexico and Texas.

This proof clearly required restitution. The order for further proof was, probably, made upon the rejected depositions, which, though inadmissible as evidence for condemnation, may have been allowed to be used as affidavits on the motion for the order.

The further proof, when taken, was conflicting.

The weight of evidence, we think, put the vessel, at the time of capture, in Mexican waters; but if the ship or cargo was enemy property, or either was otherwise liable to condemnation, that circumstance, by itself, would not avail the claimants in a prize court. It might constitute a ground of claim by the neutral power, whose territory had suffered

trespass, for apology or indemnity. But neither an enemy. nor a neutral, acting the part of an enemy, can demand restitution of captured property on the sole ground of capture in neutral waters.

We must, therefore, look further into the case.

There is some evidence which justifies suspicion. Several witnesses state facts which tend to prove that the Peel was in the employment of the rebel government; and that part, at least, of the cotton laden upon her, as return cargo, was in fact rebel property.

There are statements, on the other hand, which make it probable that the Peel was in truth what she professed to be, a merchant steamer, belonging to neutral merchants, and nothing more; that her cargo was consigned in good faith by neutral owners for sale at Matamoras, or to be conveyed across the river and sold in Texas, as it might lawfully be, not being contraband; that the cotton was purchased by neutrals, and on neutral account, with the proceeds of the cargo or other money.

In this conflict of evidence we do not think ourselves warranted in condemning, or in quite excusing the vessel or her cargo. We shall, therefore, affirm the decree by the District Court, and direct restitution, without costs or expenses to either party as against the other.

AFFIRMANCE AND DIRECTION ACCORDINGLY.

UNITED STATES v. PICO.

1. When, in Mexican grants, boundaries are given, and a limitation upon the quantity embraced within the boundaries is intended, words expressing such intention are generally used. In their absence the extent of the grant is only subject to the limitation upon the power of the governor imposed by the colonization law of 1824.
2. Where a doubt arises upon the meaning of the grant as to the quantity ceded, reference may be had to the juridical possession delivered to the grantee. This proceeding involved an ascertainment and settlement of the boundaries of the land granted, by the appropriate officers of the gov-

Statement of the case.

ernment, specially designated for that purpose, and had all the force and efficacy of a judicial determination. It bound the former government, and is equally binding upon the officers of our government.

3. A pueblo, or town of Mexico, once formed and officially recognized, became entitled, under the laws of that country, to the use of certain lands, for its benefit and the benefit of its inhabitants, and the lands were upon petition set apart and assigned to it by the government. No other evidence of title than such assignment was required, nor was any other given. The disposition of the lands assigned was subject at all times to the control of the government of the country.

THIS was a proceeding for the confirmation of a claim to lands in California acquired under the Mexican government. The claim was for two tracts, one of which was designated as the Rancho of San Margarita and San Onofre; and the other as the Rancho of Las Flores.

The Rancho of San Margarita and San Onofre was acquired under a grant made in May, 1841. It describes the land as "bordering to the north on the point called El Ballicito and La Tenega, to the west on the point of San Mateo, to the south on the boundaries of the Pueblo de las Flores and El Moro, and to the east on the land of the Cajon, according to what is shown in the sketch annexed to the expediente;" and the testimony in the case showed that these boundaries were well known in the country and easily traced. In 1842, juridical possession was given to the grantees, when the land was measured, and its boundaries established, and ever since it has been occupied, cultivated, and improved by the grantees or parties claiming under them. In 1845, the concession was approved by the departmental assembly. The resolution of approval, after reciting the concession, and that it was made in conformity with the requirements of the laws, is as follows:

"It approves of the concession made by the superior government of the department in favor of the native-born Mexican citizens, Pio Pico and Andres Pico, of the locations known by the names of San Onofre and Santa Margarita, in extent twelve square leagues (sitios ganada mayor), in entire conformity with the law of the 18th of August, 1824, and article fifth of the regulations of 21st of November, 1828."

The tract known as the Rancho of Las Flores was acquired by purchase from an Indian pueblo or town of that name. The record showed the existence of the pueblo and the assignment to it of the land in question by the officers of the Mexican government, and that subsequently the was transferred to the Picos, under the supervision and with the sanction of the local authorities.

The District Court confirmed the claim to both ranches, stating in the decree that the tract confirmed contained twenty square leagues, and giving its boundaries specifically. From this decree the United States appealed.

Mr. Stanbery, A. G., and Mr. Wills, for the appellants, and Mr. Coffey, contra.

Mr. Justice FIELD delivered the opinion of the court.

By the decree of the District Court, which is the subject of appeal in this case, the respondents obtained a confirmation of their claim to two tracts of land, containing together an area of twenty square leagues.

One of the tracts is designated as the Rancho of San Margarita and San Onofre, and is described in the concession of the governor by specific boundaries. The testimony shows that these boundaries were, at the time, well known in the country, and easily traced. The concession was made in May, 1841, and within the year following juridical possession of the land was given to the grantees; and from that time until the present day it has been occupied, cultivated, and improved by them, or parties claiming under them.

In July, 1845, the concession was approved by the departmental assembly. The resolution of approval, after designating the tract ceded, adds, "in extent twelve square leagues;" and these words are supposed by the appellants to create a limitation upon the quantity granted.

It is evident, however, that the words are not used for any such purpose, but merely indicate a conjectural estimate of the quantity. The concession of the governor, with its specific description, is referred to in the proceedings of the as-

sembly, and is stated to have been made in conformity with the requirements of the law. No objection is suggested to the boundaries given, nor is an intimation made of any intention to exclude from the concession any portion of the land they embrace or to restrict the concession in any particular.

When, in Mexican grants, boundaries are given, and a limitation upon the quantity embraced within the boundaries is intended, words expressing such intention are generally used. Thus, in the Fremont case, the boundaries stated embraced many leagues more than the quantity intended to be granted, and the grant provided for the measurement of the designated quantity and the reservation of the surplus. In the absence of terms of similar import, the extent of the grant is only subject to the limitation upon the power of the governor, imposed by the colonization law of 1824.*

Were there any doubt of the intention of the governor to cede all the land contained within the boundaries designated by him, it would be removed by the juridical possession delivered to the grantees. This proceeding involved an ascertainment and settlement of the boundaries of the lands granted by the appropriate officers of the government, specially designated for that purpose, and has all the force and efficacy of a judicial determination. It bound the former government, and is equally binding upon the officers of our government.

Such is the purport of the recent decision in the case of *Graham* v. *United States*.† In that case the survey made by the Surveyor-General of the grant confirmed did not conform to the measurement of the land as shown by the record of juridical possession, and the District Court, for that reason, set the survey aside and ordered a new survey, which should correspond with the measurement, holding that the action of the officers of the former government, upon the delivery of possession, furnished insuperable objections to

* United States *v.* D'Aguirre, 1 Wallace, 316. † 4 Id. 260.

any other course. In affirming this decision, this court expressed its concurrence with the views of the District Court, and held that a proceeding of that character must control the officers of the United States in the survey of land claimed under a confirmed Mexican grant. In other words, the case decided that the juridical possession was conclusive as to the boundaries and extent of the land granted.

The other tract included in the confirmation is designated as the Rancho of Las Flores, and was acquired by the claimants by purchase from the Indians of the pueblo of that name. The existence of the pueblo and the assignment to it of the land in question by the officers of the Mexican government are fully established by the documentary evidence in the case. The objection of the appellants is founded upon the absence of any transfer of the title to the pueblo by deed or other writing. But such transfer was not essential, nor was it usual. A pueblo once formed and officially recognized became entitled, under the laws of Mexico, to the use of certain lands, for its benefit and the benefit of its inhabitants, and the lands were, upon petition, set apart and assigned to it by the government. No other evidence of title than such assignment was required, nor was any other given.*

The disposition of the lands assigned was subject at all times to the control of the government of the country. The pueblo of Las Flores was an Indian pueblo, and over the inhabitants the government extended a special guardianship. The transfer of the land to the Picos was made in conformity with the existing regulations established for the protection of the Indians, under the supervision and with the approval of the local authorities, and appears to have been satisfactory to all parties.

The decree of the District Court must be affirmed, and it is

SO ORDERED.

* Hart v. Burnett, 15 California, 542, 561.

INSURANCE COMPANY *v.* RITCHIE.

The jurisdiction of the Circuit Courts in original suits between citizens of the same State, in internal revenue cases, conferred or made clear by the act of June 30, 1864, "to provide internal revenue," &c. (13 Stat at Large, 241), was taken away by the act of July 13th, 1866, "to reduce internal taxation, and to amend an act to provide internal revenue," &c. (14 Id. 172). And suits originally brought in the Circuit Courts, and pending at the passage of this act, fell.

THIS was an appeal from a judgment of the Circuit Court for Massachusetts, dismissing a bill in equity, filed by the Merchants' Insurance Company, a corporation created by *the laws of Massachusetts, and having its place of business in the city of Boston in that State*, against James Ritchie, and E. L Pierce, the assessor and collector of internal revenue for the third collection district of that *same* commonwealth, and *both citizens of it*, praying that they might be enjoined from the distraint and sale of the complainant's property for non-payment of a certain tax. The defendants demurred, for the reason that the bill disclosed no ground for equitable relief. The demurrer was sustained, and the bill dismissed.

Coming here, the case was elaborately argued by *Mr. Stanbery, A. G., and Mr. Ashton, Assistant A. G., for the assessor and collector, and by Messrs. S. Bartlett and F. W. Palfrey* (by brief) *for the Insurance Company;* the argument turning chiefly on the matter of public policy on the one hand, in allowing officers of the government to be embarrassed in the prompt collection of its revenues by the strong and summary process of injunction; and on the other hand, on the matter of private rights of the citizen in precluding him from adequate remedy against clearly illegal proceedings of government agents in the assessment and collection of these revenues.

But a preliminary question, the question namely, whether the suit as an internal revenue case could, under the statutes of the United States as now existing, be maintained at all, —the parties all being citizens of the same State,—cut off decision on these points, and renders a report of the principal argument irrelative.

The CHIEF JUSTICE delivered the opinion of the court.

We meet upon the threshold of this cause a question of jurisdiction.

The record discloses a suit in equity by the Merchants' Insurance Company, a corporation under the laws of Massachusetts, having its place of business in the city of Boston, against James Ritchie and E. L. Pierce, assessor and collector of internal revenue in the third collection district of that commonwealth. The corporation constructively,* and Ritchie and Pierce actually, are citizens of Massachusetts. And the question is, Whether this suit, as a revenue case, can be maintained by a citizen of Massachusetts against citizens of the same State?

The Judiciary Act of 1789 limited the jurisdiction of National courts, so far as determined by citizenship, to "suits between a citizen of the State in which the suit is brought and a citizen of another State." And, except in relation to revenue cases, this limitation has remained unchanged.

In 1833 an attempted nullification of the laws for the collection of duties on imports led to the enactment of a law, one of the provisions of which conferred on the Circuit Courts jurisdiction of "all cases in law or equity arising under the revenue laws of the United States for which other provisions had not been already made."†

Until the passage of this act no original action by a citizen of any State against a citizen of the same State could be maintained in a National court, at law, or in equity, for injuries arising from the illegal exaction of duties by collectors of revenue. Redress of such injuries could be obtained only in the State courts, and the revisory jurisdiction of this court could be invoked only under the twenty-fifth section of the Judiciary Act.

The act of 1833 made the right of action to depend not altogether, as previously, upon the character of the parties

* Louisville Railroad Company *v.* Letson, 2 Howard, 554; Marshall *v* Baltimore & Ohio Railroad Co., 16 Id. 314.

† 4 Stat. at Large, 632

as citizens or aliens, but also on the nature of the controversy, without regard to citizenship or alienage. Under that act citizens of the same State might sue each other for causes arising under the revenue laws. A citizen injured by the proceedings of a collector might have an action against him for the injury, though a citizen of the same State with himself.

And the third section of the same act gave the right to collectors or others who might be sued in any State court, on account of any act done under the revenue laws, to remove the action by a proper proceeding into a National court.

The right to remove causes from State into National courts had been long before given by the Judiciary Act, but it was limited to certain classes of cases, which did not include those arising under the laws for the collection of duties.

After the act of 1833 many suits, brought in the State courts against collectors, were removed into the Circuit Courts. The cases of *Elliott* v. *Swartwout** and *Bend* v. *Hoyt*,† were of this description. They were suits originally instituted in the Superior Court of New York, but removed to the Circuit Court of the United States for the Southern District, to recover from collectors of the port of New York duties alleged to have been illegally exacted.

Under that act suits in equity in proper cases, as well as actions at law, might have been maintained against collectors of customs by citizens of the same State; and upon the enactment, under the exigencies created by civil war, of the existing internal revenue laws, it became a question whether the general provisions of that act, giving jurisdiction of cases under the revenue laws, extended to cases under the new enactments.

This question was resolved by the internal revenue act of 1864, in the fiftieth section of which it was provided that the provisions of the act of 1833 should extend to all cases arising under the laws for the collection of internal duties.‡

* 10 Peters. 137. † 13 Id. 267. ‡ 13 Stat. at Large, 241.

It was while this section of the act of 1864 was in force that the suit in the present record was brought. Had it been suffered to remain in force the question of jurisdiction now under consideration could not have arisen.

But it was repealed by the act of 1866,* without any saving of such causes as that before us. And not only was there no such saving, but it was expressly provided that "the act of 1833 shall not be so construed as to apply to cases" arising under the act of 1864, or any amendatory acts, "nor to any case in which the validity or interpretation of such act or acts shall be in issue."

The case before us is a case under the act of 1864. It is a case of which, because of the fact that the appellants and appellees are citizens of the same State, we have no jurisdiction except under the act of 1833. And the act of 1866 declares that the act of 1833 shall not be construed so as to apply to such a case.

This is equivalent to a repeal of an act giving jurisdiction of a pending suit. It is an express prohibition of the exercise of the jurisdiction conferred by the act of 1833 in cases arising under the internal revenue laws.

It is clear, that when the jurisdiction of a cause depends upon a statute the repeal of the statute takes away the jurisdiction.† And it is equally clear, that where a jurisdiction, conferred by statute, is prohibited by a subsequent statute, the prohibition is, so far, a repeal of the statute conferring the jurisdiction.

It is quite possible that this effect of the act of 1866 was not contemplated by Congress. The jurisdiction given by the act of 1833 in cases arising under the customs revenue laws is not taken away or affected by it. In these cases suits may still be maintained against collectors by citizens of the same State. It is certainly difficult to perceive a reason for discrimination between such suits and suits under the inter-

* 14 Stat. at Large, 172.

† Rex *v.* Justices of London, 3 Burrow, 1456; Norris *v.* Crocker, 13 Howard, 429.

nal revenue laws; but when terms are unambiguous we may not speculate on probabilities of intention.

The rules of interpretation settled and established in the construction of statutes deny to us jurisdiction of the controversy in the record, because it is a suit between citizens of the same State, and the jurisdiction of such suits in internal revenue cases, conferred by the acts of 1833 and 1864, is taken away by the act of 1866.

The appeal in this cause must therefore be

DISMISSED FOR WANT OF JURISDICTION.

THE BIRD OF PARADISE.

1. Ship-owners, as a general rule, have a lien upon the cargo for the freight, and consequently may retain the goods after the arrival of the ship at the port of destination until the payment is made. Presumption is in favor of the lien, but it may be modified or displaced either by direct words or by stipulations incompatible with the existence of such a right.

2. Insolvency of the shipper occurring while the goods are in transit, or before they are delivered, will not absolve the carrier from an agreement to take an acceptance on time, instead of cash, for the freight, nor authorize him, when he had made such an agreement, to retain the goods until the freight is paid. On the other hand, as a bill of exchange or promissory note given for a precedent debt does not extinguish the debt, unless such was the agreement of the parties, a bill or note falling due before the unloading of the cargo, and protested and unpaid, is no discharge of the lien; and the ship-owner, in such a case, may stand upon it as fully as if the acceptance had never been given.

Hence, where, in the case of a vessel chartered from Liverpool to San Francisco, freight was to "be paid in Liverpool on unloading and right delivery of the cargo," at a rate fixed by the parties, "such freight to be paid, say one-fourth in cash and one-fourth by charterer's acceptance, at six months from the final sailing of the vessel, and the remainder by like bill *at three months from date of delivery, at charterer's office in Liverpool, of the certificate of the right delivery of the cargo agreeably to bill of lading*, or in cash, under discount at five per cent., at freighter's option. The ship and her freight are bound to this venture"—*Held*,

3. That the "charterer's acceptance at six months from the final sailing of the vessel" having been dishonored and he become bankrupt, it was no

payment of the one-fourth agreed to be so paid for, and that the lien for that fourth was not displaced.

ii. That as to "the remainder," which was to be by like bill, *at three months from date of delivery, at charterer's office in Liverpool, of the right delivery of the cargo agreeably to bill of lading*—the lien had been displaced, notwithstanding that the charterer had become bankrupt before the vessel arrived at San Francisco.

APPEAL from the Circuit Court for the Northern District of California, decreeing against a lien set up by ship-owners for freight, on libel filed against a cargo. The case was thus:

On the 16th March, 1863, Eccles, of Liverpool, chartered at that place from Taylor & Co., owners of the ship Bird of Paradise, that vessel, to carry a cargo of coal, of which Eccles was the owner, to San Francisco, California, at a rate agreed on per ton.

"The freight to be paid in Liverpool, on unloading and right delivery of the cargo, one-fourth in cash, one-fourth by the acceptance of Eccles, the charterer, at six months from the final sailing of the vessel, and the remainder by like bill, at three months from delivery, at charterer's office in Liverpool, of certificate of right delivery of cargo agreeably to bills of lading, or in cash, less five per cent., at freighter's option. The vessel to be addressed to the freighter's agent abroad. £500 to be advanced in cash at the port of discharge on account of the freight. *The ship and her freight are bound to this venture. The penalty for non-performance of this agreement is to be the chartered freight in pounds sterling.*"

The master signed, and the freighter, Eccles, accepted, a bill of lading, in the usual form, for the cargo deliverable "to order or assigns, he or they *paying* freight at the rate of ——, *as per charter-party.*"

The vessel sailed from Liverpool April 16, 1863, and arrived at San Francisco on the 26th December, 1863, a voyage of eight months and ten days.

The charterer, Eccles, paid the promised one-fourth of the freight before sailing, and gave his acceptance for the second fourth, at six months, falling due October 19, 1863, more

than two months before the vessel arrived, *but it was never paid, Eccles having failed in business, and remaining insolvent and a bankrupt.* On the arrival at San Francisco, the £500 agreed to be advanced in cash at the port of discharge, was also paid; but the second acceptance, the one, to wit, for the residue of the freight, *was not given*, nor the amount paid in money.

The amount due for unpaid freight, regarding the first or dishonored acceptance as a nullity, was thus $7050.

The captain refused to deliver the cargo to the agents of Eccles, but kept control of it himself.

These agents accordingly filed their libel in the District Court for the Northern District of California against the cargo, to recover possession of it; the delivery being resisted under a claim of lien for freight.

That court considered that the claim was unfounded, and decreed accordingly, and the decree being affirmed by the Circuit Court, the correctness of such a view was now the question here on appeal.

Mr. Benedict, for the appellants, owners of the vessel:

I. This is an unconscionable action. The court will make all reasonable presumptions against the libellants.

Eccles chartered the vessel to carry a cargo of coal from Liverpool to San Francisco, a voyage of more than eight months. The vessel performed the voyage in safety, at the expense of the owners, and then finding the charterer bankrupt, refused to deliver the cargo to his agents, unless the freight was paid. The agents refused to pay the freight, and they brought this extraordinary action. Having had the use of the entire ship, without expense, for more than nine months, this bankrupt charterer demands the cargo free of freight, on the sole ground that he had given a written promise to pay the freight, which he neither had performed, nor, being as he was, a bankrupt, ever would or could perform.

A court of admiralty is a court of equity to the extent of doing justice and requiring justice; and it will, in a cause of possession, compel the libellants to do equity before it

will transfer to him the possession. Freight is a most just demand.*

Charter-parties are to be liberally construed.†

II. The whole sum due—the entire balance of $7050—should have been paid before a delivery. The freight is a lien upon the cargo by the maritime law, and all presumptions are in favor of the lien. The ship is bound to the merchandise and the merchandise to the ship. This lien is not created by the act of the parties, but by the general maritime law, and is founded in public policy and the interest of commerce. *The Kimball*,‡ in this court, is full to this effect. It gives to the owner and the shipper a responsible indorser and a responsible defendant in every port of the sea. And this rule—an elementary and cardinal one—is to prevail, unless the parties have intentionally excluded it—a thing to be inferred from plain language alone. Nothing can be inferred from silence. The burden is on the shipper to prove an absolute waiver of the lien. He has given no such evidence here.

Now, in this case, the freighter having failed—having become wholly bankrupt—there was no obligation to deliver, unless the *whole* amount due—we mean both that sum due on the protested draft, and that balance due after the £500 cash were paid at San Francisco—were paid in cash. There is in every contract for a payment by acceptances, when made in a case like this, a condition—not the less fundamental because but implied—that the acceptor shall be solvent. This condition the law adds to the contract.

1. By the terms of the agreement, the giving an acceptance was "non-performance" if it were not paid. It fell due before the end of the voyage, and not being paid at maturity, Eccles failed to perform his part of the contract. Moreover his bankruptcy demonstrated that he never could perform it.

2. So, too, the charter-party declares in substance, "We have received your cargo, and it will be delivered to you if

* Minerva, 1 Haggard, 357; The Trident, 1 W. Robinson, 35; Id. 192.

† Raymond *v.* Tyson, 17 Howard, 59.

‡ 3 Wallace, 42.

you *pay* as agreed in the charter-party. If you do not 'pay' it will not be delivered. We shall not deliver on dishonored acceptances—they are not payment."

3. So, finally, by the now prevailing rules of commercial law, the rule at this day being, that a mere note or draft does not amount to a *payment* of a debt.* Certainly, in cases of sales of goods conditionally, as for cash or indorsed paper, and the cash not paid or the notes not given and the property delivered—the delivery is conditional, if the intent of either party that it should be so can be at all inferred from their acts and the circumstances of the case.†

In a case very similar to this in New York, Comstock, J., said:

"The analogies to be derived from the law of stoppage *in transitu* are perhaps not perfect, but they are sufficiently near to furnish a rule for the present case. When goods are sold to be paid for in the notes of the buyer, and he becomes insolvent before the delivery is complete, the seller may arrest the delivery and rescind the sale. There is nowhere in the terms of the contract any such condition. The law implies it, because *the assumed ability of the buyer to pay for the goods was the inducement to the sale.*"

But in this case we have the very terms of the contract. The charterer had failed to perform the charter-party on his part by not having paid his acceptance for the one-fourth. There was thus "non-performance" of the agreement; and, by the terms of the contract, "the penalty for non-performance of this agreement is to be the chartered freight in pounds sterling." That is to say, in cash on delivery.

There were also in this case circumstances which aid in the construction of the contract. This, it must be remembered, was the longest voyage known to commerce, ending many thousands of miles from the parties; no security except the cargo; the cargo homogeneous, of great value and ready sale; the taking the bill of lading in addition to the

* Sutton *v.* The Albatross, 2 Wallace, Jr., 327.

† Benedict *v.* Field, 16 New York, 598.

charter-party; the making the acceptances fall due before the end of the voyage, so that, if not paid, the charterer would violate the charter-party and the master be entitled to enforce his lien for the whole freight by the bill of lading, and the improbability that any ship-owner would despatch his ship on such a voyage with no possible security for any freight: all these coincide with those provisions of the contract which provide for the usual lien.

III. But if this were not true as to the whole amount—conceding that as to the second instalment the language of the charter-party ("the remainder by like bill at three months from delivery, at charterer's office in Liverpool, of certificate of right delivery") may place, as to that balance, the risk of solvency on the ship-owners—yet certainly as to the quarter for which the draft was given and not paid, the case is different. There has assuredly been no payment of that fourth; while payment of it was a condition precedent to delivery. In any view, by the terms of the contract, as well as by the now prevailing rule of commercial law, the giving of a worthless draft was no payment.

Messrs. Owen and Nash, contra:

I. The provisions of the charter-party are inconsistent with any lien upon the cargo for the freight.

The freight was to be paid at Liverpool, the port of loading, not at San Francisco, the port of discharge. A payment to the master at San Francisco, therefore, would not protect the party making such payment. The freight was to be paid not concurrently with the delivery of the cargo, but partly in advance and partly three months after such delivery: "One-fourth in cash and one-fourth by charterer's acceptance at six months from the final sailing of the vessel." These payments were to be made in advance of any freight being earned, in consideration therefore not of having carried, but simply of agreeing to carry and of taking the cargo on board. "The remainder, by like bill, at three months from date of delivery, at charterer's office in Liverpool, of the certificate of the right delivery of the cargo." This portion

was, therefore, payable also in Liverpool, and not payable there till a certificate should be produced at the charterer's office in Liverpool, that the cargo had been duly delivered in San Francisco, and then payable by bill at three months, or in cash, at charterer's option.

It is impossible to sustain a lien as for freight, under a special contract of this character, without disregarding the whole current of authority.*

The lien exists only where the master has a right to demand the freight on unlading the cargo, or where the freight is payable so soon after the cargo is discharged as to imply a right in the master to detain for that short period; as in the case of *The Kimball*, in this court, relied on by opposite counsel, where the freight was payable, "one-half in five, and one-half in ten days after discharge" of the cargo. There a distinction was drawn between a discharge of the cargo and the delivery of it, the period allowed being held "only a reasonable one for examining the condition of the cargo."

In the case at bar, however, the credit given was so long, and the provisions of the charter-party in reference to place of payment so inconsistent with any lien, as to make it quite clear that the contract was made upon the personal responsibility of the charterer and the consideration of the cash received in advance.

II. But the right of lien does not depend upon the solvency of the charterer. In fact, the lien is of importance to the owner only, as his remedies against the charterer are precarious. Accordingly, the cases on the subject are cases where the charterer was in default. In *Raymond* v. *Tyson*,† there was a large arrear of charter-money. In *The Kimball*,

* Raymond *v.* Tyson, 17 Howard, 53; Chandler *v.* Belden, 18 Johnson, 157; The Schooner Volunteer, 1 Sumner, 551; Certain Logs of Mahogany, 2 Id. 589; Ruggles *v.* Bucknor, 1 Paine, 358; Pinney *v.* Wells, 10 Connecticut, 104; Alsager *v.* The St. Katherine's Dock Company, 14 Meeson & Welsby, 794; Foster *v.* Colby, 3 Hurlstone & Norman, 705; Kirchner *v.* Venus, 12 Moore's Privy Council, 361; Tamvaco *v.* Simpson, 19 Common Bench, N. S. 453; affirmed, 1 Law Reporter, C. P. 363.

† 17 Howard, 53.

the charterers had become insolvent, and though the lien was sustained, it was not on this ground. In *Alsager* v. *The St. Katherine's Dock Co.*,* the charterers were bankrupt, and the suit for the cargo was brought by their assignees, who were allowed to recover without paying freight. In *Tamvaco* v. *Simpson*,† the acceptor for a portion of the freight in advance had become bankrupt.

The question whether there is a lien or not, depending as it does upon the charter containing terms as to payment, showing a credit given to the charterer inconsistent with a lien, must be determined by the charter itself, not by circumstances subsequently occurring. If, in fact, the owner has agreed to carry the cargo, without retaining a lien upon it, but looking to the personal responsibility of the charterers, whom he has agreed to trust for the freight, the charterer may sell the cargo in transit, as being free from freight, and his subsequent insolvency cannot charge it with a lien.

III. The common provision in a charter-party, binding the cargo to the ship and the ship to the cargo, is sometimes taken into consideration in determining whether the shipowner intended to waive his lien for freight. It was so in *The Kimball*, cited on the other side. In this case, in lieu of such usual clause, the charter only binds the vessel and her freight, and does not bind the cargo. This unusual language is quite consistent with the provisions as to the time, manner, and place prescribed for the payment of the freight, which it is impossible to reconcile with any right to detain the cargo.

Mr. Justice CLIFFORD delivered the opinion of the court.

Assignees of the charter-party and of the bill of lading libelled the ship Bird of Paradise, her tackle, apparel, and furniture in a cause of contract, civil and maritime.

Breach of contract alleged in the libel is the refusal of the master of the ship to deliver the cargo as stipulated in the

* 14 Meeson & Welsby, 794. † 19 Common Bench, N. S. 453.

charter-party and bill of lading. Voyage was from Liverpool to San Francisco, and the cargo consisted of nine hundred and fifty-two tons of coal. Terms of the charter-party, material to the inquiry are, that the freight shall "be paid in Liverpool on unloading and right delivery of the cargo," at the rate therein prescribed, and in full of all other specified charges. "Such freight is to be paid, say one-fourth in cash, and one-fourth by charterer's acceptance at six months from the final sailing of the vessel, . . and the remainder by like bill at three months from date of delivery, at charterer's office in Liverpool, of the certificate of the right delivery of the cargo agreeably to bill of lading, or in cash under discount at five per cent. per annum, at freighter's option." Other material clauses are, that the "vessel shall" be addressed to the freighter's agent abroad, that five hundred pounds sterling shall "be advanced in cash at port of discharge on account of the freight," and that "the ship and her freight are bound to this venture," but it does not contain the usual clause that the cargo is bound to the ship. Bill of lading is in the usual form and contains the clause, "they paying freight for the goods at the rate as per charter-party." Sum advanced for first instalment of freight was subject to three months' interest, at five per cent. per annum, and cost of insurance. Charter-party was signed by the claimants, and the bill of lading was signed by the master. Ship was loaded by the charterer, and it is proved she arrived in safety at the port of destination with the cargo on board. Consignees demanded the goods, but the master refused to deliver the same unless the freight was paid contemporaneously with the delivery, placing the refusal upon the ground that the ship had a lien upon the cargo for the unpaid balance of the freight, but the libellants claimed that they were entitled to the delivery of the cargo without paying any freight except in the manner provided in the charter-party.

1. Proofs showed that the ship sailed on the sixteenth day of April, 1863, and that she arrived at the port of destination on the twenty-sixth day of December in the same year.

Cash instalment of freight was paid as stipulated in the charter-party. Acceptance of the charterer given for the second instalment, payable in six months from date, was delivered to the claimants on the day the ship sailed from the port of departure. Before she arrived at the port of destination, the charterer failed in business, and became and is insolvent and bankrupt.

Payment of the acceptance was never made, and the proofs show that it is still held and owned by the claimants. Whole freight remains unpaid except the cash instalment paid before the ship sailed, and the five hundred pounds stipulated to be advanced in cash at the port of discharge. Amount due and unpaid is seven thousand and fifty dollars in gold, deducting the sum advanced at the port of discharge and including the residue of the last instalment and the unpaid and protested acceptance. Pending the suit, the cargo was delivered to the consignees under a stipulation that it should be returned to the master in case the claim of lien for freight should be sustained. Decree of the District Court was that the claim was unfounded; that the ship had no lien for freight on the cargo, and that the stipulation for the return of the cargo should be given up to be cancelled. Circuit Court affirmed the decree, and the claimants appealed to this court.

2. Equities of the case in view of the whole record are strongly with the ship-owner, but the questions presented for decision are questions of law and must depend upon the construction of the contract as expressed in the charter-party. Reference need not be made to the bill of lading, as it is in the usual form, and refers to the charter-party as the controlling evidence of the contract in respect to the matter involved in this controversy. Ship-owners, unquestionably, as a general rule, have a lien upon the cargo for the freight, and consequently may retain the goods after the arrival of the ship at the port of destination until the payment is made, unless there is some stipulation in the charter-party or bill of lading inconsistent with such right of retention, and which displaces the lien.

Opinion of the court.

3. Such a lien is regarded in the jurisprudence of the United States as a maritime lien, because it arises from the usages of commerce, independently of the agreement of the parties, and not from any statutory regulations. Legal effect of such a lien is, that the ship-owner, as carrier by water, may retain the goods until the freight is paid, or he may enforce the same by a proceeding *in rem* in the District Court. But it is not the same as the privileged claim of the civil law, nor is it an hypothecation of the cargo which will remain a charge upon the goods after the ship-owner has parted unconditionally with the possession. Although the lien is maritime and cognizable in the admiralty, yet it stands upon the same ground with the lien of the carrier on land, and arises from the right of the ship-owner to retain the possession of the goods until the freight is paid, and is lost by an unconditional delivery to the consignee.*

Parties, however, may frame their contract of affreightment as they please, and of course may employ words to affirm the existence of the maritime lien, or to extend or modify it, or they may so frame their contract as to exclude it altogether. They may agree that the goods, when the ship arrives at the port of destination, shall be deposited in the warehouse of the consignee or owner, and that the transfer and deposit shall not be regarded as the waiver of the lien; and where they so agree, the settled rule in this court is, that the law will uphold the agreement and support the lien.†

4. Presumption is in favor of the lien as already explained, but it may be modified, or it may be excluded or displaced by direct words, or by the insertion of some stipulation wholly incompatible or irreconcilable with the existence of such a right. Contracts of affreightment, like other commercial contracts, where the language employed is ambiguous or of doubtful meaning, are subject to judicial construction, and it often happens that the terms of the instrumen

* 1 Black, 113.

† Mordecai *v.* Lindsay (The Eddy,—REP.), *supra*, p. 481.

in respect to the payment of freight and the delivery of the cargo are so inaptly chosen that it gives rise to very close and embarrassing questions. Where the stipulation is, that the goods are to be delivered at the port of discharge before the freight is paid, without any condition or qualification, it seems to be agreed that the lien of the ship-owner for the payment of the freight is waived and lost, as the right of lien is inseparably associated with the possession of the goods. Unless the stipulation is, that the delivery shall precede the payment of the freight, and the language employed as applied to the subject-matter and the surrounding circumstances is such as clearly to show that the change of possession is to be absolute and unconditional, the lien is not displaced, as the presumption of law is the other way, which is never to be regarded as controlled, except in cases where the language employed in the instrument satisfactorily indicates that such is the intention of the parties.

5. Such precedent delivery, if absolute and unconditional, displaces the lien for freight, because it is repugnant to it and incompatible with it, but where the payment or security of payment is to be concurrent or simultaneous with the delivery of the cargo the lien exists in full force, and the ship-owner cannot be required to make the delivery until the payment of freight, or security, as the case may be, is tendered. Judge Story says the lien exists if it appears that the payment is to be made before or at the delivery of the cargo, or even if it does not appear that the delivery is to precede such payment.—(*The Volunteer*, 1 Sumner C. C. 571.) Accordingly, he held in that case, that the stipulation that the freight should be paid within ten days after the vessel returned to the port of departure, did not displace the lien on the return cargo, as the unlivery of the cargo might be rightfully postponed beyond the ten days after the return of the ship, when, by the terms of the charter-party, the freight would become due. Same defence, that is, the waiver or displacement of the lien by a clause in the charter-party giving credit for the payment of the freight, was set up in a subsequent case before the same court, in which the terms of the

clause relied on afforded more color to the views of the respondent.*

Terms of the stipulation in that case were, that the freight should be paid "in five days after the vessel's return to, and *discharge* in, the return port of the voyage." Argument of the respondent was, that the word discharge, as used in the clause, meant not merely the unloading of the brig, but the delivery of the cargo to the charterer or owner of the goods. Aided, however, by the terms of the bill of lading, which referred to the charter-party, the court came to the opposite conclusion, and held that the word discharge, as there used, meant merely the unlading of the cargo from the ship, without any reference to a delivery to the owner or consignee. Exactly the same rule was adopted and applied by this court in the construction of a similar clause of a charter-party in a case heard and decided at the last term.

Part of the charter-money, in that case, was agreed to be paid, and was paid, before the ship sailed, or during the voyage, and the stipulation was, that the balance should be paid, "one-half in five and one-half in ten days after the discharge of the homeward cargo," and the decision was, that the stipulation, construed in the light of another clause in the same instrument, which provided in effect that the ship should be bound to the merchandise and the merchandise to the ship, was not inconsistent with the right of the owner to retain the cargo for the preservation of the lien, as the clause was intended for the benefit of the charterer, giving him time to examine the goods and ascertain their condition, and to decide whether he would or would not take them and pay the freight. But the court remarked that the credit might be for so great a period as to justify the inference that the shipowner intended to waive his right of lien; and it was decided, in an earlier case, that the lien may be waived without express words to that effect, if the charter-party contains stipulations inconsistent with the exercise of such a right, or

* Certain Logs of Mahogany, 2 Sumner, 600.

where it clearly appears that the ship-owner meant to trust to the personal responsibility of the charterer.*

6. Repeated decisions of the courts in Westminster Hall have adopted the same general rule, and in some decisions of very recent date the same principles have been applied in cases entirely analogous to the one now before the court. Settled doctrine of those courts is, that the law merchant gives to the ship a lien for the freight, or rather the right of the ship-owner to retain the goods until the freight is paid.† They hold it to be a common law right, not cognizable in the admiralty; but they admit that special clauses in the charter-party, or bill of lading, inconsistent with it, operates as a waiver, and may destroy the right.‡

Unless, however, the special agreement is absolutely inconsistent with the retention of the goods, the waiver or displacement is not shown, and the right remains.§

Recent decisions in that country put the principal question under consideration in a clear light, and leave no doubt, if the case were pending there, how it would be solved. Take, for example, the case of *Alsager* v. *Dock Co.*,‖ which was decided in the Court of Exchequer. Charter-party in that case contained two clauses material to be noticed. First clause was, that the vessel might discharge in any dock the shipper might appoint, "on being paid freight" at the prescribed rate per ton. Second clause was, that the freight should be paid "on unloading and right delivery of the cargo, two months after the vessel's inward report at the custom-house." Conclusion of the court was, that the two clauses of the charter-party must be construed together; but they

* The Kimball, 3 Wallace, 42; Raymond *v.* Tyson, 17 Howard, 59.

† Philips *v.* Rodie, 15 East, 554.

‡ Lucas *v.* Nockells, 4 Bingham, 731; Chase *v.* Westmore, 5 Maule & Selwyn, 180; Tate *v.* Meek, 8 Taunton, 280; Horncastle *v.* Farran, 3 Barnewall & Alderson, 497; Small *v.* Moaltes, 9 Bingham, 588.

§ Crawshay *v.* Homfray, 4 Barnewall & Alderson, 50; Pinney *v.* Wells, 10 Connecticut, 104; Howard *v.* Macondray, 7 Gray, 516; Wilson *v.* Kymer, 1 Maule & Selwyn, 157; Neish *v.* Graham, 8 Ellis & Blackburne, 510; Campion *v.* Colvin, 3 Bingham, N. C. 26.

‖ 14 Meeson & Welsby, 798.

held that the freight was not payable until two months after the inward report, and that the ship-owner had not any lien on the cargo for the freight, because the delivery of the goods was required to precede the payment of the charter-money.

Terms of the charter-party in the case of *Foster* v. *Colby*,* were substantially the same, so far as respects the principal question in this case. Freight was payable in that charter-party in three instalments, but the terms of the first two payments are unimportant. Material clause reads as follows, to wit: "The remainder in cash, two months from the vessel's report inwards, and after right delivery of the cargo, or under discount at five per cent. per annum, at freighter's option." Held, that the charter-party did not create any lien in respect of that part of the freight which was payable two months after the vessel's inward report, although the charter-party contained the stipulation that the owners of the ship should "have an absolute lien on the cargo for all freight, dead freight, and demurrage." Latter clause was intended, as the court held, not to enlarge the right of lien for freight, as generally understood, but to include dead freight and demurrage within the operation of the general provision.

7. Words of the charter-party in this case are that the third instalment shall be paid by "bill, at three months from date of delivery at charterer's office, in Liverpool, of the certificate of the right delivery of the cargo, agreeably to the bills of lading." Giving the usual meaning to language, it is plain that the intent of the parties was that the delivery of the goods should precede the payment of the freight, and it is equally clear that the delivery was to be without qualification and unconditional. Certificate of right delivery of the cargo could not be obtained until the vessel was discharged, and the cargo delivered, and, if forwarded by the next steamer, a month would elapse before it could be delivered at charterer's office in Liverpool, which would

* 3 Hurlstone & Norman, 715.

extend the credit to four months from the delivery of the cargo.

8. Appellants contend that, inasmuch as the charterer failed in business and became a bankrupt before the vessel arrived at the port of discharge, the case is taken out of the operation of those rules of law, even in respect to the last instalment. Basis of this argument is a supposed analogy between the ship-owner as against the shipper, and the vendor of merchandise as against the vendee, as exemplified in the law of stoppage *in transitu*, but it is not perceived that any such relation exists between the ship-owner and the charterer, or that there is any foundation whatever for the argument. Intention of the parties in the contract of affreightment, as in other commercial contracts, must be ascertained from the language employed, the subject-matter, and the surrounding circumstances, and it is clear that the question of construction cannot be affected in the smallest degree by the subsequent solvency or insolvency of one of the contracting parties. Credit was given in this case to the charterer for the payment of the last instalment of the freight of four months from the time when the goods were required by the terms of the instrument to be delivered to the consignee at the port of discharge, and it is too plain for argument that the subsequent insolvency of the charterer can neither erase that clause from the charter-party or shorten the term of the credit.*

Insolvency of shipper occurring while the goods are in transit, or before they are delivered, will not absolve the carrier from his agreement as made, nor authorize him to retain the goods until the freight is paid, unless the lien exists independently of that occurrence.†

9. Claim of the appellants, also, is that the ship in this case had a lien for the second instalment of the freight, secured by the charterer's acceptance, made payable in six

* Alsager *v.* Dock Co., 14 Meeson & Welsby, 798; Tamvaco *v.* Simpson, 1 Law Rep. C. P. 371; Same case, 19 Common Bench, N. S. 478.

† Crawshay *v.* Homfray, 4 Barnewall & Alderson, 50; Chandler *v.* Belden, 18 Johnson, 157; Fieldings *v.* Mills, 2 Bosworth, 498.

months from date, and delivered to the ship-owner on the day the ship sailed. Acceptance became due, and the charterer also became a bankrupt before the vessel arrived at the port of discharge, and it is admitted that the acceptance is still held and owned by the ship-owner.

Established rule in this court is, that a bill of exchange or promissory note given for a precedent debt does not extinguish the debt or operate as payment of the same, unless such was the express agreement of the parties. Agreement of the parties filed in the case and made a part of the record, shows that the acceptance was presented to the bankrupt court, and that it has never been paid, and it is not pretended that it is of any value. Valueless as the acceptance is, the objection if made, that it had never been tendered to be cancelled, would be a mere technicality, but no such objection is made, and as the parties agree that it has never been negotiated it must be understood that any such objection is waived. Payment of that instalment of the freight therefore is not proved, and there is no evidence in the record tending to show that the lien for that instalment of the freight was ever waived. Ship-owner under the circumstances has a right to stand upon the original contract and to seek his remedy to that extent of his claim in the form to which it originally belonged as fully as if the acceptance had never been given.*

Entire freight under this charter-party, except the small advance stipulated to be made at the port of discharge, was to be paid in the port of shipment. Port of shipment was also the port where the ship lay when the contract was made, and the terms of the contract afford the most plenary evidence that the parties regarded the charter-money stipulated to be paid at that port as freight in the usual and proper sense in which that word is understood in the maritime law.†

10. Suppose, however, a different rule could be applied to

* Steamer St. Lawrence, 1 Black, 533; The Kimball, 3 Wallace, 45; The Active, Olcott, Admr. 206; Bark Chusan, 2 Story, 457.

† Gilkison *v.* Middleton, 2 Common Bench, N. S. 152; Neish *v* Graham 8 Ellis & Blackburne 310; Gracie *v.* Palmer, 8 Wheaton, 605.

the sum actually paid or advanced before the vessel sailed. Still that concession, if made, would not affect the question as to the second instalment in this case, because that instalment was not advanced in money, and has never been paid. Separated from the acceptance, which, under the decisions of this court, was not payment, it presents the ordinary case of a promise to pay freight and a failure to fulfil the contract, and in this point of view the case is clearly distinguishable from the decision in which it is held that sums stipulated in charter-parties to be paid in advance and not dependent on the carrier's contract do not have the incidents of freight, and are not protected by the lien of the ship-owner, unless by usage or special contract.*

11. Foundation of those decisions is, that money advanced as freight cannot be recovered back, not even in case the ship is lost on the voyage, and the freight is never earned; because, as it is said, payment determines the lien, and anything accepted as an advance, such as a bill of exchange, is the same thing, unless there is an express agreement to the contrary. Undoubtedly an actual payment determines the lien to that extent, but it is not correct to say that a bill of exchange has the same effect, unless it be so agreed between the parties; and the settled doctrine in this country is, that freight paid in advance is not earned unless the voyage is performed, and that the shipper may recover it back, if for any fault not imputable to him the contract is not fulfilled.†

12. Absence of the clause that the merchandise is bound to the ship cannot affect the question, as that is the presumption of the law-merchant, from the relation between the ship and the cargo, independently of any express stipulation, unless the presumption to that effect is negatived by the language of the contract.‡ Whenever the owners of the

* How *v.* Kirchner, 11 Moore's Privy Council, 21; Kirchner *v.* Venus, 12 Id. 384; Maclachlan on Shipping, 383.

† The Kimball, 3 Wallace, 44; Benner *v.* Insurance Company, 6 Allen, 222; Chase *v.* Insurance Company, 9 Id. 313; Watson *v.* Duykinck, 3 Johnson, 335; Griggs *v.* Austin, 3 Pickering, 20; 3 Kent Com. (11th ed.), 304; Pitman *v.* Hooper, 3 Sumner, 66.

‡ 1 Parsons's M. L. 124, 253.

ship constitute one party, and the owners of the cargo the other, the law of freight applies, and the fundamental rule, says Mr. Parsons, is that the rights of the respective parties are reciprocal, and that each has a lien against the other to enforce those rights, and the better opinion is, that the lien for freight commences as soon as the goods are delivered into the control of the master, or certainly as soon as they are put on board.*

Usually the charter-party contains a clause binding the ship to the merchandise and the merchandise to the ship, but the law-merchant, as already explained, imposes that mutual obligation even if it be omitted.†

Decree of the Circuit Court must be reversed with costs, and the cause remanded for further proceedings in conformity to this opinion. Libellants, upon the payment of the amount of the protested acceptance and interest and costs of suit, will be entitled to a decree that the stipulation given for the return of the goods shall be given up to be cancelled. Otherwise the libel must be dismissed.

DECREE REVERSED WITH COSTS.

UNITED STATES *v.* THE COMMISSIONER.

A *mandamus* will not be granted to compel the performance of an office, such as the issuing of a patent for land, in a case where numerous questions of law and fact arise, some of them depending upon circumstances which rest in parol proof yet to be obtained, and where the exercise of judicial functions, some of them of a high character, is required. Nor will it be granted where it is reasonable to presume that there are persons at the time in possession under another title, and who therefore should have an opportunity to defend it.

THIS was a writ of error to the Supreme Court of the District of Columbia.

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* 2 Parsons on Contracts (5th ed.), 286; Abbott on Shipping, 462; Fragano *v.* Long, 4 Barnewall and Creswell, 219; Cooke *v.* Wilson, 1 Common Bench, N. S. 153; Maclachlan on Shipping, 353; Tindall *v.* Taylor, 4 Ellis & Blackburn, 219; Same case, 28 English Law and Equity, 210.

† Brig Casco, Davies, 184; 2 Parsons on Contracts, 303; 2 Parsons's M. L. 561.

The case in that court arose on a petition by McConnell for a mandamus to command the Commissioner of the General Land Office to cause to be prepared, signed, countersigned, recorded, and issued, a patent to him for the north part of the south half of section No. 10, T. No. 39 W., range 14 E., situate in the city of Chicago. There was a rule to show cause, and a return thereto by the Commissioner of the Land Office.

The right to the patent was founded upon a certificate of purchase by private entry at the register's office in Chicago, on the 15th June, 1836. The relator complained that he had been denied the patent, since the issuing of the certificate down to the present time, some twenty-eight years, though repeated applications had been made by him for the same.

The return set up that one Robert Kenzie entered this same land, under a pre-emption right, as early as the 7th May, 1831, five years before the relator's entry, and, that the latter's certificate of purchase on the 1st June, 1834, was cancelled on the 20th August thereafter, by the commissioner on account of this previous entry.

Several objections were taken to the legality of the entry by Kenzie, such as, that it was made in the wrong district, and, if in the right one, that the entry on this part of the south half of section No. 10 was in violation of law; which objections were answered by allegations that an act of Congress was passed confirmatory of the defective entry; and also, that the parcel entered and contested belonged to the north and not to the south part of the section.

It further appeared that a patent was issued to Kenzie 4th March, 1837, in pursuance of an act of Congress passed 2d July, 1836; but to this it was objected that the rights of the relator had become vested by the previous entry of 1st June, 1836.

The court below refused to grant the mandamus, and the case was now here for review.

Mr. McDougal, for the relator.

Opinion of the court.

Mr. Justice NELSON delivered the opinion of the court.

Where the merit of the several objections and questions made in this case lie, we do not undertake to determine, nor can they be determined, understandingly, upon this record. Many of the acts of the parties, and of the officers, the registers, and commissioners of the Land Office, may be valid or void, depending upon the facts and circumstances attending them at the time, and which rest in parol, and are the proper subject of proofs. We have referred to them for the purpose of showing that this case is not one to which the remedy by mandamus can be applied. It calls for the exercise of the judicial functions of the officer, and these of no ordinary character. Indeed, however eminent, it is plain no intelligible decision could be made without the aid of facts not within his knowledge, nor attainable by proofs consistent with the proceedings in the case of mandamus. The duty is not merely ministerial, but involves judgment and discretion, which cannot be controlled by this writ. Besides, it appears that Kenzie was in possession when his entry was made in May, 1831, and was there in 1836; and, as the premises are situated in the settled part of the city of Chicago, it is but reasonable to presume that persons are at this time in possession of the same premises under his title who should have an opportunity to defend it. The relator has mistaken his remedy, for if his title under the certificate is valid, and presents a superior equity over the opposing title, as in the case of *Lyttle et al.* v. *The State of Arkansas*,* and *Lindsey* v. *Hawes*,† the appropriate remedy is by bill in equity.

Whether or not a mandamus will lie in any case to compel the issuing of a patent is a question not necessarily involved in this case; we have not therefore examined it, and express no opinion upon it. We have found no case in which this power has been exercised.

Patents are to be signed by the President in person, or in

* 9 Howard, 315.

† 2 Black, 554.

his name by a secretary, under his direction,* and countersigned by the recorder of the General Land Office.†

Judgment of the court below

AFFIRMED.

Mr. Justice MILLER did not sit in the case.

GOODRICH *v.* THE CITY.

1. Where a matter is directly in issue and adjudged in a court of common law, that judgment may be set up as an estoppel in a court of admiralty.
2. Where an action is brought in a State court against a city for its neglect to do a public duty imposed on it by law (as *ex. gr.* to keep its harbor free from obstructions hidden under water), the declaration going upon its neglect to do the thing at all, a judgment in such State court that it was not bound to do the thing at all, may be used as an estoppel in another suit (a libel in admiralty), where the allegation of the libel is that, being bound to keep the river clear, the city began to clear it—entered upon its duty—but never finished the work, by which neglect to finish it the injury occurred; the cause of action being otherwise the same.

GOODRICH filed a libel in the District Court for the Northern District of Illinois, in a cause of damage, civil and maritime, against the City of Chicago, *in personam.*

The libel alleged that he was the owner of the steamer Huron; and that, on the 27th of March, 1857, while leaving the port of Chicago, the vessel ran against a sunken wreck in the Chicago River and was sunk; that, prior to this damage done, the city had been vested with exclusive jurisdiction over the river as a common public navigable river and highway by the State of Illinois, and with all the necessary means to provide funds for defraying the expenses incident thereto; that the city accepted the act of the legislature, and had ever since assumed the exclusive jurisdiction and control over the river harbor; that on the 20th day of May, 1856, the city had passed an ordinance for the removal, without delay, of any obstruction to free navigation, by which it was ordained that whenever there should be in the harbor

* 4 Stat. at Large, 663. † 5 Id. 417.

any vessel insecurely fastened, adrift, sunken, &c., and which might require to be fastened, raised, &c., IT SHOULD BE THE DUTY of the harbor master to secure, raise, or remove such vessel WITHOUT DELAY; *that in April*, 1856, *the city appointed one Ingalls harbor master under the said ordinance, and at the time of said damage he was such harbor master, vested with full control and management of the harbor, and that it was his duty, as agent of the said city, to remove all such obstructions to the free and safe navigation of said harbor;* that in November, 1856, a schooner had been sunk near the mouth of the river, and became an obstruction to the safe navigation of it; *that the city assumed the exclusive right to remove the same, and did, by their said harbor master, undertake and commence the removal of the said sunken wreck, by hitching thereto a steam-tug, and thereby attempting to raise and remove the same as they were bound to do, but did not complete the work, nor raise and remove the said wreck, as they had exclusively undertaken to do, but worked on the said sunken vessel, endeavoring to raise the same, and pulled several pieces of timber from the said vessel in the attempt to raise and remove her, but without raising or removing the same, did (as the libellants believed), loosen the said vessel in its bed; and negligently and carelessly left the vessel until the 29th of March*, 1857, *by means whereof during that time, by the action of the winds and currents, the wreck became drifted further into the channel of the river, and during all the time aforesaid was kept in the channel by the respondent under water, so that the same could not be seen;* and without fixing or placing any buoy or signal to mark the place of the said sunken wreck; and that in consequence of the negligence of the city the said steamer Huron ran on to said sunken wreck and was sunk, in ignorance of its locality and without fault on her part, with damage to the libellants of $19,487.

The respondent having set up as defences, want of jurisdiction in the District Court; that the city was not liable on the facts of the case, and was not under any legal obligation to remove the sunken vessel, and that the accident had occurred through carelessness and unskilful conduct of the Huron, added to them by way of estoppel, the fact of *a former judg-*

ment on demurrer to the declaration, in an action on the case between the same parties in the Supreme Court of Illinois.

The declaration in the suit thus set up as an estoppel alleged:

1. That under a statute of the State of Illinois of February 14, 1851,* it became the duty of the city to remove and prevent all obstructions in the Chicago River and harbor, and that the city was authorized to levy and collect taxes for that purpose.

2. That the city assumed to discharge the duties imposed, and for that purpose levied and collected taxes, and controlled and regulated the said river and harbor, and that by means thereof and by the said State statute, it became and was its duty to remove and prevent all obstructions therein.

3. That the city undertook and entered upon the discharge of its duties and obligations by the passage of necessary ordinances, rules, and regulations, authorized by the act of 1851, whereby it became and was its duty to remove all obstructions, &c.

4. That the Chicago River and harbor was a public highway and navigable stream, and that the city, not regarding its duty in the premises, on the 29th of March, 1857, and for five months prior thereto, had negligently and carelessly suffered and permitted the obstruction spoken of to remain in the river, and that the city, although knowing that the wreck was under water and out of sight, neglected to place any buoy or signal thereon to indicate its position.

5. That by reason of the premises, on or about the 29th day of March, 1857, the Huron in passing through the river was accidentally and without any want of care and skill on the part of the owners, or those in charge of her, run on or against the said sunken wreck.

And it appeared that, on a demurrer to this declaration, judgment had been rendered finally in the Supreme Court of the State for the city.†

* The same statute referred to in the libel in admiralty.

† Goodrich *v.* The City, 20 Illinois, 445.

The District Court held judgment in the Supreme Court of the State no estoppel; and the case being deemed otherwise clear, gave judgment for the libellant.

On appeal to the Circuit Court, that court held, that the decision in the State court was "an authoritative adjudication, denying that there is an obligation imposed by law on the City of Chicago to remove obstructions from its river and harbor," and that it was thus decisive, against the libellants, of the present action. The decree of the District Court was accordingly reversed;—the Circuit Court (DAVIS, J.) expressing, at the same time, the opinion "that the facts of the case would sustain the claim made by the libellants, if the court was relieved from the embarrassment" of the decision referred to; and stating further "that if this question was an open one in Illinois, the court should have no hesitation in holding that a legal obligation is imposed on the city to remove obstructions from the river; and that it is bound to make full redress to every person injured by reason of its failure to perform its duty; that the true interest of commerce, and the best interests of the city, would be promoted by such a construction, and that it is sanctioned by principle and authority."

The case was now here on appeal from this decree by the Circuit Court reversing the former one of the District Court.

Messrs. Goodwin, Larned, and Goodwin, for the appellants, owners of the steamer:

There is no ground of liability set forth in any count in the declaration in the State court case, but that of "the omission of the city to take action for the removal of the wreck."

The case made by the declaration proceeds upon an absolute obligation on the part of the city to remove all obstructions, growing out of the power conferred, and the ordinances establishing the proper officers and providing the needful means for the exercise of that power; and the ground of action is rested wholly upon the omission of the city to exercise the power in the given case. There is no

averment in the declaration, as there is pre-eminently in the libel, that the city ever undertook or assumed to remove the wreck, or entered upon the work of such removal; but, on the contrary, the declaration excludes the idea of such assumption of responsibility or undertaking on the part of the city by its positive allegation that the city neglected and refused to take any such action, but permitted the wreck to remain, and would not undertake its removal.

And the Supreme Court being called upon to decide, on general demurrer, as to whether such a declaration had set forth a legal ground of action against the city, decided that it did not, *because* the city were not bound to undertake the removal of any obstruction in the harbor, except they elected so to do; that it was a matter of legal option with them whether they would or would not, in any given case, exercise the power so conferred; that the passage of ordinances and the providing of the proper officers and means to perform the work in such cases as they should elect to undertake it, did not impose any legal obligation to undertake any particular work; and therefore, notwithstanding all the allegations of the declaration respecting the charter, and the ordinances, and the appointment of harbor-master, were admitted, yet it did not follow that the city were bound to undertake the removal of this or any other obstruction; and so no sufficient cause of action was set forth in the declaration.

Now, giving to this decision full effect, it does not touch the case made by this libel. It decides that a case will not lie against the city for *mere omission to act, for the mere non-assumption of the power conferred* over the harbor by the charter, by neglecting to undertake to remove a particular obstruction.

The question of liability, in all cases where the city had elected to act under the power, and had entered upon and assumed the work, is therefore an open question, and this court is at liberty to decide such a case in conformity with their own views of the law and the facts.

It should be quite sufficient in a cause where the merits of

the case seem confessedly with the plaintiff, and where sound reason and authority sustain his action, to show that the case made by the libel is not within the *express point* decided by the Supreme Court of Illinois; and this court should, perhaps, if necessary, be "astute" to take the case out of that decision.

As a mere technical bar, the force of a judgment at law, when pleaded in admiralty, may be doubted on authority. In England,* it has been held, by Dr. Lushington, in *The Ann and Mary*, that an action at common law for damages caused by a collision, will not affect the jurisdiction of the admiralty, and that the verdict of the jury, upon the facts of the case, will not be conclusive upon the judgment of the admiralty court. If this is so, the whole matter of the State decision falls to the ground.

Mr. Irwin, contra:

That a judgment, on general demurrer to a declaration, is a judgment on the merits, conclusive in a subsequent suit where the parties and the cause of action are the same, is reported law so far back as the time of Croke† and Coke,‡ and has been frequently decided with us.§

And notwithstanding the *dicta* of Dr. Lushington to the contrary, in *The Ann and Mary*, there is no reason why the rule should not apply with as much force in courts of admiralty as in regard to any other.

In *Taylor* v. *The Royal Saxon*,‖ it was held that the pendency of a replevin in a State court to settle the right of property in a vessel is a bar to a libel in the admiralty to settle the same right between the same persons, &c. Grier, J., there says:

"But it is denied that this is a case of concurrent jurisdiction because of the different *form* and *course of proceedings* in a

* 2 W. Robinson, 190. † Ferrer et al. *v.* Arden, 2 Croke Eliz. 668.

‡ Ferrer's Case, 6 Reports, 7.

§ Bouchaud *v.* Dias, 3 Denio, 243; Robinson *v.* Howard, 5 California, 428; Perkins *v.* Moore, 16 Alabama, 17.

‖ 1 Wallace, Jr., 333.

court of admiralty. This proceeding, it is said, is *in rem*, that all the world is a party, while the action of replevin is a mere personal action of trespass; that, in the one case, the thing passes into possession of the court; in the other, the delivery is made by the officer, without any order or judgment of the court. These distinctions, though ingenious, do not constitute a difference or furnish an argument to justify the court of admiralty in disregarding the disposition made of this property by the law of Pennsylvania, whether it be temporary or *final*."

Again, says the same judge:

"It is true that the court of admiralty, from the peculiarity of her process and modes of proceeding, is more competent to render speedy and exact justice to the parties than courts of common law (more especially in disputes between part-owners); but it cannot, on that assumption, disregard the disposition made of this property by the law of Pennsylvania, whether it be temporary or *final*."

This reasoning, though applied by his honor to what was in effect a plea of *lis pendens*, applies with equal, if not greater force, to a plea of *res adjudicata*.

Now, in this case, the declaration shows that the same parties are attempting to litigate the same subject-matter, or *points* or *questions* in admiralty that were adjudicated and settled in the State court.

Look at the declaration as set out *supra*, p. 568, and at the libel as set out just before it, at pp. 566–7. It will be seen that the allegations in both are, in legal substance, the same. And the parties and subject-matter of both actions are undeniably the same. They are both actions to recover damages sustained by reason of an alleged obstruction in the Chicago River. The vessel injured is the same,—the Huron; the time and cause of injury are the same; the liability of the city is placed on the same ground in both actions, to wit, a duty imposed in both cases by the same act of the legislature, and the same ordinances of the city, and the neglect to perform or discharge it.

Nothing in the libel or in the facts in the case changes the

cause of action from what it was in the State court. The liability of the city is based on its *nonfeasance* in both courts; and does not the Supreme Court of Illinois decide the *questions* raised in the case at bar against the appellants?

It matters not, here, and so far as the defence of an estoppel is concerned, whether the decision in the State court was right or wrong. It is sufficient that the parties appellant selected that tribunal to litigate their supposed grievances. They must be content with the result. If a party, when defeated in one tribunal, is permitted to take his chance in another, there can be no end to litigation; for if defeated in the second, he may in like manner resort to a third, and so run the chance of all the courts in the country. Litigation is harassing and vexatious enough to parties at best, but break down and destroy the doctrine of *res adjudicata*, and it would be intolerable, wholly.

Mr. Justice SWAYNE delivered the opinion of the court.

In the view which we have taken of the case, it will be necessary to consider but a single point.

The appellants filed their libel to recover damages for the sinking of their steamer Huron, in the Chicago River, near its mouth. The casualty was caused by the steamer running against a sunken wreck. The libel alleges that it was the duty of the city to have it removed, and that it was guilty of negligence in not having done so. It alleges further, that the city entered upon the work of removal, but abandoned it before the result was accomplished.

Among the defences set up by the answer of the respondent was, that of a final judgment in the Supreme Court of Illinois, upon a general demurrer to a declaration in an action at law by the appellants against the respondent for the same cause of action.

The court below sustained the defence, and upon this ground, and another not necessary to be stated, dismissed the libel.

The record of the action at law is found among the proofs in this case. Upon a careful examination of the declaration

and of the libel, we are constrained to say, there is no such difference in the cases which they respectively make as can take this case out of the operation of the principles of *res adjudicata.**

Whatever the result might be here, if this obstacle were out of the way, we have no choice but to apply the law in this as in other cases.

DECREE AFFIRMED, WITH COSTS.

THE PEARL.

A British vessel captured during the rebellion and our blockade of the Southern coast, by an American war steamer, on her way from England to Nassau, N. P., condemned as intending to run the blockade; Nassau being a port which, though neutral within the definition furnished by international law, was constantly and notoriously used as a port of call and transshipment by persons engaged in systematic violation of the blockade, and in the conveyance of contraband of war; the vessel and cargo being consigned to a house there well known, from previous suits, to the court, as so engaged; the second officer of the vessel, and several of the seamen, examined *in preparatorio*, testifying strongly that the purpose of the vessel was to break the blockade; and the owner, who was heard, on leave given to him to take further proof, touching the use he intended to make of the steamer after arrival in Nassau, and in what trade or business he intended she should be engaged in, and for what purpose she was going to that port, saying and showing nothing at all on those points.

APPEAL from the District Court of the United States for the Southern District of Florida, restoring, on payment by the claimants of expenses and costs, the steamer Pearl, captured for intent to break the blockade of our Southern coast, established during the late rebellion; the question being chiefly of fact.

Mr. Ashton, Assistant Attorney-General, for the United States, Mr. Marvin, contra, for the claimants.

* Duchess of Kingston's Case and the notes, 2 Smith's Leading Cases, 424; Bendernagle *v.* Cocks, 19 Wendell, 208.

Opinion of the court.

The CHIEF JUSTICE, previously stating the case, delivered the opinion of the court.

The Pearl was captured on the 20th January, 1863, by the United States ship of war Tioga, between the Bahama banks and Nassau.

The papers found on board showed that she was a British vessel, belonging to one George Wigg, of Liverpool; that he became owner on the 24th of September, 1862; that one George M. Maxted was appointed master at Glasgow, where she was purchased, on the 25th of September; that one Matthew L. Irving succeeded him on the 13th of October, also at Glasgow; and that one William Jolly was appointed in his place, at Cork, on the 22d of November. Jolly was master at the time of capture.

She carried no cargo except ten bales of seamen's jackets and cloth, shipped by Wigg at Cork and consigned to H. Adderly & Co., at Nassau, to whom the vessel was also consigned. This firm has become well known in this court as largely engaged in the business of blockade-running.

Several of the seamen, examined in preparation for the primary hearing, concurred in representing the vessel as destined to the Rebel Confederacy.

One of them was present when the vessel was purchased and heard Wigg and Maxted negotiating for her. According to them, Maxted acted as principal rather than as subordinate, and was engaged about the same time in buying other vessels of the same class as the Pearl, of small size and light draft, and what was said impressed the witness with the belief that all of them were destined to trade with the Confederate ports.

Several other seamen made similar statements. It seemed to be a common understanding among them that the Pearl was to be engaged in running the blockade, and there was much talk about the practicability and probability of her getting into the Confederate ports, and especially the port of Charleston. "It was notorious," said one of them, "in Glasgow and Cork, before and after the sailing of the Pearl,

that she was engaged to run the blockade, and that she was bought and fitted and sailed for that especial purpose."

One of the firemen stated that Maxted represented to him and his mates, as an inducement to ship on the Pearl, that they might reship on her or in some vessel in the Confederate service, with large pay, and have, as a bonus, the ten pounds return-money which was to be paid them on discharge at Nassau. The same witness stated that Maxted, after leaving the Pearl, took command of a screw steamer, the Thistle, from Liverpool for Nassau.

The testimony of the second officer of the Pearl was substantially to the same effect. He was engaged at Glasgow for the general management on board, by Maxted, shortly before she sailed; and after a fortnight or more, shipped as second officer. He understood the purchase by Wigg to be made for parties in the Confederate States.

The master and the first mate testified that they knew nothing of any destination of the ship beyond Nassau. Neither knew to whom the vessel belonged, except from the papers, but believed that she was owned by Wigg. All they knew of the cargo was that it was consigned to Adderly & Co.

The cause was heard upon the preparatory evidence on the sixth of May, and on the same day, and before any decree was pronounced, a motion for further proof was made, upon affidavits by Wigg, Maxted, and several of the seamen; and on the 25th of May it was "ordered that the claimant of the ship be allowed to produce further evidence, by his own oath or otherwise, touching his interest therein and the use he intended, at the time of the capture, to make of the vessel after her arrival at Nassau; the trade or business he intended she should be engaged in, and for what purpose she was going to that port; and that the claimant of the goods have time to produce an affidavit of his right and title therein, and to produce such other proof of neutral ownership as he may be advised."

No new evidence at all appears to have been taken under this order; but the affidavits used on the notice, and a Nas-

sau newspaper containing two government notices, seem to have been admitted as further proof on the final hearing.

Some of the affiants were seamen who had been examined at Key West. They denied having made some statements contained in the depositions put into the cause by the prize commissioners; but they do not deny the conversations and understandings to which they then testified. The substance of their new affidavits was that the Pearl, at the time of her capture, was on a *bonâ fide* voyage to Nassau. The affidavits of the seamen, not before examined, were to the same effect. They are entitled to very little weight as further proof.

The affidavit of Wigg was positive to his ownership; to the non-existence of Confederate ownership; and to the allegation that the Pearl, at the time of her capture, was engaged in the *bonâ fide* prosecution of a lawful voyage from Great Britain to Nassau, and that he had no knowledge or belief that any cause existed which rendered her liable to capture.

But he said nothing at all on the most important point in respect to which he was allowed further proof, namely, what use he intended to make of the steamer after arrival in Nassau; and in what trade or business he intended she should be engaged; and for what purpose she was going to that port.

The affidavit of Maxted also asserted the sole ownership of Wigg; denied that Wigg was agent for the Confederate States or connected in business with any person residing in either of them; denied that he himself made any contract with any one to run the blockade, or had any conversation with any of the seamen in relation to shipping in any vessel to run the blockade; and concluded with an averment, that of his own knowledge the steamer was purchased by Wigg to carry mails for the British government between the West Indies and Cuba, under proposals offering five thousand pounds per annum for three years.

This affidavit, if entitled to credit, might repel the inference, warranted by the other evidence, that the Pearl was purchased and sailed with intent to break the blockade.

But Maxted's own connection with the purchase of this and other vessels, and his own engagement in the suspicious commerce with Nassau, do not allow us to regard his evidence as of much value, especially in the absence of any satisfactory affidavit from Wigg himself.

It must be remarked, also, that the government notices for proposals, put in evidence for the claimant, apparently for the purpose of supporting the statement by Maxted, do not support it at all. They invite proposals for sailing, not for steam vessels, and relate to communication among the Bahama Islands, not to communication between Cuba and the West Indies.

On the whole, we are constrained to say that we perceive no reasonable ground for believing that the Pearl was not at the time of capture destined to employment in breaking the blockade. We are not satisfied that her voyage was to terminate at Nassau; but are satisfied, on the contrary, that she was destined, either immediately after touching at that port, or as soon as practicable after needed repairs, for one of the ports of the blockaded coast.

The vessel, therefore, in conformity with the principles recognized by us in several cases, must be condemned.

As to the ten bales of merchandise, the evidence showed ownership in Wigg, rather than any other person; but no claim was put in by him. They were claimed in behalf of Adderly & Co., by the captain; but, in his deposition, he disclaimed all knowledge of the ownership, except from the consignment. No affidavits of title or neutral ownership have been put in by Adderly & Co., under the notice obtained by the claimants, for further proof. This neglect cannot be construed otherwise than as an admission that they are not entitled to restitution.

A decree of condemnation, therefore, must pass against the merchandise as well as the ship.

DECREE ACCORDINGLY.

JONES *v.* LA VALLETTE.

A judgment in the Circuit Court of Louisiana in the ordinary action by petition and summons upon a promissory note cannot be brought into this court *by appeal*. It must come here, if at all, on writ of error.

A JUDGMENT had been rendered in the Circuit Court of the United States for the Eastern District of Louisiana, in favor of La Vallette against Jones, in the ordinary action by petition and summons, upon a promissory note. The defendants below took an *appeal*, seeking to bring the case into this court in that way.

Mr. Janin now moved to dismiss the appeal, contending that *appeal* was not the proper form of bringing up the case.

Mr. Durant, contra.

The CHIEF JUSTICE delivered the opinion of the court.

The Judiciary Act of 1789 gave appellate jurisdiction to this court by writ of error, and it was held that under that act no cause could be brought here by appeal.*

The act of 1803 gave appellate jurisdiction by appeal "from final judgments and decrees in cases of equity, of admiralty, and maritime jurisdiction, and of prize or no prize." No other cases can be brought here in this mode, and the case in the record is of neither class. It must come here, if at all, upon writ of error.

The appeal must therefore be

DISMISSED FOR WANT OF JURISDICTION.

* Blaine *v.* Ship Charles Carter, 4 Dallas, 22.

PACKET COMPANY *v.* SICKLES.

1. Where the record of a former suit is offered in evidence, the declaration setting out a special contract, but not saying whether it was written or parol, and where jurors who were empanelled in the former suit are brought to testify that the contract declared on in the second suit was the same contract that was in controversy in the former one, and was passed on by them, testimony may be given on the other side that the contract was a parol one;—so as to let in a defence of the statute of frauds.

   [In the District of Columbia, in which the suits in this case were brought, the British statute of frauds, providing that "no suit shall be brought to charge any person upon any agreement that was not to be performed in one year, unless there was some memorandum or note in writing of the agreement," was in force. And the fact that the contract declared on was a parol one, and so within the statute, was one of the matters meant to be relied on by the defendants in the second trial.]

2. A contract where performance is to run through a term of years, but which, by its tenor, may be defeated at any time before the expiration of the term—*ex. gr.* a contract to pay for a right to use an invention, on a certain boat, so much a year during the term of a patent having twelve years yet to run, "*if* the said boat should so long last,"—is within the clause of the statute quoted in the preceding paragraph.

In this case, which had become somewhat complicated by several trials below, and which had been in this court on error more than once, and was now returned with a mandate for a *venire de novo*, the court makes two observations over and above the points above stated as adjudged:

(i) That the secret deliberations of the jury or grounds of their proceedings while engaged in making up their verdict, are not competent or admissible evidence of the issues or finding; but that their evidence should be confined to the points in controversy on the former trial, to the testimony given by the parties, and to the questions submitted to the jury for their consideration; and that then the record furnishes the only proper proof of the verdict.

(ii) That where the extrinsic proof of the identity of the cause of action is such that the court must submit the question to the jury as a matter of fact, any other matters in defence or support of the action, as the case may be, should be admitted on the trial, under proper instructions.

THIS was a suit brought in the Supreme Court (the former Circuit Court) of the District of Columbia to recover damages under a special contract set forth in the declaration.

The contract, in substance, was, that on the 18th of June, 1844, the plaintiffs below, Sickles & Cook, and the Wash-

ington, &c., Steam Packet Company, the defendants, agreed that Sickles & Cook should attach, for use, to a steamboat owned by the company, the Sickles cut-off, a certain patented contrivance which was designed to effect the saving of fuel in the working of steam engines; and that, in consideration thereof, if the said cut-off should effect a saving in the consumption of fuel, the company would use it on their boat *during the continuance of the said patent,* IF *the said boat should last so long*, and that they would, for the use of the cut-off, pay to the plaintiffs, weekly, three-fourths of the value of the fuel saved. *The patent had, at the date of the alleged contract, yet twelve years to run.* The declaration set forth further, that it was agreed between the parties that the saving of the fuel caused by the use of the said cut-off should be ascertained by taking two piles of wood of equal quantity and burning one pile without and the other with the use of the cut-off, and thus to ascertain how much longer the boat would run, under the same circumstances, with the use of the cut-off than without, and that the proportion of savings as agreed upon above should be paid by the defendants. It alleged finally, that this experiment had been fairly made, and showed a saving of fuel by the use of the cut-off of thirty-four per cent.

The plaintiffs accordingly claimed the value of three-fourths of the fuel thus saved, between certain dates specified.

The defendants pleaded the general issue.

On the trial the plaintiffs, to support the issue, gave in evidence the record of a former trial between the same parties on the same contract as alleged, for payments due when the writ in that case was issued, in which trial a verdict and judgment had been rendered in their favor.

The declaration in the record of this former trial contained four counts:

1. A special count on the contract, corresponding in all respects with that set out in the declaration in the present suit.

2. A common count for compensation for the use of the cut-off by the defendants on their boat before that time had and enjoyed, and for such an amount as it was reasonably worth.

3. A common count for money had and received; and

4. A special count on a contract in substance like the first, with the difference hereinafter stated: It recited that, in consideration the plaintiffs had before that time attached the said Sickles cut-off to the engine of the defendants' boat, and had agreed that they should have the use of it during the continuance of the patent-right, if the boat should last so long, they, the defendants, undertook and agreed to pay the plaintiffs three-fourths of the value of the fuel saved by the use of the cut-off; that a large quantity of the fuel, to wit, one thousand cords of wood, of the value of $2500, had been saved, yet the defendants, not regarding their promise, &c., have refused, &c. The difference between this and the first count consists mainly in the omission of any agreement to ascertain the saving of fuel by the experiment.

To the declaration in this former suit, whose record was thus offered in evidence, the defendants had pleaded the general issue.

It should be here mentioned that this suit had been in this court before. It was here in 1860.* On a trial from the result of which the writ of error then came, a record of a former trial had also been offered in evidence; apparently the same offered in the suit to whose result the present writ was taken.

The record offered in that previous trial contained a declaration having two counts upon the contract, with the common counts, a plea of the general issue, a general verdict for the plaintiffs *on the entire declaration*, and a judgment on the first count; a count similar to the counts in the declaration in the suit then pending.

Besides this testimony of the contract, the plaintiffs proved on that previous trial the quantity of fuel used in running the boat, and relied upon the rates as settled to determine their demand, and insisted that the defendants were estopped to prove there was no such contract, or to disprove any

* See the case in 24 Howard, 334.

one of the averments in the first count of the declaration in the former suit, or to show that no saving of the wood had been effected; or to show that the so-called experiment was not made pursuant to the contract, or was fraudulently made, and was not a true and genuine exponent of the capacity of the said cut-off; or to prove that the said verdict was in fact rendered upon all the testimony and allegations that were submitted to the jury, and was in point of fact rendered, as by the record it purported to have been, upon the issues generally, and not upon the first count specially.

The Circuit Court adopted these conclusions of the plaintiffs, and excluded the testimony offered by the defendants to prove these facts. On the matter coming here in 1860, by exceptions in that second suit, this court, in 24th Howard,* remarked upon the exclusion of this testimony as follows:

"The record produced by the plaintiff showed that the first suit was brought apparently upon the same contract as the second, and that the existence and validity of that contract might have been litigated. But the verdict *might* have been rendered upon the entire declaration, and without special reference to the first count. It was competent to the defendants to show the state of facts that existed at the trial, with a view to ascertain what was the matter decided upon by the verdict of the jury. It may have been that there was no contest in reference to the fairness of the experiment or to its sufficiency to ascertain the premium to be paid for the use of the machine; or it may have been that the plaintiffs abandoned their special counts and recovered upon the general counts. The judgment rendered in that suit, while it remains in force, and for the purpose of maintaining its validity, is conclusive of all the facts properly pleaded by the plaintiffs; but when it is presented as testimony in another suit, the inquiry is competent whether the same issue has been tried and settled by it."

Considering, therefore, that the Circuit Court had erred in holding the Packet Company estopped by the proceed-

* Pages 333, 346.

ings in the first suit from any inquiry in respect to the matters in issue, and actually tried in that cause, this court reversed the judgment given against it, and the case went down for trial a second time; the trial, namely, after which the present writ of error was taken.

On this new trial the plaintiffs called several of the jurors who had been empanelled in the former trial, to give evidence of the testimony then given, and also as to the matters in contest before the court on that trial; the purpose in introducing this extrinsic evidence having been to prove such facts as, in connection with the record, would show that the same contract was in controversy in the second suit, and had been conclusively adjudged in their favor. [Many of these jurors, it may be remarked, while stating *the particular grounds on which they found the verdict*, and speaking of a *contract* that was before them, did not all speak so definitely as to the terms of the contract as to make it easy to say whether they described such a one as was set forth in the first count, or such a one as was set forth in the last count.]

When the plaintiffs rested, the defendants offered a competent witness to prove that the only contract given in evidence on the former trial was by parol, *and not reduced to writing;* the purpose of this testimony having had obvious reference to a provision of the statute of frauds, in force in the District of Columbia; the words of the statute being: "That no suit shall be brought to charge any person upon any agreement *not to be performed in one year*, *unless* there was some memorandum or note in writing of the agreement," &c.

The evidence thus offered was objected to, and excluded by the court. The defendants offered to prove, further, that the contract was by parol, *and to be performed at the time stated in the declaration;* which testimony was also objected to, and excluded, except as to the latter branch. The questions growing out of this exclusion of evidence were now before this court on a bill of exceptions for review.

Two questions were, accordingly, raised here:

1. Whether the evidence as above mentioned was rightly excluded

2. Whether the contract, which it was sought to show was in issue in the former suit, was now to be regarded as valid. This question being suggested, of course, by the above-quoted section of the statute of frauds.

Messrs. Carlisle and Davidge, for the plaintiff in error:

I. The court erred in excluding the testimony:

1. Because the fact that the only evidence offered at the trial alleged to be an estoppel was parol evidence, was a fact proper for the consideration of the jury in weighing the evidence offered by the plaintiffs to show what the prior jury found.

2. Because the estoppel relied on was not an estoppel of record, in the strict sense, but was to be applied by the jury to the subject-matter by parol evidence.

As the case was tried, the court assumed the absolute truth of the evidence offered by the plaintiffs, and refused to submit that evidence to the jury, or to allow the defendants to offer any evidence based on the hypothesis that the estoppel might not be found as set up. In other words, the court undertook to determine the weight of the parol evidence.

3. Because the evidence, if admitted, showed that the testimony submitted at the former trial had relation only to the common counts. Evidence of a parol contract could not support the first count of the declaration in the former suit; nor could such evidence be objected to, as it was admissible as tending to show the measure of damages under the common counts.

We assert that if, in fact, the prior jury found only a parol contract, we are not estopped from denying its validity in law in the present case. We are estopped only from denying the particular points of facts found, to wit, a parol promise.

The fact, if true, that we did not, at the former trial, make objection on this ground was, at most, but an admission for the purposes of that case. It was an admission of law, which does not estop in any subsequent action. Questions of *law*

are not submitted to, or found by a jury, but only the naked issue of facts.*

We maintain that the contract being in parol merely was void in law, since it was not to be performed within one year.

Taking it for granted, for the present, that it was void, cases show that courts go far in searching out the particular point of fact—the *punctum facti*—decided by the prior jury, and in holding such point to be set aside and different from the one at issue in the case on trial.

Thus, in *Carter* v. *James*, a case in the English Exchequer,† the defendant had given a bond, secured by mortgage for £600. The mortgage contained a covenant to pay the debts. The plaintiff sued upon the bond, but the defendant set up a usurious agreement, and averred that the bond was given "in pursuance of that agreement," and so was void. The plaintiff replied that it was not given in pursuance of that agreement, and upon this issue was joined and a verdict found for the defendant. Afterwards, the plaintiff sued upon the covenants contained in the mortgage, it being confessedly for the same debt. The defendant pleaded the former verdict by way of estoppel, but, on demurrer, the plea was held bad, on the ground that the point of fact found in the former case was no answer in this; that point being that the bond was given in pursuance of the complainant's agreement, whereas in the present case the point was whether the covenant was so given, and whether the agreement itself was usurious.

The covenant was an agreement to pay the same debts as were named in the bond; and if the bond was given in pursuance of the complainant's agreement, the inference is irresistible that the covenant was so also; yet the court made a distinction.

In the prior case the plaintiff had not denied the fact of a usurious agreement, but had by his pleading virtually

* Richardson *v.* City of Boston, 19 Howard, 263; Hughes *v.* Alexander, 5 Duer, 488.

† 13 Meeson & Welsby, 137.

admitted it for the purposes of that case. Held (Alderson, B.) that his so admitting did not estop him on that point, as it was one on which the jury did not pass.

So in the present case, we deny that there was a written contract; we are not estopped from doing so by our not having denied it at the former trial, nor by the jury finding that there was a parol contract.

In *Burlen* v. *Shannon*,* a prior judgment had been obtained against the defendant for the board, for a certain period, of his wife, who had left his house, she being justified in doing so, it was asserted, on the ground, first, of his cruelty, and, second, of his consent. On a suit to recover board for a subsequent period, the ground then being that the wife was absent from cruelty (not his consent), the former verdict was set up as an estoppel. But its being so was denied on the ground that it was dubious whether the jury found cruelty, and that it must be left to the present jury to decide, from the evidence produced to them, what particular fact (of the two alleged) the former jury found.

In *Sawyer* v. *Woodbury*,† in the same court, a plaintiff had brought an action of covenant, alleging several distinct breaches. The jury found a general verdict in his favor. In a subsequent suit he set up one of those breaches, and claimed the former verdict as an estoppel. But the court held that evidence might be adduced to enable the jury to decide which breach it was the prior jury found.

II. The alleged contract, if merely parol, was void.

The statute avoids all contracts not "to be" performed within one year—meaning acts agreed not to be so performed; acts agreed to be done beyond the end of one year. Now, the acts stipulated to be done by the defendant in this case were, as alleged, to pay the money at certain intervals throughout the term of twelve years. In order to perform the contracts, the defendant must make these payments.

In case the boat ceased to exist during that term, the defendants would *then*, indeed, be excused from paying after-

* 14 Gray, 433.

† 7 Id. 499.

wards; but this would be a defeasance, as if by a condition subsequent, not a performance of the contract.

Had the words, "if the boat shall last so long," not been inserted, there can be no question that the alleged agreement would be void. Can these words cause a difference? The agreement was, not to pay so long as the boat should last. If that had been the agreement, then it might possibly have been fully performed in one year. But the agreement was, to pay for twelve years, though it was provided that such payments for that period might be excused and dispensed with, if the boat should previously cease to exist.

The fact that further performance may be thus dispensed with will not take the case out of the statute.*

Mr. Bradley, contra.

I. By the testimony of the former jurors, it appears that the contract specially declared on in the first two counts of the declaration in the second cause—the experiment provided for in that contract; the result of that experiment, and the consequent saving of fuel to the defendants—were the main issues in that cause, and were found by that jury.

Now, it will thus be seen that there are only two questions:

1. Was the verdict and judgment on the former trial conclusive on all the questions directly in issue on that trial, upon the proof offered by the plaintiffs, if believed by the jury?

2. Could the defendants go *behind* that verdict and judgment while the plaintiffs confined themselves to proof of what was then *in issue* and tried by the jury?

As to the first, we submit that it was, and that the court below was right in rejecting all evidence tending to show that no such contract had been made, *or that the contract was not in writing*, or that the experiment was insufficient to establish the rate of saving, or that it had been unfairly or fraudulently conducted. All these matters were involved

* Birch *v.* Earl of Liverpool, 9 Barnewall and Cresswell, 392; Roberts *v.* Tucker, 3 Exchequer R. 632; Dobson *v.* Collis, 1 Hurlstone and Norman, 81

in the issues raised by the two counts in the declaration and the pleas in the former action, and passed upon by the jury, as shown by the witnesses.

The other question may be more novel; but, according to general principles of law, and according to the settled law of Maryland, by which it is to be determined, is free from difficulty.

II. *As to the statute of frauds.*

If the contract was within the statute, the fact whether it was in writing or not was directly in issue in the first suit. If the defendant then waived the defence (if this was one) arising from the contract's being but in parol, as he might, he should have offered evidence of that fact on the second trial. He did not make such offer. *None of the bills of exceptions assert that it was not set up in that action.* If it had been, and if it was a defence, the suit could not have been sustained; which it was completely.

The authorities from *Peter* v. *Compton*, reported by Skinner,* to this day are numerous to show that the case was not within the statute.

What was this contract? It was one to put a machine on defendant's boat, to be paid for by a share of the savings of fuel caused by its use, to be ascertained as soon as the machine was in working order: that share to be paid for, from time to time, whenever demanded. The contract might run on to the expiration of the patent, or it might be terminated the next day. There is nothing from which it can be inferred that the parties understood it could not be performed within the year. It would have been *completed* by the loss or destruction of the boat at any time during the year, a matter in terms provided for.

There is a distinction between a performance which shall *complete*, and one which may *defeat* the contract within the year. If it can be *completed* within the year (as this one

* Page 353.

might have been), it is not brought within the statute, by the fact that it *may* run on for many years.*

Mr. Justice NELSON delivered the opinion of the court.

When this case, or one of the class, was formerly before this court,† in which the record of the former recovery was in evidence, it was claimed that, without any extrinsic evidence, it concluded the defendants from again denying the existence of the contract, or from disproving any other of the averments in the first count of the declaration, and it had been so ruled by the court below.

This court, when the case came up on error, agreed that the record was properly admitted as evidence of the former trial between the parties, but held the pleadings, verdict, and judgment did not furnish the necessary proof to show that the contract in controversy in the suit then on trial had been before agitated, and conclusively adjudicated in the former trial in behalf of the plaintiffs; and that the verdict had been rendered upon the entire declaration, and without special reference to the first count.

The record, with the pleadings and verdict, furnished evidence that the same matters might have been litigated on that trial, and afforded ground for the introduction of extrinsic evidence to show that the same contract had been in contest before the court, and had been referred to the decision of the jury, but nothing more. For this reason the judgment was reversed, and a new trial ordered.

Taking this view of the application and effect of the record of the former trial, the plaintiffs introduced in this case extrinsic evidence, and have endeavored to prove the necessary facts which, in connection with the record, would lead to the conclusion that the same contract was in controversy in the former suit, and had been conclusively adjudged in their favor. But this extrinsic evidence was open to be controverted on the part of the defendants. As the record

* See the authorities in support of this proposition, collected in Browne on the Statute of Frauds, 2d edition, ch. 13, §§ 272, 6, 7, 8 and 9.

† As reported in 24 Howard.

itself did not furnish evidence of the finding of the existence or validity of the contract in the former suit, and hence extrinsic proof was required to this effect, it was of course competent for the defendants to deny and disprove both, as in so doing they did not impeach the record, but only sought to disprove the evidence introduced by the plaintiffs.

The rejection of this evidence, therefore, offered by the defendants on the trial, was error. Whether or not the contract, as proved on the former trial, rested in parol or was in writing, was material. If in writing, there could be no controversy in fact in respect to its terms or stipulations; and its construction and legal effect belonged to the court to determine. If it rested in parol, its terms and conditions depended upon the extrinsic proof, and hence the materiality of the first question put to the witness, as preliminary to further proof. It was important to settle the terms of the contract in evidence on the former trial, in order to determine whether it was the same as the one then in controversy, and, resting in parol, these terms depended very much upon the testimony in the case.

There is another view in this branch of the case that must be noticed. As we have seen, the declaration in the former suit contained four counts, to which the general issue was pleaded, and a general verdict for the plaintiffs. The first and fourth counts set up two different special contracts relating to the same subject-matters, and which constituted the cause of action between the parties. Now, the extrinsic evidence furnished on the part of the plaintiffs as to the former trial, and the grounds of proceeding therein, tended to prove either count, and was sufficient to have justified the jury in finding either contract. These contracts, as thus set forth, were identical, with the exception of the agreement to settle the proportion of fuel saved by an experiment, which had been made, and resulted in the saving, by the use of the cut-off, of three-fourths of the fuel as used by the old throttle valve. The jury, therefore, might have found in favor of the plaintiffs on the contract as set forth in the fourth count, even if they disbelieved the proof of the agreement

as to the mode of settling the proportion of fuel saved. Many of the jurors called and examined speak of a contract between the parties in respect to the use of the Sickles cut-off, but so indefinitely it is impossible to determine whether the testimony related to the one set out in first or fourth counts, and no attempt was made to distinguish between the one or the other on the trial.

As we understand the rule in respect to the conclusiveness of the verdict and judgment in a former trial between the same parties, when the judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive, *per se*, it must appear, by the record of the prior suit, that the particular controversy sought to be concluded was necessarily tried and determined—that is, if the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties; and further, in cases where the record itself does not show that the matter was necessarily and directly found by the jury, evidence *aliunde* consistent with the record may be received to prove the fact; but, even where it appears from the extrinsic evidence that the matter was properly within the issue controverted in the former suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination, it will not be concluded.*

In view of this doctrine, it is quite clear that the record of the former trial, together with the extrinsic proofs, failed to show that the contract in controversy in the present suit was necessarily determined in the former in behalf of the plaintiffs. We agree, if the declaration had contained but the first count, which had set out the contract in controversy in the present suit, the effect of the judgment would have been different. The verdict of the jury, then, could not have taken place without finding the existence and validity

* Wood *v.* Jackson, 8 Wendell, 10, 16, 31, 36; Washington, &c., Packet Co. *v.* Sickles, 24 Howard, 333, 343, 345; Lawrence *v.* Hunt, 10 Wendell, 80; Cowen & Hill's Notes to Phillips's Evidence, Part 2, N. 121.

of the contract. But, as we have already shown, the record and evidence on the former trial are different, and tend to a different conclusion.

Some of the jurors in the former trial were permitted to testify as to the particular ground upon which they found the verdict. This testimony was not objected to, and therefore is not available as error here. But it is proper to say, that the secret deliberations of the jury, or grounds of their proceedings while engaged in making up their verdict, are not competent or admissible evidence of the issues or finding. The jurors oftentimes, though they may concur in the result, differ as to the grounds or reasons upon which they arrive at it.

The evidence should be confined to the points in controversy on the former trial, to the testimony given by the parties, and to the questions submitted to the jury for their consideration, and then the record furnishes the only proper proof of the verdict.*

There is another suggestion, also, it may be proper to make, growing out of the rule, now very general both in the Federal and State courts, to admit the record of a former trial as evidence to conclude a party from agitating the same matters in a second suit, and that is where the extrinsic proof of the identity of the cause of action is such that the court must submit the question to the jury as a matter of fact; any other matters in defence or support of the action, as the case may be, should be admitted on the trial, under proper instructions. For, if the jury should find against the conclusiveness of the former trial, then this additional evidence would not only be material, but constitute the whole of the proof on which the cause of action or defence must rest. If the extrinsic evidence should be so conclusive that the court could properly hold the record to be conclusive, the trial would of course be at an end, so far as

* Wood v. Jackson, 8 Wendell, 36; Lawrence v. Hunt, 10 Id. 85; Hitchin v. Campbell, 2 Blackstone, 827; Saunders on Pleading and Evidence, Pt. I. 260.

the matters embraced therein were identical with those in controversy. But, if not so conclusive, and the question must be submitted to the jury, then the record and evidence in respect to the former trial would constitute but one of the grounds relied on before the jury in support of the cause of action, or in defence, and be entirely consistent with any other grounds for the maintenance or defence of the suit in the possession of the parties. This must be so, for the reason that if the trial should, in the case contemplated, be confined to the issue growing out of the former trial, and the jury should find against its conclusiveness, nothing would be determined. The former trial, therefore, when its conclusiveness must be submitted to the jury, can be regarded only as a preliminary question, and the merits, independently of this question, should be heard and tried.

As the case must go down for another trial, and as the validity of the contract set out in the declaration may be involved in that trial, it is proper that we should express our opinion upon it, if, as it was offered to be proved, the contract was not in writing, but rested in parol.

We have referred particularly to the contract in the fore part of this opinion. The question raised is, whether or not it is within the statute of frauds, and therefore void. The law in this district, it is admitted, is a copy of the English statute on the subject.

The patent had some twelve years to run after the date of this contract, which was in June, 1844.

The words of the statute are: "That no suit shall be brought to charge any person upon any agreement that was not to be performed in one year, unless there was some memorandum or note in writing of the agreement," &c. Now, the substance of the contract is, that the defendants are to pay in money a certain proportion of the ascertained value of the fuel saved at stated intervals throughout the period of twelve years, if the boat to which the cut-off is attached should last so long.

The statute applies to contracts not wholly to be performed within the year.*

It is insisted, however, that this contract is not within it, because it may, by the happening of a certain event,—the loss or destruction of the boat,—terminate within the year. The answer is, that the possibility of defeasance does not make it the less a contract not to be performed within the year.

In *Birch* v. *The Earl of Liverpool*,† a contract for hire of a coach for five years, for a stipulated price per year, was held to be within the statute, although determinable by either party at any time within that period.

The same principle was again held in *Dobson and Another* v. *Espie*.‡ That case was the hiring of a traveller for more than a year, subject to a determination by three months' notice. Pollock, C. B., in delivering his opinion, stated that the object of the enactment was to prevent contracts not to be performed within the year from being vouched by parol evidence, when at a future period any question might arise as to their terms. No doubt, he further observes, formerly it was the practice to construe not only penal statutes, but statutes which interfered with the common law, as strictly as possible; but, in my opinion, that is not the proper course of proceeding. Alderson, B., observed: "The very circumstance that the contract exceeds the year, brings it within the statute. If it were not so, contracts for any number of years might be made by parol, provided they contained a defeasance, which might come into operation before the end of the first year."

We might refer to many other cases arising upon this statute. They are numerous, and not always consistent, for the reason, probably, given by Pollock, C. B., that the courts at first construed the enactment as strictly as possible, as it interfered with the common law. We think the construction given in the cases referred to is sound, and adopt it. The

* Boydell *v.* Drummond, 11 East, 142; Broadwell *v.* Getman, 2 Denio, 87.
† 9 Barnewall & Cresswell, 392. ‡ 2 Hurlstone & Norman, 81.

result is, that the contract in question is void, not being in writing. It is a contract not to be performed within the year, subject to a defeasance by the happening of a certain event, which might or might not occur within that time. All the mischiefs which the statute was intended to remedy apply with full force to it.

Judgment reversed, the cause remitted, and

VENIRE DE NOVO.

Mr. Justice MILLER, dissenting.

I dissent from the opinion of the court just delivered.

The points in the case before us for review are whether there was such a contract made as that set forth in the first count of the declaration, and if so, whether it was valid.

The only evidence of both these propositions offered by plaintiffs was the record of the former trial, and the testimony of certain jurors on that trial, tending to show that their verdict was based on the same contract which is described in the first count of the declaration in the present suit. If that testimony did not establish both those propositions, then plaintiffs failed in their action, for they offered no other evidence on that issue. If that testimony did show that the contract on which the verdict in the former suit was rendered was the one set up in the first count of the present declaration, then the record established both the making of that contract and its valid character, for a judgment was rendered on that verdict which is still in full force and unreversed. If the testimony of the witnesses tended to show this fact, then it should go to the jury, for its sufficiency to establish the fact was for them and not for the court. No charge on this subject was asked by defendants, and none given by the court to which defendants excepted.

The main exception sustained by this court is to the offer of defendants to prove by a competent witness that the contract proved in the former trial was a parol contract.

Did this testimony have any tendency to disprove that of the witnesses of plaintiffs who testified as to the contract on

which the former verdict was founded? I am not able to see it.

The witness did not propose to swear that the *terms* of the contract proved on the former trial differed from the terms of the contract counted on in this suit. He was expected to state that the only contract proved in the former suit was a parol contract. None of the witnesses of the plaintiffs said it was other than a parol contract. It was not pretended that the contract relied on in the first suit was a written contract.

It is said that if the contract was in parol, it is void as against the statute of frauds, and that question could not be concluded by the former judgment.

I think the law is otherwise. In the case of *Smith* v. *Whiting*,* the Supreme Court of Massachusetts says: "It is apparent from the pleadings that this very demand has been once tried and determined; and although the court may have decided wrong in rejecting the evidence in the former suit, yet this is not the way to remedy the misfortune. Exceptions might have been filed to the opinions of the judge, or a new trial had upon petition. We must presume that this very matter has been tried, and it is never permitted to overrule the judgment of a court having jurisdiction by another action." To the same effect is the case of *Grant* v. *Button*, in the Supreme Court of New York.†

If the law be, as claimed, that there can be no estoppel as to matter of law, but only as to matter of fact, what becomes of the estoppels by judgments rendered on demurrer? The authorities in favor of estoppels in this class of cases are numerous. The case of *Goodrich* v. *The City*, decided at this term,‡ is directly in point. There the judgment of the State court of Illinois on demurrer, in a former suit between the same parties, was held a bar, although it was intimated that if it had been an open question, this court might have differed with the Illinois court in the construction of the law. All decisions on demurrer must necessarily be on questions of law, for the demurrer admits the facts pleaded and only

* 11 Massachusetts, 445.

† 14 Johnson, 377.

‡ See *supra*, p. 566, last preceding case.

raises the questions of law which grow out of those facts. If the principle contended for were true, there could be no estoppel by demurrer.

If, then, the jury were satisfied from the record in the former case, and from the testimony of the witnesses, that the terms of the contract on which that verdict was founded were the same as the special contract set out in the present suit, then the verdict and judgment in that case established the existence and validity of that contract for the purposes of this suit, and whenever it may be called in question between the same parties in relation to the same transaction. And the testimony offered, if admitted, would have had no tendency to disprove either of those propositions, but only to show that the court erred in its judgment in the first suit.

Again, if I understand the opinion aright, it is said that it must be made to appear from the record of the former suit, and the testimony of the witnesses, that the former verdict was *necessarily* founded on the contract set out in this suit. It seems to me that when this case was last here before,* the court then stated the proposition much short of this. For the opinion, after alluding to the indefinite character of the pleadings in many actions, says: "It was consequently decided that it was not necessary as between parties and privies that the record should show the question upon which the right of the plaintiff to recover, or the validity of the defence depended, for it to operate conclusively; but only that the same matter in controversy might have been litigated, and that extrinsic evidence would be admitted to prove that the particular question was material, and was in fact contested, and that it was referred to the decision of the jury." The rule, as I understand it, is that to render such former judgment conclusive it is only necessary to show that the same matter might have been decided, and actually was decided.

Again, it is said in the opinion that the testimony of the jurors in the former trial was incompetent to disclose the grounds of their decision in the former case. I think the

* As reported in 24 Howard.

rule in those courts where it is adopted at all, and it is rejected wholly in many, is that a juror cannot be permitted to impeach his verdict, but that he is never refused to sustain it. And this only applies to proceedings to set aside that verdict, and not to cases where the question of what was actually decided may arise in another proceeding.

On the whole, I am of opinion that there was but one question in the case, and that was whether the former verdict and judgment were based on the same contract counted on in the present suit, and that the evidence which went to the jury had a tendency to establish that fact, and the evidence rejected by the court had no tendency to disprove it.

De Haro v. United States.

1. In 1844, persons in California petitioned the Mexican governor of that province for a grant of certain described land, situated in the vicinity of the Mission of San Francisco. The petition was referred to the secretary of state, who reported that the land was unoccupied, but that inasmuch as "common lands" (ejidos) were to be assigned to the said mission, he was of opinion that in the meanwhile the petitioners might occupy the land solicited under a provisional license. The governor thereupon made a decree, declaring the petitioners "empowered to occupy provisionally" the land, and directing a proper document to be issued to them, and a registry made of it. An instrument was accordingly issued to the petitioners, signed by the governor and attested by the secretary of state, by which the governor, in virtue of the authority vested in him, and in the name of the Mexican nation, granted "to them the occupation" of the land, subject to the measurement to be made of common lands for the establishment of San Francisco, with conditions against alienation, and for the occupation of the land within a year, and for forfeiture in case the conditions were not complied with. On this case:

Held, That the decree of the governor constituted only a naked license to occupy the land provisionally; and that the instrument issued pursuant to the decree did not pass any title to or interest in the land; that this license was a personal privilege of the parties, and upon their death did not extend to their heirs; that a claim for land, resting upon a license of this character, is not entitled to confirmation under the act of Congress of March 3, 1851.

2. The term *titulo*, in the Spanish language, only means the instrument which is given as evidence of the right, interest, or estate conferred; it does not indicate the measure of such right, interest, or estate; hence it applies equally to papers which convey title in the usual acceptation of the term, and to those which confer a mere right of occupancy.

APPEAL from the District Court for the Northern District of California, in a claim for land, now of immense value, originally presented to the board of land commissioners established by the act of March 3, 1851. The case was thus:

In April, 1844, Ramon and Francisco de Haro presented a petition to the Mexican governor of the province of California for a grant of a tract of land, called the "*Potrero of San Francisco*," situated near the mission of that name. The petitioners were minors, and their petition was accompanied with the consent of their father that they might present it, and also his application to the local alcalde for information as to the condition of the land solicited, and the alcalde's reply thereto. The petition and accompanying papers were referred to the secretary of state for his report thereon. The secretary reported that the land was unoccupied; but, for reasons stated, he was of opinion that a provisional license to occupy it should be given to the petitioners. A decree was accordingly made pursuant to this suggestion, and was followed by the issue and delivery to the petitioners of a formal document, ceding to them the occupation provisionally, subject to certain conditions. The following is a translation of the several papers mentioned:

[*Petition for the Grant.*]

EXCELLENT SENOR GOVERNOR OF BOTH CALIFORNIAS:

We, Francisco de Haro and Ramon de Haro, in the name of our family, Mexican citizens by birth, and residents of the ex-Mission of San Francisco de Asis, represent to your Excellency, with due submission, that inasmuch as we have to remove the share of cattle appertaining to our deceased mother out of the rancho of the deceased José Antonio Sanchez, and as we have in view to tame them, we entreat your Excellency to *grant* to us in the exercise of your Excellency's powers, *a small parcel of land* called *Potrero de San Francisco*, &c., because there is no

competent person to do it, according to the annexed sketch that we submit to your Excellency; and as said parcel of land can be inclosed, we intend to place on it the tamed cattle, because of the small extent of the location occupied at present by the cattle of our father, who has given us due permission to petition, as we are under the parental power and control. Therefore, we entreat your Excellency to grant us this benefit, whereby we shall receive favor and grace. We swear not to proceed moved by malice, &c. This memorial has not been written on paper of the corresponding stamp, there not being any here.

RAMON DE HARO,
FRANCISCO DE HARO.

SAN FRANCISCO, April 12, 1844.

[*Consent of the Father of the Petitioners.*]

I, the undersigned, grant by the present document, to my sons, Francisco and Ramon de Haro, the corresponding assent enabling them (because they are minors) to solicit the Superior Government of the Department the grant of the Potrero of the ex-Mission of San Francisco de Asis, at present lying unoccupied, and represented in the sketch accompanying the petition.

The said Potrero being intended to be (if it should please the Superior authority to grant it) for the benefit of their other brothers as well as themselves, and to answer due ends I give them this document in the aforementioned ex-Mission of San Francisco de Asis, on the 12th day of April, 1844.

FRANCISCO DE HARO.

[*Application of the Father of the Petitioners to the local Alcalde for Information as to the Condition of the land solicited.*]

TO THE HONORABLE THE ALCALDE OF FIRST NOMINATION OF SAN FRANCISCO:

I, Francisco de Haro, a resident of this jurisdiction, in the name of my sons, Francisco and Ramon, formally appear and say that my sons aforementioned have received my assent to solicit of the Superior Government of the Department the grant of the Potrero that lies opposite the ex-Mission of San Francisco de Asis, which stands unoccupied, and the inclosures of which

are thrown down, and lying on the ground; and inasmuch as I wish to remove the obstacles that may obstruct the speedy despatch of said petition, and since it must be referred thence to this place for report and information, and I want to obviate this delay, I therefore apply to you, in order that you be pleased to report as you may think convenient, in the subject of my solicitation.

Therefore, I entreat you to proceed in this matter according to right, and to direct this memorial, written on common paper, there not being here any of the corresponding stamped. Thus I swear, &c.

FRANCISCO DE HARO.

SAN FRANCISCO, April 13th, 1844

[*Reply of the local Alcalde to the Application for Information.*]

SAN FRANCISCO DE ASIS, April 13th, 1844.

In consideration of the reasons presented by the party who solicits, I proceed to report about the location in request, declaring that up to this day *there are no claimants of any kind, and it is not occupied by any community or private individual.*

G. HINKLEY.

[*Order of Governor referring Petition and accompanying Papers to the Secretary of State to report thereon.*]

MONTEREY, April 29th, 1844.

Let the secretary of state report on the same, and take the necessary information.

MICHELTORENA.

[*The Report of the Secretary.*]

MONTEREY, April 29th, 1844.

EXCELLENT SENOR GOVERNOR:

The Mission of San Francisco no longer holds property of any kind, and consequently the Potrero (or inclosed place for keeping horses) *in request is lying unoccupied*, as the soliciting parties show by means of a report proceeding from the respective judge; and inasmuch as *there are to be assigned to said establishment, its*

corporation or common land (*ejidos**), I am of opinion that *in the meanwhile* the parties might occupy the plot of land, by virtue of *a provisional license* of your Excellency, because no prejudice is caused *thereby* to the community, to any private individual. Your Excellency's own decision will doubtless be the most proper one.

MANUEL JIMENO.

MONTEREY, April 30th, 1844.

In conformity.

MICHELTORENA.

[*The Decree of the Governor upon the Petition and Secretary's Report.*]

MONTEREY, April 30th, 1844.

After *examining the petition* at the head of this proceeding, *the preceding reports*, and whatever else was thought to the purpose, *in conformity with the laws and regulations on the subject*, I declare Francisco and Ramon de Haro *empowered to occupy provisionally* the piece of land called Potrero de San Francisco, to the extent of half a square league, the boundaries to be the extremities of the mouth of the Potrero, and the range of hillocks or highlands environing it. *Let the corresponding patent be issued; let it be duly entered, and let this information be communicated to the person in charge of said establishment.*

[*The Document issued by the Governor, and delivered to the Petitioners pursuant to the above decree.*]

MANUEL MICHELTORENA, GENERAL OF BRIGADE IN THE MEXICAN ARMY, ADJUTANT-GENERAL OF THE STAFF OF THE SAME, COMMANDANT-GENERAL, GOVERNOR AND INSPECTOR OF THE DEPARTMENT OF CALIFORNIA:

Whereas, Francisco and Ramon de Haro have solicited the grant of the Potrero de San Francisco, so called, from the mouth of the estuaries, together with the high land surrounding it, all the necessary investigations having been made according as the laws and regulations in the matter prescribed, by virtue of the authority in me vested, I have thought proper, in the name of the Mexican nation, *to grant* to them *the occupation* of the afore-

* The word is elsewhere translated as "places for common resort," or "pleasure grounds."—REP.

mentioned Potrero, subject to the mensuration to be made of the corporation or common lands (*ejidos*) for the establishment of San Francisco, and under the following conditions:*

1st. *They shall have no power, under any consideration, to sell or alienate it to the detriment of any of the proprietors of the establishment of San Francisco.*

2d. They shall not *obstruct the paths, roads, and servitudes*, using it for culture and cattle they intend to introduce on it, but *within a year at the most it must be occupied.*

3d. The parcel of land to which reference is made is of half a square league, *and if they should transgress any of these conditions, they shall lose their right to this provisional grant, which is delivered to the parties concerned for their security*, and other ends.

Given in Monterey, on the first day of May, 1844.

MANUEL MICHELTORENA.
MANUEL JIMENO.

Under the last document the De Haros went into possession of the land, and occupied it for the pasturage of horses and cattle until their death, which occurred in May, 1846.† The land was inclosed on three sides by water, and a wall had been erected by the priests of the mission on the fourth side. This wall had gone to ruin, and the De Haros, after obtaining their concession, repaired it. The land was not a fertile tract, and was only fit for pasturage. The father of the De Haros succeeded to whatever interest they possessed in the property at their death, and he occupied the land afterwards in a similar manner; that is, for the pasturage of horses and cattle, until his death, which took place in 1849. His successors in interest were his children, six girls and one son, all minors at the time. From these children the property passed into the hands of numerous American citizens, for whose benefit, after our conquest, the claim was

* This translation of the document is given in the record; elsewhere the translation of the last four lines of the first paragraph is given as follows:

"I have determined to permit the Messrs. De Haro to occupy the beforementioned pasture-ground, subjecting themselves to the limits that shall be prescribed to the establishment of San Francisco."

† They were killed by the Americans during our war with Mexico.

presented for confirmation to the board of land commissioners, established by the act of March, 1851, to settle private land-claims in California.

When the claim was pending before the land commissioners, two papers additional to those set out at pages 600–604 were produced and given in evidence; one of them purporting to be a grant in fee simple of the land to the De Haros, signed by Governor Micheltorena, bearing date May 24, 1844, and the other purporting to be a grant of a similar nature, signed by the same officer September 18, 1844. The signature to both was genuine, but it was added after the cession of the country to the United States. The instruments were antedated, but by whom they were prepared was not shown.

The commission confirmed the claim, rejecting the paper of May 24, 1844, as a forgery or antedated, but relying upon the paper of September 18, 1844, though not without grave doubts as to its genuineness.

On appeal to the District Court additional proof as to the second paper was taken, and its real character exposed; and it, as well as the first paper, was formally abandoned by the counsel of the claimants, and the claim for confirmation was based solely on the provisional license and the proofs showing an occupation under it.

The clause which usually appears in Mexican grants of land in California, namely, that the party shall lose his right to the *land* in case he violates the conditions attached, was altered in the document of May 1, 1844, issued to the De Haros by the governor, to the words, "he shall lose his right to this *provisional concession*" in case he violates the conditions.

The document was mentioned in the list of grants made by the secretary of state, Jimeno, known as Jimeno's Index, and is noted in the record Toma de Razon. The entry in this last book was as follows:

"226. Don Francisco and Ramon Haro, on the 1st May 1844.

"Title (titulo) delivered to them of the tract named El Potrero, in extent of one half league square."

The District Court rejected the claim, holding that the right conferred by the document in question was a *mere license* to occupy the premises until the ejidos, or common lands, should be measured.

In distinguishing the case from some others cited, the court, in its opinion, said:

"*In this case the permission is given to occupy only until an assignment of the land to the pueblo is effected.* The governor not only indicates no willingness or intention to grant, but, in obedience to Jimeno's suggestion, he refuses to grant, and *ex industria* limits the concession to the permission to occupy land not then used by the Mission."

From the decree of that court the case was now here on the appeal of the claimants.

Messrs. M. Blair, F. A. Dick, J. B. Felton, W. M. Stewart, W. M. Evarts, J. S. Black, and T. J. Coffey, for the appellants:

Before proceeding to argue this case, it is our duty to inform the court that there appear in the transcript of the record several documents which are *antedated*,—not forged, in the proper signification of the word, since the *signatures* of the persons purporting to have signed are *genuine*,—and many depositions which, to-day, we know are full of untruths. Happily, the false is easily separated from the true; and it is clear from the transcript that neither the *original grantees* nor any one claiming through them are in any degree to be blamed for the attempts which have been made to impose upon the court. The original grantees, from whom the claimants derive title, Ramon and Francisco de Haro, were killed by the Americans in the war of 1846, which led to the annexation of California to the United States; long before there could have been any motive for forgery or perjury in connection with this title. Their

father, who was their heir, died in 1849; long prior to any litigation relative to California land-titles. His successors in interest were six minor girls and one minor son. From these latter heirs the estate has passed into the hands of numerous American citizens of California, who, until a recent period, shared in the prevailing ignorance of Spanish laws and customs.

Almost every one who has heard of California knows something of the history of the frauds which were practised after lands, formerly unsalable, were rendered by American enterprise, and the wonderful growth of that coast, as valuable as those which, in the Atlantic States, have been cultivated and improved for ages. Such frauds were, in many instances, perpetrated by the very officers who, under Mexico, were intrusted with the duty of granting lands; and the identity of signature, the character of the signer, and the utter confusion which prevailed in the archives of the former government, rendered it easy to impose spurious antedated documents, not only on purchasers, but on the bar and the judiciary. Witnesses of California birth for years obtained a livelihood by the fabrication of documents in the Spanish idiom, and attempting to maintain them as genuine by perjury; and it was not until Mr. Stanton, lately Attorney-General of the United States, visited that coast, and, supported by the aid and power of the Federal government, brought his great professional force and accomplishments to the work of collating the various sources of evidence, and of arranging them on principles of legal science, that it has been *possible*, by even the most careful examination of witnesses and the most laborious research of counsel, to guard the courts against being imposed upon by fraudulent and spurious land-claims.

In the case at bar the claimants were *imposed* upon by two forged grants and an antedated certificate of juridical possession. When they discovered their true character they openly abandoned them, and themselves announced the frauds and imposition. That it was not for want of diligence upon the part of these claimants that they did not at

first discover the real character of those documents, and the evidence given in support thereof, is evident from the fact that the judges of the land commission, assisted, as they were, by a special law agent, and with all the lights which at that time could be furnished by the archives in the possession of the commission, founded their decision confirming the claim of the petitioners upon one of the forged documents; and it was naturally not a difficult task to impose upon the present claimants, not one of whom could, by any possibility, have known the true state of the case. It would be unnecessary to make this preliminary statement to a California court, or to persons intimately acquainted with the local history of that State. Such a tribunal would see, on reading the transcript, that the claimants, in presenting these spurious documents, were the victims, and not the accomplices, of a fraud. On this remote Atlantic coast, where much of the history of that region has the aspect of the fabulous, the explanation is necessary for ordinary readers of the reports, and will be pardoned by all.

In here presenting the case, the claimants do not invoke the doctrine now settled, that where that which is genuine in the grant can be distinguished from that which is fraudulent, the genuine part will be upheld, and the false rejected. Denouncing the spurious wholly, they present documents of unquestionable genuineness, and ask to have their rights determined by those; and, as matter of right and justice, that they shall not be prejudiced by skilful frauds practised upon them; frauds which have heretofore deceived the most cautious and able of the bar, and even the courts themselves.

The documents on which we rely are all given in the statement of the case.

I. We might rest upon the opinion of the District Court, which decided this case. The court states that there can be no doubt of the genuineness of all these documents. It further states that the petitioners repaired the old wall which had been erected around this tract by the priests; that they placed their cattle and horses thereon, which were regularly

attended by their herdsman and themselves, who resided at the Mission. In construing the provisional grant in this case, the court states *that it is a permission given* [*to the grantees*] *to occupy until an assignment of the land to the pueblo is effected.* The court has decided, then, that in 1844 the proper authorities of Mexico granted the occupation of certain lands to the persons under whom claimants derive title, *until such time as those lands should be measured and set off as a part of the ejidos of the establishment of San Francisco*, and subject to certain conditions.

It is not pretended that those lands ever have been measured off as part of the ejidos of that establishment. It is now certain and conceded that they never can be. No condition of the grant has been violated. The authority of the governor to make such a grant is conceded. Now, this case admitted, how can a conditional grant, made by a government, to occupy certain lands until a certain event happens, and as long as designated conditions are complied with, be determined except in one of two ways: 1st, either by the happening of the event; or, 2d, by the non-fulfilment of some one of the conditions? The district judge has decided this case upon the point that the grant is not a grant in fee, but that it is simply the grant of a right to possess or occupy. The opinion does not discuss at all the point which is the only one in this case, and which is this: Conceding that the Mexican authorities granted to the De Haros only a right to possess and occupy this land, is not this right to possess and occupy still subsisting so long as the event limiting that right has not happened, and the conditions for the violation of which that right was to be forfeited, have all been complied with?

We say that it is; and that, until such event happens, or the conditions are violated, such a grant vests in a grantee an estate;—whether called an estate in fee, or a lease, or a license, makes no difference.

II. Turning from the opinion of the judge to the facts, we find that in April, 1844, the youths De Haro, Mexicans by birth, petitioned the governor of the Californias for a

small piece of land, for the purpose of placing thereon tame cattle. The alcalde of San Francisco at the same time reported that there were no claimants for that land, and that it was not occupied by any community or private individual. The case shows that it was a small, barren neck of land, extending into the Bay of San Francisco, so worthless that nobody but two boys, just starting in life, ever thought of reducing it to ownership, at a time when the most fertile lands of California could be had by the league for the mere asking, and the government was grateful to the person who would take and occupy them. It was the duty of the governor, under the colonization law of Mexico, to grant the request of these petitioners, if there were no valid legal objections. The governor of California was bound to carry out the colonization laws in their true spirit, and to make grants of vacant lands to those persons who showed themselves within their purview; and the right which he had to grant lands under those laws, was not a right which he could exercise or not at his caprice. Under the Mexican system, the petitioner for vacant lands, who complied in all respects with the colonization law, had a legal right to a grant as much as a pre-emptioner under the American law has a right to a patent. Governor Micheltorena, recognizing this right on the part of the petitioners, refers the matter to the secretary of state, for the purpose of ascertaining if any reasons there were why the De Haros should not receive a full title in fee to this land, as they had asked. For it is evident from this that, if the secretary of state had found no objection to the issue of a full, unconditional title, the governor would have granted the De Haros this land absolutely.

And now analyze the objection which the secretary of state did find to the making of an absolute grant. How far would it naturally act upon the mind of the governor, and to what extent would it naturally make him limit, qualify, or modify his grant to the petitioners? The secretary reports, in the first place, that the land "is lying *unoccupied*, as the solicit ng parties show by means of a report proceeding

from the respective [proper] judge." Now, the proper judge, Hinckley, had certified that by unoccupied he meant "that up to this day there are no claimants of any kind, and it is not occupied by any community or private individual." So that we have the case of a small piece of land, *unoccupied*, and *unclaimed*. But the secretary goes on to state, in substance, that it is possible that the Mission of San Francisco may want these lands as ejidos. He does not say that they will not select other lands as ejidos; nor does he pretend that these lands were fit to be ejidos, as they were not; but he says that a possibility depending on two contingencies, exists. Those contingencies were, first, whether any lands should ever be assigned to the said establishment; second, whether, if any lands ever were assigned to that establishment these would be the lands selected. This bare possibility of this future contingent event was the sole objection found by the proper authority to the full compliance with the prayer of the petitioners.

The secretary evidently thought that the prayer of the petition should be complied with so far as it could be, subject to this objection. And he says that he is of opinion "that in the meanwhile the parties might occupy the plot of land by virtue of a provisional license." What do these words in the "*meanwhile*" signify, unless that until these identical lands are assigned to the said establishment the parties may remain in undisturbed possession of that land, and that there is no reason for disturbing them in possession until that contingency happens?

The secretary continues, "because no prejudice is [would be] caused thereby to the community or to any private individual."

Take, now, the objection of the secretary to the full granting of this land with his recommendation to the governor, and is it not clear that the secretary said, in substance, to the governor: "These are vacant and unclaimed lands; but there is a possibility that a certain public corporation may at some day require them for public purposes. Were it not for this possibility, I would recommend that a grant in fee

absolute be made to the petitioners. But, as this possibility exists, I do recommend you to grant the lands, subject only to the possibility of this contingency happening." In other words, is it not clear that the single objection found by the secretary, to the absolute granting of this land, should be the single limit or restriction which he recommended should be put upon the grant?

III. Analyze this provisional grant, license, lease, or permission to occupy. Did the governor, in consequence of this bare possibility of an event, which probably never would happen, reject the prayer of the De Haros, and refuse to give them any title at all? or did he grant the request of the petitioners to the extent that this objection permitted him? He complied with the prayer of the petitioners, so far as he could consistently with this objection and this possibility. In the first place, he commences his decree, which precedes the title, and in accordance with which the title issues, by stating, that he makes it after examining,—in view of the petition of the parties,—the reports that were made, and whatever else was necessary to be considered, in conformity with the laws and regulations on the subject. So that whatever relief he granted, was granted in compliance with the petition, the reports, and the colonization laws. That petition was for the fee absolutely. The reports were that the fee could be granted absolutely were it not for the existence of a bare possibility that the public might at some future day want these lands for ejidos. The laws and regulations on the subject, in conformity with which this decree was made, prescribed that unclaimed and vacant lands ought to be granted for just such purposes as this land was asked for, and that is, for the purpose of raising stock—the chief employment of the nation, as the cattle raised was its chief product. The petition, the reports, and the laws, are all made a part of this decree by incorporation, and this decree must be read by their light. Now, is it to be supposed that either the governor or the secretary thought that these lands should forever be taken out of the market and excluded from the beneficial purposes of agriculture and commerce,

simply because they might by possibility be afterwards wanted for a use for which they were then not necessary at all; a possibility so remote that it did not suggest itself to the chief officer of the Pueblo of San Francisco, as is shown by the fact that he makes no mention of it in his report? The corporation in question had not yet selected any ejidos, nor was it by any means certain that it ever would. As a matter of fact, it never did. Even if it did select ejidos, it was almost an impossibility that it should select these particular lands; hardly possible, we say, that this rocky, barren, bleak tongue of land, which could under no circumstances have had any value but for the marvellous developments of later years, could have been selected by a corporation as the ejidos; the exit, the breathing-places, the places for common resort, the outskirts for the convenience of its population, a population, as is historically known, that did not exceed, at the time of the American occupation, three hundred souls—that population residing, too, an average distance of three miles from the contingent, possible ejidos.

Continuing our analysis of the decree of the governor, he says:

"I declare Francisco and Ramon de Haro empowered to occupy provisionally the piece of land called Potrero de San Francisco."

Now, what does the word "*provisional*," in connection with *occupation*, mean? The word provisional evidently means conditional—an occupation depending on something that is *foreseen* (*pro-visus*) as a possibility; and what condition or possibility has been foreseen, excepting the possibility of the measurement of these ejidos? Why should the word "provisional" be used in this connection at all, unless something had been foreseen as a possibility which was to limit and bound the right of occupation granted by this decree? The decree then proceeds as follows, using the language of the translation in the record:

"Let the co responding patent be issued; let it be duly en-

tered, and let this information be communicated to the person in charge of said establishment."

The translation should be as follows:

"Let the corresponding title issue, and let registry be made of the same, and let a communication be directed to the person in charge of said establishment."

We would here call attention to both of the words, "corresponding" and "title." The word "corresponding" means corresponding with the views hereinbefore expressed; that is to say, corresponding with the petition, the reports thereupon, and the colonization laws; in other words, a title corresponding with the facts, that a petition asks for the land in fee, reports that declare that the land is vacant and unclaimed, but possibly may be wanted for future public uses, and with colonization laws prescribing that lands vacant and unclaimed, shall be given to any Mexican citizen who will use them for ordinary industrial purposes. A title corresponding with all these facts is to issue. What is a title if it is not an evidence or an assurance of an estate in lands? This title issues directly from the government. It is made under certain solemn laws framed for the encouragement of settlement and immigration. Is it not absurd to suppose that a solemn title like this can issue from a government, clothed with all the formalities of law, and yet convey no interest or estate? The decree continues: "*Let registry be made of the same*," the correct translation of the terms used; that is, let this title which issues be recorded in the archives of the government. For what purpose should a title which conveys no title or interest be recorded in the archives of the government? What information would be imparted to any one by a registry, setting forth that a title had issued on a certain day, which title had conveyed no interest or estate in the lands therein described? The Mexican archives were kept for the purpose of carrying out the colonization laws. The province of these archives was to inform the world that certain lands had already been granted, and by consequence

were no longer open to settlement, and no longer subject to the disposition of the government. But can a reason be assigned why the government should insist on registering a title which conveyed no rights, and which is not a title in any sense of the word, when, according to the theory of the opposite side, the lands would still be open to settlement, and subject to be granted to any person who should ask for them?

The next clause in the decree is:

"Let a communication be directed to the person in charge of such establishment."

A communication to what effect? Evidently that a title to this land has been issued, and has been recorded in government archives, which title corresponded to a certain petition praying for the absolute fee of this land, and to reports of the proper authorities to the effect that there was no objection to the granting the fee of this land, provided such grants were made subject to being defeated in case these lands should be measured off as ejidos of a certain corporation, and corresponding with certain laws declaring it to be the policy of the nation that lands situated precisely as these confessedly were, should be granted to such citizens as would put them to their proper uses.

The grant was issued in accordance with this decree. Observe the official language in which Micheltorena speaks of himself:

"Manuel Micheltorena, General of Brigade in the Mexican Army, Adjutant-General of the staff of the same, Commandant-General, Governor, and Inspector of the Department of California—"

This is the language of an officer who is about to act in his official capacity, and to exercise powers conferred upon him by the nation. As an inducement to the grant, the governor sets forth the petition already analyzed, the taking of the necessary proceedings and investigation according to the colonization laws, and then continues:

"By virtue of the authority in me vested, I have thought proper, in the name of the Mexican nation, to *grant* to them the occupation of the aforementioned potrero, subject to the mensuration (measurement) to be made of the corporation or common lands (ejidos) for the establishment of San Francisco, and under the following conditions—"

Here a concession of something is made in the name of the Mexican nation. Some rights were conferred. What were the rights thus conferred? Plainly the rights to occupy the potrero.

How long was that occupation to continue, and subject to what conditions? In what manner could the rights be lost? The grant goes on to tell: In case these lands should be measured off as the ejidos of San Francisco, these rights would be determined or diminished by their own limitation. No other bound or limit to that right of occupation, excepting this possibility, that these lands would be required for a public purpose, can be found. But there are certain conditions attached to this grant to be performed by the grantees, a violation of which conditions will impose upon them the penalty of losing the rights conferred by this instrument. Rights, therefore, were conferred by this instrument—rights which could be forfeited, provided certain conditions were not complied with, and rights which could not be forfeited, that is, could not be taken away from the grantees so long as these conditions were complied with.

Now, these conditions are, in the first place, that the grantees shall not, by any title, sell or alienate the property to the prejudice of any property the establishment of San Francisco may have. In other words, the title was a title that might be sold, provided that the sale or alienation should not prevent the establishment of San Francisco claiming the lands at some future time, in case it wanted them as ejidos. This meaning which we have given to this condition will perhaps be disputed, and it is not necessary for our argument to insist on the meaning which we have given it, excepting by way of its illustration. The original

language is somewhat vague. Translated literally, the words of this condition mean, we submit, this:

"They shall not, by no title, sell it nor alienate it without prejudicing some property which the establishment of San Francisco may have."

Opposite counsel may contend that this is an absolute restriction on the right to sell or alienate. But if this had been the purpose of the grantor he would have stopped after the words "alienate it;" for the words "without prejudicing some property which the establishment of San Francisco may have," would have been evidently superfluous. The language "without prejudicing some property which the establishment of San Francisco may have," plainly contains the reasons why any restriction whatever is put on the right to alienate. And this reason would be entirely satisfied by giving to the grantees the right to sell or alienate, provided their vendees should hold the land subject to the same right of the measurement of the ejidos to which it was subjected in the hands of the original grantees. But, conceding that this was a restriction on the right to sell or alienate, when would such restriction cease? Obviously as soon as it became impossible that any rights could ever exist to be injured.

The second condition is as follows:

"They shall not obstruct the paths, roads, and servitudes, using it for culture and cattle they intend to introduce on it; but within a year, at the most, it must be occupied."

Is it not evident that this language is applicable to a long-continuing estate—something that the grantees will be entitled to, even though they let eleven months and twenty-nine days pass without availing themselves of it? This condition is incompatible with the idea of an estate determinable at the caprice of the grantor; and does it not become absurd when used in a grant which, according to the ideas of opposite counsel, conveys no rights at all?

The third article in the grant provides, that if the grantees

violate the conditions, they will lose their right to this provisional concession, which is delivered to the interested parties for their security and other ends. How could a title be *security* to them, unless it proved on its face that rights were thereby conveyed; that if they violate these conditions they will lose their rights to this provisional concession? What possible meaning can be given to a provision like this on the theory of opposing counsel that either this grant conveyed no rights, or else that the rights which it did convey were revocable at the will of the grantor? Is it not absurd to speak of losing rights in consequence of the violation of conditions, when there are no rights to lose; when, even if the conditions are complied with, there are no rights to retain?

We have before said, that the object of recording Mexican grants was to show to the world what lands, by having been granted, were no longer open to settlement and the operation of the colonization laws. Jimeno himself, the secretary, who suggested this possibility of this land being wanted as ejidos, as the only reason why they should not be absolutely granted, kept an official index, the object of which is clearly indicated by its title. It was called an "Index of the Lands Adjudicated, and Persons to whom they have been Conceded;" and all concessions of lands were regularly numbered in this index in the order in which they were granted. Now, in this index, in its regular order, this concession is inserted, under its proper number, in the same manner in which any concession under the colonization law was. Still further: in the official book called the "Toma de Razon," a book in which were set down the concession of lands adjudicated by the Mexican government, this grant was regularly recorded as a full grant of the land.

IV. If the concession did not confer upon the De Haros the right to occupy until this condition happened, what other construction can be given to the instrument? Only that of a license determinable at will. Supposing that to be the construction, by what right? when? how? has that license been revoked? The government of Mexico did not

revoke it. On the contrary, the evidence shows that the heirs of the original claimants were in undisputed possession of their tract of land at the time of the treaty of Guadalupe Hidalgo, and the right to revoke such license, if it ever existed, passed to the United States, to be exercised, if at all, by the legislature, and not by the judiciary. For, even conceding this right to be revocable at the will of the government, that will must be expressed, and cannot be implied. And how can it be argued that the courts of the United States have been clothed with the power to exercise it?

Congress, by two successive acts (the act of July 4, 1864 * ratifying certain ordinances of the city, and the act of March 8, 1866†), so far from revoking any permission to occupy, has granted *these* lands to the persons who had the *right* of occupancy. What stronger right of occupation can there be than one resting upon an unrevoked license of the highest department of the government—the source of all titles?

But we do not concede that the instrument under which we claim conferred only a license, revocable at the will of the grantor. On the contrary, we assert that such a construction would be incompatible with the history of the grant, with its language, conditions, and evident meaning, with the circumstances of the country, and of the inhabitants thereof, at the time it was made. It is matter of common knowledge, that when this grant was issued, California was a sparsely settled country, without fences, with no obstruction to prevent the herds and flocks from roaming in an untamed state over its whole surface. All the inhabitants without grants might be said to be tenants-at-will of the government lands, and the government officers would have had no more thought of disturbing them in the possession of the ungranted portions, than our government now thinks of expelling pre-emptors from the public lands. Certainly it would never have occurred to any Mexican citizen to ask, nor to any governor to grant, a right to use lands for so long as the governor should so will. Even in the most

* 13 Stat at Large, 333, § 5.

† 14 Ib. 4

populous countries it would hardly suggest itself to any private person to put a license to occupy land in writing, provided such license were revocable at will. Such a license would naturally be granted by word of mouth or by occupation without objection. But here, in the case of a private individual granting the right to use the most valuable property at *his own* pleasure, it would be an evident absurdity to put such license in the form of a solemn document, clothe it with legal formalities, give notice thereof to the world by registration, that he has done what simply allowed another to use his estate until he chooses to put him off, it may be, the next hour; for a power of revocation at will gives no fixed time to the licensee.

But if, on the other hand, it be admitted that this is something more than a license to occupy at will, what other limit or restriction on the right of occupancy can be stated than the one we have suggested, namely, the selection, measurement, and appropriation of these lands as the ejidos of San Francisco? Clearly, none other can be obtained from the grant itself. Suppose that Congress should grant a certain island to A. and his heirs, until it should be required as a site for a light-house, would it not be a grant of that island, subject to the title being defeated by the proper department of the government selecting it for a light-house; in other words, a grant on condition subsequent? And if, by any convulsion of nature, it should be rendered impossible that such island should be ever selected for a light-house site, would not the title, as against all the world, become absolute in the grantees? What difference would it make if the language in which such a grant were expressed was, "The land is granted," or "permission to use and occupy the land is granted," or "a license is given to use and occupy the land?" Would not the law, which construes words so as to get at the real intent of the party using the same, see that the grantor intended to give the grantee all the beneficial rights of property in the subject of the grant, determinable in a possible event?

The admeasurement, selection, and assignment of ejidos

was a part of the incidents of establishing a pueblo peculiar to Spanish and Mexican countries, a system quite at variance with the manners, customs, and laws of Americans. It is certain Congress has not decided, and will not decide, that the lands petitioned for by the De Haros may be set apart as ejidos; and because the object of the reservation, or rather, the right to assign them as ejidos, can never be exercised, are we to be told we thereby have not the right to occupy?

V. We pass now to the questions:

1st. Has the event taken place on the happening of which these rights of occupancy were, by the term of the grant, to cease?

2d. Has that event become impossible? If so, when and in what manner?

As to the first query, we might rest upon the fact that the government has not shown affirmatively that any such event has happened; for, it is incumbent on one who asserts that an estate is divested by the happening of a condition subsequent, to show affirmatively that such event has happened, which causes the estate to cease. But the case shows that these lands were never measured off as ejidos to the establishment of San Francisco, and that they were occupied by the heirs of the De Haros up to the cession of California to the United States, and even up to the present time.

To the second question we answer, that it became impossible for such event to happen the moment California was ceded to the United States, for the reason that *then*, with the change of proprietorship of the territory, the objects and purposes of the reservation, and the system of measuring ejidos, ceased.

We go farther, and assert that, whereas, under the Mexican system, in pastoral countries it was deemed of paramount interest to the public that ejidos, or pleasure lands, should be reserved for public use, under the American system the demands of commerce require that lands in the vicinity of a seaport be appropriated to private business and held in private proprietorship. Recognizing this policy, the Congress of the United States has twice enacted that the

lands forming the peninsula on which San Francisco now stands, all of which, under Mexico, might possibly have become ejidos, should be granted in fee to the individuals, who, as against all but the United States, had the right to occupy the same to the extent of the actual right of occupation. These acts recognize and establish the proposition that these lands can never be used as ejidos. Indeed, by such legislation, Congress has deprived itself of the power to provide for the selection and assignment thereof as ejidos; and if these lands were now to be offered to the city of San Francisco, to be used as ejidos, the corporate powers would doubtless decline to accept them with that restriction; for, while they would be useless for the common purposes of the inhabitants of that city, the necessities of commerce demand that they shall be owned by individuals, and devoted to the use of trade, manufactures, &c.

[The learned counsel then made other points not necessary, in view of the grounds of the opinion, to be presented.]

Messrs. Stanbery, A. G., Carlisle, Wills, and Cushing, argued the case very fully, contra.

Mr. Justice DAVIS delivered the opinion of the court.

The case, on account of the large pecuniary value of the land in controversy, has elicited great interest. We have been aided by oral and written arguments of rare ability, and the question of pueblo and mission rights, and the powers of the Mexican governors of California over them, has been much pressed upon our attention.

The construction, however, which we give to the espediente, conceded to be genuine, and on which the plaintiffs must recover, if at all, supersedes the necessity of discussing the remaining questions, which in any other aspect of the case, it would be important to do.

In order to ascertain the proper effect of the espediente as an entire thing, it is necessary to analyze all its parts. And with this analysis, the meaning of it, in our opinion, cannot be mistaken. The petition presented by Francisco

and Ramon de Haro, residents of the ex-mission of San Francisco, to Governor Micheltorena, asks for the *grant* of the potrero, for the purpose of pasturing cattle inherited from their mother, which they were desirous of taming, and had to remove out of the rancho where they then were. The assent of their father was necessary to enable them to solicit the grant, as they were minors, and it was given.

According to the custom of the country, this petition was referred to the secretary of the department to ascertain what was the true state of facts, and report to the governor. The informe, as it is called, or official report of Jimeno, who was then secretary, as it was approved by the governor, and formed the basis of his action, is of material assistance in arriving at the true nature of the right which was subsequently conceded. It is in these words, addressed to the governor: "The mission of San Francisco has no longer any property, and consequently the potrero which is petitioned for is lying unoccupied, as the soliciting parties show by means of a report proceeding from the respective judge; and inasmuch as there are to be assigned to said establishment, its corporation or common lands, I am of opinion, that, in the meanwhile, the parties might occupy the plot of land, by virtue of a provisional license of your excellency, because no prejudice is caused thereby to the community (or) to any private individual."

The significant fact appearing on the face of this document, is, that it ignores the very matter for which the De Haros petitioned. They solicited a grant of the land pertaining to the potrero, but Jimeno, among the most intelligent of Mexican officials, knew, if the mission was secularized, there would remain an incipient pueblo, which might embrace for its common lands, the piece of ground asked for; and, therefore, reported that the grant of it could not be safely conceded, as it might prejudice the rights of the community. But, as the inclosure was vacant, no harm could result to the public, or any private individual, by its temporary occupancy, and as the petitioners wanted very

much a place to pasture the cattle, which had fallen to them in right of their deceased mother, he recommended that they be permitted to occupy it, temporarily, and for their security, the governor should issue to them a provisional license. The report was evidently predicated on the belief that the grant of the land would interfere with the rights of the mission or pueblo; but in the meantime, as they were not ascertained, there could be no reasonable objection to the De Haros having the permissive occupation of the tract. It nowhere appears an interest in the land was in any event to be conceded, nor were any promises held out to the De Haros, if the potrero should prove to be outside of the common lands, a title in fee, or any less title should be assured to them. Jimeno recommended nothing more than a provisional license, enabling the parties to occupy the land for the occasion. The question arises, was Micheltorena's decision in conformity with Jimeno's recommendation? The material part of the order or decree of the governor, and which was extended on the same day of the approval of the report, is as follows: "I declare Francisco and Ramon de Haro, empowered to occupy provisionally the piece of land called Potrero de San Francisco to the extent of half a square league." "*Librese el correspondiente despacho*"—"let the corresponding order or despatch be delivered; let it be duly entered, and let this information be communicated to the person in charge of said establishment." It is very clear that this decree conforms to the recommendations of the report, and that Micheltorena did not intend to confer any greater powers on the De Haros than Jimeno advised.

There are no words used indicating an intention to give a title, or to vary from the position taken in the informe. The document to be issued, is one corresponding to the right conferred, which was to occupy provisionally the potrero. And the despatch which did issue for the protection of the parties, conformed to the terms of the decree, as will sufficiently appear by an examination of its essential provisions "I have determined," says the governor, "to *permit* the Messrs. De Haro to occupy the beforementioned pasture

ground, subjecting themselves to the limits that shall be prescribed to the establishment of San Francisco."

If language has any meaning, Micheltorena, intended by this instrument to give nothing more than the power to occupy, and even this power was made expressly subject to the paramount claim of the establishment of San Francisco. To *permit* pasture-ground to be occupied, excludes all idea that a grant of the land was contemplated. There are, absolutely, no words indicating an intention to make a future grant on the happening of any event whatever. But the despatch goes further, and forbids the De Haros to sell or alien it, or do any act prejudicial to the property of the establishment, on penalty "of losing their right to this provisional concession." The prohibition against sale and alienation, by necessary intendment, refers to the right of occupancy, for no other right was to be conceded, and this right was to cease, if the fundamental conditions attached to "the provisional concession," delivered to the De Haros for their protection, were violated. If they were to lose their right to the land, as is contended, why were the words appropriate to a concession of the land, which an inspection of the original document shows were written in it, stricken out, and the phrase "they shall lose their right to this provisional concession," substituted in their stead? It is clear enough, that Jimeno, who was in the habit of writing grants for land, inadvertently pursued the usual form for such grants, but recovering himself, wrote the words appropriate to confer a license to occupy, which he had recommended and the governor approved.

It surely cannot need more evidence to demonstrate that the Mexican officials intended the espediente to be what it is, a mere license to occupy, not permanently, but "in the meantime," until the ejidos were measured. It is impossible to divest the mind of the conviction, that Micheltorena and Jimeno, either believed they had not the power to grant the potrero, or, if they had, the circumstances of the mission forbade its exercise, and conceded a permissive occupation, not of right, but by way of grace and favor.

But, it is said, the occupation thus permitted could ripen into a grant in fee, or some lesser estate, in case the potrero was not included within the admeasurement of the ejidos. Not so, however, for there are in the title-papers no words granting the tract of land, either absolutely or on condition, provisionally or otherwise; nor any words by which any estate or interest in it can be raised by implication. The power conferred, resembles a grant in no particular, but is a bare, naked license, and to be governed by the rules of law applicable to such a power.

But, the authority of the "Toma de Razon" is invoked to bolster up the claim of title, because in the entry of this case, the word "titulo" is used.

It is proper to remark that the nature and effect of an espediente, when it is clearly ascertainable, from contemporaneous and official construction, cannot be defeated by an entry in the Toma de Razon. The office of the Toma de Razon is to support, not destroy the espediente. In this case, however, the entry did not mistake the character of the transaction, for the Spanish word "titulo" does not indicate the measure of the right, interest, or estate of the party. "It means," according to Spanish authority,* "the cause in virtue of which anything is possessed, and the instrument by which the right is accredited," and in Spain and Mexico there are a class of titles (titulos), not translative of property. Therefore, Jimeno did not err in characterizing the instrument given to the De Haros as a "titulo," for the word "titulo" is a *nomen generalissimum*, to be applied as well to title-papers, which convey title, in the usual acceptation of the term, as to those which confer a mere right of occupancy. And the claimants can derive no help from the use of the word "concession," for a distinguished Spanish scholar (Escriche), gives this definition of it: "Whatsoever is granted as favor or reward, as the privileges granted by the prince." As a matter of favor, Micheltorena conceded to the De Haros, the privilege of temporarily occupying the

* Escriche.

potrero in question. There was no contract to do more, nor the semblance of one.

Without pursuing the subject further, we are satisfied, from a careful examination of this Mexican record, that the only thing conferred, or intended to be conferred, on the De Haros, was a provisional or temporary license of occupation, which the governor was willing should be in writing, instead of by parol, to enable the licensees to enjoy their possession with greater security. And this leads us to a consideration of the law on the subject of licenses. If the license in question has been terminated, there is an end to this case, and it is wholly unnecessary to consider the other questions which have been discussed at the bar.

There is a clear distinction between the effect of a license to enter lands, uncoupled with an interest, and a grant. A grant passes some estate of greater or less degree, must be in writing, and is irrevocable, unless it contains words of revocation; whereas a license is a personal privilege, can be conferred by parol or in writing, conveys no estate or interest, and is revocable at the pleasure of the party making it. There are also other incidents attaching to a license. It is an authority to do a lawful act, which, without it, would be unlawful, and while it remains unrevoked is a justification for the acts which it authorizes to be done. It ceases with the death of either party, and cannot be transferred or alienated by the licensee, because it is a personal matter, and is limited to the original parties to it. A sale of the lands by the owner instantly works its revocation, and in no sense is it property descendible to heirs. These are familiar and well-established principles of law, hardly requiring a citation of authorities for their vindication; but if they are needed, they will be found collected in the notes to 2d Hare & Wallace's American Leading Cases, commencing on page 376.* We are not aware of any difference between the civil and common law on this subject.

Testing this case by these rules of law, is not the license

* Or in the last edition (4th), p. 736, notes to Prince v. Case and Rerick v. Kern.—Rep.

given by Micheltorena ended? The De Haros died in 1846, while the Mexican government owned California, and with their death the license terminated. As long as they were in full life they had a valid authority to enter upon the potrero and pasture their cattle, but, as the privilege was a personal one, it ceased when they died, and did not extend to their heirs. The continued possession by the father, and those under him, estops no one—certainly not a sovereign power ke Mexico or the United States. The representatives of the De Haros could, doubtless, lawfully enter upon the potrero in order to remove the property left there, but their authority extended no further.

It is argued, the license was to last until the ejidos were measured, and therefore is not determinable until that event occurs. This argument has no force, unless it was the intention of Micheltorena to give some interest in the land to the De Haros when the ejidos were assigned, if they did not embrace the potrero; but we have seen that he had no such intention. He promised nothing; he did not say what he would do or not do when the common lands were measured, but told the De Haros, meanwhile, until they are measured, you can occupy the potrero for a pasture-ground for your cattle. This was not a contract on consideration that they and their heirs should have the right of occupancy until the happening of this event. It might never happen; and what was intended as a mere license would be thus converted into a grant. Micheltorena could have lawfully ousted the De Haros from the possession at any time before their death, because the privilege conferred was at all times within his control, and liable to be countermanded.

The De Haros, so to speak, were tenants-at-will, and held at the sufferance of the Mexican authorities. They could not have been deceived as to the nature of the right conferred, for they repaired to Monterey to get the land in full property, and returned to San Francisco with only a provisional license to pasture their cattle on it. The term provisional excludes the idea of permanency; it means something temporary and for the occasion.

It may be true that Micheltorena, when he conceded to the De Haros the privilege of pasturing cattle on the potrero, did not intend to revoke it, if the conditions were observed, until the ejidos were measured, and that it was so understood by them; but this can, in no aspect of the case, alter the relations of the parties to this suit. It was a personal privilege conceded to the De Haros alone, and with their death it ceased. The license itself not only contains no words extending it beyond the lives of the parties, but all the circumstances of the case exclude the idea that the governor intended to pass any interest descendible to heirs.

If this is so, this claim, if presented to the Mexican government, would have been rejected, and is, therefore, not entitled to confirmation, under the act of Congress, against the United States.

In concluding this opinion, we are sorry to have to state that this record is not a clean one. It is tainted with fraud and forgery. When this claim was originally pressed for confirmation, it was on title-papers conveying a grant of the land, which are now withdrawn as being forgeries. If the espediente on which the claim is now rested carried the title to the property, why substitute forged grants? A crime is never committed without an adequate motive, and it is clear that, in the opinion of the party who did it, the genuine espediente fell short of a concession of the potrero in full property.

We are gratified, on a consideration of the evidence, to learn that the young De Haros, during the short period they occupied the potrero, did not mistake the nature of the power conferred on them. They did not add to the value of the land by improvements, and left nothing on it but what could be easily removed and made available to their heirs.

DECREE AFFIRMED.

Mr. Justice FIELD dissented.

THE SEA LION.

1 Under the act of 13th July, 1861, which forbade all commercial intercourse between the inhabitants of a State whom the President should proclaim in a state of insurrection, and the citizens of the rest of the United States, but by which it was enacted that "the President" might "in his discretion" license and permit intercourse in such articles, &c., "as he in his discretion" might think most conducive to the public interest, and that "such intercourse so far as by him licensed" should be "conducted and carried on only in pursuance of rules and regulations prescribed by the Secretary of the Treasury." *Held*—

(i) That the President alone had the right to license such intercourse.

(ii) That a license from a "Special Agent of the Treasury Department and Acting Collector of Customs" dated 16th February, 1863, to bring cotton "from beyond the United States military lines," though certifying on its face that the United States military commander of the department where the license was given, by order in the "special agent's" hands "approved and directed this policy," *and indorsed "Approved" by the rear admiral commanding that maritime station*, which license declared that cotton brought by particular persons named would "not be interfered with in any manner, and they can ship it direct to any foreign or domestic port"—was no protection to property bearing the stamp of enemy property when captured in coming from a port of a State in insurrection and then under blockade by the government, though in a course of being brought by the particular persons, named in the license.

2. Such a license as that above mentioned had no warrant either from the Treasury regulations of 28th of August, 1861, or from those of 31st March, 1863.

AN act of Congress passed during the late rebellion (July 13th, 1861), prohibited all commercial intercourse between the inhabitants of any State which the President might declare in a state of insurrection, and the citizens of the rest of the United States; and enacted that all merchandise coming from such territory into other parts of the United States with the vessel conveying it should be forfeited.

The act provided, however, that "the *President*" might "in *his* discretion *license and permit commercial intercourse*" with any such part of a State the inhabitants of which had been so declared in a state of insurrection, "in such articles, and for such time, and by such persons, as he, in *his* discretion, may think most conducive to the public interest." And

that "such intercourse, so far as by *him* licensed, shall be conducted and carried on only in pursuance of rules and regulations prescribed by the Secretary of the Treasury."

The President having soon after declared several Southern States, and among them Alabama, in a state of insurrection, and the Secretary of the Treasury having issued a series of commercial regulations* on the subject of intercourse with them, Brott, Davis & Shons, a commercial firm of New Orleans, obtained from Mr. G. S. Dennison, special agent of the Treasury Department, and acting collector of customs at New Orleans, a paper, dated February 16th, 1863, as follows:

"The United States military and other authorities at New Orleans permit cotton to be received here from beyond the United States military lines, and such cotton is exempt from seizure or confiscation. An *order is in my hands from Major-General Banks approving and directing this policy.* The only condition imposed is that cotton or other produce must not be bought with specie. All cotton or other produce brought hither from the Confederate lines by Brott, Davis & Shons will not be interfered with in any manner, and they can ship it direct to any foreign or domestic port."

This paper was indorsed by Rear Admiral Farragut, in command of the blockading force on that coast, "*Approved.*" The Rear Admiral had given also the following instructions to his commander of the Mobile blockade:

"Should any vessel come out of Mobile and deliver itself up as the property of a Union man desiring to go to New Orleans, take possession and send it into New Orleans for an investigation of the facts, and if it be shown to be as represented, the vessel will be considered a legal trader, under the general order permitting all cotton and other produce to come to New Orleans."

With the first quoted of these documents in their possession, Brott, Davis & Shons addressed the following commu

* Not set forth in the records or briefs, nor as the case was decided essentially important to be set out.

nication, dated March 9th, 1863, to one Worne; he being at this time a member of the firm of Oliver & Worne, who were engaged in business in New Orleans; Danes by birth:

"All cotton and other produce shipped from within the Confederate lines to our address by yourself, as our agent, will be protected by us under authority from the military and naval authority of this place, dated February 16th, 1863, permitting us to receive such cargoes and to reship them to foreign ports. The original permit alluded to we herewith inclose to you."

On accepting from Brott, Davis & Shons, the agency, Oliver & Worne proceeded to Mobile for the purpose, as such agents, to ship cotton *to some place;* where? was one of the questions raised.

At Mobile Worne transferred his agency to Hohenstein & Co.

These persons, upon assuming the employment passed over to them, bought a schooner, "The Sea Lion," of about ninety tons. And, on the oath of "M. D. Eslava, of Mobile," the vessel was registered under an "act to provide for the regulation of vessels owned in whole or in part by citizens of the Confederate States," as the property of Hohenstein & Co., "the only owners." On this schooner they laded two hundred and seventy bales of cotton. A small shipment (seven barrels) of turpentine was also put on board. They selected for captain a certain Netto, a Spanish subject, born in Mahon, unmarried, for four years previous to 1863 resident in Mobile, but for six years before coming there sailing on Spanish ships; one Yokum (a partner of Hohenstein), originally of the loyal States, but after 1856 of Memphis, Tennessee, being appointed by Oliver & Worne supercargo. The crew, seven in number, were from Mobile, and all Spanish but one, he being English.

The vessel being thus ready for a voyage, Oliver & Worne gave to Yocum, the supercargo, letters of introduction to persons in *New Orleans.*

Statement of the case.

[*Oliver to Brott.*]

May 10th, 1863.

F. BROTT, ESQ.,
Of Brott, Davis & Shons, New Orleans

DEAR SIR: I beg to introduce to your acquaintance Mr. N. Yocum, who visits your city on business. I recommend Mr. Yocum to your best attentions, and trust that you will assist him in his purposes, *which he will explain to you verbally.* Mr. Yocum is the senior of the firm of J. Hohenstein & Co., your agents for cotton shipments.

Trusting that lively business transactions between your respective firms may be the result of your meeting with Mr. Yocum,

I remain truly yours,

OLIVER & W.

[*Same to Pilcher.*]

May 10th, 1863.

MASON PILCHER, ESQ.,
President of Bank of New Orleans.

DEAR SIR: By the present I beg to introduce to your acquaintance Mr. N. Yocum, who visits your city on business. I recommend Mr. Yocum to your best attention, and trust that you wil please to assist him in his purposes, *which he will explain to you verbally.*

OLIVER & W.

[*Worne to Pilcher.*]

May 10th, 1863.

MASON PILCHER, ESQ.

DEAR SIR: The present will be handed to you by Mr. N. Yocum, who takes out some cotton. I would write to you more fully on this subject, but *deem it advisable to let Mr. Yocum explain this transaction to you.*

He intends purchasing a steamer. If the one you had at Havana is still unsold, Mr. Yocum may buy her, if you can recommend her as thoroughly seaworthy, and in every respect in good order. I mentioned to him your price, $40,000 at New Orleans.

Your friend D. is at *Atlanta.* It was absolutely impossible for us to obtain any vessel here. Furthermore, heavy bonds were required to obtain permission to take out cargo, and he deemed it advisable to invest in some favorable enterprise in

Statement of the case.

Georgia,* temporarily, until we could find some opportunity to do so here. He is well and sends his best regards.

Please show your best attentions to Mr. Yocum, and assist him as much as you possibly can. He is under heavy bonds to take his shipment to Havana. *You will, therefore, please to have it immediately released and cleared for that port.*

Please hand the inclosure to address, with my best compliments.

You can rely implicitly on Mr. Yocum in all he says. *It will be done faithfully.*

Truly yours, R. W.

The vessel, however, was not documented at all for New Orleans. The shipping articles, her clearance, bill of health, manifest (sworn to by the captain, Netto), all presented "Havana, Cuba," as the port of destination. And the vice-consul of Spain, in Mobile, certified that the goods in the manifest were the same which had been cleared from the consulate for that port.

The vessel set sail from Mobile in the daytime of the 8th May. When five miles southeast of Fort Morgan, which commands the entrance to Mobile harbor, and at about 12 o'clock, midnight, she was captured and sent to Key West, where she was libelled in the District Court for Southern Florida in prize. She had made no resistance, and all her papers, including the "license," were given up. Among them was this one:

MOBILE, ALA., May 8th, 1863.

N. Yocum has credit on the books of J. Hohenstein & Co., $150,034, and $17,000 subject to settlement between J. Hohenstein and N. Yocum.

J. HOHENSTEIN & Co.

The captain and the supercargo were the only persons examined *in preparatorio*.

1. *As to the port of destination.*

The supercargo said that his directions from Hohenstein & Co. were to drop down to the fleet off Mobile, supposing

* A State at the time in rebellion.—REP.

that the officers of the fleet would assist them to get to the mouth of the Mississippi, where he was to communicate with Hohenstein & Co. He added, that the vessel was dropping down with the tide and did not change her course when taken.

The captain stated that when the vessel was cleared he expected to go to Havana. "After passing Fort Morgan the supercargo, Mr. Yocum, said we would go to the mouth of the Mississippi to go to New Orleans. I should have taken her wherever the supercargo said."

These two persons, the captain and supercargo, on the next day filed a claim for the vessel in behalf of *Brott, Davis & Shons*, swearing that the vessel was bound in good faith to the port of New Orleans, there to deliver her cargo in pursuance of the license of G. S. Denison, special agent of the Treasury Department.

Brott & Davis also made joint affidavit as "*claimants* of the schooner Sea Lion and of the cargo laden and found on said schooner." It was read in evidence, by consent:

"That on the 16th February, 1863, they obtained from G. S. Denison, Esq., special agent of the Treasury Department, and acting collector of customs at New Orleans, a license to bring cotton and other produce from beyond the military lines of the United States, and from within the Confederate lines, into the port of New Orleans; that the said license was approved by D. G. Farragut, Rear Admiral; that thereupon the agents of these respondents, Messrs. Oliver & Worne, in Mobile, Alabama, acting on behalf of these respondents, loaded the schooner; that in the latter part of March, 1863, the said agents proceeded from New Orleans to Mobile for the purpose of shipping the said cargo, and were furnished with the license from Collector Denison and Admiral Farragut, which was placed in the hands of Mr. N. Yocum, who went on board the said schooner as supercargo, and express instructions were given by claimants to their agents to bring the said schooner, with her cargo, to this port of New Orleans; that it always was their design and intention to cause said schooner and her cargo to be brought to New Orleans and not to be taken to any other place whatsoever; and that it was their intention to ship the said cargo from this port

according to law, to the best market. And they further depose that each and every member of the firm of Brott, Davis & Shons, is a loyal citizen of the United States, and that *no enemy of the United States* has any property or interest in the said schooner and cargo."

Hubbell, also, the passenger, whose affidavit was received by consent, stated:

"That although the schooner was cleared for Havana as a necessity, and in blind, in order to get out of the port of Mobile, he understood she was going to New Orleans, and that he was bound for and expected to go to New Orleans, and that he was told by the supercargo of the said Sea Lion that it was his intention when off the bar to lay alongside of the blockading fleet in order to obtain a permit to come to New Orleans; that the said schooner came out of the 'swash channel,' and that when over the bar, instead of following the channel down the coast, as is the usual custom of blockade-runners, she stood out for the blockading fleet to obtain the beforementioned permit; that as evidence of the intention of the supercargo to place the said schooner in the hands of the blockading fleet, he took her out when the wind was very light, so that she was not able to sail over two knots an hour, and that it was with difficulty he induced the pilot to take her out with such a wind; that the schooner hove to on hearing the first gun from the blockading fleet, and awaited being captured."

2. *As to the ownership of the vessel and cargo.*

In the claim to the vessel, interposed by the captain and supercargo, Netto and Yocum, both captain and supercargo swore that, as they were "*informed and believed*," the vessel and cargo were the property of Brott, Davis & Shons, and that no enemy of the United States had any property or interest therein; and on the examination in preparation the supercargo said:

"I believe that Oliver & Worne and Brott, Davis & Shons, are owners of the schooner. I only know them to be owners by their own representations and by their having the management of her. I believe they own the cargo. The spirits of turpen-

tine belonged to the crew. I have no interest. I was to receive $500 as supercargo."

On the same examination the captain said:

"The cotton, I think, belonged to Brott, Davis & Shons. The supercargo told me it so belonged. I did not know anything more about its ownership. It was to be delivered wherever the supercargo said."

A certificate from the military governor of Louisiana, read by consent, stated that the firm of Brott, Davis & Co. were well known to him "as *unconditionally loyal.*"

The District Court condemned the vessel.

Messrs. W. M. Evarts and Henry Flanders, for the claimants, appellants in the case:

I. *As to the facts.*

The evidence establishes, we submit—

1. That the cargo and vessel were the property of loyal citizens of the United States.

2. That the voyage was authorized by the civil and naval authorities of the United States, and was undertaken solely with the view of giving up the vessel and cargo to the blockading fleet, in accordance with such authorization.

3. That the permit in favor of the claimants was employed in good faith.

The evidence as meant apparently to be relied on in support of the decree below, points to two matters only as giving the case a bad aspect.

1. An argument will perhaps be made against the claimants from the documented character of the vessel. But Worne, acting for Brott, Davis & Co., necessarily employed as agents, such persons as could be useful in the business about which they were employed. Embarked in a transaction such as this was, "compelled," in the language of Lord Stowell, applied to persons similarly situated, "to pick their way in fear and silence," walking, as it were, at every step, over burning ploughshares, these agents had necessarily to

employ great caution and a certain amount of subterfuge. "This," said Lord Stowell, in a case like this,* "is not very much matter of surprise or of serious judicial animadversion." They were obliged, *in order to accomplish their agency*, to deceive the enemy. That, of course. If they had avowed their purpose, proclaimed that the vessel and cargo were the property of loyal citizens of the United States, and documented the vessel in accordance with the facts, it is easy to perceive that both agents and agency would have been strangled in the outset. The master and crew believed that they were destined on a voyage to Havana; the Confederate military and civil authorities believed the same thing. On that belief alone could the vessel have obtained her clearance. That all this was a deception, and that the real destination was New Orleans, the testimony of Mr. Hubbell, a witness above all question, makes certain.

There is no motive that can be well suggested or conceived that could induce the claimants or their agents to act a part that was not open, fair, and consistent with the main and avowed design. They wished to bring out from Mobile this cargo of cotton, and being authorized to do so, they had no motive to evade the blockade. Their only concern was to get safely past the hostile batteries and place their property under the protection of the blockading fleet. There was no spoliation of papers or cargo, no attempt at resistance or escape; but an open, voluntary surrender.

2. An argument may be attempted from the memorandum as to the $150,034, and from Yocum's letters of introduction.

The former was simply an acknowledgment, on the part of J. Hohenstein & Co., that Yocum had credit on their books for $150,000, subject to settlement between the partners. As to the letters, it is, so far as this case is concerned, of no sort of importance what purposes Mr. Yocum had in view at New Orleans. The letter to Mr. Pilcher relates to Mr. Yocum's business and purposes, and not to the busi-

* The Goede Hoop, Edwards, 327.

ness and purposes of Brott, Davis & Shons. It is true, Mr. Pilcher is informed that Yocum is under heavy bonds to take his shipment to Havana, and he is requested to have it released and cleared for that port. The meaning is easily explained: In order to get this cotton out of Mobile, the civil and military requirements of the port had to be complied with. Among others, a bond had to be given that it should be taken to the asserted port of destination. The letter means to say, that if it should be understood in Mobile that the cargo was taken to New Orleans, and there protected, Yocum's bondsmen would be prosecuted for the penalty. Hence the anxiety for the reshipment of the cotton to Havana.

3. The fact that the departure from Mobile was so timed as to bring the Sea Lion out to sea at *night*, argues nothing against fair purpose. The vessel had, of necessity, to escape under cover of the darkness. Does any one suppose that the civil and naval authorities at Mobile would have permitted her to go out in broad day, in full view of the fleet, and to have thus rendered her capture certain? The attempt to have done so would have disclosed the purpose of the voyage, and have induced the seizure of the vessel and cargo, and death to every person concerned in the transaction.

The conduct, then, of the claimants throughout this transaction, we assume to have been open and fair.

II. *As to the law.*

1. The order of Admiral Farragut to his commander of the Mobile blockade, not to capture vessels and cargoes in the situation of the Sea Lion and cargo, together with his indorsement of the "permit" of the acting collector, were acts incidental to his position, and privileged this vessel and cargo from capture.

In *The Hope*,* where the commander of one squadron gave a license with a view to exempt a ship and cargo from capture by another squadron, Lord Stowell expressly de-

* 1 Dodson, 226.

clared that the admiral on a station has power relative to the ships under his immediate command, and can restrain them from committing acts of hostility; though he said that the commander could not grant a safeguard of this kind beyond the limits of his own station.

Admiral Farragut did not go beyond the limits of his own station, but was acting within them. And he had given explicit orders to the commander of his squadron,—orders which must have been communicated at the time of the seizure in question to every vessel of the squadron,—that property in the predicament of that of the claimants should not be regarded as hostile, but be sent to New Orleans for an examination of the facts. Besides, by indorsing the permit of the acting collector he adopted and made it his own, and every officer of his command was bound to respect and enforce it.

2. Even if the act of Admiral Farragut, in privileging the property of the claimants from capture, was irregular, it by no means follows that such property is condemnable as prize. Where the owners stand clear of any intention of fraud their act is not illegal, although its authorization may have been irregular.

In the *Vrow Barbara*,* the vessel was taken on her voyage from Havre to Hamburg. She had been stopped and examined in going to Havre, and had been informed in effect that she might go there. The master knew of the blockade, but understood it had been relaxed. Lord Stowell restored the property, on the ground that she had been permitted to go in.

In *The Henricus*,* the master had been permitted by one of the blockading fleet to go in with a cargo of coal, and was captured in coming out. The court held that the permission to go in with a cargo included the permission to come out with a cargo: that is to say, a mere inferential permission to bring out a cargo was respected.

In *The Venscab*,* the same principle was applied: "I beg

* Reported in the notes to The Juffrow Maria Schrœder, 3 Robinson, 155.

it may be understood," said Lord Stowell, "that I hold the blockade to have existed generally, though individual ships are entitled to an exemption from penalty, in consequence of the irregular indulgence shown them by the blockading force."

*The Juffrow Maria Schrœder** stood on the same ground, and was decided on the same principle.

In *The Johanna Maria*,† Dr. Lushington, referring to the cases just cited as applicable to the blockade of the Baltic ports, said:

"If it can be shown that any vessel has been permitted improperly to enter or come out, I shall confer the benefit of restoration on a vessel so circumstanced."

He held, too, in accordance with Lord Stowell, and in accordance with universal public law, that such restoration, in consequence of improper or irregular indulgence on the part of a blockading force, or in consequence of a more regular and formal license, did not have the effect to vitiate a blockade.

Further: The order of General Banks, approved and adopted by Admiral Farragut, was a legitimate exercise of their authority. In granting these special licenses, they had in view only public objects; they sought to obtain possession of an article which, by the policy of the hostile government, had become contraband of war, an article which this court, in Mrs. Alexander's case,‡ held liable to capture from its peculiar character and the position given it by hostile legislation. "It is well known," said the Chief Justice, in delivering the opinion of the court in that case, "that cotton has constituted the chief reliance of the rebels for means to purchase the munitions of war in Europe. It is matter of history that, rather than to permit it to come into possession of the National troops, the rebel government has everywhere devoted it, however owned, to destruction. The

* 3 Robinson, 155.

† Deane on the Law of Blockade, 86, 115.

‡ 2 Wallace, 404.

value of that destroyed at New Orleans, just before its capture, has been estimated at $80,000,000. The rebels regard it as one of their main sinews of war, and no principle of equity or just policy required, when the National occupation was itself precarious, that it should be spared from capture, and allowed to remain in case of the withdrawal of the Union troops an element of strength to the rebellion."

It was this peculiar property, this element of power and strength, this support of the Confederate treasury at home and abroad, that the military commanders sought to withdraw from the control of the enemy and subject to the control of the government. It was a means of coercing the hostile power; an operation of war under the guise of trade. It will not be denied that General Banks could organize military expeditions to capture this property, so important to the enemy and so important to us also. Could he not accomplish the same object by calling to his aid traders, who, under the stimulus of gain, would penetrate the hostile territory and bring out this support of the hostile existence? General Banks and Admiral Farragut were not thinking of commercial intercourse, but of crippling the enemy, and depriving him of his chief resource and main reliance. They were acting and prosecuting the war in one of the modes which, in the exercise of the large discretion incident to their position, they were entitled to select. They did not authorize general trade, general commercial intercourse irrespective of time or place or commodity (that to which neutrals might have objected); but what may be called a belligerent trade in its objects and purposes, limited to a particular article, and that everywhere within the hostile territory liable to capture.

Mr. Ashton, Assistant Attorney-General, and Mr. Cushing, contra.

Mr. Justice SWAYNE delivered the opinion of the court.

The vessel and cargo were captured and condemned as

prize of war. The appellants seek to reverse the decree upon the ground that both were protected by a license. The validity and effect of the alleged license is the main question to be considered. Before proceeding to examine that subject, there are several other features of the case which invite remark and must not be passed by in silence.

The vessel was fitted out and loaded at Mobile, which was then enemy territory, and in a state of stringent blockade. The cargo consisted of two hundred and seventy-two bales of cotton, and seven barrels of turpentine. She left Mobile on the 8th of May, 1863, under the Confederate flag. She had no other. About 12 o'clock in the night of the 9th of May, and about four miles southeast from Fort Morgan, she was discovered, fired upon, stopped, seized, and sent to Key West, where the decree of condemnation was subsequently pronounced.

Netto was her captain, and Yocum the supercargo. There were on board, besides them, a crew of seven men and two passengers. Certain papers were found which passed into the hands of the captors, and to which it is proper to advert.

The ship's register set forth that it had been sworn by M. D. Eslava, that Yocum & Hohenstein, a firm in Mobile, under the name of J. Hohenstein & Co., were the sole owners of the vessel. The shipping articles engaged the crew to navigate the vessel from Mobile to Havana. The manifest sworn to by Netto, stated that the cargo was intended to be conveyed to that port. The Spanish consul certified that the goods named in the manifest, were on board and destined for Havana. The clearance, signed by the deputy collector, was for the same place. A letter from Oliver & Worne introduced Yocum to Brott, Davis & Shons, of New Orleans, and expressed the hope that lively business transactions between the two houses would follow. Another letter from the same firm to Pilcher, the President of the Bank of New Orleans, asked him to aid in Yocum's business, which it was said Yocum would explain to him. A memorandum, signed by Hohenstein & Co., stated that Yocum

had credit on their books for $150,000, and for $17,000, subject to a settlement between him and Hohenstein. The paper, relied upon as a license, was also found on board, and delivered over by Yocum to the captors. After the vessel was libelled, a claim was interposed by Netto and Yocum in behalf of Brott, Davis & Shons. It is under oath, and states that they believe the vessel and cargo are the property of that firm. Yocum states that he was put in charge of the cargo by one Worne, whom he believes to be a partner of Brott, Davis & Shons. They further say that the vessel was bound in good faith to New Orleans, there to deliver her cargo in pursuance of the license.

Brott and Davis gave their affidavit *in preparatorio*. They insist upon the license, and allege that it was their intention to cause the vessel and cargo to be taken to New Orleans. They aver that they are loyal citizens, and that no enemy of the United States had any interest in the vessel or cargo. The affidavit is very full as to the procuring and transmission of the alleged license, and as to the loading of the vessel at Mobile by their agents; but is wholly silent as to who are the owners, and does not allege the whole or any part of the ownership to be in themselves. Under the circumstances, this omission can hardly be deemed accidental. It has very much the appearance of the caution of a special plea. Netto and Yocum were also examined *in preparatorio*.

They repeat their belief as to the ownership, except that Netto states the turpentine to have belonged to himself and the crew. Netto also states, that after they had passed Fort Morgan, Yocum told him New Orleans was their destination, and that he would have obeyed Yocum's order to take the vessel there. Yocum testifies that he was only supercargo, that he was to receive $500 for his services, and that he had no interest in the property. He said further, that from what he had heard Worne say in Mobile, his understanding was, that the vessel and cargo belonged to Brott, Davis & Shons, and Oliver & Worne. His instructions were to proceed to the mouth of the Mississippi—thence to communicate with Brott, Davis & Shons, and to await orders from

them. Hubbel, one of the passengers, in his examination *in preparatorio*, says that the clearance was taken for Havana as a blind to enable the vessel to get away. Yocum told him at Mobile that she was going to New Orleans. As evidence of Yocum's intention to take her to the blockading fleet, he says, that when she started the wind was so low that she could not make more than two miles an hour, and that hence it was difficult to prevail on the pilot to take her out.

In regard to the important fact last mentioned the captain and supercargo are wholly silent.

In the light of this testimony, it is difficult to resist the conclusion that the vessel left Mobile, with alternative purposes; one, if possible to evade the blockading fleet and make Havana; the other, if intercepted and seized, to set up the license and insist upon the pretext, that she was proceeding, under its authority, in good faith to New Orleans. As we shall not place our judgment upon this ground, it is unnecessary further to pursue the subject.

The license relied upon is as follows:

CUSTOM HOUSE, NEW ORLEANS,
COLLECTOR'S OFFICE, February 16th, 1863.

The United States military and other authorities at New Orleans permit cotton to be received here from beyond the United States military lines, and such cotton is exempt from seizure or confiscation. An order is in my hands from Major-General Banks approving and directing this policy. The only condition imposed is that cotton or other produce must not be bought with specie.

All cotton or other produce brought hither from the Confederate lines by Brott, Davis & Shons will not be interfered with in any manner, and they can ship it direct to any foreign or domestic port.

GEORGE S. DENISON,
Special Agent of the Treas. Dep't and Acting Collector of Customs.

Approved. D. G. FARRAGUT,
Rear Admiral.

The effect of this paper depends upon the authority under

which it was issued. The fifth section of the act of July 13th, 1861, authorized the President to proclaim any State or part of a State in a condition of insurrection, and it declared, that thereupon all commercial intercourse between that territory and the citizens of the rest of the United States, should cease and be unlawful, so long as the condition of hostility should continue, and that all goods and merchandise coming from such territory, into other parts of the United States, and all proceeding to such territory by land or water, and the vessel or vehicle conveying them, or conveying persons to or from such territory, should be forfeited to the United States: "*Provided, however*, That the President may, in his discretion, license and permit commercial intercourse with any such part of said State or section, the inhabitants of which are so declared in a state of insurrection, in such articles, and for such time, and by such persons, as he, in his discretion, may think most conducive to the public interest; and such intercourse, so far as by him licensed, shall be conducted and carried on only in pursuance of rules and regulations prescribed by the Secretary of the Treasury."

There is no other statutory provision bearing upon the subject, material to be considered.

On the 16th day of August, 1861, the President issued his proclamation declaring the inhabitants of the rebel States, including Alabama, to be in a state of insurrection.

On the 28th of the same month the Secretary of the Treasury, pursuant to the provisions of the act referred to, issued a series of regulations upon the subject of commercial intercourse with those States.

These regulations continued in force until the 31st of March, 1863, when a new series were issued by the same authority. The former were in force when the alleged license bears date; the latter when the vessel and cargo left Mobile and when they were captured. It is unnecessary to analyze them. It is sufficient to remark, that they contain nothing which affords the slightest pretext for issuing such a paper. It is in conflict with rules and requirements con-

tained in both of them. It finds no warrant in the statute. The statute prescribes that the President shall license the trade. The only function of the Secretary was to establish the rules by which it should be regulated, when thus permitted. The order of General Banks is not produced. If it were as comprehensive as the special agent assumed it to be, it covered shipments to New Orleans from Wilmington, Charleston, and all other points in the rebel States. It embraced merchandise, coming alike from places within, and places beyond his military lines. With respect to the latter it was clearly void. The President only could grant such a license. Mobile was then in possession of the enemy. The vessel and cargo bore the stamp of the enemy property. The paper relied upon was a nullity, and gave them no protection. They were as much liable to capture and condemnation as any other vessel or cargo, leaving a blockaded port and coming within reach of a blockading vessel.

The decree below was rightly rendered, and it is

AFFIRMED.

Mr. Justice GRIER:

I do not concur in this judgment. The vessel went out of Mobile by permission of the commander of the blockade there. To condemn such property would be a violation of good faith. No English court has ever condemned under such circumstances.

UNITED STATES v. MACDONALD.

A collector of customs is entitled to retain, under the fifth section of the act of March 3d, 1841 (5 Stat. at Large, 432), a sum not exceeding $2000 per annum from his receipts, as storage for the custody and safe-keeping of imported merchandise entered for warehousing and stored in bonded warehouses.

THE fifth section of the act of March 3d, 1841, enacts that in addition to the account required to be rendered by every

collector, every collector shall render a quarter-yearly account to the Secretary of the Treasury, of all sums of money received or collected—

"For *rent and storage of goods, wares, or merchandise which may be stored in the public storehouses, and for which a rent is paid beyond the rents paid by the collector;* and if from such accounting it shall appear that the money so received in any one year by any collector, on account and for *rents and storage* as aforesaid, shall in the aggregate exceed the sum of two thousand dollars, such excess shall be paid into the Treasury of the United States, as part and parcel of the public money; and no such collector shall, on any pretence whatever, hereafter receive, hold, or retain for himself, in the aggregate, more than six thousand dollars per year, including all commissions for duties, and all *fees for storage*, or fees or emoluments, or any other commissions or salaries which are now allowed and limited by law."

With this act in force, the United States brought suit in the Circuit Court for the district of Maine, on his official bond, against Macdonald, collector of customs at Portland, and his sureties, for the recovery of $6281 reported to be due the United States on the adjustment of his accounts, and which he had refused to pay into the treasury. The rejoinder alleged that Macdonald received, accounted for quarter-yearly, and retained this sum, "by virtue of his office, *for storage of merchandise* in bonded warehouses from January 20th, 1858, to April 18th, 1861, inclusive, as he lawfully might do," not more than two thousand dollars in any one year. The United States demurred, and issue was joined.

The question raised by the pleadings was touching the true construction and effect of the above-quoted fifth section of the act of March 3d, 1841; that is to say, whether, under it, a collector of customs might retain, as compensation or emolument, any portion of the moneys which had accrued from the storing or custody of imported merchandise in private bonded warehouses?

The court below considered the rejoinder good, and gave

judgment for the defendants. The case was now here on error to that judgment: the question here being the same as it was below, the true meaning of the section.

Mr. Stanbery, A. G., and Mr. Ashton, Assistant A. G., for the United States, plaintiff in error; Mr. W. P. Fessenden for the collector, contra.

Mr. Justice CLIFFORD delivered the opinion of the court.

Principal question presented for decision in this case is, whether a collector of the customs is entitled to retain as compensation a sum not exceeding two thousand dollars per annum from his receipts as storage for the custody and safe-keeping of imported merchandise, entered for warehousing, under the acts of Congress upon that subject, and stored in bonded warehouses. First-named defendant was the collector of customs for the district of Portland and Falmouth, and the other defendants were his sureties. He was appointed collector prior to the twentieth day of January, 1858, and between that day and the eighteenth day of April, 1861, he received as storage for the custody and safe-keeping of imported merchandise, subject to duty and stored in bonded warehouses, the sum of six thousand two hundred and eighty-one dollars, as appears by the pleadings. Due returns were made by the collector, but he refused to pay over the moneys so received, and the plaintiffs sued him and his sureties, declaring on his official bond.

Defendants craved oyer of the bond, and pleaded performance. Replication of the plaintiffs alleged that the statement of the collector's accounts, as adjusted and settled at the Treasury Department, showed that he had received that amount of the moneys of the plaintiffs, and that he had neglected and refused to pay the same into the treasury. Rejoinder of the defendants alleged that the sum specified in the replication of the plaintiffs accrued and was received, accounted for quarter-yearly, and retained by the collector in virtue of his office for storage of merchandise in bonded

warehouses, from the twentieth day of January, 1858, to the sixteenth day of April, 1861, inclusive, but not more than two thousand dollars in any one year, as he lawfully might do. Plaintiffs demurred, and the defendants joined in demurrer. Parties were heard, and the Circuit Court overruled the demurrer and rendered judgment for the defendants, and the plaintiffs sued out this writ of error.

I. 1. All controversy as to the material facts of the case, so far as they are set forth and well pleaded in the rejoinder of the defendants, is closed. Applying that well-known rule to the case, it follows that the demurrer admits that the whole amount retained by the collector, as alleged in the replication, accrued and was received by that officer in virtue of his office as storage of imported merchandise in bonded warehouses, and that he never received from that source during the period embraced in this controversy more than two thousand dollars in any one year. Views of the defendants are that the collector had a right, under the fifth section of the act of the third of March, 1841, as construed by this court, to retain to his own use all sums received from storage, not exceeding two thousand dollars in any one year, as compensation for his services.* By the fifth section of that act collectors are directed to render a quarter-yearly account, *in addition to the account previously required by law*, and to include in it all sums collected for fines, penalties, and forfeitures, or from seizures of merchandise, or on account of suits for frauds against the revenue, or for rent and storage in the public storehouses, for which a rent is paid beyond the rents paid by the collector.

2. Construction of that section, as given by this court, was that collectors must include all sums received for rent and storage in the public stores beyond the rents which they paid, in their quarterly accounts, and if it appeared from such accounting that the aggregate sums so received in any one year exceeded two thousand dollars, they must pay the excess into the treasury, as part and parcel of the public

* 5 Stat. at Large, 432.

money. Such excess, under that law as construed, belongs to the treasury, but if the sums received from that source in any one year did not exceed two thousand dollars, the court held that collectors might retain the whole amount to their own use, as additional compensation for their services.*

3. Sources of their compensation prior to that time were certain fees or emoluments, commissions and allowances, to which was added a prescribed sum, called salary, which was much less than the compensation to which such officers were at all times entitled. They were also entitled to certain proportions of fines, penalties, and forfeitures, but were never before obliged to embrace such receipts in their quarterly accounts.

Statement of the court in that case was, and it was undoubtedly correct, that the bill, as originally reported, not only required that the sums so received should be included in the quarterly accounts of collectors; but if the aggregate from all those sources, including fines, penalties, and forfeitures, exceeded two thousand dollars in any one year, collectors were required to pay the excess into the treasury.

Radical amendments, however, were made in the bill during its passage, essentially changing its character in that respect. Fines, penalties, and forfeitures, as it passed into a law, are not required to be included in the aggregate of the accounts from which to deduct the two thousand dollars, in order to ascertain the excess to be paid into the treasury; and, inasmuch as fees and emoluments were previously required to be included in the quarterly accounts of collectors as the principal source of their compensation, under such previous laws, the court held, and well held, that there was nothing left for that part of the section which directed the payment of the excess into the treasury to operate upon, except the sums received from rent and storage. Conclusion of the court, therefore, was, and it was a unanimous conclusion, that collectors might, if the office earned so much, retain to their own use, as an addition to the compensation

* United States *v.* Walker, 22 Howard, 299.

allowed to them by previous laws, the sum of two thousand dollars per annum for rent and storage, but that all excess beyond that sum must be paid into the treasury as public money.

II. 1. None of these principles are controverted by the plaintiffs, nor do they contend that the fifth section of that act has been repealed. Storehouses used for the storing of imported merchandise were such, at that date, as were owned by the United States, and such as were leased by the collectors under the direction of the Treasury Department. Imported merchandise might, in certain cases, be stored for a limited time without the payment of duties, unless sooner withdrawn for consumption. Where the entry of merchandise was incomplete, the fifty-second section of the act of the 28th of February, 1799, required that the importation should be conveyed to some warehouse or storehouse to be designated by the collector, there to remain, with due and reasonable care, at the expense and risk of the owner or consignee, under the care of some proper officer, until the invoice was exhibited and the value was ascertained by appraisement.

2. Goods damaged during the voyage were also required to be deposited in some warehouse or storehouse to be designated by the collector, in the same manner and subject to the same conditions as where the entry of the goods was incomplete, to be kept until the extent of the damage could be ascertained in the same way.*

3. Persons importing teas also might pay or secure the duties before a permit was granted for landing the same, on the same terms as prescribed in respect to other imported merchandise, or they might, at their option, give bond, without security, to the collector of the district for the payment of the duties in two years from the date of such bond; but the teas so imported, in that event, are required to be deposited, at the expense and risk of the importer, in one or more storehouses to be agreed upon between the importer and the revenue officer of the port.†

* 1 Stat at Large, § 52, p. 665.

† Id. § 62, p. 673.

4. Wines and distilled spirits might also, under the act of the 20th of April, 1818, be warehoused "in such public or other storehouses" as might be agreed upon between the importer and surveyor, or other public officer of the revenue where the wines or other distilled spirits were landed.*

Whether deposited in the public or "other storehouses," under either of those acts the goods imported were to be kept under the joint locks of the importer and inspector of the revenue, and no delivery of the same could be made unless the duties were first paid or secured, nor without a permit, in writing, under the hand of the collector and naval officer of the port.†

Custody and control were the same, whether merchandise was deposited in the public or other storehouse; and, whether in the one or the other, the expenses of safe-keeping were to be paid by the importer, owner, or consignee. Importer and the proper revenue officer might agree upon a store as the place of deposit other than those few warehouses then owned by the United States; but when the locks of the inspector and of the importer were affixed to the doors of the same, as required by law, and the merchandise as imported was deposited therein, under the control of the collector, it became a public storehouse for the purpose of securing the importation until the duties should be paid or secured, and the same should be withdrawn by authority of law.

5. Provision was also made in the sixth section of the act of the 14th of July, 1832, that imported wool and the manufactures of wool might, at the option of the importer, be placed in the public stores, under bond, at the risk of the importer, subject to *the payment of the customary storage* and charges, and to the payment of interest at the rate of six per cent. per annum while so stored.‡

Effect of that law was to diminish the compensation of collectors, as it made large additions to the free list and to increase the demand for storehouses for public use, as it authorized the warehousing of a large class of importations never before entitled to those privileges.

* 3 Stat. at Large, 469. † 1 Id. 674; 3 Id. 469. ‡ 4 Id. 591

Resort was had by Congress to additional compensation acts, passed annually for the period of eight years, to remedy the first difficulty, and the second was overcome without legislation, by storing the merchandise, as imported, at the expense and risk of the importer, in storehouses designated by the collector, or in such as were agreed upon between the importer and the revenue officer, or in stores owned by private persons, and leased for that purpose by the collector for limited periods. Commerce and trade revived, and the practice of leasing such storehouses at certain ports became general, and "the customary storage" collected from the importers at such offices greatly exceeded the amount paid as rent to the owner of the stores; and, as there was no law of Congress requiring collectors to account for the excess, it was retained to their own use, and at some ports swelled their receipts beyond the standard of a reasonable compensation.

III. 1. Such was the state of affairs in this behalf when Congress passed the act of the 3d of March, 1841, to which reference has already been made. Express provision of that act was, that no collector shall, on any pretence whatsoever, hereafter receive, hold, or retain for himself, in the aggregate, more than six thousand dollars per year, including all commissions for duties and all fees for storage, or fees or emoluments, or any other commissions or salaries which are allowed and limited by law. Collectors were required by the second section of the act of the 2d of March, 1799, called the Compensation Act, to keep accurate accounts of all fees and official emoluments by them received, and to transmit the same to the Comptroller of the Treasury; but they were allowed to retain to their own use the whole amount of emoluments derived from those sources.*

2. Maximum rate of compensation was first prescribed by the act of the 30th of April, 1802, and the provision was, that whenever the annual emoluments of any collector, after deducting the expenditures incident to the office, shall

* 1 Stat. at Large, 708.

amount to more than five thousand dollars, he shall account for the surplus, and pay the same into the treasury.*

Districts for the collection of the customs were, by the act of the 7th of May, 1822, divided into two classes, usually denominated the enumerated and the non-enumerated ports, and the maximum rate of compensation to collectors was diminished. Emoluments of collectors for the seven enumerated ports might reach, under the provisions of that act, the sum of four thousand dollars, but could not exceed that amount under any circumstances.

Annual compensation allowed to the collectors of the non-enumerated ports, of which Portland was one, might amount to three thousand dollars; and the provision in respect to both classes was, that the excess, after deducting the expenses incident to the office, should be paid into the treasury as public money.†

3. The contest in Walker's case was, whether or not he was entitled, as the collector of a non-enumerated port, to an annual compensation of six thousand dollars. He claimed that he was, because, as he insisted, the maximum rate of compensation to the collectors of those ports, as prescribed by the act of the 7th of May, 1822, was repealed, and, consequently, that he was entitled to four thousand dollars under the ninth section of that act, and two thousand dollars from the receipts of his office for storage, as allowed by the fifth section of the act under consideration. But this court held, that the maximum rate prescribed in the prior law allowed to the collectors of the non-enumerated ports was not repealed, but was in full force as to all the emoluments of collectors prescribed or recognized in that act.

Unanimous conclusion of the court, therefore, was that collectors of the non-enumerated ports might receive, as the annual compensation for their services, the sum of three thousand dollars, from the sources of emoluments prescribed and recognized in that act; and, in addition thereto, might retain whatever sums came to their hands within the year from

* 2 Stat. at Large, 172.

† 3 Id. 693.

rent and storage, provided the storage did not exceed two thousand dollars. Plaintiffs concede that such was the decision of this court in that case, and they do not deny that it was correct; but they contend that it does not control the present case, because, as they insist, the storage received in that case was storage in stores leased to the government, for which rents were paid beyond the rent paid by the collector.

4. Amount retained by the collector in this case accrued and was received for storage of imported merchandise in bonded warehouses; and the plaintiffs contend that bonded warehouses are not public storehouses within the meaning of that act. They are mistaken, however, in supposing that the amount retained by the collector in that case was wholly received for storage of goods stored in the public storehouses, for which rents were received beyond the rent paid by the collector. On the contrary, the bond of the collector in that suit was dated the seventh day of September, 1850, more than four years after the act of the sixth of August, 1846, establishing the warehouse system, was passed.

Date of the writ in that case was the twenty-first day of November, 1856, more than seven years after the treasury regulations of the seventeenth of February, 1849, making provision for bonded warehouses, were adopted and promulgated.

IV. 1. Importations of every kind might be entered for warehousing under the first section of the act establishing the warehouse system, and when so entered the requirement was that the goods "shall be taken possession of by the collector," and be deposited in "the public stores or other stores," to be agreed on by the collector and the importer, owner, or consignee. Public stores, as well as the "other stores," are required to be under the joint locks of the importer and the proper revenue officer, as provided in the act respecting the deposit of wines and distilled spirits, and the "other stores," as well as the public stores, so called, are expressly recognized *in the same section* as public storehouses, because it is there provided that if the goods so de-

posited shall remain "IN PUBLIC STORE *beyond one year*, without payment of the duties and charges thereon, then the goods" shall be appraised and sold by the collector at public auction.*

Such goods are not only required to go into the possession of the collector, and be thus deposited under his control, but they are also required to be kept by him in the place of deposit, at the charge and risk of the importer, owner, or consignee. Every provision of the section assumes that the goods, whether deposited in the public stores or the other stores therein mentioned, are in the possession and under the control of the collector, and they cannot be withdrawn for consumption without paying the duties, nor for transportation or exportation without paying the appropriate expenses.

2. Authority to make rules and regulations was conferred upon the Secretary of the Treasury by the fifth section of that act. Pursuant to that authority, he promulgated the regulations of the seventeenth of February, 1849, and from that time it was the policy of the department to discontinue leased stores as far as possible, and substitute bonded warehouses in their place. Bonded warehouses, under those regulations, were divided into three classes:

First. Public stores and stores leased by the department prior to the date of the regulations.

Second. Stores in the possession and sole occupancy of the importer, and placed under a customs lock and that of the importer, *to be used only* for the purpose of storing his own importations. Such importers furnished their own stores, and, of course, paid no rent, but they were required, as importers, to pay a sum equivalent to the salary of an inspector, or *half-storage* to the collector.

Third. Stores in the occupation of persons desirous of engaging in the business of storing dutiable merchandise. Importers storing goods in such stores paid rent to the owner, but they also were required to pay a sum equivalent to the

* 9 Stat. at Large, 53.

salary of an inspector, or half-storage to the collector, as in the other class of stores.

Both of those classes are called private bonded warehouses, because they were the property of their owners, and were not formally leased to the United States; but no store could be constituted such a warehouse unless it was a first-class fire-proof store, according to the classification of insurance offices, and was first proved to be such to the satisfaction of the Secretary of the Treasury, and was by him *authorized to be used* for the storage of dutiable merchandise. Until so selected by the Secretary of the Treasury, and the bond given by the owner as required, no store of a private owner could be used for the storing of dutiable importations; and when so selected and bonded, and placed under the customs locks, the store was under the control of the collector, and was as much a public storehouse as one owned or formally leased by the United States.*

3. Same regulations provide that all moneys received by collectors from owners or occupants of private bonded stores in payment *for half-storage*, or for the attendance of an inspector at the premises, will be accounted for *as receipts for storage* in their accounts with the department. Evidence is not wanting to show that the department has constantly recognized the subsisting operation of the provision under consideration in relation to storage. Throughout the period since its passage the department has required collectors to include the sums received from storage in their quarterly accounts, and if the provision is in force for that purpose, it is difficult to see why it is not also in force as authorizing the allowance to collectors.

Express recognition of its subsisting operation is also found in one of the adjudications of the department, in which it was decided that where "goods are stored under bond in a private store the importer shall either make monthly payment of a sum equivalent to the pay of an inspector placed in charge of the same, or *one-half the amount* which would

* Clark *v.* Peaslee, Massachusetts District, October Term, 1862 Treas. Cir. and Dec. by Ogden, p. 118.

accrue as storage on the goods so stored if placed in public store."*

Implied recognition of the rule, as here laid down, is found in the daily transactions of the department with the collectors of the seven enumerated ports. They are not only required to return all sums received as storage, but they are allowed six thousand dollars per annum as compensation for their services, which is exactly two thousand dollars beyond what they are entitled to receive, unless the latter sum can properly be allowed from the amount which annually accrues, and is collected and returned by them as storage.

4. Direct decision of this court in the case of Walker was that they were not entitled to but four thousand dollars under previous laws, and there has been no legislation upon the subject since that time, except that the fortieth section of the act of the eighteenth of July, 1866, provided that all moneys received by collectors for the custody of goods, wares, and merchandise in bonded warehouses, shall be accounted for as storage, under the provisions of the act which is the foundation of the collector's claim in this case.

Sums received for storage not exceeding two thousand dollars in any one year, if duly included in their quarterly accounts, are as much due to the collectors of the non-enumerated ports as to the incumbents of the larger offices, and their right to the same rests on the same foundation. Purpose of the act establishing the warehouse system, and of the regulations which followed that enactment, was to discontinue leased stores, and to substitute bonded warehouses in their place, and the leases of such stores were accordingly required to be cancelled, by the subsequent act extending the system, at the shortest period of their termination, and the making of new leases was expressly forbidden at ports where there were private bonded warehouses.†

5. Necessity has always existed, since the Treasury Department was established, for more storehouses for the deposit and safe-keeping of imported merchandise than the

* Cir. No. 4, 1857.

† 10 Stat. at Large, 272.

government owned, and it cannot be doubted that all such as have been placed under the control of the collectors, and put under the customs locks, and used for that purpose in conformity to law and the regulations of the Treasury Department, were, during the period they were so controlled, used, and occupied, public storehouses within the meaning of the provision requiring collectors to include receipts for storage in their quarterly accounts, and allowing them to retain out of the same a sum not exceeding two thousand dollars in any one year.

JUDGMENT AFFIRMED.

THE MILWAUKEE RAILROAD CO. *v.* SOUTTER AND KNAPP.

The act of confirming or setting aside a sale made by a commissioner in chancery, involving, as it often does, the exercise of a very delicate judgment and discretion, cannot be regarded as a mere control of the ministerial duties of an officer in the execution of final process.

Hence, under the case of *Bronson* v. *La Crosse Railroad Co.* (1 Wallace, 405), here approved, such an act belonged, under the Congressional statutes of July 15th, 1862, and 3d March, 1863 (12 Stat. at Large, 576 and 807), to the Circuit Court of Wisconsin, and not to the District Court, even though the sale was made under a decree of foreclosure in the last-named court, rendered before the act of July 15th, 1862, and when, therefore, the District Court was possessed of full Circuit-Court powers.

APPEAL from the Circuit Court of the United States for the district of Wisconsin.

This was an appeal by the Milwaukee and Minnesota Railroad Company from an order of court confirming a sale made by the marshal under a decree of foreclosure of a mortgage on the western division of the La Crosse and Milwaukee Railroad.

The facts out of which the appeal grew were these: The original decree of foreclosure was rendered by the District Court of Wisconsin, then possessing full Circuit-Court powers, on the 13th of January, 1862; and on the 2d of October, 1862, the marshal made a sale under that decree. In the meantime, to wit, on the 15th July, 1862, Congress, by an

act of that date, had established a Circuit Court for the district of Wisconsin, whereby all causes then pending in the District Court, which might have been brought, or which could have been originally cognizable in a Circuit Court, were transferred to the Circuit Court; and the District Court was deprived of all Circuit-Court powers. The marshal therefore returned the report of his sale into the Circuit Court. This was on the 6th day of October, 1862.

After several orders partially confirming the sale, the Circuit Court, January 17th, 1863, set it aside, and ordered the marshal to sell again according to the original decree. On the 25th of April, thereafter, the marshal made another sale.

Congress, however, on the 3d March, 1863, had passed a statute authorizing the District Courts where they had rendered final judgments or decrees, prior to the act of July 15th, 1862, in cases which might have been brought, and could have been originally cognizable in a Circuit Court, "to issue writs of execution or other final process, or to use such other powers and proceedings as might be in accordance with law, to enforce the judgments and decrees aforesaid." Acting under this law, the marshal reported this sale to the District Court, and that court made an order of confirmation. The appellants here, applied to the Circuit Court for a rule on the marshal to make a report of his sale to that court, which application was refused.

They now appealed from these orders of the Circuit and District Courts, and sought their reversal, on the ground that the District Court had no power to act in the matter of the confirmation of the sale, and that it properly belonged to the Circuit Court.

Messrs. Cram and Cushing, for the appellants; Messrs. Cary and Carlisle, contra.

Mr. Justice MILLER delivered the opinion of the court.

The decision of this question must depend upon the construction of the act of March 3d, 1863;* for without that act

* The language of which is given above, in the statement of the case.—Rep.

it is very clear that the jurisdiction belonged to the Circuit Court. We have, on a former occasion, given a construction of that act from which we see no reason to depart. In the case, *Bronson* v. *La Crosse Railroad Co.*,* we held that the powers conferred by this act on the District Courts, were only such as were necessary to control the ministerial duties of officers in the execution of final powers; and that if other powers became necessary, recourse must be had to the Circuit Court.

The act of confirming or setting aside a sale made by a commissioner in chancery, often involves the exercise of judgment and discretion as delicate as that called for by any function which belongs to the court. In the case before us, over forty exceptions were taken to the marshal's report of the sale, by three different parties, who resisted its confirmation; and the court delivered an elaborate opinion on the matter involved in these exceptions, when they were under consideration on the first sale. This strongly illustrates the fact, that judicial judgment may be called into exercise by the action of the court.

In the case of *Blossom* v. *The Railroad Co.*,† we held that the confirmation or rejection of a sale under a chancery decree, required the exercise of such judicial discretion; and therefore an appeal could be taken to this court from such an order.

These principles must control the case before us. They lead to the conclusion that the action of the District Court complained of by appellants was without authority, and must be set aside; and that this case must be remanded to the Circuit Court, with directions to enter a rule against the marshal who made the sale, to report it to that court for further proceedings, not inconsistent with this opinion.

ORDER ACCORDINGLY.

NOTE.

At the same time with this appeal was heard an appeal, on the same record, by the opposite party, Soutter & Knapp,

* 1 Wallace, 405.

† 1 Wallace, 655.

who were complainants in the court below. *They* had appealed from the original decree of foreclosure, on the ground that it did not include certain property which they were entitled to have sold under the mortgage. Upon the questions involved in that appeal, the members of the court who heard the argument—which was by the same counsel as the appeal by the other side, their positions only as respected appellant and appellee being reversed—were equally divided in opinion, and the decree and orders complained of were therefore affirmed.

THOMPSON *v.* RIGGS.

1. The eighth section of the act of Congress of 1863 (12 Stat. at Large, 764) to reorganize the courts of the District of Columbia, and which says "that if, upon the trial of the cause, an exception be taken, the bill containing it need not be sealed or signed," does not dispense with a regular bill of exceptions in the way usual in Circuit Courts of the United States when the rulings of the court, in admitting or rejecting evidence, or in giving or refusing instructions, are meant to be brought from the Supreme Court of the District to *this* court for review. The provision has reference to carrying such rulings from the special to the general term of the Supreme Court of the District itself.—*Pomeroy's Lessee* v. *Bank of Indiana* (1 Wallace, 602), approved.
2. A customer of certain bankers at Washington, D. C., in times when, specie payments having been lately suspended, coin was acquiring one value and currency (paper money) another and less, deposited with them both coin and paper money; the different deposits being entered in his pass-book, the one as "coin" the other as "currency," &c. Debts being at this time payable by law only in coin, the bankers requested their customer to make his full balance coin, which he did. Congress passed, about eight months afterwards, an act making certain treasury notes lawful money for the payment of debts. The depositor went on depositing "coin," and "treasury notes" then regarded as currency, and both were entered accordingly. He afterwards drew for "coin," for a part of his deposit, exceeding the coin deposited *after* the legal tender act, and his check was paid in coin. He afterwards drew for "coin,"—the bulk of his coin balance deposited *before* the legal tender act. Coin was refused and tender made of the notes declared by Congress a legal tender. On suit brought to recover the market value of the coin drawn for—the bank teller having testified among other things that "after the suspension, and particularly after the act making treasury notes a legal tender, his employers uniformly made with customers depositing with them a difference, in receiving and paying their

deposits, between coin or specie and paper money, and in all cases when the deposit was in coin they paid the checks of their customers in coin when they called for coin, otherwise they paid currency, treasury or bank notes"—the plaintiff offered evidence to show "that the usage and mode of dealing between the said parties as set out in the testimony of the teller was uniformly used and practised by all the banks and bankers of the District of Columbia with their customers"—

Held, that the evidence was rightly excluded.

ERROR to the Supreme Court of the District of Columbia.

Riggs & Co. were bankers in the District of Columbia: Thompson was a business man there, keeping a bank account with them, depositing specie, treasury notes, bank notes, bills for collection, in the ordinary way of bank customers. Prior to April, 1861, no distinction apparently had been made in the mode of entering, in his pass-book, credits of coin and credits of current bank notes, then payable throughout the country in coin, on demand. All kinds of money deposited had been entered in the pass-books alike. In April, 1861, the banks generally suspended specie payments, and a difference between the value of coin and of bank notes, or "current funds," as these were called, began to show itself, becoming by degrees, for some time, greater. Riggs & Co., at that date, began to make a difference in receiving and paying deposits, paying in coin when the deposit was made in coin, and in currency when made in currency. On the 18th June, 1861, Thompson had made deposits—

Coin, ...	$2,920 09
Currency, ...	2,463 50
	$5,383 59

On that day Riggs & Co. required him to make his full balance specie, which was done by his drawing a check, payable in currency, and depositing the check of another customer of the bank, payable in coin, for a like sum, and which was received and credited by the bank as specie. On the 3d of September, 1861, Thompson drew another check on the bank for $1000, payable in currency, and at the same time deposited a check, drawn by the same customer, in like

manner, payable in specie, for $1000, which was credited as cash.

Afterwards, in like manner, Thompson, from time to time, deposited with Riggs & Co. other checks, drawn on them by the same customer, payable in specie, some of which were credited as coin, and others as cash, to an amount exceeding $1600.

An extract from the bank book shows the exact form of entries between June 18, 1861, and the 25th of February, 1862.

Cr.			Dr.		
1861.			1861.		
June 18.	To bal. ($2,463\frac{50}{100}$ *cur.*), . . .	$5,383 59	June 22	By check, No. 1213, . . .	$1,463 50
June 24.	Coin, . . .	1,463 50	July 1.	By prot. Stevens,	1 75
July 5.	Cash, . . .	88 75	Sept. 3.	Check, No. 1214,	1,000 00
Aug. 3.	Do., ...	105 00		Balance, . .	5,761 73
Aug. 17.	Do., ...	80 54			$8,226 98
Aug. 31.	Do., ...	105 60			
Sept. 3.	Do., ...	1,000 00			
		$8,226 98			
1861.					
Sept. 3.	To balance, .	$5,761 73			
Sept. 14.	To cash, . .	127 71			
Sept. 5.	To King, . .	50 00			
Sept. 21.	To cash, . .	22 00			
Oct. 5.	Do., ...	153 23			
Oct. 19.	Do., ...	483 20			
Oct. 5.	To King, . .	50 00			
Nov. 23.	To cash, . .	92 10			
Dec. 7.	Do., ...	136 34			
Dec. 21.	Do., ...	140 00			
Jan. 4.	To *treasury notes*,	119 41			
Jan. 11.	To coin, . . .	74 72			
Jan. 25.	Do., ...	120 36			
Feb. 8.	Do., ...	127 11			
Feb. 20.	To Gideon. .	197 05			
		$7,724 96			

On the 25th February, 1862, above mentioned, Congress passed an act authorizing the issue of notes of the United States, which notes, the act declared, should be "*lawful*

money and a legal tender in payment of all debts, public and private," except duties, and interest on the national debt.

The entries of credits in the pass-book, after the said 25th, were thus:

1862.		
Feb. 25.	To balance, ...	$7,724 96
M'ch 1.	To T. notes, ...	158 51
M'ch 8.	Do., ...	41 00
M'ch 15.	To coin, ...	71 94
M'ch 22.	To coin, ...	65 34

On the 8th May, 1863, Thompson drew for $750 coin; more than the amount deposited *after* the passage of the legal tender law. This was paid in coin.

On the 23d of February, 1864, he drew for $6600 "coin." Riggs & Co. made a tender of notes created by the act of Congress. These were declined, and assumpsit brought in the Supreme Court of the District of Columbia to recover a sum of money equal to the just commercial value of $6600 in gold coin; a value, on the day of the draft, of $157 for every $100 of the notes tendered; and, on the day of the suit, of about $200 for each such $100.

The declaration had four counts—

Two on an alleged custom of bankers in Washington, to receive gold and silver coin, bank and other notes on deposit, keeping separate entries of the character of the deposit, and to respond to the checks drawn upon them in kind; to pay coin for deposits in coin, and notes for deposits in notes, and that the plaintiffs so dealt with the defendants; and having a large balance to their credit, in February, 1864, in gold coin, they drew two checks for coin, payment of which was refused:

And two on a special agreement in substance the same as the usage above stated, arising in like manner.

Pleas: 1st. That the defendants did not promise as alleged. 2d. Tender of treasury notes made by Congress a legal tender in payment of debts.

On the trial, at special term, before Mr. Justice Wylie, the teller of Riggs & Co. testified thus:

Statement of the case.

"Prior to the suspension, the defendants paid all checks drawn upon them by their customers in gold or its equivalent, except when the deposit had been in Virginia or other depreciated paper, and then they paid in like kind. After the suspension, and particularly after the act of February 25, 1862, making treasury notes a legal tender, they uniformly made, with their customers depositing with them, a difference, in receiving and paying their deposits, between coin or specie and paper money, and in all cases when the deposit was in coin they paid the checks of their customers in coin when they called for coin; otherwise they paid currency, treasury or bank notes."

On cross-examination, he said:

"After the suspension the defendants would no longer receive currency, then depreciated, as the equivalent of specie, as before; it continued to be received and credited to the customer, as appears by the books, *and went into the general funds of the bank;* the same money was never returned to the customer, and was not received on special deposit; *the plaintiffs never had made any special deposit with the defendants;* the books of the bank and the pass-books were kept as before the suspension, except *that the different deposits were designated by being marked, respectively, coin and currency.*"

"Thereupon the plaintiff offered to give evidence to show that the usage and mode of dealing between the said parties, as set out in the testimony of the telier, was uniformly used and practised by all the banks and bankers of the District of Columbia with their customers."

The record proceeded:

"Which last offered evidence, being objected to by defendants, is excluded by the court, and to said ruling of the court the plaintiff excepts in law, and prays the court to sign and seal this their first bill of exceptions, which is done accordingly, this eleventh day of June, 1864.

[SEAL.] "ANDREW WYLIE"

The Supreme Court of the District in which the action was brought, was created in 1863 by "An act to reorganize

the Courts of the District of Columbia." It is composed of four judges. A single justice holds what is called a "special term" (the *Nisi Prius*). Three justices hold the "general term," or ancient *Court in Banc*.

Any party aggrieved by a judgment of the court at special term, may appeal to the court at general term. The eighth section of the statute enacts:

"That if, upon the trial of a cause an exception be taken, it may be reduced to writing at the time, or it may be entered on the minutes of the justice, and afterwards settled in such manner as may be provided by the rules of the court, and then stated in writing in a case or bill of exceptions with so much of the evidence as may be material to the questions to be raised; *but such case or bill of exceptions need not be sealed or signed.*"

And the eleventh section says:

"Any final judgment, &c., may be re-examined in the Supreme Court of the United States, in the same cases and in *like manner*, as is now provided by law, in reference to final judgments, &c., of the Circuit Court of the United States for the District of Columbia."

In this last-named court, bills of exceptions had been in the old and usual form; that is to say, had been signed and sealed by the judge.

On the trial, both parties resting, the plaintiffs prayed the court to give certain instructions set out in the record—as "that, by the Constitution of the United States, no tender of the payment of a debt is good unless made in gold and silver coin, &c.," which the court refused to give; giving other instructions. And the record proceeded, *no judge's seal or signature* appearing:

"And to the said ruling of the court, as well as to refusing to give as to giving said instructions, the plaintiff excepts in law, and said exception and the evidence aforesaid *are hereby made record.*"

Verdict having gone for the defendant, the case was taken to the court at general term, and judgment entered finally for the defendant.

The case being now here on error, two questions arose:

1st. Whether in order to bring exceptions to this court from the court just named, it was necessary that they should be signed and sealed by the judge; a question, upon whose resolution, as it might be the affirmative or negative, depended the fact whether the instructions asked and given at the special term as to the constitutionality of the legal tender law had, or had not, got here for review.

2d. Whether the court had rightly refused the offer of proof that the usage and mode of dealing between the parties in this cause was uniformly used and practised by all banks and bankers in the District with their customers.

The first question was suggested here by this court.

Messrs. Bradley and Wilson, for the plaintiff in error:

I. Of course, independently of the act of Congress which organized the Supreme Court of the District, exceptions, in order to take up a case on error, must be signed and sealed by the judge. But that act, in its eighth section, dispenses with this ancient, cumbrous, and really quite useless formality. It declares in terms that if made part of the record (as they were here) bills of exception "need not be sealed or signed."

II. The instructions asked for, and those given, involving the constitutionality of the legal tender act, so far as it makes paper lawful money, are therefore before this court for adjudication. [The counsel then argued in support of the unconstitutionality of this provision of the legal tender act.]

III. The evidence of the usage ought to have been received.

In the latter part of 1861 it had become evident, as every one knows, that coin was ceasing to be the circulating medium of commerce, and was daily appreciating in value. There was a daily increasing difference between gold and silver, which, although a circulating medium, had an *intrinsic* value, and *currency*, which was merely the representative of value. Apprehending that this difference would continue and increase, it was quite natural for all parties dealing as

bankers and customers, to say the one to the other: "In our dealings we will, for our mutual benefit, distinguish coin from bank and other bills—both shall be returned in kind—gold we will repay with gold, the other we will repay in currency." Indeed, such agreements were made essential to commercial safety by the events that were then taking place. They were modifications of the usual relations between banker and customer, and adjustments to the exigencies of the times.

The natural inference, then, from the entries found in this pass-book, in such a state of the currency—never made in any pass-book in ordinary times and when gold is not at a premium—was that such had been the understanding here. The entries of themselves imported as much. As the short entry of numbers in the money columns signified not only that so many dollars had been deposited, but that so many dollars also were to be returned, so the most natural import of the words "coin" and "treasury notes," written at the same time and by one pen with, and in immediate juxtaposition to those numbers, meant not only that that "coin" or "treasury notes" had been deposited, but also that coin and treasury notes were to be paid. Especially was this the most natural meaning when coin was worth double of treasury notes. The words, indeed, in connection with the known state of the currency, could not well have any other meaning than that which we asserted, unless we suppose that a man deposits $6600 expecting when he calls for it—the next hour perhaps—to receive just $3300.

Even the testimony of Riggs & Co.'s teller, it may be remarked—though this is not important, for the whole matter was for the jury—is direct to the effect of the entries; for he states that with all their other customers Riggs & Co. uniformly paid coin or currency, as one or the other was deposited, and, of course, entered in the pass-book. Nor is this affected by his statement on cross-examination—that "the *same* money was never returned to the customer." Of course it was not. But only "the like kind" of money. It was not set up at all by Thompson that he had made a "spe-

cial deposit" in the law sense of that word. His money was not marked with an ear-mark, nor in a box or bag. Such deposits are but a charge to bankers. But in times when gold is undergoing fluctuations of value they want gold not the less on deposit. Going into the general funds of the bank, it is theirs. They use it as they do other deposits, viz., to lend out; and when gold is worth twice as much as currency to lend out at double the rates of currency. In other words, they borrow it as they do deposits of currency, to pay back on draft; not, of course, the identical pieces of gold but only the same number of dollars in gold coin; in both cases the deposit being in the nature of what the civil law calls a *mutuum*. The teller states that "the books of the bank and the pass-books were kept as before the suspension —*except* that the different deposits were designated as being marked respectively coin and currency." In the exception consists the basis of the claim. He says also that deposits of "currency" went into the general funds of the bank. But he does not say that deposits of gold ever went into the general mass of the "currency," or into the general mass of anything except of the gold itself.

The offer was, therefore, not to contradict or vary a contract, or even to supply an omission in it; but the form of it being very curt and *technical*—in the style of bankers—to explain it by showing in what way it was acted on universally by bankers and their customers in the District; a way, as the teller showed, in which it had been uniformly acted on by these same bankers with their customers generally. This was allowable. The uniform custom of banks in the District of Columbia constitutes a part of the contracts between bankers and depositors.* The offer, in fact, was in support of that which, apparently, formed and was the contract.

Neither was the evidence offered to vary general law. That, of course, cannot be done. But there is no law that when gold money is worth twice as much as paper money,

* Wigglesworth *v.* Dallison, 1 Smith's Leading Cases, 6th Am ed. 837; Keaner *v.* Bank of Columbia, 9 Wheaton, 582.

a man depositing gold money and paper money in the same bank may not agree that when he asks for gold money back he shall have it, to the extent of his deposit; being bound also when he has deposited but paper to take paper back.

Messrs. Carlisle & W. S. Cox, contra, for the bankers, defendants in error:

I. The objection suggested from the Bench, as to the absence of any proper bill of exceptions to raise the principal question, the question of constitutionality of the legal-tender act, seems to us well taken. We are instructed, however, to waive any such objection if it be competent for us to do so. The point is not made upon our brief. The argument in support of it may be briefly stated thus:

Final judgments in the Supreme Court of the District are to be examined here, not only in the same cases, but "in the same *manner*" as formerly. The provision in the eighth section dispensing with seals and signature had reference to appeals from the special term to the general term.

II. Accordingly no question as to *instructions* can arise here. The case then stands thus—of an act of Congress making certain notes a legal tender, of a tender in them, and of a refusal; there being no allegation in the court below, so far as appears here, that the law authorizing a tender in notes was not constitutional and of course binding on all. However, we are ready to argue the constitutional question. [The counsel then argued at length accordingly.]

III. To resolve the remaining question—the admissibility of the supposed usage—it is only necessary distinctly to understand the true state of facts upon which it arose.

This suit is not brought to recover a balance of deposits made in coin *after* the passage of the legal-tender act. All such deposits were repaid, and largely overpaid, in coin, on the check of May 8th, 1863, for $750. The balance sued for is that which the passage of the act found in the banker's hands, and which, if it were, as the law contemplates, used in banking, could thereafter only be recovered by the banker for his debtors, in legal-tender notes. The plaintiff's theory

is, that he had only to allow that balance to remain to his credit and thereafter make his demand for gold when the premium should be highest; thus compelling the banker, *nolens volens*, to be his broker, and to secure for him all the advantages, with none of the risks, of speculation upon the national currency. The check for $6600 was drawn upwards of two years after the passage of the act; and might with like supposed results have been delayed till gold was at 300. As there was no evidence tending to show that any of this balance was deposited after the passage of the legal-tender act, it was impertinent to offer proof of the usage where such deposits were made and received as coin. If the act was to have any operation or vitality at all, it must needs apply to bankers' balances due at its passage. Plainly, it was binding on the banker as to debts due him growing out of the legitimate use of the sums which had been so deposited. To apply it to his receiving hand, and not to his paying hand, would be absurd. The offer was, to defeat the statute by proof of a supposed usage. This was inadmissible.

Reply.—That the coin deposits were made before the tender act passed is unimportant. They were not made till after the distinction in value between coin and paper was established: ten months before the act. All loans made by Riggs & Co. in coin after April, 1861, were, in fact, paid in coin.

Mr. Justice CLIFFORD delivered the opinion of the court.

Substance of the declaration was that the defendants were bankers, exercising the trade and business of banking, and that the plaintiffs were their customers, and as such were in the habit of making their deposits at their bank, and that the defendants, as such bankers, were accustomed to receive as deposits gold and silver coin, and other money currency, of their customers, to be paid and returned in kind, agreeably to the custom of their bank and all other banks in the city of Washington; and that the plaintiffs, on the twenty-eighth day of February, 1864, having a balance due them at

the bank of the defendants, of five thousand seven hundred and sixty-one dollars, as deposits previously made there in gold and silver coin, demanded payment and return of the same, and that the defendants then and there refused to make such payment and return as they had promised to do.

Defendants pleaded the general issue, and that they, at a certain time prior to the suit, tendered and offered to pay to the plaintiffs the sum of money in their declaration mentioned in treasury notes, made a legal tender in payment of debts, and that from that time they have been and still are ready to pay the same, and now bring the same into court.

1. Parties went to trial at a special term of the court and the verdict and judgment were for the defendants. Objection was duly taken by the plaintiffs to one of the rulings of the court in excluding certain testimony offered by them to show the usage and mode of dealing of other banks, and the bill of exceptions to the ruling was regularly drawn out and duly signed and sealed.

Prayers for instructions to the jury were duly presented by the plaintiffs and they were refused by the court, and other and different instructions were given in their place, but no bill of exceptions in that behalf was tendered by the plaintiffs, or signed or sealed by the court.

Statement in the minutes is that the plaintiffs excepted in law as well to the refusal of the court to instruct the jury as requested, as to the instructions given, and that the exceptions and the evidence are hereby made record. Plaintiffs also made a motion for new trial, assigning two causes: (1.) Because the court refused to instruct the jury as prayed by the plaintiffs. (2.) Because the court instructed the jury as prayed by the defendants.

Order of the court was that the motion should be heard before the court at general term. Both parties were heard before the full bench, and the court affirmed the judgment as rendered at the special term. Writ of error to this court was sued out by the plaintiffs.

2. Principal questions discussed at the bar are presented, if at all, in the prayers for instructions which were refused,

and in the instructions which were given to the jury. Defendants contend that neither the prayers for instructions nor the instructions given are before the court, as they are not exhibited in any bill of exceptions signed and sealed by the justice who presided at the trial.

Settled practice in this court is that neither the rulings of the court in admitting or rejecting evidence, or in giving or refusing instructions can be brought here for revision in any other mode than by a regular bill of exceptions. Final judgments in a Circuit Court may be re-examined in this court and reversed or affirmed upon a writ of error, founded upon an agreed statement of facts, a special verdict, a demurrer to a material pleading, or a demurrer to evidence, as well as by a bill of exceptions; but none of the other modes will enable the appellate court to revise the rulings of the court in refusing to instruct the jury as requested, or the instructions as given, or the rulings of the court in admitting or rejecting evidence. Such rulings rest in parol and can only be incorporated into the record by a bill of exceptions, and of course cannot be re-examined in any other way.*

None of the other modes suggested, say the court, in the case of *Pomeroy's Lessee* v. *Bank of Indiana*,† enable the complaining party to review or re-examine the rulings of the court, except that of the bill of exceptions, and we reaffirm that rule.‡

Instructions requested or given rest in parol and do not, in the practice of this court, or in any other court where the common law prevails, become a part of the record, unless made so by a regular bill of exceptions, sealed by the judge who presided at the trial; and it is the well-settled practice in this court that an entry of the ruling in the minutes cannot be of any benefit to the party unless he seasonably re-

* Suydam *v.* Williamson, 20 Howard, 432.

† 1 Wallace, 602.

‡ Bulkeley *v.* Butler, 2 Barnewall & Cresswell, 434; Seward *v.* Jackson, 8 Cowen, 406; 2 Tidd's Practice, 896; 4 Chitty's General Practice, 7; 2 Institutes, 427; Dougherty *v* Campbell, 1 Blackford, 24; Cole *v.* Driskell, Id. 16; Strother *v.* Hutchinson, 4 Bingham, N. C. 89.

duces the same to form and causes it to be sealed by the judge.*

Views of the plaintiffs are that the bill of exceptions is not necessary in cases removed here from the Supreme Court of this District. Reference is made to the eighth section of the act to organize the courts in this District, as furnishing support to the proposition, but it is quite evident that the section referred to relates exclusively to the practice in the subordinate court, and not to the proceedings for the removal of the cause into this court for examination and revision.

Exceptions taken in the trial at the special term, before a single justice, as there provided, may be reduced to writing at the time, or may be entered in the minutes of the justice and settled afterwards in such manner as the rules of the court provide. Such exceptions must be "stated in writing in a case or bill of exceptions, with so much of the evidence as may be material to the questions to be raised; but the case or bill of exceptions need not be signed or sealed."†

Motion for new trial may also be entertained by the justice who tries the cause, at the same term, in the manner therein described. When such motion, however, is made upon the minutes, an appeal to the general term may be taken from the decision, in which case a bill of exceptions or case shall be settled in the usual manner. Our only purpose in referring to that section is to show that no part of it has anything to do with the question before the court.

No one of the clauses mentioned make any provision whatever for a writ of error or appeal to this court. Regulations upon that subject are made by the eleventh section of the same act, which provides that any final judgment, order, or decree of the court may be re-examined, and reversed or affirmed, in the Supreme Court of the United States upon writ of error or appeal in the same cases and in like manner as is now provided by law in reference to the final judgments, orders, or decrees of the Circuit Court of the United

* Pomeroy's Lessee *v.* Bank of Indiana, 1 Wallace, 598.

† 12 Stat. at Large, 764.

States for this District. Writs of error and appeals were required to be prosecuted under that law, in the same manner, and under the same regulations as in the case of writs of error or appeals from judgments and decrees rendered in the Circuit Court of the United States.*

Conclusion is, that the regulations respecting the removal of cases from the Supreme Court of this District, on writs of error or appeal, are the same as from the Circuit Courts of the United States, and, of course, the questions presented in the prayers for instruction, and in the instructions given to the jury in this case, are not before the court, as neither the prayers for instruction, nor the instructions given, are any part of the record.

3. Remaining question arises under the exception to the ruling of the court, in excluding the testimony offered by the plaintiffs to show the usage and mode of dealing of other bankers in this city. The teller of the defendants, called by the plaintiffs, testified that the defendants, prior to the suspension of specie payments in April, 1861, paid all checks drawn upon the bank by their customers in gold, or its equivalent, except when the deposit had been made in depreciated paper; that after that time they uniformly made a difference with their customers in receiving and paying their deposits, between coin, or specie, and paper money, and that in all cases where the deposit had been made in coin, if requested, they paid the checks in coin; that after the suspension of the banks the defendants refused to receive currency as the equivalent of specie; that currency continued to be received and credited to customers as before, but went into the general funds of the bank, and the same money was never returned to the customer, and it was not received on special deposit; that the plaintiffs had never made any special deposits with the defendants; that the books of the bank, and the pass-books were kept as before the suspension, except that the different deposits were designated as coin, cash, checks, or treasury notes.

4. Testimony of the teller of the bank is express to the

* 2 Stat. at Large, 106; United States v. Hooe et al., 1 Cranch, 318.

point that the plaintiffs never made any special deposit with the defendants, and there is no testimony in the case to support any such theory. On the contrary, it is clear that they made their deposits for their own convenience, and were credited for the amount in the usual way on the books of the bank.

Clear inference from the whole testimony is that the deposits of the defendants were made without condition or special agreement of any kind, and in such cases the law is well settled that the depositor parts with the title to his money, and loans it to the bank.*

Deposits may be made under circumstances where the legal conclusion would be that the title to the thing deposited remained with the depositor, and in that case the bank would become the bailee of the depositor, and the latter might rightfully demand the identical money deposited as his property.

Contracts between a banker and his customers are doubtless required to be performed, and must be construed in the same way as contracts between other parties. When the banker specially agrees to pay in bullion or in coin he must do so or answer in damages for its value, and so if one agrees to pay in depreciated paper, the tender of that paper is a good tender, and in default of payment the promissee can recover only its market and not its nominal value.†

But where the deposit is general, and there is no special agreement proved, the title of the money deposited, whatever it may be, passes to the bank, and the transaction is unaffected by the character of the money in which the deposit was made, and the bank becomes liable for the amount as a debt, which can only be discharged by such money as is by law a legal tender.‡

Moneys deposited with the bank in this case were entered in a pass-book in figures, expressing the amount in dollars

* Marine Bank *v.* Fulton Bank, 2 Wallace, 256.

† Robinson *v.* Noble, 8 Peters, 198; McCormick *v.* Trotter, 10 Sergeant & Rawle, 96.

‡ Bank of Kentucky *v.* Wister et al., 2 Peters, 325.

and cents, and it appears that the character of the money deposited is marked against each sum as coin, cash, check, or treasury notes, as the fact was in each particular instance. Such marks, however, are wholly insufficient to overcome the testimony of the teller, who was introduced by the plaintiffs, and who was the only witness examined upon the subject. Proof that those words were written against the several deposits for any such purpose as is supposed by the plaintiffs is entirely wanting; and in the absence of such proof it is much more reasonable to infer that they were put there as matter of convenience to the depositor, or to assist the memory as to the amount of the respective credits, in case of misrecollection or dispute.

No evidence of general usage or custom, in the ordinary sense of those terms, was offered by the plaintiffs or appears in the record. Customary rights and incidents universally attaching to the subject-matter of the contract in the place where it was made are impliedly annexed to the language and terms of the contract, unless the custom is particularly and expressly excluded. But evidence of usage is not admitted to contradict or vary express stipulations restricting or enlarging the exercise and enjoyment of the customary right. Omissions may be supplied, in some cases, by the introduction of such proof, but it cannot prevail over or nullify the express provisions and stipulations of the contract. So where there is no contract usage will not make one, as it can only be admitted either to interpret the meaning of the language employed by the parties in the absence of express stipulations, or where the meaning is equivocal or obscure.*

Judge Story expressed himself strongly against local usages or customs in particular trades or kinds of business, set up to controvert or annul the general liabilities of parties under the common law as well as under the commercial law, and remarked that there was great danger in admitting evidence of such loose and inconclusive usages and customs often un-

* Bliven *v.* New England Screw Co., 23 Howard, 431; **Addison on Contracts**, 853; Greenleaf's Evidence, sec. 292.

known to parties, and always liable to great misunderstanding and misinterpretations, and allow it to outweigh the well-known and well-settled principles of law.*

Usage contrary to law, or inconsistent with the contract, is never admitted to control the general rules of law or the real intent and meaning of the parties.†

Evidence of local usage to sell commercial paper, pledged as a security for a loan, at private sale after demand of payment, and notice that such sale would be made in case of default, was held to be inadmissible in the Court of Appeals in the State of New York, all the judges concurring.‡

Evidence of the usage of banks to regard drafts drawn upon them, payable at a day certain, as checks, and not entitled to days of grace, is inadmissible as evidence to control the rules of law in relation to such paper.§

General rule of law is, that if a merchant deposits money with a bank, the title to the money passes to the bank, and the latter becomes the debtor of the merchant to that amount; and it is not perceived that the evidence offered, if it had been admitted, could have had any other effect than to control that general rule of law, as it is not pretended that the evidence showed a special deposit or any special contract. Viewed in any light consistent with the other evidence in the record, the testimony was either entirely immaterial or inadmissible, as tending to control the well-settled rules of law.

JUDGMENT AFFIRMED, WITH COSTS.

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* Schooner Reeside, 2 Sumner, 569.

† Dykers *v.* Allen, 7 Hill, 499; Woodruff *v.* Merchants' Bank, 25 Wendell, 674.

‡ Wheeler *v.* Newbould, 16 New York, 395.

§ Bowen *v.* Newell, 4 Selden, 194.

WOLCOTT *v.* DES MOINES COMPANY.

The proviso in the act of Congress of May 15, 1856 (11 Stat. at Large, 9), making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of certain railroads in said State, by which proviso it was provided "That any and all lands heretofore reserved to the United States, by any act of Congress or in *any other manner by competent authority, for the purpose of aiding in any object of internal improvement*, or any other object whatsoever, be, and the same are hereby reserved to the United States from the operation of this act,"—operated, in connection with certain subsequent legislation, to reserve for the purpose of aid in the improvement in the navigation of the Des Moines River, an equal moiety, in alternate sections, of the public lands on, and within five miles of, the said river, between the "Raccoon Fork," so called, and the northern boundary of the State.

ERROR to the Circuit Court for the Southern District of New York.

In August, 1846, Congress granted to the then Territory, and now State, of Iowa—

"For the purpose of aiding said Territory *to improve the navigation of the Des Moines River from its mouth to the Raccoon Fork*, so called, in said Territory, one equal moiety, in alternate sections, of the public lands, in a strip five miles in width on each side of said river."

The Des Moines River, to assist the improvement of whose navigation this grant was made, rises in the very north part of the State, somewhat to the west of the middle line of the northern boundary. Flowing to the southeast, it traverses the entire commonwealth of Iowa, and falls into the Mississippi in the southeast corner of the State. [See the sketch on p. 682.]

Somewhere near the middle of the State, at Des Moines City, it receives, as a tributary, a stream called the Raccoon Fork. It thus happens that about one half the river is above the point where this Fork enters, and one half below. Each half traverses, of course, a region of great extent and value.

The phraseology of the above-quoted grant of Congress,

Statement of the case.

as the result proved, contained the germs of a controversy; the point in issue being, whether Congress meant to grant to the State land on the Des Moines River *above* the point where the Raccoon Fork enters, as well as the land *below* this point, or whether it meant to grant only land below. On the one hand, the grant was for the purpose of improving the navigation of the river "*from its mouth* TO *the Raccoon Fork.*" On the other, the grant was of one equal moiety, &c., "on each side of *the said river.*"

In August, 1859, the Des Moines Navigation Company, to which the State had conveyed the land in May, 1858, conveyed to one Wolcott a half section of one of the alternate sections, within five miles of the river, &c., above the Fork, and warranted the title.

Soon afterwards this court decided, in another case, that, on a true construction of the grant of the 8th of August, 1846, above mentioned, it did not include land *above* the point where the Raccoon Fork entered.

Wolcott now sued the Navigation Company for breach of covenant, alleging, in his declaration, that the title to the tract sold by the company to him had failed. This allegation the company denied; setting up that whatever might be the conclusion on a construction of the mere act of original grant (8th August, 1844), this case rested on another basis, to wit, on the basis of a great variety of action by different departments of the government having authority in the matter, and on acts of Congress subsequent to that of the grant.

This great variety of action, and the other acts of Congress, will be found below, in the preliminary part of the opinion of this court.

The court below thought that the title had not failed; and whether it had or not, was now the question here.

Mr. Gilbert, for the plaintiff in error; Messrs. Litchfield and Tracy, for the defendant in error; Messrs. Trumbull, Cook, and Smith, for parties allowed to intervene.

Mr. Justice NELSON delivered the opinion of the court.

The defendants conveyed by deed-poll to the plaintiff, on the 1st August, 1859, the east half of section 17, township 88, range 27, situate in Webster County, State of Iowa, containing three hundred and twenty acres, for the consideration of $3040, and warranted the title. It is charged in the declaration that the title has failed, which is denied on the part of the defendants. This presents the main issue in the case.

On the 8th August, 1846, Congress passed an act by which they granted to the Territory of Iowa, for the purpose of aid in the improvement of the navigation of the Des Moines River, from its mouth to the Raccoon Fork, in said Territory, an equal moiety, in alternate sections, of the public lands in a strip of five miles in width on each side of said river, to be selected within said Territory by an agent of the governor, subject to the approval of the Secretary of the Treasury of the United States.

The second section provided that the lands so granted should not be sold or conveyed by the Territory, nor by any State to be formed out of it, except as the improvements progressed; that is, sales might be made so as to produce the sum of thirty thousand dollars, and then cease, until the governor or State, as the case might be, should certify the fact to the President of the United States that one half of this sum had been expended on said improvements, when sales again might be made of the remaining lands sufficient to replace this amount; and the sales were thus to progress as the proceeds were expended, and the expenditure so certified to the President. Agents were appointed by the governor, who selected the sections designated by odd numbers, throughout the whole extent of the grant, which, as claimed, extended from the mouth of the river to the northern boundary of the State.

The lot in question is one of the sections thus selected and approved by the Secretary of the Treasury, and duly certified by the governor of the State to the President, according to the second section of the act, and was sold and conveyed, among other parcels of land, by the State to the defendants. The section of land of which the lot in question is a part was situated above the Raccoon Fork.

Some year and a half after the passage of this act a question arose before the commissioner of the land office whether the grant of the odd sections within the five miles extended above this Fork. He determined that it did, and that it extended throughout the whole line of the river within the limits of Iowa. It appears, however, that he afterwards changed his opinion, and on the 19th June, 1848, a proclamation was issued by the President, countersigned by him, ordering a sale of some of these odd sections, among other lands lying above the Fork, and which was to take place in the following October. On the attention of the Secretary of the Treasury being called to the subject, he, after an examination of the act, determined that, upon a true construction of it, the grant extended above the Raccoon Fork, and directed that the odd section should be re

served from the sale, which was done accordingly, and the State of Iowa duly notified. This was on the 16th June, 1849. On the 6th April, 1850, the Secretary of the Interior, whose department had in the meantime been established, and to which the supervision and control of the General Land Office had been assigned, reversed the previous decision of the Secretary of the Treasury, and determined that the grant did not extend beyond the Raccoon Fork. But he directed that the lands should be reserved from sale which were embraced within the State's selections. The question was then brought before the President, and was referred by him to the Attorney-General, who differed with the Secretary of the Interior, and concurred with the Secretary of the Treasury. But before the promulgation of this decision the President (Taylor) died, and a new cabinet coming in—and among others, a new Attorney-General—he overruled the decision of his predecessor, and affirmed that of the Secretary of the Interior. The case was then brought before the new President and cabinet, and the result is stated by the then Secretary of the Interior, under date of October 29th, 1851, which was "that in view of the great conflict of opinion among the executive officers of the government, and also in view of the opinions of several eminent jurists which have been presented to me in favor of the construction contended for by the State, I am willing to recognize the claim of the State, and to approve of the selections, without prejudice to the rights, if any there be, of other parties." Under this arrangement, the Secretary of the Interior approved of the odd sections above the Fork as certified, according to the act of Congress, till, in December, 1853, the number of acres amounted to over 271,572. On the 21st March, 1856, the commissioner of the land office again decided that the grant was limited to the Raccoon Fork, and the question was again referred to the Attorney-General, who advised the Secretary of the Interior to acquiesce in the views of his predecessor (a change having taken place as to the incumbent), and to continue the approval of the lands as certified to him under the law which was done accordingly. In the meantime, the

improvement of the Des Moines River had been carried on by the State, and by the Des Moines Navigation and Railroad Company, who, on the 9th June, 1854, had entered into an engagement with the State to finish the improvements, as contemplated by the act of Congress, and to expend for that purpose some $1,300,000.

The question as to the true construction of this grant of 8th August, 1846, and in respect to which such great diversity of opinion existed among the executive officers of the government, came before this court, and was decided at the December Term, 1859–60. The court held that it was limited to the Raccoon Fork, and did not extend above it.*

Whereupon, on the 2d March, 1861, Congress passed a joint resolution providing that "all the title which the United States still retain in the tracts of land along the Des Moines River, and above the Raccoon Fork thereof, in the State of Iowa, which have been certified to said State improperly by the Department of the Interior, as part of the grant by act of Congress approved August 8th, 1846, and which is now held by *bonâ fide* purchasers under the State of Iowa, be, and the same is hereby relinquished to the State." And, on the 12th July, 1862, Congress enacted "that the grant of lands to the then Territory of Iowa for the improvement of the Des Moines River by the act of August 8th, 1846, is hereby extended so as to include the alternate sections (designated by odd numbers) lying within five miles of said river, between the Raccoon Fork and the northern boundary of said State; such lands are to be held and applied in accordance with the provisions of the original grant, except that the consent of Congress is hereby given to the application of a portion thereof to aid in the construction of the Keokuk, Fort Des Moines, and Minnesota Railroad, in accordance with the provisions of the act of the general assembly of the State of Iowa, approved March 22, 1858."

If the case stopped here it would be very clear that the

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

plaintiff could not recover; for, although the State possessed no title to the lot in dispute at the time of the conveyance to the Des Moines Navigation and Railroad Company, yet, having an after-acquired title by the act of Congress, it would enure to the benefit of the grantees, and so in respect to their conveyance to the plaintiff. This is in accordance with the laws of the State of Iowa.

But another act of Congress is relied on by the plaintiff, passed May 15, 1856, as showing that the United States had already parted with the lands, of which the lot in question is a part, previous to this act of 12th July, 1862. It becomes necessary, therefore, to examine this act. It grants to the State of Iowa, for the purpose of aiding in the construction of certain railroads specified, every alternate section of land (designated by odd numbers), for six sections in width on each side of said roads, with the following proviso: "That any and all lands heretofore reserved to the United States by any act of Congress, or *in any other manner by competent authority, for the purpose of aiding in any objects of internal improvements, or for any purpose whatsoever*, be, and the same is hereby reserved from the operation of this act, except so far as it may be found necessary to locate the routes of the said railroads through such reserved lands, in which case the right of way shall be granted, subject to the approval of the President." This grant to the State for the benefit of the railroads, it is admitted, covers the tract within which the lot in question is situate, unless excluded by this proviso. The question turns upon the construction of the proviso. And in reading it in connection with the act of 1846, granting lands to the State of Iowa for the improvement of the Des Moines River, and in connection with the serious and prolonged conflict of opinion that arose among the executive officers of the government, extending over a period of some eight years, and which related to the title above the Raccoon Fork, in respect to which this act of 1856 was dealing in the grant for the benefit of the railroads, we think it difficult to resist the conclusion that Congress, in the passage of the proviso, had specially in their minds this previous

grant, and conflict of opinion concerning it, and intended to reserve the lands for future disposition, if the title under the first grant should turn out to be defective. The decision of this court had not then taken place, though the litigation was probably pending in the court below, in the district of Iowa. The words of the proviso point almost directly to this grant, and to the dispute arising out of it among the public authorities: "All lands heretofore reserved," &c., "by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any objects of internal improvements," &c. These improvements of the Des Moines River were then in progress. Now, if it had turned out that the true construction of the act carried the grant above the Raccoon Fork, then the lands would have been reserved by act of Congress, and no further legislation necessary. But, not satisfied with this, as if to provide for any result in respect to the title to them, if reserved in any other manner by competent authority, for the object of internal improvements, then the enacting clause should not operate to carry them under the new grant.

It has been argued that these lands had not been reserved by competent authority, and hence that the reservation was nugatory. As we have seen, they were reserved from sale for the special purpose of aiding in the improvement of the Des Moines River—first, by the Secretary of the Treasury, when the Land Department was under his supervision and control, and again by the Secretary of the Interior, after the establishment of this department, to which the duties were assigned, and afterwards continued by this department under instructions from the President and cabinet. Besides, if this power was not competent, which we think it was ever since the establishment of the Land Department, and which has been exercised down to the present time, the grant of 8th August, 1846, carried along with it, by necessary implication, not only the power, but the duty, of the Land Office to reserve from sale the lands embraced in the grant. Otherwise its object might be utterly defeated. Hence, immediately upon a grant being made by Congress for any of

these public purposes to a State, notice is given by the commissioner of the land office to the registers and receivers to stop all sales, either public or by private entry. Such notice was given the same day the grant was made, in 1856, for the benefit of these railroads. That there was a dispute existing as to the extent of the grant of 1846 in no way affects the question. The serious conflict of opinion among the public authorities on the subject made it the duty of the land officers to withhold the sales and reserve them to the United States till it was ultimately disposed of.

It should be stated, also, in connection with this proviso, that the improvements of this river were in progress at the time of the passage of the act of 1856, and had been for years, but were suspended soon after, on account of the refusal of the Land Department to certify any more sections under the act of 1846; and, as appears from the certificate of the governor of Iowa, the sum of $332,634.04 had already been expended by these defendants under their contract.

JUDGMENT AFFIRMED

NOTE.

At the same time, with the preceding case, was adjudged *Des Moines Navigation and Railroad Company* v. *Burr*, which NELSON, J., delivering the judgment of the court, said, "involved the same questions" decided in it. He referred to the opinion there given as decisive of them. The judgment was reversed with a *venire de novo*.

NASH *v.* TOWNE.

1. Courts, in the construction of contracts, look to the language employed, the subject-matter, and the surrounding circumstances; and may avail themselves of the same light which the parties enjoyed when the contract was executed. They are, accordingly, entitled to place themselves in the same situation as the parties who made the contract, in order that they may view the circumstances as those parties viewed them, and so judge of the meaning of the words and of the correct application of the language to the things described. Hence, where flour intended to

be sent to Boston was sold at Neenah, upon Lake Michigan, in mid-winter, and the letter of sale stated that the flour was sold "free on board steamer at Neenah," and was now "stored," the inference would be that the flour was to remain in the storehouse where it was until the navigation opened in the spring, and that it was to be withdrawn and delivered on board a steamer at Neenah, free of charge to the purchasers, before the spring season of navigation closed [which was May 31]. Accordingly a sale, such as above described, will support a declaration (the flour not being delivered), alleging a sale of flour, stored at Neenah, and an agreement to deliver the same, when requested, free of charge, to the purchasers, on board of a steamer to be procured or furnished by the vendors at the place where it was stored, after navigation should open, and a reasonable time before the 31st day of May following, to be conveyed to the purchasers, at Boston, in the ordinary manner of transportation.

2 Proof of a sale, and payment by a sight-draft, duly paid, will support a declaration of a sale for so much "in hand paid."

3. Receiving the price of goods sold and to be delivered, the refusal to deliver, and a conversion of the goods, constitute plenary evidence of an implied promise to refund the price paid for them, and an action for money had and received is an appropriate remedy for the vendee on such refusal to deliver.

4. Where an agent has entered into a written contract in which he appears as principal, parol evidence is inadmissible to show, with a view of exonerating him, that he disclosed his agency and mentioned the name of his principal at the time the contract was executed.

5. Where a party pays money on a consideration which fails, and in equity should be refunded—as for goods deliverable *in futuro*, but not delivered—the measure of damages on the recovery back is the sum paid and interest upon it, not as, *ex. gr.* in the case above, the value of the goods sold at the time when by the contract they were to have been delivered.

ERROR to the Circuit Court for Wisconsin; the case being thus:

Towne & Washburne, of Boston, Massachusetts, bought of Nash & Chapin, of Milwaukee, Wisconsin, in February, 1863, a thousand barrels of flour, and paid for them by a *sight draft*. The flour was not delivered, and the purchasers, Towne & Washburne, aforesaid, brought *assumpsit* for the non-delivery. The declaration contained a special count, and also the common counts.

The former set forth:

"That the defendants, on the 5th of February, 1863, at Mil-

waukee, in Wisconsin, in consideration of $5500 dollars to them *in hand paid*, sold to the plaintiffs one thousand barrels of flour, then at Neenah, in the said State, of the value of $5500, and agreed that they, the defendants, on the request of the plaintiffs, *after navigation at Neenah aforesaid should open in the spring of* 1863, *and a reasonable time before the* 31*st day of May*, 1863, *would procure, furnish, or provide a steamer* on which to ship said flour, and ship the same to the plaintiffs at Boston, in the State of Massachusetts, *and deliver the same on such steamer at Neenah*, where said flour then was, *free of charge to said plaintiffs*, and to be transported in the ordinary manner and with necessary and customary transshipments to the plaintiffs at Boston."

Plea, the general issue.

On the trial, the plaintiffs offered in evidence a letter from the defendants to the plaintiffs, dated at Milwaukee, February 5, 1863, as follows:

"Your Mr. W. left here yesterday, and before going off we sold him one thousand barrels round hoop flour, Empire Mills, Iowa, *free, on board steamer at Neenah*, for $5.50, for which find bill inclosed. We have the flour *stored* and insured, ... and will value on you at sight for the amount."

Inclosed in that letter was this bill of sale:

"Messrs. Towne & Washburne,

Bought of Nash & Chapin, general commission merchants, 1000 barrels of flour, Empire Mills, Iowa, round hoop, 5½, $5500.

Received payment, sight draft,

NASH & CHAPIN."

This evidence was objected to by the defendants, because it tended to prove a different contract from the one declared on. The court, however, overruled the objection.

The plaintiffs then offered the sight draft with evidence of its payment, and that it was drawn in payment of this flour. This, too, was objected to as variant from the declaration; but the objection was overruled.

The plaintiffs then read two warehouse receipts, one dated January 31st, 1863, as follows, and the other February 5th, 1863.

"NEENAH, January 31st, 1863.

"Received in store of Nash & Chapin, five hundred barrels Empire, Iowa, r. h. flour, to be delivered, on return of this warehouse receipt, free, on board steamer.

S. G. BURDICK."

"Indorsed: NASH & CHAPIN."

They then brought witnesses who proved that the defendants had allowed this Burdick to take the flour from his storehouse at Neenah, where it was stored, and to sell it to other persons (so to prove a conversion by the defendants to their own use), and that they refused to deliver it; setting up that the plaintiffs at the time of the sale of the flour agreed to take the warehouse receipts of S. G. Burdick, just above referred to, in lieu of the defendants' responsibility for the flour, and had requested the defendants to hold the receipts for them, which they the defendants had done.

In the course of proving this, they asked a witness who had inquired of the defendants, in behalf of the plaintiffs, why the flour was not delivered, &c., this question:

"What was said by the defendants, as to where the flour, described in the letter and bill, was stored; whether it had been delivered, and if not, as to why it had not been delivered?"

To the admission of that question the defendants objected that inasmuch as the plaintiffs had failed to prove the special count in their declaration, and had proved an existing contract to deliver flour to the plaintiffs, it was not competent for the plaintiffs to prove any other contract than the one set out, nor to prove a breach of such other contract under the other counts in the declaration. But the court overruled the objection.

The defendants on their side offered to prove that in selling the flour they had acted as agents for Burdick, above named, and so told the plaintiffs at the time of the sale; and that they paid over the money, the proceeds of the sale, to Burdick. This was objected to by the plaintiffs because it

was conversation prior to or contemporaneous with a written contract (the bill of sale and letter), and would modify or contradict it, and alter the liability of the defendants under that contract. The objection was sustained and the ruling excepted to.

They set up also that the warehouse receipts of Burdick were accepted by the plaintiffs in lieu of their responsibility for the flour; a matter which went to the jury on the evidence.

The court charged:

1. "That if the jury found that the plaintiffs had paid money to the defendants for a consideration which had failed, and which in equity the defendants ought to pay back, their verdict must be for the plaintiffs. And if they found that the defendants executed the bill of sale and letter or contract read in evidence, and the plaintiffs paid them for the flour specified, $5500, and the defendants afterwards failed and refused to deliver the flour when demanded, then their verdict should be for the plaintiffs for the amount paid by them and interest, unless the defendants delivered to, and the plaintiffs accepted the warehouse receipts in evidence in lieu of the flour."

At the request of the defendants below, it also charged:

2. "That the plaintiffs cannot recover in this cause against the defendants damage for the conversion of that flour without proof that the defendants have, after such conversion, sold the flour and received pay for it, and in that case, for only the amount actually sold, and paid for, and only the price paid to them."

And added:

"The converse of such instruction is also true; that if the jury find from the evidence that the defendants had sold said one thousand barrels of flour, or any part of it, and had received the money therefor, or the benefit of such sale and payment thereof, then their verdict should be for the amount so received by said defendants, unless they had delivered to the plaintiffs, and the plaintiffs had accepted, the warehouse receipts as a delivery of the flour."

Argument for the plaintiff in error.

Verdict and judgment having gone for the plaintiffs, the case was now here on exception to the ruling of the court admitting the testimony, and to its instructions to the jury.

Mr. Lynde, for the plaintiff in error:

I. The declaration sets out the time of delivery to have been after the opening of navigation in the spring of 1863 (April 20th, 1863), and before the 31st day of May, 1863. The utmost that can be said of the letter is, that inasmuch as the delivery must be on board steamer, the delivery should be within a reasonable time after the opening of navigation, which is a very different period. This was a variance.

Again, the declaration avers, in effect, that the plaintiff in error agreed to provide a steamer and make the shipment, and pay the charges of the warehouseman for storage and delivery to the steamer, while the letter only agrees to pay the warehouseman's charges for storage and delivery to steamer.

These papers were also inadmissible under the general counts, as they tended to prove an existing agreement to deliver flour which must be counted upon specially.*

II. The declaration alleged a payment in cash. Proof of payment by a bill was immaterial to the issue and variant from the count.

III. The court erred in allowing the question: "What was said by the defendant as to where the flour was stored, &c., and as to why it had not been delivered?"

The plaintiff had averred a contract to deliver flour at a future time. He had proved that a different one than the one he alleged had been made. Proving a breach of that contract would not prove the breach of his first count, nor of any of his counts.

IV. But the great error was in excluding evidence that the defendants were acting as agents in making the sale, and that the plaintiffs knew this, and that the money re-

* Spratt *v.* McKinney, 1 Bibb, 595; Brooks *v.* Scott, 2 Mumford, 344; Burrall *v.* Jacot, 1 Barbour, 165; Cochran *v.* Tatum, 3 Monro, 405.

ceived by the defendants had been paid over to their principals. The court erred also in charging "that if they found from the evidence that the plaintiff had paid money to the defendants for a consideration which had failed, and which in equity the defendants ought to pay back, then their verdict must be for the plaintiff."

The plaintiffs had wholly failed to prove the special count. It was not competent to prove an agreement to deliver flour under the common counts. No other right of recovery is asserted except moneys had and received to recover the consideration paid. There is no contract to pay back that money between the parties. It could only be recovered in a case where the defendant had received money of the plaintiff, which *ex aequo et bono* he should return.*

The evidence was excluded upon the authority of a special class of cases.† But in those cases the action was directly upon the contract; in this case it was not, and the contract here is only valuable in evidence as an admission of a fact, which admission could be contradicted or explained.

Now, when the action is brought, not upon the contract, but upon the facts and the equities growing out of them, why should not all the facts be proved? How could the jury say that the defendants ought, in equity, to pay back this money, without knowing whether the plaintiffs intended to pay and did pay their money to Burdick or the defendants; and whether Burdick or the defendants actually had the benefit of the money?

Again, the court erred in charging "that if they found that the defendants executed and delivered the bill of sale and letter or contract read in evidence, and the plaintiff paid them for the flour specified, $5500, and the defendants afterward failed and refused to deliver the flour when called for, their verdict should be for the plaintiffs for the amount paid by them and interest." This instruction directs *a recovery upon the contract.* The jury were not allowed to inquire

* Straton *v.* Rastall, 2 Term, 366.

† Such as Jones *v.* Littledale, 6 Adolphus & Ellis, 486; and Higgins *v.* Senior, 8 Meeson & Welsby, 844.

whether the contract was rescinded or not. There are two objections to this charge:

1. There is no such contract set out in the declaration, as is evidenced by the letter and bill of parcels; and, the record would not be a bar to a new action on the letter and bill of parcels.

2. The measure of damages is incorrectly stated. The amount of the recovery for a breach of the contract would be the value of the flour at the time when it should have been delivered.

Mr. Waldo, contra.

Mr. Justice CLIFFORD delivered the opinion of the court.

Controversy in this case grew out of a contract for the purchase, sale, and delivery of one thousand barrels of flour, and the parties concur that the flour was never delivered by the original defendants. Special count, as amended, alleged, in substance and effect, that the defendants, on the fifth day of February, 1863, at Milwaukee, in the State of Wisconsin, in consideration of five thousand five hundred dollars, sold to the plaintiffs one thousand barrels of flour, stored at Neenah, in that State, and agreed to deliver the same, when requested, free of charge, to the plaintiffs, on board of a steamer to be by them procured or furnished at the place where it was stored, after navigation should open, and a reasonable time before the thirty-first day of May following, to be conveyed to the plaintiffs, at Boston, in the ordinary manner of transportation. They also alleged demand and refusal to deliver the flour as agreed, and claimed damages for the non-fulfilment of the contract. Declaration also contained the common counts as set forth in the record.

Plea was the general issue, and the verdict and judgment were for the plaintiffs, and the defendants excepted and sued out this writ of error. Exceptions were taken by the defendants to certain rulings of the court during the trial, and to certain instructions of the court as given to the jury after

the testimony was closed, which will be considered in the order they are exhibited in the record.

I. Plaintiffs produced and offered to read in evidence, to prove the issue on their part, a certain letter, dated Milwaukee, February 5, 1863, and written by the defendants to the plaintiffs, and a bill of sale of the flour, executed at the same time and place, and signed by the defendants, and which was inclosed in the letter of the defendants so offered in evidence. Material parts of the letter were as follows: "Your Mr. W. left here yesterday, and before going off we sold him 1000 barrels round hoop flour, Empire Mills, Iowa, free, on board steamer at Neenah, for $5.50, for which find bill inclosed. We have the flour *stored* and insured, . . . and will value on you at sight for the amount." Inclosed in that letter was the following bill of sale, which was also signed by the defendants:

"Messrs. Towne & Washburne,

Bought of Nash & Chapin, general commission merchants, 1000 barrels of flour, Empire Mills, Iowa, round hoop, 5½, $5500.

Received payment, sight draft,

(Signed) NASH & CHAPIN."

Such being all the evidence offered by the plaintiffs, under the special count, the defendants objected that the evidence was not admissible in the case, because it tended to prove a different contract from that set out in the declaration, but the court overruled the objection, and the letter and bill of sale were read in evidence to the jury.

Defendants excepted to the ruling of the court, and that exception raises the first question presented for decision in the record. Obviously, the exception involves the construction of the special count, and of the contract exhibited in the letter and bill of sale offered in evidence.

Argument of the defendants is that the contract offered in evidence varied from the allegations of the special count in two particulars:

1. That it differed from the declaration as to the time when the flour was to be delivered.

2. That it also differed from the declaration as to the shipment of the flour, and because it contained no agreement to furnish a steamer.

Undoubtedly, the rule is that the proofs must correspond with the allegations in the declaration, but the requirement in that behalf is fulfilled, if the substance of the declaration is proved.

1. Allegations of fact in the pleadings, affirmed on one side and denied on the other, must in general be tried by a jury, and the purpose of the rule which requires that the allegations and the proofs must correspond, is that the opposite party may be fairly apprised of the specific nature of the questions involved in the issue. Formerly, the rule in that respect was applied with great strictness, but the modern decisions are more liberal and reasonable. Decided cases may be found, unquestionably, where it has been held that very slight differences were sufficient to constitute a fatal variance. Just demands were often defeated by such rulings until the Parliament interfered, in the parent country, to prevent such flagrant injustice.*

Federal courts have possessed the power, from their organization to the present time, to amend such imperfections in the pleadings, except in cases of special demurrer set down for hearing, and are directed to give judgment according to law and the right of the cause.†

Recent statutes in the States also confer a liberal discretion upon courts in allowing amendments to pleadings, and those statutes, together with the change they have superinduced in the course of judicial decision, may be said to have established the general rule in the State tribunals that no variance between the allegations of a pleading and the proofs offered to sustain it, shall be deemed material, unless it be of a character to mislead the opposite party in maintaining his action or defence on the merits.‡

* 1 Taylor on Evidence, § 173, p. 187.

† 1 Stat. at Large, 91.

‡ 3 Phillips on Evidence, 4th Am. ed. 148; Harmony *v.* Bingham, 1 Duer, 210; Catlin *v.* Gunter, 1 Kernan, 368.

Irrespective of those statutes, however, no variance ought ever to be regarded as material where the allegation and proof substantially correspond. Contract in this case was executed in midwinter, when the navigation was closed, and both parties knew that the flour could not be transported until the navigation opened in the spring. "Free on board the steamer at Neenah" meant that the defendants should deliver the flour on board the steamer without charge to the plaintiffs. Time of delivery is not specified, but it was to be on board a steamer at Neenah, and it would be unreasonable to suppose that the parties contemplated that it should be withdrawn from the warehouse where it was stored in safety and insured and deposited in a steamer, even if one was there, before the navigation opened in the spring.

Courts, in the construction of contracts, look to the language employed, the subject-matter, and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and, in that view, they are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described.*

Applying those rules to the case, it is quite clear that the parties did not contemplate that the flour should be withdrawn from the warehouse, where it was safely stored and insured, until the navigation opened in the spring, because the withdrawal of the same before that time would have been worse than useless, as it could not be earlier transported to the place of destination, and if withdrawn and delivered it would involve unnecessary expense and the necessity of re-warehousing it and procuring a new insurance. Plain inference, therefore, is that it was to remain in the storehouse where it was until the navigation opened in the spring,

* Barreda et al. *v.* Silsbee, 21 Howard, 161; Shore *v.* Wilson, 9 Clark & Finnelly, 569; Addison on Contracts, 846.

but that it was to be withdrawn and delivered on board a steamer at that place, free of charge to the plaintiffs, before the spring season of navigation closed.

Such being the true construction of the contract as to the time the delivery of the flour was to be made, it is evident that the objection that there is a variance in that respect between the proofs offered in evidence and the special count cannot be sustained. Averment of demand and refusal in the count is not unusual in such cases, and, even if not strictly necessary, it certainly can afford no ground to support the present exception.

2. Second objection taken at the argument is that the contract, as proved, does not support the allegation that the defendants agreed to procure or furnish a steamer at the place of delivery, or to ship the flour on board a steamer free of charge to the plaintiffs, as alleged in the special count.

Express words of the contract are, "free on board steamer at Neenah," and the terms of the contract also show that the flour, at the date of the contract, was safely stored in a warehouse at the place where it was to be delivered. Those words necessarily imply that the flour was in the possession and under the control of the defendants, and that the delivery was to be made in the future. Terms of the contract also imply as clearly that the place of delivery was on board a steamer at that port as they do that the delivery was to be made by the defendants. Freight was to be paid by the plaintiffs, but the delivery on board the steamer was to be made by the defendants, and it follows, in the absence of any stipulation to the contrary, that the defendants were to procure or select the steamer to transport the flour down the bay, and to the place of transshipment, over the usual route. Our conclusion is, that the allegations of the special count, and the proofs given in evidence, were substantially the same, or, in other words, that the differences between them, if any, were not of a character which could have misled the defendants at the trial, and therefore the objection must be overruled.

II. Evidence was also introduced by the plaintiffs showing that the defendants drew on them for the whole amount of the purchase-money, in a sight draft, and that they paid the draft, as given in evidence, when it was presented.

Exceptions were taken by the defendants to the rulings of the court in admitting that evidence, but the rulings of the court were so clearly correct that it seems unnecessary to remark further upon the subject.

III. Plaintiffs also proved that the flour, at the date of the contract, was stored in a railroad warehouse at Neenah, and that the defendants had admitted that it had been sold and delivered to a third person prior to the commencement of the suit. They went further, and proved demand and refusal, and showed that the defendants, at the date of the contract, had but one thousand barrels of flour stored in that warehouse, and that the whole of that parcel was sold and delivered prior to the suit, with the defendants' knowledge and consent.

Witnesses were examined on the subject, and in the course of their examination two other exceptions were taken by the defendants to the rulings of the court in admitting testimony. Substance of the testimony objected to and introduced was that the flour was withdrawn from the warehouse where it was stored, at the date of the contract, under the orders of the defendants, and deposited in another place, and finally delivered to other parties, in part fulfilment of a much larger contract. Testimony previously introduced showed that the plaintiffs accepted the sight draft, and paid the same for the purchase-money, and that the defendants refused to deliver the flour; and the evidence objected to was doubtless offered to show that they had converted the flour to their own use, and, in our judgment, it was properly admitted for that purpose. Where the seller of goods received the purchase-money at the agreed price, and subsequently refused to deliver the goods, and it appeared at the trial that he had converted the same to his own use, it was held at a very early period that an action for money had and received would lie to recover back the money, and it has never been

heard in a court of justice since that decision that there was any doubt of its correctness.*

Assumpsit for money had and received is an equitable action to recover back money which the defendant in justice ought not to retain, and it may be said that it lies in most, if not all, cases where the defendant has moneys of the plaintiff which, *ex equo et bono*, he ought to refund. Counts for money had and received may be joined with special counts; and where, as in this case, the special counts are for damages for the non-delivery of goods, it is perfectly competent for the plaintiff, if the price was paid in money or money's worth, to prove the allegations of the special counts and introduce evidence to support the common counts; and if it appears that the defendant refused to deliver the goods, and that he has converted the same to his own use, the plaintiff, at his election, may have damages for the non-delivery of the goods, or he may have judgment for the price paid and lawful interest. Evidence in this case was clear, not only that the plaintiffs paid the price in money, but that the defendants refused to deliver the flour, and converted the same to their own use, by selling and delivering it to other persons.†

Such a reception of the price, refusal to deliver, and conversion of the goods constitute plenary evidence of an implied promise to refund the price paid, and an action for money had and received is an appropriate remedy for the plaintiffs.

Principal defence was that the flour belonged to one Samuel G. Burdick, and that the defendants, in negotiating the sale, acted merely as the agents of the owner of the flour, and that they, during the negotiation for the sale, informed the plaintiffs of their agency, and gave to them the name of their principal as the owner of the flour. They also claimed that the plaintiffs agreed at the sale of the flour to take the warehouse receipts of their principal for the flour,

* Anonymous, 1 Strange, 407; 2 Greenleaf on Evidence, 124

† Allen *v.* Ford, 19 Pickering, 217; Jones *v.* Hoar, 5 Id. 285.

and that the defendants merely held those receipts at the request of the plaintiffs, and for their benefit, and were therefore under no obligations to deliver the flour.

Such was the theory of the defendants, but there was no proof of any such agreement, except that one of the plaintiffs testified that the defendants, when the demand was made for the delivery of the flour, claimed that such was the understanding of the parties at the date of the contract. Defendants introduced no testimony, but offered to prove that in negotiating the sale they acted as agents, and that they so informed the plaintiffs, and gave them the name of their principal. Plaintiffs objected to the testimony, and it was excluded by the court, and the defendants excepted. They still insist that the ruling of the court in that behalf was erroneous, but they admit the general rule that parol evidence is not admissible to supply, contradict, enlarge, or vary the words of a written contract; and it is equally well settled that when a contract is reduced to writing all matters of negotiation and discussion on the subject antecedent to and *dehors* the writing are excluded as being merged in the instrument.*

Parol evidence can never be admitted for the purpose of exonerating an agent who has entered into a written contract in which he appears as principal, even though he should propose to show, if allowed, that he disclosed his agency and mentioned the name of his principal at the time the contract was executed.†

Where a simple contract, other than a bill or note, is made by an agent, the principal whom he represents may in general maintain an action upon it in his own name, and parol evidence is admissible, although the contract is in writing, to show that the person named in the contract was an agent, and that he was acting for his principal. Such evidence, says Baron Parke, does not deny that the contract binds those whom on its face it purports to bind, but shows

* 2 Kent's Com., 11th ed. 746; 1 Greenleaf on Evidence, 12th ed., § 275 p. 312.

† Higgins *v.* Senior, 8 Meeson & Welsby, 844.

that it also binds another, and that principle has been fully adopted by this court.*

Cases may be found, also, where it is held that the plaintiff may prove by parol that the other contracting party named in the contract was but the agent of an undisclosed principal, and in that state of the case he may have his remedy against either, at his election.†

Evidence to that effect will be admitted to charge the principal or to enable him to sue in his own name, but the agent who binds himself is never allowed to contradict the writing by proving that he contracted only as agent, and not as principal.‡

Exceptions were also taken to the charge of the court, but they involve, for the most part, the same questions as are presented in the objections taken to the admissibility of the evidence, and therefore do not require to be further answered. Slight as the evidence was to show that the plaintiffs accepted the warehouse receipts in lieu of the flour, still the court left that question to the jury, and their finding upon the subject is conclusive. Complaint is also made that the rule of damages given to the jury was not correct, but the complaint is so clearly without merit that we forbear any further comments upon the subject.

JUDGMENT AFFIRMED, WITH COSTS.

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* New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 Howard, 381; Ford *v.* Williams, 21 Id. 289; Oelricks et al. *v.* Ford, 23 Id. 63.

† Thomson *v.* Davenport, 9 Barnewall & Cresswell, 78.

‡ Jones *v.* Littledale, 6 Adolphus & Ellis, 486; 1 Parsons on Contracts, 5th ed. 64; Titus *v.* Kyle, 10 Ohio N. S. 444; 2 Smith's Leading Cases, 6th Am. ed. 421.

CITY OF GALENA *v.* AMY.

1. Where an act, amending a city charter, says that the city council "*may, if it believe that the public good, and the best interests of the city require*" it, *levy a tax to pay its funded debt*, a mandamus will lie, at the suit of a judgment creditor, to make it levy a tax, if it does not. *The Supervisors, &c.*, v. *United States* (4 Wallace, 435), approved.
2. Where a city has a power, such as the one above given, it is no return to an alternative mandamus, commanding it to lay a special tax of one per cent. to pay the principal, and one per cent. to pay the interest and costs of judgments obtained against it for non-payment of its funded debt, or show cause, &c., that it did, in one year, levy such a tax, and that the funds raised by it are wholly exhausted.

   Nor is it an argument against the issuing of a peremptory mandamus, that the city owes a large amount of other debts, and that if these taxes are collected, other creditors will be entitled to share in the distribution of the proceeds.
3. The acts of the General Assembly of Illinois passed June 30th, 1857, and February 6th, 1865, amendatory of the act of June 21st, 1852, giving by its fourth section the power to tax as quoted in the first paragraph above, do not repeal that fourth section.

THE fourth section of a statute of Illinois, passed June 21, 1852, and incorporating the city of Galena, declares that the city council "*may, if the said city council believe that the public good and the best interests of the city require*," annually collect a tax, not exceeding one per cent. on a dollar on the assessed value of all estate taxable in the city, in addition to all other taxes; the fund to be kept separate, and annually, on the 1st of January, paid over, *pro rata*, upon the funded indebtedness of the city. "This section to continue and be in force until the whole amount of the city's indebtedness, with the interest to accrue thereon, is fully paid."

With this provision in force, the city issued a large amount of bonds to enable it to make various public improvements. One Amy having become possessed of a number of them, and the interest being unpaid, he brought suit and obtained judgment against the city upon them in the Circuit Court for Northern Illinois. The validity of the bonds was not drawn in question. The judgments being wholly unsatisfied, and the city having no property liable to execution,

Amy demanded of the mayor and aldermen that they should levy a tax to pay principal, interest, and costs of the judgment. They refused to do so. He then filed an information in the Circuit Court for the Northern District of Illinois, for a mandamus. He set forth the above quoted fourth section of the act of June 21st, 1852, empowering the city council to levy a specific tax of one per cent. to pay the interest on its funded debt, and that this tax had not been levied. That, by an act of June 30th, 1857, the city council was authorized to levy, 1st, a tax of one per cent. for general and contingent expenses; 2d, five mills for school purposes; 3d, one per cent. to pay interest on public debt; 4th, an unlimited tax for market halls, &c., and other public improvements. That none of the taxes to which the plaintiff, as a bond creditor, has a right, had been levied and applied to his principal or interest after a period named, long past. And he prayed the court to issue a mandamus, commanding the city council and their successors in office, at their next regular term, to levy *a special* tax upon the taxable property of the city of one per cent. to pay the principal, and one per cent. to pay the interest and costs of the judgments; "and to pay the same out of the proceeds, and to continue to levy a like amount for each succeeding year until said judgments, interests, and costs are wholly paid."

The city made a return, that in 1865 they levied a tax of one per cent. to pay interest on public debt, and that it had been applied to a proper and lawful purpose.

They set up in bar of the plaintiff's right, that the only powers to tax which they had were by the acts of June 30th, 1857, already mentioned, and an act of February, 1865, amendatory of the act of 1852. Sections of these last two acts relating to taxation, and stating for what purposes taxes might be laid, were set forth. In the act of 1857 were these:

"*Section* 1. The city council shall have power, by ordinance, to levy and collect annual taxes not exceeding one per cent. on the dollar on the assessed value of all real and personal estate

and property within the city, &c., made taxable by the law of the State for State purposes, to defray the *general and contingent expenses of the city*, not herein otherwise provided for; which taxes shall constitute the *general* fund.

"*Section* 3. To levy and collect taxes *not exceeding* one per cent. on the dollar per annum on all property subject to taxation, to meet the interest accruing on the debt of the city."

In the act of 1865 the following:

"*Section* 12. The city council shall levy and collect a tax of *one per cent.* on the dollar per annum on all property subject to taxation; which tax, when collected, shall be set apart for the sole and exclusive purpose of paying the interest upon the public debt of the city, whilst the same is in existence."

The latter act, the act of 1865, also contained the section set forth in the return.

"*Section* 19. All acts, or parts thereof, which conflict with the provisions of this act are also repealed; but nothing in this act shall be so construed as to deprive the city council of said city of any power or authority conferred upon the same by the act incorporating the city, and the various acts amendatory thereof, except so far as such powers and authority have been *expressly* modified or repealed by this act or the acts heretofore mentioned."

The return further set forth that the principal of the debt was $142,272, and the assessed value of the property, real and personal, within the city jurisdiction, was $740,000, and that the annual interest upon the debt now exceeded one per cent. upon the assessed value of the property in the city liable to taxation. It added that the councils intended, in good faith towards the city and its creditors (the relator included), to levy all the taxes which it had a right by law to levy. But that the General Assembly having, by the acts aforesaid, placed a limit upon the power of taxation, the councils were wholly unable to raise money for the payment of the judgments, excepting by means of proper ordinances passed under and in pursuance of section one of the act of Jan-

uary 30, 1857 (above quoted), and that by that section moneys raised were first to be applied to the payment of the ordinary and contingent expenses of the city, and unless so applied that the government of the city could not be administered.

To this answer the relator demurred. The court sustained the demurrer; and the respondents electing to stand by the return, it was ordered that a peremptory mandamus should issue. The respondents now brought the case before this court for review.

Mr. Jewett, for the city, plaintiff in error; Mr. Grant, contra.

Mr. Justice SWAYNE delivered the opinion of the court, having first stated the case.

Most of the legal principles which are involved in this case, and which must govern its determination, have been settled in other cases decided at this term.

Was there any error in the rulings of the Circuit Court?

The fourth section of the act of 1852 declares that the city council, if they believe the public good and the best interests of the city require it, may levy and collect an annual tax of not exceeding one per cent., and that the amount thus collected shall be kept separate; and that annually, on the 1st of January, it shall be paid over *pro rata* upon the funded debt of the city, that may be presented by the holders; and that this section shall continue in force until the principal and interest of the indebtedness is fully paid.

This power has not been exercised by the city authorities, and they have made no other provision for liquidating the debts due to the relator. They have no other means of payment, in possession or prospect. Under such circumstances, the discretion thus given cannot, consistently with the rules of law, be resolved in the negative.

The rights of the creditor and the ends of justice demand that it should be exercised in favor of affirmative action, and the law requires it. In such cases the power is in the nature of a trust for his benefit, and it was the plain duty of the

court below to give him the remedy for which he asked, by awarding a peremptory writ to compel the imposition of the tax, as was done.

These principles were fully considered in *The Supervisors of Rock Island County* v. *The State Bank*, of this term,* and it is sufficient to refer to that case for a fuller exposition of our views upon the subject.

This section of the act of 1852 is not repealed by either the act of 1857 or the act of 1865. There is no express repeal, and we think there is none by implication. The latter is not favored in the law. Repeal by implication, when the prior and the later act can consistently stand together, is never admitted.† Here there is no irreconcilable conflict, if indeed there be any. This point seems not to be relied upon by the counsel for the plaintiffs in error.

It is conceded that this act was in force when the bonds in question were issued. If so, it was beyond the power of the legislature to repeal it, so far as it concerns the bonds in question, unless some other adequate remedy were substituted in its place.‡

The third section of the act of 1857 and the twelfth section of the act of 1865 each authorizes the collection of one per cent., to be applied to the payment of the interest upon the city debt. The latter re-enacts the former. The efficacy of this provision is not denied. The order of the Circuit Court with respect to this tax was correct.

The return of the respondents showed no sufficient reason why a peremptory writ of mandamus should not issue, as was ordered. The demurrer of the relator was properly sustained.

It is insisted that the city owes a large amount of other debts, and that if these taxes are collected the other creditors will be entitled to share in the distribution of the proceeds.

It is not competent for the respondents to make this objection. When any other creditor complains in a proper pro-

* 4 Wallace, 435.

† McCool *v.* Smith, 1 Black, 471.

‡ Van Hoffman *v.* The City of Quincy, 4 Wallace, 535.

ceeding, and asks that the funds be marshalled, it will be time enough to consider the subject.

The counsel for the plaintiffs in error has called our attention, with emphasis and eloquence, to the diminished resources of the city, and the disproportionate magnitude of its debt. Much as personally we may regret such a state of things, we can give no weight to considerations of this character, when placed in the scale as a counterpoise to the contract, the law, the legal rights of the creditor, and our duty to enforce them. Such securities occupy the same ground in this court as all others which are brought before us. When clothed with legal validity, it is our purpose to sustain them, and to give to their holders the benefit of all the remedies to which the law entitles them. When invalid, we have not hesitated and shall not hesitate to say so. But we cannot recognize a distinction, unknown to the law, between this and any other class of obligations we may be called upon to enforce.

The judgment of the Circuit Court is

AFFIRMED.

BATES v. BROWN.

The rule of the common law, commonly called "the rule of shifting inheritance," is not in force in Illinois.

THIS was a writ of error to the Circuit Court for the Northern District of Illinois.

Kinzie Bates, the plaintiff in error, brought an action of ejectment in that court against Brown, the defendant in error, to recover certain premises. The cause was submitted upon an agreed statement of facts, which, so far as it was necessary to consider them, were as follows:

1. On the 29th of September, 1830, Alexander Wolcott bought of the State of Illinois certain lands, of which those in controversy were a part. At the time of the transaction

he paid the purchase-money, and received the usual certificate.

2. He died on the 30th of October, 1830, leaving a daughter, Mary Ann Wolcott, his only child, and his wife, Eleanor, him surviving. He left a will, duly executed, which contained the following provision:

"I further give and devise to my said wife, Eleanor M. Wolcott, and my said daughter, all my freehold estate whatsoever, to hold to them, the said Eleanor M. Wolcott and Mary Ann Wolcott, their heirs and assigns forever."

3. Mary Ann Wolcott, the daughter, died on the 16th of January, 1832, aged seven years, intestate and without issue.

4. On the 13th of May, 1833, Eleanor M. Wolcott conveyed to David Hunter, his heirs and assigns, with a covenant of general warranty, the premises in controversy.

5. On the 5th of July, 1833, a patent was issued by the Governor of Illinois for the land purchased by Alexander Wolcott, as before stated, to his "legal representatives, heirs, and assigns."

6. Eleanor M. Wolcott, his widow, married George C. Bates on the 26th of May, 1836.

7. The plaintiff, Kinzie Bates, was the issue of that marriage, and was born on the 13th of April, 1838, and was the only child of his parents.

8. His mother died on the 1st of August, 1849, leaving her husband, George C. Bates, then and still surviving.

The plaintiff claimed title as the heir at law of his deceased half sister, Mary Ann Wolcott, under the rule of the common law, generally known as that of "shifting inheritance;" maintaining that although at the time of the decease the mother was the presumptive heir of the said Mary Ann, yet that by his own birth a nearer heir was created, and that the estate thus placed in the mother was divested from her, and vested in him, the son.

To understand the matter fully it may be well to state that the Congressional Ordinance of 1787 for the government of the Northwestern Territory, of which Illinois was originally

part, created a court which it declared should have "common law jurisdiction;" and the Ordinance guaranteed also to the people of the territory "judicial proceedings, according to the course of the common law." This Ordinance declared that the estates of persons dying intestate

"Shall descend to and be distributed among their children, and the descendants of a deceased child, in equal parts; the descendants of a deceased child or grandchild to take the share of their deceased parent in equal parts among them; and when there shall be no children or descendants, then in equal parts to the next of kin, in equal degree; and among collaterals the children of a deceased brother or sister of the intestate shall have, in equal parts among them, their deceased parent's share; and there shall in no case be a distinction between kindred of the whole and half blood."

In 1819, after Illinois had become a State, a statute adopted "the common law of England" in general terms; and in 1845 another statute declared that the common law of England, "so far as the same is applicable and of a general nature, shall be the rule of decision, and shall be considered as in full force until repealed by legislative authority."

At the time of the decease of Mary Ann Wolcott, the statute of Illinois governing the descent of the real estate of persons dying intestate was as follows:

"Estates, both real and personal, of resident or non-resident proprietors in this State, dying intestate, or whose estates, or any part thereof, shall be deemed and taken as intestate estate, and after all just debts and claims against such estate shall be paid as aforesaid, shall descend to and be distributed to his or her children, and their descendants, in equal parts; the descendants of a deceased child, or grandchild, taking the share of their deceased parent in equal parts among them; *and when there shall be no children of the intestate, nor descendants of such children, and no widow, then to the parents, brothers, and sisters of the deceased person, and their descendants, in equal parts among them, allowing to each of the parents, if living, a child's part, or to the survivor of them, if one be dead, a double portion,* and if there be no parent living, then to the brothers and sisters of the intestate and their

descendants; when there shall be a widow, and no child or children, or descendants of a child or children of the intestate, then the one-half of the real estate, and the whole of the personal estate, shall go to such widow as her exclusive estate forever, subject to her entire and absolute disposition and control, to be governed in all respects by the same rules and regulations as are, or may be, provided in cases of estates of *femes sole;* if there be no children of the intestate, or descendants of such children, and no parents, brothers, or sisters, or descendants of brothers and sisters, and no widow, then such estate shall descend in equal parts to the next of kin to the intestate, in equal degree, computing by the rules of the civil law; and there shall be no representation among collaterals, except with the descendants of the brothers and sisters of the intestate; and in no case shall there be a distinction between the kindred of the whole and half blood, saving to the widow, in all cases, her dower of one-third part of the real for life, and the one-third part of the personal estate forever."

The court below gave judgment for the defendant.

Mr. Beckwith, for Bates, plaintiff in error; Mr. Fuller, contra.

Mr. Justice SWAYNE delivered the opinion of the court, having first stated the case, and quoted the statute relating to descents just above set out:

Mary Ann Wolcott, from whom the plaintiff in error claims to have derived his title by inheritance, died nearly four years before his birth. During all the intervening time it is not denied that the title was vested in his mother and her grantee. Such was the effect of the statute. It is clear in its language, and there is no room for controversy upon the subject. Although born after the title became thus vested, he insists that upon his birth it became, to the extent of his claim, divested from the grantee and vested in him. His later birth and relationship to the *propositus*, he contends, is to be followed by the same results as if he had been living at the time of her death.

It is alleged that the rule of "shifting inheritances," in the English law of descent, is in force in Illinois, and must govern the decision of this case.

The operation of this rule is thus tersely illustrated in a note by Chitty, in his Blackstone: "As if an estate is given to an only child, who dies, it may descend to an aunt, who may be stripped of it by an after-born uncle, on whom a subsequent sister of the deceased may enter, and who will again be deprived of the estate by the birth of a brother. It seems to be determined that every one has a right to retain the rents and profits which accrued while he was thus legally possessed of the inheritance. Hargrave's Co. Litt. 11; 3 Wilson, 526."*

Such is undoubtedly the common law of England.†

It is said the Ordinance of 1787, which embraced the territory now constituting the State of Illinois, and the acts of the legislature of that State of the 4th of February, 1819, and of the 3d of March, 1845, are to be considered in this connection.

The ordinance created a court which it declared "shall have common law jurisdiction," and it guaranteed to the people of the territory "judicial proceedings according to the course of the common law." There is no allusion in it to the common law but these. The two acts of the legislature contain substantially the same provisions. What is expressed in the second act, and not in the first, is clearly implied in the former. The latter declared that "the common law of England, so far as the same is applicable and of a general nature," . . . "shall be the rule of decision, and shall be considered as in full force until repealed by legislative authority."‡ Mary Ann Wolcott died, and the plaintiff in error was born before this act became a law, but it may be properly referred to as containing an exposition of the legislative intent in the prior act. Although the former act adopts "the common law of England" in general terms, it was undoubtedly intended to produce that result only so far as that law was "applicable and of a general nature."

By the common law, actual seizin, or seizin in deed, is in-

* 2 Christian's Blackstone, 208, n. 9.

† Watkins on Descents, 169.

‡ Revised Statutes of Illinois of 1845, p. 337.

dispensable to the inheritable quality of estates. If the ancestor were not seized, however clear his right of property, the heir cannot inherit.

According to the canons of descent, hereditaments descend lineally, but can never ascend. This rule is applied so rigidly that it is said "the estate shall rather escheat than violate the laws of gravitation."

The male issue is admitted before the female. When there are two or more males, the eldest only shall inherit, but females altogether.

Lineal descendants, *in infinitum*, represent their ancestors, standing in the same place the ancestor would have stood, if living.

On failure of lineal descendants of the ancestor, the inheritance descends to his collateral relations—being of the blood of the first purchaser—subject to the three preceding rules.

The collateral heir of the intestate must be his collateral kinsman of the whole blood.

In collateral inheritances, the male stock is preferred to the female. Kindred of the blood of the male ancestor, however remote, are admitted before those of the blood of the female, however near, unless where the lands have, in fact, descended from a female.*

These principles sprang from the martial genius of the feudal system. When that system lost its vigor, and in effect passed away, they were sustained and cherished by the spirit which controlled the civil polity of the kingdom. The celebrated statute of 12 Charles II, ch. 24, which Blackstone pronounces a greater acquisition to private property than *magna charta*, was followed by no change in the canons of descent. The dominant principles in the British constitution have always been monarchical and aristocratic. These canons tend to prevent the diffusion of landed property, and to promote its accumulation in the hands of the few. They thus conserve the splendor of the nobility and the influence

* Watkins on Descents, 95.

of the leading families, and rank and wealth are the bulwarks of the throne. The monarch and the aristocracy give to each other reciprocal support. Power is ever eager to enlarge and perpetuate itself, and the privileged classes cling to these rules of descent with a tenacity characteristic of their importance—as means to the end they are intended to help to subserve.

Before the Revolution, some of the colonies had passed laws regulating the descent of real property upon principles essentially different from those of the common law. In most of them the common law subsisted until after the close of the Revolution and the return of peace. It prevailed in Virginia until the act of her legislature of 1785 took effect, and it was, perhaps, the law upon this subject in "the Northwestern Territory," at the time of its cession in 1784 by Virginia to the United States. With the close of the Revolution came a new state of things. There was no monarch, and no privileged class. The equality of the legal rights of every citizen was a maxim universally recognized and acted upon as fundamental. The spirit from which it proceeded has founded and shaped our institutions, State and National, and has impressed itself upon the entire jurisprudence of the country. One of its most striking manifestations is to be found in the legislation of the States upon the subject under consideration. Of the results an eminent writer thus speaks:

"In the United States the English common law of descents, in its most essential features, has been universally rejected, and each State has established a law of descents for itself."*

Another writer, no less eminent, upon this topic says: "In the law of descents there is an almost total change of the common law. It is radically new in each State, bearing no resemblance to the common law in most of the States, and having great and essential differences in all."†

So far as British law was taken as the basis of this legis-

* 4 Kent's Commentaries, 412.

† Reeve on Descents, 11.

lation, in the different States, it was the statutes of Charles II and James II, respecting the distribution of personal property, and not the canons of descent of the common law. The two systems are radically different in their principles.

The Ordinance of 1787 contains a complete series of provisions upon the subject. They are the type and reflex of the action of many of the States at that time. The ordinance declared that the estates of persons dying intestate "shall descend to and be distributed among their children, and the descendants of a deceased child, in equal parts; the descendants of a deceased child or grandchild to take the share of their deceased parent in equal parts among them; and when there shall be no children or descendants, then in equal parts to the next of kin, in equal degree; and among collaterals the children of a deceased brother or sister of the intestate shall have, in equal parts among them, their deceased parent's share; and there shall in no case be a distinction between kindred of the whole and half blood."

We find here not a trace of the common law. These provisions are diametrically opposed to all its leading maxims. We cannot infer from their silence that anything not expressed was intended to be adopted from that source by implication or construction.

The statute governing the descent of real estate, already referred to, is also a complete code upon the subject of which it treats. It is to be presumed to cover every case for which the legislature deemed it proper to provide. If the same question had come before us under the ordinance, we should have said with reference to the common law, conflict is abrogation and silence is exclusion. The spirit and aims of the two systems are wholly different. One seeks to promote accumulation—the other diffusion. One recognizes and cherishes the exclusive claim of the eldest son—the other the equal rights of all his brothers and sisters. The latter makes no distinction on account of age, sex, or half blood. We apply to the statute also the remark that silence is exclusion. It speaks in the present tense—of the state of things existing at the time of the death of

the intestate, and not of any change or different state of things which might occur thereafter. If the legislature had designed to provide for this case, according to the rule insisted upon, we cannot doubt that they would have said so in express terms. The statute bears no marks of haste or inattention. We cannot believe it was intended to leave a rule of the common law so well known, and so important, to be deduced and established only by the doubtful results of discussion and inference. The draughtsman of the bill could not have overlooked it, and the silence of the statute is full of meaning.

One class of posthumous children are provided for. We see no reason to believe that another was intended to be included, especially when the principle involved is so important. The intention of the legislature constitutes the law. That intention is manifested alike by what they have said and by what they have omitted to say. Their language is our guide to their meaning, and under the circumstances we can recognize none other. We cannot go farther than they have gone. The plaintiff in error asks us, in effect, to interpolate into the statute a provision which it does not contain. Were we to do so, we should assume the function of the legislature and forget that of the court. The limit of the law is the boundary of our authority, and we may not pass it.

The principle contended for was applied in the case of *Dunn* v. *Evans*.* The case is briefly reported, and no arguments of counsel appear. It was also adopted in North Carolina, in *Cutlar et al.* v. *Cutlar*,† and in *Caldwell* v. *Black*.‡ No recognition of it is to be found, it is believed, in any other American adjudication.

The subject was elaborately examined by the Supreme Court of Ohio in *Drake et al.* v. *Rogers*,§ and *Dunn* v. *Evans* was overruled. It came before the Supreme Court of Indiana in *Cox et al.* v. *Matthews et al.*,‖ and received there also

* 7 Ohio, 169.
† 2 Hawkes, 324.
‡ 5 Iredell, 463.
§ 13 Ohio State, 21.
‖ 17 Indiana, 367.

a thorough examination. The result was the same as in the last case in Ohio. The doctrine was repudiated.

The court said:

"Under the laws of this State it is contemplated that such change of title from one living person to another is to be made by deed duly executed, rather than by our statutes of descent. . . . The feudal policy of tying up estates in the hands of a landed aristocracy, which had much to do with the shifting of descents as recognized by the English canons of descent, is contrary to the spirit of our laws and the genius of our institutions. It has been the policy, in this State, and in this country generally, not only to let estates descend to heirs equally, without reference to sex or primogeniture, but also to make titles secure and safe to those who may purchase from heirs upon whom the descent may be cast. Our laws have defined and determined who shall inherit estates upon the death of a person seized of lands. When those thus inheriting make conveyances, the purchasers have a right to rely upon the title thus acquired. If titles thus acquired could be defeated by the birth of nearer heirs, perhaps years afterwards, great injustice might, in many cases, be done, and utter confusion and uncertainty would prevail in reference to titles thus acquired. We are of opinion that the doctrine of shifting descents does not prevail under our laws, any more than the other *English* rule, that kinsmen of the whole blood, only, can inherit."

The rule is sanctioned by no American writer upon the law of descents. Judge Reeve,* speaking of distributees, says: "I am of opinion that such posthumous children who were born at the time of the distribution were entitled, and none others."

It is to be regretted that we have not the benefit of an adjudication by the Supreme Court of Illinois upon the subject.

Their interpretation—the statute being a local one—would of course be followed in this court. We have, however, no doubt of the soundness of the conclusion we have reached.

* On Descents, p. 74, Introduction.

We find no error in the record, and the judgment of the Circuit Court is

AFFIRMED.

CITY OF PHILADELPHIA *v.* THE COLLECTOR.

1. The jurisdiction of the Circuit Court in a case between citizens of the same State, under the internal revenue laws of July 1, 1862, and March 3, 1863, removed thereto from a State court under the act of March 2, 1833 (the Force Bill), and before the passage of the internal revenue act of June 30, 1864, is saved by the sixty-eighth section of the internal revenue act of July 13, 1866, if the justice of said Circuit Court is of opinion that the case would be removable from the State court to the Circuit Court under the sixty-seventh section of the said act of July 13, 1866.
2. Where a case, removed from a State court to a Circuit Court under the act of 1833, above mentioned, would be clearly removable under the provisions of the act of 1866, directing such Circuit Court to remand removed cases, unless the circuit judge should be of opinion that the same, if pending in the State court, would be removable under a provision which the last-named act made, the fact that the case was in the Circuit Court when the new act passed, and that it never was remanded, is a fact from which it may be inferred, as a conclusion of law, that it was the opinion of the circuit judge that the case was one that ought to be retained.
3. Where an article (as illuminating gas) which, under the internal revenue acts, is taxable when made and "sold," but is not taxable when made by the party "for his own use," is made by trustees appointed by the party using it, under obligatory and fixed arrangements with such party's creditors, at an establishment of which the party using the article has apparently the ultimate ownership, but which, till certain debts due by him, and contracted in order to build and enlarge the establishment, are paid, is held and managed exclusively by the trustees, under an arrangement that the party using may have the article at a certain price, and that all clear profits shall be set aside as a sinking fund for the payment of the principal due the creditors,—such article, when furnished to the debtor at a price fixed, is "sold," and taxable; though apparently the sale is chiefly for the purpose of providing, in the manner agreed on, a sinking fund to pay the debts of the party using it.
4. The trustees of the Philadelphia Gas Works, by the law and ordinances creating and constituting them, and by reason of the several loans created for the support and management of the said gas works, hold such a relation to the private consumer, the loanholder, and the city of Philadelphia, that all illuminating gas manufactured by the said trustees, and

furnished by them to the city, to be used in her public lamps,—is liable to, and chargeable with, the internal revenue duty imposed by the act of July 1, 1862, and the supplement thereto of March 3, 1863.

ERROR to the Circuit Court for Eastern Pennsylvania; the case being thus:

The Judiciary Act of 1789 limits the jurisdiction of the Federal courts, so far as determined by citizenship, to "suits between a citizen of the State in which the suit is brought and a citizen of another State."

An act of 1833,* "to provide further for the collection of *duties on imports*," extended the jurisdiction to cases arising under "*the revenue laws* of the United States," where other provision had not been made. And it authorized any person injured, in person or property, on account of any act done "under any law of the United States for the protection of *the revenue or* the collection of duties on imports," to maintain suit in the Circuit Court. It also allowed any person sued in a State court, on account of any act done "under the *revenue laws* of the United States," to remove the cause by a mode which the act itself set forth, into the Circuit Court of the United States.

With the passage of the internal revenue laws, made necessary by the late rebellion, it was doubted by some persons whether this act of 1833 extended to cases under the new enactments. And the internal revenue act of 1864,† by its fiftieth section extended in general words "the provisions" of the act of 1833 to cases arising under the *internal* revenue acts.

By an internal revenue act of 1866,‡ however (§ 67), Congress made provision for removing cases from State courts to the Circuit Court, authorizing such removal in a way which it particularized, "in any case, civil or criminal, where suit or prosecution shall be commenced in any court of any State against any officer of the United States, . . . or against any person acting under or by authority of any such

* 4 Stat. at Large, 632. † 13 Id. 241. ‡ 14 Id. 172.

officer, on account of any act done under color of his office," &c.

And by the sixty-eighth section, immediately following, it "repealed" the fiftieth section of the act of 1864, with, however, this proviso:

"*Provided*, That any case which may have been removed from the courts of any State *under said fiftieth section* to the courts of the United States, shall be remanded to the State court from which it was so removed, with all the records relating to such cases, unless the justice of the Circuit Court of the United States in which such suit or prosecution is pending shall be of opinion that said case would be removable from the court of the State to the Circuit Court under and by virtue of the provisions of *this* act."

With the act of 1833 in force, but before the passage of any of the others, the city of Philadelphia, in October, 1863, sued in a State court the collector of *internal* revenue of the collection district to which the city belongs, for a return of certain internal revenue taxes paid under protest; the city corporation (constructively) and the collector being citizens of the same State.

The collector assuming that the case was one arising "under the revenue laws of the United States," and that it was, therefore, within the act of 1833, removed it by the mode prescribed in that act of 1833 into the Circuit Court. This was in November, 1863. And the Circuit Court having been, apparently, of the same opinion as to the extent of operation of the act of 1833, tried the case twice, the first trial beginning in December, 1863; therefore, before the internal revenue act of 1864, having its fiftieth section, was passed. A new trial was had in October, 1864, and final judgment then given.

The suit thus brought in the State court and removed, was to recover internal revenue taxes accrued under the internal revenue acts of 1862 and 1863, demanded by the collector and paid under protest by the "Trustees of the Philadelphia Gas

Works," for gas used by the city for its public lamps. Supposing jurisdiction to have existed in the Circuit Court, the question was whether this gas had been "made and sold" by the trustees to the city, or whether it had been made by the city through its appointees, the trustees, for itself. If the former, it was taxable under the provisions of the revenue acts, which taxed all gas "made and sold;" if the latter, it came within an exception which exempted articles made by any person "not for sale, but for his or their *own use*," and was not taxable.

The history of "the Philadelphia Gas Works," where the gas was made, and their relation to the city of Philadelphia, was this:

They originated in a city ordinance passed in 1835, and which seems to have contemplated the temporary establishment of a quasi corporation which might yet be, or be ultimately, a department of the city government. The works were to be and were constructed by means of money subscribed by private individuals, for which they received certificates of *stock* entitling them to the profits arising from the manufacture and sale of gas. The ordinance provided that the works should be under the exclusive management of trustees elected by the *councils of the city;* also that the public lamps should be supplied at half the price paid by private consumers. It provided, above all, that the city corporation should have a right to take possession on certain conditions. The original capital was limited to $100,000. The works, with the increase of the city, not being found large enough and needing to be extended, subsequent ordinances were passed authorizing loans, and providing that the money should be borrowed by the *city*, on the requisition of the trustees, and that obligations of the *city* should be issued to the loanholders. A sinking fund, as security for the loanholders, was created out of the proceeds of sale of gas before any profits were distributable to the stockholders. The interest on the certificates of loan was declared payable at the office of the gas works. In 1841, under the original ordinance of 1835, reserving to the city the right to take

possession, the city did take possession in their own right, and the stock was converted into a "gas loan," in which the city was the debtor, and whose interest was, in fact, paid at the city treasury. But the works were continued under the superintendence of the existing trustees; the only change in the relation of the trustees being that they thenceforth were trustees for the city and loanholders, instead of for the stockholders. Several ordinances were subsequently passed, authorizing further loans. They stipulated that, for the further security of the loanholders, the works should be controlled and managed by a board of trustees, elected and constituted as theretofore, who should have the whole control of the works, and of all the funds belonging to them; and that the trustees should pay no part of the funds, nor any of the profits of the works, into the city treasury, but should apply the same in payment of the interest and principal of the loans; a stipulation whose primary design was declared by the Supreme Court of Pennsylvania—on a controversy between some of the holders of the gas loans and the city corporation, which last wished to take into its own control the property, held by the trustees under the various city ordinances, out of their hands, and to elect other trustees, in addition to the number provided by the original ordinance of 1835*—to have been "to keep the pledge entirely out of the hands of the borrowers (the city), and prevent the funds from being intermingled with other property of the city, and thus exposed to the hazards of expenditure for other objects than those to which it was exclusively designated."

The gas used by the city for its public lamps was manufactured at these works; and under different ordinances, specifically providing for the price payable for gas supplied to the public lamps, a process of payment was regularly gone through with at stated intervals, though practically the matter was, in a good degree, a provision by the city

* Western Saving Fund Society v. The City of Philadelphia, 31 Pennsylvania State, 178.

for the support of works whose income paid the interest on, and provided a sinking fund for final redemption of its own "gas loans," held by various creditors.

The court below was of opinion that the gas was "made and sold," and that it was taxable.

Mr. Ashton, for the collector:

1. The case of *Insurance Company* v. *Ritchie*,* lately adjudged, decides that the jurisdiction of the Circuit Courts, in original suits between citizens of the same State, in *internal* revenue cases, conferred by the 50th section of the act of June 30th, 1864, was taken away by the 68th section of the act of July 13th, 1866, and that all original suits, pending at the passage of this last act, fell. This 68th section, however, saves (under certain conditions) "any case which may have been removed from the courts of any State, *under said 50th section.*" It saves none, removed otherwise. But the present suit was not so removed. It was removed under the act of 1833, which was assumed by the collector to extend to such cases. In fact it was removed, and once tried, months before the act having that 50th section was passed. Unless, therefore, the act of 1833 extends to cases of *internal* revenue, must not this case fall? The matter is suggested.

2. *As to the merits:* If all the loans, for the payment of which the trustees appointed by the city, primarily hold and manage the gas works, were paid off, no new ones being contracted, the works, and all right over their products, would become the city's, and the tax might not be chargeable; but at present there is a clear trust for the holders of the gas loan; and the city has to elect trustees who will manage them in subordination to their obligations to those creditors. The gas is "sold" for their benefit, and by the arrangements between the city and its creditors, it must be so sold. The decision of the Supreme Court of Pennsylvania, when the city wished to act as *owners*, concludes this case.

* *Supra*, p. 541.

Messrs. Lynd (*City Solicitor*), *W. L. Hirst, and Richard Ludlow, contra:*

1. The question of jurisdiction seems not to be much pressed. If the court below was right in taking jurisdiction under the act of 1833, as it did, the case is plain. Neither the act of 1864 nor that of 1866 has anything to do with the matter.

2. *As respects the main question:* Taxing statutes, confessedly, are to be strictly construed. Hence the manufacturers or producers of gas, subject to taxation, must be private individuals, or private corporations, who pursue the business of making gas as a source of profit.

Nowhere in the law is it provided that a *city*, or town, or state, engaged in the manufacture of taxable articles, shall pay a tax; for no city or state is known to be in the exercise of any but municipal functions—functions exercised for the public good and not for pecuniary aggrandizement. The gas used by the city of Philadelphia is made under the direction of and by an especial department of the municipal government. The trustees of her gas works are chosen at stated periods by the city councils, the legislative department of the city. The trustees are mere managers; elected by the city; having no title whatever. Really and practically the gas works are a city affair. The city owes for them and owns them. There are no stockholders, and the "payment" relied on to make the case "a sale" and to take it out of that of a person manufacturing for himself is simply a payment by one hand into another and back. The city pays the gas works and the gas works hand the payment back to the city to pay interest on *its* gas debt.

The internal revenue acts were made for the purpose of taxing the revenues and the incomes of the country. Nowhere does it appear that subsidies were to be levied upon states, or towns, or that any business but that which was clearing a profit should pay a tax. These facts are evident from the whole language and import of the acts themselves, sufficiently known to all. Land itself was not to be taxed, but its products in kind and specie. The manufacturer was

not to pay for the amount of his stock, nor for his accumulation of raw material, but for the results of his skill and labor from which he gets wealth.

Mr. Justice CLIFFORD delivered the opinion of the court.

Plaintiffs sued the defendant as the collector of internal revenue in the second collection district in the State of Pennsylvania, in an action of assumpsit for money had and received, to recover back the sum of twenty-six thousand eight hundred and seventy-five dollars and fifty-seven cents, which they had previously paid to him under protest, and which he, as such collector, had demanded of them as for internal revenue duties. Record shows that the duties were assessed for the last four months of the year 1862, and for the first six months of the succeeding year, upon illuminating gas, manufactured and furnished by the trustees of the Philadelphia Gas Works, and which was consumed under the direction of the proper authorities of the city in her public lamps during that period. Assessment of the duties in question was made under the seventy-fifth section of the act of the first of July, 1862, which provides in effect that upon illuminating gas, made wholly or in part of coal, or of any other material, and produced and sold, or manufactured, or made and sold or removed for consumption, or for delivery to others than agents of the manufacturers or producers, there shall be levied and collected a duty of five cents per one thousand cubic feet. Section thirty-three of the act of the third of March, 1863, enacts that those provisions shall also be applied to the producers of the several articles mentioned in that section as subject to duty as well as the manufacturers.*

Suit was commenced in this case in the State court, but on motion of the defendant, the same was removed, on the twenty-fifth day of November, 1863, into the Circuit Court of the United States for that district, where the verdict and

* 12 Stat. at Large, 462–729.

judgment were for the defendant. Exceptions were duly taken by the plaintiffs, and they sued out the present writ of error. Defendant objects to the jurisdiction of the court, and insists that the writ of error should be dismissed, and as that objection presents a preliminary question it will first be examined.

1. Jurisdiction of the Circuit Courts was extended by the second section of the act of the second of March, 1833, to all cases in law or equity arising under the revenue laws where other provisions had not been previously made by law. Section three of that act also provided that any officer of the United States, or other person who should be sued in any State court for or on account of any act done under the revenue laws, or under color thereof, or for or on account of any right, authority, or title, set up or claimed by such officer or other person under such law, might, in the manner therein prescribed, remove the cause into the Circuit Court, and that the cause so removed should be proceeded in as one originally commenced in that court.*

Those provisions were extended to cases arising under the laws for the collection of internal duties by the fifth section of the act of the thirtieth of June, 1864, and the same section enacted in effect that all persons duly authorized to assess, receive, or collect such duties or taxes under such laws, should be entitled to all the exemptions, immunities, benefits, rights, and privileges therein enumerated or conferred.†

Undoubtedly the original act was passed for the protection of officers of the revenue, and persons acting under them, charged by law with the collection of import duties, and the first proviso in the sixty-seventh section of the act of the thirtieth of July, 1866, expressly enacts that the original act shall not be so construed as to apply to cases "arising under any of the internal revenue acts, nor to any case in which the validity or interpretation of those acts shall be in issue."‡

Effect of that proviso is to limit the scope of the original act, without repealing it, to cases arising under the acts of

* 4 Stat. at Large, 632. † 13 Id. 241. ‡ 14 Id. 172, § 67.

Congress providing for the collection of import duties, and to confine its operation to the purposes for which it was originally passed, but the proviso does not touch the provision as re-enacted in the subsequent act, entitled An act to provide ways and means for the support of the government, and for other purposes. Had legislation stopped there the subsequent provision would have remained in full force, but the sixty-eighth section of the act which in its sixty-seventh section limits and restrains the original provision in the act of the second of March, 1833, repeals the fiftieth section of the act of the thirtieth of June, 1864, altogether, subject to the proviso contained in the same repealing section.*

Substance of the last-named proviso is that any case removed from the court of a State into the Circuit Court under former regulations upon the subject, shall be remanded, unless the justice of the Circuit Court shall be of opinion that the same if pending in the State court would be removable under the new provision contained in the sixty-seventh section of the same act which in its sixty-eighth section repeals the fiftieth section of the prior law.†

2. Section sixty-seven, in the body of the section preceding the proviso limiting and restraining the operations of the original act to cases arising under the laws for the levy and collection of import duties, makes provision for the removal of any case, civil or criminal, commenced against any officer appointed or acting under the law to provide internal revenue, or against any person acting under such an officer, on account of any act done in virtue of his office, &c., and prescribes the mode of proceeding to effect such a removal of the case.‡

Present case is one which was removed into the Circuit Court under the original act, now limited and restrained in its operation to cases arising under the laws for the collection of import duties, but it is undeniably one which, if pending in the State court, would be removable under the new provision, and inasmuch as it was pending in the Cir-

* 14 Stat. at Large, 172, § 68. † Ib. ‡ Id. 171, § 67.

cuit Court when the last-named proviso was passed, and has never been remanded by the justice of the Circuit Court, it must be understood as a conclusion of law that it was his opinion that it ought to be retained in the Circuit Court. Want of jurisdiction, therefore, is not shown, although the parties, plaintiffs and defendant, are citizens of the same State.

3. Cases arising under the internal revenue laws, as now modified, if commenced in a State court, against an officer appointed or acting under those laws, or against persons acting under such an officer, may be removed on petition of the defendant into the Circuit Court for the district, and the jurisdiction of the Circuit Court over such controversies, when all the prescribed conditions for the removal concur in the case, is clear beyond doubt, irrespective of the citizenship of the parties.

Although the point was not made in this case, it seems proper to remark that the jurisdiction of the Circuit Court has often been denied in this class of cases, because the party aggrieved may appeal to the commissioner for redress, and because he may also pursue his remedy by petition to Congress or present it in the Court of Claims. Suffice it to say, without entering much into the argument, that such a theory finds no substantial support in any act of Congress upon the subject or in any decided case. On the contrary, the several acts of Congress for the assessment and collection of internal duties contain many provisions wholly inconsistent with any such theory, and which, when considered together, afford an entirely satisfactory basis for the opposite conclusion.

Collectors are appointed by the President, and they were made responsible by the fifth section of the act of the first of May, 1862, both to the United States and individuals, as the case might be, for all moneys collected by their deputies, and for every omission of duty.*

Collections were required by the twenty-third section of the act to be completed within six months, and collectors

* 12 Stat. at Large, 434.

were required to render their final account and pay the sums collected into the treasury within that period. Argument is that inasmuch as collectors were required by that act to pay all moneys collected into the treasury, they cannot be held liable to refund any portion of such collections; but the same requirement is made of the commissioner, and yet he is authorized to remit, refund, and pay back all duties erroneously or illegally assessed or collected, and to pay all judgments or sums of money recovered in any court against any collector or deputy collector for any duties or licenses paid under protest.*

4. Necessary implication from those provisions is, that actions may be maintained against collectors of the internal revenue to recover back duties illegally or erroneously assessed. Authority is also conferred upon the commissioner, by the forty-fourth section of the act of the thirtieth of June, 1864, not only to pay back all duties erroneously or illegally assessed or collected, but also all duties that appear to be excessive in amount, *and to repay* to collectors or deputy collectors the full amount of such sums of money as shall or may be recovered against them in any court for any internal duties or licenses collected by them, with costs and expenses of suit.†

Same section also confers authority upon the commissioner to repay to assessors, assistant assessors, collectors, deputy collectors, and inspectors, *all damages and costs* recovered in any suit against them by reason of any act done in the performance of their official duties. Evidently, those clauses of the section contemplate different grievances and different remedies for their redress as known at common law and in the practice of the courts.‡

5. Appropriate remedy to recover back money paid under protest on account of duties or taxes erroneously or illegally assessed, is an action of assumpsit for money had and received. Where the party voluntarily pays the money, he is without remedy; but if he pays it by compulsion of law, or

* 12 Stat. at Large, 725, 729. † 13 Id. 239. ‡ See also 14 Id. 111.

under protest, or with notice that he intends to bring suit to test the validity of the claim, he may recover it back, if the assessment was erroneous or illegal, in an action of assumpsit for money had and received.*

When a party, knowing his rights, voluntarily pays duties or taxes illegally or erroneously assessed, the law will not afford him redress for the injury; but when the duties or taxes are illegally demanded, and he pays the same under protest, or gives notice to the collector that he intends to bring a suit against him to test the validity of the claim, the collector may be compelled to refund the amount illegally exacted.†

Decisions to the same effect were made in the parent country at a very early period, and like decisions are to be found in the judicial reports of all, or nearly all, of the several States. But the third section of the act of the third of March, 1865, requires collectors to pay daily into the treasury the gross amount of all duties, taxes, and revenue received or collected in virtue of the internal revenue acts, without any abatement or deduction on account of salary, compensation, fees, costs, charges, expenses, or claims of any description whatever.‡

Defendant contends that this provision has the same legal effect in respect to suits against the collectors of the internal revenue as the second section of the act of the third of March, 1839, had in respect to suits against collectors of customs.§

6. None of the internal revenue acts, however, contemplate that collectors shall reimburse themselves for the amount of any judgment recovered against them on account of duties illegally or erroneously assessed and paid under protest. Direction in those acts is, without exception, that all such judgments shall be paid by the commissioner, including, by the latter acts, costs and expenses of suit.

* Elliott *v.* Swartwout, 10 Peters, 150.

† Bend *v.* Hoyt, 13 Id. 267.

‡ 13 Stat. at Large, 487.

§ 5 Stat. at Large, 348; Cary et al. *v.* Curtis, 3 Howard, 236; Curtis *v.* Fiedler, 2 Black, 461.

Clear implication of the several provisions is, that a judgment against the collector in such a case is in the nature of a recovery against the United States, and that the amount recovered is regarded as a proper charge against the revenue collected from that source. Evidently, therefore, it is not material in this inquiry whether the collectors of the internal revenue are required to account daily or monthly, or whether they are required to pay into the treasury the gross or only the net amount of collections, so long as this provision authorizing the commissioner to pay such judgments, costs, and expenses of suit, remains in full force.

Direct repeal is not pretended, and it is equally clear that the enactment requiring collectors to pay the gross amounts collected into the treasury is in no respect repugnant to the provision directing the commissioner to pay all judgments recovered against such collectors for duties illegally or erroneously assessed and paid under protest. Inconsistent provisions are repealed, but all others remain in full force.* Section nineteen of the act of the thirteenth of July, 1866, does not apply in this case, as it was not passed until long after this suit was commenced.†

Strong support to the conclusion that the Circuit Courts have jurisdiction in cases like the present is derived from the several provisions authorizing the removal of such cases from the State courts into the Circuit Courts for trial. Parties compelled to pay an illegal assessment ought to have a convenient remedy to redress the injury, and inasmuch as it is enacted by Congress that no suit for the purpose of restraining the assessment or collection of taxes shall be maintained in any court, it is believed that there is no more appropriate or effectual remedy known to the common law than the action of assumpsit for money had and received, as in this case.‡

7. All the gas consumed in the public lamps of the corporation plaintiffs, is manufactured at the Philadelphia Gas

* 13 Stat. at Large, 486, § 16.

† 14 Id. 152.

‡ Act March 2, 1867, § 10.

Works, and payment therefor is made by the corporation to the trustees of the works, as shown by the only witness examined in the case. Origin of the gas works is shown in the ordinance of the twenty-first of March, 1835, and it appears that the works were constructed and put in operation by means of money subscribed by private individuals, for which they received certificates of stock, signed by the mayor of the city, and countersigned by the treasurer, entitling the holder to the proper share of the profits arising from the manufacture and sale of gas. Original subscriptions amounted to one hundred thousand dollars, and the provision was, that the works should be under the exclusive control and management of twelve trustees, to be elected by the councils of the city. Purpose was to supply the city and the citizens with gas; but the stipulation was, that the public lamps of the city should be supplied at one-half the price paid by private consumers. Five hundred dollars is annually paid by the trustees to the city as rent of the lot for the location and use of the gas works. New subscriptions and loans were subsequently authorized to increase the capital stock for the extension of the works.

Moneys arising from the manufacture and sale of the gas were required by the original ordinance to be paid into the city treasury, but that part of the ordinance was afterwards repealed, which gave the entire control to the trustees. Whenever the municipality deemed it expedient they might take possession of the gas works and convert the stock into a loan, redeemable in twenty years. They did take possession of the works, and loan certificates, on the third day of June, 1841, were issued to the stockholders, but the stipulation that the works should be controlled and managed by the trustees elected, as before, was renewed in the subsequent ordinance, passed in the same month. Clear profits were required, under this last arrangement, to be set apart as a sinking fund to be invested in the loans to the association, and the trustees were charged with the duty of carrying the regulation into effect. Throughout, from the organization of the association to the commencement of the suit,

the works have been controlled and managed by the trustees, and the interest of the association, which constructed the works and put them in operation, has never been divested or become vested in the corporation.

Plaintiffs authorized the mayor of the city, on the sixteenth day of February, 1856, to contract with the trustees for the lighting, extinguishing, cleansing, and repairs of the public lamps of the city, for the term of three years, at a stipulated sum for each lamp, and made a sufficient appropriation to carry the contract into effect; and the evidence showed that the works were, throughout the period for which the duties were assessed, in the exclusive possession of the trustees. Testimony also showed that the city paid monthly for the gas consumed in her public lamps throughout that entire period. They sometimes paid a fixed sum for each lamp and sometimes one-half the rate paid by private consumers.

Prayers for instruction were presented by both parties, but the presiding justice rejected them all, and instructed the jury that the plaintiffs were not entitled to recover, and that their verdict should be for the defendant.

8. Buried as the original transaction is in subsequent ordinances and amendments thereto, still it is believed that there is no great difficulty in ascertaining the true state of the case so far as it respects the present controversy. Trustees elected by the councils of the city superintended the construction of the works, but the subscribers to the capital stock furnished the money employed in the enterprise, and became and are the legal owners of the works. When loans were subsequently made to enable the association to supply gas to a larger portion of the citizens, the capital stock and the number of shares were increased, but the control and management remained unchanged. Debts contracted by loans or otherwise became liens upon the works, and, in some instances, the faith of the city as surety or guarantor was pledged for the payment of the interest and ultimate payment of the principal. Such liens did not change the ownership of the capital stock of the association, nor did

the mere entry by the city for the purpose of laying the foundation to issue the loan certificates, as the possession was only temporary, and the control and management were, by new stipulation, continued in the trustees constituted and appointed in case of any vacancy, as provided in the original ordinance. Rent was paid, as before, to the city for the lot leased for the location of the works and for the use of the association, and the authorities continued, as before, to pay monthly or otherwise, at stipulated prices, for the gas consumed in the public lamps.

Taking the facts *as they appear in this record*, it is clear that the property of the association never became vested in the city, and it is equally clear that it remained vested in the association, subject to the liens created as security for the loans and as indemnity to the city for her liabilities incurred as surety or guarantor. Supreme Court of the State regarded the city as the borrower in the matter of the last loan, and they held that the object of the stipulation that the works should continue to be controlled and managed by a board of trustees, elected as before, was to keep the pledge out of the hands of the borrower and prevent the fund from being mingled with the funds of the city. Ruling of the court that the works were held by the city in pledge *only*, and not in full property, is all which the present case requires this court to decide. They also held that the effect of taking possession and the issuing of the certificates of loans, was, that the trustees ceased to be trustees for the stockholders and became the trustees of the city and the loanholders.*

Suppose that to be so, still they held that the control and management of the works continued in the trustees, and that they were to be elected, as under the original ordinance. Rights of the stockholders could not be divested without their consent, and the mere acceptance of certificates of loan in the place of certificates of shares in the capital stock, *without more*, would not operate to convey to the

* Saving Fund Co. *v.* City of Philadelphia, 7 Casey, 187.

city their interests in the gas works. Conclusion is, that the duties were properly assessed, and that there is no error in the record.

JUDGMENT AFFIRMED, WITH COSTS.

THE KANSAS INDIANS.

1. The State of Kansas has no right to tax lands held in severalty by individual Indians of the Shawnee, Miami, and Wea tribes, under patents issued to them by virtue of the treaties made with those tribes respectively in 1854, and in pursuance of the provisions of the 11th section of the act of June 30th, 1859 (11 Stat. at Large, p. 431).
2. If the tribal organization of Indian bands is recognized by the political department of the National government as existing; that is to say, if the National government makes treaties with, and has its Indian agent among them, paying annuities, and dealing otherwise with "head men" in its behalf, the fact that the primitive habits and customs of the tribe, when in a savage state, have been largely broken into by their intercourse with the whites,—in the midst of whom, by the advance of civilization, they have come to find themselves,—does not authorize a State government to regard the tribal organization as gone, and the Indians as citizens of the State where they are, and subject to its laws.
3. Rules of interpretation favorable to the Indian tribes are to be adopted in construing our treaties with them. Hence, a provision in an Indian treaty which exempts their lands from "levy, sale, and forfeiture," is not, in the absence of expressions so to limit it, to be confined to levy and sale under ordinary judicial proceedings only, but is to be extended to levy and sale by county officers also, for non-payment of taxes.

THESE were three distinct cases involving, however, with certain differences, essentially the same question, argued on the same day and by the same counsel.

The specific question was, whether the State of Kansas had a right to tax lands in that State held in severalty by individual Indians of the Shawnee, Wea, and Miami tribes, under patents issued to them pursuant to certain treaties of the United States; the tribal organization of these tribes having to a certain extent, as was alleged, been broken in upon by their intercourse with the whites, in the midst of

whom the Indians were, and by their enjoyment, to some extent, of the social and other advantages of our own people.

The question was raised on bills filed in equity in the county courts of Kansas, by different Indian chiefs,—Blue Jacket as representing the Shawnees; Yellow Beaver representing the Wea tribe, and Wan-zop-e-ah the Miamis—against the County Commissioners of Johnson County and Miami County, to restrain these commissioners from selling for non-payment of taxes lands held by these Indians in their individual characters. The county court dismissed the bills, conceiving that the lands were rightly taxed, and on an affirmance of such dismissals in the Supreme Court of the State, the cases were brought here. They were, respectively, thus:

I. CASE OF THE SHAWNEE TRIBE.

In 1817, a portion of the Shawnees were living in Missouri, others in Ohio; those in Missouri were upon lands given to them by the United States, and which, by treaty, was declared should *not be liable to taxes so long as they continued to be the property of the Indians.**

In 1825, the Shawnees in Missouri gave up their lands there to the United States, and in consideration for the surrender received for themselves, and such of their brethren in Ohio as might choose to follow them, a tract in Kansas—then a wild—of 50,000 square miles, or 1,600,000 acres.†

In 1831, the Shawnees in *Ohio* resolved to join their Missouri brethren who had gone to Kansas. A treaty was accordingly concluded in that year by the United States with the Ohio Shawnees. By the terms of it the President was to cause the said tribe from Ohio to be protected at their intended residence against all interruption or disturbance from any other tribe or nation of Indians, or from any other person or persons whatsoever, and he was to have the same care

* 7 Stat. at Large, 166.

† Id. 284.

and superintendence over them in the country to which they were to remove, that heretofore he had over them at their then place of residence. 100,000 acres of land within the 50,000 square miles, above mentioned, were granted to them in fee by patent, so long as they should exist as a nation. These lands were not to be ceded by them except to the United States, and *were never to be included within the bounds of any State or Territory, nor to be subject to its laws.**

The Ohio Shawnees were thus transferred to Kansas, and were there resident with the rest of their tribe from the time they went there, continuously, up to 1854. In the course of this term of years, the progress of civilization westward, carried numbers of white men *to*, around, among, and beyond them. They were thus in the midst of whites. In May of the year just mentioned, 1854, Kansas became a "Territory" of the United States, with an organic law from Congress. By this law, it was ordained "that all treaties, laws, and other engagements made by the government of the United States with the Indian tribes inhabiting the territories embraced therein should be faithfully and rigidly observed;" and also that all such "territory, as by treaty with any Indian tribe was not to be included within the territorial limits or jurisdiction of any State or Territory should be excepted out of the boundaries and constitute no part of the same until said tribe should signify their assent to the President of the United States to be included therein."

In November of this same year, 1854, the Shawnees—holding their lands in common in fee by patent, no partition having been made among themselves, and they proposing to divide them to the extent of 200 acres each, among themselves, but having no mode to effect this except by parole—ceded to the United States the whole tract of 1,600,000 acres. A retrocession of a part (200,000 acres) was made in the same instrument to carry out this purpose, with a stipulation that these retroceded lands should cover the lands where improvements of individuals had been made, and that the

* 7 Stat. at Large, 357.

restriction before annexed to their title should be as to the power of alienation, regulated as Congress might provide for. In one article of the agreement now made with these Indians, "the care and protection of the United States are invoked, and they agree to comply with the laws of the United States, and expect to be protected and have their rights vindicated by them."* A sum of $829,000 was agreed to be paid to the Shawnee Indians for the cession to the United States. One article of the treaty provides that this sum "shall be in full satisfaction not only of such claim, but of all others of what kind soever, *and in release of all demands and stipulations arising under former treaties.*" From this re-ceded or reserved tract 200 acres were to be selected *for each individual*, except as to certain bands, who were to have *their* lands in common and in a compact body. The lands assigned to individuals were to be patented, under such restrictions as Congress—or, as that body afterwards enacted†—such restrictions as the Secretary of the Interior might impose. This officer afterwards made rules; and patents were issued in fee simple, with the restriction that "the said lands shall never be sold or conveyed by the grantee or his heirs without the consent of the Secretary of the Interior."

In July, 1859, a constitution was formed for the State of Kansas, in which it was provided that all rights of individuals should continue as if no State had been formed, or change in the government made.

In January, 1861, an act for the admission of the State was passed by Congress.‡ In this it was provided "that nothing contained in this said constitution respecting the boundaries of said State shall be construed to impair *the rights of person or property now pertaining to the Indians of said territory*, so long as such rights shall remain unextinguished by treaty with such Indians." And also, "that no territory should be included which, by treaty with such Indian tribes, was not (without the consent of such tribe) to be included within the territorial limits or jurisdiction of any State or

* 10 Stat. at Large, 1053–63. † 11 Id. 430. ‡ 12 Id. 127.

Territory; but that all such territory shall be excepted out of the boundaries and constitute no part of the State of Kansas until said tribe shall signify their assent to the President of the United States to be included in said State."

No treaty had been made by this tribe in which such consent was given by them. Nor was such assent shown by the record to have been given to the President.

II. THE CASE OF THE WEA TRIBE

Was similar in the outlines to that of the Shawnees. It was a small tribe—a mere band—who joining with other small tribes surrendered to the United States, *by treaty of 10th August*, 1854,* lands which had been ceded to them in earlier times while the region was wild. One hundred and sixty acres were reserved for each individual, to be selected, not in a body, by the heads of families. Ten sections were reserved for the common property of the tribe, and one section for the American Indian Mission Association. The unselected lands were to be sold and the proceeds given to the Indians. The patents were like those given to the Shawnees.

III. THE CASE OF THE MIAMI TRIBE

Was, in its main aspect, like the others. By the treaty of 1854,† it was provided, "should difficulties at any time arise, that these Indians would abide by the laws of the United States, and as they expected to be protected and have their rights vindicated by those laws." And also in the 11th article of the same treaty it was provided, "that the President, with the advice and consent of the Senate, might adopt such policy in the management of their affairs as in his judgment might be most beneficent to them; or Congress might thereafter make such provision by law as expe-

* 10 Stat. at Large, 1082.

† Id. 1097.

rience should prove to be necessary." Like the Indians of the other two tribes, this tribe held their rights in severalty, with the conditions against alienation except on approval, &c. The patents, in the case of this tribe, declared, however:

"That the lands now patented shall *not be liable to levy, sale, or execution, or forfeiture:* PROVIDED, that the legislature of a State within which the ceded county may be hereafter embraced, may, with the assent of Congress, remove the restriction."

IN THE CASE OF THE SHAWNEE TRIBE, the Commissioners of the County of Johnson, which had laid the tax, answered the bill as follows:

"That the aggregate of the lands selected by the said Indians, and from which it is sought to enjoin the levy of taxes, is about one hundred thousand acres; that they do not lie in a contiguous body, but are scattered over the entire area of the lands ceded by said tribe of Indians to the United States; in fact, over the whole body of the said county of Johnson; that interspersed with the selected lands are farm lands and roads, and school districts and municipal townships (the said districts and townships exercising their jurisdiction and functions over the said lands) of the white citizens of the county; that the lands are traversed by the white citizens as well as by Indians in visiting each other, in going to mill and to various business centres of the county; that highways have been laid across the lands by different county tribunals, and frequently at the instance and request of the grantees of the lands; that since the lands have been patented to the Indians, many of them have sold to their white neighbors, and to each other, such portions as they were allowed to do by the Secretary of the Interior; that the Indians traffic and live with their white neighbors as they do with each other, and as such white neighbors do with each other; that many of the Indians have intermarried with their white neighbors and friends; that their marriage ceremony conforms to the laws of the State; that many of the members of the said tribe of Indians, and who are the complainants in the bill, and who are grantees of the selected lands, are white

men and women; that the said white men are entitled to, and do exercise the elective franchise at all elections; that the Indians appeal to the different courts of justice of the county to protect their rights, not only as against their white neighbors, but as against each other; that offenders among them are brought by them before the courts of justice for trial and punishment; that the Indians invoke the aid and shield of the laws, courts, and institutions of the State as administered and enforced in the said county to preserve order, maintain justice, protect rights, and redress wrongs among themselves as well as among their white neighbors and themselves; that they use the common schools established in said county, and their children are entitled to the benefit of the different school funds; that on the decease of any of the said Indians, their estates are subject to the laws of descent, inheritance, and distribution of the State, and are in fact administered upon and disposed of by their request and application in the Probate Court of said county; that many of the said Indians have paid the taxes levied upon their lands into the treasury of the county, and that commercial business and social intercourse prevail throughout said county between the complainants and the citizens and residents of said county."

AS RESPECTED THE WEA TRIBE, it was admitted in a case agreed on,

"That guardians are appointed by the Probate Court of said county for minors, and their lands sold by order of the Probate Court under the like regulations of the Secretary of the Interior; that the members of said tribe sue and are sued in the various courts in the said county of Miami; that the said Indians trade and traffic with the whites, and the whites with them—the same as the whites do with each other; that the tribe exercise no control over the head-rights, and do not punish for offences among themselves, but that the Indians go to the criminal courts for redress; that eight of the persons for whose use this suit is brought are white men, adopted into the said tribe, and own head-rights under the treaty; that some of the adopted whites exercise the elective franchise; that highways are laid out over and across said lands under the authority of the laws of Kansas; that farms of the whites are interspersed more or less among these Indian lands; that municipal townships of the county

embrace the said Indian lands, and have done so since the organization of the county. That annuities of the United States are not received by the chiefs, but are paid over to each Indian who signs the pay-roll. The chiefs only receive those funds that are used and expended for tribal purposes. The said tribe does not enforce the collection of debts among the members of said tribe."

AS RESPECTED THE MIAMIS, the case was admitted to be essentially similar.

In 1860 a law was passed by the Territorial authorities of Kansas,* to the effect "that all Indians in Kansas Territory to whom lands have been set apart in severalty or by families, and who shall receive patents therefor from the United States, are hereby declared to be, *and are, made citizens of the Territory of Kansas.*"

Notwithstanding all this, however, it was plain that a tribal organization in all three of the tribes was, to a greater or less extent, kept up. Blue Jacket, who filed the bill on behalf of the Shawnees, was himself the Shawnee head-chief. There was also a second chief. These Indians had a council, elected for a year, and a clerk of council, and a sheriff, of their own. Also a place where the council and head-men met to transact business once in each month. The number of Indians belonging to the tribe was 860, not including absentees, of whom there were about 250.

The clerk of the council, a white man apparently, who was a member of the Shawnee tribe of Indians by *adoption*, gave the following account of them:

"I have resided among them since the year 1849. I was the head of a family. I got eight hundred acres of land as a head-right. I have been clerk of the Shawnee council since 1856. I attend the meetings of the council regularly. I keep a record of the business transacted in the council. Any difficulties between members of the tribe they sit as a council to determine the same. Since I have been clerk there have been quite a num-

* Compiled Laws of Kansas, p. 602.

ber of difficulties settled by the council. Shawnees who die, the council appoint persons to sell the personal property and pay the debts. They appoint the men to sell; order the sale to pay the debts. We keep a record in the council in relation to all the transactions relating to orphans and the disposal of property of deceased persons, &c. The last estate settled in the council was the estate of Eliza Flint, a woman who died in the fall of 1864. She had but a few things to administer on. There is one estate which is not yet settled up. It is of a man who died in the fall of 1864. The council do not order the sale of real estate, and do not take control of our lands. I am administering, through the Probate Court of Johnson County, the estate of James Suggott, who was a member of the Shawnee tribe. There is one minor, and I am the guardian appointed by the Probate Court of Johnson County. I was curator of an incompetent Indian, appointed by the Probate Court of Wyandotte County, in Kansas. The council takes cognizance of offences committed by one Shawnee against another Shawnee. They determine the punishment for offences of Shawnees against Shawnees. The party found guilty is fined. He is fined the value of the thing stolen, which is paid to the owner, and a like value paid to the council, which goes into the council fund. There have been cases of this kind since I have been clerk, but not a very great many. The last man that was fined was in 1863; he had stolen something. Within the last five years there have been a number of persons punished. There was one case where a Shawnee was charged with manslaughter. The council found him guilty, and sentenced him to one hundred lashes, and to be expelled from the tribe, and to lose his annuity; but that sentence was not executed, owing to the opposition of some of the tribe. This took place in 1860 or 1861. It was just before the war, and the defendant went into the service. They have hung one man for murder since I was clerk. In the case of William Fish, arrested by the sheriff of Johnson County, for shooting Robert Bluejacket, the council directed me and the Shawnee sheriff to demand him of the sheriff of Johnson County, to be delivered over to the council for trial. We did so, and he was delivered up to us. Fish and Bluejacket were both Shawnee Indians. This took place in 1858; in the fall. He was tried before the council, and acquitted. The Shawnees have a custom of their own with regard to marriage. Some marry according to the

old custom, and some marry by the minister. Charles Bluejacket is our minister. The more enlightened portion go to him to perform the ceremony. He has a ceremony of his own. Some are still married according to the old custom. Each mode of getting married is considered by the Shawnees as valid. I never was present at an Indian marriage according to the old custom. The Charles Bluejacket who is minister is the same who is complainant in this case, and head chief. We are a church body alone. We are not connected to any other church. Charles Bluejacket is an exhorter, but nothing more. We sell head-rights to white men, according to the rules prescribed by the Secretary of the Interior. White men have bought parts of head-rights, made farms, and planted orchards on the lands they have bought. I know of two or three cases of this kind. I never voted but once, that I recollect of. A number of Shawnees voted at the election for county-seat in 1858. Shawneetown was a candidate. I was judge of township election in 1863. There are state and county roads and town roads leading out through Shawnee lands. There is a road laid out by the county through my land. I sent my children, at one time, to Mr. Bladget to school."

Blue Jacket himself testified:

"The sheriff of the Shawnees executed the sentence of death for the murder referred to by the last witness. This was in the year 1856 or 1857. They are still in the habit of punishing Shawnees for offences against Shawnees. We have a national school fund and a school fund of our own. The interest on the national school fund is about $5000 per annum. We have what is called the mission school, carried on under the direction of the Society of Friends or Quakers. There is a Sunday school for the Shawnees still kept up at the Quaker Shawnee mission. *The United States have a Shawnee Indian agent for the Shawnees, who resides amongst us. The Shawnees have a treaty now pending with the United States.* In 1863 the Shawnees, by their head men, signed a treaty with the United States, and it was sent to Washington City. It was signed by the men who were appointed by the nation to make a treaty. It has never been acted on by the Senate. This treaty was drawn up in 1864, and is still pending. I was one of the delegates from the Shawnee nation to make the treaty."

So in regard to THE WEA AND MIAMI TRIBES, it appeared that each tribe had its "head men," who represented it and transacted its business; receiving funds from the United States and disbursing them for tribal purposes; the government of the United States having an Indian agent for both tribes, who transacted business with them through their chiefs and head men at his office.

On the cases coming from the County Court to the Supreme Court of Kansas, the principal case, that of the Shawnees, was twice fully argued. And the court, through its chief justice, gave an extended and able opinion. No more of it can be here presented than short and much-mutilated extracts. Even these, however, will serve to convey some idea of the line of view had by that tribunal:

"What is the nature of the plaintiffs' title? Have the patentees but a portion of the title, the remainder being in the government, or have they the whole title?

"It is not material to inquire whether the title of the Shawnees would be correctly described by the technical term 'fee-simple.' The true test is, what was the *intention* of the parties, as derivable from the treaty and the provisions of the patent, all taken together, considered with reference to circumstances existing at the time they were made and issued.

"The policy of the government has been to induce the Indians to abandon their mode of life, as hunters and warriors, and to cultivate in them a taste for and aid them in adopting the pursuits and manners of civilization. To this end enlightened missionaries have been encouraged to live among them as teachers, and the vicious of the white race have, so far as was practicable, been excluded from their country. They have been furnished with agricultural implements and taught the use of them. Traders and merchants have been permitted to live among them and furnish them with supplies, so that they need not depend upon the spoils of war, or rely upon the uncertain success of the chase for the necessaries of life. The effect of this policy is seen in many instances. The nationalities of some of the tribes most ferocious in history have become extinct, the members thereof constituting a worthy portion of the great body politic, undistinguishable from the great mass, except in color or texture.

"The Shawnees, for the last third of a century, have lived upon the very borders of civilization, and much of the time in actual contact with the white race. Many of them have been gradually losing the distinctive characters of the red man, adopting the habits and modes of life of their fairer-skinned neighbors, and are, and have been for years, thrifty, substantial, industrious husbandmen. On the other hand, others of them still live the nomadic lives of their fathers, preferring to remain in habits, mode of life, and in name, Indians. In the country ceded by them by the treaty of 1854, the former class, under tribal regulations, were occupying particular portions of their country, having made thereon farms and other improvements pertaining to a fixed mode of life. Their reservation would soon be surrounded by white settlements, and be useless to the nomadic portion as hunting-grounds. There was vastly more of it than would be necessary for agricultural purposes if every member of the tribe were to become an independent tiller of the soil. Good policy dictated that the portion of these lands, which, under the circumstances, must soon become wholly useless to the Indians as homes, should be placed in a situation to be occupied by the whites. Upon consultation with the Indians, it was ascertained that their views and those of the government coincided, and immmediate steps were taken for an amicable arrangement.

"It was competent for the Indians, had they seen proper so to do, to have selected the whole in a compact body and held them in common. Had they done so no patents would have been issued to them, and their title would have been at least the 'Indian title.' But it was not expected that course would be taken by them. It is apparent from the provision of the treaty that some of them desired to hold their shares in severalty. Among the more civilized and thrifty of them such a desire was a very natural one. When the Indian, in pursuance of the treaty, made his selection of lands to be held by himself in severalty, the title of the tribe, so far as the lands selected were concerned, vested in him; that is, he took the right of perpetual use and occupation. Had it been the intention of the framers of the treaty that he should not acquire a greater title, further provision was wholly unnecessary, but further provision was in fact made. The tribe agreed that, under proper restrictions for the protection of the patentees, the government might issue pat-

ents for the lands. It was feared, probably, that some of the patentees might be overreached by their more shrewd and better-educated white neighbors, and be deprived of their lands without adequate compensation. Hence the stipulation. Nothing remained in the government but the ultimate titles, and the ordinary mode adopted by the government for conveying that to individuals is by patent in fee-simple. Must not the conclusion be that the object of these patents was to convey to the Indians the ultimate title? It seems so to the court. But the correctness of this conclusion is confirmed by the fact that, when any of these lands are sold by the grantees with the consent of the government, the whole consideration of the sale goes to the Indian.

"The effect of the restrictions in the patent remains to be considered.

"It need not be argued that it does not operate as a condition. An attempt by the Indian to convey without the assent of the Secretary of the Interior does not forfeit his right to the land.

"His act would be wholly void, not affecting his title in any way. It is not a limitation upon the title, because the whole title of the government passed when the patent issued.

"The conclusion of the court upon the first point is that the absolute title to the lands in question was intended to be, and is, in the Indians and not in the government, and that they must be held to be taxable if there be no other reason for adjudging them exempt.

"*Second.* Are these lands exempt from taxation on the ground that they belong to the Shawnees? For some purposes at least the tribal organization of the Shawnees is still maintained, but it nowhere appears that as a tribe they have a right to or that they attempt to control in any manner the lands held in severalty by the patentees. The lands not only do not lie in a compact body, but they are widely scattered, being thickly interspersed with the lands and settlements of white persons.

"There is no express prohibition against taxing these lands or the personal property of the Indians residing upon them. The treaty does not contain it, nor is it contained in any act of Congress to which our attention has been directed. In disposing of these lands to the Indians, it doubtless was competent for the proper branch of the government to have prohibited their

taxation by the State, at least so long as they might remain the property of the members of an Indian tribe. The exercise of such power in this instance must be sought elsewhere than in express provisions of law or treaty."

The court then distinguished the case from *Goodell* v. *Jackson*,* decided by Chancellor Kent, and from *The Cherokee Nation* v. *Georgia*, and *Worcester* v. *Georgia*, in this court;† which last cases went, the court below observed, on the ground that the Indians concerned were recognized by the general government as occupying exclusively a district of country, in the enjoyment of which they were promised the protection of the United States; the court, in the latter case, said (page 557): "The treaties and the laws of the United States contemplate the Indian Territory as completely separate from that of the States." His honor proceeded:

"The Shawnees do not hold their lands in common, nor are they contiguously located. It is difficult to conceive of a national existence without a national domain upon which to maintain it. It may be competent for the general government, for some purposes, to recognize the continued tribal existence of the Indians, but it never has recognized them as distinct nationalities, except in connection with the country they occupied. It never has treated with them, or legislated in regard to their affairs, except as the owners and exclusive occupants of a particular district of country. The Shawnees who own and occupy these selected and patented lands are in precisely the same situation they would have been in if, instead of giving them two hundred acres of land apiece, the government had given each two hundred dollars, which they had used in purchasing each a quarter of a section of the public lands wherever it could be found within the State."

On the whole case the conclusion of the Supreme Court of Kansas was:

"That the Shawnees who hold their lands in severalty under patents from the government have the abstract title thereto;

* 20 Johnson, 693. † 5 Peters, 1; 6 Id. 515.

that the lands are subject to taxation, unless exempted specifically by the constitution of this State, or by some paramount law, and that they are not so exempt."

As respected the MIAMIS, that learned tribunal, on a comparison of the treaty made with them with treaties with other Indians made at about the same time and penned by the same person—in which last treaties it was stipulated that the lands should "not be liable to levy, sale, or execution or forfeiture," and at the same time stipulated that they should not be taxed for a certain term of years, &c.,—held that the words above quoted had reference to "judicial proceedings alone."

On the cases coming here, the whole three were argued by *Mr. T. A. Hendricks, for the plaintiffs in error, and by Mr. E. P. Stanton, contra;* the latter counsel enlarging upon and enforcing the arguments presented in the opinion of the Supreme Court of Kansas, and as respected the case of the Shawnees, more prominently, calling attention to the fact that there was no provision in the treaty of 1854, as there had been in that of 1831, exempting these lands from taxation, or withdrawing them from the State or Territorial jurisdiction; and so argued that it was plain, when the Indians ceded all their lands back to the United States, that the lands were divested of all conditions which had previously attached to them; and that when the government afterwards conveyed a part of them to the Indians in severalty, they were subject only to such conditions as were stipulated by the new treaty, or expressed on the face of the patents.

Mr. Justice DAVIS delivered the opinion of the court in all three of the cases; a separate opinion in each.

IN THE CASE OF THE SHAWNEES.

The sole question presented by this record is, whether the lands belonging to the united tribe of Shawnee Indians, residing in Kansas, are taxable?

The authorities of the county of Johnson asserting the right, and the highest court of the State having sustained it, the question is properly here for consideration. The solution of it depends on the construction of treaties, the relations of the general government to the Indian tribes, and the laws of Congress. In order to a proper understanding of the rights of these Indians, it is necessary to give a short history of some of the treaties that have been made with them.

In 1825 the Shawnee tribe was divided—part being in Missouri and part in Ohio. The Missouri Shawnees were in possession of valuable lands near Cape Girardeau, and in that year* ceded them, by treaty, to the United States, and, in consideration of the cession, received for their use, and those of the same nation in Ohio, who chose to join them, a tract of country in Kansas, embracing fifty square miles. In pursuance of the favorite policy of the government to persuade all the Indian tribes *east* of the Mississippi to migrate and settle on territory, to be secured to them, *west* of that river, in 1831,† a convention was concluded with the Ohio Shawnees—they being willing to remove West, in order to obtain "a more permanent and advantageous home for themselves and their posterity." In exchange for valuable lands and improvements in Ohio, they obtained, by patent, in fee-simple to them and their heirs forever, so long as they shall exist as a nation, and remain upon the same, one hundred thousand acres of land, to be located under the direction of the President of the United States, within the tract granted in 1825 to the Missouri Shawnees.

This treaty contained words of promise that the same care, superintendence, and protection, which had been extended over them in Ohio, should be assured to them in the country to which they were to remove, and also a *guarantee* that their lands should never be within the bounds of any State or Territory, nor themselves subject to the laws thereof. In obedience to the obligations of this treaty, they

* 7 Stat. at Large, 284. † Id. 355.

removed and united with their brethren, who had preceded them from Missouri, but were soon met by the advancing tide of civilization. In view of the rapid increase of population in the Kansas country, and the small number of Shawnees—the tribe does not now contain over twelve hundred souls—it was deemed advisable to lessen their territorial limits.

Accordingly another treaty was concluded with them on the 2d day of November, 1854.* By this treaty the united Shawnee nation ceded to the United States all the large domain granted to them by the treaty of 1825. In consideration for this cession, two hundred thousand acres of these same lands were receded to them, and they also obtained annuities and other property. This treaty was peculiar in some of its provisions. It did not contemplate that the Indians should enjoy the whole tract, as the quantity for each individual was limited to two hundred acres. The unselected lands were to be sold by the government, and the proceeds appropriated to the uses of the Indians. It also recognized that part of the lands selected by the Indians could be held in common, and part in severalty. If held in common, they were to be assigned in a compact body; if in severalty, the privilege was conceded of selecting anywhere in the tract outside of the common lands.

The Indians who held separate estates were to have patents issued to them, with such guards and restrictions as Congress should deem advisable for their protection. Congress afterwards† directed the lands to be patented, subject to such restrictions as the Secretary of the Interior might impose; and these lands are now held by these Indians, under patents, without power of alienation, except by consent of the Secretary of the Interior. This treaty was silent about the guarantees of the treaty of 1831; but the Shawnees expressly acknowledged their dependence on the government of the United States, as formerly they had done, and invoked its protection and care. Prior to the ratification of this treaty

* 10 Stat. at Large, 1063.

† 11 Id. 430

(although not before it was signed) the organic act for the Territory of Kansas was passed, and on the 29th of January, 1861, Kansas was admitted into the Union; but the rights of the Indians, the powers of Congress over them, their lands, and property, and the stipulations of treaties, were fully preserved, and in the same words, both in the organic act and the act for the admission of Kansas.

The Ohio Shawnees, when they ceded their lands in Ohio, did it in pursuance of an act of Congress of May 28, 1830,* which assured them the country to which they were translated should be secured and guaranteed to them and their heirs forever. The well-defined policy of the government demanded the removal of the Indians from organized States, and it was supposed at the time the country selected for them was so remote as never to be needed for settlement. This policy was deemed advantageous to their interests, as it separated them from the corrupting influences of bad white men, and secured for them a permanent home. It is plain to be seen, that the covenants with the Shawnees in the treaty of 1861, that they should not be subject to the laws of organized States or Territories, nor their lands included within their boundaries, unless with their own consent, signified to the President, must have materially influenced their decision to part with their Ohio possessions and join their brethren in Kansas. They, therefore, removed under the assured protection of the government, to enjoy, as they expected, in perpetuity, free from encroachment, a home adapted to their habits and customs. But these expectations were not to be realized, for the spirit of American enterprise, in a few years, reached their country, and the same white population that pressed upon them in Ohio and Missouri followed them there.

The present and future wants of this population created the necessity for the treaty of 1854, and the segregation of lands allowed by it, in connection with the power to sell these unselected tracts, invited what followed—a mixed oc-

* 4 Stat. at Large, 411.

cupancy of the same territory by the red and white men—the very matter which dictated the removal of the Indians from the older States.

It is insisted, as the guarantees of the treaty of 1831 are not, in express words, reaffirmed in the treaty of 1854, they are, therefore, abrogated, and that the division of the Indian territory into separate estates, so changes the status of the Indians that the property of those who hold in severalty is liable to State taxation. It is conceded that those who hold in common cannot be taxed. If such are the effects of this treaty, they were evidently not in the contemplation of one of the parties to it, and it could never have been intended by the government to make a distinction in favor of the Indians who held in common, and against those who held in severalty. If the Indians thus holding had less rights than their more favored brethren, who enjoyed their possessions in common, and in compact form, would not good faith have required that it should have been so stated in the treaty? The general pledge of protection substantially accorded in this treaty, as in all the other treaties with this tribe, forbids the idea that government intended to withdraw its protection from one part of the tribe and extend it to the other.

But, it is not necessary to import the guarantees of the treaty of 1831 into that of 1854, in order to save the property of the entire tribe from State taxation. If the necessities of the case required us to do so, we should hesitate to declare that, in the understanding of the parties, the promises under which the treaty of 1831 were made, and the guarantees contained in it, were all abandoned when the treaty of 1854 was concluded. If the tribal organization of the Shawnees is preserved intact, and recognized by the political department of the government as existing, then they are a "people distinct from others," capable of making treaties, separated from the jurisdiction of Kansas, and to be governed exclusively by the government of the Union. If under the control of Congress, from necessity there can be no divided authority. If they have outlived many things, they have not outlived the protection afforded by the Con-

stitution, treaties, and laws of Congress. It may be, that they cannot exist much longer as a distinct people in the presence of the civilization of Kansas, "but until they are clothed with the rights and bound to all the duties of citizens," they enjoy the privilege of total immunity from State taxation. There can be no question of State sovereignty in the case, as Kansas accepted her admission into the family of States on condition that the Indian rights should remain unimpaired and the general government at liberty to make any regulation respecting them, their lands, property, or other rights, which it would have been competent to make if Kansas had not been admitted into the Union. The treaty of 1854 left the Shawnee people a united tribe, with a declaration of their dependence on the National government for protection and the vindication of their rights. Ever since this their tribal organization has remained as it was before. They have elective chiefs and an elective council; meeting at stated periods; keeping a record of their proceedings; with powers regulated by custom; by which they punish offences, adjust differences, and exercise a general oversight over the affairs of the nation. This people have their own customs and laws by which they are governed. Because some of those customs have been abandoned, owing to the proximity of their white neighbors, may be an evidence of the superior influence of our race, but does not tend to prove that their tribal organization is not preserved. There is no evidence in the record to show that the Indians with separate estates have not the same rights in the tribe as those whose estates are held in common. Their machinery of government, though simple, is adapted to their intelligence and wants, and effective, with faithful agents to watch over them. If broken into, it is the natural result of Shawnees and whites owning adjoining plantations, and living and trafficking together as neighbors and friends. But the action of the political department of the government settles, beyond controversy, that the Shawnees are as yet a distinct people, with a perfect tribal organization. Within a very recent period their head men negotiated a treaty with the

United States, which, for some reason not explained in the record, was either not sent to the Senate, or, if sent, not ratified, and they are under the charge of an agent who constantly resides with them. While the general government has a superintending care over their interests, and continues to treat with them as a nation, the State of Kansas is estopped from denying their title to it. She accepted this status when she accepted the act admitting her into the Union. Conferring rights and privileges on these Indians cannot affect their situation, which can only be changed by treaty stipulation, or a voluntary abandonment of their tribal organization. As long as the United States recognizes their national character they are under the protection of treaties and the laws of Congress, and their property is withdrawn from the operation of State laws.

It follows, from what has been said, that the Supreme Court of Kansas erred in not perpetuating the injunction and granting the relief prayed for.

IN THE CASE OF THE WEAS.

The opinion just rendered in the case of Blue Jacket, representing the united tribe of Shawnee Indians, controls the decision of this case. The relations of the general government to the Wea tribe, and their relations to the State of Kansas, are settled by the agreed statement of facts in the record, in connection with the treaty of 10th August, 1854.* This tribe being weak in numbers, united with three other tribes, equally weak, and ceded to the United States large possessions obtained under former treaties, reserving for each individual only one hundred and sixty acres of land, and ten sections for the common property of the united tribes, with one section in addition, for the American Indian Mission Association. The reservation of the limited quantity for each individual was not to be in a compact body. Indi-

* 10 Stat. at Large, 1082.

viduals and heads of families had the right of selection, as in the Shawnee treaty, and the lands were to be patented, with restrictions upon alienation, as the President or Congress should prescribe. The unselected lands were to be sold, and the proceeds paid over to the Indians. This policy produced, as in the case of the Shawnees, a mixed occupancy of the original Indian territory, and, in consequence, the same difficulties. These difficulties must have been foreseen by the people of Kansas and the general government, but could not have been within the apprehension of the limited intelligence of the Indians. The basis of the treaty, doubtless, was, that the separation of estates and interests, would so weaken the tribal organization as to effect its voluntary abandonment, and, as a natural result, the incorporation of the Indians with the great body of the people.

But this result, desirable as it may be, has not yet been accomplished with the Wea tribe, and, therefore, their lands cannot be taxed. It is conceded, that the tribal organization is kept up and maintained in the county of Miami, where they live, and where the annuities are paid to them, under the supervision of the Indian agent of the tribe. And it is further conceded, that the chiefs and head men of the tribe, represent it and transact its business, receive funds from the United States for tribal purposes and disburse it, and that an agent for the tribe resides in the county, where he transacts the business of the United States with the tribe through their chiefs and head men. These concessions place the Wea Indians in the same category with the Shawnees.

It is argued, because the Indians seek the courts of Kansas for the preservation of rights and the redress of wrongs, sometimes voluntarily, and in certain specified cases by direction of the Secretary of the Interior, that they submit themselves to all the laws of the State. But the conduct of Indians is not to be measured by the same standard, which we apply to the conduct of other people. Kansas is not obliged to confer any rights on them. Because a sound policy may dictate the wisdom of treating them, in some

respects, as she treats her own citizens, and thereby weaning them from the ancient attachment to their own customs, they are none the less a separate people, under the protection of the general government. This policy may eventually succeed in disbanding the tribe, but until it does, the Indians cannot look to Kansas for protection, nor can the general laws of the State taxing real estate within its limits reach their property.

But, it is said, the protection promised the Shawnees is not accorded to the Weas, in the treaty of August, 1854. Not so, for in the tenth article, they agree "to commit no wrong on either Indian or citizen; and if difficulties should arise, to abide by the laws of the United States in such cases made and provided, as they expect to be protected and have their rights vindicated by those laws." Did not the government accord to them the protection invoked, by executing the treaty? It surely did not need that the United States should say in words, we agree to protect you and vindicate your rights. But the 11th article fixes beyond dispute the reciprocal relations of the general government and these Indians. It declares the object of the treaty is to advance the interests of the Indians; and if it should prove ineffectual, "it was agreed that the President, with the advice and consent of the Senate, should adopt such policy in the management of their affairs as in his judgment should be proper, or Congress might make such provision by law as experience should prove to be necessary." How far the powers of the President or Congress extend under this article, it is unnecessary to discuss or decide. It is sufficient to say, that it leaves the Indians most clearly under the protection of the general government, and withdraws their property from the jurisdiction of Kansas.

IN THE CASE OF THE MIAMIS.

The principle of the foregoing cases of the Shawnee and Wea tribes of Indians, is also decisive of this controversy. The Miami tribe hold their head rights in severalty, by vir-

tue of the provisions of the treaty which was proclaimed by the President on the 4th of August, 1854.*

It is unnecessary to pursue the history of this tribe through the various treaties which have been concluded between them and the United States. It is sufficient to state that they are a nation of people, recognized as such by the general government in the making of treaties with them, and the relations always maintained towards them, and cannot, therefore, be taxed by the authorities of Kansas. Their tribal organization is fully preserved, and they are under the supervision of an agent, who resides in the county where their lands are situated. It is not necessary to decide, until the question arises, what powers have been conferred on Congress, or the President, by virtue of the 11th article of the treaty of 1854, being the same as the 11th article of the Wea treaty. There is, however, one provision in the Miami treaty—being in addition to the securities furnished the Shawnees and Weas—which, of itself, preserves the Miami lands from taxation. This particular provision exempts the lands from "levy, sale, execution, and forfeiture." It is argued, that these words refer to a levy and sale under judicial proceedings, but such a construction would be an exceedingly narrow one, whereas enlarged rules of construction are adopted in reference to Indian treaties. In speaking of these rules, Chief Justice Marshall says: "The language used in treaties with the Indians shall never be construed to their prejudice, if words be made use of which are susceptible of a more extended meaning than their plain import as connected with the tenor of their treaty."†

Applying this principle to the case in hand, is it not evident that the words "levy, sale, and forfeiture" are susceptible of a meaning, which would extend them to the ordinary proceedings for the collection of taxes? Taxes must be first levied, and they cannot be realized without the power of sale and forfeiture, in case of non-payment. The position, it seems to us, is too plain for argument. The object of the

* 10 Stat. at Large, 1093.

† 6 Peters, 582.

treaty was to hedge the lands around with guards and restrictions, so as to preserve them for the permanent homes of the Indians. In order to accomplish this object, they must be relieved from every species of levy, sale, and forfeiture—from a levy and sale for taxes, as well as the ordinary judicial levy and sale.

The judgment of the Supreme Court of Kansas in all three cases was REVERSED, and the causes remanded, with directions to enter a judgment in conformity with the opinions above given in the several cases.

THE NEW YORK INDIANS.

1. Where Indians, being in possession of lands, their ancient and native homes, the enjoyment of which, "without disturbance by the United States," has been secured to them by treaty with the Federal government, with the assurance that "the lands shall remain theirs until they choose to sell them," the State in which the lands lie has no power to tax them, either for ordinary town and county purposes or for the special purpose of surveying them and opening roads through them.—The case of *The Kansas Indians* (*supra*, p. 737), approved.
2. A statute of a State authorizing a sale of such lands for taxes so laid, is void, even though the statute provide that "no sale, for the purpose of collecting the tax, shall, in any manner, affect the right of the Indians to occupy the land."
3. Where Indians, under arrangements approved by the United States, agree to sell their lands to private citizens, and to give possession of them at the expiration of a term of years named, a taxation of the lands before the efflux of the term is premature; even though a sale for the nonpayment of the taxes might not take place until after the time when, if they fulfilled their agreements, the Indians would have left the land; and even though any sale would be subject to the proviso named in the preceding paragraph.
4. A deed under a sale for taxes, and purporting to convey the lands to the purchaser, even with the qualification of such a proviso as that in the third paragraph, would, in law, be a disturbance of the Indian tribe.

ERROR to the Court of Appeals of New York; the case being thus:

In 1786, and before the adoption, therefore, of the Fed-

eral Constitution, the State of Massachusetts, which laid claim to four tracts of land in Western New York then occupied by native Indians (Senecas, chiefly), and known respectively as the Alleghany, Cattaraugus, Buffalo Creek, and Tonawanda reservations, entered, at the conclusion of some disputes, into an agreement with the State of New York by which New York ceded to Massachusetts, and her grantees, in fee, the right of pre-emption from those Indians and all estate in the reservations, except jurisdiction and sovereignty, which it was agreed should belong to the State of New York. By the fourth article of this compact New York stipulated thus:

"The said Indian reservations, so long as they shall *remain the property of Massachusetts*, shall be exempt from *all taxes whatever*, and no *general* or *State* tax shall be charged on the lands of the said reservations thereafter to be granted by Massachusetts, or on the occupants or proprietors of such lands, until fifteen years after the confirmation of such grants in the manner mentioned in the compact; but the said lands, and the occupants thereof, during the said period shall be subject to *town and county charges or taxes only*."

Before the adoption of the Constitution, the then United States, and after its adoption, the Federal government, made several treaties with these Indians;* the Treaty of Canandaigua, November 11, 1794, being one,† by which the land in those reservations were acknowledged to belong to them, the said Indians, and by which it was agreed that the United States would "never claim" the same, nor disturb the Indians, and that the land should "*remain theirs until they chose to sell the same to people of the United States.*"

In 1791 Massachusetts parted with her rights in these reservations, and the same had, in 1838, become vested in Ogden & Fellows. In that year, 1838, a treaty was made be-

* Treaty of Fort Stanwix, Oct. 22, 1784, 7 Stat. at Large, 15; Treaty of Fort Harmar, Jan'y 9, 1788, Id. 33; Treaty of Genesee, Sept. 15, 1797, Id 601; Treaty of Buffalo Creek, June 30, 1802, Id. 70; Treaty of January 15 1848, Id. 530; Treaty of May 20, 1842, Id. 586.

† 7 Stat. at Large, 41.

tween the United States and the Indians, providing for the removal of the latter to the west of the Mississippi River; and at the same treaty a deed of conveyance was executed between the Seneca nation and Ogden & Fellows in fee, as joint tenants of the four reservations. The treaty provided for the removal of the Indians within five years. It was to become obligatory on the parties only after being proclaimed by the President. And as this proclamation was not made till April 4, 1840, no right (as the treaty was construed by the officers of the Federal government, a construction in which Ogden & Fellows acquiesced) accrued to Ogden & Fellows till April 4, 1845.

Before the expiration of these five years, differences arose between the Indians and Ogden & Fellows, and in order to settle them, a new treaty was made in 1842 between the United States and the Indians; and a deed was executed between Ogden & Fellows and the Indians, by which it was agreed that the Indians should remain in possession of two of the reservations, to wit, the Alleghany and Cattaraugus, with the same right and title in all things that they had possessed before the sale. The two others (the Buffalo Creek and Tonawanda) being, by the deed, ceded to Ogden & Fellows.

The Indians remained in possession accordingly of the two retained reservations.

In 1840, May 9th, the legislature of New York passed an act, by which it authorized a highway tax to be assessed upon the Alleghany and Cattaraugus reservations (the two still in possession of, and subsequently agreed to be retained by, the Indians); and the tax was assessed.

In the following year, May 4th, 1841, the same legislature authorized the assessment of other taxes for making roads upon those same two reservations, and on one of the others also, the Buffalo Creek.

This act of 1841 contained eight sections.

The first authorized the board of supervisors of Erie County to appoint commissioners to lay out, open, and construct roads across the Cattaraugus reservation lying within the county, and the same in respect to the supervisors of the

county of Cattaraugus, over the Alleghany reservation in that county.

The second provided for the survey of these roads by the commissioners, and conferred upon the supervisors the power to direct the repair and improvement of them.

The third provided for raising money to defray the expenses of constructing and repairing the roads, and for the building of bridges, and repairing the same, by levying for the years 1841, 1842, and 1843, on the lands in the Cattaraugus reservation, lying in the county of Erie, the sum of $4000, and on the Alleghany $4000, and on the Cattaraugus, lying within the county of Cattaraugus, $1000 each year.

The fourth provided for the survey and maps of the reservations, with a view to the taxation.

The fifth section provided for the sale of the lands in case of default in the payment of the taxes. It contained, however, this proviso:

"PROVIDED, *That no sale for the purpose of collecting said taxes shall in any manner affect the right of the Indians to occupy said lands.*"

The eighth or last section was thus:

"The taxes hereby authorized may be imposed, assessed, levied, and collected as directed by this act, *notwithstanding the occupation of the said lands, or parts or portions thereof, by the Indians*, or by any other person or persons; and *the failure to extinguish the right of the Indians, or to remove them from the possession thereof, shall not impair the validity of said taxes, or prevent the collection thereof.*"

The act of 1840 did not contain the proviso, above given, to the fifth section of this act of 1841.

Under these acts, the county supervisors assessed taxes to the amount of $16,000, or more. One of the tracts afterwards retained by the Indians (the Cattaraugus), and one of those agreed at the expiration of the five years to be ceded to Ogden & Fellows, were, in addition to the beforesaid special tax, assessed; also, in 1840, 1841, 1842, and 1843, with ordinary town and county taxes. The taxes of no kind being paid, the lands were sold.

A case being agreed on, Fellows and others (Ogden being dead) brought suit in the Supreme Court of New York against the controller of the State and the purchaser at the tax sales praying that the assessments might be declared void. That court gave judgment for the defendants; a judgment which the Court of Appeals of the State affirmed. This judgment was now here for review; the question being whether the State of New York had power to tax the Indian reservations in that State, especially the Cattaraugus and Alleghany.

Mr. Martindale, Attorney-General of New York, for the appellees, and in support of the right to tax:

The Indians' title is a right of occupancy, use, and enjoyment, and not of alienation.* It does not include the whole property in the land. The "ultimate fee" to these reservations which carries with it the right of pre-emption, is the real property, and this has hitherto proved far more valuable, in market and in treaties, than the Indian right of occupancy.

Now the assessment of taxes authorized by the law of 1841 does not relate to, or affect the Indians' title. On the contrary, that title—the right of occupancy—is by the fifth section expressly excepted from the operation of the statute.

The taxes were not authorized by the legislature until after the lands were conveyed by the Indians to our own citizens, and after the purchase had been approved by the general government. Under these circumstances, the intent presumable, not less than the intent expressed, was to impose and enforce the tax in respect to the *interests rightfully acquired by our citizens*, and it is only on that *assumption* that the plaintiff has any standing in court.

The assessments complained of are made then, in fact, against the right and property of Fellows, to which the treaty

* The Cherokee Nation *v.* The State of Georgia, 5 Peters, 1; Worcester *v.* The State of Georgia, 6 Id 515; Mitchel *v.* The United States, 9 Id. 711.

of Canandaigua, 1794, had no relation. *His* title is, without doubt, liable to taxation by State authority.*

In addition, the fourth article of the compact of 1786, between New York and Massachusetts, admits the right to impose town and county taxes, of which class the taxes here laid are.†

Mr. J. H. Reynolds, contra.

Mr. Justice NELSON delivered the opinion of the court.

The principal authority to tax is derived from two acts of the legislature, passed May 9, 1840, and May 4, 1841. As the act of 1840 was held by the court below void as respects these reservations, we will, for the present, dismiss it.

The act of 1841 contains eight sections.

[His honor here stated the first five sections of the act in the words already given on pages 763–4.]

The eighth section provides that the taxes may be assessed, levied, and collected as directed by the act, notwithstanding the occupation of the lands by the Indians. The failure to extinguish the right of the Indians, or to remove them from the possession, shall not impair the validity of said taxes or prevent the collection.

This last section furnishes, doubtless, a solution of what we must otherwise regard as a very free, if not extraordinary, exercise of power over these reservations and the rights of the Indians, so long possessed and so frequently guaranteed by treaties. These treaties are historical and need not be referred to, beginning in 1784 and coming down to 1842. That of 1794, entered into at Canandaigua, New York, may be cited as a specimen. Third article, "The United States acknowledge all the land within the aforementioned boundaries (which include the reservations in question) to be the property of the Seneca nation, and the United States will never claim the same nor disturb the Seneca nation, . . .

* McCulloch *v.* The State of Maryland, 4 Wheaton, 429; People *v.* Mayor, &c., of Brooklyn, 4 New York, 426, 427.

† See Opinion of Denio, J., in Fellows *v.* Denniston, 23 New York, 425

in the free use and enjoyment thereof; but it shall remain theirs until they choose to sell the same to the people of the United States, who have the right to purchase."

We will now refer to the explanation of this law, which, it is admitted, is the first (except that of 1840) ever passed by the legislature of New York to tax these Indian reservations.

By the treaty of 1838 the Seneca nation on these reservations agreed to remove to the west of the Mississippi River, and, at the same time, with the consent of the United States, sold their lands to Ogden & Fellows, who held the pre-emptive right, derived from Massachusetts, and executed a conveyance of the same. The treaty provided for the removal within five years. It was proclaimed April 4, 1840. Before the expiration of the five years, difficulties arose between the grantees and the Indians, which resulted in a new treaty, 20th May, 1842, between the United States and the Seneca nation, when it was agreed that the deed embracing these two reservations should be cancelled, and the Indians remain as before with all their original rights. The words are: "The said nation shall continue in the occupation and enjoyment of the whole of the said two several tracts of land, called the Cattaraugus reservation and the Alleghany reservation, with the same right and title in all things as they had and possessed therein immediately before the sale of said reservation."

Now, it will be seen that this act of New York, which was passed in 1841, was passed at a time when the grantees, under the treaty of 1838, had taken the title in fee, but before the expiration of the five years. And it was doubtless assumed, which we think a mistake, that the whole title being in the grantees, the State, notwithstanding the possession of the Indians, might enter upon the reservations in the exercise of its internal police powers, and deal with them as with any other portion of its territory. Hence the eighth section directing that taxes may be imposed, assessed, or levied and collected, notwithstanding the occupation of the Indians, or the failure to extinguish their right, or to remove them

from the possession, and declaring that the neglect should not impair the validity of the taxes or prevent the collection.

This explanation is due to the character of the State, and removes the inference that might otherwise be drawn, that the legislature were encouraging, if not authorizing, a direct interference by the owners of the right of pre-emption with these ancient possessions and occupations, secured by the most sacred of obligations of the Federal government.

It is provided, however, that the execution of these laws shall not disturb or affect the right of the Indians in their occupation of the reservations, and a clause in the fifth section is referred to as conclusive of this position. "But no sale for the purpose of collecting said taxes shall in any manner affect the right of the Indians to occupy said lands." It is true that this clause undertakes to save this right, which the act of 1840 did not; but the rights of the Indians do not depend on this or any other statutes of the State, but upon treaties, which are the supreme law of the land; it is to these treaties we must look to ascertain the nature of these rights, and the extent of them.

It has already been shown that the United States have acknowledged the reservations to be the property of the Seneca nation—that they will never claim them nor disturb this nation in their free use and enjoyment, and that they shall remain theirs until they choose to sell them. These are the guarantees given by the United States, and which her faith is pledged to uphold. Now we have seen that this law, taxing the lands in the reservations, authorizes the county authorities to enter upon them, survey and lay out roads, construct and repair them, construct and repair bridges, assess and collect taxes to meet the expenses, and survey the lands for the purpose of making the assessments, and in pursuance of these powers the proper officers of the counties have assessed upon them large sums for the years 1840, 1841, 1842, and 1843.

The answer to all this interference with the possession, and occupation, and exercise of authority is, that the sale

of the lands in default of payment of the taxes shall not "affect the right of occupancy of the Indians." We are of opinion that this is not a satisfactory answer.

We have looked through all the treaties from 1784 down to the present time, and find but one of them in which any right is stipulated to enter upon the lands reserved to construct roads. That is the treaty of 1794, in which the Seneca nation cede to the United States the right to make a wagon-road from Fort Schlosser to Lake Erie, as far south as Buffalo Creek.

A clause in the adjustment of the dispute between New York and Massachusetts, in respect to these and other lands, has been referred to, which provides that no general or State tax shall be charged or collected from the lands thereafter to be granted by Massachusetts, or on occupants or proprietors of such lands until fifteen years have elapsed after confirmation, &c., "but that the lands so granted, and the occupants thereof, shall, during the said period, be subject to town and county charges, or taxes only." We suppose this provision had no relation to the Indian occupation, or Indian occupants, for the two States possessed no power to deal with Indian rights or title. They were dealing exclusively with the pre-emption right after the Indian title was extinguished, and with the government and jurisdiction over the territory. The clause doubtless related to the condition of these lands in case the Indian title should be extinguished as to the whole or any part of them within the fifteen years' exemption. At all events, whatever may be the true construction, it can in no way affect the Indian occupants. The commissioners had no power over them.

The question of the taxation of Indian lands, while in their tribal organization, by the State authorities, has been before us this term in several cases from the State of Kansas, and after a very full consideration of the subject the power was denied.* We refer to the opinions in these cases as

* The Kansas Indians; *supra*, p. 737; the last preceding case.

rendering any further examination of the subject unnecessary.

The tax imposed on the Buffalo reservation in 1840, 1841, 1842, and 1843, is not distinguishable from that imposed on the Alleghany and Cattaraugus reservations. The Indians were still in their ancient possessions and occupancy, and till removed by the United States were entitled to the undisturbed enjoyment of them.

On looking into the record it appears that these reservations, besides the special taxation referred to, have been taxed for the years 1840, 1841, 1842, and 1843, for the ordinary town and county charges in each year.

If I understand the opinion of the learned judge of the Court of Appeals, these taxes, as it respects the Buffalo reservation, are sustained on the ground that the Indians had parted with their title to Ogden & Fellows by the treaties and conveyances of 1838 and 1842, and that the whole title was in the grantees, though the period for the removal of the Indians had not expired, but would before the sales could take place for default in payment or the purchaser be entitled to the possession.

We have already given the answer which we think satisfactory to this ground in support of the judgment below. Until the Indians have sold their lands, and removed from them in pursuance of the treaty stipulations, they are to be regarded as still in their ancient possessions, and are in under their original rights, and entitled to the undisturbed enjoyment of them. This was the effect of the decision in the case of *Fellows* v. *Blacksmith*.* The time for the surrender of the possession, according to their consent given in the treaty, had not expired when these taxes were levied. The period within which the removal was to take place, under the treaty of 1838, was five years from the time it went into effect. It was not proclaimed till 1840, and under that of 1842 the time did not expire till 1846. The taxation of the lands was premature and illegal.

* 19 Howard, 366.

It will be seen on looking into the general laws of the State imposing taxes for town and county charges, as well as into the special acts of 1840 and 1841, that the taxes are imposed upon the lands in these reservations, and it is the lands which are sold in default of payment. They are dealt with by the town and county authorities in the same way in making this assessment, and in levying the same, as other real property in these subdivisions of the State. We must say, regarding these reservations as wholly exempt from State taxation, and which, as we understand the opinion of the learned judge below, is not denied, the exercise of this authority over them is an unwarrantable interference, inconsistent with the original title of the Indians, and offensive to their tribal relations.

The tax titles purporting to convey these lands to the purchaser, even with the qualification suggested that the right of occupation is not to be affected, may well embarrass the occupants and be used by unworthy persons to the disturbance of the tribe. All agree that the Indian right of occupancy creates an indefeasible title to the reservations that may extend from generation to generation, and will cease only by the dissolution of the tribe, or their consent to sell to the party possessed of the right of pre-emption. He is the only party that is authorized to deal with the tribe in respect to their property, and this with the consent of the government. Any other party is an intruder, and may be proceeded against under the twelfth section of the act of 30th June, 1834.*

We are gratified to find that in 1857 the legislature of New York passed a law declaring, in substance, that no tax shall thereafter be assessed on either of the two reservations (Alleghany and Cattaraugus), or on any part of them, so long as they remain the property of the Seneca nation, and that all acts of the State conflicting with the provisions of this section are hereby repealed.†

Our conclusion is, that the whole of the taxes assessed upon

* 4 Stat. at Large, 730.

† 1 R. S. P., 907, § 10.

the three reservations (Buffalo Creek, Alleghany, and Cattaraugus), are illegal, and void as in conflict with the tribal rights of the Seneca nation as guaranteed to it by treaties with the United States.

The judgment must therefore be REVERSED, and the cause remanded, with directions to enter a judgment IN CONFORMITY WITH THIS OPINION.

SUPERVISORS *v.* SCHENCK.

The levy of a tax and payment of interest by the proper county authorities, validates, in the hands of *bonâ fide* holders for value, county bonds, issued in their origin, irregularly, as *ex gr.* in virtue of a popular vote ordered by a "County Court," instead of one ordered by the "Board of Supervisors;" the vote, however, and other proceedings having been in all respects other than the source of order, regular. [In this case the tax had been levied and the interest paid by the county for nine years before it was set up that the bonds were void.]

ERROR to the Circuit Court for the Northern District of Illinois; the case being thus:

An Illinois statute, passed in 1849, authorized the "county court" of counties wishing to subscribe to stock in railroads, to make subscriptions and to issue bonds. But the statute provided that no subscription should be made or bonds issued whereby any debt should be created by the county court, except after an election to be held in a mode prescribed in the statute, and after at such election two-thirds of the qualified voters of the county had voted to have it.

In 1851—that is to say, two years after the statute just mentioned had been passed—the legislature passed another statute, called *The Township Organization Law*, thus:

"No county under this organization *shall possess or exercise any corporate powers, except such as are enumerated in this act*, or shall be specially given by law, or shall be necessary to the exercise of the powers so enumerated or given.

Statement of the case.

"The powers of a county as a body politic can *only* be exercised *by the board of supervisors thereof*, or in pursuance of a resolution by them adopted.

"The board of supervisors of each county in this State shall have power . . . . to perform all other duties, not inconsistent with this act, which may be required of or enjoined on them by any law of this State relating to the county courts."

One of the counties of Illinois—Marshall County—had adopted the township organization which this statute of 1851 authorized before the 28th day of February, 1853, and was *on that day so organized and acting.*

In this state of the statute law and of facts Schenck brought assumpsit in the Circuit Court for Northern Illinois against the board of supervisors of this same Marshall County, to recover interest which had become due September 12th, 1865, on the coupons of certain bonds issued nine years before, signed by the board of supervisors of the said county, for stock in the Western Air-Line Railroad. The *narr.* was in the ordinary form.

Special plea, that on the 28*th day of February*, 1853, the *County Court* of Marshall County ordered an election, to vote for and against a subscription, &c. That such election was held *under said order;* that the board of supervisors, on the 14th of November, 1854, *acting by authority of said election*, subscribed; that the bonds and coupons were issued in payment of the *said* subscription; that *no election was ever held by order of the board of supervisors*, and that the said Marshall County had been organized and was acting under the Township Organization Law since prior to 28th of February, 1853, *all of which appeared from the public records of said county.* The plea alleged, therefore, that the bonds and coupons had been issued without authority of law, and were void.

Special replication, not denying the facts alleged in the plea, but alleging that the bonds and coupons were issued in payment for stock of the company, which stock was received by the county; that the county enjoyed all the benefits of a stockholder; that the bonds were sold by the railroad company to the plaintiff, for value, without any notice of any

want of authority to execute the same, *other than the constructive notice, which might be implied* from the record of the said proceedings; that ever since the date of the bonds (1856) the board of supervisors had annually levied and collected the necessary taxes, and paid the interest on them; *and that therefore the bonds and coupons had been ratified, and were now valid and binding on the county.*

General demurrer and judgment on it against the supervisors of the county for the amount of the coupons declared on.

The county now brought the case to this court; the error complained of being that the Circuit Court had overruled the demurrer, instead of sustaining it, and the question being, whether the bonds were void in the hands of *bonâ fide* holders before maturity, because the election which authorized their issue was called by the *County Court* of Marshall County, instead of the *board of supervisors* of the county, notwithstanding that all the subsequent proceedings as was admitted were regular, and the county had, for seven or eight years, levied and collected taxes to pay the interest upon them, and had paid the interest as it fell due, until the default stated in the declaration of this case.

Mr. Cook, for the supervisors of the County of Marshall, plaintiff in error:

1. This is a question of power and of its legal exercise. Counties are organized for purposes of government. If they create debts for purposes so alien to the purpose of their creation as building railroads, they must do so under general or special law. Without law, the creation of such a debt is *void.* If a law exists for the creation of the debt, unless such debt is created substantially according to the law, no liability attaches to the county. These statutes have expressly declared that the bonds should not issue, unless in pursuance of authority conferred by a vote of the majority in favor of such subscription, at an election called in the mode pointed out by the act. It is admitted that these bonds were issued without such an election. A slight deviation

from the mode prescribed will not, we may fully admit, invalidate such securities in the hands of innocent holders for a valuable consideration. But there is a wide difference between an act performed without authority, or in violation of law, and an act defectively performed under authority. In the former case the act is absolutely void. Here a ratification is set up. But how could the county authorities ratify a contract which they had no authority to make, and especially without any further or other authority than that which they had at the time they made it? Such a contract is "incapable of ratification by the county authorities."*

2. Then it is set up that the plaintiffs are *bonâ fide* holders of these bonds without notice. But can there be such holders of bonds like these?

The supervisors derived their authority to act from the law, which was public, and the condition precedent was not only one which was in its nature public, but it was also a matter of record in the public offices. Purchasers of these bonds were bound to look to these records, and if those showed *primâ facie* that the board was not authorized in law to issue the bonds, then the holders took them *with notice.*

3. The Supreme Court of Illinois has construed these statutes, *in Cook* v. *Supervisors of Marshall County*, not yet reported, and held part of the issue of these same bonds to be void. This court follows the rulings of State courts on State statutes.

Mr. S. W. Fuller, contra:

1. The exact question raised here has been decided by this court numerous times. *Knox County* v. *Aspinwall*,† is full to the point. In that case it appeared that, under the law of Indiana, it was the duty of the sheriffs to give the notices of the election; but the election authorizing the issue of the bonds was called by the board of commissioners of Knox County, and the court held, that as all the subsequent proceedings were regular, the error in calling the election did

* Clarke *v.* The Supervisors, 27 Illinois, 305. † 21 Howard, 542.

not invalidate the bonds in the hands of *bonâ fide* holders. The same question was again raised, and decided the same way, in *Bissell et al.* v. *City of Jeffersonville*;* and other cases since, are in harmony with these.†

2. By levying and collecting taxes to pay the interest on its bonds, and paying that interest for a series of years in the manner stated in the replication, the county has ratified its bonds. In *Keithsburg* v. *Frick*,‡ in the State where this case comes from, the court say, in regard to bonds similarly issued:

"The corporation is now estopped from setting up any irregularity in their issue, inasmuch as they have repeatedly recognized their validity by paying them out, levying taxes, and paying interest on them for a series of years. . . . It is now too late to raise a question as to the regularity of their issue."

We need not criticize or discuss the soundness of the decision in *Cook* v. *The Board of Supervisors of Marshall County*. It is not one of that class of decisions of the State courts which are binding upon this court. Bonds and coupons like those involved in this suit are commercial securities, negotiable instruments, and the questions pertaining to them must be decided by the rules of commercial law. This court has always expounded that law for itself. Its right to do so was declared in *Swift* v. *Tyson*,§ a decision never, that we know of, departed from.

Mr. Justice CLIFFORD delivered the opinion of the court.

Counties in the State of Illinois may purchase or subscribe for shares in the capital stock of any railroad company incorporated or organized under any law of the State, in any sum not exceeding one hundred thousand dollars.

* 24 Howard, 287.

† Moran *v.* Miami County, 2 Black, 722; Gelpcke et al. *v.* The City of Dubuque, 1 Wallace, 175; Von Hostrup *v.* Madison City, Id. 291; Meyer *v.* The City of Muscatine, Id. 384; Thomson *v.* Lee County, 3 Id. 327; Rogers *v.* Burlington, Id. 654.

‡ 34 Illinois, 405.

§ 16 Peters, 1.

Opinion of the court.

Pursuant to that law the corporation defendants, on the twelfth day of September, 1856, issued, as alleged in the first count of the declaration, thirty bonds, each for one thousand dollars, payable to the Western Air-Line Railroad Company, or order, in twenty years from date, with interest coupons annexed, stipulating for the payment to bearer of interest annually, at the rate of six per centum per annum. Same count alleged that the plaintiff, on the first day of July, 1857, became the legal holder of those bonds, with the coupons thereto attached, by due indorsement and delivery.

Present suit, which was an action of assumpsit, was brought by the plaintiff to recover one year's interest on those bonds, which fell due on the twelfth day of September, 1865, nine years after the bonds were issued and eight years after the plaintiff became the holder of the same, for value, and in the usual course of business.

The authority of counties to purchase or subscribe for such shares and issue such bonds is subject to certain conditions or regulations, one of which is, that a majority of the qualified voters of the county must first vote for such subscription or purchase. Provision is also made for proper notice to the electors of the time and place of the meeting for that purpose, and the requirement is, that the notice must specify the company in which stock is proposed to be subscribed, the amount proposed to be taken, the time the bonds are to run, and the rate of interest the bonds are to bear.

Defendants appeared and filed a special plea, and rested their defence entirely upon the allegations of that plea. Substance of the defence was, that the bonds were issued without authority, and were invalid, because the election to procure the consent of a majority of the qualified voters of the county was ordered to be held by the county court of the county, and not by the board of supervisors of the county, as required by law; but they admitted, among other things, that the election was properly conducted, and that the returns were duly made, and that the proceedings, in all other respects, were regular and correct.

Replication of the plaintiff alleged that the bonds and coupons were executed and delivered in payment of a like number of shares of the stock in the railroad company; that the shares of the stock were received by the defendants in payment for the bonds, and that the defendants have ever since held and owned the same, and by virtue thereof have participated in the election of the officers of the company, and in all other benefits and advantages attending such ownership. He also alleged that the transfer of the bonds to him was for a valuable consideration, and without notice of any defect in the preliminary proceedings, and that the defendants, having paid the interest annually accruing on the bonds to the amount of six thousand dollars, have thereby ratified and confirmed the same as binding and obligatory.

Defendants demurred, and the plaintiff joined in demurrer. Circuit Court overruled the demurrer, and rendered judgment for the plaintiff, and the defendants removed the cause into this court.

I. Bonds to the amount of one hundred thousand dollars were issued by the defendants, of which the bonds specified in the declaration were a part, and the railroad company, at the same time, transferred stock to them in the same amount. Decision of the Circuit Court in overruling the demurrer is the only error assigned in the record, and the single question presented in the case is, whether the bonds specified in the declaration, and which were indorsed and delivered before maturity, are void in the hands of the plaintiff, who is the holder for value, and without notice of any defect in the proceedings, because the order for the election in which the majority of the qualified voters of the county voted to subscribe for the stock of the railroad company and purchase the shares, was made by the county court, and not by the supervisors of the county.

Before examining that question it may be well to mention some of the further admissions of the defendants, as exhibited in their special plea. They therein admit, in express terms, that the notices of the election were duly published, that the election was held, that the required number of quali-

fied votes were given on the fifth day of April, 1853, and that the board of supervisors of the county, on the fourteenth day of November, 1854, made an order, and recorded it, that the county do subscribe one hundred thousand dollars to the stock of the company named in the bonds; and that the board, on the same day, passed another order to empower the chairman of the board to make the subscription, and that he made the subscription and purchased the shares on the following day.

These admissions of the plea, or answer, are followed by others of equal importance, to wit: That the chairman and clerk of the board did afterwards issue, by the order of the board, the bonds of the county, as alleged in the declaration, and that the same were duly delivered to the railroad company, in payment for a like number of the stock shares of the company.

Looking at these several admissions, it is obvious that the sole objection to the validity of the bonds, even *inter partes*, arises from the fact alleged in the plea, and not directly denied in the replication, that the order for the election was passed by the county court of the county, and not by the board of supervisors. Express authority is conferred upon counties in that State to subscribe for shares, or purchase the same, in any railroad company incorporated and organized under the laws of the State, in any amount not exceeding the sum already specified, and the Supreme Court of the State have settled the doctrine in a series of decisions that the law of the State conferring such authority is constitutional and valid.*

Power in the county, therefore, to make the subscription, purchase the shares, and issue the bonds in this case, if the proceedings were regular, is placed beyond all question. Support to that proposition is hardly necessary, as it is settled by the decisions of this court, as well as by the highest judicial authority of the State, and stands confessed.†

* 2 Statutes, 1072; Prettyman *v.* Tazewell, 19 Illinois, 406; Johnson *v* Stark Co., 24 Id. 75; Butler *v.* Dunham, 27 Id. 474.

† Rogers *v.* Burlington, 3 Wallace, 663.

Notices of the time and place of the election, in due form of law, were duly published, and the meeting was formally held at the time appointed, and at the usual place for such elections. Returns of the election were duly made, and the admission of the plea warrants the conclusion that they show that a majority of the qualified voters voted for the subscription. Compliance, therefore, is shown with every provision of the original law which authorized counties to make such subscriptions and purchase shares in the capital stock of railroad companies. Orders for such elections were required under that law to be made by the county court of the proper county, and the provision was that the stock so subscribed or purchased should be under the control of the county court making such subscription or purchase, in all respects, as stock owned by individuals.*

Prior to the date of the order for the election in this case, however, the township organization law was passed, which provides that the powers of a county as a body politic can only be exercised by the board of supervisors thereof, or in pursuance of a resolution by them adopted.†

None of the other provisions of the prior law are repealed, nor is there any change in the regulations, except that the order for the election is required to be made by the board of supervisors, and not by the county court of the county. The objection is that the order in this case was made as under the prior law, but the notices, in regular form, were duly published, and the election was held, and the board of supervisors of the county ratified the proceedings by subscribing for the stock, issuing the bonds, accepting the shares in payment of the same, and by participating ever after in the election of the officers of the company and in the management of its affairs, as owners to that extent of the stock of the company.

Throughout they appear to have adopted the order and the results of the election as rightfully authorized acts, and for the period of ten years the county has held the stock as

* 2 Statutes, 1072.

† Id. 1146.

their own property, and have voluntarily enjoyed all the benefits of absolute legal ownership, without any complaint or any attempt to enjoin the proceedings.

Preliminary proceedings looking to such a subscription by a municipal corporation may often be enjoined for defects or irregularities before the contract is perfected, in cases where the corporation will be held to be forever concluded, if they remain silent and suffer the shares to be purchased, the bonds to be issued, and the securities to be exchanged. Nothing of the kind was attempted in this case, and the defendants have never rescinded, or attempted to rescind, the contract, and have never returned, or offered to return, the evidences of their ownership of the shares in the stock of the company, but have annually acknowledged the validity of the bonds by voting taxes for the payment of the accruing interest, and have actually paid the same to the amount of six thousand dollars.

Judge Story said there was no maxim, where it does not prejudice the rights of strangers, better settled in reason and law than *Omnis ratihabitio retrotrahitur et mandato priori æquiparatur*, and it is equally well settled that the maxim is as applicable to corporations in matters of simple contract as to other contracting parties. Questions of ratification most frequently arise in respect to the acts or omissions of agents, but the general rule is the same in all cases where the act done was one which it was competent for the party attempted to be charged to do. When the principal, upon a full knowledge of all the circumstances of the case, deliberately ratifies the acts, doings, or omissions of his agent, he will be bound thereby as fully, to all intents and purposes, as if he had originally given him direct authority in the premises, to the extent which such acts, doings, or omissions reach.*

Ratification is inoperative if the party attempted to be charged was not competent to make the contract in question when the same was made, nor when the supposed acts

* Story on Agency, ed. 1863, § 239; Fleckner *v.* United States Bank, 8 Wheaton, 363; N. Y. & N. H. R. R. Co. *v.* Schuyler et al., 34 New York, 49.

of ratification were performed, or if the contract was illegal, immoral, or against public policy. Like an individual, a corporation may ratify the acts of its agents done in excess of authority, and such ratification may, in many cases, be inferred from acquiescence in those acts, as well as from express adoption.* Such ratification may be by express consent, or by acts and conduct of the principal inconsistent with any other hypothesis than that he approved, and intended to adopt what had been done in his name; and it was held in *Peterson* v. *The Mayor of New York*,† that the principle is as applicable to corporations as to individuals. Where the officers of the corporation openly exercise powers affecting the interests of third persons, which presupposes a delegated authority for the purpose, and other corporate acts subsequently performed show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed.‡

All of the acts of the board of supervisors of the county in making the subscription, purchasing the shares, issuing the bonds, and exchanging the securities, appear to have been open and well known to the corporation, and yet they constantly suffered themselves to be represented in the choice of officers and in the management of all the affairs of the railroad company, and have voluntarily voted taxes for the payment of the yearly interest on the bonds, *and actually paid the same*, as admitted in the special plea.

Examined in the light of those suggestions, it would be difficult to imagine a case where the rule that a subsequent ratification is as good as a previous authority can be more justly applicable than in the case under consideration.§ So, where shares in a railroad company were received by the officers of a county in exchange for their bonds, and

* Hoyt *v.* Thompson, 19 New York, 218.

† 17 Id. 453.

‡ Bank of United States *v.* Dandridge, 12 Wheaton, 70.

§ Mills *v.* Gleason, 11 Wisconsin, 490; Angell & Ames on Corporations 8th ed., § 237, 304; 2 Kent's Commentaries, 11th ed. 348; Bissel *v.* Railroad, 22 New York, 264.

were never returned, and the proper officers of the county voted for directors at two elections, and the supervisors paid two annual instalments of interest, the Supreme Court of Illinois held that those acts, unexplained, were as satisfactory evidence of a design to ratify the issue of the bonds as if it had been done by an order of the supervisors.*

Direct decision to the same effect was also made by that court in *Keithsburg* v. *Frick*,† which is the latest reported decision upon the subject. Views of the court in that case were that the acts of the supervisors in issuing the bonds and putting them upon the market, and by levying taxes and paying interest for a series of years, estopped the county from setting up any irregularity in their issue, and this court has, in repeated instances, affirmed the same doctrine.

Leading case in this court is that of *Knox County* v. *Aspinwall*,‡ which was very fully considered by the court. Alleged defect in that case was that the notices of the election, as required by law, had not been given in any form, but the decision was that the question as to the sufficiency of the notice, and the ascertainment of the fact whether the majority of votes had been cast in favor of the subscription, was necessarily left to the inquiry and judgment of the county board, as no other tribunal was provided for the purpose. Intimation of the court was that their decision might not be conclusive in a direct proceeding to inquire into the facts previously to the execution of the power, and before the rights and interests of third parties had attached. But the court held that after the authority had been executed, the stock subscribed, the bonds issued, and in the hands of innocent holders, it was too late, *even in a direct proceeding*, to call the power in question; much less, say the court, can it be called in question to the prejudice of a *bonâ fide* holder of the bonds in a collateral way.

Similar views were expressed by this court in the case of *Bissel* v. *Jeffersonville*,§ and in many others referred to by the

* Johnson *v.* Stark Co., 24 Illinois, 90.
‡ 21 Howard, 544.
† 34 Id. 421.
§ 24 Id. 299

plaintiff.* When a corporation has power, under any circumstances, to issue negotiable securities, the decision of this court is that 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.†

State courts in other States have decided in the same way, as well where the controversy was between the original parties as in favor of indorsers and holders, without notice of the alleged defect.‡

Argument of the defendants proceeds upon the ground that if they can show that the order for the election emanated from the wrong source, the plaintiff, although an innocent holder for value, cannot recover; but it is clear that in a case like the present, where the power to issue the bonds was fully vested in the corporation, the proposition cannot be sustained. On the contrary, it is settled law that a negotiable security of a corporation, which upon its face appears to have been duly issued by such corporation, and in conformity with the provisions of its charter, is valid in the hands of a *bonâ fide* holder thereof, without notice, although such security was in point of fact issued for a purpose, and at a place not authorized by the charter of the corporation.§

Attention is drawn to the fact that in a recent case not yet reported, the Supreme Court of the State have held that these bonds are void, even in the hands of an innocent holder, but inasmuch as the power to issue the bonds was fully conferred by law, the question of their validity in the hands of innocent holders, without notice, is a question of commercial law where the State adjudications, although en-

* Moran *v.* Miami Co., 2 Black, 725.

† Gelpcke *v.* Dubuque, 1 Wallace, 203.

‡ Savings Co. *v.* New London, 29 Connecticut, 174; Tash et al. *v.* Adams, 10 Cushing, 252.

§ Stoney *v.* Life Ins. Co., 11 Paige Ch., 635; F. & M. Bank *v.* B. & D. Bank, 16 New York, 129; Goodman *v.* Simonds, 20 Howard, 365; Thompson *v.* Lee Co., 3 Wallace, 327.

titled to great respect, do not furnish the rule of decision in this court.*

Prior decisions of the State court were in accordance with the decisions of this court, and as those decisions were supposed to be correct expositions of the law of the State at the period when these bonds were issued, the latter adjudications cannot control the judgment in this case.

JUDGMENT AFFIRMED, WITH COSTS.

KELLY v. CRAWFORD.

1. Where agents, in the sale of an article, acknowledging a debt of unascertained amount due their principals, sign an agreement passing certain debts described as "all accounts hereunto attached, and marked Exhibit A,"—no exhibit, however, being then or afterwards annexed,—and "all other debts due" (for the particular article), the contract having the further purpose of ascertaining, with certainty, from an examination by an accountant of the books of the assigning party the exact amount due,—the contract, in connection with the report of the accountant, may, on a suit for the amount found due, be read in evidence, even without the exhibit never annexed.
2. Where, to a suit against a partnership for debt, the defence is, that a former partner has unwarrantably signed the firm name after dissolution of the partnership, the paper signed may be read in evidence by itself, it being so read, however, "subject to the proof to be given hereafter."
3. Where a party who has been, and still is, carrying on an agency in the sale of anything for another, becomes thus indebted to this other, and agrees that an accountant shall examine the books of account and ascertain from them the exact amount due, "the amount so found to be due and owing to be final,"—the agreement is not "a submission to arbitration," nor is the amount found by the accountant an "award" in any such sense as will make them subject to the strict rules governing arbitrations and awards.

ON error to the Circuit Court for the Northern District of Illinois; the case was thus:

Crawford & Co., in 1860, were coal dealers in Cleveland, and at the same time Kelly & Maher were coal dealers in Chicago.

* Swift v. Tyson, 16 Peters, 18.

Statement of the case.

On the 4th August Kelly made a contract with Crawford & Co., the purport of which was, that Crawford & Co. were to supply Kelly & Co. with coal; that the coal was to be furnished at Cleveland; that Kelly & Co. were to advance the freight and insurance; that upon its arrival here they were to dock and sell it, to guarantee the payment of all sales. The contract prescribed the manner in which the proceeds of the sales were to be divided between the parties, and provided that the coal was to remain the property of Crawford & Co.

On the 13th of September, 1861, there being a large sum of money due Crawford & Co. for coal furnished under the contract, an agreement was made, in substance thus:

"Know all men, &c., that whereas Kelly & Co. *are indebted* to Crawford & Co. *upon joint account, the exact amount to be ascertained from the books of Kelly & Co. by one G. H. Quigg, under the supervision of the parties to this agreement* (the amount so found to be due and owing *to be final*). In consideration of such indebtedness, &c., the said Kelly & Co. hereby assign to the said Crawford & Co. *all the accounts hereunto attached, and marked 'Exhibit A,'* together with two wheelbarrow scales [and other chattels personal, specified], and all other accounts due and owing to said Kelly & Co. upon their coal books, except the accounts now enjoined in chancery. Further: that Crawford & Co. are to put the said accounts into speedy collection; and after paying the expenses of collecting, the balance shall be applied to the extinguishment of the debt of said Kelly & Co. to Crawford & Co., as ascertained by the aforesaid G. H. Quigg. *It being distinctly understood that the said Quigg is to ascertain the amount due,* which the parties hereto now agree is to be the actual amount. Should there be any balance left after collecting the sums herein referred to, the said Crawford & Co. agree to pay the same over to Kelly & Co.; and should the said sum of accounts, and the personal property herein referred to, be insufficient to pay the sum found (hereafter) to be due to Crawford & Co., then Kelly & Co. agree to pay the balance remaining unpaid to Crawford & Co."

No "exhibit" of any kind had been annexed to this contract at the date of its execution, nor was ever afterward annexed.

Argument for the plaintiff in error.

Quigg, in September, 1861, along with Maher, Crawford & Co. supervising what he did, proceeded to determine from the books of Kelly & Co. the amount due Crawford & Co. In doing this he corrected errors and oversights, and made some new entries, and on the 16th of June, 1862, he wrote up a balance of the accounts as they stood on the books at that time; including in it all the accounts that had been entered upon the books by him subsequent to the agreement. Acting thus, he reported, in June, 1862, the sum due to be $5474.

Kelly & Co. having failed to pay the amount thus found, Crawford & Co. brought assumpsit in the court below against them.

The declaration consisted of one special count on the agreement, and the award of Mr. Quigg, thereunder. It set forth that the accounts had been put into collection, and that there was a deficit. The common counts were added.

To this declaration Maher pleaded:

1st. General issue.

2d. That he did not execute the agreement set out in first count of the declaration.

3d. That the agreement so set out was executed by Kelly, in the name of Kelly & Co., *without his knowledge or consent*, and that long before the date thereof, the firm of Kelly & Co., of which he had been a member, was dissolved.

On the trial, the contract between the parties of September 13th, 1861, was admitted by the court in evidence, "*subject to the proof to be given thereafter*," without the exhibit to which it refers, against two objections of the defendants—1st, that it was incomplete without the exhibit; 2d, that it was invalid, because executed by one of the firm of Kelly & Co., after its dissolution.

Quigg was examined as a witness in the case, and exhibited the books, and testified that the entries made by him, and the balance the books showed, were accurate.

Mr. D. C. Nichols, for Kelly & Co., plaintiffs in error:

1. The contract without the schedule was incomplete—a

contract with its most important part omitted—and did not tend to show the case between the parties. Their rights, under the contract, depended upon the accounts assigned. The accounts were to be put into speedy collection. The first count of the plaintiffs' declaration alleges that this was done. If more was collected than Quigg should award, the plaintiffs were to pay the balance to the defendants below; if less, the defendants below were to make up the deficiency. The contract without the schedule had no certain meaning.* The absence of the schedule made a patent ambiguity which cannot be supplied by parol evidence.†

If this contract could have been rendered competent by extrinsic evidence, that evidence should have been first introduced, before the contract was received in evidence.‡

2. By the contract of September 13th, 1861, Quigg was to determine the balance due the plaintiffs from the defendants as shown by the books *at the time they were submitted to him.* Instead of so finding the balance he changed the books; introduced new and original matter in them, and in making up the balance-sheet included this matter. In doing this he exceeded the submission.

Now, an award not in pursuance of the submission, or based upon matters not submitted, is void.§

Mr. Merrick, contra:

The court is now asked to reverse this judgment, not because of any injustice done the defendants, or that the judgment and finding of the jury are not fully supported by the pleadings and proofs in the case, or that the jury were in any-

* Dennis *v.* Barber, 6 Sergeant & Rawle, 425; Sloan *v.* Ault, 8 Clark (Iowa), 229; Shields *v.* Henry, 31 Alabama, 53; Miller *v.* Travers et al., 8 Bingham, 244 (21 English Common Law, 524); Jackson *v.* Parkhurst, 4 Wendell, 369.

† Gilson et al. *v.* Gilson, 16 Vermont, 468.

‡ Haswell *v.* Bussing, 10 Johnson, 128; Penfield *v.* Carpender, 13 Id. 350; Irvine *v.* Cook, 15 Id. 239.

§ Pope *v.* Brett, 3 Williams's Saunders, 292; Harvey *v.* Aston, Willes, 92; George *v.* Lousley, 8 East, 13; Leggo *v.* Young, 81 English Common Law, 625; Shearer *v.* Handy, 22 Pickering, 417.

wise misled by the direction of the court, or would not be justifiable in coming to the same conclusion under any aspect of the case consistent with the facts, or that substantial justice has not been done to the defendant; nothing of the kind is assigned for error. On the contrary, there being no errors assigned in this court, the plaintiffs in error substantially admit that the defendants in error made out their case. The allegation is that the court erred technically in permitting the defendants in error to introduce and read in evidence to the jury, the contract of September 13th, 1861, and the books of Kelly & Co. There is really nothing else. There was no substantial error in what was done, and none even in a technical view. There was no dispute about anything. Quigg was not an arbitrator; but was a mere accountant, fixed on to find the sum due on the books of Kelly & Co.

Mr. Justice FIELD delivered the opinion of the court.

On the trial of this cause the agreement of September 13th, 1861, was admitted in evidence, without the exhibit to which it refers, against two objections of the defendants: 1st, that it was incomplete without the exhibit; 2d, that it was invalid, because executed by one of the firm of Kelly & Co. after its dissolution.

The answer to the first objection consists in the fact that no exhibit, though mentioned in the agreement as annexed to it, was in truth annexed. The parties executed the agreement, and acted upon it without this document being attached. The agreement cannot, therefore, be treated as incomplete in the absence of the exhibit; it was only ineffectual to pass the amounts specified in that paper; it was effectual to pass all other matters mentioned. The contract was not intended merely to transfer certain assets; it had for a further object to ascertain the amount of the indebtedness of the defendants from the examination of their books by an accountant. It was clearly admissible in connection with the statement of the accountant to show the amount of such indebtedness.

To the second objection the answer is equally brief and

conclusive. The agreement was admitted, "subject to the proof to be given thereafter," and it was subsequently proved that the agreement was ratified by the other partner of the firm of Kelly & Co., and the fact of ratification is specially found by the jury.

The principal objections urged for a reversal of the judgment rest upon the idea that the agreement of September 13th, 1861, was a submission to arbitration, and the report or statement of Quigg was the award of an arbitrator; and that both are to be judged by the strict rules applicable to arbitrations and awards. This is, however, a mistaken view of the agreement and report. As observed by counsel, there was no dispute or controversy between the parties to be submitted to arbitration; nor was anything to be submitted to the judgment or discretion of Quigg. The books of account of the defendants were to determine the amount due; about these there was no controversy. The only duty of Quigg was to examine them as an accountant and to state what they exhibited.

The objection that the report was not made from the accounts as they stood on the books at the time they were placed in the hands of Quigg, is not one which can affect the result. The object of submitting the books to him for examination was to ascertain the exact amount of the indebtedness of the defendants to the plaintiffs. For this purpose it was in his power to write up the books, to correct errors discovered, and make entries of what had been omitted by oversight or mistake. It is to be presumed that the parties desired to arrive at a just result, not to have a balance struck from the books without regard to their correctness. The agreement provides that the amount due was to be ascertained by Quigg, under the supervision of the parties, and the proof shows that this was done under the immediate supervision of one of the defendants.

Besides, Quigg was examined as a witness in the case, and exhibited the books, and testified as to the balance they showed and the entries made by him. These books were, of themselves, admissible as evidence of the balance due by

Statement of the case.

the defendants, independent of the agreement of September 13th, 1861. Upon the evidence they furnished, taken in connection with the testimony of Quigg, the verdict of the jury may be sustained without reference to his report. They showed the amount received from the sales of coal furnished to the defendants to which the plaintiffs were entitled; and for such amount the recovery can be upheld under the common counts, for money had and received.

Judgment affirmed.

O'Neal *v.* Kirkpatrick.

On the 13th of May, 1861, the legislature of California passed an act which provides for the reclamation and sale of the "swamp and overflowed lands" of the State. The twenty-seventh section declares that the provisions of the act shall "apply equally to all *salt-marsh or tide lands* in the State as to swamp and overflowed." On the next day—the 14th of May—the same legislature passed another act ratifying and confirming the sales of all *marsh and tide lands* belonging to the State, which had been made according to the provisions of any acts of the legislature for the sale of "swamp and overflowed lands," and declaring that "any of said marsh and tide lands that remained unsold might be purchased under the provisions of the laws then in force for the sale of swamp and overflowed lands, *Provided* no marsh or tide lands within five miles of the city of San Francisco, &c., should be sold or purchased by authority of this act." On this case—

Held, that after the passage of the second act there was no authority for the sale or purchase of salt-marsh or tide lands within five miles of the city of San Francisco.

This was an ejectment in the Circuit Court of the United States for the District of California, to recover a lot of land situate on the margin of the bay of San Francisco, *within five miles of the city*, below ordinary high-water mark, and which contained about forty acres of land under water, but which could be easily reclaimed, and, by the natural growth of the city, would soon become a part of it. The plaintiff claimed title under a certificate of purchase from the State dated 23d

February, 1864, and which purported to have been issued by the register of the land office, under two acts of the legislature, passed April 21st, 1858, and May 13th, 1861.

The question in the case turned upon the power of the register to grant, or, in other words, on the authority to make the sale of the premises. The act of 1858 provided for the sale of the "*swamp and overflowed*" lands of the State. But the lands in question, as described in the certificate, were "*salt-marsh and tide lands*," not within the class or designation of the act. The other act, passed May 13th, 1861, was entitled "An act to provide for the reclamation and segregation of the swamp and overflowed *and salt-marsh and tide lands* donated to the State of California by act of Congress." It contained an elaborate system for reclaiming "swamp and overflowed" lands in the State, under the supervision and control of commissioners. Section twenty-sixth provided for the sale of these lands, and section twenty-seventh enacted that "the provisions of this act shall apply equally to all salt-marsh or tide lands in the State, as to swamp and overflowed." If the case had rested here, the authority to make the sale would seem to have been undoubted. But the same legislature passed an act the next day (May 14th) which, it was contended, annulled this authority. It was entitled, "An act to provide for the sale of the marsh and tide lands of this State," and contained but one section. This provided:

1. That the sales of all marsh and tide lands belonging to the State, that had been made according to the provisions of any acts of the legislature providing for the sale of the "swamp and overflowed lands," were thereby ratified and confirmed.

2. That any of said marsh and tide lands that remained unsold might be purchased under the provisions of the laws now in force providing for the sale of the swamp and overflowed lands, "*Provided* no marsh or tide lands within five miles of the city of San Francisco or the city of Oakland, &c., shall be sold or purchased by authority of *this* act," and *Provided, further*, that no sales of lands, either tide or marsh,

which were thereby ratified and confirmed, within five miles of said cities, &c., shall be confirmed by this act, except alcalde grants.

Judgment having gone for the defendant, the plaintiff brought the case here on error.

Messrs. C. T. Botts and Gregory Yale, for the plaintiff; Messrs. Delos Lake, M. Blair, and T. A. Dick, contra.

The argument on the part of the defendant was that this act restrained the power of sale of these marsh and tide lands, given by the act of the day preceding, so as to exempt those lying within five miles of the city, within which the *locus in quo* is situate.

The argument on the part of the plaintiff, that the restriction was confined to sales made under the act itself—that is, the act containing the restriction—and that it did not interfere with or affect sales made under the act of May 13th.

Mr. Justice NELSON delivered the opinion of the court.

What affords some plausibility to the argument, on the part of the plaintiff, is the peculiarity of the words of the proviso. The words are, "provided, no marsh or tide lands located within five miles of the city, &c., shall be sold or purchased by *authority of this act.*" This purchase, as appears from the certificate, was made in 1864, under the act of May 13th, 1861, and hence was not within any restriction, as none existed in that act. The point is a nice one, but, we are inclined to think, not substantial. It will be observed that the act of May 14th does not profess to confer any authority of itself to sell or to purchase the marsh and tide lands, but provides that any remaining unsold may be purchased under the provisions of the laws now in force—that is, under the act of May 13th. It incorporates, by the reference, that act into its own provisions as the authority for future sales, and when the restriction is limited to sales or purchases made *by authority of this act*, it necessarily embraces sales and purchases under the act of May 13th, that being the act to which reference is made, and where the authority may

be found. This construction, which conforms to the fair and reasonable import of the terms of the act, makes the two statutes sensible and consistent, and avoids the absurdity which must otherwise be imputed to the legislature of passing two acts, in two consecutive days, each containing an independent authority for the sale and purchase of these marsh and tide lands—one with the five miles restriction, and the other without it.

It may be said that the clause authorizing the sales of these lands in the act of May 14th, in terms, refers only to laws then in force, providing for the sales of swamp and overflowed lands, and hence that the reference is to the act of April 21st, 1858. But the answer is, that the act of May 13th provides for the sales of lands of this class, and then, by the 27th section, enacts that the provisions of the act should apply to salt-marsh or tide lands the same as to those of swamp and overflowed. This section incorporated these marsh and tide lands into the several provisions of the act of May 13th, putting them on the same footing as the other class, and hence the reference in the act of May 14th fairly embraced them. But, independently of this view, as the act of May 13th provided for the sales of swamp and overflowed lands, the reference, by its terms, is as applicable to that act as to the act of 1858.

The intent of the legislature to prohibit these sales within the five miles is apparent from another provision of the act of May 14th, for while it confirmed those that had been made under some misconstruction of previous laws, it excepted those made within the five miles, save only alcalde grants.

There is another act of the legislature quite as decisive against the title of the plaintiff as the one we have examined, and less involved, passed April 27th, 1863. This act provides for the sales of swamp and overflowed marsh and tide lands belonging to the State. It fixes the price and time of credit given to the purchaser, prescribes the oath to be taken by him on the application, and the duties of the county surveyor in making the location, also of the surveyor-general and register of the land office. The act provides, also, for

certificates of purchase and the issuing of the patents; and section 30 declares: "This act shall not apply to the marsh and tide lands upon the city front, and within five miles of the city and county of San Francisco," &c. And section 31 provides that "all acts and parts of acts in conflict with the provisions of this act are hereby repealed."

This act adopts a general system for the sale of certain specified classes of the public lands, and, among others, marsh and tide lands, and, as we have seen, repeals in express terms all previous laws inconsistent or in conflict with it. And, of course, if any previous law existed authorizing a sale of these lands within five miles of the city of San Francisco, which the 30th section of this act prohibits, it must be regarded as repealed.

We need only add, the sale of the lot in question was made after the passage of this act. There being no authority to sell the land in question or issue the certificate, it follows that the plaintiff is without title, and the court below was right in giving judgment for the defendant.

JUDGMENT AFFIRMED.

Mr. Justice FIELD did not sit in the case, or take any part in its decision.

DEERY v. CRAY.

1. No person can rely on an estoppel growing out of a transaction to which he was neither a party nor a privy, and which in no manner touches his rights,

   Hence where a plaintiff claims under A. and his deed, defendants who do not claim under it cannot set up its recitals as estoppels.

2. Where an heir conveys both as heir, and also as executor under a power in a will which his deed recites, the fact that his deed thus acknowledges a will does not estop a party claiming under the deed to assert that the grantor inherited as heir.

3. Where numerous leading facts point to the conclusion that every part of a large tract of land (an old manor) divided into several parts has been held under an ancient deed (one of the year 1785), from the date of the deed till the present time, the fact that every link of the title, in all

parts of the tract, cannot now be specifically shown, is not enough to avoid the presumption that the tract is held under such deed.

4. The presumption being established, recitals in the deed, consistent with the other evidence in the case, may be used as proof against persons who are not parties to the deed and who claim no right under it.

5. A certificate by the proper officers, that a *feme covert* being "privately examined, apart from and out of the hearing of her husband," acknowledged, &c., is a sufficient compliance with the Maryland statute of 1807, which requires the examination to be "out of the presence" of the husband. The expressions are equivalent.

6. When it is sought to apply the rule that a court of error will not reverse where an error works no injury, it must appear beyond doubt that the error complained of neither did prejudice nor could have prejudiced the party against whom the error was made.

Hence where by an error of the court below a plaintiff had not been allowed to introduce the first item of her testimony, and had no interest therefore to show anything which might avoid the proof of the other side—proof which, though apparently fatal to her case, even though the error had not been made, she might, possibly, have avoided if the court had not committed the error, but had given her a standing in the case which would have made it avail her to avoid such opposite proof—the judgment was reversed.

THIS was an action of ejectment brought in the Circuit Court for the District of Maryland, by Eliza C. Deery, to recover an undivided third part of a tract of land, called Kent Fort Manor, on Kent Island, in Queen Anne's County, Maryland. The defendants were Cray, Bright, and others, occupying different parts of the tract.

Miss Deery, the plaintiff, was the daughter of Elizabeth Chew, who married William Deery, and afterwards, in second marriage, Eli Beatty. The Elizabeth Chew thus married was the daughter of Samuel Lloyd Chew the younger, who died about the year 1796, intestate, leaving the said Elizabeth Chew, and also three others, his children and heirs-at-law. The effort of the plaintiff was to trace title, from the original patentee of Kent Fort Manor to her grandfather, Samuel Lloyd Chew, from whom she claimed through her mother, who died the wife of Eli Beatty in 1838. Title was shown regularly enough down to a certain William Brent, of Virginia.

In the progress of the trial she took six bills of exception to rulings of the court on the admissibility of evidence.

It is only necessary to refer to the fourth and sixth exceptions, those being the only ones considered by this court, because, as the court said, the fourth referred to and embodied all that was contained in the three previous bills of exception on the same subject; and because the conclusions of the court on the question raised by that bill of exceptions rendered the matter involved in the fifth unimportant.

As regarded this fourth and this sixth exception the case was thus:

1. *As to the fourth.* Having read to the jury without objection evidence tending to show title and possession of the land in the above-mentioned William Brent, from the year 1767, the plaintiff offered to read a copy of a deed, certified from the proper recording office, purporting to be made by Elinor Brent, executrix, and Daniel Carroll Brent and William Brent, acting executors,* of the last will and testament of the William Brent first mentioned, conveying the manor to Samuel Chew. This deed *recited* that William Brent, Sr., deceased, by his last will and testament, bearing date January 7, 1782, constituted the persons aforesaid executors of the said will, and authorized them to sell and convey in fee-simple the land and premises described in the said deed, and that William Brent, who united in the conveyance as executor, was also heir-at-law of the said William Brent, senior. The deed then undertook by apt language, to convey by virtue of the will, and William Brent also conveyed as heir-at-law, and they jointly and severally covenanted to warrant the title. The *plaintiff offered no evidence of the existence of the will* under which the executors professed to act, *nor of the heirship of William Brent*, one of the grantors, *other than what was contained in the recitals of the deed;* and for want of such proof the court rejected the deed. Proof had been made of fruitless search among title-papers and records for the will recited.

The plaintiff then offered a mass of testimony designed to show that the possession of the land had passed with the

* Described in the deed like their testator as "of Virginia."

said deed, and had been held under it, and in consistency with it, for such a length of time as to raise a presumption of the truth of one or both of the recitals above mentioned.

To understand this testimony the better, it may be stated that the whole tract is divided first into two parts by a line, below which lies a part called "the lowermost half part," now claimed by the defendant Cray. The upper half is divided into three parts, one to the east called Long Point farm, another next westwardly called the Indian Point (or Green's Creek) farm, and a third, more westerly yet, about which there was no dispute. The three together make up the northern half.

The evidence thus offered in support of the deed was partly documentary and partly parol. Taking the former chronologically it presented:

1. The will of Samuel Chew, the grantee, in the deed dated November 24th, 1785, about six months after the date of that conveyance to him. He died the succeeding year. By this will he devised Kent Fort Manor to his wife, Elizabeth Chew, for life, and after her death to his son, Samuel Lloyd Chew.

2. A mortgage of Kent Fort Manor by Samuel Lloyd Chew to Charles Carroll of Carrollton, dated February 20th, 1789, shortly after the death of his father.

3. A deed from Philip Barton Key to Arthur Bryan, dated May 7th, 1798, conveying "all that moiety or half-part of Kent Fort Manor, on Kent Island, in Queen Anne's County, being the lowermost half-part of said tract of land called Kent Fort Manor, and is the same land and half-part of which Mrs. Chew was heretofore seized." This deed had a full covenant of warranty.

4. An agreement of counsel that the land thus conveyed to Arthur Bryan was partitioned among his heirs in 1802, by the Chancery Court of Maryland, and allotted to Susanna Tait, sister of said Arthur.

5. A deed from Samuel A. Chew, son of Samuel Lloyd

Chew, dated March 6th, 1838, conveying to Thomas Murphy Long Point farm, a part of Kent Fort Manor.

6. A deed from said Samuel A. Chew to James Bright, Jr., dated January 4th, 1840, conveying Indian Point farm, another part of said manor.

These two farms, as already said, were on the north half of the manor, and form no part of the land conveyed by Key to Bryan.

All these documents were copies, properly certified to come from the recording offices where such deeds should rightfully be recorded.

The parol evidence showed that Samuel Chew, first of the name and grantee in the deed, died in 1786; that his son, Samuel Lloyd Chew, second of the name, died in 1796, leaving as his heirs Samuel A. Chew, third of the name, Bennett Chew, Henrietta Chew, and Elizabeth Chew. The plaintiff, as already said, was daughter of the last-named person, and in that right claimed the property in controversy. Elizabeth Chew, widow of the first Samuel Chew and his devisee for life of the property, died in 1807. It was further shown that one William Bryan, who in 1802 resided on Long Point farm and Indian Point farm, and who had resided there for several years previous, stated repeatedly that he held his possession under the Chews; that in 1825 Samuel A. Chew, third of the name and uncle to plaintiff, took possession of about five hundred acres of the north part of said manor, west of Long Point and Indian Point farms, which he held until his death, in 1843, and that the same was now held under that title; that Robert Tait, son and heir of Susanna Tait, was in 1825 in possession of the southern half of the manor, and sold it to Richard Cray, his son-in-law, and that possession was now held under that title.

All this being finally offered with the deed, they were rejected by the court, to which rejection an exception—the fourth one in the case—was taken.

2. *As to the sixth exception.* In the further progress of the trial some of the defendants offered in evidence a deed from the plaintiff's mother, then married to Beatty, to Samuel A.

Chew, her uncle, purporting to convey all her interest in Kent Fort Manor. As the plaintiff claimed as heir-at-law of her mother, this deed, if admitted, was apparently destructive of her claim. Her counsel objected to the admission of the deed on the ground that it was defectively acknowledged.

By statutes in Maryland, *femes covert* can convey their lands by deed acknowledged before two justices of the county court, such acknowledgment being made by the woman "*out of the presence* and hearing of her husband;" the clerk of the court certifying that they were the "justices of the said court." In the case of the deed from the plaintiff's mother, now offered, the acknowledgment in that part relating to the presence of the husband, ran thus:

"STATE OF MARYLAND, *to wit:*

"Be it remembered, that on this 26th of October, 1821, personally appeared before us, two *justices of the peace of the State of Maryland for Washington County*, the above-named Eli Beatty and Elizabeth his wife, and Henry C. Schnebly and Henrietta Maria his wife, party grantors in the foregoing instrument of writing, and severally acknowledged the same to be their and each of their act and deed, &c., and the said Elizabeth C. Beatty, wife of Eli Beatty, &c., being by us, two justices of the peace as aforesaid, respectively, *privately examined apart from and out of the hearing of their and each of their husbands*, whether they and each of them doth make their acknowledgment of the said instrument of writing willingly and freely, &c."

The certificate of the clerk under the court's seal was:

"STATE OF MARYLAND, WASHINGTON COUNTY, *ss:*

"I hereby certify that, &c, whose names are signed to the above acknowledgment, *were, at the time of signing thereof, and still are, justices of the peace for the county aforesaid, duly commissioned and qualified, and to all their acts as such full faith and credit is, and ought to be, given, as well in courts of justice as thereout.*"

The objections made by the plaintiff to this certificate of acknowledgment were:

1. That it did not show that the justices who took the acknowledgment had been sworn into office; nor

2. That they were justices of the county for which they took the acknowledgment; nor

3. That Mrs. Beatty had been examined "out of the *presence* of her husband."

But the court overruled the objections, and an exception, —the sixth in number on the record,—was taken.

The case was now here on the exceptions.

Mr. Brent, for the plaintiff in error, contended, 1. That the recitals in the deed from the executors of W. Brent being ancient recitals, were presumably true, and that the court had erred in rejecting the deed upon the mass of proof, documentary and parol, showing that it had been followed by long and harmonious possession on the part of the grantee, and those claiming under him, down to the year 1840.

2. That the objection taken in the case of the deed said to have been executed by Mrs. Beatty, especially the third objection, ought to have prevailed; decisions in Maryland relating to the acknowledgment of deeds by *femes covert* being very strong to the point that the formula of acknowledgment presented by the statutes should be literally followed, equivalent words not being enough.*

Messrs. Wallis and Alexander contending, primarily, that William Brent, who was a party to the deed as executor, did not convey as heir-at-law, but in a different capacity, to wit, in the capacity of one taking under the will, and that when you set up the will you were estopped to set up heirship,—heirship being incompatible with the very title sought to be derived under the deed,—argued—

1. That if the deed were admitted, and all the proof given to sustain it were admitted, it did not raise the presumption that the recitals were true; that, independently of other matters (which the counsel urged), there was no evidence that

* Steffey *v.* Steffey, 19 Maryland, 13; Johns *v.* Reardon, 11 Id. 469; Hawkins *v.* Gould, 3 Harris & Johnson, 243.

Samuel Lloyd Chew ever had possession; that in 1789 his son mortgaged all his interest to Charles Carroll of Carrollton; and that no evidence being produced that this mortgage had been either paid or released, the plaintiff herself had shown that title had passed out of the ancestor under whom she claimed. At this point the chain was completely broken, and a hiatus made which no presumption supplies. That this was especially true of the lowermost half-part, where the title comes to Bryan, through Key alone, who shows no title derived from any of the Chews at all.

That both in Virginia and Maryland wills were matter of record, and that the failure to find a will anywhere proved that none ever existed.

2. That the acknowledgment in the deed from the plaintiff's mother was substantially a compliance with the statute in regard to the acknowledgment of *femes covert*, and if not, that the defect was cured by certain curative acts of the State; that at all events the deed had been rightly admitted.

3. That if the second deed was rightly received the plaintiff could not have recovered under any circumstances; and that so, not having been prejudiced by rejection of the first deed, and the evidence to support it, this court would not reverse, even if they considered that there had been error in that rejection; the plaintiff having no further case to litigate.

Mr. Justice MILLER delivered the opinion of the court, and—having stated the facts of the offer of the copy of the deed from the executors of W. Brent, and of the offer of the mass of testimony designed to show that possession had so passed with the deed, and had been held under and in consistency with it for such a length of time as to raise a presumption of the truth of one or both the recitals in it—went on as follows:

Before we proceed to examine the sufficiency of this evidence for the purpose for which it was offered, we shall notice a criticism of defendants' counsel in regard to the matter in the recitals, of which proof can be received. It is said that by the recital of the existence of a will which au-

thorizes the executors of William Brent, Sr., to convey the land, William Brent, Jr., and Samuel Chew, the grantee, and all persons claiming under them, are estopped from denying the existence of such a will, and from claiming any benefit from the fact that William Brent, Jr., was heir-at-law, and conveyed as such heir, as well as executor. The proposition does not seem to us to be well founded. It may be very true that William Brent and the other grantors in that deed were estopped as against Samuel Chew to deny the truth of anything recited in the deed. And if any controversy growing out of that transaction had ever arisen, in which Samuel Chew, or any person claiming under him, was adversary to William Brent, or any person claiming in his right, the person claiming under the latter would have been estopped from denying the existence of such a will as that described in the deed, or that said Brent was heir to William Brent, Sr. But suppose that William Brent, some years after the execution of this deed, had brought an action of ejectment against a person who derived no right under the deed, but who claimed adversely to the title of both Brent and Chew, would William Brent, in that case, have been estopped from claiming as heir of his father by the recital of the will in his deed to Chew? Clearly not; for the simple reason that no person can rely upon estoppel growing out of a transaction to which he was not a party nor a privy, and which in no manner touches his rights. There is no mutuality, which is a requisite of all estoppels. That is precisely the case before us. The plaintiff claims under Brent and his deed. Defendants claim nothing under that deed, and deny all connection with the title it purports to give. They are strangers to it, and have no right to set up its recitals as estoppels.

There is another reason why there can be no such estoppel. It was the manifest intent of all the parties to the deed that it should convey such title as might be conveyed under the will, and if that should be invalid, convey such title as William Brent had as heir-at-law. These purposes did not necessarily defeat each other. There might have been a will,

and it might have been doubtful whether it had been executed with the formalities necessary to transmit title to land in Maryland, or to authorize the executors to do so. In such case the purchaser had a right to take, also, for his security, a conveyance from the heir-at-law. If he could do this by a separate instrument, there is no reason why he could not do it in the same instrument which professed to convey by authority of the will. The very nature of the case, therefore, precludes the idea of estoppel; for, to say that a party claiming under that deed is estopped to assert that William Brent inherited the land as heir-at-law, is to deprive him of a right conferred by the deed, and which was one of the essential conditions of its acceptance.

If, then, the testimony offered by plaintiff was sufficient to raise the presumption that William Brent was heir-at-law of the party who died seized, or that such a will existed as that recited in the deed, then that instrument should have been read to the jury.

The evidence offered in support of the deed may be divided into that which is documentary and that which is parol.

It is not necessary that we should go into a minute examination of the effect of this testimony. We are satisfied that it affords a reasonable and fair presumption that every part of Kent Fort Manor has been held under the deed from William Brent and his co-executors to Samuel Chew, from its date in 1785 till the present time. In reference to the north half of the manor, there can be no reasonable doubt of this proposition, for no one is in possession of any part of it who does not hold under Samuel Chew, grandson of the grantee, and son of Samuel Lloyd Chew, to whom the manor was devised by that grantee. It is maintained, however, that in reference to the southern half of the manor, which is proved to have been held under the deed from Philip Barton Key to Arthur Bryan, from the date of that deed in 1798 to the present time, there is a hiatus which can be filled by no presumption. If, however, we recall the statement in Key's deed to Bryan, that the land which he is

conveying "is the same land and half-part of Kent Fort Manor of which Mrs. Chew was heretofore seized," we can have no difficulty in presuming that in some way Key had become the owner of Mrs. Chew's title. The lapse of time and the reference to her seizin would be sufficient to authorize a jury to presume a conveyance by Mrs. Chew to Key, or to some one from whom he derived title. This consideration is strengthened by the fact that Key covenants to warrant the title to the land against all persons whomsoever. It is unreasonable to believe that in the very deed in which he makes this covenant he would admit Mrs. Chew's former seizin and point to her title, unless he had in some way become invested with that title, especially as she was still living and could have asserted her right against Key's grantee, if she had not in some manner parted with it.

Is it requiring too much to presume from these facts that one or both the recitals in the rejected deed, and on which its power to convey this land depends, are true? Not a single circumstance is to be found inconsistent with the fact that William Brent, one of the grantees in that deed, was son and heir to William Brent, Sr. Nor is there anything except the failure to find it, inconsistent with the existence of such a will as is recited in that deed. When we consider that William Brent, Sr., died in Virginia; that all the grantees in the deed resided there; that the system of recording and proving wills had not then become so general and so well understood as it has since, and that for eighty years no occasion has arisen for the production of that will, the failure to find it by parties who have no other relations with the Brents than this one transaction of their ancestors, does not argue so forcibly against its existence at that time, as to overthrow the presumption arising from long possession of this manor, held under the supposition of the existence of such will.

That recitals of this kind in an ancient deed may be proved as against persons who are not parties to the deed, and who claim no right under it, is too well settled to admit now of controversy. Such is the doctrine of this court in *Carver* v.

Jackson,* and in *Crane* v. *Astor and Morris*.† The only question is, whether the facts justify such a presumption, and we must say that, if they can do so in any case, we do not see how the inference can be resisted in the case before us.

It follows that the Circuit Court erred in refusing to admit the deed offered by plaintiff as set out in the fourth bill of exceptions.

2. In the further progress of the trial some of the defendants offered in evidence a deed from the plaintiff's mother to Samuel A. Chew, her uncle, purporting to convey all her interest in Kent Fort Manor. As plaintiff's efforts, as far as developed, had been to establish a title as heir-at-law of her mother, of course this deed, if admitted, was fatal *prima facie* to her claim. Her counsel objected to the admission of the deed, and his objection being overruled, he took his sixth bill of exceptions, which we now proceed to examine.

All the objections made to this deed relate to the certificate of acknowledgment. The first two are unimportant. They are that it does not appear that the justices of the peace who took the acknowledgment were sworn into office, or that they took the acknowledgment in the county of which they were justices. We think that it is a presumption of law from the facts stated in the certificate of the justices, and of the clerk of the county court, that both these requirements were complied with.

But it is also strenuously urged that the deed is void because the certificate does not show a compliance with the law of Maryland then in force concerning the privy examination of married women. The act of 1807, which was in force at that time, required this examination to be conducted out of the presence and hearing of the husband, and the point is made that it does not appear from the certificate that Mrs. Beatty, the mother of plaintiff, was examined *out of the presence of her husband*, with whom she joined in the conveyance. The certificate recites "that the said Elizabeth

* 4 Peters, 1.

† 6 Peters, 598. See also Raymond *v.* Dennis, 4 Binney, 314; Stokes *v* Daws, 4 Mason, 248.

C. Beatty, wife of Eli Beatty, and Henrietta Schnebly, wife of Henry Schnebly, being by us, justices of the peace as aforesaid, respectively, privately examined apart from, and out of the hearing of their, and each of their husbands, did," &c. Now, although the words "out of the presence" are not used here, we are of opinion that the words which are used show necessarily and conclusively that the examination was had out of the presence of the husband.

In the first place, it was had *privately*. As the object of the statute was not to provide for strict privacy from all persons, but only privacy from the husband, it is to be supposed that it was in this sense the justices used the word. It is also stated that she was examined *apart* from her husband. This expression is still stronger, and can mean nothing less than that the husband was not present when she was examined; and, to make it still clearer that this exam ination, private and apart from her husband, was out of his presence, it is further certified that it was out of his hearing.

Some decisions of the Supreme Court of Maryland have been cited to show that the rule there is a strict one as to the agreement between the certificate and the statute, but none which overturns the doctrine recognized by that court, as it has been by all others, that equivalent words, or words which convey the same meaning, may be used instead of those to be found in the statute. We are satisfied that within this principle the certificate in this case is a compliance with the act of 1807, and that there was no error in admitting the deed to be read to the jury.

It is claimed that, if we shall find this deed to be valid, we must affirm the judgment, although we may find error in the previous rulings of the court, upon the ground that this conveyance shows that plaintiff has no title to the land, and that therefore such error is without prejudice to her rights. We concede that it is a sound principle that no judgment should be reversed in a court of error when the error complained of works no injury to the party against whom the ruling was made. But whenever the application

of this rule is sought, it must appear so clear as to be beyond doubt that the error did not and could not have prejudiced the party's rights. In the case before us this is not so clear. The plaintiff, by reason of the error of the court, had never been permitted to introduce the first step in the proof of her case. She had no interest in offering to show anything which might avoid the force of the deed read by defendants. If she could have proved it a forgery it would have done her no good in this suit, because she had failed, under the erroneous ruling of the court, to make out a *prima facie* case for herself. We cannot assume here that she might not have successfully avoided the effect of that deed, if the court had given her a standing in the case which would have made it avail her to do so.

The judgment of the Circuit Court must therefore be REVERSED, and the case remanded, with directions to award

A NEW TRIAL.

LEE *v.* DODGE.

In this case, which was a controversy of fact chiefly, a decree of conveyance of land alleged to have been agreed, by correspondence, to be conveyed, was refused; the court being compelled, from all the circumstances in proof, to think that the only witness who testified that a letter making a proposition of sale had been answered, accepting it, labored under a mistake.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The appellants were the heirs-at-law of G. W. Lee, and, on the strength of the title which they had inherited from him, had obtained in the Circuit Court just named, a judgment in ejectment against Dodge and others for a part of lot 4, block 53, of the city of Chicago. The defendants in that action set up a conveyance from Lee to Lois Cogswell, and showed by sundry mesne conveyances, they were in pos-

session of the lot under that deed. It was, however, proved on the trial, that the deed to Lois Cogswell was left by Lee at his death among his papers, signed and acknowledged, but with a blank space where the name of the grantee should be; and that this was filled up with the name of Lois Cogswell, and delivery of the instrument made without authority, after G. W. Lee's death, by B. T. Lee, his administrator. As both parties claimed title under Lee, the plaintiffs of course had a verdict and judgment, and thereupon the defendants in that suit filed a bill in the same court for an injunction, and for a conveyance of the legal title. The case was thus:

On the 4th May, 1836, Lee, who resided in the West, and was about to start on a tour from New York to Illinois, entered into a written agreement with Jonathan Cogswell, Lois Cogswell (sister to Jonathan), and F. S. Kinney, Esq. (a member of the bar), by which he agreed to invest in real estate ten thousand dollars furnished by the other three parties to the contract, in the proportion of $5000 by Jonathan Cogswell, $3000 by Lois Cogswell, and $2000 by Kinney. Lee agreed to pay to each of his partners one-half the sum advanced, with interest, within three years, and to give his personal attention to the business. The profits and losses were to be shared, one-half by him and the other half by the others. He was at liberty to make purchases to the amount of $40,000 partly on credit. The titles were in the first place to be taken in Lee's name, and he was afterwards to make such conveyances as the state of the venture required.

Lee invested the ten thousand dollars as agreed, getting among other purchases six canal lots in Chicago, which were bought largely on credit. He also purchased for himself about the same time and in the same manner, lot 4, block 53, which was also a canal lot. He seems to have been engaged in various speculations about that time, and shortly after became much indebted and embarrassed. Not being able to pay his partners the half the money they had invested, when the three years elapsed, he confessed to J. Cogswell, for their joint benefit, a judgment for the $5000 and interest

Towards the close of 1841 he availed himself of a privilege allowed by the statute of Illinois, and consolidated his payments on the canal lots; that is to say, he concentrated all the payments which he had made on six lots, upon two and part of another, and thereby paid in full and obtained clear title for these, and relinquished his claim to the others. In doing this he made his own lot 4, block 53, one of those on which payments were consolidated, and thus became debtor to the partnership for about $1500, a little more than one-third the cost of that lot.

On the 26th March, 1842, his health having been for some months broken down, he addressed a letter to Kinney, inclosing one to the Cogswells, dated the 20th of the same month from Mishwaukie, Illinois.

In the letter to Cogswell, he makes a full statement of the transactions concerning the canal lots; says that he is not able to hold any part of the property, and would like to have some arrangement made by which he could give up his interest in all of it, and be released of his debt to them; and adds that he lives at such a distance from the property that other agents can attend to it at less expense than he can.

In his letter to Kinney he says:

"I inclose a letter upon the subject of the canal lots, and you will see how it stands; but how to manage it without our being together I know not. As I am not able to own the property, and really, in the depressed feeling I am in, am not fit to take care or look after it, I would like them to take all and give up my note, I paying property enough to make them secure. For instance, the property to be all theirs, which is at one-third less than cost now. It will include $2172 of my own property. I will give, besides, the west fractional half of section 19, which ought to go with the east half, now owned by the company, $400. I will also (if they actually ask—it ought not to be required)—give all my school section lots in Chicago, worth $1500 cash now. I feel so much depressed and so unfit to take care of these matters that I will, if the whole matter can be settled, give up this property and have it off my mind, if the whole is asked."

Statement of the case.

This letter Kinney filed and preserved, as he did other letters of Lee; including letters between the date of the proposition and Lee's death. Lee himself, after lingering in disease and embarrassment for some months, died in November, 1842.

What was done by Cogswell or by Kinney in the way of action upon these two letters of Lee was a chief point in issue. The defendants in the bill, who were in possession of the lot and who claimed it under the deed of the administrator, set up that the letter contained a proposition, and that this proposition had been accepted; that so there had been a contract; that the deed from the administrator had been in pursuance of that contract, and that no conveyance ought to be decreed. The complainants, Lee's heirs-at-law, on the other hand, denied that there was any contract; asserting that the letter of the 26th March was not a definite offer, but only a statement of what he, Lee, would be willing to do if the parties could meet personally and so "manage" things; and asserting, moreover, that even such a plan as was suggested had never been responded to or accepted.

The evidence on this last point, as it appeared on the one side and on the other, was thus:

In favor of the idea that it had been accepted. Kinney testified that soon after receiving Lee's two letters, he had different conversations with Jonathan Cogswell and his sister, in which they agreed to accept Lee's offer; and that some six or eight weeks after the letter of Lee was written—he thought in the month of May—he wrote him a letter accepting, on behalf of himself and the Cogswells, the offer of Lee, without exacting the school section lots in Chicago; and he further stated that he thought that he received a letter from Lee acknowledging the receipt of this letter of acceptance. He also stated that he had promised Lee to go to Illinois that summer on this business.

Certain facts were relied on as confirming this testimony; as—

1. That Lee had left at his death a deed (found among his papers after that event) signed and acknowledged, but with

a *blank* space where the name of the grantee should be, and that this deed was with another deed; a deed of the partnership lots.

ii. That there was found among Lee's papers a letter from Cogswell, dated October 18th, 1842; a long letter, detailing the pecuniary troubles of the writer, and expressing his desire to realize from the lands in which he had invested with Lee. He speaks of the lands which were conveyed to his sister, mentions the canal lots, and says if the deed has not been recorded that the name of the grantee should be changed, and they should be conveyed to him, and then directs that the deeds be recorded. But there was no specific mention of lot 4, now in controversy.

iii. Letters of Kinney also were found among Lee's papers, urging the conveyance, and recording of deeds for real estate.

The blank, as to the grantee's name, in the deed from Lee for the lot 4, was, as already mentioned, filled up by Lee's administrator, one B. T. Lee. Kinney, it appeared, went, in June, 1843, to Chicago, and had a full settlement with B. T. Lee, administrator of G. W. Lee, of an individual claim which he had against Lee's estate, and also of that of the partnership. In that settlement he received the deed already mentioned, of the lot in controversy, found among Lee's papers, and by his advice and with his knowledge the blanks in the deed were filled with the name of Lois Cogswell, and delivery made by B. T. Lee. These arrangements, Kinney testified, were made with the purpose of carrying out "the contract," and that B. T. Lee, the administrator, understood things in that way.

On the other hand, the testimony of Mr. Kinney was given twenty years after the date of the alleged transaction.

No letter of acceptance was produced from any source, nor any alleged copy of one.

A letter thus, from Kinney to Lee, dated July, 1842, was found among Lee's papers:

Opinion of the court.

"DEAR FRIEND LEE:

"The last letter I had the pleasure of receiving from you *related to the lands in Chicago*, &c. Dr. and Miss Cogswell had it for a time, and perhaps the former took it with him, as I am not able to find it at present. *I will, therefore, defer saying anything in reply until I find the letter. It is, in fact, a difficult matter to say what is best to be done under the circumstances. . . . Your management of the matter was one great inducement to enter into it, and we might almost as well throw the whole away as attempt to manage it ourselves at this distance.* My main object, however, in addressing you at this time is in regard to taxes, which I wish you to attend to, and see paid, on all the property we are jointly interested in."

That the deed for the *partnership property*—found after Lee's death among his papers with the deed having the grantee's name in blank, for this canal lot 4, block 53, in controversy—was *fully executed* and only needed delivery.

As to B. T. Lee, the administrator's, understanding that a contract existed when Kinney went to Chicago, in June, 1843, and had a full settlement with him there, B. T. Lee himself testified that he had never at that time heard of a contract, and that none was spoken of during the settlement. Two full memoranda of agreement, showing the terms of settlement, relating the one to a personal claim of Kinney's against the estate, the other to the joint claim of Cogswell and himself, made no reference to any existing contract.

Mr. Justice MILLER (stating the case) delivered the opinion of the court.

The conveyance of the legal title which is asked for by the bill filed in this suit is claimed on the ground of a contract, alleged to have been made in his lifetime by G. W. Lee; and the only question in the case is as to the truth of this allegation, which is fully denied by the defendants in the court below, who are appellants here.

It is claimed by complainants that the contract was made by letters; Lee proposing the terms in a letter written by

him from Kishwaukee, Illinois, which were accepted by a letter written by Kinney, at New York, where he resided. The letter, or rather the two letters, supposed to contain the offer of Lee are produced, and are admitted to be in his handwriting; but the letter of acceptance, if there was one, is not produced, nor any copy of it; and the fact that such a letter was ever written depends upon the testimony of Kinney and certain circumstances supposed to corroborate his statement.

The counsel for the appellants denies that what is written in this letter was intended as an offer which Lee expected the other party to act on definitely; but rather as a suggestion of what he was willing to do if they could get together. The opening expression of the letter certainly does point strongly to a personal interview as essential in the writer's view to a final arrangement. Still the terms offered are so definite, the property which he was to convey, and the consideration which he was to receive, namely, the note in which he had confessed judgment, were all so fully set forth, that we think if an unconditional acceptance in writing can be made out, it constitutes a contract, which should be specifically enforced in a court of chancery.

We have already stated that the proof of this acceptance rests mainly on the testimony of Kinney, who states that he is very confident that some six or eight weeks after the letter of Lee was written—he thinks in the month of May—he wrote him a letter accepting, in behalf of himself and the Cogswells, the offer of Lee, without exacting the school-section lots in Chicago. He further states that he thinks he received a letter from Lee acknowledging the receipt of this letter of acceptance.

Let us look now, for a moment, at certain matters which are urged upon us, strongly confirming this statement of Kinney.

1. The fact which we have already mentioned, that a deed for this lot was left, signed and acknowledged, with a blank space for the name of the grantee, by G. W. Lee among his papers at his death, with another deed of the partnership

lots which was fully executed and only needed delivery, is one of them.

It is to be remarked, however, as to the deed for the partnership lots, that Lee had previously conveyed the partnership property whenever requested by the other partners, and letters are in the record from them urging him to do this as to the canal lots. From his embarrassed condition, it was also his moral duty to make this conveyance to save the property, to those who were entitled to it, from the grasp of his individual creditors. This sufficiently explains the existence of that deed. But the fact that the deed for his own lot had no grantee in it, implies that his purpose with regard to it was not the same as with reference to the other. He might have kept such a deed in readiness, if Kinney should come out West, as he had written he would, and should then be willing to accept his proposition and satisfy the judgment against him. Or he may have been expecting a favorable answer from Kinney, and wished to be ready if he received it. At all events, conceding his willingness to make the contract, we do not think that any very strong presumption arises that his proposition had been accepted—which is the point to be established—from this paper in the form of a deed, but without a delivery, and with no directions left on either of these points.

2. A letter from Jonathan Cogswell to Lee, found among Lee's papers, dated October 18th, 1842,* is much relied on as showing that the contract had been concluded.

The counsel for the appellees assumes that what is there written is written of the lot in controversy. But as we have already seen that the lots which were undoubtedly partnership property were to be conveyed for safety to some other member of the company by Lee, and as there are letters from them urging him to do this, all that Cogswell says in that letter is fully applicable to the partnership lots. At least, it might just as well have been written, and is as easily understood, if no thought had ever been entertained of conveying the lot which belonged exclusively to Lee.

* *Supra*, top of p. 812.

3. Other letters of Kinney urging the conveyance and recording of deeds for real estate are produced, as showing the understanding that Lee was to convey this lot, but the answer is as in the case of the letter of Cogswell, that they do not mention this lot, and all that is said in them is fully explicable on the hypothesis that they refer exclusively to partnership lots.

We do not perceive, then, that these circumstances add much support to the testimony of Kinney. Of this, it is to be remarked, that it is delivered twenty years after the date of the supposed letter of acceptance, that he does not pretend to be precise as to the date of it, within several weeks, and still less is he positive as to its language. He speaks, as we are satisfied, with candor, but with a want of certainty which is commendable, in reference to matters occurring so long ago of which he has no memorandum in writing. He says that some little time after receiving Lee's letters he had conversations, at different times, with Jonathan and Lois Cogswell, in which they agreed to accept Lee's offer, and he feels pretty sure he wrote to that effect to Lee. If we recall the fact, that Lee says he did not see how the matter could be arranged without a personal interview, and connect this with Kinney's statement that he had promised Lee to come out to Illinois that summer on that business, we can see how easily Kinney, having agreed with the Cogswells as to the terms of settlement, and having resolved to go out to Illinois and close it up, may, in recalling the transaction after twenty years, have been so impressed with his conviction that it was all satisfactorily arranged before Lee's death, as to feel confident that he had communicated to Lee the resolution, which had only been arrived at in the minds of himself and the Cogswells.

Many circumstances, not easily reconciled with the existence of such a letter, confirm this view of the matter. No such letter of acceptance was found among the papers of G. W. Lee. The force of this fact is rendered much stronger by the circumstance that among his papers several letters were found, from Kinney and Cogswell, bearing

dates between the date of his proposition and that of his death.

Kinney was a lawyer, and knew the necessity of preserving some evidence of his acceptance of the proposition, if it was one on which he ever expected to rely, yet he produces no copy of this letter of acceptance. Nor does he produce the letter from Lee acknowledging the receipt of that letter, although he found carefully filed away the letters in which Lee makes the proposition. These letters contain a full statement of the canal-lots transaction; thus showing that when importance was attached to letters they were preserved. Several other letters of Lee to Kinney are produced, but none recognizing the existence of this contract.

Kinney swears that the arrangements made when he went to Chicago, in June, 1843, and had a settlement with B. T. Lee, the administrator, were made with a view of carrying out the contract, which we are considering, and that B. T. Lee so understood it. B. T. Lee swears that he had never then heard of such a contract, and that no mention was made of it during his negotiation with Kinney. It is fortunate, in this conflict of recollections, that Kinney produces two memorandums of agreement made at the time, embracing the terms of settlements made by him with B. T. Lee, and signed by them; one having reference to his individual claim against Lee's estate, and the other to the claim of himself and the Cogswells. These are full; and a careful examination of them discloses nothing which, by the remotest implication, can be held to refer to an agreement made by Lee in his lifetime. Yet, as Kinney must, as a lawyer, have known that B. T. Lee was largely exceeding his powers as an administrator, nothing would have been more natural than a reference to a contract, which would have supplied this defect of power, if any such contract had been known to exist. Not only is there no allusion to a former agreement, but the one made at this time varies materially from the one set up in this suit; and this variance is to the prejudice of the parties interested in Lee's estate. The superior value of these writings as evidence, over the

recollections of Mr. Kinney, after twenty years from the time of the transaction, is apparent to every legal mind.

There is another piece of written testimony to which the same remark is applicable, and which we think is of itself almost conclusive that Kinney is mistaken in his recollection as to a written acceptance of Lee's proposition. It is the letter written by him to Lee, dated July 1st, 1842. [His Honor here quoted the letter on p. 813, beginning "Dear Friend Lee."] It is to be remembered that Kinney swears that he thinks it was in May, or early in June of that year, that he wrote to Lee accepting his proposition. And if it was accepted at all, it is reasonable to suppose that it was done within three months from the time the offer was made.

The letter referred to in this letter of Kinney, as received from Lee, was undoubtedly the one containing Lee's proposition. The language of Kinney's letter is wholly inconsistent with the idea that Lee's proposition had been accepted. On the contrary, it states an objection to it in the loss of his services, equivalent to throwing away the whole sum invested. Yet this letter was written three months after they had probably received that proposition, and one month after the time when Kinney says it was accepted.

Under all the circumstances, in proof before us, we are compelled to conclude that Kinney labored under a mistake when he testified that the proposition of Lee had been accepted in writing. This fact is a vital one in the case of complainants, and having failed to establish it, they must fail in their suit.

Decree reversed with costs, and the case remanded with directions to enter a decree

DISMISSING THE BILL.

WITHENBURY *v.* UNITED STATES.

A decree in a prize cause, which disposes of the whole matter in controversy, upon a claim filed by particular parties; which is final as to them and their rights, and final also so far as the claimants and their rights are concerned as to the United States; which leaves nothing to be litigated between the parties, and awards execution in favor of the libellants against the claimants,—is final within the meaning of the Judiciary Acts, and this court has jurisdiction of an appeal from it.

APPEAL from the District Court of the United States for the Southern District of Illinois.

Several libels were filed in that court for the condemnation, as prize of war, of large quantities of cotton and other property captured on the interior navigable waters of the United States, or on land adjacent thereto. On motion, these libels were consolidated, and various claims were interposed in the consolidated suit for portions of the property libelled. Among these claims was that of Withenbury & Doyle. They denied the validity of the capture, and insisted on their own title to nine hundred and thirty-five bales of the cotton.

Upon hearing of the cause as to this claim, an order was made dismissing the claim, with costs, for which execution was ordered.

From this decree the appeal now pending was taken, and a motion for dismissal was now made, upon the ground that the decree was not final, and therefore was not within the jurisdiction of this court.

A motion of a similar sort was made and argued at the same time in another and similar appeal, *Le More* v. *United States*.

Messrs. Ashton, Assistant Attorney-General, and Cushing, in support of the motion:

No disposition has yet been made of the libel, or of the cotton or its proceeds. The suit still remains pending in the District Court for the Southern District of Illinois. In *Hu-*

miston v. *Stainthorp*,* this court, on a question of what is a final decree, assumed as of course the doctrine of *The Palmyra*,† a case in admiralty, and where Marshall, C. J., says:

"The appeal is not well taken. The decree of the Circuit Court was not *final* in the sense of the act of Congress. The damages remain undisposed of, and an appeal may still lie upon that part of the decree awarding damages. The whole cause is not, therefore, finally determined in the Circuit Court, and we are of opinion that the cause cannot be divided so as to bring up successively distinct parts of it."

The inconvenience of admitting, in contradiction to the decision of the court in the case of *The Palmyra*, that a cause in admiralty can be divided so as to bring up successively distinct parts of it, is illustrated in the present case by the fact that not only have Withenbury & Doyle taken an appeal on their claim, leaving the cotton and the libel against it in the court below, undisposed of, but that other parties, namely, Le More, claiming a part of the same cotton on the same libel, but adversely to Withenbury & Doyle, have also taken an appeal, and entered it here. Thus we have two adversary sets of claimants, each splitting off from the main case, and from one another, and coming here with their appeals, while the main case still remains in the inferior court. Can appeals be thus evolved indefinitely from the body of one case? We think not; but that on rejecting all the claims against this parcel of cotton, the court below should have proceeded to determine the question of prize, and after that to decide what to do with the proceeds of the cotton, and then to enter a final decree. Upon such a decree any or all parties might have appealed in due form.

Mr R. M. Corwine, contra:

This is a definite sentence in admiralty; which is a final decree. It dismisses the claimant from the case. He has no

* 2 Wallace, 106.

† 10 Wheaton, 502; and see Montgomery *v.* Anderson, 21 Howard, 386.

further voice in its conduct. It is final as to him and his property. The evil impending cannot be repaired by an appeal from a long-deferred definite or final decree of the whole case, or the disposition of all the claims filed in it. *Execution* of this sentence must go forth in the absence of an appeal. The claimants then have no other remedy than this appeal.

The CHIEF JUSTICE delivered the opinion of the court.

It appears from the record that the decree disposed of the whole matter in controversy upon the claim of Withenbury & Doyle. It was final as to them and their rights, and it was final also so far as the claimants and their rights are concerned as to the United States. It left nothing to be litigated between these parties. It awarded execution in favor of the libellants against the claimants.

We think that such a decree in a prize cause must be regarded as final within the meaning of the Judiciary Acts, and that we have jurisdiction of the appeal from it.

The appeals in The Bermuda case, and in the case of the Alexander cotton, were of the same character with that now before us. In neither of these cases had all matters arising upon the libel and the claims been finally disposed of. In the first the appeal was by claimants of part of the property libelled, whose claims had been dismissed and the property claimed by them condemned. In the other the appeal was by the United States from a decree of restitution in favor of a claimant of part of the property libelled, in the same consolidated cause from a decree in which, against another claimant, the appeal which we are now asked to dismiss was taken.

It is true, that in the cases just referred to no question of jurisdiction was made at the bar, but it existed necessarily in each cause, and was practically determined in favor of the jurisdiction, and, as we still think, rightly determined.

The motion to dismiss is therefore denied.

The motion to dismiss the appeal in *Le More* v. *United*

States depends on like facts and the same principles with that just decided, and must also be denied.

Mr. Justice CLIFFORD dissented.

SEYMOUR *v.* FREER.

Where, through mistake or accident, no bond, or a defective bond, has been filed, this court will not dismiss the appeal,—if it is in all other respects quite regular,—except on failure to comply with an order to give the proper security within such reasonable time as it may prescribe.

APPEAL from the Circuit Court for Northern Illinois.

This was a motion to dismiss an appeal because the bond for the prosecution of the appeal was not filed within ten days after the decree.

It appeared that the decree in the Circuit Court was drawn and placed in the hands of the clerk on the 15th of November, 1866, upon an understanding by the counsel, sanctioned by the court, that it was to be entered, when approved by the court, as of that day. It was retained for several days by the judge, who required a stipulation from counsel in respect to the receiver appointed by the decree, and was then returned to the clerk, and entered on the 20th as of the 15th. The bond was filed on the 28th.

The CHIEF JUSTICE delivered the opinion of the court.

We think that for the purposes of appeal this decree must be regarded as having been passed on the 20th, and that the bond was filed in time.

But if this were otherwise, and through mistake or accident no bond, or a defective bond, had been filed, this court would not dismiss the appeal, except on failure to comply with an order to give the proper security within such reasonable time as it might prescribe.* What is essential to an

* Brobst *v.* Brobst, 2 Wallace, 96.

appeal is allowance, citation to the appellees, or equivalent notice or waiver, and the bringing up of the record at the next term of this court. Security for prosecution should be taken by the judge on signing the citation; but if this duty be omitted or defectively performed, a remedy can be applied here on motion.

In the present case a bond, admitted to be sufficient for costs of prosecution, whether given in time to make appeal operate as a supersedeas or not, was filed in the court below before removal to this court.

The motion to dismiss the appeal must therefore be

DENIED.

GARRISON *v.* CASS COUNTY.

Appeal dismissed for want of jurisdiction, where the decree was rendered 13th June, 1861, but no appeal was prayed for or allowed until June Term, 1865, when, on motion of the defendants below, an appeal was allowed *nunc pro tunc*, as of 13th June, 1861, there having been no citation to the appellees, and the record not having been brought up at the next term.

MOTION to dismiss an appeal from the Supreme Court of the Territory of Nebraska.

The CHIEF JUSTICE delivered the opinion of the court.

The decree in this case was rendered on the 13th June, 1861. No appeal was prayed or allowed until the June Term, 1865. At that term, on motion of the defendants below, an appeal was allowed *nunc pro tunc*, as of 13th June, 1861.

There is nothing in the record which warranted the making of this order; nor, if it could have been lawfully made, would it avail the defendant, for there was no citation to the appellees, and the record was not brought up at the next term of this court.

At most, it can only be regarded as an allowance of an appeal at the June Term, 1865, and no citation appears to have been issued since to the appellees, nor was there any equivalent notice, nor has there been any waiver.

The appeal must therefore be

DISMISSED FOR WANT OF JURISDICTION.

ALVISO *v.* UNITED STATES.

A citation to the adverse party, with due return or waiver by general appearance, or otherwise, is indispensable to jurisdiction on appeal.

ON motion to dismiss an appeal from the District Court for Northern California, the CHIEF JUSTICE stated the case and gave the opinion of the court.

The final decree in the District Court was rendered on the 8th September, 1863, and an appeal was allowed, on motion of the claimant, on the 18th November, 1863. Upon this appeal no action was taken by the appellants. On the 23d February, 1864, an appeal was again allowed, and the record was brought to this court and filed November 11, 1864.

This was in time, but no citation was issued to the adverse party, and there is nothing to show any waiver; and a citation, with due return, or waiver by general appearance or otherwise, is indispensable to jurisdiction on appeal.*

The writ, therefore, must be

DISMISSED.

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* Bacon *v.* Hart, 1 Black, 38; Castro *v.* United States, 3 Wallace, 49.

Statement of the case.

German *v.* United States.

An appeal from California dismissed where the record was not brought and filed within sixty days of the next term of the court; the record, moreover, not having been returned within the term.

On motion to dismiss an appeal from the District Court of the United States for Southern California.

The CHIEF JUSTICE stated the case, and delivered the opinion of the court.

The appeal in this case was allowed on the 26th October, 1864, and the record was filed here on the 21st August, 1865. This was too late. The record should have been brought and filed within the first sixty days of the next term of this court. This was not done, nor was the record returned within the term. The appeal, therefore, must be

Dismissed.

Ex Parte The Milwaukee Railroad Company.

A mandamus awarded in a branch of the railroad controversies between the Milwaukee and Minnesota Railroad Company and the Milwaukee and St. Paul Railway Company, compelling the latter, and its receivers, to deliver to the former certain rolling stock in compliance with a mandate of this court made July 18, 1865.

This was an application for a mandamus to the judge of the Circuit Court for the District of Wisconsin, in one part of the railroad cases connected with the roads between Milwaukee and St. Paul, and which under various names have filled so considerable a part of the reports of this court for the last few terms.

By a reference to the case of the *Railroad Company* v. *Soutter*,* it will be seen that this court, reversing the action of

* 2 Wallace, 510.

the Circuit Court, sent its mandate directing that an order be entered there that upon the payment by the Milwaukee and Minnesota Company of all the interest due on the mortgage which was the foundation of the suit, and all the costs, that company should be put in possession of the road, and of all the rolling stock and other property belonging to said road.

Accordingly, that court, on the 18th day of July, A. D. 1865, having ascertained the amount due, and to become due, within a prescribed time, made an order that on the payment of that sum the receiver and the Milwaukee and St. Paul Railway Company, who were in possession of said road and rolling stock, should deliver it to said Minnesota Company.

The Minnesota Company paid this money, amounting to nearly a half million dollars, and the receiver and the St. Paul Company delivered them possession of the road and of part of the rolling stock specified in the order, but the St. Paul Company refused to comply with this order as to a very large amount of the rolling stock, worth several hundred thousand dollars.

At the April Term, 1866, of the Circuit Court, the Minnesota Company made an application to that court to enforce this decree by an attachment against the officers of the St. Paul Company. After a full hearing of this motion in the Circuit Court, on affidavits and argument, the judges of the court were divided in opinion, and the motion failed. The present application was for the purpose of compelling that court to execute its order of the 18th July, 1865.

Mr. Carpenter, in support of the petition for a mandamus, and Messrs. Ryan & Cary, contra, argued the matter at much length, December 14th, 1866.

Mr. Justice MILLER now, May 16th, 1867, delivered the opinion of the court.

This case was argued very fully in the early part of the term, but a decision has been reserved, in the hope that the action of this court might become unnecessary.

The litigation between these parties has consumed such a large proportion of the time of this court, and the close of the term is so near at hand, with the pressure of matters of more importance upon us, that we cannot enter into a statement of the reasoning which governs our action in the present motion. It is sufficient to say that we are satisfied that the petitioner has presented a case calling for the exercise of the supervisory power of this court over the Circuit Court, which can only be made effectual by a writ of mandamus. A writ of mandamus will therefore issue from this court, directed to the judges of the Circuit Court of the United States for the District of Wisconsin, commanding them to proceed with the execution of the order of that court of July 18, 1865.

HIGUERAS v. UNITED STATES.*

1. Land claims arising by virtue of a right or title derived from the Spanish or Mexican government are required to be presented to the land commissioners for adjudication.
2. Final decrees in such cases, whether made by the commissioners or by the District Court, unless an appeal is taken, are conclusive between the United States and the claimants.
3. Confirmation alone, however, did not, under the original act, confer upon the claimant a right to a patent; but it was made the duty of the surveyor-general, as a condition to the granting of the same, to cause such claim, if finally confirmed, to be accurately surveyed, and to furnish plats of the same to the Land Office.
4. But the second section of the subsequent act conferred jurisdiction upon the District Court to order such surveys to be returned into that court for examination.
5. Authority is also conferred upon the court to set the survey aside and annul the same, or to correct and modify it.
6. Parties may except to any such order or decree, and appeal from the same; but the questions for decision here are those only which are presented in the exceptions.

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* For the syllabus to this case, adjudged some terms since in the reporter's absence, he is indebted to the courtesy of the learned Justice by whom the opinion of the court was delivered.

7 Such an appeal does not open the decree of confirmation for revision, because that decree is the foundation of the survey.

8. Unless the decree of confirmation is a valid decree, there cannot be a valid survey, as the latter is founded upon the former.

9. Mexican governors made three kinds of grants or concessions of vacant public lands. 1. Grants by specific boundaries, where the donee is entitled to the entire tract described. 2. Grants by quantity, as of one or more leagues of land situated in a larger tract, and usually described by out-boundaries, where the donee is entitled to the quantity specified, and no more. 3. Grants of a certain place or rancho by some particular name, either with or without specific boundaries, where the donee is entitled to the tract according to the boundaries, if given; and if not, according to the limits of the possession and settlement.

10. Boundaries of the claim in this case are given in the decree of confirmation; and as neither party appealed from that decree, they are not now at liberty to question its correctness or to ask for any modification of its terms.

11. Construction of the decree must be governed by the ordinary rules of the common law, as it is a decree of a Federal court sitting in a State where the common law prevails.

12. Terms of the decree, taken as a whole, are sufficiently definite and complete to secure to the claimants all their legal rights.

13. Errors exist, undoubtedly, in the courses specified in the decree; but the general rule in such cases is, that courses and distances must give place to monuments and physical boundaries described in the grant; and when that rule is applied in the case, there is no such uncertainty as is supposed.

14. First course is from the back of the principal house to the lone tree, which is not the subject of dispute. Second course is from the lone tree, along the sierra, to the adjoining rancho. Third course runs westwardly along the northern line of that rancho to the arroyo, which is well known. Fourth course runs up the arroyo to the estuary, and from that point to the place of beginning.

15. Correct, as above, the courses of the described lines by the monuments given, as should be done, and the boundaries of the tract are specific and complete, and the survey and decree describe the same land.

APPEAL from the District Court for Northern California.

Mr. Bradley, for the appellants; Mr. Willes, contra.

Mr. Justice CLIFFORD delivered the opinion of the court.

This is an appeal from a decree of the District Court of the United States for the Northern District of California, confirming the survey of a private land claim. Appeals in

such cases are authorized by the fifth section of the act of the fourteenth of June, 1860, if applied for within six months after the date of the decree, and it is under that special provision that the present controversy is now before the court.

I. 1. Original claimant acquired a possessory right to the tract of land situate in Santa Clara County, California, and called Tularcitos, on the fourth of October, 1821, by virtue of a decree of concession of that date made to him by the governor of the Territory. Directions of the decree of concession were that the applicant for the tract should be put in possession of the same by the commissioner of San José, in whose jurisdiction the land was situated. Measurements were to be made and monuments fixed on the four sides of the tract, and the officer designated to perform the duty was to make return of his doings to the government. Pursuant to those directions the commissioner attended to the duty assigned to him and made his return, in which he states that he went upon the tract and gave possession to the donee, designating the number of varas allowed on each of the four sides of the concession.

Claim to a portion of the tract it seems was subsequently made by an adjoining proprietor, and on the seventeenth day of October, 1835, the original claimant presented to the governor of the Territory a second petition, in which he requested that the boundaries of the concession to him might be enlarged, and that his title to the former concession might be confirmed. He based the claim in the second application chiefly upon two grounds: 1. That he had been in the occupation of the tract for more than twelve years. 2. That a part of the tract embraced in the decree of concession had been granted to another person.

2. Second decree of concession granted the augmentation, as requested, and directed that the same should be considered as annexed to the former concession. Annexed to the petition was a *diseno* describing the entire tract, which appears to have been made in strict conformity to the colonization laws. Remark should be made that the first concession did not profess to grant anything more than a possessory

right, and the second espediente is without the formal title, but there can be no doubt that the several documents are sufficient to give to the donee an inchoate right to the tract, within the meaning of the treaty of cession and the act of Congress subsequently passed to carry the provisions of the treaty into effect.*

Such also were the views of the land commissioners appointed under that act of Congress, as appears by their decree confirming the claim.

Description of the tract as given in the decree of confirmation is that it is situated in Santa Clara County and is the same land formerly occupied by José Higuera, now deceased, and is known by the name of Los Tularcitos. Boundaries given in the decree are as follows: Beginning at the back side of the principal house on said rancho, standing at the foot of the hill, and running thence northwardly to a lone tree on the top of the sierra (which tree is known as a landmark), thence east along the sierra to the line of the land known as the rancho of José Maria Alviso, thence southerly along the west line of said Alviso's rancho till it intersects the Arroyo de la Penetencia, thence up said arroyo to an estuary, and from that point to the place of beginning.

3. Appeal was duly taken from that decree by the United States, but the appeal, on the motion of the district attorney, was subsequently dismissed, and on his motion also it was ordered, adjudged, and decreed that the claimants have leave to proceed under the decree as a final decree in their favor. No appeal was subsequently taken, and the decree, therefore, became and is the final decree in the case. Final decrees in such cases, if regularly made and duly entered in the record, are conclusive between the United States and the claimants, unless an appeal is seasonably taken from the decree according to law.†

4. Confirmation alone, however, did not, under that act, confer upon the claimant a right to a patent, but it was made the duty of the surveyor-general to cause all private land

* 9 Stat. at Large, 631–2.

† Id. 632.

claims finally confirmed to be accurately surveyed, and to furnish plats of the same; and the provision was that a patent should 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 land, duly certified and approved by the surveyor-general.

Such was the legal effect of a final confirmation of a private land claim under the act of Congress first passed to carry the treaty of cession into effect, and such also was the legal course of proceeding under that act to procure a patent.

5. But authority was conferred upon the District Courts for the Northern and Southern Districts of California, under the second section of the subsequent act, to which reference has been made, upon the application of any party interested, to make an order requiring any survey of a private land claim, within their respective districts, to be returned into such court for examination and adjudication; and if, upon the hearing of the allegations and proofs, the court should be of opinion that the survey and location were erroneous, the court, in that event, was authorized to set it aside and annul the same, or to correct and modify it. Proofs are to be taken and the parties have a right to be heard, and thereupon the court is required "to render judgment thereon."

Survey of the tract in this case was made by the surveyor-general, and on the seventh day of June, 1859, the court, on motion of the claimants, made an order directing the plat of the survey to be returned into court. Whereupon the claimants filed three exceptions to the survey, which in substance and effect are as follows: 1. That the survey was not made in accordance with the decree of confirmation. 2. That according to the decree of confirmation and the evidence in the case, the northern and southern lines of the survey should be extended easterly to the sierra or main range of mountains, so as to include the tract of country known as the Valley of the Calaveras. 3. That the northern line, extending from the estuary to the Calera Creek, should be a straight line instead of an angle, as represented on the plat. Testimony was taken, but before the hearing the

claimants filed an additional exception, describing the tract of country mentioned in the second exception, and claiming that the lines of the survey should be extended as therein specified, so as to embrace that whole tract. Additional testimony was then taken and the parties were heard, and after the hearing the several exceptions were overruled, and a decree entered that the "survey be, and the same is hereby confirmed." Claimants asked for a rehearing, which was granted, but the court refused to modify the decree, and ordered that it stand as the final decree in the cause. Present appeal is from that decree, and the questions for decision are those presented in the exceptions to the survey and location, as the same were filed by the claimants.

II. 1. Appellants insist, as a primary proposition, that the boundaries of the tract, as given in the decree, are so indefinite and incongruous that the decree cannot be carried into effect, and consequently that they have a right in this proceeding to prove the extent of the tract as formerly occupied by the original claimant, so that the court may determine the true location and correct the errors in the decree of confirmation. But no such authority is to be found in the act conferring jurisdiction over the surveys of private land claims, nor in any other act of Congress upon that subject. Survey is required of all private land claims finally confirmed. Such claims are required to be accurately surveyed, which is equivalent to a requirement that the survey, where the decree of confirmation is by metes and bounds, shall conform to the decree.

Private land claims, such as are recognized in that act, are those which arise by virtue of a right or title derived from the Spanish or Mexican government. Every person claiming such lands in California was required to present his claim to the land commissioners for adjudication, and the provision was that all land the claims to which should be finally decided to be invalid, and all lands the claims to which should not have been presented to the commissioners within two years from the date of the act, should be decreed, held, and considered as part of the public domain.

2. Confirmed claims *only* were required under that act to be surveyed, and it is only the surveys of such claims that the District Court, under the second section of the subsequent act, is authorized to order into court for examination and adjudication. Confirmation must precede the survey which is made subject to such an order, and if the decree of confirmation is so indefinite and incongruous that it cannot be executed, then it is void and of no effect, and the claim to the land stands upon the same footing in legal contemplation as a claim which was never presented to the commissioners for adjudication. Nothing can be plainer than the proposition that a decree of confirmation under that act, which is in itself void, cannot be the proper foundation of a legal survey and location of the claim; and if not then, it is equally clear that the survey of the claim, although made by the surveyor-general, and ordered into the District Court, cannot confer any jurisdiction upon the court to determine the boundaries of the claim. Assume, therefore, that the proposition under consideration is correct, and it necessarily follows that the claimants have no legal right whatever to any portion of the tract.

3. Jurisdiction over the "right or title" of the claimant is conferred upon the commissioners, under the act entitled "An act to ascertain and settle private land claims," but the jurisdiction over the surveys of the same, after the plat is certified and approved by the surveyor-general, is conferred upon the District Court under the subsequent act, and the two things are wholly distinct and cannot be blended, nor can the one be substituted for the other.

4. But the court does not, by any means, intend to be understood as acceding to the proposition that the decree of confirmation in this case is either void or voidable. On the contrary, it is clear, we think, that the decree, when properly understood, is not only free from any question as to its validity, but is also of a character to secure to the claimants all their right and title in the premises.

5. Concessions or grants of land by Mexican governors

were of three kinds, and in some respects the rules applicable to their construction are widely different. They were concessions or grants by specific boundaries, where, of course, the donee is entitled to the entire tract or concession, or grants by quantity, as of one or more leagues of land situate at some designated place, or within a larger tract described by what are called out-boundaries, where the donee is entitled to the quantity specified and no more, or grants or concessions of a certain place or rancho by some particular name, either with or without specific boundaries, where the donee is entitled to the tract according to the boundaries, if boundaries are given, and if not, according to the extent and limits of the tract or rancho as shown by the proofs of settlement and possession.

Confessedly, the concession in this case, as originally made, was of the latter class, but the questions presented for decision under the exceptions to the survey have respect to the decree of confirmation, and not to the concession or concessions as made by the governor.

III. 1. The decree of confirmation gives the boundaries of the claim, and as neither of the parties appealed from it, they are not at liberty to question its correctness or ask for any modification of its terms. Construction of the decree must be governed by the ordinary rules of the common law, as it is the decree of a Federal court sitting in a State where the common law prevails. Most or all of the courses given in the decree are undoubtedly erroneous; but there is very little difficulty in ascertaining the cause of the error, and still less in the conclusion that the errors in that behalf ought not to control the questions under consideration, nor be suffered to affect or prejudice the rights of either party. Unlike what is usually to be seen in Mexican espedientes, it appears in this case that two of the diseños or maps of the tract exhibited in the espedientes, contain on their face a delineation, as on a card, of the four cardinal and other principal points of the compass. Referring to the delineation, it will be seen that north, as there delineated, is in the place of northwest, and that the corresponding error occurs through

out the delineation. Make the correction suggested, and the representation of the points of compass would be substantially correct in all respects; or, in other words, read north for northwest and northeast for north, and there would be little or no incongruity between the monuments given in the decree and the courses as therein laid down. Mistakes of a like character were made by the Mexican witnesses in their description of the tract and its boundaries. They knew the monuments designated as marking the boundaries of the donee's possession, but they do not profess to have had any positive knowledge as to the true course from one monument to another. Language of the decree is so nearly the same as that employed by one or more of the witnesses as to justify the conclusion that the commissioners, in framing the decree, borrowed the terms of the description from the language employed by the witnesses.

2. Appellants do not deny that the place of beginning is correct, nor do they controvert the fact that the first course is from the back side of the principal house to a lone tree on the top of the sierra, which is known as a landmark. The course, as stated by the witnesses and given in the decree, is northwardly, but the termini of the line being given and the respective monuments marking the line admitted, it is clear that the monuments must govern. Measurements of distances and the direction of lines in reference to the points of the compass mentioned in a deed, may be made a part of the description of the premises intended to be granted, and in some cases, where the lines are so short as evidently to be susceptible of entire accuracy in their measurement, and are defined in such a manner as to indicate an exercise of care in describing the premises, such a description is regarded with great confidence as a means of ascertaining what is intended to be conveyed. But ordinarily surveys are so loosely made, and so liable to be inaccurate, especially when made in rough or uneven land or forests, that the courses and distances given in the instrument are regarded as more or less uncertain, and always give place, in questions of doubt or discrepancy, to known monuments and bounda-

ries referred to as identifying the land.* Such monuments may be either natural or artificial objects, such as rivers, streams, springs, stakes, marked trees, fences, or buildings.†

3. Second line mentioned in the decree is from the lone tree along the sierra to the line of the land known as the rancho of José Maria Alviso, who was the southern colindante of the original claimant. Three objections are assigned by the claimants to the second line in the decree as showing that it is unreliable and cannot be executed. First objection is that the course from the lone tree along the sierra, as described in the decree, is east instead of southeast as it should be, if the views of the appellees are correct. Beyond doubt, the fact is as suggested, but the objection is entitled to no weight, for the same reasons as those assigned in respect to the error in the described course of the first line. Both of the monuments, to wit: the lone tree and the sierra, are fully proved, and the appellants are obliged to concede that the lone tree and sierra of the survey are the same as those of the decree. They do not attack the survey as a departure from the decree, but insist that the decree is so indefinite and incongruous that it cannot be executed, and that the survey is contrary to the actual location of the land granted to the donee, as shown by the evidence in the case. Impliedly the proposition admits that if the decree can be executed the appellees must prevail, and so is the course of the argument.

Appellants contend, in the next place, that the second line, that is, the line from the lone tree along the sierra, is unreliable, because they insist that the evidence shows that the lone tree is not a corner boundary. Present inquiry, however, is how it was viewed by the commissioners when they framed the decree, and not what they might or ought to

* Washburn on Real Property (2d ed.), 673; Preston's Heirs *v.* Bowman, 6 Wheaton, 582; Marshall *v.* Currie, 4 Cranch, 176; Farrington *v.* Ridgely, 4 Maine, 286; Howe *v.* Bass, 2 Massachusetts, 280; Bosworth *v.* Sturtevant, 6 Cushing, 392; Jackson *v.* Ives, 9 Cowen, 661.

† Newsom *v.* Prior, 7 Wheaton, 10; Rix *v.* Johnson, 5 New Hampshire 524.

have decided, if the evidence since taken had been before them at that time. Looking at the language of the decree it is beyond a doubt that the commissioners, in framing it, regarded the lone tree as a corner boundary, that is, as the termination of the first line and as the beginning of the second; so that the second objection of the appellants is unfounded in fact.

Third objection is that the second line, if run from the lone tree along the sierra, would not intersect the line of the rancho mentioned in the decree. But the objection is purely a technical one, and as such is entitled to no weight. Alviso's land did not, it is true, extend quite to the sierra, or if it did his northern line, as exhibited on the diseños in the record, was not so delineated. Protract the line in the same direction to the sierra, and the whole foundation of the objection is gone. The intention of the decree is obvious, and there can be no doubt that the surveyor-general was right in regarding that supposed defect as supplied by necessary implication from the language of the decree. He terminated the second line at the point where the northern line of the other rancho, if protracted as the commissioners assumed, would strike the sierra, and in adopting that view, it is clear that he carried into effect the intention of the commissioners.

4. Residue of the decree is without objection, except that the third line has the corresponding error in the course of the line. Substance of the objection is that the course is described as southerly instead of westwardly, as assumed by the appellants, and as running along the west line of the other rancho instead of along the northern line of the same, as it should have been if their theory is correct. Obviously, both of these mistakes are of the same character as those previously considered in the description of the first and second lines, and they may be answered in the same way, as the evidence is full to the point that the location of the rancho referred to was well known. Evidence shows that the proprietor of that rancho and the original claimant at one time had a controversy in respect to that line, but that

the same was satisfactorily adjusted under Mexican rule before the second concession was made to the donee. When reference, therefore, was made to that rancho, it was to one well known, and the termination of the line was at the Arroyo de la Penetencia, which was equally well known and established.

5. Remaining portion of the description as given in the decree is as follows: Thence up the arroyo to an estuary, and from that point to the place of beginning. Correct the description of the courses of the lines, or strike out that portion of the description, and the boundaries of the tract are complete and specific, and the survey and the decree describe the same tract of land. Unless the views of the claimants are misunderstood, they do not deny that fact; and if they do, it is a sufficient answer to the denial, in view of the explanations already given, to say that in the judgment of this court the just and legal conclusion is the other way.

6. Having come to the conclusion that the rights of the appellants are fully defined in the decree of the commissioners, and that the survey in question corresponds with that decree, we do not think it necessary to enter into any extended examination of the evidence as to the extent of the tract embraced in the original concessions as presented to the land commissioners. All those matters were concluded by the decree, and the only question now is whether the decree of the commissioners is fairly carried into effect by the survey and decree of the District Court, and our conclusion upon that question is that the complaints of the appellants are without any foundation. While such is our conclusion, we still think it proper to say that we have looked into the evidence in the case with care, and have no hesitation in saying that if the whole controversy was open, as is supposed by the claimants, we should be constrained to concur in the views of the district judge, that the great weight of the evidence shows that the survey describes the true location and boundaries of the tract.

DECREE AFFIRMED.

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