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CASES

ARGUED AND ADJUDGED

IN

The Supreme Court

OF

THE UNITED STATES,

DECEMBER TERM, 1872.

REPORTED BY

JOHN WILLIAM WALLACE.

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JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE.

HON. SALMON PORTLAND CHASE.

ASSOCIATES.

HON. NATHAN CLIFFORD,
HON. SAMUEL F. MILLER,
HON. STEPHEN J. FIELD,
HON. JOSEPH P. BRADLEY,
HON. NOAH H. SWAYNE,
HON. DAVID DAVIS,
HON. WILLIAM STRONG,
HON. WARD HUNT.

ATTORNEY-GENERAL.

HON. GEORGE H. WILLIAMS.

SOLICITOR-GENERAL.

HON. SAMUEL FIELD PHILLIPS.
Appointed November 15th, 1872.

CLERK.

DANIEL WESLEY MIDDLETON, ESQUIRE.

ALLOTMENT, ETC., OF THE JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

AS MADE APRIL 28, 1873, 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.	SECOND.	1872.
HON. WARD HUNT, New York.	NEW YORK, VERMONT, AND CONNECTICUT.	December 11th. PRESIDENT GRANT.
	THIRD.	1870.
HON. WM. STRONG, Pennsylvania.	PENNSYLVANIA, NEW JERSEY, AND DELAWARE.	February 18th. PRESIDENT GRANT.
	FIRST.	1858.
HON. N. CLIFFORD, Maine.	MAINE, NEW HAMPSHIRE, MASSACHUSETTS, AND RHODE ISLAND.	January 12th. PRESIDENT BUCHANAN.
	FIFTH.	1870.
HON. J. P. BRADLEY, New Jersey.	GEORGIA, FLORIDA, ALABAMA, MISSISSIPPI, LOUISIANA, AND TEXAS.	March 21st. PRESIDENT GRANT.
	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, ARKANSAS, AND NEBRASKA.	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.

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DECISIONS

IN THE

SUPREME COURT OF THE UNITED STATES,

DECEMBER TERM, 1872.

DAIR *v.* UNITED STATES.

A bond, perfect upon its face, apparently duly executed by all whose names appear thereto, purporting to be signed and delivered, and actually delivered without a stipulation, cannot be avoided by the sureties upon the ground that they signed it on a condition that it should not be delivered unless it was executed by other persons who did not execute it—where it appears that the obligee had no notice of such condition, and there was nothing to put him upon inquiry as to the manner of its execution, and that he had been induced upon the faith of such bond to act to his own prejudice.

ERROR to the Circuit Court for the District of Indiana.

The United States brought an action of debt on a distiller's bond, executed by Jonathan Dair and William Sauks as principals, and by James Dair and William Davison as sureties. There was no dispute as to the right to recover against the principals, but the sureties, who pleaded separately, denied their liability upon the bond, and upon the issue thus raised by them, there was the following special finding by the court:

"That the said James Dair and William Davison signed the said writing obligatory upon the day of its date, as sureties, at the instance of Jonathan Dair, one of the principals, but that it was signed by them upon the condition that said writing obligatory was not to be delivered to the plaintiff until it should be executed by one Joseph Cloud as co-surety; that the said writing obligatory, upon its signing by them upon the condition

aforesaid, was placed in the hands of the said principal, Jonathan Dair, who afterwards, without the performance of that condition, and without the consent of the said James Dair and William Davison, delivered the same to the plaintiff. And, that when the bond was so delivered, *it was in all respects regular upon its face, and that the plaintiff had no notice of the condition.*"

As a conclusion of law upon these facts, judgment was rendered in favor of the United States, against all the parties to the bond, for the amount which it was conceded the principals owed the government. This writ of error was prosecuted by them to reverse that decision.

Messrs. J. E. McDonald and J. M. Butler, for the plaintiffs in error:

This court, in *Pawling et al.* v. *The United States*,* held that parol evidence might be introduced to establish the fact that a bond which on its face purported to have been delivered, absolutely, had been delivered in violation of the conditions upon which it had been signed, by some of the parties, and that if such defence should be made out, it was sufficient to defeat the suit on this bond as to those who had signed it thus conditionally.

The same doctrine is laid down in a leading case in New York, *People* v. *Bostwick et al.*,† where most of the leading cases on both sides of the question are cited, and the questions are treated upon the legal principles involved, as well as in the light of adjudicated cases, and such conclusions are reached as make it impossible to disregard them without a departure from well-established propositions of law relating to the execution of instruments like the one under consideration.

But *Pawling et al.* v. *The United States* binds this court as an authority.

It is an axiom of the law that a bond speaks from the time of its delivery, and it makes no difference how perfect it may be in form, it is, unless it has actually been delivered,

* 4 Cranch, 219. † 32 New York, 445.

no bond. To constitute a delivery it must pass out of the hands of the obligors with their consent, and must be received by the obligee or his agent in that behalf, for the purpose for which it was intended.

Mr. G. H. Williams, Attorney-General, and Mr. C. H. Hill, Assistant Attorney-General, contra, relied on *State* v. *Peck*,* a case, they said, directly in point for the government; the principle involved being, after all, they argued, only that plainly just one, long ago declared by Lord Holt,† when he said in a case somewhat similar in principle:

"Seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger."

Mr. Justice DAVIS delivered the opinion of the court.

It is important that the question involved in this case should be settled, on account of the various interests connected with the administration of governmental affairs, requiring official bonds to be taken, which, as a general thing, are rarely executed in the presence of both parties. It is easy to see, if the obligors are at liberty, when litigation arises and loss is likely to fall upon them, to set up a condition, unknown to the person whose duty it was to take the bond, and which is unjust in its result, that the difficulties of procuring satisfactory indemnity from those who are required by law to give it, will be greatly increased. Especially is that so, since parties to the action are permitted to testify.

In *Green* v. *The United States*,‡ the cause of action and defence were the same as in this suit, but as the judgment was reversed on another ground, and the merits of the defence were not discussed, they were not decided. As the case

* 53 Maine, 284.

† Hern *v.* Nichols, 1 Salkeld, 289; and see in recent times Pickard *v.* Sears, 6 Adolphus & Ellis, 469, per Denman, C. J.

‡ 9 Wallace, 658.

was sent back for a new trial, the court thought proper to call the attention of the court below and of counsel to the subject, and took occasion to say that it had grave doubts whether the facts set up were a valid defence to the action. Subsequent reflection has confirmed the views then entertained, and we are now prepared to say that the position of the defendants cannot be maintained. The ancient rules of the common law in relation to estoppels in pais have been relaxed, and the tendency of modern decisions is to take a broader view of the purpose to be accomplished by them, and they are now applied so as to reach the case of a party, whose conduct is purposely fraudulent or will effect an unjust result.

It must be conceded that courts of justice, if in their power to do so, should not allow a party who, by act or admission, has induced another with whom he was contracting to pursue a line of conduct injurious to his interests, to deny the act or retract the admission in case of apprehended loss. Sound policy requires that the person who proceeds on the faith of an act or admission of this character should be protected by estopping the party who has brought about this state of things from alleging anything in opposition to the natural consequences of his own course of action. It is, accordingly, established doctrine that whenever an act is done or statement made by a party, which cannot be contradicted without fraud on his part and injury to others, whose conduct has been influenced by the act or admission, the character of an estoppel will attach to what otherwise would be mere matter of evidence.*

Why should not this principle of estoppel, on every reason of justice and good faith, be applied to the covenant on which this action is founded. The bond was in all respects regular, executed according to prescribed forms, and accepted by the officer whose duty it was to take it, as a completed contract. There was nothing on the face of the paper or in the transaction itself to put the officer on inquiry, or

* 2 Smith's Leading Cases, 7th edition, note to the Duchess of Kingston's Case, 424.

to raise even a suspicon in his mind that a condition was annexed to the delivery of the instrument. The transaction was one of ordinary occurrence in the administration of the revenue laws, and if the officer was satisfied of the sufficiency of the indemnity, there being no circumstances to create distrust that the principal obligors who tendered the bond were not upright men, there was nothing left for him to do but to take it and issue the license. This was done, and the government will be greatly prejudiced if the sureties who were relied on to perform the conditions in case of the failure of the principals, can defeat a recovery on the ground that they did not intend to be bound unless another shared the responsibility, and so told the principal obligors who solicited their signatures. But they did not inform the revenue officer of this condition, and their omission to do so then estops them from setting it up now. The silence which they imposed upon themselves at the time makes their present conduct culpable, for it is not to be doubted that the officer in charge of this business would have acted differently if the information which the principals received had been communicated to him. In the execution of the bond the sureties declared to all persons interested to know that they were parties to the covenant and bound by it, and in the belief that this was so they were accepted and the license granted. They cannot, therefore, contravene the statement thus made and relied on without a fraud on their part and injury to another, and where these things concur the estoppel is imposed by law. As they confided in Dair it is more consonant with reason that they should suffer for his misconduct than the government, who was not placed in a position of trust with regard to him.

The case of *Paulding et al.* v. *The United States*, has been cited as an authority against the position taken in this case; but it is not so, because the additional securities to be procured in that case were named on the face of the bond, and this fact is stated in the plea. If the name of Joseph Cloud appeared as a co-surety on the face of this bond, the estoppel would not apply, for the reason that the incomplete-

ness of the instrument would have been brought to the notice of the agent of the government, who would have been put on inquiry to ascertain why Cloud did not execute it, and the pursuit of this inquiry would have disclosed to him the exact condition of things.

In any case, if the bond is so written that it appears that several were expected to sign it, the obligee takes it with notice that the obligors who do sign it can set up in defence the want of execution by the others, if they agreed to become bound, only on condition that the other co-sureties joined in the execution.

We are aware that there is a conflict of opinion in the courts of this country upon the point decided in this case, but we think we are sustained by the weight of authority. At any rate, it is clear on principle that the doctrine of estoppel in pais should be applied to this defence.

It would serve no useful purpose to review the authorities. This work has been performed in several well-considered cases in Maine, Indiana, and Kentucky, and although these courts do not rest their decisions on the same ground, yet they all agree that the facts pleaded in this suit do not constitute a bar to the action.*

JUDGMENT AFFIRMED.

LYNDE *v.* THE COUNTY.

1. The submission to the voters of a county, under the Code of Iowa, of the question "whether the county judge at the time of levying the annual taxes shall levy a special tax of a specified number of mills on a dollar of valuation, for the purpose of constructing a court-house in the county; the tax to be levied from year to year until a sufficient amount is raised for said purpose, not to exceed," &c., is (by implication) a submission of the question whether money shall be *borrowed* to build the court-house, and negotiable bonds be sold as the means of borrowing; this, though the same section of the code enacts that the county judge may submit to the voters the question "whether money may be borrowed to aid in the

* State *v.* Peck, 53 Maine, 284; State *v.* Pepper, 31 Indiana, 76; Millett *v.* Parker, 2 Metcalfe (Ky.), 608.

erection of public buildings;" and though the question submitted to the voters as above mentioned be submitted only in virtue of an enactment immediately following, that "when the question so submitted involves the expenditure of money, the proposition of the question must be accompanied by a provision to levy a tax for the payment thereof in addition to the usual taxes." This, at least as respects the holders, *bonâ fide* and for value, of bonds so issued, when the bonds declare on their face that "all of said bonds are issued in accordance with a vote of the people of said county."

2. The county judge being, by the Code of Iowa, the officer designated to decide whether the voters have given the required sanction to the borrowing of money and issuing of bonds, his execution and issue of bonds setting forth on their face that "all of said bonds are issued in accordance with a vote of the people of said county," and that "the people have voted the levying of sufficient taxes," &c., is conclusive evidence against the county of the popular sanction so far as respects holders *bonâ fide* and for value.
3. A power given to issue county bonds carries with it a power to make them payable beyond the limits of the county for which they are issued, as also beyond the limits of the State in which the county is, and to sell them beyond such limits.
4. It carries with it, also, a right to cancel bonds previously given to a contractor with the county, but not yet put by him on the market, and to issue to him new ones in a different form.
5. Under the Code of Iowa, which enacts that in case of the "absence" of the county judge the county clerk shall supply his place, the said judge is not, when, owing to his absence from the State, the county clerk is acting as county judge in the county—holding a term of the county court there, issuing county warrants, and doing other business, in the county, in discharge of his duties as acting county judge—so wholly superseded in his office as that he may not, when beyond the limits of the county, do certain ministerial acts, as *ex. gr.*, execute and issue bonds, whose purpose is to advance the concerns of the county; and for that purpose buy, at the place where he is, a new county seal; the Code having authorized the county judge to procure one.

ERROR to the Circuit Court for the District of Iowa; the case being thus:

The Code of Iowa of 1851, section 98, thus enacts:

"Each county now or hereafter organized is a body corporate for civil and political purposes only; and as such may sue and be sued; shall keep a seal such as provided by law; may acquire and hold property and make all contracts necessary or expedient for the management, control, and improvement of the same, and for the better exercise of its civil and political powers

may take any order for the disposition of its property; and may do such other acts, and exercise such other powers, as may be allowed by law."

By section 106 the county judge is made—

"The accounting officer, and general agent of the county, and as such is authorized and required . . . to take the management of all county business; . . . to audit all claims for money against the county; to draw and seal with the county seal all warrants on the treasurer for money to be paid out of the county treasury; . . . to superintend the fiscal concerns of the county, and secure their management in the best manner."

By section 129 the county judge as a county court has power—

"To provide for the erection and reparation of court-houses, jails, and other necessary buildings within and for the use of the county."

By sections 114–116 it is enacted that—

"The county judge may submit to the people of his county at any regular election, or at a special one called for that purpose, the question *whether money may be borrowed to aid in the erection of public buildings.*

"When the question so submitted involves the borrowing or the expenditure of money, the proposition of the question must be accompanied by a provision to levy a tax for the payment thereof, in addition to the usual taxes. No vote adopting the question proposed, will be of effect unless it adopt the tax also."

Section 119 proceeds:

"The county judge on being satisfied that the above requirements have been substantially complied with, and that a majority of the votes cast are in favor of the proposition submitted, *shall cause the proposition and result of the vote* to be entered at large on the minute-book, and a notice of its adoption to be published for the same time and in the same manner as is above provided for publishing the preliminary notice; *and from the time of entering the result of the vote in relation to borrowing or expending money, . . . the vote and the entry thereof on the county records shall have the force and effect of an act of the General Assembly.*"

Section 94 enacts that—

"The county judge of each county having a seal is required to obtain, as soon as practicable, for his county, a new seal of the same size with the present one, and with the same device; but the inscription on which shall be 'seal of the county of —— Iowa' (naming the county), in capital letters; and each new seal hereafter obtained, shall be of the same description," &c.

Section 111 enacts that—

"In case of a vacancy in the office of county judge, and in the case of the absence, inability, or interest of that officer, the prosecuting attorney of the county shall supply his place, . . . and when the prosecuting attorney cannot act the county clerk shall fill the place of the judge."

The office of "prosecuting attorney of the county" was afterwards abolished.

These provisions of the Code being in force, Robert Clark, the county judge of Winnebago, submitted to the voters of that county, at a special election held on the 6th day of March, 1860, the question of levying a tax of seven mills on the dollar, for the purpose of building a court-house; the said tax to be levied annually, not exceeding ten years, until a sufficient amount was raised for the said purpose. The whole number of votes at the election was twenty-nine, of which twenty-four were in favor of the proposition.

No proposition was ever submitted to the voters to borrow money or to issue bonds for that or any other purpose.

The county judge then made a contract with one Martin Bumgardner to build a court-house for the county, and on account of the contract, made and delivered to him, on the 9th day of March, 1860, bonds in the name of the county for $20,000, the amount for which the court-house was to be built.

Afterwards he went to New York with Bumgardner, and professing to act as county judge of the county, made and issued to Bumgardner new bonds for $20,000, which new bonds differed in the amount of each, in time of payment, and in the amount of coupons, and in other particulars; and

he had a seal made at New York, which he called the seal of the county. He then and there signed the said bonds and affixed the said seal to them, and delivered them to Bumgardner.*

The bonds thus issued, and which by their terms were payable to Martin Bumgardner or bearer, contained this recitation on their face:

"All of said bonds are issued in accordance with a vote of the people of said county, and in pursuance of an order of the county court of Winnebago County, legally entered of record in the office of the county judge, on the 9th day of March, A.D. 1860, in fulfilment of a contract entered into with said Martin Bumgardner, for the erection of a court-house for said county of Winnebago. And the people of said county have voted the levying of sufficient taxes, from year to year, to pay the principal and interest of each and all of said bonds as the same mature and become payable."

And they ended with a teste thus:

"In witness whereof I, Robert Clark, county judge of said county, have hereto set my hand and affixed seal of the said county, the 9th day of March, A.D. 1860.

"ROBERT CLARK,
[SEAL.] County Judge."

The old bonds were now, in accordance with a proposition made by Clark when the new ones were spoken of, delivered up to Clark at New York, and were afterwards cancelled.

While Clark was in New York, making and delivering the new bonds, the clerk of the District Court of Winnebago

* The finding of facts by the court below did not state any reason for the cancellation of the old bonds and the issue of new ones, nor any history of the new seal bought in New York. The bill of exceptions, however, stated that the *defendant* (the county) offered to show that Clark, "finding that the original bonds could not be negotiated," had other bonds printed, purchased a seal, &c.; "that the seal thus obtained in New York was brought back to Winnebago County, and was by Bumgardner sold to the county for $4, and had ever since been used as the county seal" The plaintiff objected to all such testimony as irrelevant; but the court admitted it.—REP.

was acting as county judge in said county, and held a term of a county court, and issued county warrants, and did other business in discharge of his duties as acting county judge.

The new bonds coming into the possession of one Lynde, who purchased them for value, without notice of any defence to them, he dying left them by his last will to his son; and neither principal nor interest of the bonds being paid, the son sued the county on them in the court below.

The facts being found by the court essentially as above stated, the court gave judgment on them for the county. To this judgment the plaintiff excepted.

Mr. H. D. Bean, for the plaintiff in error; Mr. T. F. Witherow, contra.

Mr. Justice SWAYNE delivered the opinion of the court.

The case involves the validity of certain bonds issued by the judge of the county of Winnebago. Such cases have been numerous in this court. The one before us, though new in some of its aspects, presents no point which has not been substantially determined in preceding cases. The parties waived a jury, and the court, according to the provisions of the statute upon the subject, found the facts. The findings are set forth in the record. The proposition for us to decide is, whether the facts found warrant the judgment given.

The Code of Iowa of 1851* authorizes the county judge, sitting as the County Court, "to provide for the erection and reparation of court-houses, jails, and other necessary buildings within and for the use of the county."

In Iowa every county is a body corporate.†

In *Clapp* v. *The County of Cedar*‡ it was said by the Supreme Court of the State that the office of county judge being created and his powers and duties defined by statute, the principles of the law of agency, where those powers and duties are drawn in question, have no application; that "he

* Chapter 15, § 129, p. 26.

† Idem, chapter 14, § 93, p. 19.

‡ 5th Iowa, 15.

is the living representative and embodiment of the county," and that "his acts are the acts of the corporation." In *Hull & Argalls* v. *The County of Marshall** it was held that, by virtue of his general authority, he might contract for the building of a court-house, to be paid for out of the revenue of the county, but that when a debt was to be incurred for that purpose special authority must be conferred by a popular vote in the manner provided by the statute. It was further held that where a loan was thus authorized, the form of the securities not being prescribed, negotiable bonds might be issued.

The statute provides that the judge may submit to the people, at a regular or special election, "the question whether money may be borrowed to aid in the erection of public buildings," and other questions not necessary to be mentioned; and that "when the question so submitted involves the borrowing or expenditure of money" it "must be accompanied by a provision to lay a tax for the payment thereof," and that "no vote adopting the question proposed will be of effect unless it adopt the tax also."†

Upon looking into the record in this case we find that the question submitted to the voters was, "whether the county judge, at the time of levying the taxes for the year 1860, should levy a special tax of seven mills on a dollar of valuation, for the purpose of constructing a court-house in said county, and said tax to be levied from year to year until a sufficient amount is raised for said purpose, not, however, to exceed ten years." There was the requisite majority in favor of the proposition. It was expressed in this formula that a court-house was to be built, and we think it was implied that money was to be borrowed to accomplish that object. Otherwise the vote gave no authority which did not already exist, and was an idle ceremony. The statute authorized an appeal to the voters only that they might give or refuse authority to incur a debt. It could not have been intended that the erection should be delayed until a sum

* 12 Iowa, 142. † Code of 1851, chapter 15, §§ 114–116, pp. 23, 24.

sufficient to pay for the structure had been realized from the tax authorized to be imposed, or that the work should proceed only *pari passu* with the progress of its collection from year to year. What is implied is as effectual as what is expressed.* Viewing the subject in the light of the statutory provisions and of the action of the people, we cannot say that the bonds were issued without due authorization.

But, if the authority were doubtful, there are other facts bearing upon this point which, in our judgment, are conclusive. The county judge is the officer designated by the statute to decide whether the voters have given the required sanction. He executed and issued the bonds, and the requisite popular sanction is set forth upon their face. It is a settled rule of law that, where a particular functionary is clothed with the duty of deciding such a question, his decision, in the absence of fraud or collusion, is final. It is not open for examination, and neither party can go behind it. Here the bonds are in the hands of a *bonâ fide* purchaser, and under the circumstances he was not bound to look beyond the averment on their face.

It is not a valid objection that the bonds were made payable and were sold beyond the limits of the county of Winnebago and of the State of Iowa. The power to issue them carried with it authority to the county judge as to both these things—to do what he deemed best for the interests of the county for which he was acting.

These points have been so frequently ruled in this way that it is needless to cite authorities to support them.

It was competent for the county judge to visit New York for purposes connected with the proper disposal of the bonds. A statute of the State authorized him to procure a seal, and prescribed certain regulations to which all such seals should conform. While there, he might well take up bonds which had been previously issued, but not put on the market, and give others in their place, affixing to them a seal there procured for that purpose. There is nothing in the statutes of

* United States *v.* Babbit, 1 Black, 55.

Iowa forbidding either, and we are aware of no principle of general jurisprudence which was violated by such a proceeding. Certainly the county could sustain no injury by the change, and it has therefore no right to complain. At most there was only an irregular execution of a power of the existence of which we entertain no doubt. Admitting an irregularity to have occurred it certainly cannot affect the rights of a holder for value without notice.

It is insisted that the county judge was *functus officio* at the time he issued the bonds in question, and that they are for this reason void.

The statute of the State provides that, in case of the *absence* of that officer, the county clerk shall fill his place. The absence spoken of is doubtless absence from the county seat. In that event unlimited authority is given to the clerk to act as his substitute. But it is not declared that the judge shall be regarded as out of office while absent, or that he shall do no official act during that period. Judicial power is necessarily local in its nature, and its exercise to be valid must be local also. But it is otherwise as to many ministerial acts, and different considerations apply where they are drawn in question. It does not appear that there was any conflict between what the judge did abroad and what the clerk did at home. All the judge did was purely ministerial in its character, and we see no sufficient reason for holding that to this extent he did not bring with him his official character and exercise his official authority. He did not for the time being wholly abdicate his office. Certain powers with which it was clothed fell into abeyance, and continued in that state until his absence ceased. The authority to do all that he did in New York touching the bonds, we hold not to have been in this category.*

JUDGMENT REVERSED, and the cause remanded with directions to enter a

JUDGMENT FOR THE PLAINTIFF IN ERROR.

* Galveston Railroad *v.* Cowdrey, 11 Wallace, 459.

Opinion of the Chief Justice, and of Field and Miller, JJ., dissenting.

Mr. Justice FIELD (with whose views and dissent concurred the CHIEF JUSTICE and Mr. Justice MILLER), dissenting.

I am compelled to dissent from the judgment of the majority of the court in this case, upon the following grounds:

1st. The county judge had no power to issue bonds binding upon the county, without previous authority conferred by a vote of the people. Such is the construction given to the statutes of Iowa, which are supposed to confer such power, by the Supreme Court of that State, and that construction is obligatory upon us. Here the only question ever submitted to the voters of the county was whether a tax of seven mills on the dollar should be levied for the purpose of building a court-house; and the only power conferred was to levy such a tax. I cannot find in this vote any authority in the county judge to issue bonds of the county for constructing a court-house, payable at different periods, and then to take up the bonds by issuing new bonds drawing a larger interest than the first, and differing in amount and time of payment, and providing that a failure to pay the interest as it matures shall cause the entire principal to become due.

2d. As the bonds were issued without the authorization of a vote of the people, the county is not estopped to deny their validity by reason of any recitals they contain. The county judge was only an agent of the county, acting under a special and limited authority, the exercise of which was supposed to be carefully guarded, and he could not enlarge that authority by any representation that he possessed what was never conferred. The statutes of the State never intended to make the liabilities of its counties dependent upon the mere statements of any of its officers. The law of agency is not different when applied to the acts of agents of municipal bodies, in a matter so serious and delicate as the contracting of a public debt, and when applied to the acts of agents of private individuals. They must both keep strictly within the limits of their power of attorney or their acts will be invalid. They cannot cure any inherent defect

in their action arising from want of power by any extent of recitals that they had the requisite authority. With great deference to the opinions of my associates, this seems to me to be a legal truism.

3d. When the bonds in suit were executed and issued the county judge was in the city of New York, and by express provision of the statutes of Iowa his authority and functions ceased when he was without the State. At the time he put his signature to these instruments another person was acting as judge in his place and was invested with his authority, and as such officer issued county warrants, held a term of the County Court, and discharged other duties devolved by law upon the county judge.

It seems to me that the ruling of the majority of the court in this case, holding that the bonds, issued under circumstances attending the issue of these, are valid obligations, binding upon the county, goes further than any previous adjudication towards breaking down the barriers which State legislatures have erected against the creation of debts, and consequent increase of taxation, by careless, ignorant, or unscrupulous public officers.

VOORHEES *v.* BONESTEEL AND WIFE.

1. Affirmative relief will not be granted in equity upon the ground of fraud unless it be made a distinct allegation in the bill.
2. Nor will a trust alleged in a bill to exist, be considered as proved when every material allegation of the bill in that behalf is distinctly denied in the answer; and the proofs, instead of being sufficient to overcome the answer, afford satisfactory grounds for holding that there was no trust in the case.
3. Under the laws of New York, a married woman may manage her separate property, through the agency of her husband, without subjecting it to the claims of his creditors; and when he has no interest in the business, the application of a portion of the income to his support will not impair her title to the property.

APPEAL from the decree of the Circuit Court for the Southern District of New York, dismissing a bill filed by

one Voorhees, assignee in bankruptcy of John Bonesteel, against the said Bonesteel and Sophia his wife, to get possession of 1145 shares of the stock of the Nicolson Pavement Company, of Brooklyn, which, though standing in the name of the wife, he, the assignee, asserted were held in fact and truth for the husband, but which the husband and wife asserted were not so held, but belonged, on the contrary, to the wife alone, and were her separate property.

The case was thus:

John Bonesteel, above named, at first resident in Chicago and afterwards in New York, a man of active and scheming turn of mind, but always embarrassed, and Mr. S. B. Chittenden, also first of Chicago but afterwards of Brooklyn, a man of property and standing in that place, the second largest taxpayer in the place and editing or controlling the editorship of the Brooklyn *Union*, an influential paper there, had married in 1848, or thereabouts, each of them, a daughter of one Hartwell, a person of property in Bridgeport. At the date mentioned, Bonesteel was engaged in business in Chicago, and dealing not unfrequently with his brother-in-law, Chittenden, who was also in business there, but who appears to have always rather distrusted Bonesteel's capacity for the practical management of affairs. In 1853, or 1854, said Mr. Chittenden, in giving testimony in the matter, "It became apparent to me that he was insolvent, and I told his wife's father that I thought so. In 1855, perhaps, I told him he had better do no business with me. From that time to 1859 Mr. Hartwell very frequently advanced money to him; as often as twice a year. When he came to New York to pay his debts he would advance money to him to help him through the season. In 1859 he failed and made an assignment. A year or two later, I think in 1863, he came to New York to reside, Mr. Hartwell furnishing him money to pay his board. He had no occupation. After he had been there boarding, Mr. Hartwell furnishing his daughter money for the support of the family, a year or longer, he began to do a brokerage dry goods business. He came and bought goods of me. I knew that he was bankrupt, and we

never delivered goods until he paid for them. He was my brother-in-law, but I refused to allow my firm to sell him goods on any other condition, because I thought somebody might attach them. I think, within the last year, while pursuing this business, his father-in-law wrote me a letter stating that he had concluded, 'at the request of John's wife, to advance him another $3000,' and he ordered me to pay the money over to him. I paid him the $3000, but I wrote to Mr. Hartwell that he would lose it; that I didn't think Mr. Bonesteel would ever be able to return it. He said, '*I do it for my daughter.*'"

In this condition of things, about the year 1865, one Taylor, who had also been a resident of Chicago, but had now come to reside in New York—had purchased from Samuel Nicolson, the patentee of that sort of pavement called by his name, a license to furnish it to certain places, including New York and Brooklyn, in the East, and was now seeking to get the pavement into general public use. He gave this account of things:

"When I first came to New York, I was an entire stranger in the city. Being intimately acquainted with Mr. Bonesteel, and Mrs. Bonesteel, too, and desiring to get the influence of her and her husband, and other influential parties, I made up my mind to give Mrs. Bonesteel one-*third* interest of Brooklyn, *at that time;* being satisfied that it was for my interest to give it to her. I had a conversation with her, in the end of June or beginning of July, 1866. The substance of the conversation was: Mr. Bonesteel had been exerting himself with me, going round and seeing parties for a month or more, in reference to introducing the pavement. She felt uneasy about his neglecting his own business, and running round for me about 'the Nicolson,' which, she was afraid, would amount to nothing. I impressed upon her that it would be a good thing, provided I could get certain influences—the influence of Mr. Chittenden, the only person whose influence was wanted—to help me along. She stated that she had let her husband have some money to engage in business, and that by his neglecting *that* he would lose what he had, and not make anything out of the pavement. I told her I was satisfied that *she* would make four times as

much out of the pavement as Bonesteel would in trafficking in goods."

Bonesteel, the bankrupt, gave an account of things not dissimilar, as follows:

"Mr. Taylor was a stranger in the city, and was anxious to introduce the pavement here, and, at the same time, had a large contract at Elmira, New York; and, knowing that I had many acquaintances and friends here who could be of assistance to me in the obtaining of contracts for introducing the pavement, wished me to secure them; showing me, at the same time, that there was a good profit in the work; that if I would devote and give my time to it, I should have all the profit, over $1000, realized therefrom. . . . He was constantly coming to me, at my place of business, and taking up my time in calling upon influential parties and property owners. I said to him that my wife had furnished to me several thousand dollars in money to use in the purchase and selling of merchandise, to assist in the making of money to maintain the family, and that I did not feel it was right or proper, under the circumstances, to give up so much of my time. I called his attention frequently to his taking so much of my time. *He said she should not be made the sufferer by the misappropriation of my time.*"

The account given by Mr. Chittenden, as appearing in interrogatories put to him and answers received, was thus:

Question. When did you first hear of the Nicolson pavement in connection with Brooklyn?

Answer. Some time in the year 1866, standing in the subtreasury building, I saw Mr. Bonesteel. I asked him what he was about. He spoke of a new pavement. I asked him where the pavement came from, and what the merits of it were. He told me about it, and I asked him to come to my office and talk to me about it. After hearing his story, I said, "John, you were always wild. I don't believe in it, but I will investigate it." I sent to Chicago and Milwaukee, wrote to gentlemen to whom he referred me, and made inquiries.

Q. Did you have any interview with Mrs. Bonesteel on the subject?

A. I was in the habit of visiting her constantly, and talked with her about it frequently.

Q. What did she propose to you about it, if anything?

A. I don't know that she proposed absolutely anything to me in the early part of it.

Q. At any time, about introducing it?

A. According to my recollection, I said, if I can ascertain that this is a good pavement for Brooklyn, I will do all I can for it; and I also said, if I do it, Mr. Taylor ought to give you at least a half interest in it.

Q. Had she then expressed a desire to have you aid her in the matter?

A. She at first expressed a strong disinclination to have her husband have anything to do with it, because she had no faith in it.

Q. Later, was her opinion changed?

A. When I became satisfied it was a good pavement, she was very glad to have my assistance.

Q. You did finally assist in introducing the pavement into this city?

A. I laid it in front of my own property, and in front of my neighbor's property, both sides of the street, at my own expense.

Q. Why?

A. Because I believed that it was the best pavement that could be possibly devised for Brooklyn.

Q. How, in your mind, was that to benefit Mrs. Bonesteel?

A. I told her husband and told her that, in consideration of the advocacy which I could give it, and which the newspaper which I had the management of could give—as it was a good pavement—the least he could do, if he was a reasonable man, was to give her half. I urged and insisted on this. But I did not make this a condition of my advocating the pavement. I had a double object: I knew it was a good pavement and I desired to benefit Mrs. Bonesteel.

Q. You knew she was embarrassed somewhat by her husband's difficulties?

A. I knew perfectly well that her family were living at the expense of her father.

Q. You knew that they were living at her father's house?

A. In her father's house, and I had reason to suppose that he had never returned any of the money that he had received from

him many years, which I think he once said to me had amounted to $30,000.

Q. Did Mrs. Bonesteel confer all along with you as her adviser in reference to the management of the business?

A. My impression is that nothing important was done in the matter without consulting me. When she required money she came to me.

Q. So that she took an active part in the matter herself?

A. She took an active part in it; as much as any lady would who trusted in her husband and confided in his good intentions.

CROSS-EXAMINED.

Q. You say that you said to Mrs. Bonesteel that she ought to have half; who did you suppose at that time was to have this right for Brooklyn? Who was to have the other half?

A. I was asked to buy an interest in it, and refused to give $100 for the whole of it. I had a doubt whether it was worth $100. I was well aware of the difficulties of introducing matters of this kind into a city like Brooklyn.

Q. You say that you said that Mrs. Bonesteel, you thought, ought to have half. Who was to have the other half?

A. Mr. Taylor owned the whole. My argument was this to Mr. Bonesteel: "Mr. Taylor owns the whole; by your industry you may possibly work up something; if you do it is fair that he should give your wife a half interest."

Q. Then you expected that Mr. Taylor and Mrs. Bonesteel would go on together?

A. I presumed that Mr. Taylor would sell out if he could, and as quick as he could.

Q. How many conversations did you have with Mr. Taylor, and to what effect?

A. Two conversations perhaps. We talked on various subjects. I told him I believed it was a good pavement, but I doubted whether there was any money to be made in it. I told him I was willing to advocate it, and I did advocate it. I gave instructions to the editor of the Brooklyn *Union* to get all the information he could on the subject, and to advocate it as strongly as the facts would admit of.

Q. Was there anything ever said by you, or in your presence, relative to this interest being transferred to Mr. Bonesteel?

A. Not a word?

Q. Or to Mrs. Bonesteel, in preference to being transferred to him?

A. It was distinctly understood that Mr. Bonesteel was a bankrupt, and it would be of no use to put it in his name, *and if it was transferred at all, I understood that Mr. Taylor gave it to Mrs. Bonesteel as he would a silver cup to her child.*

After Mr. Chittenden had laid the pavement in front of his own house, as described, and after it was advocated in the Brooklyn *Union*, one-half the license for Brooklyn was sold largely through the efforts of Mr. Bonesteel (acting, as his wife testified, as her agent), to Messrs. Page, Kidder & Co., for $10,000; and by the same instrument of conveyance by which this was done the *other half* was transferred to Mrs. Bonesteel herself.

Bonesteel, the husband, testified that he considered that the transfer was thus made to her, in consequence of what he had told Taylor about taking up his time away from business that he was carrying on as his wife's agent, and with her money; more especially since by his not attending to her business, he let the right season for selling pass, and so caused a loss to his wife of several thousand dollars.

How a *half* came now to be transferred to Mrs. Bonesteel instead of a *third*, which Taylor by that part of his testimony already quoted, stated that he meant originally to give her, was thus explained or sought to be by himself.

When so good a sale as the one to Page, Kidder & Co. for $10,000 had been made, Bonesteel, it seemed, had urged upon Taylor that he ought to be content with such a good sum of money, and give the remaining half to him or his wife. Taylor knew that Bonesteel had failed; and in regard to the whole matter stated thus:

"I said to Mr. Bonesteel when he insisted upon my giving the interest between the third and the half, that I wanted to keep it myself, and should not let his wife have it, but upon his urging matters I told him that I would not give it to him, but to his wife, as I did the other, for he was in debt, and if I did, his creditors would get it, and that I had nothing to give them.

I had not previously conveyed the one-half to his wife, but had made up my mind to give it to her as promised, and therefore considered it as given. He claimed that it was through Chittenden's influence that I sold the half of Brooklyn for what I got, and I thought it was, and I conveyed it. . . . I would not have conveyed the half if I had not thought thus of Mr. Chittenden's influence. I thought his influence of great importance, as he was rich and a prominent man in Brooklyn."

Page, Kidder & Co., being thus owners of one-half the licenses, and Mrs. Bonesteel holding the other half, they two—Bonesteel, the husband, acting for her, and as she testified as her agent—organized under the general law of New York, the Nicolson Pavement Company of Brooklyn; and transferring each their half of the license to the company received in return stock in its capital; this capital being fixed in the charter at $500,000.

As the result proved, Bonesteel was not "*always*" wild. This particular project, at least, proved a good one. Mrs. Bonesteel soon sold to a certain W. Smith & Co. one-half of her stock (a quarter of the capital) for $10,000, receiving the purchase-money and using it as her own; she left 356 shares in the company as working capital; sold 44 other shares for $2000, and used the money; gave her husband 5 shares, enough to enable him to become a trustee and president of the company, which he now was, at a salary of $4000, and had 1145 shares, charged to be worth $30,000, and impliedly admitted to be worth about $10,000, remaining in her own name.

It was these 1145 shares which her husband's assignee in bankruptcy, by the bill filed against him and her, now sought to recover for *his* creditors.

The bill set forth debts to the amount of $30,000, and assets, one worthless note; charged that the one-half interest vested in Mrs. Bonesteel was in truth conveyed to her in consideration of her husband's services, in negotiating and selling the other half; that the stock was, therefore, in fact the property of her husband, the now bankrupt. It charged further, that since the organization of the company, Bone-

steel had participated in its management, and had no other business; that many very profitable contracts had been since made with the city of Brooklyn for paving, &c. The bill prayed an account and transfer of the stock to the complainant, the assignee.

Both husband and wife answered, each denying every material allegation in the bill; her answer specially averring, that when the Nicolson pavement was brought forward, her husband was acting with her knowledge and approval as her agent, with money owned by her, advanced to her by her father, and with other sums used in support of the family and advanced by her, to be charged on any distribution of his property at his death as advances; that her husband continued to act as her agent in the matter of the pavement; that she had laid out large sums of her own money in advancing and protecting her interests in the company; and setting up generally a history such as the reader can readily infer from the case as already stated.

The reader will thus perceive that the question was really one of evidence on the facts; and one where the evidence was pretty much one way.

The court below dismissed the bill; and from that decree it was that the present appeal was taken.

Mr. J. P. C. Cottrill, for the appellants; Messrs. J. Winslow and J. M. Van Cott, contra.

Mr. Justice CLIFFORD delivered the opinion of the court.

Assignees of the estate of the debtor, in a proceeding in bankruptcy, may be chosen by the creditors, or if they make no choice, at their first meeting, the judge, or, in case there is no opposing interest, the register, may make the appointment, subject to the approval of the judge.* Section fourteen also provides that as soon as an assignee is appointed and qualified, the judge, or where there is no opposing interest, the register, shall, by an instrument under his hand,

* 14 Stat. at Large, 522.

assign and convey to the assignee all the estate, real and personal, of the bankrupt, and that the title to all such estate, with the deeds, books, and papers of the bankrupt relating thereto, shall, by operation of law, vest in such assignee. Such assignments, it was foreseen, might give rise to controversies, and the second section of the act, in view of that contingency, provides that Circuit Courts shall have concurrent jurisdiction with the District Courts, of the same district, of all suits at law or in equity which may or shall be brought, by the assignee in bankruptcy, against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt, transferable to or vested in such assignee.

Voorhees, the complainant, is the assignee in bankruptcy of the first-named respondent, and he alleges in the bill of complaint that the schedule of debts, filed by the bankrupt, shows that he owed debts to an amount exceeding thirty thousand dollars; that the schedule exhibits no assets except a certain note believed to be worthless; that the other respondent is the wife of the bankrupt; that she has standing in her name, upon the books of the Nicolson Pavement Company, a corporation organized under the general laws of the State of New York, eleven hundred and forty-five shares of the capital stock of said company, of the par value of one hundred and fourteen thousand five hundred dollars, and that she holds stock certificates of the said company for the said shares, which are believed to be of a value exceeding thirty thousand dollars. Apart from those matters the complainant also alleges that he, as such assignee, has received the required instrument, duly executed, assigning and conveying to him all the estate, real and personal, of the bankrupt, and that the said stock, as he believes, is in fact and truth the property of the bankrupt, and as such that it should have been included in the inventory of his property, and that it should be applied to the payment of the debts due to his creditors. All of said shares, it is ad-

mitted, are standing in the name of the wife of the bankrupt, but the complainant alleges that the facts and circumstances under which the title was acquired, as confirmed by the conduct of the respondents since that time, affords satisfactory evidence that the property of the shares is in the bankrupt, and he states what the facts and circumstances attending the acquisition were, as he is informed and believes, with great fulness and particularity. Appended to that statement are eleven interrogatories to the respondents, designed to elicit evidence to establish the truth of the alleged circumstances.

Service was made and the respondents appeared and filed separate answers. Among other things the last-named respondent admits that she is the wife of the bankrupt, that the shares mentioned in the bill are standing in her name upon the books of the pavement company, and that she holds the stock certificates therefor, but she alleges that the value of the stock is less than one-third of the sum alleged in the bill. On the other hand she denies that the stock is or ever was the property of the bankrupt, or that he ever had any interest therein, or that the shares should have been included in his inventory, or be applied to the payment of the debts due to his creditors, and she denies that the circumstances under which she became possessed of the stock are correctly set forth in the bill, and each and every allegation in that behalf, so far as the same are different from, or inconsistent with, the statement as set forth in her answer. What she alleges is, that prior to that time she was engaged in the dry goods business, her husband acting as her agent and attorney in fact in carrying on the business; that the business was conducted in her name and for her account, upon capital furnished to her by her father; that he made advances to her exceeding twenty thousand dollars, which she employed in carrying on that business or expended in paying the expenses of their family; that the assignee of the patent described in the bill desired to secure her services and influence, and through her the influence of her friends, in the interest of that improvement, and proposed if she

would render such services and procure the aid and influence of her friends for the same purpose that he would give her a one-half interest and right in his assignment or license to lay such pavement in that city, and would also give her husband employment in promoting the enterprise and accomplishing the undertaking; that she accepted the proposition and rendered the promised service in all proper ways in her power, and that the other contracting party, in consideration thereof, conveyed a one-half interest in the enterprise to her as he had proposed, and that such conveyance was made and received in good faith and without any intent of defrauding the creditors of the bankrupt; that none of the money, assets, or property of the bankrupt was used to procure such conveyance, nor is the same in any way represented in the shares of the capital stock of the pavement company now held and owned by the respondent. Suffice it to say, without reproducing the further details of her answer, that she claims and avers that she is legally and equitably entitled to hold, and that she does hold the shares in question as her separate and individual estate.

Substantially the same defences are set up in the answer of the other respondent. He admits that the first-named respondent is his wife, that the stock stands in her name, and that she holds the stock certificates; but he denies that the stock is or ever was his property; that he has or ever had any interest in the same, or that it should have been included in his inventory, or that it should be applied to the payment of his debts as alleged in the bill. Concurring with the other respondent he also denies that the circumstances under which she acquired the shares are such as are alleged in the bill, and avers that the shares mentioned are the individual and separate property of his wife, as alleged in her answer.

Proofs were taken on both sides, and the court having heard the parties, entered a decree for the respondents, dismissing the bill of complaint, and the complainant appealed to this court.

Before proceeding to examine the errors assigned it be-

comes necessary to make some further reference to the circumstances of the transaction, in order that the questions presented for decision may be fully understood. Both parties agree that the title to the shares in question came from the owner of the license, granted by the patentee of the pavement invention, to lay that pavement in the city of Brooklyn, and the pleadings and proofs show that the bankrupt, acting as the agent of his wife, negotiated a sale to the firm therein mentioned of one-half of the right for the sum of ten thousand dollars, and that the owner of that license, in consideration of those services and the services in the same behalf rendered by the wife, agreed to assign the other half of the license to the wife, who is the present holder of the shares. Pursuant to that agreement the owner of the license, on the seventh of December, 1866, made an assignment of the whole license, conveying one-half to the last-named respondent, and the other half to the firm by whom it had previously been purchased; and it appears that the sale and transfer were ratified by the patentee on the tenth of May following. By this arrangement the last-named respondent became the owner of one-half of the license interest, but she subsequently sold to William Smith & Co. one-half of her interest so acquired for the sum of ten thousand dollars, and received the consideration to her own use, and expended the money for the support of herself and family.

All the parties interested came together on the fifth of November, subsequent to the execution of the confirmatory license by the patentee, and organized the pavement company, and in consideration of the transfer of that license to the company, the several parties received certificates in due form for their respective proportions of the same, the last-named respondent receiving eleven hundred and fifty shares of the stock, being one-fourth, less four hundred shares reserved for the working capital of the corporation. Forty-four of the reserved shares were subsequently transferred to the same respondent, and the proofs show that she sold the same as her own property and appropriated the avails to

pay her family expenses. Five of the shares first allotted to her she gave to her husband that he might be qualified to act as a trustee in the company, leaving the eleven hundred and forty-five shares standing in her name.

It is claimed by the assignee that the half-interest in the license right was transferred to the wife of the bankrupt at a time when he was insolvent, in consideration of the services rendered by the bankrupt, and that the avails belonged to his creditors, and that the ownership vested in the wife is simply a cover and a fraud. Accusations of fraud may well be dismissed, as nothing of the kind is alleged in the bill of complaint, and it is well-settled law that affirmative relief will not be granted in equity upon the ground of fraud unless it be made a distinct allegation in the bill, so that it may be put in issue by the pleadings.*

Suppose, however, the rule was otherwise, and that the complainant may prove fraud, and be entitled to relief upon that ground, even if he has not alleged anything of the kind, still the result must be the same, as he has not introduced any sufficient proof to establish the charge or to warrant the court in adopting that theory, even if the charge was made in the bill. Instead of that, the theory of the bill is that the half-interest in the pavement license was conveyed to the wife in trust for her husband, and that the shares in question are now held by her to his use, as representing to that extent the one-half interest of the pavement license, which, as the complainant alleges, was purchased for the benefit of the bankrupt.

Confessedly the claim in that view is distinctly alleged in the bill, but the difficulty which the complainant has to encounter in attempting to support that theory is that every material allegation of the bill in that behalf is distinctly denied in each of the answers, and that the proofs, instead

* Noonan *v.* Lee, 2 Black, 508; Moore *v.* Greene, 19 Howard, 69; Beaubien *v.* Beaubien, 23 Id. 190; Magniac *v.* Thomson, 15 Id. 281; Same Case, 2 Wallace, Jr., 209; Eyre *v.* Potter, 15 Howard, 42; Fisher *v.* Boody, 1 Curtis, 206.

of being sufficient to overcome the answers, afford satisfactory grounds for holding that the theory of the respondents is correct.

Courts of equity cannot decree against such denials in the answer of the respondent, on the testimony of a single witness. Where the denial is distinct the rule is universal that the complainant under such circumstances must have two witnesses, or one witness and corroborative circumstances, or he is not entitled to relief, as he cannot prevail if the balance of proof be not in his favor, and he must have circumstances in his favor in addition to his single witness in order to turn the balance.*

Evidence is entirely wanting to show that the holder of the shares in dispute, or her grantor, or her husband, ever intended or supposed that the conveyance of the one-half interest in the license was made to the wife in trust for her husband. Taken as a whole, the proofs, instead of supporting that theory, show very satisfactorily that the property was conveyed to the holder of the shares, in pursuance of a prior agreement between her and her grantor that she should have such an interest as her own, and that it was received by her without any suggestion from any source that the title was in any manner qualified, or that it was not to be her own separate property.† Confirmation of that view is derived from the conduct and declarations of all the parties, during the negotiations and at the time of the transfer. Throughout she always treated the property as her own, and the husband constantly acquiesced in that claim. She sold a part of the interest and received the purchase-money, and disposed of it as her own, and when the pavement company was organized, she joined with the others interested in the enterprise, and transferred her remaining interest to the company and became a stockholder, accepting the eleven hundred and fifty shares as her proportion of the stock to be divided at that time among the shareholders. All agreed

* Clark's Ex'r *v.* Van Riemsdyk, 9 Cranch, 160; Hughes *v.* Blake, 6 Wheaton, 468; Delano *v.* Winsor, 1 Clifford, 505.

† Voorhees, Assignee, *v.* Bonesteel, 7 Blatchford, 498.

in treating her as the owner of a quarter interest in the license, and they assigned the shares to her as her separate property, and the evidence shows that she has always dealt with the interest in the license and in the stock as her own.

Attempt is made in argument to show that the conveyance of the one-half interest in the pavement license was made, in part at least, in consideration of the services of the bankrupt, and it must be conceded that some of the proofs tend strongly to support that theory, but the answer to the suggestion made by the respondents, deduced from the same proofs, is satisfactory and conclusive. Those same proofs also show that in rendering those services the bankrupt was acting as the agent and attorney in fact of his wife, that for some time previously he had been engaged in transacting her business, using the money furnished to her by her father, and that the respondent in rendering the services which it is urged constituted a part of the consideration for the sale of the half interest in the pavement license, he was acting in her behalf and to promote her interest.

Under the laws of New York a married woman may manage her separate property, through the agency of her husband, without subjecting it to the claims of his creditors, and it is held that she is entitled to the profits of a mercantile business, conducted by the husband in her name, if the capital is furnished by her and he has no interest but that of a mere agent.* Where the husband has no interest in the business it is also held that the application of a portion of the income to the support of the husband will not impair the title of the wife to the property.† Married women, at common law, could take title to real or personal property by conveyance from any person except the husband, but where no trust was created her personal property vested absolutely in her husband when reduced to his possession, and he became possessed of her chattels real in her right with

* Abbey *v.* Deyo, 44 Barbour, 381.

† Buckley *v.* Wells, 33 New York, 520; Sessions Acts 1848, 307; Id. 1849, 528; Id. 1860, 157.

power to alien them at his pleasure during her life, and if he survived her, they became his absolute property. Statutes, such as those above referred to, are intended to divest the title of the husband, as such, during coverture, and to enable the wife to take the absolute title as though she were unmarried.* Laws of the kind have the effect to modify so far the antecedent disabilities incident to the conjugal relation, as to secure the wife in the beneficial enjoyment of the new interests she is permitted by law to acquire, and it is expressly held that she is at liberty to avail herself of the agency of her husband as if they had not been united in marriage.† Those laws vest in the wife the legal title to the rents, issues, and profits of her real estate as against the husband and his creditors, and it is held that the husband cannot, as formerly, acquire title to such property in virtue of his marital rights. Consequently it is held that where the legal title to property is in the wife, as against her husband, it cannot be seized to satisfy his debts without proof that in the given case her title is merely colorable and fraudulent as against his creditors, which is decisive of this case, as nothing of the kind was either alleged in the bill or established by any sufficient evidence.‡

Apply that rule to the case and it is clear that the decision of the Circuit Court is correct, and the decree is accordingly

AFFIRMED.

* Draper *v.* Stouvenel, 35 New York, 512; Kelso *v.* Tabor, 52 Barbour, 127.

† Owen *v.* Cawley, 36 New York, 600.

‡ Gage *v.* Dauchy et al., 34 New York, 293; Webster *v.* Hildreth, 33 Vermont, 457.

Statement of the case.

THE COMMERCE.

1. A steamer condemned for not changing her course when meeting a sailing vessel.
2. When the District and Circuit Courts in such a decree agree in their estimate of the value of the sailing vessel, this court will not set aside their estimate without satisfactory evidence that they were mistaken.

APPEAL from the Circuit Court for the District of Maryland.

The steamer Commerce was proceeding down the Chesapeake Bay, in a southeast course, on an evening of January, 1870; the schooner Seamen trying to sail up in a course about north-northwest. The night was perfectly calm, and the moon was shining. When nearly opposite Annapolis, the vessels first saw each other, at a distance of about two miles, and not a great while afterwards collided; the steamer cutting the schooner in two, and sending her with her cargo forthwith to the bottom in the deepest part of the bay. Her owners hereupon libelled the steamer in the District Court at Baltimore. The master of the steamer answered, stating that she was proceeding down the bay at a rate of six or seven miles an hour, holding a course south by west; that he discovered a sailing vessel approaching from the opposite direction, holding a course, as near as he could judge, north by east; that a light wind was prevailing from the southeast, of about two knots an hour; that when the schooner was about a mile distant, he altered the course of the steamer to south by east; that he continued this last-mentioned course, and the schooner continued her original course until the vessels were within about four hundred yards of each other, when the schooner changed her course so as to cross the bow of the steamer; that he then caused the engines of the steamer to be stopped and reversed; that if the schooner had not altered her course the collision would not have taken place, &c.

The captain of the schooner testified that the schooner was becalmed, "her sails amidship and swinging inboard,"

and could not change her course nor get out of the way; and that the steamer was warned when yet half a mile off that unless she changed *hers*, she would certainly "be into the schooner."

The pilot of the schooner confirmed this account of things, stating that the schooner was actually going back rather than forwards, drifting with an ebb tide; that the bay was so calm that the schooner would not answer her helm at all, and had to be kept straight with an oar.

A more credible witness than either of these persons—who it will have been observed were both from the schooner, and who were to some extent contradicted by the master of the steamer, who testified that "a light wind was prevailing from the southeast of about two knots an hour"—was one Thurlow, who happened to be on a sloop lying off Annapolis, and between the two vessels and the shore when the collision took place, and had been watching both the probabilities and the fact of the disaster. "I was," said this witness, "two or three hundred yards westward of these vessels when the collision took place. I saw the two boats about five minutes before the collision and up to the time of the collision. I heard the captain of the schooner holloa to the steamer to keep away from him. I think that the steamer did not slacken her speed, nor change her course. The schooner did not change hers. She was keeping her proper course up the bay. There was not a particle of wind at the time that I could judge; not a ripple upon the water. You could see a vessel about a mile off, and her lights about a mile and a half."

The District Court condemned the steamer, and put the value of the schooner at $2500. She had cost the libellants $2000 some years before, but they had laid out some money in repairing her, and witnesses swore that she was now well worth $2500, and even more. The Circuit Court on appeal affirmed the decree of the District Court.

Mr. William Shepard Bryan, for the appellant, argued:

1st. That no reliance was to be given to the testimony of

the master and pilot of the schooner, who would, of course, whatever they had done or omitted to do, exculpate themselves; and,

2d. That if the steamer was properly condemned, the award of damages in favor of the schooner for more than her whole cost several years before, was plainly erroneous.

Mr. W. S. Waters, contra.

Mr. Justice STRONG delivered the opinion of the court.

If the schooner was guilty of any fault which caused the collision, or contributed to it in any degree, it was in a change of her course, which the respondents allege she made when the vessels were about four hundred yards from each other. No other fault was averred in the answer to the libel, and no other has been suggested in the argument here. But the evidence utterly fails to establish the allegation of any change of the course of the schooner after the steamer hove in sight, or after she was seen from the steamer. Not only is there the direct evidence to the contrary of the master and pilot of the schooner, as well as of a disinterested witness who saw the collision from a yacht two or three hundred yards westward from the place where it happened, but it is made abundantly manifest that a change of course was then impossible. There was a dead calm, with not a ripple upon the water, and the sails of the schooner were amidships, swinging inboard. She was drifting with an ebb tide, and could be kept straight only by an oar. Such is the overwhelming testimony. And nothing appears on the other side except the statement of the master of the steamer, who has testified that "the wind was about southeast, and, as near as he could judge, about a two-knot breeze." As the steamer was on a southeast course, and making six or seven knots, this testimony is very light evidence in the scale against the proofs that the schooner was becalmed, and consequently that the averment of a change of her course is without foundation. The case exhibits nothing, then, to justify the steamer's failure to keep out of the way, and she was properly condemned.

It is said, however, she has been mulcted in excessive damages. The District Court and the Circuit Court concurred in the assessment made, and we do not perceive that more was allowed to the libellants than the evidence warranted. When both the lower courts have agreed in their estimate of the damages, we ought not to set aside their conclusions without satisfactory evidence that they were mistaken. We have no such evidence before us.

DECREE AFFIRMED.

SLAUGHTER-HOUSE CASES.

THE BUTCHERS' BENEVOLENT ASSOCIATION OF NEW ORLEANS *v.* THE CRESCENT CITY LIVE-STOCK LANDING AND SLAUGHTER-HOUSE COMPANY.

PAUL ESTEBEN, L. RUCH, J. P. ROUEDE, W. MAYLIE, S. FIRMBERG, B. BEAUBAY, WILLIAM FAGAN, J. D. BRODERICK, N. SEIBEL, M. LANNES, J. GITZINGER, J. P. AYCOCK, D. VERGES, THE LIVE-STOCK DEALERS' AND BUTCHERS' ASSOCIATION OF NEW ORLEANS, AND CHARLES CAVAROC *v.* THE STATE OF LOUISIANA, *ex rel.* S. BELDEN, ATTORNEY-GENERAL.

THE BUTCHERS' BENEVOLENT ASSOCIATION OF NEW ORLEANS *v.* THE CRESCENT CITY LIVE-STOCK LANDING AND SLAUGHTER-HOUSE COMPANY.

1. The legislature of Louisiana, on the 8th of March, 1869, passed an act granting to a corporation, created by it, the exclusive right, for twenty-five years, to have and maintain slaughter-houses, landings for cattle, and yards for inclosing cattle intended for sale or slaughter within the parishes of Orleans, Jefferson, and St. Bernard, in that State (a territory which, it was said,—see *infra*, p. 85,—contained 1154 square miles, including the city of New Orleans, and a population of between two and three hundred thousand people), and prohibiting all other persons from building, keeping, or having slaughter-houses, landings for cattle, and yards for cattle intended for sale or slaughter, within those limits; and requiring that all cattle and other animals intended for sale or slaughter in that district, should be brought to the yards and slaughter-houses of the corporation; and authorizing the corporation to exact certain prescribed fees for the use of its wharves and for each animal landed, and certain prescribed fees for each animal slaughtered, besides the head, feet, gore, and entrails, except of swine: *Held*, that this grant of exclusive right or privilege, guarded by proper limitation of the prices to be charged, and imposing the duty of providing ample conveniences, with permission to all owners of stock to land, and of all

butchers to slaughter at those places, was a police regulation for the health and comfort of the people (the statute locating them where health and comfort required), within the power of the State legislatures, unaffected by the Constitution of the United States previous to the adoption of the thirteenth and fourteenth articles of amendment.

2. The Parliament of Great Britain and the State legislatures of this country have always exercised the power of granting exclusive rights when they were necessary and proper to effectuate a purpose which had in view the public good, and the power here exercised is of that class, and has until now never been denied.

Such power is not forbidden by the thirteenth article of amendment and by the first section of the fourteenth article. An examination of the history of the causes which led to the adoption of those amendments and of the amendments themselves, demonstrates that the main purpose of all the three last amendments was the freedom of the African race, the security and perpetuation of that freedom, and their protection from the oppressions of the white men who had formerly held them in slavery.

3. In giving construction to any of those articles it is necessary to keep this main purpose steadily in view, though the letter and spirit of those articles must apply to all cases coming within their purview, whether the party concerned be of African descent or not.

While the thirteenth article of amendment was intended primarily to abolish African slavery, it equally forbids Mexican peonage or the Chinese coolie trade, when they amount to slavery or involuntary servitude; and the use of the word "servitude" is intended to prohibit all forms of involuntary slavery of whatever class or name.

The first clause of the fourteenth article was primarily intended to confer citizenship on the negro race, and secondly to give definitions of citizenship of the United States, and citizenship of the States, and it recognizes the distinction between citizenship of a State and citizenship of the United States by those definitions.

The second clause protects from the hostile legislation of the States the privileges and immunities of *citizens of the United States* as distinguished from the privileges and immunities of citizens of the States.

These latter, as defined by Justice Washington in *Corfield* v. *Coryell*, and by this court in *Ward* v. *Maryland*, embrace generally those fundamental civil rights for the security and establishment of which organized society is instituted, and they remain, with certain exceptions mentioned in the Federal Constitution, under the care of the State governments, and of this class are those set up by plaintiffs.

4. The privileges and immunities of citizens of the United States are those which arise out of the nature and essential character of the National government, the provisions of its Constitution, or its laws and treaties made in pursuance thereof; and it is these which are placed under the protection of Congress by this clause of the fourteenth amendment.

It is not necessary to inquire here into the full force of the clause forbidding a State to enforce any law which deprives a person of life, liberty,

or property without due process of law, for that phrase has been often the subject of judicial construction, and is, under no admissible view of it, applicable to the present case.

5. The clause which forbids a State to deny to any person the equal protection of the laws was clearly intended to prevent the hostile discrimination against the negro race so familiar in the States where he had been a slave, and for this purpose the clause confers ample power in Congress to secure his rights and his equality before the law.

ERROR to the Supreme Court of Louisiana.

The three cases—the parties to which as plaintiffs and defendants in error, are given specifically as a sub-title, at the head of this report, but which are reported together also under the general name which, in common parlance, they had acquired—grew out of an act of the legislature of the State of Louisiana, entitled: "*An act to protect the health of the City of New Orleans, to locate the stock landings and slaughter-houses, and to incorporate 'The Crescent City Live-Stock Landing and Slaughter-House Company,'*" which was approved on the 8th of March, 1869, and went into operation on the 1st of June following; and the three cases were argued together.

The act was as follows:

"SECTION 1. *Be it enacted, &c.*, That from and after the first day of June, A.D. 1869, it shall not be lawful to land, keep, or slaughter any cattle, beeves, calves, sheep, swine, or other animals, or to have, keep, or establish any stock-landing, yards, pens, slaughter-houses, or abattoirs at any point or place within the city of New Orleans, *or the parishes of Orleans, Jefferson, and St. Bernard*, or at any point or place on the *east* bank of the Mississippi River within the corporate limits of the city of New Orleans, or at any point on the west bank of the Mississippi River, above the present depot of the New Orleans, Opelousas, and Great Western Railroad Company, *except* that the 'Crescent City Stock Landing and Slaughter-House Company' may establish *themselves* at any point or place as hereinafter provided. Any person or persons, or corporation or company carrying on any business or doing any act in contravention of this act, or landing, slaughtering or keeping any animal or animals in violation of this act, shall be liable to a fine of $250, for each and

every violation, the same to be recoverable, with costs of suit, before any court of competent jurisdiction."

The second section of the act created one Sanger and sixteen other persons named, a corporation, with the usual privileges of a corporation, and including power to appoint officers, and fix their compensation and term of office, and to fix the amount of the capital stock of the corporation and the number of shares thereof.

The act then went on:

"SECTION 3. *Be it further enacted, &c.*, That said company or corporation is hereby authorized to establish and erect at its own expense, at any point or place on the east bank of the Mississippi River within the parish of St. Bernard, or in the corporate limits of the city of New Orleans, below the United States Barracks, or at any point or place on the west bank of the Mississippi River below the present depot of the New Orleans, Opelousas, and Great Western Railroad Company, wharves, stables, sheds, yards, and buildings necessary to land, stable, shelter, protect, and preserve all kinds of horses, mules, cattle, and other animals; and from and after the time such buildings, yards, &c., are ready and complete for business, and notice thereof is given in the official journal of the State, the said Crescent City Live-Stock Landing and Slaughter-House Company shall have *the sole and exclusive privilege of conducting and carrying on the live-stock landing and slaughter-house business within the limits and privileges granted by the provisions of this act;* and cattle and other animals destined for sale or slaughter in the city of New Orleans, or its environs, shall be landed at the live-stock landings and yards of said company, and shall be yarded, sheltered, and protected, if necessary, by said company or corporation; and said company or corporation shall be entitled to have and receive for each steamship landing at the wharves of the said company or corporation, $10; for each steamboat or other water craft, $5; and for each horse, mule, bull, ox, or cow landed at their wharves, for each and every day kept, 10 cents; for each and every hog, calf, sheep, or goat, for each and every day kept, 5 cents, all without including the feed; and said company or corporation shall be entitled to keep and detain each and all of said animals until said charges are fully paid. But

if the charges of landing, keeping, and feeding any of the aforesaid animals shall not be paid by the owners thereof after fifteen days of their being landed and placed in the custody of the said company or corporation, then the said company or corporation, in order to reimburse themselves for charges and expenses incurred, shall have power, by resorting to judicial proceedings, to advertise said animals for sale by auction, in any two newspapers published in the city of New Orleans, for five days; and after the expiration of said five days, the said company or corporation may proceed to sell by auction, as advertised, the said animals, and the proceeds of such sales shall be taken by the said company or corporation, and applied to the payment of the charges and expenses aforesaid, and other additional costs; and the balance, if any, remaining from such sales, shall be held to the credit of and paid to the order or receipt of the owner of said animals. Any person or persons, firm or corporation violating any of the provisions of this act, or interfering with the privileges herein granted, or landing, yarding, or keeping any animals in violation of the provisions of this act, or to the injury of said company or corporation, shall be liable to a fine or penalty of $250, to be recovered with costs of suit before any court of competent jurisdiction.

"The company shall, before the first of June, 1869, build and complete A GRAND SLAUGHTER-HOUSE of sufficient capacity to accommodate all butchers, and in which to slaughter 500 animals per day; also a sufficient number of sheds and stables shall be erected before the date aforementioned, to accommodate all the stock received at this port, all of which to be accomplished before the date fixed for the removal of the stock landing, as provided in the first section of this act, under penalty of a forfeiture of their charter.

"SECTION 4. *Be it further enacted, &c.*, That the said company or corporation is hereby authorized to erect, at its own expense, one or more landing-places for live stock, as aforesaid, at any points or places consistent with the provisions of this act, and to have and enjoy from the completion thereof, and after the first day of June, A.D. 1869, *the exclusive privilege of having landed at their wharves or landing-places all animals intended for sale or slaughter in the parishes of Orleans and Jefferson;* and are hereby also authorized (in connection) to erect at its own expense one or more slaughter-houses, at any points or places

consistent with the provisions of this act, and to have and enjoy, from the completion thereof, and after the first day of June, A.D. 1869, *the exclusive privilege of having slaughtered therein all animals, the meat of which is destined for sale in the parishes of Orleans and Jefferson.*

"SECTION 5. *Be it further enacted, &c.*, That whenever said slaughter-houses and accessory buildings shall be completed and thrown open for the use of the public, said company or corporation shall immediately give public notice for thirty days, in the official journal of the State, and within said thirty days' notice, and within, from and after the first day of June, A.D. 1869, *all other stock landings and slaughter-houses within the parishes of Orleans, Jefferson, and St. Bernard shall be closed, and it will no longer be lawful to slaughter cattle, hogs, calves, sheep, or goats, the meat of which is determined for sale within the parishes aforesaid, under a penalty of* $100, *for each and every offence, recoverable, with costs of suit, before any court of competent jurisdiction; that all animals to be slaughtered, the meat whereof is determined for sale in the parishes of Orleans or Jefferson, must be slaughtered in the slaughter-houses erected by the said company or corporation;* and upon a refusal of said company or corporation to allow any animal or animals to be slaughtered after the same has been certified by the inspector, as hereinafter provided, to be fit for human food, the said company or corporation shall be subject to a fine in each case of $250, recoverable, with costs of suit, before any court of competent jurisdiction; said fines and penalties to be paid over to the auditor of public accounts, which sum or sums shall be credited to the educational fund.

"SECTION 6. *Be it further enacted, &c.*, That the governor of the State of Louisiana shall appoint a competent person, clothed with police powers, to act as inspector of all stock that is to be slaughtered, and whose duty it will be to examine closely all animals intended to be slaughtered, to ascertain whether they are sound and fit for human food or not; and if sound and fit for human food, to furnish a certificate stating that fact, to the owners of the animals inspected; and without said certificate no animals can be slaughtered for sale in the slaughter-houses of said company or corporation. The owner of said animals so inspected to pay the inspector 10 cents for each and every animal so inspected, one-half of which fee the said inspector shall retain for his services, and the other half of said fee shall be

paid over to the auditor of public accounts, said payment to be made quarterly. Said inspector shall give a good and sufficient bond to the State, in the sum of $5000, with sureties subject to the approval of the governor of the State of Louisiana, for the faithful performance of his duties. Said inspector shall be fined for dereliction of duty $50 for each neglect. Said inspector may appoint as many deputies as may be necessary. The half of the fees collected as provided above, and paid over to the auditor of public accounts, shall be placed to the credit of the educational fund.

"SECTION 7. *Be it further enacted, &c.*, That all persons slaughtering or causing to be slaughtered, cattle or other animals in said slaughter-houses, shall pay to the said company or corporation the following rates or perquisites, viz.: For all beeves, $1 each; for all hogs and calves, 50 cents each; for all sheep, goats, and lambs, 30 cents each; *and the said company or corporation shall be entitled to the head, feet, gore, and entrails of all animals excepting hogs, entering the slaughter-houses and killed therein*, it being understood that the heart and liver are not considered as a part of the gore and entrails, and that the said heart and liver of all animals slaughtered in the slaughter-houses of the said company or corporation shall belong, in all cases, to the owners of the animals slaughtered.

"SECTION 8. *Be it further enacted, &c.*, That all the fines and penalties incurred for violations of this act shall be recoverable in a civil suit before any court of competent jurisdiction, said suit to be brought and prosecuted by said company or corporation in all cases where the privileges granted to the said company or corporation by the provisions of this act are violated or interfered with; that one-half of all the fines and penalties recovered by the said company or corporation [*Sic* in copy—REP.], in consideration of their prosecuting the violation of this act, and the other half shall be paid over to the auditor of public accounts, to the credit of the educational fund.

"SECTION 9. *Be it further enacted, &c.*, That said Crescent City Live-Stock Landing and Slaughter-House Company shall have the right to construct a railroad from their buildings to the limits of the city of New Orleans, and shall have the right to run cars thereon, drawn by horses or other locomotive power, as they may see fit; said railroad to be built on either of the public roads running along the levee on each side of the Mississippi

River. The said company or corporation shall also have the right to establish such steam ferries as they may see fit to run on the Mississippi River between their buildings and any points or places on either side of said river.

"SECTION 10. *Be it further enacted, &c.*, That at the expiration of twenty-five years from and after the passage of this act the privileges herein granted shall expire."

The parish of Orleans containing (as was said*) an area of 150 square miles; the parish of Jefferson of 384; and the parish of St. Bernard of 620; the three parishes together 1154 square miles, and they having between two and three hundred thousand people resident therein, and prior to the passage of the act above quoted, about 1000 persons employed daily in the business of procuring, preparing, and selling animal food, the passage of the act necessarily produced great feeling. Some hundreds of suits were brought on the one side or on the other; the butchers, not included in the "monopoly" as it was called, acting sometimes in combinations, in corporations, and companies, and sometimes by themselves; the same counsel, however, apparently representing pretty much all of them. The ground of the opposition to the slaughter-house company's pretensions, so far as any cases were finally passed on in this court was, that the act of the Louisiana legislature made a monopoly and was a violation of the most important provisions of the thirteenth and fourteenth Articles of Amendment to the Constitution of the United States. The language relied on of these articles is thus:

AMENDMENT XIII.

"Neither slavery nor *involuntary servitude* except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, nor any place subject to their jurisdiction."

AMENDMENT XIV.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, *are citizens of the United States* and of the State wherein they reside.

* See *infra*, pp. 85, 86.

"No State shall make or enforce any law which shall abridge the *privileges or immunities of citizens of the United States*, nor shall any State deprive any person of life, *liberty, or property*, without due process of law, nor deny to any person within its jurisdiction the *equal protection of the laws.*"

The Supreme Court of Louisiana decided in favor of the company, and five of the cases came into this court under the 25th section of the Judiciary Act in December, 1870; where they were the subject of a preliminary motion by the plaintiffs in error for an order in the nature of a supersedeas. After this, that is to say, in March, 1871, a compromise was sought to be effected, and certain parties professing, apparently, to act in a representative way in behalf of the opponents to the company, referring to a compromise that they assumed had been effected, agreed to discontinue "*all* writs of error concerning the said company, now pending in the Supreme Court of the United States;" stipulating further "that their agreement should be sufficient authority for any attorney to appear and move for the dismissal of *all* said suits." Some of the cases were thus confessedly dismissed. But the three of which the names are given as a sub-title at the head of this report were, by certain of the butchers, asserted not to have been *dismissed.* And *Messrs. M. H. Carpenter, J. S. Black, and T. J. Durant, in behalf of the new corporation*, having moved to dismiss them also as embraced in the agreement, affidavits were filed on the one side and on the other; the affidavits of the butchers opposed to the "monopoly" affirming that they were plaintiffs in error in these three cases, and that they never consented to what had been done, and that no proper authority had been given to do it. This matter was directed to be heard with the merits. The case being advanced was first heard on these, January 11th, 1872; Mr. Justice Nelson being indisposed and not in his seat. Being ordered for reargument, it was heard again, February 3d, 4th, and 5th, 1873.

Mr. John A. Campbell, and also Mr. J. Q. A. Fellows, argued the case at much length and on the authorities, in behalf of

the plaintiffs in error. The reporter cannot pretend to give more than such an abstract of the argument as may show to what the opinion of the court was meant to be responsive.

I. The learned counsel quoting Thiers,* contended that "the right to one's self, to one's own faculties, physical and intellectual, one's own brain, eyes, hands, feet, in a word to his soul and body, was an incontestable right; one of whose enjoyment and exercise by its owner no one could complain, and one which no one could take away. More than this, the obligation to labor was a duty, a thing ordained of God, and which if submitted to faithfully, secured a blessing to the human family." Quoting further from Turgot, De Tocqueville, Buckle, Dalloz, Leiber, Sir G. C. Lewis, and others, the counsel gave a vivid and very interesting account of the condition and grievances of the lower orders in various countries of Europe, especially in France, with its *banalités* and "*seigneurs justiciers*," during those days when "the prying eye of the government followed the butcher to the shambles and the baker to the oven;" when "the peasant could not cross a river without paying to some nobleman a toll, nor take the produce which he raised to market until he had bought leave to do so; nor consume what remained of his grain till he had sent it to the lord's mill to be ground, nor full his cloths on his own works, nor sharpen his tools at his own grindstone, nor make wine, oil, or cider at his own press;" the days of monopolies; monopolies which followed men in their daily avocations, troubled them with its meddling spirit, and worst of all diminished their responsibility to themselves. Passing from Scotland, in which the cultivators of each barony or regality were obliged to pay a "multure" on each stack of hay or straw reaped by the farmer—"thirlage" or "thraldom," as it was called—and when lands were subject to an "astriction" astricting them and their inhabitants to particular mills for the grinding of grain that was raised on them, and coming to Great Britain, the counsel adverted to the reigns of Edward III, and Rich-

* De la Propriété, 36, 47.

ard II, and their successors, when the price of labor was fixed by law, and when every able-bodied man and woman, not being a merchant or craftsman, was "bounden" to serve at the wages fixed, and when to prevent the rural laborer from seeking the towns he was forbidden to leave his own village. It was in England that the earliest battle for civil liberty had been made. Macaulay thus described it:*

"It was in the Parliament of 1601, that the opposition which had, during forty years, been silently gathering and husbanding strength, fought its first great battle and won its first victory. The ground was well chosen. The English sovereigns had always been intrusted with the supreme direction of commercial police. It was their undoubted prerogative to regulate coins, weights, measures, and to appoint fairs, markets, and ports. The line which bounded their authority over trade, had, as usual, been but loosely drawn. They therefore, as usual, encroached on the province which rightfully belonged to the legislature. The encroachment was, as usual, patiently borne, till it became serious. But at length the Queen took upon herself to grant patents of monopoly by scores. There was scarcely a family in the realm that did not feel itself aggrieved by the oppression and extortion which the abuse naturally caused. Iron, oil, vinegar, coal, lead, starch, yarn, leather, glass, could be bought only at exorbitant prices. The House of Commons met in an angry and determined mood. It was in vain that a courtly minority blamed the speaker for suffering the acts of the Queen's highness to be called in question. The language of the discontented party was high and menacing, and was echoed by the voice of the whole nation. The coach of the chief minister of the crown was surrounded by an indignant populace, who cursed *monopolies*, and exclaimed that the prerogative should not be allowed to touch the old liberties of England."

Macaulay proceeded to say that the Queen's reign was in danger of a shameful and disgraceful end, but that she, with admirable judgment, declined the contest and redressed the grievance, and in touching language thanked the Commons for their tender care of the common weal.

* History of England, vol. 1, p. 58.

Argument against the monopoly.

The great grievance of our ancestors about the time that they largely left England, was this very subject. Sir John Culpeper, in a speech in the Long Parliament, thus spoke of these monopolies and pollers of the people:

"They are a nest of wasps—a swarm of vermin which have overcrept the land. Like the frogs of Egypt they have gotten possession of our dwellings, and we have scarce a room free from them. They sup in our cup; they dip in our dish; they sit by our fire. We find them in the dye-fat, wash-bowl, and powdering-tub. They share with the butler in his box. They will not bait us a pin. We may not buy our clothes without their brokage. These are the leeches that have sucked the commonwealth so hard that it is almost hectical. Mr. Speaker! I have echoed to you the cries of the Kingdom. I will tell you their hopes. They look to Heaven for a blessing on this Parliament."

Monopolies concerning wine, coal, salt, starch, the dressing of meat in taverns, beavers, belts, bone-lace, leather, pins, and other things, to the gathering of rags, are referred to in this speech.

But more important than these discussions in Parliament were the solemn judgments of the courts of Great Britain. The great and leading case was that reported by Lord Coke, *The Case of Monopolies.** The patent was granted to Darcy to buy beyond the sea all such playing-cards as he thought good, and to utter and sell them within the kingdom, and that he and his agents and deputies should have the whole trade, traffic, and merchandise of playing-cards, and that another person and none other should have the making of playing-cards within the realm. A suit was brought against a citizen of London for selling playing-cards, and he pleaded that being a citizen free of the city he had a right to do so. And—

"Resolved (Popham, C. J.) *per totam Curiam,* that the said grant of the plaintiff of the sole making of cards within the realm, was utterly void, and for two reasons:

* 11 Reports, 85.

"1. That it is a monopoly and against the common law.
"2. That it is against divers acts of Parliament."

[The learned counsel read Sir Edward Coke's report of the judgment in this case, which was given fully in the brief at length, seeking to apply it to the cases before the court.]

It was from a country which had been thus oppressed by monopolies that our ancestors came. And a profound conviction of the truth of the sentiment already quoted from M. Thiers—that every man has a right to his own faculties, physical and intellectual, and that this is a right, one of which no one can complain, and no one deprive him—was at the bottom of the settlement of the country by them. Accordingly, free competition in business, free enterprise, the absence of all exactions by petty tyranny, of all spoliation of private right by public authority—the suppression of sinecures, monopolies, titles of nobility, and exemption from legal duties—were exactly what the colonists sought for and obtained by their settlement here, their long contest with physical evils that attended the colonial condition, their struggle for independence, and their efforts, exertions, and sacrifices since.

Now, the act of the Louisiana legislature was in the face of all these principles; it made it unlawful for men to use their own land for their own purposes; made it unlawful to any except the seventeen of this company to exercise a lawful and necessary business for which others were as competent as they, for which at least one thousand persons in the three parishes named had qualified themselves, had framed their arrangements in life, had invested their property, and had founded all their hopes of success on earth. The act was a pure MONOPOLY; as such against common right, and void at the common law of England. And it was equally void by our own law. The case of *The Norwich Gaslight Company* v. *The Norwich City Gaslight Company*,* a case in Connecticut, and more pointedly still, *The City of Chicago* v. *Rumpff*,† a case in Illinois, and *The Mayor of the City of Hudson* v. *Thorne*,‡

* 25 Connecticut, 19. † 45 Illinois, 90. ‡ 7 Paige, 261.

a case in New York, were in entire harmony with Coke's great case, and declared that monopolies are against common right.*

How, indeed, do authors and inventors maintain a monopoly in even the works of their own brain? in that which in a large sense may be called their own. Only through a provision of the Constitution preserving such works to them. Many State constitutions have denounced monopolies by name, and it is certain that every species of exclusive privilege is an offence to the people, and that popular aversion to them does but increase the more largely that they are granted.

II. *But if this monopoly were not thus void at common law, it would be so under both the thirteenth and the fourteenth amendments.*

The thirteenth amendment prohibits "slavery and involuntary *servitude*." The expressions are ancient ones, and were familiar even before the time when they appeared in the great Ordinance of 1787, for the government of our vast Northwestern Territory; a territory from which great States were to arise. In that ordinance they are associated with enactments affording comprehensive protection for life, liberty, and property; for the spread of religion, morality, and knowledge; for maintaining the inviolability of contracts, the freedom of navigation upon the public rivers, and the unrestrained conveyance of property by contract and devise, and for equality of children in the inheritance of patrimonial estates. The ordinance became a law after Great Britain, in form the most popular government in Europe, had been expelled from that territory because of "injuries and usurpations having in direct object the establishment of an absolute tyranny over the States." Feudalism at that time prevailed in nearly all the kingdoms of Europe, and serfdom and servitude and feudal service depressed their people to the level of slaves. The prohibition of "slavery and involuntary servitude" in every form and degree, except as a

* The statement of these cases being made, *infra*, pp. 106–109, in the dissenting opinion of Mr. Justice Field, is not here given.

sentence upon a conviction for crime, comprises much more than the abolition or prohibition of African slavery. Slavery in the annals of the world had been the ultimate solution of controversies between the creditor and debtor; the conqueror and his captive; the father and his child; the state and an offender against its laws. The laws might enslave a man to the soil. The whole of Europe in 1787 was crowded with persons who were held as vassals to their landlord, and serfs on his dominions. The American constitution for that great territory was framed to abolish slavery and involuntary servitude in all forms, and in all degrees in which they have existed among men, except as a punishment for crime duly proved and adjudged.

Now, the act of which we complain has made of three parishes of Louisiana "enthralled ground." "The seventeen" have *astricted* not only the inhabitants of those parishes, but of all other portions of the earth who may have cattle or animals for sale or for food, to land them at the wharves of that company (if brought to that territory), to keep them in their pens, yards, or stables, and to prepare them for market in their abattoir or slaughter-house. Lest some competitor may present more tempting or convenient arrangements, the act directs that all of these shall be closed on a particular day, and prohibits any one from having, keeping, or establishing any other; and a peremptory command is given that all animals shall be sheltered, preserved, and protected by this corporation, and by none other, under heavy penalties.

Is not this "a servitude?" Might it not be so considered in a strict sense? It is like the "thirlage" of the old Scotch law and the *banalités* of seignioral France; which were servitudes undoubtedly. But, if not strictly a servitude, it is certainly a servitude in a more popular sense, and, being an enforced one, it is an involuntary servitude. Men are surely subjected to a servitude when, throughout three parishes, embracing 1200 square miles, every man and every woman in them is compelled to refrain from the use of their own land and exercise of their own industry and the improve-

ment of their own property, in a way confessedly lawful and necessary in itself, and made unlawful and unnecessary only because, at their cost, an exclusive privilege is granted to seventeen other persons to improve and exercise it for them. We have here the "servients" and the "dominants" and the "thraldom" of the old seignioral system. The servients in this case are all the inhabitants in any manner using animals brought to the markets for sale or for slaughter. The dominants are "the seventeen" made into a corporation, with these seignioral rights and privileges. The masters are these seventeen, who alone can admit or refuse other members to their corporation. The abused persons are the community, who are deprived of what was a common right and bound under a thraldom.

III. *The act is even more plainly in the face of the fourteenth amendment.* That amendment was a development of the thirteenth, and is a more comprehensive exposition of the principles which lie at the foundation of the thirteenth.

Slavery had been abolished as the issue of the civil war. More than three millions of a population lately servile, were liberated without preparation for any political or civil duty. Besides this population of emancipated slaves, there was a large and growing population who came to this country without education in the laws and constitution of the country, and who had begun to exert a perceptible influence over our government. There were also a large number of unsettled and difficult questions of State and National right that had no other settlement or solution but what the war had afforded. It had been maintained from the origin of the Constitution, by one political party—men of a high order of ability, and who exerted a great influence—that the *State* was the highest political organization in the United States; that through the consent of the separate States the Union had been formed for limited purposes; that there was no social union except by and through the States, and that in extreme cases the several States might cancel the obligations to the Federal government and reclaim the allegiance and fidelity of its members. Such were the doctrines of Mr.

Calhoun, and of others; both those who preceded and those who have followed him. It is nowhere declared in the Constitution what "a citizen" is, or what constitutes citizenship; and what ideas were entertained of citizenship by one class in our country may be seen in the South Carolina case of *Hunt* v. *The State*, where Harper, J., referring to the arguments of Messrs. Petigru, Blanding, McWillie, and Williams—men eminent in the South as jurists—who were opposing nullification, says:

"It has been *admitted* in argument by all the counsel except one, that in case of a secession by the State from the Union, the citizens and constituted authorities would be bound to obey and give effect to the act."

But the fourteenth amendment does define citizenship and the relations of citizens to the State and Federal government. It ordains that "all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State where they reside." Citizenship in a State is made by residence and without reference to the consent of the State. Yet, by the same amendment, when it exists, no State can abridge its privileges or immunities. The doctrine of the "States-Rights party," led in modern times by Mr. Calhoun, was, that there was no citizenship in the whole United States, except *sub modo* and by the permission of the States. According to their theory the United States had no integral existence except as an incomplete combination among several integers. The fourteenth amendment struck at, and forever destroyed, all such doctrines. It seems to have been made under an apprehension of a destructive faculty in the State governments. It consolidated the several "integers" into a consistent whole. Were there Brahmans in Massachusetts, "the chief of all creatures, and with the universe held in charge for them," and Soudras in Pennsylvania, "who simply had life through the benevolence of the other," this amendment places them on the same footing. By it the national principle has received an indefinite enlarge-

ment. The tie between the United States and every citizen in every part of its own jurisdiction has been made intimate and familiar. To the same extent the confederate features of the government have been obliterated. The States in their closest connection with the members of the State, have been placed under the oversight and restraining and enforcing hand of Congress. The purpose is manifest, to establish through the whole jurisdiction of the United States ONE PEOPLE, and that every member of the empire shall understand and appreciate the fact that his privileges and immunities cannot be abridged by State authority; that State laws must be so framed as to secure life, liberty, property from arbitrary violation and secure protection of law to all. Thus, as the great personal rights of each and every person were established and guarded, a reasonable confidence that there would be good government might seem to be justified. The amendment embodies all that the statesmanship of the country has conceived for accommodating the Constitution and the institutions of the country to the vast additions of territory, increase of the population, multiplication of States and Territorial governments, the annual influx of aliens, and the mighty changes produced by revolutionary events, and by social, industrial, commercial development. It is an act of Union, an act to determine the reciprocal relations of the millions of population within the bounds of the United States—the numerous State governments and the entire United States administered by a common government—that they might mutually sustain, support, and co-operate for the promotion of peace, security, and the assurance of property and liberty.

Under it the fact of citizenship does not depend upon parentage, family, nor upon the historical division of the land into separate States, some of whom had a glorious history, of which its members were justly proud. Citizenship is assigned to nativity in any portion of the United States, and every person so born is a citizen. The naturalized person acquires citizenship of the same kind without any action of the State at all. So either may by this title of citizenship

make his residence at any place in the United States, and under whatever form of State administration, he must be treated as a citizen of that State. His "privileges and immunities" must not be impaired, and all the privileges of the English Magna Charta in favor of freemen are collected upon him and overshadow him as derived from this amendment. The States must not weaken nor destroy them. The comprehensiveness of this amendment, the natural and necessary breadth of the language, the history of some of the clauses; their connection with discussions, contests, and domestic commotions that form landmarks in the annals of constitutional government; the circumstances under which it became part of the Constitution, demonstrate that the weighty import of what it ordains is not to be misunderstood.

From whatever cause originating, or with whatever special and present or pressing purpose passed, the fourteenth amendment is not confined to the population that had been servile, or to that which had any of the disabilities or disqualifications arising from race or from contract. The vast number of laborers in mines, manufactories, commerce, as well as the laborers on the plantations, are defended against the unequal legislation of the States. Nor is the amendment confined in its application to laboring men. The mandate is universal in its application to persons of every class and every condition. There are forty millions of population who may refer to it to determine their rank in the United States, and in any particular State. There are thirty-seven governments among the States to which it directs command, and the States that may be hereafter admitted, and the persons hereafter to be born or naturalized will find here declarations of the same weighty import to them all. To the State governments it says: "Let there be no law made or enforced to diminish one of the privileges and immunities of the people of the United States;" nor law to deprive them of their life, liberty, property, or protection without trial. To the people the declaration is: "Take and hold this your certificate of status and of

capacity, the Magna Charta of your rights and liberties." To the Congress it says: "Take care to enforce this article by suitable laws."

The only question then is this: "When a State passes a law depriving a thousand people, who have acquired valuable property, and who, through its instrumentality, are engaged in an honest and necessary business, which they understand, of their right to use such their own property, and to labor in such their honest and necessary business, and gives a monopoly, embracing the whole subject, including the right to labor in such business, to seventeen other persons—whether the State has abridged any of the privileges or immunities of these thousand persons?"

Now, what are "privileges and immunities" in the sense of the Constitution? They are undoubtedly the personal and civil rights which usage, tradition, the habits of society, written law, and the common sentiments of people have recognized as forming the basis of the institutions of the country. The first clause in the fourteenth amendment does not deal with any interstate relations, nor relations that depend in any manner upon State laws, nor is any standard among the States referred to for the ascertainment of these privileges and immunities. It assumes that there were privileges and immunities that belong to an American citizen, and the State is commanded neither to make nor to enforce any law that will abridge them.

The case of *Ward* v. *Maryland** bears upon the matter. That case involved the validity of a statute of Maryland which imposed a tax in the form of a license to sell the agricultural and manufactured articles of other States than Maryland by card, sample, or printed lists, or catalogue. The purpose of the tax was to prohibit sales in that mode, and to relieve the resident merchant from the competition of these itinerant or transient dealers. This court decided that the power to carry on commerce in this form was "a privilege or immunity" of the sojourner.

* 12 Wallace, 419.

2. *The act in question is equally in the face of the fourteenth amendment in that it denies to the plaintiffs the equal protection of the laws.* By an act of legislative partiality it enriches seventeen persons and deprives nearly a thousand others of the same class, and as upright and competent as the seventeen, of the means by which they earn their daily bread.

3. *It is equally in violation of it, since it deprives them of their property without due process of law.* The right to labor, the right to one's self physically and intellectually, and to the product of one's own faculties, is past doubt property, and property of a sacred kind. Yet *this* property is destroyed by the act; destroyed not by due process of law, but by charter; a grant of privilege, of monopoly; which allows such rights in this matter to no one but to a favored "seventeen."

It will of course be sought to justify the act as an exercise of the police power; a matter confessedly, in its general scope, within the jurisdiction of the States. Without doubt, in that general scope, the subject of sanitary laws belong to the exercise of the power set up; but it does not follow there is no restraint on State power of legislation in police matters. The police power was invoked in the case of *Gibbons* v. *Ogden.** New York had granted to eminent citizens a monopoly of steamboat navigation in her waters as compensation for their enterprise and invention. They set up that Gibbons should not have, keep, establish, or land with a steamboat to carry passengers and freight on the navigable waters of New York. Of course the State had a great jurisdiction over its waters for all purposes of police, but none to control navigation and intercourse between the United States and foreign nations, or among the States. Suppose the grant to Fulton and Livingston had been that all persons coming to the United States, or from the States around, should, because of their services to the State, land on one of their lots and pass through their gates. This would abridge the rights secured in the fourteenth amendment.

* 9 Wheaton, 203.

The right to move with freedom, to choose his highway, and to be exempt from impositions, belongs to the citizen. He must have this power to move freely to perform his duties as a citizen.

The *Passenger Cases*, in 7 Howard, are replete with discussions on the police powers of the States. The arguments in that case appeal to the various titles in which the freedom of State action has been supposed to be unlimited. Immigrants, it was said, would bring pauperism, crime, idleness, increased expenditures, disorderly conduct. The acts, it was said, were in the nature of health acts. But the court said that the police power could not be invoked to justify even the small tax there disputed.

Messrs. M. H. Carpenter and J. S. Black (a brief of Mr. Charles Allen being filed on the same side), and Mr. T. J. Durant, representing in addition the State of Louisiana, contra.

Mr. Justice MILLER, now, April 14th, 1873, delivered the opinion of the court.

These cases are brought here by writs of error to the Supreme Court of the State of Louisiana. They arise out of the efforts of the butchers of New Orleans to resist the Crescent City Live-Stock Landing and Slaughter-House Company in the exercise of certain powers conferred by the charter which created it, and which was granted by the legislature of that State.

The cases named on a preceding page,* with others which have been brought here and dismissed by agreement, were all decided by the Supreme Court of Louisiana in favor of the Slaughter-House Company, as we shall hereafter call it for the sake of brevity, and these writs are brought to reverse those decisions.

The records were filed in this court in 1870, and were argued before it at length on a motion made by plaintiffs in error for an order in the nature of an injunction or super-

* See *supra*, p. 36, sub-title.

sedeas, pending the action of the court on the merits. The opinion on that motion is reported in 10 Wallace, 273.

On account of the importance of the questions involved in these cases they were, by permission of the court, taken up out of their order on the docket and argued in January, 1872. At that hearing one of the justices was absent, and it was found, on consultation, that there was a diversity of views among those who were present. Impressed with the gravity of the questions raised in the argument, the court under these circumstances ordered that the cases be placed on the calendar and reargued before a full bench. This argument was had early in February last.

Preliminary to the consideration of those questions is a motion by the defendant to dismiss the cases, on the ground that the contest between the parties has been adjusted by an agreement made since the records came into this court, and that part of that agreement is that these writs should be dismissed. This motion was heard with the argument on the merits, and was much pressed by counsel. It is supported by affidavits and by copies of the written agreement relied on. It is sufficient to say of these that we do not find in them satisfactory evidence that the agreement is binding upon all the parties to the record who are named as plaintiffs in the several writs of error, and that there are parties now before the court, in each of the three cases, the names of which appear on a preceding page,* who have not consented to their dismissal, and who are not bound by the action of those who have so consented. They have a right to be heard, and the motion to dismiss cannot prevail.

The records show that the plaintiffs in error relied upon, and asserted throughout the entire course of the litigation in the State courts, that the grant of privileges in the charter of defendant, which they were contesting, was a violation of the most important provisions of the thirteenth and fourteenth articles of amendment of the Constitution of the United States. The jurisdiction and the duty of this court

* See subtitle, *supra*, p. 36.—REP.

to review the judgment of the State court on those questions is clear and is imperative.

The statute thus assailed as unconstitutional was passed March 8th, 1869, and is entitled "An act to protect the health of the city of New Orleans, to locate the stock-landings and slaughter-houses, and to incorporate the Crescent City Live-Stock Landing and Slaughter-House Company."

The first section forbids the landing or slaughtering of animals whose flesh is intended for food, within the city of New Orleans and other parishes and boundaries named and defined, or the keeping or establishing any slaughter-houses or *abattoirs* within those limits except by the corporation thereby created, which is also limited to certain places afterwards mentioned. Suitable penalties are enacted for violations of this prohibition.

The second section designates the corporators, gives the name to the corporation, and confers on it the usual corporate powers.

The third and fourth sections authorize the company to establish and erect within certain territorial limits, therein defined, one or more stock-yards, stock-landings, and slaughter-houses, and imposes upon it the duty of erecting, on or before the first day of June, 1869, one grand slaughter-house of sufficient capacity for slaughtering five hundred animals per day.

It declares that the company, after it shall have prepared all the necessary buildings, yards, and other conveniences for that purpose, shall have the sole and exclusive privilege of conducting and carrying on the live-stock landing and slaughter-house business within the limits and privilege granted by the act, and that all such animals shall be landed at the stock-landings and slaughtered at the slaughter-houses of the company, and nowhere else. Penalties are enacted for infractions of this provision, and prices fixed for the maximum charges of the company for each steamboat and for each animal landed.

Section five orders the closing up of all other stock-land-

ings and slaughter-houses after the first day of June, in the parishes of Orleans, Jefferson, and St. Bernard, and makes it the duty of the company to permit any person to slaughter animals in their slaughter-houses under a heavy penalty for each refusal. Another section fixes a limit to the charges to be made by the company for each animal so slaughtered in their building, and another provides for an inspection of all animals intended to be so slaughtered, by an officer appointed by the governor of the State for that purpose.

These are the principal features of the statute, and are all that have any bearing upon the questions to be decided by us.

This statute is denounced not only as creating a monopoly and conferring odious and exclusive privileges upon a small number of persons at the expense of the great body of the community of New Orleans, but it is asserted that it deprives a large and meritorious class of citizens—the whole of the butchers of the city—of the right to exercise their trade, the business to which they have been trained and on which they depend for the support of themselves and their families; and that the unrestricted exercise of the business of butchering is necessary to the daily subsistence of the population of the city.

But a critical examination of the act hardly justifies these assertions.

It is true that it grants, for a period of twenty-five years, exclusive privileges. And whether those privileges are at the expense of the community in the sense of a curtailment of any of their fundamental rights, or even in the sense of doing them an injury, is a question open to considerations to be hereafter stated. But it is not true that it deprives the butchers of the right to exercise their trade, or imposes upon them any restriction incompatible with its successful pursuit, or furnishing the people of the city with the necessary daily supply of animal food.

The act divides itself into two main grants of privilege,—the one in reference to stock-landings and stock-yards, and

the other to slaughter-houses. That the landing of live-stock in large droves, from steamboats on the bank of the river, and from railroad trains, should, for the safety and comfort of the people and the care of the animals, be limited to proper places, and those not numerous, it needs no argument to prove. Nor can it be injurious to the general community that while the duty of making ample preparation for this is imposed upon a few men, or a corporation, they should, to enable them to do it successfully, have the exclusive right of providing such landing-places, and receiving a fair compensation for the service.

It is, however, the slaughter-house privilege, which is mainly relied on to justify the charges of gross injustice to the public, and invasion of private right.

It is not, and cannot be successfully controverted, that it is both the right and the duty of the legislative body—the supreme power of the State or municipality—to prescribe and determine the localities where the business of slaughtering for a great city may be conducted. To do this effectively it is indispensable that all persons who slaughter animals for food shall do it in those places *and nowhere else.*

The statute under consideration defines these localities and forbids slaughtering in any other. It does not, as has been asserted, prevent the butcher from doing his own slaughtering. On the contrary, the Slaughter-House Company is required, under a heavy penalty, to permit any person who wishes to do so, to slaughter in their houses; and they are bound to make ample provision for the convenience of all the slaughtering for the entire city. The butcher then is still permitted to slaughter, to prepare, and to sell his own meats; but he is required to slaughter at a specified place and to pay a reasonable compensation for the use of the accommodations furnished him at that place.

The wisdom of the monopoly granted by the legislature may be open to question, but it is difficult to see a justification for the assertion that the butchers are deprived of the right to labor in their occupation, or the people of their daily service in preparing food, or how this statute, with the

duties and guards imposed upon the company, can be said to destroy the business of the butcher, or seriously interfere with its pursuit.

The power here exercised by the legislature of Louisiana is, in its essential nature, one which has been, up to the present period in the constitutional history of this country, always conceded to belong to the States, however it may *now* be questioned in some of its details.

"Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may all," says Chancellor Kent,* "be interdicted by law, in the midst of dense masses of population, on the general and rational principle, that every person ought so to use his property as not to injure his neighbors; and that private interests must be made subservient to the general interests of the community." This is called the police power; and it is declared by Chief Justice Shaw† that it is much easier to perceive and realize the existence and sources of it than to mark its boundaries, or prescribe limits to its exercise.

This power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property. "It extends," says another eminent judge,‡ "to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State; . . . and persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the State. Of the perfect right of the legislature to do this no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned."

* 2 Commentaries, 340. † Commonwealth *v.* Alger, 7 Cushing, 84.

‡ Thorpe *v.* Rutland and Burlington Railroad Co., 27 Vermont, 149.

The regulation of the place and manner of conducting the slaughtering of animals, and the business of butchering within a city, and the inspection of the animals to be killed for meat, and of the meat afterwards, are among the most necessary and frequent exercises of this power. It is not, therefore, needed that we should seek for a comprehensive definition, but rather look for the proper source of its exercise.

In *Gibbons* v. *Ogden*,* Chief Justice Marshall, speaking of inspection laws passed by the States, says: "They form a portion of that immense mass of legislation which controls everything within the territory of a State not surrendered to the General Government—all which can be most advantageously administered by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c., are component parts. No direct general power over these objects is granted to Congress; and consequently they remain subject to State legislation."

The exclusive authority of State legislation over this subject is strikingly illustrated in the case of the *City of New York* v. *Miln*.† In that case the defendant was prosecuted for failing to comply with a statute of New York which required of every master of a vessel arriving from a foreign port, in that of New York City, to report the names of all his passengers, with certain particulars of their age, occupation, last place of settlement, and place of their birth. It was argued that this act was an invasion of the exclusive right of Congress to regulate commerce. And it cannot be denied that such a statute operated at least indirectly upon the commercial intercourse between the citizens of the United States and of foreign countries. But notwithstanding this it was held to be an exercise of the police power properly within the control of the State, and unaffected by the clause of the Constitution which conferred on Congress the right to regulate commerce.

* 9 Wheaton, 203.

† 11 Peters, 102.

To the same purpose are the recent cases of the *The License Tax*,* and *United States* v. *De Witt*.† In the latter case an act of Congress which undertook as a part of the internal revenue laws to make it a misdemeanor to mix for sale naphtha and illuminating oils, or to sell oil of petroleum inflammable at less than a prescribed temperature, was held to be void, because as a police regulation the power to make such a law belonged to the States, and did not belong to Congress.

It cannot be denied that the statute under consideration is aptly framed to remove from the more densely populated part of the city, the noxious slaughter-houses, and large and offensive collections of animals necessarily incident to the slaughtering business of a large city, and to locate them where the convenience, health, and comfort of the people require they shall be located. And it must be conceded that the means adopted by the act for this purpose are appropriate, are stringent, and effectual. But it is said that in creating a corporation for this purpose, and conferring upon it exclusive privileges—privileges which it is said constitute a monopoly—the legislature has exceeded its power. If this statute had imposed on the city of New Orleans precisely the same duties, accompanied by the same privileges, which it has on the corporation which it created, it is believed that no question would have been raised as to its constitutionality. In that case the effect on the butchers in pursuit of their occupation and on the public would have been the same as it is now. Why cannot the legislature confer the same powers on another corporation, created for a lawful and useful public object, that it can on the municipal corporation already existing? That wherever a legislature has the right to accomplish a certain result, and that result is best attained by means of a corporation, it has the right to create such a corporation, and to endow it with the powers necessary to effect the desired and lawful purpose, seems hardly to admit of debate. The proposition is ably discussed and affirmed in the case of *McCulloch* v. *The State of Maryland*,‡ in relation to the power of Congress to organize

* 5 Wallace, 471. † 9 Id. 41. ‡ 4 Wheaton, 316.

the Bank of the United States to aid in the fiscal operations of the government.

It can readily be seen that the interested vigilance of the corporation created by the Louisiana legislature will be more efficient in enforcing the limitation prescribed for the stock-landing and slaughtering business for the good of the city than the ordinary efforts of the officers of the law.

Unless, therefore, it can be maintained that the exclusive privilege granted by this charter to the corporation, is beyond the power of the legislature of Louisiana, there can be no just exception to the validity of the statute. And in this respect we are not able to see that these privileges are especially odious or objectionable. The duty imposed as a consideration for the privilege is well defined, and its enforcement well guarded. The prices or charges to be made by the company are limited by the statute, and we are not advised that they are on the whole exorbitant or unjust.

The proposition is, therefore, reduced to these terms: Can any exclusive privileges be granted to any of its citizens, or to a corporation, by the legislature of a State?

The eminent and learned counsel who has twice argued the negative of this question, has displayed a research into the history of monopolies in England, and the European continent, only equalled by the eloquence with which they are denounced.

But it is to be observed, that all such references are to monopolies established by the monarch in derogation of the rights of his subjects, or arise out of transactions in which the people were unrepresented, and their interests uncared for. The great *Case of Monopolies*, reported by Coke, and so fully stated in the brief, was undoubtedly a contest of the commons against the monarch. The decision is based upon the ground that it was against common law, and the argument was aimed at the unlawful assumption of power by the crown; for whoever doubted the authority of Parliament to change or modify the common law? The discussion in the House of Commons cited from Macaulay clearly

establishes that the contest was between the crown, and the people represented in Parliament.

But we think it may be safely affirmed, that the Parliament of Great Britain, representing the people in their legislative functions, and the legislative bodies of this country, have from time immemorial to the present day, continued to grant to persons and corporations exclusive privileges—privileges denied to other citizens—privileges which come within any just definition of the word monopoly, as much as those now under consideration; and that the power to do this has never been questioned or denied. Nor can it be truthfully denied, that some of the most useful and beneficial enterprises set on foot for the general good, have been made successful by means of these exclusive rights, and could only have been conducted to success in that way.

It may, therefore, be considered as established, that the authority of the legislature of Louisiana to pass the present statute is ample, unless some restraint in the exercise of that power be found in the constitution of that State or in the amendments to the Constitution of the United States, adopted since the date of the decisions we have already cited.

If any such restraint is supposed to exist in the constitution of the State, the Supreme Court of Louisiana having necessarily passed on that question, it would not be open to review in this court.

The plaintiffs in error accepting this issue, allege that the statute is a violation of the Constitution of the United States in these several particulars:

That it creates an involuntary servitude forbidden by the thirteenth article of amendment;

That it abridges the privileges and immunities of citizens of the United States;

That it denies to the plaintiffs the equal protection of the laws; and,

That it deprives them of their property without due process of law; contrary to the provisions of the first section of the fourteenth article of amendment.

This court is thus called upon for the first time to give construction to these articles.

We do not conceal from ourselves the great responsibility which this duty devolves upon us. No questions so far-reaching and pervading in their consequences, so profoundly interesting to the people of this country, and so important in their bearing upon the relations of the United States, and of the several States to each other and to the citizens of the States and of the United States, have been before this court during the official life of any of its present members. We have given every opportunity for a full hearing at the bar; we have discussed it freely and compared views among ourselves; we have taken ample time for careful deliberation, and we now propose to announce the judgments which we have formed in the construction of those articles, so far as we have found them necessary to the decision of the cases before us, and beyond that we have neither the inclination nor the right to go.

Twelve articles of amendment were added to the Federal Constitution soon after the original organization of the government under it in 1789. Of these all but the last were adopted so soon afterwards as to justify the statement that they were practically contemporaneous with the adoption of the original; and the twelfth, adopted in eighteen hundred and three, was so nearly so as to have become, like all the others, historical and of another age. But within the last eight years three other articles of amendment of vast importance have been added by the voice of the people to that now venerable instrument.

The most cursory glance at these articles discloses a unity of purpose, when taken in connection with the history of the times, which cannot fail to have an important bearing on any question of doubt concerning their true meaning. Nor can such doubts, when any reasonably exist, be safely and rationally solved without a reference to that history; for in it is found the occasion and the necessity for recurring again to the great source of power in this country, the people of the States, for additional guarantees of human rights;

additional powers to the Federal government; additional restraints upon those of the States. Fortunately that history is fresh within the memory of us all, and its leading features, as they bear upon the matter before us, free from doubt.

The institution of African slavery, as it existed in about half the States of the Union, and the contests pervading the public mind for many years, between those who desired its curtailment and ultimate extinction and those who desired additional safeguards for its security and perpetuation, culminated in the effort, on the part of most of the States in which slavery existed, to separate from the Federal government, and to resist its authority. This constituted the war of the rebellion, and whatever auxiliary causes may have contributed to bring about this war, undoubtedly the overshadowing and efficient cause was African slavery.

In that struggle slavery, as a legalized social relation, perished. It perished as a necessity of the bitterness and force of the conflict. When the armies of freedom found themselves upon the soil of slavery they could do nothing less than free the poor victims whose enforced servitude was the foundation of the quarrel. And when hard pressed in the contest these men (for they proved themselves men in that terrible crisis) offered their services and were accepted by thousands to aid in suppressing the unlawful rebellion, slavery was at an end wherever the Federal government succeeded in that purpose. The proclamation of President Lincoln expressed an accomplished fact as to a large portion of the insurrectionary districts, when he declared slavery abolished in them all. But the war being over, those who had succeeded in re-establishing the authority of the Federal government were not content to permit this great act of emancipation to rest on the actual results of the contest or the proclamation of the Executive, both of which might have been questioned in after times, and they determined to place this main and most valuable result in the Constitution of the restored Union as one of its fundamental articles. Hence the thirteenth article of amendment of that instru-

ment. Its two short sections seem hardly to admit of construction, so vigorous is their expression and so appropriate to the purpose we have indicated.

"1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

"2. Congress shall have power to enforce this article by appropriate legislation."

To withdraw the mind from the contemplation of this grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this government—a declaration designed to establish the freedom of four millions of slaves—and with a microscopic search endeavor to find in it a reference to servitudes, which may have been attached to property in certain localities, requires an effort, to say the least of it.

That a personal servitude was meant is proved by the use of the word "involuntary," which can only apply to human beings. The exception of servitude as a punishment for crime gives an idea of the class of servitude that is meant. The word servitude is of larger meaning than slavery, as the latter is popularly understood in this country, and the obvious purpose was to forbid all shades and conditions of African slavery. It was very well understood that in the form of apprenticeship for long terms, as it had been practiced in the West India Islands, on the abolition of slavery by the English government, or by reducing the slaves to the condition of serfs attached to the plantation, the purpose of the article might have been evaded, if only the word slavery had been used. The case of the apprentice slave, held under a law of Maryland, liberated by Chief Justice Chase, on a writ of habeas corpus under this article, illustrates this course of observation.* And it is all that we deem necessary to say on the application of that article to the statute of Louisiana, now under consideration.

* Matter of Turner, 1 Abbott United States Reports, 84.

The process of restoring to their proper relations with the Federal government and with the other States those which had sided with the rebellion, undertaken under the proclamation of President Johnson in 1865, and before the assembling of Congress, developed the fact that, notwithstanding the formal recognition by those States of the abolition of slavery, the condition of the slave race would, without further protection of the Federal government, be almost as bad as it was before. Among the first acts of legislation adopted by several of the States in the legislative bodies which claimed to be in their normal relations with the Federal government, were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value, while they had lost the protection which they had received from their former owners from motives both of interest and humanity.

They were in some States forbidden to appear in the towns in any other character than menial servants. They were required to reside on and cultivate the soil without the right to purchase or own it. They were excluded from many occupations of gain, and were not permitted to give testimony in the courts in any case where a white man was a party. It was said that their lives were at the mercy of bad men, either because the laws for their protection were insufficient or were not enforced.

These circumstances, whatever of falsehood or misconception may have been mingled with their presentation, forced upon the statesmen who had conducted the Federal government in safety through the crisis of the rebellion, and who supposed that by the thirteenth article of amendment they had secured the result of their labors, the conviction that something more was necessary in the way of constitutional protection to the unfortunate race who had suffered so much. They accordingly passed through Congress the proposition for the fourteenth amendment, and they declined to treat as restored to their full participation in the government of the Union the States which had been in insurrection, until they

ratified that article by a formal vote of their legislative bodies.

Before we proceed to examine more critically the provisions of this amendment, on which the plaintiffs in error rely, let us complete and dismiss the history of the recent amendments, as that history relates to the general purpose which pervades them all. A few years' experience satisfied the thoughtful men who had been the authors of the other two amendments that, notwithstanding the restraints of those articles on the States, and the laws passed under the additional powers granted to Congress, these were inadequate for the protection of life, liberty, and property, without which freedom to the slave was no boon. They were in all those States denied the right of suffrage. The laws were administered by the white man alone. It was urged that a race of men distinctively marked as was the negro, living in the midst of another and dominant race, could never be fully secured in their person and their property without the right of suffrage.

Hence the fifteenth amendment, which declares that "the right of a citizen of the United States to vote shall not be denied or abridged by any State on account of race, color, or previous condition of servitude." The negro having, by the fourteenth amendment, been declared to be a citizen of the United States, is thus made a voter in every State of the Union.

We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the fifteenth amendment, in terms,

mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth.

We do not say that no one else but the negro can share in this protection. Both the language and spirit of these articles are to have their fair and just weight in any question of construction. Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void. And so if other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent. But what we do say, and what we wish to be understood is, that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution, until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it.

The first section of the fourteenth article, to which our attention is more specially invited, opens with a definition of citizenship—not only citizenship of the United States, but citizenship of the States. No such definition was previously found in the Constitution, nor had any attempt been made to define it by act of Congress. It had been the occasion of much discussion in the courts, by the executive departments, and in the public journals. It had been said by eminent judges that no man was a citizen of the United States, except as he was a citizen of one of the States composing the Union. Those, therefore, who had been born and resided always in the District of Columbia or in the Territories, though within the United States, were not citizens. Whether

this proposition was sound or not had never been judicially decided. But it had been held by this court, in the celebrated Dred Scott case, only a few years before the outbreak of the civil war, that a man of African descent, whether a slave or not, was not and could not be a citizen of a State or of the United States. This decision, while it met the condemnation of some of the ablest statesmen and constitutional lawyers of the country, had never been overruled; and if it was to be accepted as a constitutional limitation of the right of citizenship, then all the negro race who had recently been made freemen, were still, not only not citizens, but were incapable of becoming so by anything short of an amendment to the Constitution.

To remove this difficulty primarily, and to establish a clear and comprehensive definition of citizenship which should declare what should constitute citizenship of the United States, and also citizenship of a State, the first clause of the first section was framed.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

The first observation we have to make on this clause is, that it puts at rest both the questions which we stated to have been the subject of differences of opinion. It declares that persons may be citizens of the United States without regard to their citizenship of a particular State, and it overturns the Dred Scott decision by making *all persons* born within the United States and subject to its jurisdiction citizens of the United States. That its main purpose was to establish the citizenship of the negro can admit of no doubt. The phrase, "subject to its jurisdiction" was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States.

The next observation is more important in view of the arguments of counsel in the present case. It is, that the distinction between citizenship of the United States and citizenship of a State is clearly recognized and established.

Not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within the State to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union.

It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual.

We think this distinction and its explicit recognition in this amendment of great weight in this argument, because the next paragraph of this same section, which is the one mainly relied on by the plaintiffs in error, speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several States. The argument, however, in favor of the plaintiffs rests wholly on the assumption that the citizenship is the same, and the privileges and immunities guaranteed by the clause are the same.

The language is, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of *the United States*." It is a little remarkable, if this clause was intended as a protection to the citizen of a State against the legislative power of his own State, that the word citizen of the State should be left out when it is so carefully used, and used in contradistinction to citizens of the United States, in the very sentence which precedes it. It is too clear for argument that the change in phraseology was adopted understandingly and with a purpose.

Of the privileges and immunities of the citizen of the United States, and of the privileges and immunities of the citizen of the State, and what they respectively are, we will presently consider; but we wish to state here that it is only the former which are placed by this clause under the protection of the Federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment.

If, then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of the State as such, the latter must rest for their security and protection where they have heretofore rested; for they are not embraced by this paragraph of the amendment.

The first occurrence of the words "privileges and immunities" in our constitutional history, is to be found in the fourth of the articles of the old Confederation.

It declares "that the better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively."

In the Constitution of the United States, which superseded the Articles of Confederation, the corresponding provision is found in section two of the fourth article, in the following words: "The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States."

There can be but little question that the purpose of both these provisions is the same, and that the privileges and immunities intended are the same in each. In the article of the Confederation we have some of these specifically mentioned, and enough perhaps to give some general idea of the class of civil rights meant by the phrase.

Fortunately we are not without judicial construction of this clause of the Constitution. The first and the leading case on the subject is that of *Corfield* v. *Coryell*, decided by Mr. Justice Washington in the Circuit Court for the District of Pennsylvania in 1823.*

* 4 Washington's Circuit Court, 371.

"The inquiry," he says, "is, what are the privileges and immunities of citizens of the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are *fundamental;* which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads: protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole."

This definition of the privileges and immunities of citizens of the States is adopted in the main by this court in the recent case of *Ward* v. *The State of Maryland*,* while it declines to undertake an authoritative definition beyond what was necessary to that decision. The description, when taken to include others not named, but which are of the same general character, embraces nearly every civil right for the establishment and protection of which organized government is instituted. They are, in the language of Judge Washington, those rights which are fundamental. Throughout his opinion, they are spoken of as rights belonging to the individual as a citizen of a State. They are so spoken of in the constitutional provision which he was construing. And they have always been held to be the class of rights which the State governments were created to establish and secure.

In the case of *Paul* v. *Virginia*,† the court, in expounding this clause of the Constitution, says that "the privileges and immunities secured to citizens of each State in the several States, by the provision in question, are those privileges and immunities which are common to the citizens in the latter

* 12 Wallace, 430.

† 8 Id. 180.

States under their constitution and laws by virtue of their being citizens."

The constitutional provision there alluded to did not create those rights, which it called privileges and immunities of citizens of the States. It threw around them in that clause no security for the citizen of the State in which they were claimed or exercised. Nor did it profess to control the power of the State governments over the rights of its own citizens.

Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction.

It would be the vainest show of learning to attempt to prove by citations of authority, that up to the adoption of the recent amendments, no claim or pretence was set up that those rights depended on the Federal government for their existence or protection, beyond the very few express limitations which the Federal Constitution imposed upon the States—such, for instance, as the prohibition against ex post facto laws, bills of attainder, and laws impairing the obligation of contracts. But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power of the States, and without that of the Federal government. Was it the purpose of the fourteenth amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of *citizens of the United States*, to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?

All this and more must follow, if the proposition of the

plaintiffs in error be sound. For not only are these rights subject to the control of Congress whenever in its discretion any of them are supposed to be abridged by State legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the States, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects. And still further, such a construction followed by the reversal of the judgments of the Supreme Court of Louisiana in these cases, would constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment. The argument we admit is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt.

We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them.

Having shown that the privileges and immunities relied on in the argument are those which belong to citizens of the States as such, and that they are left to the State governments for security and protection, and not by this article placed under the special care of the Federal government, we may hold ourselves excused from defining the privileges

and immunities of citizens of the United States which no State can abridge, until some case involving those privileges may make it necessary to do so.

But lest it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture to suggest some which owe their existence to the Federal government, its National character, its Constitution, or its laws.

One of these is well described in the case of *Crandall* v. *Nevada*.* It is said to be the right of the citizen of this great country, protected by implied guarantees of its Constitution, "to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through which all operations of foreign commerce are conducted, to the subtreasuries, land offices, and courts of justice in the several States." And quoting from the language of Chief Justice Taney in another case, it is said "that *for all the great purposes for which the Federal government* was established, we are one people, with one common country, *we are all citizens of the United States;*" and it is, as such citizens, that their rights are supported in this court in *Crandall* v. *Nevada*.

Another privilege of a citizen of the United States is to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States. The right to peaceably assemble and petition for redress of grievances, the privilege of the writ of *habeas corpus*, are rights of the citizen guaranteed by the Federal Constitution. The right to use the navigable waters of the United States, however they may penetrate the territory of the several States, all rights secured to our citizens by treaties with foreign nations,

* 6 Wallace, 36.

are dependent upon citizenship of the United States, and not citizenship of a State. One of these privileges is conferred by the very article under consideration. It is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bonâ fide* residence therein, with the same rights as other citizens of that State. To these may be added the rights secured by the thirteenth and fifteenth articles of amendment, and by the other clause of the fourteenth, next to be considered.

But it is useless to pursue this branch of the inquiry, since we are of opinion that the rights claimed by these plaintiffs in error, if they have any existence, are not privileges and immunities of citizens of the United States within the meaning of the clause of the fourteenth amendment under consideration.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of its laws."

The argument has not been much pressed in these cases that the defendant's charter deprives the plaintiffs of their property without due process of law, or that it denies to them the equal protection of the law. The first of these paragraphs has been in the Constitution since the adoption of the fifth amendment, as a restraint upon the Federal power. It is also to be found in some form of expression in the constitutions of nearly all the States, as a restraint upon the power of the States. This law, then, has practically been the same as it now is during the existence of the government, except so far as the present amendment may place the restraining power over the States in this matter in the hands of the Federal government.

We are not without judicial interpretation, therefore, both State and National, of the meaning of this clause. And it

is sufficient to say that under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision.

"Nor shall any State deny to any person within its jurisdiction the equal protection of the laws."

In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause. The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.

If, however, the States did not conform their laws to its requirements, then by the fifth section of the article of amendment Congress was authorized to enforce it by suitable legislation. We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other. But as it is a State that is to be dealt with, and not alone the validity of its laws, we may safely leave that matter until Congress shall have exercised its power, or some case of State oppression, by denial of equal justice in its courts, shall have claimed a decision at our hands. We find no such case in the one before us, and do not deem it necessary to go over the argument again, as it may have relation to this particular clause of the amendment.

In the early history of the organization of the government, its statesmen seem to have divided on the line which should separate the powers of the National government from those of the State governments, and though this line has

never been very well defined in public opinion, such a division has continued from that day to this.

The adoption of the first eleven amendments to the Constitution so soon after the original instrument was accepted, shows a prevailing sense of danger at that time from the Federal power. And it cannot be denied that such a jealousy continued to exist with many patriotic men until the breaking out of the late civil war. It was then discovered that the true danger to the perpetuity of the Union was in the capacity of the State organizations to combine and concentrate all the powers of the State, and of contiguous States, for a determined resistance to the General Government.

Unquestionably this has given great force to the argument, and added largely to the number of those who believe in the necessity of a strong National government.

But, however pervading this sentiment, and however it may have contributed to the adoption of the amendments we have been considering, we do not see in those amendments any purpose to destroy the main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the States with powers for domestic and local government, including the regulation of civil rights—the rights of person and of property—was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the States, and to confer additional power on that of the Nation.

But whatever fluctuations may be seen in the history of public opinion on this subject during the period of our national existence, we think it will be found that this court, so far as its functions required, has always held with a steady and an even hand the balance between State and Federal power, and we trust that such may continue to be the history of its relation to that subject so long as it shall have duties to perform which demand of it a construction of the Constitution, or of any of its parts.

The judgments of the Supreme Court of Louisiana in these cases are

AFFIRMED.

Mr. Justice FIELD, dissenting:

I am unable to agree with the majority of the court in these cases, and will proceed to state the reasons of my dissent from their judgment.

The cases grow out of the act of the legislature of the State of Louisiana, entitled "An act to protect the health of the city of New Orleans, to locate the stock-landings and slaughter-houses, and to incorporate 'The Crescent City Live-Stock Landing and Slaughter-House Company,'" which was approved on the eighth of March, 1869, and went into operation on the first of June following. The act creates the corporation mentioned in its title, which is composed of seventeen persons designated by name, and invests them and their successors with the powers usually conferred upon corporations in addition to their special and exclusive privileges. It first declares that it shall not be lawful, after the first day of June, 1869, to "land, keep, or slaughter any cattle, beeves, calves, sheep, swine, or other animals, or to have, keep, or establish any stock-landing, yards, slaughter-houses, or abattoirs within the city of New Orleans or the parishes of Orleans, Jefferson, and St. Bernard," except as provided in the act; and imposes a penalty of two hundred and fifty dollars for each violation of its provisions. It then authorizes the corporation mentioned to establish and erect within the parish of St. Bernard and the corporate limits of New Orleans, below the United States barracks, on the east side of the Mississippi, or at any point below a designated railroad depot on the west side of the river, "wharves, stables, sheds, yards, and buildings, necessary to land, stable, shelter, protect, and preserve all kinds of horses, mules, cattle, and other animals," and provides that cattle and other animals, destined for sale or slaughter in the city of New Orleans or its environs, shall be landed at the landings and yards of the company, and be there

yarded, sheltered, and protected, if necessary; and that the company shall be entitled to certain prescribed fees for the use of its wharves, and for each animal landed, and be authorized to detain the animals until the fees are paid, and if not paid within fifteen days to take proceedings for their sale. Every person violating any of these provisions, or landing, yarding, or keeping animals elsewhere, is subjected to a fine of two hundred and fifty dollars.

The act then requires the corporation to erect a grand slaughter-house of sufficient dimensions to accommodate all butchers, and in which five hundred animals may be slaughtered a day, with a sufficient number of sheds and stables for the stock received at the port of New Orleans, at the same time authorizing the company to erect other landing-places and other slaughter-houses at any points consistent with the provisions of the act.

The act then provides that when the slaughter-houses and accessory buildings have been completed and thrown open for use, public notice thereof shall be given for thirty days, and within that time "all other stock-landings and slaughter-houses within the parishes of Orleans, Jefferson, and St. Bernard shall be closed, and it shall no longer be lawful to slaughter cattle, hogs, calves, sheep, or goats, the meat of which is determined [destined] for sale within the parishes aforesaid, under a penalty of one hundred dollars for each and every offence."

The act then provides that the company shall receive for every animal slaughtered in its buildings certain prescribed fees, besides the head, feet, gore, and entrails of all animals except of swine.

Other provisions of the act require the inspection of the animals before they are slaughtered, and allow the construction of railways to facilitate communication with the buildings of the company and the city of New Orleans.

But it is only the special and exclusive privileges conferred by the act that this court has to consider in the cases before it. These privileges are granted for the period of twenty-five years. Their exclusive character not only fol-

lows from the provisions I have cited, but it is declared in express terms in the act. In the third section the language is that the corporation "shall have the *sole and exclusive privilege* of conducting and carrying on the live-stock, landing, and slaughter-house business within the limits and privileges granted by the provisions of the act." And in the fourth section the language is, that after the first of June, 1869, the company shall have "the exclusive privilege of having landed at their landing-places all animals intended for sale or slaughter in the parishes of Orleans and Jefferson," and "the exclusive privilege of having slaughtered" in its slaughter-houses all animals, the meat of which is intended for sale in these parishes.

In order to understand the real character of these special privileges, it is necessary to know the extent of country and of population which they affect. The parish of Orleans contains an area of country of 150 square miles; the parish of Jefferson, 384 square miles; and the parish of St. Bernard, 620 square miles. The three parishes together contain an area of 1154 square miles, and they have a population of between two and three hundred thousand people.

The plaintiffs in error deny the validity of the act in question, so far as it confers the special and exclusive privileges mentioned. The first case before us was brought by an association of butchers in the three parishes against the corporation, to prevent the assertion and enforcement of these privileges. The second case was instituted by the attorney-general of the State, in the name of the State, to protect the corporation in the enjoyment of these privileges, and to prevent an association of stock-dealers and butchers from acquiring a tract of land in the same district with the corporation, upon which to erect suitable buildings for receiving, keeping, and slaughtering cattle, and preparing animal food for market. The third case was commenced by the corporation itself, to restrain the defendants from carrying on a business similar to its own, in violation of its alleged exclusive privileges.

The substance of the averments of the plaintiffs in error

is this: That prior to the passage of the act in question they were engaged in the lawful and necessary business of procuring and bringing to the parishes of Orleans, Jefferson, and St. Bernard, animals suitable for human food, and in preparing such food for market; that in the prosecution of this business they had provided in these parishes suitable establishments for landing, sheltering, keeping, and slaughtering cattle and the sale of meat; that with their association about four hundred persons were connected, and that in the parishes named about a thousand persons were thus engaged in procuring, preparing, and selling animal food. And they complain that the business of landing, yarding, and keeping, within the parishes named, cattle intended for sale or slaughter, which was lawful for them to pursue before the first day of June, 1869, is made by that act unlawful for any one except the corporation named; and that the business of slaughtering cattle and preparing animal food for market, which it was lawful for them to pursue in these parishes before that day, is made by that act unlawful for them to pursue afterwards, except in the buildings of the company, and upon payment of certain prescribed fees, and a surrender of a valuable portion of each animal slaughtered. And they contend that the lawful business of landing, yarding, sheltering, and keeping cattle intended for sale or slaughter, which they in common with every individual in the community of the three parishes had a right to follow, cannot be thus taken from them and given over for a period of twenty-five years to the sole and exclusive enjoyment of a corporation of seventeen persons or of anybody else. And they also contend that the lawful and necessary business of slaughtering cattle and preparing animal food for market, which they and all other individuals had a right to follow, cannot be thus restricted within this territory of 1154 square miles to the buildings of this corporation, or be subjected to tribute for the emolument of that body.

No one will deny the abstract justice which lies in the position of the plaintiffs in error; and I shall endeavor to

show that the position has some support in the fundamental law of the country.

It is contended in justification for the act in question that it was adopted in the interest of the city, to promote its cleanliness and protect its health, and was the legitimate exercise of what is termed the police power of the State. That power undoubtedly extends to all regulations affecting the health, good order, morals, peace, and safety of society, and is exercised on a great variety of subjects, and in almost numberless ways. All sorts of restrictions and burdens are imposed under it, and when these are not in conflict with any constitutional prohibitions, or fundamental principles, they cannot be successfully assailed in a judicial tribunal. With this power of the State and its legitimate exercise I shall not differ from the majority of the court. But under the pretence of prescribing a police regulation the State cannot be permitted to encroach upon any of the just rights of the citizen, which the Constitution intended to secure against abridgment.

In the law in question there are only two provisions which can properly be called police regulations—the one which requires the landing and slaughtering of animals below the city of New Orleans, and the other which requires the inspection of the animals before they are slaughtered. When these requirements are complied with, the sanitary purposes of the act are accomplished. In all other particulars the act is a mere grant to a corporation created by it of special and exclusive privileges by which the health of the city is in no way promoted. It is plain that if the corporation can, without endangering the health of the public, carry on the business of landing, keeping, and slaughtering cattle within a district below the city embracing an area of over a thousand square miles, it would not endanger the public health if other persons were also permitted to carry on the same business within the same district under similar conditions as to the inspection of the animals. The health of the city might require the removal from its limits and suburbs of all buildings for keeping and slaughtering cattle, but no such

object could possibly justify legislation removing such buildings from a large part of the State for the benefit of a single corporation. The pretence of sanitary regulations for the grant of the exclusive privileges is a shallow one, which merits only this passing notice.

It is also sought to justify the act in question on the same principle that exclusive grants for ferries, bridges, and turnpikes are sanctioned. But it can find no support there. Those grants are of franchises of a public character appertaining to the government. Their use usually requires the exercise of the sovereign right of eminent domain. It is for the government to determine when one of them shall be granted, and the conditions upon which it shall be enjoyed. It is the duty of the government to provide suitable roads, bridges, and ferries for the convenience of the public, and if it chooses to devolve this duty to any extent, or in any locality, upon particular individuals or corporations, it may of course stipulate for such exclusive privileges connected with the franchise as it may deem proper, without encroaching upon the freedom or the just rights of others. The grant, with exclusive privileges, of a right thus appertaining to the government, is a very different thing from a grant, with exclusive privileges, of a right to pursue one of the ordinary trades or callings of life, which is a right appertaining solely to the individual.

Nor is there any analogy between this act of Louisiana and the legislation which confers upon the inventor of a new and useful improvement an exclusive right to make and sell to others his invention. The government in this way only secures to the inventor the temporary enjoyment of that which, without him, would not have existed. It thus only recognizes in the inventor a temporary property in the product of his own brain.

The act of Louisiana presents the naked case, unaccompanied by any public considerations, where a right to pursue a lawful and necessary calling, previously enjoyed by every citizen, and in connection with which a thousand persons were daily employed, is taken away and vested exclusively

for twenty-five years, for an extensive district and a large population, in a single corporation, or its exercise is for that period restricted to the establishments of the corporation, and there allowed only upon onerous conditions.

If exclusive privileges of this character can be granted to a corporation of seventeen persons, they may, in the discretion of the legislature, be equally granted to a single individual. If they may be granted for twenty-five years they may be equally granted for a century, and in perpetuity. If they may be granted for the landing and keeping of animals intended for sale or slaughter they may be equally granted for the landing and storing of grain and other products of the earth, or for any article of commerce. If they may be granted for structures in which animal food is prepared for market they may be equally granted for structures in which farinaceous or vegetable food is prepared. They may be granted for any of the pursuits of human industry, even in its most simple and common forms. Indeed, upon the theory on which the exclusive privileges granted by the act in question are sustained, there is no monopoly, in the most odious form, which may not be upheld.

The question presented is, therefore, one of the gravest importance, not merely to the parties here, but to the whole country. It is nothing less than the question whether the recent amendments to the Federal Constitution protect the citizens of the United States against the deprivation of their common rights by State legislation. In my judgment the fourteenth amendment does afford such protection, and was so intended by the Congress which framed and the States which adopted it.

The counsel for the plaintiffs in error have contended, with great force, that the act in question is also inhibited by the thirteenth amendment.

That amendment prohibits slavery and involuntary servitude, except as a punishment for crime, but I have not supposed it was susceptible of a construction which would cover the enactment in question. I have been so accustomed to regard it as intended to meet that form of slavery which had

previously prevailed in this country, and to which the recent civil war owed its existence, that I was not prepared, nor am I yet, to give to it the extent and force ascribed by counsel. Still it is evident that the language of the amendment is not used in a restrictive sense. It is not confined to African slavery alone. It is general and universal in its application. Slavery of white men as well as of black men is prohibited, and not merely slavery in the strict sense of the term, but involuntary servitude in every form.

The words "involuntary servitude" have not been the subject of any judicial or legislative exposition, that I am aware of, in this country, except that which is found in the Civil Rights Act, which will be hereafter noticed. It is, however, clear that they include something more than slavery in the strict sense of the term; they include also serfage, vassalage, villenage, peonage, and all other forms of compulsory service for the mere benefit or pleasure of others. Nor is this the full import of the terms. The abolition of slavery and involuntary servitude was intended to make every one born in this country a freeman, and as such to give to him the right to pursue the ordinary avocations of life without other restraint than such as affects all others, and to enjoy equally with them the fruits of his labor. A prohibition to him to pursue certain callings, open to others of the same age, condition, and sex, or to reside in places where others are permitted to live, would so far deprive him of the rights of a freeman, and would place him, as respects others, in a condition of servitude. A person allowed to pursue only one trade or calling, and only in one locality of the country, would not be, in the strict sense of the term, in a condition of slavery, but probably none would deny that he would be in a condition of servitude. He certainly would not possess the liberties nor enjoy the privileges of a freeman. The compulsion which would force him to labor even for his own benefit only in one direction, or in one place, would be almost as oppressive and nearly as great an invasion of his liberty as the compulsion which would force him to labor for the benefit or pleasure of another,

and would equally constitute an element of servitude. The counsel of the plaintiffs in error therefore contend that "wherever a law of a State, or a law of the United States, makes a discrimination between classes of persons, which deprives the one class of their freedom or their property, or which makes a caste of them to subserve the power, pride, avarice, vanity, or vengeance of others," there involuntary servitude exists within the meaning of the thirteenth amendment.

It is not necessary, in my judgment, for the disposition of the present case in favor of the plaintiffs in error, to accept as entirely correct this conclusion of counsel. It, however, finds support in the act of Congress known as the Civil Rights Act, which was framed and adopted upon a construction of the thirteenth amendment, giving to its language a similar breadth. That amendment was ratified on the eighteenth of December, 1865,* and in April of the following year the Civil Rights Act was passed.† Its first section declares that all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are "citizens of the United States," and that "such citizens, of every race and color, without regard to any previous condition of slavery, or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall have the same right in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as enjoyed by white citizens."

This legislation was supported upon the theory that citizens of the United States as such were entitled to the rights and privileges enumerated, and that to deny to any such citizen equality in these rights and privileges with others, was, to the extent of the denial, subjecting him to an invol-

* The proclamation of its ratification was made on that day (13 Stat. at Large, 774).

† 14 Id. 27.

untary servitude. Senator Trumbull, who drew the act and who was its earnest advocate in the Senate, stated, on opening the discussion upon it in that body, that the measure was intended to give effect to the declaration of the amendment, and to secure to all persons in the United States practical freedom. After referring to several statutes passed in some of the Southern States, discriminating between the freedmen and white citizens, and after citing the definition of civil liberty given by Blackstone, the Senator said: "I take it that any statute which is not equal to all, and which deprives any citizen of civil rights, which are secured to other citizens, is an unjust encroachment upon his liberty; and it is in fact a badge of servitude which by the Constitution is prohibited."*

By the act of Louisiana, within the three parishes named, a territory exceeding one thousand one hundred square miles, and embracing over two hundred thousand people, every man who pursues the business of preparing animal food for market must take his animals to the buildings of the favored company, and must perform his work in them, and for the use of the buildings must pay a prescribed tribute to the company, and leave with it a valuable portion of each animal slaughtered. Every man in these parishes who has a horse or other animal for sale, must carry him to the yards and stables of this company, and for their use pay a like tribute. He is not allowed to do his work in his own buildings, or to take his animals to his own stables or keep them in his own yards, even though they should be erected in the same district as the buildings, stables, and yards of the company, and that district embraces over eleven hundred square miles. The prohibitions imposed by this act upon butchers and dealers in cattle in these parishes, and the special privileges conferred upon the favored corporation, are similar in principle and as odious in character as the restrictions imposed in the last century upon the peasantry in some parts of France, where, as says a French

* Congressional Globe, 1st Session, 39th Congress, part 1, page 474

writer, the peasant was prohibted "to hunt on his own lands, to fish in his own waters, to grind at his own mill, to cook at his own oven, to dry his clothes on his own machines, to whet his instruments at his own grindstone, to make his own wine, his oil, and his cider at his own press, . . . or to sell his commodities at the public market." The exclusive right to all these privileges was vested in the lords of the vicinage. "The history of the most execrable tyranny of ancient times," says the same writer, "offers nothing like this. This category of oppressions cannot be applied to a free man, or to the peasant, except in violation of his rights."

But if the exclusive privileges conferred upon the Louisiana corporation can be sustained, it is not perceived why exclusive privileges for the construction and keeping of ovens, machines, grindstones, wine-presses, and for all the numerous trades and pursuits for the prosecution of which buildings are required, may not be equally bestowed upon other corporations or private individuals, and for periods of indefinite duration.

It is not necessary, however, as I have said, to rest my objections to the act in question upon the terms and meaning of the thirteenth amendment. The provisions of the fourteenth amendment, which is properly a supplement to the thirteenth, cover, in my judgment, the case before us, and inhibit any legislation which confers special and exclusive privileges like these under consideration. The amendment was adopted to obviate objections which had been raised and pressed with great force to the validity of the Civil Rights Act, and to place the common rights of American citizens under the protection of the National government. It first declares that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." It then declares that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due

process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The first clause of this amendment determines who are citizens of the United States, and how their citizenship is created. Before its enactment there was much diversity of opinion among jurists and statesmen whether there was any such citizenship independent of that of the State, and, if any existed, as to the manner in which it originated. With a great number the opinion prevailed that there was no such citizenship independent of the citizenship of the State. Such was the opinion of Mr. Calhoun and the class represented by him. In his celebrated speech in the Senate upon the Force Bill, in 1833, referring to the reliance expressed by a senator upon the fact that we are citizens of the United States, he said: "If by citizen of the United States he means a citizen at large, one whose citizenship extends to the entire geographical limits of the country without having a local citizenship in some State or Territory, a sort of citizen of the world, all I have to say is that such a citizen would be a perfect nondescript; that not a single individual of this description can be found in the entire mass of our population. Notwithstanding all the pomp and display of eloquence on the occasion, every citizen is a citizen of some State or Territory, and as such, under an express provision of the Constitution, is entitled to all privileges and immunities of citizens in the several States; and it is in this and no other sense that we are citizens of the United States."*

In the Dred Scott case this subject of citizenship of the United States was fully and elaborately discussed. The exposition in the opinion of Mr. Justice Curtis has been generally accepted by the profession of the country as the one containing the soundest views of constitutional law. And he held that, under the Constitution, citizenship of the United States in reference to natives was dependent upon citizenship in the several States, under their constitutions and laws.

* Calhoun's Works, vol. 2, p. 242.

The Chief Justice, in that case, and a majority of the court with him, held that the words "people of the United States" and "citizens" were synonymous terms; that the people of the respective States were the parties to the Constitution; that these people consisted of the free inhabitants of those States; that they had provided in their Constitution for the adoption of a uniform rule of naturalization; that they and their descendants and persons naturalized were the only persons who could be citizens of the United States, and that it was not in the power of any State to invest any other person with citizenship so that he could enjoy the privileges of a citizen under the Constitution, and that therefore the descendants of persons brought to this country and sold as slaves were not, and could not be citizens within the meaning of the Constitution.

The first clause of the fourteenth amendment changes this whole subject, and removes it from the region of discussion and doubt. It recognizes in express terms, if it does not create, citizens of the United States, and it makes their citizenship dependent upon the place of their birth, or the fact of their adoption, and not upon the constitution or laws of any State or the condition of their ancestry. A citizen of a State is now only a citizen of the United States residing in that State. The fundamental rights, privileges, and immunities which belong to him as a free man and a free citizen, now belong to him as a citizen of the United States, and are not dependent upon his citizenship of any State. The exercise of these rights and privileges, and the degree of enjoyment received from such exercise, are always more or less affected by the condition and the local institutions of the State, or city, or town where he resides. They are thus affected in a State by the wisdom of its laws, the ability of its officers, the efficiency of its magistrates, the education and morals of its people, and by many other considerations. This is a result which follows from the constitution of society, and can never be avoided, but in no other way can they be affected by the action of the State, or by the residence of the citizen therein. They do not derive

their existence from its legislation, and cannot be destroyed by its power.

The amendment does not attempt to confer any new privileges or immunities upon citizens, or to enumerate or define those already existing. It assumes that there are such privileges and immunities which belong of right to citizens as such, and ordains that they shall not be abridged by State legislation. If this inhibition has no reference to privileges and immunities of this character, but only refers, as held by the majority of the court in their opinion, to such privileges and immunities as were before its adoption specially designated in the Constitution or necessarily implied as belonging to citizens of the United States, it was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage. With privileges and immunities thus designated or implied no State could ever have interfered by its laws, and no new constitutional provision was required to inhibit such interference. The supremacy of the Constitution and the laws of the United States always controlled any State legislation of that character. But if the amendment refers to the natural and inalienable rights which belong to all citizens, the inhibition has a profound significance and consequence.

What, then, are the privileges and immunities which are secured against abridgment by State legislation?

In the first section of the Civil Rights Act Congress has given its interpretation to these terms, or at least has stated some of the rights which, in its judgment, these terms include; it has there declared that they include the right "to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property." That act, it is true, was passed before the fourteenth amendment, but the amendment was adopted, as I have already said, to obviate objections to the act, or, speaking more accurately, I should say, to obviate objections to legis-

lation of a similar character, extending the protection of the National government over the common rights of all citizens of the United States. Accordingly, after its ratification, Congress re-enacted the act under the belief that whatever doubts may have previously existed of its validity, they were removed by the amendment.*

The terms, privileges and immunities, are not new in the amendment; they were in the Constitution before the amendment was adopted. They are found in the second section of the fourth article, which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," and they have been the subject of frequent consideration in judicial decisions. In *Corfield* v. *Coryell*,† Mr. Justice Washington said he had "no hesitation in confining these expressions to those privileges and immunities which were, in their nature, fundamental; which belong of right to citizens of all free governments, and which have at all times been enjoyed by the citizens of the several States which compose the Union, from the time of their becoming free, independent, and sovereign;" and, in considering what those fundamental privileges were, he said that perhaps it would be more tedious than difficult to enumerate them, but that they might be "all comprehended under the following general heads: protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole." This appears to me to be a sound construction of the clause in question. The privileges and immunities designated are those *which of right belong to the citizens of all free governments.* Clearly among these must be placed the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons. In the discus-

* May 31st, 1870; 16 Stat. at Large, 144.

† 4 Washington's Circuit Court, 380.

sions in Congress upon the passage of the Civil Rights Act repeated reference was made to this language of Mr. Justice Washington. It was cited by Senator Trumbull with the observation that it enumerated the very rights belonging to a citizen of the United States set forth in the first section of the act, and with the statement that all persons born in the United States, being declared by the act citizens of the United States, would thenceforth be entitled to the rights of citizens, and that these were the great fundamental rights set forth in the act; and that they were set forth "as appertaining to every freeman."

The privileges and immunities designated in the second section of the fourth article of the Constitution are, then, according to the decision cited, those which of right belong to the citizens of all free governments, and they can be enjoyed under that clause by the citizens of each State in the several States upon the same terms and conditions as they are enjoyed by the citizens of the latter States. No discrimination can be made by one State against the citizens of other States in their enjoyment, nor can any greater imposition be levied than such as is laid upon its own citizens. It is a clause which insures equality in the enjoyment of these rights between citizens of the several States whilst in the same State.

Nor is there anything in the opinion in the case of *Paul* v. *Virginia*,* which at all militates against these views, as is supposed by the majority of the court. The act of Virginia, of 1866, which was under consideration in that case, provided that no insurance company, not incorporated under the laws of the State, should carry on its business within the State without previously obtaining a license for that purpose; and that it should not receive such license until it had deposited with the treasurer of the State bonds of a specified character, to an amount varying from thirty to fifty thousand dollars. No such deposit was required of insurance companies incorporated by the State, for carrying on

* 8 Wallace, 168.

their business within the State; and in the case cited the validity of the discriminating provisions of the statute of Virginia between her own corporations and the corporations of other States, was assailed. It was contended that the statute in this particular was in conflict with that clause of the Constitution which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." But the court answered, that corporations were not citizens within the meaning of this clause; that the term citizens as there used applied only to natural persons, members of the body politic owing allegiance to the State, not to artificial persons created by the legislature and possessing only the attributes which the legislature had prescribed; that though it had been held that where contracts or rights of property were to be enforced by or against a corporation, the courts of the United States would, for the purpose of maintaining jurisdiction, consider the corporation as representing citizens of the State, under the laws of which it was created, and to this extent would treat a corporation as a citizen within the provision of the Constitution extending the judicial power of the United States to controversies between citizens of different States, it had never been held in any case which had come under its observation, either in the State or Federal courts, that a corporation was a citizen within the meaning of the clause in question, entitling the citizens of each State to the privileges and immunities of citizens in the several States. And the court observed, that the privileges and immunities secured by that provision were those privileges and immunities which were common to the citizens in the latter States, under their constitution and laws, by virtue of their being citizens; that special privileges enjoyed by citizens in their own States were not secured in other States by the provision; that it was not intended by it to give to the laws of one State any operation in other States; that they could have no such operation except by the permission, expressed or implied, of those States; and that the special privileges which they conferred must, therefore, be enjoyed at home unless the assent

of other States to their enjoyment therein were given. And so the court held, that a corporation, being a grant of special privileges to the corporators, had no legal existence beyond the limits of the sovereignty where created, and that the recognition of its existence by other States, and the enforcement of its contracts made therein, depended purely upon the assent of those States, which could be granted upon such terms and conditions as those States might think proper to impose.

The whole purport of the decision was, that citizens of one State do not carry with them into other States any special privileges or immunities, conferred by the laws of their own States, of a corporate or other character. That decision has no pertinency to the questions involved in this case. The common privileges and immunities which of right belong to all citizens, stand on a very different footing. These the citizens of each State do carry with them into other States and are secured by the clause in question, in their enjoyment upon terms of equality with citizens of the latter States. This equality in one particular was enforced by this court in the recent case of *Ward* v. *The State of Maryland*, reported in the 12th of Wallace. A statute of that State required the payment of a larger sum from a non-resident trader for a license to enable him to sell his merchandise in the State, than it did of a resident trader, and the court held, that the statute in thus discriminating against the non-resident trader contravened the clause securing to the citizens of each State the privileges and immunities of citizens of the several States. The privilege of disposing of his property, which was an essential incident to his ownership, possessed by the non-resident, was subjected by the statute of Maryland to a greater burden than was imposed upon a like privilege of her own citizens. The privileges of the non-resident were in this particular abridged by that legislation.

What the clause in question did for the protection of the citizens of one State against hostile and discriminating legislation of other States, the fourteenth amendment does for

the protection of every citizen of the United States against hostile and discriminating legislation against him in favor of others, whether they reside in the same or in different States. If under the fourth article of the Constitution equality of privileges and immunities is secured between citizens of different States, under the fourteenth amendment the same equality is secured between citizens of the United States.

It will not be pretended that under the fourth article of the Constitution any State could create a monopoly in any known trade or manufacture in favor of her own citizens, or any portion of them, which would exclude an equal participation in the trade or manufacture monopolized by citizens of other States. She could not confer, for example, upon any of her citizens the sole right to manufacture shoes, or boots, or silk, or the sole right to sell those articles in the State so as to exclude non-resident citizens from engaging in a similar manufacture or sale. The non-resident citizens could claim equality of privilege under the provisions of the fourth article with the citizens of the State exercising the monopoly as well as with others, and thus, as respects them, the monopoly would cease. If this were not so it would be in the power of the State to exclude at any time the citizens of other States from participation in particular branches of commerce or trade, and extend the exclusion from time to time so as effectually to prevent any traffic with them.

Now, what the clause in question does for the protection of citizens of one State against the creation of monopolies in favor of citizens of other States, the fourteenth amendment does for the protection of every citizen of the United States against the creation of any monopoly whatever. The privileges and immunities of citizens of the United States, of every one of them, is secured against abridgment in any form by any State. The fourteenth amendment places them under the guardianship of the National authority. All monopolies in any known trade or manufacture are an invasion of these privileges, for they encroach upon the liberty of citizens to acquire property and pursue happiness, and were

held void at common law in the great *Case of Monopolies*, decided during the reign of Queen Elizabeth.

A monopoly is defined "to be an institution or allowance from the sovereign power of the State by grant, commission, or otherwise, to any person or corporation, for the sole buying, selling, making, working, or using of anything, whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty they had before, or hindered in their lawful trade." All such grants relating to any known trade or manufacture have been held by all the judges of England, whenever they have come up for consideration, to be void at common law as destroying the freedom of trade, discouraging labor and industry, restraining persons from getting an honest livelihood, and putting it into the power of the grantees to enhance the price of commodities. The definition embraces, it will be observed, not merely the sole privilege of buying and selling particular articles, or of engaging in their manufacture, but also the sole privilege of using anything by which others may be restrained of the freedom or liberty they previously had in any lawful trade, or hindered in such trade. It thus covers in every particular the possession and use of suitable yards, stables, and buildings for keeping and protecting cattle and other animals, and for their slaughter. Such establishments are essential to the free and successful prosecution by any butcher of the lawful trade of preparing animal food for market. The exclusive privilege of supplying such yards, buildings, and other conveniences for the prosecution of this business in a large district of country, granted by the act of Louisiana to seventeen persons, is as much a monopoly as though the act had granted to the company the exclusive privilege of buying and selling the animals themselves. It equally restrains the butchers in the freedom and liberty they previously had, and hinders them in their lawful trade.

The reasons given for the judgment in the *Case of Monopolies* apply with equal force to the case at bar. In that case a patent had been granted to the plaintiff giving him the sole

right to import playing-cards, and the entire traffic in them, and the sole right to make such cards within the realm. The defendant, in disregard of this patent, made and sold some gross of such cards and imported others, and was accordingly sued for infringing upon the exclusive privileges of the plaintiff. As to a portion of the cards made and sold within the realm, he pleaded that he was a haberdasher in London and a free citizen of that city, and as such had a right to make and sell them. The court held the plea good and the grant void, as against the common law and divers acts of Parliament. "All trades," said the court, "as well mechanical as others, which prevent idleness (the bane of the commonwealth) and exercise men and youth in labor for the maintenance of themselves and their families, and for the increase of their substance, to serve the queen when occasion shall require, are profitable for the commonwealth, and therefore the grant to the plaintiff to have the sole making of them is *against the common law and the benefit and liberty of the subject.*"* The case of Davenant and Hurdis was cited in support of this position. In that case a company of merchant tailors in London, having power by charter to make ordinances for the better rule and government of the company, so that they were consonant to law and reason, made an ordinance that any brother of the society who should have any cloth dressed by a cloth-worker, not being a brother of the society, should put one-half of his cloth to some brother of the same society who exercised the art of a cloth-worker, upon pain of forfeiting ten shillings, "and it was adjudged that the ordinance, although it had the countenance of a charter, was against the common law, *because it was against the liberty of the subject; for every subject, by the law, has freedom and liberty to put his cloth to be dressed by what cloth-worker he pleases, and cannot be restrained to certain persons, for that in effect would be a monopoly*, and, therefore, such ordinance, by color of a charter or any grant by charter to such effect, would be void."

* Coke's Reports, part 11, page 86.

Although the court, in its opinion, refers to the increase in prices and deterioration in quality of commodities which necessarily result from the grant of monopolies, the main ground of the decision was their interference with the liberty of the subject to pursue for his maintenance and that of his family any lawful trade or employment. This liberty is assumed to be the natural right of every Englishman.

The struggle of the English people against monopolies forms one of the most interesting and instructive chapters in their history. It finally ended in the passage of the statute of 21st James I, by which it was declared "that all monopolies and all commissions, grants, licenses, charters, and letters-patent, to any person or persons, bodies politic or corporate, whatsoever, of or for the sole buying, selling, making, working, or using of anything" within the realm or the dominion of Wales were altogether contrary to the laws of the realm and utterly void, with the exception of patents for new inventions for a limited period, and for printing, then supposed to belong to the prerogative of the king, and for the preparation and manufacture of certain articles and ordnance intended for the prosecution of war.

The common law of England, as is thus seen, condemned all monopolies in any known trade or manufacture, and declared void all grants of special privileges whereby others could be deprived of any liberty which they previously had, or be hindered in their lawful trade. The statute of James I, to which I have referred, only embodied the law as it had been previously declared by the courts of England, although frequently disregarded by the sovereigns of that country.

The common law of England is the basis of the jurisprudence of the United States. It was brought to this country by the colonists, together with the English statutes, and was established here so far as it was applicable to their condition. That law and the benefit of such of the English statutes as existed at the time of their colonization, and which they had by experience found to be applicable to their circumstances, were claimed by the Congress of the United Colonies in 1774 as a part of their "indubitable rights and liber-

ties."* Of the statutes, the benefits of which was thus claimed, the statute of James I against monopolies was one of the most important. And when the Colonies separated from the mother country no privilege was more fully recognized or more completely incorporated into the fundamental law of the country than that every free subject in the British empire was entitled to pursue his happiness by following any of the known established trades and occupations of the country, subject only to such restraints as equally affected all others. The immortal document which proclaimed the independence of the country declared as self-evident truths that the Creator had endowed all men "with certain inalienable rights, and that among these are life, liberty, and the pursuit of happiness; and that to secure these rights governments are instituted among men."

If it be said that the civil law and not the common law is the basis of the jurisprudence of Louisiana, I answer that the decree of Louis XVI, in 1776, abolished all monopolies of trades and all special privileges of corporations, guilds, and trading companies, and authorized every person to exercise, without restraint, his art, trade, or profession, and such has been the law of France and of her colonies ever since, and that law prevailed in Louisiana at the time of her cession to the United States. Since then, notwithstanding the existence in that State of the civil law as the basis of her jurisprudence, freedom of pursuit has been always recognized as the common right of her citizens. But were this otherwise, the fourteenth amendment secures the like protection to all citizens in that State against any abridgment of their common rights, as in other States. That amendment was intended to give practical effect to the declaration of 1776 of inalienable rights, rights which are the gift of the Creator, which the law does not confer, but only recognizes. If the trader in London could plead that he was a free citizen of that city against the enforcement to his injury of monopolies, surely under the fourteenth amendment every

* Journals of Congress, vol. i, pp. 28–30.

citizen of the United States should be able to plead his citizenship of the republic as a protection against any similar invasion of his privileges and immunities.

So fundamental has this privilege of every citizen to be free from disparaging and unequal enactments, in the pursuit of the ordinary avocations of life, been regarded, that few instances have arisen where the principle has been so far violated as to call for the interposition of the courts. But whenever this has occurred, with the exception of the present cases from Louisiana, which are the most barefaced and flagrant of all, the enactment interfering with the privilege of the citizen has been pronounced illegal and void. When a case under the same law, under which the present cases have arisen, came before the Circuit Court of the United States in the District of Louisiana, there was no hesitation on the part of the court in declaring the law, in its exclusive features, to be an invasion of one of the fundamental privileges of the citizen.* The presiding justice, in delivering the opinion of the court, observed that it might be difficult to enumerate or define what were the essential privileges of a citizen of the United States, which a State could not by its laws invade, but that so far as the question under consideration was concerned, it might be safely said that "it is one of the privileges of every American citizen to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit, without unreasonable regulation or molestation, and without being restricted by any of those unjust, oppressive, and odious monopolies or exclusive privileges which have been condemned by all free governments." And again: "There is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more nor less than the sacred right of labor."

In the *City of Chicago* v. *Rumpff*,† which was before the Supreme Court of Illinois, we have a case similar in all its

* Live-Stock, &c., Association *v.* The Crescent City, &c., Company (1 Abbott's United States Reports, 398).

† 45 Illinois, 90.

features to the one at bar. That city being authorized by its charter to regulate and license the slaughtering of animals within its corporate limits, the common council passed what was termed an ordinance in reference thereto, whereby a particular building was designated for the slaughtering of all animals intended for sale or consumption in the city, the owners of which were granted the exclusive right for a specified period to have all such animals slaughtered at their establishment, they to be paid a specific sum for the privilege of slaughtering there by all persons exercising it. The validity of this action of the corporate authorities was assailed on the ground of the grant of exclusive privileges, and the court said: "The charter authorizes the city authorities to license or regulate such establishments. Where that body has made the necessary regulations, required for the health or comfort of the inhabitants, all persons inclined to pursue such an occupation should have an opportunity of conforming to such regulations, otherwise the ordinance would be unreasonable and tend to oppression. Or, if they should regard it for the interest of the city that such establishments should be licensed, the ordinance should be so framed that all persons desiring it might obtain licenses by conforming to the prescribed terms and regulations for the government of such business. We regard it neither as a regulation nor a license of the business to confine it to one building or to give it to one individual. Such an action is oppressive, and creates a monopoly that never could have been contemplated by the General Assembly. It impairs the rights of all other persons, and cuts them off from a share in not only a legal, but a necessary business. Whether we consider this as an ordinance or a contract, it is equally unauthorized, as being opposed to the rules governing the adoption of municipal by-laws. The principle of equality of rights to the corporators is violated by this contract. If the common council may require all of the animals for the consumption of the city to be slaughtered in a single building, or on a particular lot, and the owner be paid a specific sum for the privilege, what would prevent the making a

similar contract with some other person that all of the vegetables, or fruits, the flour, the groceries, the dry goods, or other commodities should be sold on his lot and he receive a compensation for the privilege? We can see no difference in principle."

It is true that the court in this opinion was speaking of a municipal ordinance and not of an act of the legislature of a State. But, as it is justly observed by counsel, a legislative body is no more entitled to destroy the equality of rights of citizens, nor to fetter the industry of a city, than a municipal government. These rights are protected from invasion by the fundamental law.

In the case of the *Norwich Gaslight Company* v. *The Norwich City Gas Company*,* which was before the Supreme Court of Connecticut, it appeared that the common council of the city of Norwich had passed a resolution purporting to grant to one Treadway, his heirs and assigns, for the period of fifteen years, the right to lay gas-pipes in the streets of that city, declaring that no other person or corporation should, by the consent of the common council, lay gas-pipes in the streets during that time. The plaintiffs having purchased of Treadway, undertook to assert an exclusive right to use the streets for their purposes, as against another company which was using the streets for the same purposes. And the court said: "As, then, no consideration whatever, either of a public or private character, was reserved for the grant; and as the business of manufacturing and selling gas is an ordinary business, like the manufacture of leather, or any other article of trade in respect to which the government has no exclusive prerogative, we think that so far as the restriction of other persons than the plaintiffs from using the streets for the purpose of distributing gas by means of pipes, can fairly be viewed as intended to operate as a restriction upon its free manufacture and sale, it comes directly within the definition and description of a monopoly; and although we have no direct constitutional provision against a monop-

* 25 Connecticut, 19.

oly, yet the whole theory of a free government is opposed to such grants, and it does not require even the aid which may be derived from the Bill of Rights, the first section of which declares 'that no man or set of men are entitled to exclusive public emoluments or privileges from the community,' to render them void."

In the *Mayor of the City of Hudson* v. *Thorne*,* an application was made to the chancellor of New York to dissolve an injunction restraining the defendants from erecting a building in the city of Hudson upon a vacant lot owned by them, intended to be used as a hay-press. The common council of the city had passed an ordinance directing that no person should erect, or construct, or cause to be erected or constructed, any wooden or frame barn, stable, or hay-press of certain dimensions, within certain specified limits in the city, without its permission. It appeared, however, that there were such buildings already in existence, not only in compact parts of the city, but also within the prohibited limits, the occupation of which for the storing and pressing of hay the common council did not intend to restrain. And the chancellor said: "If the manufacture of pressed hay within the compact parts of the city is dangerous in causing or promoting fires, the common council have the power expressly given by their charter to prevent the carrying on of such manufacture; but as all by-laws must be reasonable, the common council cannot make a by-law which shall permit one person to carry on the dangerous business and prohibit another who has an equal right from pursuing the same business."

In all these cases there is a recognition of the equality of right among citizens in the pursuit of the ordinary avocations of life, and a declaration that all grants of exclusive privileges, in contravention of this equality, are against common right, and void.

This equality of right, with exemption from all disparaging and partial enactments, in the lawful pursuits of life,

* 7 Paige, 261.

throughout the whole country, is the distinguishing privilege of citizens of the United States. To them, everywhere, all pursuits, all professions, all avocations are open without other restrictions than such as are imposed equally upon all others of the same age, sex, and condition. The State may prescribe such regulations for every pursuit and calling of life as will promote the public health, secure the good order and advance the general prosperity of society, but when once prescribed, the pursuit or calling must be free to be followed by every citizen who is within the conditions designated, and will conform to the regulations. This is the fundamental idea upon which our institutions rest, and unless adhered to in the legislation of the country our government will be a republic only in name. The fourteenth amendment, in my judgment, makes it essential to the validity of the legislation of every State that this equality of right should be respected. How widely this equality has been departed from, how entirely rejected and trampled upon by the act of Louisiana, I have already shown. And it is to me a matter of profound regret that its validity is recognized by a majority of this court, for by it the right of free labor, one of the most sacred and imprescriptible rights of man, is violated.* As stated by the Supreme Court of Connecticut, in

* "The property which every man has in his own labor," says Adam Smith, "as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands; and to hinder him from employing this strength and dexterity in what manner he thinks proper, without injury to his neighbor, is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty both of the workman and of those who might be disposed to employ him. As it hinders the one from working at what he thinks proper, so it hinders the others from employing whom they think proper." (Smith's Wealth of Nations, b. 1, ch. 10, part 2.)

In the edict of Louis XVI, in 1776, giving freedom to trades and professions, prepared by his minister, Turgot, he recites the contributions that had been made by the guilds and trade companies, and says: "It was the allurement of these fiscal advantages undoubtedly that prolonged the illusion and concealed the immense injury they did to industry and their infraction of natural right. *This* illusion had extended so far that some persons asserted that the right to work was a royal privilege which the king might

the case cited, grants of exclusive privileges, such as is made by the act in question, are opposed to the whole theory of free government, and it requires no aid from any bill of rights to render them void. That only is a free government, in the American sense of the term, under which the inalienable right of every citizen to pursue his happiness is unrestrained, except by just, equal, and impartial laws.*

I am authorized by the CHIEF JUSTICE, Mr. Justice SWAYNE, and Mr. Justice BRADLEY, to state that they concur with me in this dissenting opinion.

Mr. Justice BRADLEY, also dissenting:

I concur in the opinion which has just been read by Mr. Justice Field; but desire to add a few observations for the purpose of more fully illustrating my views on the important question decided in these cases, and the special grounds on which they rest.

The fourteenth amendment to the Constitution of the United States, section 1, declares that no State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States.

The legislature of Louisiana, under pretence of making a police regulation for the promotion of the public health, passed an act conferring upon a corporation, created by the act, the exclusive right, for twenty-five years, to have and maintain slaughter-houses, landings for cattle, and yards for

sell, and that his subjects were bound to purchase from him. We hasten to correct this error and to repel the conclusion. God in giving to man wants and desires rendering labor necessary for their satisfaction, conferred the right to labor upon all men, and this property is the first, most sacred, and imprescriptible of all." . . . He, therefore, regards it "as the first duty of his justice, and the worthiest act of benevolence, to free his subjects from any restriction upon this inalienable right of humanity."

* "Civil liberty, the great end of all human society and government, is that state in which each individual has the power to pursue his own happiness according to his own views of his interest, and the dictates of his conscience, unrestrained, except by equal, just, and impartial laws." (1 Sharswood's Blackstone, 127, note 8.)

confining cattle intended for slaughter, within the parishes of Orleans, Jefferson, and St. Bernard, a territory containing nearly twelve hundred square miles, including the city of New Orleans; and prohibiting all other persons from building, keeping, or having slaughter-houses, landings for cattle, and yards for confining cattle intended for slaughter within the said limits; and requiring that all cattle and other animals to be slaughtered for food in that district should be brought to the slaughter-houses and works of the favored company to be slaughtered, and a payment of a fee to the company for such act.

It is contended that this prohibition abridges the privileges and immunities of citizens of the United States, especially of the plaintiffs in error, who were particularly affected thereby; and whether it does so or not is the simple question in this case. And the solution of this question depends upon the solution of two other questions, to wit:

First. Is it one of the rights and privileges of a citizen of the United States to pursue such civil employment as he may choose to adopt, subject to such reasonable regulations as may be prescribed by law?

Secondly. Is a monopoly, or exclusive right, given to one person to the exclusion of all others, to keep slaughter-houses, in a district of nearly twelve hundred square miles, for the supply of meat for a large city, a reasonable regulation of that employment which the legislature has a right to impose?

The first of these questions is one of vast importance, and lies at the very foundations of our government. The question is now settled by the fourteenth amendment itself, that citizenship of the United States is the primary citizenship in this country; and that State citizenship is secondary and derivative, depending upon citizenship of the United States and the citizen's place of residence. The States have not now, if they ever had, any power to restrict their citizenship to any classes or persons. A citizen of the United States has a perfect constitutional right to go to and reside in any State he chooses, and to claim citizenship therein,

and an equality of rights with every other citizen; and the whole power of the nation is pledged to sustain him in that right. He is not bound to cringe to any superior, or to pray for any act of grace, as a means of enjoying all the rights and privileges enjoyed by other citizens. And when the spirit of lawlessness, mob violence, and sectional hate can be so completely repressed as to give full practical effect to this right, we shall be a happier nation, and a more prosperous one than we now are. Citizenship of the United States ought to be, and, according to the Constitution, is, a sure and undoubted title to equal rights in any and every State in this Union, subject to such regulations as the legislature may rightfully prescribe. If a man be denied full equality before the law, he is denied one of the essential rights of citizenship as a citizen of the United States.

Every citizen, then, being primarily a citizen of the United States, and, secondarily, a citizen of the State where he resides, what, in general, are the privileges and immunites of a citizen of the United States? Is the right, liberty, or privilege of choosing any lawful employment one of them?

If a State legislature should pass a law prohibiting the inhabitants of a particular township, county, or city, from tanning leather or making shoes, would such a law violate any privileges or immunities of those inhabitants as citizens of the United States, or only their privileges and immunities as citizens of that particular State? Or if a State legislature should pass a law of caste, making all trades and professions, or certain enumerated trades and professions, hereditary, so that no one could follow any such trades or professions except that which was pursued by his father, would such a law violate the privileges and immunities of the people of that State as citizens of the United States, or only as citizens of the State? Would they have no redress but to appeal to the courts of that particular State?

This seems to me to be the essential question before us for consideration. And, in my judgment, the right of any citizen to follow whatever lawful employment he chooses to adopt (submitting himself to all lawful regulations) is one of

his most valuable rights, and one which the legislature of a State cannot invade, whether restrained by its own constitution or not.

The right of a State to regulate the conduct of its citizens is undoubtedly a very broad and extensive one, and not to be lightly restricted. But there are certain fundamental rights which this right of regulation cannot infringe. It may prescribe the manner of their exercise, but it cannot subvert the rights themselves. I speak now of the rights of citizens of any free government. Granting for the present that the citizens of one government cannot claim the privileges of citizens in another government; that prior to the union of our North American States the citizens of one State could not claim the privileges of citizens in another State; or, that after the union was formed the citizens of the United States, as such, could not claim the privileges of citizens in any particular State; yet the citizens of each of the States and the citizens of the United States would be entitled to certain privileges and immunities as citizens, at the hands of their own government—privileges and immunities which their own governments respectively would be bound to respect and maintain. In this free country, the people of which inherited certain traditionary rights and privileges from their ancestors, citizenship means something. It has certain privileges and immunities attached to it which the government, whether restricted by express or implied limitations, cannot take away or impair. It may do so temporarily by force, but it cannot do so by right. And these privileges and immunities attach as well to citizenship of the United States as to citizenship of the States.

The people of this country brought with them to its shores the rights of Englishmen; the rights which had been wrested from English sovereigns at various periods of the nation's history. One of these fundamental rights was expressed in these words, found in Magna Charta: "No freeman shall be taken or imprisoned, or be disseized of his freehold or liberties or free customs, or be outlawed or exiled, or any otherwise destroyed; nor will we pass upon him or condemn

him but by lawful judgment of his peers or by the law of the land." English constitutional writers expound this article as rendering life, liberty, and property inviolable, except by due process of law. This is the very right which the plaintiffs in error claim in this case. Another of these rights was that of *habeas corpus*, or the right of having any invasion of personal liberty judicially examined into, at once, by a competent judicial magistrate. Blackstone classifies these fundamental rights under three heads, as the absolute rights of individuals, to wit: the right of personal security, the right of personal liberty, and the right of private property. And of the last he says: "The third absolute right, inherent in every Englishman, is that of property, which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution save only by the laws of the land."

The privileges and immunities of Englishmen were established and secured by long usage and by various acts of Parliament. But it may be said that the Parliament of England has unlimited authority, and might repeal the laws which have from time to time been enacted. Theoretically this is so, but practically it is not. England has no written constitution, it is true; but it has an unwritten one, resting in the acknowledged, and frequently declared, privileges of Parliament and the people, to violate which in any material respect would produce a revolution in an hour. A violation of one of the fundamental principles of that constitution in the Colonies, namely, the principle that recognizes the property of the people as their own, and which, therefore, regards all taxes for the support of government as gifts of the people through their representatives, and regards taxation without representation as subversive of free government, was the origin of our own revolution.

This, it is true, was the violation of a political right; but personal rights were deemed equally sacred, and were claimed by the very first Congress of the Colonies, assembled in 1774, as the undoubted inheritance of the people of this country; and the Declaration of Independence, which

was the first political act of the American people in their independent sovereign capacity, lays the foundation of our National existence upon this broad proposition: "That all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness." Here again we have the great threefold division of the rights of freemen, asserted as the rights of man. Rights to life, liberty, and the pursuit of happiness are equivalent to the rights of life, liberty, and property. These are the fundamental rights which can only be taken away by due process of law, and which can only be interfered with, or the enjoyment of which can only be modified, by lawful regulations necessary or proper for the mutual good of all; and these rights, I contend, belong to the citizens of every free government.

For the preservation, exercise, and enjoyment of these rights the individual citizen, as a necessity, must be left free to adopt such calling, profession, or trade as may seem to him most conducive to that end. Without this right he cannot be a freeman. This right to choose one's calling is an essential part of that liberty which it is the object of government to protect; and a calling, when chosen, is a man's property and right. Liberty and property are not protected where these rights are arbitrarily assailed.

I think sufficient has been said to show that citizenship is not an empty name, but that, in this country at least, it has connected with it certain incidental rights, privileges, and immunities of the greatest importance. And to say that these rights and immunities attach only to State citizenship, and not to citizenship of the United States, appears to me to evince a very narrow and insufficient estimate of constitutional history and the rights of men, not to say the rights of the American people.

On this point the often-quoted language of Mr. Justice Washington, in *Corfield* v. *Coryell*,* is very instructive. Being

* 4 Washington, 380.

called upon to expound that clause in the fourth article of the Constitution, which declares that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States," he says: "The inquiry is, what are the privileges and immunities of citizens in the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, *fundamental;* which belong, of right, to the citizens of all free governments, and which have at all times been enjoyed by the citizens of the several States which compose this Union from the time of their becoming free, independent, and sovereign. What these fundamental privileges are it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole; the right of a citizen of one State to pass through, or to reside in, any other State for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of *habeas corpus;* to institute and maintain actions of any kind in the courts of the State; to take, hold, and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the State, may be mentioned as some of the particular privileges and immunities of citizens which are clearly embraced by the general description of privileges deemed to be fundamental."

It is pertinent to observe that both the clause of the Constitution referred to, and Justice Washington in his comment on it, speak of the privileges and immunities of citizens *in* a State; not of citizens *of* a State. It is the privileges and immunities of citizens, that is, of citizens as such, that are to be accorded to citizens of other States when they are found in any State; or, as Justice Washington says, "privileges and immunities which are, in their nature, fundamen-

tal; which belong, of right, to the citizens of all free governments."

It is true the courts have usually regarded the clause referred to as securing only an equality of privileges with the citizens of the State in which the parties are found. Equality before the law is undoubtedly one of the privileges and immunities of every citizen. I am not aware that any case has arisen in which it became necessary to vindicate any other fundamental privilege of citizenship; although rights have been claimed which were not deemed fundamental, and have been rejected as not within the protection of this clause. Be this, however, as it may, the language of the clause is as I have stated it, and seems fairly susceptible of a broader interpretation than that which makes it a guarantee of mere equality of privileges with other citizens.

But we are not bound to resort to implication, or to the constitutional history of England, to find an authoritative declaration of some of the most important privileges and immunities of citizens of the United States. It is in the Constitution itself. The Constitution, it is true, as it stood prior to the recent amendments, specifies, in terms, only a few of the personal privileges and immunities of citizens, but they are very comprehensive in their character. The States were merely prohibited from passing bills of attainder, *ex post facto* laws, laws impairing the obligation of contracts, and perhaps one or two more. But others of the greatest consequence were enumerated, although they were only secured, in express terms, from invasion by the Federal government; such as the right of *habeas corpus*, the right of trial by jury, of free exercise of religious worship, the right of free speech and a free press, the right peaceably to assemble for the discussion of public measures, the right to be secure against unreasonable searches and seizures, and above all, and including almost all the rest, the right of *not being deprived of life, liberty, or property, without due process of law*. These, and still others are specified in the original Constitution, or in the early amendments of it, as among the privileges and im-

munities of citizens of the United States, or, what is still stronger for the force of the argument, the rights of all persons, whether citizens or not.

But even if the Constitution were silent, the fundamental privileges and immunities of citizens, as such, would be no less real and no less inviolable than they now are. It was not necessary to say in words that the citizens of the United States should have and exercise all the privileges of citizens; the privilege of buying, selling, and enjoying property; the privilege of engaging in any lawful employment for a livelihood; the privilege of resorting to the laws for redress of injuries, and the like. Their very citizenship conferred these privileges, if they did not possess them before. And these privileges they would enjoy whether they were citizens of any State or not. Inhabitants of Federal territories and new citizens, made such by annexation of territory or naturalization, though without any status as citizens of a State, could, nevertheless, as citizens of the United States, lay claim to every one of the privileges and immunities which have been enumerated; and among these none is more essential and fundamental than the right to follow such profession or employment as each one may choose, subject only to uniform regulations equally applicable to all.

II. The next question to be determined in this case is: Is a monopoly or exclusive right, given to one person, or corporation, to the exclusion of all others, to keep slaughter-houses in a district of nearly twelve hundred square miles, for the supply of meat for a great city, a reasonable regulation of that employment which the legislature has a right to impose?

The keeping of a slaughter-house is part of, and incidental to, the trade of a butcher—one of the ordinary occupations of human life. To compel a butcher, or rather all the butchers of a large city and an extensive district, to slaughter their cattle in another person's slaughter-house and pay him a toll therefor, is such a restriction upon the trade as materially to interfere with its prosecution. It is onerous, unreasonable, arbitrary, and unjust. It has none of the

qualities of a police regulation. If it were really a police regulation, it would undoubtedly be within the power of the legislature. That portion of the act which requires all slaughter-houses to be located below the city, and to be subject to inspection, &c., is clearly a police regulation. That portion which allows no one but the favored company to build, own, or have slaughter-houses is not a police regulation, and has not the faintest semblance of one. It is one of those arbitrary and unjust laws made in the interest of a few scheming individuals, by which some of the Southern States have, within the past few years, been so deplorably oppressed and impoverished. It seems to me strange that it can be viewed in any other light.

The granting of monopolies, or exclusive privileges to individuals or corporations, is an invasion of the right of others to choose a lawful calling, and an infringement of personal liberty. It was so felt by the English nation as far back as the reigns of Elizabeth and James. A fierce struggle for the suppression of such monopolies, and for abolishing the prerogative of creating them, was made and was successful. The statute of 21st James, abolishing monopolies, was one of those constitutional landmarks of English liberty which the English nation so highly prize and so jealously preserve. It was a part of that inheritance which our fathers brought with them. This statute abolished all monopolies except grants for a term of years to the inventors of new manufactures. This exception is the groundwork of patents for new inventions and copyrights of books. These have always been sustained as beneficial to the state. But all other monopolies were abolished, as tending to the impoverishment of the people and to interference with their free pursuits. And ever since that struggle no English-speaking people have ever endured such an odious badge of tyranny.

It has been suggested that this was a mere legislative act, and that the British Parliament, as well as our own legislatures, have frequently disregarded it by granting exclusive privileges for erecting ferries, railroads, markets, and other establishments of a public kind. It requires but a slight

acquaintance with legal history to know that grants of this kind of franchises are totally different from the monopolies of commodities or of ordinary callings or pursuits. These public franchises can only be exercised under authority from the government, and the government may grant them on such conditions as it sees fit. But even these exclusive privileges are becoming more and more odious, and are getting to be more and more regarded as wrong in principle, and as inimical to the just rights and greatest good of the people. But to cite them as proof of the power of legislatures to create mere monopolies, such as no free and enlightened community any longer endures, appears to me, to say the least, very strange and illogical.

Lastly: Can the Federal courts administer relief to citizens of the United States whose privileges and immunities have been abridged by a State? Of this I entertain no doubt. Prior to the fourteenth amendment this could not be done, except in a few instances, for the want of the requisite authority.

As the great mass of citizens of the United States were also citizens of individual States, many of their general privileges and immunities would be the same in the one capacity as in the other. Having this double citizenship, and the great body of municipal laws intended for the protection of person and property being the laws of the State, and no provision being made, and no machinery provided by the Constitution, except in a few specified cases, for any interference by the General Government between a State and its citizens, the protection of the citizen in the enjoyment of his fundamental privileges and immunities (except where a citizen of one State went into another State) was largely left to State laws and State courts, where they will still continue to be left unless actually invaded by the unconstitutional acts or delinquency of the State governments themselves.

Admitting, therefore, that formerly the States were not prohibited from infringing any of the fundamental privileges and immunities of citizens of the United States, except

in a few specified cases, that cannot be said now, since the adoption of the fourteenth amendment. In my judgment, it was the intention of the people of this country in adopting that amendment to provide National security against violation by the States of the fundamental rights of the citizen.

The first section of this amendment, after declaring that all persons born or naturalized in the United States, and subject to its jurisdiction, are citizens of the United States and of the State wherein they reside, proceeds to declare further, that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws;" and that Congress shall have power to enforce by appropriate legislation the provisions of this article.

Now, here is a clear prohibition on the States against making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States.

If my views are correct with regard to what are the privileges and immunities of citizens, it follows conclusively that any law which establishes a sheer monopoly, depriving a large class of citizens of the privilege of pursuing a lawful employment, does abridge the privileges of those citizens.

The amendment also prohibits any State from depriving any person (citizen or otherwise) of life, liberty, or property, without due process of law.

In my view, a law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, does deprive them of liberty as well as property, without due process of law. Their right of choice is a portion of their liberty; their occupation is their property. Such a law also deprives those citizens of the equal protection of the laws, contrary to the last clause of the section.

The constitutional question is distinctly raised in these cases; the constitutional right is expressly claimed; it was

violated by State law, which was sustained by the State court, and we are called upon in a legitimate and proper way to afford redress. Our jurisdiction and our duty are plain and imperative.

It is futile to argue that none but persons of the African race are intended to be benefited by this amendment. They may have been the primary cause of the amendment, but its language is general, embracing all citizens, and I think it was purposely so expressed.

The mischief to be remedied was not merely slavery and its incidents and consequences; but that spirit of insubordination and disloyalty to the National government which had troubled the country for so many years in some of the States, and that intolerance of free speech and free discussion which often rendered life and property insecure, and led to much unequal legislation. The amendment was an attempt to give voice to the strong National yearning for that time and that condition of things, in which American citizenship should be a sure guaranty of safety, and in which every citizen of the United States might stand erect on every portion of its soil, in the full enjoyment of every right and privilege belonging to a freeman, without fear of violence or molestation.

But great fears are expressed that this construction of the amendment will lead to enactments by Congress interfering with the internal affairs of the States, and establishing therein civil and criminal codes of law for the government of the citizens, and thus abolishing the State governments in everything but name; or else, that it will lead the Federal courts to draw to their cognizance the supervision of State tribunals on every subject of judicial inquiry, on the plea of ascertaining whether the privileges and immunities of citizens have not been abridged.

In my judgment no such practical inconveniences would arise. Very little, if any, legislation on the part of Congress would be required to carry the amendment into effect. Like the prohibition against passing a law impairing the obligation of a contract, it would execute itself. The point would

be regularly raised, in a suit at law, and settled by final reference to the Federal court. As the privileges and immunities protected are only those fundamental ones which belong to every citizen, they would soon become so far defined as to cause but a slight accumulation of business in the Federal courts. Besides, the recognized existence of the law would prevent its frequent violation. But even if the business of the National courts should be increased, Congress could easily supply the remedy by increasing their number and efficiency. The great question is, What is the true construction of the amendment? When once we find that, we shall find the means of giving it effect. The argument from inconvenience ought not to have a very controlling influence in questions of this sort. The National will and National interest are of far greater importance.

In my opinion the judgment of the Supreme Court of Louisiana ought to be reversed.

Mr. Justice SWAYNE, dissenting:

I concur in the dissent in these cases and in the views expressed by my brethren, Mr. Justice Field and Mr. Justice Bradley. I desire, however, to submit a few additional remarks.

The first eleven amendments to the Constitution were intended to be checks and limitations upon the government which that instrument called into existence. They had their origin in a spirit of jealousy on the part of the States, which existed when the Constitution was adopted. The first ten were proposed in 1789 by the first Congress at its first session after the organization of the government. The eleventh was proposed in 1794, and the twelfth in 1803. The one last mentioned regulates the mode of electing the President and Vice-President. It neither increased nor diminished the power of the General Government, and may be said in that respect to occupy neutral ground. No further amendments were made until 1865, a period of more than sixty years. The thirteenth amendment was proposed by Congress on the 1st of February, 1865, the fourteenth on

the 16th of June, 1866, and the fifteenth on the 27th of February, 1869. These amendments are a new departure, and mark an important epoch in the constitutional history of the country. They trench directly upon the power of the States, and deeply affect those bodies. They are, in this respect, at the opposite pole from the first eleven.*

Fairly construed these amendments may be said to rise to the dignity of a new Magna Charta. The thirteenth blotted out slavery and forbade forever its restoration. It struck the fetters from four millions of human beings and raised them at once to the sphere of freemen. This was an act of grace and justice performed by the Nation. Before the war it could have been done only by the States where the institution existed, acting severally and separately from each other. The power then rested wholly with them. In that way, apparently, such a result could never have occurred. The power of Congress did not extend to the subject, except in the Territories.

The fourteenth amendment consists of five sections. The first is as follows: "All persons born or naturalized within the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The fifth section declares that Congress shall have power to enforce the provisions of this amendment by appropriate legislation.

The fifteenth amendment declares that the right to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude. Until this amendment was adopted the sub-

* Barron *v.* Baltimore, 7 Peters, 243; Livingston *v.* Moore, Ib. 551; Fox *v.* Ohio, 5 Howard, 429; Smith *v.* Maryland, 18 Id. 71; Pervear *v.* Commonwealth, 5 Wallace, 476; Twitchell *v* Commonwealth, 7 Id. 321.

ject to which it relates was wholly within the jurisdiction of the States. The General Government was excluded from participation.

The first section of the fourteenth amendment is alone involved in the consideration of these cases. No searching analysis is necessary to eliminate its meaning. Its language is intelligible and direct. Nothing can be more transparent. Every word employed has an established signification. There is no room for construction. There is nothing to construe. Elaboration may obscure, but cannot make clearer, the intent and purpose sought to be carried out.

(1.) Citizens of the States and of the United States are defined.

(2.) It is declared that no State shall, by law, abridge the privileges or immunities of citizens of the United States.

(3.) That no State shall deprive *any person*, whether a citizen or not, of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

A citizen of a State is *ipso facto* a citizen of the United States. No one can be the former without being also the latter; but the latter, by losing his residence in one State without acquiring it in another, although he continues to be the latter, ceases for the time to be the former. "The privileges and immunities" of a citizen of the United States include, among other things, the fundamental rights of life, liberty, and property, and also the rights which pertain to him by reason of his membership of the Nation. The citizen of a State has the same fundamental rights as a citizen of the United States, and also certain others, local in their character, arising from his relation to the State, and in addition, those which belong to the citizen of the United States, he being in that relation also. There may thus be a double citizenship, each having some rights peculiar to itself. It is only over those which belong to the citizen of the United States that the category here in question throws the shield of its protection. All those which belong to the citizen of a State, except as to bills of attainder, *ex post facto*

laws, and laws impairing the obligation of contracts,* are left to the guardianship of the bills of rights, constitutions, and laws of the States respectively. Those rights may all be enjoyed in every State by the citizens of every other State by virtue of clause 2, section 4, article 1, of the Constitution of the United States as it was originally framed. This section does not in anywise affect them; such was not its purpose.

In the next category, obviously *ex industriâ*, to prevent, as far as may be, the possibility of misinterpretation, either as to persons or things, the phrases "citizens of the United States" and "privileges and immunities" are dropped, and more simple and comprehensive terms are substituted. The substitutes are "any person," and "life," "liberty," and "property," and "the equal protection of the laws." Life, liberty, and property are forbidden to be taken "without due process of law," and "equal protection of the laws" is guaranteed to all. Life is the gift of God, and the right to preserve it is the most sacred of the rights of man. Liberty is freedom from all restraints but such as are justly imposed by law. Beyond that line lies the domain of usurpation and tyranny. Property is everything which has an exchangeable value, and the right of property includes the power to dispose of it according to the will of the owner. Labor is property, and as such merits protection. The right to make it available is next in importance to the rights of life and liberty. It lies to a large extent at the foundation of most other forms of property, and of all solid individual and national prosperity. "Due process of law" is the application of the law as it exists in the fair and regular course of administrative procedure. "The equal protection of the laws" places all upon a footing of legal equality and gives the same protection to all for the preservation of life, liberty, and property, and the pursuit of happiness.†

* Constitution of the United States, Article I, Section 10.

† Corfield *v.* Coryell, 4 Washington, 380; Lemmon *v.* The People, 26 Barbour, 274, and 20 New York, 626; Conner *v.* Elliott, 18 Howard, 593; Murray *v.* McCarty, 2 Mumford, 399; Campbell *v.* Morris, 3 Harris &

It is admitted that the plaintiffs in error are citizens of the United States, and persons within the jurisdiction of Louisiana. The cases before us, therefore, present but two questions.

(1.) Does the act of the legislature creating the monopoly in question abridge the privileges and immunities of the plaintiffs in error as citizens of the United States?

(2.) Does it deprive them of liberty or property without due process of law, or deny them the equal protection of the laws of the State, they being *persons* "within its jurisdiction?"

Both these inquiries I remit for their answer as to the facts to the opinions of my brethren, Mr. Justice Field and Mr. Justice Bradley. They are full and conclusive upon the subject. A more flagrant and indefensible invasion of the rights of many for the benefit of a few has not occurred in the legislative history of the country. The response to both inquiries should be in the affirmative. In my opinion the cases, as presented in the record, are clearly within the letter and meaning of both the negative categories of the sixth section. The judgments before us should, therefore, be reversed.

These amendments are all consequences of the late civil war. The prejudices and apprehension as to the central government which prevailed when the Constitution was adopted were dispelled by the light of experience. The public mind became satisfied that there was less danger of tyranny in the head than of anarchy and tyranny in the members. The provisions of this section are all eminently conservative in their character. They are a bulwark of defence, and can never be made an engine of oppression. The language employed is unqualified in its scope. There is no exception in its terms, and there can be properly none in their application. By the language "citizens of the United States" was meant *all* such citizens; and by "any person"

McHenry, 554; Towles's Case, 5 Leigh, 748; State *v.* Medbury, 3 Rhode Island, 142; 1 Tucker's Blackstone, 145; 1 Cooley's Blackstone, 125, 128.

was meant *all* persons within the jurisdiction of the State. No distinction is intimated on account of race or color. This court has no authority to interpolate a limitation that is neither expressed nor implied. Our duty is to execute the law, not to make it. The protection provided was not intended to be confined to those of any particular race or class, but to embrace equally all races, classes, and conditions of men. It is objected that the power conferred is novel and large. The answer is that the novelty was known and the measure deliberately adopted. The power is beneficent in its nature, and cannot be abused. It is such as should exist in every well-ordered system of polity. Where could it be more appropriately lodged than in the hands to which it is confided? It is necessary to enable the government of the nation to secure to every one within its jurisdiction the rights and privileges enumerated, which, according to the plainest considerations of reason and justice and the fundamental principles of the social compact, all are entitled to enjoy. Without such authority any government claiming to be national is glaringly defective. The construction adopted by the majority of my brethren is, in my judgment, much too narrow. It defeats, by a limitation not anticipated, the intent of those by whom the instrument was framed and of those by whom it was adopted. To the extent of that limitation it turns, as it were, what was meant for bread into a stone. By the Constitution, as it stood before the war, ample protection was given against oppression by the Union, but little was given against wrong and oppression by the States. That want was intended to be supplied by this amendment. Against the former this court has been called upon more than once to interpose. Authority of the same amplitude was intended to be conferred as to the latter. But this arm of our jurisdiction is, in these cases, stricken down by the judgment just given. Nowhere, than in this court, ought the will of the nation, as thus expressed, to be more liberally construed or more cordially executed. This determination of the majority seems to me to lie far in the other direction.

I earnestly hope that the consequences to follow may prove less serious and far-reaching than the minority fear they will be.

BRADWELL *v.* THE STATE.

1. The Supreme Court of Illinois having refused to grant to a woman a license to practice law in the courts of that State, on the ground that females are not eligible under the laws of that State; *Held*, that such a decision violates no provision of the Federal Constitution.
2. The second section of the fourth article is inapplicable, because the plaintiff was a citizen of the State of whose action she complains, and that section only guarantees privileges and immunities to citizens of other States, in that State.
3. Nor is the right to practice law in the State courts a privilege or immunity of a citizen of the United States, within the meaning of the first section of the fourteenth article of amendment of the Constitution of the United States.
4. The power of a State to prescribe the qualifications for admission to the bar of its own courts is unaffected by the fourteenth amendment, and this court cannot inquire into the reasonableness or propriety of the rules it may prescribe.

IN error to the Supreme Court of the State of Illinois.

Mrs. Myra Bradwell, residing in the State of Illinois, made application to the judges of the Supreme Court of that State for a license to practice law. She accompanied her petition with the usual certificate from an inferior court of her good character, and that on due examination she had been found to possess the requisite qualifications. Pending this application she also filed an affidavit, to the effect "that she was born in the State of Vermont; that she was (had been) a citizen of that State; that she is now a citizen of the United States, and has been for many years past a resident of the city of Chicago, in the State of Illinois." And with this affidavit she also filed a paper asserting that, under the foregoing facts, she was entitled to the license prayed for by virtue of the second section of the fourth article of the Constitution of the United States, and of the fourteenth article of amendment of that instrument.

Statement of the case.

The statute of Illinois on the subject of admissions to the bar, enacts that no person shall be permitted to practice as an attorney or counsellor-at-law, or to commence, conduct, or defend any action, suit, or plaint, in which he is not a party concerned, in any court of record within the State, either by using or subscribing his own name or the name of any other person, without having previously obtained a license for that purpose from some two of the justices of the Supreme Court, which license shall constitute the person receiving the same an attorney and counsellor-at-law, and shall authorize him to appear in all the courts of record within the State, and there to practice as an attorney and counsellor-at-law, according to the laws and customs thereof.

On Mrs. Bradwell's application first coming before the court, the license was refused, and it was stated as a sufficient reason that under the decisions of the Supreme Court of Illinois, the applicant—"as a married woman would be bound neither by her express contracts nor by those implied contracts which it is the policy of the law to create between attorney and client." After the announcement of this decision, Mrs. Bradwell, admitting that she was a married woman—though she expressed her belief that such fact did not appear in the record—filed a printed argument in which her right to admission, notwithstanding that fact, was earnestly and ably maintained. The court thereupon gave an opinion in writing. Extracts are here given:

"Our statute provides that no person shall be permitted to practice as an attorney or counsellor at law without having previously obtained a license for that purpose from two of the justices of the Supreme Court. By the second section of the act, it is provided that no person shall be entitled to receive a license until he shall have obtained a certificate from the court of some county of his good moral character, and this is the only express limitation upon the exercise of the power thus intrusted to this court. In all other respects it is left to our discretion to establish the rules by which admission to this office shall be determined. But this discretion is not an arbitrary one, and must be held subject to at least two limitations. One is, that the

court should establish such terms of admission as will promote the proper administration of justice; the second, that it should not admit any persons or class of persons who are not intended by the legislature to be admitted, even though their exclusion is not expressly required by the statute.

"The substance of the last limitation is simply that this important trust reposed in us should be exercised in conformity with the designs of the power creating it.

"Whether, in the existing social relations between men and women, it would promote the proper administration of justice, and the general well-being of society, to permit women to engage in the trial of cases at the bar, is a question opening a wide field of discussion, upon which it is not necessary for us to enter. It is sufficient to say that, in our opinion, the other implied limitation upon our power, to which we have above referred, must operate to prevent our admitting women to the office of attorney at law. If we were to admit them, we should be exercising the authority conferred upon us in a manner which, we are fully satisfied, was never contemplated by the legislature.

"It is to be remembered that at the time this statute was enacted we had, by express provision, adopted the common law of England, and, with three exceptions, the statutes of that country passed prior to the fourth year of James the First, so far as they were applicable to our condition.

"It is to be also remembered that female attorneys at law were unknown in England, and a proposition that a woman should enter the courts of Westminster Hall in that capacity, or as a barrister, would have created hardly less astonishment than one that she should ascend the bench of bishops, or be elected to a seat in the House of Commons.

"It is to be further remembered, that when our act was passed, that school of reform which claims for women participation in the making and administering of the laws had not then arisen, or, if here and there a writer had advanced such theories, they were regarded rather as abstract speculations than as an actual basis for action.

"That God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply, and execute the laws, was regarded as an almost axiomatic truth.

"In view of these facts, we are certainly warranted in saying

that when the legislature gave to this court the power of granting licenses to practice law, it was with not the slightest expectation that this privilege would be extended to women."

The court having thus denied the application, Mrs. Bradwell brought the case here as within the twenty-fifth section of the Judiciary Act, or the recent act of February 5th, 1867, amendatory thereto; the exact language of which may be seen in the Appendix.

Mr. Matthew Hale Carpenter, for the plaintiff in error:

The question does not involve the right of a female to vote. It presents a narrow matter:

Can a female citizen, duly qualified in respect of age, character, and learning, claim, under the fourteenth amendment,* the privilege of earning a livelihood by practicing at the bar of a judicial court?

The original Constitution said:

"The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

Under this provision each State could determine for itself what the privileges and immunities of its citizens should be. A citizen emigrating from one State to another carried with him, not the privileges and immunities he enjoyed in his native State, but was entitled, in the State of his adoption, to such privileges and immunities as were enjoyed by the class of citizens to which he belonged by the laws of such adopted State.

But the fourteenth amendment executes itself in every State of the Union. Whatever are the privileges and immunities of a citizen in the State of New York, such citizen, emigrating, carries them with him into any other State of the Union. It utters the will of the United States in every State, and silences every State constitution, usage, or law which conflicts with it. If to be admitted to the bar, on attaining the age and learning required by law, be one of the

* See the Amendment, *supra*, pp. 43, 44.

privileges of a white citizen in the State of New York, it is equally the privilege of a colored citizen in that State; and if in that State, then in any State. If no State may "make or enforce any law" to abridge the privileges of a citizen, it must follow that the privileges of all citizens are the same.

Does admission to the bar belong to that class of privileges which a State may not abridge, or that class of political rights as to which a State may discriminate between its citizens?

It is evident that there are certain "privileges and immunities" which belong to a citizen of the United States as such; otherwise it would be nonsense for the fourteenth amendment to prohibit a State from abridging them. I concede that the right to vote is not one of those privileges. And the question recurs whether admission to the bar, the proper qualification being possessed, is one of the privileges which a State may not deny.

In *Cummings* v. *Missouri*,* this court say:

"The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness *all avocations, all honors, all positions, are alike open to every one, and that in the protection of these rights all are equal before the law.* Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined."

In *Ex parte Garland*,† this court say:

"The profession of an attorney and counsellor is not like an office created by an act of Congress, which depends for its continuance, its powers, and its emoluments upon the will of its creator, and the possession of which may be burdened with any conditions not prohibited by the Constitution. Attorneys and counsellors are not officers of the United States; they are not elected or appointed in the manner prescribed by the Constitution for the election and appointment of such officers. They are officers of the court, admitted as such by its order, *upon*

* 4 Wallace, 321.

† Ib. 378.

Argument for the plaintiff in error.

evidence of their possessing sufficient legal learning and fair private character. . . . The order of admission is the judgment of the court, that the parties possess the requisite qualifications as attorneys and counsellors, and are entitled to appear as such and conduct causes therein. From its entry the parties become officers of the court, and are responsible to it for professional misconduct. They hold their office during good behavior, *and can only be deprived of it for misconduct, ascertained and declared by the judgment of the court, after opportunity to be heard has been offered.*"*

It is now settled by numerous cases,† that the courts in admitting attorneys to, and in expelling them from, the bar, act judicially, and that such proceedings are subject to review on writ of error or appeal, as the case may be.

From these cases the conclusion is irresistible, that the profession of the law, like the clerical profession and that of medicine, is an avocation open to every citizen of the United States. And while the legislature may prescribe qualifications for entering upon this pursuit, they cannot, under the guise of fixing qualifications, exclude a class of citizens from admission to the bar. The legislature may say at what age candidates shall be admitted; may elevate or depress the standard of learning required. But a qualification, to which a whole class of citizens never can attain, is not a regulation of admission to the bar, but is, as to such citizens, a prohibition. For instance, a State legislature could not, in enumerating the qualifications, require the candidate to be a white citizen. This would be the exclusion of all colored citizens, without regard to age, character, or learning. Yet no sound mind can draw a distinction between such an act and a custom, usage, or law of a State, which denies this privilege to all female citizens, without regard to age, character, or learning. If the legislature may, under pretence of fixing qualifications, declare that no

* Ex parte Heyfron, 7 Howard's Mississippi, 127; Fletcher *v.* Daingerfield, 20 California, 430.

† Ex parte Cooper, 22 New York, 67; Strother *v.* Missouri, 1 Missouri, 605; Ex parte Secomb, 19 Howard, 9; Ex parte Garland, 4 Wallace, 378.

female citizen shall be permitted to practice law, it may as well declare that no colored citizen shall practice law; for the only provision in the Constitution of the United States which secures to colored male citizens the privilege of admission to the bar, or the pursuit of the other ordinary avocations of life, is the provision that "no State shall make or enforce any law which shall abridge the privileges or immunities of a citizen." And if this provision does protect the colored citizen, then it protects every citizen, black or white, male or female.

Now, Mrs. Bradwell is a citizen of the United States, and of the State of Illinois, residing therein; she has been judicially ascertained to be of full age, and to possess the requisite character and learning.

Still admission to the bar was denied her, not upon the ground that she was not a citizen; not for want of age or qualifications; not because the profession of the law is not one of those avocations which are open to every American citizen as matter of right, upon complying with the reasonable regulations prescribed by the legislature; but first upon the ground that inconvenience would result from permitting her to enjoy her legal rights in this, to wit, that her clients might have difficulty in enforcing the contracts they might make with her, as their attorney, because of her being a married woman; and, finally, on the ground of her sex, merely.

Now, the argument *ab inconvenienti*, which might have been urged with whatever force belongs to it, against *adopting* the fourteenth amendment in the full scope of its language, is futile to resist its full and proper operation, now that it has been adopted. But that objection is really without force; for Mrs. Bradwell, admitted to the bar, becomes an officer of the court, subject to its summary jurisdiction. Any malpractice or unprofessional conduct towards her client would be punishable by fine, imprisonment, or expulsion from the bar, or by all three. Her clients would, therefore, not be compelled to resort to actions at law against her. The objection arising from her coverture was in fact

abandoned, in its more full consideration of the case, by the court itself; and the refusal put upon the fact that the statute of Illinois, interpreted by the light of early days, could not have contemplated the admission of any woman, though unmarried, to the bar. But whatever the statute of Illinois meant, I maintain that the fourteenth amendment opens to every citizen of the United States, male or female, black or white, married or single, the honorable professions as well as the servile employments of life; and that no citizen can be excluded from any one of them. Intelligence, integrity, and honor are the only qualifications that can be prescribed as conditions precedent to an entry upon any honorable pursuit or profitable avocation, and all the privileges and immunities which I vindicate to a colored citizen, I vindicate to our mothers, our sisters, and our daughters. The inequalities of sex will undoubtedly have their influence, and be considered by every client desiring to employ counsel.

There may be cases in which a client's rights can only be rescued by an exercise of the rough qualities possessed by men. There are many causes in which the silver voice of woman would accomplish more than the severity and sternness of man could achieve. Of a bar composed of men and women of equal integrity and learning, women might be more or less frequently retained, as the taste or judgment of clients might dictate. But the broad shield of the Constitution is over them all, and protects each in that measure of success which his or her individual merits may secure.

No opposing counsel.

Mr. Justice MILLER delivered the opinion of the court.

The record in this case is not very perfect, but it may be fairly taken that the plaintiff asserted her right to a license on the grounds, among others, that she was a citizen of the United States, and that having been a citizen of Vermont at one time, she was, in the State of Illinois, entitled to any right granted to citizens of the latter State.

The court having overruled these claims of right founded on the clauses of the Federal Constitution before referred

to, those propositions may be considered as properly before this court.

As regards the provision of the Constitution that citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States, the plaintiff in her affidavit has stated very clearly a case to which it is inapplicable.

The protection designed by that clause, as has been repeatedly held, has no application to a citizen of the State whose laws are complained of. If the plaintiff was a citizen of the State of Illinois, that provision of the Constitution gave her no protection against its courts or its legislation.

The plaintiff seems to have seen this difficulty, and attempts to avoid it by stating that she was born in Vermont.

While she remained in Vermont that circumstance made her a citizen of that State. But she states, at the same time, that she is a citizen of the United States, and that she is now, and has been for many years past, a resident of Chicago, in the State of Illinois.

The fourteenth amendment declares that citizens of the United States are citizens of the State within which they reside; therefore the plaintiff was, at the time of making her application, a citizen of the United States and a citizen of the State of Illinois.

We do not here mean to say that there may not be a temporary residence in one State, with intent to return to another, which will not create citizenship in the former. But the plaintiff states nothing to take her case out of the definition of citizenship of a State as defined by the first section of the fourteenth amendment.

In regard to that amendment counsel for the plaintiff in this court truly says that there are certain privileges and immunities which belong to a citizen of the United States as such; otherwise it would be nonsense for the fourteenth amendment to prohibit a State from abridging them, and he proceeds to argue that admission to the bar of a State of a person who possesses the requisite learning and character is one of those which a State may not deny.

In this latter proposition we are not able to concur with counsel. We agree with him that there are privileges and immunities belonging to citizens of the United States, in that relation and character, and that it is these and these alone which a State is forbidden to abridge. But the right to admission to practice in the courts of a State is not one of them. This right in no sense depends on citizenship of the United States. It has not, as far as we know, ever been made in any State, or in any case, to depend on citizenship at all. Certainly many prominent and distinguished lawyers have been admitted to practice, both in the State and Federal courts, who were not citizens of the United States or of any State. But, on whatever basis this right may be placed, so far as it can have any relation to citizenship at all, it would seem that, as to the courts of a State, it would relate to citizenship of the State, and as to Federal courts, it would relate to citizenship of the United States.

The opinion just delivered in the *Slaughter-House Cases** renders elaborate argument in the present case unnecessary; for, unless we are wholly and radically mistaken in the principles on which those cases are decided, the right to control and regulate the granting of license to practice law in the courts of a State is one of those powers which are not transferred for its protection to the Federal government, and its exercise is in no manner governed or controlled by citizenship of the United States in the party seeking such license.

It is unnecessary to repeat the argument on which the judgment in those cases is founded. It is sufficient to say they are conclusive of the present case.

JUDGMENT AFFIRMED.

Mr. Justice BRADLEY:

I concur in the judgment of the court in this case, by which the judgment of the Supreme Court of Illinois is affirmed, but not for the reasons specified in the opinion just read.

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* *Supra*, p. 36.

The claim of the plaintiff, who is a married woman, to be admitted to practice as an attorney and counsellor-at-law, is based upon the supposed right of every person, man or woman, to engage in any lawful employment for a livelihood. The Supreme Court of Illinois denied the application on the ground that, by the common law, which is the basis of the laws of Illinois, only men were admitted to the bar, and the legislature had not made any change in this respect, but had simply provided that no person should be admitted to practice as attorney or counsellor without having previously obtained a license for that purpose from two justices of the Supreme Court, and that no person should receive a license without first obtaining a certificate from the court of some county of his good moral character. In other respects it was left to the discretion of the court to establish the rules by which admission to the profession should be determined. The court, however, regarded itself as bound by at least two limitations. One was that it should establish such terms of admission as would promote the proper administration of justice, and the other that it should not admit any persons, or class of persons, not intended by the legislature to be admitted, even though not expressly excluded by statute. In view of this latter limitation the court felt compelled to deny the application of females to be admitted as members of the bar. Being contrary to the rules of the common law and the usages of Westminster Hall from time immemorial, it could not be supposed that the legislature had intended to adopt any different rule.

The claim that, under the fourteenth amendment of the Constitution, which declares that no State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, the statute law of Illinois, or the common law prevailing in that State, can no longer be set up as a barrier against the right of females to pursue any lawful employment for a livelihood (the practice of law included), assumes that it is one of the privileges and immunities of women as citizens to engage in any and every profession, occupation, or employment in civil life.

It certainly cannot be affirmed, as an historical fact, that this has ever been established as one of the fundamental privileges and immunities of the sex. On the contrary, the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state; and, notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most States. One of these is, that a married woman is incapable, without her husband's consent, of making contracts which shall be binding on her or him. This very incapacity was one circumstance which the Supreme Court of Illinois deemed important in rendering a married woman incompetent fully to perform the duties and trusts that belong to the office of an attorney and counsellor.

It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, but these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society

must be adapted to the general constitution of things, and cannot be based upon exceptional cases.

The humane movements of modern society, which have for their object the multiplication of avenues for woman's advancement, and of occupations adapted to her condition and sex, have my heartiest concurrence. But I am not prepared to say that it is one of her fundamental rights and privileges to be admitted into every office and position, including those which require highly special qualifications and demanding special responsibilities. In the nature of things it is not every citizen of every age, sex, and condition that is qualified for every calling and position. It is the prerogative of the legislator to prescribe regulations founded on nature, reason, and experience for the due admission of qualified persons to professions and callings demanding special skill and confidence. This fairly belongs to the police power of the State; and, in my opinion, in view of the peculiar characteristics, destiny, and mission of woman, it is within the province of the legislature to ordain what offices, positions, and callings shall be filled and discharged by men, and shall receive the benefit of those energies and responsibilities, and that decision and firmness which are presumed to predominate in the sterner sex.

For these reasons I think that the laws of Illinois now complained of are not obnoxious to the charge of abridging any of the privileges and immunities of citizens of the United States.

Mr. Justice SWAYNE and Mr. Justice FIELD concurred in the foregoing opinion of Mr. Justice BRADLEY.

The CHIEF JUSTICE dissented from the judgment of the court, and from all the opinions.

MAHAN *v.* UNITED STATES.

1. Under article 4 of chapter xliv of the Revised Code of Mississippi, which enacts,

> "That no contract for the sale of any personal property, &c., shall be allowed to be good and valid except the buyer shall receive part of the personal property or shall actually pay or secure the purchase-money, or part thereof, or unless some note or memorandum in writing of the bargain be made and signed by the party to be charged by such contract or his agent thereunto lawfully authorized,"

a parol agreement for the sale of cotton in payment of a mortgage debt, cannot be sustained, where, though the price of the cotton per pound was fixed, the number of pounds was not definitely ascertained, nor any payment was indorsed on the mortgage, nor any receipt given, nor any memorandum in writing made, nor any present consideration paid, nor any change of possession effected, nor any delivery, either actual or symbolic, made.

2. Such a transaction would, from want of delivery, not be good as a gift *inter vivos*.

APPEAL from the Court of Claims; the case as found by that court, from the evidence, being thus:

One Mitchell, of Mississippi, being indebted to his step-daughter, of whose estate he had been the guardian, mortgaged, with his wife (the mother of the step-daughter mentioned), a life estate which the wife had in a valuable cotton farm in Mississippi, near the river of that name; and soon afterwards died. Mrs. Mitchell, his widow, became administratrix of his estate. In 1861 the rebellion broke out. There were at this time one hundred and sixteen bales of cotton on the farm; and the war being flagrant in Mississippi, the Confederate general ordered all cotton near the river, under penalty of being burnt, to be removed from it, in order to prevent its capture by the forces of the United States.

In compliance with this order, Mrs. Mitchell removed the cotton to Kingston, near Natchez, where it was stacked and covered. "After the cotton had been thus removed to Kingston, but before the capture of Natchez by the United States forces, and before the passage of the Abandoned and Captured Property Act, *a parol* agreement was made be-

tween Mrs. Mitchell and her daughter, now like herself a widow, to the effect that the latter should take the cotton as a payment upon the mortgage before described. The price was fixed at twenty cents per pound, but the number of pounds was not definitely ascertained, neither was any payment indorsed upon the mortgage, nor any receipt given, nor any memorandum in writing made, nor any present consideration paid. Neither did any change of possession take place, nor was there any delivery, actual or symbolic. The cotton remained at Kingston until its seizure by the military forces of the United States, immediately upon which the daughter asserted that she was the owner, and sought to procure its release."

Not succeeding in this, and the cotton being sold, and the Captured and Abandoned Property Act being passed, which allowed loyal owners of property captured in the South and so disposed of, to apply to the Court of Claims for the proceeds, the daughter (now re-married to one Mahan) filed with her husband a petition in the court just named, to have the money which, on sale of it, the cotton had brought. The Court of Claims said:

"The party relies upon a purchase and sale at which, so far as the evidence shows, she paid no money, relinquished no rights, released no debt, assumed no responsibility, and acquired no possession. The intent of the parties was not evidenced by the payment of the purchase-money, nor by the ascertainment of the price, nor by a receipt upon the mortgage, nor by a written memorandum between the parties, nor by any formal or decisive declaration before witnesses, nor by the delivery of the thing sold. The facts do not, in law, establish a sale and delivery, and the evidence to prove the ownership of the captured property fails."

The court accordingly dismissed the petition, and from that dismissal this appeal came.

Mr. R. M. Corwine, for the appellant:

I confess myself embarrassed at the very outset in the discussion of the ownership of the cotton when captured.

The testimony is clear and direct, even as stated by the court below in its findings, and free from any doubt. And yet that court find that what was done did not amount to such a sale as would pass the title. [The counsel then went into an examination of the findings.]

But on the case as found it cannot be doubted that, as between the mother and daughter, there was a good contract of sale. The price was fixed, the number of bales (116) ascertained, and the precise location of the cotton understood between the parties. It was that particular lot of cotton which was stored at Kingston, and distinctly marked and piled up there. This was enough to authorize the daughter to take possession and control the cotton as against the mother; and, if possession had been refused, she could have filed her bill to compel a specific performance. But the parties went a step further. It was agreed that the cotton should be taken as part *payment* on the mortgage. Thus a price was fixed, and the mode of payment satisfactory to the parties provided. Undoubtedly the minds of the parties met; the mother could have compelled the daughter to take the cotton and give the credit as stipulated.

Neither at common law nor by the statute of frauds of England or Mississippi, was it necessary that the evidence of sale should be in writing. Story,* in commenting on the English statute, states the rule with respect to agreements for the sale of personal property to be, that where it is to be performed within one year it need not be in writing. The statute of Mississippi (Howard and Hutchinson's Compilation of Mississippi Laws, p. 370, § 1) re-enacts the English statute, and, in so far as the sale of personal property is concerned, where the agreement is to be performed within one year, the language is the same and so is the law.

But if this transaction is held not to be such a sale as passed the title absolutely to Mrs. Mahan, it must be held to be a gift *inter vivos*. The learned Dr. Bouvier in his Law Dictionary† states the rule to be, that such a gift, when

* On Sales, § 258.

† Volume 1, page 561.

completed by delivery, passes the title to the thing, so that it cannot be recovered back by the giver; and such is no doubt the rule.

Mr. G. H. Williams, Attorney-General, and Mr. C. H. Hill, contra.

Mr. Justice MILLER delivered the opinion of the court.

The sole question in the case is, whether the appellant was the owner of the cotton at the time of its seizure by the agents of the United States, and this must be decided as a matter of law on the finding of facts made by the Court of Claims, notwithstanding the frequent reference by the counsel of the appellant to the view which he takes of the evidence given in that court.

It is strongly urged by the counsel that, by the common law, the facts as found by the court, constituted a valid sale of the property, and that, as there was no statute of frauds in force in the State of Mississippi requiring delivery or a written memorandum to make a sale of personal property valid, the parol agreement set out in this finding constituted a valid sale. Whether this would be so in the absence of such a statute as most of the States have on that subject, might admit of serious debate.

But, while there is no such provision in the authorized publication of the statutes of Mississippi of 1840 by Howard and Hutchinson, to which we have been referred, we find in the Revised Code of Mississippi of 1857, which, from our own researches, we are bound to believe was the law in force when this agreement was made, a very stringent provision on this subject in the statute of frauds and perjuries of that code.

Article four of chapter forty-four* enacts that no contract for the sale of any slaves, personal property, goods, wares, and merchandise for the price of fifty dollars or upwards shall be allowed to be good and valid, except the buyer shall receive the slaves, or part of the personal property,

* Page 359.

goods, wares, and merchandise, or shall actually pay or secure the purchase-money, or part thereof, or unless some note or memorandum in writing of the bargain be made and signed by the party to be charged by such contract or his agent thereunto lawfully authorized.

The finding of the Court of Claims negatives in the most express terms the existence in the agreement, by which the title of the cotton was supposed to be transferred, of each and every one of the acts or conditions, some one of which is by that statute made necessary to the validity of the contract.

To hold that an agreement which that statute declares shall not be allowed to be good and valid was sufficient to transfer the title of the property to the claimant, would be to overrule the uniform construction of this or a similar clause in all statutes of frauds by all the courts which have construed them.

The Court of Claims held that the agreement passed no title, and we concur in their conclusion on that subject.

It is unnecessary to examine into the effect of the transaction as a gift *inter vivos*. The finding that there was no delivery would be as fatal to such a gift as to the agreement of sale. Besides there is nothing in the petition of the plaintiff, or in the findings of the Court of Claims, on which such a gift could be considered as in the issue. The finding that it was a parol contract of sale is directly opposed to the idea of a gift.

DECREE AFFIRMED.

CARLISLE *v.* UNITED STATES.

1. Aliens domiciled in the United States in 1862 were engaged in manufacturing saltpetre in Alabama, and in selling that article to the Confederate States, knowing that it was to be used by them in the manufacture of gunpowder for the prosecution of the war of the rebellion; *Held*, that they thus gave aid and comfort to the rebellion.
2. The doctrine of *Hanauer* v. *Doane* (12 Wallace, 342), that "he who, being bound by his allegiance to a government, sells goods to the agent

of an armed combination to overthrow that government, knowing that the purchaser buys them for that treasonable purpose, is himself guilty of treason or a misprision thereof," repeated and affirmed.

3. Aliens domiciled in the United States owe a local and temporary allegiance to the government of the United States; they are bound to obey all the laws of the country, not immediately relating to citizenship, during their residence in it, and are equally amenable with citizens for any infraction of those laws. Those aliens who, being domiciled in the country prior to the rebellion, gave aid and comfort to the rebellion, were, therefore, subject to be prosecuted for violation of the laws of the United States against treason and for giving aid and comfort to the rebellion.
4. The proclamation of the President of the United States, dated December 25th, 1868, granting "unconditionally, and without reservation, to all and to every person who, directly or indirectly, participated in the late insurrection or rebellion, a full pardon and amnesty for the offence of treason against the United States, or of adhering to their enemies during the late civil war, with restoration of all rights, privileges, and immunities under the Constitution and the laws which have been made in pursuance thereof," includes aliens domiciled in the country who gave aid and comfort to the rebellion.
5. The pardon and amnesty thus granted relieve claimants prosecuting in the Court of Claims for the proceeds of captured and abandoned property, under the act of Congress of March 12th, 1863, from the consequences of participation in the rebellion, and the necessity of establishing their loyalty in order to prosecute their claims, which would otherwise be indispensable to a recovery.
6. By the proceeding known as a "petition of right," the government of Great Britain accords to citizens of the United States the right to prosecute claims against that government in its courts, and therefore British subjects, if otherwise entitled, may, under the act of Congress of July 27th, 1868, prosecute claims against the United States in the Court of Claims.

THIS was an appeal from the Court of Claims. The claimants there were subjects of the Queen of Great Britain, but had been residents within the United States prior to the war of the rebellion, and during its continuance. In 1864 they were the owners of sixty-five bales of cotton stored on a plantation in Alabama. This cotton was seized during that year by naval officers of the United States and turned over to an agent of the Treasury Department, by whom the cotton was sold and the proceeds paid into the treasury. The present action was brought in the Court of Claims under the act of Congress of March 12th, 1863, known as

the Captured and Abandoned Property Act, to recover these proceeds.

The court found that the claimants were the owners of the cotton, and that it was seized and sold as stated, and that the net proceeds, amounting to $43,232, were paid into the treasury.

The court also found that the government of Great Britain accords to citizens of the United States the right to prosecute claims against that government in its own courts; but that the claimants were engaged, in 1862, in manufacturing saltpetre in Alabama, and selling that article to the Confederate States, and that they thus gave aid and comfort to the rebellion, and for that reason were not entitled to recover the proceeds of the cotton seized. Their petition was accordingly dismissed. The facts connected with the manufacture and sale of the saltpetre are thus stated by the court in its findings:

"From having, in 1860 and 1861, been engaged in the business of railroad contractors, they began in December, 1861, the manufacture of saltpetre at Santa Cave, Alabama, and continued engaged therein until the following April, when, owing to the presence of United States troops in the vicinity, they left the cave, and remained absent therefrom until the following October, when, immediately after the evacuation of Huntsville, Alabama, by the United States forces, they resumed work in making saltpetre at said cave, and continued it about two months. Their right to make saltpetre there was under a contract of lease between the owners of the cave and other parties, which had been transferred to the claimants, by whom it was, in May, 1863, sold and transferred to the so-called 'Confederate States of America' for $34,600. On the 28th of March, 1862, the claimants sold to the said Confederate States of America 2480 lbs. of saltpetre, at 75 cents per pound, in all $1860, and received payment therefor at Richmond, Virginia, on the 27th of June, 1862, from a rebel captain of artillery; and on the 30th of November, 1862, they sold to the said 'Confederate States' 4209 lbs. of nitre, at 75 cents per pound, in all $3156.75,

and in the bill of the same, which the claimants receipted, it was expressed that the said nitre was 'for manufacture of gunpowder;' and the amount of said bill was paid at Larkinsville, Alabama, on the 24th of December, 1862, by the rebel 'superintendent of nitre and mining district No. 9;' and the claimants hired to the said 'Confederate States' wagons to transport the said nitre from Santa Cave to Rome, Georgia."

From the decree dismissing the petition the claimants appealed to this court.

Messrs. Carlisle and McPherson, for the appellants; Mr. C. H. Hill, Assistant Attorney-General, contra.

Mr. Justice FIELD delivered the opinion of the court.

The circumstances attending the manufacture and sale of the saltpetre, as disclosed in the findings of the court, plainly show that the claimants knew that the saltpetre was to be used by the Confederates in the manufacture of gunpowder for the prosecution of the war of the rebellion, and there is little doubt that the sale was made in order to aid the Confederates in accomplishing their treasonable purposes. By thus furnishing materials for the prosecution of the war whilst they were domiciled in the country, knowing the uses to which the materials were to be applied, the claimants became participators in the treason of the Confederates equally as if they had been original conspirators with them. The Court of Claims, therefore, did not err in its conclusion that the act of the claimants in selling the saltpetre to the Confederates, under these circumstances, was an act of aid and comfort to the rebellion. We have already held in *Hanauer* v. *Doane*,* and we repeat and reaffirm what we there said, that "he who, being bound by his allegiance to a government, sells goods to the agent of an armed combination to overthrow that government, knowing that the purchaser buys them for that treasonable purpose, is himself guilty of

* 12 Wallace, 347.

treason or a misprision thereof. He voluntarily aids the treason. He cannot be permitted to stand on the nice metaphysical distinction that, although he knows that the purchaser buys the goods for the purpose of aiding the rebellion, he does not sell them for that purpose. The consequences of his acts are too serious and enormous to admit of such a plea. He must be taken to intend the consequences of his own voluntary act."

But the aid and comfort thus given to the rebellion by the claimants did not justify a denial of their right to recover the proceeds of their property in the treasury of the United States after the proclamation of pardon and amnesty made by the President on the 25th of December, 1868, unless their character as aliens excludes them from the benefit of that proclamation, a question which we shall presently consider. Assuming that they are within the terms of the proclamation, the pardon and amnesty granted relieve them from the legal consequences of their participation in the rebellion, and from the necessity of proving that they had not thus participated, which otherwise would have been indispensable to a recovery. It is true, the pardon and amnesty do not and cannot alter the actual fact that aid and comfort were given by the claimants, but they forever close the eyes of the court to the perception of that fact as an element in its judgment, no rights of third parties having intervened.

There has been some difference of opinion among the members of the court as to cases covered by the pardon of the President, but there has been none as to the effect and operation of a pardon in cases where it applies. All have agreed that the pardon not merely releases the offender from the punishment prescribed for the offence, but that it obliterates in legal contemplation the offence itself.

When, therefore, in Padelford's case,* a claimant under the Captured and Abandoned Property Act, who had given aid and comfort to the rebellion, appeared in the Court of Claims, asking for a restoration of the proceeds of his prop-

* 9 Wallace, 531.

erty, and showing that he had taken the oath prescribed by the proclamation of President Lincoln, of December 8th, 1863, and had since then kept the oath inviolate, and was thereby by force of the proclamation pardoned, this court held that after the pardon thus granted no offence connected with the rebellion could be imputed to him; that if in other respects he made the proof which under the act entitled him to a decree for the proceeds of his property, the law made the proof of pardon a complete substitute for proof that he had given no aid or comfort to the rebellion; and that a different construction would defeat the manifest intent of the proclamation and of the act of Congress which authorized it.

In Klein's case,* which subsequently came before the court, an act of Congress designed to deny to the pardon of the President the effect and operation which the court had thus adjudged to it, and which declared that an acceptance of pardon without disclaimer should be conclusive evidence of the acts pardoned, and be inoperative as evidence of the rights conferred by it in the Court of Claims and in this court, was held to be unconstitutional and void.

In Mrs. Armstrong's case,† which was here at the last term, the court declined to consider whether the evidence was sufficient to prove that the claimant had given aid and comfort to the rebellion, and held that the proclamation of pardon and amnesty issued by the President on the 25th of December, 1868, entitled her to the proceeds of her captured and abandoned property in the treasury, without proof that she never gave such aid and comfort; that the proclamation granting pardon unconditionally, and without reservation, was a public act of which all courts of the United States were bound to take notice, and to which all courts were bound to give effect.

In Pargoud's case,‡ also here at the last term, the claimant stated in his petition that he was guilty of participating in the rebellion, but that he had been pardoned by the Presi-

* 13 Wallace, 128. † Ib. 154. ‡ Ib. 156.

dent, by special act, in January, 1866, and also by operation of the President's general proclamation. The Court of Claims decided against the claimant on the ground that his petition did not aver that he had not given any aid or comfort to the rebellion, and did not sufficiently aver a pardon by the President. This court reversed the judgment, following the decision in Mrs. Armstrong's case, and holding that the President's proclamation of December 25th, 1868, relieved claimants of captured and abandoned property from proof of adhesion to the United States during the civil war.

After these repeated adjudications, it must be regarded as settled in this court that the pardon of the President, whether granted by special letters or by general proclamation, relieves claimants of the proceeds of captured and abandoned property from the consequences of participation in the rebellion, and from the necessity of establishing their loyalty in order to prosecute their claims. This result follows whether we regard the pardon as effacing the offence, blotting it out, in the language of the cases, as though it had never existed, or regard persons pardoned as necessarily excepted from the general language of the act, which requires claimants to make proof of their adhesion, during the rebellion, to the United States. It is not to be supposed that Congress intended by the general language of the act to encroach upon any of the prerogatives of the President, and especially that benign prerogative of mercy which lies in the pardoning power. It is more reasonable to conclude that claimants restored to their rights of property, by the pardon of the President, were not in contemplation of Congress in passing the act, and were not intended to be embraced by the requirement in question. All general terms in statutes should be limited in their application, so as not to lead to injustice, oppression, or any unconstitutional operation, if that be possible. It will be presumed that exceptions were intended which would avoid results of that nature.*

Such being the general effect of pardon and amnesty

* United States *v.* Kirby, 7 Wallace, 482.

granted by the President, it only remains to consider whether the proclamation of December 25th, 1868, embraces the claimants who were aliens domiciled in the country, within its provisions. And upon this point we entertain no doubt. The claimants were residents in the United States prior to the commencement of the rebellion. They so allege in their petition; they were, therefore, bound to obey all the laws of the country, not immediately relating to citizenship, during their sojourn in it; and they were equally amenable with citizens for any infraction of those laws. "The rights of sovereignty," says Wildman, in his Institutes on International Law,* "extend to all persons and things not privileged that are within the territory. They extend to all strangers therein, not only to those who are naturalized and to those who are domiciled therein, having taken up their abode with the intention of permanent residence, but also to those whose residence is transitory. All strangers are under the protection of the sovereign while they are within his territories, and owe a temporary allegiance in return for that protection."

By allegiance is meant the obligation of fidelity and obedience which the individual owes to the government under which he lives, or to his sovereign in return for the protection he receives. It may be an absolute and permanent obligation, or it may be a qualified and temporary one. The citizen or subject owes an absolute and permanent allegiance to his government or sovereign, or at least until, by some open and distinct act, he renounces it and becomes a citizen or subject of another government or another sovereign. The alien, whilst domiciled in the country, owes a local and temporary allegiance, which continues during the period of his residence.

This obligation of temporary allegiance by an alien resident in a friendly country is everywhere recognized by publicists and statesmen. In the case of Thrasher, a citizen of the United States resident in Cuba, who complained of inju-

* Wildman, p. 40.

ries suffered from the government of that island, Mr. Webster, then Secretary of State, made, in 1851, a report to the President in answer to a resolution of the House of Representatives, in which he said: "Every foreigner born residing in a country owes to that country allegiance and obedience to its laws so long as he remains in it, as a duty upon him by the mere fact of his residence, and that temporary protection which he enjoys, and is as much bound to obey its laws as native subjects or citizens. This is the universal understanding in all civilized states, and nowhere a more established doctrine than in this country." And again: "Independently of a residence with intention to continue such residence; independently of any domiciliation; independently of the taking of any oath of allegiance or of renouncing any former allegiance, it is well known that, by the public law, an alien or a stranger born, for so long a time as he continues within the dominions of a foreign government, owes obedience to the laws of that government, and may be *punished for treason* or other crimes as a native-born subject might be, unless his case is varied by some treaty stipulation."*

The same doctrine is stated in Hale's Pleas of the Crown,† East's Crown Law,‡ and Foster's Discourse upon High Treason,§ all of which are treatises of approved merit.

Such being the established doctrine, the claimants here were amenable to the laws of the United States prescribing punishment for treason and for giving aid and comfort to the rebellion. They were, as domiciled aliens in the country prior to the rebellion, under the obligation of fidelity and obedience to the government of the United States. They subsequently took their lot with the insurgents, and would be subject like them to punishment under the laws they violated but for the proclamation of the President of December 25th, 1868. That proclamation, in its comprehensive terms, includes them and all others in like situation. It grants "unconditionally, and without reservation, to all

* Webster's Works, vol. vi, p. 526.

† Vol. i, chap. 10.

‡ Vol. i, chap. 2, sec. 4.

§ Sec. 2, p. 185.

and to every person who, directly or indirectly, participated in the late insurrection or rebellion, a full pardon and amnesty for the offence of treason against the United States, or of adhering to their enemies during the late civil war, with restoration of all rights, privileges, and immunities under the Constitution and the laws which have been made in pursuance thereof."

The act of Congress of July 27th, 1868,* authorizes any alien to prosecute claims against the United States in the Court of Claims, where the government of which he is a citizen or subject accords to citizens of the United States the right to prosecute claims against such government in its courts. In O'Keefe's case† it was held that, by the proceeding known as a "petition of right," the government of Great Britain accords to citizens of the United States the right to prosecute claims against that government in its courts, and therefore that British subjects, if otherwise entitled, may prosecute claims against the United States in the Court of Claims. There is, therefore, no impediment to the recovery by the claimants in this case of the net proceeds of their cotton paid into the treasury.

The judgment of the Court of Claims must, therefore, be REVERSED, and that court directed to enter judgment in favor of the claimants for the amount of such net proceeds; and it is

SO ORDERED.

THE COLLECTOR v. DOSWELL & Co.

1. Commercial brokers who act wholly as buyers (other parties acting as sellers, and these, and not the brokers, receiving the purchase-money) do not make "sales" as commercial brokers within the meaning of the Internal Revenue Act of July 13th, 1866, laying a tax of one-twentieth of one per cent. on the amount of all sales made by such brokers.
2. This is not altered by the fact that the compensation to the brokers for making purchases was one-half of one per cent. paid by the buyer,

* 15 Stat. at Large, 243. † 11 Wallace, 178.

and one-fourth of one per cent. paid by the seller, under a custom of trade prevalent in the city where the purchases were made, established when brokers were sellers as well as buyers, though not kept up at the time of the sales under consideration.

ERROR to the Circuit Court for the District of Louisiana.

The ninth section of the act of July 13th, 1866, to reduce internal taxation, and to amend the internal revenue laws,* declares, among other things, that there shall be paid monthly on all *sales* by commercial brokers of any goods, wares, or merchandise, a tax of one-twentieth of one per cent. on the amount of said *sales*, and on or before the tenth day of each month every commercial broker shall make a list or return to the assessor of the district of the gross amount of such *sales*, as aforesaid, for the preceding month; provided, that, in estimating such sales of goods, wares, and merchandise, for the purpose of this section, *any sales made by or through another broker, upon which a tax had been paid*, shall not be estimated and included as sold by the broker for whom the sale was made.

Doswell & Co., cotton brokers of New Orleans, having paid a tax assessed against them under this statute, and made in vain an appeal to the commissioner of internal revenue to get back the money paid, brought this suit against the collector, to whom they had paid it.

On the trial an agreed statement of facts was submitted to the court, by which it appeared that the plaintiffs did not sell any cotton or other goods, but limited themselves to making purchases for those who required their services; that the money was paid by their principals directly to the parties who made the sales, and that their compensation for making the purchases was one-half of one per cent. paid by the buyer, and one-fourth of one per cent. by the seller, under a custom of the trade in New Orleans, established when cotton brokers were sellers as well as buyers, and kept up, though they were so no longer.

The case agreed on further showed that a tax on all the

* 14 Stat. at Large, 134.

sales for which the plaintiffs were assessed, had been paid by the parties making the sales.

The court below gave judgment for the plaintiff, and the record of that judgment the government now brought here for review.

Mr. G. H. Williams, Attorney-General, and Mr. S. F. Phillips, Solicitor-General, for the collector, plaintiff in error, submitted the case on a statement of it, and without argument.

Mr. Frederick Chase, contra.

Mr. Justice MILLER delivered the opinion of the court.

That the plaintiffs did not make sales as commercial brokers is too clear for argument. They acted wholly as buyers and other parties as sellers. The per cent. paid them by the sellers under the usage does not change their relation to the transaction.

The section of the statute referred to provides for taxes in a great variety of sales by bankers, brokers, and others, of stocks, real estate, &c., but it is always a tax on *sales*, and always collected of the seller, or his broker or agent.

It is stated in the agreement of facts submitted that a tax on all the sales for which the plaintiffs were assessed had been paid by the parties making the sales. This clearly relieved the plaintiffs from any obligation to pay this tax, if it otherwise existed, under the *proviso* of the ninth section of the statute.

It is so very clear, upon applying the statute to the agreed statement of facts, that the transactions charged against the plaintiffs were not sales, and not taxable to them, that it cannot be made plainer by argument; and, while the law officers of the government have furnished a brief statement of the facts, they have neither cited the statute nor made an argument against the right of the plaintiffs to recover.

The judgment of the Circuit Court in their favor is therefore

AFFIRMED.

JAMES *v.* MILWAUKEE.

An act of legislature authorizing a municipal corporation to lend its credit to a railroad company specified, and to "*any other railroad company duly incorporated and organized* for the purpose of constructing railroads," leading in a direction named, "and which in the opinion of common council are entitled to such aid from the city;" authorizes the lending of the city credit to a railroad company *thereafter* duly incorporated and organized, as well as the lending of such credit to those in existence when the act was passed.

ERROR to the Circuit Court for the Eastern District of Wisconsin.

Mr. J. W. Cary, and O. H. Waldo (counsel in another but similar case), for the plaintiff in error; Mr. E. G. Ryan, contra.

Mr. Justice SWAYNE stated the case, and delivered the opinion of the court.

This action was brought by the plaintiffs in error to recover the amount of certain overdue interest coupons attached to twelve bonds issued by the city of Milwaukee to the Milwaukee and Superior Railroad Company, and the amount of like coupons attached to a like bond issued by the city to the Milwaukee and Beloit Railroad Company.

The pleadings upon both sides are voluminous, but a short statement of the case will be sufficient for the purposes of this opinion.

The act of the legislature of Wisconsin of the 2d of April, 1853, authorized the city of Milwaukee to lend its credit to certain specified railroad companies, upon the terms and conditions prescribed. The act of the 12th of July, 1853, declared that the provisions of the preceding act "are extended, and shall include the Milwaukee and Watertown Railroad Company, *and any other railroad company duly incorporated and organized* for the purpose of constructing railroads leading from the city of Milwaukee into the interior of the State, which, in the opinion of the common council, are entitled to aid from the city." The act of the 31st of

March, 1854, extended the original act "to the South Wisconsin Railroad Company, or to any other railroad company duly incorporated and organized for the purpose of constructing railroads" to connect with "any other railroad having its terminus in said city, which, in the opinion of the common council are entitled to aid from said city." The act of March 18th, 1856, limited the amount of bonds to be issued to an aggregate of $2,000,000.

The Milwaukee and Superior Railroad Company was incorporated by an act approved March 4th, 1856, and the Milwaukee and Beloit Railroad Company by another act approved on the same day.

On the 11th of June, 1856, the common council passed an ordinance authorizing the issue of bonds to the first named company to an amount not exceeding $100,000, and on the same day another ordinance, authorizing the issue of like bonds, not exceeding the same amount, to the latter company. Both ordinances were approved and ratified by a popular vote in the manner prescribed by the statutes.

The bonds and coupons in question in this case were thereupon executed and delivered. They purport on their face to be issued in pursuance of the act of "April 2d, 1853, and of the several acts amendatory thereto."

Upon the trial in the Circuit Court the learned judge instructed the jury that the acts referred to had no application to railroad companies not in existence when they took effect, and that "there was no authority for the city to issue these bonds, and they are void, and the plaintiffs cannot recover." The plaintiffs in error excepted.

The only question which we have found it necessary to consider is the correctness of this ruling, and that depends upon the construction to be given to the language of the act of July 12th, 1853, whereby it is declared that the provisions of the prior act "are extended and shall include" the railroad specially named, "*and any other railroad company duly incorporated and organized* for the purpose of constructing railroads leading from the city of Milwaukee," &c. The

defendant in error insists that the power conferred was confined to companies already in existence at the date of the act, and such was the opinion of the court below. We entertain a different opinion.

In this inquiry the intention of the legislature is to be sought for. That, whatever it may be, constitutes the law. If it had been intended to limit the scope of the act to pre-existing corporations, we cannot doubt that the term *heretofore*, or some equivalent phrase, would have been employed in the proper place. This would have made the effect of the act what is contended for by the defendant in error. If the word *hereafter* had been used, that would have produced the opposite result. In either case the effect of the term employed would have been exclusive. In the former, the act would have applied only to companies already existing, and, in the latter, only to those of later creation. The language is, "any other railroad company duly incorporated and organized." No tense is expressed and no particular time is indicated. There is nothing which limits and points its meaning any more to companies then, than to those thereafter, organized. It is applicable, and in all respects alike applicable, to both, and we think both were intended to be included.

This view of the subject derives support from the plain reason and object not only of this act, but of the entire series of acts upon the subject. They are all *in pari materia*, constitute a common context, and are to be regarded as if embraced in the same statute.* The presence of railroads, and especially of their *termini*, are beneficial to cities by increasing their business and promoting their growth. Such works animate all the sources of local prosperity. In the case before us, doubtless quite as much was anticipated as could, under any circumstances, have been realized. The legislature intended to give the city the full benefit of this policy. Companies organized and those to be organized were alike important. The restrictions and safeguards pro-

* Smith's Com. 758.

vided are applicable to both. They are found in the required sanction of the common council, the approval of the voters, the limitation of the maximum of credit to be given to each company selected, and the limitation of the maximum of the aggregate of such credits. No reason can be imagined why one class should be embraced and the other excluded. There is no consideration, affirmative or negative, which does not apply alike to both. No discrimination is made in any of the acts, and both classes are within the language employed.

The construction practically given by the parties interested, as evinced by their conduct, is in harmony with the views we have expressed, and is not without weight.*

The common council deliberately passed the ordinances, the electors approved them, the mayor subscribed and issued the bonds, and the companies received them as valid. We do not learn that there was any doubt or dissent as to the question of legal authority until after both companies had become hopelessly bankrupt.

Our attention has been called to numerous parallelisms of language in other statutes of Wisconsin, where there is, as in this case, clearly a prospective meaning. Doubtless such analogies might be found in abundance elsewhere. But we deem it unnecessary to pursue the subject further.

JUDGMENT REVERSED, and the cause remanded with directions to proceed

IN CONFORMITY TO THIS OPINION.

GARNHARTS v. UNITED STATES.

Where, on an information for breach of the internal revenue laws, the record shows that an answer of a claimant was stricken out by the court, in a case in which he was entitled to a trial by jury, and judgment rendered against him as upon default, the court will not presume that the order was passed for good cause, unless enough is shown in the record to warrant such a conclusion.

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* Meyer v. Muscatine, 8 Wallace, 384.

Statement of the case in the opinion.

Any such judgment will accordingly be reversed, and the cause remanded with directions to permit the claimant to answer, and to award a *venire*.

ERROR to the District Court for the Middle District of Alabama; in which court, on an information against certain distilled spirits seized on land, and answer and claim, the court, on motion of the district attorney of the United States, ordered the claim and answer to be stricken from the files; and refusing to let the claimants either amend the old answer or file a new one, entered a decree condemning the property seized.

To this action of the court the claimants excepted, and brought the question of its propriety here.

Messrs. J. W. Noble and N. P. Chipman, for the claimant, plaintiffs in error; Mr. G. H. Williams, Attorney-General, and Mr. C. H. Hill, Assistant Attorney-General, contra.

Mr. Justice CLIFFORD stated the case more fully, and delivered the opinion of the court.

Distilled spirits, found elsewhere than in a distillery or distillery warehouse, not having been removed therefrom according to law, are declared to be forfeited to the United States by the thirty-sixth section of the act of the twentieth of July, 1868, imposing taxes on distilled spirits.*

Ninety-six casks of distilled spirits, duly assessed under that act, were, on the twenty-fourth of May, 1869, seized on land, at Montgomery, in the Middle District of Alabama, as subject to forfeiture, the taxes imposed not having been paid, and the casks with their contents having been found elsewhere than in a distillery or distillery warehouse. Seizure was made by the deputy collector, and he delivered the casks as seized to the marshal. Subsequently, to wit, on the tenth of June in the same year, the district attorney filed an information against the property seized, praying process against the property, and that the same might be condemned

* 15 Stat. at Large, 140.

as forfeited, which information sets forth the following causes of forfeiture: (1.) That the spirits were found at the place aforesaid in the control of J. H. Garnhart & Co., holding the spirits with intent to sell the same in fraud of the internal revenue laws; that when found they were not in any distillery or distillery warehouse, or in transit to any bonded warehouse, or intended for transportation. (2.) That the spirits had been removed from some distillery or distillery warehouse without a permit and without paying or securing the payment of the tax imposed thereon, or giving bond for the removal thereof to any bonded warehouse, and without having been inspected, bonded, gauged, or stamped as required by law. (3.) That the casks containing the spirits were not stamped, marked, or branded as required by law. Process was requested, and it is not denied that it was issued and served, and the persons in whose possession the spirits were found appeared on the twenty-sixth of June next after the seizure and filed their claim to the property, in which they allege that they are the true and *bonâ fide* owners of the ninety-six casks of distilled spirits, and it appears that they gave security for costs as required in such proceedings. Nothing further appears to have been done in the cause until the twenty-fifth of May, in the succeeding year, when the claimants appeared and filed an answer, in which they allege as follows: (1.) That they are the true and *bonâ fide* owners of the property in controversy. (2.) That they admit that the spirits were seized as set forth in the information. (3.) That the charges and allegations contained in each of the first three paragraphs of the information, are untrue. (4.) That the claimants never had any intention to defraud the United States, that the spirits were duly and legally stamped, and that the tax was paid as required by law.

Discrepancies are noticed in the record as to dates, arising doubtless from the fact that a second claim was filed, called in the transcript the claim and answer, but enough appears to enable the court to understand the proceedings and to

show that the judgment should be reversed, as it is stated in the bill of exceptions that issue was joined upon the answer, and that sundry depositions had been taken and were on file in court.

Where the seizure is made on land, the claimant is entitled to a trial by jury, if he appears and files an answer denying the facts set forth in the information. They, the claimants, did appear in this case, and the answer which they filed denies every material fact in the information set forth as a cause of forfeiture, and the bill of exceptions states that an issue had been joined upon that pleading. Repeated decisions of this court have established the rule that where the seizure is made on navigable waters, the case belongs to the instance side of the subordinate court, but where the seizure is made on land, the suit is one at common law, and the claimants are entitled to a trial by jury.* Beyond all question the claimants were entitled to a trial by jury, but the court, instead of granting them that right, entered an order, on motion of the district attorney, striking out the claim and answer; and having refused to allow the claimants to amend their answer or to file a new one, entered a decree condemning the property seized, and the claimants excepted. Much discussion of the error assigned is unnecessary, as it is clearly a good cause to reverse the judgment, as determined by this court in two cases where the question was fully considered. The cases of *Hozey* v. *Buchanan*,† and *Mandelbaum* v. *The People*,‡ both decide that it is error to strike out an answer filed by the defendant, which constitutes a good defence, and on which he relied as a defence to the charge made against him by the complaining party.

Suggestion is made that it does not appear upon what ground the order was made, which is all the worse for the prevailing party, as such an order can never be justified unless it was made for good cause appearing in the record.

* Confiscation Cases, 7 Wallace, 462; The Sarah, 8 Wheaton, 394; Armstrong's Foundry, 6 Wallace, 769; 3 Greenleaf on Evidence, § 396.

† 16 Peters, 218.

‡ 8 Wallace, 313.

Where the record shows that the answer of the respondent was stricken out by the court, in a case in which the respondent was entitled to a trial by jury, and judgment was rendered against him as upon default, the court will not presume that the order was passed for good cause, unless enough is shown in the record to warrant such a conclusion.

JUDGMENT REVERSED, and the cause remanded with directions to permit the claimants to answer, and to award

A VENIRE.

HANRICK *v.* BARTON.

1. In Texas titles, before the adoption of the common law, a title of possession issued to an attorney in fact of the original grantee for the latter's use, vested the title in such grantee, and not in the attorney.
2. The original grant by the government was regarded as the foundation of the title; and the extension of that title upon specific lands, if made for the benefit of the original grantee, vested title in him.
3. The papers of the original title, from the government grant to the title of possession (called the espediente), properly belong to the archives of the General Land Office, and include a power of attorney from the grantee to obtain the possessory title.
4. Certified copies of such papers from the General Land Office are admissible in evidence, and are then evidence for all purposes for which the originals could be adduced.
5. Under the Mexican-Spanish law formerly prevailing in Texas, a power of attorney to sell and convey land was properly executed by the attorney in his own name, specifying that he executed the deed as attorney for his principal.
6. In order to render a certified copy of a deed admissible in evidence in Texas, it must be filed with the papers in the cause at least three days before the commencement of the trial; but the affidavit of loss of the original deed need not be filed until the trial.

ERROR to the Circuit Court for the Western District of Texas.

Edward Hanrick, a citizen of Alabama, in December, 1860, brought two actions of trespass to try title, in the nature of actions of ejectment, in the District Court of the United States for the Western District of Texas, for the re-

Statement, in the opinion, of the case as to the first part of the third bill.

covery of eleven leagues of land in Falls County, in that State, alleged to have been granted by the proper officers of the State of Coahuila and Texas to one Atanacio de la Serda, and claimed by the plaintiff as owner in fee. The original plaintiff having died, the present plaintiff was admitted to prosecute the action as his administrator and only heir.

The defendants pleaded:

1st. The general issue;

2d. Title under one Thomas J. Chambers; and

3d. The statutes of limitation of three and ten years.

A jury being waived, the two causes were consolidated and tried by the court as one cause, in July, 1870, and the court found and decided that the plaintiff had failed to make out legal title to the land in controversy in Edward Hanrick, and gave judgment for the defendants, without passing upon the issues raised on the statutes of limitation. The case was brought here by the plaintiff upon certain bills of exception taken during the trial of the cause, showing rulings of the court adverse to the plaintiff, which were material to the result, and which, he alleged, were erroneous.

Mr. Conway Robinson, with whom was Mr. W. G. Hale, for the plaintiff in error; Mr. G. F. More, contra.

Mr. Justice BRADLEY stated the case in its different parts, as it arose on the exceptions, in their order, and delivered the opinion of the court.

The first and second bills relate to certain rulings upon replications proffered by the plaintiff to the pleas of the statute of limitations. As these became immaterial from the final view which the court below took of the case, which relieved the defendants from relying on the statutes of limitation, we will consider the other bills.

The plaintiff produced in evidence a properly certified and translated copy from the General Land Office of the following title-papers, on which he relied for showing a grant of the land in controversy to Atanacio de la Serda.

1st. A petition by La Serda, described as a native and

Statement, in the opinion, of the case as to the first part of the third bill.

resident of Nacogdoches, to the governor, dated October 29th, 1830, praying for a grant of eleven leagues of land in the department.

2d. A grant by Governor Letona to La Serda, dated at Leona Vicario, March 11th, 1831, for eleven leagues of vacant land of the State, subject to the usual conditions of colonization then in force.

3d. A blank unsigned application to the alcalde of Austin, dated Austin, ——, 1833, purporting to be made by Matthew R. Williams, attorney in fact of Atanacio de la Serda, stating the grant made to him, and praying that title of possession of the same might be made for eleven leagues of land on the left bank of the river Brazos, within the colony of Austin and Williams.

4th. An order of Lesassier, alcalde of Austin, dated October, 1833, referring the application to Austin and Williams for their approval, and if they approved it, referring it to the principal surveyor, to survey the land.

5th. Consent of Austin and Williams, dated ——, 1833.

6th. Survey by F. W. Johnson of the eleven leagues in controversy for the attorney in fact of Atanacio de la Serda; the survey being addressed to the alcalde.

7th. A grant or title of possession, purporting to be made by Luke Lesassier, alcalde of Austin, acting as a commissioner under authority of the government, by which (as the grant recites) in consideration of the sale made to Atanacio de la Serda (referring to the particulars of the same), exhibited by the citizen Matthew R. Williams, attorney in fact of said La Serda, he, Lesassier, declared as follows, to wit:

"I grant to and put the aforesaid attorney in fact of citizen Atanacio de la Serda into real, actual, corporal, and virtual possession of eleven leagues of land, the same which he prayed for and which the government sold him, situate on the left margin of the river Brazos, &c."

Describing the eleven leagues in controversy; and after specifying the terms and conditions to be complied with, concluding thus:

Opinion of the court as to the first part of the third bill.

"Therefore, by virtue of the authority in me vested by the before-mentioned decree, &c., I issue this present title, and do ordain that an authentic copy thereof be taken and delivered to the party interested, for the purpose that he may own, use, and enjoy the land which has been sold to him, for himself, for his children, his heirs, or successors, &c."

The plaintiff then offered in evidence a deed, dated the 8th day of July, 1838, which, it is conceded, was sufficiently authenticated, and by which the said Matthew R. Williams, as attorney in fact of La Serda (but in his own name as such attorney), conveyed or attempted to convey the land in question to Asa Hoxey and R. M. Williamson, from whom the plaintiff deduced title to himself. To the admission of this deed in evidence the defendants objected, and it was excluded by the court, which ruling constitutes the ground of the first part of the third bill of exceptions.

The principal objections urged against this deed were, *first*, that the plaintiff had not shown any valid and legal authority from La Serda to Williams to sell and convey the land; *secondly*, that the deed was not a valid execution of the power, if such a power existed. Other objections were assigned, from which it appears that the defendants had contended that the title of possession was a grant to Williams, the alleged attorney, and not to La Serda, but that the court had overruled the objection, and had held that it was a grant to La Serda. If the grant enured to Williams he would have needed no power from La Serda to make the deed in question; but if it enured to La Serda, of course such a power was necessary. It is essential, therefore, to determine the effect of the title of possession issued by the alcalde, Lesassier.

This grant, if judged by common-law methods of assurance, is not expressed in the most apt terms. At first blush it seems to convey the land to the attorney in fact of La Serda, and not to La Serda himself. But it seems to be in the usual form used in such cases.* In construing Mexican

* See Hancock v. McKinney, 7 Texas Reports, 384, where the same form is used.

titles in Texas much greater stress seems to be laid on the original grant made by the governor than is laid by us on the ordinary land-warrant in government titles. In the land system of the United States the final patent is the all-controlling document as to the legal title. But in Texas titles the final "extension of title," as it is called, which is usually issued by a local commissioner appointed for that purpose (in this case the alcalde of Austin), is regarded more as a certificate of location, issued for the purpose of designating the particular land on which the original grant is to take effect than as an independent grant. In *Clay* v. *Holbert*,* the court, speaking of a title very similar to that under consideration, says: "It is believed that, this being a sale of land, not made by the commissioner, but by the executive, so far as the right of the purchaser is concerned, the commissioner's duty did not begin until after the right had been acquired by purchase from the State; and it relates then mainly to the reference to a surveyor, approval of the survey, and putting the purchaser in possession; and his [the commissioner's] title was only evidence of the right acquired by the purchaser, and did not give or convey the right, because the right had accrued by the act of the State executive." It is true, the title of possession is necessary to render the original title perfect; for until it issues the original grant does not attach itself to any specific land. But when it is issued the original title is said to be extended upon the particular land designated.

When, therefore, a grant from the governor to La Serda is produced, together with a survey made at the instance of a person who assumes to act as his attorney in fact; and a title of possession is then shown, professing to put the attorney in fact, as such, in possession of the land surveyed, and declaring that said title was issued in order that the party interested might own and enjoy the land which had been sold to him, for himself, his children, his heirs and successors or assigns, such title must be deemed to be issued for

* 14 Texas Reports, 202.

the benefit of, and to enure to, the original grantee. Its legal effect must be to perfect title in him. And in so holding, we think that the court below was right. We do not mean to say that the original grantee, if not prohibited by law, might not have assigned his inchoate title to a third person; nor that the title might not, by a grant in proper form, have been perfected in such assignee; but we think that the legal effect of the extension of title in this case, by the document offered in evidence, was to perfect La Serda's title, and not to vest title in Williams.

This conclusion renders it necessary that Williams should have had a power of attorney from La Serda, in order that a deed executed by him should have any efficacy in transferring the title to another. But no such power was among the papers previously offered in evidence, at least so far as appears by the bill of exceptions now under consideration.

But there was attached to the deed offered in evidence, and offered with it, a document, consisting of a copy of the original title-papers in Spanish, accompanied with an English translation, duly certified by the translator and the Commissioner of the General Land Office to be a true and correct translation from the original Spanish title-papers in said office. The papers thus certified were the title-papers previously given in evidence, and two other documents in addition thereto, namely: first, a power of attorney from La Serda to one J. S. Roberts, dated July 20th, 1832, authorizing Roberts to obtain possession and title of the eleven leagues granted to La Serda, as before stated, and to sell and convey the same, and to appoint one or more substitutes in his place; secondly, the other additional document was an act executed by J. S. Roberts, and dated December 10th, 1832, whereby he substituted Matthew R. Williams in his place as attorney of La Serda.

It is apparent that if this power of attorney and act of substitution were properly authenticated, they gave Williams full power to sell and convey, as well as acquire possession. The counsel of the defendants contends that they were not properly authenticated; that they were private

documents and no part of the original title; and, therefore, did not properly belong to the archives of the Land Office, but to the officer before whom, or clerk of the county in which they were executed (in this case Nacogdoches), and therefore that the certificate of the General Land Office could not give authenticity to the copies. His proposition is, "that copies of papers in the Land Office are not evidence unless said papers properly form a part of the said archives of said office." This general proposition is undoubtedly correct. Private deeds, conveyances, or mortgages executed before a notary between citizens, and having only a private effect and operation, could not be regarded as belonging to the public archives, but the originals or protocols would be preserved by the notary, or officer acting as such, or turned over to the county clerk having custody of the county records. But the set of documents which make up the original title-papers of any tract of land, from the original petition of the grantee to the final extension of title (usually called in Mexico the "espediente"), do belong to the public archives. They either have to pass under the examination and approval of the different officials concerned in granting out the public lands as the basis of their acts, or they are the very acts themselves of those officials, constituting the preliminary and final acts of title, demonstrating for all future time the alienation of a specific portion of the public domain. Now, although some of these documents may contain private stipulations between the parties concerned, yet their proper place of custody is the General Land Office, and not private or local offices; and, if they belong to the archives, certified copies of them are evidence. The original act of 1836 establishing the General Land Office declares (sec. 6) that the Commissioner of the General Land Office shall be entitled to the custody of all the records, books, and papers in any way appertaining to the lands of the Republic, and that may now be in the care or possession of all empresarios, political chiefs, commissarios, or commissioners for issuing land-titles, or any other person; and that the said records, books, and papers shall become and be deemed the

Opinion of the court as to the first part of the third bill.

books and papers of the said office. The fifteenth section required all local registers, after recording powers of attorney, or any other instrument of writing connected with the grant of orders of survey, to forward them to the Commissioner of the General Land Office, showing that such instruments were regarded as belonging to that office. The power of attorney in the present case was specially referred to and acted on in the final grant of title, as appears by its recitals, and became a paper necessary for the Land Office to have in its possession in order to see the ground for extending the title to Williams as the attorney in fact of La Serda. Being thus an integral part of the original title, and belonging to the archives of the General Land Office, it was properly authenticated for all purposes by the certificates of the translator and commissioner. The Land Office Act of December 14th, 1837, declared that certified copies of any records, books, or papers belonging to the office, should be competent evidence in all cases where the originals could be evidence.* The subsequent acts on the subject are equally explicit.†

The next objection made by the defendants is, that although the power should be deemed sufficient, the deed was not a valid execution of the power, being a conveyance by Williams in his own name as attorney of La Serda, and not a conveyance in the name of La Serda by his attorney, Williams. The defendants' counsel is correct in saying that this would have been defective at common law.‡ But in Texas, at the time when this deed was executed, the Spanish law with respect to transfers of title still prevailed. The common law was adopted in its application to juries and evidence on December 20th, 1836, but was not generally adopted as the rule of decision in other respects until January 20th, 1840.§ By the Mexico-Spanish law, prevailing in Texas in 1838, the deed was framed and executed in the ordinary legal form for transferring the title of the con-

* Paschal's Digest, Art. 4086.
† Ib., Arts. 4088, 3715.
‡ Story on Agency, §§ 147, 148.
§ Paschal's Digest, Arts. 3706, 978.

Statement of the case as to the second and third parts of the third bill.

stituent or party who executed the power of attorney. Several instances of such deeds are to be found in the Texas reports, and passed without objection. The form of a deed to be executed by an attorney, as prescribed by the Spanish Partidas, L. 61, Tit. 18, Partidas 3d, is given in 16 Texas, 68, as follows:

"Know all men who may see these presents, that A. B., as attorney of C. D., specially authorized by him to sell, &c., to receive the purchase-money, and in his name to covenant, &c., does sell, &c."

Such instruments are deemed the act of the principal and not of the agent. This being the law of Texas when the deed was executed, it was sufficient, in form and mode of execution, to pass a perfect title at that time from La Serda to the grantees, for it is well settled that if a title once becomes vested no subsequent change of laws as to forms or solemnities of conveyance will divest it.

The other objections raised to the admission of the deed are all involved in those already noticed, and need no further examination.

The position so elaborately argued by the defendants' counsel, to the effect that the title-papers appear never to have been completed, no evidence having been given to show that a *testimonio* was ever issued, or that the final title of possession ever became an executed instrument, cannot be considered on this writ of error. We have no means of knowing what evidence may have been offered to sustain the title-papers admitted in evidence, except from the defendants' bill of exceptions, and that is not now properly before us.

Our conclusion on the first part of the third bill of exceptions is, that there was error in rejecting the deed of 8th July, 1838, executed by Matthew R. Williams, as attorney in fact of La Serda.

In the second and third parts of the same bill, the plaintiff, after satisfactorily proving, by affidavits, the loss of a certain deed executed by Matthew R. Williams, as attorney

Statement of the case as to the second and third parts of the third bill.

in fact, and in the name of La Serda, dated 18th of May, 1850, whereby La Serda, by his said attorney, conveyed the land in controversy to Edward Hanrick, the original plaintiff in this action, and after putting in evidence the title-papers of La Serda, as stated in the first part of the bill, and after the rejection of the deed of 8th July, 1838, and the documents thereto attached, offered in evidence a duly certified copy of the said deed of May 18th, 1850, from the records of Falls County, Texas, which copy exhibited an acknowledgment before a notary public of the execution of the deed by Williams, as well as proof of its execution by one of the subscribing witnesses. The certified copy was objected to because the plaintiff did not file among the papers of the suit, three days before the trial, an affidavit of the loss of the deed; and the court excluded it on this ground.

The statute on this subject, passed 18th May, 1846 (omitting words immaterial to this case), is as follows:*

"Every instrument permitted or required to be recorded in the office of the clerk of the county court, and which has been so recorded after being proven or acknowledged in the manner provided by law, shall be admitted in evidence without proving its execution. Provided that the party who wishes to give it in evidence shall file the same among the papers of the suit three days before the commencement of the trial, and give notice to the opposite party. And *whenever* any party to a suit shall file among the papers of the suit an affidavit stating that any instrument recorded as aforesaid has been lost, or that he cannot procure the original, a certified copy of the record of such instrument shall be admitted in like manner as the original could be."

The plaintiff had duly filed among the papers of the suit more than three days before the commencement of the trial, the certified copy of the deed now offered; but did not file any affidavit of the loss of the original deed; and this was the

* Paschal's Digest, Article 3716.

The fourth and fifth bills stated and passed on.

ground of objection. It is sufficient to say that the statute does not require the proof of loss to be filed before the trial. It declares that "*whenever*" a party shall file an affidavit stating that an instrument has been lost, a certified copy shall be admitted the same as the original could be. It seems to us, that if the certified copy is filed three days before the commencement of the trial, with notice that the party intends to offer it in evidence (as was done in this case), it is a sufficient compliance with the statute. It is conceded that the Texas reports do not furnish any authority directly on the point; but it is understood that the practice corresponds to the course followed in this case. At all events, the statute seems to require nothing more. We think, therefore, that the certified copy of this deed was improperly excluded, on the ground assigned for its exclusion. Of course it could not be sustained as evidence in the cause, unless it was proven that Williams had authority to act for La Serda.

The fourth bill of exceptions is essentially the same as the first part of the third, showing a renewed offer of the deed of 1838, after proving the signature of the magistrate before whom it was acknowledged, and tracing title from Hoxey and Williamson to Hanrick. It needs no further discussion.

The fifth bill does not show any erroneous ruling. It presents an offer by the plaintiff from the Land Office, of a document purporting to be an agreement by La Serda to sell the eleven leagues of land to Roberts as soon as possession should be obtained, under a penalty of $10,000, with a mortgage of the grant, in case of failure to perform; and also an offer of another document whereby Roberts assigned this agreement to one Peebles; and, thirdly, a release from Peebles to Edward Hanrick.

A conclusive objection to these documents (which was made by the defendants) was, that they transferred no title. They were mere agreements. Other objections were raised against their admission, which it is not necessary to discuss.

Statement of the case.

The conclusion to which we have come is, that the judgment must be REVERSED, with directions to award a

VENIRE DE NOVO.

THE CAYUGA.

1. Where, on a reference by a District Court sitting in admiralty to assess the damages done by a collision, the master after taking depositions reports a certain sum as due, but is not requested by the respondents in the case to return the testimony or his finding of facts into court, and though returning certain parts of the testimony, does not return the whole, nor any finding of facts, and the court confirms his report and enters a decree accordingly—a decree affirmed by the Circuit Court—this court cannot, in the absence of the testimony and where the record does not afford any satisfactory statement of facts to enable it to determine that there is any error in the report of the commissioner, review that matter.
2. A steamer condemned in damages for an accident occurring to her tow, which she was taking round a dangerous point with a very long hawser.

APPEAL from the Circuit Court for the Southern District of New York; the case as appearing from the weight of testimony being thus:

The Cayuga, a steamer engaged in towing canal-boats upon the Hudson River, took, on the 25th of May, 1867, the canal-boat Floating Battery, loaded with sand, in tow at Albany, to be brought to New York. The whole tow of the steamer consisted of thirty canal-boats and two barges, the latter being from 150 to 200 feet astern of the former. The canal-boats were placed in six tiers, each consisting of five boats, the Floating Battery being the starboard boat of the hindmost tier, bringing her the nearest to the west shore.

The distance from her to the Cayuga was about 1000 feet.

Upon the first night out, the Floating Battery was brought in contact with a lighthouse near Coxsackie, with such force that her lines parted and she was separated from the tow. She was replaced, however, in her old position by the aid

of a passing steamer without much difficulty. After this she leaked a little, "about as much in twenty-four hours as a man could pump out in an hour." The evidence was clear that prior to this accident she was uncommonly dry and free from leaking. On the morning of the 28th of May, at about 12½ o'clock—the canal-boat having been but a short time before pumped out—as the steamer with her tow was rounding West Point, the canal-boat struck something (a submerged rock the libellants alleged), upon her starboard side, with such force as to throw her captain, who was lying down in the cabin, out of his berth, and—the blow being a "sagging blow"—to cause the boat to strike her companion upon its port side with great violence, sending the latter against its neighbor. At this time the canal-boat was not more than ten feet from the rocks upon the west shore; "so near that a man could have jumped from her upon those rocks."

As soon as the captain could gain his feet, he rushed upon deck, and being convinced that the boat was sinking, he and the bowman went immediately into the cabin for the purpose of securing their personal effects. When they reached it they heard the water rushing into the boat, and before they had procured their clothes the water was upon the cabin floor.

The helm was then lashed to port to send the boat to shore. By this time she had sunk so rapidly that the water was rushing in at the cabin windows, within a few inches of the deck. This was only two or three minutes after the blow. The lines connecting her with the next boat were then cut, her men stepping upon the boat upon her port side.

Two witnesses, standing upon the next boat to the canal-boat which was struck, close to her, who were not interested in any way in the cause, testified positively that they saw her sink stern foremost. No horn was blown after the canal-boat received her blow, nor any lantern swung: the usual signals from a vessel in tow to her steamer when desiring aid. The steamer did not stop, and her officers knew nothing of the accident to the canal-boat until the next morning.

Argument for the steamer.

A light that had been seen on the canal-boat, it appeared, had been seen for a considerable time, perhaps half an hour, after the accident. The only light, however, on the canal-boat was from a sheet-iron stove, which weighed about fifty pounds, and was placed upon a movable galley, not fastened to the deck. When the boat sank, the galley might have floated, the stove not being heavy enough to sink it.

The owners of the canal-boat having libelled the steamer in the District Court at New York, that court entered a decretal order in favor of the libellants and referred the cause to a commissioner to assess the damages. He took depositions and reported the value of the boat and cargo at $2329.92. The owners of the steamer excepted to the amount allowed, but they did not state what would have been a fair allowance for either boat or cargo, nor did they request the commissioner to report the evidence or his finding of the facts.

Some testimony was given in the record as having been taken before the commissioner, but it was not certified that it was all that was put before him. The District Court confirmed the report of the commissioner and entered a final decree in favor of the libellants. The owners of the steamer thereupon appealed to the Circuit Court, where the decree of the District Court was affirmed. They then appealed to this court, and the case was here upon the same testimony as that introduced in the courts below.

Mr. Van Santvoord, for the appellants, sought from an ingenious collocation of the evidence to show that the vessel had not struck a rock near the shore as the steamer turned at West Point, or that if she did, she certainly did not sink immediately, as two of the witnesses had testified. Her *light* had confessedly been seen for half an hour after the accident, which showed that these witnesses could not possibly have spoken the truth. She was therefore afloat for some minutes after the accident.

In these contracts for towing, says Lord Kingsdown, delivering the opinion of the court in Privy Council, in *The*

Julia,* the law implies an engagement that each vessel will perform its duty in completing it; that proper skill and diligence would be used on board each; and that neither vessel by neglect or misconduct would create unnecessary risk to the other, or increase any risk which might be incidental to the service undertaken. The obligation of the steamer to complete her contract, or to do what might be necessary to save the boat towed not being discharged by an accidental interruption or injury,† the cutting the boat loose without such notice or alarm, if not an act creating unnecessary risk to the steamer, was an act greatly increasing the risk incidental to the service undertaken by the steamer. And this clear breach of duty is not less available as a defence, even if it were doubtful whether such notice would have been of any avail.‡

In addition, the master of the canal-boat, in cutting her loose without any signal by swinging a light or other effectual alarm to the steamer of her condition, was clearly guilty of negligence and breach of duty, which should be held to release the steamer of any obligation which she would otherwise have been under to take the requisite measures to provide for the safety of the canal-boat and to discharge the steamer from the damages consequent upon the loss of the boat and the cargo thereafter.

The learned counsel, relying on the evidence that had come up in the record as to the value of the canal-boat and cargo, argued that the sum given by the commissioner was excessive; that if the owners of the steamer were liable at all, they were not liable for so much (being the greater part thereof) as might have been saved by reasonable notice to the persons in charge of the steamer of her condition, when measures would have been taken to save, if not the whole boat and cargo, at least some part of them.

Mr. J. C. Carter, *contra*, contended that the case was a clear one. The steamer in rounding a dangerous point, and

* 1 Lushington's Admiralty, 224–231. † The Annapolis, Ib. 355.

‡ Cramer *v.* Allen, 5 Blatchford's Circuit Court, 248; and see Muddle *v.* Stride, 9 Carrington & Payne, 380.

doubtless in a critical state of the tide, had let a very large and, of course, unmanageable tow follow with too long a hawser. The sinking in two or three minutes was testified to positively, and any light that had been on the boat which was seen for half an hour after the blow, was one floating on her galley after she had sank.

As to the other point, the damages on their face were not unreasonable. Moreover, the record does not present enough evidence for this court to review them.

Mr. Justice CLIFFORD delivered the opinion of the court.

Damages are claimed in this case by the owners of the canal-boat Floating Battery, against the steamboat Cayuga, in a cause of tort civil and maritime, for the loss of the canal-boat and her cargo, consisting of two hundred and twenty-five tons of moulding sand, which the libellants had engaged to transport from the port of Albany and to deliver in the city of New York to certain consignees.

Employed as the steamboat was in towing boats and barges between those ports, the owners of the canal-boat, on the twenty-fifth of May, 1867, applied to the agent of the steamboat to take the canal-boat in tow, and he undertook and contracted to tow the canal-boat, as requested, to her port of destination; and it is alleged that the steamboat, in the evening of that day, took the canal-boat, with other boats and barges, in tow, and proceeded down the river in execution of the contract. Besides the canal-boat of the libellants the steamboat had twenty-nine other canal-boats in tow, and two barges, the canal-boats being arranged in six tiers of five boats each, the canal-boat of the libellants being the starboard boat of the hindmost tier, and nearest to the west shore. By the record it appears that the whole six tiers of canal-boats were towed by hawsers from the stern of the steamboat extending aft from eighty to one hundred fathoms, which were fastened to the foremost tier of the canal-boats, showing that the canal-boat of the libellants was more than a thousand feet astern of the steamboat when the whole were in motion, as the canal-boats are about a hundred

feet in length. All the canal-boats except the first tier were propelled by lines from the stern of the canal-boat immediately ahead, and they were kept in their places by breast-lines. Arranged as described the steamboat with her tow, including also two barges of a larger class than the canal-boats, and propelled by long hawsers extending aft from the stern of the steamboat a distance of a hundred and fifty feet further than the last tier of the canal-boats, proceeded down the river; but it appears that the canal-boat of the libellants was brought in contact, during the first night of the trip, with a lighthouse in the river, with such force that her lines parted and she was separated for a time from the other canal-boats of her tier. Prompt measures were adopted to pick her up, and she was soon, by the aid of another steamer, replaced in her former position as the starboard canal-boat in the sixth tier of the tow. Prior to that accident the evidence is clear and undisputed that the canal-boat of the libellants was stanch, tight, and in every respect in good condition, but she received some injuries by the collision, causing her to leak a little, making it necessary to use her pump, say for an hour once in twenty-four hours, showing that she was still seaworthy and not disabled. On the morning of the third day of the trip, about half-past twelve o'clock, as the steamboat, with her thirty canal-boats and two barges in tow, was rounding West Point, the canal-boat of the libellants struck some object in the water, her starboard side coming in contact with it with such force as to throw her master from his berth, in which he was lying, and to cause the boat to careen and strike the boat on her port side, sending the latter against the next boat in the same tier with great violence. Injuries of a very serious character were occasioned by the accident to the canal-boat of the libellants. Her planks below the water-line on the starboard side were broken to such an extent that she filled with water with such rapidity as to prevent the master and bowman from securing their clothing, which was below, and to cause the canal-boat with her cargo on board to sink in two or three minutes. Process was issued and served and the respond-

ents appeared and filed an answer. Testimony was taken, and the District Court entered a decretal order in favor of the libellants and referred the cause to a commissioner to compute the amount of the damages. Hearing was had before the commissioner and he reported that the damages amounted to $2329.92.

Exceptions were taken by the respondents to the amount allowed by the commissioner as the value of the canal-boat, and also to the charge for the value of the cargo, but they do not state what would have been a proper allowance for either charge, nor did the respondents request the commissioner to report the evidence or his finding of the facts. Certain testimony is given in the record as having been taken before the commissioner, but it is not certified that it is all the testimony introduced before him, nor does the transcript afford any satisfactory statement of facts to enable the court to determine that there is any error in the report of the commissioner. Pursuant to that view, doubtless, the District Court confirmed the report of the commissioner and entered a final decree in favor of the libellants, and the respondents appealed to the Circuit Court, where the decree of the District Court was affirmed. Whereupon the respondents appealed to this court and now submit the case upon the same testimony as that introduced in the subordinate courts, and ask to have the decree of the Circuit Court reversed.

Most of the material facts touching the merits are either admitted by the respondents or so fully proved as to supersede all necessity for much discussion of any such topic. They admit that their agent undertook and agreed to tow the canal-boat of the libellants from the port of departure to her port of destination, and that having undertaken to perform the stipulated service they were under obligation to see that it was performed with ordinary and reasonable care and skill, and that they would be liable if they or those in charge of the steamboat were guilty of any such negligence in the performance of that duty as caused the loss of the

canal-boat and her cargo. Conceding all that, still they deny that they or those in charge of the steamboat are responsible for the disaster, but contend that the same was caused either by the unseaworthiness of the canal-boat, or the neglect and fault of her crew or those in charge of her, in not using her pumps, or in failing to stop some leak, or other neglect or fault of those parties for which the respondents are not responsible. Mismanagement and fault are imputed to those in charge of the canal-boat as follows: that they cut the canal-boat loose from the other boats in the tier as the steamboat with her tow rounded West Point, and while she was proceeding down the river in her proper course, and the charge is that they did the act from an apprehension that the canal-boat was in a sinking condition, and without any notice or alarm to the steamboat or to those intrusted with her navigation; and they deny that the steamboat was so navigated as to cause the canal-boat of the libellants to strike against the rocks at that place, or that her bottom or side was broken by any such casualty as that alleged in the libel, or that those in charge of the steamboat were guilty of any fault, negligence, or carelessness. Such denials cannot avail the respondents, as the evidence to prove the allegations of the libel is full and satisfactory and abundantly sufficient to show that the decision of the subordinate courts is correct.

Attempt is made in argument to convince the court that considerable time elapsed after the canal-boat of the libellants was cut loose from the other canal-boats in the same tier before she sunk, as tending to show that the final disaster was attributable to the mismanagement of those in charge of the canal-boat in cutting the lines which held her in the tow. Having lashed her helm to port they cut the lines which held her in her position that she might go ashore, which it seems would in all probability have occurred if the canal-boat had continued to float, but the evidence satisfies the court that she filled with water and sank before there was time for any such hope to be realized. Inferences of an opposite character are drawn by one or two

Statement of the case.

witnesses of the respondents, but they have no actual knowledge upon the subject, as is clear from their own statement. They infer that the canal-boat continued to float down the river for some time after she received the injuries because they saw, as they suppose, a light floating upon the water, which it is quite as probable was a light on the shore or the light in the galley of the canal-boat, as that, not having been fastened to the deck, might not have been submerged in the disaster to the canal-boat and her cargo.

Suffice it to say that the evidence that the canal-boat sunk in two or three minutes from the time she received the injuries described is such as to convince the court that it is true, and that the statements of the other witnesses, not being founded upon actual knowledge, are not sufficient to support the allegations of the answer.

Nothing further need be remarked in respect to the charge that the master of the canal-boat was guilty of mismanagement, as it is clear that the charge is without any support, and it is quite clear that the exceptions are not of a character to enable the court to review the findings of the master.

DECREE AFFIRMED.

SMITH *v.* ADSIT.

1. Where a complainant setting out a case in the highest State court, for equitable relief against a sale, which a third party had undertaken to make of land, alleged that the party in making the sale had violated an act of Congress, and that the sale was therefore null and void, and the State court dismissed the bill for want of jurisdiction; *held*, that although the question whether the sale was not a nullity might have been presented, yet that the case having been dismissed below for want of jurisdiction, it did not appear that a Federal question had been decided, much less that it had been decided adversely to the complainant.
2. Independently of this, whatever might have been the reasons for the decision, the question whether the State court had jurisdiction of the case, was a question exclusively for the State tribunals.
3. *Held*, accordingly, that no jurisdiction existed here in such a case under the 25th section of the Judiciary Act of 1789, or the act of February 5th, 1867, amendatory of it.

ON motion to dismiss, for want of jurisdiction, a writ of

error to the Supreme Court of the State of Illinois; the case being thus:

An act of Congress of February 11th, 1847, providing for raising a military force for a limited time, enacted that a bounty in the form of one hundred and sixty acres of land, to be located by the warrantee, should be given to soldiers honorably discharged, but provided "that all sales, mortgages, *powers*, or other instruments of writing going to affect the title or claim to any such bounty right, made or executed prior to the issue of the warrant or certificate, should be null and void to all intents and purposes whatsoever."

With this statute in force Smith filed a bill in one of the inferior State courts of Illinois, against Adsit, Wright, Rourk, and the trustees of schools of township thirty, in range six, in Grundy County, charging that in 1850, by conveyance from one Holmes, he became the owner of certain lands in the county of Grundy, particularly described. The bill averred that Holmes had been a soldier in the Mexican war, that he received a certificate of service and of honorable discharge, entitling him, under the acts of Congress, to a land warrant, and that he applied to Adsit to procure the warrant for him; that Adsit prepared the necessary papers, and at the same time made out a power of attorney for Holmes, authorizing the assignment of the land warrant about to be obtained, with blank spaces for its date, for the number and date of the warrant, and for the name of the attorney, and that he fraudulently induced Holmes to sign it; that this power of attorney was filled up subsequently, and after the land warrant was obtained, with the name of one Hoard as the attorney, with the number and date of the warrant issued (No. 23,129, date August 18th, 1848), and with August 30th, 1848, as the date of the power. The bill further charged that Adsit then procured the attorney to assign the warrant to him, that he located it and obtained for the land a patent in his own name, as assignee of Holmes. It further charged that at the date of the power Holmes was a minor, and that the defendants, Wright, Rourk, and the school trustees, hold the land under conveyances from Adsit,

with notice of the plaintiff's rights. It further charged that the power of attorney was a nullity because obtained by fraud, and because of the minority of Holmes; and it averred that if any sale was made by him to Adsit of the land warrant, it was in fact made before the warrant was issued, that it was therefore null by force of the act of Congress, and that consequently Adsit held and located the warrant as a trustee for Holmes, and that the purchasers from him were chargeable with the same trust.

The prayer of the bill was that Adsit might be decreed to have acquired the lands in trust for Holmes; that the other defendants might be decreed to have purchased them, and to hold them charged with the same trust; that an account should be directed, and also a conveyance, to the plaintiff as assignee of Holmes. There was also a prayer for general relief.

The answer of Adsit denied the fraud charged, and averred that he purchased the land warrant from Holmes, without any agreement to act as his agent; and the other defendants set up that they were *bonâ fide* purchasers from Adsit, without notice of any equity in Holmes.

The court in which the bill had been filed entered a decree against Adsit for $6829, and dismissed the bill as to the other defendants. Adsit then appealed to the Supreme Court of the State, where the decree against him was reversed, and the bill dismissed as to him, *for want of jurisdiction*. From that decree Smith, the complainant, appealed to this court, under an assumption that the case came within the 25th section of the Judiciary Act of 1789, or the act of February 5th, 1867, amendatory of it, and that a title, right or privilege under a statute of the United States, had been specially set up and claimed by him and decided against by the Supreme Court of the State.*

Mr. George Payson, for the defendant in error, adverting to the fact that the bill had been dismissed as to Adsit, in the

* For the exact language of the acts referred to, and in the main sufficiently familiar to the profession, see Appendix.

Supreme Court, *for want of jurisdiction*, now moved the court to dismiss the writ in this court, because it nowhere appeared in the record that the decision of the court below was against any statute of the United States specially set up by the complainant, but, on the contrary, that the record, so far as it showed anything, showed that the decree had been based on independent grounds.

Mr. W. T. Burgess, *contra*, *against the dismissal:*

The injury sustained springs from the violation of an act of Congress. This act lies at the foundation of the whole case made. The relief must be applied for, in the first instance, in a State court having, under the laws of the State, jurisdiction to grant it, and it has been denied by the Supreme Court of the State when it ought to have been allowed. Now the case at bar upon all these questions is so clearly within the jurisdiction imposed upon this court, that it needs only to be stated to be seen.

Mr. Justice STRONG, having stated the case, delivered the opinion of the court.

A decree was entered in the State court where the bill was filed, against Adsit for $6829, and the bill dismissed as to the other defendants. He then appealed to the Supreme Court of the State, where the decree against him was reversed, and the bill was dismissed as to him, as the record shows, for want of jurisdiction.

In view of this we do not perceive that we have any authority to review the judgment of the State court. Plainly, if there be any Federal question in the case it is because the plaintiff claimed some title, right, privilege, or immunity under the act of Congress to which reference was made in his bill, and because the decision of the court was against the title, right, privilege, or immunity thus set up or claimed. Such a claim and such a decision must appear in the record. But we think this does not appear. It must be admitted that the question whether the sale of the land warrant by Holmes to Adsit, if made before the warrant issued, as

charged in the bill, was not a nullity, may have been presented, but it does not appear that such a question was decided, much less that it was decided adversely to the plaintiff in error. Nothing is more certain than that to give this court jurisdiction to review the judgment of a State court, the record must show, either expressly or by necessary intendment, not only that a Federal question was raised, but that it was decided adversely to the party who has caused the case to be removed here.

The doctrine was plainly stated in *Crowell* v. *Randell*,* and it has been repeated in numerous later decisions. Indeed it is the express requirement of the twenty-fifth section of the Judiciary Act, and of the act of February 14th, 1867. And the rulings of this court have gone further. In *Parmelee* v. *Lawrence*,† it was said it must appear that the question must have been necessarily involved in the decision, and that the State court could not have given a judgment without deciding it. In *Williams* v. *Norris*,‡ it was held not to be enough that the construction of an act of Congress was drawn in question, and that the decision was against the title of the party, but that it must also appear that the title depended on that act. And in *Rector* v. *Ashley*,§ it was laid down that if the judgment of the State court can be sustained on other grounds than those which are of Federal cognizance, this court will not revise it, though a Federal question may also have been decided therein, and decided erroneously. These decisions go much further than is necessary to sustain our judgment now.

As we have seen, the bill was dismissed for want of jurisdiction. The judgment of the court respecting the extent of its equitable jurisdiction is, of course, not reviewable here. The record does not inform us what other questions, if any, were decided. It nowhere appears that the sale from Holmes to Adsit was ruled to be valid, notwithstanding the act of Congress which declared that sales of bounty-rights, made or executed prior to the issue of land warrants there-

* 10 Peters, 368.
† 11 Wallace, 36.
‡ 12 Wheaton, 117.
§ 6 Wallace, 142.

for, shall be null and void. Nor was it necessary to the decree that was entered that such a decision should have been made. After the land had been sold by Adsit to *bonâ fide* purchasers without notice, which had been decreed in the court below, from which decree there was no appeal—after it had thus been settled that there was no continuing trust in the land—it may well have been determined that the plaintiff's remedy against Adsit was at law, and not in equity, even if the sale from Holmes to him was utterly void. But whatever may have been the reasons for the decision, whether the court had jurisdiction of the case or not, is a question exclusively for the judgment of the State court.

We need not pursue the subject further. It is enough that it does not appear the claim of the plaintiff, that the sale of Holmes to Adsit was a nullity because of the act of Congress, was necessarily involved in the decision, or that the sale was decided to be valid, or that the same decree would not have been made if the invalidity of the sale had been acknowledged.

WRIT DISMISSED.

BANK *v.* TURNBULL & CO.

Where a proceeding in a State court is merely incidental and auxiliary to an original action there—a graft upon it, and not an independent and separate litigation—it cannot be removed into the Federal courts under the act of 2d of March, 1867, authorizing under certain conditions the transfer of "suits" originating in the State courts.

ERROR to the Circuit Court for the District of Virginia; the case being thus:

By the statute law of the State just named, it is enacted, that when an execution has been levied, and a party other than the defendant asserts a claim to the property levied on, the sheriff, before proceeding to sell, may require of the plaintiff an indemnifying bond, upon the delivery of which the claimant of the property may execute "a suspending

bond," the effect of which is to delay the sale until the claim thereto can be adjusted. If the claimant desires that the property should remain in the same possession as when the levy was made, he may execute "a forthcoming bond," and thereupon the property remains in such possession at the risk of the claimant. This is the statute remedy to try in such case the right of property, and is termed *an interpleader*.

This statute being in force, the First National Bank at Alexandria, Virginia, obtained a judgment in the State Circuit Court for the county of Alexandria, against Abijah Thomas for $4700, with interest and costs. Upon this judgment an execution issued and was levied upon some cotton at Alexandria. Certain persons, to wit, Alexander and John Turnbull, *citizens of the State of Maryland*, with Alexander Reach, *a citizen of the State of New York*, trading together as Turnbull & Co., asserted a claim as owners of the property thus levied on, and, thereupon, the sheriff, before proceeding further under his levy, demanded of the plaintiff in the execution an indemnifying bond, which demand was complied with. Turnbull & Co., then caused to be executed both a suspending and forthcoming bond, thereby preventing a sale of the property levied on. Under authority of the statute, the Circuit Court of Alexandria, in which the judgment was rendered, upon the petition of Turnbull & Co., as claimants of the property, entered an order, directing an issue to be tried by a jury, to determine the right to the property thus levied on, and in such order adjudged that Turnbull & Co. should be plaintiffs on the trial of the issue. Before any further action, however, was taken under this order, Turnbull & Co. filed a petition to said court, praying for a removal of the suit to the Circuit Court of the United States for the District of Virginia. This petition was filed in virtue of the act of Congress of March 2d, 1867, which enacts:

"That where a *suit* is now pending or may hereafter be brought, in any State court in which there is a controversy between a citizen of the State in which the *suit* is brought and a citizen of another State, and the matter in dispute exceeds

$500, exclusive of costs, such citizen of another State, whether he be plaintiff or defendant, may [on compliance with certain conditions prescribed] file a petition in such State court for the removal of the *suit* into the next Circuit Court of the United States, to be held in the district where the suit is pending, and offer good and sufficient surety for his entering in such court on the first day of its session copies of all process, pleadings, depositions, testimony, and other proceedings in said suit, . . . and it shall be, thereupon, the duty of the State court to accept the surety, and proceed no further in the *suit*. And the said copies being entered as aforesaid in such court of the United States, the *suit* shall then proceed *in the same manner as if it had been brought there by original process*."

The application to the State court was refused, and Turnbull & Co. thereupon petitioned the judge of the District Court at chambers for a mandamus to compel the removal. This being granted, the case was brought into the Circuit Court and there docketed.

Upon the calling of the case there, a motion was made by the counsel for the bank to dismiss the same for want of jurisdiction, which motion was overruled, and thereupon, a written stipulation was signed by the counsel of the respective parties providing that a jury should be waived, and the cause submitted to the decision and judgment of the court. Upon a full hearing of the case under such submission, the court decided, that the property in controversy was not liable to the execution of the bank, and gave judgment in favor of Turnbull & Co., with costs. To that judgment a writ of error was sued out from this court.

The record did not show that any process had been issued or declaration filed against the bank; or that the bank had pleaded, demurred, or otherwise answered.

On the calling of the case here, after the judges had looked at the record, the Chief Justice signified to the counsel that the court was not satisfied that the case had been one for removal under the act of March 2d, 1867, to the Circuit Court, and directed them to speak to that point.

Mr. H. O. Claughton, for the plaintiff in error, argued that

Recapitulation of the case in the opinion.

this was so, and that the Circuit Court below ought not to have received it, but to have left it with the County Court of Alexandria. The statutes, he argued, authorized the transfer of nothing but "a suit;" and in *West* v. *Aurora City*,* this court had decided that the only sort of suit removable from a State court to the Federal court, was a suit regularly commenced by process served upon the defendant. There was nothing of that sort here. What was transferred was, in fact, not "a suit," but an incident to a suit, a collateral question springing out of it. That a proceeding incidental to another suit is not a "suit" within the spirit of the act, was settled by this court in *Gwin* v. *Breedlove*,† *Huff* v. *Hutchinson*,‡ and *Freeman* v. *Howe*.§

Mr. F. L. Smith, contra:

In *The City Council of Charleston* v. *Weston*,‖ the question arose as to whether or not a *prohibition* was a *suit* within the meaning of the 25th section of the Judiciary Act. Marshall, C. J., in answer to this question, speaking for the court, says of the word *suit:*

"The term is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy in a court of justice which the law affords him. The modes of proceeding may be various, but if the right is litigated between parties in a court of justice, the proceeding by which the decision is sought, is a suit."

In *Holmes* v. *Jennison*,¶ Taney, C. J., delivering the opinion of the court, entirely concurs in this definition given by Chief Justice Marshall.

Mr. Justice SWAYNE delivered the opinion of the court.

The bank recovered a judgment against Abijah Thomas for $4700, and interest, in the Circuit Court for the county

* 6 Wallace, 139. † 2 Howard, 29. ‡ 14 Id. 586. § 24 Id. 450.
‖ 2 Peters, 465; and see Cohens *v.* Virginia, 6 Wheaton, 413; and Ex parte Milligan, 4 Wallace, 2.
¶ 14 Peters, 340.

of Alexandria. A writ of fieri facias was issued to the sheriff of that county, and was levied upon certain personal property to satisfy the judgment. Turnbull & Co. claimed the property as theirs. The plaintiff gave the sheriff an indemnifying bond and required him to sell. To prevent this Turnbull & Co. gave him a suspending bond, and, in order to have the property retained in the possession of Thomas, also a forthcoming bond. Turnbull & Co. thereupon applied to the Circuit Court of the county for leave to intervene in the original suit, and to order an issue to try the right of property. The prayer of the petition was granted, and an order was made that a jury should be sworn to try the issue whether the property levied upon belonged to Turnbull & Co., or to Thomas, and that Turnbull & Co. should be regarded as the plaintiffs in the proceeding. Without availing themselves of this order Turnbull & Co. thereupon applied to the Circuit Court for the county for an order to remove the cause, under the act of Congress of 1867, to the Circuit Court of the United States for that district. This was refused, and they thereupon petitioned the judge of the District Court of the United States, sitting at chambers, for a writ of mandamus directed to the Circuit Court for the county. The writ was allowed and issued, and the cause was removed according to the prayer of the petitioners. In the Circuit Court of the United States the bank moved to dismiss for want of jurisdiction. The motion was overruled. The parties thereupon waived a jury and submitted the cause to the court. The court found for Turnbull & Co., and gave judgment in their favor. The bank took a bill of exceptions, setting forth all the evidence, and excepting to the judgment given.

Upon examining the record we find there was no process issued against the bank, no declaration filed by Turnbull & Co., and no plea or other written response by the bank. The record is a blank as to these things.

It may well be doubted whether so informal a proceeding as that presented by this record is a "*suit*" within the mean-

ing of the act of Congress under which the right of removal was claimed and allowed.* But, as we do not propose to place our judgment on that ground, it is not necessary to consider the subject.

Conceding it to be a suit, and not essentially a motion, we think it was merely auxiliary to the original action, a graft upon it, and not an independent and separate litigation. A judgment had been recovered in the original suit, final process was levied upon the property in question to satisfy it, the property was claimed by Turnbull & Co., and this proceeding, authorized by the laws of Virginia, was resorted to to settle the question whether the property ought to be so applied. The contest could not have arisen but for the judgment and execution, and the satisfaction of the former would at once have extinguished the controversy between the parties. The proceeding was necessarily instituted in the court where the judgment was rendered, and whence the execution issued. No other court, according to the statute, could have taken jurisdiction. It was provided to enable the court to determine whether its process had, as was claimed, been misapplied, and what right and justice required should be done touching the property in the hands of its officer. It was intended to enable the court, the plaintiff in the original action, and the claimant, to reach the final and proper result by a process at once speedy, informal, and inexpensive. That it was only auxiliary and incidental to the original suit is, we think, too clear to require discussion. We shall content ourselves with referring to some of the leading authorities which bear upon the subject.†

The judgment of the court below is REVERSED, and the cause will be REMANDED to that court with directions to enter a judgment of reversal, and then to remit the case to the Circuit Court for the county of Alexandria, whence it came.

Mr. Justice STRONG dissented.

* West *v.* Aurora City, 6 Wallace, 142.

† Gwin *v.* Breedlove, 2 Howard, 35; Freeman *v.* Howe, 24 Id. 460; Dunn *v.* Clarke, 8 Peters, 1; Williams *v.* Byrne, Hempstead, 472.

KOONTZ *v.* NORTHERN BANK.

1. A purchaser under a deed from a receiver is not bound to examine all the proceedings in the case in which the receiver is appointed. It is sufficient for him to see that there is a suit in equity, or was one, in which the court appointed a receiver of property; that such receiver was authorized by the court to sell the property; that a sale was made under such authority; that the sale was confirmed by the court, and that the deed accurately recites the property or interest thus sold. If the title of the property was vested in the receiver by order of the court, it in that case passes to the purchaser. He is not bound to inquire whether any errors intervened in the action of the court or irregularities were committed by the receiver in the sale.
2. If the court is deceived by the report of a receiver, or master, as to the conditions upon which property is sold under its order, and the purchaser participates in the deception, the court can, at any time before the rights of third parties have intervened, set the whole proceedings, including the deed, aside. But after the rights of such third parties have intervened, its authority in that respect can only be exercised consistently with protection to those rights.
3. If the receiver omit to perform his whole duty, by which the parties are injured, or commit any fraud upon the court, and the rights of third parties have so far intervened as to prevent the court from setting the proceedings aside, the injured parties must seek their remedy personally against that officer, or on his official bond.

APPEAL from the Circuit Court for the Southern District of Mississippi; the case being thus:

The Commercial Bank of Natchez owning certain property, and among it a dwelling attached to its banking-house, its property was placed, on an application for a forfeiture of its charter, in the hands of one Robertson as trustee. Several of the stockholders, represented by a certain Bacon, being dissatisfied with what was thus done, filed a bill in the court below against this Robertson, and all the property was taken from him and put into the hands of one Ferguson, as receiver. Hereupon, in November, 1857, the receiver was authorized by the court to sell the lands or any part of them *upon such terms as he may deem best for the interest of all parties*, provided that he shall not sell any of said lands upon a longer credit than one, two, and three years from the time of sale.

The order authorizing the sale adding:

"*In all cases he is to retain a lien* or *take a deed of trust on the lands sold.*"

On the 12th of March, 1860, the receiver sold the dwelling attached to the bank to one Gustavus Calhoun, and on the same day executed to him a conveyance of the premises sold, reciting in the conveyance that he executed it as receiver, and "for and in consideration of the sum of nine thousand and five hundred dollars, *to him in hand paid by the said Gustavus Calhoun*, the receipt whereof is hereby acknowledged." It contained a covenant of warranty against all persons claiming through the receiver. The deed was duly recorded within five days after the sale, and Calhoun entered into and kept possession under it.

After the receiver had thus executed his conveyance—that is to say, on the 19th of May, 1860—the receiver reported that he had "sold the dwelling attached to the banking-house in Natchez for $9500, and prayed that the same may be confirmed." He also referred to certain sales of land in Bolivar County, in 1858, in which the purchasers had allowed the lands to be sold for taxes. The court ordered that this report, and a report made by a commissioner in the case, be referred to the master in chancery "to examine into and report upon the sufficiency and correctness of said reports."

The master, in conformity to this order, made his report on 29th May, 1860. He stated that he had had the reports under consideration and found them correct, and recommended their confirmation. The last portion of the report of Ferguson, the receiver, respecting the redemption of lands in Bolivar County, he referred to the court for consideration.

At the same term, 1860, the court ordered that the report of the master in chancery *be in all things confirmed*, reserving for consideration until the next term the matter referring to the lands in Bolivar County.

The reader will have observed that neither in the master's report of sale nor anywhere else in these proceedings is the name of the person mentioned to whom the sale was made,

nor the terms on which it was made, as whether for cash or on credit. And, in point of fact, Calhoun did not pay any cash, but, on the contrary, gave his promissory note to the receiver, Ferguson, for the price.

In this state of things, and Calhoun being in possession of the property thus bought by him, and occupying it as his dwelling, his son-in-law, one Blackburn, was desirous of raising money to carry on the business of planting, in which he was engaged on a plantation owned by Calhoun, his father-in-law. A firm in New Orleans, Given, Watts & Co., agreed to furnish it to him upon his own notes, provided these were secured by a mortgage of real estate of Calhoun. Accordingly, on the 22d of January, 1867, Blackburn gave the firm his notes (three notes for $4000 each, falling due respectively in October, November, and December, 1867), and Calhoun and wife executed, on the same day, a mortgage of the property bought, and occupied at the time as above mentioned. Prior to its execution, Given, Watts & Co., to assure themselves of the validity of Calhoun's title, caused an inquiry to be instituted, and received from the clerk of the court a certificate that there were no incumbrances. Given, Watts & Co. sold one of these notes to the Northern Bank of Kentucky, and, becoming bankrupt, the other two passed to their assignees in bankruptcy.

Calhoun became insolvent, and one Koontz, who had succeeded Ferguson as receiver of the Commercial Bank of Natchez, finding that Calhoun had never paid his note for $9500, now proposed to him to cancel the conveyance that had been made to him. Calhoun agreed to do this, and thereupon made a deed of the premises to Koontz; after which Koontz applied to the court on an *ex parte* proceeding and obtained an order reciting the invalidity of the sale by Ferguson to Calhoun and cancelling the same.

In this state of things the Northern Bank of Kentucky and the assignees of Given, Watts & Co. filed a bill of foreclosure in the court below, against Koontz and also against Calhoun and wife, praying a foreclosure of the mortgage and payment of the three notes, or of what was due on them.

Argument for the receiver.

The court, finding the amounts due the complainants respectively, decreed a foreclosure *nisi*, and ordered Koontz to hold the property subject to payment of the amounts thus found, and enjoined him from setting up any title under the conveyance made to Koontz adverse to the rights of the complainants under the mortgage. From this decree Koontz appealed.

Mr. W. W. Boyce (*a brief of Mr. W. P. Harris being filed*), *for the appellant:*

1. A report of a sale without the name of the purchaser, or the terms of sale (or whether for cash or credit), is in chancery practice a report fatally defective; in other words, no report. If there was no report there was nothing on which a confirmation could act; and, therefore, no confirmation. The whole matter remained in the control of the court, and it properly cancelled Ferguson's deed.

2. The deed was executed and delivered before there was any report of a sale, a wholly irregular proceeding. A deed should have been returned with a report of the sale, to be delivered when the sale was confirmed and the purchase-money paid.

3. The execution of the deed to Calhoun was void for want of authority to execute it, unless there was taken contemporaneously with it "a lien or deed of trust." The authority to sell existed only as a means to an end; the end being to take a lien or deed of trust.

These difficulties are obvious and conclusive of the case, unless in some way avoided. The argument will be that Given, Watts & Co. were *bonâ fide* purchasers without notice, and not affected by errors of the court or receiver.

But were they without notice? The deed by which Calhoun obtained a color of title, was of record for purposes of notice. It disclosed on its face that Calhoun's purchase was not from a party holding title, but from an officer of court acting under orders, and by which a report and confirmation of the sale was requisite. This order set forth the terms of sale. The deed led the purchaser to the record of the case

of *Bacon et al.* v. *Robertson*, and from that he saw an irregular proceeding, a sale and deed delivered long before there was any report of the sale. He saw a report which did not give the name of the purchaser, or the terms of the sale, or any direct order of confirmation. He knew that sales on credit were incomplete until payment. All this put him upon inquiry, and is constructive notice of the actual facts. He did not inquire of Calhoun whether he paid the purchase-money. The condition of the record was such that it put on him as a prudent man the duty of further investigation.

Mr. P. Phillips (*a brief of Messrs. Nugent and Yerger being filed*), *contra.*

Mr. Justice FIELD delivered the opinion of the court.

There is only one question in this case which we deem it important to consider, and that is, whether the deed of the receiver, in the suit of *Bacon and others* v. *Robertson*, passed to Calhoun a good title to the property mortgaged by him; and upon this question we have no doubt.

The suit of *Bacon and others* v. *Robertson* related to the effects of the Commercial Bank of Natchez in the hands of the defendant, who had been appointed trustee under a proceeding for the forfeiture of the charter of the bank, and presented a case in which it was eminently proper that a receiver should be appointed of the effects. No question was made as to the legality or propriety of the appointment. The premises in question, consisting of a house and lot in Natchez, constituted a portion of these effects. The order of the court, entered at its November Term in 1857, empowered the receiver to sell the lands, or any part of them, belonging to the bank, upon such terms as he might deem best for the interest of all parties, provided he should not sell any of the lands on a longer credit than one, two, or three years; and in all cases should retain a lien or take a deed of trust on the lands. Under the authority thus conferred, the receiver sold the property in controversy in March, 1860, to Calhoun, for the sum of nine thousand and nine hundred

dollars, and executed and delivered to him a deed of the premises, reciting that it was made by the grantor, as receiver, and in consideration of the sum specified, the receipt of which it acknowledged. Soon afterwards the deed was placed on the records of the county.

In May, following, the receiver reported to the court that he had sold the premises for the consideration stated, and prayed that the sale might be confirmed. The court referred the report to a master to examine into its sufficiency and correctness. The master reported that it was correct, and recommended its confirmation. The court thereupon ordered that the master's report be in all things confirmed. This confirmation carried with it the confirmation of the sale into which the master was required to examine.

Soon afterwards Calhoun went into possession of the premises purchased under the deed from the receiver, and remained in possession in person, or by his tenants, up to the period when the mortgage in suit was executed, in January, 1867, and until his surrender to Koontz, the present receiver.

There was undoubtedly an irregularity committed by the receiver in executing his conveyance before the sale was confirmed by the court, and until then the contract of purchase was not binding upon that officer. But his conveyance was not on that account void; it was only voidable. If the deed had been executed after the confirmation, it would have taken effect by relation as of the day of the sale.* If the confirmation had been denied, the deed, resting upon the sale, would have become inoperative. But the confirmation having been made, all objection to the time at which the deed was executed is removed.

The authority conferred by the court upon the receiver to sell, carried with it authority to give to the purchaser evidence of a transfer of title. And that the court intended he should exercise this implied authority, by executing deeds where land was sold, is evident from the requirement that

* Fuller *v.* Van Geesen, 4 Hill, 171, and cases there cited.

he should, in case of sale on credit, retain a lien or take a deed of trust on the lands from the purchaser.

The report of the receiver does not state in terms that the sale to Calhoun was made in cash; it only discloses the fact that a sale was made, and specifies the amount of the purchase-money. But the only inference which the court could reasonably draw from the language, in absence of any statement that the sale was on credit, was undoubtedly that it was a cash sale. It is clear that the court so understood the transaction. The receiver so treated it by the immediate execution and delivery of a deed reciting the payment of the stipulated consideration, and omitting to take in return any trust-deed from the purchaser.

If the fact were otherwise, and the court was deceived by the report of the receiver or master, and the purchaser participated in creating the deception, it could, undoubtedly, at any time before the rights of innocent purchasers had intervened, have set the whole proceedings, including the deed, aside. But after the rights of such third parties had intervened, its authority in that respect could only be exercised consistently with protection to those rights.

A purchaser under a deed from a receiver is not bound to examine all the proceedings in the case in which the receiver is appointed. It is sufficient for him to see that there is a suit in equity, or was one, in which the court appointed a receiver of property; that such receiver was authorized by the court to sell the property; that a sale was made under such authority; that the sale was confirmed by the court, and that the deed accurately recites the property or interest thus sold. If the title of the property was vested in the receiver by order of the court, it would in that case pass to the purchaser. He is not bound to inquire whether any errors intervened in the action of the court, or irregularities were committed by the receiver in the sale, any more than a purchaser under execution upon a judgment is bound to look into the errors and irregularities of a court on the trial of the case, or of the officer in enforcing its process.

If the receiver in the one case, or the sheriff in the other,

omit to perform his whole duty, by which the parties are injured, or commit any fraud upon the court, and the rights of third parties have so far intervened as to prevent the court from setting the proceedings aside, the injured parties must seek their remedy personally against those officers, or on their official bonds. The interest of parties in the controversy will generally induce such attention to the proceedings as to prevent great irregularities from occurring, without being brought to the notice of the court.

The decree of the court is

AFFIRMED.

DAVIS *v.* GRAY.

1. In this case—where a person who had been appointed receiver of a railroad, to which a large grant of lands had been made by a State, was seeking to enjoin the officers of the State which had declared the lands forfeited, from granting them to other persons—the court states at large what is the office and what are the duties of a receiver, giving to them a liberal interpretation in aid of the jurisdiction of the court. It says that in the progress and growth of equity jurisdiction it has become usual to clothe them with much larger powers than were formerly conferred; that in some of the States they are by statute charged with the duty of settling the affairs of certain corporations when insolvent, and are authorized expressly to sue in their own names; and that the court sees no reason why a court of equity, in the exercise of its undoubted authority, may not accomplish all the best results intended to be secured by such legislation, without its aid
2. The doctrines of *Osborne* v. *The Bank of the United States* affirmed; and the principles re-declared.

   (*a.*) That a Circuit Court of the United States, in a proper case in equity, may enjoin a State officer from executing a State law in conflict with the Constitution or a statute of the United States, when such execution will violate the rights of the complainant.

   (*b.*) That where the State is concerned the State should be made a party, if it can be done. That it cannot be done is a sufficient reason for the omission to do it, and the case may proceed to decree against her officers in all respects as if she were a party to the record.

   (*c.*) That in deciding who are parties to the suit the court will not look beyond the record. That making a State officer a party does not make the State a party, although her law may prompt his action, and

she may stand behind him as the real party in interest; that a State can be made a party only by shaping the bill expressly with that view, as where individuals or corporations are intended to be put in that relation to the case.

3. The Memphis, El Paso, and Pacific Railroad Company had not (on the 20th of January, 1871), in view of the existence of the rebellion, and of several statutes of Texas condoning its non-compliance with conditions of its charter, lost its franchise or its right of and to the land grant and land reservation of the company given in its charter.
4. The articles 5 and 7 of the constitution of Texas, made in 1869, which on an assumption that the company had then lost them, disposed of the lands away from it, violated the obligations of a contract and were void.
5. Where the State of Texas had made to a railroad company a large grant of lands, defeasible if certain things were not done within a certain time by the company, the fact that the so-called secession of the State and her plunging into the war, and prosecuting it, rendered it impossible for the company to fulfil the conditions, in law abrogated them.
6. However, as the court thought that the enforcement of the legal rule in the particular case would work injustice, it declined to apply such legal rule, and applying an equitable one held that the conditions should still be complied with; but complied with in such reasonable time, as would put the parties in the same situation, as near as might be, as if no breach of condition had occurred.

APPEAL from the Circuit Court for the Western District of Texas; the case being thus:

The State of Texas had at the times hereinafter named, certain public lands. A general land office was established at the capital of the State for the registration of titles and surveys, and the lands were divided when surveyed into sections of six hundred and forty acres each. One Kuechler was the chief of this office, under the title of the "Commissioner of the General Land Office." All certificates for the public lands were issued by this commissioner; and all patents were issued under the seals of the State and the General Land Office, and were required to be signed by the governor and countersigned by the said commissioner. These certificates were evidences of obligation on the part of the State to grant, and give a patent to the holder for a certain amount therein mentioned of the vacant and unreserved public lands of the State; when the certificates are located and surveyed, and the surveys returned to the commissioner

and approved by him, a patent, conveying the fee, is executed as above mentioned.

In and about the year 1856, and for many years thereafter the State of Texas, though of great extent, was, as it still is, sparsely inhabited, while its public domain was far from markets, and without connection with the more settled parts of the country; and it was greatly to the interest of the State to attract immigration and capital. To produce this result it became the settled policy of the State to make grants and reservations of public lands to corporations, conditioned upon the construction of certain amounts of railroad within certain times. In pursuance of this policy the Memphis, El Paso, and Pacific Railroad Company, was incorporated February 4th, 1856, by the State of Texas, to build a railroad across the State from the eastern boundary to El Paso, with a land grant of 16 sections to the mile; certificates for 8 sections per mile to be issued on the grading of successive lengths of road, and 8 more per mile upon the complete construction of the same; and a reservation was granted of the alternate or odd sections of land for eight miles on each side of the road, within which the company should have an exclusive right to locate its certificates, while it also had the privilege to locate said certificates on any other unappropriated public lands.

This reservation, of course, was of the greatest value, as it enabled the company to reap the advantage of the enhancement of price which the construction of the road by them would cause in the lands along the line.

In the same year of 1856 the company was organized in reliance on the grants, and especially on the reservation, and duly accepted the same.

There were certain conditions *precedent* to the vesting of the charter, land grant, and reservation; but they were all complied with, and at a cost to the company for surveys of over $100,000. These and subsequent surveys resulted, for the company, in the official designation of the road line and the centre line of the reservation for some 800 miles, and the "sectionizing" and numbering of the odd sections of

land in said reservation in a belt of country some 250 miles in length and 16 in width; and for the State in the surveying and mapping of the same belt of country and the "sectionizing" and numbering of the alternate or even sections for the benefit of the State. The company also graded some 65 miles of road westerly from Moore's Landing, in Bowie County, and was interrupted in the work of construction by the rebellion and so-called "secession" of Texas; but resumed work after the war, and graded between 20 and 30 miles further, from Jefferson in Marion County, in the direction of Moore's Landing.

There were certain conditions *subsequent* annexed to the charter, viz.: that if the company should not have completely graded not less than 50 miles of their road by the 1st of March, 1861, and at least 50 miles additional thereto within two years thereafter, then the charter of said company should be null and void. The first 50 miles were graded within the required time; the second 50 miles have never been graded. Within two years after the performance of the first condition, however, the legislature of Texas, by act "for the relief of railroad companies," approved February 11th, 1862, enacted, that the failure of any chartered railroad company to complete any section, or fraction of a section, of its road as required by existing laws, should not operate as a forfeiture of its charter, or of the lands to which the said company would be entitled under the provisions of an act entitled "An act to encourage the construction of railroads in Texas by donation of land," approved January 30th, 1854; provided that the said company should complete such section, or fraction of a section, as would entitle it to donations of land, under existing laws, within two years after the close of the war between the Confederate States and the United States of America. Within the two years after the close of the war, the provisional legislature, by act of November 13th, 1866, enacted, "that the grant of 16 sections of land to the mile to railroad companies heretofore or hereafter constructing railroads in Texas shall be extended, under the same restrictions and limita-

tions heretofore provided by law, for 10 years after the passage of this act;" and by article 12, section 33 of the present constitution of Texas, while declaring that the legislatures which sat from March 18th, 1861, to August 6th, 1866, were without constitutional authority, yet enacted that such declaration should not affect, prejudicially, private rights which had grown up under such acts, and that though the legislature of 1866 was only provisional, its acts were to be respected, so far as they were not in violation of the Constitution and laws of the United States.

By act of July 27th, 1870, the Southern Transcontinental Railroad Company was incorporated, and it was enacted, in terms, that it might "purchase the rights, franchises, and property of the Memphis, El Paso, and Pacific Railroad Company, heretofore incorporated by the State."

The land grant was limited to fifteen years from the 4th of February, 1856, but this time had not yet expired, and by an act of November 13th, 1866, for the benefit of railroad companies, it was enacted, that this grant of 16 sections of land to the mile to railroads theretofore or thereafter constructing railroads in Texas, should be extended under the same restrictions and limitations theretofore provided by law, for ten years after the passage of this act.

The land reservation was conditioned upon certain surveys: 1. It was to be surveyed from the eastern boundary of Texas, as far as the Brazos River, within four years from March 1st, 1856. 2. The centre line of the reserve was to be run and plainly designated from the Brazos to the Colorado within fifteen months from February 10th, 1858. 3. The whole reservation was to be surveyed within ten years from February 10th, 1858. 4. The company was to have a connection with some road leading to the Mississippi River or the Gulf of Mexico, within ten years from February 10th, 1858. The first and second of these conditions were fulfilled within the times limited. The legislature, by act approved January 11th, 1862, enacted that "the time of the continuance of the present war between the Confederate States and the United States of America shall not be com-

puted against any internal improvement company in reckoning the period allowed them in their charters, by any law, general or special, for the completion of any work contracted by them to do."

This act the company considered extended the time for the performance of the third and fourth conditions till the 10th of June, 1873.

In the years 1867 and 1868 the company executed two series of bonds, known as land grant bonds, amounting in the aggregate to the par value of $10,000,000 in gold, and also executed and delivered to one Forbes and others, trustees as aforesaid, two mortgages to secure said bonds, by one of which they mortgaged all lands actually acquired or thereafter to be acquired by said company by grading, constructing, and equipping the first 150 miles of the road of said company, from Jefferson in Marion County to Paris in Lamar County, and by the other of which they mortgaged the like property for the second 150 miles, from Paris to Palo Pinto in Palo Pinto County. These bonds were put on the bourse in Paris, France, and sold for value to the extent of $5,343,700 of their par value, mostly in small lots, and to persons of limited means. The grants, guarantees, and assurances by the State of Texas to said company of the said franchises, and especially of said land grant and land reservation, were recited in said mortgages, and were also announced and repeated to the purchasers personally, and by advertisement and prospectus, and the purchasers took the bonds relying on said grants, and upon the exclusive right of the company to locate certificates within the territory so reserved.

The bonds not being paid the Circuit Court for the Western District of Texas, on motion of Forbes, trustee under the mortgage, on the 6th of July, 1870, enjoined the railroad company from disposing of any of its effects, and put the road into the hands of one John A. C. Gray, as receiver:

"To take possession of the moneys and assets, real and personal; roadbed, road, and all property, whatsoever, of the said Memphis, El Paso, and Pacific Railroad Company, wheresoever

the same may be found, with power under the special order of the court, from time to time to be made, to manage, control, and exercise all the franchises, whatsoever, of said company, and, if need be, under the direction of the court, to sell, transfer, and convey the road, roadbed, and other property of said company, as an entire thing," &c.

On the 20th of January, 1871, it was further ordered by the court:

"That the said John A. C. Gray, receiver, as aforesaid, be, and he is hereby, authorized and empowered to defend and continue all suits brought by or against the said Memphis, El Paso, and Pacific Railroad Company, whether before or after the appointment of said receiver, and whether in the name of said company or otherwise; defend all suits brought against him as such receiver or affecting his receivership, and to bring such suits *in the name of said company, or in the name of said receiver*, as he may be advised by counsel to be necessary and proper in the discharge of the duties of his office, and for acquiring, securing, and protecting the assets, franchises, and rights of the said company and of the said receiver, and for securing and protecting the land grant and land reservation of the said company."

In November, 1869, the present constitution of Texas was adopted, and was approved by Congress. The fifth and sixth sections of this constitution are as follows:

"SECTION 5. All public lands heretofore reserved for the benefit of railroads or railway companies shall hereafter be subject to location and survey by any genuine land certificates.

"SECTION 7. All lands granted to railway companies which have not been alienated by said companies in conformity with the terms of their charter respectively and the laws of the State under which the grants were made, are hereby declared *forfeited* to the State for the benefit of the school fund."

The constitutional convention which framed this constitution passed an ordinance to the effect that all heads of families actually settled on vacant lands lying within the Memphis and El Paso railroad reserve, shall be entitled to and receive from the State of Texas 80 acres of land, in-

cluding the place occupied, on payment of all expenses of survey and patent; and that all vacant lands lying within said reserve are declared open and subject to sale to heads of families actually settled on or who may actually settle on said reserve, at the price of one dollar per acre; and that said vacant lands within said reserve shall be open to pre-emption settlers, and subject to the location of all genuine land certificates.

There were in 1869, and were on the 20th of January, 1871, when Gray was ordered by the court to bring such suits in the name of the company as he might be advised by counsel were necessary and proper in the discharge of the duties of his office, a great number of land certificates outstanding and unlocated in Texas. Since the passing of the said ordinance, and the adoption of the said constitution, many hundreds of the holders of certificates other than those issued to the company had located their certificates on the sections reserved to the company, had returned their surveys and locations to the Commissioner of the General Land Office, and had applied for patents on the same. Before the 19th day of September, 1870, Commissioner Kuechler and Governor Davis, professing to act under the said constitutional provisions, issued 2 of such patents. On the 19th of September, 1870, the receiver filed a protest with the commissioner against issuing any further patents for lands reserved to the company, but the commissioner and governor disregarded the protest and issued 32 additional patents within the reserve; the whole of the land thus patented amounting to nearly 20,000 acres.

Hereupon on the same 20th of January, 1871, Gray, who was a citizen of New York, filed a bill in the court below against one Davis, governor of the State of Texas, and Keuchler, already mentioned as commissioner of the land office of the State. The bill—averring that "the Memphis, El Paso, and Pacific Railroad Company" is "a corporation created by and existing under certain statutes of Texas," already referred to, and that it had done "all acts and things necessary to the full and complete vesting, secur-

ing, and preserving of the franchises, rights, and privileges granted thereby"—set forth a history much as above given. It averred that the company was insolvent, and could not continue the construction of the road, and that the holders of said bonds would necessarily be remitted to the security of the mortgages; that the said security was worthless unless the receiver, under order of court, should be able to sell the franchises and property of said company to some party or parties who, by constructing the road, should acquire the lands referred to in the mortgages, and hold the same subject to the lien of them. It set forth that the general laws of Texas authorized to the fullest extent the conveyance of the franchises of a railway company by sale under execution or foreclosure; and that by act of July 27th, 1870, the Southern Transcontinental Railroad Company was created, and, as before mentioned, was expressly authorized by its charter to "purchase the rights, franchises, and property of the Memphis, El Paso, and Pacific Railroad Company, heretofore incorporated by the State;" that the Southern Transcontinental Company stood ready to do this, and to devote the lands to be acquired by the exercise of said Memphis and El Paso franchises to the settlement of the land grant mortgage debt, provided the receiver could convey the charter, the land grant, and the grant of the land reservation unimpaired and in full force.

It set forth further, that the receiver, on negotiating for a transfer of the franchises of the company, found that the market for them was peculiar, in the following respects: it was limited, as the franchises are only of use or value to those who desired and were able to construct the road; it depended in great measure upon the reputation of and confidence in the enterprise, and a belief among capitalists, outside of the State of Texas, that the State could and would have to abide by the grants contained in the charter; that it depended peculiarly and essentially upon the preservation of the land grant and land reservation, inasmuch as the country through which the road was to be built was sparsely inhabited, without cities or towns to furnish local traffic;

that Texas lands at a distance from railroads, were of but nominal value compared with lands along the line of the roads, and that the Southern Transcontinental Railroad Company, to whom the receiver chiefly looked as a purchaser, already had the right of way across the State and parallel with the route of the Memphis and El Paso charter, following "as near as might be practicable the old survey of the Memphis and El Paso road;" making the mere right of way of the latter of comparatively little value without the lands and the reservation.

It asserted that the acts of the governor and commissioner of the land office, in executing and causing to issue patents for the reserve, were, and their continuance would be, irretrievable destruction of that portion of the franchise of the company which consisted of the right to have the odd sections of the reservation devoted exclusively to the location and patenting of the company's certificates, would destroy all confidence in the other grants of the company, as well as in the grant of the reservation, and render the franchise of the company valueless in the hands of the receiver, doing irreparable injury to the interests committed to his charge.

It set forth further that the Southern Transcontinental Company asserted and insisted to the receiver, that unless the said acts were judicially declared unlawful, and perpetually restrained, the said franchises would be valueless to them, and that they would not carry out the purchase of the same.

[It was an admitted fact in the case, that the Memphis, El Paso, and Pacific Railroad Company had never sectionized or numbered the land reservation of the same west of Brazos River, or any portion of said reservation west of said river; and that no work had been done on the road of the said company before or since the year 1861, either by grading or otherwise, except those as already affirmatively stated and set forth.]

The bill further asserted that the charter of the company was a contract between the State and the company, which contract was now in the hands of the complainant as re-

ceiver, and under direction of a court of equity, to be used for the benefit of the creditors of the company; that the said provisions of the constitution of Texas and the said ordinance of convention impaired the obligation and value of the said contract, and also of the said contracts of mortgage, and were in so far contrary to article 1, section 10, of the Constitution of the United States, which declares that "no State shall pass any law impairing the obligation of contracts," and were in so far null and void; and that the acts of the governor of the State and commissioner of the land office, in issuing such patents, were without authority of law, and illegal, and that any repetition of the same should be perpetually restrained. The bill prayed an injunction accordingly.

As a reason for confining the bill to the two defendants named, an amendment to the bill alleged that the complainant had applied at the General Land Office of Texas, to have the number and names of the parties who had located land certificates other than those issued to the Memphis, El Paso, and Pacific Railroad Company, on lands within and forming a part of the land reservation of the said company, and to obtain a list of the same; that he had been informed, on making such application, and by the defendant, Kuechler, the Commissioner of the General Land Office, that the number of the same was very great, to wit, many hundreds, and that a list could not be furnished without great time and labor. The amendment further alleged that parties were constantly making locations and surveys of land certificates as aforesaid on the lands of said reservation; and that parties who had made such locations and surveys had —— months allowed them by law, after making the same, before they were required to make returns thereof to the Commissioner of the General Land Office, and that the complainant was consequently unable, and never would be able, to obtain a correct list of such parties.

To this bill the defendants demurred:

1st. Because it did not appear from it that the defendants, or either of them, had any direct or personal interest in the

lands which were the subject-matters of this suit; but on the contrary that they were sued in their official capacities only; and that the lands were a part of the public domain of the State of Texas, which was not and could not be made a party to this suit.

2d. Because it did not appear that while under the amendment 11 to the Constitution of the United States [which declares that "the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of a foreign State"], the court could have no jurisdiction as between the complainant and the State of Texas, jurisdiction existed in a suit against two of the officers of said State in their official capacity alone, to decree portions of the constitution of the State, which had been accepted by the Congress of the United States, and which the defendants were sworn to obey, void.

3d. Because it did not appear that the bill was founded on fraud, accident, mistake, trust, specific performance, or any ground of equity jurisdiction; or that the same set out any equity against the defendants whatever; on the contrary, it appeared that the bill was brought to have sections 5 and 7 of article ten of the constitution of the State of Texas decreed void.

4th. Because it did not appear that the complainant, being an officer of the court, had a right to sue the defendants therein, nor that the court could have jurisdiction as between the complainant, though a citizen of the State of New York, and the defendants, as citizens of the State of Texas, in either their respective official or individual capacities.

5th. Because the "act incorporating the Memphis, El Paso, and Pacific Railroad Company," and the other acts referred to in the bill, did not amount to a contract between the State of Texas and the company.

6th. Because it did not appear that any designated third person or persons was or were about to have a patent granted him or them by the defendants, and that such third person

or persons was or were sought to be made a party or parties, nor that said bill was not too vague and indefinite.

7th. Because it did not appear that the creditors not specified of the company were made parties thereto, nor that the persons not specified applying for patents on locations of certificates, within the limits of the lands that were reserved, were made parties thereto; all of whom, according to the bill, had equities that ought to be determined in this suit, and hence were necessary and proper parties to this suit.

8th. Because it did not appear that the complainant had any equities that he was not bound to have litigated against such third persons not specified, and also against those not specified who had located certificates within the limits of the lands that were reserved, before he would have a right (which was not conceded) to invoke any action by means of a bill in a court of equity, in case such a court might have jurisdiction.

The demurrer was overruled, and, no answer being filed, a decree *pro confesso* was taken for the complainant, and on the 16th of February, 1871, a final decree was granted in accordance with the prayer of the bill, to the following effect:

"That in July, 1870, and at the time of the appointment of Gray as receiver, and at the date of the decree, the company was duly possessed of the franchise and right of, and to the land grant and land reservation of the company; that the said right and the franchise of the company were unimpaired, and in full force and virtue; that the provisions of the constitution of Texas, and of said ordinance of convention, so far as they impaired, or purported to impair the said charter, land grant, or land reservation, were contrary to the provisions of article 1, section 10, of the Constitution of the United States, and were in so far, null and void; and that the defendants should be perpetually enjoined from issuing, or causing or permitting to issue, any patent of the lands of the odd sections of said reservation, except on the certificates granted to the company, or its assigns."

From this decree appeal was taken by the defendants to this court.

Mr. T. J. Durant and Mr. G. F. Moore, for the appellants; Messrs. B. R. Curtis, J. A. Davenport, and C. Parker, contra.

Mr. Justice SWAYNE delivered the opinion of the court.

This is an appeal in equity from the decree of the Circuit Court of the United States for the Western District of Texas. The appellee was the complainant in the court below. The defendants demurred to the bill. The demurrer was overruled. The defendants stood by it. A decree as prayed for was thereupon rendered *pro confesso* for the complainant. The defendants removed the case to this court by appeal, and it is now before us, as it was before the court below, upon the demurrer to the bill. This brings the whole case as made by the bill under review. The facts averred, so far as they are material, are to be taken as admitted and true. We shall refer to them accordingly. The question presented for our determination is, whether the Circuit Court erred in overruling the demurrer. The appellants, having elected not to answer, the decree for the complainant followed as of course.

At the outset of our examination of the case, we are met by jurisdictional objections as to the parties—both complainant and defendants—which, before proceeding further, must be disposed of. We will consider first, those which relate to the complainant, and then, those with respect to the defendants.

The complainant was appointed to his office of receiver, in the suit in equity of *Forbes and others* v. *The Memphis, El Paso, and Pacific Railroad Company*, a corporation created by the State of Texas. The suit was in the same court whence this appeal was taken. In that case, on the 6th of July, 1870, it was, among other things, ordered and decreed, that the corporation should be enjoined from disposing of any of its effects, and that John A. C. Gray, the complainant in this suit, should be, and he was thereby "appointed receiver; to take possession of the moneys and assets, real and personal; roadbed, road, and all property whatsoever, of the said Memphis, El Paso, and Pacific Railroad Com-

pany, wheresoever the same may be found, with power under the special order of the court, from time to time to be made, to manage, control, and exercise all the franchises, whatsoever, of said company, and, if need be, under the direction of the court, to sell, transfer, and convey the road, roadbed, and other property of said company, as an entire thing," &c.

On the 20th of January, 1871, it was further ordered by the court "that the said John A. C. Gray, receiver as aforesaid, be, and he is hereby, authorized and empowered to defend and continue all suits brought by or against the said Memphis, El Paso, and Pacific Railroad Company, whether before or after the appointment of said receiver, and whether in the name of said company or otherwise; defend all suits brought against him as such receiver or affecting his receivership, and to bring such suits in the name of said company, or in the name of said receiver, as he may be advised by counsel to be necessary and proper in the discharge of the duties of his office, and for acquiring, securing, and protecting the assets, franchises, and rights of the said company and of the said receiver, and for securing and protecting the land grant and land reservation of the said company."

It is to be presumed the receiver filed this bill, as it is framed in accordance with the advice of counsel.*

The authority given by the decree is ample. Still the question arises whether it was competent for him to proceed in his own name instead of the name of the company whose rights he seeks by this bill to assert. A receiver is appointed upon a principle of justice for the benefit of all concerned. Every kind of property of such a nature that, if legal, it might be taken in execution, may, if equitable, be put into his possession. Hence the appointment has been said to be an equitable execution. He is virtually a representative of the court, and of all the parties in interest in the litigation wherein he is appointed.† He is required to

* Bank of the United States *v.* Dandridge, 12 Wheaton, 70.

† Jeremy's Equity, 249; Davis *v.* Duke of Marlborough, 2 Swanston, 125; Shakel *v.* Duke of Marlborough, 4 Maddock, 463.

take possession of property as directed, because it is deemed more for the interests of justice that he should do so than that the property should be in the possession of either of the parties in the litigation.* He is not appointed for the benefit of either of the parties, but of all concerned. Money or property in his hands is in *custodiâ legis*.† He has only such power and authority as are given him by the court, and must not exceed the prescribed limits.‡ The court will not allow him to be sued touching the property in his charge, nor for any malfeasance as to the parties, or others, without its consent; nor will it permit his possession to be disturbed by force, nor violence to be offered to his person while in the discharge of his official duties. In such cases the court will vindicate its authority, and, if need be, will punish the offender by fine and imprisonment for contempt.§ The same rules are applied to the possession of a sequestrator.‖ Where property in the hands of the receiver is claimed by another, the right may be tried by proper issues at law, by a reference to a master, or otherwise, as the court in its discretion may see fit to direct.¶ Where property, in the possession of a third person, is claimed by the receiver, the complainant must make such person a party by amending the bill, or the receiver must proceed against him by suit in the ordinary way.** After tenants have attorned to the receiver, he may distrain for rent in arrear in his own name.†† In a suit between partners he may be required to carry on the business,

* Wyatt's Practical Register, 355.

† In re Colvin, 3 Maryland Chancery Decisions, 278; Delany *v.* Mansfield, 1 Hogan, 234.

‡ The Chautauque County Bank *v.* White, 6 Barbour, 589; Verplanck *v.* Mercantile Ins. Co. of New York, 2 Paige, 452.

§ De Groot *v.* Jay, 30 Barbour, 483; Angel *v.* Smith, 9 Vesey, 335; Russell *v.* E. A. R. R. Co., 3 Mac. & Gor. 104; Parker *v.* Browning, 8 Paige, 388; Noe *v.* Gibson, 7 Paige, 513; 2 Story's Equity, § 833, A. & B.

‖ 2 Daniels's Chancery Practice, 1433.

¶ Empringham *v.* Short, 3 Hare, 470.

** 8 Paige, 388; Noe *v.* Gibson, 7 Id. 513; 2 Story's Equity, *supra;* 2 J. & W. 176; 2 Daniels's Chancery Practice, 1433.

†† 2 Daniels's Chancery Practice, 1437.

in order to preserve the good-will of the establishment, until a sale can be effected.*

Here the property in question is not in the possession of the defendants. The possession of the receiver has not been invaded. He has not been in possession, is not seeking possession; and there is no question in the case relating to that subject. But the order of the court expressly requires the receiver to secure and protect "the assets, franchises, and rights," and "the land grant and reservation of said company." He is seeking to perform that duty by enjoining the appellants from doing illegal acts, which the bill alleges, if done, would render the rights and title of the company to the immense property last mentioned, of greatly diminished value, if not wholly worthless.

We think it is competent for him to perform this function in the mode he has adopted. The decree, in the case wherein he was appointed, expressly authorizes him to sue for that purpose in his own name. The order was made by a court of adequate authority in the regular exercise of its jurisdiction. No appeal has been taken, and the order stands unreversed.

This bill is auxiliary to the original suit.† It is analogous to a petition by a receiver to the court to protect his possession from disturbance, or the property in his charge from threatened injury or destruction. No title in the receiver is necessary to warrant such an application, or the administration by the court of the proper remedy. There can be no valid objection to the receiver here, in analogy to that proceeding, maintaining this suit. In the progress and growth of equity jurisdiction it has become usual to clothe such officers with much larger powers than were formerly conferred. In some of the States they are by statutes charged with the duty of settling the affairs of certain corporations when insolvent, and are authorized expressly to sue in their own names. It is not unusual for courts of equity to put them in charge of the railroads of companies which have fallen

* Marten *v.* Van Schaick, 4 Paige, 479.

† Freeman *v.* Howe, 24 Howard, 451; Jones *v.* Andrews, 10 Wallace, 327.

into financial embarrassment, and to require them to operate such roads, until the difficulties are removed, or such arrangements are made that the roads can be sold with the least sacrifice of the interests of those concerned. In all such cases the receiver is the right arm of the jurisdiction invoked. As regards the statutes, we see no reason why a court of equity, in the exercise of its undoubted authority, may not accomplish all the best results intended to be secured by such legislation, without its aid.

A few remarks will be sufficient to dispose of the jurisdictional objections as to the appellants.

In *Osborn* v. *The Bank of the United States*,* three things, among others, were decided:

(1.) A Circuit Court of the United States, in a proper case in equity, may enjoin a State officer from executing a State law in conflict with the Constitution or a statute of the United States, when such execution will violate the rights of the complainant.

(2.) Where the State is concerned, the State should be made a party, if it could be done. That it cannot be done is a sufficient reason for the omission to do it, and the court may proceed to decree against the officers of the State in all respects as if the State were a party to the record.

(3.) In deciding who are parties to the suit the court will not look beyond the record. Making a State officer a party does not make the State a party, although her law may have prompted his action, and the State may stand behind him as the real party in interest. A State can be made a party only by shaping the bill expressly with that view, as where individuals or corporations are intended to be put in that relation to the case.

Dodge v. *Woolsey*,† *The State Bank of Ohio* v. *Knoop*,‡ *The Jefferson Branch Bank* v. *Skelly*,§ *Ohio Life and Trust Co.* v. *Debolt*,‖ and *The Mechanics' and Traders' Bank* v. *Debolt*,¶ proceeded upon the same principles, and were controlled

* 9 Wheaton, 738. † 18 Howard, 331. ‡ 16 Id. 369.
§ 1 Black, 436. ‖ 16 Howard, 432. ¶ 18 Id. 380.

by that authority, with respect to the jurisdictional question arising in each of those cases as to the defendant.

In *Woodruff* v. *Trapnall*,* a writ of mandamus was issued to the proper representative of the State of Arkansas to compel him to receive the paper of the Bank of the State of Arkansas in payment of a judgment which the State had recovered against the relator. The bank was wholly owned by the State, and the claim was made under a clause in the charter which had been repealed. Judgment was given against the respondent. The question of jurisdiction does not appear to have been raised. In *Curran* v. *The State of Arkansas, The Bank of the State of Arkansas, and others*,† it appeared that the bank had become insolvent. A creditor's bill was filed to reach its assets. The objection was taken that the State could not be sued. This court answered that the objection involved a question of local law, and that as the State permitted herself to be sued in her own tribunals, that was conclusive upon the subject. According to the jurisprudence of Texas, suits like this can be maintained against the public officers who appropriately represent her touching the interests involved in the controversy.‡ In the application of this principle there is no difference between the governor of a State and officers of a State of lower grades. In this respect they are upon a footing of equality.§

A party by going into a National court does not lose any right or appropriate remedy of which he might have availed himself in the State courts of the same locality. The wise policy of the Constitution gives him a choice of tribunals. In the former he may hope to escape the local influences which sometimes disturb the even flow of justice. And in the regular course of procedure, if the amount involved be large enough, he may have access to this tribunal as the

* 10 Howard, 190.

† 15 Id. 304.

‡ Ward *v.* Townsend, 2 Texas, 581; Cohen *v.* Smith, 3 Id. 51; Commissioner General Land Office *v.* Smith, 5 Id. 471; McLelland *v.* Shaw, 15 Id. 319; Stewart *v.* Crosby, Ib. 547.

§ Whitman *v.* The Governor, 5 Ohio State, 528; Houston and Great Northern Railroad Co. *v.* Kuechler, Commissioner, Supreme Court of Texas—not yet reported.

final arbiter of his rights.* Upon the grounds of the jurisprudence of both the United States and of Texas we hold this bill well brought as regards the defendants.

It is insisted that the corporation, on behalf of which this suit was instituted, has ceased to exist.

The bill avers that "The Memphis, El Paso, and Pacific Railroad Company" . . . is "a corporation created by and existing under certain statutes of the State of Texas hereinafter set forth," and that within the times limited by the charter and extended by other acts the company "did all acts and things necessary to the full and complete vesting, securing, and preserving of the franchises, rights, and privileges granted thereby." The demurrer admits the truth of these averments unless they are inconsistent with the statutes which bear upon the subject. The corporation was created by an act of the legislature of Texas, approved February 4th, 1856. By the first section certain parties are named and created a body politic and corporate, and the general powers inherent in all such bodies are formally given. The second gives the right to construct a railway, commencing on the eastern boundary of the State, between Sulphur Fork and Red River, at the western terminus of the Mississippi, Ouachita, and Red River Railroad, or of the Cairo and Fulton Railroad, and running thence westerly to the Rio Grande, opposite to or near the town of El Paso. The twentieth section declares that no rights shall vest under the charter until a certain amount of stock therein named shall have been subscribed, and the percentage prescribed shall have been paid upon it. This requirement is covered by the averment in the bill that the company had done everything necessary to secure the vesting of all the franchises given to it. We do not understand that there is any controversy on this subject. All the other conditions prescribed, involving the existence of the corporation, are clearly subsequent. They are found in the fourteenth section of the charter, in the first section of the act of February

* Ex parte McNiel, 13 Wallace, 236.

5th, 1856, and in the third section of the act of February 10th, 1858. To any argument drawn from these provisions there are two conclusive answers:

(1.) There has been no judgment of ouster and dissolution. Without this they are inoperative. To make them effectual they must be grasped and wielded by the proper judicial action.*

(2.) The offences and punishment denounced have been condoned and waived by the subsequent action of the legislature. The act of March 20th, 1861; the act for the relief of railroad companies, approved January 11th, 1862; the act for the relief of companies incorporated for purposes of internal improvement, approved February 18th, 1862; and the third section of the "Act to incorporate the Transcontinental Railroad Company," of the 27th July, 1870, each and all have that effect. The section last mentioned authorizes the company therein named to "purchase the rights, franchises, and property of the Memphis, El Paso, and Pacific Railroad Company, heretofore incorporated by this State." This is a clear affirmation, by implication, of the existence of the corporation, and of the possession of the rights, franchises, and property conferred by its charter. What is implied is as effectual as what is expressed.† These considerations are so clearly conclusive, that it is needless to advert more particularly in this connection to the legislation in question, or to pursue the subject further. There is no warrant for the proposition that the corporation had ceased to exist.

The heart of this litigation lies in the immense land grant which is in controversy between the parties. The objections we have considered are only outworks thrown up to prevent the conflict from reaching that point. It is insisted that the rights of the company touching the entire reservation have become forfeited.

* See Angell & Ames on Corporations, § 777, and the authorities there cited.

† United States *v.* Babbit, 1 Black, 57.

The fifteenth section of the charter provides as follows: "All the vacant lands within eight miles on each side of the extension line of said road, shall be exempt from location or entry, from and after the time when such line shall be designated by survey, recognition, or otherwise. The lands hereby reserved shall be surveyed by said company at their expense, and the alternate or even sections reserved for the use of the State. And it shall be the duty of said company to furnish the district surveyor of each district through which said roadway runs, with a map of the track of said road, together with such field-notes as may be necessary to the proper understanding and designation of the same."

There are other provisions prescribing various details not necessary to be particularly stated or considered.

A proviso in the seventeenth section declares that no title shall be permanently vested in the company or their assigns for land granted for the grading as contemplated by the act, until twenty-five miles of the road shall have been completed and put in running order. The proviso in the twentieth section of the charter, that no rights shall vest under it until the condition therein prescribed is complied with, has already been considered. Conditions of forfeiture of the lands granted are prescribed in this and subsequent acts. They are found in the fourteenth section of this act; in the first and fourth sections of the supplemental act of the same date; and in the third and fourth sections of the act of February 10th, 1858. These conditions will be considered hereafter.

The act for the relief of internal improvement companies of February 18th, 1862, declared that the time of the continuance of the war between the Confederate States and the United States should not be computed against any internal improvement company in reckoning the period allowed them for the completion of any work they had contracted to do.

The act of January 11th, 1862, for the relief of railroad companies enacted that the failure of any chartered railroad company of the State to complete any part of its road, as required by existing laws, should not operate as a forfeiture of its charter or of the lands to which the company would

be entitled, under the provisions of the act entitled "An act to encourage the construction of railroads in Texas by donations of land," approved January 30th, 1854, and the several acts supplementary thereto, provided the company should complete such portion of its road as would entitle it to donations of land under existing laws within two years from the close of the war.

The act for the benefit of railroad companies of November 13th, 1866, declared that the grant of sixteen sections of land to the mile to railroad companies theretofore, or thereafter, constructing railroads in Texas, should be extended under the same restrictions and limitations theretofore provided by law, for ten years after the passage of the act. These several acts are valid.*

By an act approved July 27th, 1870, the Southern Transcontinental Railroad Company was incorporated.

It was declared that the object of the company thus created was to construct and establish a railway line and telegraphic communication from the eastern boundary of the State of Texas, "and thence as near as practicable to the route of the Memphis, El Paso, and Pacific Railroad Company, to, or near, the town of El Paso." It was enacted that "the main line of said road shall follow, as near as may be practicable, the old survey of the Memphis and El Paso road." It was further enacted that "the said company, hereby incorporated, may purchase the rights, franchises, and property of the Memphis, El Paso, and Pacific Railroad Company, heretofore incorporated by this State," as before mentioned.

The first section of the ordinance of 1869 declared that all heads of families settled on vacant lands lying within the Memphis and El Paso railroad reserve, should be entitled to receive from the State of Texas eighty acres of land, including the place occupied, upon payment of the expenses of survey and patent.

By the second section it was declared that all the vacant

* See the 33d section of the constitution of Texas of 1869, and Texas v. White, 7 Wallace, 700.

land within the reserve was open to sale to settlers and pre-emption settlers, and subject to the location of land certificates. The third section declared that the company had forfeited its right to the land, and that certain certificates having been issued to the company and patents issued thereon, it was made the duty of the Attorney-General to institute legal proceedings to have such certificates and patents cancelled.

In November, 1869, the present constitution of Texas was adopted. It was subsequently approved by Congress.

Sections five and seven of this constitution are as follows:

"SECTION 5. All public lands heretofore reserved for the benefit of railroads or railway companies shall hereafter be subject to location and survey by any genuine land certificates.

"SECTION 7. All lands granted to railway companies which have not been alienated by said companies in conformity with the terms of their charter respectively, and the laws of the State under which the grants were made, are hereby declared forfeited to the State for the benefit of the school fund."

This summary gives a view of the statutory and constitutional provisions necessary to be considered in disposing of the question before us.

On the 20th of June, 1857, the company filed in the land office at Austin surveys showing the line of the road from the eastern boundary of the State to El Paso, which line was officially recognized by the Commissioner of the General Land Office of Texas. By the 1st of March, 1860, the company had surveyed, sectionized, and numbered all the sections and fractional sections of the vacant lands within the reservation, from the eastern boundary of the State to the crossing of the Brazos, of which due returns were made to the commissioner, and by him accepted. By the 10th of May, 1859, the company had marked and designated the central line of the road from the Brazos to the Colorado, and made proper returns to the office of the commissioner, by whom they were accepted. The lands granted to the company thereby became defined and officially recognized as such along the whole extent of their line.

In doing this work the company surveyed, numbered, and mapped each alternate or even section of public lands for two hundred and fifty miles in length, and sixteen miles in width, in behalf of the State of Texas. It was of great benefit to her, and is reported to the receiver to have cost the company more than $100,000.

By consent of parties the bill was amended *nunc pro tunc* in three particulars. The complainant admitted that no land within the reserve had been surveyed, sectionized, or numbered west of the Brazos River, and that no work had been done on the road before or since 1861, except as averred in the bill. He averred that he applied to the General Land Office for the number and names of those who had located certificates other than such as were issued to the company upon lands within the reservation, and that Keuchler, the defendant, answered that the number was very great, amounting to hundreds, and that a list could not be furnished without great time and labor. He averred further that parties were constantly locating certificates and making surveys within the reservation, and that they were allowed a specified time to make their returns, so that it was impossible for him to obtain a full list of such parties.

The company commenced work within one year from the 1st of March, 1856, and before the 1st of March, 1861, had completely graded more than fifty miles of its roadway, beginning at the eastern boundary line of the State and extending west in the direction of El Paso.*

We do not understand that up to that time there was a breach of any condition touching the existence of the corporation or its right to the lands within the reservation. Before that time the tracts east of the Brazos covered by the grant were definitely fixed by the surveys which the company had made. The title of the company to those west of the Brazos, though the sections were not designated, was equally valid. The good will of a lease which the landlord is in the habit of renewing is property, and rights

* See section 3 of the act of February 10th, 1858.

growing out of it, whether by contract or otherwise, will be protected and enforced by a court of equity.*

The rights of the company west of the Brazos were of a much more substantial character than those which were the subjects of judicial action in the cases cited.

The real estate of a corporation is a distinct thing from its franchises. But the right to acquire and sell real estate is a franchise, and the right to acquire the particular real estate designated in the charter of this company, and here in question, is within that category. It might, therefore, well be doubted whether this right could be taken from the company without an appropriate proceeding instituted for that purpose, and prosecuted to judgment by the State. But the view which we take of the case renders it unnecessary to pursue the subject.

We will recur to the conditions of forfeiture touching the land grant, and consider them irrespective of that point. The provisions to that effect, in the fourteenth section of the charter, are expressly superseded by those in the first section of the supplemental act of February 5th, 1856. The fourth section of that act prescribes a further condition. These provisions again are superseded by the third and fourth sections of the amendatory act of February 10th, 1858. The conditions prescribed by the last-named act are:

(1.) To survey the reserve as far as the Brazos River, within four years from the 1st of March, 1856.

(2.) To run and designate the centre line of the reservation from the Brazos to the Colorado, within fifteen months from the 10th of February, 1858.

(3.) To survey the whole reserve within ten years from February 10th, 1858.

(4.) To have a connection with some road leading to the Mississippi or Gulf of Mexico within ten years from February 10th, 1858.

(5.) That the company shall have finished and in running

* Phyfe *v.* Wardell & Woolley, 5 Paige, 268; see, also, Amour *v.* Alexander, 10 Id. 571.

order at least twenty-five miles of their road within one year after it is connected with certain other roads mentioned in the act, and at least fifty miles every two years thereafter until the road is completed.

(6.) That the right to acquire lands from the State by donation shall cease at the expiration of fifteen years from February 10th, 1858.

The two first conditions were performed within the time prescribed. These points are covered by the averments of the bill. The time limited for the performance of the third and fourth is extended from February 10th, 1868, to June 10th, 1873, by adding the time of the continuance of the war, according to the act of February 18th, 1862, before referred to. When the bill was filed there were no such roads as those mentioned in the fifth condition with which a connection could be formed. The fifteen years limited by the sixth condition expired February 10th, 1873. The period that elapsed during the war is to be added. That extends the time so much further.

The title of the company is therefore unaffected by the breach of any condition annexed to the grant.

But suppose there had been such breaches, as is insisted by the counsel for the appellants, the result must still be the same.

Except as to a small portion of the land in question the legal title is yet in the State. Whatever may be the right of the company it is wholly equitable in its character. With a few exceptions, which have no applicability in this case, the same rules apply in equity to equitable estates as are applied at law to legal estates. They are alike descendible, devisable, alienable, and barrable.*

There is wide distinction between a condition precedent, where no title has vested and none is to vest until the condition is performed, and a condition subsequent, operating by way of defeasance. In the former case equity can give

* Jickling on the Analogy of Estates, &c., 17; Croxall *v.* Shererd, 5 Wallace, 281.

no relief. The failure to perform is an inevitable bar. No right can ever vest. The result is very different where the condition is subsequent. There equity will interpose and relieve against the forfeiture upon the principle of compensation, where that principle can be applied, giving damages, if damages should be given, and the proper amount can be ascertained.* By the common law a freehold estate could not be created without livery of seizin, and it could not be determined without some act *in pais* of equal notoriety. Conditions subsequent are not favored in the law,† and when they are sought to be enforced in an action at law, there must have been a re-entry, or something equivalent to it, or the suit must fail. The right to sue at law for the breach is not alienable. The action must be brought by the grantor or some one in privity of blood with him.‡ In *Dumpor's Case*,§ it was decided that a condition not to alien without license is finally determined by the first license given.

Here the controlling consideration is, that the performance of all the conditions not performed was prevented by the State herself. By plunging into the war, and prosecuting it, she confessedly rendered it impossible for the company to fulfil during its continuance. This is alleged in the bill, and admitted by the demurrer.

The rule at law is, that if a condition subsequent be possible at the time of making it, and becomes afterwards impossible to be complied with, by the act of God, or the law, or the grantor, the estate having once vested, is not thereby divested, but becomes absolute.‖ The analogy of that rule applied here would blot out these conditions. But this would be harsh and work injustice. Equity will, therefore, not apply

* Wells *v.* Smith, 2 Edwards's Chancery, 78; see also as to the principle of compensation, Beaty *v.* Harkey, 2 Smedes & Marshall, 563.

† 4th Kent, 129.

‡ Nicoll *v.* New York and Erie Railroad Co., 2 Kernan, 121; Ludlow *v.* The New York and Harlem Railroad Co., 12 Barbour, 440; Webster *v.* Cooper, 14 Howard, 488.

§ 4 Reports, p. 119.

‖ Coke Littleton, 206 a, 208 b; 2 Blackstone's Commentaries, 156; 4 Kent, *130.

the principle to that extent. It will regard the conditions as if no particular time for performance were specified. In such cases the rule is that the performance must be within a reasonable time.* We are clear in our conviction that, under the circumstances, a reasonable time for performance had not elapsed when this bill was filed. As the State, by the act of July 27th, 1870, created the Southern Transcontinental Railroad Company, and authorized that company to "purchase the rights, franchises, and property of the Memphis, El Paso, and Pacific Railroad Company," it will be but right to allow a reasonable time for that purchase to be made, if such an arrangement can be effected, and for the vendee thereafter to perform all that was incumbent upon the Memphis, El Paso, and Pacific Railroad Company by its charter and the supplementary and amendatory acts. If that arrangement cannot be made, the latter company will have the right to provide otherwise for the fulfilment of its obligations to the State within such time, and thus consummate its inchoate title to the lands within the reservation. Either will be in accordance with the principles of reason and justice, and within the spirit of well-considered adjudications.†

Both parties will thus be put in the same situation, as near as may be, as if the breaches had not occurred. Neither will be subjected to any serious hardship. The State, by her own acts, has lost the benefits of an earlier completion of the work. The company has lost the income which it might have enjoyed, and has doubtless been thrown into embarrassments it would have escaped. The circumstances do not call for a severe application of the rules of law upon either side.

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* Hayden *v.* Stoughton, 5 Pickering, 528; 4 Kent, *125, 126; Comyns's Digest, Title, "Condition G, 5."

† Walker *v.* Wheeler, 2 Connecticut, 299; Beaty *v.* Harkey, 2 Smedes & Marshall, 563; Moss *v.* Matthews, 3 Vesey, Jr., 279; 2 Vernon, 366; 1 Id. 83; 3 Brown's Chancery, 256; Taylor *v.* Popham, 1 Id. 168; 1 Bacon Abridgment, 642; 1 Maddock's Chancery Practice, 41, 42; City Bank *v.* Smith, 3 Gill & Johnson, 265.

Breaches of such conditions may be waived by the grantor expressly or *in pais*.* Such waiver is expressed in the statutes relating to the subject, to which we have referred, except the act creating the Transcontinental Company, and there it exists by the clearest implication.

That the act of incorporation and the land grant here in question, were contracts, is too well settled in this court to require discussion.† As such, they were within the protection of that clause of the Constitution of the United States which declares that no State shall pass any law impairing the obligation of contracts. The ordinance of 1869, and the constitution adopted in that year, in so far as they concern the question under consideration, are nullities, and may be laid out of view.‡ When a State becomes a party to a contract, as in the case before us, the same rules of law are applied to her as to private persons under like circumstances. When she or her representatives are properly brought into the forum of litigation, neither she nor they can assert any right or immunity as incident to her political sovereignty.§

A case more imperatively demanding the exercise of jurisdiction in equity could hardly be imagined than that presented in this bill. Should the interposition invoked be refused, doubtless the reservation would speedily be thatched over with adverse claims. A cloud would not only be thrown upon the title of the company, but the time, litigation, labor, and expense involved in the vindication of its rights, would very greatly lessen the value of the grant and materially delay the progress of the work it was intended to aid. The injury would be irreparable. It is the peculiar function of a court of equity in a case like this to avert such results.

It has been insisted that those holding adverse claims should have been brought into the case as parties. They

* Dumpor's Case, 1st Smith's Leading Cases, 85, American note.

† Fletcher *v.* Peck, 6 Cranch, 137; New Jersey *v.* Wilson, 7 Id. 166; Dartmouth College *v.* Woodward, 4 Wheaton, 518; State Bank *v.* Knoop, 16 Howard, 369.

‡ Von Hoffman *v.* The City of Quincy, 4 Wallace, 535.

§ Curran *v.* The State of Arkansas, 15 Howard, 308.

are too numerous for that to be done. An application was made to one of the defendants for a list of their names, and it was not given. The important questions which have arisen between the appellants and the company can all be properly determined without the presence of other parties than those before us.

The parties referred to are sufficiently represented for the purposes of this litigation by the Governor and the Commissioner of the General Land Office. We feel no difficulty in disposing of the case as it is presented in the record.

There are other points, ably maintained by the learned counsel for the appellants, to which we have not adverted. They are sufficiently answered by what has been said. It would extend this opinion unnecessarily, and could serve no useful purpose, specifically to consider them.

The Circuit Court decided correctly. The decree appealed from is

AFFIRMED.

Mr. Justice HUNT did not hear the argument in this case and did not participate in its decision.

Mr. Justice DAVIS, with whom concurred the CHIEF JUSTICE, dissenting, said:

I am constrained to enter my dissent to the opinion and judgment of the court in this case, for the reason that this suit, although in form otherwise, is in effect against the State of Texas. The object which it seeks to obtain shows this to be so, which is to deprive the State of the power to dispose, in its own way, of its public lands, and this object, by the decision just rendered, is accomplished. In my judgment the bill should have been dismissed, because the State is exempt from suit at the instance of private persons, and on the face of the bill it is apparent that the State is arraigned as a defendant.

PIERCE ET AL. *v.* CARSKADON.

By a statute of West Virginia passed in September, 1863, where a judgment was rendered against a non-resident in an action in which an attachment was issued, without personal service of a copy of such attachment upon the defendant, or of process in the suit, and without his appearance therein, such defendant had a right upon returning, or openly appearing in the State, to have, upon his petition, the proceedings in the action reheard, and to make his defence as if he had appeared in the case before judgment. Under this statute a judgment was thus recovered against the defendants in this case in December, 1864, and within one year thereafter they applied by petition to the State court for a rehearing, but they were not allowed to file their petition because it did not conform to a statute of the State passed in February, 1865, amending the statute of 1863, and requiring a defendant applying to appear and defend an action where judgment was rendered, as in this case, upon publication without personal service of attachment or process, to state in his petition and verify the same by his oath as a condition of being permitted thus to appear and defend, that he had not committed certain designated public offences. *Held*, on the authority of *Cummings* v. *The State of Missouri* (4 Wallace, 320), and *Ex parte Garland* (Ib. 333), that the court erred in refusing to receive the petition; that the act of February, 1865, in thus depriving the defendants for past misconduct, and without judicial trial, of an existing right, partook of the nature of a bill of pains and penalties, and was subject to the constitutional inhibition against the passage of bills of attainder, under which general designation bills of pains and penalties are included; and, also, that the statute in question, in thus depriving the defendants of the right they possessed, for acts to which such deprivation was not previously affixed by law as a punishment, came within the inhibition of the Constitution against the passage of an *ex post facto* law.

ERROR to the Supreme Court of Appeals of West Virginia; the case being thus:

In August, 1864, one Carskadon brought an action of trespass *de bonis asportatis* against Pierce, Williams, and others, in one of the State courts of West Virginia, and at the same time sued out an attachment against their real estate; and on the 20th of December, 1864, recovered a judgment against Pierce and Williams for $690.

The attachment which gave the court jurisdiction, was sued out under an act of West Virginia, passed 25th Sep-

tember, 1863,* which provided in its first section as follows, viz.:

"When any suit is instituted for any debt, or for damages for breach of any contract, on affidavit stating the amount and justice of the claim, that there is present cause of action therefor; or where it is to recover damages for any wrong, stating a certain sum which, at the least, the affiant believes the plaintiff is entitled to or ought to recover; that the defendant or one of the defendants is not a resident of this State, and that the affiant believes he has estate or debts due him within the county in which the suit is, or that he is sued with a defendant residing therein, the plaintiff may forthwith sue out of the clerk's office an attachment against the estate of the non-resident defendant for the amount so stated."

The act also provided that when an attachment was returned executed, an order of publication should be made against the defendant unless he had been served with a copy of the attachment, or with a process in the suit; that the right to sue out the attachment might be contested, and that when the court was of opinion that it was issued on false suggestions, or without sufficient cause, it should be abated. That when the attachment was properly sued out and the case was heard upon the merits, if the court was of opinion that the claim of the plaintiff was not established, final judgment should be given for the defendant; but if established, such judgment should be given for the plaintiff, and the court should proceed to dispose of the property attached as provided in the act. The act also provided that if the defendant, against whom the claim was, had not appeared, or been served with a copy of the attachment sixty days before the judgment or decree, the plaintiff should not have the benefit thereof, unless he should give bond with sufficient security, in such penalty as the court should approve, with condition to perform such future order, as might be made upon the appearance of the defendant, and his making a defence.

The attachment sued out in the case was levied on the

* Acts of West Virginia, 1863, p. 47–8.

lands of the defendants, Pierce and Williams; but neither any copy of the attachment nor any process in the suit was served on either of them, nor did either of them appear in the case.

Pursuant to the order of the court made in October, 1864, publication was made for four weeks of the suit, with notice requiring the defendants to appear therein within one month after publication. No appearance being had, and proof of publication being made, the case was, on the 20th of December, 1864, tried before a jury, who assessed against the defendants, Pierce and Williams, the plaintiff's damages at $690. The other defendants were found not guilty of the trespasses alleged. Upon this verdict, judgment was on the same day rendered by the court for the amount of the damages allowed, with interest until paid, and for a sale of the attached real property, subject however to the proviso that before the sale should take place, the plaintiff, or some one for him, should give bond, with sufficient security, in the penalty of $1500, conditioned to perform such future order as might be made upon the appearance of the said defendants and their making defence.

At this time, December 20th, 1864, the act under which the attachment was issued and the above proceedings were had, provided in its twenty-seventh section, as follows:

"If a defendant against whom, on publication, judgment or decree is rendered under any such attachment, or his personal representative shall return to or appear openly in this State, he may, within one year, after a copy of such judgment or decree shall be served on him at the instance of the plaintiff, or within five years from the date of the decree or judgment, if he be not so served, petition to have the proceedings reheard. On giving security for costs, he shall be admitted to make defence against such judgment or decree as if he had appeared in the case before the same was rendered, except that the title of any *bonâ fide* purchaser to any property, real or personal, sold under such attachment, shall not be brought in question or impeached. But this section shall not apply to any case in which the petitioner or his decedent was served with a copy of the attachment, or

with process in the suit wherein it issued more than sixty days before the date of the judgment or decree, or to any case in which he appeared and made defence."

Within one year from the date of the judgment, the defendants did petition the court to allow them a rehearing of the cause, but the court refused to allow their petition to be filed, because the affidavit to the petition did not conform to the provisions of an act of the legislature of West Virginia, passed on the 11th day of February, 1865,* amending the twenty-seventh section, above cited, so as to read as follows:

"If a defendant, against whom, on publication, a judgment or decree has been or shall hereafter be rendered in an action or suit in which an attachment has been or may be sued out, and levied, as provided in this chapter, or his personal representatives, shall return to or openly appear in this State, he may, within one year, after a copy of such judgment or decree shall be served on him, at the instance of the plaintiff, or within five years from the date of such judgment or decree, if he be not so served, petition to have the proceedings reheard. Such petition shall be presented to the Circuit Court of the county in which the judgment or decree was rendered, and, unless it be presented on behalf of a corporation, shall state the residence of the defendant at the commencement of the present rebellion, and at the time such judgment or decree was rendered, the State of which he claims to be a citizen, and also his ground of defence against such judgment or decree, and shall be verified by the affidavit of the party presenting the same. The said petition, when not presented on behalf of a corporation, shall be accompanied by the affidavit of such defendant or his personal representative, stating the following facts: *First.* That such defendant never voluntarily bore arms against the United States, the reorganized government of Virginia, or the State of West Virginia. *Second.* That such defendant never voluntarily gave aid or comfort to persons engaged in armed hostility against the United States, the reorganized government of Virginia, or the State of West Virginia, by countenancing, counselling, or encouraging them therein. *Third.* That such defendant never

* Acts of West Virginia, 1865, pp. 20, 21, 22.

sought, accepted, nor attempted to exercise any office or appointment whatever, civil or military, under any authority or pretended authority hostile to the United States, the reorganized government of Virginia, or the State of West Virginia. *Fourth.* That such defendant never yielded any voluntary support to any government, or pretended government, power, or constitution, within the United States, hostile or inimical thereto, or hostile or inimical to the reorganized government of Virginia, or the State of West Virginia; provided, nevertheless, that if the judgment or decree be against several defendants, upon a demand founded on contract, the court may order a rehearing and permit defence to be made on behalf of all the said defendants, if the petition be accompanied by the affidavit of any one of them stating the facts above mentioned. If the petitioner claims to be a citizen of this State, he shall also make and file an affidavit that he will support the Constitution of the United States and the constitution of West Virginia, and that he takes such obligation freely and of choice, without any mental reservation or purpose of evasion. Upon the filing of such petition and affidavit, a summons shall be awarded by the said court against the plaintiff or his personal representatives, commanding him to show cause, if any he can, at the next term of such court, why the defendant, or his personal representative, shall not be permitted to make defence to such decree, which summons shall be issued by the clerk of such court, and served upon the plaintiff, or his personal representative, at least thirty days before the return day thereof. Upon the return of such summons, executed, the plaintiff, or his personal representative, may file his own affidavit, or that of any other person, denying any one or more of the facts stated in the affidavit of the defendant, or his personal representative, filed with his petition as aforesaid, and showing wherein such defendant may have done or committed any of the acts mentioned in his said affidavit, and thereupon an issue shall be made by said court and tried by a jury, as to whether the said defendant has been guilty of the acts charged against him in said affidavit filed by the plaintiff, or his personal representative, upon which issue the plaintiff shall have the affirmative. If the jury find that the defendant has been guilty of any of the acts so charged against him, such defendant, his personal representative, and all others, in any way claiming under, by, or through him, shall forever

be precluded from appearing in or making defence against such judgment or decree or in any manner questioning the validity thereof; but the court may grant new trials as in other cases."

To the judgment of the court refusing a rehearing the defendants excepted, and the case was removed to the Supreme Court of Appeals of West Virginia, by a writ of error, upon the question of the invalidity of the said act of February 11th, 1865, because it was repugnant to the Constitution of the United States; the ground of the alleged repugnance being that the act, in depriving the defendants for past misconduct, and without judicial trial, of an existing right, partook of the nature of a bill of pains and penalties, and was subject to the constitutional inhibition against the passage of bills of attainder, under which general designation bills of pains and penalties are included; and, also, that the statute in question, in depriving the defendants of the right they possessed, for acts to which such deprivation was not previously affixed by law as a punishment, came within the inhibition of the Constitution against the passage of an *ex post facto* law. The Court of Appeals, the highest one in the State in which a decision in the suit could be had, decided in favor of the validity of the act; and the judgment was now brought here for review.

Mr. Caleb Bogess, for the plaintiff in error; Mr. B. Stanton, contra.

Mr. Justice FIELD delivered the opinion of the court.

This case is covered in every particular by the decisions of this court in *Cummings* v. *The State of Missouri*, and in *Ex parte Garland*, reported in 4th Wallace. Upon the authority of those decisions the judgment of the Supreme Court of West Virginia must be REVERSED, and the cause remanded for further proceedings; and it is

SO ORDERED.

BRADLEY, J., dissented from the judgment, on the

ground that the test oath in question was one which it was competent for the State to exact as a war measure in time of civil war.

PEABODY, COLLECTOR, *v.* STARK.

1. In the absence of a clear, common conviction on the part of all the members of the court as to the meaning of a direction relating to distillers in one of the internal revenue acts, the court—not holding such construction as in general obligatory on it—expressed itself content to adopt, and did adopt accordingly, what was shown to have been the unvarying practical construction given to the direction by the office of the Commissioner of Internal Revenue from the time that the act went into effect; such construction being obviously fair to both the distiller and the government.
2. Held accordingly, that under the 80 per cent. clause in the 20th section of the act of July 20th, 1868, the distiller is not liable until a survey in which the tax is assessed has been delivered to him as provided in the 10th section.

ERROR to the Circuit Court for the Middle District of Tennessee.

Stark brought an action in the court just named against Peabody, collector of internal revenue, to recover back as illegal a tax. The tax complained of as illegal was a reassessment upon the plaintiff as a distiller, in which he was assessed to the amount of 80 per cent. of the producing capacity of his distillery (in pursuance of section 20 of the Internal Revenue Act of July 20th, 1868),* though he had not actually made that amount of spirits, and notwithstanding the fact that no copy of the survey of his distillery fixing its producing capacity had been filed with him, or delivered to him, as required by section 10 of that same act.

The section of the internal revenue law thus last referred to requires assessors to make, or cause to be made, surveys of all distilleries registered or intended to be registered, and

* 15 Stat. at Large, 129.

to estimate and determine their true producing capacity, a written report whereof shall be made in triplicate, signed by the assessor, *one copy of which shall be furnished to the distiller*, one retained by the assessor, and the other immediately transmitted to the Commissioner of Internal Revenue. It also provides that the commissioner may at any time order a resurvey, the report of which shall be executed in triplicate *and deposited as before provided.*

On the trial the plaintiffs introduced evidence to show that 400 gallons of spirits not reported by them were lost by leakage, and by being burnt, &c.

The district attorney introduced evidence tending to show that, although the distillers were not furnished with the certified copy of either survey, yet they had actual notice of both.

The judge instructed the jury—

"That if a copy of the survey of the distillery was not delivered to the distillers according to the requirements of section 10 of said act, that they would not be bound by the survey, notwithstanding they might in fact know what the results of it were, and that in this event the government could only exact the tax upon the actual amount of spirits produced, including the 400 gallons destroyed, as aforesaid; to which ruling the United States district attorney then and there excepted."

Mr. G. H. Williams, Attorney-General, and Mr. C. H. Hill, Assistant Attorney-General, in behalf of the Commissioner of Internal Revenue, who on an affirmance of the judgment would under existing statutes have to pay the amount of it:

The object in providing that the distiller shall have a copy of the report sent to him is in order that if it is erroneous in any respect he may call the attention of the assessor to it, and, if need be, have the distillery resurveyed and the error corrected. But it was never meant to be made a condition essential in order to fix the rights of the government to the 80 per cent. duties given by section 20 of the act; or otherwise than as a matter directory. If the distiller have actual notice, in any way, of the number of gallons at which the

capacity of his distillery has been fixed by a survey, this is enough. The giving him a copy of the report of the survey is but one mode of giving him notice at what rate he has been rated. The proof in this case tended to show that he had actual notice of the result of both surveys, though no copies of either were delivered to him.

Messrs. Blair, Dick, Shackelford, and Helm, contra, contended that when a statute commands an act to be done in a certain way, or upon certain terms, or gives a new proceeding, or prescribes the manner and form of this proceeding, the manner and form so prescribed by the statute are not merely directory, but are *an essential condition* of a right of recovery; and that nothing can dispense with the mandate of the statute.

They also produced a letter from Mr. Josiah Given, deputy commissioner in the office of Internal Revenue, in the Treasury Department, dated July 31st, 1870, in reply to a request of one of the above-named counsel for a copy of the rulings of that office as to the date at which surveys of distilleries take effect. This letter stated—

"That under the 10th section of the act of July 20th, 1868, it has been uniformly held that the distiller is not bound by the survey until a copy of the report thereof, executed as required by said section, is delivered to him, and that assessments must, therefore, be made upon the basis of the survey last delivered to the distiller prior to the period for which the assessment is being made."

Mr. Justice MILLER delivered the opinion of the court.

The question whether a duty imposed by statute upon a ministerial or executive officer, the performance or non-performance of which affects the rights of others, is merely directory to the officer and only confers on parties injured a right of action against the officer, or on the other hand, is a condition essential to fix the rights of other parties as between themselves, is a very common, but often a very difficult one to decide.

Its decision depends mainly upon a consideration of the nature of the duty thus imposed in its relation to the rights of parties to be affected, but often also upon the proper construction of the language employed in the statute as being chiefly directed to the officer, or as declaratory of a principle governing the rights of parties.

Looking to the statute before us in the former aspect, the duty of depositing the copy of the survey with the distiller, is not in terms imposed upon the assessor, or the Commissioner of Internal Revenue; though the direction that this shall be done is made emphatic by being repeated as to the additional survey, if one shall be made. And while it is a fair inference that it was the duty of the assessor to deposit the copy with the distiller, it was so far an act which could be legally performed by another, that we do not doubt it would have been valid if performed by the commissioner or an agent of his, the survey being duly certified. It can hardly be said, then, that the statute is exclusively directed to the assessor.

The purpose of the requirement of delivering a copy to the distiller, which is manifestly to make certain to him that he will be held liable for a definite number of gallons, at all events, whether his distillery makes it or not, affords an argument of weight, that until he has this official information, a rule so harsh was not to be applied to him.

On the other hand, it is said that this special provision was only intended to secure one mode by which the assessed capacity of his distillery should come to the knowledge of the distiller, and if he is correctly informed from any other source of the number of gallons per day at which that capacity has been fixed by a legal survey, it is all that is necessary to govern his action.

In the absence of a clear conviction on the part of the members of the court on either side of the proposition in which all can freely unite, we incline to adopt the uniform ruling of the office of the internal revenue commissioner, holding that the distiller is not liable under the eighty per cent. clause, until a copy of the survey in which the tax is

assessed has been delivered to him as provided in section ten. It is made to appear to us in a very satisfactory manner that such has been the unvarying rule of that office since the act went into effect, and while we do not hold such ruling as in general obligatory upon us, we are content to adopt it in this case for the reason already mentioned, as well as for its obvious fairness to the government and to the distiller.

JUDGMENT AFFIRMED.

HUMPHREY *v.* PEGUES.

An act of assembly of a State passed in 1851 to incorporate a railroad company chartered a corporation, but did not exempt its property from taxation. An act passed in 1855 to amend its *charter* did exempt it. In 1863 an act was passed conferring on a company which had been incorporated in 1849 to build a railroad, but which had never yet found inducements sufficient to make it build the road, all the rights, powers, and privileges "granted by the *charter*" of the first-named road. *Held:*

1st. That the property of the second road was made, by the act of 1863, exempt from taxation.

2d. That the legislature could not repeal the act of 1863 so as to subject it to taxation.

ERROR to the Circuit Court for the District of South Carolina; the case being thus:

On the 16th of December, 1851, the legislature of South Carolina, by "an act to *incorporate* the Northeastern Railroad Company," chartered the corporation now known by that name. This act contained no exemption of the company's property from taxation, and by its terms was to continue in force for fifty years from the ratification thereof.

On the 19th of December, 1855, the same legislature passed another act, entitled "An act to *amend the charter* of the Northeastern Railroad Company, and for other purposes." This act enacted:

"SECTION 1. That the stock of the Northeastern Railroad

Company and the real estate that it now owns, or may hereafter acquire, which is connected with or subservient to the works, authorized in the charter of the said company, *shall be, and the same is hereby, exempted from all taxation* during the continuance of the present charter of the said company."

Prior to the date of either of these acts, that is to say, on the 19th of December, 1849, the same legislature had, by an act entitled "An act to charter the Cheraw and Darlington Railroad Company," incorporated the company of that name. This act, after authorizing the formation of the company and the raising of the stock, provided thus:

"SECTION 5. That *for the purpose of organizing and forming this company* . . . all the powers, rights, and privileges granted by the *charter* of the *Wilmington and Manchester Railroad Company* to that company shall be and are hereby granted to the Cheraw and Darlington Railroad Company," &c.

The powers, rights, and privileges here referred to as granted by the charter of the Wilmington and Manchester Railroad Company, whose name is above italicized, to that company, did not include any exemption of its property from taxation.

The Cheraw and Darlington Railroad Company thus, as above mentioned, incorporated in 1849, had not up to the 17th of December, 1863, built its road; and on the day and year last mentioned the same legislature amended its charter by the passage of the act which thus enacted:

"SECTION 1. That section 5 of an act entitled 'An act to charter the Cheraw and Darlington Railroad Company,' ratified the 19th day of December, A.D. 1849, be amended so as to read as follows, to wit:

"That all the powers, rights, and privileges granted by the charter of the Northeastern Railroad Company are hereby granted to the Cheraw and Darlington Railroad Company, and subject to the conditions therein contained."

Soon after this amendatory act of 1863 was passed, the Cheraw and Darlington Railroad, which had been lying dormant since 1849, was built and put in operation.

These different enactments above mentioned being in

force, the State officers of counties in South Carolina where the Cheraw and Darlington Railroad was situate, acting under the authority of the legislature of the State, imposed certain taxes on the stock and property of that company, and were proceeding to enforce payment of them, when one Pegues, a stockholder in Mississippi, filed a bill in the court below praying an injunction to restrain the collection. The court granted the injunction, and from this, its action, the county officers appealed. The question was whether (as Pegues, the complainant, contended) the act of December 19th, 1855, "to amend the charter of the Northeastern Railroad Company," &c., and exempting its property from taxation, formed a *part of its charter* when, on the 17th of December, 1863, the privileges granted to *that* company were conferred on the Cheraw and Darlington company; or whether (as the State of South Carolina contended) the privileges thus conferred were limited to those granted to the Northeastern company by its original charter or act of incorporation, passed in 1851, by which no exemption from taxation was conferred.

Mr. D. H. Chamberlain, for the State officers, appellants, contended that an exemption from taxation was never to be implied; that nothing less than a clear intention on the part of the legislature—an intention expressed in terms which admit no other reasonable construction—would suffice to sustain a privilege so valuable and so far-reaching; that as was shown by the words—"an act to amend the *charter* of the Northeastern Company"—in the amendatory act of 1855, it was the act of 1851 incorporating the company which constituted its *charter;* and that when the act of 1863 gave to the Cheraw and Darlington Railroad all the powers, rights, and privileges granted by the *charter* of the Northeastern Railroad Company, it gave it only the powers, rights, and privileges granted by that act of 1851.

In addition to this, that the original grant of powers, rights, and privileges made to the Cheraw and Darlington road by the section 5 of the act of December 19th, 1849, to

charter that road, was "for the purpose of *organizing and forming* that company," and that when this act was amended by substituting the new words contained in the amendatory act of the 17th of December, 1863, granting other privileges —the road not yet being so much as undertaken—the original purpose "of organizing and forming the company" still remained; and that it was a construction such as, in regard to a law exempting property from taxation, was not to be made, that would extend the interpretation so much further, as the complainant sought to do.

The learned counsel also contended that if this view were not sound, and if the property of the Cheraw and Darlington Railroad were by the act of 1863 exempted, yet the right to repeal or amend any previously existing exemption from taxation was inherent and inextinguishable in the State; that the power of taxation was one of the highest and most vitally necessary powers of sovereignty, and that if one legislature could take it from all subsequent legislatures, government could not go on.

Mr. T. G. Barker, contra.

Mr. Justice HUNT (having quoted the several statutes above given) delivered the opinion of the court.

The stockholders of the Cheraw and Darlington Company contend that the act of the 19th of December, 1855, entitled "An act to amend the charter of the Northeastern Railroad Company," &c., formed a part of the charter of the Northeastern Company in 1863, when the privileges conferred upon that company were granted to the Cheraw and Darlington Company.

The State contends that the privileges thus granted were limited to those conferred upon the Northeastern by its original charter or act of incorporation, passed in 1851.

All the "privileges," as well as powers and rights of the prior company, were granted to the latter. A more important or more comprehensive privilege than a perpetual immunity from taxation can scarcely be imagined. It con-

tains the essential idea of a peculiar benefit or advantage, of a special exemption from a burden falling upon others.

There is nothing in the terms of the statute of 1863 to indicate that the legislature intended to limit the privileges conferred upon the Cheraw Company to those granted to the Northeastern Company by its original act of incorporation, and to exclude the important privileges contained in the amending act. The charter of the Northeastern Company, as it existed in 1863, was based upon the two acts of the legislature, passed in 1851 and 1855, respectively. The first act was entitled an "act to incorporate" the Northeastern Company. The latter act was entitled "an act to amend the charter of the Northeastern Company." A charter, in the sense here used, is an instrument or authority from the sovereign power, bestowing rights or privileges; as it is briefly expressed, it is an act of incorporation. Such was the obvious understanding of the word by the legislature of South Carolina. The first act was expressed as creating the incorporation of the company; the second, using a synonymous expression, purported to amend its charter. The words charter and act of incorporation were used convertibly. Whether it be said that the rights and privileges conferred upon the Northeastern, as they stood in 1863, existed in its charter or were derived from its incorporation amounts to the same thing. We have no doubt that all of them were intended to be granted to the Cheraw Company by the act of that year. The charter or incorporation of 1851 had been amended in 1855, and by an act which purported in its title not to create an original authority, but by amending the original charter to bestow additional powers upon the company. After the passage of the amended act, the Northeastern was, in law, as if it had originally been chartered, with all the rights, powers, and privileges conferred upon it by the act of 1855. Such was the legal effect of the amendment; and such, no doubt, was the understanding of its effect by the legislature of South Carolina, when, in 1863, they conferred all its powers and privileges upon the Cheraw Company. The case shows that from 1849 to 1863 no suf-

ficient inducements had been found to procure the building of the Cheraw road. We are not advised what other powers and privileges were then and there conferred upon it in addition to the exemption we are considering. But this exemption was conferred; an exemption that must have been understood by the least reflecting person as being of immense value to all concerned in the road. The road was soon afterwards built, and has since then been and now is in operation. These facts serve to show—first, that there was, in this instance, the consideration that at any time exists for the granting by the legislature of such privilege to aid the acceptance of the same and the building of the road; and, secondly, the intention of the legislature, by omitting a reference to the original act of incorporation, to grant all the powers and privileges that had been at any time conferred upon the Northeastern Company.

Another question is raised, to wit: That a legislature does not possess the power to grant to a corporation a perpetual immunity from taxation. It is said that the power of taxation is among the highest powers of a sovereign State; that its exercise is a political necessity, without which the State must cease to exist, and that it is not competent for one legislature, by binding its successors, to compass the death of the State. It is too late to raise this question in this court. It has been held that the legislature has the power to bind the State in relinquishing its power to tax a corporation.* It has been held that such a provision in the charter of an incorporation constitutes a contract which the State may not subsequently impair.† These doctrines have been reiterated and reaffirmed so recently as the year 1871, in an opinion delivered by Mr. Justice Davis in the case of *The Wilmington Railroad* v. *Reid*.‡ They must be considered as settled in this court.

JUDGMENT AFFIRMED.

* Jefferson Bank *v.* Skelly, 1 Black, 436.

† Providence Bank *v.* Billings, 4 Peters, 514; Dartmouth College *v.* Woodward, 4 Wheaton, 518; The Binghamton Bridge, 3 Wallace, 51.

‡ 13 Wallace, 264.

DICKINSON *v.* THE PLANTERS' BANK.

1. Although under a stipulation in writing made by the parties to the suit, and filed with the clerk of the court, in pursuance of the act of March 3d, 1865, which gives to the finding of the court (which may be either general or special) the same effect as the verdict of a jury, this court can, where the finding is special, consider the sufficiency of the facts found to support the judgment, yet, returning in the record all the evidence in the case, where the court, in an action of *assumpsit* on a check or draft, does not find what the evidence proves, nor any ultimate fact except one stated in the judgment, to wit: "That the defendant did not assume and promise as the plaintiff in declaring has alleged,"—does not give this court jurisdiction to consider such sufficiency.
2. The fact that the court below, in an opinion which accompanied the judgment, has stated some of the facts of the case does not alter things; the facts stated not being stated as a special finding, but rather advanced to show why the judge came to the conclusion that the alleged promise had not been proved.

ERROR to the Circuit Court for the District of Tennessee; the case being thus:

One William Dickinson, a manufacturer of salt at Kanawha, in that part of Virginia now called West Virginia, had an agent selling the salt in Tennessee and thereabouts. By direction of Dickinson, this agent took the proceeds, and with them bought a draft of the Planters' Bank of Tennessee, at Nashville, on the Bank of Virginia, at Richmond; the former bank crediting the latter with the amount. The draft was in this form:

$5224.25. PLANTERS' BANK OF TENNESSEE,
NASHVILLE, Nov. 14, 1861.

Pay to the order of William Dickinson, fifty-two hundred and twenty-four $\frac{25}{100}$ *dollars.*

D. WEAVER,
Cashier.

To Cashier of Bank of Virginia, Richmond.

On his way from Nashville to Kanawha, the agent learned that on the 15th of November, that is to say, one day after the date of the draft, Dickinson had died. Accordingly, on

arriving, December 6th, at Kanawha, he handed the draft and other papers connected with his agency to Dickinson's son, also named William Dickinson, who, by a will that the father had left in a bank at Lynchburg, Virginia, was appointed executor of the father's estate. These were times of the rebellion, and Lynchburg, Nashville, and Richmond were all within the Confederate lines, having at the time and for some time afterwards communication with each other, while Kanawha, being in West Virginia, was within the lines of the Federal government, and had no intercourse with any of them. Dickinson, the son and executor, was quite desirous to get the money on his draft, but being reputed to be a "Union man," could not with safety go to Lynchburg, to get his father's will, or to Richmond, between which and Kanawha, from 1862 till the surrender of the rebel army in 1865, there was no lawful intercourse. He, however, indorsed the check with his own name, identical with that of his father, and by that means sought to negotiate it through a Virginia bank. It being known, however, at the bank to which he applied, that the "William Dickinson" named as payee, was the father and not the son, and the will not having been yet proved, no negotiation of the draft could be made. Dickinson, the son, then, March, 1864, applied to the Federal headquarters for a pass to get through the Union lines, but was refused; nor could he get any pass till February, 1865, when getting papers from the headquarters of both armies, and having got the will and had it proved, he went to Richmond in the latter part of May, 1865, which the evidence went to show was as soon as he could get there, and indorsing his draft properly, presented it for payment. Payment was refused, the bank having recently become insolvent. He then had the draft protested by a notary, and directed the notary to give notice of the dishonor to the Planters' Bank of Tennessee at Nashville, and that the holder would look to that bank for payment. A notice to the Planters' Bank of Tennessee was accordingly deposited by the notary in the post-office; but that it was directed to the Planters' Bank of Tennessee at *Nashville*,

Tennessee, was not so clearly shown. The cashier of that bank testified that he received no notice. It was not denied that the Bank of Virginia, at Richmond, had funds during all this time of the Planters' Bank.

Dickinson, as executor of his father's estate, now brought *assumpsit* in the court below, against the Planters' Bank of Tennessee. The *narr* contained two counts; the first special on the draft; and the second for money had and received. The bank pleaded the general issue, and on the trial relied apparently in part on the non-intercourse act of July 13th, 1861 (chapter 3), and the President's proclamation of August 16th of the same year. The parties having taken depositions on both sides, "filed," as appeared by a recital in the judgment in the case, "a stipulation in writing with the clerk of that court, waiving a jury, and the cause came on to be tried and determined by the court."

An act of March 3d, 1865, thus enacts:

"SECTION 4. That issues of fact in civil cases in any Circuit Court of the United States, may be tried and determined by the court without the intervention of a jury, whenever the parties or their attorneys of record file a stipulation in writing with the clerk of the court waiving a jury. The finding of the court upon the facts, which finding may be either general or special, shall have the same effect as the verdict of a jury. The rulings of the court in the cause in the progress of the trial, when excepted to at the time, may be reviewed by the Supreme Court of the United States upon a writ of error or upon appeal, provided the rulings be duly presented by a bill of exceptions. When the finding is special, the review may also extend to the determination of the sufficiency of the facts found to support the judgment."

The court gave an "opinion" and subsequently a judgment. They were in these words.

OPINION.

The court, after hearing the testimony and argument of counsel on both sides, is of opinion, and doth declare that the bank check drawn by the Planters' Bank of Tennessee on the Bank of Virginia, at Richmond, on the 14th of November, 1861, was

Statement of the case.

so drawn by the request of the agent of William Dickinson, the plaintiff's testator, and in pursuance of the instructions of said William in his lifetime; that the said contract was not an illegal transaction according to the provisions of the non-intercourse act of July 13th, 1861 (chapter 3), and the proclamation of the President of the 16th of August, 1861, as it was drawn at Nashville on Richmond, both of which were in the lines of the Confederate or rebel government, and no agreement existing that it was to be sent beyond those lines, where intercourse was prohibited; that at the time when said check was drawn, and for several weeks afterwards, there was regular communication by mail and railroad between Richmond and Nashville, and the Planters' Bank drew checks from time to time, until the latter part of February, 1862, for considerable sums of money, which were paid by said bank at Richmond, and that at the time of drawing the check of the 14th November, 1861, and during the whole period of the civil war, and afterwards, the Planters' Bank had funds in the said Bank of Virginia, at Richmond, and that said bank is now indebted to the Planters' Bank of Tennessee in a large sum of money, and that said Bank of Virginia is insolvent. It further appeared to the court that, on the day of the drawing of the check by the Planters' Bank specified in the declaration, a credit was given on their books to the said Bank of Virginia for the amount of said check so drawn.

This court is of opinion, and doth declare that this check, when executed and delivered to the agent of William Dickinson, was an absolute appropriation of so much money in the Bank of Virginia to the holder of the check, to remain there until called for, and could not, therefore, be afterwards withdrawn by the drawers. If the holder of the check chose to transmit the same to the country with which intercourse was prohibited, and by the casualties of war or other accidents, it was rendered difficult or impossible to present the check for payment, and the bank on which it was drawn became insolvent, the drawer of the check having the funds in the Virginia bank would not be responsible for the loss by such insolvency.

This court is also of opinion that there is not sufficient evidence of a notice to the defendant of the demand and protest of the check, which protest was made on the 30th of May, 1865. The cashier of the bank received no notice, as he states in his testimony, and it is not proved that the notice was directed to

Nashville, the place of business of the defendant, but only to the Planters' Bank of Tennessee.

The plaintiff's counsel excepted to the opinion and rulings of the court, discharging the defendant from responsibility upon the draft sued on.

The plaintiff further requested the court to find and so decide, that William Dickinson, the owner of this draft, having died in Virginia, on the 15th day of November, 1861, the day after the draft was made and delivered to his agent Creasey, that it made no difference and could not change the responsibility of the party by its being on the 6th of December, afterwards carried to Kanawha, the late residence of William Dickinson. Because if it had been retained in Tennessee and sent directly to Richmond, it could not have been presented and paid only to the legal representative of William Dickinson, deceased. That William Dickinson, the executor, was residing at Kanawha, and the will was in the Lynchburg Bank of Virginia. That he could not prove the will and qualify as executor before he did, and was unable to go to Richmond and have the draft presented and protested before he did, and consequently the plaintiff had a right to recover.

The plaintiff requested the court to decide from the facts and circumstances proved, due notice of the protest was given the defendant. The plaintiff requested the court to decide that the plaintiff under the second count had a right to recover, for so much money had and received by defendant to his use; all of which requests made by the plaintiff the court refused to comply with, but rendered judgment against the plaintiff for costs of suit.

To which action of the court the plaintiff excepts, and tenders this his bill of exceptions, which is signed and sealed by the court, and made a part of the record.

CONNALLY F. TRIGG. [SEAL.]

Final judgment entered May 12th, 1868.

JUDGMENT.

The parties again appeared, by their attorneys, and the said parties, by their attorneys of record, having filed a stipulation in writing with the clerk of this court, waiving a jury, and the cause coming on to be tried and determined by the court, and

having heard the evidence and argument of counsel on both sides, the court is of opinion that the issues are in favor of the defendant, and that the defendant did not assume and promise as the plaintiff in declaring has alleged. It is therefore considered by the court that the defendant recover of the plaintiff the costs by it about its suit in this behalf expended; and that *fi. fa.* issue for the same.

This judgment was brought here for review.

The record reported what purported to be all the evidence in the case; a large number of depositions, from which the facts as given, *supra*, pp. 250–252, were derived by the reporter.

Mr. Reverdy Johnson (*with whom was Mr. H. B. Cooper*), *for the plaintiff in error*, assuming that the facts stated as above by the reporter, or others like them, and those stated also by the court in its opinion, *was the case now before this court*, argued that the rulings of the court below were erroneous, and that the judgment should be reversed.

I. Because, under the circumstances, appearing in the record, in the depositions of the witnesses, if the *jury* believed the evidence—and it was for them to pass upon it—it was impossible for the plaintiff to have presented the check for payment sooner than he did. Now the rule of law in such cases is, that demand is to be made within a reasonable time, and that what is a reasonable time is for the jury, to be decided upon a consideration of all the circumstances.

II. That the judge erred in deciding that if the demand was in time, notice of non-payment was not properly given to the defendant, because the notary's letter containing the protest, was not directed to Nashville, but only to the Planters' Bank of Tennessee. Because—

1st. If the evidence proved only that the notary's letter was directed to the bank generally, and not to Nashville, under the circumstances the jury might have inferred that it reached Nashville in due course.

2d. Because in fact there was evidence in the testimony

of the plaintiff and of Johnson, that the notary's letter was directed to the defendant at Nashville.

Mr. Conway Robinson, contra:

The trial must be taken to have been under the act of the 3d of March, 1865, and the finding of the court upon the facts being general, its finding has the same effect as the verdict of a jury. When there are no rulings *in the progress of the trial*, which can be reviewed, the finding of the court stands like a verdict; and the judgment on the finding stands like the judgment on a verdict. There being "*in the progress of the trial*," no rulings of the court—none "*excepted to at the time*,"—none shown to be erroneous, the judgment on a general finding, like the judgment on a general verdict, must be affirmed.* Such is the case here. The plaintiff in error is in the same position as if he were here complaining that the jury erred in overruling the points and propositions which were argued to them in his behalf, and had found for the defendant when they should have found for the plaintiff.† Clearly, it is so as to all that follows these words on p. 254:

"The plaintiff further requested the court to *find* and so decide."

And as to all that follows these words on the same page:

"The plaintiff requested the court to decide from the facts and circumstances proven."

Mr. Justice STRONG delivered the opinion of the court.

It is very clear that in this case there was no special finding of facts upon which any judgment for the plaintiff could have been rendered. The suit was an action to recover the amount of a check dated November 14th, 1861, drawn by

* Burr *v.* Des Moines Co., 1 Wallace, 102; Insurance Co. *v.* Tweed, 7 Id. 51; Basset *v.* United States, 9 Id. 40; Norris *v.* Jackson, Ib. 125; Flanders *v.* Tweed, Ib. 425; Copelin *v.* Insurance Co , Ib. 462; Coddington *v.* Richardson, 10 Id. 516.

† Generes *v.* Campbell, 11 Wallace, 198; Miller *v.* Life Insurance Co., 12 Id. 300, 301.

the defendants in error upon the Bank of Virginia, at Richmond, and payable to the order of the plaintiff's testator. To the declaration the defendants pleaded the general issue, and the parties, by written stipulation filed with the clerk of the court, waived a jury. It is true that no such stipulation has been sent up with the record, but in the judgment it is recited that such a one was made and filed. We must, therefore, hold that the issue was tried by the court under the act of March 3d, 1865, which gives to the finding of the court upon the facts (which finding may be either general or special), the same effect as the verdict of a jury. It is, however, only when the finding is special, that the review of this court can extend to the determination of the sufficiency of the facts found to support the judgment.

Here the record as returned contains what is stated to have been all the evidence in the cause, but the court has not found what the evidence proves, nor any ultimate facts except that stated in the judgment, "that the defendant did not assume and promise as the plaintiff in declaring has alleged." Some facts indeed are stated in the opinion of the court, that seem to have accompanied the judgment, but they are not stated as a special finding. They are rather advanced as reasons why the judge came to the conclusion that the alleged promise of the defendants had not been proved. It is impossible to regard anything that appears in this case as equivalent to a special verdict. Plainly to a recovery by the plaintiff it was indispensable that the check drawn in favor of his testator had been presented for payment in a reasonable time, or that there had been a sufficient excuse for non-presentation, and that notice of its dishonor had been given duly to the drawers. These were questions of fact submitted for determination to the court. But it nowhere appears in the finding, when, if ever, the check was presented, or if presentation was delayed what circumstances caused the delay, or whether the delay was reasonable or unreasonable. Nor is it found what notice, if any, was given to the defendants of the dishonor of the check. So far as anything appears, it is in the opinion of

the court, which was that "there was no sufficient notice of the demand and protest of the check, which protest was made on the 30th of May, 1865."

We cannot, therefore, inquire whether the evidence as detailed by the witnesses was sufficient, under the circumstances, to justify a finding that the presentation and demand were made in a reasonable time, or whether it might have been inferred that notice of non-payment was duly given.

But though the finding was general, any rulings of the court in the progress of the trial, if excepted to at the time and duly presented by bills of exceptions, may be reviewed by us. This is provided by the act of 1865. Manifestly, however, the rulings thus subject to review are decisions of law, not findings of fact. Some requests appear to have been submitted to the court to find certain facts, which were refused. They are no more the subject of exception and review than would be a request to a jury to find in a particular manner, and a refusal by the jury so to find. One request also was that the court should decide that the plaintiff had a right to recover under the second count of the declaration, for money had and received. This also was refused, and so far as we can see, very properly. The record presents nothing which would have justified such a decision. There is nothing else in the case that requires notice.

JUDGMENT AFFIRMED.

INSURANCE COMPANY v. COMSTOCK.

1. Where, under the 41st section of the Bankrupt Act of 1867, a trial by jury is had in the District Court in a case of application for involuntary bankruptcy, and exceptions are taken in the ordinary and proper way, to the rulings of the court on the subject of evidence and to its charge to the jury, a writ of error lies from the Circuit Court when the debt or damages claimed amount to more than $500; and if that court dismiss or declines to hear the matter a mandamus will lie to compel it to proceed to final judgment.

Statement of the case.

2. In this case, where the court had dismissed the case because it supposed it had no jurisdiction, a writ of error was dismissed as not a proper remedy, and an intimation given to the court below to reinstate the case and proceed to hear the questions presented by the bill of exceptions.

ON motion to dismiss a writ of error to the Circuit Court for the Northern District of Illinois; the case being thus:

The Bankrupt Act of 1867, which by its terms applies to all moneyed, business, or commercial corporations as well as to individuals, gives to the District Courts of the United States original jurisdiction in all matters and proceedings in bankruptcy. It enacts by its—

"SECTION 2. That the several Circuit Courts of the United States within and for the districts where the proceedings in bankruptcy shall be pending, shall have *a general superintendence* and jurisdiction of all cases and questions arising under this act; and, *except when special provision is otherwise made*, may upon bill, petition, or other proper process, of any party aggrieved, hear and determine the case as *in a court of equity*.

"Said Circuit Courts shall also have concurrent jurisdiction with the District Courts of the same district, of all suits at law or in equity which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to or vested in such assignee."

A subsequent section, the 41st, after referring to the return day of the summons to the alleged bankrupt, enacts:

"That on such return day or adjourned day . . . the court shall proceed summarily to hear the allegations of the petitioner and debtor, and may adjourn the proceedings from time to time on good cause shown; *and shall, if the debtor on the same day so demand in writing, order a trial by jury at the first term of the court at which a jury shall be in attendance, to ascertain the facts of such alleged bankruptcy;* and if upon such hearing or trial the debtor proves to the satisfaction of the court, or *the jury* (as the case may be), that the *facts set forth in the petition* are not true, or that the debtor has paid and satisfied all liens upon his property (in case the existence of such liens were the sole ground

of the proceeding), the proceeding shall be dismissed and the respondent shall recover his costs."

The act further provides, by sections 8 and 9, as follows:

"SECTION 8. That appeals may be taken from the District to the Circuit Courts in all cases in equity, and writs of error may be allowed to said Circuit Courts from said District Courts in cases at law under the jurisdiction created by this act, when the debt or damages claimed amount to more than $500; and any supposed creditor whose claim is wholly or in part rejected, or an assignee who is dissatisfied with the allowance of a claim may appeal from the decision of the District Court to the Circuit Court from the same district; but no appeal shall be allowed in any case from the District to the Circuit Court unless it is claimed and notice given thereof to the clerk of the District Court to be entered with the record of the proceedings, and also to the assignee or creditor, as the case may be, or to the defeated party in equity within ten days after the entry of the decree or decision appealed from.

"*The appeal* shall be entered at the term of the Circuit Court which shall be first held within and for the district next after the expiration of ten days from the time of claiming the same. But if the appellant in writing waives his appeal before any decision thereon, proceedings may be had in the District Court as if no appeal had been taken, and no appeal shall be allowed unless the appellant at the time of claiming the same shall give bond in the manner now required by law in cases of such appeals.

"*No writ of error* shall be allowed unless the party claiming it shall comply with the statutes regulating the granting of such writs.

"SECTION 9. In cases arising under this act no appeal or writ of error shall be allowed in any case from the Circuit Courts to the Supreme Court of the United States, unless the matter in dispute in such case shall exceed $2000."

These enactments being in force, certain persons presented a petition in the District Court for the Northern District of Illinois, setting forth, in conformity with formal requirements of the act, that the Knickerbocker Insurance Company of Chicago owed debts to an amount exceeding $300,

and that their respective demands exceeded $250, and had made fraudulent preferences. Among these persons were Allen & Mackey, who set forth that the company was indebted to them in the sum of $2500 under a policy of insurance and had made fraudulent preferences. They prayed, along with other creditors, that the company might be decreed bankrupt.

The company denied the allegations both of debt and acts of bankruptcy, and demanded in writing a trial by jury. On the trial, which was had in regular common-law way of a trial by jury, the company excepted to the admission of several items of evidence which the court, against its objection, had received, and also to the charge of the court. Verdict and judgment having been given against the company, the cause was removed by writ of error to the Circuit Court for the district. The company assigned errors there in a formal way, but when the case came on to be heard, the Circuit Court, without any consideration or examination of the exceptions taken or errors assigned, dismissed it for want of jurisdiction. Thereupon the company took a writ of error to this court.

Mr. Thomas Dent, in support of the motion to dismiss the writ of error:

The only jurisdiction which the Circuit Court could have had in the case arose under the 2d section of the Bankrupt Act. That section provides abundantly for the case under consideration, not by allowing a writ of error, but by giving the Circuit Court a final superintendence. The insurance company should have sought relief under that section. The proceeding by writ of error was improper, and was rightly dismissed by the court below for want of jurisdiction. But if it were not so, no appeal or writ of error lies to this court from the action of the Circuit Court.

1. The adjudication by the District Court did not determine that a debt of $2500, or, in other words, a debt of more than $500 was due the creditor. A proceeding in bankruptcy is not a proceeding to determine *the amount* of any

particular debt or claim, but is a proceeding taken by some one who has a demand provable under the act to the amount of $250; and the three inquiries presented to the court under such a petition are:

1st. Whether the petitioner has a claim to the amount of $250, provable under the act.

2d. Whether the debtor owes debts provable under the act exceeding $300; and, finally,

3d. Whether the alleged act or acts of bankruptcy have been committed by the debtor.

The chief one of these inquiries is almost always that last named. The adjudication finally made does not determine that there is a debt to the amount of $500. The amount of $500 cannot be said to be *directly* involved. The claim of Allen & Mackey was not fixed by the decree of the District Court. It was thus not a final judgment. All know that claims against a bankrupt's estate are (under the 22d section of the act) proved before the register and are then forwarded to the assignee, who then compares the proofs with what the bankrupt's books disclose. The court may, however, re-examine them. Hence it would be a misnomer to characterize the petition for involuntary bankruptcy as "a case at law . . . wherein the debt or damages claimed amount to more than $500." It bears no resemblance at all, in form, to such a proceeding; and not much to one in equity. The words, then, of the 8th section do not sanction a writ of error in this case.

The cases in which provision is made by the 8th section of the Bankrupt Act for writs of error, are the cases at law referred to in what is given above as the second clause of the 2d section.

Messrs. Story and Roby, contra:

Section 9 of the Bankrupt Act provides:

"That in cases arising under this act, no appeal or writ of error shall be allowed in any case from the Circuit Courts to the Supreme Court of the United States, unless the matter in dispute in such case shall exceed $2000."

Argument against dismissal.

Though negatively stated in the act, this is a solemn legislative *affirmation*, that an appeal or writ of error *shall* be allowed *in all cases* where the amount in controversy exceeds the sum named.

The supervisory jurisdiction of the circuit judge, under the second section, only exists "in cases where special provision is not otherwise made," in the Bankrupt Act. Now, this court has said that special provision *is* otherwise made, within the meaning of that exception, when the case is tried by a jury at a stated term of the District Court, under the provisions of the 41st section.* And Miller, J., of this court, sitting as presiding judge of the Circuit Court, entertained jurisdiction of a case removed from the District Court by writ of error sued out by the petitioning creditors, and reversed the judgment of the District Court, dismissing the petition with costs.

It is proper to observe that there are only two cases provided for in the Bankrupt Act, where a *jury trial* may be had:

1st. Under the 41st section, where a party resists the proceeding to have him adjudged a bankrupt, and demands a jury trial, in writing, when the court is *required* "to order a trial by jury at *the first term of the court* at which a jury shall be in attendance."

2d. Under section 31st, when creditors oppose the discharge, in which case the court may "order any question of fact so presented to be tried at a *stated session* of the District Court."

Congress has thus carefully provided, in every case where a jury trial is allowed, that it shall be had at a stated term of the court, where it must be conducted according to the due course of the common law. All such decisions are reviewable by writ of error.

The judgment of the District Court was a judgment for $2500, and it was a final judgment.

It is averred in the petition of Allen & Mackey, under

* Morgan *v.* Thornhill, 11 Wallace, 79.

which the trial was had in the District Court, that the company was indebted to them in the sum of $2500 upon a policy of insurance for that sum. The existence and validity of this claim, was specially denied by plaintiff in error, was one of the principal questions at issue on the trial, and the verdict of the jury found this issue against the company.

On this trial the petitioners could have proved no other debt, no other act of bankruptcy, than the one alleged; nor could the jury have found any verdict except it was responsive to both these issues. When both found for petitioners, they *establish the existence and validity of this debt of* $2500, as well as the acts of bankruptcy alleged.

This judgment when rendered is *final* and *conclusive* upon all parties until reversed.

It was held by this court at an early day, that the finding and judgment declaring a defendant bankrupt is *final and conclusive as to the petitioner's claim*, and cannot be collaterally attacked, even by other creditors. All parties are bound by it as by a decree *in rem*.*

The judgment in question is, therefore, as much *a judgment against the company for* $2500 as if rendered in an ordinary action upon the policy, and is clearly reviewable under the general appellate jurisdiction vested in this court, independent of the provisions of the Bankrupt Act.

Mr. Justice CLIFFORD delivered the opinion of the court.

Moneyed, business, and commercial corporations, are as much within the provisions of the Bankrupt Act as unincorporated individuals or associations, and all the provisions of the act forbidding preferences and fraudulent conveyances are as applicable to such debtors, if insolvent, as to any other insolvent debtors falling within those provisions, and the same acts which render individual debtors liable to be adjudged bankrupts on the petition of their creditors, if committed by such a corporation which is insolvent, will warrant the creditors of the same to institute proceedings for that

* Showhan *v.* Wherritt, 7 Howard, 627.

Restatement of the case in the opinion.

purpose against such debtors, and to claim that they be adjudged bankrupts for the same reasons.

On the fifth of January, 1872, certain creditors of the Knickerbocker Insurance Company presented their petition to the District Court for the Northern District of Illinois, representing that the company owed debts to an amount exceeding three hundred dollars, and that their respective demands against the company exceeded two hundred and fifty dollars, and that the company within six months next before the filing of the petition, being then and there insolvent or in contemplation of insolvency, made sundry payments of money to certain of their creditors in satisfaction of their claims with a view to give a preference to such creditors having such claims, and well knowing that the said company was insolvent. They also represented that the said company within the said six months, being then and there bankrupt or in contemplation of bankruptcy, made divers payments of money, sales, conveyances, and assignments of property, mortgages, and other effects to various persons within the district, with intent and for the purpose of giving such persons a fraudulent preference over other creditors of the company, and for the purpose of preventing the assets of the company from being administered under the Bankrupt Act. Based on these representations the prayer of the petition is that the company may be declared a bankrupt, and that a warrant may issue to take possession of the estate of the company. On the return day for hearing the petition, the corporation respondents appeared and denied that they had committed the acts of bankruptcy set forth in the petition, and demanded in writing a trial by jury pursuant to the provision in such case made and provided.* Subsequently other creditors were permitted to appear as petitioners, and the pleadings having been concluded the parties went to trial, and the jury, under the instructions of the court, found the respondents guilty

* 14 Stat. at Large, 537.

as alleged in the petition. Exceptions were duly filed by the respondents to the rulings and instructions of the court, and they sued out a writ of error and removed the cause into the Circuit Court for the same district. Suffice it to say, in respect to the exceptions, that they embrace not only material rulings and the instructions of the court given to the jury, but also the decisions of the court in refusing to instruct the jury as requested by the respondents. Errors were duly assigned by the respondents in the Circuit Court, but the Circuit Court dismissed the writ of error for want of jurisdiction, holding that a writ of error will not lie in such a case to remove the record from the District Court into the Circuit Court for re-examination. Jurisdiction, it was insisted by the respondents, did exist in the Circuit Court to re-examine such a case under a writ of error to the District Court which rendered the judgment, and they sued out a writ of error to the Circuit Court and removed the cause into this court.

Writs of error may be allowed from the Circuit Courts to the District Courts in cases at law, and appeals may be taken from the District Courts to the Circuit Courts in certain cases, under the jurisdiction created by the Bankrupt Act, when the debt or damages claimed amount to more than $500, but the provision is that no appeal shall be allowed from the District to the Circuit Court unless it is claimed and the required notices are given within ten days after the entry of the decree or decision from which the appeal is taken, and that no writ of error shall be allowed unless the party claiming it shall comply with the statutes regulating the granting of such writs. Applicants for an appeal must give bond as required under the act "to amend the judicial system," and the party claiming a writ of error must also give good and sufficient security to prosecute the writ to effect, and must comply with the regulations contained in the Judiciary Act as to the service of the writ and the required notice to the adverse party.

Taken literally, the ten days' limitation does not extend to

writs of error, but the better opinion is, in view of the fact that writs of error and appeals are associated together in the first clause of the section, that the word appeal at the commencement of the second clause means the same as review or revision, and that it was intended to include the writ of error as well as appeal, as the whole section seems to contemplate a more expeditious disposition of the cause in the appellate court than that prescribed in the Judiciary Act or the act to amend the judiciary system.*

Grant all that, and still it is insisted that a writ of error from the Circuit Court to the District Court will not lie in a case like the present, as neither the process nor proceeding is in form an action at law or a suit in equity, which must be admitted, confining the admission strictly to the matter of form. Even when so confined it may be doubtful whether the admission ought not to be further qualified, as the first pleading of the moving party is quite as analogous to the writ and declaration at common law as the petition now employed as a substitute for the common-law declaration in more than half of the State courts, and which, under the recent act to further the administration of justice, may be employed in the Federal courts.†

Support to that view is also derived from the first pleading of the respondents, which is in substance and effect the same as the first pleading of the claimant in an information based upon a seizure on land, where it is required that the case shall be tried by jury, unless the right is waived by the consent of the claimant.

Power and jurisdiction in all matters and proceedings in bankruptcy are conferred upon the District Courts, but the forty-first section of the Bankrupt Act expressly provides that the court shall, if the debtor, on the return day, or day of hearing, "so demand in writing," order a trial by jury, at the first term of the court at which a jury shall be in attendance, to ascertain the alleged fact of such alleged

* 14 Stat. at Large, 520; Morgan *v.* Thornhill, 11 Wallace, 75; 1 Stat. at Large, 85; 2 Id. 244.

† 17 Stat. at Large, 196.

bankruptcy. Regulations are also enacted as to the matters open to inquiry and the course of the trial, as follows: that if, upon such hearing or trial, the debtor proves to the satisfaction of the court, "when the hearing is summary, or of the jury, if one is demanded," that the facts set forth in the petition are not true, or that he, the debtor, has paid and satisfied all liens upon his property, in case the existence of such liens is the sole ground of the petition, the proceedings shall be dismissed and the respondent shall recover costs.*

Such a provision is certainly entitled to a reasonable construction, and it seems plain, when it is read in the light of the principles of the Constitution and of analogous enactments, and when tested by the general rules of law applicable in controversies involving the right of trial by jury, that the process, pleadings, and proceedings must be regarded as governed and controlled by the rules and regulations prescribed in the trial of civil actions at common law. Congress, it must be assumed, in conceding to the debtor the right to demand a trial of the issue by a jury, intended to confer a right of some value, which would be converted into a mockery if the judge presiding over the trial may exclude by his rulings all the evidence which the debtor offers to disprove the charges set forth in the petition, and he, the debtor, be left without any power to resort to an appellate tribunal to correct the errors committed by the bankrupt court.

Cases of the kind, when tried by a jury, if the Circuit Court has any jurisdiction upon the subject, must be removed into that court by a writ of error, as when tried by a jury the case is excluded from the special jurisdiction conferred in the first clause of the second section of the act by the very words of the clause. Where "special provision" is otherwise made the case is excluded from the general superintendence and jurisdiction of the Circuit Court by the exception introduced, as a parenthesis, into the body of that

* 14 Stat. at Large, 537.

part of the section.* Decrees in equity rendered in the District Court, it may be admitted, might be revised in the Circuit Court in a summary way if Congress should so provide by law, but it is clear that judgments in actions at law rendered in that court, if founded upon the verdict of a jury, can never be revised in the Circuit Court in that way, as the Constitution provides that "no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rule of the common law." Two modes only were known to the common law to re-examine such facts, to wit: the granting of a new trial by the court where the issue was tried or to which the record was returnable, or, secondly, by the award of a *venire facias de novo* by an appellate court for some error of law which intervened in the proceedings.† All suits which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights, are embraced in that provision. It means not merely suits which the common law recognized among its settled proceedings, but all suits in which legal rights are to be determined in that mode, in contradistinction to equitable rights and to cases of admiralty and maritime jurisdiction, and it does not refer to the particular form of procedure which may be adopted.‡

Apply these rules to the case before the court and it is clear beyond doubt that the Circuit Court erred in dismissing the writ of error for the want of jurisdiction, as it was the right of the excepting party to have the questions, if duly presented in the bill of exceptions, re-examined by the Circuit Court, which leaves nothing further open for decision except the question what disposition shall be made of the case and what direction, if any, shall be given to the subordinate court.

Appellate courts under such circumstances do not determine the questions presented in the bill of exceptions filed

* Morgan *v.* Thornhill, 11 Wallace, 79.

† 2 Story on the Constitution (3d ed.), 584; Parsons v. Bedford et al., 3 Peters, 448; Knight *v.* Cheney, 5 National Bankrupt Register, 317.

‡ United States *v.* Wonson, 1 Gallison, 20.

in the District Court, as those questions have not been re-examined in the Circuit Court, and this court is not inclined to re-examine any such questions coming up from the District Court until they have first been passed upon by the Circuit Court. Consequently the question whether a writ of error will lie from this court to the Circuit Court to re-examine the rulings of the Circuit Court in a case removed into that court from the District Court, in such a case as the one under consideration, does not arise, as the record shows that the Circuit Court never passed upon the questions as to the correctness or incorrectness of the rulings of the District Court.

Repeated decisions of this court have established the rule that this court has power to issue a mandamus, in the exercise of its appellate jurisdiction, and that the writ will lie in a proper case to direct a subordinate Federal court to decide a pending cause.* Power to issue the writ of mandamus to the Circuit Courts is exercised by this court to compel the Circuit Court to proceed to a final judgment or decree in a cause, in order that this court may exercise the jurisdiction of review given by law; and in the case of *Ex parte Bradstreet*,† this court decided, Marshall, C. J., giving the opinion of the court, that every party has a right to the judgment of this court in a suit brought by him in one of the inferior courts of the United States, provided the matter in dispute exceeds the sum or value of two thousand dollars, and that the court in such case will issue the writ to a Circuit Court or a District Court exercising Circuit Court powers, in a case where the subordinate court had improperly dismissed the case, requiring the court to reinstate the case and to proceed to try and adjudge the issues between the parties.

Examined, as the case must be, in the light of these authorities, it is quite clear that the respondents, had they petitioned this court for a mandamus, instead of suing out a writ of error, would be entitled to a remedy in some one of

* Marbury *v.* Madison, 1 Cranch, 175; Kendall *v.* United States, 12 Peters, 622.

† 7 Peters, 647.

Statement of the case in the opinion.

the forms in which a remedy is granted in such a case, but it is not doubted that the present decision will be in practice equally effectual to that end, as it is entirely competent for the Circuit Court, under the circumstances, to grant a rehearing and reinstate the case, and to proceed and decide the questions presented in the bill of exceptions.

Mandamus being the proper remedy, error will not lie.*

WRIT OF ERROR DISMISSED FOR WANT OF JURISDICTION.

CARPENTER *v.* LONGAN.

1. The assignment of a negotiable note before its maturity, raises the presumption of a want of notice of any defence to it; and this presumption stands till it is overcome by sufficient proof.
2. When a mortgage given at the same time with the execution of a negotiable note and to secure payment of it, is subsequently, but before the maturity of the note, transferred *bonâ fide* for value, with the note, the holder of the note when obliged to resort to the mortgage is unaffected by any equities arising between the mortgagor and mortgagee subsequently to the transfer, and of which he, the assignee, had no notice at the time it was made. He takes the mortgage as he did the note.

APPEAL from the Supreme Court of Colorado Territory.

Messrs. J. M. Carlisle and J. D. McPherson, for the appellant; Messrs. Bartley and Casey contra.

Mr. Justice SWAYNE stated the case, and delivered the opinion of the court.

On the 5th of March, 1867, the appellee, Mahala Longan, and Jesse B. Longan, executed their promissory note to Jacob B. Carpenter, or order, for the sum of $980, payable six months after date, at the Colorado National Bank, in Denver City, with interest at the rate of three and a half per cent. per month until paid. At the same time Mahala Longan executed to Carpenter a mortgage upon certain real estate

* Ayres *v.* Carver, 17 Howard, 591.

therein described. The mortgage was conditioned for the payment of the note at maturity, according to its effect.

On the 24th of July, 1867, more than two months before the maturity of the note, Jacob B. Carpenter, for a valuable consideration, assigned the note and mortgage to B. Platte Carpenter, the appellant. The note not being paid at maturity, the appellant filed this bill against Mahala Longan, in the District Court of Jefferson County, Colorado Territory, to foreclose the mortgage.

She answered and alleged that when she executed the mortgage to Jacob B. Carpenter, she also delivered to him certain wheat and flour, which he promised to sell, and to apply the proceeds to the payment of the note; that at the maturity of the note she had tendered the amount due upon it, and had demanded the return of the note and mortgage and of the wheat and flour, all which was refused. Subsequently she filed an amended answer, in which she charged that Jacob B. Carpenter had converted the wheat and flour to his own use, and that when the appellant took the assignment of the note and mortgage, he had full knowledge of the facts touching the delivery of the wheat and flour to his assignor. Testimony was taken upon both sides. It was proved that the wheat and flour were in the hands of Miller & Williams, warehousemen, in the city of Denver, that they sold, and received payment for, a part, and that the money thus received and the residue of the wheat and flour were lost by their failure. The only question made in the case was, upon whom this loss should fall, whether upon the appellant or the appellee. The view which we have taken of the case renders it unnecessary to advert more fully to the facts relating to the subject. The District Court decreed in favor of the appellant for the full amount of the note and interest. The Supreme Court of the Territory reversed the decree, holding that the value of the wheat and flour should be deducted. The complainant thereupon removed the case to this court by appeal.

It is proved and not controverted that the note and mortgage were assigned to the appellant for a valuable consid-

eration before the maturity of the note. Notice of anything touching the wheat and flour is not brought home to him.

The assignment of a note underdue raises the presumption of the want of notice, and this presumption stands until it is overcome by sufficient proof. The case is a different one from what it would be if the mortgage stood alone, or the note was non-negotiable, or had been assigned after maturity. The question presented for our determination is, whether an assignee, under the circumstances of this case, takes the mortgage as he takes the note, free from the objections to which it was liable in the hands of the mortgagee. We hold the affirmative.* The contract as regards the note was that the maker should pay it at maturity to any *bonâ fide* indorsee, without reference to any defences to which it might have been liable in the hands of the payee. The mortgage was conditioned to secure the fulfilment of that contract. To let in such a defence against such a holder would be a clear departure from the agreement of the mortgagor and mortgagee, to which the assignee subsequently, in good faith, became a party. If the mortgagor desired to reserve such an advantage, he should have given a non-negotiable instrument. If one of two innocent persons must suffer by a deceit, it is more consonant to reason that he who "puts trust and confidence in the deceiver should be a loser rather than a stranger."†

Upon a bill of foreclosure filed by the assignee, an account must be taken to ascertain the amount due upon the instrument secured by the mortgage. Here the amount due was the face of the note and interest, and that could have been recovered in an action at law. Equity could not find that

* Powell on Mortgages, 908; 1 Hilliard on Mortgages, 572; Coot on Mortgages, 304; Reeves *v.* Scully, Walker's Chancery, 248; Fisher *v.* Otis, 3 Chandler, 83; Martineau *v.* McCollum, 4 Id. 153; Bloomer *v.* Henderson, 8 Michigan, 395; Potts *v.* Blackwell, 4 Jones, 58; Cicotte *v.* Gagnier, 2 Michigan, 381; Pierce *v.* Faunce, 47 Maine, 507; Palmer *v.* Yates, 3 Sandford, 137; Taylor *v.* Page, 6 Allen, 86; Croft *v.* Bunster, 9 Wisconsin, 503; Cornell *v.* Hilchens, 11 Id. 353.

† Hern *v.* Nichols, 1 Salkeld, 289.

less was due. It is a case in which equity must follow the law. A decree that the amount due shall be paid within a specified time, or that the mortgaged premises shall be sold, follows necessarily. Powell, cited *supra*, says: "But if the debt were on a negotiable security, as a bill of exchange collaterally secured by a mortgage, and the mortgagee, after payment of part of it by the mortgagor, actually negotiated the note for the value, the indorsee or assignee would, it seems, in all events, be entitled to have his money from the mortgagor on liquidating the account, although he had paid it before, because the indorsee or assignee has a legal right to the note and a legal remedy at law, which a court of equity ought not to take from him, but to allow him the benefit of on the account."

A different doctrine would involve strange anomalies. The assignee might file his bill and the court dismiss it. He could then sue at law, recover judgment, and sell the mortgaged premises under execution. It is not pretended that equity would interpose against him. So, if the aid of equity were properly invoked to give effect to the lien of the judgment upon the same premises for the full amount, it could not be refused. Surely such an excrescence ought not to be permitted to disfigure any system of enlightened jurisprudence. It is the policy of the law to avoid circuity of action, and parties ought not to be driven from one forum to obtain a remedy which cannot be denied in another.

The mortgaged premises are pledged as security for the debt. In proportion as a remedy is denied the contract is violated, and the rights of the assignee are set at naught. In other words, the mortgage ceases to be security for a part or the whole of the debt, its express provisions to the contrary notwithstanding.

The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity.*

* Jackson *v.* Blodget, 5 Cowan, 205; Jackson *v.* Willard, 4 Johnson, 43.

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It must be admitted that there is considerable discrepancy in the authorities upon the question under consideration.

In *Baily* v. *Smith et al.**—a case marked by great ability and fulness of research—the Supreme Court of Ohio came to a conclusion different from that at which we have arrived. The judgment was put chiefly upon the ground that notes, negotiable, are made so by statute, while there is no such statutory provision as to mortgages, and that hence the assignee takes the latter as he would any other chose in action, subject to all the equities which subsisted against it while in the hands of the original holder. To this view of the subject there are several answers.

The transfer of the note carries with it the security, without any formal assignment or delivery, or even mention of the latter. If not assignable at law, it is clearly so in equity. When the amount due on the note is ascertained in the foreclosure proceeding, equity recognizes it as conclusive, and decrees accordingly. Whether the title of the assignee is legal or equitable is immaterial. The result follows irrespective of that question. The process is only a mode of enforcing a lien.

All the authorities agree that the debt is the principal thing and the mortgage an accessory. Equity puts the principal and accessory upon a footing of equality, and gives to the assignee of the evidence of the debt the same rights in regard to both. There is no departure from any principle of law or equity in reaching this conclusion. There is no analogy between this case and one where a chose in action standing alone is sought to be enforced. The fallacy which lies in overlooking this distinction has misled many able minds, and is the source of all the confusion that exists. The mortgage can have no separate existence. When the note is paid the mortgage expires. It cannot survive for a moment the debt which the note represents. This dependent and incidental relation is the controlling consideration, and takes the case out of the rule applied to choses in action,

* 14 Ohio State, 396.

where no such relation of dependence exists. *Accessorium non ducit, sequitur principale.*

In *Pierce* v. *Faunce*,* the court say: "A mortgage is *pro tanto* a purchase, and a *bonâ fide* mortgagee is equally entitled to protection as the *bonâ fide* grantee. So the assignee of a mortgage is on the same footing with the *bonâ fide* mortgagee. In all cases the reliance of the purchaser is upon the record, and when that discloses an unimpeachable title he receives the protection of the law as against unknown and latent defects."

Matthews v. *Wallwyn*† is usually much relied upon by those who maintain the infirmity of the assignee's title. In that case the mortgage was given to secure the payment of a non-negotiable bond. The mortgagee assigned the bond and mortgage fraudulently and thereafter received large sums which should have been credited upon the debt. The assignee sought to enforce the mortgage for the full amount specified in the bond. The Lord Chancellor was at first troubled by the consideration that the mortgage deed purported to convey the legal title, and seemed inclined to think that might take the case out of the rule of liability which would be applied to the bond if standing alone. He finally came to a different conclusion, holding the mortgage to be a mere security. He said, finally: "The debt, therefore, is the principal thing; and it is obvious that if an action was brought on the bond in the name of the mortgagee, as it must be, the mortgagor shall pay no more than what is really due upon the bond; if an action of covenant was brought by the covenantee, *the account must be settled in that action.* In this court the condition of the assignee cannot be better than it would be at law in any mode he could take to recover what was due upon the assignment." The principle is distinctly recognized that the measure of liability upon the instrument secured is the measure of the liability chargeable upon the security. The condition of the assignee cannot be better in law than it is in equity.

* 47 Maine, 513.

† 4 Vesey, 126.

So neither can it be worse. Upon this ground we place our judgment.

We think the doctrine we have laid down is sustained by reason, principle, and the greater weight of authority.

DECREE REVERSED, and the case remanded with directions to enter a decree

IN CONFORMITY WITH THIS OPINION.

BUCHANAN *v.* SMITH.

1. A creditor has reasonable cause to believe his debtor "insolvent" in the sense of the Bankrupt Act, when such a state of facts is brought to his notice respecting the affairs and pecuniary condition of his debtor, as would lead a prudent business man to the conclusion that he, the debtor, is unable to meet his obligations as they mature in the ordinary course of business.
2. A debtor "suffers" or "procures" his property to be seized on execution, when, knowing himself to be insolvent, an admitted creditor who has brought suit against him—and who he knows will, unless he applies for the benefit of the Bankrupt Act, secure a preference over all other creditors—proceeds in the effort to get a judgment until one has been actually got by the perseverance of him the creditor and the default of him the debtor.
3. Such effort by the creditor to get a judgment, and such omission by the debtor to "invoke the protecting shield of the Bankrupt Act" in favor of all his creditors, is a fraud on the Bankrupt Act, and invalidates any judgments obtained.
4. The fact that the debtor, just before the judgments were recovered, may have made a general assignment which he meant for the benefit of all his creditors equally, does not change the case. Such assignment is a nullity.

APPEAL from the Circuit Court for the Northern District of New York, where the proofs, as conceived by the reporter, made a case essentially thus:

The Cascade Paper Manufacturing Company of Penn Yan, New York, had for a long time purchased things used in the manufacture of paper, of Buchanan & Co., merchants in the city of New York, and had habitually given notes in pay-

ment. Its dealings with them were considerable, and its credit so good that it was not limited as to time; that when extensions were asked they were given, and that up to March 3d, 1869, its notes had never lain over or been protested for nonpayment. The notes of the company were indorsed by its officers individually, except in one instance, when accident prevented. On the 3d of March, 1869, however, the company were unable to meet a note to Buchanan & Co., which came due on that day, and telegraphed the fact to these last, adding that they had sent that day a draft for half the amount, and a new note at thirty days for the balance. Buchanan & Co. replied (apparently by telegraph on the same day), that they would protect the note; but in a letter of March 4th, reciting these facts (apparently not having received the promised half remittance and new note), they say:

"We are much disappointed at not receiving anything from you to-day. What does it mean? We had used the note, and it was not at all convenient for us to take care of it at so short notice. We shall certainly expect to hear from you by next mail."

On the 21st of March, 1869, the company's mills were destroyed by fire. The loss was about $80,000; the insurance $45,000 or $47,000. From that time the company did no more business; and, *as it afterwards appeared, it was from that time insolvent.* At the time of the fire Buchanan & Co. held six notes of the company, to wit:

One for $1000, due March 25th, 1869.
One for $2501, due April 2d, 1869.
One for $1141, due April 6th, 1869.
One for $2293.19, due May 4th, 1869.
One for $2305.94, due June 4th, 1869.
One for $2318.69, due July 3d, 1869.

Two days after the fire the company wrote to Buchanan & Co., informing them of the fact, and, apparently, of the magnitude of their loss. These last replied March 23d, expressing sympathy, and "a trust that when you get things more settled *they may not turn out as bad as you now expect.*"

Statement of the case.

They promised in the same letter to take care of the note of the company due the 25th, and to advise in a few days about the other coming due April 2d.

Just before this fire, Mr. Goodwin, one of the firm of Buchanan & Co., had set off on a tour of business, westward. He reached Penn Yan immediately after the fire, and had an interview with the officers of the company, who informed him of the amount of their loss and insurance, and spoke of the notes, and said, "On account of our misfortune of burning, we shan't be able to meet those notes. Of course we can't get the insurance-money in, and you will have to be easy with us, and wait; but will get your pay in full." They said that all they wanted was their insurance-money to pay all they owed, and as soon as they got that they would commence to pay. They asked to have the notes renewed, which was afterwards done. They said the concern would be solvent if they got their insurance-money, and expressed their expectation of getting it. No statement was made of the company's debts, and Buchanan & Co., according to their own positive testimony, had no knowledge of any particulars, or of the fact of their debts beyond supposition.

The following letters from Buchanan & Co. now were written. What replies, if any came back, did not appear.

NEW YORK, March 29th, 1869.

THE CASCADE PAPER COMPANY.

GENTLEMEN: In relation to renewal of notes, we shall do everything we reasonably can, though we cannot really afford to renew a single one. You must take into consideration that our Mr. Buchanan has recently met with a greater loss by fire, with less than half the amount of insurance you have, and we really need all the money we can command. We have taken care of the $1000 note due 25th, and you will please send us new note with your individual indorsements, and at as short time as possible. Can't you possibly take care of the one due April 2d and 6th? You see our position, and we trust you will meet the matter accordingly.

Yours truly,

BUCHANAN & Co.

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NEW YORK, April 2d, 1869.

THE CASCADE PAPER COMPANY.

GENTLEMEN: Your note for $2501 is payable to-day, and up to this time (2 P.M.) we hear nothing from you in regard to it. We shall be obliged to have it protested if we do not hear from you in time. You have not sent us new indorsed note for the $1000 payable March 25th. We trust in these matters you will only rely upon us, as a question of necessity, and not of convenience. Money is very tight, and we need all that is due us.

Yours truly,

BUCHANAN & Co.

NEW YORK, April 30th, 1869.

THE CASCADE PAPER COMPANY.

GENTLEMEN: Yours of 29th instant, with inclosure, at hand. We are surprised that you should request us to extend your note due May 4th, for your superintendent, Mr. Joy, gave the writer to understand most distinctly that should be paid when due. This he said to him when at your place in March. Mr. Joy then said if we would renew some notes due about that time (which we did) everything would be met promptly after that. We have been obliged to use that note due the 4th proximo, and we are not in a position to take it up. Our payments about this time are exceedingly large, much greater than usual, and we have need of every dollar we can raise to pay our own liabilities. We cannot, therefore, renew your note. You certainly can in some way, with your connections, raise the money, and, if necessary, you ought to be willing to make any sacrifice to do it. If in no other way, we should suppose you could get an advance for the amount you need on your insurance policies. At any rate, gentlemen, you must in some way contrive to pay the note, for we are not in a position to renew it for you.

Yours truly,

BUCHANAN & Co.

NEW YORK, June 5th, 1869.

MR. W. C. JOY,

Superintendent of the Cascade Paper Company.

DEAR SIR: We were very much surprised and very greatly incommoded by getting notice this morning of protest of your note due yesterday, 4th instant, for $2305.94. Have telegraphed you for explanation, and up to this time, 2½ o'clock, have re-

ceived no reply. This note had been discounted, and as we had heard nothing from you to the contrary, we supposed, of course, it would be paid. You promised us when we had to take up the last one, that after that all your notes would be promptly met. Please attend to it at once, and send funds. What are we to expect in regard to your note due us next week, the 7th instant, for $4701.42? We assure you we are not in a position to take care of that. You must provide the funds to pay that. You have no idea how short we are just at this time, and what a disappointment and trouble it has been for us to-day to take care of your note due yesterday. Let us hear from you at once.

Yours truly,

BUCHANAN & Co.

NEW YORK, June 9th, 1869.

MR. W. C. JOY,

Superintendent of the Cascade Paper Company.

DEAR SIR: Since writing you yesterday we learn the Manhattan Insurance Company paid you some time since about $5000. Under the circumstances, think you should have paid us something on account.

As we understand the matter, there is, beside the Buffalo company, unpaid as follows:

Home, N. H.,	$10,000
Columbia, N. Y.,	3,000
Market, N. Y.,	3,000
Atlantic,	3,000

On which there is due about $18,500.

We do not know how serious the difficulties in the way of collecting from these companies may be, but from such information as we have been able to obtain, fear you may underrate them. Under the circumstances we think you should assign your claims against these companies to us, or at least enough of them to cover our claim, which, in round figures, is about $12,000.

The chances of collection in our hands will be quite as good as in yours, and probably a good deal better. If you are correct in assuming that their refusal to pay is the result of Woodruff's interference and management, the assignment to us would be the very best means you can adopt to avoid litigation and loss. We suppose you have a board of trustees, and that in case

you make the assignment it will be proper to have a meeting and authorize some officers of the company to execute the assignment. Please let us hear from you by first mail.

Yours truly,

BUCHANAN & Co.

NEW YORK, June 12th, 1869.

G. R. YOUNG, ESQ.,

President of the Cascade Paper Company.

DEAR SIR: We hold the following notes of the Cascade Paper Company, payable to the order of yourself and Mr. W. C. Joy, and indorsed by you both, viz.:

One due May 4th,	at Metropolitan Bank,	N. Y.,	.	.	$2,293 19
" June 4th,	"	"	"	.	. 2,305 94
" " 7th,	"	"	"	.	. 4,701 42
" July 4th,	"	"	"	.	. 2,318 69
					$11,619 24

For the note due May 4th we hold as collateral another note of the company for $2318.70, due July 1st, indorsed same as the others. All the above notes, excepting the one due July 4th, have been protested for non-payment. We have from time to time renewed all these notes at the request of Mr. Joy, and Mr. Raplee, treasurer of your company, for reasons given by them at the time. The last excuse given us was, that they were waiting for their insurance-money. Now, as the company have, to our knowledge, collected a large portion of their insurance-money, some $20,000 or more, we think we are entitled to our money, and that we are, under all the circumstances, very unfairly treated. We have this day written Mr. Joy, as superintendent of the company, requesting him to remit us by return mail at least one-half of the amount of our account, and at the same time informing him if it was not done we should at once instruct our lawyers to commence suits against yourself and Mr. Joy as indorsers. We thought it best to inform *you* how this matter stood, as you might not be fully informed in regard to it.

Yours truly,

BUCHANAN & Co.

"In the month of June or July," as was testified by the superintendent of the company, "it became apparent to its officers that the company could not meet its engagements."

On the 19th of the June thus spoken of by the superintendent, that is to say June, 1869, Buchanan & Co. brought suit, in the Supreme Court of New York, against the company and the individual indorsers, Joy and Young, the former superintendent and the latter president of the company, upon the two notes which had fallen due June 4th and June 7th respectively; and immediately after the two notes due July 1st and July 3d, fell due, a suit was brought upon those notes also.

"At the time the suits were commenced," testified the superintendent *in May*, 1870, when he was examined, "I should say, *from my present* standpoint, the company was insolvent." There was no proof in the present proceeding that, when these suits were brought, any debts of the company had matured, except those of Buchanan & Co., and $229 due one Jones.

Each member of the firm of Buchanan & Co., which consisted of four persons, was examined as a witness, and they all testified that their information and belief was, that the company was perfectly solvent, and intended to pay everybody in full; that they commenced the suit because they thought that the company's delay had been unreasonable and unnecessary; that the officers of the company were keeping the insurance-money, which ought to be paid to *them*, and speculating with it; and because the company had promised to pay as soon as they got the insurance-money, and had collected nearly $30,000 of it without paying anything; that the suits were not brought nor anything done subsequently, under any understanding, request, or suggestion of the company; but, on the contrary, that the company requested them to wait longer, and begged them not to think of bringing a suit; that they brought the suit for the purpose of getting their pay by any legal means; that they did not consider the question whether other parties would get their pay or not, for that they did not know that the company owed anybody else.

It appeared in the evidence that the company pleaded in the suits on the notes a misnomer in abatement; and that

Buchanan & Co. made a motion to correct the misnomer, and to strike out the answer as "sham," and for judgment on it as "frivolous." The motion to amend was granted. The company's counsel then insisted that the plaintiffs must re-serve their complaint as amended, and the company have the usual time to answer. In a discussion before the court upon this point the plaintiff's counsel (according to *his* statement as given in the present suit) insisted, as a matter of argument, that where delay was the only object sought by a defendant which did not deny its obligation, delay might work injury to the plaintiffs by enabling other parties to gain a priority *in case of insolvency*. And he suggested insolvency as a possible inference, from the application for delay, for the court to consider upon such a motion. He did not assert it as a fact, and as he testified he had no knowledge or information on the subject and no decided belief on the subject of their solvency or insolvency. The company's counsel emphatically denied the suggestion of insolvency, and objected to any such inference being drawn. The judge said there was no proof on the subject, and gave the company ten days to answer. The company's counsel testified that the statement of insolvency was positively made by the counsel of Buchanan & Co., but admitted that there was nothing in the papers, one way or the other, upon the subject; that it became a matter of argument upon the assertions of counsel made in court, the plaintiff's counsel saying that the company was insolvent and the company's counsel saying that he did not believe it was insolvent, and he admitted that he did, in fact, believe they were solvent, and did say that he so believed in the argument. This argument was made on the 19th or 20th of July.

On the 19th of July a judgment against the company for $229 was recovered by one Jones, which was subsequently satisfied on execution. But Buchanan & Co. testified that they had no knowledge or information of these facts.

On the 21st of July, 1869, the company made a general assignment of all their property and effects to one Benjamin Hoyt in trust to pay their creditors. This assignment was

Statement of the case.

made under advice of reputable counsel, who advised the company that they might lawfully make it, and that it would be valid. "The company supposed," according to the testimony of their superintendent, "that the title to all their property would pass to Hoyt, and they intended to have it so pass by the assignment. They intended it should so pass before Buchanan & Co. could get their judgments and issue executions. They knew when the assignment was executed that this firm would shortly be entitled to enter judgments, and it was the intention on the part of the company in making the assignment to Hoyt to prevent them from gaining a preference by means of their judgments. They expected and intended that no property would be left on which they could get any lien. They did not expect or intend that Buchanan & Co. should get a preference over their other creditors; but intended by the assignment to secure an equal distribution of their property to their creditors, and to prevent any creditor from getting a preference. The officers of the company consulted together in reference to the assignment. There was not any difference of view."

The members of the firm of Buchanan & Co. testified that no information of this assignment was given to them, and that they had no knowledge of it until after their liens had attached as hereinafter mentioned.

On the 3d of August, no defences having been entered in any of the suits, Buchanan & Co. recovered judgments against the company in them by default, and against Joy & Young, indorsers on the notes. On the same day their attorneys sent transcripts of the judgments to the clerk of Yates County, in which the company's real estate was situated, to be docketed by him, and the same were docketed by him on the 4th day of August.

On the same 3d day of August the attorneys of Buchanan & Co. also issued executions on the two judgments to the sheriff of Yates County, wherein personal property of the company was situated, which executions were received by the sheriff on the 4th of August, and were sufficient in form to become liens on that day under the statutes of the State

of New York, upon all the personal property of the defendants within that county. On the 4th of August Buchanan & Co. commenced, under the said judgments, certain proceedings supplementary to execution (which are the substitute under the New York code for a creditor's bill), and thereby obtained an equitable lien upon all the choses in action of the company, which proceedings subsequently resulted in the appointment of B. Buchanan (a member of the firm) as receiver.

The different members of the firm testified that at the time of commencing the suits, and at the time of recovering and docketing the judgments, issuing the executions and commencing the supplementary proceedings, they did not actually believe that the company was insolvent, or in contemplation of insolvency, and so far as they were aware, neither of them had any reasonable cause so to believe; but, on the contrary, their belief in fact was, and as they supposed their information warranted the belief, that the company was perfectly solvent. They each further testified that so far as they were aware, they had no cause to believe that the company had any intention, view, or desire of giving a preference to their firm, or making any disposition of property in its favor or in fraud of the Bankruptcy Act; but, on the contrary, they in fact believed that the company was resisting their proceedings with the purpose of delaying, and so far as possible preventing their obtaining payment of their claims; that their information and belief was that the company did all it could to prevent the judgments, executions, and receiverships; that they thought it a part of the company's plan not to give them a preference or allow them to get any if it could help it; that it was doing all it could to prevent their getting any preference; and that they had no facts nor any cause to believe that it was showing or permitting them any favor.

The sheriff of Yates County, on receiving the executions, August 4th, called upon the officers of the company, and they all said that an execution could not touch the property; that they had made an assignment, and that it was in Hoyt's

hands; and they supposed that that would exempt the property from levy. They objected to the levy. The sheriff also called on Hoyt, who said there was a general assignment of the company made to him; that he had possession of all the property, and that he thought the sheriff had no right to make a levy. So the sheriff did not levy at that time.

When the attorneys of Buchanan & Co. sent the transcripts of judgments to the clerk of Yates County, on the 3d of August, they wrote him a letter, in which they requested him to docket the judgments, and also to inform them whether there were any other judgments against any of the defendants, or any assignment or transfer of property by any of them, and if so, for a memorandum thereof. The clerk sent back the letter with a memorandum of a judgment recovered by Jones against the company for $229, July 19th; and also of "general assignment, dated July 21st, 1869, B. L. Hoyt, assignee." This letter was received by Buchanan & Co.'s attorneys August 5th. This was the first information, as they testified, which they or their attorneys, so far as they knew, had ever received of the existence of the assignment, or of any judgment against the company other than their own. The attorneys sent for a copy of the assignment and received it on the 7th of August. Mr. Goodwin, one of the firm, went at once to Penn Yan to investigate the circumstances. He arrived there on the 9th, and remained there till the 13th. On arriving at Penn Yan he saw the sheriff, who informed him that the company had made an assignment, and there was not anything to levy on. He also saw Mr. Hoyt, who asserted that the property had vested in him as assignee. He also saw the officers of the company, who said that they had made an assignment of the property which the company formerly owned, and that the assignment was good and valid. Under advice of counsel, Goodwin directed the sheriff to levy, and gave him the bond of indemnity required by him. The sheriff levied on the personal property of the company August 13th.

By orders of the Supreme Court, made in the supplementary proceedings August 13th and 16th, Buchanan was ap-

pointed receiver of the unpaid policies of insurance held by said company, and on the 20th, 21st, and 23d of August commenced suits on them against the insurers, to recover the losses due the company, which suits were still pending.

On the 9th of September a petition in bankruptcy was filed against the company, on which, September 24th, it was adjudicated bankrupt, and one Smith appointed its assignee.

The inventory of the assets and liabilities of the firm filed July 21st, 1869, showed:

Liabilities, ...	$74,775 00
Assets, ...	41,435 00
Deficit, ...	$33,340 00

Among the assets were—

Cash in hands of Treasurer, ...	$6,554 70
Claims against insurance companies for loss by fire,	14,545 30

Hereupon Smith filed a bill in the court below against Buchanan & Co., which, after setting forth the appointment of the complainant as assignee, alleged that the judgments in favor of Buchanan & Co. against the company were suffered and procured by the company with intent to give that firm a preference over the other creditors of the company, and with intent to hinder, delay, and impair the operation of the Bankrupt Act; and that that firm, when they entered their judgments and issued their executions, had reasonable cause to believe that the company was insolvent, and that a fraud on the act was intended.

The bill also alleged the illegality of the appointment of the defendant, Buchanan, as receiver of the insurance claims.

The answer set forth the recovery of the judgments, the issuing of the executions, the levies thereunder, and the appointment of the receiver; and put in issue all the allegations of fraud in the recovery of the judgment, and any knowledge on the defendants' part of the insolvency of the company.

The court below gave judgment for the complainant,

granting the relief asked in the bill, and setting aside the judgments under which the defendants claimed their lien.

From that decree this appeal was taken.

It was admitted on both sides in the argument that by the terms of the Bankrupt Act it was necessary that three things should concur to entitle the complainant, as assignee, to the decree prayed in the bill:

1st. That the company, within four months before the filing of the petition against them in bankruptcy, did "*procure* or *suffer*" their property, or some part thereof, to be attached, sequestered, or seized on execution by Buchanan & Co., with a view to give them a preference.

2d. That the company was insolvent at that time, or in contemplated insolvency.

3d. That Buchanan & Co., at the time the company "procured or suffered" such attachment, sequestration, or seizure of their property (if they did so "procure or suffer" it) had reasonable cause to believe that the company was insolvent, and that they procured or suffered such attachment, sequestration, or seizure of their property to be made to secure such preference and in fraud of the provisions of the act.

Mr. T. M. North, for the plaintiff in error:

This case presents a question of great importance. It is, how far a creditor may lawfully use the process of the State courts to collect his debts, and how far the Bankruptcy Act restricts him in that use.

I. We maintain that a creditor may lawfully do all that he might have done before the Bankrupt Act to collect his debts, provided he has no active or passive assistance from a debtor whom he has reasonable cause to believe insolvent and intending to help him to a preference. "The preference which the law condemns," said Chase, C. J., on the circuit, "is a preference made within the limited time *by the bankrupt*, not a priority lawfully gained by creditors. It is as much the policy of the Bankrupt Act to uphold liens and trusts when valid as it is to set them aside when invalid."

Of course Buchanan & Co. intended to collect the bill by

ordinary process in State courts. That is not *per se* unlawful. No statute has forbidden it; no decisions hold it wrong *per se*. The machinery of the State courts has not been abolished by the Bankrupt Act, nor the whole burden of collecting debts thrown on the Federal courts. They did not intend to violate the letter or spirit of the Bankrupt Act by any collusion with their debtor. They expected to succeed, as they did succeed, not only without help from their debtor, but in spite of its utmost resistance. They believed their debtor good but slow pay, and meant to enforce the payment unreasonably delayed. If there were other creditors (as to which they knew nothing), and if there would not ultimately be enough for all (which when they perfected their liens, they had no reason to believe and did not believe) they had no intention of taking unlawful advantage of them, and took none. They sought no aid from their debtor and received none.

They sought, and they obtained, simply the reward which the law has for ages given to the energetic and prompt creditor. The maxims "*Vigilantibus non dormientibus*," and "*Prior tempore potior est jure*," have been so far modified by the Bankrupt Act as that no creditor is allowed to gain any advantage by his activity if any act, procurement, or even passive co-operation of the debtor has aided him. But neither the terms nor policy of the act forbid an honest creditor from keeping the advantage which he has gained by energetic fighting, in spite of resolute and sincere resistance of the debtor, even though in failing circumstances, or actually insolvent. It is only the further prosecution of a suit which has not yet reached final judgment that is stayed by bankruptcy. A judgment already obtained is not discharged unless surrendered by voluntary act of the creditor in proving his debt. If he chooses not to surrender it, but to stand on it, the law recognizes his right. In the practical administration thus far of this law, the lien of a creditor, obtained without the forbidden co-operation of the debtor by judgment, by execution, or by the appointment of a receiver, before the filing of a petition in bankruptcy, has been upheld

by repeated adjudications, and the title of the assignee in bankruptcy has been held subordinate to the lien.*

1. It is quite clear that the bankrupts did not in fact intend to give the firm a preference. As less than $15,000 of their insurance-money is inventoried as unpaid July 21st, it is plain that $30,000 or $32,000 of it must have been collected after the fire. But the firm got none of it. Indeed the company had on hand on that day $6554.70 cash in their treasurer's hands; which if the company had meant to prefer the firm would have been paid to it. So far from meaning to prefer this firm, the contrary was the fact. The company intended to prevent their getting a preference, and in fact supposed that they had effectually prevented any such preference. They acted under the advice of eminent counsel, who advised them, and they believed it to be true, that the assignment which they made was legal, valid, and sufficient to prevent the firm from gaining a preference. That advice was justified by all the existing decisions authoritative in that circuit and district. Such an assignment had been held not to conflict with any provision of the Bankruptcy Act, by Nelson, J., in *Sedgwick* v. *Place*,† as well as by Swayne, J., in *Langley* v. *Perry*,‡ and *Farrin* v. *Crawford*.§ And there had been at that time no decisions to the contrary. It had also been held valid under the State laws by the courts of the State.‖

2. It is equally clear that the firm did not in fact believe the company intended to give them a preference, but actually believed the intention to be precisely the reverse. How could they have had "reasonable cause to believe" what did not in fact exist, and what every fact and circum-

* In re Campbell, 1 Abbott's United States Reports, 185; Sampson *v.* Burton, 4 Bankrupt Register, 3; Sedgwick *v.* Minck, by Nelson, J., 1 Id. 204; Wright *v.* Filley, Miller, J., 4 Id. 197; Armstrong *v.* Rickey, Sherman, J., 2 Id. 150; Re Campbell, McCandless, J., 6 Internal Revenue Record, 174; Re Wright, Field, J., 2 Id. 155; Re Schnepf, Benedict, J., 2 Benedict's District Court, 72; and numerous other cases.

† 1 Bankrupt Register, 204. ‡ 2 Id. 180. § Ib. 181.

‖ De Ruyter *v.* St. Peter's Church, 3 New York, 238; Hurlburt *v.* Carter, 21 Barbour, 221; Bowery Bank Case, 5 Abbott's Practice, 415.

stance operating upon their minds tended to make them disbelieve?

3. The firm had no reasonable cause to believe the company insolvent at the time the suits were commenced, or at the time their liens were perfected on the 4th of August.

In the case of a merchant, insolvency might be suspected, from his allowing judgment to be recovered on a just debt, without defence, but in many instances men not engaged in business habitually avoid paying just debts till forced by legal process, and no cause to believe insolvency could be charged on their creditors. Otherwise, as the Supreme Court of New York say in *Hoover* v. *Greenbaum*:*

"If such facts are held to be sufficient to charge a creditor with the knowledge required by the Bankrupt Act, it would be dangerous for any creditor to collect from his debtors the claims he has against them, by legal proceedings."

In an agricultural community the non-payment of notes at maturity does not afford reasonable ground to believe insolvency. The company were not traders at the time that these judgments were recorded, but were in very peculiar circumstances. A presumption reasonable as to merchants in the ordinary course of their business, would be wholly inapplicable to this case.

4. If at the time these liens were obtained, August 4th, the firm had no reasonable cause to believe that their debtors were insolvent, and intended to give them a preference, nothing which occurred afterwards could possibly make that invalid which was valid on the 4th of August.

Neither the information received August 5th, of the assignment and the Jones judgment, nor the knowledge acquired by Mr. Goodwin, August 10th and 11th, nor his directing a levy and indemnifying the sheriff on the 13th, could prejudice the liens acquired on the 4th. We may, therefore, lay out of consideration all that occurred after that date.

5. The burden of proof rests on the assignee. It must

* 62 Barbour, 193.

be admitted that, irrespective of the Bankrupt Act, his title is subject to liens of Buchanan & Co. If there is any provision in the act making his title superior to theirs, it is for him to show it, and to prove the facts that make it applicable.

The adjudication of bankruptcy is not even *primâ facie* evidence as against Buchanan & Co., who were not parties to it.*

II. The liens of Buchanan & Co., if not void under the Bankrupt Act, were valid under the laws of the State of New York. Even if not so, this court would not examine into the regularity of the proceedings. It will take notice of the existence and jurisdiction of the Supreme Court of New York, and that it is a court of general jurisdiction; and whether its decision be correct or otherwise, its action, until set aside by some direct proceeding, is regarded as binding in every other court. It cannot be questioned when introduced collaterally, unless it be shown that the court had no jurisdiction.

Mr. G. Gorham, contra:

I. 1. On the 3d of August, 1869, when these judgments were recovered, and for a long time prior thereto, indeed immediately after the fire in March, the company was insolvent. As a fact this will not be denied.

2. The company suffered and procured the judgments to be entered, the executions to be issued, and the levy to be made, and thus transferred its property to Buchanan & Co., with a view to give them a preference over its other creditors, and with a view to prevent its property from coming to the assignee in bankruptcy, and from being distributed under the Bankrupt Act, and to impede, and delay, and impair the effect and operation of the act.

(*a.*) The company permitted the judgments to be entered, when by filing its petition in bankruptcy it could have prevented the entry of the judgments.

* Re Schick, 2 Benedict, 5; Re Dibblee, 2 Bankruptcy Register, p. 186.

A debtor who is threatened or pressed can prevent the taking of his property on legal process by going into voluntary bankruptcy, and if he does not he clearly allows or suffers the taking.*

(*b.*) The insolvency of the company being established, and the fact being proven that it permitted judgments to be entered and its property to be taken on execution, the intent follows.

The natural consequence of the defendants obtaining judgment and levy was to give them a preference over other creditors, there not being sufficient assets to pay all the creditors in full; and it was also a necessary consequence that so much of the property as was covered by the lien of the judgments and executions would thereby be prevented from reaching the hands of an assignee in bankruptcy; and the intention, aim, and object of bankrupt laws being the equal distribution of the insolvent's estate among all creditors, the judgments and levy necessarily impeded, delayed, and impaired the effect and operation of the Bankrupt Act.†

It is a necessary legal presumption, which ordinarily cannot be rebutted by any evidence of a want of such intention.‡

The fact that the superintendent Joy denies any such intention, cannot do away with this presumption.

(*c.*) The act of suffering the defendants to take the property of the company on legal process, the company being insolvent, was a transfer of the property to the defendants.§

The fact that these judgments were obtained in direct hostility to the bankrupt, does not alter the case.

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* In re Black & Secor, 1 Bankruptcy Register, 81; In re Craft, Ib. 89; In re Dibblee, Ib. 185; Haskell *v.* Ingalls, 5 Id. 205; In re Forsyth & Murtha, 7 Id. 174.

† Denny *v.* Dana, 2 Cushing, 160; Beals *v.* Clark, 13 Gray, 18; Black & Secor, *supra;* Foster *v.* Hackley, 2 Bankruptcy Register, 131.

‡ In re Smith, 3 Id. 98, and cases cited; Driggs *v.* Moore, Ib. 149; Campbell *v.* Traders' Bank, Ib. 124; In re Dibblee, 2 Id. 185; Morgan *v.* Mastick, Ib. 163; Clark *v.* Binninger, 3 Id. 99.

§ Black & Secor, 1 Id. 82; Same case, 2 Id. 65; Wilson *v.* Brinkman, Ib. 149.

‖ Wilson *v.* Brinkman, Ib. 149; Giddings *v.* Dodd, 1 Dillon, 115.

3. Buchanan & Co. when they entered their judgments, and when they caused levies to be made, had reasonable cause to believe the company to be insolvent.

(*a.*) They held the commercial paper of the company, past due, unpaid, and protested.

(*b.*) They brought suits upon this paper, and knew it was not paid before judgment.*

(*c.*) They knew, by evidence in their own hands, that the company had committed an act of bankruptcy before they commenced their second action, and before the time to answer expired they knew that two acts of bankruptcy had been committed, in that the company had suspended payment of its commercial paper for fourteen days without resuming. These were acts of bankruptcy.

(*d.*) The company had caused to be recorded in Yates County clerk's office, on July 21st, a general assignment reciting its insolvency, and this was notice to the defendants.

(*e.*) Before the levy was made, Goodwin, one of the firm of Buchanan & Co., had seen this record of assignment, had attended the sheriff sale on a prior execution, and had talked with the officers of the company with reference to its affairs.

(*f.*) The transfer of the company's property to these defendants by execution and levy was so extraordinary a transaction, and entirely out of a regular business course, that the defendants were not only put upon inquiry but thereby were *fully advised* of the company's insolvency.†

(*g.*) The fact that each of the judgment creditors denies any reasonable cause to believe in the insolvency of the company, and denies any intent to do anything in contravention of the Bankrupt Act, is of no consequence, because confessedly they had knowledge of *facts which constitute insolvency*, and their denial is rather one of law than fact.‡

4. It follows as a necessary consequence that if Buchanan & Co. had reasonable cause to believe the company insolvent,

* Haskell *v.* Ingalls, 5 Bankruptcy Register, 205.

† Wilson *v.* City Bank, 5 Bankruptcy Register, 270.

‡ Rison *v.* Knapp, 1 Dillon, 186.

Argument for the general creditors.

they had like cause to believe a fraud upon the act was being committed. By their proceedings they were seeking to get a preference over the other creditors of the company, while the Bankrupt Act requires that all creditors shall share alike. The object of Buchanan & Co. in suing the notes held by them, was to get their money whether other creditors got theirs or not. They were not satisfied with the general assignment without preferences which the company had executed, and by which they would have been placed on a footing with all the other creditors; but avoided that by compelling the sheriff to levy under a bond of indemnity, and by obtaining a judgment setting aside the assignment.

They must be presumed to know that the natural, the necessary, consequences of their acts was to obtain that which was a fraud upon the Bankrupt Act.

This court has met this question, and held that when the bankrupt has shown by acts of bankruptcy, which are certain tests of insolvency, that he is unable to meet his engagements, one creditor cannot, by a race of diligence, obtain a preference to the injury of others.* Such conduct is considered a fraud on the act, whose aim is to divide the assets equally, and therefore equitably. This ruling has been followed by the courts under the present act.

II. The appointment of Buchanan as receiver of the claims against the insurance companies, was a nullity. Sections 292 and 294 of the New York Code of Procedure, in reference to proceedings supplementary to execution, have no applicability to incorporations.†

Reply: A debtor does not, in the sense of the Bankrupt Act, "*suffer*" his property to be taken, if he in good faith uses, as he is advised and believes, effectual means to prevent it, and fails only by mistake, misfortune, lack of

* Shawhan *v.* Wherritt, 7 Howard, 644.

† Hinds *v.* Canandaigua and Niagara Falls Railroad Co., 10 Howard's Practice, 487; Sherwood *v.* Buffalo and New York City Railroad Co., 12 Id. 136.

time, or accident.* The word "suffer," in this connection implies volition, something voluntarily and knowingly omitted. It was added to cover acts of wilful omission, not embraced in the word "procure." It is to be used in the sense of "allow," or "permit," not of "endure." A man suffers, permits, or allows that which he could, but does not desire to, prevent. He simply *endures* that which he has done the best he knew how to avoid.† It must be an act of *volition* on his part; it must be, in other words, something that is done *voluntarily*.

The context of the statute shows that it must be a suffering "*with intent* to give a preference," which is inconsistent with the sense of involuntary endurance.

Is every debtor bound to run a race of diligence with his creditor? Is every creditor bound to see that his debtor does run such a race, and, at his peril, to see to it that the debtor wins the race? Are the proceedings in State courts to be used merely as a spur to the debtor to make him run?

Mr. Justice CLIFFORD delivered the opinion of the court.

Preferences, as well as fraudulent conveyances, are, under certain circumstances, declared to be void if made by a debtor actually insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him as a bankrupt.‡

Those circumstances, so far as that rule of decision is applicable to this case, are, if the debtor procures any part of his property within that period to be attached, sequestered, or seized on execution with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, that such attachment, sequestration, or seizure is void, provided it also appears that the creditor making the attachment, sequestration, or seizure, or the person to be benefited thereby, had reasonable cause

* Armstrong *v.* Rickey, 2 Bankruptcy Register, 150; Re Schnepf, 2 Benedict's District Court, 72.

† Campbell *v.* Traders' Bank, 3 Bankruptcy Register, 124.

‡ 14 Stat. at Large, 534.

to believe that the debtor was insolvent, and that the attachment, sequestration, or seizure was procured in fraud of the provisions of the Bankrupt Act.

On the 9th of September, 1869, a creditor of the corporation respondents filed a petition in bankruptcy against the company, in the office of the clerk of the District Court, and on the twenty-fourth of the same month the District Court adjudged the said paper manufacturing company to be bankrupts within the true intent and meaning of the Bankrupt Act.

Pursuant to that decree the appellee, on the 10th of November following, was duly appointed assignee of the estate of the bankrupts, and the register having charge of the case, there being no opposing interest, by an instrument in writing under his hand assigned and conveyed to the said assignee all the property and estate, real and personal, of the bankrupts.

By virtue of that instrument of assignment and conveyance all the real and personal estate of the bankrupts, with all their deeds, books, and papers relating thereto, became vested in the appellee as such assignee. Such instrument of assignment and conveyance embraced the several parcels of real estate described in the bill of complaint and certain personal property at that time in the hands of an assignee appointed by the State court, or in the custody of the sheriff of the county, but which has since been in part sold by the sheriff and the proceeds have been paid into the registry of the District Court. Five policies of insurance upon the property of the bankrupts, which had been destroyed by fire and for which losses the insurance companies were liable, were also included in the said instrument of assignment and conveyance.

Complaint is made by the appellee in the bill that the respondents, or the three first named, on the 3d of August, prior to the decree adjudging the corporation respondents bankrupts, recovered two several judgments against the bankrupt company, in the Supreme Court of the State,

amounting in the aggregate to the sum of $11,815.65; that the said judgments, on the day following, were docketed in the office of the clerk of the county, where the judgments still remain of record, and constitute an apparent lien upon the property and estate so assigned and conveyed to the appellee as such assignee, and are a cloud upon his title.

Apart from that he also claims that the same parties took out executions upon the said judgments and delivered the same to the sheriff of the county, and that the sheriff, on the 11th of the same month, levied the executions upon certain personal property of the bankrupt company which he held in possession when the petition in bankruptcy was filed, and he alleges that the sheriff, by order of the District Court duly entered, has since sold the said personal property and paid the proceeds into the registry of the bankrupt court; that the other respondent claims that he has been appointed receiver of the several policies of insurance, and that he has commenced actions against the insurance companies to recover the losses suffered by the burning of the property covered by the said policies, in consequence of which the insurance companies refuse to pay said losses to the complainant.

Both the allegations of the bill and the proofs show that the corporation respondents, on the said 3d of August and long prior thereto, were utterly insolvent and bankrupts, and the complainant charges that they procured and suffered the said judgments in favor of the parties named to be entered and their own property to be attached, sequestered, and seized, as alleged, with intent to give to those creditors a preference over their other creditors, and that they intended by such disposition of their property to defeat and delay the operation of the Bankrupt Act; that the said judgment creditors, throughout those proceedings, had reasonable cause to believe that the debtor company was insolvent, and that the judgments were entered, the executions issued, and the levies made in fraud of the provisions of the Bankrupt Act, and that the proceedings were commenced and prosecuted with a view to prevent the property from

coming to the assignee in bankruptcy and from being distributed under said act.

Service was made and the said judgment creditors appeared and filed an answer, and a separate answer was filed by the respondent claiming to be the receiver of the policies of insurance. Proofs were taken and the parties were heard and the court entered a decree for the complainant, and from that decree the respondents appealed to this court.

Most or all of the defences which it becomes material to consider consist of denials that the charges contained in the bill of complaint are true, and in that respect the two answers are substantially alike. Briefly described the answers deny that the corporation respondents did procure or suffer the said judgments to be entered, or their property to be taken upon legal process issued upon said judgments, with intent thereby to give to those judgment creditors a preference over their other creditors, or with intent to defeat or delay, by such disposition of their property, the operation of the Bankrupt Act; or that they had reasonable cause to believe that the respondent company was insolvent, or that the judgments were entered or the executions issued or the levies made in fraud of the provisions of the Bankrupt Act; or that such proceedings were instituted with a view to prevent the property of the bankrupts from coming to the assignee in bankruptcy, or to prevent the same from being distributed under the said act, as charged in the bill of complaint.

Fraudulent preference is the *gravamen* of the charge, and the complainant, as the assignee of the estate of the bankrupts, prays that the said judgments and all the proceedings in the suits may be decreed to be void and of no effect, and that the judgments, executions, and levies may be vacated and set aside, and that it may be decreed that he, as such assignee, is entitled to have and receive all the real and personal estate of the bankrupts free and clear of any lien by virtue of the said judgments, or of any of the aforesaid proceedings, and for an injunction.

Three things must concur to entitle the complainant, as such assignee, to the decree as prayed in the bill of complaint: (1.) That the corporation respondents, within four months before the filing of the petition against them in bankruptcy, did procure or suffer their property, or some part thereof, to be attached, sequestered, or seized on execution by the said judgment creditors, with a view to give a preference to such creditors by such attachment, sequestration or seizure, over their other creditors. (2.) That the corporation respondents were insolvent at that time, or in contemplation of insolvency. (3.) That the judgment creditors, at the time their debtors, the corporation respondents, procured or suffered such attachment, sequestration, or seizure of the aforesaid property belonging to the said debtors, had reasonable cause to believe that the debtors whose property was so attached, sequestered, or seized, were insolvent, and that they procured or suffered such attachment, sequestration, or seizure of such property to be made to secure such preference and in fraud of the provisions of the Bankrupt Act.

Equal distribution of the property of the bankrupt, *pro rata*, is the main purpose which the Bankrupt Act seeks to accomplish, and it is clear to a demonstration that the end and aim of those who framed the act must be defeated in this case if the proceedings of the judgment creditors are sustained, as they have perfected liens, by those proceedings, upon all or nearly all of the visible property of the bankrupts.

Until the debtor commits an act of bankruptcy it is doubtless true that any creditor may lawfully sue out any proper process to enforce the payment of debts overdue, and may proceed to judgment, execution, seizure, and sale of his property; but it is equally true that the appointment of an assignee under a decree in bankruptcy relates back to the commencement of the bankrupt proceedings, and that the instrument required to be executed, under the hand of the judge or register, assigns and conveys to the assignee all the estate, real and personal, of the bankrupt, including

equitable as well as legal rights, and interests and things in action as well as those in possession, which belonged to the debtor at the time the petition in bankruptcy was filed in the District Court.*

Conceded, as that proposition must be, it is obvious that the judgment creditors could not acquire any interest in the property of the debtor by virtue of the order of the State court extending the powers of the receiver, previously appointed to collect the several amounts due from the insurance companies, to all the other estate, real, personal, and mixed, of the bankrupts, as it is admitted in the answer that the order in question was passed subsequent to the filing of the petition in bankruptcy, which is the foundation of the decree adjudging the corporation respondents to be bankrupts. Suppose it were otherwise, still the same conclusion must follow, as the court is of the opinion that all the essential allegations of the bill of complaint are established.

Much discussion to show that the paper company was insolvent is certainly unnecessary, as the answer admits the fact to be as alleged in the bill of complaint. They failed to meet their paper at maturity as early as the 4th of March, 1869, as conclusively appears from the letter of the principal appellants to the treasurer of the company, acknowledging the receipt of a telegram from him to the effect that the company could not pay their note falling due on that day.

It appears by the record that the bankrupt company was engaged in the manufacture of paper; that they had for a long time purchased goods for the purpose of the principal appellants on credit; that the appellants at that time held six notes against them, some of which were overdue; that the mills of the company, on the 20th of the same month, were destroyed by fire, which prevented the company from transacting any further business.

Correspondence immediately ensued between the appellants and the bankrupt company or their superintendent. Two days after the fire the company informed the appellants

* 14 Stat. at Large, 522.

of their misfortune, and the appellants replied on the following day, promising to take care of one of their notes and to advise them, in a few days, as to another which would fall due in a short time. Immediately one of the appellants visited the superintendent of the bankrupt company for the purpose of ascertaining the extent of their loss and whether they would be able to take care of their unpaid notes.

Application was soon after made to the appellants by the company that they should consent to renew the notes, and for an extension of the time of payment, which led to further correspondence and to some crimination, the appellants charging that the officers of the company had promised that all the notes should be promptly met, and that they had failed to make good their promise, and insisting that they must provide funds for that purpose. Urgent demands to that effect were made by the appellants, as appears by the letters given in evidence, but the bankrupts failed to supply the necessary funds, and the appellants, though they at first refused so to do, finally consented to renew all of the notes except two, reducing the number from six to four, as appears by their own testimony.

Those four notes were as follows: (1.) Note dated April 2d, 1869, for $4701.42, payable in sixty-three days from date. (2.) Note dated May 4th, 1869, for $2318.70, payable in fifty-five days from date. (3.) Note dated November 6th, 1868, for $2305.94, payable June 4th next after its date. (4.) Note dated November 16th, 1868, for $2318.69, payable the 3d of July next after its date.

Repeated demands for payment having been ineffectual, the appellants, on the 9th of June subsequent to the fire, suggested to the superintendent of the company that the chances of collecting the insurance-money would be better if the policies were placed in their hands, and urged that the company should assign their claims under the policies of insurance to them, "or at least enough of them to cover our claim, which in round numbers is about $12,000." Such a course, it was suggested in the same letter, would be the very best means they (the company) could adopt to *avoid liti-*

gation and loss, which affords convincing evidence that it was the purpose and intention of the appellants to secure a preference over the other creditors of the company.

Persuasion having failed to accomplish the purpose, the appellants, in a letter dated three days later and addressed to the president of the company, presented a schedule of the notes renewed and unpaid, complaining that they had been very unfairly treated, and informed him that unless one-half of the amount due to them was remitted by return mail, they should instruct their attorneys to commence suits against him and the superintendent of the company as indorsers of the notes. Instead of yielding at that time to the threat of the appellants, the corporation bankrupts, on the 21st of July following, made, executed, and delivered to one Benjamin Hoyt an indenture of assignment, wherein they pretended to convey to the said assignee all their real and personal property in trust, to convert the same into money, and with the proceeds to pay the debts of the company.

Extended discussion of that transaction, however, is quite unnecessary, as both parties agree that the said assignment was made in contemplation of insolvency, contrary to the provisions of the revised statutes of the State, and to hinder, delay, and defraud creditors. Whether the instructions were given to the attorneys, as threatened, does not appear, but it does appear that the notes overdue were protested and that those notes, on the 19th of the same month, were put in suit against the bankrupt company, and that a second suit was commenced against the company upon the other two notes immediately after they fell due.

Enough appears both in the pleadings and proofs to show that those suits, on the 3d of August following, were pending in the State court, and that the principal appellants on that day recovered judgment in both suits against the corporation defendants. Judgment in one of the suits was rendered for the sum of $7118.14, and in the other for the sum of $4197.51, as appears by the record. Both judgments were entered and perfected on the same day, and on the following day transcripts thereof were duly filed and the re-

spective judgments were duly docketed in the office of the clerk of the county, so as to become, at least in form, a lien on all the estate, real and personal, belonging to the bankrupt corporation.

Argument to show that the purpose of the principal appellants in attaching, sequestering, and seizing the property of the bankrupt company, as charged in the bill of complaint, was to obtain a preference over the other creditors of the company, is hardly necessary, as the charge is fully proved, and it is equally certain that the debtors throughout the entire period from the commencement to the close of those proceedings were hopelessly insolvent, and the acts, conduct, and declarations of the appellants, in the judgment of this court, afford the most convincing proof that they had reasonable cause to believe, even if they did not positively know, that such was the actual pecuniary condition of their debtors.

Attempt is made to satisfy the court that the debtors themselves did not know that they were insolvent, but the theory, in view of the evidence, is not supported, and must be rejected as improbable and as satisfactorily disproved.

Even suppose that is so, still it is insisted by the appellants that the decree is erroneous because it is not proved, as they contend, that the bankrupts procured or suffered their property to be attached, sequestered, or seized by the appellants, as charged in the bill of complaint, within the true intent and meaning of the Bankrupt Act. Properly viewed, they insist that their acts and conduct only show that they have used the process of the State courts, as they had a right to do, to collect their debts due from the insolvent company, and they submit the proposition that a creditor may lawfully do all he might have done before the Bankrupt Act was passed to collect his debts, provided he has no active or passive assistance from his debtor, whom he has reasonable cause to believe to be insolvent, to help him to secure such a preference over the other creditors of the debtor.

Creditors, it is conceded, are forbidden to sue out State process, within the said four months, and employ it to create

and perfect such liens on the property of their debtor, by his active or passive assistance, but the proposition submitted is that whatever they can obtain of their insolvent debtor, in that way, under such process, by their own energy and activity, in spite of the debtor, they may lawfully retain, and that such liens are not displaced or dissolved by any subsequent bankrupt proceedings.

Strong doubts are entertained whether the proposition could be sustained, even if the theory of fact which it assumes was fully proved, as the fourteenth section of the Bankrupt Act provides to the effect that the required instrument of assignment, when duly executed, shall vest in said assignee the title to all the property and estate of the bankrupt, although the same is then attached on mesne process as the property of the debtor, where the attachment was made within four months next preceding the commencement of the bankrupt proceedings, but it is not necessary to decide that question at this time, as the evidence is full to the point that the judgment creditors in this case did have the passive assistance of the bankrupt debtors in obtaining their judgments and in perfecting their liens, under the State process and laws, upon all the property, real and personal, of their debtors.

Throughout it was plainly the purpose of the principal appellants to obtain a preference over the other creditors of the bankrupt company, either by payment or assignment, and it must be conceded that the officers of the company for a time refused or declined to comply with any such request or intimation or in any way to promote their purpose, but the facts and circumstances disclosed in the record fully warrant the conclusion of the Circuit Court that they ultimately acquiesced in what was done by the appellants, even if they did not actively promote the consummation of the several measures which they, the appellants, adopted to perfect liens upon all the visible property of the bankrupt company, unless it exceeded in value the amount of their judgments.*

* Hilliard on Bankruptcy, 3d ed., 322–330.

Opinion of the court.

Sufficient is shown to satisfy the court that those having charge of the affairs of the corporation respondents knew that they were insolvent, and that they also knew that it was the purpose and intent of the principal appellants to secure a preference over the other creditors of the bankrupt corporation. Insolvent as they knew the company to be, they could not, as reasonable men, expect that all the debts of the company would be paid, and they must have known that the appellants would secure a preference over all the other creditors of the company if they suffered them, without invoking the protecting shield of the Bankrupt Act, to recover judgments in the two pending suits, and to perfect the other measures which they subsequently adopted to give effect to their liens upon all the property of the corporation bankrupts.*

Tested by these considerations the court is of the opinion that the findings of the Circuit Court were correct, and that the allegations of the bill of complaint are sustained, as follows: (1.) That the corporation respondents, within four months before the filing of the petition against them in bankruptcy, did procure or suffer their property to be attached, sequestered, or seized on execution by the principal appellants, with a view to give a preference to such creditors by such attachment, sequestration, or seizure, over their other creditors. (2.) That the corporation respondents were insolvent at that time, or in contemplation of insolvency. (3.) That the judgment creditors, at the time their said debtors procured or suffered such attachment, sequestration, or seizure of the aforesaid property belonging to the said debtors, had reasonable cause to believe that the said debtors whose property was so attached, sequestered, or seized were insolvent, and that they procured or suffered such attachment, sequestration, or seizure of such property to be made to secure such preference, and in fraud of the provisions of the Bankrupt Act.†

* Marshall *v.* Lamb, 5 Adolphus & Ellis, New Series, 126.

† Shawhan *v.* Wherritt, 7 Howard, 644; Fernald *v.* Gay, 12 Cushing, 596; Scammon, Assignee, *v.* Cole et al., 5 National Bankrupt Register, 257;

Insolvency in the sense of the Bankrupt Act means that the party whose business affairs are in question is unable to pay his debts as they become due in the ordinary course of his daily transactions, and a creditor may be said to have reasonable cause to believe his debtor to be insolvent when such a state of facts is brought to his notice respecting the affairs and pecuniary condition of his debtor, in a case like the present, as would lead a prudent business man to the conclusion that he, the debtor, is unable to meet his obligations as they mature in the ordinary course of business.

Such a party, that is, a creditor securing a preference from his debtor over the other creditors of the debtor, cannot be said to have had reasonable cause to believe that his debtor was insolvent at the time unless such was the fact, but if it appears that the debtor giving the preference, whether a merchant or trading company, was actually insolvent and that the means of knowledge upon the subject were at hand, and that such facts and circumstances were known to the creditor securing the preference, as clearly ought to have put him, as a prudent man, upon inquiry, it would seem to be a just rule of law to hold that he had reasonable cause to believe that the debtor was insolvent, if it appears that he might have ascertained the fact by reasonable inquiry. Ordinary prudence is required of a creditor under such circumstances, and if he fails to investigate when put upon inquiry he is chargeable with all the knowledge it is reasonable to suppose he would have acquired if he had performed his duty.* Such proceedings, therefore, must be held invalid, as they were promoted and prosecuted by the parties acting in fraud of the Bankrupt Act, and inasmuch as that conclusion affects the judgments recovered by the appellants, it will not be necessary to bestow much consideration upon the subsequent proceedings to perfect the liens or to the order for the appointment of a receiver, or to the second

Same case, 3 Id 100; Smith, Assignee, *v.* Buchanan, 4 Id. 133; Same case, 8 Blatchford, 153.

* Toof *v.* Martin, Assignee, 13 Wallace, 40; Scammon, Assignee, *v.* Cole, 5 National Bankrupt Register, 263.

order extending his jurisdiction and enlarging his powers. Evidently the judgments must be set aside as being superseded by the proceedings in bankruptcy, and if so, it is quite clear that all the subsequent proceedings founded upon those judgments become inoperative and ineffectual to prevent the assignee in bankruptcy from exercising the same power and dominion over all the property and estate of the bankrupts, as he might have exercised if such judgments had never been rendered, or no such subsequent proceedings had ever taken place. Creditors issuing executions on judgments obtained upon demands long overdue against a bankrupt, who has been pressed in repeated instances to pay or secure the demands and has failed to do so because of his inability, must be held to have had reasonable cause to believe that his debtor was insolvent.*

It was suggested at the argument that the appointment of the receiver was an independent order of the State court, and that the action of the State court must be regarded as valid until it is set aside by some direct proceeding, but it is a sufficient answer to that objection to say that the State statute under which the appointment was made has no application whatever to corporations, and that the proceeding must be regarded as wholly unauthorized and void.† Judgment creditors of a corporation, it is held, do not obtain a preference by such a proceeding, but must proceed according to the provisions of the article relative to the sequestration of the property and effects of corporations for the benefit of creditors.‡

Viewed in any light the court is of the opinion that neither the decree of the State court appointing the receiver nor the order enlarging his powers, nor any of his proceedings under those powers, afford any defence to the bill of complaint.

DECREE AFFIRMED.

* Wilson *v.* City Bank, Ib. 270; Foster *v.* Goulding, 9 Gray, 52.

† Code, §§ 292, 294; Hinds *v.* Railroad Co., 10 Howard's Practice Report, 487; Sherwood *v.* Railroad Co., 12 Id. 136.

‡ Sessions Acts, 1825, p. 449; 2 Revised Statutes, 463; Morgan *v.* Railroad, 10 Paige's Chancery, 290; Loring *v.* Gutta-Percha and Packing Co., 36 Barbour, 32

Statement of the case.

BRADLEY, J.:

I dissent from the opinion of the court just read. In my opinion an adversary suit against an insolvent person may be prosecuted to judgment up to the very moment of bankruptcy. The diligent debtor cannot be deterred from such prosecution by a knowledge that his debtor is insolvent, or by any apprehensions that bankrupt proceedings may be in contemplation. He is not bound, himself, to petition against his debtor in bankruptcy, nor does the neglect of his debtor to file such a petition deprive him of his fairly-gained preference, unless complicity between them can be shown, of which in my opinion there was no evidence in this case.

Mr. Justice DAVIS did not sit.

SLAWSON *v.* UNITED STATES.

Under the proviso to the first section of the Abandoned and Captured Property Act, excluding from its benefits property which "has been used in waging or carrying on war against the United States," the Court of Claims was held to have rightly dismissed a petition asking for the proceeds of a vessel which had been so used at Charleston, S. C., though on the evacuation of that place by the rebels, the quartermaster's department of the navy, in ignorance of how the boat had been used, chartered her and took her into the service of the government, and kept her in such service for twelve months, when disregarding the claims of her owner it turned her over to the Treasury Department for sale as captured property.

APPEAL from the Court of Claims; the case being thus:

An act of Congress, passed March 12th, 1863, and known as the "Captured and Abandoned Property Act," enacted that the Secretary of the Treasury might appoint agents to receive and collect all abandoned or captured property in any State engaged in the late rebellion. Such property the act directed to be sold, and the proceeds to be paid into the Treasury; and any person professing to be the owner, on certain conditions prescribed, was authorized to prefer his

claim to the Court of Claims, and on proof of his ownership, loyalty, &c., to recover the net proceeds of the sale. The act, however, by a *proviso* to its first section, expressly enacts that the property included within the act,

"Shall not include any kind or description which has been used or which was intended to be used for waging or carrying on war against the United States, such as arms, ordnance, ships, steamboats, or other water craft."

With this act in force, one Slawson preferred his petition to the Court of Claims, claiming the proceeds of the steamer "De Kalb," which had been taken and sold as abandoned property under this act, in the following circumstances:

In April, 1861, before the bombardment of Fort Sumter, the Confederate authorities at Charleston took forcible possession of a steamer owned at that time by one Dingle, and then in the possession of Slawson, who had charge of her—he objecting to her being taken into the rebel service—and used her for military purposes, under a charter, until the evacuation of Charleston, in February, 1865. During the continuance of this employment, and while she was under the charter, Dingle died, and in April, 1863, the boat was sold at administrator's sale to Slawson, who, either as agent of the owner, or as owner himself, had the management of her from the beginning of the rebellion to the evacuation of Charleston. On the morning that this event took place, the boat, while lying at the wharf, was set on fire by soldiers and turned adrift in the harbor. In this condition she was boarded by Slawson and the fire put out, but she drifted ashore on James Island, opposite Charleston, where she was when the United States forces took possession of the city.

On the occasion of this occupation, one Tower, an engineer in the navy, was placed in charge of the captured vessels and transport services. In a conversation between him and Slawson his attention was called to the steamer, and after making inquiries as to her condition, he directed Slawson to bring her to Charleston, and agreed to place her in

the service of the United States. Accordingly, with the consent of Captain Moore, of the quartermaster's department, he fixed $150 per day as the compensation for her use. Neither this sum nor any other was ever paid for this use, nor would the quartermaster's department give up the vessel to Slawson again, though he asked to have her. The steamer remained in the service of the government until April, 1866. Then, without notice to Slawson, and against his will, under an order from the quartermaster-general's office—directing that vessels captured at Charleston should, when not required by the quartermaster's department, be turned over to the agents of the treasury—she was turned over to the agents of the treasury accordingly. Slawson then applied to the Secretary of the Treasury for the return of the boat, but the secretary replied, that, "in view of the facts, if the property had been seized by a treasury agent, or had not come into the possession of his department by transfer from the military authorities as captured, it might be within the scope of his authority as secretary to decide that the United States had no rightful claim to the boat, and to restore her. But that by the act of transfer to the Treasury Department, the military power had adjudged and determined the fact, that the boat was the lawful capture or prize of the army, and that it was not within his power to revise that decision."

The boat was accordingly sold, and the proceeds paid into the treasury.

Slawson now petitioned that court for their net amount. The court dismissed his petition on the ground of its restricted jurisdiction; and referred to the above-quoted proviso as to property which had been "used for waging or carrying on war against the United States." From this decree of dismissal Slawson appealed.

Mr. George Taylor, for the appellant; Mr. C. H. Hill, Assistant Attorney-General, contra.

Mr. Justice DAVIS delivered the opinion of the court.

It is impossible to suppose that Tower would have made

the contract he did with Slawson if he had been informed of the true state of affairs with reference to this steamer, and in the absence of proof on the subject it is a fair presumption that he was kept purposely in ignorance of the fact that she had been engaged constantly for nearly two years preceding the occupation of Charleston by the Federal forces, with the consent of the owner, in carrying on war against the United States. The object of Slawson in the transaction was obvious. If he could, through the instrumentality of Tower, get his steamer in the service of the government at a stated compensation, he would have a chance at least to save her from being treated as prize of war, and, if so, to obtain a remunerative price for her future employment. The circumstances at the time were favorable to the accomplishment of his object. The steamer was aground on a distant island, and Tower, although he had a right to suspect, could not certainly know the kind of use to which she had been previously put. If a credulous man, which would seem to be the case, he could be easily imposed on, and in the nature of things it was not to be expected that any one would volunteer information to condemn the boat and Slawson's conduct in connection with her.

It seems, however, that the mode adopted by Slawson to save his boat, and obtain compensation for her future use, if ingeniously contrived, did not accomplish his object, for the government not only declined to pay anything for her use, but appropriated the boat itself as the lawful capture of the army. This disposition of the property was strenuously resisted by Slawson. The quartermaster's department not only refused on request to return the boat, but without notice to Slawson, and against his will, turned it over to the agent of the treasury. Learning that this was done, he invoked, without success, the authority of the Secretary of the Treasury in his behalf. This officer declined to restore the boat, on the ground that by the act of transfer to the Treasury Department the military power had adjudged and determined the fact that the boat was the lawful capture or prize of the army, and that he had not the power to revise

that decision. She was accordingly sold, and the net proceeds paid into the treasury. Slawson insists that he is entitled to these proceeds under the act to provide for the collection of abandoned property, even if there had been a valid capture, but the proviso to the first section of this act expressly excludes from its operation property which, like this, has been used for the purpose of carrying on war against the United States. Congress did not think proper to become the trustee for the owner of a steamboat engaged, with his consent, in the military service of the enemy at the very time Charleston was taken. It will not do to say that Slawson acted under compulsion after his purchase. In the first place the Court of Claims do not find this to be the case, and, besides, his conduct is inconsistent with any such theory, for he purchased the steamer while under charter in the Confederate service, and necessarily must have known that he could not recover her from that service. It needs no argument to show that the purchaser under such circumstances consents that the boat shall be continued in the same business in which she had been engaged from the commencement of the rebellion. The claimant is, therefore, excluded from the benefit of the Captured and Abandoned Property Act, and as the Court of Claims has no jurisdiction to try a case growing out of the appropriation of property by the army or navy, it follows that its judgment must be

AFFIRMED.

WALKER *v.* WHITEHEAD.

1. The laws which exist at the time of the making a contract, and in the place where it is made and to be performed, enter into and make part of it. This embraces those laws alike which affect its validity, construction, discharge, and enforcement. The remedy or means of enforcing a contract is a part of that "obligation" of a contract which the Constitution protects against being impaired by any law passed by a State.
2. *Held*, accordingly, when, on the 1st of January, 1870, suit was brought on a promissory note given in March, 1864, payable in March, 1865, that

Case stated in the opinion.

a law passed in October, 1870, which enacted (by one section) that in all suits pending on any contract made before June 1st, 1865, it should not be lawful for the plaintiff to have a verdict unless he made it appear that all taxes chargeable by law on the same had "been *duly paid for each year* since the making of the same;" and enacted (by another section) that it should be a condition precedent to such recovery that "the said debt has been *regularly* given in for taxes and the taxes paid," and (by other sections) made other retrospective enactments,—impaired the obligation of a contract, and was accordingly unconstitutional.

IN error to the Supreme Court of the State of Georgia.

Mr. P. Phillips, for the plaintiff in error; no opposing counsel.

Mr. Justice SWAYNE stated the case, and delivered the opinion of the court.

The case, as it appears in the record, is as follows: On the 1st of January, 1870, the plaintiff in error instituted this suit against the defendant in error upon a promissory note, made by the latter to the former, dated March 28th, 1864, for $7219.47, payable on the 19th of March then next ensuing. The defendant interposed two pleas:

1st. That after the maturity of the note he had tendered payment in Confederate treasury notes.

2d. That he was a loser by the result of the late war against the United States of one hundred negroes worth $50,000, and of Confederate securities of the value of $20,000; that he was a citizen of the Confederate States who waged and carried on that war, and that he pleads those losses as an offset to the demand of the plaintiff to the amount of the principal and interest of that demand.

When the case was called on the calendar the defendant moved the court to dismiss it, because the plaintiff had not filed an affidavit of the payment of the taxes upon the note as required by the act of the legislature of Georgia of the 13th of October, 1870. The plaintiff objected upon several grounds. The court overruled his objection, and dismissed the case. The plaintiff thereupon removed it to the Supreme Court of the State. That court affirmed the judgment of the court below.

Case stated in the opinion.

The first and second sections of the act referred to are as follows:

"SECTION 1. That in all suits pending, or hereafter brought, in or before any court of the State, founded upon any debt or contract or cause of action made or implied before the 1st June, 1865, or upon any other debt or contract in renewal thereof, it shall not be lawful for the plaintiff to have a verdict or judgment in his favor, unless he has made it clearly to appear before the tribunal trying the same that all legal taxes chargeable by law upon the same *have been duly paid for each year* since the making or implying of said debt or contract.

"SECTION 2. In any suit now pending, or hereafter brought, it shall be the duty of the plaintiff, within six months after the passage of this act, if the suit be pending, and at the filing of the writ, if the suit be hereafter brought, to file with the clerk of the court of justice an affidavit, if the suit was founded on any debt or contract as described in section one, that all legal charges chargeable by law upon such debt or contract *have been duly paid*, or the income thereon *for each year since the making of the same*, and that he expects to prove the same upon the trial; and, upon failure to file such affidavit as herein required, said suit shall, on motion, be dismissed."

The fourth section declares it to be a condition precedent to a recovery that "the said debt has been *regularly* given *in for taxes*, and the taxes paid."

The fifth section provides, in respect of judgments already rendered, that no levy or sale shall be made unless an affidavit be made that all taxes "have been duly paid from the time of making said contract to the time of attaching the affidavit."

The sixth section provides that in all cases of indebtedness of this class the defendant may offset "any losses he may have suffered by, or in consequence of, the late war against the United States," whether the said losses "be from the destruction or *depreciation* of property."

The seventh section declares that these damages shall not be considered as "too remote or speculative, if it appear that they were fairly and legitimately produced, *directly or indirectly, by said war or the results thereof.*"

The ninth section provides that these losses by the war may be offset against judgments already rendered.

The fourteenth section provides that, as to such debts due to widows and minors, they are to be settled "upon the principles of equity, *taking into consideration the relative loss of property sustained by the plaintiff and defendant.*"

The fifteenth section provides that the provisions of the fourteenth are not to apply where the defendant is in possession of the property, for the purchase of which the said contract was entered into, with this proviso: that "the defendant may elect to give up the property in his possession for which such contract was entered into, and such election shall be the full discharge of such indebtedness."

The contract here in question is within the predicate of this act. It was made more than six years before the act was passed. The act was retrospective—denounced a penalty not before prescribed for the non-payment of taxes—and, if such delinquency had existed for a single year, confiscated the debt by making any remedy to enforce payment impossible. The denunciation and the penalty came together. There was no warning and there could be no escape. The purpose of the act was plainly not to collect back taxes—that was neither asked nor permitted as a means of purgation—but to bar the debt and discharge the debtor.

The act is not an *ex post facto* law only because that phrase in its legal sense is confined to *crimes* and their punishment.

The Constitution of the United States declares that no State shall pass any "law impairing the obligation of contracts."

These propositions may be considered consequent axioms in our jurisprudence:

The laws which exist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it. This embraces alike those which affect its validity, construction, discharge, and enforcement;

Nothing is more material to the obligation of a contract than the means of its enforcement. The ideas of validity

and remedy are inseparable, and both are parts of the obligation which is guaranteed by the Constitution against impairment;

The obligation of a contract "is the law which binds the parties to perform their agreement;"

Any impairment of the obligation of a contract—the degree of impairment is immaterial—is within the prohibition of the Constitution;

The States may change the remedy, provided no substantial right secured by the contract is impaired. Whenever such a result is produced by the act in question, to that extent it is void. The States are no more permitted to impair the efficacy of a contract in this way than to attack its vitality in any other manner. Against all assaults coming from that quarter, whatever guise they may assume, the contract is shielded by the Constitution. It must be left with the same force and effect, including the substantial means of enforcement, which existed when it was made. The guarantee of the Constitution gives it protection to that extent.*

The effect of these propositions upon the judgment before us requires but a single remark. A clearer case of a law impairing the obligation of a contract, within the meaning of the Constitution, can hardly occur.

The judgment of the Supreme Court of Georgia is REVERSED, and the cause will be remanded to that court with directions to enter a judgment of reversal, and then to proceed

IN CONFORMITY TO THIS OPINION.

RAILROAD COMPANY *v.* MANUFACTURING COMPANY.

1. When goods are delivered to a common carrier to be transported over his railroad to his depot in a place named, and there to be delivered to a second line of conveyance for transportation further on, the common-law liability of common carriers remains on the first carrier until he has

* Von Hoffman *v.* The City of Quincy, 4 Wallace, 535.

delivered the goods for transportation to the next one. His obligation, while the goods are in his depot, does not become that of a warehouseman.

2. The section in the charter of the Michigan Central Railroad Company, providing that the company shall not be responsible for goods on deposit in any of their depots "awaiting *delivery*," does not include goods in such depots awaiting *transportation;* but refers to such goods alone as have reached their final destination.
3. Although a common carrier may limit his common-law liability by special contract assented to by the consignor of the goods, an unsigned general notice printed on the back of a receipt does not amount to such a contract, though the receipt with such notice on it may have been taken by the consignor without dissent.
4. The court expresses itself against any further relaxation of the common-law liability of common carriers.

IN error to the Circuit Court for the District of Connecticut; the case being thus:

In October, 1865, at Jackson, a station on the Michigan Central Railroad, about seventy-five miles west of Detroit, one Bostwick delivered to the agent of the Michigan Central Railroad Company, for transportation, a quantity of wool consigned to the Mineral Springs Manufacturing Company, at Stafford, Connecticut, and took a receipt for its carriage, on the back of which was a notice that all goods and merchandise are at the risk of the owners while in the warehouses of the company, unless the loss or injury to them should happen through the negligence of the agents of the company.

The receipt and notice were as follows:

"MICHIGAN CENTRAL RAILROAD COMPANY,
"JACKSON, October 11th, 1865.

"Received from V. M. Bostwick, as consignor, the articles marked, numbered, and weighing as follows:

[Wool described.]

"To be transported over said railroad *to the depot*, in Detroit, and there to be delivered to ——, agent, or order, upon the payment of the charges thereon, *and subject to the rules and regulations established* by the company, a part of which notice is given on the back hereof. This receipt is not transferable.

"HASTINGS,
"Freight Agent."

The notice on the back was thus:

"The company will not be responsible *for damages occasioned by delays* from storms, accidents, *or other causes*, . . . and all goods and merchandise will be at the risk of the owners thereof *while in the company's warehouses, except such loss or injury as may arise from the negligence of the agents of the company.*"

Verbal instructions were given by Bostwick that the wool should be sent from Detroit to Buffalo, by lake, in steamboats, which instructions were embodied in a bill of lading sent with the wool. Although there were several lines of transportation from Detroit eastward by which the wool could have been sent, there was only one transportation line propelled by steam on the lakes, and this line was, and had been for some time, unable, in their regular course of business, to receive and transport the freight which had accumulated in large quantities at the railroad depot in Detroit. This accumulation of freight there, and the limited ability of the line of propellers to receive and transport it, were well known to the officers of the road, but neither the consignor, consignee, nor the station-master at Jackson, were informed on this subject. The wool was carried over the road to the depot in Detroit, and remained there for a period of six days, when it was destroyed by an accidental fire, not the result of any negligence on the company's part. During all the time the wool was in the depot it was *ready to be delivered* for further transportation to the carrier upon the route indicated.

In consequence of the loss the manufacturing company sued the railroad company. The charter of the company, which was pleaded and offered in evidence, contained a section thus:

"The said company may charge and collect a reasonable sum for storage upon all property which shall have been transported by them upon delivery thereof at any of their depots, and which shall have remained at any of their depots more than four days; *Provided*, that elsewhere than at their Detroit depot, the consignee shall have been notified if known, either personally or by

notice left at his place of business or residence, or by notice sent by mail, of the receipt of such property at least four days before any storage shall be charged, and at the Detroit depot such notice shall be given twenty-four hours (Sundays excepted) before any storage shall be charged; but such storage may be charged after the expiration of said twenty-four hours upon goods not taken away; *Provided*, that in all cases the said company shall be responsible for goods on deposit in any of their depots *awaiting delivery*, as warehousemen, and not as common carriers."

The controversy, of course, was as to the nature of the bailment when the fire took place. If the railroad company were to be considered as warehousemen at the time the wool was burned, they were not liable in the action, as the fire which caused its destruction was not the result of any negligence on their part. If, on the contrary, their duty as carriers had not ceased at the time of the accident, and there were no circumstances connected with the transaction which lessened the rigor of the rule applicable to that employment, they were responsible; carriers being substantially insurers of the property intrusted to their care.

The court was asked by the railroad company to charge the jury that its liability was the limited one of a warehouseman, importing only ordinary care. The court refused so to charge, and, on the contrary, charged that the railroad company were liable for the wool as common carriers, during its transportation from Jackson to Detroit, and after its arrival there, for such reasonable time as, according to their usual course of business, under the actual circumstances in which they held the wool, would enable them to deliver it to the next carrier in the line, but that the manufacturing company took the risk of the next carrier line not being ready and willing to take said wool, and submitted it to the jury to say whether under all the circumstances of the case in evidence before them, such reasonable time had elapsed before the occurrence of the fire.

The jury, under the instructions of the court, found that the railroad company were chargeable as carriers, and this writ of error was prosecuted to reverse that decision.

Argument for the carrier.

Mr. F. Chamberlin, for the plaintiff in error:

1. The railroad company was not liable even by the severe rule of the common law, and independently of the proviso in their charter, and of the notice.

The law on the subject is thus stated by Judge Story, in his work on bailments:

"If a carrier between A. and B. receives goods to be carried from A. to B., and thence forwarded by a distinct conveyance to C., as soon as he arrives with the goods at B. and deposits them in his warehouse there, his responsibility as *carrier* ceases, for that is the termination of his duty *as such. He then becomes as to the goods a mere warehouseman*, undertaking for their further transportation."*

The language of the same book in another place is equally pertinent and significant:†

"When the goods have arrived at the place of their fixed destination and are there deposited in the carrier's warehouse, to await the convenience of the owner in sending for them, *or for the purpose of being forwarded by some other carrier* to another place, then his duty as carrier ends on the arrival of the goods at his (the carrier's) warehouse, and his duty as warehouseman commences."

There is no difference which is of substance to the manufacturing company between goods to be delivered to the owner at their final destination and goods deliverable to the owner or his agent for further carriage.

The controlling fact is, that the plaintiff's duty *of carriage* is completed, and the goods are stored for the convenience of the owner. The office of the plaintiffs is in both cases the same, the carriage is the same, and the delivery to the person entitled to receive them is the same in the one case as in the other. If the goods are to go farther, by an independent line, the next carrier stands in place of the owner

* See. 538.

† See. 448; and see Garside *v.* Trent Navigation Co., 4 Term, 581, and Moore *v.* Michigan Central Railroad Co., 3 Michigan, 39.

or consignee, so far as the first carrier is concerned, and as soon as the function of carriage proper is performed, that is, in this case, as soon as we place them in the depot "ready to be delivered" over, they are "awaiting delivery."

There was indeed, in this case, no offer to deliver, as owing to their limited means of transportation, by the line of propellers, any such offer would have been a useless act. *Lex nemi rem cogit ad vana.*

If it be said that the railroad company knew of this inability of the line of propellers and should have not taken this wool, the answer is that as common carriers, having, themselves, ample means of carriage, the railroad company could not have declined to receive any goods to be carried so far as their line extended; that is to say, to Detroit. They were bound to take the wool to that point.

2. But if liable by the rules of the old common law, still by the very terms of the railroad company's charter, the company, while the wool should be in deposit in a depot "*awaiting* delivery," was not to be responsible as common carriers, but only as warehousemen. Now, this case is that while the wool was in the depot "*ready to be delivered*," &c., it was destroyed. This brings matters within the terms of the proviso, unless we raise a distinction—one which has no foundation in reason—between a case in which the goods are at the final terminus of their carriage, and this in which they were to be delivered to another carrier, selected by the defendant in error, for further carriage.

3. Independently of this, there was a notice, in plain terms, to the consignor, and this was the condition of the contract, that all goods and merchandise would be at the risk of the owners thereof, while in the company's warehouses, except such loss or injury as might arise from the negligence of the agents of the company. Now, the receipt without dissent by a consignor of a bill of lading, by which the carrier stipulates against liability for loss by fire, discharges the carrier from liability for such loss not caused by his own negligence. And in an action against the carrier, evidence is not admissible, in the absence of fraud, to

show that the consignor did not read the terms of the bill of lading.*

Since the case of *York Compy.* v. *Central Railroad Co.*,† in this court, it can no longer be doubted that the common-law liability of a carrier for the safe carriage of goods *may* be limited and qualified by special contract with the owner, provided that such special contract do not attempt to cover losses by negligence or misconduct.

Mr. A. P. Hyde, contra.

Mr. Justice DAVIS delivered the opinion of the court.

It is not necessary in the state of this record to go into the general subject of the duty of carriers in respect to goods in their custody which have arrived at their final destination. Different views have been entertained by different jurists of what the carrier is required to do when the transit is ended in order to terminate his liability, but there is not this difference of opinion in relation to the rule which is applicable while the property is in process of transportation from the place of its receipt to the place of its destination.

In such cases it is the duty of the carrier, in the absence of any special contract, to carry safely to the end of his line and to deliver to the next carrier in the route beyond. This rule of liability is adopted generally by the courts in this country, although in England, at the present time, and in some of the States of the Union, the disposition is to treat the obligation of the carrier who first receives the goods as continuing throughout the entire route. It is unfortunate for the interests of commerce that there is any diversity of opinion on such a subject, especially in this country, but the rule that holds the carrier only liable to the extent of his own route, and for the safe storage and delivery to the next carrier, is in itself so just and reasonable that we do not hesitate to give it our sanction. Public policy, however, requires that the rule should be enforced, and will not allow

* Grace *v.* Adams, 100 Massachusetts, 505.

† 3 Wallace, 107.

the carrier to escape responsibility on storing the goods at the end of his route, without delivery or an attempt to deliver to the connecting carrier. If there be a necessity for storage it will be considered a mere accessory to the transportation, and not as changing the nature of the bailment. It is very clear that the simple deposit of the goods by the carrier in his depot, unaccompanied by any act indicating an intention to renounce the obligation of a carrier, will not change or modify even his liability. It may be that circumstances may arise after the goods have reached the depot which would justify the carrier in warehousing them, but if he had reasonable grounds to anticipate the occurrence of these adverse circumstances when he received the goods, he cannot by storing them change his relation towards them.

Testing the case in hand by these well-settled principles, it is apparent that the plaintiffs in error are not relieved of their proper responsibility, unless through the provisions of their charter, or by the terms of the receipt which was given when they received the wool. They neither delivered nor offered to deliver the wool to the propeller company. Nor did they do any act manifesting an intention to divest themselves of the character of carrier and assume that of forwarder.

It is insisted that the offer to deliver would have been a useless act, because of the inability of the line of propellers, with their means of transportation, to receive and transport the freight which had already accumulated at the Michigan Central depot for shipment by lake. One answer to this proposition is, that the company had no right to assume, in discharge of its obligation to this defendant, that an offer to deliver this particular shipment would have been met by a refusal to receive. Apart from this, how can the company set up, by way of defence, this limited ability of the propeller line when the officers of the road knew of it at the time the contract of carriage was entered into, and the other party to the contract had no information on the subject?

It is said, in reply to this objection, that the company

could not have refused to receive the wool, having ample means of carriage, although it knew the line beyond Detroit selected by the shipper was not at the time in a situation to receive and transport it. It is true the company were obliged to carry for all persons, without favor, in the regular course of business, but this obligation did not dispense with a corresponding obligation on its part to inform the shipper of any unavoidable circumstances existing at the termination of its own route in the way of a prompt delivery to the carrier next in line. This is especially so when, as in this case, there were other lines of transportation from Detroit eastward by which the wool, without delay, could have been forwarded to its place of destination. Had the shipper at Jackson been informed, at the time, of the serious hindrances at Detroit, to the speedy transit of goods by the lake, it is fair to infer, as a reasonable man, he would have given a different direction to his property. Common fairness requires that at least he should have been told of the condition of things there, and thus left free to choose, if he saw fit, another mode of conveyance. If this had been done there would be some plausibility in the position that six days was an unreasonable time to require the railroad company to hold the wool as a common carrier for delivery. But under the circumstances of this case the company had no right to expect an earlier period for delivery, and cannot, therefore, complain of the response of the jury to the inquiry on this subject submitted to them by the Circuit Court.

It is earnestly argued that the plaintiffs in error are relieved from liability under a provision contained in one section of their charter,* if not by the rules of the common law.

But it is quite clear, on reading the whole section, that it refers to property which has reached its final destination, and is there awaiting delivery to its owner. If so, how can the proviso in question be made to apply to another and distinct class of property? To perform this office it must act independently of the rest of the section, and enlarge, rather

* See the section, *supra*, pp. 320–321.—REP.

than limit, the operation of it. This it cannot do, unless words are used which leave no doubt the legislature intended such an effect to be given to it.

It is argued, however, that there is no difference between goods to be delivered to the owner at their final destination and goods deliverable to the owner, or his agent, for further carriage. That in both cases, as soon as they are "ready to be delivered" over, they are "awaiting delivery." This position, although plausible, is not sound. There is a clear distinction, in our opinion, between property in a situation to be delivered over to the consignee on demand, and property on its way to a distant point to be taken thence by a connecting carrier. In the former case it may be said to be awaiting delivery; in the latter, to be awaiting transportation. And this distinction is recognized by the Supreme Court of Michigan in the case of the present plaintiffs in error against Hale.* The court in speaking on this subject say, "that goods are on deposit in the depots of the company, either awaiting transportation or awaiting delivery, and that the section (now under consideration) has reference only to goods which have been transported and placed in the company's depots for delivery to the consignee." To the same effect is a recent decision of the Court of Appeals of New York,† in a suit brought to recover for the loss of goods by the same fire that consumed the wool in this case, and which were marked for conveyance by the same line of propellers on Lake Erie.

It is insisted, however, by the plaintiffs in error, if they are not relieved from liability as carriers by the provisions of their charter, that the receipt taken by the consignor, without dissent, at the time the wool was received, discharges them. The position is, that the unsigned notice printed on the back of the receipt is a part of it, and that, taken together, they amount to a contract binding on the defendants in error.

* 6 Michigan, 243.

† Mills *v.* Michigan Central Railroad Co., 45 New York, 626.

This notice is general, and not confined, as in the section of the charter we have considered, to goods on deposit in the depots of the company awaiting delivery. It is a distinct announcement that all goods and merchandise are at the risk of the owners thereof while in the company's warehouses, except for such loss or injury as may arise from the negligence of the agents of the company. The notice was, doubtless, intended to secure immunity for all losses not caused by negligence or misconduct during the time the property remained in the depots of the company, whether for transportation on their own line, or beyond, or for delivery to consignees. And such will be its effect if the party taking the receipt for his property is concluded by it. The question is, therefore, presented for decision whether such a notice is effectual to accomplish the purpose for which it was issued.

Whether a carrier when charged upon his common-law responsibility can discharge himself from it by special contract, assented to by the owner, is not an open question in this court since the cases of *The New Jersey Steam Navigation Company* v. *The Merchants' Bank*,* and *York Company* v. *Central Railroad*.† In both these cases the right of the carrier to restrict or diminish his general liability by special contract, which does not cover losses by negligence or misconduct, received the sanction of this court. In the former case the effect of a general notice by the carrier seeking to extinguish his peculiar liability was also considered, and although the remarks of the judge on the point were not necessary to the decision of the case, they furnish a correct exposition of the law on this much-controverted subject.

In speaking of the right of the carrier to restrict his obligation by a special agreement, the judge said: "It by no means follows that this can be done by an act of his own. The carrier is in the exercise of a sort of public office, from which he should not be permitted to exonerate himself without the assent of the parties concerned. And this is not to be implied or inferred from a general notice to the public

* 6 Howard, 344.

† 3 Wallace, 107.

limiting his obligation, which may, or may not, be assented to. He is bound to receive and carry all the goods offered for transportation, subject to all the responsibilities incident to his employment, and is liable to an action in case of refusal. If any implication is to be indulged from the delivery of the goods under the general notice, it is as strong that the owner intended to insist upon his rights and the duties of the carrier, as it is that he assented to their qualification. The burden of proof lies on the carrier, and nothing short of an express stipulation by parol or in writing should be permitted to discharge him from duties which the law has annexed to his employment."

These considerations against the relaxation of the common-law responsibility by public advertisements, apply with equal force to notices having the same object, attached to receipts given by carriers on taking the property of those who employ them into their possession for transportation. Both are attempts to obtain, by indirection, exemption from burdens imposed in the interests of trade upon this particular business. It is not only against the policy of the law, but a serious injury to commerce to allow the carrier to say that the shipper of merchandise assents to the terms proposed in a notice, whether it be general to the public or special to a particular person, merely because he does not expressly dissent from them. If the parties were on an equality in their dealings with each other there might be some show of reason for assuming acquiescence from silence, but in the nature of the case this equality does not exist, and, therefore, every intendment should be made in favor of the shipper when he takes a receipt for his property, with restrictive conditions annexed, and says nothing, that he intends to rely upon the law for the security of his rights.

It can readily be seen, if the carrier can reduce his liability in the way proposed, he can transact business on any terms he chooses to prescribe. The shipper, as a general thing, is not in a condition to contend with him as to terms, nor to wait the result of an action at law in case of refusal to carry unconditionally. Indeed such an action is seldom

resorted to, on account of the inability of the shipper to delay sending his goods forward. The law, in conceding to carriers the ability to obtain any reasonable qualification of their responsibility by express contract, has gone as far in this direction as public policy will allow. To relax still further the strict rules of common law applicable to them, by presuming acquiescence in the conditions on which they propose to carry freight when they have no right to impose them, would, in our opinion, work great harm to the business community.

The weight of authority is against the validity of the kind of notices we have been considering.* And many of the courts that have upheld them have done so with reluctance, but felt themselves bound by previous decisions. Still they have been continued, and this persistence has provoked legislation in Michigan, where this contract of carriage was made, and the plaintiffs in error have their existence. By an act of the legislature passed after the loss in this case occurred, it is declared "that no railroad company shall be permitted to change or limit its common-law liability as a common carrier by any contract or in any other manner, except by a written contract, none of which shall be printed, which shall be signed by the owner or shipper of the goods to be carried."†

It is fair to infer that this kind of legislation will not be confined to Michigan, if carriers continue to claim exemption from common-law liability through the medium of notices like the one presented in defence of this suit.

These views dispose of this case, and it is not necessary to notice particularly the instructions which the court below gave to the jury. If the court erred at all it was in charging more favorably for the plaintiffs in error than the facts of the case warranted.

JUDGMENT AFFIRMED.

* See 2 Parsons on Contracts, 238, note N, 5th edition; and the American note to Coggs *v.* Bernard, 1 Smith's Leading Cases, 7th American edition; Redfield Law of Railways, p. 369; McMillan *v.* M. S. & N. I. R. R. Co., 16 Michigan, p. 109, and following.

† Statutes of Michigan, Compilation of 1871, p. 783, § 2386.

Statement of the case.

COFIELD v. MCCLELLAND.

1. A bill to compel a conveyance from a person to whom the probate judge of Arapahoe County, Colorado Territory (in which county is situated Denver), had conveyed a lot in pursuance of the acts of Congress of May 23d, 1844, and May 28th, 1864, for the relief of the city of Denver, and of the act of Colorado Territory of March 11th, 1864, dismissed:
   1st. Because the defendant was in possession of the lot in question at the time of the passage of the act for the relief of the city of Denver, and at the time of the entry of the lands made by the probate judge, by means of which he became and was the party by law entitled to the deed from the probate judge; and,
   2d. Because the appellant, by omitting to sign and deliver the statement required by section four of the Territorial statute, became barred of the right to the lands, both in law and equity.
2. Notices required by statute presumed to have been given by a probate judge, he having made a conveyance of land which could have been properly made only after such notices given.

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

The city of Denver, which is in the county of Arapahoe, Colorado Territory, was originally laid out by a company or association of persons, on the public domain of the United States, before the same had been surveyed and became subject to entry. And the company was aided by the privileges of pre-emption, at the minimum price, being secured to settlers and occupants of lots by the general enactment of May 23d, 1844,* "for the relief of the citizens of the towns upon the lands of the United States under certain circumstances," and by a special enactment "for the relief of the citizens of Denver," of the 28th of May, 1864,† whereby the probate judge of the county was constituted a trustee to enter the land selected for the site of the town, when the same became subject to entry, and to pass the legal title to the settlers and occupants of lots, under rules and regulations prescribed by the legislative authority of the Territory of Colorado.

These acts being in force, the probate judge of Arapahoe

* 5 Stat. at Large, 657.

† 13 Id. 94.

County having, on the 6th of May, 1865, entered the town site under the acts referred to, on the 10th of May, 1865, and in accordance with the directions of a Territorial act of Colorado, of March 11th, 1864, advertised for four weeks thereafter in a weekly newspaper published at Denver (though whether also by posting notices in three public places in the town, which a Territorial act of Colorado required, did not appear, the judge himself being dead), the fact that he had made the said entry, and that all claimants of lots in the town should within ninety days present their claims to him.

Mrs. Louisa McClelland, then, as the evidence in the case went strongly to show, in occupation of lot No. 6, block 69, in Denver, and who had erected valuable improvements on it, and was then paying taxes upon it—all without apparent knowledge of any counter claim—accordingly presented her claim for the said lot, and there being no counter claim made to it by any one, the probate judge, on the 11th of August, 1865, conveyed the said lot to her. She being thus in possession, one Cofield, in April, 1869, filed a bill against her to compel a conveyance to him. The bill alleged an equitable title to the lot in the complainant by the occupation and possession; a prior settlement, to wit, by a certain Preston, in 1859, a conveyance by Preston to one Hall, and after several intermediate conveyances, by which the lot came to one Bates, a conveyance by Bates to the complainant in 1869.*

The court below having dismissed the bill, the complainant took this appeal.

Mr. J. M. Woolworth, for the appellant; Messrs. Bartley and Casey, contra.

Mr. Justice HUNT delivered the opinion of the court.

The territory upon which stands the city of Denver, Colorado, was entered upon, occupied, and possessed by numer-

* There was also an allegation of collusion with the probate judge, but this was denied on the answer being wholly disproved, and being put aside by the court, need not be noticed.

ous persons before the same was surveyed and had become subject to public entry. Occurrences like the one which gives rise to this bill seem to have been common, and the rights of the parties were protected and regulated by an act of Congress passed May 23d, 1844. A special act was also passed by Congress, on the 28th of May, 1864, "for the relief of the citizens of Denver." It is by the principles prescribed in these several statutes that the rights of the parties in this suit are to be determined.

The first of the acts to which reference has been made* authorizes the probate judge to enter at the proper land office the land settled and occupied by such occupants of a town or city. It is also enacted that such entry by him shall be "in trust for the several use and benefit of the occupants thereof according to their respective interests, the execution of which trust as to the disposal of the lots in such town, and the proceeds of the sale thereof, to be conducted under such rules and regulations as may be prescribed by the legislative authority of the State or Territory in which the same is situated."

The act "for the relief of the citizens of Denver, in the Territory of Colorado,"† authorizes "the probate judge of Arapahoe County to enter at the minimum price, in trust for the several use and benefit of the rightful occupants of said land, and the *bonâ fide* owners of the improvements thereon, according to their respective interests, the following legal subdivisions of land," describing certain specific divisions, of which the lot in question is a portion.

The act of the Territorial legislature of Colorado, passed March 11th, 1864, contained numerous provisions regulating the rights of settlers and the manner in which their rights shall be ascertained. The second section enacts that the title from the probate judge shall be in trust for and conveyed to "the person or persons who shall have, possess, or be entitled to the possession or occupancy thereof according

* May 23d, 1844, 5 Stat. at Large, 657.

† May 28th, 1864, 13 Stat. at Large, 94.

to his, her, or their respective rights or interest in the same, as they existed in law or equity, at the time of the entry of such lands, or to his, her, or their heirs or assigns."

This regulating act of the Territory is in harmony with the acts of Congress. It expresses more explicitly than do those acts, the statement that the occupation and possession which gives the right, is that which exists at the time of the entry of the lands by the probate judge. Those in possession of the land when the entry shall be made by the probate judge, are the persons for whom he holds the lands in trust, and to whom he is to make the respective deeds. Although less explicitly declared, this is the construction and meaning of the acts of Congress also.

The land on which the city of Denver stands was entered by the probate judge in May, 1865. The evidence is strong and quite convincing that at that date, as well as at the time of the passage of the enabling act (May, 1864), Mrs. McClelland, the defendant, was in the actual possession of lot No. 6, with valuable improvements made thereon, and paying the taxes on the same. Such must have been the conclusion of the court below, and we concur in it. The result is fatal to the plaintiff's right of recovery.

Again: Section three of the Territorial act, to which reference has been made, makes it the duty of the judge entering the land, within thirty days after such entry, by posting a notice in three public places and by publishing the same in a newspaper of the town, if there be one, to give notice of such entry. This notice is required to be published once in each week, for three weeks, and to contain an accurate description of the lands so entered. It was published by the probate judge in a newspaper published at Denver, for four weeks, commencing May 10th, 1865. The judge was not living at the time of the trial, and there was no evidence that the notice was posted in three public places in the town. We think this is a case in which the presumption applies that the officer has done his duty, especially as no provision was made in the act for procuring the evidence that notice had been published. The case comes within the rule so well

settled in this court, "that the legal presumption is that the surveyor, register, governor, secretary of state, have done their duty in regard to the several acts to be done by them in granting lands, and therefore surveys and patents are always received as *primâ facie* evidence of correctness."*

Section four of the Territorial act, to which reference has been made, enacts as follows:

"§ 4. Each and every person or association, or company of persons, claiming to be an occupant or occupants, or to have possession or to be entitled to the occupancy or possession of such lands, or to any lot, block, or share therein, shall, within ninety days after the first publication of such notice . . . sign a statement in writing, containing an accurate description of the particular parcel or parts of land in which he claims an interest, . . . and deliver the same into the office of the judge or judges, and all persons failing to sign and deliver such statement within the time specified in this section, shall be forever barred the right of claiming or recovering such lands or any interest or estate therein . . . in any court of law or equity."

No language could be more explicit to make the failure to deliver the statement within the time specified a bar, an absolute bar, to the recovery of the same, however strong might be the equitable claim to the land so lost.

This regulation is a reasonable one. In a crowded district, with a changing frontier population, it might well be required that the claim should be interposed at an early day.

It is not pretended that the appellant, or any one on his behalf, made the statement required by section four. Its absence bars his claim in every court either of law or equity.

For the two reasons stated—

1st. That the defendant below was in possession of the lot in question at the time of the passage of the act for the relief of the city of Denver and at the time of the entry of the lands made by the probate judge, by means of which she

* See the numerous cases cited in Cowen & Hill's Notes to Phillips's Evidence, note 174, "Presumptions."

became and was the party by law entitled to the deed from the probate judge; and,

2d. That the appellant, by omitting to sign and deliver the statement required by section four of the Territorial statute, became barred of the right to the lands, both in law and equity—

We are of the opinion that the judgment of the court below, dismissing the complaint, was correct, and that it must be

AFFIRMED.

RIPLEY v. INSURANCE COMPANY.

One took out an accident policy of insurance on his life while "travelling by public or private conveyance." Having performed a part of his journey by steamer, which brought him to a certain village, he *walked* thence home about eight miles. *Held*, that while thus walking, he was not travelling by either public or *private conveyance*.

ERROR to the Circuit Court for the Western District of Michigan; the case being this:

On the 8th of May, 1869, one Ripley took out an accident policy of insurance on his life, "good for one day," for $5000. It stipulated for the payment of that sum to the legal representatives of the assured, in the event of his death, from injuries effected through violent and accidental means; provided that the death was caused by an accident while the assured was "travelling by public or private *conveyance*."

After purchasing the ticket, the insured proceeded by steamboat to a village about eight miles from his residence, and from that village he *walked* home. While on his way he received injuries by violence, from the effects of which he died soon afterwards, and within the time limited by the policy.

The question was whether, when he received the injuries, he was "travelling by public or private *conveyance*." The court below held that he was not; and this holding was the error complained of.

Argument for the representatives of the insured.

Mr. George Gray, for the plaintiff in error:

In *Northrup* v. *The Railway Passengers' Assurance Company*,* the contract was against accident "while travelling by public or private conveyance," *provided for the transportation of its passengers.* Yet the company was held liable though the death was caused while the party was *walking* from a steamboat landing to a railway station, a distance of seventy rods. This case regards the walking as part of the original journey in the public or private conveyance, and wisely; for few persons on a long journey are all the time in the railcarriages. The case does but carry out the injunction given by Cockburn, C. J., in *Trew* v. *Railway Passengers' Assurance Company*:†

"We ought not to give to these policies a construction which will defeat the protection of the assured in a large class of cases."

But, independently of this. The words "private conveyance," reasonably, and *ex vi termini*, include the case of a person pursuing a journey, or travelling, by means of his own personal powers of locomotion; his limbs with their muscles and tendons, bones and joints—the primitive universal "private conveyance" of man. "Conveyance" is the instrument or means of carrying or transferring anything from place to place. It is derived from *con* (with, by, along), and *via* (the way).‡ It is used in this sense in the Scriptures, where it is said that the Saviour had "*conveyed himself* away."§ So in poetry,

> "Love cannot, like the wind, itself *convey*
> To fill two sails, though both are spread one way."
>
> *Howard.*

And so in ordinary language and in everyday life. Should a court direct its officer to "*convey* the prisoner to jail," no one will doubt that the prisoner's walking to the place des-

* 43 New York, 516; and see Theobald *v.* The Railway Passengers' Assurance Co., 26 English Law and Equity, 432.

† 30 L. J. Exchequer, 317. ‡ Webster. § John 5 : 13.

ignated would be a literal and exact compliance with the order. If one were to say to an intruder, "*Convey* yourself away," the speaker would have no idea but that the party should walk off; nor would the party himself expect that anything else was meant.

Mr. H. C. Robinson, contra.

The CHIEF JUSTICE delivered the opinion of the court.

That the deceased was *travelling* is clear enough, but was travelling on foot travelling by public or private conveyance?

The contract must receive the construction which the language used fairly warrants. What was the understanding of the parties, or, rather, what understanding must naturally have been derived from the language used? It seems to us that walking would not naturally be presented to the mind as a means of public or private conveyance. Public conveyance naturally suggests a vessel or vehicle employed in the general conveyance of passengers. Private conveyance suggests a vehicle belonging to a private individual.

If this was the sense in which the language was understood by the parties, the deceased was not, when injured, travelling, within the terms of the policy. There is nothing to show that it was not.

JUDGMENT AFFIRMED.

MERRILL *v.* PETTY.

An appeal on a libel *in personam* for a collision by the owners of a schooner against the owners of a sloop that had been sunk in the collision, dismissed; the decree having been for $1292.84, and, therefore, "not exceeding the sum or value of $2000." The fact that prior to this libel *in personam*, the owners of the sloop had filed in another district a libel *in rem* against the schooner, laying their damages at $4781.84, and that in the District and Circuit Courts below, both cases might have been heard as one (a fact asserted by counsel but not apparent in the record),

held not to affect the matter; the cases never having been brought into the same district or circuit, nor in any manner consolidated.

ON motion to dismiss an appeal from the Circuit Court for the Southern District of New York, the case was thus:

A schooner (the Mary Eveline) sailing down Hell Gate (towards New York), came into collision with a sloop (the Ethan Allen) sailing up (towards Connecticut), and sunk her. The owners of each vessel blamed the officers and crew of the other, and sought respectively relief in admiralty. The owners of the sloop which had been sunk, accordingly filed a libel, *in rem*, against the schooner in the *Southern* District of New York, claiming $3489; while there being no *res* for the owners of the schooner to proceed against—the sloop being at the bottom of the East River—the owners of the schooner were obliged to proceed personally against the *owners* of the sloop. This proceeding, which was for $2100 damages, they instituted in the *Eastern* District of New York; the suit of *Petty* v. *Merrill*.

Owing to the docket in the Eastern District being lighter than that in the Southern, the personal proceeding was reached first, when, as was said in one of the briefs in the case, and not denied in the other (though the fact thus alleged, and not denied, did not appear in the record), both cases by consent of counsel were heard together, on the same facts and the same proofs, without however any attempt to consolidate, in form, the two proceedings, or to transfer the proceeding in the Southern District into the Eastern one. However heard, the result of the matter was that the libel *in rem*, against the schooner (the proceeding in the Southern District), was dismissed *in that district*, while in the personal proceeding (that in the Eastern District) the owners of the sloop were there decreed guilty in $1792.84. Decrees were entered in the respective District Courts, accordingly. From both these decrees the owners of the sloop appealed to the respective Circuit Courts of the Southern and Eastern Districts.

When the cases got to the respective Circuit Courts, the

order of priority which had happened in the District Courts was reversed, and in the Circuit Courts the proceeding *in rem*—the one against the schooner (the case of *The Mary Eveline*)—was first called.* There again—more or less of necessity—the merits of both cases were again heard on the one appeal; and the Circuit Court for the Southern District was—as the District Courts in both had been before—of the opinion that the fault was with the sloop. It accordingly affirmed the decree in its own District Court; that is to say, it dismissed the libel.

When the appeal from the District Court of the Eastern District in the personal proceeding (*Petty* v. *Merrill*) came up to be heard in the Circuit Court for that district, the Circuit Court, deeming itself concluded by the decree in the proceeding *in rem*, in the Circuit Court for the Southern District, did not hear the merits anew; but examining the matter of damages, and reducing these to the extent of $500, entered a final decree for $1292.84.

From both the decrees—the one in the Southern Circuit, *The Mary Eveline*, and that in the Eastern, *Petty* v. *Merrill*—the owner of the sloop, Merrill, appealed.

The present motion to dismiss was in the appeal in the personal proceeding, that from the Eastern District; and was made on the ground that the amount did not exceed the sum of $2000, and, therefore, that no appeal lay.

The reader will of course remember that by the 22d section of the Judiciary Act, the jurisdiction of this court would attach only

"Where the matter in dispute exceeds the sum or value of $2000, exclusive of costs."

Mr. F. A. Wilcox, in support of the motion:

When judgment is obtained by a plaintiff or libellant the amount in dispute is the amount of the judgment, and that

* This happened because in the decree in the personal proceeding the matter had been referred to a master to assess damages; this delaying the appeal in the Eastern District.

decides the question of the right to appeal.* Here the judgment appealed from is less than $2000; it is but $1292.84.

Mr. R. H. Huntley, contra, and against the dismissal.

1. The libel in this case is in the nature of a cross-libel. Both actions are brought to recover damages for the same collision; the facts and the witnesses are the same; the question to be determined is the same, viz., "Which was the faulty vessel in the collision?" and both causes were tried together, and the merits of the collision in both have been argued as one.

2. The matter in dispute means the matter for which suit is brought, on which issue is joined, and in relation to which jurors are called and witnesses examined.†

3. In this case the amount in dispute is found by adding together $3489, the amount of libellant's claim in the cause of *The Mary Eveline*, the libel *in rem*, and $1292.84, the amount decreed by the Circuit Court to the libellants in the personal proceeding, the cause of *Petty* v. *Merrill*, making in all the sum of $4781.84.

4. No case can be cited, where a cross-libel had been filed and the damages litigated were over $2000, in which the court denied jurisdiction.

5. If this court decides that it has discretion to entertain this motion, then the proper exercise of that discretion will be to postpone the decision of this motion until the hearing of *The Mary Eveline*, the proceeding *in rem*.

Reply: Several claims, although the same defendant may have to pay them, cannot be added to make jurisdiction, although united in the same suit.‡

Mr. Justice CLIFFORD delivered the opinion of the court.

Power to re-examine the decrees of the Circuit Courts, removed there by appeal from the District Courts, was con-

* Phillips's Practice, 74.
† Lee *v.* Watson, 1 Wallace, 337.
‡ Rich *v.* Lambert, 12 Howard, 352; Oliver *v.* Alexander, 6 Peters, 143.

ferred upon this court by the 22d section of the Judiciary Act, where the matter in dispute exceeds the sum or value of $2000, exclusive of costs. Such decrees, however, could only be removed here under that act by virtue of a writ of error, but the subsequent act allowing the removal to be made by appeal in cases of equity, of admiralty, and maritime jurisdiction, and of prize or no prize, contains the same limitation that the matter in dispute "shall exceed the sum or value of $2000, exclusive of costs," and also provides that such appeals shall be subject to the same rules, regulations, and restrictions as are prescribed in law in case of writs of error.*

Damages are claimed by the libellants, as the owners of the schooner Mary Eveline, against the respondents, as the owners of the sloop Ethan Allen, in a case of collision civil and maritime. They allege in their libel that the collision occurred on the 20th of September, 1868, in East River, under the following circumstances: That the schooner was beating down the river bound for the port of New York, the tide being ebb and the wind about southwest; that she had taken the channel to the east of Blackwell's Island, another schooner being just ahead of her, sailing in the same direction; that the respective schooners had beaten out the tack to the eastward, running as near the west shore of Long Island as they could safely go; that the other schooner, being ahead, went about first on the westward tack, towards the other shore, and was just in the act of going about again on her eastward tack as the schooner of the libellants went about; that it became necessary for the schooner of the libellants, in order to avoid the other schooner, to go to the leeward and pass under the stern of the other schooner, as she was making her westward tack, and they allege that their schooner had just passed the stern of the other schooner when the sloop was seen sailing up the channel to the east-

* 1 Stat. at Large, 84; 2 Id. 244; The San Pedro, 2 Wheaton, 140; United States *v.* Goodwin, 7 Cranch, 111; Wiscart *v.* Dauchy, 3 Dallas, 328; The Sloop Betsey, 1b. 16; The Admiral, 3 Wallace, 612.

ward of Blackwell's Island, distant about a hundred yards on the port-bow of the schooner, sailing before the wind near the centre of the channel six or seven miles an hour, with her mainsail and jib set and going at full speed; that the schooner of the libellants was at that time going about and following the other schooner, with her head to the wind, with the head-sheets flowing and her helm hard-a-lee; that the sloop, instead of keeping out of the way, as she clearly should have done, by luffing and keeping off, as she was under full headway with her mainsail and jib set, ran into and against the schooner of the libellants, striking her cat-head against the stem of the schooner, knocking her fore-foot off and splitting the stem and doing other serious damage to the schooner; that owing to the sudden and confused orders given by those on board the sloop, keeping off and immediately luffing, it became impossible to avoid the collision, and that the same occurred wholly through the fault and negligence of the sloop and of those in charge of her navigation, and that it was not in any way the result of fault on the part of the schooner or of those in charge of her deck.

Service was made, and the respondents appeared and filed an answer, in which they allege that the circumstances attending the collision are not truly stated in the libel; that the collision did not occur through any fault, negligence, or mismanagement of the sloop, or of those in charge of her navigation, or through or by the sudden and confused orders given by her officers, as charged in the libel, but solely by reason of the fault, negligence, and mismanagement of those in charge of the schooner; that the sloop was sailing through East River on the east side of Blackwell's Island, against a strong ebb-tide, the wind being south-southwest, blowing a whole-sail breeze; that for the purpose of securing the benefit of an eddy-tide she was standing near the shore with her boom on her port-side; that while she was so standing on a steady course the two schooners were standing across the river on the same side of the island, to the westward; the foremost and windward of the two, having beaten out

her tack, went about just abreast of the sloop at a safe distance; that the other, though to the leeward, continued on her tack after the one ahead went about, and in such a position as entirely prevented the sloop from luffing or avoiding her in any other way; that she continued her course without change until she arrived at a point ahead of and off the starboard bow of the sloop, when she put her helm down to go about, and while in the act of luffing into the wind ran into and upon the sloop, striking her at the cat-head, on her starboard side, breaking and crushing in her planking, and causing her to sink in a few minutes, and that the sloop and her cargo became a total loss.

Testimony was taken on both sides, and the District Court, having heard the parties, entered a decretal order in favor of the libellants, and sent the cause to a commissioner to report the amount of the damages. He made a report, to which the respondents filed several exceptions, some of which were sustained and others were overruled, and the court entered a final decree for the libellants, as corrected, in the sum of $1292.84 damages, and costs of suit. Appeal was taken by the respondents to the Circuit Court, but the Circuit Court affirmed the decree and the respondents appealed to this court.

Since the appeal was entered in this court the libellants, as appellees, have filed a motion to dismiss the appeal, because the matter in dispute does not exceed the sum or value of $2000, exclusive of costs, as required by the 22d section of the Judiciary Act.

Much discussion of that question is certainly unnecessary, as the rule in this court has been settled for the period of sixty years, that where the writ of error is brought by the defendant in the original action, the matter in dispute is the amount of the judgment rendered in the Circuit Court, as this court can only affirm the judgment rendered in that court.*

* Gordon *v.* Ogden, 3 Peters, 34; Wise *v.* Turnpike Co., 7 Cranch, 276.

Attempt was subsequently made, it must be admitted, to call in question the rule established in those two cases, but this court reaffirmed the rule in the most authoritative manner, deciding as follows:

(1.) That the amount required is to be ascertained and determined by the sum in controversy at the time of the judgment in the Circuit Court, and not by any subsequent additions thereto, such as interest.

(2.) That where the plaintiff sues for an amount, exceeding $2000, if by reason of any erroneous ruling of the court below he recovers nothing, or less than that sum, the sum claimed by the plaintiff in his writ and declaration in that state of the case, is the sum in controversy for which a writ of error will lie.

(3.) That if the verdict is given against the defendant for a less sum than $2000, and judgment is rendered against him accordingly, that, in that state of the case, nothing is in controversy between him and the plaintiff, if the plaintiff acquiesces in the judgment, beyond the sum for which the judgment is given, and consequently the defendant is not entitled to any writ of error.*

Supported as the rule suggested is by an unbroken series of decisions throughout the period mentioned, it would seem to be a work of supererogation to attempt to enforce it by any extended argument, especially as the rule is a necessary deduction from the act of Congress which provides that such jurisdiction may be exercised by this court in the classes of cases mentioned, "where the matter in dispute exceeds the sum or value of $2000, exclusive of costs."

Congress, it is conceded, has not expressly enacted that final judgments and decrees in such cases shall not be re-examined here where the matter in dispute does not exceed

* Knapp *v.* Banks, 2 Howard, 73; Winston *v.* United States, 3 Id. 771; Rogers *v.* St. Charles, 19 Id. 112; Udall *v.* The Ohio, 17 Id. 17; Olney *v.* The Falcon, Ib. 19; Gruner *v.* United States, 11 Id. 163; Brown *v.* Shannon, 20 Id. 55; Oliver *v.* Alexander, 6 Peters, 143; Spear *v.* Place, 11 Howard, 522; Rich *v.* Lambert, 12 Id. 347; Clifton *v.* Sheldon, 23 Id. 481; Sampson *v.* Welsh, 24 Id. 207; Seaver *v.* Bigelows, 5 Wallace, 208.

the sum or value mentioned, but inasmuch as the appellate power of the court is conferred by the Constitution, with such exceptions and under such regulations as Congress shall make, the rule of construction is that the negative of any other jurisdiction in that respect is implied from the intent manifested by the affirmative description contained in that section of the Judiciary Act.*

Opposed to this conclusion is the statement in the answer that the respondents, before the present suit was commenced, filed a libel in the District Court for the Southern District of New York for the same collision against the schooner and all persons intervening in the suit, and the suggestion of the respondents in this suit is that the libel in this case is in the nature of a cross-libel, and that the amount in dispute should be ascertained by adding to the sum allowed as damages in the decree in this case the amount of the libellants' claim in the libel in the other case, which was filed and the decree entered in the District Court for another district in the same circuit. Various reasons are mentioned in argument to show that the suggestion of the respondents may be adopted, but none of them have the support of any authority, nor do the counsel refer to any case as a precedent to warrant such a proceeding. Some of the reasons given are as follows:

(1.) That it was agreed between the parties that the two cases should be heard together, but the record contains no evidence of such an agreement, and if it did it could not avail the respondents, as it is settled law that consent cannot give jurisdiction. Several cases† expressly decide that the agreement of the parties cannot authorize this court to revise a judgment of an inferior court in any other mode of proceeding than that which the law prescribes.‡

(2.) That the two cases were heard at the same time, before the District Court of the Eastern District, where this

* Durousseau *v.* United States, 6 Cranch, 318.

† Scott *v.* Sandford, 19 Howard, 393; Kelsey *v.* Forsyth, 21 Id. 85; Montgomery *v.* Anderson, 21 Id. 386.

‡ Mordecai *v.* Lindsay, 19 Id. 200.

libel was pending. But that was a mere oral arrangement between the parties to expedite a decision, which neither did nor could have the effect to withdraw the other libel from the jurisdiction of the District Court in which the suit was commenced. One was a proceeding *in rem* and the other was a suit *in personam*, and it does not appear that any attempt was made to consolidate them or to discontinue one and transfer it into the court where the other was pending. On the contrary, though they were both heard at the same time, it appears that separate decrees were entered, each in the respective District Court where the suit was commenced. Separate appeals were also taken by the losing party in the District Court where the decree was entered, and the two appeals were separately entered on the calendar of this court.

Two suits, commenced and prosecuted as described, cannot be blended in this court without an open violation of the rule laid down by the late Chief Justice Taney, that "parties cannot authorize this court to revise a judgment of an inferior court in any other mode of proceeding than that which the law prescribes."*

They were not heard together in the Circuit Court, as this suit was still before the commissioner, but the suggestion is that the merits in both suits were by consent discussed at the same time. Suppose that is so, still the fact remains that the respective decrees of affirmance were entered at different times and of course in the respective districts where the appeals from the respective District Courts were pending. Nothing was done to consolidate the suits and separate appeals were allowed to this court.

Evidently this court has no jurisdiction, as the matter in dispute, exclusive of costs, is less than $2000.

DISMISSED FOR WANT OF JURISDICTION.

[See the next case, in which it was decided that the fault was not with the sloop, but with the schooner; the decree from which the appeal in the preceding case was taken being thus practically reversed.]

* Kelsey *v.* Forsyth, 21 Howard, 88.

Statement of the case in the opinion.

THE MARY EVELINE.

1. Though a sailing vessel having the wind is *primâ facie* bound to adopt such a course as will prevent collision with other sailing vessels not having it, it is still the duty of these last in an emergency to make their courses so as not to render it difficult for the vessel having the wind to do her duty by rendering it doubtful what movement she should make.
2. This principle applied to a case where a vessel having the wind, in order to avoid a very strong tide (that in Hell Gate), was sailing so close to a shore wall that she could not safely have lessened the distance, and where the position of the other vessels in regard to a third vessel made it dangerous for the vessel having the wind to luff.
3. Under these circumstances the vessel having the wind *held* justified in having kept her course.

APPEAL from the Circuit Court for the Southern District of New York.

On the afternoon of September 20th, 1868, the sloop Ethan Allen and the schooner Mary Eveline came in collision while navigating the East River, near Blackwell's Island. The sloop was sunk and her cargo was lost. Her owners filed their libel against the schooner and her owners, claiming as damages the value of the sloop and her cargo. The libel was dismissed in the District Court, and the decree was affirmed in the Circuit Court. The libellants appealed to this court.

Mr. R. H. Huntley, for the appellants; Mr. F. A. Wilcox, contra.

Mr. Justice HUNT stated the case and delivered the opinion of the court.

The Ethan Allen was going eastward through Hell Gate, on her passage to some port in Connecticut. The wind was fresh and blowing from the southwest. She was running against a strong ebb-tide, and for the purpose of avoiding the strength of the tide was running close under the eastern shore of Blackwell's Island. Her hull was within about seventy-five feet of the wall of the island, and her sails on her port side came within twenty or thirty feet of the island.

Statement of the case in the opinion.

The Eveline was sailing in the opposite direction, towards New York, and was close in company with the schooner Hawley, the latter being ahead. The two schooners were beating up against the wind. On the last tack before the collision the Eveline was so close to the Hawley that when the latter tacked the former was obliged to keep off so as to go under the Hawley's stern. By the time the Eveline got well under way on the last tack the Hawley had crossed the river, and made her next tack near the Blackwell shore, and passed but a little way in front of the Allen. The Eveline passed on under the Hawley's stern, keeping off the wind for that purpose. As she luffed to go about she ran directly into the Allen, striking her on the starboard bow. The answer admits that the Eveline took a direction to the leeward and astern of the Hawley, and that she just cleared her stern. It alleges, also, that the collision occurred through the sudden and confused orders of the Allen, and especially in this: that she first kept off and then luffed, whereby it became impossible for the Eveline to avoid the collision. The *primâ facie* duty of avoiding the collision no doubt rested upon the vessel having the advantage of the wind. She was bound to adopt such course as would protect all the vessels, assuming that the other vessels would do their duty also. It was, however, the duty of the other vessels so to make their courses as not to render it embarrassing or difficult for the sloop to do her duty, or to make it doubtful what she should do in the emergency. The schooners were bound to take reasonable precautions on their part. The sloop, although having the wind, was not a guarantor against collision.

The channel was some 650 to 750 feet in width. The schooners were each 160 feet in length, occupying one half of the width of the channel. The Allen was close to Blackwell's Island. Her position there was not only the best for herself, but in thereby giving to the schooners nearly the whole of the channel, was the best position on their account. She kept steadily on her course as near to the island as she could safely pass. The vessels had been in sight for some time and each well understood the position of the other.

The answer alleges that the Allen should have avoided the difficulty by luffing or keeping off. It does not, however, specify which she should have done. Her hull was within seventy-five feet of the island wall, and her sails within twenty or thirty feet of the wall. This was, of itself, a hazardous proximity. It would have been very unsafe to have lessened this distance. The evidence is that she was running as close to the shore as it was safe for her to do. She could not, therefore, have kept off. If she had luffed, she would have brought herself out into the narrow channel, where the Hawley and the Eveline were both beating across in front of her, and the danger of a collision would have been much greater than by adopting the course she did.

We are of the opinion that, under the circumstances, the Allen did right in keeping her course, and that the fault was with the Eveline rather than with the Allen. If the Eveline had tacked when the Hawley did, she would have avoided the collision. This would have brought her out of the way, leaving the passage next to the island clear for the Allen. Again, she should not have changed her course by keeping away on the last tack, thus rendering necessary a larger sweep to go about and bringing her nearer to the Allen, when her course could not be changed. If she was at this point in a position of embarrassment it was her own fault. She saw it in advance, should have known it, and avoided it, by keeping further to the leeward of the Hawley, or by making her tack at an earlier period. She cannot shift upon another the consequence of an embarrassment produced by her own fault.

The captain of the Eveline did not expect the Allen to luff into the channel. He testifies that he supposed she would go to the Blackwell Island side, and that there was plenty of room for her there. He acted upon this theory, in which we think he was greatly in error, and the collision was the result.

On the most of the points of the case there is, as is usual in collision cases, a great conflict of evidence. Upon a care-

Statement of the case.

ful review of the testimony, we think the error was with the schooner Eveline, and that the libel should not have been dismissed.

DECREE REVERSED and record remitted with instructions to enter judgment for libellants, and for further proceedings

IN ACCORDANCE WITH THIS OPINION.

[See the preceding case.]

MARQUEZE *v.* BLOOM.

A case brought here as within the 25th section of the Judiciary Act dismissed; neither the record nor the opinion of the Supreme Court, which was in the records, showing any question before that court, except one relating to the interruption of a "prescription" (statute of limitations) set up as a defence, and the opinion showing that this question was decided exclusively upon the principles of the jurisprudence of the State.

ON motion to dismiss a writ of error to the Supreme Court of the State of Louisiana.

Marqueze & Co. brought this suit in the Fourth District Court of the Parish of Orleans, in Louisiana, on the 19th of April, 1866, against Bloom, Kahn, and Levi, trading as Bloom, Kahn & Co. The petition was for the recovery of money alleged to be due to the plaintiffs, for certain merchandise sold to the defendants during the first six months of 1861, amounting with interest, to $1045. The defendants, except Levi, pleaded the prescription of three years. Levi pleaded the same prescription, averring that at the time of the sale of the goods and since, until the commencement of the suit, he resided in the city of New Orleans. The District Court gave judgment against all the defendants. Levi alone appealed to the Supreme Court, and the judgment as to him was reversed.

The opinion of the Supreme Court was in the record, and it appeared that the only question before that court related

to the interruption of prescription, and that this was decided exclusively upon the principles of the jurisprudence of the State.

The CHIEF JUSTICE:

No Federal question is referred to in the record or in the opinion. We have, therefore, no jurisdiction of the case,* and the writ of error must be

DISMISSED.

McNITT *v.* TURNER.

1. Under the statute of Illinois authorizing the sale of the real estate of a decedent, and directing the executor or administrator to make out a petition to the county court "stating therein what real estate the said testator or intestate may have died *seized of*," a statement of the real estate which he died "*leaving*" is a sufficient compliance with the statute.
2. Where a statute of Illinois enacted that "in all cases where an intestate shall have been a non-resident or without a widow, &c., but having property in the State, administration should be granted to the public administrator of the proper county, and to no one else:" *Held*, that where a person to whom letters of administration on the estate of a non-resident applied, under the statute referred to in the paragraph above, to have a sale of his property, and the court, having jurisdiction of the subject, ordered the sale, it would not be presumed that he was not the *public* administrator.
3. Where, under the same statute (the one referred to in the first of the above two paragraphs), an administrator gave public notice that he meant to apply to have a power to sell the decedent's lands, stating that it belonged to him, and describing the several pieces in this way:

Parts of Sections.	Township.	Range.
S. E. 4	1 S.	4 W.
S. W. 24	3 N.	8 W.

"All the above lands being *recorded* north *or* south of the base line, and east and west of the fourth principal meridian."

And the petition prayed to sell the decedent's land, describing it as—

S. E. 4	1 S.	4 W.
S. W. 24	3 N.	8 W.

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* Gibson *v.* Chouteau, 8 Wallace, 314; Worthy *v.* The Commissioners, 9 Id. 613; Northern Railroad *v.* The People, 12 Id. 384.

Statement of the case.

Held, that the notice was correct, and the description in the petition, aided by the notice, sufficient.

4. A purchaser at judicial sale by an administrator, does not depend upon a return by the administrator making the sale, of what he has done. If the preliminary proceedings are correct, and he has the order of sale and the deed, this is sufficient for him.

5. Where jurisdiction has attached, whatever errors may occur subsequently in its exercise, the proceeding being *coram judice*, cannot be impeached collaterally except for fraud.

6. A purchaser at a judicial sale is a "purchaser" within the recording acts of Illinois, enacting that unrecorded deeds shall take effect as to "subsequent purchasers" without notice, after the time for filing the same for record, and not before.

Error to the Circuit Court for the Southern District of Illinois; the case being thus:

Turner, alleging that he "was possessed as of his own demesne in fee" of the same, brought *ejectment* against McNitt and another for a piece of land, "situate in the county of Brown, and State of Illinois," and described as follows, to wit:

"The southeast quarter of section four (4) in township one (1) south, of range four (4) west in said county of Brown."

Both plaintiff and defendant admitted title in one Samuel Spotts.

The plaintiff claimed through a decree of sale made on prior proceedings, by the Circuit Court of Adams County, Illinois, after Spotts's death. The validity of this title depended on the interpretation to be given to certain statutes, and on the validity of a certain notice, thus:

A statute of Illinois, relating to wills, enacts:*

"Section 51. In all cases where the intestate shall have been *a non-resident or* without a widow, next of kin, or creditors in this State, but having property within the State, administration shall be granted to the *public administrator* of the proper county, *and to no other person.*"

Another enactment provides:

"Section 98. When any executor or administrator, whose

* Gales's Statutes of Illinois, 698.

testator or intestate shall have died seized of any real estate in this State, shall discover or suspect that the personal estate of such testator or intestate is insufficient to pay the just claims against his or her estate, such executor or administrator shall, as soon as conveniently may be, make a just and true account of the said personal estate and debts, as far as he or she can discover the same, and shall make out a petition to the Circuit Court of the county in which administration shall have been granted, *stating therein what real estate the said testator or intestate died seized of*, or so much thereof as will be necessary to pay his or her debts as aforesaid, and to request the aid of the said court in the premises."*

SECTION 104 provides that the court shall examine the allegations and proofs, and if it appear that the personal estate is insufficient to pay the debts, the court shall direct the sale.

SECTION 105 provides that the conveyance made under the order of sale shall be effectual against all claiming through the intestate or his heirs.

SECTION 106 provides how the sales shall be made, imposes a penalty for selling contrary thereto, and declares that no irregularity in the sale shall affect the validity of the title.

With these provisions in force, Archibald Williams, to whom the probate justice for Adams County had granted, November 24th, 1837, letters of administration on the estate of Spotts, describing him as "of the city of New Orleans, Louisiana," gave in the Quincy Whig, for four weeks (the first publication being July 21st, 1838), the following

NOTICE.

"The subscriber, as *administrator* of the estate of Samuel Spotts, deceased, will make application to the Circuit Court of Adams County, and State of Illinois, at the next September Term thereof, for leave to sell the following real estate, belonging to the said Samuel Spotts, or so much thereof as will be sufficient to pay his debts, his personal estate being insufficient to pay the same. All persons interested in said estate are re-

* Gales's Statutes of Illinois, 711; Revised Statutes of Illinois of 1845, pp. 558, 559, §§ 103, 104, 105, 106.

quested to show cause, if any they have, why it should not be sold for the purposes aforesaid.

Parts of Sections.	Township.	Range.
S. E. 4	1 S.	4 W.
S. W. 24	3 N.	8 W.
S. W. 15	10 N.	3 E.
S. E. 26	13 S.	2 W.
N. W. 36	4 N.	6 W.
N. W. 23	5 N.	7 W.
S. W. 7	9 N.	5 E.*

"All of the above land being *recorded* north *or* south of the base line, and east and west of the fourth principal meridian.

"Archibald Williams,
"Administrator of Samuel Spotts, deceased."

The notice having been thus given, Williams presented a petition or "bill" to the Circuit Court of the said county of Adams, setting forth these letters, and setting forth that Spotts had died intestate before the 1st of January, A. D. 1836, "*leaving*" in Illinois certain real estate described in the copy of the inventory, marked Exhibit A, filed herewith.

[The inventory (purporting to be "an inventory of the real estate belonging to the *estate of Samuel Spotts, deceased,*") then set forth thirty-one quarter sections of land, described in this style:

S. E. 4	1 S.	4 W.
S. W. 24	3 N.	8 W.
S. W. 15	10 N.	3 E.
S. E. 26	13 S.	2 W.
N. W. 36	4 N.	6 W.
N. W. 23	5 N.	7 W.
S. W. 7	9 N.	5 E.]

The petition or "bill" further set forth personal property to the value of $5, and debts to the amount of $19,599, as appeared by an account thereof, annexed, and it prayed an order of sale of so much of the real property as would pay the debts.

* There were in all thirty-one quarter sections mentioned. The seven here given, show the style of the notice herein.

The bill was exhibited against no one by name; no persons were made parties to it. Proof being made to the court of the publication as above mentioned of the "Notice," the court, reciting "that it appeared to it that the allegations in the said bill were true, and that due publication had been made of the intention to apply to this court for permission to sell *the lands in the said bill mentioned*," decreed, September 14th—its September Term—1838, a sale of them, or of so much as would pay the debts. The administrator made no report of sales until the 30th of August, 1851. He then reported that he had, on the 17th day of June, 1839, in pursuance of the decree, sold thirty-one quarter sections of land, one of which was the "S. E. 4, 1 S. 4 W.," which was reported as sold to one Hennen.

Through this sale and a chain of mesne conveyances, beginning with the heirs-at-law of Hennen, it was that the plaintiff claimed.

It was proved that the premises were situated in what is known as "The Military Bounty Tract."

THE DEFENDANT claimed through a deed (to one John Lucas), made in Spotts's lifetime, that is to say, through a deed dated September 12th, 1820, which deed, however, had not been recorded until January 2d, 1864. Whether the deed was operative depended on the interpretation to be given to a statute in force, alike when the deed was made, when it was recorded, and now,* and which enacts:

"SECTION 22. Deeds and other instruments relating to or affecting title to real estate, shall be recorded in the county where such real estate is situated."

"SECTION 23. All deeds, mortgages or other instruments of writing, which are required to be recorded, shall take effect and be in force after the time of filing the same for record, *and not before*, as to all creditors and *subsequent* purchasers, without notice, and all such deeds and title-papers shall be adjudged *void* as to all such creditors *and subsequent purchasers without notice*, until the same shall be filed for record."

* Revised Statutes of Illinois of 1845, 108.

Argument for the plaintiff in error.

The court charged that the plaintiff, Turner, had shown title and was entitled to recover. The defendant excepted; the exception being in this general form:

"To which opinion and decision of the court the defendant then and there excepted at the time of the charge."

The defendants then asked the court to charge,

"(1.) That the deed from Spotts to Lucas and the subsequent deeds in that chain of title conveyed the fee of the premises in question to McNitt.

"(2.) That the deed from Spotts to Lucas having conveyed the premises to Lucas, Spotts did not die seized of them, and that they were therefore not liable to be sold by his administrator for the payment of his debts, and that the decree of sale was void.

"(3.) That Spotts having conveyed to Lucas before the proceeding in the Circuit Court of Adams County was instituted by Williams, no title passed by the deed of Williams to Hennen, and hence none by the subsequent mesne conveyances to Turner."

The court refused thus to charge, and the defendants again excepted.

Verdict and judgment having gone for the plaintiff, the defendants brought the case here.

Messrs. J. Grimshaw and O. H. Browning, for the plaintiff in error:

The proceeding in the court of Adams County was wholly *ex parte*. It does not show who Spotts's heirs were, or where they lived, or what their ages were. Though not stating that he left none, it wholly ignores the existence of any. No report of the sale was made until twelve years after it was made, if it was ever made. Where the sale was made is not stated. All this by way of preface to the argument.

1. The whole proceeding of converting realty into assets is a statutory and extraordinary one, and very dangerous to the rights of minors always. The 98th section of the statute relied on allows the sale by an administrator for debts only where the intestate has died *seized*. Seizin is a condition

precedent: and of course it must be averred in the petition that the party did die seized. Now—

1st. "Leaving" an estate is not equivalent to being "seized" of it. There are many rights in land inferior to "seizin." Indeed, a party may be *dis*seized and yet own an estate, which he may recover by writ. Such an estate he would "leave" though not seized of it; nay, though *dis*seized of it. There is the greatest reason then for following the words of the statute.

2d. But if "dying seized of land" were synonymous with "leaving" it, how then?

As a matter of fact, Spotts did not die leaving this land. He had conveyed to Lucas years before he died. The fact of his conveyance is not denied. It is no answer to say that purchasers at judicial sale are "purchasers" within the meaning of the 23d section of the act relating to the recording of deeds. Purchasers at properly conducted judicial sales are; but not purchasers at judicial sales that are void. Purchasers under the 98th section, authorizing administrators to make sale, are purchasers within the recording acts *only* when the conditions which the statute prescribes for such sale have existed. Seizin (or, if you please, for the sake of the argument, "leaving") is here one condition. But certainly when the sale was applied for, and even when it was ordered and in process of being made, the condition did not exist. Spotts had neither died "seized" of nor "leaving" the land. How does the condition come into existence, by the fall of the auctioneer's hammer and the execution of the deed? It cannot so come into existence. The attempted answer begs the whole question.

2. The intestate was a non-resident, a citizen of Louisiana. It does not appear that he had ever been in Illinois. Now, the 51st section of the statute relating to wills is imperative, that in such a case the probate judge must do one thing, and one thing only. He must grant administration to the public administrator. Williams was not the public administrator; though, as a matter of fact, it may be stated that there was one at that time. Williams's letters were for

Recapitulation of the case in the opinion.

the administration of this estate alone. They were plainly void under the statute.*

3. The only description given of the land in the petition, the exhibit filed therewith, the notice, the decree of sale, the report of sale in any of the papers connected with the case, is as follows: "S. E. 4, 1 S. 4 W.," to which it is fair to add the words, "in the State of Illinois," as the petition states that Spotts "died intestate, leaving in this State the real property described in the copy of the inventory marked Exhibit A." It was decreed against by the same description; advertised for sale by the same description; and by the same description sold and reported by the administrator.

Now, by what right does the purchaser of the "S. E. 4, 1 S. 4 W.," in the State of Illinois, claim the "southeast quarter of section four, in township one south, range four west, in Brown County, Illinois?"

No base-line, meridian, or county is mentioned in the description of the land in the proceedings in the Adams Circuit Court, though it is said that they are "*recorded* north *or* south of the base-line," &c. But the court will take judicial notice that there are, in Illinois, different base-lines and meridians, and that there is a quarter section of land in Brown County and another in Washington County which equally answers to the description given in the petition, and other proceedings, viz.: "S. E. 4, 1 S. 4 W., in the State of Illinois." Which was intended, the court cannot tell. There is an ambiguity; but, as it was not raised by evidence, it cannot be removed by evidence. It is inherent in the description, is patent, and the decree and the sale are alike void.†

Messrs. Skinner, Marsh, and Frost, contra.

Mr. Justice SWAYNE delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the Southern District of Illinois.

* Case of the Marshalsea, 10 Reports, 76; Wales *v.* Willard, 2 Massachusetts, 120.

† White *v.* Herman, 51 Illinois, 244.

Recapitulation of the case in the opinion.

The defendant in error brought two separate actions of ejectment in the court below, one against each of the plaintiffs in error. They were landlord and tenant, and by consent of the parties the actions were consolidated. The plaintiff recovered the premises in controversy. The defendants thereupon brought this writ of error.

The chain of title relied upon by the respective parties was as follows: Turner gave in evidence a patent from the United States to Louis F. Lefay, dated October 23d, 1818; a deed from Lefay to Samuel Spotts, dated December 19th, 1818, and recorded in the proper county March 22d, 1820; the proceedings of the Circuit Court of Adams County, in Illinois, touching a decree of sale made by that court upon the application of Archibald Williams as the administrator of Spotts, and a sale made accordingly; a deed by the administrator to Duncan N. Hennen, the purchaser, dated June 17th, 1839, recorded April 3d, 1841; and a chain of mesne conveyances extending from the heirs-at-law of Hennen down to Turner, the plaintiff in the court below.

The defendants gave in evidence a deed from Spotts to John Lucas, dated September 12th, 1820, recorded January 2d, 1864, and a sequence of deeds from Lucas down to McNitt, one of the plaintiffs in error. McNitt was in possession of the premises.

The court instructed the jury that Turner had shown title, and was entitled to recover. To this the defendants excepted.

The defendants then asked the court to instruct the jury:

That the deed from Spotts to Lucas and the subsequent deeds in that chain of title conveyed the fee of the premises to McNitt.

That the deed from Spotts to Lucas having conveyed the premises to Lucas, Spotts did not die seized of them, that they were therefore not liable to be sold by his administrator for the payment of his debts, and that the decree of sale was void.

That Spotts having conveyed to Lucas before the proceeding in the Circuit Court of Adams County was instituted by

Williams, no title passed by the deed of Williams to Hennen, and hence none by the subsequent mesne conveyances to Turner.

These instructions the court refused to give, and the defendants excepted.

A few remarks will be sufficient to dispose of this exception. All the instructions relate to the deed of Spotts to Lucas.

The decree of sale was made by the court at the September term, 1838. The sale to Hennen was made on the 17th of June, 1839. The deed of Williams to him was made on the 17th of June, 1839, and recorded April 3d, 1841. The deed of Spotts to Lucas, though made on the 12th of September, 1820, was not recorded until January 2d, 1864. The 22d section of statute of Illinois, in force at both these periods and still in force, provides that "deeds and other instruments relating to or affecting title to real estate shall be recorded in the county where such real estate is situated." The next section is as follows: "Sec. 23. All deeds, mortgages, or other instruments of writing, which are required to be recorded, shall take effect and be in force after the time of filing the same for record, *and not before* as to all creditors and *subsequent* purchasers, without notice, and all such deeds and title-papers shall be adjudged *void* as to all such creditors *and subsequent purchasers without notice* until the same shall be filed for record."

The term "purchasers" as used in this statute includes purchasers at judicial sales. A deed not filed for record is as to them wholly without effect. It is in all respects, so far as they are concerned, as if it did not exist. The maxim applies, *De non apparentibus et de non existentibus eadem est ratio.**

Seizin was originally the completion of the feudal investiture. In American jurisprudence it means, generally, own-

* Martin *v.* Dryden, 1 Gilman, 187; Curtis *v.* Root, 28 Illinois, 367; Cook *v.* Hall, 1 Gilman, 575; see also Choteau *v.* Jones, 11 Illinois, 300; Kennedy *v.* Northrup, 15 Id. 148; Brookfield *v.* Goodrich, 32 Id. 363.

ership. The covenant of seizin and the covenant of right to convey are synonymous.*

The deed from Spotts to Lucas cannot affect any question arising in the case, and must be excluded from consideration. All the instructions asked by the plaintiffs in error assumed its efficacy for the purposes to which they referred. The instructions were therefore properly refused.

It is assumed in the assignment of errors and in the printed arguments of the learned counsel for the plaintiffs in error, that the admission in evidence of the record from the Circuit Court of Adams County, was objected to, the objection overruled, and exception taken. No such exception appears in the record.

In an action of ejectment the plaintiff must recover, if at all, upon the strength of his own title. The weakness of his adversary's cannot avail him.

The only exception which remains to be considered is to the charge of the court, that the plaintiff had shown title in fee and was entitled to recover. That exception is thus set out in the record: "To which opinion and decision of the court the defendant then and there excepted, at the time of the said charge." The chain of the plaintiff's title, as exhibited on the trial, consisted of many links. The exception should have pointed out specifically the link or links deemed defective, and in what the defect was supposed to consist, in order that the court might be duly notified and have an opportunity to correct the error, if any, into which it had fallen. The exception is insufficient. But this objection has not been insisted upon by the counsel for the defendant in error. We shall, therefore, consider the case as if the exception were sufficiently full and specific to meet the requirements of the rule upon the subject.

The objections taken to the title of the defendant in error are all confined to the judicial proceedings touching the sale by the administrator. Those objections, so far as it is necessary to consider them, are—

* Rawle on Covenants for Title, 34; Browning *v.* Wright, 2 Bosanquet & Puller, 14; 1 Washburn on Real Property, 35.

That the seizin of Spotts, at the time of his decease, is neither averred nor shown; and that the contrary appears.

That the authority to sell was given to Williams, the administrator, specially appointed, when the general administrator for the county should have been appointed, and the authority given to him; and that the description of the premises in the petition of the administrator is insufficient and a nullity.

It is insisted that these defects are jurisdictional, and that the proceeding was *coram non judice* and void.

The petition sets forth "that the said Samuel Spotts heretofore, to wit, before the first day of January, A.D. 1836, died, *leaving* in this State the real property described in the copy of the inventory marked 'Exhibit A,' filed herewith." The term *leaving*, used in this connection, is the synonym of *owning*. It is idiomatic rather than dialectic, and is believed to obtain in this sense throughout the country where so applied. This is sufficient. Such a petition need not follow the language of the statute and be drawn with the accuracy of an indictment. Nothing is required but the substance of what is necessary to be stated, intelligibly expressed. The deed of Spotts to Lucas is relied upon to disprove the seizin. That deed, we have shown, can have no such effect. The record of deeds in the proper office, as it stood, showed the seizin of the decedent, and that was sufficient. No one was bound to look further, and it was conclusive upon all concerned.

It does not appear that Williams was not the public administrator, and if he were not, that there was any such officer for Adams County at that time. If there was not, the appointment of Williams was proper. Error must be shown. It is not to be inferred, except where the inference is inevitable. Everything consistent with the record which would have warranted the appointment, will be presumed to have existed and to have been found and acted upon by the court.* Acts done which presuppose the existence of

* Conrad Schnell et al. *v.* The City of Chicago, 38 Illinois, 382.

other acts, to make them legally operative, are presumptive proofs of the latter.* These views render it unnecessary to consider the construction of the statute contended for by the counsel for the defendant in error, whereby, in effect, *and* would be substituted for "*or*;" and also the question whether the statute, not declaring an appointment made contrary to its provisions void, is not merely directory.† It was certainly within the jurisdiction of the court to decide both these points. The form of the letters issued to the general administrator, and to other persons when appointed, is the same.‡

It is insisted that the description contained in the petition is so defective by reason of the omission to name the meridian east or west of which the land is situated, that its terms are equally applicable to another tract in another county. Admitting this to be so, it is averred in the petition, and shown by the evidence, that the tract in question belonged to Spotts, while no such fact appears as to the other tract, and it is not pretended that it exists. This is sufficient. The decree finds all the allegations of the petition to be true. Proof of the ownership by Spotts of the tract sold was admissible to locate the description upon the proper premises, and to remove the ambiguity which was found to exist. In the case of *Dougherty* v. *Purdy*,§ as in this case, the meridian was omitted in the description, and the ambiguity was the same as here.

The land is correctly described in the schedule attached to the notice of the intended application to the court for authority to sell. This might be resorted to, if necessary, to supply the defect in the petition subsequently filed.‖ It will be presumed that the land described in the petition is the same with that described in the notice, as the descriptions harmonize as far as the former extends. Under certain cir-

* Bank of the United States *v.* Dandridge, 12 Wheaton, 70.

† Sedgwick on Statutory and Common Law, 368.

‡ Gales's Statutes, 702, sec. 62.

§ 18 Illinois, 207.

‖ Schnell *v.* Chicago, 38 Illinois, 383.

cumstances an averment fatally defective in a declaration may be remedied by a fuller averment in the replication.*

It was proved upon the trial of this case that the premises are situated in the Military Bounty Tract. We take judicial notice of the fact that this entire tract is situated between the Illinois and Mississippi Rivers, and all of it west of the fourth principal meridian. This also identifies the land in question.† The judicial proceedings are not defective in the particular under consideration.

The deed of the administrator to Hennen, made pursuant to the sale, is correct. No exception was taken to it. The fact that the report of the sale by the administrator, found in the clerk's office after his death, was not filed, approved, and recorded until the 30th of May, 1851, is unimportant. In *Wheaton* v. *Sexton*,‡ there had been a sale under execution and a deed by the marshal. The execution was never returned. This court said: "The purchaser depends upon the judgment, the levy, and the deed. All other questions are between the parties to the judgment and the marshal. Whether the marshal sells before or after the return, whether he makes a correct return or any return at all to the writ, is immaterial to the purchaser, provided the writ was duly issued and the levy made before the return."

The notice was correct.§ This has not been seriously questioned. The word "recorded" in the sentence at the foot of the list of lands is evidently a misprint for *situated*. It may be so read or regarded as surplusage. In either case the effect will be the same.

But there is a comprehensive and more conclusive answer to all the objections to the sale which have been considered, and to others suggested which have not been adverted to.

Upon the filing of the notice with the proof of publication, and the subsequent filing of the petition of the administrator for authority to sell, the Circuit Court had jurisdiction of the case. No presumption on that subject is necessary.

* Lafayette Insurance Co. *v.* French, 18 Howard, 405.

† White *v.* Herman, 51 Illinois, 245. ‡ 4 Wheaton, 503.

§ Goudy *v.* Hall, 36 Illinois, 313.

Jurisdiction is authority to hear and determine. It is an axiomatic proposition that when jurisdiction has attached, whatever errors may subsequently occur in its exercise, the proceeding being *coram judice*, can be impeached collaterally only for fraud. In all other respects it is as conclusive as if it were irreversible in a proceeding for error. The order of sale before us is within this rule. *Grignon's Lessee* v. *Astor et al.** was, like this, a case of a sale by an administrator. In that case this court said: "The purchaser under it is not bound to look beyond the decree. If there is error in it of the most palpable kind, if the court which rendered it have, in the exercise of jurisdiction, disregarded, misconstrued, or disobeyed the plain provisions of the law which gave them the power to hear and determine the case before them, the title of the purchaser is as much protected as if the adjudication would stand the test of a writ of error; and so where an appeal is given, but not taken, in the time allowed by law." This case and the case of *Voorhees* v. *The Bank of the United States*† are the leading authorities in this court upon the subject. Other and later cases have followed and been controlled by them. *Stow* v. *Kimball*‡ affirms the same doctrine.

JUDGMENT AFFIRMED.

TAYLOR *v.* TAINTOR, TREASURER.

1. When the bail of a party arrested by order of a State court of one State on information for a crime, and released from custody under his own and his bail's recognizance that he will appear at a day fixed and abide the order and judgment of the court on process from which he has been arrested, have suffered him to go into another State, and while there he is, after the forfeiture of the recognizance, delivered up (under the second section of the fourth article of the Constitution and the act of February 12th, 1793, passed to give effect to it) on the requisition of the governor of a third State for a crime committed (without the knowledge of the bail) in *it*, and is tried, convicted, and imprisoned in such third State, the bail are not discharged from liability on their recogni-

* 2 Howard, 341. † 10 Peters, 449. ‡ 28 Illinois, 93.

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zance on suit by the State where the person was *first* arrested. There has been no such "act of the law" in the case as will discharge bail. The law which renders the performance impossible, and therefore excuses failure, must be a law operative in the State where the obligation was assumed, and obligatory in its effect upon her authorities.

2. The fact that there has been placed in the hands of the bail, by some one, not the person arrested nor any one in his behalf, nor so far as the bail knew, with his knowledge, a sum of money equivalent to that for which the bail and himself were bound, has no effect, in a suit against the bail, on the rights of the parties.

IN error to the Supreme Court of Errors of the State of Connecticut; in which court William Taylor, Barnabas Allen, and one Edward McGuire were plaintiffs in error, and Taintor, Treasurer of the State of Connecticut, was defendant in error. The case arose under that clause of the Federal Constitution* which ordains that

"A person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime,"

and under the act of Congress passed February 12th, 1793, to carry into effect this provision, and which makes it the duty of the executive of the State or Territory to which a person charged with one of the crimes mentioned has fled, upon proper demand to cause the fugitive to be arrested and delivered up.

Mr. M. W. Seymour, for the plaintiff in error; Messrs. S. B. Beardsley and N. L. White, contra.

Mr. Justice SWAYNE stated the facts of the case and delivered the opinion of the court.

This is a writ of error, issued under the 25th section of the Judiciary Act of 1789, to the Supreme Court of Errors of the State of Connecticut.

The attorney of the State for the county of Fairfield pre-

* Article 4, section 2.

Statement of the case in the opinion.

sented to the Superior Court for that county, at the August term, 1866, an information charging Edward McGuire with the crime of grand larceny. A bench warrant, returnable to the same term, was thereupon issued. McGuire was arrested and held in custody. The court fixed the amount of bail to be given at $8000. On the 24th of September, 1866, McGuire and the other plaintiffs in error entered into a recognizance to the defendant in error in that sum, conditioned that McGuire should appear before the Superior Court, to be held at Danbury, in Fairfield County, on the third Tuesday of October, 1866, to answer to the information before mentioned, and abide the order and judgment of the court. McGuire was thereupon released from custody. He failed to appear according to the condition of the recognizance, and it was duly forfeited on the 16th of October, 1866.

This suit was thereupon instituted in the Superior Court of Fairfield County to recover the amount of the obligation. The facts developed at the trial, and relied upon by the defendants to defeat the action were, according to the practice in that State, found and certified by the court, and became a part of the record. So far as it is necessary to state them, they are as follows:

After the recognizance was entered into McGuire went into the State of New York, where he belonged. While there, upon a requisition from the governor of Maine upon the governor of New York, he was seized by the legal officers of New York, and was by them forthwith, on the 19th of October, 1866, delivered over to the proper officers of the State of Maine, by whom he was immediately and against his will removed to that State. The requisition charged a burglary alleged to have been committed by McGuire in Maine before the recognizance in question in this case was taken. At the time of the forfeiture of the recognizance McGuire was, and he has been ever since, legally imprisoned in Maine. In June, 1867, he was tried there for the burglary charged in the requisition, and convicted and sentenced to confinement in the penitentiary for fifteen years,

and was, at the time of the trial of this case in the court below, serving out his time under that sentence. Neither of the sureties knew, when they entered into the recognizance, that there was any charge of crime against McGuire other than the one alleged in the information in Connecticut. If the testimony were admissible, the plaintiff proved that the sum of $8000 was placed in the hands of the sureties to indemnify them against the liability they assumed, and if the testimony were admissible, the sureties proved that the money was not placed in their hands by McGuire, nor by any one in his behalf; and that, so far as the sureties knew, it was done without his knowledge.

The Superior Court gave judgment for the plaintiff. The defendants thereupon removed the case to the Supreme Court of Errors for Fairfield County. That court affirmed the judgment, and the defendants thereupon brought this writ of error.

The fact that the sureties were indemnified was proper to be considered by the Superior Court upon an application for time to produce the body of McGuire.* But it could have no effect upon the rights of the parties in this action, and may therefore be laid out of view.

It is the settled law of this class of cases that the bail will be exonerated where the performance of the condition is rendered impossible by the act of God, the act of the obligee, or the act of the law.† Where the principal dies before the day of performance, the case is within the first category. Where the court before which the principal is bound to appear is abolished without qualification, the case is within the second. If the principal is arrested in the State where the obligation is given and sent out of the State by the governor, upon the requisition of the governor

* Bank of Geneva *v.* Reynolds, 12 Abbott's Practice Reports, 81; Same *v.* Reynolds et al., 20 Howard's Practice Reports, 18.

† People *v.* Bartlett, 3 Hill, 571; Coke Littleton, 206, *a;* Bacon's Abridgment, tit. "Conditions," (2); Viner's Abridgment, tit. "Condition," (Gc.) pl. 18, 19, and (I. c.) pl. 16; Hurlstone on Bonds, 48.

of another State, it is within the third.* In such cases the governor acts in his official character, and represents the sovereignty of the State in giving efficacy to the Constitution of the United States and the law of Congress. If he refuse, there is no means of compulsion.† But if he act, and the fugitive is surrendered, the State whence he is removed can no longer require his appearance before her tribunals, and all obligations which she has taken to secure that result thereupon at once, *ipso facto*, lose their binding effect. The authorities last referred to proceed upon this principle.

It is equally well settled that if the impossibility be created by the obligor or a stranger, the rights of the obligee will be in nowise affected.‡ And there is "a distinction between the act of the law proper and the act of the obligor, which exposes him to the control and action of the law."§ While the former exonerates, the latter gives no immunity. It is the willing act of the obligor which creates the obstacle, and the legal effect is the same as of any other act of his, which puts performance out of his power. This applies only where the accused has been convicted and sentenced. Before judgment—*non constat*—but that he may be innocent.

Where a State court and a court of the United States may each take jurisdiction, the tribunal which first gets it holds it to the exclusion of the other, until its duty is fully performed and the jurisdiction invoked is exhausted: and this rule applies alike in both civil and criminal cases.‖ It is indeed a principle of universal jurisprudence that where jurisdiction has attached to person or thing, it is—unless there is some provision to the contrary—exclusive in effect until it has wrought its function.

Where a demand is properly made by the governor of one

* State *v.* Allen, 2 Humphreys, 258; Devine *v* State, 5 Sneed, 626; State *v.* Adams, 3 Head. 260.

† Kentucky *v.* Dennison, 24 Howard, 66.

‡ People *v.* Bartlett, 3 Hill, 570.

§ United States *v.* Van Fossen, 1 Dillon, 409.

‖ Hagan *v.* Lucas, 10 Peters, 400; Taylor *v.* Carryl, 20 Howard, 584; Troutman's case, 4 Zabriskie, 634; Ex parte Jenkins & Crosson, 2 American Law Register, 144.

State upon the governor of another, the duty to surrender is not absolute and unqualified. It depends upon the circumstances of the case. If the laws of the latter State have been put in force against the fugitive, and he is imprisoned there, the demands of those laws may first be satisfied. The duty of obedience then arises, and not before. In the case of Troutman, cited *supra*, the accused was imprisoned in a civil case. It was held that he ought not to be delivered up until the imprisonment had legally come to an end. It was said that the Constitution and law refer to fugitives at large, in relation to whom there is no conflict of jurisdiction.

The law which renders the performance impossible, and therefore excuses failure, must be a law operative in the State where the obligation was assumed, and obligatory in its effect upon her authorities. If, after the instrument is executed, the principal is imprisoned in another State for the violation of a criminal law of that State, it will not avail to protect him or his sureties. Such is now the settled rule.*

When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge; and if that cannot be done at once, they may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue him into another State; may arrest him on the Sabbath; and, if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of new process. None is needed. It is likened to the rearrest by the sheriff of an escaping prisoner.† In 6 Modern‡ it is said: "The bail

* Withrow *v.* The Commonwealth, 1 Bush. (Kentucky), 17; United States *v.* Van Fossen, 1 Dillon, 406; Devine *v.* The State, 5 Sneed, 625; United States *v.* French, 1 Gallison, 1; Grant *v.* Fagan, 4 East, 190.

† 3 Blackstone's Commentaries, 290; Nicolls *v.* Ingersoll, 7 Johnson, 152; Ruggles *v.* Corry, 3 Connecticut, 84, 421; Respublica *v.* Gaoler, 2 Yeates, 263; 8 Pickering, 140; Boardman & Hunt *v.* Fowler, 1 Johnson's Cases, 413; Commonwealth *v.* Riddle, 1 Sergeant & Rawle, 311; Wheeler *v.* Wheeler, 7 Massachusetts, 169.

‡ Page 231, Case 339, Anon.

have their principal on a string, and may pull the string whenever they please, and render him in their discharge." The rights of the bail in civil and criminal cases are the same.* They may doubtless permit him to go beyond the limits of the State within which he is to answer, but it is unwise and imprudent to do so; and if any evil ensue, they must bear the burden of the consequences, and cannot cast them upon the obligee.†

In the case of *Devine* v. *The State*,‡ the court, speaking of the principal, say, "The sureties had the control of his person; they were bound at their peril to keep him within their jurisdiction, and to have his person ready to surrender when demanded. . . . In the case before us, the failure of the sureties to surrender their principal, was, in the view of the law, the result of their own negligence or connivance, in suffering their principal to go beyond the jurisdiction of the court and from under their control." The other authorities cited are to the same effect.

The plaintiffs in error were not entitled to be exonerated for several reasons:

When the recognizance was forfeited for the non-appearance of McGuire, the action of the governor of New York, pursuant to the requisition of the governor of Maine, had spent its force and had come to an end. McGuire was then held in custody under the law of Maine to answer to a criminal charge pending there against him. This, as already stated, cannot avail the plaintiffs in error. The shortness of the time that intervened between the arrest in New York and the imprisonment in Maine on the one hand, and the failure and forfeiture in Connecticut on the other, are entirely immaterial. Whether the time were longer or shorter—one year or one day—the legal principle involved is the same, and the legal result must be the same.

If McGuire had remained in Connecticut he would proba-

* Harp *v.* Osgood, 2 Hill, 218.

† Devine *v.* The State, 5 Sneed, 625; United States *v.* Von Fossen, 1 Dillon, 410; Respublica *v.* Gaoler, 2 Yeates, 265, cited *supra.*

‡ 5 Sneed, 625.

bly not have been delivered over to the authorities of Maine, and would not, therefore, have been disabled to fulfil the condition of his obligation. If the demand had been made upon the governor of Connecticut, he might properly have declined to comply until the criminal justice of his own State had been satisfied. This right, it is not to be doubted, he would have exercised. Had he failed to do so, the obligation of the recognizance would have been released. The plaintiffs in error are in fault for the departure from Connecticut, and they must take the consequences. But their fault reached further. Having permitted their principal to go to New York, it was their duty to be aware of his arrest when it occurred, and to interpose their claim to his custody.*

We have shown that when McGuire was arrested in New York the original imprisonment, under the information in Connecticut, was continued; that the bail had a right to seize him wherever they could find him; that the prosecution in Connecticut was still pending, and that the Superior Court having acquired jurisdiction, it could neither be arrested nor suspended *in invitum* by any other tribunal. Though beyond the jurisdiction of Connecticut, he was still through his bail in the hands of the law of that State, and held to answer there for the offence with which he was charged. Had the facts been made known to the executive of New York by the sureties at the proper time, it is to be presumed he would have ordered McGuire to be delivered to them and not to the authorities of Maine. The result is due, not to the Constitution and law of the United States, but to their own supineness and neglect. Under the circumstances they can have no standing in court to maintain this objection.

The act of the governor of New York, in making the surrender, was not "the act of the law" within the legal meaning of those terms; but in the view of the law was the act of McGuire himself. He violated the law of Maine, and thus put in motion the machinery provided to bring

* Alguire *v.* The Commonwealth, 3 Ben. Monroe, 349, 351.

him within the reach of the punishment denounced for his offence. But for this that machinery, so far as he was concerned, would have remained dormant. To hold that the surrender was the act of the law, in the sense contended for, would be as illogical as to insist that the blow of an instrument used in the commission of a crime of violence, is the act of the instrument and not of the criminal. It is true that in one case there would be a will and purpose as to the result in question, which would be wanting in the other, but there would be in both, the relation of cause and effect, and that is sufficient for the purposes of the analogy. The principal in the case before us, cannot be allowed to avail himself of an impossibility of performance thus created; and what will not avail him cannot avail his sureties. His contract is identical with theirs. They undertook for him what he undertook for himself.

The act of the governor of New York was the act of a stranger.

It is true that the constitutional provision and the law of Congress, under which the arrest and delivery were made, are obligatory upon every State and a part of the law of every State. But the duty enjoined is several and not joint; and every governor acts separately and independently for himself. There can be no joint demand and no joint neglect or refusal. In the event of refusal, the State making the demand must submit. There is no alternative. In the case of McGuire no impediment appeared to the governor of New York, and he properly yielded obedience. The governor of Connecticut, if applied to, might have rightfully postponed compliance. If advised in season he might have intervened and by a requisition have asserted the claim of Connecticut. It would then have been for the governor of New York to decide between the conflicting demands. Whatever the decision—if the proceedings were regular—it would have been conclusive. There could have been no review and no inquiry going behind it.* We cannot hold

* The matter of Clark, 9 Wendell, 221; Ex parte Jenkins & Crosson, *supra*, p. 370, note ‖.

that Connecticut was in any sense a party or consenting to what was done in New York. It follows that if McGuire had been held in custody in New York, at the time fixed for his appearance in Connecticut, it would not in anywise have affected the obligation of the recognizance.

A different doctrine would be fraught with mischief. It could hardly fail, by fraud and connivance, to lead frequently to abuses, involving the escape of offenders of a high grade, with pecuniary immunity to themselves and their sureties. Every violation of the criminal laws of a State is within the meaning of the Constitution, and may be made the foundation of a requisition.* Hence the facility of escape if this instrumentality could be used to effect that object. The rule we have announced guards against such results.

The supposed analogy between a surrender under a treaty providing for extradition and the surrender here in question has been earnestly pressed upon our attention. There, the act is done by the authorities of the nation—in behalf of the nation—pursuant to a National obligation. That obligation rests alike upon the people of all the States. A National exigency might require prompt affirmative action. In making the order of surrender, all the States, through their constituted agent, the General Government, are represented and concur, and it may well be said to be the act of each and all of them. Not so here.

The judgment of the Supreme Court of Errors of Connecticut is

AFFIRMED.

Mr. Justice DAVIS and Mr. Justice HUNT did not sit.

Mr. Justice FIELD (with whom concurred Mr. Justice CLIFFORD and Mr. Justice MILLER), dissenting.

I am unable to concur in the judgment rendered by the majority of the court in this case. I agree with them that sure-

* Kentucky *v.* Dennison, 24 Howard, 66; Certain Fugitives, 24 Law Magazine, 226.

ties on a recognizance can only be discharged from liability by the performance of the condition stipulated, unless that become impossible by the act of God, or of the law, or of the obligee. But I differ from them in the application of their term *act of the law*. If I understand correctly their opinion they limit the term to a proceeding authorized by a law enacted by the State where the recognizance was executed. I am of opinion that the term will also embrace a proceeding authorized by any law of the United States. A proceeding sanctioned by such law, which renders the performance of the condition of the recognizance impossible, ought, in my judgment, upon plain principles of justice and according to the authorities, to release the sureties.

The Constitution of the United States declares its own supremacy, and that of the laws made in pursuance of it, and of treaties contracted under the authority of the United States. As the supreme law of the land they are, of course, to be enforced and obeyed, however much they may interfere with the law or constitution of any State.

Now the Constitution provides that "a person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime."* The act of Congress of February 12th, 1793, was passed to carry into effect this provision, and has made it the duty of the executive of the State or Territory to which a person charged with one of the crimes mentioned has fled, upon proper demand to cause the fugitive to be arrested and delivered up. In pursuance of this act the principal on the recognizance in suit was arrested by order of the governor of New York, and delivered up as a fugitive from justice to the officers of the State of Maine. By them he was taken to that State, and having been previously indicted for a felony, was there tried, convicted, and sentenced to the penitentiary for fifteen years. Thus in the

* Article 4, section 2.

execution of a valid law of the United States, passed to carry out an express constitutional provision, the prisoner was taken against his will from the custody of his bail, and placed in the custody of officers of another State, from whom the bail could not recover him to make a surrender pursuant to the condition of their recognizance. It is no answer to say that the prisoner, when called in Connecticut, was detained by the State of Maine, and not by any proceeding or order under an act of Congress, because that proceeding or order had been executed, and was no longer operative. He was taken out of the custody and placed beyond the reach of his bail by a proceeding under the act, and therefore to such proceeding their inability to surrender him must be attributed.

The case is not essentially different from a surrender of a fugitive from justice under an extradition treaty. The United States have such treaties with several European nations, and whatever may have been the extravagant doctrines respecting the rights of the States, at one time in some parts of the country, it will not now be pretended that with the enforcement of such treaties any State, by her laws or judicial proceedings, can interfere. If the fugitive, after his arrival in this country, should commit a crime and be held to bail, it would be a question with the authorities of the General Government whether he should be surrendered under the treaty; but if surrendered it would be manifestly unjust to the bail to hold them to the performance of the conditions of the recognizance.

It seems to me that it would be a more just rule to hold, that whenever sureties on a recognizance are rendered unable to surrender their principal, because he has been taken from their custody without their assent, in the regular execution of a law or treaty of the United States, their inability thus created should constitute for their default a good and sufficient excuse. The execution of the laws and treaties of the United States should never be allowed in the courts of the United States to work oppression to any one.

INSURANCE COMPANY *v.* PIAGGIO.

1. A. brought suit on a policy on vessel and freight, for a total loss. The jury found the whole amount insured *with interest* and $5000 besides for damages, and judgment was entered accordingly. *Held*, that the party could not recover damages beyond legal interest, and that there was error on the face of the record.
2. The error *held*, however, not to require a *venire de novo*, but to be such that, under the "Act to further the administration of justice" (17 Stat. at Large, 197), the court could reverse the judgment and modify it by disallowing the $5000, and remanding the case with directions to enter judgment for the residue found by the jury with interest;—the case being one where all the facts were apparent in the record, though not by a special verdict in form.
3. It is not error to charge that a party assured had no right to abandon, when the insurers have accepted the abandonment.
4. Nor to refuse to charge that an abandonment made through error, and so accepted, is void if not warranted by the policy, when no evidence had been given of error by either side.
5. A judgment will not be reversed for want of a charge requested when the record contains no sufficient information that the charge requested was material to the issues.
6. Nor because the court charges in a way which, though right in the abstract, may not be so in application, when the record does not show that sufficient evidence had not been given to warrant the jury in passing on the question.

ERROR to the Circuit Court for the District of Louisiana, in which court Piaggio brought suit against the New Orleans Insurance Company for a total loss, under two policies of insurance: the one for $7000, on the brig Sicilia, and the other for $5000 on her freight.

The petition alleged that the brig, having sailed from New Orleans for Helsingfors, in the Gulf of Finland, July 20th, 1870, was compelled "by the perils of the seas *and unavoidable accidents*," to put into Matanzas, Cuba; that the plaintiff, upon news of the disaster, gave information to the insurers and asked whether he should abandon the vessel, and was advised so to do; that thereupon he abandoned to the insurers, and claimed for a total loss, and the abandonment was accepted.

Statement of the case.

It further alleged that the brig, while in the port of Matanzas, was driven ashore by a hurricane, and, with her cargo, wrecked and entirely lost.

It further alleged that the insurers promised to pay the insurance on freight, and informed the plaintiff that they would telegraph to their bankers in London to pay the same to the plaintiff's order, but that soon after they declined to pay or recognize the loss, and recalled their instructions for payment given to their bankers; that when the plaintiff was informed that the insurance on freight would be paid, he drew against the amount on his correspondent in Genoa, to whom he had transferred the certificate of insurance on freight; that his draft was protested, and thereby his credit injured and his business damaged to the extent of $15,000.

It further alleged that the defendants had *re*insured on this risk $10,000 with another company on the *cargo* of the vessel, and had paid to the said company the loss on said risk.

The plaintiff claimed the sums insured on the vessel and freight, and the damage of $15,000 with interest, for the non-payment.

The answer of the defendants put in issue, by denial, all the allegations of the petition, alleged that the policies were void for non-payment of premiums; that the brig was unseaworthy; that she put into Matanzas from unseaworthiness, and not from perils of the seas; and that there, the plaintiff's agents finding it impossible to raise money by bottomry to make her seaworthy, telegraphed a false account of her disasters, and that the defendants, trusting thereto, assented to abandonment, and, to accommodate the plaintiff, were willing to advance funds without waiting for the proofs and delays required by the policy; that learning the truth as to the abandonment, they revoked their acceptance of it, and declined to make the accommodation advances.

The answer then alleged that the policies were vitiated by the brig's deviation in voluntarily putting into Matanzas.

The policy set out in the plaintiff's petition contained clauses:

"Warranted not to use ports in the West India Islands between July 15th and October 15th.

"No loss except general average shall in any case be paid unless amounting to 75 per cent., after deducting proceeds of savings, if any, and exclusive of all charges of ascertaining and proving the loss."

On the trial the defendants requested the court to charge:

"1. That if the jury find that the plaintiff abandoned the voyage when he had no right to make the abandonment of the Sicilia, by reason of repairs needed, falling short of the 75 per cent. of valuation of said Sicilia, under the warranty of the policy on the hull, then the plaintiff cannot recover on the policy for the freight, and his abandonment of the freight-list to the insurers did not bind the latter."

"The court refused to give this charge because it was in proof that an abandonment had been made and accepted without fraud, and under and in accordance with the advice of the defendant."

"2. That an abandonment made by plaintiff through error, and accepted through error by the defendant, whether conditionally or unconditionally, is null and void, if not warranted at the time under the policy of insurance."

"This was refused as irrelevant; no evidence having been adduced of error by either party. The court therefore considered it to be merely a speculative instruction or charge."

"3. As the policy of insurance warrants that the insurers would be liable only for total loss, or constructive total loss, when the damage exceeded 75 per cent., if the jury find that the damage to the brig Sicilia, when in the port of Matanzas, did not exceed 75 per cent. of the value put on her in the policy after deductions stated in said policy, then the plaintiff had no right to make an abandonment."

"The court refused to give the charge because it was in proof that an abandonment had been made and accepted without fraud, and under and in accordance with the advice of the defendant."

"4. That the reinsurance by the defendants of the cargo of

the Sicilia to the amount of $10,000, which had been insured by another company, not being made in favor of the plaintiff, who was a total stranger to this transaction, has no connection with the issues raised as to the policy on the hull and freight of the Sicilia, and therefore can have no bearing on the decision of this jury; and that in the absence of proof as to the warranties in said insurance and reinsurance policies of $10,000 on the cargo, it is impossible to determine whether or not the payment and reimbursement of the said $10,000 were properly and correctly made; and that whether properly or improperly made that circumstance cannot militate either for or against either the plaintiff or defendant in the present controversy."

"The court refused to give the said charge;" no reason being assigned.

To these four refusals the defendants excepted.

The court charged (the defendants again excepting):

"That independent of the abandonment, if the jury believe there was an actual total loss by storm and disaster of the sea, the plaintiff has a right to recover."

The jury found a verdict in these words:

"That the plaintiff shall recover from defendants the sum of $7000 under his policy of insurance in the hull of the vessel; the sum of $5700, gold coin, under his policy of insurance in the freight-list; *together with interest on these two amounts*, as prayed for in his petition; ☞ and the further sum of $5000 damages, with interest at the rate of 5 per cent. from the date of judicial demand."

A motion to set aside the verdict and for a new trial being refused, the court thus entered its judgment:

"By reason of the verdict and in accordance therewith it is ordered, adjudged, and decreed, that the plaintiff do have and recover of the defendant the sum of $7000 under his policy on the hull of brig Sicilia; the sum of $5700, gold coin, under his policy on the freight-list; *together with 5 per cent. interest on said two sums from September 29th*, 1870, *till paid*; ☞ and the further sum of $5000 damages, with 5 per cent. interest from the 14th of December, the day of judicial demand, till paid, and costs of suit."

The return to this court did not contain any of the evidence given at the trial, which seemed to have occupied several days, with an examination of seven witnesses orally, and numerous documents.

The case came here by writ of error; on the following assignment of errors:

I. The allowance and computation in the judgment of damages, for non-payment of the freight insurance, to wit, $5000, and interest thereon, over and above the full sums insured in both policies and interest thereon.

II. The allowance and computation in the judgment of the loss under the vessel policy, notwithstanding the breach of the warranty against the use of West India ports in that policy, and the loss of the vessel in such a port during such breach.

III. The errors in the refusals to charge, and in the charge, as already set forth in the five bills of exceptions and the foregoing statement.

Mr. W. M. Evarts, for the plaintiff in error:

I. It is not necessary to argue, or adduce authorities for, the proposition that interest is the only damages for the simple non-payment of money according to duty, or to implied or express contract. That the allowance of $5000 as damages, over and above the insurance-moneys, *and interest* on them, was error, on the face of the record, and without any reference to any possible evidence or ruling at the trial, and that, for this error, the judgment below must be reversed, is indisputable.

II. As to the second ground for a new trial for error apparent upon the record, to wit: the breach of warranty, in the use of the West India port of Matanzas, and the wreck by a hurricane in that port, the only question seems to be as to the consequence of the absence from the record of any evidence bearing upon the point of this resort to the port of Matanzas being voluntary or under stress from perils insured against. But, on the face of the contract, a breach of its warranty arises by the resort to this West India port, and

the wreck from peril there supervening. The affirmative proof to defeat this consequence of this apparent breach of warranty is wholly wanting. Presumptively, no such proof was offered at the trial. It is not allowable for the plaintiff in error to incumber the record by *all the evidence at the trial* upon the motive and to the end of showing that no such proof was given. The defendant in error should have procured the presence of such evidence, if any was given at the trial, by the appropriate applications in the court below or in this court.

III. The errors exhibited on the bills of exception.

1st. The instruction asked for and refused, and made the occasion of the first bill of exceptions, was proper to be given, and the refusal to give it was error. The court put its refusal to give this instruction upon the single ground "that it was in proof that an abandonment had been made and accepted without fraud, and under and in accordance with the advice of the defendants." But this was in issue on the pleadings and proofs, and was the very thing to be passed upon by the jury. The court refused a proper instruction, on a question of law, by usurpation of the province of the jury, on a question of fact.

2d. The same observations, in substance, apply to the second bill. A proper instruction, as matter of law, is refused upon an assumption of a conclusion of fact, which belonged to the jury.

3d. The error under the third bill is of the same character as that under the first; the observations made upon that are applicable to this.

4th. The instruction asked for and refused was clearly proper, and the exception in the fourth bill was well taken. The evidence had been taken upon this extraneous transaction, and for the purpose of affecting the verdict of the jury, which it was well calculated to do. The court was rightly called upon to exclude this consideration from affecting the mind of the jury, unless it was, in law, a proper subject for their consideration in this case. It manifestly was not proper, as an element in the jury's conclusions in this case.

5th. The passage in the charge of the judge which is made the subject of the fifth bill, as an abstract and general proposition, may be unobjectionable. But, indisputably, the only "actual total loss by storms and disaster of the sea," was by the hurricane in the port of Matanzas, and this naked charge, applied to this state of facts, was equivalent to a peremptory charge that, without regard to the antecedent history of the voyage, or to the warranties of the policies, the plaintiffs had a right to recover for a total loss under both policies. But this depends upon the question whether the total wreck by the hurricane, in the port of Matanzas, was covered or not by the policies, as an original and independent cause of loss. And this depended upon the previous history of the voyage, and could only be disposed of by the verdict of the jury, under proper instructions from the court, covering these anterior considerations.

Mr. T. J. Durant, contra.

Mr. Justice CLIFFORD delivered the opinion of the court.

Due application was made by the plaintiff to the corporation defendants for a policy of insurance upon the brig Sicilia, of which he was the owner, and on the 11th of July, 1870, he effected with the defendants such a contract, for the period of one year, lost or not lost, the brig then lying in the port of New Orleans, whereby the defendants insured the vessel against the perils of the seas and other risks of her intended voyages, as more fully appears in the policy.

It also appears that the plaintiff, five days later, having freighted the brig with cotton for Helsingfors, in the Gulf of Finland, also effected insurance, with the defendants, upon her freight list for $5700, payable to his own order in gold, as shown by the certificate filed in the case, which represents and takes the place of a policy as fully as if the property was covered by such an instrument, issued direct to the holder of the certificate.

Well appointed and in good order and condition, the brig, on the 20th of the same month, left her port of departure

Restatement of the case in the opinion.

laden with a valuable cargo of cotton and properly officered and manned, but was subsequently compelled, by perils of the seas and unavoidable accidents, to put into the port of Matanzas, Cuba, in distress and disabled, for the security of the property concerned and the preservation of the lives of those on board [?], that being disabled and in want of repairs she remained in that harbor for that purpose, and that while there, and before her repairs were completed, she was driven ashore by a hurricane, and in spite of every exertion which could be made to save her, was wrecked, and, with her cargo, was entirely lost.

Payment of the sums insured being refused, the plaintiff instituted the present suit to recover the amount, claiming also $15,000 in addition thereto, as damages for the delay in fulfilling the contract. Testimony was taken, and the parties went to trial; and the jury, under the instructions of the court, returned a verdict for the plaintiff, and the defendants excepted and sued out the present writ of error.

By the terms of the policy, the brig was valued at $10,000, but the risk taken by the defendants on the vessel was only $7000, as appears by the policy.

Exceptions were taken by the defendants to the refusal of the court to instruct the jury, as requested, and to the instructions given by the court to the jury, and they also assign for error the finding by the jury, of $5000 damages, and the allowance of the same in the judgment of the court, and also, of the allowance in the judgment of the loss under the policy.

These allowances are specified in the verdict, substantially as follows: That the plaintiff shall recover the sum of $7000 under his policy on the vessel, the sum of $5700, gold coin, under his policy on the freight list, with interest, as prayed in his petition, and the further sum of $5000 damages, with interest at the rate of five per cent. from the date of judicial demand.

Judgment was rendered for the plaintiff, as follows: By reason of the verdict it is ordered, adjudged, and decreed that the plaintiff do have and recover the sum of $7000

under his policy on the brig, the sum of $5700, gold coin, under his policy on the freight list, together with five per cent. interest on said two sums from September 29th, 1870, till paid; and the further sum of $5000 damages, with five per cent. interest from the 14th of December, the day of judicial demand, till paid, and costs of suit.

Errors apparent in other parts of the record may be re-examined, as well as those which are shown in the bill or bills of exceptions, and it is too plain for argument that the verdict and judgment are a part of the record. Whenever the error is apparent in the record the rule is that it is open to re-examination, whether it be made to appear by bill of exceptions or in any other manner; and it is everywhere admitted that a writ of error will lie when a party is aggrieved by an error in the foundation, proceedings, judgment, or execution of a suit in a court of record.*

Damages were claimed by the plaintiff in this case for alleged loss on account of the failure of the defendants to make payments as stipulated in the policy, and it appears by the verdict that the jury awarded to the plaintiff $5000 on that account, in addition to lawful interest. Apart from that, it also appears that the court, in computing the judgment, allowed the same sum for the same claim.

Interest is allowable as damages in such a case from the time the payments were due, or from demand made, where the defendant refuses to account or make payment, but the plaintiff cannot recover special damages for the detention of money due to him beyond what the law allows as interest.† Where a principal sum is to be paid at a specific time, the law implies an agreement to make good the loss arising from a default by the payment of lawful interest.‡

* Suydam *v.* Williamson, 20 Howard, 433, 437; Bennett *v.* Butterworth, 11 Id. 669; Slacum *v.* Pomeroy, 6 Cranch, 221; Garland *v.* Davis, 4 Howard, 131; Cohens *v.* Virginia, 6 Wheaton, 410.

† Kendall *v.* Stokes, 3 Howard, 102; Pope *v.* Barret, 1 Mason, 117; Searight *v.* Calbraith, 4 Dallas, 325.

‡ Robinson *v.* Bland, 2 Burrows, 1086; Sedgwick on Damages, 4th ed., 434.

Opinion of the court.

Tested by these considerations, it is quite clear that the act of the jury in allowing the plaintiff $5000 for the detention of the money due under the policies, in addition to lawful interest, and the act of the Circuit Court in including that amount in the judgment, were erroneous; and inasmuch as the error is apparent both in the verdict and in the judgment, it is equally clear that it is a matter which is re-examinable in this court on a writ of error; and, having come to that conclusion, the only remaining inquiry in this connection is what disposition shall be made of the case.

Errors of the kind, it is insisted by the defendants, necessarily require that a new *venire* shall be ordered, but the act of Congress to further the administration of justice* provides that the appellate court may affirm, modify, or reverse the judgment, decree, or order brought before it for review, or may direct such judgment, decree, or order to be rendered, or such further proceedings to be had by the inferior court as the justice of the case may require; and in view of that provision the court is not inclined to adopt the course suggested by the defendants, as it would lead to unnecessary delay and expense.

Verdicts, it is said, are either general or special, and that if there is error in a case where the verdict is general it can only be corrected by a new trial, and it must be admitted that the rule as suggested finds much countenance in the text-books; nor will it be necessary to depart from that rule in the present case. Strictly speaking, a special verdict is where the jury find the facts of the case and refer the decision of the cause to the court, with a conditional conclusion, that if the court is of the opinion, upon the whole matter as found, that the plaintiff is entitled to recover, then the jury find for the plaintiff; but if otherwise, then they find for the defendant.†

Examples of special verdicts less formal, however, may be found, and the usual course is to sustain such verdicts if

* 17 Stat. at Large, 197.

† Mumford v. Wardell, 6 Wallace, 432; Suydam v. Williamson, 20 Howard, 432; 3 Blackstone's Commentaries, 377.

they contain all the facts necessary to a proper judgment between the parties in respect to the matter in controversy. Courts also, in the trial of issues of fact, often propound questions to a jury, and the rule is well settled that such a special finding, even when it is inconsistent with the general verdict, shall control in determining what judgment shall be rendered in the case.*

Undoubtedly a special verdict is erroneous if it does not find all the facts essential to the rendering of the judgment; but if it contain all the facts required for that purpose the better opinion is that the court of original jurisdiction may render such judgment as the facts found require, and if they err, and the error is apparent in the record, that such error may be re-examined on writ of error in this court.†

Confirmation of this view as the correct one is also derived from the act of Congress‡ which permits parties to waive a jury and submit the issues of fact, in civil cases, to the court, as the provision in that act is that the finding may be general or special, and that it shall have the same effect as the verdict of a jury. Special findings, under that provision, never have a conditional conclusion, and yet the review extends, by the express words of the act, to the determination of the sufficiency of the facts found to support the judgment.

All the facts are found in this case, and they are all apparent in the record, and inasmuch as the question to be determined is what judgment ought to be rendered on those facts, the court is of the opinion that it is not necessary to order a new *venire.*

Five bills of exceptions were tendered and allowed, as follows:

* Rambo *v.* Wyatt, 32 Alabama, 363; Fraschieris *v.* Henriques, 6 Abbott Practice Cases (N. S.), 263; Anonymous, 3 Salkeld, 373; Trust Company *v.* Harris, 2 Bosworth, 87; Adamson *v.* Rose, 30 Indiana, 383.

† O'Brien *v.* Palmer, 49 Illinois, 73; Manning *v.* Monaghan, 23 New York, 541; Seward *v.* Jackson, 8 Cowen, 406; Monkhouse *v.* Hay, 8 Price, 280; Moody *v.* McDonald, 4 California, 299; Langley *v.* Warner, 3 Comstock, 329; Moffet *v.* Sackett, 18 New York, 528.

‡ 13 Stat. at Large, 501.

(1.) Because the court refused to instruct the jury that if they found that the plaintiff abandoned the voyage when he had no right to make the abandonment under the policy, then the plaintiff cannot recover for the insurance on the freight list; but the bill of exceptions states that the court refused to give the charge because it was in proof that an abandonment had been made and accepted without fraud and in accordance with the advice of the defendants, which is all that need be said on the subject.

(2.) Because the court refused to charge the jury that an abandonment made by the plaintiff through error and accepted through error by the defendants, whether conditionally or unconditionally, is null and void, if not warranted at the time, under the policy of insurance; but the bill of exceptions states that the court refused so to instruct the jury because no evidence had been given to show error by either party, which is certainly a good reason for declining to give the instruction.*

(3.) Because the court refused to instruct the jury substantially as in the first request, and which was declined for the same reason.

(4.) Because the court refused to instruct the jury as requested in respect to a policy of reinsurance executed by the defendants on the cargo of the brig; but the record contains no sufficient information that such an instruction was material to the issues between the parties.

(5.) Because the court instructed the jury that, independent of the abandonment, if they believed there was an actual total loss, by storm and disaster of the sea, the plaintiff had a right to recover. Doubt cannot be entertained of the correctness of that instruction as an abstract proposition, and inasmuch as it is not stated in the bill of exceptions that evidence had not been given sufficient to warrant the jury in passing upon the question, it is plain that it furnishes no proper ground to reverse the judgment.

Deviation is also set up as a defence, but the record con-

* United States *v.* Breitling, 20 Howard, 252; Goodman *v.* Simonds, 20 Id. 359.

tains no evidence upon the subject, nor is any such question presented in any one of the bills of exceptions.

JUDGMENT REVERSED AND MODIFIED, by disallowing the sum of $5000 damages found by the jury and included in the judgment, and the interest allowed on the same, and the cause remanded with directions to enter a judgment for the plaintiff for the residue found by the jury, with interest.

BURKE *v.* SMITH.

The laws of a State required that before being organized, all railroad companies should have a subscription to their stock of not less than $50,000. Certain persons did subscribe more than this (to wit, $148,750), with a proviso, however, that if a certain city in its corporate capacity subscribed $50,000 or upwards, the city should accept what each of them had subscribed above a small sum ($300) named. The city did subscribe the $50,000, and much more ($400,000), when, A.D. 1853, the directors of the company—these directors being themselves persons who had subscribed part of the $148,750—passed a resolution authorizing the original subscribers to transfer to the city all stock subscribed by them over $300 each, and that the stock thus transferred be merged in the subscription made by the city.

As appeared by "an agreement of record," in which, without signature of anybody attached, it was certified by the clerk that it was admitted by the complainants *on the final hearing* that all the subscribers transferred, before July, 1854, their stock (above $300) to the city; that none of the original subscribers were ever charged on the books of the company with any greater amount than $300; that this sum had been paid by each, and accepted by the company in full satisfaction.

The company being insolvent in 1858, and the executions of creditors being then returned unsatisfied, the creditors of the company, in 1868, filed a bill against the original subscribers to make them pay up the excess over $300 which they had subscribed. *Held*,

1. That these subscribers could not be made liable for such excess.
2. That the proceeding being one in equity and not at law, the "agreement of record," though not made part of the record by the pleadings, would be regarded as evidence.
3. That it proved the transfer and acceptance of the stock by the city.
4. That the fact that the directors were original subscribers did not affect the case; the transfer having been in accordance with the conditions on which the original subscription was made, and in itself fair.

Statement of the case.

5. That independent of all this, the bill probably could not be maintained because of laches.

APPEAL from the Circuit Court for the District of Indiana, the case being thus:

Burke, Putnam, and others were the equitable owners of a judgment recovered in 1857 against the New Albany and Sandusky Railroad Company. Upon this judgment an execution was issued in 1858, which, on the 1st of December of that year, was returned "*nulla bona*." On the 29th of January, 1868, that is to say, about ten years after the execution had been thus returned unsatisfied, they brought the present suit. It was a bill in chancery against one Smith and some twenty-seven other defendants, and, alleging the insolvency of the company, it sought to subject to the payment of the judgment, rights which, it alleged, the company had against the said defendants. It averred that the defendants, on the 22d of August, 1853, under the general railroad laws of Indiana, organized the above-named railroad company and subscribed to its capital stock, severally, amounts which they had never paid, and the object of the bill was to compel the payment of the *debts* thus incurred, and the application of the payments to the satisfaction of the complainants' judgment. The facts were these:

On the 22d of August, 1853, under the general railroad laws of the State, the defendants, with others, united in forming articles of association for the incorporation of the New Albany and Sandusky Railroad Company, and severally subscribed to its capital stock in sums varying from $1000 to $5000. [The railroad laws referred to allow, it may be added, no organization of a road until at least $50,000, or $1000 for every mile of the proposed road, shall have been established.] The articles of association contained the following stipulation:

"*Provided*, however, and it is hereby understood, that if the city of New Albany, in its corporate capacity, shall hereafter take stock in this corporation to the amount of $50,000 or upwards, inasmuch as the present subscribers being residents of,

and owning property in said city, will then be under the necessity of contributing still further to the corporation by way of taxation, unless a portion of the present subscription is taken off their hands, the said city shall accept, in part of the amount to be subscribed in its corporate capacity, at its par value, a transfer of any amount of stock now subscribed for by each individual over and above the amount of six shares, or $300, which each such individual may desire or request shall be so transferred."

There were fifty-five original subscribers, and the aggregate amount of the subscriptions was $148,750. With such a subscription, and under such articles of association, the subscribers became a corporate body. After their incorporation the city of New Albany subscribed $400,000 to the capital stock of the company.* This subscription was made on the 19th of November, 1853, and on the 31st of December next following, the directors of the company adopted an order,

"That the original subscribers to the articles of association be permitted, in accordance with the stipulations contained in the articles, to transfer any amount of the stock so originally subscribed by them over and above the amount of six shares, or $300, to the city of New Albany; said city having made a subscription to the stock of said company to the amount of $50,000 and upwards, and that the stock thus transferred be merged in the subscription already made by said city, so that the stock of said city, under her present subscription, with the stock so transferred, shall not exceed $400,000 as subscribed by her."

The directors of the company, who made this order, were themselves subscribers, like the defendants, for more than six shares, or sums above $300.

So far, there was no controversy respecting the facts. And there was also an "agreement of record"—a document certified by the clerk of the court below, with the bill, answers, depositions, &c., as part of the full, *true*, and

* This subscription had not been paid in cash, but had been settled between the railroad company and the city by a compromise. See New Albany *v.* Burke, 11 Wallace, 98.—REP.

complete copy and transcript of the record and proceedings in the case—that the defendants transferred to the city of New Albany all the stock subscribed by them in excess of $300 for each, in compliance with the stipulation contained in the original articles of association; that the transfers were made before the 1st day of July, 1854; that none of these original subscribers were ever charged on the books of the railroad company with any greater amount of stock than $300; that the amount of stock charged against each (viz., $300) had been fully paid long before the filing of this bill, and when called by the company, and that such payments had been accepted by the company as full satisfaction of the respective subscriptions.

The question was, whether the defendants were debtors to the railroad company for any excess of their subscriptions above $300.

The court below was of opinion that they were not, and dismissed the bill against them.

The complainants appealed.

Messrs. Burke, Porter, and Harrison, for the appellants:

The defendants confessedly subscribed large sums to the stock of the road, and so organized it. By the laws of Indiana it could not have been otherwise organized. Having organized it and given it the power to incur debts, and it having incurred them, these persons—the solid and solvent subscribers—the men on the faith of whose subscriptions creditors have given money and done work—all at once and suddenly vanish from the scene.

Now are they released?

The directors certainly had no power to release them as against the creditors of the company. This is certain. The argument then will be that the subscribers have made a transfer of their stock to the city, and that the city having assumed their subscription, they are discharged! But the record shows no copy of any transfer. What is said by the clerk under the head of "agreement of record" constitutes no part of the record at law. That this court cannot notice

such a paper was decided in *Fisher* v. *Cockerell*,* in *Suydam* v. *Williamson*,† *New Orleans* v. *Gaines*,‡ and in other cases.

Then even if a paper transferring the stock were shown, there is no evidence that the city ever accepted the transfer. What power indeed, supposing a transfer to have been attempted to be made—what power had the city in its corporate capacity to accept it? So far as appears it had none.

Then again. The act of the directors releasing the defendants was void, not only on general principles, but also because they were all personally interested in having such an order of release, and in fact all availed themselves of it.

The whole operation is void. It is an attempt upon the part of the directors to allow a cancellation of so much stock, a nominal transfer to the city, but a real blotting out of so much stock; a transfer that would relieve the directors and their fellows, but that would not increase the stock of the transferee. Whatever name may be given such a transaction, its substance and effect, if permitted, would be to reduce the capital of the company and its means of paying its debts and carrying out the objects of the corporation to the extent of the amount so transferred. The directors have no authority to thus dispose of the effects of the corporation.

Mr. M. C. Kerr, contra.

Mr. Justice STRONG delivered the opinion of the court.

The question to be solved is whether the appellees are debtors to the railroad company for the excess of the subscriptions above $300, made by them to the articles of association. If they are, the complainants have an equitable right to subject those debts to the payment of the judgment they have against the railroad company. And it must also be conceded that if the company has, in fraud of its creditors, released subscribers to its stock from the payment of their subscriptions, the release is inoperative to protect those

* 5 Peters, 248. † 20 Howard, 427. ‡ 22 Id. 141.

subscribers against claims of the creditors. Under the law of the State, all railroad companies are required to have a subscription to their capital stock not less than $1000 for every mile of their proposed roads before they may exercise corporate powers. This requirement is intended as a protection to the public, and to the creditors of the companies. And it is clear that the directors of a company, organized under the law, have no power to destroy it, to give away its funds, or deprive it of any means which it possesses to accomplish the purposes for which it was incorporated. The stock subscribed is the capital of the company, its means for performing its duty to the commonwealth, and to those who deal with it. Accordingly, it has been settled by very numerous decisions that the directors of a company are incompetent to release an original subscriber to its capital stock, or to make any arrangement with him by which the company, its creditors, or the State shall lose any of the benefit of his subscription. Every such arrangement is regarded in equity, not merely as *ultra vires*, but as a fraud upon the other stockholders, upon the public, and upon the creditors of the company.

It is upon these principles that the appellants in this case rely, and the question is whether they are applicable to the facts as found.

That the subscriptions made by the appellees to the articles of association for the incorporation of the company were, according to their terms, not absolute engagements to pay for a greater amount of stock than $300 for each subscriber is undeniable. They were engagements to pay for the number of shares subscribed, only on the contingency that the city of New Albany should not afterwards take stock in the corporation to the amount of $50,000 or upwards, or, if such stock should be taken, on the contingency that they failed to transfer a part of their subscriptions to the city. Such was the letter and the spirit of the contract entered into by each subscriber. Whether the law permitted it to have such a legal effect we will presently consider. But that such was its meaning, independently of any rule

of legal policy, is very plain. It is the very language of the articles of association. When, therefore, the directors of the company, on the 31st of December, 1853, ordered that the original subscribers to the articles, in accordance with the stipulation contained therein, be permitted to transfer any amount of the stock (exceeding six shares) subscribed by them to the city of New Albany (that city having made a subscription exceeding $50,000), and ordered that the stock thus transferred be merged in the stock subscribed by the city, the order was no more than allowing the contract to be performed as made. It was no release of any rights which the company had; no abandonment of any resources of the corporation. It was no more than the subscribers, in view of the provisions of their contract, had a right to demand. Unless the contract must be held to have been an absolute undertaking, that each subscriber would himself pay for all the stock subscribed by him, it was fully performed by the payment of $300 and the transfer of the excess to the city to be merged in its larger subscription.

It must, however, be conceded that conditions attached to subscriptions for the stock of a railroad company made before its incorporation have, in many cases, been held to be void, and the subscriptions have been treated as absolute. The question respecting their validity has most frequently arisen when the condition has been that the proposed road should be located in a specified manner, or over a defined line. But other conditions have been held invalid, and have been disregarded by the courts. The reasons for such a ruling are obvious, and they commend themselves to universal approval. When a company is incorporated under general laws, as the New Albany and Sandusky Railroad Company was, and the law prescribes that a certain amount of stock shall be subscribed before corporate powers shall be exercised, if subscriptions, obtained before the organization was effected, may be subsequently rendered unavailable by conditions attached to them, the substantial requirements of the laws are defeated. The purpose of such a requisition is, that the State may be assured of the successful prosecu-

tion of the work, and that creditors of the company may have, to the extent at least of the required subscription, the means of obtaining satisfaction of their claims. The grant of the franchise is, therefore, made dependent upon securing a specified amount of capital. If the subscriptions to the stock can be clogged with such conditions as to render it impossible to collect the fund which the State required to be provided before it would assent to the grant of corporate powers, a charter might be obtained without any available capital. Conditions attached to subscriptions, which, if valid, lessen the capital of the company, thus depriving the State of the security it exacted that the railroad would be built, and diminishing the means intended for the protection of creditors, are therefore a fraud upon the grantor of the franchise, and upon those who may become creditors of the corporation. They are also a fraud upon unconditional stockholders, who subscribed to the stock in the faith that capital sufficient would be obtained to complete the projected work, and who may be compelled to pay their subscriptions, though the enterprise has failed, and their whole investment has been lost. It is for these reasons that such conditions are denied any effect.

But the reasons of the rule are totally inapplicable to the present case. The appellees are not asking to diminish the capital of the company by force of any condition attached to their subscriptions. The action of the board of directors permitting a transfer to the city of New Albany of all the stock originally subscribed, in excess of six shares by each subscriber, according to the stipulations of the articles of association, was not a release of any stock subscription, nor was it an attempt to lessen the means of the company to build its road and pay its creditors. We cannot, while recognizing the rule as a sound one, overlook the peculiar facts of this case. Under the articles of association the original subscribers undertook, not that they would respectively pay, at all events, for all the shares mentioned in their several subscriptions, but, in substance and effect, that such a number of shares should be paid for, either by themselves

or by the city of New Albany, if it became a subscriber. There was no condition by which the number of shares subscribed and made available could ever be reduced. Had the city taken no stock they would have been liable for all the shares taken by them. It is impossible to see in this any fraud upon the State or upon the creditors of the company. They have all the security in those subscriptions which they would have had there been no right to transfer to the city reserved. The capital stock is all that it was represented to be when the company became incorporated. The only change is, that a part of it is pledged by the city of New Albany, instead of by these appellees. No capital has been lost by the transfer.

If, then, the reason of the rule invoked by the appellants has no applicability to the facts of this case, the rule itself fails, there is no condition to be stricken from the subscription, and there is no ground for holding the appellees liable beyond the plain letter and spirit of their contract.

It is insisted, however, on behalf of the appellants that there never was any transfer by these appellees to the city of the excess above six shares for each, of the stock mentioned in their subscriptions, and it is denied that we can consider the admission of such a transfer, which appears in the record, as any proof of its having been made. It is said that the alleged admission is an unauthorized certificate of the clerk, which constitutes no part of the record, and we are referred to *Fisher* v. *Cockerell.** But that case does not support the appellants. It was an action at common law, in which it was said "in cases at common law, the course of the court has been uniform, not to consider any paper as part of the record which is not made so by the pleadings, or by some opinion of the court referring to it. . . . The unauthorized certificate of the clerk that any document was read, or any evidence given to the jury, cannot make that document or that evidence a part of the record, so as to bring it to the cognizance of this court."

* 5 Peters, 248.

Opinion of the court.

All the other cases cited were suits at law in which, of course, the evidence could not come upon the record except in the regular manner. A clerk's certificate could not bring it there. But this is a bill in equity. In such a case no bill of exceptions is necessary to bring upon the record the proofs and admissions of the parties. There is the same reason for regarding the admission which appears in this record a part of the record, as there is for considering any one of the depositions. It would be very extraordinary, if parties to a proceeding in equity may not, at the hearing, make an admission of facts, upon which the inferior court may act, and which may be considered on appeal to this court. And it would be still more extraordinary, if appellants, under whose direction a record in chancery has been made up, and who have filed it here without objection, should be permitted to assert for the first time on the argument that the clerk had certified improperly as a part of the record, an admission at the hearing below, which was never made, or which, if made, we are not at liberty to regard. It is not denied that the admission of record, certified by the clerk, was agreed to by the parties, that it was reduced to writing, and entered upon the record, nor is it denied that it was considered by the court below as evidence in the cause, and considered without objection. We must, therefore, hold that it is to be treated as a part of the record now, and if so, it establishes fully the transfer of the stock to the city before July 1st, 1854; that none of the appellees were ever charged with it on the books of the company, and that the transfer was made with the assent of the corporation, constituting with the payment made for the six shares not transferred, full satisfaction of the indebtedness of the appellees, and accepted as such. It is true there appears to have been no written transfer. None was necessary. The appellees had received no certificates. They were not on the books as stockholders for more than six shares each, and from the beginning it was understood and agreed that for all liability beyond that, the city, if it subscribed, was to step into their place.

It is next denied that the city accepted the transfer. To this it may be answered that the acceptance is implied in the admission of record. There could have been no transfer without the assent of both parties. More than this. The other evidence tends strongly to show that the mayor and some members of the councils of the city knew of the transfers and assented to them, and the city never dissented from the arrangement.

It is true that a mere assignment of his share by a subscriber does not relieve him from liability until the assignee is substituted in his place. But here the substitution was recognized by the company. The stock was not charged to the appellees on the books, and after the lapse of nine years it is too late to affirm that the transfer was not accepted.

Again, it is argued that the directors of the company were personally interested as original subscribers, and therefore that their order of December 31st, 1853, permitting the transfer was illegal. But if, as we have endeavored to show, the original subscriptions were valid as made, if the stipulation in the articles of association was not prohibited by the law, it needed no such order of the board of directors to validate the substitution of the city for the original subscribers. It matters not then that the directors were interested. Equity would have enjoined them against interference to prevent a transfer, with all its stipulated consequences. The substitution of the city was a matter over which they had no discretionary power.

There is, then, we think, nothing, either in law or in the facts, that can justify our holding that the appellees were indebted to the company on their subscriptions when this bill was filed; nothing to impeach the validity of the arrangement provided for in the articles of association, and carried out afterwards with the assent of the company, by which they were discharged from all liability.

This is sufficient for the case, and if it were not it would be a grave inquiry, whether the laches of the appellants has not been such that they cannot now invoke equitable relief.

Their judgment was recovered in 1857, and the return of *nulla bona* to their execution was made in December, 1858. Before that time the company had become insolvent, and some five years before that time the arrangement had been consummated which they now assail as a fraud upon the creditors. It is incredible that they did not know of the arrangement. The articles of association were on record open to their inspection. Those articles exhibited in prospect precisely what was done. No one could have seen them without having it suggested that the original subscribers had not at first intended to pay for all the stock mentioned in their subscription, and that it was intended the city should take part of the stock off their hands. The company's books, which they might have seen, would have told them the appellees had paid for only six shares. This was quite sufficient to make inquiry a duty. And had inquiry been made there was not the least difficulty in ascertaining the facts. Yet the present suit was delayed until 1868. True, the appellants' bill alleges the indebtedness of the appellees by force of their contracts. It does not charge a fraud. But it is plain that unless the arrangement by which the subscriptions were merged in that of the city was a fraud upon them their bill must fail. The court must set aside that arrangement or they cannot recover. And the burden is upon them to establish the fraud. Had their bill been framed to set aside the arrangement because of fraud, it must have been held to have been filed too late. The statute of limitations bars actions for fraud in Indiana after six years, and equity acts or refuses to act in analogy to the statute. Can a party evade the statute or escape in equity from the rule that the analogy of the statute will be followed by changing the form of his bill? We think not. We think a court of equity will not be moved to set aside a fraudulent transaction at the suit of one who has been quiescent during a period longer than that fixed by the statute of limitations, after he had knowledge of the fraud, or after he was put upon inquiry with the means of knowledge accessible to him.

But we pursue this branch of the case no further. We have already said enough to show that, in our opinion, there was no error in the decree of the court below.

DECREE AFFIRMED.

HUNTINGTON *v.* TEXAS.

TEXAS *v.* HUNTINGTON.

1. Statement of the points adjudged in *Texas* v. *White & Chiles* (7 Wallace, 700), and *Texas* v. *Hardenberg* (10 Id. 68).
2. The State of Texas provided in an act of December 16th, 1851, authorizing the comptroller of public accounts to receive five thousand bonds, issued, of $1000 each, to the State by the United States, and payable to bearer, that "*no bond issued as aforesaid . . .* payable to bearer, shall be available in the hands of any holder *until the same shall have been indorsed . . . by the governor of the State of Texas.*" The legislature of the State, when in rebellion, by an act of January 11th, 1862, repealed this act of December 16th, 1851. *Held*, that notwithstanding what may have been said in *Texas* v. *White & Chiles*, and in *Texas* v. *Hardenberg*, the repealing act was valid as to bonds issued and used for a lawful purpose, and that the title of the State to such bonds, without indorsement, passed to the holder unaffected by any claim of the State.
3. No presumption can arise from the absence of such indorsement on the bonds that they had been issued without authority, and for an unlawful purpose, and the presumption that they had been issued with authority and for a lawful purpose is in favor of the holders of the bonds, especially after payment by the United States.
4. It was primarily the duty of the government, as the United States were the obligors in the bonds, and the rebellion was waged against them, to ascertain and decide whether bonds presented to and paid by it had or had not been issued and used in aid of the rebellion; and after such decision the presumption must be that the parties who held the bonds were entitled to payment as against the reconstructed State of Texas.
5. Whether an alienation of the bonds by the usurping government divested the title of the State, depends on other circumstances than the quality of the government. If the object and purpose of it were just in themselves and laudable, the alienation was valid; but if, on the contrary, the object and purpose were to break up the Union and overthrow the constitutional government of the Union, the alienation was invalid.

6. No other than a holder of the bonds, or one who, having held them, has received the proceeds with notice of the illegal transfer for an illegal purpose, can be held liable to the claim of the reconstructed State. After presentment, recognition, and order of payment, any one never having held or controlled the bonds, may receive the proceeds on a proper order.

ERROR to the Supreme Court of the District of Columbia; the case being thus:

The United States, on the 1st of January, 1851, issued to the State of Texas for the sale of a portion of her northwestern territory, five thousand coupon bonds of $1000 each, numbered successively from No. 1 to No. 5000, and "redeemable after the 31st day of December, 1864." They were made on their face all payable "to bearer," and declared to be transferable on delivery. The coupons, which extended to December 31st, 1864, and no farther, were equally payable "to bearer." These bonds were known as Texas indemnity bonds.

On the 16th of December, 1851, in anticipation of the bonds being delivered to it, the State of Texas passed an act, authorizing their governor to receive them from the United States,

"And when received, to deposit them in the treasury of the State of Texas, *to be disposed of as may be provided by law; provided,* that no bond issued as aforesaid, as a portion of the said $5,000,000 of stock, payable to bearer, shall be available in the hands of any holders *until the same shall have been indorsed in the city of Austin, by the governor of the State of Texas.*"

After this act of December 16th, 1851, and between that day and the 11th of February, 1860, the State of Texas passed thirteen different acts providing for the sale or disposal of these same bonds; for lawful State purposes; as *ex gr.*, paying the public debt of the State; the erection of a State capitol; to establish a system of schools, &c., &c.; none of *these* acts requiring in terms an indorsement of the bonds by the governor, as required in the above-quoted act of December 16th, 1851, nor any of them designating by num-

bers on them the particular bonds to be appropriated to the particular objects authorized. Subsequently to this again, the rebellion having broken out, and the State having gone over to the rebel side, and there being a large number of these bonds still undisposed of in the State treasury, the legislature of Texas, by an act of January 11th, 1862, repealed the act of December 16th, 1851 (making an indorsement necessary), and the then authorities of Texas, in January, 1865, sold or transferred certain of the bonds to two persons, White and Chiles, *for the purpose of aiding the rebellion.* In the cases of *Texas* v. *White & Chiles*,* and *Texas* v. *Hardenberg*,† in this court, it was determined that as against the true, that is to say, the loyal State of Texas (citizens of which had stopped payment of them at the Federal treasury), no title had passed to bonds which had been thus transferred; and that notwithstanding the transfer, the reconstructed State might reclaim the bonds or their proceeds.

How many bonds were transferred to White and Chiles, or what were their exact numbers, was not perfectly ascertained; but it was well known that the bonds transferred to White and Chiles did not comprise the whole issue for $5,000,000, and that some of them had been transferred under one of the thirteen enactments already mentioned.‡

In this state of things the State of Texas brought suit in the court below against one Huntington, cashier of the First National Bank of Washington, for the alleged conversion of thirty-seven of the five thousand bonds, originally issued to the State.

Of these thirty-seven bonds, ten had been held by one Haas, and were presented and filed at the Treasury Department in July, 1865, by him. After payment of them had been officially recommended by the first comptroller of the treasury, Huntington, at the request of Haas and his attorney, Mr. F. P. Stanton, advanced to them the money on the warrant expected to be issued. Haas accordingly, by letter, dated

* 7 Wallace, 700. † 10 Id. 68.

‡ See Report of Mr. Comptroller Taylor, submitted to Mr. Secretary McCulloch, August 15th, 1865.

September, 1866, addressed through his attorney to the Secretary of the Treasury, requested that payment should be made to Huntington; and a few days afterwards, that is to say in September, 1866, payment was so made.

As to thirteen others, they were presented and filed in October, 1865, by Huntington himself, and paid to him on the 25th of January, 1866.

The remaining fourteen had like the ten been held by Haas, and were presented and filed by him, and after payment of them had been officially recommended, &c., as in the case of the ten, Huntington, at the request of Haas and his attorney, advanced to them the money on the warrant expected to be issued, and Haas by letter, dated January 1st, 1866, addressed through his attorney to the Secretary of the Treasury, requested that payment should be made to Huntington, who, in regard to these fourteen also, had advanced the money to be paid on them. A few days afterwards payment of these fourteen was so made.

The reader will thus understand that thirteen bonds were presented by and paid to Huntington himself, while the remaining twenty-four had never come in any way into his hands; his only relation to them whatever having been that after the presentation of them by others and the official recommendation of payment of them, he had advanced the amount of the warrant expected to be issued, to the former holders of the bonds, now surrendered to the treasury, and taken from them a request to the Secretary of the Treasury that the amounts due should be paid to *him*.

When the first ten (of Haas's) bonds were paid, the claim of the State of Texas in relation to bonds said to have been illegally transferred, in January, 1865, to White and Chiles, had not been made known to the Treasury Department; but the fact that the State had a claim in relation to such bonds had been communicated to Huntington before the 25th of January, 1866, the date of the payment of the thirteen bonds which he had himself presented and received payment of. Huntington then stated that he had bought the bonds in October, 1865, before hearing of that claim, and

on the faith of the payment in September of the bonds presented in the name of Haas by Mr. Stanton.

In the absence of knowledge whether or not the bonds presented by Huntington were affected by the claim of the State referred to, the comptroller recommended their payment.

It also appeared—or at least the defendant's evidence tended to show this—that before purchasing the thirteen bonds presented for payment in October, 1865, Huntington made inquiries at the Treasury Department for the purpose of ascertaining whether it had any objection to the payment of them; that he was informed by the officers to whom he applied of no objection to their payment, and that they thought they would have to be paid; and that he accordingly purchased them at 96 cents in gold.

It appeared that during the rebellion the Secretary of the Treasury had decided not to pay the coupons of Texas indemnity bonds, except where the bonds were indorsed by some loyal governor of the State. When the rebellion terminated, the question as to the payment of these bonds, as they reappeared, became so urgent that it was taken into consideration by the First Comptroller of the Treasury at the request of the Secretary of the Treasury; and, on August 15th, 1865, that officer furnished the secretary with an elaborate opinion, recommending the payment of unindorsed bonds to holders who received them in good faith. In accordance with this opinion the department commenced the redemption of these bonds, and payments were made as rapidly as the cases which had accumulated could be examined. After notice reached the department of the discovery of the White & Chiles transactions, there was a temporary suspension of the redemption of bonds, which it was suggested might have passed through their hands. The department made efforts to ascertain the numbers of the bonds involved in that transaction, and all practicable endeavors to protect any interest which the State of Texas might have in the premises; and after finding it impossible to determine the numbers and description of the bonds involved in that

transaction, the department proceeded as before with the redemption of indemnity bonds, under the opinion of the comptroller of August, 1865; the comptroller, in each particular case, examining the bonds and recommending their payment. Huntington made occasional inquiries at the department with reference to the indemnity bonds, and was informed from time to time as to the condition of the question there. He was informed of the determination of the department to delay the redemption of bonds long enough to ascertain whether it was possible to do anything to protect the interests of the State of Texas in the bonds issued to White & Chiles, and subsequently that it was impossible for the department to give any information relative to the numbers and description of the White & Chiles bonds.

In compliance with a request of the plaintiffs, the court below instructed the jury that the government of Texas, from August, 1861, to July, 1865, was a usurping government, incapable of performing any act which could legally divest the title to property of the State, and that if the jury should find that the bonds in question were alienated by that government or its agents, that such alienation passed no title; also, that the defendants could acquire no title to the bonds without the indorsement of them by a governor of Texas loyal to the United States; also, that if the defendants took the bonds after maturity, they took them subject to the right of property in them of the State of Texas; and finally, that if the bonds were transferred after maturity by persons exercising authority in Texas and at war with the United States, then no matter how or from whom received by the defendants, they were still the property of the plaintiff, and that the act of defendants in procuring payment of them from the United States Treasury, if that was done, was a conversion, and made the defendants liable for their value with interest.

And in compliance with a request of the defendants, the court instructed the jury, in effect, that if the bonds were presented to the Treasury Department by holders other than the defendants, and payment was ordered, and afterwards

by the then holders the proceeds were directed to be paid to the defendants and were received by them without ever having had possession or control of the bonds, or having claimed title to them, such receipt of the proceeds did not amount to a conversion by the defendants.

The defendants excepted to the first instruction (their exception being a tenth exception taken by them), and the plaintiff excepted to the second instruction.

In accordance with the first of the above instructions, the jury found for the plaintiffs the value of the thirteen bonds, paid on the 25th of January, 1866, and in accordance with the second for the defendants as to the other twenty-four.

The case was now here on the cross-exceptions.

Messrs. J. Hubley Ashton and W. S. Cox, for Huntington, cashier of the bank:

1. *As to the tenth (the defendant's) exception.* These bonds were negotiable, and by the decisions of this court are to be put on the footing of negotiable paper.* The title, therefore, is not affected by anything short of actual notice. They are presumed, also, to have been received before maturity;† and even if proved to have been taken by their last holders when overdue, these may protect themselves under one who took it before maturity,‡ and protect themselves, even though they had *notice* of an infirmity in the title, if they derive their title to the instrument from a prior *bonâ fide* holder for value.§

2. Now, although the defendants purchased the bonds which they deposited for redemption, after they were redeemable, there is no evidence that the party from whom they purchased had not received them before maturity. The presumption is the other way; and defendants, standing in their place, are to all legal intents, *primâ facie* the holders before maturity, in good faith, and for a valuable consideration, of these negotiable securities.

* Murray *v.* Lardner, 2 Wallace, 110.

† Byles on Bills, 165; 2 Parsons on Bills, 9. ‡ Story on Notes, § 191.

§ Dudley *v.* Littlefeld, 8 Shepley, 418; Smith *v.* Hiscock, 14 Maine, 451.

3. We are met with the objection, however, that by the act of the legislature of Texas, of December 16th, 1851, the bonds ceased to be negotiable unless they were indorsed by the governor of the State, and that this court has held in *Texas* v. *White & Chiles*, and *Texas* v. *Hardenberg*, that the act of the rebel legislature of January 11th, 1862, repealing the act of December 16th, 1851, is wholly void. To this we reply, that as far as this act of January 11th, 1862, was *in aid of the rebellion*, it has been declared by this court to be void. But, it is submitted, that with *this* exception only, it was valid; and it fully authorized a transfer of the bonds unindorsed, if issued for any lawful and innocent object.

It appears from various acts of the legislature of Texas, thirteen in number, passed from January 31st, 1852, to February 11th, 1860, that the State had authorized the sale or disposal of quantities of these bonds, exceeding in the aggregate, in fact, the whole $5,000,000 in the treasury of the State. For all the objects and uses contemplated by this series of acts passed prior to the rebellion, and, therefore, of unquestionable validity, the repeal of the act of December 16th, 1851, was not a nullity; and bonds issued and put into circulation under these acts, were negotiable and available in the hands of holders, without the indorsement of the governor. A large amount of the bonds may have passed from the treasury of Texas into circulation under these acts, long before their maturity, without the governor's indorsement, and the title of the holders of such bonds would unquestionably be good. If any of the bonds remained in the treasury of the State, whether to the general account, or to special accounts, they may thus have been lawfully put into circulation, unindorsed, long before the *White & Chiles* transaction.

Thus, the purchaser of bonds would see that by a series of laws, covering the whole amount of these bonds, they might have been lawfully put into circulation before maturity, without the governor's indorsement. As these several laws did not designate any particular bonds, any of them might have been issued under any of the laws, without

regard to these particular numbers. The purchaser would discover that, under any one of more than a dozen different laws enacted prior to the rebellion, the bonds offered to him might have lawfully issued before maturity. He would, therefore, buy bonds of the United States expressed on their face to be transferable by delivery without notice of anything affecting the negotiability of the particular bonds.

This series of enactments was not brought to view in the arguments in *Texas* v. *White & Chiles*, or *Texas* v. *Hardenberg*, and was not, therefore, considered by the court.

The instruction excepted to by the plaintiff. This related to the bonds that were not owned or controlled by the defendants. As to these bonds, the facts show no case of conversion. The defendants never had possession, use, or control of them. They simply took an assignment of the debt of the United States for the bonds, after they had been delivered up to the government by the holder.

Messrs. R. T. Merrick and T. J. Durant, for the State, contra, relied upon the cases of *Texas* v. *White & Chiles*, and *Texas* v. *Hardenberg*, as deciding all the questions in this case as to the bonds purchased by the bank. They contended that, under those decisions, Texas indemnity bonds, in the condition of the present ones, unindorsed, and taken after maturity, could not be validly transferred, so as to convey title, even to an innocent purchaser for value.

Upon the question as to the conversion of the bonds never owned by the bank, they cited *McCombie* v. *Davis*,* and *Snow* v. *Leathem*.†

The CHIEF JUSTICE delivered the opinion of the court.

We have held in *Texas* v. *White & Chiles*,‡ and *Texas* v. *Hardenberg*,§

1. That when a State by public statute requires the indorsement of its governor as a prerequisite to the valid transfer of bonds belonging to it, and payable to itself or

* 6 East, 538.
† 2 Carrington & Payne, 314.
‡ 7 Wallace, 700.
§ 10 Id. 68.

bearer, the holder of such bonds, without such indorsement, will have no title as against the State, unless he can show the consent of the State otherwise given to the transfer.

2. That an act repealing the statute requiring the indorsement of the governor, passed by the legislature when the State is in rebellion against the United States, is a nullity as to bonds issued without such indorsement, and for the purpose of aiding the rebellion.

3. That such bonds remain the property of the State and may be reclaimed, or the proceeds thereof recovered in a proper action by that State when the rebellion has ceased, against any one in possession of the same, with notice of the intent with which they were issued and used.

4. That the existence of the rebellion at the time of the repealing act, was a public fact with notice of which all persons were charged, and that when the bonds were purchased after they had become payable, the purchaser took them subject to all the equitable rights of the State when its relations to the Union had been restored.

But it must be observed that we have not held that such a repealing act was absolutely void, and that the title of the State could in no case be divested. On the contrary, it may be fairly inferred from what was said in *Texas* v. *White*, that if the bonds were issued and used for a lawful purpose, the title passed to the holder unaffected by any claim of the State. Title to the bonds issued to White & Chiles was held not to be divested out of the State, because of the unlawful purpose with which they were issued, and because the holders were, in our opinion, chargeable with notice of the invalidity of their issue and of their unlawful use.

If, in that case, there had been proof that a large portion of the bonds issued without the indorsement of the governor, were in fact issued for legitimate objects, and were applied to legitimate purposes, no presumption could have arisen from the absence of that indorsement that the particular bonds which were the subject of controversy in that case, had been issued without authority and for an unlawful purpose. If, for example, it had appeared that bonds to a

large amount had been issued unindorsed, and applied to the support of schools, or to the maintenance of asylums for the insane, for the deaf mute, or the blind, or to other purposes equally legitimate, the presumption, especially after payment by the United States, would have been in favor of the holders of bonds and not against them. We say especially after payment by the United States, for the United States were the obligors in the bonds, and it was against the United States that the rebellion had been waged, and it was primarily the duty of the government to ascertain and decide whether the bonds had or had not been issued and used in aid of rebellion, and had, therefore, presumptively passed into the hands of holders not entitled to payment as against the reconstituted State of Texas.

The action of the government in refusing payment, during the war, of the coupons of the unindorsed bonds, increased the significance of its action in paying not only the coupons, but the bonds themselves, after the war had terminated. The bonds and coupons could only have been paid on proof, satisfactory to the government, that the title of the State had been divested by its actual authorities for some legitimate purpose, or if otherwise, then to parties not chargeable with notice of the unlawful issue and use. Any other payment would have been a wrong to the reconstituted State.

There was no such proof in either of the cases formerly decided. Whether there was evidence in the present case establishing the fact of unlawful issue and use, and the further fact of notice to the defendants, within the principles heretofore laid down, as now explained and qualified, is for the jury.

We think it unnecessary to examine all the exceptions taken in this case. We shall confine ourselves to the tenth exception taken by the defendants, and to the one taken by the plaintiffs.

We think that the instruction, embodied in this tenth exception, was calculated to mislead the jury. Indeed it could hardly fail to do so. Whether the alienation of the bonds,

by the usurping government, divests the title of the State, depended, as we have said, upon other circumstances than the quality of the government. If the government was in actual control of the State, the validity of its alienation must depend on the object and purpose of it. If that was just in itself and laudable, the alienation was valid; if, on the contrary, the object and purpose were to break up the Union and to overthrow the constitutional government of the Union, the alienation was invalid. So the most that could be said of the absence of the indorsement of the governor, was that it raised a presumption against the validity of the alienation, not that no title to the bonds could be obtained without such indorsement. So, too, it cannot have been correct to say without qualification that the defendants took the bonds, if originally transferred by persons exercising authority in Texas, at war with the United States, subject to all the equities existing against the usurping government. That would depend upon the character and object of the original transfer. And the final proposition of the instruction must be qualified according to these principles, to make it conform to the law as we understand it.

But in our judgment, the instruction given upon the request of the defendants and excepted to by the plaintiff, was quite correct. We are entirely satisfied with it. We think it clear that no one other than a holder of the bonds, or one who, having held them, has received the proceeds, with notice of the illegal transfer for an illegal purpose, can be held liable to the claim of the reconstituted State. After presentment, recognition, and order of payment, any one, never having held or controlled the bonds, may receive the proceeds upon a proper order. In such a case the State must look to the United States, if bonds still belonging to her have been paid to third parties, after presentment and allowance, in favor of holders without good title.

But while we sustain this ruling, the judgment, for erroneous instructions in other respects, must be REVERSED, and the cause must be remanded for further proceeding

IN ACCORDANCE WITH THIS OPINION.

UNITED STATES, LYON ET AL. *v.* HUCKABEE.

1. Where, under the Confiscation Act of August 6th, 1861, after a libel showing a case within the act, an amended libel sets out a case which shows that there can be no confiscation under the act, both libel and amended libel should be dismissed.
2. The process prescribed by the Confiscation Acts cannot, by the union of certain claimants of land proceeded against, with the United States, otherwise than as informers, be made the means by which the conflicting titles to the land, between such person and other claimants, shall be settled.
3. Where land was sold to the so-called "Confederate States" during the rebellion, and was captured by the United States, it became on the extinction of the Confederacy, and without further proceeding, the property of the United States, and could be properly sold by them.
4. Such sale rendered any proceeding against the persons who owned the land prior to sale to the "Confederate States," wholly improper.
5. Where the agents of the said Confederacy came to persons owning iron works, and informed them that they must either contract to furnish iron at a uniform price, or lease or sell the works to the Confederacy or that they would be impressed, and the owners—then much in debt—after consultation—the works being already in charge of a guard from the Confederacy, which possessed despotic power over skilful laborers—considering that to "contract" would cause a failure of their scheme, and to lease would be ruinous, resolved to sell; *Held*, that such a sale was not made under duress.
6. Where a subordinate court, which had no jurisdiction in the case, has given judgment for the plaintiff or defendant, or improperly decreed affirmative relief to a claimant, an appellate court must reverse. It is not enough to dismiss the suit.

ERROR to the Circuit Court for the Middle District of Alabama; the case being thus:

In the year 1862, soon after the outbreak of the late rebellion, one C. C. Huckabee and three other persons, formed under the general laws of Alabama a corporation called "The Bibb County Iron Company;" Huckabee being president, and the other corporators, directors; and, with him, the only stockholders. As the name of the corporation indicates, its object was the working in iron; its particular machinery being such as made it capable of manufacturing cannon, and other munitions of war. Rolling-mills were erected, and lands, slaves, and mules bought.

Statement of the case.

When the company had thus got fairly going, the rebel government sent one of its officers to Huckabee, the president, requiring him and the corporation to make a contract with the Confederacy, to deliver iron to it at a uniform price named. [The iron had been furnished at the price named, for some time before this, but no formal contract to furnish it uniformly at that price existed.] Huckabee refused to make any such contract. Finally, being sent for again by the agents of the rebel government, he was told that the agreement under which the iron was then furnished was not a contract, and that he must make a *contract*. He then consulted with his stockholders, and the result was that the company refused to make any contract. He was then sent for a third time, and told that the company must either contract on government terms, or lease the works, or sell them to the Confederate States, and that otherwise the works would be impressed. The company resolved, after some weeks consideration, to sell. The influences which operated on the owners, according to the statement of Huckabee, the president, were these:

"We owed a large amount of money, about $300,000, and our debts were increasing. We knew that if we *contracted* we could not pay our debts and get back our capital. To *lease* would have been ruinous; and as we had been informed that if we did not either contract, lease, or sell, the works would be impressed, we regarded it best to sell. I cannot say that there could not have been other reasons influencing the minds of other corporators than myself to join in the resolution authorizing the sale."

It appeared that during most of the time that the iron company had been in operation, a guard from the rebel army had been in control of it, so far as to see that it sent no iron away except to the rebel authorities. And moreover that the rebel powers possessed an almost despotic power over the whole body of skilful laborers in the region.

The sale was made, and a deed executed under the corporate seal *and* the hands of the president and all the other corporators, three in number, September 13th, 1863. The

consideration was $600,000, Confederate money, which was duly paid, and after a discharge of the corporate debts, divided among the stockholders; the persons who had executed the deed. Confederate money was at this time worth one-fourteenth of the same amount in Federal money.

The deed recited that at a meeting of all the stockholders, held on September 9th, 1863, it was resolved unanimously that the president be authorized, for the sum of $600,000, to sell to the Confederate States all lands, negroes, mules, &c., and to execute deeds of *warranty;* and that the party of the second part agreed to pay the said sum for the said property, provided the *said stockholders united in the conveyance.* The deed contained full covenants of warranty. More than a month subsequently to its date, to wit, on the 25th November, 1863, it was acknowledged before the probate judge, as having been "*executed voluntarily on the day of its date.*"

The Confederate government from that time managed the works, casting great quantities of cannon, shell, shot, and other implements of war, which were used to maintain the rebellion.

In March, 1865, the property was captured by the government army. It remained for a short time under the military forces, and was then taken possession of by the Treasury Department as captured and abandoned property, and the rebel confederacy having become now extinct, on the 3d of February, 1866, after public notice, was sold for $45,000 to Francis Lyon, for himself and others, by the Commissioner of the Bureau of Refugees, Freedmen, and Abandoned Lands, under the authority of the President and Secretary of the Treasury. Prior to the sale Lyon went to Huckabee and asked him if the title was good. He said he believed it was; and declined a suggestion of Lyon to take part in the contemplated purchase (which he said he would like to do), because he had not the money at the time. The sale having been made the money was paid, and a deed executed. The sale was confirmed by act of Congress, approved December 15th, 1866, which "released and confirmed to the

said Lyon any interest which the United States had in the land described."

Prior to all this, that is to say, on the 1st of October, 1865, the District Attorney of the United States, describing himself as "prosecuting for the United States and an informer," had exhibited an information in the District Court for the Middle District of Alabama (in which the property was), against it (describing it), "said to belong to the late so-called Confederate States of America," and praying process to enforce the seizure, condemnation, and confiscation of the same.

This proceeding was made under the act of August 6th, 1861, which enacts that if during the then existing rebellion,

"Any person or persons . . . shall purchase, or acquire, sell, or give any property . . . with intent to use or employ the same, or suffer the same to be used and employed in aiding, abetting, or promoting such insurrection or resistance to the laws, or any person or persons engaged therein, or if any person or persons being the owner or owners of any such property, shall knowingly use or employ, or consent to the use or employment of the same as aforesaid, all such property is hereby declared to be lawful subject of prize and capture wherever found; and it shall be the duty of the President of the United States to cause the same to be seized, confiscated, and condemned.

"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 proceedings shall be for the use of *such informer and the United States in equal parts.*"

Things stood in this way from October 1st, 1865, when this information was filed, till the 30th of May, 1866, when Lyon and his co-purchasers were in possession. On that day, Huckabee and his co corporators in the old Bibb County Iron Company appeared as claimants of the property against which the information had been filed, asserting that *they* and no other persons were "the true and legal

owners" of it, and that the property had not been knowingly used and employed with the consent of the owners in aiding, abetting, and promoting the rebellion, but, on the contrary thereof, that the said property was built with the money and labor of them, the said respondents, and for their sole use, and was never *voluntarily* employed in the way alleged. They set up also that they had all been pardoned for all participation in the rebellion.

On the 24th of October, 1866, the Assistant Attorney-General of the United States wrote from Washington to the District Attorney in Alabama to *dismiss* the proceedings in confiscation instituted by him, the property having been sold to Mr. Lyon by the Commissioner of the Freedman's Bureau, "unless Mr. Lyon should prefer that, *for the purpose of securing and perfecting the title*, he should desire them to be continued for his own use and benefit; and *in that case the proceedings will be carried on in the name of the United States, at the cost and charges of Mr. Lyon.*"

Soon after this, that is to say, on the 26th of November, 1866, and obviously with a view of carrying out the suggestion of securing and perfecting the title in Lyon, Lyon and his co-purchasers came forward, and were made defendants. They set out the original ownership of "The Bibb County Iron Company," the sale by it to the Confederate States, with the full knowledge of the purpose to which the property was to be applied, the capture, in March, 1865, of the property by the Federal army, and the subsequent sale and conveyance, by authority of the United States, to them.

An amended information was also filed, setting out pretty much what was in the original one, but setting out in addition the *capture of the property by the forces of the United States, and the sale and conveyance by the government to Lyon and his co-purchasers, the act of Congress confirming it, all fully and in form*, but still asking process of seizure, condemnation, and confiscation as before.*

Lyon answered this amended information, setting out the

* The idea of Mr. Lyon apparently was that any title which the United States got by confiscation would inure to him by way of estoppel.

history down to his deed, a copy of the deed, and a copy of the act of Congress confirming his title.

Huckabee and his co-corporators also answered this amended libel, setting up that "the so-called Confederate States were not a legal government, but existed by mere force and compulsion, and that it therefore never had any capacity under the laws of the United States or under the law of nations to acquire the title to lands;" setting up also that the deed given was executed under duress.

In this state of things the case came on for hearing, when the District Court dismissed the libel and amended libel, and made a decree vesting the property in Huckabee and his ancient co-corporators or their assigns. From that decree the United States and Lyon and his co-purchasers appealed.

Mr. J. T. Morgan, in support of the decree below:

I. *The libel and amended libel were both rightly dismissed.*

1. As to the amended libel. This is no more than an effort to procure a confiscation under the statutes of the property *in confirmation of the title of Mr. Lyon.* The original libel was by the United States and *an* informer. The amended one *is in reality* by the United States, Lyon and his co-purchasers (in the interest of him and them) against Huckabee and the original owners. The amended answer of Lyon is but a form, an admission of and support to the main parts of the amended libel. But the Confiscation Statutes are war measures, and the use of their great powers and of their extraordinary process for any purpose which concerns only private interests is wholly anomalous and improper.

2. As to the original libel. The amended libel shows an act of Congress approved 15th of December, 1866, by which title is declared to be in the United States and to be granted to Lyon. It destroys the case made in the original libel. No ground of confiscation by the government such as the original libel sets up can therefore exist.

3. Admitting, for argument's sake, that the process prescribed in the Confiscation Acts could be used by private

persons in the anomalous way attempted by Mr. Lyon, still on his own showing he and his co-purchasers (who are, in fact, complainants against Huckabee and his co-corporators) have a perfectly good title. They allege a valid sale to the Confederate government, the capture of the property by the United States, the extinction of the Confederate government, and a sale to them by the United States confirmed by Congress. *They* do not allege any claim by anybody, or any cloud on their title. They seek to confiscate a title which, according to their own showing, has no existence whatever. If they have the perfectly good title that they allege they have, then for any disturbance to their rights they have, of course, a full, adequate, and complete remedy at law. The fact that they may *really* feel, or even know, that they have not a good title, and are seeking through the extraordinary process of a confiscation to get one, does not alter the case, so far as this proceeding is concerned.

II. *The relief given to Huckabee and the original corporators was rightly granted.*

1. The power of the Confederate States to acquire title to lands must depend on their being a government. No legal authority for their existence can be found. "Confederate States" was the name merely for certain people engaged in rebellion, a rebellion opposed by law as well as by arms throughout the United States.*

The deed therefore which was made by Huckabee and his associates passed no title to the Confederate States. There was no grantee; no person or legal entity to receive. The consideration was illegal. It was made for an illegal purpose. It conveyed lands and other property for the express purpose of assisting the military operations of the States in rebellion. It was made by persons engaged in rebellion, contrary to the statutes of the United States prohibiting conveyances of property by such persons, and the United States government, if it had the power, never waived this violation of law, and confirmed the title, nor did it do

* United States *v.* Keehler, 9 Wallace, 86.

any act that could be so construed until after the surrender, and after it had proceeded in court to confiscate and condemn the lands so conveyed, setting up, in its proceeding, the making of such conveyance as the ground of forfeiture.

Congress has never admitted that the government of the United States acquired title to lands from or through the Confederate States, either by capture, succession, or treaty. Such an admission necessarily implies that the Confederate States had enough of legal corporate capacity to hold a title to lands; and this fact conceded, it must have had sovereignty, for it did not pretend to hold lands otherwise than as a sovereign power.

2. The deed was made by duress. It was made under such constraint as left the grantors without that freedom of choice and will that is essential in every contract. The owners made all the resistance they could make when they refused to contract. If they contracted, they could not pay their debts and get their capital back. If they leased they were "ruined." Nothing remained but to sell or be impressed. A rebel guard was in possession of the works. They sold. Did they not sell under duress?

The American cases, including the leading one of *Foshay* v. *Fergurson*,* strongly support the doctrine that there is no sound distinction between cases of threat or mischief to property, or to the person or good name, "because consent is of the essence of the contract, and where there is compulsion there is no consent," and there is compulsion when one's person or property is seriously threatened with mischief, or where "a man's necessities may be so great as not to admit of the ordinary process of law, to afford him relief."†

Mr. P. Phillips, *contra* (*for the plaintiff in error*):

Conceding that Mr. Lyon could not try the validity of this title in the way in which he sought to do it, and that

* 5 Hill (New York), 158.

† Collins *v.* Westbury, 2 Bay, 211; Sospartas *v.* Jennings, 1 Id. 470.

the libel and amended libel were properly dismissed, how did the court, after all, pass upon the title and award the property to the counter-claimants? If the court had no jurisdiction it ought to have dismissed the whole case; the libel, amended libel, and all the claims, leaving all parties just where they were originally.

For its deciding on the conflicting titles, its decree must certainly be reversed, and the course we speak of pursued.

It is hoped, however, that the court may find fit opportunity in reversing this decree, to express its opinion on the title set up by Huckabee and others, and so give quiet to the title which the government has conveyed to Lyon and his associates; and in this hope, and in reply to what has been said as to the merits of the title, we have to say:

The facts stated do not make duress any definition of that word as given by this court in cases* which both say the same thing, and only iterate old law.

The case of *Foshay* v. *Fergurson*,† relied on by the other side, and which carries this doctrine to its greatest length, is no support for the present case. The judge there says:

"I do not intend to say that a man can avoid his bond on the ground that it was procured by an illegal *distress on his goods;* but I entertain no doubt that a contract procured by threats and fears of battery, or the *destruction* of property, may be avoided on the ground of duress."

In this case there was no *destruction* threatened, but only *impressment*, which may be likened to a distress.

But if duress in fact existed this would not make the conveyance void, but voidable only, and a *bonâ fide* purchaser for valuable consideration, without notice, would hold the estate against the original grantor.‡

And in such a transaction, if the party on whom the duress has been practiced stands by and allows the defendant

* Brown *v.* Pierce, 7 Wallace, 214; Baker *v.* Morton, 12 Id. 150.

† 5 Hill, 158

‡ Fletcher *v.* Peck, 6 Cranch, 133; Bean *v.* Smith, 2 Mason, 252, 272; Somes *v.* Brewer, 2 Pickering, 184; Woods *v.* Mann, 1 Sumner, 509.

to purchase, this will bar his right of recovery. Much less will he be permitted to recover when on inquiry made by the intended purchaser he advises him that his title is good.*

And if a party seeks to set aside his conveyance rather than to affirm it, he can only do so by a restoration of the consideration received for it.†

Suppose the deed from the corporation could be avoided, for duress, this could only be done by the *corporation itself*. The corporation may and must appear by its constitutional organs or curators. The appearance of each and every member is no appearance at all.‡

In Broke's Abridgment, under the head of "Duress," (pl. 18) citing 21 Edward IV, 8, 14, 15, we find the following:

"*Dures ne poit este al corps politique, mes poit este al Maior de faire chose apparetignant a son office*, PER OPTIMEM OPINIONEM, *car il est teste del corporat. Imprisonment del teste del natural corps en pillorie, est imprisonment de tout le corps, car entier.*"

And in Brownlow it is said that a husband may avoid a deed on account of the duress upon his wife, and so a mayor and commonalty may avoid a deed on account of duress of imprisonment of the mayor, for there is identity of person.§

The title of the United States to the premises was acquired by actual capture, and also by its right of succession to the overthrown and extinct government.‖

It is argued that the deed was *absolutely void*, because the Confederate States were incapable of being a grantee—that it was not "a person or legal entity"—and being engaged in rebellion was opposed by law as well as arms throughout the United States.

* Doolittle *v.* McCullough, 7 Ohio State, 307.

† Harding *v.* Handy, 11 Wheaton, 103; Norton *v.* Young, 3 Greenleaf, 33; Cushing *v.* Wyman, 38 Maine, 591; Cook *v.* Gilman, 34 New Hampshire, 556.

‡ Broke; Title, Corporation, 28; Coke Lit., 66 B.

§ 2 Brownlow, 276.

‖ See United States *v.* Padelford, 9 Wallace, 540; and United States *v.* Klein, 13 Id. 136, 137.

Restatement of the case in the opinion.

If the Confederate government was *incapax*, in reference to a deed for land, it was equally incapable of being a party to any contract whatever, and yet we know as a fact that the government of the United States has been maintaining suits in foreign countries as the successor of the Confederate States, and claiming rights through them, and has received into the treasury millions of money derived from property sold by others to them.

It is too late—if ever it was soon enough—to raise this question; for this court, as early as 1868, in *Thorington* v. *Smith*,* described the Confederate States as "*a government*, called by publicists, *a government de facto*, but more aptly denominated a *government* of paramount force," and repeated decisions since have affirmed the same principle.

Mr. Justice CLIFFORD delivered the opinion of the court.

Pleadings, in informations for seizures upon land, or for confiscation of property, as well as in causes of admiralty or maritime jurisdiction, or in actions at law, or suits in equity, are governed by certain well-established rules of practice, which require that the allegations shall correspond with the facts as proved, and that the information, as in the case of a libel, declaration, or bill of complaint, if filed in a Federal court, shall show that the court has jurisdiction of the cause of action.† Proper parties in all cases are also required, and in all cases, except where there is a set-off or cross-action, the damages or relief sought, if the cause of action is sustained, should be adjudged and awarded to the party promoting the suit and not to a stranger; and if the cause of action is not sustained the judgment or decree should be for the opposite party, whether respondent or defendant.

Laws were passed by Congress at the commencement of the late rebellion, to prevent combinations to oppose the laws of the United States, and to provide for the confiscation of property used in the insurrection, and to that end all

* 8 Wallace, 9.

† McKinlay *v.* Morrish, 21 Howard, 346.

Restatement of the case in the opinion.

persons were forbidden by an act of Congress to "purchase or acquire, sell or give any property, of whatsoever kind or description, with intent to use or employ the same or suffer the same to be used or employed in aiding, abetting, or promoting such insurrection or resistance to the laws, or any person or persons engaged therein;" and the provision was, that if any person, being the owner of any such property, shall knowingly use or employ or consent to the use or employment of the same as aforesaid, all such property shall be the lawful subject of prize and capture wherever found, and it was made the duty of the President to cause the same to be seized, confiscated, and condemned.*

Pursuant to that act the district attorney exhibited an information against a certain tract of land, therein described, containing three thousand six hundred acres, with the improvements thereon, known as the Bibb County Iron Works, which belonged to the late Confederate States, and which, as he alleges, had been previously seized by the marshal under an order of seizure duly issued; and he also alleges that the property had, for several years, been knowingly used and employed by the owners, or with their consent, in aiding, abetting, and promoting the late insurrection and rebellion, and in aiding, abetting, and promoting persons engaged in the insurrection, rebellion, and resistance to the laws and authority of the United States, and that the property, during those years, had been knowingly used and employed by the owners, or with their consent, as a place for the mining and manufacturing of iron ore into all kinds of machinery and implements for military purposes by persons engaged in armed rebellion and resistance to the laws and public authorities, contrary to the statute in such case made and provided. Service was made and the present defendants appeared and claimed to be the true and lawful owners of the property, and they deny in separate and distinct articles in the answer every material allegation of the information. Apart from that they also allege that they have severally

* 12 Stat. at Large, 319.

received special pardon and full amnesty from the President for all past offences connected with the late war of the rebellion, and that they respectively have fully complied with all the terms and conditions of the several pardons, and therefore that the property should be restored to them as the rightful owners.

Prior to the rebellion the property in question was owned by a corporation known as the Bibb County Iron Company, and it appears that the present plaintiffs, at this stage of the litigation, entered their appearance in the suit, and being admitted to become parties and make claim, they alleged that the property belongs to them as the joint owners of the same; that the original owners sold the property to the late Confederate States for the sum of six hundred thousand dollars and then and there received payment in full for the same, and executed to the grantees a title-deed of the premises with full covenants of warranty, and that the purchasers took full possession of the property with all the appurtenances appertaining to the same; and they also aver that the grantors were fully advised of the objects and purposes for which the property was purchased, which were to furnish the grantees with iron to be used in manufacturing arms and munitions of war to be used in prosecuting the rebellion, and that the same was held, used, occupied, and enjoyed by the grantees as the undisputed owners until the same was captured by our military forces, having been used throughout that period as the efficient means of furnishing iron for arms, cannon-balls, and shells; that the property was subsequently captured from the Confederate States by our military forces and was put up and sold at public auction by the Assistant Commissioner of the Bureau of Refugees, Freedmen, and Abandoned Lands, who was authorized and lawfully empowered to sell and convey the same in that manner, and that the plaintiff claimants, or one of them, in behalf of himself and the others, became the purchasers for the sum of forty-five thousand dollars, that being the highest and best bid made for the same, and that the said commissioner, being thereto duly authorized by the President and

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Secretary of the Treasury, conveyed the property to the plaintiff claimants.

Beyond doubt those allegations were entirely inconsistent with the theory of the original information, as they show that the property, at the time the information was filed, was vested in the grantees of the United States, by virtue of a deed duly executed, and given for a valuable consideration paid by the purchasers, who, it is admitted, have never committed any such acts of forfeiture as those charged in the information. Allegations of the kind, however, are not sufficient without proof to oust the jurisdiction of the court. But the district attorney subsequently filed an amended information, and he also alleges that the property was captured from the Confederate States, and that the same was seized by order of the President, and that it was, by his order and that of the Secretary of the Treasury, sold to the highest bidder as captured property belonging to the United States, and that the same was purchased, as aforesaid, by the plaintiff claimants for the sum stated in the claim of the grantees. Such an averment in the information is sufficient proof of the fact, as against the prosecutor, especially as he confirms the allegation by referring to the act of Congress, which provides that any interest which the United States have in the lands described in the deed . . . be and the same is hereby released and confirmed to the said grantees.*

Absolute condemnation of the property to the United States was claimed in the first pleading, but the district attorney substantially admits, in the amended information, that no such decree can be entered, as he avers that the property is liable to condemnation, in confirmation of the title of the grantees under the United States, which would be a proceeding wholly without precedent in the jurisprudence of the United States.

Responsive to that, the present defendants filed an amended answer excepting to the amended information; because it

* 14 Stat. at Large, 616.

appears that the United States have no longer any interest in the prosecution, as they have released their right in the property to the other claimants, and because the jurisdiction of the court is ousted as relates to the property sought to be condemned.

It also appears that C. C. Huckabee, one of the present defendants, filed a separate answer, in which he alleges that he is the sole owner of a certain described portion of the lands mentioned in the information; and he also avers that the deed conveying the same to the Confederate States, which he and his associates gave, was executed under duress, and in obedience to the commands of an unlawful power, which neither he nor they could resist, and that the deed is void on that account; and he denies that the lands were ever captured by our military forces, or that the lands were ever seized under any warrant of seizure, as alleged in the information. Hearing was had upon the merits before the court, the parties having waived a jury and filed a stipulation to that effect. Witnesses were examined and other proofs were introduced, and the court entered a decree dismissing both the original and the amended informations.

Such a decree is usually regarded as exhausting the jurisdiction of the court, except in maritime cases, where there is a fund in the registry of the court to be restored to the rightful owner, but the court in this case proceeded to adjudge and decree that the claim of C. C. Huckabee, one of the defendants, be allowed and sustained to certain rights and privileges therein mentioned, including all the timber on a described portion of the lands, and the right of cutting and transporting the same, and that the title to the said described lands be adjudged to be in the said claimant, and that the marshal restore the possession of the said lands to the said claimant, and that the claim of all the defendants be sustained and allowed to another described portion of the lands in controversy, including also the right to the timber for certain purposes, and to the iron-ore in certain described localities; and it was also adjudged and decreed that the

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present plaintiffs, except the United States, should pay the costs of the suit. Exceptions were taken by the present plaintiffs to the rulings of the court and to the decree, and they sued out the present writ of error.

Evidence of the most satisfactory character, consisting of the deed signed by the corporation and by the several defendants, who owned all of the stock of the company, was introduced by the United States to show that the lands and improvements in question were conveyed by the original owners to the Confederate States, and that the purchasers paid to the grantors the agreed consideration of six hundred thousand dollars, and it appeared that they entered into full possession of the premises and used and employed the lands and improvements for the purposes alleged in the amended information. Equally satisfactory evidence was also introduced by the United States to show that the entire property was captured by our military forces during the war of the rebellion, and that the whole premises were sold under the orders of the President, as alleged, and that the same were conveyed by the commissioner who conducted the sale for the consideration of forty-five thousand dollars to the plaintiff claimants, or to one of them, for his benefit and that of his associates.

Subsequent to the capture by our military forces, the possession of the lands and improvements was continued in the United States, until the sale and conveyance by the said commissioner to the present grantees, on the third of February, 1866, at which time they received possession of the premises from the commissioner, and have continued in possession of the same to the present time, under an absolute deed from the commissioner, conveying to the grantees all the right, title, and interest which the United States had in the property at the time of the sale and conveyance, which conveyance has since been confirmed by an act of Congress.*

Four principal grounds are assumed by the present de-

* 14 Stat. at Large, 616.

fendants in support of the decree dismissing the informations, and the supplemental decree granting affirmative relief to the present defendants: (1.) That private persons, other than mere informers, cannot join with the United States in prosecuting an information for the confiscation of property, nor can the United States prosecute such a suit for the mere purpose of confirming the title of a third party. (2.) That the jurisdiction of the court was ousted by the sale and conveyance of the property to the grantees in the deed from the said commissioner, it also appearing that the conveyance was subsequently confirmed by an act of Congress. (3.) That the property was not subject to capture by our military forces, as the deed from the original owners to the Confederate States was void, having been executed by the owners of the property under duress. (4.) That if the grantees under the United States have a good title, then the court below had no jurisdiction of the case, as they have, if disturbed in their possession, a plain, adequate, and complete remedy at law.

Enough appears in the act of Congress forbidding the owners of property to use and employ it or to suffer it to be used and employed for such a purpose, with their consent, to show that the first objection is well taken, as it is made the duty of the President to cause the same to be seized, confiscated, and condemned, and the provision is that the proceedings for condemnation may be instituted by the attorney general or by the district attorney of the proper district, and that the proceedings instituted by those officers "shall be wholly for the benefit of the United States;" nor is the force of the objection in any degree obviated by the fact that the same section of the act provides that any person may file an information with one of those officers, and that, in that state of the case, "the proceedings shall be for the use of such informer and the United States in equal parts," as it is clear that the latter clause of the section affords no support to the theory that private persons, other than an informer, may join with the United States in prosecuting

such an information, or that the United States may prosecute such a suit for the mere purpose of confirming the title of a third party.*

Informations of the kind should propound in distinct articles the causes of forfeiture, and should aver that the same are contrary to the form of the statute in such case made and provided, and the rule is that inasmuch as the information is in the nature of a criminal proceeding, the allegations must conform strictly to the statute upon which it is founded, which is sufficient to show that the theory of the amended information cannot be sustained.†

2. Property owned by the United States certainly is not subject to confiscation under the information in this case, and inasmuch as it appears that the property was seized, sold, and conveyed by the order of the President, as alleged in the amended information, and that the conveyance so made has been confirmed by an act of Congress, the second objection must also be sustained, as it must be assumed, in view of what is alleged in the information and fully proved, that the property at the time of the sale and conveyance belonged to the United States.

3. Duress, it must be admitted, is a good defence to a deed, or any other written obligation, if it be proved that the instrument was procured by such means; nor is it necessary to show, in order to establish such a defence, that actual violence was used, because consent is the very essence of a contract, and if there be compulsion there is no binding consent, and it is well settled that moral compulsion, such as that produced by threats to take life or to inflict great bodily harm, as well as that produced by imprisonment, is sufficient in legal contemplation to destroy free agency, without which there can be no contract, because in that state of the case

* 12 Stat. at Large, 319; Confiscation Cases, 7 Wallace, 462; Jecker *v.* Montgomery, 18 Howard, 124; 2 Parsons on Shipping, 385; The Betsy, 1 Mason, 354.

† The Hoppet, 7 Cranch, 389; The Caroline, Ib. 500; The Charles, 1 Brockenborough, 347; The Mary Ann, 8 Wheaton, 380; 2 Parsons M. Law, 681.

there is no consent.* Unlawful duress is a good defence to a contract if it includes such degree of constraint or danger, either actually inflicted or threatened and impending, as is sufficient in severity or apprehension to overcome the mind and will of a person of ordinary firmness.† Decided cases may be found which deny that contracts procured by menace of a mere battery to the person, or of trespass to lands, or loss of goods, can be avoided on that account, as such threats it is said are not of a nature to overcome the will of a firm and prudent man; but many other decisions of high authority adopt a more liberal rule, and hold that contracts procured by threats of battery to the person, or of destruction of property, may be avoided by proof of such facts, because, in such a case, there is nothing but the form of a contract without the substance.‡ Positive menace of battery to the person, or of trespass to lands, or of destruction of goods, may undoubtedly be, in many cases, sufficient to overcome the mind and will of a person entirely competent, in all other respects, to contract, and it is clear that a contract made under such circumstances, is as utterly without the voluntary consent of the party menaced, as if he were induced to sign it by actual violence; nor is the reason assigned for the more stringent rule, that he should rely upon the law for redress, satisfactory, as the law may not afford him anything like a sufficient and adequate compensation for the injury.§ Much discussion of the topic, however, is unnecessary, as the record does not exhibit any sufficient evidence, in either point of view, to support such a defence or to warrant the court in finding for the defendants upon any such ground, which is all that need be said upon the subject, as it is obvious that that objection cannot be sustained.‖

* Brown *v.* Pierce, 7 Wallace, 214.

† Chitty on Contracts, 217; 2 Greenleaf on Evidence, 283.

‡ Foshay *v.* Fergurson, 5 Hill, 158; Central Bank *v.* Copeland, 18 Maryland, 317; Eadie *v.* Slimmon, 26 New York, 12; 1 Story's Equity Jurisprudence, 9th ed. 239.

§ Baker *v.* Morton, 12 Wallace, 158.

‖ Ryder Wombwell Law Reports, 4 Exchequer, 39; Giblin *v.* McMullen, Law Reports, 2 Privy Council Appeals, 335.

4. Argument to show that the court below had no jurisdiction of the case if the plaintiff claimants had a good title to the premises, is hardly necessary, as both the pleadings and evidence show that they were in the possession of the lands and improvements when the prosecution was commenced. Sufficient has been remarked to show that their title is a good one as against the United States, and it is quite clear that the present defendants do not have any such standing in the pleadings in this information as to give them the right to call it in question, as the suit is one in the name and for the benefit of the United States.* Such being the character of the suit, the mistake of the district attorney in supposing that it might be prosecuted to confirm the title of the plaintiff claimants, cannot have the effect to give the court any jurisdiction of the case, much less to give the court jurisdiction to determine that the title to the premises is in the defendants and to eject the plaintiffs, holding under the United States, and to decree that the possession of the lands and improvements shall be delivered to the defendants. What the district attorney expected to accomplish by continuing to prosecute the information after the seizure and sale of the property by the United States is not perfectly certain, unless he supposed the court might treat the information as one in the nature of a bill in equity to remove a cloud upon the title of the grantees under the United States, arising from the pretence of the present defendants that the deed which they executed to the Confederate States was void as having been procured by duress. Concede that, still it is evident that it was an attempt to accomplish what the court under such a pleading had no jurisdiction to grant, as the parties interested were citizens of the same State, and no such issue was alleged in the information, and if there had been, and the parties had been citizens of different States, it would nevertheless be clear that the court could not grant any such relief under any process founded upon the act of Congress, entitled an act to confiscate property.† Doubtless

* Confiscation Cases, 7 Wallace, 462.

† 12 Stat. at Large, 319.

a bill in equity would lie, in a proper court, to remove a cloud upon their title, but it is obvious that for any encroachment upon their possessions they had a plain, adequate, and complete remedy at law. They claimed title under the United States, and the record shows that the title of the United States was derived by conquest from the government of the late Confederate States. Our military forces captured the property while it was in the possession of the Confederate States as means for prosecuting the war of the rebellion, and it appears that the captors took immediate possession of the property and continued to occupy it under the directions of the executive authority until the government of the Confederate States ceased to exist and the unlawful confederation became extinct, when it was sold by the orders of the executive and conveyed to the plaintiff claimants.

All captures in war vest primarily in the sovereign, but in respect to real property, Chancellor Kent says, the acquisition by the conqueror is not fully consummated until confirmed by a treaty of peace, or by the entire submission or destruction of the state to which it belonged, which latter rule controls the question in the case before the court, as the confederation having been utterly destroyed no treaty of peace was or could be made, as a treaty requires at least two contracting parties.* Power to acquire territory either by conquest or treaty is vested by the Constitution in the United States. Conquered territory, however, is usually held as a mere military occupation until the fate of the nation from which it is conquered is determined, but if the nation is entirely subdued, or in case it be destroyed and ceases to exist, the right of occupation becomes permanent, and the title vests absolutely in the conqueror.† Complete conquest, by

* 1 Kent's Commentaries (11th ed.), 110; Lawrence's Wheaton (2d ed.), 55; United States *v.* Percheman, 7 Peters, 86.

† Insurance Co. *v.* Canter, 1 Peters, 511; Hogsheads of Sugar *v.* Boyle, 9 Cranch, 195; Shanks *v.* Dupont, 3 Peters, 246: United States *v.* Rice, 4 Wheaton, 254; The Amy Warwick, 2 Sprague, 143; Johnson *v.* McIntosh, 8 Wheaton, 588.

whatever mode it may be perfected, carries with it all the rights of the former government, or in other words, the conqueror, by the completion of his conquest, becomes the absolute owner of the property conquered from the enemy, nation, or state. His rights are no longer limited to mere occupation of what he has taken into his actual possession, but they extend to all the property and rights of the conquered state, including even debts as well as personal and real property.*

Tested by these considerations, it must be assumed for the further purposes of this investigation that the title acquired by the plaintiff claimants from the United States was a valid title, and if so, then it is clear that the court below had no jurisdiction of the cause of action alleged in the information, as the plaintiffs, if disturbed in their possession of the premises, had a plain, adequate, and complete remedy at law. Discussion of that rule of decision at this time, however, is unnecessary, as the whole subject was considered by this court in a recent case, to which reference is made as one entirely applicable in principle to the case before the court.†

Numerous exceptions were taken by the plaintiffs to the rulings of the court in admitting and rejecting evidence, several of which it is obvious were erroneous, but in the view taken of the case it is not necessary to re-examine any such questions, as the court is of the opinion that the court below had no jurisdiction to render any decree in the case upon the merits of the controversy.

Usually where a court has no jurisdiction of a case, the correct practice is to dismiss the suit, but a different rule necessarily prevails in an appellate court in cases where the subordinate court was without jurisdiction and has given

* Halleck's International Law, 839; Elphinstone *v.* Bedreechund, 1 Knapp's Privy Council Cases, 329; Vattel, 365; 3 Phillmore's International Law, 505.

† Insurance Co. *v.* Bailey, 13 Wallace, 621; Hipp *v.* Babin, 19 Howard, 271.

judgment or decree for the plaintiff or improperly decreed affirmative relief to a claimant. In such a case the judgment or decree in the court below must be reversed, else the party which prevailed there would have the benefit of such judgment or decree, though rendered by a court which had no authority to hear and determine the matter in controversy.

DECREE IN ALL THINGS REVERSED for the want of jurisdiction in the court below, and the cause remanded with directions to dismiss the case, including the original and amended informations, and the claims of all the claimants.

WALKER *v.* HENSHAW.

Prior to the 9th of July, 1858, when the President set apart the surplus of land which remained after the Shawnee Indians had obtained their complement under the treaty of the United States with them, ratified November 2d, 1854, and opened such surplus to pre-emption and settlement, an Indian of the Wyandotte tribe could not locate "a float" held by him under the treaties of the United States made with his tribe October 5th, 1842, and 1st of March, 1855.

ERROR to the Supreme Court of Kansas; the case being thus:

Walker and others brought an action under the civil code of Kansas to try title to and get possession of a section of land in Douglas County, Kansas, being "parcel of the lands ceded to the United States by the Shawnee tribe of Indians, by treaty ratified November 4th, 1854,* and lying between the Missouri State line and a line parallel thereto and west of the same thirty miles distant."

The condition of these lands, as gathered from the provisions of certain Indian treaties and the laws of Congress, was as follows:

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* 10 Stat. at Large, 1056.

Statement of the case.

By articles of convention, made between William Clark, Superintendent of Indian Affairs, and the *Shawnees*, of November 7th, 1825, in exchange for their lands near Cape Girardeau, on the Mississippi, held under the authority of the Spanish government, the Shawnees had the right to select 1,600,000 acres of land (a tract equal to fifty miles square) on the Kansas River, to be "laid off either south or north of that river, and west of the boundary of Missouri."

By act of Congress of May 28th, 1830, the President was authorized to make the exchange,* and—

§ 3. "To assure the tribe or nation . . . . that the United States will forever secure and guarantee to them, their heirs or successors, the country so exchanged with them," and

§ 6. "To cause such tribe or nation to be protected, at their new residence, against all interruption or disturbance *from any other tribe or nation of Indians*, or from any other person or persons whatsoever."

By articles of agreement and convention of August 8th, 1831, the United States agreed to grant, by patent in fee simple, 100,000 acres of land, to be located under direction of the President, within the limits of the fifty miles square reserve, provided for by the said treaty of 1825,† and to guarantee that said lands

"Shall never be within the bounds of any State or Territory, . . . and cause said tribe to be protected . . . against all interruption or disturbance *from any other tribe or nation of Indians*, or from any other person or persons whatever."‡

[This fifty miles square reserve was located so as to include the lands in question.]

These arrangements and this treaty, the reader will observe, were with the *Shawnee* Indians; and thus things with that tribe and the United States remained A.D. 1842.

On the 17th of March in the year just named, a treaty was concluded between the *Wyandot* Indians and the United States.§ The 14th article of it was thus:

* 4 Stat. at Large, 412, § 2.
† 7 Id. 356, art. 2.
‡ 7 Id. 357, art. 10.
§ 11 Id. 583.

Statement of the case.

"The United States *agree to grant*, by patent in fee simple, to each of the following named persons [Irwin Long among others] and their heirs, all of whom are Wyandottes, one section of land, . . . out of any lands west of the Mississippi [afterwards changed by amendment to Missouri] River, *set apart* for Indian use, *not already claimed or occupied by any person or tribe.* The lands hereby granted to be selected by the *grantees*, . . . *but never to be conveyed* by them, or their heirs, without the permission of the President of the United States."

We now come back to the *Shawnees.*

The 1,600,000 acres of land granted to them by the treaty of 1825, subject to the provisions of the treaty of August 8th, 1831, including the lands in question, remained the property of the Shawnees until November 2d, 1854.* A new treaty was then ratified between them and the United States, by which the Shawnees ceded to the United States this 1,600,000 acres, and the United States ceded back to the Shawnees 200,000 thereof, "to be selected between the Missouri State line and a line parallel thereto, and west of the same thirty miles distant," *including the lands in question.*

Out of these 200,000 acres, east of the thirty mile line, were to be carved certain head rights, and set off certain tracts to be occupied by Shawnees in common and for the protection of certain absentees; the residue was to be

"Set apart in one body of land, in compact form, under the direction of the President of the United States, and all such Shawnees as return to and unite with the tribe within FIVE years from the proclamation of this treaty† shall be entitled to the same quantity of land" as their brethren, &c., ... "and whatever portion of said surplus remains unassigned, *after the expiration of said five years*, shall be sold as hereinafter provided," &c., the selections to conform to the legal subdivisions of the survey provided for in article 5.

The fifth article also

"No *white person or citizen* shall be permitted to *make locations or settlements* within the thirty mile limits until after all of the

* 10 Stat. at Large, 1053. † This gave until November 2d, 1859.

lands shall have been *surveyed*, and the Shawnees shall have made their selections and locations, *and the President shall have set apart the surplus.*"

On the 22d of July, 1854, Congress passed an act extending the pre-emption laws over "all the lands to which the Indian title has been, or shall be, extinguished" within the Territories of Nebraska and Kansas.*

We now pass back again to the Wyandottes, with whom the treaty had been made October 5th, 1842.

By a new treaty, now made March 1st, 1855, it was thus provided in a tenth article:

"That each of the individuals to whom reservations were granted by the fourteenth article of the treaty of March 17th, 1842, or their heirs or legal representatives, shall be permitted to *select* and *locate* said reservations on any *government* lands west of the States of Missouri and Iowa, *subject to pre-emption and settlement*, said reservations to be patented by the United States in the name of the reservees as soon as practicable after the selections are made; and the reservees, their heirs or *proper* representatives, shall have the unrestricted right to sell and convey the same whenever they may think proper."

The lands in question were first opened for settlement, pre-emption, and sale on the 9th of July, 1858.

So far as to treaties and the date of opening of these lands to pre-emption, &c. Now as to the facts of this particular case.

The plaintiffs claimed under Irwin Long, the Wyandotte Indian mentioned in the treaty of 1842, who held a patent from the United States. In support of this title it appeared that on the 8th of May, 1857, one Stover, a white man, as agent for Long, filed in the office of the Surveyor-General of Kansas and Nebraska a written notice that as such agent of Long he had on that day selected and located a reserve of land to which Long was entitled, *in pursuance of the two treaties made by the United States with the Wyandottes on the 5th of October*, 1842, *and the 1st of March*, 1855. On this pro-

* 10 Stat. at Large, 309.

ceeding a patent—this being the patent under which the plaintiffs claimed—purporting to convey the lands in pursuance of the said treaties, was issued and duly delivered.

The defendants claimed title by virtue of a pre-emption settlement of the 28th of July, 1858. In support of this title it appeared that in February, 1857, one Whaley, being personally qualified, entered upon and made settlement in person, and commenced to improve with intent to pre-empt and purchase the land; that after making such settlement, and within thirty days thereafter, he went to the proper local land office, with intent to file notice of his said settlement and intention to pre-empt, and offered to make such filing; but that the register of the land office refused to allow such filing, on the ground that the said land was not pre-emptable; that in April of the same year he went to the same office and made the same offer, which was refused by the register on the same grounds; that on the 30th day of July, 1858, he duly filed in the office of the register of the said land office a notice of his settlement on said land, and of his intention to pre-empt the same, dating the time of his settlement July 28th, 1858; *that on the 5th day of May, 1859*, he purchased the said land, and paid for the same, and took the usual certificate of such purchase and payment; that on the 10th day of August, 1860, the said pre-emption and purchase was approved by the Commissioner of the General Land Office of the United States, and the register of the local land office was duly notified, by letter of said commissioner, of such approval.

That afterward the said Whaley applied to the register of said local land office, at his office, for a patent from the United States to him for said land, and was informed by said register that said patent had been sent from Washington to said office, and afterwards recalled.

As already said, the land in question was first opened for settlement, pre-emption, and sale, on the 9th of July, 1858.

The suit being referred to a referee to try the action, he found as matter of law that up to the 9th of July, 1858, when, as just mentioned, the lands were first opened for settlement,

pre-emption, and sale, and indeed up to May 5th, 1859, when Whaley made his payment and purchase, neither plaintiffs nor defendants had acquired any title; but that by the purchase and payment then made, an equitable title was vested in Whaley.

He accordingly found that the defendants were entitled to judgment, and found further that the plaintiffs should convey the title to the defendants, &c.

This decision was declared to be right by the Supreme Court of the State, and the case was now brought here for review.

Messrs. W. T. Otto and J. P. Usher, for the plaintiffs in error; Messrs. Thacher and Banks, contra.

Mr. Justice DAVIS delivered the opinion of the court.

If the land in controversy was subject to the location of the Wyandotte float before it was proclaimed open to pre-emption and settlement, the title of the plaintiffs cannot be divested by any supposed equity growing out of the pre-emption of the defendants. If, on the contrary, neither the plaintiffs' grantor nor the defendants could take any steps towards acquiring title to the land until the 9th day of July, 1858, when it was first opened to pre-emption settlement, the defendants having since that date complied with all the requirements of the pre-emption law, and obtained the usual certificates of purchase, and the grantor of the plaintiffs having taken no action on the subject after the 8th day of May, 1857, are equitably entitled to the land, and the legal title enures to their benefit.

Whether the one or the other of these categories be true, depends on the construction to be given several Indian treaties, which we will proceed to notice.

By the fourteenth article of the treaty with the Wyandotte nation of Indians, ratified on the 5th day of October, 1842,* the United States agreed to grant to each of several named

* 11 Stat. at Large, 583.

persons (among the number Irwin Long), Wyandottes by blood or adoption, a section of land out of any lands west of the Missouri River, set apart for Indian use, not already claimed or occupied by any person or tribe. The privilege of selecting the lands was conceded to the grantees, but the power of alienation was denied them, except with the permission of the President.

Another treaty was made with this same tribe of Indians on the first day of March, 1855,* which conferred on the reservees, under the treaty of 1842, the right to select and locate their lands on any government lands west of the States of Missouri and Iowa, subject to pre-emption and settlement, and the restriction upon alienation imposed in the first treaty was withdrawn, except as to certain incompetent persons. The reserve of Long, through whom the plaintiffs claim title, was located upon the land in dispute, in May, 1857, and the question is, was the location authorized by either of these treaties? It is contended that the lands were not, at the time of the attempted location, subject to be taken under the Long float, because they were then claimed or occupied by the Shawnee Indians, and this presents the most important subject of inquiry.

It had been, for a long time prior to the Wyandotte treaty of 1842, the well-defined policy of Congress to remove the Indians from organized States, and in execution of this policy, territory supposed at the time to be too remote for white settlement, was set apart exclusively for the use of Indian tribes. It was this policy that dictated the removal of the Shawnees from Missouri and Ohio, in 1825 and 1831, to a tract of country in Kansas of large area, ceded to them by the United States, and embracing the lands in controversy. They held this large tract of land under the protection of treaties and acts of Congress, from 1825 to 1854, when the rapid decrease in their numbers, and the encroachments of the white population, induced the government to conclude another treaty with them, essentially lessening

* 10 Stat. at Large, 1162.

their territorial limits. During this time they were, by express stipulation, assured of protection, not only against interruption or disturbance from any other tribe of Indians, but from everybody else. In recognition of this guarantee, the reservees, under the Wyandotte treaty of 1842, although in pursuance of the policy of the government, confined in their selections to lands west of the Missouri River set apart for Indian use, could not appropriate the lands already claimed or occupied by any person or tribe.

It is apparent, therefore, that Long had no right to locate his float on the land in dispute, from 1842 to 1854, because during all this time it was claimed or occupied by the Shawnees. Did the treaty of 1854 with them so alter the condition of things as to render valid the location of this float in 1857? By this treaty the Shawnee nation ceded to the United States all the large domain granted to them by the treaty of 1825, with the exception of two hundred thousand acres reserved as homes for the Shawnee people, to be selected within certain defined limits, which included the lands in dispute. It was contemplated that even this reservation might be more than the wants of this people required, on account of the paucity of their numbers and the limited quantity of land assigned to each individual member of the tribe. Accordingly, provision was made that the surplus which remained unassigned after the expiration of five years, unless sooner ascertained, should be sold by the government and the proceeds appropriated to the use of the Indians. During this time the privilege was conceded to the Shawnees of selecting their lands wherever they chose, within the limits of the reservation. Indeed, until this privilege was exhausted, the land, in any proper sense, belonged to them.

In surrendering the larger part of their immense possessions to relieve the government from the predicament in which it was placed by the advancing tide of white population, they did not part with any right in the lesser part reserved by them as long as the claim of any single member of the tribe, according to the terms of the treaty, was unsatisfied. If one person could acquire a right to any portion

of the lands thus reserved so could another, and in this way the privilege of free and unrestricted selection would be frittered away. It needed no special provision to secure this freedom of choice, for without it the treaty could not be executed. By virtue of the treaty itself these lands were appropriated to a specific purpose, and whatever interfered with the accomplishment of this purpose was necessarily forbidden.

It is easy to see that the purpose for which the Shawnees retained in their own hands the entire reservation could not be effected, if an entry for location and settlement by any one else were permitted, for the part thus taken was subject at any moment of time to be chosen for the use and occupation of the Shawnees. In effect the retrocession by these Indians of the lands granted to them in 1825 was on the condition that they should be allowed to select, within a limited time, out of two hundred thousand acres set apart for this purpose, a quantity of land equal to two hundred acres for each individual member of the tribe. The performance of this condition required, until this time expired, absolute non-interference by any outside party. On any other theory of interpretation these Indians, on account of their helpless state, could not have obtained the lands they desired. If these views be correct the exclusion, in section five, of white persons and citizens from making locations or settlements was not required by the necessities of the case. They were excluded without it. The clause was doubtless inserted out of superabundant caution and to satisfy the misgivings of the Indians, who, from experience, had good reason to dread the encroachments of this class of people, notwithstanding treaty stipulations. This experience had given them no ground to apprehend interference from the Indians on account of the direct control exercised by the government over the affairs of all the Indian tribes.

If, however, the government had been able, without difficulty, to protect them against their own race, it had not, with every effort, been always able to hold in restraint the ceaseless activity of the white race. It was therefore natural

that on this occasion the Shawnees should want, although wholly unnecessary, a positive stipulation against the unlawful intrusion upon their rights by our own citizens. Indeed, this very case affords an illustration of the quarter from which trouble has always arisen, for Stover, a white man located the reserve, and it is a reasonable presumption, in the absence of any proof on the subject, that he was interested in the location. It is enough to say, without pursuing this branch of the case further, that we agree with the learned Supreme Court of Kansas, that the latter clause of the fifth article of the treaty "conferred no right or made no prohibition which the law would not raise on the treaty" without it.

If so, the location of Long's float, under the treaty of 1842, was an illegal act, because inconsistent with the existing rights of the Shawnees. These rights were in full force at the time of the attempted location, and remained in this condition until the proclamation of the President of the 9th of July, 1858, setting apart the surplus of lands which remained after the Shawnees had obtained their full complement and opening the lands thus segregated for pre-emption and settlement.

In no respect has the United States failed to discharge the obligation incurred by the treaty of 1842 with the Wyandotte reservees. The Indian country to which they were invited to go had been defined by Congress,* and they were told to locate their reserves anywhere within it, provided they did not encroach on the rights of others. This limitation was not only reasonable in itself, but essential to preserve the faith of the government in its several treaties with the different Indian tribes. Why thirteen years were suffered to pass without these reserves being located does not appear, but it is obvious in 1855 they had materially lessened in value, as before that time the limits of the Indian country, by legislation and treaty, had been very much restricted. This restriction imposed on the government the duty of

* See 4 Stat. at Large, 729, and acts extending the same.

making other provisions for these floating grants, and this duty was performed by the Wyandotte treaty of 1855. This treaty, among other things, allowed the reservees to locate their floats on any government lands west of Missouri and Iowa subject to pre-emption and settlement, and removed the restraint upon the power of alienation, imposed in the former treaty. This action of the government placed Long and the defendants, as to the lands in question, on precisely the same grounds. Neither party could acquire any right to them until they were thrown open to pre-emption and settlement, and both, as soon as this was done, were at liberty to take them up; Long, by means of his float, the defendants by reason of their qualifications as pre-emptors; and whoever moved in the matter first would have the better right. It required, however, positive affirmative action after the lands were declared to be public lands before any title to them, legal or equitable, could be obtained, and all proceedings attempting to forestall the proclamation of the President were null and void, because in contravention of the treaty with the Shawnees. The defendants, not relying on their prior settlement in February, 1857, to protect them, took the proper steps after this proclamation to perfect their pre-emption, and have performed all the conditions to which they were subject by the law. They have therefore a complete equitable title to the land, and as the patent issued to Long was based on an unlawful entry it ought to be transferred to the defendants.

There is, in our opinion, no error in the judgment of the Supreme Court of Kansas, and it is accordingly

AFFIRMED.

RIBON *v.* RAILROAD COMPANIES.

A majority of the stockholders and creditors of a railroad company which had several mortgages on the road, agreed to sell it for a price offered, and to divide the proceeds among all the stockholders and creditors in a way settled on by those agreeing to the plan. Other stockholders and

creditors refusing to agree, in order to get around their opposition a sale was effected through the action of the majority, by an amicable foreclosure of mortgage, the trustees in one of the mortgages being complainants, and those in other mortgages, with the corporation whose road was intended to be sold, the defendants. The dissatisfied stockholders and bondholders then filed a bill against the purchaser and the railroad corporation whose road had been sold, *but not making any of the trustees or any of the consenting stockholders parties*, charging collusion in this sale, and praying that it might be set aside, a resale made, and the money arising from the sale be applied primarily to their benefit. *Held*, that the bill was fatally defective for want of proper parties.

APPEAL from the Circuit Court for the District of Iowa.

Ribon and several others, bondholders and stockholders in the Mississippi and Missouri Railroad Company, filed a bill against the Chicago, Rock Island, and *Pacific* Railroad Company, to set aside as collusive and fraudulent a sale which had been made of the road of the former company (one which had numerous stockholders, and also numerous bond creditors, secured by five different mortgages) to the latter company, through means of an amicable foreclosure and decree, in which certain persons, trustees in one mortgage given by the latter company, were complainants, and certain other persons, trustees in four other mortgages given by the same company, along with the company itself, were defendants.

The bill alleged an agreement between a company called the Chicago and Rock Island Railroad Company, and a majority of the bondholders and stockholders of the Mississippi and Missouri road, by which this latter road should be sold to the former company, and the proceeds divided among the bondholders and stockholders of the latter, in a way fixed upon; that there being several stockholders and bondholders in the latter company who dissented from this arrangement, a scheme was devised by the majority of the stockholders, *to which the different trustees under the different mortgages were parties*, to carry the thing out in the way above named, and so cut off those who dissented; and the execution of the scheme through a sale of the Mississippi and Missouri Railroad to the old Chicago and Rock Island Company, with a some-

Case stated in the opinion.

what different organization, and a name so far changed as to have the addition of "Pacific."

The bill was filed by the complainants for themselves and such other dissenting bondholders and stockholders as should choose to become parties and contribute; and it prayed, as already stated, that the sale might be set aside; praying further that the property might be resold under the decree; that the money arising from the sale be applied, first, to the payment of the bonds of the complainants and of any dissenters who might come in, and be afterwards applied upon the stock of the complainants and of any dissenters who might come in; and praying for other and further relief.

It made both the Chicago, Rock Island, and Pacific company (the company purchasing), and the Mississippi and Missouri company (the company whose road had been sold), defendants; *but it did not make any of the stockholders through whose assent the trustees had acted, nor the trustees through whose act the scheme was charged to have been actually consummated, parties.*

For these omissions, as of indispensable parties, the defendants demurred; and the court below sustained the demurrer and dismissed the bill. Ribon and his co-complainants appealed.

Mr. J. Grant, for the appellants, cited *Dodge* v. *Woolsey*;* *Mr. T. F. Witherow, contra.*

Mr. Justice SWAYNE stated particulars of the case, and delivered the opinion of the court.

This is an appeal in equity from the decree of the Circuit Court of the United States for the District of Iowa. The appellants are the complainants. A brief statement of the case as presented in the record will be sufficient for the purposes of this opinion.

The Mississippi and Missouri Railroad Company was incorporated to construct a railroad from Davenport, on the

* 18 Howard, 331.

Case stated in the opinion.

Mississippi River, to a point at or near Council Bluffs, on the Missouri River. It executed five mortgages to secure different sets of bonds, and issued stock in shares of $100 each, to the amount of $3,500,000. The company built a part of its roadway, and became greatly embarrassed. A large majority in interest of the bondholders and stockholders decided to sell all the property of the company to the Chicago and Rock Island Railroad Company, or to such other corporation as that company might designate to receive the transfer; and in order to pass the title it was determined to have the mortgages foreclosed and a sale made under the decree. The Rock Island company entered into the arrangement, and agreed to pay $5,500,000 as the consideration of the sale. Payment was to be made in bonds as specified in the contract. The majority in interest of the bond and stockholders of the Mississippi company agreed among themselves as to the distribution of the fund. Such proceedings were subsequently had that under a decree in a suit in equity, wherein the trustees in one of the five mortgages were complainants, and the trustees of the other four and the Mississippi company were defendants, a sale was made to the Chicago, Rock Island, and *Pacific* Railroad Company for the sum of $2,100,000. Five and a half millions of the bonds of the purchasing company were nevertheless paid over according to the prior contract, and have been distributed according to the agreement among themselves, of the majority in interest of the stockholders and bondholders of the Mississippi company. The Chicago, Rock Island, and Pacific company is in possession of the property so sold to them, and operating the finished part of the road. It is not denied that the proceedings touching the sale are upon their face regular and valid.

The holders of the bonds of the Mississippi company, to the amount of $185,000 and of six thousand shares of the stock, refused to become parties to the arrangements and proceedings of the majority in interest—never assented to the sale, and did not participate in the distribution of the proceeds.

The complainants are dissenting bond and stockholders. They filed this bill for themselves and such other dissenters as might choose to become parties and contribute to the costs of the litigation. The prayer of the bill is that the sale may be declared fraudulent and void; that the property may be resold under the decree; that the money arising from the sale be applied, first, to the payment of the bonds of the complainants and of the other dissenting bondholders who may become parties, and that the residue be applied upon the stock of the complainants and of such other dissenters as may become parties, and for other and further relief.

The appellees demurred to the bill, and assigned for cause, among others, the want of indispensable parties. The demurrer was sustained, and the complainants not electing to amend, the court dismissed the bill.

The want of parties is the only point we have found it necessary to consider.

The rule in equity as to parties defendant is that all whose interests will be affected by the decree sought to be obtained must be before the court; and if any such persons cannot be reached by process—do not voluntarily appear, or from a jurisdictional objection going to the person in the courts of the United States, cannot be made parties—the bill must be dismissed. Where a decree can be made as to those present, without affecting the rights of those who are absent, the court will proceed. But if the interests of those present and of those absent are inseparable, the obstacle is insuperable. The act of Congress of 1839 and the rule of this court upon the subject give no warrant for the idea that parties whose presence was before indispensable could thereafter be dispensed with. The subject was fully considered in *Shields* v. *Barrow*.* What is there said need not be repeated.

The rule that all to be affected by the result must be before the court is subject to certain exceptions. But they

* 17 Howard, 130.

have no application to the case before us, and need not, therefore, be considered. The rule, as we have stated it, is well settled in equity jurisprudence.*

In the case before us the two railroad companies were properly made defendants—the Mississippi and Missouri company because it was the mortgagor and the owner of the mortgaged premises up to the time of the sale, and because if the sale were annulled its title would be restored; the Chicago, Rock Island, and Pacific company, because it was the purchaser and is in possession of the property under a claim of title. But the Mississippi and Missouri company has nothing at stake. It is without means, present or prospective. It has been stripped of all its property and effects, and only cumbers the ground.

The trustees in the five mortgages which were foreclosed should have been made parties. Their presence as such was indispensable. If the sale should be annulled they might be in the situation of the plaintiff who collects a judgment which is afterwards reversed. He may be called upon to refund and compelled to do so. A question would also arise whether the consideration of the agreement under which the five and a half millions of bonds were paid had not failed, and whether all the bondholders and stockholders who participated in the distribution of the proceeds of the sale should not be required to refund. If either or both were too numerous for all to be brought before the court, some might have been made parties in their own behalf and as the representatives of the others.†

Dodge v. *Woolsey et al.*,‡ to which our attention was called by the learned counsel for the appellants, presents no material points of analogy to the case before us, and affords no support to this bill in the particular under consideration. The bill in this respect is fatally defective. We do not deem

* Caldwell *v.* Taggart, 4 Peters, 190; Story *v.* Livingston, 13 Id. 359; Marshall *v.* Beverley, 5 Wheaton, 313; Coy *v.* Mason, 17 Howard, 580; Russell *v.* Clark's Ex'rs, 7 Cranch, 69.

† Story's Equity Pleadings, 7th ed., §§ 120–121, 128, 131, 132, and notes.

‡ 18 Howard, 331.

it necessary to pursue the subject further. The demurrer was properly sustained and the bill properly dismissed.

DECREE AFFIRMED.

KENICOTT *v.* THE SUPERVISORS.

1. A legislative act chartering a railroad company and authorizing the construction of a railroad between certain points, authorized, by its 7th, 8th, and 9th sections, the company to borrow money, and authorized also a county through which the road chiefly ran to issue its bonds and provide for their payment by the sale of its swamp and overflowed lands. A 10th section proceeded:

   "Any county through which said road *may* run, and *every* county through which *any other railroad may* run with which this road *may be joined, connected,* or *intersected, may,* and are hereby *authorized* and *empowered* to *aid* in the *construction* of the *same,* or of *such other road* with which it may so connect; and for this purpose the provisions of the seventh, eighth and ninth sections of this act *shall extend, include,* and be *applicable* to *every* such county and *every such* railroad."

   Held, that this section did not require that the road to be aided should be actually built before a county was authorized to mortgage its lands; but, contrariwise, that the aid was intended to be given before the road was built, and that the counties giving the aid were expected to take the ordinary risk of the success of the undertaking in which they embarked their property.
2. Where another company was subsequently chartered to build a road, whose course ran up to one terminus of the road of the company previously chartered, and thence onwards completely through another county adjoining the county in which the former road lay, and the railroad company first chartered undertook the construction of the new road from the terminus above mentioned onwards, completely through the other and adjoining counties; *held,* that the authority to construct the connecting road, and the entering into a contract for its construction, formed a "connection" within the meaning of the above-quoted 10th section.
3. In a bill to foreclose a mortgage given to secure negotiable railroad bonds with the bonds transferred to a *bonâ fide* holder for value, no other or further defences are allowed as against the mortgage than would be allowed were the action brought in a court of law upon the bonds. *Carpenter* v. *Longan* (*supra,* 271) affirmed.
4. The 7th and 10th sections of the act of the Illinois legislature, of February, 1855, chartering the Mount Vernon Railroad Company, authorized

(other things permitting) the mortgage of the swamp and overflowed lands of Wayne County, Illinois, by the judges of the County Court.

5. A *bonus* is not a gift or gratuity, but a sum paid for services, or upon a consideration in addition to or in excess of what would ordinarily be given.

APPEAL from the Circuit Court for the Southern District of Illinois; the case being thus:

The Central Railroad of Illinois runs, in a large part of its course, north and south through the State just named. The great extent of its course, and the important places through which it passes or to which it leads, made it a matter very desirable to the towns in adjoining districts on the east and west of it to connect themselves by other railroads with it. Among the towns on the east, and about eighteen miles to the east of the road, was Mount Vernon, a place situate in Jefferson County, a county on the east of the road, whose course runs parallel to the whole of the western line of the county. This town, moving early in the matter, the legislature of Illinois, in February, 1855, chartered a company, called the Mount Vernon Railroad Company, whose immediate purpose was, with the aid of a mortgage on certain lands in Jefferson County, known as the "swamp and overflowed lands," to build a road from Mount Vernon, in Jefferson County aforesaid, to the Illinois Central. Such a road, of course, would run west through the western part of Jefferson County, cross its western line, and connect soon after with the desired trunk of the Illinois Central.

The charter, in its seventh, eighth, and ninth sections, reads thus:

"SECTION 7. The corporation may borrow such sums of money as they deem advisable, and upon such terms as they may agree for the carrying out of the objects of this act, and may provide any security therefor they think best, by bond and mortgage, or otherwise.

"SECTION 8. The County Court of Jefferson County are hereby authorized and empowered to subscribe for such amount of the capital stock of said company as they may think proper. They may issue the bonds of the county, and provide for the payment of the principal and interest thereof, by *sale* or *mort-*

gage, one or both, of the *swamp* and *overflowed lands* of said county, and dispose of such bonds for money to pay, or in payment of their subscription to said stock; all and each to be upon such time, *terms,* and in such *mode* as they may *deem* best; or they *may make such other disposition* of said swamp and overflowed lands in *aid* of the *construction* and maintenance of said railroad as they *deem best* for the public interest of said county.

"SECTION 9. Before any disposition is made of said swamp and overflowed lands, or any subscription to the stock of said company, the said County Court may, at any regular or special term of said court, order a special election to be held for the purpose of taking the sense of the qualified voters of the county thereupon—giving such notice thereof as they may deem proper—and which shall be conducted, and returns made, canvassed, and published in all respects as other county elections. The County Court shall prepare a proposition or propositions of the mode or modes, one or more, containing a *brief, clear, distinct idea of the plan or plans proposed by them for aiding in constructing of said road;* which said proposition shall be printed at large as an election ticket, and the voters may express their will on said proposition by writing 'Yea' and 'Nay' on a separate ticket. The proposition or plan having the highest number of votes shall be adopted by the County Court."

But in addition to the sections thus quoted followed another and very important one in these words:

"SECTION 10. Any county through which said road *may* run, and *every* county through which *any other railroad may* run with which this road *may be joined, connected,* or *intersected, may,* and are hereby *authorized* and *empowered* to *aid* in the *construction* of the *same,* or of *such other road* with which it may so connect; and for this purpose the provisions of the seventh, eighth, and ninth sections of this act *shall extend, include,* and be *applicable* to *every* such county, and *every such* railroad."

So far as to Jefferson County; and this 10th section.

On the east again of Jefferson County, and, like it, having "swamp and overflowed lands," and like it interested in gaining a connection with the great trunk of the Illinois Central, was Wayne County; the west line of this county being about eleven miles east of the town of Mount Vernon.

Statement of the case.

On the same day of February, 1855, when the charter already mentioned was granted, a charter had been granted to another company, named the Belleville and Fairfield Railroad Company, whose purpose was the construction of a road from Belleville (a place in Illinois near St. Louis, and west of the Illinois Central), through Nashville (Illinois) and Mount Vernon, to Fairfield, a place in Illinois nearly east of Mount Vernon, and so finally to Louisville, Kentucky. This road, which ran from west to east, was chartered so as to run through both the counties of Jefferson and Wayne, and by the terms of the 10th section of the Mount Vernon road might "be joined, connected, or intersected" with it.

This charter to the Belleville and Fairfield road being in existence, the County Court of Wayne County, on the 13th of March, 1856, made a deed of its swamp lands to one Charles Wood, in trust for that company or any other company that would build a railroad through the county. This deed recited that a connection had been made between the Mount Vernon and the Belleville and Fairfield roads, by which the latter would become a part of and elongation of the former; that the power to appropriate the swamp lands in Wayne County through which the said road was situated was brought into operation; that a vote had been taken in November, 1855, to appropriate and donate said lands for the purpose of aiding in constructing the said road, and that this power had been conferred by the 9th section of the charter of the Mount Vernon company, and that in execution of such authority and power the deed was made by the County Court. The deed contained a proviso, that if the road should not be made in a certain time the land should be reconveyed by Wood to the county.

An act of the Illinois legislature, passed February 14th, 1857, amendatory of the charter of this Belleville and Fairfield company, and extending its line of transit, changed the name of the company to "The St. Louis and Louisville Railroad Company." The proposed line of the road as thus enlarged crossed the Illinois Central and was located directly

through five different counties, of which Wayne was one. The act declared:

"SECTION 4. The vote heretofore taken in Wayne County to donate the swamp lands to the Belleville and Fairfield Railroad Company, &c., and the conveyance of said land by the County Court of said county in trust for the use of the said railroad company are, and the same are hereby declared to be legal and valid.

"SECTION 5. Each county through which said railroad runs may donate the swamp lands of such county to the St. Louis and Louisville Railroad."

In this state of things the county of Wayne held an election in November, 1858, in which the question was thus proposed to the voters:

"For appropriating the swamp lands of Wayne County as a *bonus* to any company for building a railroad through said county.

"Against the same."

A majority of votes was cast in favor of the proposition, and thereupon soon after this time two persons, named Van Duser and Smith, entered into a contract with Wayne County for building that part of the road of the Belleville and Fairfield company (or, as it now was, the St. Louis and Louisville company) lying between the east line of Wayne County and Mount Vernon, thus running across the entire width of Wayne County. This contract having been partially executed by Van Duser and Smith was assigned to the Mount Vernon Railroad Company, in which they had become the chief stockholders, and that company undertook the construction of this portion of the road.

The county of Jefferson entered into a like contract for the construction of the Mount Vernon road, from Mount Vernon to the Illinois Central.

On the 20th of April, 1859, S. J. Wilson and T. M. Scott, judges of the County Court of Wayne County, mortgaged the whole, about 100,000 acres, of the swamp and overflowed lands of the county to Isaac Seymour, of New York, in trust

to secure the payment of bonds to the amount of $800,000, to be issued by the Mount Vernon Railroad Company. The recitals of the mortgage ran thus:

"WHEREAS, The Congress of the United States duly passed an act, approved September the 28th, A.D. 1850, entitled 'An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits,' and in pursuance thereof the Secretary of the Interior of the United States caused a patent to be issued to the State of Illinois for all the swamp and overflowed lands within its limits, to be *situated* under the direction of the commissioners of the Land Office:

"*And whereas*, The legislature of the said State of Illinois passed an act, approved by the governor of said State on the 22d of January, A.D. 1852, entitled 'An act to dispose of the swamp and overflowed lands, and to pay the expenses of selecting and surveying the same,' which said act authorized the appropriation and disposal of said lands for such purposes as may be deemed expedient by the court or county judges:

"*And whereas*, The legislature of the State of Illinois passed an act, approved by the governor of said State on the 15th of February, A.D. 1855, entitled 'An act to incorporate the Mount Vernon Railroad Company,' whereby all such persons and corporations as shall become stockholders under the provisions of the said act, and their successors, were duly incorporated into a body politic and corporate under the name of the Mount Vernon Railroad Company, and the parties of the first part were duly authorized and empowered to make such disposition of the swamp and overflowed lands within the said county of Wayne, in aid of the construction and maintenance of the said railroad, as they deem best for the public interest of said county:

"*And whereas*, At a special term of the said County Court of the county of Wayne, held on the 28th of September, A.D. 1855, an order was duly made and entered by the same court, whereby a special election was ordered and directed on the 5th of November, A.D. 1855, to be held for the purpose of taking the sense of the qualified voters of the county upon the mortgaging that portion of the said overflowed and swamp lands hereinafter described, for the purpose of aiding in the construction and maintenance of the said the Mount Vernon Railroad; and the said

County Court did then and there order public notice of such special election to be given by advertisements, in accordance with the statute laws of said State of Illinois, which said notice was given and published in conformity with the terms and provisions of said order; and the said County Court did prepare a proposition containing *a brief, clear, and distinct idea of the plan proposed by them for aiding in constructing said road*, and did cause the said propositions to be duly printed at large as an election ticket, and presented to the said qualified voters of said county, to be used at such election, in the words and figures following, to wit:

"For appropriating the swamp lands of Wayne County as a bonus to any company for building a railroad through said county."

"Against the same."

"And the said special election was duly held, pursuant to said notice, on the said 5th day of November, A.D. 1855, and conducted in all things in conformity to the provisions of said charter and the laws of the said State of Illinois, and the returns thereof made, canvassed, and published in all respects as other county elections are required to be in and by the said laws:

"*And whereas*, The said proposition or plan above stated received the highest number of votes, and a majority of all the votes given at such election, and a majority of the qualified voters of the said county of Wayne expressed their will by writing and voting 'Yea' upon the said several printed propositions or tickets cast by them at the said election; and whereas, upon the returns of said special election being duly made, canvassed, and published as aforesaid, the County Court of the county of Wayne did adopt the proposition or plan having the highest number of votes as aforesaid, and did order and adjudge and determine to execute a mortgage in conformity to such proposition or plan, and to the provision of this instrument, to the parties of the second part as trustees upon the land hereinafter described, for the purpose of aiding in the construction and maintenance of the said Mount Vernon Railroad, which said order was duly made in open court on the 20th of April, A.D. 1859:

"*And whereas*, By virtue of the said several acts and proceedings the parties of the first part have become endowed with the

Statement of the case.

requisite power and authority to dispose of and mortgage the said lands for the purpose of aiding the construction and maintenance of the railroad of the said Mount Vernon Railroad Company, and the said parties deem it best for the public interest of the said county of Wayne that the lands hereinafter described should be mortgaged to the party of the second part, trustee and commissioner, duly appointed and selected by both the said parties of the first part and the said the Mount Vernon Railroad Company, upon the terms and conditions particularly set forth:

"*And whereas*, The said the Mount Vernon Railroad Company has deemed it advisable to provide for the issue and disposal, now and hereafter, of its construction bonds, for the purpose of raising funds, from time to time, for the construction and completion of the railroad, and for the equipment thereof, and the expenses of organizing and operating the same, and thereby to become indebted to divers persons, bodies politic or corporate, who shall become holders of such construction bonds and obligations in the just and full sum in the aggregate of $800,000, secured to be paid by their 400 construction bonds or obligations of and for $500 each, and by their 600 construction bonds or obligations of and for $1000 each, to the extent of $800,000 in the aggregate, to bear date on the first day of ——, A.D. 1859, and be payable in fifteen years from the date thereof, which will be in the year 1874, at the Bank of North America, in the city of New York, with interest at the rate of 7 per centum per annum, payable semi-annually at the Bank of North America, in said city of New York, on the 1st day of May and November, in each year, to be secured hereby; all which bonds are to have warrants for the payments of the interest thereon attached, and to be in the form following, the respective number and amounts thereof being omitted:

"The Mount Vernon Railroad Company acknowledges itself to owe Isaac Seymour or bearer $1000, which said company hereby promises to pay on presentation of this bond hereof at the Bank of North America, in the city of New York, on the first day of May, A.D. 1874, with interest thereon at the rate of 7 per cent. per annum, semi-annually, on the first day of May and November in each year, until the said principal sum shall be paid on presentation of the proper interest warrants hereto annexed at the said Bank of North America.

"This bond is one of a series of 400, of $500 each, and 600 of $1000 each, of like term and date, not exceeding in the whole the sum of $800,000, issued

and to be issued for the purpose of the construction and the completion of the said railroad, and the expenses incident thereto. Full payment of the principal and interest of the whole issue of these bonds is secured by a mortgage bearing even date herewith to the said Isaac Seymour, of the city of New York, as trustee, of 100,000 acres of land in the county of Wayne, in the State of Illinois, granted by the said State and county, for the purpose of constructing and maintaining said railroad, and also by a mortgage to said Isaac Seymour, as trustee of said railroad, its branches, and other real and personal property of said company.

"In witness whereof the said the Mount Vernon Railroad Company has caused this bond to be executed and attested in its behalf, by its president and treasurer, and its interest warrants to be signed by its secretary, and its corporate seal to be hereto affixed at the ——, in the State of ——, this —— day of ——, A.D. 1859."

"Which said construction bonds or obligations are primarily secured by this indenture, and the lands herein described, and the avails thereof, are to constitute a primary fund for the payment of the principal and interest of the said bonds.

"Now, therefore, this indenture witnesseth: That the said parties of the first part, in consideration of the premises and of one dollar to them severally paid by the parties of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, remised, released, conveyed, and confirmed, and, by these presents, do grant, bargain, sell, remise, release in full of, convey, and confirm to the party of the second part, his successors, and the survivors of them, and the heirs and assigns of such survivors, forever, all and singular the land and premises situate and lying and being in the county of Wayne, and the State of Illinois, bounded and described as follows, that is to say."

[Here followed a description by tracts of all the lands mortgaged; these being the swamp and overflowed lands in question.]

"To have and to hold all and singular the lands and premises hereby granted or intended so to be, and each and every part and parcel thereof, with the appurtenances, unto the said party hereto of the second part, his successors and assigns, forever, as joint tenants, and not as tenants in common, for the uses and purposes in this indenture set forth and declared.

"And this indenture further witnesseth that the said parties of the first part, for themselves and their successors do cove-

nant and agree that if default shall be made in the payment of the interest upon the said construction bonds or obligations, so that a sum equal to one year's interest of the whole amount of the said construction bonds or obligations already issued and secured by these presents, [?] or that if default shall be made in the payment of the principal of said construction bonds or obligations, that then and from thenceforth it shall and may be lawful for the said parties of the second part to enter into and upon and take possession of all and singular the lands and all the premises included or intended to be included in this mortgage."

This mortgage was accompanied by a deed of trust of the same date between the same parties, with recitals similar to it, and equally in the interests of the bondholders. Both, as appeared by an entry in the records of the County Court, were thus recognized in that tribunal. The entry was thus:

APRIL SPECIAL TERM, 1859.

"At a special term of the County Court of Wayne County, began and held at the court-house in Fairfield, on the 20th day of April, 1859. Present, Hon. S. J. Wilson, judge; T. M. Scott, associate; J. W. Barnhill, clerk."

Order of County Court of Wayne County.

"And now, on this day, the court executed to Isaac Seymour, of the city of New York, a deed of trust to certain swamp and overflowed lands lying in said Wayne County. The conditions and provisions of said trust deed will more fully appear by reference to said trust deed, which is entered of record in the recorder's office of said county in mortgage-book 'B,' pages 330 to 341; and also executed a mortgage on the same lands to the said Isaac Seymour, as collateral security, to enable the Mount Vernon Railroad Company to procure money to build a railroad through Wayne, from the eastern boundary of said Wayne County to Mount Vernon, in Jefferson County; and which mortgage is referred to and is recorded in the recorder's office of said Wayne County, in mortgage-book 'B,' pages 341 to 359.

"And it is ordered by the court that S. J. Wilson be, and he is hereby, appointed a commissioner to act as the attorney of said Isaac Seymour, trustee as aforesaid, in the said county of Wayne, State of Illinois."

Argument for the county.

The Mount Vernon Railroad Company issued the bonds such exactly as were described in the recitals above given of the mortgage; and certain of them (to the extent of $73,000) passed into the hands of one Kenicott and others, citizens of Massachusetts. These holders of the bonds had paid value for them before their maturity, without notice of any defect or infirmity in the bonds or in the mortgage. The interest being unpaid, they filed a bill in the court below against the Board of Supervisors of Wayne County impleaded with the Mount Vernon Railroad Company, to foreclose the mortgage given as already mentioned by the county just named.

In its answer, the defendant insisted that the Mount Vernon Railroad Company was not located in, did not run in the county of Wayne, and had no authority or right to run or locate its road through that county. It was denied that there was any other railroad running through the county of Wayne with which the Mount Vernon road was joined, or connected, or intersected, and it was averred that it did not then connect with any railroad in the county of Wayne. Proofs were taken, and the bill was dismissed upon the ground that the proofs failed to show that at the date of the mortgage and deed of trust for securing the payment of the bonds there was any line of railroad constructed, or authorized to be constructed, through the county of Wayne, with which the Mount Vernon railroad was joined, connected, or intersected. The plaintiffs thereupon appealed to this court.

Mr. J. C. Robinson, for the county of Wayne, in support of the judgment below, argued that the Mount Vernon railroad could not under its charter run through Wayne County; that upon the most liberal construction to be given to the tenth section the power depended on the existence of one of two facts:

1st. That the Mount Vernon road may run through Wayne County; or

2d. That some other railroad may run through that county with which the Mount Vernon road "may be joined, connected, or intersected."

Now there was no proof of any consolidation of the roads; a matter in Illinois confessedly to be done only in a way prescribed by statute.* The case was sought, in fact, to be rested on a sort of connection by contract of the Mount Vernon road at Mount Vernon, with a railroad through Wayne County, to be built by the effort of Wayne County, from east to west, and so on to Mount Vernon. But no such power can be got from any provision which is contained in the Mount Vernon charter; and as to any proposition that a county by virtue of its municipal organization possesses power to build a railroad, the idea is one which no one in this day would advance. A county, as the law is now settled to be, is created by the law-making power, a municipal organization for the purposes of government alone, and sustains to the sovereign power the relation of a mere corporation, with only such powers as have been expressly granted, or result by necessary implication.

No doubt under the laws of Illinois a county may sell and convey its real estate. But neither under those laws nor independently of them may a county make a gift, a pure donation, of its property. The vote taken here was "for appropriating the swamp lands of Wayne County as a *bonus* to any company for building a railroad through said county." Such a vote was a nullity. To *give away*, without any consideration, the property of the public is beyond the power of any county court, or even of the people themselves.†

By the eighth section of the charter of the Mount Vernon road, the County Court is required "to *prepare a proposition or propositions* OF THE MODE OR MODES, *one or more, containing a brief, clear, distinct idea* OF THE PLAN OR PLANS *proposed by them for aiding in constructing of* SAID ROAD."

The proposition submitted was this:

"For appropriating the swamp lands of Wayne County as a

* Act of 28th February, 1844; Session Laws of 1854, p. 9; Gross's Statutes, p. 537, ch. 86*a*.

† Whiting *v.* Sheboygan Railroad Co., 25 Wisconsin, 167; The People *v.* The Township Board of Salem, 9 American Law Register, new series (August, 1870), p. 487.

bonus to any company for building a railroad through said county."

Does this proposition embrace a "brief, clear, distinct idea" of a "plan" to aid in the construction of the *Mount Vernon Railroad*, whose nearest point to Wayne County is eleven miles west of its most western boundary, and by *mortgaging* these lands *to secure the payment of the bonds to be issued by that company?* No one will say it does.

As to the recitals in the mortgage which we suppose will be set up by way of estoppel, it is enough to say that these complainants are entire strangers to that instrument, and can take no benefit from it; there is no proof in the record that they ever saw or heard of it, and of course their action could not have been at all influenced by it. Under such facts there can be no application of the law of estoppel, as it does not operate as to strangers.*

Neither does the doctrine of estoppel apply to a grantor acting officially as a public agent or trustee.†

Mr. W. B. Scates, contra, for the bondholders.

Mr. Justice HUNT delivered the opinion of the court.

The following propositions may be considered as settled in this court.

1. If an election or other fact is required to authorize the issue of the bonds of a municipal corporation, and if the result of that election, or the existence of that fact, is by law to be ascertained and declared by any judge, officer, or tribunal, and that judge, officer, or tribunal, on behalf of the corporation, executes, or issues the bonds, with a recital that the election has been held, or that the fact exists, or has taken place, this will be sufficient evidence of the fact to all *bonâ fide* holders of the bonds.‡

2. If there be lawful authority for the municipality to issue

* Carver *v.* Jackson, 4 Peters, 83.

† Fairtitle *v.* Gilbert, 2 Term, 169; Coke Littleton, 363, *b.*

‡ Authorities, *infra.*

its bonds, the omission of formalities and ceremonies, or the existence of fraud on the part of the agents of the municipality issuing the bonds, cannot be urged against a *bonâ fide* holder seeking to enforce them.*

3. There must, however, be an original authority, by statute, to the municipality to issue the bonds. Municipal corporations have not the power, except through the special authority of the legislature, to issue corporate bonds which will bind their towns; neither have they the power to sell or mortgage the lands belonging to such towns without special authority.†

The alleged absence of such authority is the basis of the defence to the mortgage sought to be foreclosed in the present action. Four several and distinct grounds on which such power is based are urged by the plaintiffs. But one of these will be examined. The court is satisfied with the authority to be found in the 10th section of the act to incorporate the Mount Vernon Railroad Company. An examination of the others is not necessary.

The town of Mount Vernon is situated in Jefferson County, and some 18 miles easterly of the Illinois Central Railroad. This road passes within a short distance of the westerly line of said county, and nearly parallel with it. Wayne County is still east of Jefferson County, the whole of the latter county lying between Wayne and the Illinois Central road. In the month of February, 1855, the legislature of Illinois passed an act to incorporate the Mount Vernon Railroad Company, for the purpose of building a railroad from Mount Vernon to the Illinois Central Railroad, or to its Chicago branch. The 7th section of the act provided that the company might borrow money and secure the same by bond or mortgage. By the 8th section it was enacted that the county of Jefferson might issue its bonds and provide for the payment thereof by the sale or mortgage of its swamp or

* Grand Chute *v.* Winegar, 15 Wallace, 355; Commissioners of Knox Co. *v.* Aspinwall, 21 Howard, 539; Gelpcke *v.* Dubuque, 1 Wallace, 203; Moran *v.* Miami County, 2 Black, 722.

† Marsh *v.* Fulton County, 10 Wallace, 676.

overflowed lands, or that they might make such other disposition of the lands in aid of the construction and maintenance of the railroad as they deemed best for the public interests of the county.

The 9th section provided that the question of aiding the railroad, and of the mode in which such aid should be given, should be submitted to the decision of the voters of the county.

The 10th section was in the following words:

"Any county through which said road *may* run, and *every* county through which *any other railroad may* run, with which this road *may be joined*, *connected*, or *intersected*, *may*, and are hereby *authorized* and *empowered* to *aid* in the *construction* of the *same* or of *such other road* with which it may so connect; and for this purpose the provisions of the seventh, eighth, and ninth sections of this act *shall extend*, *include*, and be *applicable* to *every* such county and *every such* railroad."

The provisions of the 7th, 8th, and 9th sections of the charter of the Mount Vernon Railroad Company were thus made applicable to any other county than that of Jefferson, through which that road should run, or through which any other railroad should run, which might join, intersect, or connect with the Mount Vernon road. Such other county was expressly authorized to aid in the construction of the Mount Vernon road, or of such other road with which it might so connect.

No reasonable construction of this act will require that the road to be aided should be actually built before the county was authorized to give it aid. That theory would no doubt add greatly to the security of the county, and would relieve it from many of the perplexing questions which so commonly arise. If, however, the road were actually built, no aid would be needed in its construction. The aid might, in that event, be useful to its stockholders, or might relieve it from embarrassments, but a road which is built can neither need nor receive aid in its construction. That is a fact accomplished. The language of this act expressly authorizes the swamp or overflowed lands to be used

by the counties in aid of the construction of the road, and it seems to be quite plain that the aid was intended to be given before the road was built, and that the counties were expected to take the ordinary risk of the success of the undertaking in which they embarked their property.

The county of Wayne held an election in November, 1858, and voted that these lands should be applied in aid of any company that would build a railroad through the county. Soon after this time Van Duser & Smith entered into a contract with Wayne County for building that part of the road of the Belleville and Fairfield Company lying between the east line of Wayne County and Mount Vernon, thus running across the entire width of Wayne County. This contract was assigned to the Mount Vernon Railroad Company, who undertook the construction of this portion of the road.

The county of Jefferson entered into a like contract for the construction of the Mount Vernon road, from Mount Vernon to the Illinois Central.

It was for the purpose of aiding in the construction of the road thus undertaken to be built by the Mount Vernon Railroad Company from the east line of Wayne County to Mount Vernon, the charter of that company also requiring its road to be built from Mount Vernon to the Illinois Central, that the bonds in question were issued. They were sold under the authority of the county of Wayne, by its agents, and the proceeds were applied as was intended by the county. The Belleville and Fairfield Railroad Company, afterwards changed to the St. Louis and Louisville Railroad Company, was chartered for the construction of a railroad from St. Louis, on the Mississippi, to Mount Carmel, on the Wabash River. Its proposed line crossed the Illinois Central, and was located directly through five different counties, among which was the county of Wayne. It was that portion of the line of this road through the county of Wayne that was located and surveyed by the Mount Vernon Railroad Company and of which the construction was undertaken by that company, as the assignee of Van Duser & Smith.

Some portion of the work had then been done. This brought the county of Wayne within the terms of the 10th section already quoted, and authorized its action in the issue of bonds to aid in its construction.

These were existing contracts, under which the contracting parties were taking efficient measures for the construction of the road. Those contracting parties could make no objection to the power of the counties so to contract. The contracts were valid and obligatory against them, and would be effectual, if carried out, to make the railroad connections needed by the county.

The authority to construct the connecting road, and the entering into a contract for its construction, formed a connection within the meaning of the 10th section.

Such was also the opinion and the assertion of the county of Wayne, when, in November, 1856, it conveyed these lands to Charles Wood, in trust for certain railroads that should build a road through that county.

The deed to Wood recites that a connection had been made between the Mount Vernon road and the others mentioned, that a vote had been taken in the county of Wayne authorizing that deed, and that it was made in pursuance thereof. This deed was recognized and confirmed by the legislature, and expressly declared to be valid in the passage of the act of February 14th, 1857, to amend the charter of the Belleville and Fairfield Railroad Company. The lands were afterwards reconveyed to the county by Mr. Wood.

Holding that there was valid power for the giving of the mortgage in question by the county of Wayne under the 10th section of the Mount Vernon charter, and that there was in fact and in law a sufficient connection with other roads, we do not deem it necessary either to examine the other alleged sources of authority for the execution of the mortgage, or the alleged acts of the county in confirmation of it. Under the circumstances stated, we are also of the opinion that there was a sufficient submission of the question to the voters of the county, and that as against *bonâ fide* holders for value the question is not an open one. It

Opinion of the court.

has been decided at the present term of this court, that where a note secured by a mortgage is transferred to a *bonâ fide* holder for value before maturity, and a bill is filed to foreclose the mortgage, no other or further defences are allowed as against the mortgage than would be allowed were the action brought in a court of law upon the note.*

In this action to foreclose the mortgage, the case stands in this respect as it would stand had the present suit been brought directly upon the bonds, and without reference to the mortgage.

The execution of the deed and mortgage by Wilson and Scott, the judges of the county court of Wayne County, and on behalf of the county, was a sufficient execution by the county. In the mortgage and trust deed all the proceedings to authorize a conveyance by the county are recited—the title of the swamp lands in the county through an act of Congress; the authority of the State to dispose of the same by the courts or county judges; the passage of the act incorporating the Mount Vernon Railroad Company—and that the parties of the first part were duly authorized on behalf of the county to make disposition of the land in aid of the construction of the railroad; that the question had been referred to and passed upon by the voters of the county; that, by virtue of all the proceedings recited, the said judges, parties of the first part, had become endowed with power to dispose of the lands; therefore they conveyed, as set forth. This conveyance was, on the 20th of April, 1859, by an order that day entered in its minutes, recognized and confirmed as the act of the county of Wayne by its authorized agents, and by which the lands were mortgaged and conveyed. The 7th section of the Mount Vernon Railroad act, above referred to, vests the power to dispose of these lands in the county court. This body must act by agents, and none can be more suitable and appropriate than the judges of the court. By the 2d section of the act to dispose of swamp and overflowed lands, passed January 22d, 1852, it is provided that in the

* Carpenter *v.* Longan, *supra*, p. 271.

cases in the 1st section mentioned, the deed of conveyance shall be made by the judges of the county court as such, and countersigned by the clerk with his official seal. In reference to sales at auction, it is provided by the 11th section that a conveyance shall be executed by "the court, signed in their official capacity," and countersigned by the clerk. The signature of the clerk is nowhere declared to be an absolute prerequisite. In effect this was a conveyance on behalf of the county, by their agents for that purpose duly appointed. By the 7th section of the Mount Vernon charter the county court was authorized to sell or mortgage the lands, or to make such other disposition of them "as they may deem best for the public interest." No mode was pointed out in which a conveyance should be made. No particular signature was made a condition to the validity of the conveyance. There is no ground for the objection to the form here adopted, viz.: by a deed of trust and mortgage, signed by the judges of the county court. In form and in substance the deed was well executed, and valid as the deed of the county.

The objection to the word "bonus" in the proposition submitted to the voters of Wayne County is not valid. This submission, in connection with the general subject of a failure to comply with the requisites prescribed by the statute, has been already discussed. Upon its individual merits we are also of the opinion that the objection is not valid. It is a verbal criticism merely—an objection to the words and not to the substance of the submission. A proposition was submitted to the voters, of which the affirmative was in these words: "For appropriating the swamp lands of Wayne as a bonus to any company for building a railroad through said county." It is said that the word "bonus" condemns the submission; that this word means a gratuity, a voluntary donation, a gift, and that a town or county cannot, although it have the direct authority of the legislature, give away its property. When this question is properly before us it will be disposed of. It does not, however, arise in this case. In the first place, if it be assumed that the word is correctly

defined as a gift, or gratuity, that meaning is controlled and limited by the connection in which it is here used, to wit: that in consideration of it the company receiving the lands will undertake to build a railroad through the county. It is not simply a *bonus*, but a bonus to any company who shall undertake the great task of building a railroad through the county, a task which, it is loudly complained, has not yet been performed by any one.

But, secondly, the meaning of the word bonus is not that given to it by the objection. It is thus defined by Webster: "A premium given for a loan or a charter or other privilege granted to a company; as, the bank paid a *bonus* for its charter; a sum paid in addition to a stated compensation." It is not a gift or gratuity, but a sum paid for services, or upon a consideration in addition to or in excess of that which would ordinarily be given.

Upon the principles announced in the opening of this opinion, the plaintiffs are entitled to a judgment for the amount of the bonds held by them. If we are right in the positions taken, there was indeed no real defence to the bonds.

We think there was error in the decision of the case; that the judgment must be

REVERSED, AND A NEW TRIAL HAD.

Mr. Justice MILLER and Mr. Justice FIELD dissented.

Mr. Justice DAVIS did not sit.

MORGAN *v.* PARHAM.

1. When a vessel is regularly registered in the port to which she belongs, that is to say, "in the port nearest to which her owner, husband, or acting and managing owner usually resides" [registered, *ex. gr.*, at New York], the fact that she may be temporarily in a port of a State [as *ex. gr.*, Mobile, in Alabama], other than that where her home port is, and engaged in lawful commerce—one of a daily line of steamers—between

that port and the port of a yet third State [as *ex. gr.*, New Orleans in Louisiana], does not cause her to become incorporated into the personal property of the State of Alabama, and no State but that in which her home port is has dominion over her for the purpose of taxation.

2. The fact that the vessel was enrolled by her master as a coaster at Mobile, Alabama, and that her license as a coaster was renewed from year to year, does not affect her registry in New York or her ownership there. It accordingly does not change the rule.

ERROR to the Circuit Court for the Southern District of Alabama; the case being thus:

The Constitution ordains that

"Congress shall have power to regulate commerce between the States."

An act of Congress passed December 31st, 1792,* enacts that

"Every ship or vessel shall be registered by the collector of the district in which such ship or vessel shall belong at the time of her registry, and her port shall be that nearest to which her owner, husband, or acting and managing owner usually resides, and the name of the vessel and the port to which she shall so belong shall be painted on her stern, on a black ground in white letters, not less than three inches in length."

The omission to designate the name "and *port to which she belongs*" is made penal.

An act of February 18th, 1793,† for enrolling and licensing vessels employed in the coasting trade, enacts thus:

"SECTION 3. That it shall and may be lawful for the collectors of the several districts to *enrol and license* any ship or vessel that may be *registered*, upon such registry being given up; or to register any ship or vessel that may be enrolled upon such enrolment and license being given up. And when any ship shall be in any other district than the one to which she belongs the collector of such district, on the application of the master or commander thereof, and upon his taking an oath or affirmation that according to his best knowledge and belief the property

* Section 3d; 1 Stat. at Large, 56, 288. † Ib. 306.

remains as expressed in the register or enrolment proposed to be given up, &c., shall make the exchanges aforesaid; but in every such case the collector, to whom the register or enrolment and license may be given up, shall transmit the same to the Register of the Treasury; and the register, or enrolment and license granted in lieu thereof, shall within ten days after the arrival of such ship or vessel within the district to which she belongs, be delivered to the collector of the said district, and be by him cancelled."

This provision of the Constitution, and these acts being in force, the steamer "Frances" was assessed in the years 1866 and 1867 as personal property in the city of Mobile, belonging to one Morgan. A tax was laid upon the vessel, and remaining unpaid, the same was seized by the collector of the city of Mobile. The owner, Morgan, brought an action of trespass in the court below against the collector for such seizure, and the collector justified by virtue of his tax warrant.

The facts upon which the question of the liability to taxation of the vessel depended, were these:

The Frances was brought to Mobile in 1865, and from that time until the trial in 1870, had been employed as a coasting steamer between Mobile and New Orleans. Before being brought to Mobile, the vessel was duly registered at the port of New York, under the ownership of the plaintiff, and the name of the vessel and her port of New York were then painted on her stern, according to the acts of Congress, and the same had ever since so remained. The plaintiff then was and since had remained a citizen of New York. The vessel then was the property of the plaintiff, and had continued to be his property from that time to the day of the trial.

In January, 1867, the vessel was regularly enrolled at the custom-house in Mobile by her master, as a coaster, and her license as a coasting vessel was renewed in the several years 1868 and 1869, and with other similar vessels constituted one of a daily line of steamers plying between Mobile and New Orleans. During this term the captain of the vessel

had been a resident of Mobile, and the agent conducting the business of the vessels at Mobile was resident there, occupied an office there for such business, and employed and paid the persons who assisted him therein, but such agent was under the control of a superior agent residing in New Orleans, who employed and paid the captain and other officers of the vessel. A wharf and office in Mobile were occupied for the use of these vessels. The vessels were built at Wilmington for the domestic trade. They transported the mails, freight, and passengers between Mobile and New Orleans, and this business was extensive and profitable. Upon these facts the question arose, was this vessel subject to taxation as personal property under the laws of the State of Alabama?

The court held that the vessel was taxable under those laws, and gave judgment for the defendant. To review that judgment the present suit was brought.

Mr. P. Phillips, for the plaintiff in error, contended that the vessel was owned in New York, had not been blended with the commerce and business of Alabama, was engaged in the interstate coasting trade, and that her taxation by the authority of Alabama would be in violation of that provision of the Constitution of the United States which gives to Congress the regulation of commerce between the States.

Mr. C. W. Rapier (with whom was Mr. C. F. Moulton), contra, insisted that the vessel was personal property within the State of Alabama, and subject to the general rule of taxability.

Mr. Justice HUNT delivered the opinion of the court.

The fact that the vessel was physically within the limits of the city of Mobile, at the time the tax was levied, does not decide the question. Thus, if a traveller on that day had been passing through that city in his private carriage, or an emigrant with his worldly goods on a wagon, it is not contended that the property of either of these persons would

be subject to taxation as property within the city. It is conceded by the respective counsel that it would not have been.

On the other hand this vessel, although a vehicle of commerce, was not exempt from taxation on that score. A steamboat or a post-coach engaged in a local business within a State may be subject to local taxation, although it carry the mail of the United States. The commerce between the States may not be interfered with by taxation or other interruption, but its instruments and vehicles may be.* It is not, therefore, upon this principle that we are to decide the case. Nor does it fall within that range of cases of which *The Steamship Company* v. *The Portwardens*,† and *Gibbons* v. *Ogden*,‡ furnish illustrations. In each of those cases the taxation was upon a subject directly connected with the navigation of the public waters and with the commerce of the country. In the first case a statute had been passed requiring every vessel entering the harbor of New Orleans to pay five dollars to the port wardens, in addition to other fees, whether any service were performed or not. In the second case vessels navigating the waters of the Hudson River were required to take a license for that purpose from the State of New York. The imposition in this class of cases was a tax upon the use of the public waters of the country, and tended immediately to interfere with and to obstruct the commerce between the States. In the instance before us the tax was upon a vessel at the wharf. It was in this respect as if a tax had been laid upon lumber or cotton lying on the dock at Mobile.

This vessel was owned by and employed in the service of a resident of the State of New York. It was primarily and presumptively taxable under the authority of that State, and of that State only. It is urged that her status, or condition, was affected by what was done, or neglected, in regard to her register and enrolment. In *Blanchard* v. *Martha Washington*,§ the law on this subject is thus explained: "Ships or vessels are required to be registered‖ by the collector of the

* Gibbons *v.* Ogden, 9 Wheaton, 1; "Passenger Cases," 7 Howard, 283.
† 6 Wallace, 31.
‡ 9 Wheaton, 210.
§ 1 Clifford, 466.
‖ 1 Stat. at Large, 288.

district in which shall be comprehended the port to which the same shall belong at the time of the registry, which port shall be deemed to be that at, or nearest to which, the owner, if there be but one, or, if more than one, the husband and acting manager usually resides." Permanent registry, therefore, as appears by this provision, is required to be made at the home port of the vessel, and what is meant by the home port is clearly and plainly defined. Registry must be made at her home port, and the same section provides that the name of the vessel, and the port to which she shall so belong, shall be painted on her stern, on a black ground, in white letters, of not less than three inches in length. All persons, therefore, have the means of ascertaining the name of the vessel and her home port, and her shipping papers, which include a copy of her register or enrolment, are by law required to furnish the same information. The act of February 18th, 1793, prescribes the terms and shows the effect of enrolment in another port. In substance, the permanent register is given up to the collector of that port, and a certificate is issued showing the name of the vessel, the port to which she belongs, and that to which she is destined. This certificate is temporary in its character, and is based upon the proposition that the vessel belongs, or has her home port, at a different place from that at which she receives this certificate.*

There was nothing, therefore, in her enrolment in the port of Mobile that affected her registry in New York, or her ownership in that place, or that tended to subject her to the taxation of the State of Alabama, under the circumstances stated.

It is the opinion of the court that the State of Alabama had no jurisdiction over this vessel for the purpose of taxation, for the reason that it had not become incorporated into the personal property of that State, but was there temporarily only, and that it was engaged in lawful commerce between the States with its *situs* at the home port of New

* Blanchard *v.* Martha Washington, *supra;* White's Bank *v.* Smith, 7 Wallace, 646.

York, where it belonged and where its owner was liable to be taxed for its value. The case of *Hays* v. *The Pacific Mail Steamship Company*,* is decisive of the case before us. In that case all the stockholders in the vessel sought to be taxed resided in New York, but had agencies in Panama and San Francisco, and a naval dock and yard at Benicia, in that State, for the purpose of repairing and furnishing supplies. On arriving at San Francisco the vessel usually remained a day only to unload her freight and passengers, and proceeded to Benicia for repairs and refitting for the next voyage, and usually remained there ten or twelve days. The vessels were part of a line plying in connection between New York and San Francisco, carrying freight and passengers, were all ocean ships and all registered in New York, and taxes were assessed upon them in that State. This route and this mode of proceeding was the permanent, regular, and continued business of the ships in question. Taxes for the years 1851 and 1852 were assessed upon the vessels under authority of the State of California, paid under protest, and suit brought to recover back the taxes so paid. A recovery was had below, and this court sustained the judgment in an able opinion delivered by my learned predecessor, Mr. Justice Nelson. The ships, it was held, were engaged in the business and commerce of the country upon the great highway of nations, touching at such ports and places as their interests demanded. He says, "So far as respects the ports and harbors within the United States, they are entered and cargoes discharged or laden on board, independently of any control over them except as it respects such municipal and sanitary regulations of the local authorities as are not inconsistent with the Constitution and laws of the General Government, to which belongs the regulation of commerce with foreign nations and between the States. . . . But whether (he proceeds) the vessel leaving her home port for trade and commerce visits, in the course of her voyage or business, several ports or confines her operations in the carrying trade to one,

* 17 Howard, 596.

are questions that will depend on the profitable returns of the business, and will furnish no more evidence that she has become a part of the personal property within the State and liable to taxation at one port more than the other. She is within the jurisdiction of all or any one of them temporarily and for a purpose wholly excluding the idea of permanently abiding in the State or changing her home port. Our merchant vessels are not unfrequently absent for years in the foreign carrying trade, seeking cargo, carrying it and unlading it from port to port during all the time absent; but they neither lose their national character nor their home port, as inscribed upon their stern."

This vessel, the Frances, remained the property of the plaintiff, with her home port at New York, and had never become blended with the commerce and property of the State of Alabama, within the principle of *People* v. *Commissioners.** The vessel touches tri-weekly or daily at Mobile, and the same at New Orleans. If her regular route were from New Orleans to Mobile, thence to St. Augustine, thence to Savannah, thence to Charleston, and returning by the same course, the case would be no different. She would be engaged in interstate commerce, with her home port still remaining unchanged, and the property continuing unmixed with the permanent property of either State. Her right to trade at each of those ports, without molestation by either of these States, is secured by the Constitution of the United States. The Federal authority has been exerted by the passage of the navigation laws and the issuing of a coasting license to this vessel. All State interference is thereby excluded.

Whether the steamer Frances was actually taxed in New York during the years 1866 and 1867 is not shown by the case. It is not important. She was liable to taxation there. That State alone had dominion over her for that purpose. Alabama had no more power to tax her or her owner than had Louisiana, or than Florida, Georgia, and South Carolina would have had in the case I have supposed.

The jurisdiction of this court over the present case, as in

* 23 New York, 224.

Statement of the case.

the case of *Hays* v. *The Pacific Mail Steamship Company*,* arises from the facts, first that the property had not become blended with the business and commerce of Alabama, but remained legally of and as in New York; and secondly, that the vessel was lawfully engaged in the interstate trade, over the public waters. It is in law as if the vessel had never before or after that day been within the port of Mobile, but touching there on a single occasion when engaged in the interstate trade, had been subjected to a tax as personal property of that city. Within the authorities it is an interference with the commerce of the country not permitted to the States.

JUDGMENT REVERSED.

OSBORNE *v.* MOBILE.

The State of Georgia chartered a company to transact a general forwarding and express business. The company had a business office at Mobile, in Alabama, and there did an express business which extended within and beyond the limits of Alabama; or, rather, there made contracts for transportation of that sort.

An ordinance of the city of Mobile was then in force, requiring that every express company or railroad company doing business in that city, and having a business extending *beyond* the limits of the State, should pay an annual license of $500, which should be deemed a first-grade license; that every express or railroad company doing business *within* the limits of the State should take out a license called a second-grade license and pay therefor $100; and that every such company doing business *within the city* should take out a third-grade license, paying therefor $50. And it subjected any person or incorporated company who should violate any of its provisions to a fine not exceeding $50 for each day of such violation.

Held, that the ordinance, in requiring payment for a license to transact in Mobile a business extending beyond the limits of the State of Alabama, was not repugnant to the provision of the Constitution, vesting in the Congress of the United States the power "to regulate commerce among the several States."

ERROR to the Supreme Court of the State of Alabama.

Osborne was the agent, at Mobile, Alabama, of the South-

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* *Supra.*

ern Express Company, incorporated by the State of Georgia, and as such transacted a general forwarding and express business within and extending beyond the limits of Alabama.

An ordinance of the city of Mobile was then in force, requiring that every express company or railroad company doing business in that city, and having a business extending beyond the limits of the State, should pay an annual license of $500, which should be deemed a first-grade license; that every express or railroad company doing business within the limits of the State should take out a license called a second-grade license, and pay therefor $100; and that every such company doing business within the city should take out a third-grade license, paying therefor $50. It subjected any person or incorporated company who should violate any of its provisions to a fine not exceeding $50 for each day of such violation.

On the 10th of February, 1869, Osborne was fined by the mayor of Mobile for violating that ordinance in conducting the business of his agency without having paid the $500 and obtained the license required. He appealed to the Circuit Court of the State, which affirmed the judgment of the mayor. He then appealed to the Supreme Court of Alabama, and that court affirmed the judgment of the Circuit Court. A writ of error brought the case here.

The question was whether the ordinance, in requiring payment for a license to transact in Mobile a business extending beyond the limits of the State of Alabama, was repugnant to the provision of the Constitution, vesting in the Congress of the United States the power "to regulate commerce among the several States."

Messrs. B. R. Curtis and Clarence Seward, for the plaintiff in error; Mr. P. Phillips, contra.

The CHIEF JUSTICE delivered the opinion of the court.

In several cases decided at this term we have had occasion to consider questions of State taxation as affected by this

clause of the Constitution. In one,* we held that the State could not constitutionally impose and collect a tax upon the tonnage of freight taken up within its limits and carried beyond them, or taken up beyond its limits and brought within them; that is to say, in other words, upon interstate transportation. In another,† we held that a tax upon the gross receipts for transportation by railroad and canal companies, chartered by the State, is not obnoxious to the objection of repugnancy to the constitutional provision.

The tax on tonnage was held to be unconstitutional because it was in effect a restriction upon interstate commerce, which by the Constitution was designed to be entirely free. The tax on gross receipts was held not to be repugnant to the Constitution, because imposed on the railroad companies in the nature of a general income tax, and incapable of being transferred as a burden upon the property carried from one State to another.

The difficulty of drawing the line between constitutional and unconstitutional taxation by the State was acknowledged, and has always been acknowledged, by this court; but that there is such a line is clear, and the court can best discharge its duty by determining in each case on which side the tax complained of is. It is as important to leave the rightful powers of the State in respect to taxation unimpaired as to maintain the powers of the Federal government in their integrity.

In the second of the cases recently decided, the whole court agreed that a tax on business carried on within the State and without discrimination between its citizens and the citizens of other States, might be constitutionally imposed and collected.

The case now before us seems to come within this principle.

The Southern Express Company was a Georgia corporation carrying on business in Mobile. There was no discrimination in the taxation of Alabama between it and the

* Case of the State Freight Tax, 15 Wallace, 232.

† Case of the State Tax on Railway Gross Receipts, Ib. 284.

corporations and citizens of that State. The tax for license was the same by whomsoever the business was transacted. There is nothing in the case, therefore, which brings it within the case of *Ward* v. *Maryland*.* It seems rather to be governed by the principles settled in *Woodruff* v. *Parham*.†

Indeed, no objection to the license tax was taken at the bar upon the ground of discrimination. Its validity was assailed for the reason that it imposed a burden upon interstate commerce, and was, therefore, repugnant to the clause of the Constitution which confers upon Congress the power to regulate commerce among the several States.

It is to be observed that Congress has never undertaken to exercise this power in any manner inconsistent with the municipal ordinance under consideration, and there are several cases in which the court has asserted the right of the State to legislate, in the absence of legislation by Congress, upon subjects over which the Constitution has clothed that body with legislative authority.‡

But it is not necessary to resort to the principles maintained in these cases for the decision of the case now before us. It comes directly within the rules laid down in the case relating to the tax upon the gross receipts of railroads. In that case we said: "It is not everything that affects commerce that amounts to a regulation of it within the meaning of the Constitution." We admitted that "the ultimate effect" of the tax on the gross receipts might "be to increase the cost of transportation," but we held that the right to tax gross receipts, though derived in part from interstate transportation, was within the general "authority of the States to tax persons, property, business, or occupations within their limits."

The license tax in the present case was upon a business carried on within the city of Mobile. The business licensed included transportation beyond the limits of the State, or rather the making of contracts, within the State, for such

* 12 Wallace, 423. † 8 Id. 123.

‡ License Cases, 5 Howard, 504; Willson *v.* Blackbird Creek Marsh Co., 2 Peters, 245; Cooley *v.* Board of Wardens, 12 Howard, 315.

transportation beyond it. It was with reference to this feature of the business that the tax was, in part, imposed; but it was no more a tax upon interstate commerce than a general tax on drayage would be because the licensed drayman might sometimes be employed in hauling goods to vessels to be transported beyond the limits of the State.

We think it would be going too far so to narrow the limits of State taxation.

The judgment of the Supreme Court of Alabama is, therefore

AFFIRMED.

PLANTERS' BANK *v.* UNION BANK.

UNION BANK *v.* PLANTERS' BANK.

1. A military commander commanding the department in which the city of New Orleans was situate, had not the right, on the 17th of August, 1863, after the occupation of the city by General Butler, and after his proclamation of May 1st, 1862, announcing that "all the rights of property of whatever kind will be held inviolate, subject only to the laws of the United States," to seize private property as booty of war, or, in face of the acts of Congress of 6th of August, 1861, and July 17th, 1862, make any order as commander confiscating it.
2. Where after judgment for a certain sum a *remittitur* is entered as to part, the *remittitur* does not bind the party making it, if the judgment be vacated and set aside.
3. Where after judgment for a certain sum, execution is allowed, during a motion for a new trial, to issue for a part of the sum, which part is admitted to be due, this, though anomalous, is not a ground for reversal, where no objection appears to have been made, and where it may fairly be presumed that the defendant assented to what was done; and where, a new trial being afterwards granted, it was limited to a trial as to the excess of the claim above the amount for which the execution was issued.
4. A promise to pay in "Confederate notes" in consideration of the receipt of such notes and of drafts payable by them, is neither a *nudum pactum* nor an illegal contract.
5. Though an illegal contract will not be enforced by courts, yet it is the doctrine of this court that where such a contract has been executed by the parties themselves, and the illegal object has been accomplished, the money or thing which was the price of it may be a legal consideration between the parties for a promise express or implied, and that the court

will not unravel the transaction to discover its origin. The doctrine applied to the case of money received for the sale of "Confederate bonds."

6. Although, where *money* has been deposited with a bank, or drafts, &c., to be collected in *money*, and there has been no contract or understanding that a different rule should prevail, the bank where the deposit is made ordinarily becomes the owner of the money and consequently a debtor for the amount collected, and under obligation to pay on demand, not the identical money received, but a sum equal in legal value, yet this does not apply where the thing deposited was not *money*, but a commodity, such as "Confederate notes," and it was agreed that the collections should be made in like notes. The fact that the collecting bank used the notes in their business does not alter the case. The case distinguished from *Marine Bank* v. *Fulton Bank* (2 Wallace, 252).

ERROR to the Circuit Court for the District of Louisiana; the case being this:

On the outbreak of the rebellion of 1861, both the States of Tennessee and Louisiana joined in that movement; and while those two States were both under the control of the rebel powers, the Planters' Bank of Tennessee (at Natchez) remitted to the Union Bank of Louisiana (at New Orleans) large sums of "Confederate treasury notes," and also forwarded to it drafts and other claims for collection (and a few Confederate bonds for sale), it having been understood between the two banks that the drafts and claims thus forwarded for collection and the price of the bonds sent for sale were payable only in such Confederate currency, and all the collections made on account of the Planters' Bank having been made in that currency, with its knowledge and authority. In this way entirely a large balance was made up in favor of the Planters' Bank. There was no controversy as to these facts.

About the 1st of May, 1862, New Orleans was recaptured by the government forces and passed into their control. A large balance, in the course of dealings already mentioned, was at this time due the Planters' Bank.

On entering New Orleans, General Butler, the general who took possession of it for the United States, issued a proclamation, in which he declared:

"All the rights of property, of whatever kind, will be held inviolate, subject only to the laws of the United States."

On the 6th of August, 1861, Congress passed "An act to confiscate property used for insurrectionary purposes," &c., and on the 17th of July, 1862, "An act to suppress insurrection, to punish treason and rebellion, and for other purposes." These acts designated certain agents for seizing the property of rebels and prescribed certain judicial proceedings for the condemnation of it in the courts of the United States, when belonging to natural persons who were rebels, to persons who aided, abetted, and gave comfort to the rebellion, or who held office under the so-called Confederate States, or any State assisting to form them. But neither of the acts gave authority to military commanders to seize such property, nor did either make the property of any incorporated banks liable to such seizure.

In this state of things, an order was issued on the 17th of August, 1863, by command of Major-General Banks, then in command of the department, requiring the several banks and banking associations of New Orleans to pay over without delay to the Chief Quartermaster of the army, or to such officer of his department as he might designate, all money in their possession belonging to, or standing upon their books to the credit of, *any corporation*, *association*, or pretended government in hostility to the United States, and all moneys belonging to, or standing on their books to the credit of, any person registered as an enemy of the United States, or engaged in any manner in the military, naval, or civil service of the so-called Confederate States, or who should have been or who might thereafter be convicted of rendering any aid or comfort to the enemies of the United States. The order declared that such funds would be held and accounted for by the quartermaster's department, subject to the future adjudication of the government of the United States. Under this order the Union Bank, as the evidence tended to show, on the 10th day of September, 1863, paid to the acting quartermaster the balance standing to the credit of the Planters' Bank on their books, being the

whole balance due. The payment was made in Confederate notes ($211,774) and the quartermaster accepted them in discharge of the balance.

On the 15th of the same September, 1863, the Planters' Bank drew on the Union Bank for $86,646, the sum in Federal money which it conceived to be due to it. The Union Bank refused to pay, alleging the seizure by General Banks and payment over accordingly. Thereupon — on the 11th of September, 1866—the Planters' Bank sued the Union Bank in the court below, to recover its alleged balance, with interest from the date of the demand. The defendant set up the facts of the case as above given, and that the Confederate moneys sent to the defendant by the Planters' Bank were issued and put in circulation by the said Confederate States during the rebellion for the purpose of maintaining and prosecuting the war, &c.; that the dealings of the plaintiff in the said currency were designed on its part to give, and did contribute to give circulation and credit to such unlawful issues, and that it, the defendant, was therefore not liable, on account of the receipt of such currency, to the plaintiff in manner and form as by it alleged.

The case came to trial in February, 1868, and the jury returned a verdict for the plaintiff for the amount claimed in full, with interest, $113,296.01, and a judgment was entered accordingly.

A motion for a new trial was then made, and while the same was undetermined and held under advisement, the following order was entered:

"On motion of the attorneys for plaintiff it is ordered that a *remittitur* of interest allowed in the judgment in this case be entered, except what is claimed as follows, &c."

On the same day the attorneys of the plaintiff, on the suggestion that the attorneys of defendant had, during the trial, admitted in presence of the jury that there was due to plaintiff $26,752.63, with interest from 25th November, 1863, asked that an execution be issued for this sum; and the

motion was granted "without prejudice to the plaintiff's right to recover the balance under the judgment in the case."

The motion for a new trial was ordered to be reargued, and after the reargument a new trial was granted, "excepting as regards the sum of $26,752.63, admitted by the defendant to be due to the plaintiff."

On the 24th of January, 1871, two years and ten months after this, the case was again submitted to the jury, and they being sworn to try the issues, the court, against the defendant's objection, permitted the plaintiff to withdraw his *remittitur*.

On this trial THE DEFENDANT requested the court to charge the jury—

"That the generals commanding the army of the United States, engaged in military operations against the rebels in the late civil war, had the legal power to seize and take possession of the property or effects of rebels, whenever in their judgment necessary or conducive to the successful prosecution of the war; that the commanding generals were the sole judges [subject alone to the control of their military superiors] of the necessity or expediency of such seizures, and that if the jury find from the evidence that the military authorities exacted payment of the balance on the books of the defendant to the credit of the Planters' Bank and its branches, then that the military authorities thus exacting payment were invested, as regards said payments, with all the rights of a creditor.

"That if the demand of the plaintiff arose from the receipt of the so-called Confederate notes, with the authority of the plaintiff, and the military authorities of the United States exacted payment of said demand [and accepted payment in Confederate treasury notes], and if the said payment was made accordingly to the said authorities under compulsion, and a receipt in full given for the amount so paid to them, then that the said payment and receipt are a valid acquittance and discharge of the defendant from any liability to the extent of such part of the demand of the plaintiff as arose from the receipt of the so-called Confederate treasury notes for account of the plaintiff with its authority."

The court did so charge, with the exception that it left out the important words in [ ]. It said:

"The jury will determine what the payment ought to have been. I consider that the military authorities had no right to transact with the defendant in this case; Confederate money was then almost worthless in the discharge of the debt due by the defendant to the Planters' Bank."

The defendant also asked the court to charge further:

"That if the balance of account sued for is composed, wholly or in part, of direct remittances from the plaintiff to the defendant of Confederate treasury notes to be placed to credit of the plaintiff, and of collections for their account of drafts, actually and in effect and intent, payable in Confederate treasury notes, remitted for collections by plaintiff to defendant, and by the latter collected for account of plaintiff in Confederate treasury notes, and that the banks were necessary instruments of the Confederate government in putting its issues of Confederate treasury notes in circulation and forcing them upon the country, and that the plaintiff, as one of the banks, willingly lent itself as the instrument of the Confederate government to put those issues in circulation, then, that the plaintiff cannot recover such amount of the balance thus composed of treasury notes and 'collections.'

"That no lawful or valid obligation can arise from the sale of bonds or securities of the Confederate government, and no action lies for the proceeds of such bonds."

But both these last two charges the court refused to give.

THE PLAINTIFF asked the court to charge—

"That if the jury find that the defendant received 'Confederate currency' on behalf of the plaintiff and entered the same to the credit of the plaintiff on the books of his bank, and used the same in its general business, the defendant thereby became the debtor of the plaintiff, and the measure of the indebtedness is the value of 'Confederate currency' in the lawful money of the United States, at the time the credit was entered as aforesaid and the collections were made."

But the court refused thus to charge, and charged:

"That the measure of indebtedness for receipts or collections

made by the defendant in 'Confederate currency,' and used by it in its general business, was the value of such currency at the date of demand of payment made by the plaintiff, and not at the date when such currency was received and used by defendant in its business."*

The jury found in favor of the plaintiff for $24,713, with interest from the 15th of September, 1863, and judgment was entered accordingly.

Both parties excepted,—

The defendant to the refusals of the court to charge as requested, to the allowance of a withdrawal of the *remittitur*, and to the order of the court ordering execution for the $26,752.63, before the motion for a new trial was determined;

The plaintiff to the refusal to charge as requested and to the charge as given.

[It should be added (in order to explain a part of the argument, and of the dissenting opinion in this case), that by acts of March 3d, 1863,† and the 11th of May, 1866,‡ Congress enacted that it should be "a defence in all courts, to any action pending or to be commenced," against any one for "a seizure" of property when it was shown that such seizure had been made under any "order . . . of any military officer of the United States holding the command of the department, district, or place in which such seizure was made."]

Messrs. P. Phillips and Conway Robinson for the Union Bank, and in support of its *assignment of errors:*

1. Had General Banks authority to issue the order under which the payment was made? If he had, it would clearly follow that he had the right to place his own construction on it, and to determine when and in what manner the debt should be paid, and his receipt for the amount would oper-

* The reader will, of course, understand that between the two dates mentioned here "Confederate currency" had largely diminished in market value.

† 12 Stat. at Large, 756, § 4.

‡ 14 Id. 46.

ate as complete a discharge of the debtor, as if it had been executed by the creditor himself.

He had the power to issue the order. He was in command of the department, and the only representative of the constitutional commander-in-chief. The order was issued while the war was flagrant. In the absence of any prohibitory act of Congress, or order from his superior, he was vested with the full power of doing all that the laws of war permitted. Whatever the chief executive could do in those portions of the country which had fallen by conquest under his dominion, he could do.

In a case before Lord Tenterden, in 1830, on appeal from the judgment of the Supreme Court of Bombay, it was shown that the property was seized in a recently conquered province, long after it had been conquered, at a distance from actual hostilities, and when courts of justice were exercising their authority.

His lordship said:

"We think the proper character of the transaction was that of hostile seizure made, if not *flagrante*, yet, *nondum cessante bello*, and consequently the municipal court had no jurisdiction to adjudge upon the subject; but if anything had been done amiss, recourse could only be had to the government for redress."*

The right of the conqueror to acquire title to possess and alienate both *immovable* and *incorporeal* property is treated of by Dr. Phillimore.† Speaking of the case of payment of a debt to a conqueror, subsequently to which the former sovereign is restored, he puts these questions:

"Has the restored government the right to demand of the debtor the payment which he has discharged during the *interregnum?* Does it follow that if this government had the right to exact the debt, *it was the debtor's duty to pay it?* Are the two propositions convertible? Or, if so, may not the original creditor demand a second payment?"

The author then quotes Bynkershoek, to the effect that

* Elphinstone *v.* Bedreechund, 1 Knapp, Privy Council, 360–1.

Vol. 3, p. 396.

the debt is *satisfied and extinct;* and this, he says, is unquestionably the opinion of the greater number of the most able jurists; the conclusion from the analogies to be drawn from the Roman law, and the international practice as shown by treaties.

The order of General Banks has been approved by his government; his receipts have of course been accounted for by him. If, in the exercise of his power, "anything has been done amiss" (we use the language of Lord Tenterden), "recourse could only be had to the government for redress."

The government has passed laws protecting its military officers for acts done during the war. It has thus interposed itself in this case between the parties to the controversy. If the order was originally illegal, the government has protected the officer from suit. It has made his acts its own, and if wrong has been inflicted, the creditor can look only to the good faith of Congress.

The question whether *private debts* are properly subjected to seizure, has created much discussion. The case is often provided for by treaty. The 10th article of the treaty of 1794, with Great Britain,* declares they shall not be "confiscated or sequestered." The articles of "Camillus," written by Hamilton in vindication of this article,† show the violence with which the provision of the treaty had been attacked.

His vindication of the principles involved proceeds on the ground that whenever a government grants permission to a foreigner "to bring his property within its territory, it tacitly promises protection." How, he asks, can it be reconciled with the idea of a trust, to take the property from its owner, when he has personally given no cause for the deprivation?

Again,

"Where the persons or goods of an enemy are found in our country, there is a reliance upon our hospitality and justice; there is an express or implied safe conduct; the individuals and

* 8 Stat. at Large, 122.

† Works of Hamilton, vol. 7, pp. 232, 233, 335.

their property are in the custody of our faith. To make them a prey is therefore to infringe every rule of generosity and equity; it is to add cowardice to treachery."

The reason, therefore, for the denial of the right of such seizure between two independent governments on the breaking out of war, would seem to have no application to a war waged for the suppression of a rebellion, and we may further add that notwithstanding the strong language of "Camillus," the decisions of this court are decidedly in favor of the right, even as between foreign nations.*

Payment to a usurped government such as that of the Confederates is held good on the principle of irresistible force.

This court lately decided† that the United States could not recover against one of its officers who had paid over to the Confederate authorities the amount due to the former, for the payment had thus extinguished the debt.

In the case before us it can make no difference whether the defendant held the plaintiff's funds on special or general deposit; in other words, whether as bailee or debtor. The order was not directed to obtain any property or funds of the defendant, but to obtain the property or funds of the plaintiff. To enforce now by judicial sentence a second payment from the defendant, is to shield him intended to be wounded, and wound the party intended to be shielded.

2. The order for a *remittitur* entered on the application of the plaintiff, was a confession of record, that the amount thus renounced was not due by the defendant. It was in the nature of a judgment, and the court had no power after the lapse of the term at which it was entered to set it aside. It is like a judgment on *retraxit*, which is as complete a bar as a judgment on verdict.‡

3. It was equally erroneous to order an execution for a part of the first judgment rendered while the motion for a new trial was pending and undisposed of. The defendant

* Brown *v.* United States, 8 Cranch, 110.

† United States *v.* Thomas, 15 Wallace, 337.

‡ Thomason *v.* Odum, 31 Alabama, 108.

was thus deprived of his writ of error and supersedeas, and was forced to pay the amount of this execution, as this was not a final judgment.

4. Can the dealing of these banks in Confederate notes and *bonds*, thus stimulating their circulation and enhancing their value, be the foundation of a valid contract enforceable in the courts of the United States?

The grounds of necessity which induced the court to declare that this currency constituted a sufficient consideration for a note in the case of *Thorington* v. *Smith** do not cover this case. There was certainly here no necessity for the purpose of maintaining social existence in the South, to deal in *bonds* given for the purpose of carrying on the rebellion, as there might have been in using the only money there, the Confederate notes.

Mr. T. J. Durant, for the Planters' Bank, and in support of its *assignment of error:*

The court below erred in charging the jury that the measure of indebtedness of the Union Bank to the Planters' Bank was the value of Confederate currency in National currency at the time the Planters' Bank demanded payment from the Union Bank, and not the value at the time the Union Bank received the Confederate currency and passed the amount thereof on its books to the credit of the Planters' Bank.

The exact matter was decided by this court in *Marine Bank* v. *Fulton Bank*.† There the latter bank, one of New York, had remitted to the former, a bank of Chicago, two notes for collection, which was made. About a year after the collection was made the New York bank made a demand of payment from the Chicago bank, which was refused unless the former bank would accept Illinois currency, at the time of demand of payment sunk in value to 50 per cent. below par.

In speaking of this collection, this court said:

"It was used by the bank in the same manner that it used

* 8 Wallace, 13.

† 2 Id. 256.

the money deposited with it that day by city customers, and the relation between the two banks was the same as that between the Chicago bank and its city depositors. It would be a waste of argument to attempt to prove that this was a debtor and creditor relation."

The features of this case are so analogous to the case now before us, and the reasoning of the court is so applicable throughout, that we only refer to other cases* to the same effect.

Mr. Justice STRONG delivered the opinion of the court.

Whether the payment in Confederate notes, and the quartermaster's acceptance of them in discharge of the balance, was a satisfaction of the claim of the plaintiffs upon the defendants is a controlling question in the case. The Circuit Court instructed the jury that it was not, because payment was made to the quartermaster in Confederate notes, which the court was of opinion he had no authority to receive, though holding that the military authorities thus exacting payment were invested with all the rights of a creditor.

It might be difficult to maintain, if the military authorities were clothed with the rights of creditors, that is, if they had succeeded to the position and title of the plaintiffs, that they could not determine what funds they would receive in payment of the balance on the defendants' books to the credit of the plaintiffs. It is not perceived why they could not accept Confederate notes in discharge of a debt which had become due to them. But a grave question lies back of this. Did the order of General Banks justify any payment of the balance to the military authorities? If it did not, it is immaterial in what currency the payment was made. Payment in any currency was no protection to the debtors. The validity of the order is, therefore, the first thing to be considered. It was made, as we have seen, on the 17th of

* Commercial Bank of Albany *v.* Hughes, 17 Wendell, 100; Foley *v.* Hill, 2 House of Lords Cases, 36; Carr *v.* Carr, 1 Merivale, 541, *note;* Sims *v.* Bond, 5 Barnewall & Adolphus, 389.

August, 1863. Then the city of New Orleans was in quiet possession of the United States forces. It had been captured more than fifteen months before that time, and undisturbed possession was maintained ever after its capture. Hence the order was no attempt to seize property "*flagrante bello*," nor was it a seizure for immediate use of the army. It was simply an attempt to confiscate private property which, though it may be subjected to confiscation by legislative authority, is, according to the modern law of nations, exempt from capture as booty of war. Still, as the war had not ceased, though it was not flagrant in the district, and as General Banks was in command of the district, it must be conceded that he had power to do all that the laws of war permitted, except so far as he was restrained by the pledged faith of the government, or by the effect of Congressional legislation. A pledge, however, had been given that rights of property should be respected. When the city was surrendered to the army under General Butler, a proclamation was issued, dated May 1st, 1862, one clause of which was as follows: "All the rights of property of whatever kind will be held inviolate, subject only to the laws of the United States." This, as was remarked in the case of *The Venice*,* "only reiterated the rules established by the legislative and executive action of the National government in respect to the portions of the States in insurrection, occupied and controlled by the troops of the Union." That action, it was said, indicated the policy of the government to be, not to regard districts occupied and controlled by National troops as in actual insurrection, or their inhabitants as subject, in most respects, to treatment as enemies.

Substantial, complete, and permanent military occupation and control was held to draw after it the full measure of protection to persons and property consistent with a necessary subjection to military government. We do not assert that anything in General Butler's proclamation exempted property within the occupied district from liability to confis-

* 2 Wallace, 258.

cation as enemies' property, if in truth it was such. All that is now said is that after that proclamation private property in the district was not subject to military seizure as booty of war. But admitting, as we do, that private property remained subject to confiscation, and also that the proclamation applied exclusively to inhabitants of the district, it is undeniable that confiscation was possible only to the extent and in the manner provided by the acts of Congress. Those acts were passed on the 6th of August, 1861, and on the 17th of July, 1862. No others authorized the confiscation of private property, and they prescribed the manner in which alone confiscation could be made. They designated government agents for seizing enemies' property, and they directed the mode of procedure for its condemnation in the courts. The system devised was necessarily exclusive. No authority was given to a military commandant, as such, to effect any confiscation. And under neither of the acts was the property of a banking institution made confiscable. Both of them had in view the property of natural persons who were public enemies, of persons who gave aid and comfort to the rebellion, or who held office under the Confederate government, or under one of the States composing it. In no one of the six classes of persons whose property was by the act of 1862 declared subject to confiscation was an artificial being included. It is, therefore, of little importance to inquire what, under the general laws of war, are the rights of a conqueror, for during the recent civil war the government of the United States asserted no general right in virtue of conquest to compel the payment of private debts to itself. On the contrary it was impliedly disclaimed, except so far as the acts of 1861 and 1862 asserted it. Those enactments declaring that private property belonging to certain classes of persons might be confiscated, in the manner particularly described, are themselves expressive of an intent that the rights of conquest should not be exercised against private property except in the cases mentioned, and in the manner pointed out. And it is by no means to be admitted that a conquering power may compel private debtors to pay

their debts to itself, and that such payments extinguish the claims of the original creditor. It does indeed appear to be a principle of international law that a conquering state, after the conquest has subsided into government, may exact payment from the state debtors of the conquered power, and that payments to the conqueror discharge the debt, so that when the former government returns the debtor is not compellable to pay again. This is the doctrine stated in Phillimore on International Law,* to which we have been referred. But the principle has no applicability to debts not due to the conquered state. Neither Phillimore nor Bynkershoeck, whom he cites, asserts that the conquering state succeeds to the rights of a private creditor.

It follows then that the order of General Banks was one which he had no authority to make, and that his direction to the Union Bank to pay to the quartermaster of the army the debt due the Planters' Bank was wholly invalid. This makes it unnecessary to consider in detail the exceptions taken by the defendants to the rulings of the Circuit Court, respecting the order and the alleged payment under it; for if the order was invalid, payment to the quartermaster did not satisfy the debt.

It is further assigned for error by the defendants, that the court allowed the plaintiffs to withdraw a *remittitur* entered by them of part of a verdict obtained on a former trial of the case. The only objection made in the court below to the allowance was, that the *remittitur* was an acknowledgment of record that the amount remitted was not due. There had been a former trial in which the plaintiffs had obtained judgment for $113,296.01, with five per cent. interest from November 25th, 1863. This was a larger amount of interest than the petition of the plaintiffs had claimed, and they entered on the judgment a *remittitur* of the excess, expressly reserving their rights to the balance of the judgment. Subsequently a new trial was granted, and it is now con-

* Vol. 3, part 12, ch. 4.

tended that the *remittitur* had the effect of a *retraxit.* As it was entered after judgment, such would perhaps be its effect if the judgment itself had not been set aside and a new trial had not been granted.* But such cannot be its operation now. If it takes effect at all it must in its entirety, and the plaintiffs must hold their first judgment for the balance unremitted. As that judgment no longer exists, there is no reason for holding that the remission of a part of it is equivalent to an adjudication against them. This assignment of error is, therefore, not sustained.

Another error assigned by the defendants is, that the court ordered execution to issue on the judgment first recovered for the sum of $26,752.63, without prejudice to the plaintiffs' rights to recover the balance, that amount having been admitted to be due, and that this was done before the motion for a new trial was disposed of. It must be admitted that though there was a judgment in existence, the order of an execution at the time it was made was anomalous. But there does not appear to have been any objection to it, and it is not shown that the defendants have sustained any injury in consequence of its issue. It may fairly be presumed that the defendants assented to the order, and admitted that the sum for which the execution was directed was due. The new trial afterwards granted was limited to the controversy respecting the excess of the claim over $26,752.63, which, as the order stated, "was admitted by the defendants to be due the plaintiffs."

The only remaining errors assigned by the defendants which require notice, grow out of the refusal of the court to charge the jury as requested, that if they found the balance of account sued for was composed wholly or in part of direct remittances from the plaintiffs to the defendants of Confederate treasury notes, and of collections of drafts payable and paid in such notes, and if they found that the banks were necessary instruments of the Confederate government

* Bowden *v.* Horne, 7 Bingham, 716.

for putting its issues of Confederate notes in circulation and forcing them upon the country, and that the plaintiffs, as one of the banks, willingly lent itself as an instrument of that government, then the plaintiffs could not recover such amount of the balance thus composed of treasury notes and collections. The point, it will be observed, does not assume that the plaintiffs were willing agents, or agents at all of the Confederate government in putting into circulation the notes which went to make up the balance of account standing to their credit. It assumes only that they had, as such agents, put some of the issues of the government into circulation, at some time, in some transaction with some person, not necessarily the defendants. That assumption, had it been sustained by the finding of the jury, was wholly impertinent, and therefore the only relevant question presented by the point was, whether Confederate treasury notes had and received by the defendants for the use of the plaintiffs were a sufficient consideration for a promise, express or implied, to pay anything. After the decision in *Thorington* v. *Smith* the point could not have been affirmed. A promise to pay in Confederate notes, in consideration of the receipt of such notes and of drafts payable by them, cannot be considered a *nudum pactum* or an illegal contract.

Nor should the court have charged that, in the circumstances of this case, no action would lie for the proceeds of the sales of Confederate bonds which had been sent by the plaintiffs to the defendants for sale, and which had been sold by them, though the proceeds had been carried to the credit of the plaintiffs and made a part of the accounts. It may be that no action would lie against a purchaser of the bonds, or against the defendants on any engagement made by them to sell. Such a contract would have been illegal. But when the illegal transaction has been consummated; when no court has been called upon to give aid to it; when the proceeds of the sale have been actually received, and received in that which the law recognizes as having had value; and when they have been carried to the credit of the plaintiffs, the case is different. The court is there not asked to enforce

an illegal contract. The plaintiffs do not require the aid of any illegal transaction to establish their case. It is enough that the defendants have in hand a thing of value that belongs to them. Some of the authorities show that, though an illegal contract will not be executed, yet, when it has been executed by the parties themselves, and the illegal object of it has been accomplished, the money or thing which was the price of it may be a legal consideration between the parties for a promise, express or implied, and the court will not unravel the transaction to discover its origin. Thus, in *Faikney* v. *Reynous*,* a plaintiff was allowed to recover in an action on a bond given by a partner to his copartner for differences paid in a stockjobbing transaction prohibited by act of Parliament. This was the case of an express agreement to pay a debt which could not have been recovered of the firm. *Petrie* v. *Hannay*† was a similar case, except that the partner plaintiff had paid the differences by a bill on which there had been a recovery against him, and his action against his copartner for contribution was sustained. This was an action on an implied promise. *Ex parte Bulmer*‡ goes much farther, and perhaps farther than can now be sustained. We are aware that *Faikney* v. *Reynous* and *Petrie* v. *Hannay* have been doubted, if not overruled, in England, but the doctrine they assert has been approved by this court.§ *Lestapies* v. *Ingraham*‖ is full to the same effect. We think, therefore, the court was not in error in refusing to affirm the defendants' points.

No more need be said respecting the exceptions taken and errors assigned by the defendants below. None of them are sustained.

A single assignment of error made by the plaintiffs below remains to be considered. At the trial they asked for the following instruction: "If the jury should find from the

* 4 Burrow, 2069. † 3 Term, 419. ‡ 13 Vesey, 316.

§ Armstrong *v.* Toler, 11 Wheaton, 258; McBlair *v.* Gibbes, 17 Howard, 236; Brooks *v.* Martin, 2 Wallace, 70.

‖ 5 Barr, 71; see also Farmer *v.* Russell, 1 Bosanquet & Puller, 296.

evidence that the defendants received Confederate currency on behalf of the plaintiffs, and entered it to the credit of the plaintiffs on the books of the bank, and used it in their general business, the defendants thereby became the debtors of the plaintiffs, and that the measure of the indebtedness was the value of Confederate currency in the lawful money of the United States at the time the credit was entered and the collections were made." This instruction the court declined giving, but in lieu thereof charged the jury that the measure of indebtedness for receipts, or collections, made by the defendants in Confederate currency and used by them in their general business, was the value of such currency at the date of demand of payment made by the plaintiffs, and not at the date when such currency was received and used by the defendants in their business. This refusal to instruct the jury as requested and the instructions actually given are now complained of as erroneous. We think, however, they were correct in view of the assumed and conceded facts. We do not controvert the position that generally a bank becomes a debtor to its depositor by its receipt of money deposited by him, and that money paid into a bank ceases to be the money of the depositor and becomes the money of the bank which it may use, returning an equivalent when demanded, by paying a similar sum to that deposited. Such is undoubtedly the nature of the contract between a depositor and his banker. So also a collecting bank ordinarily becomes the owner of money collected by it for its correspondent, and consequently a debtor for the amount collected, under obligation to pay on demand, not the identical money received, but a sum equal in legal value.

But it is to be observed this is the rule where *money* has been deposited, or collected, and when there has been no contract or understanding that a different rule should prevail. The circumstances of the present case are peculiar. It seems to have been conceded in the court below that the deposits were made in Confederate currency, and that the collections were made in like currency with the assent of the plaintiffs. The instructions asked of the court assume this.

The Union Bank then became the agent of the plaintiffs to receive and to collect, not money, but Confederate notes, or promises, and the obligation it assumed was to pay Confederate notes when they should be demanded. The subject of the contract was a commodity, not money, and there was no default in the Union Bank until a demand was made and refused. And from the nature of the transaction it is to be inferred that the intent of the parties was that the one should impose and the other assume only a liability to return to the plaintiffs notes of the Confederate government like those received, or collected; notes promising to pay a like sum. And it is not perceived that the effect of the assumption is changed by the fact that the defendants used the notes received in their general business, if they did use them, prior to any demand for the fulfilment of their undertaking. Such use was in contemplation of the parties from the beginning. In *Robinson* v. *Noble's Administrators*,* a promise to pay in Cincinnati at a certain time, "in the paper of the Miami Exporting Company, or its equivalent," was held by this court to impose upon the promisor only a liability to make good the damages sustained through his failure to pay at the day, and that those damages were measured by the market value of the paper at the time when payment should have been made. The promise was assimilated to an engagement to deliver a certain quantity of flour, or any other commodity, on a given day. A loan for consumption to be returned in kind contemplates a restoration not of the identical thing loaned, but of a similar article equal in quantity, and if no return be made, all that the lender can require is the value of the thing which should have been returned at the time when the contract was broken. The value at the time of the loan is not to be considered. Both parties take the risk of appreciation or depreciation. Why should not a similar rule be applied to the present case? Ought the plaintiffs to recover more than the damages they have sustained from the breach of the contract? Ought they to be

* 8 Peters, 181.

placed in a better position than that they would occupy if the defendants had paid them the right quantity of Confederate notes when they were demanded? We think not. Clearly if the notes had appreciated after they were received by the defendants, and before the demand was made, the plaintiffs would have been entitled to the benefit of the appreciation. This is because of the nature of the transaction, and it would seem, for the same reason, the risk of depreciation was necessarily theirs.

This case differs very materially from *Marine Bank* v. *Fulton Bank*.* There, it is true, the collecting bank received depreciated currency of the Illinois banks, and, it may be assumed, with the assent of its correspondent. But there were positive instructions to hold the avails of the collections subject to the order of the bank which had sent the notes for collection; and the proceeds of the collections were an authorized lawful currency. The two banks, therefore, stood to each other in the relation of debtor and creditor, and the collecting bank acknowledged that relation immediately on the payment of the notes which had been sent to it for collection. Not so here. The collections were not made in money, and it was not the understanding of the parties that money should be paid. We hold, therefore, that the Planters' Bank ought not to be permitted to recover more than the damages sustained by it in consequence of the defendant's failure to deliver Confederate notes when they were demanded, and those damages are measured by the value of those notes in United States currency at the time when the demand was made and when the notes should have been delivered; and in so holding we do not intend to deny or qualify the doctrine asserted in *Marine Bank* v. *Fulton Bank*, or in *Thompson* v. *Riggs*.† It follows that the charge given to the jury was correct.

There is, then, nothing in the record complained of by either party which would justify our ordering a new trial.

JUDGMENT AFFIRMED.

* 2 Wallace, 252.

† 5 Wallace, 663.

Syllabus.

Mr. Justice BRADLEY, dissenting.

I dissent from the judgment of the court in this case. The officer in command of the armies of the United States, after the possession of New Orleans had been secured, required debtors in New Orleans of creditors in the enemy's lines to pay such debts to the proper receiving officer of the army. That the debts due from the citizens of a belligerent state to the citizens of the state with whom the former is at war may be confiscated is undoubted international law. If such confiscation is, in fact, made by the military authorities, and if the action of those authorities is assumed or confirmed by the sovereign authority, the confiscation is perfect.

In this case the acts of the military authorities have been substantially adopted and confirmed by the Federal government in passing a law exempting military officers from all actions and suits for any acts done in their military capacity.

By this act, if any wrong was done, the government assumes it and holds itself responsible to the injured party, if any illegality occurred.

One party must suffer in this case, either the debtor or the creditor; and, as the debtor was compelled to pay the debt to the military authorities it ought not to be compelled to pay it over again to the creditor. Let the creditor apply to the Federal government for relief, by which the acts of the military authorities have been, in effect, assumed and confirmed.

In my judgment, such a disposition of the case would better accord with the principles of international law and the mutual rights and relations of all the parties concerned.

TWEED'S CASE.

A person having entered, January 23d, 1866, into a contract with the government to purchase, as its agent, "cotton which formerly belonged to the so-called 'Confederate States' now in the possession of individuals in the Red River country (concealed)," was not precluded by the fact of such agency and during it from buying other cotton in that region

Statement of the case.

not formerly belonging to those so-called States; he having discovered, when he went to the region, that there was no cotton upon which his contract operated, and his contract not obliging him by its terms to devote his whole time to the business of the agency, nor from buying cotton if of a kind not such as was described in his agreement.

A principal suit having been decided in one way, a proceeding by way of intervention, and involving the same question, of necessity follows it.

ERROR to the Circuit Court for the District of Louisiana; the case being thus:

The act of Congress of July 2d, 1864,* in addition to that of a prior date, "to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States," enacted in its 8th section that it should be lawful for the Secretary of the Treasury . . . "to authorize agents to purchase for the United States any products of States declared in insurrection . . . at such prices as may be agreed on with the seller, not exceeding the market value thereof at the place of delivery," &c.

This statute being in force, Tweed, upon the 23d of January, 1866, entered into a contract with one Burbridge, then deputy general agent of the Treasury Department, in which, after reciting "that it is represented that large quantities of cotton, which formerly belonged to the late so-called Confederate States, are now in possession of individuals in the Red River country, concealed from the knowledge of agents appointed to collect the same, and the marks by which said former ownership could have been proved have been destroyed, for the purpose of enabling the individuals holding it to convert it to their own use; and whereas, it is also represented that most of this cotton is held at places and in districts remote from military posts, so that, if it could be found and identified, it could not be brought forward by the agents, except by increasing the expense of obtaining military aid in its removal, and that the parties holding it dare not bring it within the reach of the civil or military authorities, for fear that its true character may be discovered, thereby causing its seizure; and whereas, it is also repre-

* 12 Stat. at Large, 820.

sented that a large portion of this cotton can be purchased from the holders at much less than its real value, if the purchaser will take the title at his own risk of seizure by government authorities," it was agreed that Tweed was to furnish all money necessary to buy said cotton, together with all necessary assistance for the purpose of transportation, and to "use all proper efforts to purchase as much of said cotton situated upon and near the Red River and its tributaries as can be purchased, prepared for shipment, and transported to and delivered at New Orleans, at a cost not exceeding three-fourths its market value there, and to deliver the same to said Burbridge, in New Orleans." And, thereupon, Burbridge agreed to deliver to Tweed three-fourths of such cotton in full of his interest therein.

On the 24th of February, 1866, the Secretary of the Treasury wrote from Washington, D. C., a letter to the general agent of the Treasury Department at New Orleans, directing the termination of this contract. As hereafter stated, Tweed received notice of this revocation "in March, 1866."

Having obtained the contract above mentioned, Tweed bought from various owners, at a fair market price, in and about Shreveport, Louisiana, 495 bales of cotton; 463 bales of it were bought on or before the 1st of March, 1866 (50 of these 463 on the 5th of February preceding), and the rest upon the 5th and 8th of March.

On the 10th of March, 1866, Burbridge was succeeded in his office of deputy agent, &c., by one Flanders.

The cotton reached New Orleans March 23d, 1866, a part of it having been shipped from Shreveport on the 13th of the same month. Insurance on it was effected under an open policy of Burbridge, deputy agent, &c., and it came to New Orleans subject to *adjudication* by said Burbridge, &c.

On its arrival, Flanders, as successor of Burbridge, and the now deputy general agent of the United States, claimed one-fourth of it under the contract above stated, and accordingly delivered to Tweed the three-fourths, but refused to deliver the other fourth.

Hereupon Tweed filed a petition in the court below claim-

ing the 123 bales which Flanders, a deputy general agent, retained. The petition alleged that no part of the cotton which he had bought in and about Shreveport was captured or abandoned property, and that the United States had no right, title, or interest in the same, or any part thereof; that the 123 bales retained were worth $17,500; and that he Tweed, feared that Flanders would, pending the suit, dispose of and remove them from the jurisdiction of the court. It prayed for a citation of Flanders, sequestration of the cotton until further orders, and that, after due proceedings, the cotton be redelivered. The citation was granted and the cotton sequestered, &c.

The answer of Flanders denied that Tweed owned the cotton, and asserted that it belonged to the United States; that he, Flanders, was in possession of it as an officer of the United States, by virtue of a contract between Tweed and the Treasury Department, and that the cotton being virtually in the custody of the United States was not liable to sequestration, and that all his, Flanders's, acts in reference to it were official, and not private; that, accordingly, the court had no jurisdiction over the matters complained of, but that such jurisdiction was exclusively in the Court of Claims.

The United States, intervening, stated that the cotton belonged to *them* as sole owners, and that Flanders was in possession merely as their agent.

The case was tried before a jury. The bill of exceptions showed that evidence was offered which conduced to show—

"That the cotton was raised in the northern part of Texas, by planters, and was possessed by them until the winter of 1865–66, and was sent to market or to Jefferson, Texas, as private property, and that *it had never been captured by or surrendered to the army or any military authority of the United States, nor included in any surrender; that none of it was the property of the Confederate States, or had been destined for their use, but was private property; that the defendant testified that he had no evidence at all to affect it as captured or abandoned property;* that while said cotton was deposited in the warehouse at Jefferson, Texas,

one Turnbull, then an agent to collect abandoned and captured property, published a notice for claimants of cotton to make oath of their ownership, and failing to do this he would seize it as captured property. One of the parties whose property was seized had no notice of the order, and his property was taken and held by Turnbull, and other property was seized by said Turnbull upon protest of the same kind; and the testimony generally conduced to prove these facts, and that in the opinion of the witness *his seizures were oppressive, causeless, and for the purpose of extortion.*"

"That *in March*, 1866, the plaintiff went to Shreveport under his contract; that he discovered that there was no property of the kind described in the contract upon which it operated. He was also informed that the contract had been revoked by the Treasury Department. *The supervising agent at Shreveport first gave him information to this effect.* Thereupon he determined not to take any proceedings under it, and so notified the agent at Shreveport. During the months of February and March, he made purchases of cotton from the owners of the cotton that had been held and seized by Turnbull as aforesaid, and which was then in custody of the agents aforesaid by reason of the seizure. *He was informed that no evidence had been produced to affect the claims of the owners and the purchases were safe.* The supervising treasury agent at Shreveport, who held the cotton, so advised the plaintiff."

THE PLAINTIFF asked the court to charge:

"If the cotton described in the petition was not captured by the army of the United States, nor surrendered to them, was not abandoned property, nor was ever property of the Confederate States, but was produced on plantations of private individuals, and was held and possessed as private property by them until the purchase of the same by the plaintiff; and if he purchased the same on his own account from such private owner, and the same was delivered to him, and the same was so held until the detention of the same by the defendant, *who did not take, or hold, or possess it under color of any law or statute of the United States, or any authority of his office, or color of the same, but of his own will, the plaintiff is entitled to recover.*"

This charge the court gave, and the defendants excepted.

THE DEFENDANT asked the court, to charge, in effect:

"1. That a writ of sequestration would not lie if the defendant held the cotton in question as deputy general agent of the Treasury Department, under the acts of Congress relating to captured or abandoned property.

"2. That the Circuit Court had no jurisdiction by virtue of the writ of sequestration to direct the cotton to be taken from the possession of the defendant, if the same, at the time the writ issued, was in his possession as such agent, under color of the acts of Congress relating to captured and abandoned property.

"3. That the defendant, if he held the possession of the cotton, as such agent for the collection of captured or abandoned property, had the right to retain the same, and that the plaintiff could not recover the property except by suit in the Court of Claims."

The court refused thus to charge; and the defendant excepted. The jury found for the plaintiff, and judgment went accordingly.

On the exceptions above stated, and on the refusal of the court on motion to arrest the judgment, the cases were now here on writs of error by both Flanders and the United States.

Mr. S. F. Phillips, Solicitor-General, with whom was Mr. G. H. Williams, Attorney-General, for the plaintiff in error:

The case raises these questions:

1. How far one, who became an agent of the United States to purchase cotton of a certain description at a specified time and place, can show that cotton purchased by him at such a time and place is not within the scope of his agency?

2. Whether property held under the act of July 8th, 1864, section two, is liable to sequestration, *pendente lite*, in favor of an adverse claimant?

3. Whether the only remedy of the plaintiff below be not exclusively in the Court of Claims?

I. The error in the instruction requested by the plaintiff, and given by the court, is, that it takes for granted that Tweed as agent of the United States, under the contract,

could, with regard to any cotton bought by him at the time and place that most if not all of this was, disclaim being an agent of the United States.

There was *no evidence* that Tweed's agency had been revoked by the first day of March, 1866. The letter authorizing such revocation was written at Washington on the 24th of February before, addressed to an officer at New Orleans, but Tweed first heard of it "in March," at Shreveport. The burden of showing when an existing agency terminated, is upon him who avers it, and, therefore, in this case, upon Tweed. All that he shows thereupon is that he first heard of it in March, without further specification. It may be assumed as a fact that Tweed had not heard of the revocation until several days after the 1st of March. It also appears that four hundred and sixty-three bales of this parcel of cotton were bought by Tweed on or before March 1st, and all of it by March 8th. Much the larger part of the cotton, therefore, was bought at the time when and the place where Tweed's agency operated; probably all of it was.

Will public policy allow him to suggest that such cotton was bought as principal, for his own individual advantage?

Tweed shows that the contract extended to only such *Confederate cotton* as was on Red River, and he alleges that this was not of that class.

Before proceeding further, we observe that, if any part of this cotton, no matter how small, was purchased by Tweed as agent,—in this suit brought by him under an allegation that none of it was so purchased, the plaintiffs in error are entitled to the benefit of the doctrines in respect to the mingling and confusion by agents of their own and their principal's goods. The case shows that fifty bales were purchased on the 5th of February.

The contract was undoubtedly made at *Tweed's promotion.* This imposed upon him vigilance, activity, and the duty of having an eye single to the interest of his employer, to such extent that whilst agent he could not place himself in a position to become interested to allay or divert the suspicion of that employer as to any particular parcel of cotton. His

bona fides in a particular case need not be questioned. The question is whether an allowance of such liberty to an agent may not open a door to fraud in general. Will the relation of principal and agent admit of such liberty? We think not.*

II. As respects the refusal of the court to give the first and second instructions asked by the defendant, we assign as ground of error that the court assumed the propriety of the writ of sequestration issued in this case. Concede that the plaintiff was entitled to recover in some action, yet during the pendency of his action the property in question could not be taken out of the hands of an agent of the United States by sequestration; because,

1st. The custody of the cotton by Flanders was the *custody of the law*. A thing in the keeping of an officer of the government, under color of a statute of the United States, upon trust for the benefit of the whole country, is in *custody of the law*, as much as if in the keeping of an officer of the government, under color of process from a court or magistrate, upon trust for the benefit of one or more citizens.

2d. The possession by Flanders was the possession by the United States.

In the third instruction refused, the court below assumed a jurisdiction which was exclusively in the Court of Claims.

Mr. T. D. Lincoln, contra.

Mr. Justice CLIFFORD delivered the opinion of the court.

Cotton in bales to a large amount was purchased by the plaintiff from different owners of the same, for which he paid a fair market value, as appears by the bills of sale exhibited in the record, amounting in the whole to four hundred and ninety-five bales; [?] that he shipped the same for his own account, to his own agents in New Orleans, and that he paid the freight on the same, and the other expenses and insurance. Testimony was also introduced by the plain-

* See Keech *v.* Sandford, 2 Equity Cases, Abridged; Moore *v.* Moore, 1 Selden, 256.

tiff showing that the cotton was raised by planters in an adjoining State, and that they continued to possess it until it was sent to market; that the cotton had never been captured by, or surrendered to our army; that none of it was the property of the Confederate States, nor had it ever been destined for their use.

Prior to those transactions a contract had been made between a supervising special agent of the Treasury Department and the plaintiff, that the plaintiff should engage in the business of collecting captured and abandoned cotton in that district. By that instrument it was agreed between the parties that the plaintiffs should furnish all money necessary to purchase the cotton, and all the assistance required for the purpose, and all the requisite transportation, and that he should use all proper efforts to make the purchases and to transport and deliver the same to the other party, at the port of New Orleans, in good shipping order, with receipted bills of sale from the holders, at a cost not exceeding three-fourths of its market value, and free and discharged of all cost of purchase and expense of transportation. In consideration of which the other party agreed to pay and deliver to the plaintiff three-fourths of the cotton, of average quality, as compensation in full for his services, and all costs and expenses. Efforts were made by the plaintiff to make such purchases, but it appears that he soon found that there was no cotton of that description within the said district, and having learned that the contract had been revoked by the Treasury Department, he determined to proceed no further under that agreement.

Property of the kind, however, was seized by another party, to whose transactions it becomes necessary to advert, in order to a full understanding of the present controversy. He, the said other party, published a notice for the claimants of cotton to appear and make oath of their ownership, stating that if they failed to do so he would seize it as captured property. Such property was seized by that party, claiming to be an agent to collect captured and abandoned property, but the evidence introduced tended to prove that his seizures

were causeless and oppressive. Some of the cotton seized under those circumstances, and which remained in the hands of the agents of the party making the seizures, the plaintiff admits he purchased, from the owners of the same, having been previously informed by a supervising treasury agent that no evidence had been produced to affect the claims of the owners, and that it was safe to make the purchases, and it appears that the cotton was shipped to New Orleans with his other shipments. All of these transactions took place while the other party to the written agreement was a supervising special agent, but he was soon after superseded, under the instructions of the Treasury Department, and the defendant in the present suit was appointed in his place.

Enough is remarked to show the origin of the controversy, as the defendant insisted that the written agreement between his predecessor and the plaintiff was applicable to all the cotton which the plaintiff had purchased and shipped, and that he, as the successor of the other party to that agreement, was entitled to hold one-fourth of the cotton so purchased and shipped, for the United States.

Pursuant to that claim the defendant made a division of the cotton, and delivered three-fourths of the same to the plaintiff and retained one-fourth of the whole amount. Demand of the other one-fourth having been refused, the plaintiff instituted the present suit to recover the residue of the cotton, being one hundred and twenty-three bales, valued at the sum of $17,500. Service was made, and the defendant appeared and made defence.

Proceedings in the meantime took place under the last paragraph of the petition, in which the plaintiff prayed that a writ of sequestration might be issued, directed to the marshal, requiring him to take the cotton in question into his possession, and to hold the same subject to the order of the court, and he also prayed for judgment decreeing that the cotton is his property, and that the same be delivered to him, or that he have judgment for the value, with interest from judicial demand, and with privilege upon the property sequestered. Process of sequestration was accordingly issued

by the court, and it appears that it was duly served and executed by the marshal.

Exceptions to the proceeding were filed by the defendant, in which he alleged: (1.) That the cotton is captured property, and that it was at the time the writ of sequestration was issued, and that the property, as such, was in his possession and custody for the use and benefit of the United States. (2.) That the Circuit Court is without jurisdiction of the case, as the property sequestered is *de facto* and *de jure* captured property under the acts of Congress, and that it should be dealt with as the law provides.

He also filed an answer, in which he denied that the plaintiff was the owner of the property, and set up the same defence as in his preliminary exceptions. Subsequently the district attorney intervened, and alleged that the United States were the sole owners of the cotton, and prayed that their claim might be allowed and adjudged good, and that the proceedings instituted by the plaintiff may be disallowed and dismissed. Application was made by each party to bond the property, but the application of the plaintiff was granted and that of the defendant was denied.

Unsuccessful in that, the defendant next filed a peremptory exception to the right of the plaintiff to recover in the suit, in which he alleged that the plaintiff was not and never was the owner of the property; that he never owned but a two-thirds interest in the same; that the other third interest is, and throughout has been in another party. Hearing was had and the court overruled the peremptory exception and entered a decree recognizing the plaintiff as the lawful owner of the property. Whereupon the defendant sued out a writ of error and the cause was transferred to this court, where the judgment was reversed because the record did not contain any stipulation in writing waiving a trial by jury, and the cause was remanded for further proceedings.*

Pursuant to the directions of the mandate the cause came in order for further proceedings, and leave was granted to

* Flanders *v.* Tweed, 9 Wallace, 425.

the defendant to amend his answer, which he did by setting up, in a more formal manner, the defences mentioned in his preliminary exception and in his former answer. Evidence was introduced by both parties, and the jury, under the instructions of the court, returned their verdict in favor of the plaintiff.

Four exceptions were taken at the trial, and the questions which those exceptions present are the only questions open in the case for re-examination. They relate to the instruction given by the court to the jury, and the three requests for instruction presented by the defendant which the court refused to give.

By the bill of exceptions it appears that the court instructed the jury, in substance and effect, as follows: That if the jury believe that the cotton was not captured by the army, nor surrendered to the national forces; that it was not abandoned property nor ever the property of the Confederate States, but that it was raised on the plantations of private individuals and that it was held and possessed by the owners as private property until the purchase of the same by the plaintiff; that the plaintiff purchased the same on his own account from such private owners, and that he held the same until it was taken by the defendant, and that the defendant did not take, hold, or possess it under color of any law or statute of the United States or any authority of his office or color of the same, but of his own will, then the plaintiff is entitled to recover.

Reasonably viewed it is clear that the instruction given covered every allegation of the claim and every ground of defence set up both in the preliminary exception and in the amended answer. Instructions given by the court at the trial are entitled to a reasonable interpretation, and if the propositions as stated are correct they are not, as a general rule, to be regarded as the subject of error on account of omissions not pointed out by the excepting party, as the party aggrieved, if he supposes the instructions given are either indefinite or not sufficiently comprehensive, is always

at liberty to ask that further and more explicit instructions may be given, and if he does not do so he is not entitled to claim a reversal of the judgment for any such supposed error.* Courts are not inclined to grant a new trial merely on account of ambiguity in the charge of the court to the jury, where it appears that the complaining party made no effort at the trial to have the point explained.† Where the court charge the jury correctly upon all the ingredients of the cause of action and upon all the matters of the defence, it is not error in the court to refuse to instruct as requested by either party, even though the proposition presented is correct as an abstract proposition.‡

Beyond all doubt evidence was introduced by the plaintiff tending to prove every proposition involved in that instruction, and it is equally clear that the evidence was of a character to warrant the finding of the jury. Suppose that is so, still it is insisted by the defendant that the instruction is erroneous, because it assumes that the plaintiff, notwithstanding the written agreement to which he was a party, could make such purchases on his own account, but the bill of exceptions shows that there was no property to be purchased of the kind specified in the written agreement, and that the plaintiff, having ascertained that the authority of the other party had been revoked, determined not to act under the agreement; that the plaintiff purchased the cotton on his own account, and paid the whole of the purchase-money, and that none of the cotton had ever been captured by our army or surrendered to our military authorities, and that none of it was the property of the Confederate States or had ever been abandoned by the owners.

Tried, as the case was, by a jury, it was certainly proper that the court should submit the whole evidence to their determination; and it is clear that the jury by their finding

* Castle *v.* Bullard, 23 Howard, 189; Rogers *v.* The Marshal, 1 Wallace, 654.

† Locke *v.* United States, 2 Clifford, 580; Express Co. *v.* Kountze, 8 Wallace, 353.

‡ Mills *v.* Smith, 8 Wallace, 27.

have affirmed every proposition involved in the instruction in favor of the plaintiff. Such being the fact, the rule is that where the instructions given to the jury are sufficient to present the whole controversy to their consideration, and the instructions are framed in clear and unambiguous terms, it is no cause for the reversal of the judgment to show that one or more of the prayers for instruction presented by the losing party, and not given by the court, were correct in the abstract, as the refusal of the court to give the instructions as requested under those circumstances could not work any injury to the party making the request, and therefore cannot be regarded as error.* What more the defendant could properly have it is difficult to see, as the court submitted every inquiry of fact involved in the instruction to the judgment of the jury, and they, having returned their verdict for the plaintiff, it follows that the theory of fact assumed in the instruction is established as true, unless a new trial is granted by the court which tried the cause, or by the direction of this court for error of law. Taken together, the charge and the verdict, as perfected by the judgment, afford a presumption that the theory of fact assumed in the instruction is true, unless the contrary is stated in the bill of exceptions, or it appears that there was no sufficient evidence to warrant the court in submitting the questions to the jury.†

Three requests for instructions were made by the defendant, to the effect following:

1. That a writ of sequestration would not lie if the defendant held the cotton in question as deputy general agent of the Treasury Department, under the acts of Congress relating to captured or abandoned property.

Sufficient has already been remarked to show that there was no evidence in the case to warrant the court in submit-

* The Schools *v.* Risley, 10 Wallace, 115; Law *v.* Cross, 1 Black, 536; Tome *v.* Dubois, 6 Wallace, 555.

† Russell *v.* Ely, 2 Black, 580; State *v.* Hopkins, 5 Rhode Island, 58; Murray *v.* Fry, 6 Porter (Indiana), 372; Day *v.* Raguet, 14 Minnesota, 283.

ting such a question to the jury as an independent instruction, and the exception is accordingly overruled.*

2. That the Circuit Court had no jurisdiction by virtue of the writ of sequestration to direct the cotton to be taken from the possession of the defendant, if the jury find that the same, at the time the writ issued, was in his possession as such agent, under color of the acts of Congress relating to captured and abandoned property.

But the defendant had no right to seize the cotton in question, as the evidence showed that it had never been captured nor abandoned, and that the title to the same had become vested in the plaintiff by purchase from the private owners. Proof to show that the theory of the defence in that behalf is correct was entirely wanting. On the contrary, the defendant himself testified that he had no evidence *at all* to affect it as captured or abandoned property at the time the suit was instituted, which is certainly sufficient to show that the instruction requested was properly refused, as it is settled law that it is error in the court to give an instruction when there is no evidence in the case to support the theory of fact which it assumes.†

3. That the defendant, if he held the possession of the cotton, as such agent for the collection of captured or abandoned property, had the right to retain the same, and that the plaintiff could not recover the property except by suit in the Court of Claims.

Throughout the several propositions of the defence, the theory of fact is constantly interwoven that the defendant held the cotton under color of the acts of Congress relating to captured and abandoned property, but it is clear that a party cannot be held to have acted under color or by virtue of an act of Congress which did not confer any authority upon him, or any other person, to perform the act which is in controversy.‡ Neither an officer nor an agent can prop-

* United States *v.* Breitling, 20 Howard, 254.

† Id.; Goodman *v.* Simonds, Ib. 359.

‡ Reynolds *v.* Orvis, 7 Cowen, 272; Bigelow *v.* Stearns, 19 Johnson, 40; King *v.* Bedford, 6 East, 369; Britton *v.* Butler, 9 Blatchford, 462.

erly be said to have acted under color of a law which neither gave him nor any other person authority to do the act in question, nor can an officer be said to have acted under the authority of his office unless he has some appearance of right to it and is in possession and acting in that capacity, as the acts of a mere intruder or usurper of an office, without any colorable title, are undoubtedly wholly void both as to individuals and the public.* Whenever a person sued sets up a defence that he was an officer or an employé of the government acting under color of law, it plainly devolves upon him to show that the law which he invokes authorized the act in question to be done, and that he acted in good faith; but nothing of the kind is shown in this case. Instead of that he admits in his own testimony that he had no evidence at all to affect the cotton as captured or abandoned property.

Apart from that defence the theory is also constantly set up that the plaintiff during that period could not purchase cotton of the owners even though it was neither captured nor abandoned property, as he was, by virtue of that agreement, an agent of the United States, to which two answers may be made, either of which is sufficient to show that the theory is unfounded and without merit: (1.) Because the agreement does not contain any stipulation that the plaintiff should devote his whole time to the business of the agency, nor any other of a character to prohibit him from purchasing cotton from the private owners if the same was not included in the category of the cotton described in the written agreement. (2.) Because the written agreement never in fact became operative, as the plaintiff, not finding any such cotton in the district specified, never made any such purchases.

Nothing need be added in respect to the ruling of the court in denying the motion in arrest of judgment, as the motion raises the same questions as those involved in the prayers for instruction presented by the defendant and which were refused by the court.

* Plymouth *v.* Painter, 17 Connecticut, 593; People *v.* White, 24 Wendell, 525; Carleton *v.* People, 10 Michigan, 258; People *v.* Hopson, 1 Denio, 579.

Mention has already been made of the fact that the United States intervened in the suit, and the record shows that their claim was subsequently dismissed and that they also sued out a writ of error and removed the whole proceeding into this court, which is number 136 on the calendar.

All that is necessary to add upon the subject is, that the principal suit having been decided in favor of the plaintiff, the proceeding in intervention must necessarily fall with the defence set up by the defendant in that suit.

JUDGMENT IN EACH CASE AFFIRMED.

Mr. Justice BRADLEY, with whom concurred Mr. Justice DAVIS, dissenting.

I dissent from the opinion of the court in these cases. Tweed, the defendant in error, repaired to the Red River region to purchase cotton, under a written engagement with a government agent to purchase and pay for the same, and to deliver one-fourth part to the government, upon the express consideration stated in the agreement, that it was well known that a great deal of cotton belonging to the Confederate government was in that district, but could not be identified, and was kept back by the parties having it in possession for fear of its being seized. Tweed was to have the prestige of government protection; was to purchase any cotton he could find for sale, without any questions; was to send it to the government agent at New Orleans, and there three-fourths of it were to be set apart to his use and one-fourth to the use of the government. This was the general purport and effect of the agreement. There cannot be a doubt, from the evidence in the case, that he derived great advantage from his semi-official character. But having made his purchases, he concluded that it would be a better speculation to have all the cotton than only three-fourths of it; and, therefore, he sets up the pretence that he did not act under the agreement, but on his own independent account. The cotton, however, went forward, protected by the general policy of insurance taken out by the government agent, and arrived at New Orleans. The government agent, Flanders,

took possession of it, and gave up to Tweed his three-fourths, according to the agreement. The balance he retained for the government, against Tweed's consent, and was sustained in his action by the Secretary of the Treasury.

Tweed sued out a sequestration (a writ in the nature of the common-law replevin) from the United States Circuit Court of Louisiana, and by virtue of that writ one-fourth part of the cotton held by Flanders, the government agent, for the government, was taken out of his possession, and the court held that this was a lawful exercise of the judicial authority.

Now, on the merits of the case, I cannot concur in the opinion that Tweed could, under the circumstances, repudiate his agreement; but I think he was bound by it and by his acts, and was estopped from asserting an independent purchase of the cotton on his own account; and that the charge of the court should have been to that effect, and that the charge given and the refusal to charge as requested were erroneous.

I also hold that this was a suit against the government itself. Flanders did not hold the cotton on his own account, but on government account; and his acts were sanctioned and adopted by the Treasury Department. He was acting for the government, and his possession was the government's possession. Whether he was acting lawfully or unlawfully was a question which the court could not decide by an adverse proceeding in a suit brought for the recovery of the cotton.

This is a very different case from that of a replevin brought by the owner of goods unlawfully taken by a sheriff upon execution against another person. Goods in the custody of the law, seized for the benefit of a private party, in satisfaction of a judgment or to meet an asserted claim, may be replevied by the true owner; but goods claimed by the government itself, as its own goods, and held by its agents in possession, cannot be reclaimed in this manner. They can only be reclaimed by application to Congress, or, in certain cases, to the Court of Claims.

Statement of the case.

Nor is the case governed by that class of cases in which a mandamus will lie against a government officer to compel him to perform a ministerial duty. Such a writ is issued, or is supposed to be issued, by the government itself, to compel its officials to do their duty to its citizens.

STEAMBOAT COMPANY *v.* CHASE.

A statute of a State giving to the next of kin of a person crossing upon one of its public highways with reasonable care, and killed by a common carrier by means of steamboats, an action on the case for damages for the injury caused by the death of such person, does not interfere with the admiralty jurisdiction of the District Courts of the United States, as conferred by the Constitution and the Judiciary Act of September 24th, 1789; and this is so, even though no such remedy enforceable through the admiralty existed when the said act was passed, or has existed since.

ERROR to the Supreme Court of Rhode Island.

A statute of the State just named,* passed in October, 1853, and relating to common carriers by means of steamboats, enacts:

"SECTION 16. If the life of any person crossing upon a public highway with reasonable care, shall be lost by reason of the negligence or carelessness of such common carriers, or by the unfitness or negligence or carelessness of their servants or agents, in this State, such common carriers shall be liable to damages for the injury caused by the loss of life of such person, to be recovered by action on the case, for the benefit of the husband or widow and next of kin of the deceased person.

"SECTION 21. In all cases in which the death of any persons ensues from injury inflicted by the wrongful act of another, and in which an action for damages might have been maintained at the common law had death not ensued, the person inflicting such injury shall be liable to an action for damages for the injury caused by the death of such person, to be recovered by

* Revised Statutes, chapter 176. Of Actions.

action on the case for the use of his or her husband, widow, children, or next of kin," &c.

These statutory provisions being in force in Rhode Island, but no such right enforceable through the admiralty having been given by Congress, a steamer owned by the American Steamboat Company, common carriers upon Narraganset Bay (a public highway, and tidal waters running between Providence and Newport, both within Rhode Island), negligently ran over one George Cook crossing upon that bay with reasonable care, in a sailboat, and killed him. Thereupon Chase, administrator of Cook, brought suit against the steamboat company in one of the State courts of Rhode Island. The company set up that the court had not jurisdiction of the cause of action on the ground that under the Constitution of the United States—which ordains that

"The judicial power of the United States shall extend to ALL cases of admiralty and maritime jurisdiction"—

And under the ninth section of the Judiciary Act approved September 24th, 1789, which section says that

"*The District Courts shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction*, saving to suitors in all cases the right of a common-law remedy when the common law is adequate to give it"—

exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction was vested in the District Courts; that the courts of common law had only such jurisdiction of marine torts as was conferred by the saving clause in the ninth section of the act, and that actions for damages for loss of life did not come within the clause.

The court, however, sustained the jurisdiction; and verdict and judgment having been given for the plaintiff in $12,000, and the Supreme Court of the State having affirmed that judgment, the cause was removed to this court.

Messrs. J. A. Gardner and B. F. Thurston, for the plaintiff in error:

The question is, can a court of common law exercise ju-

risdiction, and give a remedy to a suitor for a consequential injury growing out of a marine tort, when no remedy for such injury exists in the admiralty?

Or, assuming that under the general jurisdiction of courts of admiralty cognizance of such action could be entertained by a district court of the United States, can a suitor have a remedy in a court of common law, when the right to such action is created by a State statute, passed subsequent to September 24th, 1789?

The obvious purpose of the Constitution and of the ninth section of the Judiciary Act, was to create a maritime court for the purpose of administering the universal law of the seas upon the basis of the civil system, known to maritime states, in distinction from a court familiar only with the limited jurisprudence of the common law system. Indeed, there is an obvious propriety in excluding the courts of common law from adjudicating upon subjects which are, from their nature, of admiralty cognizance, except to the extent recognized and permitted by the acts of Congress. A jury of landsmen unfamiliar with the rules and necessities of navigation, is imperfectly qualified to administer justice in a case, the turning-point in which, on the question of liability, can be settled only after a skilled and intelligent weighing of acts done by the respective parties in the exercise of a science requiring special knowledge and aptitude to understand.

As the grant of admiralty jurisdiction to the district courts embraces all subjects which from their nature belong to the admiralty, and is exclusive in its general character,* it follows that the Federal and the State courts of common law have no other jurisdiction over the same subjects than that which is conferred by the saving clause of the ninth section of the act of 1789, which is in the words, "*saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it.*"†

Now a statutory action for damages for loss of life re-

* The Genesee Chief, 12 Howard, 457; The Hine, 4 Wallace, 556.

† The Moses Taylor, 4 Wallace, 412.

sulting from a collision on navigable waters was unknown to both the common law and the admiralty in 1789.* It has not been since, by legislation of Congress, given to the admiralty. It, therefore, cannot have been *saved* to the common-law courts, either directly or by implication. Neither was such remedy saved if known to the admiralty and unknown to the common law. Not only are the remedies which are saved confined to common-law remedies,† but only such concurrent remedies are saved as the common law was then competent to give. In *The Hine* v. *Trevor*,‡ this court remarked:

"It could not have been the intention of Congress by the exception in that section, to give the suitor all such remedies as might afterwards be enacted by State statutes, for this would have enabled the States to make the jurisdiction of their courts concurrent in all cases, by simply providing a statutory remedy for all cases. Thus the exclusive jurisdiction of the Federal courts would be defeated. In the act of 1845, where Congress does this, the language expresses it clearly. There is added 'any concurrent remedy which may be given by the State laws, where such steamer or other vessel is employed.'"

It is not to be presumed that it was the intention of Congress, at the moment that it was given to the Federal courts the exclusive cognizance of civil causes of admiralty jurisdiction, to save to the common-law courts any greater *right* than it conferred upon the admiralty courts. It is an existing common-law remedy which is saved to suitors *for rights recognized by the admiralty.*

It is important to observe that the privilege is a personal one to *suitors.* It is not a jurisdiction conferred on courts, or a power vested in State legislatures to create new rights of action, affecting subjects coming within the law of the sea.§

* Such action was not allowed in England until 9 Victoria (1846), when it was given by the statute known as Lord Campbell's act. There was no legislation on this subject by any of the United States earlier than the English statute, and most of the American statutes are, in substance, copies of the English statute.

† The Moses Taylor, 4 Wallace, 431. ‡ Ib. 572.

§ The Belfast, 7 Wallace, 624.

Nowhere have the courts intimated that claims founded on marine torts, where the right of the party to proceed *in rem*, or *in personam*, in the admiralty to enforce such claims is not recognized, he can pursue such claims under a right given by State laws, in the common-law courts.

A suit to recover damages for loss of life resulting from a collision of two vessels on the seas is in its nature proper for admiralty cognizance. The suit is founded on the collision itself, a subject exclusively cognizable in the admiralty; and by the act of 1789, the derivative suit, if cognizable anywhere, should be exclusively cognizable in the admiralty. If, from an omission by Congress to create by a new statute a right to maintain it there, such a suit cannot be so proceeded in, then there still exists the same but no greater hardship on suitors than yet exists in several States, which have never, up to this day, in derogation of the common law, enacted statutes giving an action for damages where death results from a tort.

We insist, therefore, that the courts of common law have only the right to exercise a *concurrent* jurisdiction over such subjects of admiralty cognizance as they under the Constitution and the acts of Congress are permitted to deal with at all.* With respect to subjects of recognized admiralty cognizance at the time of the passage of the act of 1789, the State legislatures could provide common-law remedies, and may by subsequent legislation enlarge or modify these remedies: preserving always the distinctive characteristics of common law procedure. But the case is different with respect to subjects not of recognized admiralty cognizance. And as yet no civil remedy to next of kin for damages consequent on an injury resulting in the loss of life of their relative is as yet known to the admiralty, Congress not yet having given any.

Mr. W. P. Sheffield, contra:

The words "extend to" in the provision of the Federal

* New Jersey Steam Navigation Co. *v.* Merchants' Bank, 6 Howard, 390; The Hine *v.* Trevor, 4 Wallace, 568.

Constitution, that the judicial power shall *extend to* all cases of admiralty and maritime jurisdiction, do not imply that the nation shall exhaust this jurisdiction.

In addition, the saving clause of the 9th section of the Judiciary Act "*saves to suitors in all cases the right of a common-law remedy, when the common law is competent to give it.*" Yet "the clause was inserted," says this court,* "probably from abundant caution, lest the exclusive terms in which the power is confirmed in the District Court might be deemed to have taken away the concurrent remedy which had before existed." The same right would have existed had no such clause been inserted. Indeed, the State must have the same right to exercise the reserved powers over her waters, to the extent that they are reserved, as she has to exercise the reserved powers of government over the land, and to have the same power to provide a remedy for injuries committed on tide-waters, within her limits, that she has to punish the like injuries committed on land by railroad companies who carry the mails over post routes; and have the same right to exercise a police authority generally to protect her citizens upon the water, as she has to exercise this authority to protect them upon land. The fact that the Federal government has the power to carry out the objects of the Federal government over water or land, does not abrogate the power of a State to protect her citizens. If indeed a State should legislate so as to obstruct the Federal authorities in attaining the ends for which the Federal government was created, such legislation would be void. So if this injury had been inflicted upon the high seas, or beyond the State jurisdiction, the State statute would not have applied to it. The jurisdiction of the States to enact laws punishing offences committed within the counties of States, upon waters, has been affirmed in numerous cases in this court.†

The Federalist (No. 45) says, "The powers reserved to the several States will extend to all objects which in the ordi-

* New Jersey Steam Navigation Co. *v.* Merchants' Bank, 6 Howard, 390.

† United States *v.* Bevans, 3 Wheaton, 386; Smith *v.* Maryland, 18 Howard, 71; Gibbons *v.* Ogden, 9 Wheaton, 195.

nary course of affairs concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." The object of Rhode Island in passing this statute plainly was but to protect the lives of her citizens. It relates exclusively to persons, and does not apply to things which are generally the subject of admiralty jurisdiction. As it applies to the case at bar, it in no way interferes with any *exercised* power of the Federal government, to regulate commerce between the States or with foreign nations. It provides that the right of action which Cook would have had against the steamboat company, had they not killed him, should survive to his administrator, and provides nothing more. The effect of it is simply to take from careless persons that immunity from punishment which the common law tolerates, if carelessness destroys its victims. If Cook had been injured, no matter how much, so long as he had not been killed, no question would have been made here, that an action at common law could have been maintained by him under a State statute, for then the remedy at common law and the common-law remedy would have coincided. The statute providing that the right of action with the common-law remedy shall survive, cannot change the jurisdiction.

Reply: The grant of jurisdiction by the Constitution to the Federal courts of "*all* cases of admiralty and maritime jurisdiction," and the broad declaration by the act of 1789, that such jurisdiction is "exclusive" of all State and Federal courts of common law, is poorly satisfied by the declaration that all that is thus exclusively vested is a right to proceed *in rem*, and that the common-law courts are only prohibited from making an inanimate object a defendant. If a form of procedure respecting a subject, and not the subject itself, is all that distinguishes the exclusive jurisdiction of courts of admiralty from courts of common law, then much learning and zeal in argument have been wasted before this court and by the bench, in the effort to define and settle the limits of these two ancient conflicting jurisdictions.

Opinion of the court.

Mr. Justice CLIFFORD delivered the opinion of the court.

Remedies for marine torts, it is conceded, may be prosecuted in the admiralty courts, even though the wrongful act was committed on navigable waters within the body of a county, as the exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction is conferred upon the District Courts by the ninth section of the Judiciary Act. Repeated attempts were made in our early judicial history to induce the court to hold otherwise, but the court refused to adopt any other theory, and held that the entire admiralty power of the Constitution was lodged in the Federal courts; that Congress intended by the ninth section of the Judiciary Act to invest the District Courts with that entire power, as courts of original jurisdiction, employing the phrase "exclusive original cognizance" to express that purpose, and that it was intended that the power should be exclusive of the State courts as well as the other Federal courts.

Common carriers of passengers, whether by railroad or steamboat, in case the life of a passenger in their care is lost, or the life of any person crossing upon a public highway is lost in that State, by reason of the negligence or carelessness of such common carrier, or by the unfitness, negligence, or carelessness of their servants or agents, are made liable by the statute law of the State to damages for the injury caused by the loss of the life of such person, to be recovered by action on the case for the benefit of the husband or widow and next of kin of the deceased person.*

Provision is also made by another section of the same statute that in all cases in which the death of any person ensues from injury inflicted by the wrongful act of another, and in which an action for damages might have been maintained at the common law had death not ensued, the person inflicting such injury shall be liable to an action for damages for the injury caused by the death of such person, to be recovered by an action on the case for the use of his or her husband, widow, children, or next of kin.

* Revised Statutes, 427.

Undisputed as the facts are in this case it is not necessary to refer to them with much particularity. By the pleadings it appears that the defendants are common carriers of passengers over the waters of the Narraganset Bay, one of the public highways within the State, between the ports of Newport and Providence in the same State, and that the plaintiff is the administrator of the estate of George Cook, late of Portsmouth in that State, deceased. He was passing over the waters of the bay in a sailboat and lost his life on the 29th of June, 1869, by means of a collision between the steamboat of the defendants and the sailboat in which he was passing, and which was caused, as the plaintiff alleges, while the decedent was in the exercise of due care and wholly through the unfitness, negligence, and carelessness of the master of the steamboat. Damages are claimed by the plaintiff for the benefit of the widow and children of the deceased. Judgment was rendered for the plaintiff in the Supreme Court of the State in the sum of $12,000; and the defendants sued out a writ of error and removed the cause into this court.

Two errors are assigned: (1.) That the common-law courts cannot exercise jurisdiction and give a remedy for a consequential injury, growing out of a marine tort, where no remedy for such an injury exists in the admiralty courts. (2.) That a suitor cannot have a remedy in such a case in a common-law court, even if the admiralty courts have jurisdiction, as the right of action was created by a State statute enacted subsequent to the passage of the Judiciary Act.

Where no remedy exists for an injury in the admiralty courts the fact that such courts exist and exercise jurisdiction in other causes of action leaves the State courts as free to exercise jurisdiction in respect to an injury not cognizable in the admiralty as if the admiralty courts were unknown to the Constitution and had no existence in our jurisprudence. Jurisdiction to enforce maritime liens by proceedings *in rem* is exclusive in the admiralty courts. State courts, therefore, are incompetent to afford a remedy in such a case, as they do not possess the power to issue the appropriate

process to enforce the lien and give effect to the proceeding. Vested exclusively as such power is in the admiralty courts, it is settled law that the State legislatures cannot authorize State courts to exercise jurisdiction in such a case by a proceeding *in rem*.*

Exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction was conferred upon the District Courts by the ninth section of the Judiciary Act, including all seizures under the laws of impost, navigation, or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts as well as upon the high seas.†

Admiralty jurisdiction was conferred upon the United States by the Constitution, and inasmuch as the power conferred extends to all cases of admiralty and maritime jurisdiction, it is clear and undeniable that a remedy for a marine tort may be sought in the admiralty courts, and if the injured party had survived no doubt is entertained that he might have sought redress for his injuries in the proper admiralty court, wholly irrespective of the State statute enacting the remedy there given and prescribing the form of action and the measure of damages, as the wrongful act was committed on navigable waters within the admiralty and maritime jurisdiction conferred upon such courts by the Constitution and the laws of Congress.‡

Doubts, however, may arise whether the action survives in the admiralty, and if not, whether a State statute can be regarded as applicable in such a case to authorize the legal representatives of the deceased to maintain such an action for the benefit of the widow and children of the deceased. Undoubtedly the general rule is that State laws cannot extend or restrict the jurisdiction of the admiralty courts, but

* The Moses Taylor, 4 Wallace, 411; The Hine, 4 Id. 555; The Belfast, 7 Id. 642.

† United States *v.* Bevans, 3 Wheaton, 387.

‡ The Commerce, 1 Black, 578; The Belfast, 7 Wallace, 640; 2 Story on the Constitution, § 1669; The Genesee Chief, 12 Howard, 452.

it is suggested that the action may be maintained in this case, without any departure from that principle, as the only practical effect allowed to the State statute is to take the case out of the operation of the common-law maxim that personal actions die with the person. Most of the common-law cases deny that the action is maintainable in the name of the legal representatives, and several text writers have expressed the same opinion.* Judge Sprague also applied the same rule in the case of *Crapo* v. *Allen*,† but in a later case‡ he left the question open, with the remark that it cannot be regarded as settled law that an action cannot be maintained in such a case.

Statutes have been passed in many of the States giving a remedy in such cases, and in the case of *Hiner* v. *The Sea Gull*,§ the Chief Justice held in a case where the suit was brought by the husband to recover damages to himself for the death of his wife, occasioned by the fault of the defendant, that the suit was maintainable.‖

Difficulties, it must be conceded, will attend the solution of the question, but it is not necessary to decide it in the present case, as the jurisdiction of the State court may be supported, whether such a suit may or may not be maintained in the admiralty courts.

Sufficient has already been remarked to show that the State courts have jurisdiction if the admiralty courts have no jurisdiction, and a few observations will serve to show that the jurisdiction of the State courts is equally undeniable if it is determined that the case is within the jurisdiction of the admiralty courts. Much discussion of that topic cannot be necessary, as several decisions of this court have established that rule as applicable in all cases where the action in the State court is in form a common-law action against the

* Carey *v.* Railroad Co., 1 Cushing, 475; Baker *v.* Bolton et al., 1 Campbell, 493; Dunlap's Practice, 87; Hall's Admiralty Practice, 22; 2 Parsons on Shipping, 351; Benedict's Admiralty, 2d ed., § 309.

† 1 Sprague, 184. ‡ Cutting *v.* Seabury, 1 Sprague, 522.

§ 2 Law Times, 15.

‖ Ford *v.* Monroe, 20 Wendell, 210; James *v.* Christy, 18 Missouri, 162.

person, without any of the ingredients of a proceeding *in rem* to enforce a maritime lien. Where the suit is *in rem* against the thing, the original jurisdiction is exclusive in the District Courts, as provided in the ninth section of the Judiciary Act; but when the suit is *in personam* against the owner, the party seeking redress may proceed by libel in the District Court, or he may, at his election, proceed in an action at law, either in the Circuit Court if he and the defendant are citizens of different States, or in a State court as in other cases of actions cognizable in the State and Federal courts exercising jurisdiction in common-law cases, as provided in the eleventh section of the Judiciary Act.* He may have an action at law, in the case supposed, either in the Circuit Court or in a State court, because the common law in such a case is competent to give him a remedy, and wherever the common law in such a case is competent to give a party a remedy, the right to such a remedy is reserved and secured to suitors by the saving clause contained in the ninth section of the Judiciary Act.†

Suitors may have a common-law remedy in all cases where the common law is competent to give it, but the defendants insist that a suitor cannot have redress in a common-law court in such a case, even if the admiralty courts have jurisdiction, as the right of action was created by a State statute enacted subsequent to the passage of the Judiciary Act.

Attempt is made to deny the right to such a remedy in this case, upon the ground that the operation of the saving clause must be limited to such causes of action as were known to the common law at the time of the passage of the Judiciary Act, and the argument is that the cause of action alleged was not known to the common law at that period, which cannot be admitted, as actions to recover damages for personal injuries prosecuted in the name of the injured party were well known, even in the early history of the common law. Such actions, it must be admitted, did not ordinarily

* Leon *v.* Galceran, 11 Wallace, 188.

† 1 Stat. at Large, 76; The Belfast, 7 Wallace, 644; The Moses Taylor, 4 Id. 411; The Hine, 4 Id. 555.

survive, but nearly all the States have passed laws to prevent such a failure of justice, and the validity of such laws has never been much questioned.*

Questions of the kind cannot arise in suits *in rem* to enforce maritime liens, as the common law is not competent to give such a remedy, and the jurisdiction of the admiralty courts in such cases is exclusive. Such a question can only arise in personal suits where the remedy, in the two jurisdictions, is without any substantial difference. Examined carefully it is evident that Congress intended by that provision to allow the party to seek redress in the admiralty if he saw fit to do so, but not to make it compulsory in any case where the common law is competent to give him a remedy. Properly construed a party under that provision may proceed *in rem* in the admiralty, if a maritime lien arises, or he may bring a suit *in personam* in the same jurisdiction, or he may elect not to go into admiralty at all, and may resort to his common-law remedy in the State courts, or in the Circuit Courts of the United States if he can make proper parties to give the Circuit Court jurisdiction of his case.†

Different systems of pleading and modes of proceeding, and different rules of evidence prevail in the two jurisdictions, but whether the party elects to go into one or the other, he must conform to the system of pleading and to the rules of practice, and of evidence, which prevail in the chosen forum. State statutes, if applicable to the case, constitute the rules of decision in common-law actions, in the Circuit Courts as well as in the State courts, but the rules of pleading, practice, and of evidence in the admiralty courts are regulated by the admiralty law as ultimately expounded by the decisions of this court. State legislatures may regulate the practice, proceedings, and rules of evidence in their own courts, and those rules, under the 34th section of the Judiciary Act, become, in suits at common law, the rules of decision, where they apply, in the Circuit Courts.

* Railroad *v.* Barron, 5 Wallace, 90.

† Leon *v.* Galceran, 11 Id. 188.

All these are familiar principles, and they are sufficient to dispose of the case and to show that there is no error in the record.

JUDGMENT AFFIRMED.

BEALL *v.* NEW MEXICO.

1. A statute authorizing judgment against the sureties of an appeal bond, as well as against the appellants, in case of affirmance, is not unconstitutional.
2. A Territorial legislature, having by its organic act power over all rightful subjects of legislation, is competent to pass such an act.
3. An administrator *de bonis non* cannot sue the former administrator or his representatives for a devastavit, or for delinquencies in office; nor can he maintain an action on the former administrator's bond for such cause. The former administrator, or his representatives, are liable directly to creditors and next of kin. The administrator *de bonis non* has to do only with the goods of the intestate unadministered. If any such remain in the hands of the discharged administrator or his representatives, in specie, he may sue for them either directly or on the bond.
4. Regularly, a decree of the probate court against the administrator for an amount due, and an order for leave to prosecute his bond, are prerequisites to the maintenance of a suit thereon.

ERROR to the Supreme Court of the Territory of New Mexico; the case being thus:

One Hinckley died at Santa Fé, in the Territory of New Mexico, in October, 1866. At the time of his death he was a member of a mercantile copartnership, consisting of himself and two persons named Blake and Wardwell, and they carried on business at Fort Craig and other places in the Territory of New Mexico.

In November, 1866, one Beall was appointed "administrator and executor of the estate of Hinckley, according to the last will of the deceased," and upon such appointment gave a bond with himself as principal and one Staab and others as sureties, conditioned in the ordinary form:

"To account for, pay, and turn over all the moneys and property of the said estate to the legal heirs of the said deceased,

and to execute the last testamentary will of the said deceased, and to do all other things relative to the said administration as required by law, or by the order of the Probate Court of the county of Santa Fé, or any other court having jurisdiction in the matter."

In pursuance of his appointment, Beall filed in the probate court an inventory of the assets of the estate, in which, among other things, he said:

"The property, rights, and credits of the said deceased, so far as the undersigned, executor, has been able to obtain a knowledge thereof, were, at the time of his decease, as follows:

"The firm or partnership of which the deceased was a member with Blake and Wardwell, were owing the said deceased the sum of $46,538.60. The undersigned being satisfied that the sum stated is correct, has agreed to receive of the said Blake and Wardwell, in full discharge of the capital and profits of the said deceased, the aforesaid sum. The said Blake and Wardwell have agreed to pay the said sum as soon as they can arrange their affairs to do so, and within a reasonable time. The undersigned is satisfied that the said arrangement is the best he could make for the interest of the estate, and that the payment will be made in due time."

He subsequently ($5000 of the sum having in the meantime been paid), rendered an account to the court of probate, in which he charged himself with a balance due from Wardwell and Blake, in this manner:

"April 30th, 1868, to amount due from Wardwell and Blake, $41,556 25."

In January, 1869, Beall, who was an officer of the army and expected to be ordered away from New Mexico, resigned his office of administrator, leaving the amount due from Blake and Wardwell unpaid: and in October, 1869, one Griffin was appointed administrator *de bonis non* to succeed him. Directly after this, that is to say, in November, 1869, a suit by the Territory of New Mexico, on the relation of this Griffin, was brought in the District Court for the county of Santa Fé, against Beall as principal and Staab and the others, his sureties, upon the administration bond which he and they had given on his appointment.

The breaches of the bond assigned in the declaration were, in substance, that Hinckley's interest in the copartnership referred to, at the time of his death, was worth $60,000; that the effects of the firm consisted of merchandise, real estate, mines, and credits; and that Beall unlawfully and by verbal agreement disposed of the same for $46,500 to Wardwell and Blake, the surviving partners, thereby allowing the interest of the deceased to remain in their possession, and by them (and Beall) to be converted to their own use, and that he neglected to pay over and account for the same; also, generally, that through his want of attention and neglect assets of the estate to the amount of $60,000 were wholly lost, wasted, and dissipated.

The case having come on to be tried before a jury, Griffin, the administrator *de bonis non*, was examined as a witness for his own side of the case. He said:

On examination in chief—

"I had frequent conversations with Beall. I asked him why he had not taken some security; I told him I thought it was not safe; asked him if he had any note for the amount; he said he had not; all he had was in the inventory; *when he sold the property*, he supposed they would pay for it. After my appointment Beall delivered to me a paper [produced], purporting to be an abstract from the books of Hinckley, Blake, and Wardwell, showing the condition of the account of Hinckley with the firm, and said it was a true statement."

[The paper, which was a debit and credit account containing many items on both sides and ending in a balance of $46,538.60, was read to the jury.]

On cross-examination, the witness, being asked by the defendant's counsel if Beall had ever told him that he had *sold* Hinckley's interest to Blake and Wardwell, answered:

"I don't recollect that *he ever told me so; I inferred so* from Beall's conversations, who treated it as a sale."

The judge charged the jury as follows:

"On the part of the plaintiff it is contended that Beall, as administrator of Hinckley, deceased, sold the interest of Hinck-

ley's estate in the property and effects of Hinckley, Blake, and Wardwell to Blake and Wardwell, the surviving partners of the firm, for the sum of $46,538.60, on credit, without taking any security for the same. In the opinion of the court, the statements of the inventory filed by Beall in the probate court, which are evidence in the cause, and the evidence of Elkins, establishes the fact of such sale. By selling this property on credit, Beall becomes personally liable in law to the estate for the amount for which the property was sold; and if the jury, from the evidence, arrive at the same conclusion with the court, they should find for the plaintiff, and assess his damages at $41,556, with interest at 6 per cent., such interest to commence six months after the inventory was filed, January 10th, 1867."

Under this charge the jury rendered a verdict in favor of the plaintiff, and assessed the damages at $48,000, upon which verdict judgment was entered. An appeal was taken to the Supreme Court of the Territory. An appeal bond was given, conditioned that the appellants should perform the judgment of the court, and pay the damages and costs that might be adjudged against them upon their said appeal.

There is a provision in the *Revised Statutes of New Mexico** which reads as follows:

"In case of appeal in civil suits, if the judgment by the appellate court be against the appellant, it shall be rendered against him and his securities on the appeal bond."

The 7th section of the organic act of the Territory,† provides—

"That the legislative power of the Territory shall extend to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of this act. . . . All the laws passed by the Legislative Assembly and governor shall be submitted to the Congress of the United States, and *if disapproved* shall be null and of no effect."

There was no evidence that this law had ever been disapproved.

In pursuance of it, when the judgment was affirmed by

* Section 5, page 290.

† Brightly's Digest, p. 694.

the Supreme Court of the Territory, judgment was rendered against the appellants and the sureties upon the appeal bond.

The latter judgment was brought to this court by writ of error; the court being called upon to review as well certain errors which were alleged to affect the action itself, as others which were assigned upon a bill of exceptions taken at the trial of the cause.

The errors assigned were—

1st. That judgment was entered by the Supreme Court against the sureties of the appeal bond as well as against the appellants below.

2d. That an administrator *de bonis non* cannot maintain suit on the original administrator's bond.

3d. Other objections, as that the late administrator, Beall, had not been called to account in the probate court, and no decree had been passed against him, and that no order of the probate court was obtained for leave to prosecute the bond.

Mr. W. M. Evarts, for the plaintiff in error; Messrs. W. W. McFarland and L. P. Poland, contra.

Mr. Justice BRADLEY delivered the opinion of the court.

The first error assigned is, that judgment was entered by the Supreme Court against the sureties of the appeal bond as well as against the appellants below. This point depends on the question whether the statute of the Territory authorizing such a judgment is a valid one or not. As the legislative power of the Territory, by the organic act, extends to all rightful subjects of legislation consistent with the Constitution of the United States, it would seem to extend to such a case as this. A party who enters his name as surety on an appeal bond does it with a full knowledge of the responsibilities incurred. In view of the law relating to the subject it is equivalent to a consent that judgment shall be entered up against him if the appellant fails to sustain his appeal. If judgment may thus be entered on a recognizance, and against stipulators in admiralty, we see no reason in the nature of things, or in the provisions of the Constitution,

why this effect should not be given to appeal bonds in other actions, if the legislature deems it expedient. No fundamental constitutional principle is involved; no fact is to be ascertained for the purpose of rendering the sureties liable, which is not apparent in the record itself; no object (except mere delay) can be subserved by compelling the appellees to bring a separate action on the appeal bond.

The next point made is a more serious one, to wit, that an administrator *de bonis non* cannot maintain suit on the original administrator's bond. It is true the action is brought in the name of the Territory of New Mexico, to which the bond was given, and is so far correct; but it is expressly brought "for the use and benefit of William W. Griffin, administrator *de bonis non*," and the whole frame of the petition is conceived on the theory that the duty of Beall to respond for defaults and devastavits in administration is owed to the administrator *de bonis non*. This does not seem to be the law as understood in England or in the States which derive their principles of jurisprudence from England, although in some States statutes have been passed making it the duty of an administrator who has been displaced, or of the representatives of one who has deceased, to account to the administrator *de bonis non*.* By the English law, as administered in the ecclesiastical courts, the administrator who is displaced, or the representatives of a deceased administrator or executor intestate, are required to account directly to the persons beneficially interested in the estate, distributees, next of kin, or creditors; and the accounting may be made or enforced in the probate court, which is the proper court to supervise the conduct of administrators and executors.†

* Williams on Executors, 443, note (1); do., 783, note (1), 4th American edition; Wernick's Administrator *v.* McMurdo, 5 Randolph, 51; Hagthorp *v.* Hook, 1 Gill & Johnson, 270; Bank of Pen. *v.* Haldeman, 1 Penrose & Watts, 161; Kendall *v.* Lee, 2 Id. 482; Drenkle *v.* Sharman, 9 Watts, 485; Weld *v.* McClure, Ib. 495; Small's Estate, 5 Barr, 258; Carter *v.* Trueman, 7 Id. 320; Adams *v.* Johnson, 7 Blackford, 529; 2 Redfield's Law of Wills, 91 and note.

† Ib.

To the administrator *de bonis non* is committed only the administration of the goods, chattels, and credits of the deceased which have not been administered. He is entitled to all the goods and personal estate which remain in specie. Money received by the former executor or administrator, in his character as such, and kept by itself, will be so regarded; but, if mixed with the administrator's own money it is considered as converted, or, technically speaking, "administered." And all assets of the testator or intestate in the hands of third persons at the death of an administrator or executor intestate belong to the administrator *de bonis non*.* Of course debts and choses in action not reduced to possession belong to this category. In this case the claim of Hinckley's estate against his surviving partners is of this character. If anything can be realized therefrom by the prosecution of those partners, it is the duty of the administrator *de bonis non* to prosecute them, as much as it was his predecessor's duty to do so, before his discharge. But, for the delinquency of the former administrator in not prosecuting, he is responsible to the creditors, legatees, and distributees directly, and not to the administrator *de bonis non*. This is the result of the authorities referred to. And it follows that, as the administrator *de bonis non* has no claim against the former administrator on this ground, he cannot prosecute for it on the administration bond. It is said in Williams on Executors (referring to 1 Haggard's Ecclesiastical Reports, 139), that "if the original administrator be dead, and administration *de bonis non* has been obtained, such administrator may sue the executors of the deceased administrator at law on the administration bond, in the name of the ordinary; and the court will order the bond 'to be attended with,' in the common-law court, and produced at the hearing of the cause."† The authority referred to was the case of "*The Goods of Hall*," in which the first administrator died without having distributed the assets in

* 1 Williams on Executors, 781, 4th American edition.

† Vol. i, p. 444, 4th American edition; p. 514, 6th English edition.

his hands, and leaving a considerable balance of the estate in the hands of his bankers. The administrator *de bonis non* having applied to the executors of the deceased administrator for his balance, and payment being refused, he commenced the action on the former administrator's bond, and the prerogative court sanctioned the proceeding. But this case was undoubtedly founded on the theory that the money in bank was a part of the original intestate's estate in specie, and, as such, that the administrator *de bonis non* was entitled to it. If specific effects of the estate remain in the hands of a discharged administrator or executor, or in the hands of his representatives, of course, the administrator *de bonis non* is entitled to receive them. And, if they are refused, he will be the proper person to institute suit on the bond to recover the amount. But this is perfectly consistent with the doctrine above expressed, that for delinquencies and devastavits he cannot sue his predecessor or his predecessor's representatives, either directly or on their administration bond.

We have been unable to find anything in the local laws or statutes of New Mexico establishing a different rule on this subject from that which prevails in States governed by the common law. The judgment must, therefore, be reversed for this ground alone, without reference to other errors assigned.

Other objections to the validity of the action are raised—as that the late administrator, Beall, has not been called to account in the probate court, and no decree has been passed against him, and that no order of the probate court was obtained for leave to prosecute the bond. Many authorities show that these preliminaries are necessary to sustain the action. They will be found generally collected in the text and notes of Williams on Executors, p. i, book v, c. iv, pp. 444–448, 4th American edition. Chief Justice Redfield says: "The ordinary bond for faithful administration is not intended to transfer the jurisdiction of questions connected with such administration from the appropriate and exclusive

sphere of the probate courts to that of the common-law courts. But these bonds are designed to secure the enforcement of the decrees of the probate court, after they are rendered against the executor or administrator, whereby his breach of duty is established in the proper forum."* The bond is taken by the probate court, and is subject to its control, and the money which may be recovered thereon is ordinarily to be paid into said court for distribution as assets of the estate, unless recovered to satisfy a particular judgment or decree.† These considerations seem to demonstrate the propriety of requiring the order of the probate court for prosecuting the bond.

Were not these considerations amply sufficient to decide the case, we should still be of opinion that the view taken by the court below on the trial, as to the nature and consequences of Beall's settlement with Hinckley's surviving partners, was very questionable, and calculated to mislead the jury. Beall's account of this settlement, as contained in his inventory of the estate filed soon after the testator's death, was as follows:

"The property, rights, and credits of the said deceased, so far as the undersigned, executor, has been able to obtain a knowledge thereof, were, at the time of his decease, as follows:

"The firm or partnership of which he was a member with Blake and Wardwell, at Fort Craig and other places in this Territory, were owing the said deceased the sum of $46,538.60. The undersigned, being satisfied that the sum stated is correct, has agreed to receive of the said Blake and Wardwell, in full discharge of the capital and profits of the said deceased, the aforesaid sum. The said Blake and Wardwell have agreed to pay the said sum as soon as they can arrange their affairs to do so, and within a reasonable time. The undersigned is satisfied that the said arrange-

* 2 Redfield's Law of Wills, 92.

† See 1 Williams on Executors, 446, 4th American edition.

ment is the best he could make for the interest of the estate, and that the payment will be made in due time."

The judge on the trial seemed to treat this statement as a clear admission of a sale; whereas in our judgment it was equally consistent with a mere liquidation of accounts; and the witness, Elkins, who was called to testify as to Beall's conversations, was obliged to admit that Beall had never told him that it was a sale, but that he, the witness, only inferred that it was such. The testimony of this witness, and the inventory and accounts of the executor being all the material evidence on the subject, ought to have been left to the jury, as well as the evidence relating to the executor's negligence.

Regarding the transaction as clearly a sale, the judge instructed the jury that the administrator had rendered himself liable for the whole claim by not taking security for its payment; whereas, if it was merely a liquidation of the accounts he would only be liable for negligence (if under the circumstances of the case he was guilty of negligence) in enforcing the claims of the estate against the surviving partners.

However, the errors which lie at the foundation of the action preclude further trial, and require that the judgment should be unconditionally REVERSED, with directions to

DISMISS THE PETITION.

MITCHELL *v.* HAWLEY.

A patentee of certain machines, whose original patent had still between six and seven years to run, conveyed to another person the "right to make and use and to license to others the right to make and use four of the machines" in two States "during the remainder of the original term of the letters-patent, *provided*, that the said grantee shall not in any way or form dispose of, sell, or grant any license to use the said machines *beyond* the said term." The patent having, towards the expiration of the original term, been extended for seven years, *held*, that an injunction by a grantee of the extended term would lay to restrain the use of the four machines, they being in use after the term of the original patent had expired.

Statement of the case.

APPEAL from the Circuit Court for the District of Massachusetts; the case being thus:

The 18th section of the Patent Act of July 4th, 1836,* after enacting that patents may in certain cases be extended, and that "thereupon the said patent shall have the same effect in law as though it had been originally granted for the term of twenty-one years," adds:

"And the benefit of such renewal shall extend to assignees and grantees of the right to use the thing patented to the extent of their respective interests therein."

With this statutory enactment in force the United States, on the 3d of May, 1853, granted a patent to one Taylor for fourteen years for improved machinery in felting hats, the patent lasting, of course, till May 3d, 1867.

While the patent was in force, that is to say on the 19th of November, 1860, Taylor, by deed reciting that one Bayley was "desirous of obtaining the exclusive right to make and use, and license to others the right to use the said machines in the States of Massachusetts and New Hampshire," "conveyed to the said Bayley" certain rights, as follows:

"The exclusive right to make and use, and to license to others the right to use the said machines in the said States of Massachusetts and New Hampshire, and in no other place or places, during the remainder of the original term of said letters-patent. *Provided, that the said Bayley shall not in any way or form dispose of, sell, or grant any license to use the said machines beyond the 3d day of May, A.D.* 1867.

"Should the said letters-patent be extended beyond the 3d of May, A.D. 1867, then it is agreed that the said Bayley shall have the right to control the same in the said States of Massachusetts and New Hampshire, provided that he shall pay to the said grantor or his heirs or assigns, a fair and reasonable compensation for the same, or on terms as favorable as may be offered by any other person or party."

* 5 Stat. at Large, 125.

In possession of this license Bayley, on the 18th of March, 1864, in consideration of $1200, licensed one Mitchell and others of the town of Haverhill, Massachusetts, to run and use two sets (four machines) for felting hats, in said town of Haverhill, *under Taylor's patent bearing date May 3d, A.D.* 1864.

Before the patent expired (May 3d, 1867) the Commissioner of Patents renewed and extended it for the further term of seven years; and one Hawley, having become the owner of this extended term for the States of Massachusetts and New Hampshire, filed a bill against Mitchell and the others to restrain them from using the four machines which Bayley on the 18th of March, 1864, had given them license to use, it being admitted that the said Mitchell et al. were now using those identical machines.

The court below granted the injunction, and the defendants took this appeal.

Mr. F. A. Brooks, for the appellant, relying on *Bloomer* v. *Millinger*,* and on the 18th section of the Patent Act, contended that a sale of machines by the patentee himself operated to take *the thing sold* out of the reach of the Patent Act altogether, and that as long as the machines themselves lasted, the owner could use them.

Mr. J. E. Manadier, contra, argued that here the right to make and use, and to license to others the right to use, was expressly limited as to duration by apt words, showing clearly an intent that it should not survive the original term of the patent; that this was a perfectly lawful sort of contract, and therefore that the rights must expire with that term; for that neither the 18th section of the Patent Act nor anything laid down in *Bloomer* v. *Millinger* was applicable.

Mr. Justice CLIFFORD delivered the opinion of the court.

Patentees acquire by their letters-patent the exclusive right to make and use their patented inventions and to

* 1 Wallace, 351.

vend the same to others to be used for the period of time specified in the patent, but when they have made one or more of the things patented, and have vended the same to others to be used, they have parted to that extent with their exclusive right, as they are never entitled to but one royalty for a patented machine, and consequently a patentee, when he has himself constructed a machine and sold it without any conditions, or authorized another to construct, sell, and deliver it, or to construct and use and operate it, without any conditions, and the consideration has been paid to him for the thing patented, the rule is well established that the patentee must be understood to have parted to that extent with all his exclusive right, and that he ceases to have any interest whatever in the patented machine so sold and delivered or authorized to be constructed and operated. Where such circumstances appear, the owner of the machine, whether he built it or purchased it, if he has also acquired the right to use and operate it during the lifetime of the patent, may continue to use it until it is worn out, in spite of any and every extension subsequently obtained by the patentee or his assigns.*

Patents were granted, under the prior Patent Act, for the term of fourteen years, but the provision was that a patentee in certain cases might have the term extended for seven years from and after the expiration of the first term, and the same section provided that the benefit of such renewal shall extend to assignees and grantees of the right to use the thing patented to the extent of their respective interests therein, which last provision has frequently been misunderstood. Such misapprehension has usually arisen from a failure to keep in view the well-founded distinction between the grant and the right to make and vend the patented machine, and the grant of the right to use it, as was first satisfactorily pointed out by the late Chief Justice Taney with his accustomed clearness and precision.†

* Bloomer *v.* Millinger, 1 Wallace, 350.

† Bloomer *v.* McQuewan, 14 Howard, 549; Chaffee *v.* Boston Belting Co., 22 Id. 223.

Restatement of the case in the opinion.

Purchasers of the exclusive privilege of making or vending the patented machine hold the whole or a portion of the franchise which the patent secures, depending upon the nature of the conveyance, and of course the interest which the purchaser acquires terminates at the time limited for its continuance by the law which created the franchise, unless it is expressly stipulated to the contrary. But the purchaser of the implement or machine for the purpose of using it in the ordinary pursuits of life stands on different grounds, as he does not acquire any right to construct another machine either for his own use or to be vended to another for any purpose. Complete title to the implement or machine purchased becomes vested in the vendee by the sale and purchase, but he acquires no portion of the franchise, as the machine, when it rightfully passes from the patentee to the purchaser, ceases to be within the limits of the monopoly.

Patented implements or machines sold to be used in the ordinary pursuits of life become the private individual property of the purchasers, and are no longer specifically protected by the patent laws of the State where the implements or machines are owned and used. Sales of the kind may be made by the patentee with or without conditions, as in other cases, but where the sale is absolute, and without any conditions, the rule is well settled that the purchaser may continue to use the implement or machine purchased until it is worn out, or he may repair it or improve upon it as he pleases, in same manner as if dealing with property of any other kind.

Letters-patent were granted to James F. Taylor for new and useful improvements in machinery for felting hats, bearing date the third of May, 1853, securing to him the exclusive right to make and use and to vend to others the right to make and use the said machines for the term of fourteen years from the date of the letters-patent. Due conveyance or license, subject to certain restrictions and limitations, was made by the patentee of the exclusive right to make and use "*and to license to others the right to use the said machines*"

in the States of Massachusetts and New Hampshire, *during* the remainder of the original term of said letters-patent, it being expressly stipulated in the instrument of conveyance that the licensee "*shall* not, *in any way*, *or form*, *dispose of*, *sell*, *or grant* any license to use the said machines beyond the expiration" of the original term. Apart from that the patentee also stipulated that the said licensee, if the patent should be extended, should have the right to control the same in those two States, he paying to the grantors in his license, or their heirs and assigns, a fair and reasonable compensation for the same, on terms as favorable as may be offered to any other person or party. Bayley, as such licensee, on the eighteenth of March, 1864, constructed four machines, being two sets, and sold the machines, "with the right to run" the same, to the grantors of the respondents, for the sum of twelve hundred dollars, executing to the purchasers at the same time a license under his hand and seal, authorizing the purchasers, as such licensees, "to run and use two sets (four machines) for felting hats, in said town of Haverhill, under Taylor's patent, bearing date as specified in the original letters-patent," showing conclusively that the purchasers were referred to the original letters-patent as the source of his authority. Of course said letters-patent expired on the third of May, 1867, and the record shows that the commissioner, before the term expired, renewed the letters-patent and extended the same for the further term of seven years from the expiration of the original term, and that the complainants having become by certain mesne conveyances, duly recorded, the exclusive assignees of the right, title, and interest in the renewed letters-patent for those two States, instituted the present suit to restrain the respondents from using the four machines which they or their grantors purchased of the licensee under the original letters-patent. They appeared to the suit and filed an answer setting up as a defence to the charge of infringement that they are by law authorized to continue to use the four machines just the same under the extended letters-patent as they had the right to do under the original patent, when the purchase was made

by those under whom they claim, which is the only question in the case.

No one in general can sell personal property and convey a valid title to it unless he is the owner or lawfully represents the owner. *Nemo dat quod non habet.* Persons, therefore, who buy goods from one not the owner, and who does not lawfully represent the owner, however innocent they may be, obtain no property whatever in the goods, as no one can convey in such a case any better title than he owns, unless the sale is made in market overt, or under circumstances which show that the seller lawfully represented the owner.*

Argument to show that the grantor under whom the respondents claim never acquired the right to sell the machines and give their purchasers the right to use the same in the ordinary pursuits of life beyond the term of the original patent is certainly unnecessary, as the instrument of conveyance from the patentee to him, which describes all the title he ever had, expressly stipulates that he shall not in any way or form dispose of, sell, or grant any license to use the said machines beyond the expiration of that term of the patent, and the form of the license which he gave to the purchasers shows conclusively that he understood that he was not empowered to give a license which should extend beyond that limitation. Notice to the purchaser in such a case is not required, as the law imposes the risk upon the purchaser, as against the real owner, whether the title of the seller is such that he can make a valid conveyance. Certain exceptions undoubtedly exist to that rule, but none of them have any application to this case. Suppose the rule was otherwise, and that the real owner, in order to defeat the

* Foxley's Case, 5 Coke, 109 a; 2 Blackstone's Commentaries, 449; 2 Kent, 11th ed. 224; Williams *v* Merle, 11 Wendell, 80; Stone *v.* Marsh, 6 Barnewall & Creswell, 551; Marsh *v.* Keating, 1 Bingham, New Cases, 198; Marsh *v.* Keating, 2 Clarke & Finelly, 250; Benjamin on Sales, 4; White *v.* Spettigue, 13 Meeson & Welsby, 603; 1 Smith's Leading Cases, 7th edition, 1195; 1 Parson's Con., 5th ed. 520.

title of the purchaser, must show that the latter knew what the facts were, the court would still be of the opinion that the decree ought to be affirmed, as the terms of the license which the seller gave to the purchasers were sufficient to put them upon inquiry, and it is quite obvious that the means of knowledge were at hand, and that if they had made the least inquiry they would have ascertained that their grantor could not give them any title to use the machines beyond the period of fourteen years from the date of the original letters-patent, as he was only a licensee and never had any power to sell a machine so as to withdraw it indefinitely from the operation of the franchise secured by the patent.

DECREE AFFIRMED.

MARSHALL v. KNOX.

1. The District Court sitting in bankruptcy has no jurisdiction to proceed by rule to take goods seized, before any act of bankruptcy by the lessees, for rent due by them in Louisiana, under "a writ of provisional seizure"—and then in the hands of the sheriff, and held by him as a pledge for the payment of rent due—out of his hands, and to deliver them to the assignee in bankruptcy to be disposed of under the orders of the bankrupt court; neither the sheriff nor the lessor having been parties to the proceedings in bankruptcy nor served with process to make them such.
2. The Circuit Court may under the second section of the Bankrupt Act entertain on bill as an original proceeding, a case thus involving a question of adverse interest in goods so seized.
3. Under the Civil Code of Louisiana, a lessor has a right to seize, for rent in arrears, goods on the premises, and until he is paid his rent, retain them as against an assignee in bankruptcy subsequently occurring.
4. In such a case where the goods have been taken out of his hands and given to the assignee in bankruptcy, by an order of the District Court acting summarily and without jurisdiction, and sold by such assignee, the Circuit Court, having got possession of the case by bill filed by the lessor, to be regarded as one in an original proceeding, will proceed and decide the whole controversy.
5. And it will give the lessor the full value of the goods sold clear of all expenses, whether the assignee obtained that value or not (limited, of course, by the amount of rent which he is entitled to have paid to him), and also to all the taxable costs to which he has been put by the litiga-

tion. Damages beyond this refused as hardly due in the particular case, and at any rate more properly to be claimed in a proceeding at law.

APPEAL from the Circuit Court for the District of Louisiana; the case being thus:

Marshall was the owner of a plantation in the parish of Avoyelles, in Louisiana, and on the 7th of February, 1867, leased it to Nathan Smith and Henry Fuller for three years, from January 1st, 1867, at $3000 a year, payable in two equal payments. At the end of the first year the tenants were in arrear $1400, and on the 4th of January, 1868, Marshall commenced an action therefor in the District Court of the parish, and applied for and obtained a writ of provisional seizure (as it is called), being the usual process by which a lessor takes possession of his lessee's property found on the premises, for the purpose of enforcing his lien thereon. This writ was served by the sheriff on the 6th of January, 1868, by serving a copy on the lessees, and by a seizure of their property on the land, consisting of mules, wagons, farming implements, and stock, grain, furniture, &c., appraised at $1744.

On the 15th of January, 1868, Smith, one of the lessees, filed in the District Court of the United States for Louisiana a petition to be declared a bankrupt, and was declared such accordingly; and on the 12th of February, 1868, the defendants were appointed his assignees. The controversy in this case arose from the proceedings undertaken by the assignees to take the property aforesaid out of the hands of the sheriff, and to dispose of it under the orders of the bankrupt court. They first obtained from the court a rule upon the lessor and the sheriff to show cause why they should not deliver up the property to the assignees, alleging that various creditors of the bankrupt claimed a privilege on the property, and that it was necessary for a proper adjustment of all claims, privileges, and liens, that the possession should be surrendered to the assignees, to be subject to the bankrupt court. The lessor contested this rule, stated his own rights and proceedings, and claimed possession of the prop-

erty through the sheriff, for the purpose of selling the same to raise the amount of his rent. The rule, however, was made absolute, without, so far as appeared, any other proof on the subject. The lessor appealed, but the district judge would not allow the appeal, and there was no justice of this court at that time (April, 1868) assigned to that circuit to whom application could be made. The lessor thereupon filed a bill, the present bill, in the court below for an injunction to prohibit the assignees from proceeding under the said order of the bankrupt court, and from taking possession of the property, and for a decree that they be directed to pursue any residuary interest of the bankrupt in the lessor's suit in the District Court of the parish, and not molest him in detaining and subjecting the property to the payment of his rent, and for further relief. Failing to obtain a preliminary injunction, and the property being taken and sold by the assignees, the lessor filed a supplemental bill, complaining of the illegality of the proceedings, asking for a review of the same, and for an account and damages. The bill and supplemental bill set out the lease, the provisional seizure, the proceedings in the bankrupt court, and the acts of the assignees; and complained that the lessor was injured by a sacrifice of the property; and stated that before filing the original bill he had offered the assignees a bond, with sufficient sureties, to protect any persons claiming any superior liens to his on the property, if any such there were, which, however, he denied.

The defendants, in their answer, alleged that the lessees had a counter claim for repairs and permanent improvements, and that a number of hands employed on the plantation had a privilege for their wages superior to that of the lessor; but no proof of these facts was offered in the case.

The principal allegations of the complainant were proved, and the defendants on their part adduced proof to show that they had acted in good faith under the orders of the bankrupt court, and that they had sold the property fairly, and held the proceeds for distribution, according to the rights of the parties in due course of the bankruptcy proceedings.

On hearing, the bill was dismissed for want of jurisdiction; and Marshall, the lessor and complainant, appealed.

Three questions now came before this court:

1st. Was this decree dismissing the bill for want of jurisdiction rightly made? Ought not the court below contrariwise, to have entertained the case and decided it on its merits?

2d. Supposing that it ought to have done so, how stood the case on the merits? and

3d. If these were with the complainant, what relief ought he to have?

Messrs. E. T. Merrick and G. W. Race, for the appellant; no opposing counsel.

Mr. Justice BRADLEY delivered the opinion of the court.

The first question is, whether the decree dismissing the bill for want of jurisdiction was rightly made, and this is to be solved by reference to the second section of the Bankrupt Act. By this section it is declared that the Circuit Courts "shall have a general superintendence and jurisdiction of all cases and questions arising under this act; and, except when special provision is otherwise made, may, upon bill, petition, or other proper process, of any party aggrieved, hear and determine the case as in a court of equity." By a subsequent clause of the same section it is declared that said courts "shall have concurrent jurisdiction with the District Courts . . . of all suits at law or in equity . . . by the assignee against any person claiming an adverse interest, or by such person against such assignee, touching any property, or rights of property, of said bankrupt, transferable to or vested in such assignee."

The first clause confers upon the Circuit Courts that supervisory jurisdiction which may be exercised in a summary manner, in term or vacation, in court or at chambers, and upon the exercise of which this court has decided that it has no appellate jurisdiction.*

* Morgan *v.* Thornhill, 11 Wallace, 65.

Opinion of the court.

The second clause confers jurisdiction by regular suit, either at law or in equity, in the cases specified; that is, in controversies between the assignee and persons claiming an adverse interest, touching any property of the bankrupt.

The present case is in form a regular bill in equity; but it also asks a revision of the action of the District Court in the premises. As an original bill in equity it cannot stand, if the District Court had jurisdiction to proceed as it did; for the matter was already decided in that court. As a bill to review the proceedings and decision of the District Court, it was a very proper proceeding, and ought to have been entertained by the Circuit Court. The revisory jurisdiction of the Circuit Court may be exercised by bill as well as by petition; and as this bill complains of the action of the District Court, and asks for a review and reversal thereof, the Circuit Court erred in dismissing it for want of jurisdiction. But regarded as a bill of review, we could not, according to our decision in *Morgan* v. *Thornhill*, entertain an appeal from the decision of the Circuit Court in the case.

The appeal, therefore, must be dismissed, unless it can be shown that the District Court proceeded without jurisdiction. If this were the case, then the bill may be regarded as an original bill, of which the Circuit Court clearly had jurisdiction, and the appeal to this court was properly taken.

The case here, then, depends on the question whether the District Court had jurisdiction to proceed by rule as it did. The goods, it has been seen, were in the custody of the sheriff, under a writ of provisional seizure, and held as a pledge for the rent of the lessor. The seizure had been made before the bankruptcy. The landlord claimed the right thus to hold possession of them until his claim for rent was satisfied. This claim was adverse to that of the assignee. The case presented was one of conflicting claims to the possession of goods; and the sheriff had present possession for the benefit of the lessor. Neither the sheriff nor the lessor was a party to the proceedings in bankruptcy. No process had been served upon them to make them such.

They were not before the court; and the court had no control or jurisdiction over them.

Under these circumstances the assignees applied for and obtained from the District Court, a rule on the lessor and sheriff to deliver the goods to them. Had the court authority to make such a rule? Could such a rule be characterized as due process of law?

The bankrupt law does not distinguish in what cases the District Court may proceed summarily, and in what cases by plenary suit; and we are left to decide the question on the general principles that affect the case. The second section, however, in conferring jurisdiction on the Circuit Courts, uses this language: "Said Circuit Courts shall also have concurrent jurisdiction with the District Courts of the same district of *all suits at law or in equity*, which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt." This language seems to indicate that where there is a claim to an adverse interest in the property, a suit at law or in equity will be the mode of redress properly resorted to. The eighth section, in granting appeals and writs of error from the District to the Circuit Court, only does so in cases in equity and at law, and in cases where the claim of a creditor is allowed or rejected. If, therefore, adverse claims to property could be decided by the summary action of the District Court, not only would the party claiming adversely to the assignee be deprived of a trial by due process of law, but he would be without appeal. An appeal was in fact denied in this case.

We think that it could not have been the intention of Congress thus to deprive parties claiming property, of which they were in possession, of the usual processes of the law in defence of their rights.

The subject, in one of its aspects, came before this court in the case of *Smith* v. *Mason*, reported in 14 Wallace, 419. In that case the adverse claim was to the absolute property of the fund in dispute; not, as in this, to a mere lien, and

to possession by way of pledge under the lien; and we held that the bankrupt court could not, by a mere rule, make the adverse claimant a party to the bankruptcy proceedings and adjudge his right in a summary way, but that the assignee must litigate the claim in a plenary suit, either at law or in equity. But it may, with some plausibility, be said that, as the property in this case is conceded to be in the bankrupt, and the question has respect only to the right of possession under the lien, the District Court, which has express jurisdiction of the "ascertainment and liquidation of the liens and other specific claims" on the bankrupt's property, might properly assume control of the property itself. The claim, however, is to the right of possession, and that right may be just as absolute and just as essential to the interests of the claimant as the right of property in the thing itself, and is, in fact, a species of property in the thing just as much the subject of litigation as the thing itself. It is the opinion of the court, therefore, that the case is not substantially different from that of *Smith* v. *Mason*. Besides, it has another point, in common with that case, upon which a direct adjudication was made therein. The lessor in this case was not a party to the bankrupt proceeding; and in *Smith* v. *Mason* we held expressly that "strangers to the proceedings in bankruptcy, not served with process, and who have not voluntarily appeared and become parties to such litigation, cannot be compelled to come into court under a petition for a rule to show cause."

The court is of opinion, therefore, that the District Court proceeded without jurisdiction in compelling the lessor and the sheriff, under a rule to show cause, to deliver up possession of the goods in question to the assignees. It results that the bill in this case was properly filed as an original bill, and on that account should not have been dismissed as for want of jurisdiction. The case should have been heard and decided upon the merits.

We are then brought to the question of merits. If the complainant had no right to hold the goods, notwithstand-

ing his claim to hold them, in an action at law against the assignee he could have recovered only nominal damages; and, coming into a court of equity for redress, and praying for an account of the value of the goods, and for damages, if it turn out that he had no right to withhold the goods from the possession of the assignee, the court would be very reluctant to compel the latter to place the value of the goods in his hands to be relitigated in another suit. A court of equity having got possession of the case by the lessor's own act, must proceed to decide the whole merits of the controversy.

But we think it very clear that the complainant had a right to the possession which he claimed. The fourteenth section of the Bankrupt Act, it is true, vests in the assignees all the property and estate of the bankrupt, "although the same is then attached on mesne process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of such proceedings." But this clause evidently refers to those cases of original process of attachment, which only become perfected liens by the judgment which may ensue. The lessor's lien for rent on the goods of his tenant situate on the premises is one of the strongest and most favored in the law of Louisiana. The articles of the Civil Code use the following language:

"The lessor has for the payment of his rent and other obligations of the lease, a right of pledge on the movable effects of the lessee which are found on the property leased."*

"In the exercise of this right the lessor may seize the objects which are the subject of it before the lessee takes them away, or within fifteen days after they are taken away, if they continue to be the property of the lessee, and can be identified."†

"The right which the lessor has over the products of the estate, and on the movables which are found on the place

* Article 2675.

† Article 2679.

leased, for his rent, is of a higher nature than mere privilege. The latter is only enforced on the price arising from the sale of movables to which it applies. It does not enable the creditor to take or keep the effects themselves specially. The lessor, on the contrary, may take the effects themselves and retain them until he is paid."*

When the rent accrues, or even before it is due, if the lessor apprehends that the goods may be removed, he may have a writ of provisional seizure to the sheriff, who, by virtue thereof, takes possession of the goods and sells them in due course, as soon as the court has recognized the amount of rent for which they are liable.

Such a case is similar to that of an execution, in reference to which it has been properly held that where the levy is made before the commencement of proceedings in bankruptcy, the possession of the officer cannot be disturbed by the assignee. The latter, in such case, is only entitled to such residue as may remain in the sheriff's hands after the debt for which the execution issued has been satisfied. Such, we think, were the relative rights of the parties in this case. If the assignee apprehended that the sheriff would, by delay or negligence, waste the goods in his hands, he could either apply to the District Court of the parish for redress or aid in the premises, or perhaps file a bill in equity in the Circuit or District Court of the United States.

The next question is, what relief ought to be given to the complainant?

The goods have been sold by the assignees. They cannot be returned in specie. The supplemental bill prays that the assignees be decreed to account to the complainant for the full value of the property, and also such sum of money as he might be entitled to receive by reason of the wrongful acts of the assignees in the premises, and for further relief. The bill, it must be remembered, was originally filed for an injunction to prevent the assignees from disturbing the complainant in his possession of the goods. He

* Article 3185.

was not in laches in defending his rights. He is clearly entitled, under the circumstances of the case, to the full value of these goods, clear of all expenses, whether the assignees realized that value or not (limited, of course, by the amount of rent which he is entitled to be paid); and also to all the taxable costs to which he has been put by this litigation. As to any damages beyond that, if he has suffered any, we think that he ought not to recover them in this suit, as he, or the sheriff for his benefit, had an option to bring an action of trespass for damages, instead of resorting to a court of equity for relief. Damages are allowed, it is true, in certain cases, as incidental to other relief; but even if they could, in strictness, be awarded in this suit, we do not think that the case is such as to call for the interposition of the court in directing an inquiry as to damages.

DECREE REVERSED, with directions to the court below to proceed in the cause

IN CONFORMITY WITH THIS OPINION.

SMITH *v.* McCOOL.

Where in ejectment a special verdict has been found and judgment entered on it in the court below, for the plaintiff, which judgment, in an appellate court, is set aside with directions to enter judgment for the defendant, the special verdict cannot, on the plaintiffs bringing a second ejectment upon a subsequently acquired title, be used to establish a fact found in it, as *ex. gr.* the heirship of one of the parties under whom the plaintiffs claimed.

ERROR to the Circuit Court for the Northern District of Illinois. The case was twice argued in this court: once at December Term, 1869, and now again in December Term, 1872.

Messrs. G. F. Harding and H. M. Weed, for the plaintiff in error; Messrs. J. B. Hawley and G. C. Lanphere, contra.

Opinion of the court.

Mr. Justice SWAYNE stated the case, and delivered the opinion of the court.

The action in the court below was ejectment. The plaintiff in error was the plaintiff there. A like action between the same parties for the same premises was heretofore decided by this court, and is reported in 1st Black, 459. In that case the jury found a special verdict, which is set out in the statement of the case by the reporter. This court held that the plaintiff had no title at the commencement of the suit, and upon that ground reversed the judgment, and remanded the cause with directions to the court below to enter a judgment upon the special verdict for the defendant, which was accordingly done. Smith, the plaintiff in that action, subsequently instituted the case now before us, upon a title alleged to have been acquired since the commencement of the former suit. Upon the trial in this case, he offered in evidence the special verdict in the former case, to prove the heirship of one of the parties under whom he claimed. The evidence was objected to by the counsel for the defendant, and excluded by the court. The plaintiff excepted and has brought this ruling here for review.

A verdict without a judgment in a case like this is of no validity, either as an estoppel or as evidence.* To give efficacy to a verdict, general or special, it must be followed by a judgment, and when offered to establish any fact, such fact must have constituted, in whole or in part, the foundation of the judgment which was rendered. Greenleaf says:† "It is only where the point in issue has been *determined* that the judgment is a bar. If the suit has been discontinued, or the plaintiff becomes nonsuit, or for any other reason there has been no judgment of the court upon the matter in issue, the proceedings are not conclusive." The matter must have become *res judicata*.‡

* Reed *v.* The Proprietors, &c., 8 Howard, 291; Donaldson *v.* Jude, 2 Bibb, 60; 3 Bouvier's Institutes, 376.

† On Evidence, § 535.

‡ King *v.* Chase, 15 New Hampshire, 14.

If the judgment originally rendered upon the special verdict here in question had still subsisted, the case would be a different one. But that judgment was reversed. The reversal took away all efficacy from the verdict. It is true this court ordered a judgment to be entered upon it in favor of the defendant, but that was not upon the ground that the verdict showed title in the defendant, but because it showed there was none in the plaintiff. The judgment for the defendant followed as a matter of course. It was, in effect, a judgment *veredicto non-obstante*, or of nonsuit. Instead of giving the findings its sanction, and resting upon them as its foundation, the judgment denied their efficacy and repelled them as immaterial. This suit was brought upon an after-acquired title. The causes of action in the two cases are as distinct from each other as if the latter were brought to recover a different tract of land.

In the leading case of the Duchess of Kingston,* Lord Chief Justice De Grey said:

"From a variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: First, that the judgment of a court of concurrent jurisdiction directly upon the point, is as a plea, a bar, or as evidence conclusive between the same parties, upon the same matter directly in question in another court; secondly, that the judgment of the court of exclusive jurisdiction directly upon the point, is in like manner conclusive upon the same matter, between the same parties, coming incidentally in question in another court, for a different purpose. But neither the judgment of a concurrent nor exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred from argument."

The authority of this case it is believed has never been controverted. But what in such cases is "directly upon the

* 20 State Trials (8vo.), 355; 2 Smith's Leading Cases, 7th American edition, 648.

point," "what came collaterally in question," and what was "incidentally cognizable," are questions upon which the adjudications are wide asunder.* The cases maintaining the broadest, and those the narrowest, views are numerous. They are collected and ably analyzed in the American note to *Doe* v. *Oliver* and *The Duchess of Kingston's Case* in 2 Smith's Leading Cases.†

As the proper determination of the case before us does not require the consideration of this subject, we forbear to enter upon its examination.

Under the circumstances we think the special verdict, and the proceeding upon it in the case in which the verdict was rendered, may be regarded as not unlike a demurrer to evidence. In such cases there is an admission of record of all the facts proved, of those which the evidence tends to prove, and of those which may be fairly inferred from it. The party demurring relies upon the law arising upon the facts thus presented. The facts so spread on the record are never evidence for or against either party in another suit. Here the special verdict performed the same office as such a demurrer.

The defendant's counsel insisted upon the legal proposition—ultimately sustained by this court—that, conceding the facts to be as found, the plaintiff was not entitled to recover in that action. He may well have been, and doubtless was, less careful to introduce his full evidence, and to contest the facts found, including the one which the verdict was offered in this case, to prove, than he would have been but for the confident assurance that they were all immaterial in respect to the judgment to be given, which he claimed must be in favor of his client.

As there could be no special plea owing to the form of the action, the verdict, if admissible, must have been held to work an estoppel as to all the facts found. Its effect would have been the same as if it could have been, and had

* Roberts v. Heim, 27 Alabama, 678; King v. Chase, 15 New Hampshire, 13.

† 7th American edition, pp. 787–813.

been, specially pleaded.* This must have taken the defendant by surprise, and been very harsh in its effect. It would, doubtless, have tended to defeat rather than promote the ends of justice. The ruling of the court which required the plaintiff to prove the heirship *aliunde* subjected him to no hardship. If the fact were as found by the special verdict there could be no difficulty in his proving it, as it was proved before. If the fact were otherwise, to admit the estoppel would have involved the sacrifice of truth and justice to a technicality, and have subjected the defendant to a grievous loss, which he ought not to be required to bear. The parties were properly allowed to stand in the second action in all respects upon a footing of equality, as they stood in the first.

Upon the whole case we are of opinion that the learned judge decided correctly in rejecting the evidence. There are other grounds disclosed in the record, upon which, in the view of some members of the court, a judgment of affirmance might well be placed; but as we are unanimous in the views expressed, it has been deemed unnecessary fully to consider them.

JUDGMENT AFFIRMED.

SPECHT *v.* HOWARD ET AL.

1. Where improper evidence has been suffered by the court to get before the jury, it is properly afterwards withdrawn from it.
2. On a suit by the indorsee of a negotiable note which has no place of payment specified in it, against the indorser who relied on a confessedly defective demand on the maker, of payment; that is to say, on a fruitless effort at demand, in the place where the note was dated, but in which place the maker did not live, parol evidence that at the time when the note was drawn, it was agreed between the maker and the indorsee that it should be made payable in the place where the effort to demand payment had been made, and that this place of payment had been omitted

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* Dame *v.* Wingate, 12 New Hampshire, 291.

Statement of the case in the opinion.

by the mistake of the draughtsman—being evidence to vary or qualify the absolute terms of the written contract—would be improperly let in to the jury and would be properly withdrawn.

ERROR to the Circuit Court for the Western District of Tennessee.

Mr. D. K. McRae, for the plaintiff in error; Messrs. R. M. Corwine and Quinton Corwine, contra.

Mr. Justice SWAYNE stated the case, and delivered the opinion of the court.

The defendants in error were the plaintiffs in the court below. The action was upon a promissory note made by Jehl & Brother to Specht, and by him indorsed to Howard, Sanger & Co., the plaintiffs. The makers and indorser lived in Memphis. The indorsees lived in the city of New York, and the note was made and indorsed there. No place of payment was mentioned in the note. At its maturity the makers were sought in the city of New York, and not being found, the note was protested for non-payment, and notice was given by mail to the indorser. Upon the trial, after proof of the protest and notice, the plaintiffs offered to prove that at the time the note was drawn, it was agreed between the makers, and Howard, Sanger & Co., that it should be made payable in the city of New York, and that the place of payment was omitted by the mistake of the draughtsman. Specht objected to the admission of the testimony. The objection was overruled and he excepted. The agreement and mistake were proved. Specht then offered to prove that he had not consented that the note should be made payable in New York. The testimony was rejected and he excepted. He then asked the court to rule that the plaintiffs' evidence showed such a change in his contract of indorsement as discharged him from liability. The court refused so to rule, and he excepted. The court then withdrew from the jury the evidence relating to the parol agreement, and ruled that the proof of demand and notice was insufficient to create any liability on the part of the defend-

ant. Specht excepted to the withdrawal of the evidence as to the parol agreement. The plaintiffs then proved that, after the maturity of the note, Specht, with a full knowledge of the defective demand and notice, promised to pay the note. No objection was made to the admission of this testimony, nor to the charge of the court upon the subject. The jury found for the plaintiffs and judgment was rendered accordingly.

The error complained of is, that the court withdrew from the jury the evidence touching the parol agreement as to the place of payment made contemporaneously with the drawing and execution of the note. The plaintiff in error insists that, being a surety, it altered and discharged his contract.

The evidence was improperly admitted and was properly withdrawn. The agreement was a nullity and could not in any wise affect the rights of either of the parties. "It is a firmly settled principle that parol evidence of an oral agreement alleged to have been made at the time of the drawing, making, or indorsing of a bill or note, cannot be permitted to vary, qualify, or contradict, to add to or subtract from the absolute terms of the written contract."* An agreement between the creditor and principal must, to exonerate the surety, be one "binding in law upon the parties."†

JUDGMENT AFFIRMED.

WATER COMPANY *v.* WARE.

Where an incorporated company undertook to lay water-pipes in a city, agreeing that it would "protect all persons against damages by reason of excavations made by them in laying pipes, and *to be responsible for all damages which may occur by reason of the neglect of their employés on*

* Parsons on Notes and Bills, 501.

† McLemore *v.* Powell, 12 Wheaton, 554.

Statement of the case.

the premises;" *held*, on the company's having let the work out to a subcontractor, through the negligence of *whose* servants injury accrued to a person passing over the street, that the company could be properly sued for damages.

ERROR to the Circuit Court for Minnesota; the case being thus:

The city of St. Paul, desiring to have water-pipes laid along the streets of the city, passed an ordinance authorizing the St. Paul Water Company, an incorporated company, so to lay them. But as it was necessary that large excavations of the earth should be made along the streets, and considerable blasting of rock below, the ordinance in one of its sections, the 6th, thus provided:

"The said water company expressly agrees to protect all persons against damages by reason of excavations made by them in the said city, in laying pipes, and to keep the said excavations properly guarded by day and night, *and to become responsible for all damages which may occur by reason of the neglect of their employés in the premises*, and that the streets and highways in said city shall not be unnecessarily obstructed or incumbered in laying said pipes."

The water company accepted the ordinance. It did not, however, do any work itself or by its own servants, but made a contract in writing with one Gilfillan to do the work for them. Under this contract, Gilfillan himself superintending the work every day, certain excavations, drillings, and blastings were made in different streets of the city.

While these operations were going on in one of the streets, a certain Ware, driving his horse and wagon in it, was much injured, owing to his horse taking fright at a steam-drill in the street, put there to drill the rocks that it was necessary to remove, and suddenly and without notice set in motion. He accordingly sued *the company* for damages.

His witnesses having given evidence tending to show that the accident was owing to the fact that the excavations were not "properly guarded" and that the highways were "unnec-

essarily obstructed and incumbered," disclosed in cross-examination the fact above mentioned, to wit, that the company did not do any work itself or by its servants, but that it had farmed out its engagement to lay the pipes, and that all that had happened, had happened while the contractor was thus in the discharge of his contract.

Thereupon (the plaintiff resting) the defendant asked the court

"To direct the jury to return a verdict for the defendant, without requiring the defendant to enter upon a defence, upon the ground that the negligence, if any, found as the cause of injury to plaintiff, was the negligence of the servants and employés of said contractor, and not of the defendant or any of its servants and employés."

This motion the court denied, saying:

"The action is brought upon the principle which is settled, at least in the Federal courts, that when a person (company or corporation included) is engaged in a work, in the ordinary doing of which a nuisance necessarily occurs, the person is liable for any injury that may result to third parties from carelessness or negligence, though the work may be done by a contractor, and although the plaintiff might have sustained an action against the city of St. Paul, it is his right to seek his remedy against the party who created the nuisance."

The defendant then gave evidence to show that the plaintiff had been driving carelessly, and, the case being rested, asked the court to charge—

"1. That under the evidence in the case they must find a verdict for the defendant.

"2. That if the injury complained of was caused solely by the negligence or misconduct in the manner of doing the work of the employés of the contractor, then the defendant is entitled to a verdict."

The court refused to give either charge, and the defendant excepted. Verdict and judgment having been given for the plaintiff, $2200, the defendant brought the case here.

Argument for the party injured.

Mr. W. H. Peckham, for the plaintiff in error:

The court below proceeded upon the theory either that under the contract between the water company and its contractor, the persons employed by the contractor to do the work, were the servants of the company, and that the company was therefore liable for their misconduct or negligence; or that having caused the work to be done, it was liable for such misconduct or negligence, though the relation of master and servants did not exist between it and the persons doing the work.

But the legal relation of master and servants did not exist between the water company and the persons in charge of the machinery and doing the work. They were in the employ of the contractor. He was exercising an independent employment, and was their superior.* A party is not liable for the misconduct or negligent acts of the employés of one to whom he lets a job of work to be done by contract. This is settled by the New York case of *Blake* v. *Ferris*,† and by other cases.‡

Mr. M. Lamprey, contra:

The case of *Storrs* v. *The City of Utica*§ is in point, and the reasoning of the court seems particularly applicable to this case. *Blake* v. *Ferris*, cited on the other side, is reviewed, and the doctrine that the city is not liable for injuries caused by negligence in the improvement of streets, because it has employed a contractor to do the work, is distinctly overruled.

But we need not enter on any discussion whatever of that formerly vexed question. Such a discussion is wholly unnecessary, and in view of other grounds on which the

* Forsyth *v.* Hooper, 11 Allen, 419; Pack *v.* The Mayor, &c., 8 New York, 222; Kelly *v.* The Mayor, &c., 11 Ib. 432; Painter *v.* Pittsburgh, 46 Pennsylvania State, 213.

† 5 New York, 48.

‡ Hilliard *v.* Richardson, 3 Gray, 349; Callahan *v.* Burlington Railroad Company, 23 Iowa, 562; Chicago City *v.* Robbins, 2 Black., 418.

§ 17 New York, 108.

court below doubtless rested its views—grounds alike obvious and impregnable—such a discussion might be called irrelative.

The effect of section six of the ordinance, which is both an agreement with the public and a law, is to make the water company liable, when injury results from negligence of an employé, whether such employé is a contractor or workman. The company agrees to protect all persons against damages by means of excavations; to keep the excavations properly guarded; to become responsible for all damages; and not to unnecessarily obstruct the streets. It cannot rid itself from the primary liability imposed by this ordinance, by letting the work to a contractor. The liability exists, no matter how the work is done. The contractor is an employé of the company within the meaning of this section.

Reply: 1. The ordinance was intended solely for the indemnity of the city, and one not a party to it can derive no rights under it.

2. The water company, under the ordinance, did not agree to become responsible for the misconduct of the persons doing the work, but only for damages "*by reason of excavations*," and "*to keep such excavations properly guarded*," and to become responsible for all damages which might occur "*by reason of the neglect of their employés in the premises*;" that is, by reason of the neglect of its employés to keep its excavations properly guarded. The object of the provision was to bind the company to do, in respect to the public streets, what, as between the city and the public, would be primarily the duty of the city to do. The only change it made between the city and the company was to give to the city a contract right to hold the company for any damages *it* might be compelled to pay, by reason of the existence of the excavations in the street.

Mr. Justice CLIFFORD delivered the opinion of the court.

Injuries of a physical nature were received by the plain-

Restatement of the case in the opinion.

tiff through an obstruction in one of the public streets of the city of St. Paul, occasioned, as he alleges, by an employé of the corporation defendants, for whose acts they are responsible, and he instituted the present suit to recover compensation for those injuries. Service was made, and the defendants appeared, and the parties went to trial, and the verdict and judgment were for the plaintiff; and the defendants excepted and sued out this writ of error.

Evidence was introduced by the plaintiff tending to show that where the accident occurred was a public street of the city; that the defendants entered into an engagement with the authorities of the city to make the necessary excavations in the streets, and to lay therein suitable pipes and complete the work as stipulated in a certain contract, to introduce a supply of water into the city for the use of the inhabitants, and that their employé or contractor was at work at the time making the excavations and laying the pipes; that the excavations in the street where the plaintiff was injured extended from the intersection of Eighth Street to the intersection of Ninth Street, and that the excavation with the embankments made on the sides of the same by throwing out the earth, occupied the greater part of the width of the street, leaving on the east side little more than a passageway of sufficient width for a one-horse carriage; that in making the excavation the workmen found it necessary to drill and blast, employing the steam drill for drilling, and blasting, as usual, with gunpowder; that the engine which propelled the drill was three feet in diameter and was elevated six or seven feet above the surface of the ground, and at the time of the accident to the plaintiff it stood near the intersection of Eighth Street with the street in which the plaintiff was passing; that the plaintiff, with one other person, was riding in a carriage drawn by one horse, and having turned from Ninth Street into the street where the accident occurred, the plaintiff, with the other person in the carriage, was driving along down the narrow passageway, on the east side of the street, when the persons in charge of the engine suddenly, and without giving any notice or warning of their

intention, set the engine and drill in operation, causing a loud noise which frightened the plaintiff's horse and caused him to shy and turn upon the sidewalk, overturning the carriage and injured the plaintiff.

Due care, it is alleged, was used by the plaintiff, as when he left the intersecting street and passed into the street where the accident occurred the engine and drill were not in operation, nor was there any barricade or signal of any kind to indicate that there was any danger, or that any special precaution was necessary except what was suggested by the embankment and the narrowness of the street; and the evidence also tended to prove that neither the engine nor the drill was seen by the plaintiff or by the person in the carriage with him until the horse of the plaintiff was within ten feet of the place where the engine and drill were situated, and that it was at that moment that they were put in operation by those in charge of the work, and that one of the workmen ran into the street and threw up his arms as if to stop the horse, which had the effect to make him still more unmanageable.

Having introduced evidence tending to prove the foregoing facts the plaintiff rested, and the defendants moved the court to direct the jury to return a verdict in their favor upon the ground that the negligence proved, if any, as the cause of the injury to the plaintiff was the negligence of the contractor in charge of the work, or his servants or employés, and not of the defendants, or their servants or employés, which motion the court then and there denied, and remarked that "the action is brought upon the principle, which is well settled in the Federal courts, that where a person or corporation is engaged in a work in the ordinary doing of which a nuisance necessarily occurs, the party is liable for any injury that may result to third parties from carelessness or negligence, even though the work may be done by a contractor," and it makes no difference even if the party, in a case like the present, might sustain an action against the municipal corporation, as it is his right to seek his remedy against the party who created the nuisance or his im-

mediate employés, to which ruling and decision the defendants then and there excepted.

Testimony was then introduced by the defendants tending to show that the injury mentioned in the declaration was not caused by any neglect or misconduct of the persons in charge of the work, but wholly by the reckless and negligent driving of the plaintiff, and the person with him in the carriage.

Prayers for instruction to the jury were presented by the defendants in substance and effect as follows:

(1.) That the court instruct the jury that upon the whole evidence they must find their verdict for the defendants.

(2.) That if the injury to the plaintiff was caused solely by the negligence or misconduct of the employés of the contractor in doing the work, then the defendants are not liable.

Both of those requests were refused, and the rulings of the court in that behalf, together with the refusal of the court at the close of the plaintiff's case to direct a verdict for the defendants, present the principal questions in the case for the decision of the court. Other prayers for instruction, involving the same principles, were also presented by the defendants, which were also refused, and the rulings are embraced in the exceptions.

Cities and towns are usually required by statute to keep their streets and highways safe and convenient for travellers, and if they neglect so to do, in a case where that duty is imposed by law, and suffer the same to get out of repair and defective, and any person as a traveller receives injury through such defect, either to his person or property, the delinquent corporation is responsible in damages to the injured party. Such a party, however, cannot maintain an action against the corporation grounded *solely* on the defect and want of repair in the highway, but he must also allege and prove that the corporation had notice of the defect or want of repair and that he was injured, either in person or property, in consequence of the unsafe and inconvenient state of the highway, as the duty to repair in such cases is a duty owed to the public, and consequently if one person

might sue for his proportion of the damages for the non-performance of the duty, then every other member of the community would have the same right of action, which would be ruinous to the corporation, and for that reason it was held at common law, that no action founded merely on the neglect to repair would lie.*

Nor will an action lie in such a case at the present time; but it is settled law, by the highest authority of the country from which the common law is derived, that where it appears that the corporation is under a legal obligation to repair the way in question, and that such obligation is a matter of general and public concern, and also that the place in question is out of repair and that the plaintiff has sustained some peculiar damage in his person or property by means of such defect or want of repair, that the corporation, if the means of performing the duty to make the repairs are within their control, is liable to compensate the injured party for the injury which he suffered from their neglect.† Since the decision in *Mayor of Lyme-Regis* v. *Henley*, the case last referred to, many decisions to the same effect have been made by the State courts in this country approving that rule and applying it in all similar controversies.‡

Grant all that and still the defendants deny that the rule established by those authorities furnishes any support to the rulings of the Circuit Court, as they, the defendants, were mere contractors to make the excavations and lay the pipes, and they insist that the persons responsible to the plaintiff, if any, are the persons whom they employed to do the work and who were in charge of it at the time the plaintiff was injured, and they deny that they in any view of the case can be held answerable for the neglect and carelessness of those

* Weightman *v.* Washington, 1 Black, 52.

† Henly *v.* The Mayor, &c., of Lyme, 5 Bingham, 91; The Mayor *v.* Henly, 3 Barnewall & Adolphus, 77; Mayor, &c., of Lyme-Regis *v.* Henly, 2 Clark & Finnelly, 331.

‡ Hutson *v.* New York, 5 Sandford, 304; Erie *v.* Schwingle, 22 Pennsylvania State, 384; Storrs *v.* Utica, 17 New York, 104; Conrad *v.* Trustees of Ithaca, 16 Id. 159; Browning *v.* Springfield, 17 Illinois, 145; Lloyd *v.* Mayor, 1 Selden, 369.

who had contracted with them to make the excavations and lay the pipes, and who had charge of the engine and steam drill, the operation of which frightened the horse of the plaintiff.

Concede that proposition and it would follow that the rulings in question are incorrect; but the evidence exhibited in the record shows that the defendants agreed with the municipal authorities to protect all persons against damages by reason of the excavations made by them preparatory to laying the pipes, and to keep the work properly guarded by day and night, and to be responsible for all damages which "may occur by reason of neglect of their employés in the premises," and that the streets should not be unnecessarily obstructed or incumbered in doing the work. Such an agreement would not acquit the municipality of an obligation, otherwise attaching, to keep the streets safe and convenient for travellers, but it may well be held that a party injured through a defect or want of repair in such a street, occasioned by the neglect or carelessness of such a contractor in doing the work, or of those for whose acts he is responsible, may, at his election, sue the contractor for redress or pursue his remedy against the municipality, as it is clear that the contractor, in case of a recovery against the latter, would be answerable to the municipality as stipulated in his agreement. Improvements of the kind, such as making excavations and laying pipes for gas or for sewers, are made by municipal corporations, under circumstances where the corporation is immediately responsible for the defect or want of repair in the street, without any other party being answerable over to them for any damages they may have to pay to a traveller who may be injured through such a defect or want of repair, as where they appoint their own superintendent and the work is done by their order and directions. Other cases arise where improvements are constructed by contractors, in which the municipality is not responsible at all, as where the improvement is of such a character that a prudent man would not find it necessary to incumber or obstruct the street in any respect or for any purpose, as in that

case it would be clear that the defect or want of repair which occasioned the injury was solely the result of neglect and carelessness on the part of the contractor, and not of any culpable fault of the officers of the municipality. Contractors with such a corporation for such a purpose may or may not be responsible to a third party, in a case like the present, according to the circumstances, but it is not necessary to enter much into the discussion of that topic in this case, as the evidence shows that the defendants agreed to become responsible for all damages which may occur by reason of neglect of their employés in the premises. Tested by these considerations it is quite clear that the case must be viewed just as it would be if the work had been done by the defendants, and not by the sub-contractors, or as if the work had in all respects been done under the directions of the defendants as the immediate contractors with the municipal corporation.

Where the obstruction or defect caused or created in the street is purely collateral to the work contracted to be done, and is entirely the result of the wrongful acts of the contractor or his workmen, the rule is that the employer is not liable; but where the obstruction or defect which occasioned the injury results directly from the acts which the contractor agreed and was authorized to do, the person who employs the contractor and authorizes him to do those acts *is equally liable* to the injured party.* Exactly the same view was advanced by this court when that case was brought here by the first writ of error, in which the court said that if the nuisance necessarily occurs in the ordinary mode of doing the work the occupant or owner is liable, but if it is from the negligence of the contractor or his servants, then he should alone be responsible.† Common justice requires the enforcement of that rule, as if the contractor does the thing which he is employed to do the employer is as responsible for the thing as if he had done it himself, but if the act which is the subject of complaint is purely collateral to the

* Robbins *v.* Chicago, 4 Wallace, 679.

† Chicago *v.* Robbins, 2 Black, 428.

matter contracted to be done, and arises indirectly in the course of the performance of the work, the employer is not liable, because he never authorized the work to be done.* It would be monstrous, said Lord Campbell, if a party causing another to do a thing were exempted from liability for the act merely because there was a contract between him and the person immediately causing the act to be done, which may be accepted as correct if applied in a case where the work contracted to be done will necessarily, in its progress, render the street unsafe and inconvenient for public travel.† More than one party may be liable in such a case, nor can one who employs another to make such an excavation relieve himself from liability for such damages as those involved in the case before the court by any stipulation with his employé, as both the person who procured the nuisance to be made and the immediate author of it are liable.‡

Apply these rules to the case before the court, and it is clear that they are sufficient to dispose of all the exceptions and to show that there is no error in the record.

JUDGMENT AFFIRMED.

WALBRUN *v.* BABBITT.

1. When on the undisputed parts of a case a verdict is clearly right, so that if a new *venire* were awarded the same verdict would have to be given, a court will not reverse because on some disputed points a charge may have been technically inaccurate.
2. A sale by a retail country merchant then insolvent of his entire stock, suddenly, is a sale "not made in the usual and ordinary course" of his business; and, therefore, *primâ facie* evidence of fraud, within the 35th section of the bankrupt law.

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* Hole *v.* Railway Co., 6 Hurlstone & Norman, 497.

† Ellis *v.* Gas Cons. Co., 2 Ellis & Blackburne, 770; Newton *v.* Ellis, 5 Id. 124; Lowell *v.* Railroad, 23 Pickering, 31.

‡ Storrs *v.* Utica, 17 New York, 108; Creed *v.* Hartmann, 29 Id. 591; Same Case, 8 Bosworth, 123; Congreve *v.* Smith, 18 New York, 79; Same *v.* Morgan, 18 Id. 84; Shearman & Redfield on Negligence, 423; Mayor *v.* Furze, 3 Hill, 616; Milford *v.* Holbrook, 9 Allen, 21.

Statement of the case.

3. The presumption of fraud arising from the unusual nature of such a sale can be overcome only by proof on the part of the buyer that he pursued in good faith all reasonable means to find out the pecuniary condition of the vendor.
4. One purchasing in such a case from a vendee who he knows has used no such means, but on the contrary has bought under other suspicious circumstances, takes with full knowledge of the infirmity of the title. And as against either or both purchasers the assignee in bankruptcy may set the sale aside if made within six months before a decree in bankruptcy, even though a fair money consideration have been paid by each.

ERROR to the Circuit Court for the District of Missouri.

Babbitt, assignee in bankruptcy of Marks Mendelson, brought trover against Walbrun & Co. in the court below, to recover the value of a stock of merchandise sold by the bankrupt to one Summerfield, and by the latter to the said defendants. The ground of the action was that the several transfers were frauds on the bankrupt law under the 35th section thereof—a section in these words:*

"If any person, being insolvent or in contemplation of insolvency or bankruptcy, within six months before the filing of the petition by or against him, makes any payment, *sale*, assignment, transfer, conveyance, or other disposition of any part of his property to any person who then has reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and that such payment, *sale*, assignment, transfer, or other conveyance, is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under this act, or to defeat the object of, or in any way impair, hinder, impede, or delay the operation and effect of, or to evade any of the provisions of this act, the sale, assignment, transfer, or conveyance shall be void, and the assignee may recover the property or the value thereof as assets of the bankrupt; and if such *sale*, assignment, transfer, or conveyance *is not made in the usual and ordinary course of business of the debtor, the fact shall be* primâ facie *evidence of fraud.*"

The facts of the case which were undisputed, were thus: In November, 1868, Mendelson, doing business in Kings-

* 14 Stat. at Large, 534.

ville, a small town in the interior of Missouri, as a retail country merchant, wrote to one Summerfield, who was his brother-in-law, living in St. Louis and engaged there in the furniture business, to bring some money and come and buy him out. Summerfield at once went to Kingsville, and took, in currency, money enough for the purpose. On his arrival there Mendelson told him he was desirous of selling his stock, because he could not succeed in the business in which he was engaged, and wished to deal in furniture and hardware. An account of stock was taken, and Summerfield paid Mendelson for it after deducting 25 per cent. off the cost price. Soon after this purchase Summerfield, leaving Mendelson in possession of the store, went to Chillicothe, Missouri, and told Walbrun & Co., a firm there with which he had some acquaintance, of his purchase of the stock of goods at 25 per cent. below cost, because the owner wanted to go into the furniture business, and that, as he only desired to make 5 per cent., he would resell to them at 20 per cent. below cost. They agreed to take the goods at his offer, as they needed some of the articles to replenish their stock, if they came up to the account that was given of them. Accordingly, one Ritter, a member of the firm, went back to Kingsville with Summerfield. They found Mendelson still in charge of the store. Some of the goods were boxed up and some on the shelves. In making his purchase, Ritter made no inquiry of the pecuniary condition of either Mendelson or Summerfield. Both parties lodged at Mendelson's house. The morning after arriving they commenced examining the goods at the store, and found some of them in bad condition, of which Ritter complained. After measuring several pieces, to see if the stock conformed to the inventory, Summerfield excused himself from further service on the ground that he had to return to St. Louis, as he had just learned of the sickness of his wife, and told Ritter to take the goods home with him, and if the inventory was defective he would make it right. Ritter replied that he thought that if they would work hard they could soon get through, but finally yielded to Summerfield's persua-

sions, and, with the assistance of Mendelson, boxed the goods up and shipped them to Chillicothe. Ritter paid the full inventory price at the agreed rate, and both parties left Kingsville that night for their respective homes. Mendelson's debts at the time of this sale were about $9000. This stock of goods was all the property worth naming that he had. The price given by Summerfield for it was $5373.

On the 24th of December, 1868, on petition of his creditors, Mendelson was adjudicated a bankrupt. The money received by him from Summerfield for the goods did not reach his creditors, as, according to his own statement, he lost it.

There were other facts and circumstances connected with the transactions which invited inquiry, but, as they were represented differently in the sworn testimony of the different witnesses, they are not given as any part of the case. All the witnesses agreed in the case as stated above, and as this court considered, there was no necessity, for the purposes of this suit, of going beyond it.

The court below gave several instructions bearing, some of them, on these disputed parts of the case. These instructions were assigned for error, though in several points not unfavorable to the defendant. But on the whole case, embracing the undisputed parts of the suit (the case as above given), the court directed the jury to find for the plaintiff. Verdict and judgment went accordingly. The defendants now brought the case here.

Mr. T. J. Durant, for the plaintiff in error; Mr. Nathaniel Myers, contra.

Mr. Justice DAVIS delivered the opinion of the court.

In the view we take of this case it is not necessary to notice the assignments of error upon the instructions to the jury by the court below. In some respects they may be technically inaccurate, and in others they were far too favorable to the defendants. But, in any event, they did not materially affect the merits of the action, and, as there were no

disputed facts bearing on the real matter in controversy, the court could have properly told the jury to find, as they did, for the plaintiffs.* Indeed, the verdict was so obviously right that the court would not set aside the judgment when the record shows that no other result could be obtained on a new trial.

That Mendelson intended to defraud his creditors in the course which he pursued is too plain for controversy; but the inquiry is, has he succeeded in diverting his property from the payment of his debts to the injury of his creditors?

The 35th section of the bankrupt law condemns fraudulent sales equally with fraudulent preferences, and declares that if such sales are not made in the usual and ordinary course of the business of the debtor that fact shall be *primâ facie* evidence of fraud. The usual and ordinary course of Mendelson's business was to sell at retail a miscellaneous stock of goods common to country stores in a small town in the interior of the State of Missouri. It was to conduct a business of this character that the goods were sold to him, and, as long as he pursued the course of a retailer, his creditors could not reach the property disposed of by him, even if his purpose at the time were to defraud them.

But it is wholly a different thing when he sells his entire stock to one or more persons. This is an unusual occurrence, out of the ordinary mode of transacting such a business, is *primâ facie* evidence of fraud, and throws the burden of proof on the purchaser to sustain the validity of his purchase.†

Summerfield seeks to overthrow the legal presumption that Mendelson intended to commit a fraud on his creditors by showing that he paid full value for the goods in ignorance of the condition of Mendelson's affairs. But the law will not let him escape in this way. The question raised by the

* Bevans *v.* The United States, 13 Wallace, 56.

† Scammon, Assignee. *v.* Cole, 5 National Bankruptcy Register, 257; Graham *v.* Stark et al., 3 Id. 95; Kingsbury et al. *v.* Hale, Ib. 84; Driggs *v.* Moore, Ib. 149; Tuttle *v.* Truax, 1 Id. 169.

statute is not his actual belief, but what he had reasonable cause to believe. In purchasing in the way and under the circumstances he did, the law told him that a fraud of some kind was intended on the part of the seller, and he was put on inquiry to ascertain the true condition of Mendelson's business. This he did not do, nor did he make any attempt in that direction. Indeed, he contented himself with limiting his inquiries to the object Mendelson had in selling out, and to his future purposes. Something more was required than this information to repel the presumption of fraud which the law raised in the mere fact of a retail merchant selling out his entire stock of goods. If this sort of information could sustain the sale, the provision of the bankrupt law we are considering would be no protection to creditors, for any one in Mendelson's situation, and with the purpose he had in view, would be likely to give the party with whom he was dealing a plausible reason for his conduct.

The presumption of fraud arising from the unusual nature of the sale in this case can only be overcome by proof on the part of the buyer that he took the proper steps to find out the pecuniary condition of the seller. All reasonable means, pursued in good faith, must be used for this purpose. If Summerfield had employed any means at all directed to this end he would have discovered the actual insolvency of Mendelson.

In choosing to remain ignorant of what the necessities of his case required him to know, he took the risk of the impeachment of the transaction by the assignee in bankruptcy, in case Mendelson should, within the time limited in the statute, be declared a bankrupt.

The defendants are in no better condition than Summerfield would be if he had not transferred the stock to them, because they took his title with full knowledge of its infirmity, and must blame their own folly for the result. Ritter, the active agent of the firm in the transaction, was fully informed by Summerfield of the circumstances attending his purchase, and this information was confirmed on his arrival at Kingsville. He there found Mendelson in charge of the

store, with some of the goods boxed up and some on the shelves, sure indications that the sale was recent and that there had been no actual change of possession. These things, in connection with the residence of Summerfield in St. Louis, and his occupation there, ought to have excited the fears of a reasonable man that the sale by Mendelson was not for an honest purpose, and prompted him to make inquiry upon the subject. Ritter, instead of doing this, treated the transaction as one of ordinary occurrence and as not imposing on him the duty of ascertaining the pecuniary status of either the vendor or vendee. Without learning anything, or seeking to learn anything, beyond the facts that the goods suited him and Mendelson wanted to change his business, he completed the purchase and immediately transferred the stock to the store of the defendants in Chillicothe. If this sale can be upheld, the law which declared the title of Summerfield *primâ facie* fraudulent could be easily rendered of no benefit, for all that would be necessary for a person buying property out of the ordinary course of business of the seller, to place it out of the reach of creditors, would be, as soon as he had consummated his purchase, to sell to another, who would acquire a good title, no matter how presumptively invalid the title of his vendor might be. It needs no argument to prove that if the law against fraudulent sales could be evaded in this way, it would furnish no sort of protection to creditors. Ritter, when he purchased, knew the nature of Summerfield's title, because he knew, or ought to have known, that a retail dealer like Mendelson, in selling out his entire stock, was presumptively guilty of intending to defraud his creditors, if it should turn out that he had any. Of this the bankrupt law gave him distinct notice, and as he chose, like Summerfield, to remain ignorant of Mendelson's affairs, he took the hazard of Summerfield's inability to prove the fairness of his title. It follows that if the sale to Summerfield cannot be supported, neither can the sale by him to the defendants.

It is unnecessary to notice the exceptions taken to the admission or rejection of testimony, because our decision is

based on the evidence which was received without objection, and about which there is no controversy.

JUDGMENT AFFIRMED.

[See the next following case, and also Smith *v.* Buchanan, *supra*, p. 277.]

WAGER ET AL. *v.* HALL.

1. The transfer by a debtor who is insolvent, of his property, or a considerable portion of it, to one creditor as a security for a pre-existing debt, without making any provision for an equal distribution of its proceeds to all his creditors, operates as a preference to such transferee, and must be taken as *primâ facie* evidence that a preference was intended, unless the debtor or transferee can show that the debtor was at the time ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts.
2. Such a transfer, if made within four months before the filing by the party of a petition in bankruptcy, is in fraud of the Bankrupt Act, and void.

APPEAL from the Circuit Court for the Western District of Wisconsin.

Hall, assignee of Lakin, a trader in Brodhead, Green County, Wisconsin, filed a bill in the court below against Wager & Fales, merchants, of Troy, New York, to set aside a mortgage on lands in the said Brodhead, given by the said bankrupt to them for $3000, to secure five payments, of $600 each, payable in six, twelve, sixteen, twenty, and twenty-four months, which mortgage and notes were executed December 15th, 1869, being twenty-four days prior to his filing his petition in bankruptcy, on the ground that it was given in violation of the Bankrupt Act. That act, in its 35th section, thus enacts:*

"If any person, being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, *with a view to give a preference* to any creditor or

* 14 Stat. at Large, 534.

person having a claim against him, . . . makes any . . . pledge, assignment, transfer, or conveyance of any part of his property, . . . absolutely or conditionally, the person receiving such . . . pledge, assignment, transfer, or conveyance, or to be benefited thereby, . . . having reasonable cause to believe such person is insolvent, and that such . . . pledge, assignment, or conveyance is made in fraud of the provisions of this act, the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited."

The admitted case, stated favorably for the bankrupt, seemed to be thus:

Prior to 1854, Lakin was a clerk in Troy, and while there made the acquaintance of Fales (one of the defendants), who was a clerk at the same time. In 1854, Lakin went to Janesville, Wisconsin, and for two years worked as a clerk in a grocery store. Then he was in partnership with one Williston, in the grocery business, in Janesville, until the spring of 1858. Then he was a clerk for two years in Janesville and other places, during the last six months of which he was in the hardware store of one Richardson, of Janesville. In 1860 Richardson started a branch hardware store at Brodhead, about twenty miles west of Janesville, and put the same under the control of Lakin, who received half of the profits for his services.

After about sixteen months Lakin bought out Richardson, and continued a general hardware business at Brodhead, making purchases of stoves from a firm in Troy, which his former fellow-clerk at Troy, Fales, had formed with one Wager under the name of Wager & Fales. His sales in 1862 and 1863 were about $15,000 a year, and from 1864 to 1870 from $20,000 to $28,000 per year. His invoice of *goods* on hand, taken in 1864, was $10,393.67. His invoice of goods taken September 13th, 1865, was $8450.77. Soon after that he set agoing a branch store at Juda, near Brodhead, and his whole inventory, taken December 31st, 1867, was $23,978.97.

In February, 1868, he sold out his entire stock of stoves and tinware to Spaulding & Brown, of Brodhead, for $6000,

but continued to deal in hardware and agricultural implements.

Spaulding & Brown paid $2000 cash down, and for the balance gave their note of $4000, payable as fast as the stoves should be sold, and a considerable portion of this note remained unpaid January, 1870.

Up to April 1st, 1868, Lakin's stock was in a rented wooden building, and then being in fear of fire, he resolved to build a brick store, and for that purpose borrowed, *at that time*, on long time, $3000 of his father-in-law, Hayner, to be secured by mortgage on the store, and began to build the store on lots which he then owned. Hayner superintended the building of the store, and it was completed near the close of the same year, costing, aside from the lots, $8500.

Hayner resided in Brodhead from April 1st, 1868, to June, 1869, when he moved to Woodstock, Illinois, but he did not *receive his mortgage until August 27th*, 1869.

Lakin commenced buying stoves of Wager & Fales (whose mortgage it was now sought to set aside) as early as 1863, and continued to buy from $300 to $4000 per year from that time to and including 1867.

The debt for which Lakin gave the mortgage to Wager & Fales, was mostly for stoves purchased by him in 1867 at four months' credit. At the time of purchase it was agreed that Lakin should pay interest on all bills after maturity. Wager & Fales permitted the account to run until the notes and mortgage were given, he in the meantime making some small payments.

Lakin sold but few of the stoves bought of Wager & Fales during 1867, nor until he sold out his stove business to Spaulding & Brown; and the fact that he failed to realize on the stoves, and that he desired to build a new brick block during 1868, induced him to urge Wager & Fales to wait on him, and as their account was on interest, and there was nothing else to be done amicably, they consented.

When his store was completed, which was near the close of the year 1868, he found it had cost about double what he

had expected, and as he had not realized on the stoves, *he asked for further time, again promising to pay interest.*

On the 1st of February, 1869, Lakin wrote Wager & Fales hoping that they would "not get entirely out of patience with him or lose confidence in him," excusing himself for non-payment, and telling them that he had "a good stock of goods, in a good brick store, well insured, and was in a better and safer condition than ever before."

On the 4th of March, 1869, Lakin, having again excused himself for non-payment, and begged patience, after repeated requests for payment by Wager & Fales, who say they have already waited "very patiently," requested Wager & Fales to send him a statement of his account, and "several notes running as long a time as they could afford to let them, and that he would stamp, sign, and return them," and do his best to meet them when due. The matter rested in this way until one Johnson, who had for several years been the travelling agent of Wager & Fales, and was then their partner, came West and saw Lakin with a view of getting money from him. Lakin asked for more time. Johnson told him he would give him time, but if he gave him long time that he ought to give a mortgage on his real estate. Lakin was reluctant to give a mortgage, and stated that he was perfectly responsible, more so than when the debt was incurred, and that if his matters were closed up under the hammer, he would have $15,000 over and above his debts, and offered to turn out notes against other parties, three dollars to one, but said that the times were hard, and that he depended upon farmers for collection. The matter was left open at Lakin's special request and on his assurance that a mortgage would injure his credit, and on his promise to pay certain stipulated sums monthly.

After Johnson got home, and about September, 1869, he gave Wager & Fales a detailed account of his interview with Lakin, and told them that he considered Lakin honest and responsible, that he required some time to make him easy in his business matters, and that he thought it was their duty to accommodate him by giving him time, for the rea-

sons that he had bought a great many stoves of them, and paid them a great deal of money, and probably would again, and was partly a Trojan, and out of their friendship for him; and then if he would give a ten per cent. mortgage, *that* would close up the account on the books of the old firm of Wager & Fales, now about to be reconstituted, with him, Johnson, as a partner. In this Wager & Fales concurred.

The matter remained in that way until some time in October or November, 1869, when Wager & Fales sent the matter to Richardson to put in shape; the same Richardson already mentioned as the old principal of Lakin at Janesville, in 1860, and who was a friend as well of their own. Richardson and Lakin agreed upon terms, and Lakin was to get an abstract of title, execute the papers, and return them; but upon Richardson's submitting the proposition to Wager & Fales, they objected to certain portions of it, and Richardson informed Lakin that the matter must rest until he heard further from Wager & Fales. When he did hear, Lakin consented to their terms, and on the 15th of December, 1869, the mortgage and notes were given.

During the year 1869, including the last four months of that year, Lakin was in the habit of stating to all who questioned him in regard to his condition, that he was worth from $12,000 to $15,000 over and above his debts and liabilities.

So far as to the mortgage sought by this bill to be set aside.

Now as to the circumstances under which the petition in bankruptcy was filed.

About the 1st of September, 1869, that is to say, four months prior to filing it, Lakin owed a certain Nazro about $2400. During that four months Nazro sold him over $500 worth of goods, and Lakin paid him during the same time over $400. His last purchase was over $200, and made November 26th, 1869, and his last payment December 20th, 1869.

On the 26th of December, 1869, a friend of Lakin, residing at Brodhead, went to Woodstock with a letter which he

had just received from a friend in Chicago, saying that a report had been sent by some one in Brodhead to the *Mercantile Agency in Chicago*, that Lakin had made an assignment of his property to his father-in-law, Mr. Hayner. Lakin went to Janesville and told his attorney of the report, gave him what, according to his own account, he supposed, at the time, to be a true statement of his affairs, that he owed about $12,000 besides what he owed Hayner on the mortgage above mentioned, and that he had goods, notes, accounts, and real estate, which in his opinion were worth $28,000 or $30,000, and asked for advice. His attorney advised him to make a statement of his affairs to his creditors, ask them for an extension, if necessary; telling them there was no truth in the report of the assignment, and to get his friends to indorse for him; the attorney saying that thus he thought there would be no trouble in arranging matters. Almost immediately some of his creditors, including an agent of Nazro, came to Brodhead to investigate his concerns. He and Nazro's agent made a statement of his condition, and on December 27th or 28th, 1869, and after a considerable investigation, found that his debts were much larger than he had ever stated, and, as he alleged, much larger than he had ever supposed; being at least $23,000. Lakin then saw his attorney again, and told him how he had found matters, and was advised to send a full printed statement of his condition to each of his creditors. Lakin made and sent out such a statement, dated January 1st, 1870, and it showed his debts to be $26,447.73.

Lakin, then in company with Nazro's agent, again counselled with his attorney, who advised him that as Nazro was one of his largest creditors and a man of great business experience, he had better go to Milwaukee with the agent, and confer with Nazro, and he did so. Nazro then requested Lakin to go into voluntary bankruptcy. Lakin expressed a wish to do what was best for his creditors, but told Nazro he thought his creditors would get more money if they would select some one as assignee, and that he would turn over everything he had to such assignee for the benefit of

his creditors. Nazro told Lakin that the securities he had given stood in the way of that, and that unless he went into voluntary bankruptcy, he would himself file a petition and force him into bankruptcy. Lakin then saw his attorney, and filed his petition in bankruptcy January 8th, 1870.

Lakin's books were in a bad condition, and had been kept very loosely for years. The result was that his schedules in bankruptcy, dated February 2d, 1870, showed his debts to be $28,450.

Lakin's particular friend, Richardson, was on his paper during most of the last six months of the year 1869, and a company with which he was connected was a general creditor at the time of the failure. Lakin's father-in-law, Hayner, and his particular friend, Williston, were on his paper to a considerable amount at the bank at the time of his failure. A brother-in-law was a general creditor for $1083. Several of his most intimate friends were general creditors.

So far as to the admitted case.

1. To show that Lakin was at the time of giving the mortgage to Wager & Fales insolvent, and that he gave them the mortgage with a view to give them a preference over his other creditors, the assignee called five witnesses, whose evidence tended to show that for one or two years prior to the failure, Lakin had found it difficult to raise money to pay certain claims against him, and at times had been unable to do so and been protested; that he used moneys in his hands as treasurer of the school district, and also as treasurer of the church, and also moneys held by him in trust and in a fiduciary capacity, and that they and some others in Brodhead regarded him irresponsible, but that during the same time he was doing a business of from $15,000 to $30,000 per year, and pretended to be worth $20,000 over and above all his debts. Two of these witnesses had, during the time, reported him to mercantile agencies as insolvent.

To rebut this evidence, and to show that whatever might have been Lakin's actual condition, he never, prior to his failure, had any idea of stopping business, or being unable

to pay all his debts, or that the mortgage would operate as a preference to Wager & Fales, but that he gave the mortgage to obtain a long extension so that he would not have to crowd his own creditors, or sell property for less than it was worth to pay his debts, and that this extension would give him more money to use in his business and pay other debts, the defendants called nine witnesses, whose evidence in addition to the facts, as above stated, tended to show that Lakin as treasurer of the school district and the church received no compensation, but by a sort of consent of the board of trustees used the moneys as he pleased, they drawing on him for the amounts as they might desire to use it; that there was no defalcation with either.

2. To show that Wager & Fales at the time of receiving this mortgage had reasonable cause to believe that Lakin was insolvent, and that the mortgage was made in fraud of the provisions of the Bankrupt Act, the assignee called one witness. His evidence tended to show that he had had a conversation with the defendant, Wager, in November, 1869, in which Wager stated that he had made up his mind that Lakin was insolvent, but that the witness stated that he had recently been in Brodhead and that Lakin had assured him that he had property enough to pay all his debts, and he thought Lakin would pay dollar for dollar.

This testimony was contradicted by Wager.

In addition to this there was the positive evidence of six witnesses, that Lakin had all the time represented himself to be worth from $12,000 to $15,000 over and above his debts, and that they all believed it.

The court below decreed that the mortgage was fraudulent, and should be discharged of record. The defendants appealed to this court.

Messrs. J. B. Cassady and W. Merill, for the appellant:

1. Did Lakin make the mortgage *with a view* to give Wager & Fales a preference over his other creditors?

The words—"with a *view* to give a preference"—were selected and put in this clause of the statute because they express a thought—a condition of things which the clause

would not express without them, and hence they are not to be rendered insignificant by construction.

Lakin could not give a mortgage "with a *view* to give Wager & Fales a *preference* over his other creditors," without recognizing the fact, or in other words *knowing*, or at least *believing*, that he had not sufficient property to pay all his debts, and hence that in so far as he secured them in excess of their proportionate share of his estate, he would take from others a corresponding amount of their proportionate share of his estate, and thus prevent an equal distribution of his estate which in his mind—his view—*at the time* was less in value than the amount of his liabilities. A view to give a preference, therefore, as used in this clause, is nothing more nor less than a mental picture, a vision of an amount of indebtedness by the debtor exceeding the value of all his property, and a purpose to prevent an equal distribution by paying or securing some creditors at the expense of others. If Lakin had the picture in his mind—the vision—then he necessarily had some intent or belief as to the effect of giving the *mortgage*, and hence his intent or belief is in the question. The giving of a mortgage, or doing any other act by a debtor which would operate as a preference with such a picture in his mind, and with such a purpose, would establish an intent to give a preference.

But it is idle to talk about a man giving a mortgage with a view to give a preference to some of his creditors over others, when at the time of giving the mortgage he had no knowledge or belief that his property was less in value than the amount of his liabilities.

The case of *Jones* v. *Howland*,* a leading case in Massachusetts, seems to settle this case in our favor. That case, indeed, arose on section second of the Bankrupt Act of 1841. But a fair analysis of that section and of section thirty-five of the present bankrupt law, under which this case arises, will, we think, reveal the fact, that they mean to lay down essentially the same rule as to the *intent of the debtor*, and if this is so the authorities sustain our position.

* 8 Metcalf, 377, 386, 387.

Argument for the debtor.

In *Jones* v. *Howland* the court say:

"If a party who *fears* or *believes* himself insolvent, but *does not* contemplate stoppage or failure, and *intends* to keep on, and make his payments, and transact his business, hoping that his affairs may be thereafter retrieved, and *in that state of mind* makes a sale or payment, without intending to give a preference, and as a measure connected with going on in his business, and not as a measure preparatory to, or connected with, a stoppage in business, such sale or payment is not void, as made in contemplation of bankruptcy, within the meaning of the second section of the United States Bankrupt Act of 1841, though he *immediately* afterwards became bankrupt.

"It is said that a man must be supposed to intend the natural result of his act. But this remark, though often treated as an axiom, is by no means an infallible proposition. The result is not always evidence of the supposed intent. When we *look back upon events* that have happened, *we stand in a different position;* we behold with a clearer vision as we embrace within our glance the *beginning* and the *end*, the *act* and the *consequences*. But the man who is *doing the act* may contemplate a very different result. His judgment may be biassed by his wishes, and sanguine feelings may be the cause of overlooking difficulties, which to a more quiet temperament might appear insurmountable. Disappointments also may take place which were not anticipated. The experience of others is rarely a guide to an embarrassed man, and he goes on with the hope of relief, even against hope. To infer, therefore, a *design* to give a preference to a favored creditor, and in the immediate expectation of bankruptcy, from the mere fact of insolvency, is by no means a certain inference nor such as the jury would be necessarily bound to draw from the debtor's knowledge of his insolvency. The *evidence* must also go *further* and establish, as a *fact*, the *design* to give the preference—a fact too important to be left upon conjecture."

The court in the above opinion follows the best considered English cases;* and these cases have been adopted by this

* Fidgeon *v.* Sharpe, 5 Taunton, 545; Morgan *v.* Brundrett, 5 Barnewall & Adolphus, 297; Atkinson *v.* Brindall, 2 Bingham's New Cases, 225; Same Case, 2 Scott, 369; Hartshorn *v.* Slodden, 2 Bosanquet & Puller, 582; Gibbins *v.* Phillips, 7 Barnewall & Creswell, 529; Belcher *v.* Prittie, 10 Bingham, 408.

court as containing the "sounder rule."* Hence this court takes the same view as the court did in *Jones* v. *Howland*. The doctrine stated in that case has moroever been cited with approval or substantially followed in many of the Circuit and District Courts of the United States.

2. Did Wager & Fales, at the time of receiving the mortgage, have reasonable cause to believe that Lakin was insolvent?

There is no evidence that Wager & Fales had any knowledge that Lakin owed any debt except their own, and we submit, as a matter of law, that the mere fact that Wager & Fales held an account against Lakin which had been due nearly two years, under the circumstances stated, is not sufficient to establish as a matter of fact that they had reasonable cause to believe that he was insolvent.

3. Did Wager & Fales when they received the mortgage have reasonable cause to believe that Lakin made it in fraud of the provisions of the Bankrupt Act?

It is very evident that the question whether the mortgage was made by Lakin in fraud of the provisions of the Bankrupt Act, is entirely a different question from the one whether at the time he had the ability to pay his debts as they became due in the ordinary course of business; and for Wager & Fales to have reasonable cause to believe the one, is entirely a different question than for them to have reasonable cause to believe the other.

The evidence is overwhelming that Wager, Fales, Johnson, and Richardson were at the time of receiving the mortgage each and all convinced from what they knew in regard to Lakin, and what he had told them, that he was worth from $10,000 to $20,000, over and above his debts, and there is no evidence in the case tending to show that they had any reasonable cause to believe that he owed any considerable amount of debts aside from their own, much less that the amount of his debts was in excess or equal to the value of his property.

* Buckingham *v.* McLean, 13 Howard, 169–170.

Restatement of the case in the opinion.

Mr. Justice CLIFFORD delivered the opinion of the court.

Preferences as well as fraudulent conveyances, if made within four months before the filing of the petition by or against the bankrupt, are forbidden by the Bankrupt Act, but three things must be proved in order that the transaction may come within that prohibition and be affected by it as an illegal payment, security, or transfer: (1.) That the payment, pledge, assignment, transfer, or conveyance was made within four months before the filing of the petition by or against the bankrupt and with a view to give a preference to some one of his creditors, or to a person having a claim against him or who was under some liability on his account. (2.) That the person making the payment, pledge, assignment, transfer, or conveyance was insolvent or in contemplation of insolvency at the time the preference was given or secured. (3.) That the person receiving such payment, pledge, assignment, or conveyance, or to be benefited thereby, had reasonable cause to believe that the person making the payment or giving or securing such preference was insolvent, and that the payment, pledge, assignment, transfer, or conveyance was made in fraud of the provisions of the Bankrupt Act.*

On the 15th of December, 1869, the insolvent debtor named in the bill of complaint executed to the respondents a certain deed of mortgage of that date, of the following parcels of real estate, situate in the town of Brodhead in that State, and known as the north one-third of lot one in block one hundred and one, also all of lot three in block one hundred and one, also the north half of the south half of block seventy-nine, also the east half and the southwest quarter of block two hundred and six, also all of block one hundred and forty-two, it appearing that all of these several parcels of real estate were conveyed by the insolvent debtor to secure the payment of five notes which he gave to the respondents, of the same date, payable to the respondents

* Scammon v. Cole, 5 National Bankruptcy Register, 259.

Restatement of the case in the opinion.

or order as follows: one for $600, payable in six months; one for $600, payable in twelve months; one for $600 payable in sixteen months; one for $600, payable in twenty months, and one for $600 payable in two years, and all with interest at the rate of 10 per cent.

Prior to that date, to wit, on the 27th of August of the same year, the insolvent debtor mortgaged the first-named parcel of real estate, which is his new brick store and lot, to Andrew P. Hayner, the father of his wife, to secure the payment of three notes of that date which he gave to the mortgagee, of the following tenor: one for $1287.87, payable in three years; one for $1000, payable in two years, and one for $1000, payable in three years, all with interest annually at the rate of 10 per cent.

Twenty-four days after he gave the mortgage to the respondents he filed his petition in bankruptcy, and on the 2d of February following he was adjudged a bankrupt. His creditors made an examination into his affairs soon after he gave the mortgage to the respondents, when it was made to appear that he was hopelessly insolvent, which induced him to make an effort to compromise with his creditors, but without any success, and he then filed the petition to be adjudged a bankrupt, and on the 4th of March in the same year the complainant was duly appointed the assignee in bankruptcy of his estate.

All of the notes secured by the mortgage to the respondents were given by the insolvent debtor for a debt which had been past due more than two years, and which the insolvent contracted for stoves purchased by him as stock in trade. His purchases were made on a credit of four months, and the record shows that the respondents, in repeated instances, called upon him for payment and had several times sent their agent to effect that object without much success. Small amounts were paid, but the insolvent debtor constantly asked for further indulgence, offering as a reason for his failure to meet his contracts that business was dull, and that it was impossible to collect what was due from his customers.

Restatement of the case in the opinion.

More than a year before the execution of this mortgage, he sold out his stock of stoves to other parties and abandoned that business, limiting his trade to that of a retail hardware merchant, and during that same year he built the new brick store which he mortgaged to his father-in-law three or four months before he gave the mortgage to the respondents.

Precisely what sum the store cost does not appear, but it must have been as much as $6000 or $8000, as the evidence shows that he owed more than $14,000 when he gave the mortgage in question, a large portion of which had been due for a long time.

Convincing evidence was also introduced showing that for a year or two he had been hard pressed for money by many of his creditors, and that his notes in repeated instances had been protested for non-payment, and it also appears that he had borrowed money at banks by means of indorsers and been obliged to get the same renewed, and he had used trust funds in his hands to pay pressing demands, and when called upon to repay the amount he was obliged to ask for delay.

Some of the notes given for the stock of stoves he had used to secure past-due debts and such portion of the consideration as had been paid he had expended in his business. Part of the money required to build the store, to wit, the sum of $3000, he borrowed of his wife's father, agreeing at the time to give him a mortgage of the premises when the store was completed, but the mortgage was not executed until the next season, and it appears that the respondents, when they heard of that mortgage through their agent, also demanded a similar security, which the insolvent debtor for a time refused to give, pleading as an excuse for declining the request that it would injure his credit. Witnesses were also examined to show that his credit was not in good repute, but it is unnecessary to enter into those details, as the proofs are of the most satisfactory character that he did not pay his debts when the obligations fell due and that he suffered his notes to go to protest.

Nothing need be added to show that the means of ascertaining the condition of his affairs were at hand, as his other

creditors, when they instituted inquiries upon the subject, shortly after the insolvent debtor gave the mortgage to the respondents, found no difficulty in learning that he owed more than the value of his property, and that he had been insolvent for two years. Enough, and more than enough has been remarked to show that the mortgagor was insolvent when he executed the mortgage to the respondents, as the fact is admitted both by the mortgagor and the mortgagees.

Preferences of one creditor over another are prohibited by the Bankrupt Act, if made within four months before the filing of the petition, and the complainant, as such assignee, prays that the mortgage may be declared fraudulent and void, and that the same may be decreed to be given up to be cancelled, or that the respondents may be required, in due form of law, to execute and deliver to him, as such assignee, a satisfaction, release, and discharge of the mortgage. Proofs were taken, and the parties having been heard, the Circuit Court entered a decree for the complainant, and the respondents appealed to this court.

Made, as the mortgage was, within twenty-four days next before the petition in bankruptcy was filed, and for the express purpose of securing to the respondents the payment of a large debt long overdue, the first material allegation to be proved may be considered, in view of the evidence already referred to, as fully established. Discussion to show that the effect of the mortgage was to secure a preference over all of the creditors of the bankrupt, except his wife's father and the firm secured by one of the notes given by the purchasers of the stoves, is unnecessary, as that proposition is self-evident; and the allegation that the mortgagor was insolvent at the time may also be considered established, as it is fully proved and stands confessed. Sufficient has also been remarked to show that the conveyance in mortgage was made with a view to give a preference to the respondents over all his other creditors, except such as he had previously secured in the modes previously explained.

Evidence of the most satisfactory character was introduced to show that the insolvent debtor had reasonable cause to believe that he was insolvent, and in view of all the circumstances the conclusion of the court is that he knew that he was insolvent in the sense of the Bankrupt Act. Creditors were constantly pressing him for payment, and he was notoriously unable to comply with their just demands. Extensions were asked, which were sometimes granted and sometimes refused, and it appears that considerable of his paper went to protest. Such a conveyance, under such circumstances, could hardly be made by one deeply insolvent unless with a view to give the grantee a preference over other creditors, who were without any security, as the law authorizes the presumption that a person of ordinary intelligence intends what is the necessary and unavoidable consequence of his acts.

Insolvency, as used in the Bankrupt Act, when applied to traders, does not mean an absolute inability of the debtor to pay his debts at some future time, upon a settlement and winding up of his affairs, but a present inability to pay in the ordinary course of his business, or, in other words, that a trader is insolvent when he cannot pay his debts in the ordinary course of business as men in trade usually do, and such must be the conclusion, even though his inability be not so great as to compel him to stop business.*

Reference is made by the respondents to the case of *Jones* v. *Howland*,† which it is insisted lays down a different rule. Suppose it be admitted that the opinion in that case affords some support to the suggestion, still it is only an apparent inconsistency, which is easily reconciled, as the case arose upon the prior Bankrupt Act, which did not declare such a conveyance void, unless it was *made in contemplation* of bankruptcy *and for the purpose* of giving the creditor a preference or priority over the other creditors of the bankrupt.‡ What was said by the judge who gave the opinion in that case,

* Vennard *v.* McConnell, 11 Allen, 562; Thompson *v.* Thompson, 4 Cushing, 134; Barnard *v.* Crosby, 6 Allen, 331.

† 8 Metcalf, 377–385.

‡ 5 Stat. at Large, 442.

which is supposed to be inconsistent with the more recent opinions of the court upon the same general subject, was said in construing the provision referred to in the prior law. He did say in that case that if the debtor honestly believes he shall be able to go on in his business, and with such belief pays a just debt without a design to give a preference, such payment is not fraudulent though bankruptcy should afterwards ensue; but the judge admitted in the same case that if the debtor, being insolvent and *knowing his situation* and expecting to stop payment, shall then make a payment or give security to a creditor for a just debt, with a view to give him a preference over other creditors, such payment or giving security is fraudulent. But the present Bankrupt Act avoids a conveyance, made with a view to give a preference, if the debtor at the time be in fact insolvent, although he may not contemplate bankruptcy in connection with the conveyance.* Such a conveyance, *if made by a person actually insolvent* or in contemplation of insolvency, to secure a pre-existing debt, said Hoar, J., "may be avoided by the assignee if the mortgagee had reasonable cause to believe him insolvent at the time he took the mortgage, and that the conveyance was made to impede the operation of the insolvent laws;" and he added that it is made *primâ facie* evidence of such cause of belief if the conveyance is not made in the usual and ordinary course of business of the debtor.†

Nothing remains, therefore, to be re-examined except the issue whether the respondents had reasonable cause to believe that the mortgagor was insolvent and that the conveyance was made in fraud of the provisions of the Bankrupt Act. Proof that the respondents had actual knowledge that the mortgagor was insolvent at that time is not required to support the prayer for relief, but the allegation in that behalf is sustained if it appears that they had reasonable cause for such belief, as that is the language of the Bankrupt Act. Actual knowledge of the alleged fact is not made the criterion of proof in such an issue, nor is it necessary that it

* Forbes *v.* Howe, 102 Massachusetts, 435.

† Nary *v.* Merrill, 8 Allen, 452.

should appear that the respondents actually believed that the mortgagor was insolvent, but the true inquiry is whether they, as business men, acting with ordinary prudence, sagacity, and discretion, had reasonable cause to believe that the debtor was insolvent, in view of all the facts and circumstances known to them at the time the conveyance was made.* Unless the debtor was in fact insolvent it cannot be held that such a grantee had reasonable cause to believe the allegation, but if it appears that the debtor was in fact insolvent as alleged, and that the means of knowledge were at hand, and that such facts and circumstances were known to the grantee as were clearly sufficient to put a person of ordinary prudence and discretion upon inquiry, it is well settled that it would be his duty to make all such reasonable inquiries to ascertain the true state of the case. Purchasers are required to exercise ordinary prudence in respect to the title of the seller, and if they fail to investigate when put upon inquiry, they are chargeable with all the knowledge which it is reasonable to suppose they would have acquired if they had performed their duty in that regard.† Creditors have reasonable cause to believe that a debtor, who is a trader, is insolvent when such a state of facts is brought to their notice respecting the affairs and pecuniary condition of the debtor as would lead a prudent business man to the conclusion that he is unable to meet his obligations as they mature in the ordinary course of business.‡ All experience shows that positive proof of fraudulent acts, between debtor and creditor, is not generally to be expected, and it is for that reason, among others, that the law allows in such controversies a resort to circumstances as the means of ascertaining the truth, and the rule of evidence is well settled that circumstances altogether inconclusive, if separately considered, may by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to

* Coburn *v.* Proctor, 15 Gray, 38.

† Tiffany *v.* Lucas, 15 Wallace, 410; Scammon *v.* Cole, 5 National Bankruptcy Register, 263.

‡ Toof *v.* Martin, 13 Wallace, 40.

constitute conclusive proof, which is a rule clearly applicable to the facts and circumstances disclosed in this record.*

Apply those two rules to the present case and it may well be said that the argument is concluded, as it is difficult to resist the conclusion that the respondents had *actual knowledge* that "the insolvent debtor was unable to meet his obligations as they matured in the ordinary course of his business."† Such proof, however, is not required, as the only issue in this behalf is whether the respondents had reasonable cause to believe that the debtor was insolvent at the time they received the conveyance, testing the question under the rule prescribed by this court.‡

Much discussion of the question whether the respondents had reasonable cause to believe that the conveyance was made in fraud of the Bankrupt Act may well be omitted, as the whole issue is substantially adjudged by the recent decision of this court, which is to the effect following: that the transfer by a debtor who is insolvent of his property, or a considerable portion of it, to one creditor as a security for a pre-existing debt, without making any provision for an equal distribution of its proceeds to all his creditors, operates as a preference to such transferee and must be taken as *primâ facie* evidence that a preference was intended, unless the debtor or transferee can show that the debtor was at the time ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts; and that a transfer by an insolvent debtor of his property, or any considerable portion of it, with a view to secure it to one creditor, and thus prevent an equal distribution among all his creditors, is a transfer in fraud of the Bankrupt Act.§

Knowledge of a given fact may be proved by circumstances, even in an ordinary equity suit, where, from the nature of the pleadings, the testimony of a single witness

* Castle *v.* Bullard, 23 Howard, 187. † Toof *v.* Martin, 13 Wallace, 40.

‡ Coburn *v.* Proctor, 15 Gray, 38.

§ Toof *v.* Martin, 13 Wallace, 40; Nary *v.* Merrill, 8 Allen, 452; Metcalf *v.* Munson, 10 Id. 491; Scammon *v.* Cole, 5 National Bankruptcy Register, 269.

without corroboration would not be sufficient to establish the alleged fact, and if so it cannot be doubted that circumstances in a case like the present are sufficient to put the respondents upon inquiry, or even to show that they had reasonable cause to believe the alleged fact, that the conveyance was made in fraud of the Bankrupt Act. Their debt had been overdue for two years, and throughout that period they had pressed the insolvent debtor for payment, both in person and through their agent, and it is not doubted that if they had made the least inquiry they would have been as successful as his other creditors were, a few days later, in ascertaining that he was hopelessly insolvent. Beyond doubt they knew that he had mortgaged his new brick store and lot to his wife's father, and when he finally consented to give them a mortgage on all or nearly all of his real estate, they were fairly put upon inquiry, and having neglected to make such they are justly chargeable with all the knowledge it is reasonable to suppose they would have acquired if they had performed their duty as required by law.

DECREE AFFIRMED.

[See the last preceding case, and also Buchanan *v.* Smith, *supra*, p. 277.]

RAILWAY COMPANY *v.* PRESCOTT.

1. The proviso in the 21st section of the act of July 4th, 1864, amendatory of the act of July 1st, 1862, to aid the Kansas Pacific Railway in the construction of its road, requiring the prepayment of the cost of surveying, selecting, and conveying the lands, requires the prepayment as to lands granted by the original act, as well as to those granted by the amendatory one.
2. Although lands sold by the United States may be taxed before the government has parted with the legal title by issuing a patent, this principle is to be understood as applicable only to cases where the *right* to the patent is complete, and the equitable title fully vested without anything more to be paid or any act done going to the foundation of the right.
3. Hence, where there has been a large grant (as *ex. gr.*, to a great railroad company to aid in the construction of its road), if prepayment by the

grantee of the cost of surveying, selecting, and conveying the lands granted be required by the statute making the grant, before any of the lands "shall be conveyed," or if the grant contain a proviso that any of the lands granted and not sold by the company within three years after the final completion of the road, shall be liable to be sold to actual settlers under the pre-emption laws, at a price named per acre, the money to be paid to the company—no title (in the first instance unless there be the required prepayment, nor in the second instance at all) vests in the grantee in such a way as that a tax sale will divest the government title.

ERROR to the Supreme Court of Kansas; the case being thus:

An act of Congress passed in 1862, to aid what was afterwards known as the Kansas Pacific Railway Company, in the construction of its road, gave to the said company alternate sections of land on each side of the road, within certain limits, and provided that a patent should issue to the company only as each section of forty miles in length should be completed and accepted by the President. The act also contained a provision that any of these lands not sold by the company within three years after the final completion of the road, should be liable to be sold to actual settlers under the pre-emption laws, at a dollar and a quarter per acre, the money to be paid to the company.

No part of the road having been built in 1864, the original act of 1862 was amended in the year last named, by extending the limits of the grant on each side of the road, and by several other provisions favorable to the company. But by the 21st section of the amendatory statute it was enacted:

"That before any land granted by *this* act shall be conveyed to any company or party entitled thereto under *this* act, there shall first be paid into the Treasury of the United States *the cost of surveying, selecting, and conveying the same by the said company or party in interest* as the titles shall be required by said company, which amount shall, without any further appropriation, . . . be used by the Commissioner of the General Land Office, *for the prosecution of the survey of the public lands along the line of said road, and so from year to year, until the whole shall be completed,* as provided under the provisions of this act."

With these statutes in force, the railway company filed its bill in one of the State courts of Kansas against one Prescott, to quiet the title to a tract of land in Kansas, to which it set up title only by virtue of the provisions of the above-quoted act of Congress of 1862. The defendant set up a tax title for taxes assessed in 1868, with a subsequent sale.

It was admitted on both sides that at the time the lands were assessed the company had completed the section of forty miles of road within which the lands lay, and that the President had accepted them; but that in the present case payment of the costs of surveying, selecting, and conveying had never been made, and that no patent for the land had issued.

The primary question thus was, who was the owner of the land at the time it was assessed and taxed, the United States or the railway company? If the United States, then the land was not subject to State taxation, and the sale was void. If the railway company, it was, and there being in that case no question about the regularity of the sale, the title of the company had been divested.

And this primary question depended on others behind it, to wit:

1st. Whether in order to the procuring of a title into itself, it was necessary for the company to have paid the costs of surveying, selecting, and conveying the land?

2d. Whether such a proviso as existed here, giving to the government a contingent right to offer the lands to actual settlers under the pre-emption laws, did not prevent the lands so vesting in the company as to be liable to be sold for taxes?

The court in which the company's bill was filed, referring to the doctrine as admitted, that a right to a patent was sufficient to subject lands to taxation, considered:

1. That where land is granted to a company for the sole purpose of aiding in the construction of a railroad, and the same was constructed to the approval of government, the company acquired such an interest in the land as rendered it subject to taxation, even though it had not received a

patent, and had not paid the cost of surveying, selecting, and conveying the same.

2. That the provision in a grant by the government "that any of the lands so granted and not sold by the company within three years after the final completion of the road, should be liable to be sold to actual settlers under the preemption laws, at one dollar and a quarter per acre, the money to be paid to the company," reserved no such interest in the government as would render the land not subject to taxation.

It accordingly decreed a dismissal of the bill, and that decree being affirmed in the Supreme Court of the State, the case was brought here by the company for review.

Mr. I. G. Mohler, in support of the ruling below:

We submit as a preliminary point, worthy of consideration, whether the 21st section of the amendatory act of 1864,—requiring that before any of the lands granted by "*this* act" should be conveyed to the company the cost of surveying, selecting, and conveying said lands, shall first be paid into the Treasury of the United States by the company, &c.,—is not limited to lands acquired by virtue of *that* act. The language is "this act." Independently of that the original act of 1862 required no such prepayment, and the government cannot disregard a statute which made a grant—an executed contract—and annex new conditions to the grant by a subsequent enactment. If this point is well taken, then as the title here is derived under the original act (the act of 1862), the requisition does not apply to this particular case.

But independently of this:

1. A *legal* title is confessedly unnecessary to give to a State a right to tax. "The *right* to a patent once vested," says this court, in *Stark* v. *Starrs*,* "is equivalent, as respects the government dealing with the public lands, *to a patent issued;* and when issued, it relates back so far as may be

* 6 Wallace, 402.

necessary to cut off intervening claimants, *to the inception of the right of the patentee.*" Indeed the whole foundation of the plaintiff's case is a title in himself. He sets one up, and if he has no title, of course, he can maintain no bill to have his title quieted.

2. Now the grant attached, and a good equitable title vested upon the compliance by the company on which the grant itself was made; that is to say, upon the completion of any forty consecutive miles of road, accepted by the President. The 21st section of the amendatory act does not prevent an *equitable* title from vesting. It only declares that "before any land *granted* by this act shall be conveyed," certain small expenses shall be paid. It assumes that the land has been "granted," *i. e.*, that the grant has attached; but withholds a patent, or evidence of *legal* title, till the small expenses mentioned are discharged.

3. The court below was equally right as to the effect of the proviso in the original statute of 1862, opening to actual settlers under the pre-emption laws any of the lands not sold within three years. The effect of an opposite construction would be to render the act nugatory and void, and consequently destroy the grant, for government cannot grant away any portion of the public lands, and yet still own them. This proviso is in the nature of a saving clause in a statute; but a saving clause in a statute, where it is directly repugnant to the purview or body of the act, and cannot stand without rendering the act inconsistent and destructive of itself, is to be rejected.

Mr. J. P. Ushur, contra, for the plaintiff in error.

Mr. Justice MILLER delivered the opinion of the court.

The original act of 1862 was amended in 1864 by extending the limits of the grant on each side of the road, and by several other provisions.

A question is raised whether the provision in the twenty-first section of the amendatory statute of 1864—by which it is declared that before any of the lands granted by the act

should be conveyed to the company, the cost of surveying, selecting, and conveying said lands should first be paid into the Treasury of the United States by the company or party in interest—requires this prepayment of the cost of surveying for the lands granted by the original act, or is limited to the lands acquired by the extension of the grant.

Looking to the whole scope of the amended act, and to the provision that the money so paid was to constitute a fund for the continuance and completion of the entire surveys along the road where none had been made, we are of opinion that no patent could rightfully issue in any case until the cost of survey had been paid. None of the road had been built when the amendatory act was passed. No right had vested in any tracts of land, and the power, as well as intent, of Congress to require such payment cannot be contested.

While we recognize the doctrine heretofore laid down by this court, that lands sold by the United States may be taxed before they have parted with the legal title by issuing a patent, it is to be understood as applicable to cases where the *right* to the patent is complete, and the equitable title is fully vested in the party without anything more to be paid, or any act to be done going to the foundation of his right.

The present case does not fall within that principle.

Two important acts remain to be done, the failure to do which may wholly defeat the right of the company to a patent for these lands.

The first is the payment of the costs of surveying. It is admitted that this has never been done in the present case. If the company have such an interest in these lands that they can be sold by the State under her power of taxation, then the title is divested out of the government without its consent, and the right to recover the money expended in the surveys is defeated. As the government retains the legal title until the company or some one interested in the same grant or title shall pay these expenses, the State cannot levy taxes on the land, and under such levy sell and

make a title which might in any event defeat this right of the Federal government reserved in the act by which the inchoate grant was made.

Another important and declared purpose of Congress would be equally defeated by the title thus acquired under the tax sale, if it were valid.

It is wisely provided, that these lands shall not be used by the company as a monopoly of indefinite duration. The policy of the government has been for years to encourage settlement on the public land by the pioneers of emigration, and to this end it has passed many laws for their benefit. This policy not only favors the actual settler, but it is to the interest of those who, by purchase, own adjacent lands, that *all of it* should be open to settlement and cultivation. Looking to this policy, and to the very large quantity of lands granted by this statute to a single corporation, Congress declared that if the company did not sell those lands within a time limited by the act they should then, without further action of the company, or of Congress, be open to the actual settler under the same laws which govern the right of pre-emption on government lands, and at the same price. Any one who has ever lived in a community where large bodies of lands are withheld from use, or occupation, or from sale except at exorbitant prices, will recognize the value of this provision. It is made for the public good, as well as for that of the actual settler. To permit these lands to pass under a title derived from the State for taxes would certainly defeat this intent of Congress. It makes no difference in the force of the principle, that the money paid by the settler goes to the company. The lands which the act of Congress declares shall be open to pre-emption and sale are withdrawn from pre-emption and sale by a tax title and possession under it, and it is no answer to say that the company which might have paid the taxes gets the price paid by the settler.

For these reasons we think that though the line of the road had been built and approved by the President, so far

as to authorize the company to obtain a patent for this land, if they had paid the cost of survey and the expenses of making the conveyance, yet the neglect to do this and the contingent right of offering the land to actual settlers at the minimum price asked for its lands by the government, forbid the State to embarrass these rights by a sale for taxes.

JUDGMENT REVERSED, and the case remanded to the State court with instructions to proceed in conformity to this opinion.

CRAPO *v.* KELLY.

A. of Massachusetts, owning a ship then on the high seas bound for the port of New York, but registered in Massachusetts, applied to the insolvent court of Massachusetts for the benefit of the insolvent laws of the State, and under the statutes of the State the judge of the insolvent court executed and delivered to the assignee in insolvency a transfer of all the debtor's property, the effect of which, under the statute, was to convey to the assignee all the debtor's property "which he could have lawfully sold, assigned, or conveyed." The debtor himself executed no transfer.

After this, the ship being still on the high seas, B., of New York, sued A. in a New York court for a money debt, and in accordance with the laws of New York respecting non-resident debtors issued an attachment against his property.

The ship arrived in port a few days afterwards and was attached by the sheriff at B.'s suit.

On a suit in New York, between the assignee in insolvency appointed by the Massachusetts court and the sheriff of New York, to determine with whom was the prior right, whether with the Massachusetts assignee in insolvency or the New York attaching creditor, it was held by the highest court of New York that the prior right was with the New York attaching creditor.

On appeal to this court, where a question as to its jurisdiction to review the decision of the New York court was raised, as a preliminary point.

Held—

1st. That the New York court necessarily decided what effect the insolvent proceedings in Massachusetts had by the law and usage in that State, and that as it decided *against* the effect which the defendant set up for them, this court had jurisdiction to review the judgment of the New York court.

2d. That for the purposes of this suit, the ship though on the high seas was a portion of the territory of Massachusetts, and that the assignment by the insolvent court of that State passed the title to her, in the same manner and with the like effect as if she had been physically within the bounds of that State when the assignment was executed.

3d. That accordingly the assignee in insolvency had the prior right, and that the judgment below was wrong.

ERROR to the Supreme Court of New York; the case being thus:

On the 18th of January, 1861, the American ship Arctic, owned, as to one-half, by Gibbs & Jenny, of Massachusetts, and registered as to that half in their names, in the port of Fairhaven, in the State aforesaid, was at the guano islands in the Southern Pacific Ocean, and on that day set sail from the said islands for New York.

On the 12th of February, and the 6th of March following, the ship, then sailing on the said ocean, and the said Gibbs & Jenny being insolvent and applying voluntarily to the judge of the insolvent court of Massachusetts for the benefit of the insolvent laws of the State, that judge, acting under a statute of the State, appointed one Crapo and others their assignees in insolvency, and executed and delivered to them an assignment of all the personal property of the said insolvents. No assignment was made by the insolvents themselves.

The statute which authorizes the judge of the insolvent court thus to transfer the debtor's property makes the transfer operate as a conveyance of all the debtor's property "which he could have lawfully sold, assigned, or conveyed." It however enacts further, that the debtor shall,

> "When required by the assignees, make and execute all such deeds and writings, and do all such other lawful acts and things which may be necessary or useful for confirming the assignment so made by the said judge, and for enabling the assignees to demand, recover, and receive all the estate and effects assigned as aforesaid, *especially such part thereof, if any, as may be without this Commonwealth.*"

On the 24th of April following (the ship still on the high

seas), one Robinson, a citizen and resident of New York, began an action against the said Gibbs & Jenny on certain promissory notes of theirs held by him, and in consequence of their residence out of the State of New York, a warrant was issued to the sheriff of New York, one Kelly, to attach their property; this proceeding being one in conformity to the laws of New York.

On the 30th of April the ship arrived at New York, direct from the Pacific Ocean, and the sheriff seized her in the harbor, and attached one undivided half of her as the property of Gibbs & Jenny. Crapo and his co-assignees appeared two days afterwards and, notwithstanding the previous attachment by the sheriff, claimed the ship as assignees of Gibbs & Jenny. She was thereupon released from custody on the claimants giving a bond, in conformity with the statutes of New York, conditioned that in a suit to be brought on the bond they would establish the fact that they were owners of the half of the vessel attached, or on failure to do so pay the sheriff the value of the share.

Kelly accordingly brought suit on the bond; the question on that suit being this, whether a New York creditor of the insolvents, by his prior attachment of their property in the State of New York, and pursuant to the laws of that State, could hold the property against the *subsequent* possession or claim of possession of such property, asserted in the State of New York, by authority of a statutory sequestration under the laws of Massachusetts of the general property of the debtors for the benefit of their creditors, and seeking to take the property out of the possession of the New York sheriff, on the ground of the sequestration of the Massachusetts insolvent statute antedating the New York sheriff's attachment.

The highest court of the State upheld the sheriff's title, and a recovery accordingly was had upon the bond.

The case was now brought here, as within the jurisdiction of this court, under the 25th section of the Judiciary Act,*

* See the section *infra*, Appendix.

because, as was alleged, the highest court of New York had disregarded that provision of the Constitution 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; and the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof",—

And to the act of Congress of May 26th, 1790, which, after prescribing the forms of authentication, enacts:

"And the said records and judicial proceedings authenticated as aforesaid shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from whence the said records are or shall be taken."

Mr. W. M. Evarts, against the jurisdiction and in support of the ruling below:

I. *There is no jurisdiction.*

1. The fact that controversies between litigants involve rights or titles claimed under the laws and jurisprudence of *different* States, does not subject the determinations of State courts, made the forum of such controversies, to review by this court. Unless the controversy and its decision in the State court involves the further element that some right or protection claimed under the Constitution of the United States has been denied by the State court, its judgment is not reviewable here.*

2. If the insolvent proceedings in Massachusetts are to be considered as within the sense of this article of the Constitution, "Judicial Proceedings," full faith and credit was given to their purport at the trial of this cause in the New York courts.

No "judicial proceeding" in Massachusetts has adjudi-

* Maxwell *v.* Newbold, 18 Howard, 511; Hoyt *v.* Shelden, 1 Black, 518; Betton *v.* Valentine, 1 Curtis, 168.

cated anything whatever concerning the ship, her title or possession, or any consequences that have attached to her by reason of the insolvency of her owners.

The controversy between these two competing pursuits of the ship in the port of New York was *res integra*, as a judicial question, when the action now under review was begun in New York.

No adjudication on this controversy has ever yet been had in Massachusetts, and all that the insolvent proceedings in Massachusetts have contributed *towards* such an adjudication has been to furnish the assignees a standing, which has been fully recognized in the New York courts.

The case of *Green* v. *Van Buskirk*,* where the section of the Constitution relied on by the plaintiffs in error was considered, while it upheld the appellate jurisdiction of this court in that case, excludes it, we submit, in this. That case upon the merits,† seems conclusive of this case upon *its* merits; that is to say, that the *lex fori* where the *res* is found must determine when and how it shall be subjected to the pursuit of creditors seeking the forum.

II. *But if jurisdiction exists here to review, the judgment below was right.*

1. The attaching creditor, Robinson, was a resident, subject, and citizen of New York, and as such entitled to the protection of its tribunals, and to seek their aid and remedies in asserting his claims against his debtors, and in satisfying his debt out of their property found within that jurisdiction.

2. The insolvent proceedings in Massachusetts never operated, or purported to operate, to transfer, by their own force, possession of *choses in possession* beyond the jurisdiction of the powers of the court, to wit, the county of its jurisdiction. Any further transfer could, by the terms of the statute, exist only by virtue of the jurisdiction which the court had over the *persons* of the insolvents, and it needed

* 5 Wallace, 310.

† 7 Id. 139.

the personal exercise of their *jus disponendi* in aid of the court.*

3. It is too late to dispute the doctrine (which has been accepted and established throughout the United States) that the insolvent laws of a State have no force to transfer the title to property not within the territory of the State, and that the title of such assignees will not be recognized when it comes in conflict with liens acquired by domestic creditors under the local laws. International comity may require us to permit such assignees to come to another State and take possession of property and collect choses in action, but they must take subject to the prior liens of creditors there who, by greater diligence, have availed themselves of the remedies provided by its laws against the property of the debtor.†

4. Nor in this view does the fact that the property in dispute was an American ship, registered under the acts of Congress, at Fairhaven, in Massachusetts, make any difference or enable her to carry with her the operation of her insolvent law round the world. Upon the high seas neither the attachment law of New York nor the insolvent laws of Massachusetts have any dominion. After leaving Massachusetts the ship was free from the operation of the one, and until she reached New York she was exempt from that of the other. She was indeed the property of a citizen of the State from which she sailed, and, as property, followed his person so far that his acts and contracts in respect to her were to be controlled by the *lex loci contractus*, but it was only *through the owner* that that law could operate upon her. So that if he sold or mortgaged her, or made any other contract respecting her in Massachusetts, or if he died, domiciled there, and bequeathed her by will, or died intestate as

* See the section *supra*, p. 611.

† Holmes *v.* Remsen, 20 Johnson, 229; Abraham *v.* Plestoro, 3 Wendell, 538; Johnson *v.* Hunt, 23 Id. 87; Mosselman *v.* Caen, 34 Barbour, 66; Olyphant *v.* Atwood, 4 Bosworth, 459; Willitts *v.* Waite, 25 New York, 577; Booth *v.* Clark, 17 Howard, 322; Ogden *v.* Saunders, 12 Wheaton, 219; Harrison *v.* Sterry, 5 Cranch, 289; Milne *v.* Moreton, 6 Binney, 353; Green *v.* Van Buskirk, Wallace, 310; 7 Id. 139; Guillander *v.* Howell, 35 New York, 657.

to her, the laws of Massachusetts would regulate the rights of property in her arising from these incidents. So in respect to the taxing power, being within no other State, it would properly be held that the owners residing where she was registered would be properly taxable for her there. But in no other or larger sense can it justly be said that at sea she was governed by or subject to the laws of Massachusetts. The American doctrine, as to the effect of foreign bankrupt assignments, has always been a recognized and admitted exception to the rule that personal property follows the person of the owner.

5. Therefore the simple question is, whether, because the vessel did not arrive until after the assignment was executed, comity requires that a New York creditor of the insolvent, pursuing with diligence the remedy prescribed by the law of New York, shall be deprived of the fruits of his diligence for the accommodation and benefit of the assignees and the Massachusetts creditors whom they represent. To this there can be but one answer, and the right of the New York creditor must be preferred and his remedy upheld. The reasons upon which this policy of protecting the rights of domestic creditors have always been rested, apply with equal force to property of the insolvent brought into the State after the assignment, as to that which happens to be here at the exact moment of the assignment. Their convenience, their natural right to all the securities and remedies which the laws of their own State afford, the fairness of allowing them to reap the fruits of their diligence, the hardships of sending them to a foreign State or country for dividends when a remedy lies at their own doors, and those considerations of general utility which relate to the general interests of creditors and the harmony of States, all lead to the same policy and necessity in respect to property of the insolvent attached by the diligent creditor, no matter at what precise moment it came within the State.

6. If the point in issue is regarded as a question of *comity*, the superior rights of the home creditor must prevail. The argument will then be rested upon the proposition that the

operation of the insolvent law of Massachusetts did *proprio vigore* transfer the absolute title of the ship, being at sea, to the assignees, to the exclusion of creditors attaching under the laws of whatever State and jurisdiction she should first reach.

This proposition is in defiance of the settled law of the Federal and State courts. And, not only is there no authority whatever for the new and startling proposition contended for; not only must this court, to establish it, override the well-settled current of American law, by which bankrupt laws and proceedings of foreign States have been allowed no effect upon property situated outside of their territorial limits, but the result sought to be obtained will be contrary to our best interests and subversive of our long-established and well-recognized policy. It will be a complete abandonment of the American doctrine, and a submission to the rule devised by Great Britain for her own benefit, as the great creditor nation of the world, so that she might, in the language of Platt, J., in *Holmes* v. *Remsen*:*

"By issuing a commission against a bankrupt merchant in London, spring a net, which shall cover all the effects of such bankrupt throughout the world, and draw them all to her own forum for distribution, . . . for the fact cannot be disguised that Great Britain having the most extended commerce, and her merchants and manufacturers *crediting* abroad vastly more than they *owe* to foreign creditors, has a strong and peculiar interest in contending for a rule which draws to herself the distribution of all the effects which her lucrative commerce has dispersed over the globe."

Foreign nations are still and to a greatly increased extent our creditors, and especially so with regard to goods at sea, in foreign bottoms. To these the doctrine contended for is quite as applicable as to Massachusetts ships arriving at our port. And this court is now asked to make a decision which, as to the immense interest of our foreign importations daily arriving in the port of New York, will defeat

* 20 Johnson, 264.

the just claims of domestic creditors in all cases of foreign bankruptcy of the owner and shipper occurring after their shipment and before arrival.

Looking at the question in this light, as one "of policy and of public utility," and with a view to what "the best interests of our own subjects require," there would seem to be no doubt of the inexpediency of extending the rule of comity farther than it has ever yet been carried, and to cover the goods or ships of foreign bankrupts at sea, and destined for our ports at the time of the bankruptcy.

7. Massachusetts is the last State in the Union to which any enlarged comity should be extended in regard to the recognition of her insolvent laws, and of titles thereby created. In 1854 the Supreme Court of that State decided that an assignment of property in that Commonwealth, made in New York by an insolvent citizen of New York, to a trustee for the benefit of creditors, giving preference to certain creditors, also citizens of New York, is ineffectual as against an attachment made in Massachusetts by a citizen thereof. When a State, which pursues such a policy, sends her assignees in insolvency to New York, to take possession of property, no principle of comity, heretofore announced, can require our courts, for their benefit, to take the property away from New York creditors, who have acquired a prior lien.*

Mr. Edwards Pierpont (*with whom was Mr. W. Stanley*), *contra.*

Mr. Justice HUNT delivered the opinion of the court.

The claim of Federal jurisdiction over this action is based upon article 4, section 1, of the Constitution of the United States. It is there declared 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 acts, records, and proceedings shall be proved, and the effect

* Zipcey *v.* Thompson, 1 Gray, 243; Blake *v.* Williams, 6 Pickering, 303; Lanfear *v.* Sumner, 17 Massachusetts, 110.

thereof." In 1790 and in 1804 Congress passed laws prescribing that manner and effect. By the act of May 26th, 1790,* after prescribing the forms of authentication, it is enacted: "And the said records and judicial proceedings authenticated as aforesaid shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from whence the said records are or shall be taken." Under this statute it has been held in this court, from an early day, that the faith and credit spoken of are not limited to the form of the record, and are not satisfied by its admission as a record. It is held that the same effect is to be given to the record in the courts of the State where produced, as in the courts of the State from which it is taken.†

The defendant in error insists in reply that the validity of the record of the court of probate and insolvency in the State of Massachusetts is not involved, and the faith and credit due to it is not in question. This is based upon the argument that that record has never adjudicated upon the title or possession of the vessel in question, and that the same was *res integra* when this action was commenced in New York.

The case of *Green* v. *Van Buskirk*, reported in 5th Wallace, p. 310, and also in 7th Id. p. 139, is relied upon as conclusive upon this point. In that case Bates, who lived in New York, executed and delivered to Van Buskirk, who lived in the same State, a chattel mortgage on certain iron safes which were then in the city of Chicago. This was done on the 3d day of November, 1857. Two days after this Green, who was also a citizen of New York, being ignorant of the existence of the mortgage, sued out a writ of attachment in the courts of Illinois, levied on the safes, and sold them in satisfaction of the judgment obtained in the attachment suit. There was no appearance or contest in defence of this attachment suit, and Van Buskirk was not

* 1 Stat. at Large, 122.

† Mills *v.* Duryee, 7 Cranch, 483; Leland *v.* Wilkinson, 6 Peters, 317; United States *v.* Johns, 4 Dallas, 412.

a party to it, although he had power to make himself such party. It was conceded that by the laws of Illinois, mortgages of personal property, until acknowledged and recorded, are void as against third persons. In this state of the affair Van Buskirk sued Green in the New York courts for the value of the safes mortgaged to him by Bates, and of which Green had thus received the proceeds. Green pleaded his attachment suit in bar of the action. The courts of New York gave judgment in favor of Van Buskirk, holding that the law of New York was to govern, and not the law of Illinois, although the property was situated in the latter State, and that the title passed to him by the execution of the mortgage. The case first came before this court on a motion to dismiss for want of jurisdiction.* The motion was maintained, on the ground that the record neither showed that the construction of any clause of the Constitution was drawn in question in the State court, nor that any right was claimed under such clause, or that any decision was made against such right. The only issue it was said was as to the right of property and possession at the time of such seizure. In the opinion of the court, delivered by Mr. Justice Miller, after discussing the law applicable to the general questions in the case, the conclusion on the question of jurisdiction is thus stated: "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 the plaintiff in error, under the constitutional provision and statute referred to, and that the case is, therefore, properly here for review." Without reference to whether he was right or wrong, the fact that Green claimed under the judicial record of Illinois, and that his claim was overruled, was held to give this court jurisdiction.

* 5 Wallace, 310.

Without reference to whether Crapo was right or wrong, whether the question was *res integra*, or *res adjudicata*, the fact that he claimed title under the Massachusetts record, and that his claim was overruled, gives the court jurisdiction of the present case. The authority of *Green* v. *Van Buskirk*, in 5th Wallace, is clear to that point.

The case as reported in 7 Wallace is to the same effect. In restating the argument of jurisdiction Mr. Justice Davis says: "This court in denial of the motion to dismiss held that the Supreme Court of New York necessarily decided what effect the attachment proceedings in Illinois had by the law and usage in that State, and as it was decided against the effect that Green claimed for them, this court had jurisdiction under that clause of the Constitution" above quoted. Whether the Supreme Court of New York held correctly or otherwise was important when the case came before this court for a final hearing, but the fact simply that it had decided against Green's claim of the effect of the records gave jurisdiction.

We think the jurisdiction of the court now to hear and decide the case is sufficiently clear.

Omitting all superfluous circumstances, the facts necessary to present the question on the merits are these: On the 23d of February, 1861, the insolvent court of Massachusetts appointed Crapo and others assignees in insolvency of Gibbs & Jenny, and the judge of that court executed and delivered to them an assignment of all the personal property of Gibbs & Jenny. At this date Gibbs & Jenny were the owners of the ship Arctic, an American vessel registered at the port of Fairhaven, in the district of New Bedford, in the State of Massachusetts, which vessel was then on the high seas, to wit, in the Pacific Ocean. On the 30th day of the following April this vessel arrived in the port of New York, and was at once seized as the property of Gibbs & Jenny, by an attachment issued at the suit of one Robinson, a creditor of Gibbs & Jenny, residing in New York. On the next day but one after the arrival of the vessel Crapo came to New

York and took possession of her, subject to the possession of Kelly, the sheriff. Crapo represents the title under the Massachusetts assignment, which then, and at all times since, he has sought to enforce. Kelly claims under the New York attachment.

The question is, which proceeding gave the better title.

Certain propositions relating to the question are not disputed.

1. If the assignment under which Crapo claims had been the personal act of Gibbs & Jenny, it would have passed the title to the vessel wherever she might have been at the time of its execution.

2. If the vessel at the time of the execution of the assignment had been within the territorial limits of Massachusetts, the assignment, although not the personal act of Gibbs & Jenny, would have divested their title and that of all persons claiming under them, provided diligence has been used to reduce the vessel to possession.

3. If the vessel had been in the port of New York at the time of the execution of the insolvent assignment (there being no personal assignment), and had subsequently been seized there under attachment proceedings by a New York creditor, such attachment proceeding would have held the vessel as against the prior insolvent assignment.

The first of these propositions results from the fact that personal property, wherever it may be, is under the personal control of its owner, and the title passes by his actual transfer. The second is based upon the idea that the property being actually present and under the control of the law, passes by act of the law. The third proposition assumes that a transfer by legal proceeding possesses less solemnity than one made by the owner himself; that each nation is entitled to protect its own citizens, and that the remedy by law taken by its citizens having the actual possession of the *corpus*, ought to prevail over a title by law from another State, which is not accompanied by such possession. This principle authorizes the Massachusetts assignee to hold the property when in Massachusetts, and the New York creditor

to seize it when it is in New York, under the circumstances stated.*

The present case is deficient in each of the elements necessary to bring the vessel within the range of the foregoing principles. She was not transferred by the personal act of the owner. She was not literally within the territory of Massachusetts when the insolvent assignment took effect; and, thirdly, she was not in the port of New York.

The question then arises, while thus upon the high seas was she in law within the territory of Massachusetts. If she was, the insolvent title will prevail.

It is not perceived that this vessel can be said to be upon United States territory, or within United States jurisdiction, or subject to the laws of the United States regulating the transfer of property, if such laws there may be. Except for the purposes and to the extent to which these attributes have been transferred to the United States, the State of Massachusetts possesses all the rights and powers of a sovereign State. By her own consent, as found in article 1 of the Constitution of the United States, she has abandoned her right to wage war, to coin money, to make treaties, and to do certain other acts therein mentioned. None of the subjects there mentioned affect the question before us. The third article of that instrument extends the judicial power of the United States "to all cases of admiralty and maritime jurisdiction." This gives the power to the courts of the United States to try those cases in which are involved questions arising out of maritime affairs, and of crimes committed on the high seas. To bring a transaction within that jurisdiction, it must be not simply a transaction which occurred at sea, as the making of a contract, but one in which the question itself is of a maritime nature, or arises out of a maritime affair, or it must be a tort or crime committed on the high seas. Over such cases the United States courts have jurisdiction; that is, they are authorized to hear and deter-

* 1 Parsons's Maritime Law, 78, v. c. and n.; Abbott on Shipping, 6th American edition, 36 and n.; Joy *v.* Sears, 9 Pickering, 4; Conard *v.* Atlantic In. Co., 1 Peters, 449.

mine them. No rule of property is thereby established. This remains as it would have been had no such authority been given to the United States court.

To Congress is also given power "to define and punish piracies and felonies committed on the high seas, and offences against the law of nations." It will scarcely be claimed that the title to property could be affected by this provision. Nor does the circumstance that the Arctic sailed under the flag of the United States and was entitled to the protection of that government against insult or injury from the citizens or ships of other nations, touch the present point. None of these instances are like that of the passage of a bankrupt law by the United States, which acts directly upon the property of all the citizens of all the States, wherever it may be. Had the claim of either party to this vessel been based upon a proceeding under that statute, the title would have been complete, if the property had been within the territory or jurisdiction of any of the States of the Union.

It is not perceived, therefore, that the relation of Massachusetts to the Union has any effect upon the title to this vessel. It stands as if that State were an independent sovereign State, unconnected with the other States of the Union. The question is the same as if this assignment had been made in London by a British insolvent court, adjudicating upon the affairs of a British subject.

We are of the opinion, for the purpose we are considering, that the ship Arctic was a portion of the territory of Massachusetts, and the assignment by the insolvent court of that State passed the title to her, in the same manner and with the like effect as if she had been physically within the bounds of that State when the assignment was executed.

The rule is thus laid down by Mr. Wheaton in his treatise on International Law:* "Both the public and private vessels of every nation on the high seas, and out of the territorial limits of any other State, are subject to the jurisdiction

* Eighth edition, § 106, *et seq.*

of the state to which they belong. Vattel says that the domain of a nation extends to all its just possessions, and by its possessions we are not to understand its territory only, but all the rights it enjoys. And he also considers the vessels of a nation on the high seas as portions of its territory. Grotius holds that sovereignty may be acquired over a portion of the sea." As an illustration of the proposition that the ship is a portion of the territory of the State, the author proceeds: "Every state has an incontestable right to the service of all its members in the national defence, but it can give effect to this right only by lawful means. Its right to reclaim the military service of its citizens can be exercised only within its own territory, or in some place not subject to the jurisdiction of any other nation. The ocean is such a place, and any state may unquestionably there exercise, on board its own vessels, its right of compelling the military or naval services of its subjects."

Chancellor Kent, in his Commentaries,* says: "The high seas are free and open to all the world, and the laws of every state or nation have there a full and perfect operation upon the persons and property of the citizens or subjects of such a state or nation." "No nation has any right or jurisdiction at sea, except it be over the persons of its subjects, in its own public and private vessels; and so far territorial jurisdiction may be conceded as preserved, for the vessels of a nation are in many respects considered as portions of its territory, and persons on board are protected and governed by the law of the country to which the vessel belongs."

Wharton† says: "A ship in the open sea is regarded by the law of nations as a part of the territory whose flag such ship carries." "By this (he says) may be explained several cases quoted as establishing the *lex domicilii*, though they are only sustainable on the ground that the ship at sea is part of the territory whose flag she bears. . . . In respect to principle, ships at sea and the property in them, must be viewed as part of the country to which they belong."

* Vol. i, p. 26.

† Conflict of Laws, § 356.

The modern German law is to the same point. Bluntschil, in his *Moderne Volkerrect*,* says: "Ships are to be regarded as floating sections of the land to which they nationally belong, and whose flag they are entitled to carry."

Bischof, in his *Grundriss des positiven internationalen Seerechts*,† says: "Every state is free on the seas, so that its ships are to be regarded as floating sections of its country, *territoria clausa; la continuation ou la prorogation du territoire*, and those on board such ships in foreign waters are under their laws and protection. This even applies to children born to subjects on such ships."

Wildman, in his treatise on International Law,‡ says: "Provinces and colonies, however distant, form a part of the territory of the parent state. So of the ships on the high seas. The rights of sovereignty extend to all persons and things not privileged, that are within the territory."

The adjudicated cases in this country are to the same effect. In *Plestoro* v. *Abraham*,§ it was held that where a British subject, being indebted, left England, and while on his voyage to this country and before he arrived here, he was, under the laws of Great Britain, declared a bankrupt, and provisional assignees were appointed, it was held that the assignment to such assignees divested the title of the bankrupt to the personal property brought with him to this country. In giving his opinion upon the motion to dissolve the injunction, Chancellor Walworth said: "In the case of *Holmes* v. *Remsen*,‖ Chancellor Kent decided that an assignment by the commissioners of bankruptcy in England, operated as a legal transfer of the personal property and choses in action of the bankrupt in this country. Even as against a subsequent attachment taken out here by an American creditor, under the act against absconding and absent debtors. It is doubtful whether that decision, to its full extent, can be sustained. It was strongly opposed and ably questioned by Platt, in a case between the same parties, which

* Sec. 317. † Graz, 1868; cited in Wharton's Conflict of Laws, § 356, n.
‡ Page 40. § 1 Paige, 236. ‖ 4 Johnson's Chancery, 460.

subsequently came before the Supreme Court.* It also stands in opposition to the opinions of the State courts in Connecticut, Massachusetts, Pennsylvania, Maryland, and in both of the Carolinas, . . . and to the decision of the Supreme Court of the United States, in *Harrison* v. *Sterry*,† and in *Ogden* v. *Saunders*.‡ But the case before me (he proceeds) steers clear of all these decisions. In the cases cited the contest was between foreign assignees and domestic creditors, claiming under the laws of the country where the property was situated and where the suits were brought. The question in these cases was, whether the personal property was to be considered as having locality for the purpose of giving a remedy to creditors residing in countries where the property was in fact situated at the time of the foreign assignment. In this case the controversy is between the bankrupt and his assignees and creditors, all residing in the country under whose laws the assignment was made. Even the property itself, at the time of the assignment, was constructively within the jurisdiction of that country, being on the high seas in the actual possession of a British subject. Under such circumstances the assignment had the effect to change the property and divest the title as effectually as if the same had been sold in England under an execution against him, or he had voluntarily conveyed the same to the assignee for the benefit of his creditors."

The case was carried to the Court of Errors of the State of New York, that body being composed of the chancellor, the judges of the Supreme Court, the lieutenant-governor, and the members of the senate. The record did not show distinctly that the vessel which brought the goods was a British ship, and on this point the chancellor's order was reversed. Marcy, justice, and Throop, lieutenant-governor, eminent men and able judges, held that the assignment in Great Britain divested the title of the bankrupt to personal property in this country, and that his property in a vessel on the high seas was likewise transferred. Maynard, Oliver,

* 20 Johnson, 229. † 5 Cranch, 289. ‡ 12 Wheaton, 213.

and Stebbins held that, as to the personal property of the bankrupt *in this* country, the assignment did not effect a transfer of the same, even as between the assignee and the bankrupt. Maynard and Stebbins held that to produce the transfer, under such circumstances, of the property of a British bankrupt, which was on the high seas at the time of the assignment, it must distinctly appear that the vessel was a British vessel, and thus the property was within British jurisdiction. It is fairly to be inferred that if it had appeared that the vessel was a British vessel the chancellor's order would have been sustained. Thus Mr. Ogden, who argued for the reversal of the order, said:* "Had the goods been on board a British vessel it would have been so averred. In the absence of such averment the fair conclusion is that the vessel in which they were embarked was American; and if so, the goods were as much within our jurisdiction as if landed in a storehouse at New York." Senator Maynard, in his opinion,† repeats this statement. He says: "The presumption was as fair that it was on board of an American ship as that it was on a British ship; and if so, it was, at the date of the assignment, within the jurisdiction of this country." Stebbins, senator, says:‡ "I hold, therefore, that if this property was laden on board an American vessel, and on the high seas at the time of the assignment, it was within the jurisdiction of the United States, and could no more pass by that assignment than if lodged in the custom-house in New York; and if laden on board a British vessel that fact should have been averred by the assignee as essential to his title." The chancellor's order was reversed, and apparently upon this ground, that it did not actually appear that the ship on which the goods were laden was a British ship. The principle of the decision was in accordance with the principle announced by the chancellor, as already quoted, to wit, that the presence of the goods in a British ship on the high seas, continued them within British jurisdiction. The limited application given to this decision

* 3 Wendell, 544. † Id. 558. ‡ Id. 567.

in *Johnson* v. *Hunt*,* is scarcely sustained by the facts. None of the other cases cited are cases of goods on the ship of the state or nation of the insolvent whose goods are the subject of the assignment. They are cases where the property was confessedly within another jurisdiction and hence the conflict.

Judge Story says,† upon this case: "It is difficult to perceive how the doctrine of the chancellor, as to the operation of the British bankrupt laws upon the British subjects and their property *in transitu* can be answered. The transfer must be admitted to be operative to divest the bankrupt's title to the extent of an estoppel as to his own personal claim in opposition to it, for the law of America, be it what it may, had not then operated upon it. It was not locally within our jurisdiction. No one could doubt the right of the assignee to personal property locally in England at the time of the assignment. In what respect does such a case differ from a case where it has not passed into another jurisdiction? Is there any substantial difference between its being on board a British vessel and its being on board of an American vessel on the high seas?" No claim can be made that this vessel was within the jurisdiction of New York when the assignment was executed.

If the title passed to the insolvent assignees, it passed *eo instanti* the assignment was executed. It took effect then or never. The return of the vessel afterwards to America, her arrival in the port of New York, her seizure and sale there did not operate to divest a title already complete.‡

Again, the owners of this vessel and the assignees in insolvency were citizens of Massachusetts, and subject to her laws. It is not doubted that a sale of property between them of property on board of this vessel, or of the vessel itself, would be regulated by the laws of Massachusetts. It is not doubted that the vessel was taxable in Massachusetts only, or that if Gibbs or Jenny had been on board of the

* 23 Wendell, 91.

† Conflict of Laws, § 419.

‡ Ib. § 391, and Thuret *v.* Jenkins, 7 Martin, 318, 353, 354.

vessel, and had died before the vessel reached New York, his personal property on or in her would have passed under the laws of Massachusetts.*

If this vessel had never returned to the American shores but had gone to the bottom in the Pacific seas, after the assignment was complete, whose vessel would she have been at the time of such loss? There can be but one answer. The Massachusetts statute declares that this assignment vested in Crapo and his associates all the title and interest the insolvent had in this vessel. In other words it vested in them the absolute ownership. There was not then, or for weeks afterwards, any possible question of their title. The insurance-money upon the ship would have been their property, and they would have been bound to collect it and distribute it among the creditors.

Personal property which has an established *situs* in another State, is no doubt governed by the *lex loci sitæ rei*, so far that it will be governed in its distribution by the laws of the place where found, rather than the law of the domicile. This rule only applies where such property has acquired an established *situs*. Until that occurs there can be no conflict of jurisdiction.

It is said, however, that the fact that the property on board a vessel at sea and the vessel itself, contracts respecting them and the distribution of the assets of the intestate, are regulated by the laws of Massachusetts, arises solely from the circumstance that the owner is a resident of that State; that jurisdiction of the parties it is, that gives the jurisdiction of these subjects. The authorities from Kent, Story, and Wheaton, and the continental authorities, the civil law before cited, as well as the decisions in *Plestoro* v. *Abrahams*, make the ship itself, under such circumstances, a part of the territory of the State to which its owner belongs. If he resides in Boston his property in the remotest county of the State is under the protection of its laws, as being upon and

* Morgan *v.* Parham, *supra*, 471; Hoyt *v.* Commissioners, 23 New York, 224

within its territory. So his property on his ship, for the purpose we are considering, is legally and constructively within its territory. In each case it is true that the existence of an owner is necessary to call forth the exercise of the law and the duty and power of the State. In this sense, it is true, that the residence of the owner produces the result. It is produced, however, not only by the existence and residence of the owner, but by an extended State territory upon which his property remains, and where it is subject to State laws and entitled to the protection of the same laws.

Grotius* holds that sovereignty may be acquired over a portion of the sea, *ratione personarum.*† Rutherford and others hold this to be an error, and that no nation has jurisdiction over the ocean itself. All agree that jurisdiction over the public and private vessels of a nation at sea, remains to the nation, and it is expressed in the language already quoted.

In the celebrated Trent Case, occurring in 1862, Messrs. Mason and Slidell were removed from a British private vessel by Commodore Wilkes of the San Jacinto, a public vessel of the United States. Great Britain insisted that the rights of a neutral vessel not only had been violated, for which she demanded apology, but she insisted that these persons should be replaced and returned on board a British ship. This was done, and they were actually placed on board a British vessel in or near the harbor of Boston. They were not British subjects, and their return could only have been demanded for the reason that they had been torn from British soil, and the sanctity of British soil as represented by a British ship had been violated. Citizenship or residence had no influence upon the question.

This vessel, the Arctic, was upon the high seas at the time of the assignment. The status at that time decides the question of jurisdiction. The State of New York had no juris-

* De Jure Belli, book ii, ch. iv, § 13.

† Wheaton on International Law, § 106.

diction over her until long afterwards. No conflict can, therefore, arise between the laws of New York and of Massachusetts. The United States had no jurisdiction over her for the purpose we are considering. We hold that she was subject to the disposition made by the laws of Massachusetts, and that for the purpose and to the extent that title passed to the assignees, the vessel remained a portion of the territory of that State.

JUDGMENT REVERSED, and the case remanded FOR FURTHER PROCEEDINGS.

Mr. Justice CLIFFORD, concurring in the judgment.

Unable to assent to the opinion of the court just delivered, I will proceed to state the reasons which induce me to concur in a reversal of the judgment brought here for re-examination.

Ships and vessels of the United States, said Mr. Justice Nelson, are creations of the legislation of Congress. None can be denominated such or be entitled to the benefits and privileges thereof except those registered or enrolled by virtue of the act for registering and clearing vessels and regulating the coasting trade, or those which are registered or enrolled in pursuance of the act for the registering and recording ships and vessels, or such as are duly qualified for carrying on the coasting trade and fisheries; and the provision is that they must be wholly owned by a citizen or citizens of the United States, and that they shall not continue to enjoy such benefits and privileges any longer than they shall be so owned, and be commanded by a citizen or citizens of the United States.* Nor can any ship or vessel be registered or enrolled unless built and owned, as therein required, and thence continuing to belong to a citizen or citizens of the United States, or ships or vessels captured from the enemy, in war, by a citizen and lawfully condemned as prize or adjudged to be forfeited for a breach of the laws of the United States, and being wholly owned by a citizen

* 1 Stat. at Large, 55; Ib. 288.

or citizens thereof. Beyond all doubt these acts of Congress declare the true character of registered and enrolled ships and vessels, and all ships and vessels not brought within these provisions of the acts of Congress, and not entitled to the benefits and privileges thereto belonging, are of no more value as American vessels, said Mr. Justice Nelson, than the wood and iron out of which they are constructed. Their substantial if not their entire value consists in their right to *the character of national vessels*, and to have the protection of the national flag floating at their masthead.*

Governed by these views, this court held, in the case first cited, that Congress having created, as it were, this species of property and conferred upon it its chief value, under the power given in the Constitution to regulate commerce, that no serious doubt could be entertained but that the same power may be extended to the security and protection of the rights and titles of all persons dealing therein. Such ships and vessels are ships and vessels of the United States and not of the several States in any international sense, and there are no authorities, whether judicial or such as treat of the law of nations, which support any different view, as the word state when used in the treatises upon the law of nations means *the nation* and not any subdivision of it, as is sometimes supposed.

American ships offending against our law may be seized by the executive authority upon the high seas, but a seizure of ships or vessels of one nation cannot be made within the jurisdiction of another for the infringement of its own revenue or navigation laws, as the act of seizure is a violation of the territorial authority of the nation within whose jurisdiction the seizure is made.†

By the record it appears that the plaintiff, who is the present defendant, is the sheriff of the county where the

* White's Bank *v.* Smith, 7 Wallace, 655; Brig Martha Washington, 25 Law Reporter, 22.

† The Flora, 11 Wheaton, 42; The Apollon, 9 Id. 371; 4 Opinions of the Attorney-General, 285.

suit was instituted, and that the first five defendants are the assignees in bankruptcy, either of William L. Gibbs and William Jenny, or of Edmund Allen, all of Fairhaven, county of Bristol, and State of Massachusetts, having been duly appointed as such by the court of insolvency for that county, and that the other two defendants are their sureties in a bond for the undivided half of the ship Arctic, which they gave to release the ship from an attachment served by the plaintiff in the suit before the court. Gibbs & Jenny owned three-eighths of the ship, and Allen owned one-eighth of the same, and it also appears that the two defendants first named, on the seventh of February, 1861, petitioned the court of insolvency of the county, representing that they owed debts which they were unable to pay in full, and prayed that a warrant might be issued for taking possession of their joint and separate estate, and that such further proceedings might be had as the law in such cases prescribes; and it further appears that such a warrant was issued on the same day, and that on the twentieth of the same month the messenger made return that he had taken possession of all the estate of the insolvent debtors, except such as is exempt by law from attachment, and of all deeds, books of account, *and papers* which had come to his knowledge, and that he had given the required notice. Three of the defendants were duly appointed assignees of the estate of the insolvent debtors, and on the twelfth of the same month the judge of the court, by an instrument in due form, conveyed and assigned to the said assignees all the individual and partnership estate, real and personal, of the said insolvent debtors, including all the property of which they were possessed, or in which they were interested, except such as was exempted from attachment, and all their deeds, books of account, and papers, which of course included the title-papers to the ship. On the fourteenth of the same month, Allen also presented a petition to the same court, of like import, and which contained a similar prayer, and seven days later the court issued the warrant, and on the twenty-fifth of the same month the messenger made his return to the same effect as that made

Restatement of the case by Clifford, J.

to the other warrant. All these proceedings appear to be correct, and the judge of the court having appointed as assignees the person first named in the other warrant and the other two persons named as principals in the bond given for value, on the sixth of March in the same year conveyed and assigned to them all the real and personal estate of the insolvent debtor by an instrument in the same form as in the other case, and which contains the same description of the property conveyed and assigned. Throughout these proceedings the ship was in the Pacific Ocean, or on her homeward voyage to the port of New York, where she arrived in safety on the thirtieth of April, laden with a cargo of guano. Debts were owed by the insolvent debtors to parties in New York, and on the twenty-fourth of April, before the vessel arrived at her wharf, Edward M. Robinson commenced a suit against the three insolvent debtors to recover a sum exceeding six thousand dollars, and a judge of the court, upon his application, issued a process of attachment, directed to the sheriff, commanding him to attach all the property of the defendants in that action, or so much thereof as would be sufficient to satisfy the demand in the action; and it appears that on the thirtieth of the same month he did, by virtue of that process, attach one undivided half part of the said ship as the property of the defendants named as such in the process. Seasonable application was accordingly made to the judge by the said five assignees, claiming to be the owners of the said one undivided half of the ship, praying that she might be valued as provided by the law of the State. Hearing was had and the judge granted the application, and the appraisers appointed having valued the said undivided half of the ship, the five assignees with the other two defendants in this action gave the bond which is the foundation of the action in which the judgment before the court was rendered. Reference need only be made to a single allegation in the declaration, which is that the said claimants were not, nor was either of them, at the time the attachment was made, the owners or owner of the said one undivided half of the ship,

as that is sufficient to show the nature of the controversy. Service was made, and the defendants appeared and alleged in their answer that the five assignees were the absolute owners of the same at that time, and that they continued to be such until the vessel was released in the manner stated in the declaration. Evidence was introduced by both parties, and the court directed a verdict for the plaintiff, subject to the opinion of the court at general term; and the cause came to hearing at general term, when the plaintiff moved that judgment be entered on the verdict, but the court denied the motion and dismissed the complaint. Pursuant to the regular practice the court, in general term, prepared and entered in the record their conclusions of law, and a statement of the facts on which those conclusions arose. They determined as matter of law that the assignees named as defendants were, at the time the attachment was made, the owners of the property attached, and that they were entitled to claim and take the same from the plaintiff as the attaching officer. Their conclusions, it appears, were based chiefly upon the facts set forth in the agreed statement, which need not be further referred to, as the facts which it contains have already been sufficiently reproduced. They also find to the effect that one of the assignees, in behalf of all, left the place of his residence on the second of May, and arrived in New York on the following day, for the purpose of taking possession of the ship, but was unable to do so, as he found she was in the possession of the sheriff, it appearing that the plaintiff in the attachment suit, having received early information that the ship was coming to that port, took measures to have the attachment process served even before she came to her wharf. Appeal was taken by the plaintiff in this suit to the Court of Appeals, where the judgment rendered in general term was reversed and judgment rendered for the plaintiff upon the verdict found by the jury in the court of original jurisdiction.

Two principal questions are presented for decision: (1) Whether the property in the ship, testing the question by

the laws of the State where the insolvency proceedings took place, passed to the assignees by virtue of the assignments executed by the court having jurisdiction of the subject-matter; or (2) Whether the attaching creditor is entitled to hold it by virtue of his attachment made long subsequent to the execution and delivery of those instruments.

Property may be attached on mesne process in that State, and if it be true that the property in the ship, testing the question by the laws of that State, did not pass to the assignees of the insolvent debtors by virtue of the instruments of assignment, further examination of the case is unnecessary, as it must plainly follow that there is no error in the record, and that the judgment should be affirmed.

"Full faith and credit," the Constitution ordains, "shall be given in each State . . . to the judicial proceedings of every other State; and that Congress may, by general laws, prescribe the manner in which . . . such proceedings shall be proved, and the effect thereof." Congress accordingly enacted that "judicial proceedings . . . shall have such faith and credit given to them in every court within the United States as they have, by law or usage, in the courts from whence" they shall be taken.*

Discussion of those provisions is unnecessary at this time, as their true intent and meaning have been fully explained by the decisions of this court. Congress, say the court in *Mills* v. *Duryee*,† have declared the effect by declaring what faith and credit shall be given to the proceeding, so that it only remains, in every case, to inquire what is the effect of a judgment in the State where it is rendered. If a judgment is conclusive in the State where it was pronounced, it is equally conclusive everywhere in the courts of the United States.‡

Such an assignment, as a general rule, passes the whole of the property of the insolvent debtor, except what is exempted from attachment; or, in other words, the rights of

* 1 Stat. at Large, 122.

† 7 Cranch, 484.

‡ Christmas *v.* Russell, 5 Wallace, 302; Bissell *v.* Briggs, 9 Massachusetts, 462; 2 Story on the Constitution, 3d ed. 1313.

the assignee are as comprehensive as that of an attaching creditor in jurisdictions where the creditor may attach, if need be, the whole property of the debtor, except what is exempted by statute, to respond to the judgment, giving the assignee, like a creditor, the power to reach the property of the debtor, in cases of fraud, even greater than the debtor possessed before the decree of insolvency was passed.* Assignees in insolvency under the comprehensive rule by which the assignee is vested with all the rights of property belonging to the bankrupt, acquire the same right as creditors to avoid any transactions of the insolvent debtor which were intended to enable a third party to hold his property in trust for his own benefit. In reference to such a case it has been well said that there is a broad distinction between a bill by a bankrupt, the author of the fraud, and one by the assignee, who seeks to recover the property for the benefit of the very interest sought to be defrauded, as public policy in the first case forbids the court to lend its aid to a plan intended to deprive creditors of their just rights, but to grant relief in the second case, is to act in accordance with the rights of creditors for the purpose of defeating the fraudulent design.† In cases unaffected with fraud the assignee stands in the situation of the insolvent debtor, and succeeds to all his property and rights of property, whether legal or equitable, and the rule is supported by the highest authority, that the assignment passes all his property, whether mentioned or not in the schedule to the assignee; and it was held, in *Gray* v. *Bennett*,‡ that any one who affirms that a particular thing does not pass by force of the statute must bring himself within its exceptions or show conclusively *aliunde* that it was the design of the makers of the law that the thing specified should not pass to the assignee.§

Where the rule of the State courts is that all the property

* Hill *v.* Smith, 12 Meeson & Welsby, 618; Russell *v.* Bell, 10 Id. 352.

† Carr *v.* Hilton, 1 Curtis, 233; Bingham *v.* Jordan, 1 Allen, 374.

‡ 3 Metcalf, 525.

§ Fiske *v.* Hunt, 2 Story, 584; Cooper *v.* Henderson, 6 Binney, 189; Robson on Bankruptcy, 336.

of the insolvent passes to the assignee, this court has decided, the opinion having been given by the late Chief Justice Taney, that any such imperfection in the schedule cannot have any influence, as this court will adopt the same rule as the State court.*

Had the ship been in the home port it is not denied that the insolvents could have conveyed it for a valuable consideration before the decree in insolvency was passed, nor that personal property under those circumstances, if it had been previously conveyed in fraud of the Bankrupt Act, would have passed to the assignees by virtue of the assignment executed to them by the judge of the court of insolvency. Doubt cannot be entertained upon that subject, and it is equally clear by all the authorities that ships at sea and goods to arrive pass to a purchaser for value, if the purchase is made in good faith, just as effectually as if the ship was moored at her wharf and the goods were deposited in a warehouse. Owners of ships, says Mr. Parsons, ought to be able to sell their ships though at sea and employed in making voyages, and the rule which he lays down is in substance and effect that a *bonâ fide* sale, on consideration, with whatever transfer of papers and of registry can be made, is valid if possession be taken by the purchaser as soon as is practicable by reasonable endeavor, however long it may be before such possession is or can be taken; that such a sale does not merely give an inchoate right to be completed by possession, as the whole property in the ship passes to the purchaser, and the sale operates as a complete transfer thereof, vesting the property in the purchaser, liable only to be divested by his laches in taking possession. Such a purchase, he insists, is valid; and he adds, as a second proposition, that the purchaser is not bound to go or send to a distant port to take possession, but may safely wait the arrival of the vessel in her home port.† Sales of ships at sea and goods to arrive have been upheld by the courts of that State

* Bank *v.* Horn, 17 Howard, 160; Robson on Bankruptcy, 542.

† Parsons on Shipping, 83; Hilliard on Bankruptcy, 107.

from the earliest period of her judicial history, as appears by an unbroken series of decisions commencing early in the present century.* Delivery in such a case being impossible, it is not required, and it is upon that ground that the title of the purchaser is held to be valid unless he is guilty of laches in taking possession of the ship when she returns. His title is not protected upon the ground that the ship is a ship of the State, but solely upon the ground that a delivery being impossible it is not required. When a ship is abroad, says Abbott, in his valuable work on shipping,† a perfect transfer of the ship may, at the common law, be made by assignment of the bill of sale, and delivery of that and the other documents relating to the ship, just as the delivery of the key of a warehouse to the buyer of goods contained therein is held to change the property of the goods, the delivery in such a case being not merely a symbol, but the mode of enabling the buyer to take actual possession as soon as circumstances will permit. Exactly the same rule is adopted by Mr. Chitty in his work on contracts,‡ and he refers to several American decisions for its support. Symbolical delivery, says Chancellor Kent,§ will in many cases be sufficient and equivalent, in its legal effect, to actual delivery; and he puts the case of the sale of a ship and goods at sea as examples where the delivery must be symbolical by the delivery of the documentary proofs of the title. Superadded to the preceding authorities is another which, it would seem, ought to be regarded as decisive, as it is the unanimous opinion of this court, which was delivered by the late Chief Justice Taney.‖ A ship at sea, said he, may

* Bank *v.* Stacey, 4 Massachusetts, 661; Bank *v.* Stubbs, 6 Id. 422; Putnam *v.* Dutch, 8 Id. 287; Tucker *v.* Buffington, 15 Id. 477; Badlam *v.* Tucker, 1 Pickering, 389; Gardner *v.* Howland, 2 Id. 599; Joy *v.* Sears, 9 Id. 4; Pratt *v.* Parkman, 24 Id. 42; Turner *v.* Coolidge, 2 Metcalf, 350; Winsor *v.* McLellan, 2 Story, 492; Brinley *v.* Spring, 7 Greenleaf, 241; Wheeler *v.* Sumner, 4 Mason, 183.

† Seventh edition, 31.

‡ Tenth edition, 421.

§ 2 Commentaries (11th ed.), 501; Story on Sales, § 312; Benjamin on Sales, 516.

‖ Gibson *v.* Stevens, 8 Howard, 399.

be transferred to a purchaser by the delivery of a bill of sale. So also as to the cargo, by the indorsement and delivery of the bill of lading. It is hardly necessary, said that great magistrate, to refer to adjudged cases to prove a doctrine so familiar in the courts, but he did refer to twelve in number, every one of which supports the proposition. Nor was the question a new one to the court at that time, as the point had been ruled by the unanimous concurrence of the court more than twenty years before that decision, in a case where the opinion was delivered by Mr. Justice Story.* He said that cases arise, even of an absolute sale of personal property, where the want of possession is not presumptive of fraud, if possession cannot, from the circumstances of the property, be within the power of the parties; and he puts as a familiar example of the doctrine the sale of a ship or goods at sea, where, as the learned judge said, possession is dispensed with *upon the plain ground of its impossibility*, and he adds that it is sufficient if the vendee takes possession of the property within a reasonable time after its return home.

Further argument to show that the one undivided half of the ship, which belonged to the insolvents, passed to the assignees by the laws of the State, is certainly unnecessary, as it is believed no different rule prevails anywhere, either in England or in the United States.

By the insolvent law of the State it is provided that the judge shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the debtor, except such as is by law exempt from attachment, with all his deeds, books, and papers relating thereto; and it cannot be doubted that the instrument required to be executed by the judge pursuant to that section was intended to have the effect to convey and assign to the assignee all the estate, real and personal, of every name and nature, and that proposition is confirmed by the fact that the seventieth section makes it the duty of the debtor, at the request of the assignee, to do what may be necessary and useful to

* Conard *v.* Insurance Co., 1 Peters, 449.

enable the assignee to demand, recover, and receive all the estate and effects so assigned, especially any part thereof which is without the State.*

Tested by these considerations, it is quite clear that the effect of the assignment, when duly executed by the court of insolvency, as there regarded, was to vest in the assignees the one undivided half of the ship which previously belonged to the insolvent debtors, and the settled law of this court is that in such a case every other court in the United States, whether State or Federal, in which such a proceeding comes under revision, is bound to give it the same effect it would receive in the courts of that State.†

Attempt is made to show that the rule laid down in *Green* v. *Van Buskirk*, is not applicable to the case before the court, as the ship was upon the high seas, and the suggestion is that the insolvent laws of a State do not have any extra-territorial operation, but the Constitution is operative in the State where the plaintiff resides, as well as in the State which is the domicile of the defendants; and the act of Congress passed in pursuance of the Constitution, provides that such judicial proceedings 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 shall be taken.

Evidently the Court of Appeals did not give the proceedings in question the same effect as they have by law and usage in the courts of the State where the statute assignment was executed by the judge of the court of insolvency, and for that reason the judgment should be reversed.

Mr. Justice BRADLEY, with whom concurred Mr. Justice FIELD, dissenting.

I dissent from the judgment of the court in this case. According to my view, whilst the disposition of his movable property by the owner is respected by the laws of all States

* General Statutes, 586, 590.

† Green *v.* Van Buskirk, 7 Wallace, 145; S. C., 5 Id. 310.

everywhere, the laws of any particular State and transfers by operation of law, have no extra-territorial force which other States will concede, except by comity. This comity is never exercised to the prejudice of the citizens of the State which accords it. In the case now decided the force and effect of the judicial assignment would have been regarded as conclusive in Massachusetts had the ship, the subject of it, returned there and become subjected to its local jurisdiction. But whether conclusive in other countries, to which the ship might have gone, would have depended entirely on the exercise of comity by the governments and courts of those countries; and the reason would be that the property was on the high seas, and not within the jurisdiction of Massachusetts, when the effect of its local laws were called into exercise by the judicial assignment. I do not deny that if the property had been within Massachusetts jurisdiction when the assignment passed, the property would have been *ipso facto* transferred to the assignee by the laws of Massachusetts *proprio vigore*, and being actually transferred and vested, would have been respected the world over. But that was not this case.

I think the case comes clearly within the operation of the three fundamental rules or axioms laid down by Huber in his Praelectiones, which constitute the groundwork of Justice Story's Treatise on the Conflict of Laws. "The first is, that the laws of every empire have force only within the limits of its own government, and bind all who are subjects thereof, but not beyond those limits. The second is, that all persons who are found within the limits of a government, whether their residence is permanent or temporary, are to be deemed subjects thereof. The third is, that the rulers of every empire, from comity, admit that the laws of every people, in force within its own limits, ought to have the same force everywhere, so far as they do not prejudice the powers or rights of other governments or of their citizens."

And whilst in many particulars the vessels, especially the public vessels, of a country will be regarded as carrying with them the jurisdiction of that country, I cannot concede that

this fiction (for it is only a *fictio juris*) can be extended to such a case as this. When it does apply it applies wherever the ship may be, whether on the high seas or within the limits of a foreign country. It would apply to a ship in New York harbor as well as to a ship on the high seas. But whether that rule can be applied at all, as between the different States of the Union, to vessels belonging to citizens of the United States, which are properly vessels of the United States, and not of particular States, need not be decided in this case.

ST. JOSEPH TOWNSHIP *v.* ROGERS.

A statute of Illinois, by a twelfth section, authorized any township along the route of a railroad named, to subscribe to its stock;

But enacted by a thirteenth, that no subscription should be made until notice had been given to the legal voters, to meet for the purpose of voting on the matter. "*Provided*" that where elections had been already held "and a *majority of the legal voters of any township*" were in favor of a subscription, no further election should be necessary to be held.

A fourteenth section enacted that "if it shall appear that *a majority of all the legal voters of such townships voting at such election*, shall have voted 'For Subscription,' it shall be the duty of the supervisor to subscribe to the capital stock, &c., the amount so voted to be subscribed, and to receive from the company the proper certificates therefor."

A fifteenth section enacted that it should be "the duty of the clerk of any township in which a vote should be given in favor of subscription, within ten days thereafter, to transmit to the county clerk of the respective counties a transcript of the vote given and the amount so subscribed, and the rate of interest to be paid. *Provided*, that where elections may *have been held as aforesaid*, it shall be the duty of the town clerks to file with the county clerks, &c., within ten days after the issuing of said bonds certificates of the votes of their towns, the amount of stock voted to be subscribed, the amount of bonds issued, and the rate of interest payable thereon."

Of a minority of the legal voters of St. Joseph Township voting before the act was passed, at an election called and held, a majority voted in favor of subscription, and the supervisor and clerk professing to act for the township, issued bonds to the amount voted; but no record of any kind was ever kept of the election, nor was any record or transcript ever transmitted to the county clerk.

After this an act was passed reciting that "township officers along the line

Statement of the case.

of the road had failed to keep a full and perfect record of elections called and held, and township clerks had failed to file with the county clerk certificates as required" by the above-quoted act, and enacting that where *such* informalities and neglect may have occurred, and bonds have been issued, to aid in the construction of said railroad, that no *such* neglect or omission on the part of township officers shall in any way invalidate or impair the collection of said bonds:

On this case in favor of a *bonâ fide* holder for value of the bonds, *held*—

1. That even in the case of an election held *prior* to the passage of the first-mentioned act, a majority of the legal voters of the township voting at an election, was sufficient to authorize a subscription, although all the voters voting on both sides were together but a minority of all the legal voters of the township.
2. That if this were not so, yet the second act "entirely obviated *all* the mistakes and irregularities in the prior proceedings."
3. That, in addition, the fourteenth section of the original act made it the duty of the supervisor who executed the bonds to determine the question whether an election was held, and whether a majority of the votes cast were in favor of the subscription, and inasmuch as he passed upon that question and subscribed for the stock and subsequently executed and delivered the bonds, it was clearly too late to question their validity where they were in the hands of an innocent holder.

Error to the Circuit Court for the Southern District of Illinois.

Rogers brought assumpsit in the court below against St. Joseph Township, Champagne County, Illinois, to recover interest on certain railroad bonds alleged to have been issued by said township. The township set up that the bonds were not properly issued, and void.

The case was thus:

On the 28th of February, 1867, the legislature of Illinois passed "an act to amend the articles of association of the Danville, Urbana, Bloomington, and Pekin Railroad Company, and to extend the powers of and confer a charter upon the same." In its material parts the act read thus:

"Section 12. To further aid in the construction of said road by said company, any incorporated town or townships, along the route of said road, may subscribe to the capital stock of said company in any sum not exceeding $250,000.

"Section 13. No such subscription shall be made until the question has been submitted to the legal voters of such incorpo-

ration, town or township in which the subscription is proposed to be made. And the clerk of each of said towns or townships is hereby required, upon the presentation of a petition signed by at least ten citizens who are legal voters, to post up notices, &c., notifying the legal voters of such town or township to meet at the usual place of holding elections in such town or township, &c., for the purpose of voting for or against such subscription, *Provided, that where elections may have already been held, and a majority of the legal voters of any township or incorporated town were in favor of a subscription to said railroad, then, and in that case, no other election need be had; and the amount so voted for shall be subscribed as in this act provided; and such elections are hereby declared to be legal and valid, as though this act had been in force at the time thereof; and all the provisions hereof had been complied with.*

"SECTION 14. If it shall appear that *a majority of all the legal voters of such towns or townships, voting at such election*, have voted 'For Subscription,' it shall be the duty of the president of the board of trustees, or other chief executive officer, if in incorporated towns, and of the supervisor in townships, to subscribe to the capital stock of said railroad company, in the name of such town or township, the amount so voted to be subscribed, and to receive from said company the proper certificates therefor. He shall also execute to said company, in the name of such town or townships, bonds bearing interest at ten per cent. per annum, which bonds shall run for a term of not more than twenty years, and the interest on the same shall be made payable annually; and which bonds shall be signed by such president, executive officer, or supervisor, and be attested by the clerk of the town or township in whose name the bonds are issued, and it shall be his duty to make out a record of the issuing of said bonds. Said bonds shall be delivered to the president or secretary of said company, for the use of said company. And when any city or county shall hereafter vote to make subscription, as aforesaid, the chairman of the board of supervisors of such county and the mayor of such city shall be required to subscribe to the capital stock of said company the amount so voted.

"SECTION 15. It shall be the duty of the clerk of any such town or township in which a vote shall be given in favor of subscription, within ten days thereafter, to transmit to the county

clerk of their respective counties a transcript or statement of the vote given, and the amount so voted to be subscribed, and the rate of interest to be paid, *Provided* that where elections may *have been held as aforesaid*, it shall be the duty of the town clerks to file with the county clerks of their respective counties, within ten days after the issuing of said bonds, certificates of the votes of their towns, the amount of stock voted to be subscribed, the amount of bonds issued, and the rate of interest payable thereon."

On the 25th of February, 1869, the same legislature passed an act entitled "An act to amend articles of association of the Danville, Urbana, Bloomington, and Pekin Railroad Company, and to extend the powers of and confer a charter upon the same." It was thus:

"Whereas, certain township officers along the line and through which the Danville, Urbana, Bloomington, and Pekin Railroad passes, have failed to *keep a full and perfect record of elections called and held*, and township clerks have *failed to file with the county clerk, certificates, as required by section fifteen of the amended articles of association of said railroad*, therefore,

"Section 1. *Be it enacted*, where *such* informalities and neglect may have occurred, and bonds have been issued to aid in the construction of said railroad, that no *such* neglect or omission on the part of township officers, shall in any way invalidate or impair the collection of said bonds, both principal and interest, as they may respectively fall due," &c.

So far as to the legislation in the case.

On the trial the plaintiff gave in evidence different bonds, dated October 1st, 1867, issued by the *supervisor and clerk* of the township, purporting that the township acknowledged itself to owe so much money, which it promised to pay the bearer, with interest, at ten per centum per annum, yearly on the 1st of October.

The bond recited that it was issued by virtue of a law of the State of Illinois, entitled:

"'An act to amend the articles of association of the Danville, Urbana, Bloomington, and Pekin Railroad Company, and to extend the powers of and confer a charter upon the same,' ap-

proved February 28th, 1867, and in accordance with the vote of the electors of said township at the special election held August *fourteenth*, 1866, in accordance with said act."

On the other hand evidence was given by the township, tending to show that the election held for the purpose of deciding whether the township would subscribe stock, was held on the *fourth* of August, 1866, and, of course, before the passage of the act of February 28th, 1867, incorporating the company, and that at the time of the election there were three hundred legal voters in St. Joseph Township, of whom only seventy-five persons voted at the election; a majority of the seventy-five only voting in favor of the issuing of the bonds; that no poll-book or record of any kind was made or kept of the election, and that no record or transcript of the proceedings at it was ever transmitted to the county clerk.

The plaintiff in reply relied on the recitals in his bonds, on the fourteenth section of the act, and on the amendatory or curative act.

The question of course was, whether under the two acts above quoted, and the facts of the case, the bonds were valid.

The court gave these instructions:

"1st. The election held in August, 1866, as declared in the evidence, was validated by the act of February 28th, 1867, so as to authorize the defendant to subscribe for stock in the Danville, Urbana, Bloomington, and Pekin Railroad, and to issue the bonds in question; and when the stock was subscribed and the bonds issued, the bonds are binding on the defendant in the hands of a *bonâ fide* holder.

"2d. The recitals in the bond estop the defendant from denying the fact of a valid election as against a *bonâ fide* holder of the bonds or coupons attached thereto."

Verdict and judgment having gone accordingly, the township brought the case here.

Messrs. William Lawrence and C. B. Smith, for the plaintiff in error:

Negotiable bonds issued by a municipal corporation,

without any authority of law, are void even in the hands of an innocent purchaser.* This all will admit.

2. A statute which authorizes township officers to issue bonds only when an election "may have already been held, and a *majority of the legal voters of the township* were in favor" thereof, does not authorize the issue of bonds when *less* than a "majority of the legal voters" were in favor thereof, although there were "a majority of all the legal voters *voting at such election.*"

If bonds are issued in such case they are issued without authority of law, and are void even in the hands of a *bonâ fide* holder.

The act of February 28th, 1867, confers power on incorporated townships in two classes of cases.

In one, the power is given to be exercised *after* the question "has been submitted to the legal voters of the township," and when "it shall appear that a majority of all the legal voters of such township, *voting at such election*," have voted therefor, &c.

In the other class—the class provided for by the *proviso*—no future vote is to be had, but townships are authorized to issue bonds only in cases "where elections may *have already been held* (without authority of law before the statute was passed), and (only in those cases when) *a majority of the legal voters of any township were in favor of* a subscription." This class is *sui generis*.

The bonds now in controversy recite that they were issued under this statute, "and in accordance with the vote of the electors of said township, at the special election, held August 14th, 1866, in accordance with said act." This, of course, was *prior to the date of the act*, and the bonds now in controversy belong to the second class.

The charge held that a *majority of those voting*, though those voting were a minority of the legal voters of the township, was sufficient if *they* voted in favor of bonds to authorize their issue.

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* Marsh *v.* Fulton County, 10 Wallace, 676.

Argument for the township.

This we deny, and insist that *a majority of all the legal voters of the township* was requisite, because:

1. The *language* of the *proviso* to section fourteen, of the act of February 28th, 1867, upon every principle of interpretation clearly so requires. There is no room, therefore, for construction.

2. There is a *manifest reason* why the legislature would, in this class of cases, require a majority of all the voters, since the vote, when had, was unauthorized, and voters had no motive to attend and indicate their wishes.

3. The language employed as to elections *to be held* after the statute was passed, when contrasted with that as to *past elections*, clearly indicates that the legislature intended in one class, as the statute says, to require only "a majority of all the legal voters voting at such election," while in the other, as the statute declares, "a majority of (all) the legal voters of the township" is requisite.

Nor can the opening language of the fourteenth section apply to the case provided for by the proviso to the thirteenth, and cure an omission to comply with *its* directions in the case for which *it* provides. It refers, of course, to that part of the section prior to the proviso. Otherwise we have two contradictory enactments for the same case.

4. Where a legislative act confers authority on a municipal corporation to issue negotiable bonds only in cases where a *past fact exists*, a false recital of the existence of such fact in bonds issued neither estops the corporation from denying it, nor raises a presumption of its existence, even in favor of an innocent holder of such bonds, nor excuses him from the duty of ascertaining if such fact exists.

The false recital of *such* fact cannot make applicable and operative a legislative act otherwise inapplicable and inoperative. The charge to the jury as made in the court below goes much further than to assume that if a majority of those voting at an election voted in favor of bonds, then bonds issued would be valid in the hands of an innocent holder. The charge was given on evidence tending to show that no vote was taken on the question of issuing the bonds now in

controversy, and certainly none on the 14th of August, 1866, the date recited in the bonds. Yet the charge was that "The recitals in the bonds estop the defendant from denying the fact of a valid election as against a *bonâ fide* holder of the bonds or coupons attached thereto." The effect of this is that if a *minority* vote of all the electors of the township, or if *no vote at all* was had, bonds issued reciting a vote are valid in the hands of a *bonâ fide* holder. But this, as has been shown, cannot be so, if the want of a vote, or the want of the requisite majority vote, goes to the question of power to issue the bonds, as it does in this case.

There is not much difficulty in distinguishing between negotiable securities executed *ultra vires*, and those issued within the power of municipal corporations.

The cases on this subject fall within two classes:

One class is where a power is given to a corporation *in præsenti*, but the power is to be exercised "on certain conditions," as it is said in *Knox County* v. *Aspinwall*;* or as it is elsewhere expressed,† where there are "qualifications coupled with the grant of power." There is a large class of such cases, but they relate to the question of the *regularity* of the exercise of power, and of votes taken, &c. Here it has been held by some courts, and denied by others, that when bonds are issued reciting the proper vote, or even without the recital, but when a vote has in fact been had, that *bonâ fide* purchasers of bonds have a right to presume that the corporation has *regularly* complied with "the conditions," because this is a fact within their peculiar knowledge, and on grounds of justice the corporation is estopped from denying it, and upon the principle that they may not take advantage of their own wrong. But in this class "the conditions" to be performed are all *subsequent* to the grant of power, mere qualifications coupled with the grant, and none of them hold that where the power is by law made dependent on a vote of electors, and no vote, or only a minority vote, is had, that a recital in the bonds can supply the want of power to issue them.

* 21 Howard, 546.

† Gelpcke *v.* Dubuque, 1 Wallace, 203.

But there is another class of cases where there is a total absence of any power to issue bonds by a municipal corporation. One of these is where a power is given only *when a past fact happens to exist*, as the foundation of the power. If there be no foundation on which the power can rest, it cannot exist. Here there are no "certain conditions" which accompany the power to be performed. Here there are no "qualifications coupled *with* the grant of power," for no power has ever been granted, and none ever existed under "any circumstances,"* because as the power is only to be given in case a certain past fact exist, the non-existence of the fact carries with it the non-existence of the power.

Now, in this class of cases, the fact on which the power depends is not "peculiarly within the knowledge of the corporation," and there can be no *estoppel*, and in such case there is no presumption that officers have *regularly* performed any duty, because it is not a question of official duty *to be performed*, but a question of the existence of a past fact, which, in the case now under consideration, was a voluntary, unofficial, unauthorized act. Such facts can be as readily ascertained by bondholders as by corporate authorities. There is no question in such case either as to the directory character of the provisions of the statute, for the essential fact on which the power depends for its existence is past, not *in futuro*, and is vital to the power itself.

The case now under consideration falls within this class.

In *Gould* v. *Town of Sterling*,† it was held that where a town had issued negotiable bonds, which could only be issued when the written assent of two-thirds of the resident persons taxed in the town had been obtained and filed in the county clerk's office, the bonds issued without such assent were invalid; and that the purchaser of them could not rely upon the recital in the bonds that such assent had been obtained: and Cooley in his Constitutional Limitations, in commenting on this and other cases, says:

"The doctrine in the case of *Gould* v. *Town of Sterling* appears

* 1 Wallace, 175.

† 23 New York, 458.

to us to be sound, and that wherever a want of power exists a purchaser of the securities is chargeable with notice of it, *if the defect is disclosed by the corporate records*, or as in that case by other records where the power is required to be shown."

5. A statute which attempts to create a municipal debt where none existed before, as by attempting to validate void bonds, is unconstitutional and void.

This principle, and the application of it to this case, are perhaps sufficiently shown in what has already been said.

The curative act of February 25th, 1869, in fact cannot be construed as applicable to the bonds now in controversy. Its preamble relates more especially to the omission to "keep a full and perfect record of electors," and "to file with the county clerk certificates as required by section fifteen of" the act of February 28th, 1867. It enacts that if *such* informality and neglect may have occurred they shall not invalidate bonds. But if it can apply to the *proviso* of section fifteen of the act of 1867, and the duty of town clerks to file certificates of votes had prior to the act, so far as it attempts to give validity to what was invalid before, it is an attempt by legislative act to create a debt.*

6. Bonds issued by municipal authorities reciting a vote on the 14th of August, cannot be sustained on a vote taken on the 4th of August, when the law under which they are issued requires a vote of electors to authorize their issue.

There is evidence tending to show that a vote was had August 4th, but no evidence tending to show there was any vote August 14th. There was no vote August 14th. Now if the vote taken August 4th authorized any bonds to be issued, it is fair to presume they were issued. On that hypothesis the power existed, and could be used to issue bonds reciting a vote of that date. Nothing in the record shows bonds were not so issued.

7. The fifth section of the ninth article of the constitution of Illinois, of 1848, provides that:

* Marshall *v.* Silliman, Supreme Court of Illinois, January, 1872; see McDaniel *v.* Correll, 19 Illinois, 228; 11 Id. 54; 14 Id. 223; 15 Id. 125-481; 35 Id. 363; 37 Id. 88; 48 Id. 212; Cooley's Constitutional Limitations, 382.

"The *corporate authorities* of counties, townships, school districts, cities, towns, and villages, may be vested with power to assess and collect taxes *for corporate purposes;* such tax to be uniform in respect to persons and property within the jurisdiction of the body imposing the same."

In *Howard* v. *St. Clair and M. L. and D. Company*, it was held that this section

"Was to be construed as a limitation upon the power of the legislature to delegate the right of corporate or local taxation to any other than the *corporate or local authorities*, and that by the phrase 'corporate authorities' must be understood *those municipal officers who are either directly elected* by the people to be taxed, or appointed in some mode to which they have given their assent."*

By the township organization law, in force in St. Joseph Township, the "corporate authorities," or municipal officers "elected by the people," were, when the vote was had and bonds issued in this case, "one supervisor, one town clerk, one assessor, one collector," &c.†

The township cannot be made liable on bonds issued *only* by the supervisor and clerk, in favor of a railroad company in payment of a subscription by such officers, made in the name of the township, to the capital stock of such company, without the consent of a majority of the qualified voters of such township, given in favor of such subscription and issue of bonds, after the enactment of a law authorizing them.

8. It is error for the judge in charging a jury in the trial of an issue of fact, to assume the existence of a disputed material fact in issue.

The record shows that one of the disputed questions of fact on the trial in the Circuit Court was whether an election was held in August, 1866, yet the judge charged the jury that "the election held in August, 1866, as detailed in the evidence, was validated by the act of February 28th, 1867," &c. This charge *assumes* a controverted fact, and instructs

* People ex rel. *v.* Mayor, &c., 51 Illinois, 30.

† Act of February 20th, 1861, Gross's Laws, 744.

the jury accordingly. The objection now taken, though technical, is good, and one on which courts have reversed judgments.*

Mr. H. C. Burchard, contra:

The point mainly relied on by the counsel of the plaintiff in error is, that the majority of all the legal voters of the township did not vote in favor of the election. But independently of the impossibility of the supervisors knowing otherwise than by the election who all the legal voters were, it is to be observed,

I. That the counsel, in point of fact, would completely change the order of the provision as found in the act. They transfer the proviso of the thirteenth section from that section where it occurs, and apply it to the fourteenth section following, as though it read,

"The supervisor shall subscribe if it shall appear that a majority of the legal voters voting at such election have voted for subscription, *provided* that where elections may have already been held and a majority of the legal voters of any township were in favor of a subscription to said railroad, then and in that case no other election need be had."

By what authority do counsel thus treat an act of the legislature?

II. That the phrase "a majority of the legal voters of any township," as used in the thirteenth section, is no broader than the phrase "a majority of all the legal voters of such townships voting at such election," used in section fourteen, but the latter expression only states more fully what the former implies. This appears in various ways.

1st. It is apparent from the provisions of section fifteen of the act which required the town clerks to file with the county clerks "certificates of the votes of their towns." If a majority of all the voters residing in the townships were necessary, whether voting or not, the certificate of votes

* Tracy *v.* Swartwout, 10 Peters, 80; United States *v.* Laub, 12 Id. 1; Games *v.* Stiles, 14 Id. 322.

cast at the election would be valueless without some provision for ascertaining the number of actual legal voters in the township.

2d. Phraseology, almost identical with that of this statute, occurs in section five, article seven, of the constitution of the State of Illinois, which forbids the removal of a county seat "until the point to which it is proposed to be removed shall be fixed by law, and a *majority of the voters of the county* shall have voted in favor of its removal to such point;" yet the Supreme Court of Illinois, in construing this section and the phrase "voters of the county," held

> "That the voters of the county referred to were *the voters who should vote at the election authorized by it.* We hold, therefore, that a majority of the legal votes cast at this election is sufficient to determine the question of a relocation of the county seat."*

Similar language is used in section six of the same article of the constitution of the State of Illinois, which, in *People* v. *Garner*,† received a similar construction from the Supreme Court of the State. The same construction has been given by the Supreme Court of Tennessee.

"A majority of the voters of the county," says the court in *Louisville and Nashville Railroad* v. *County Court of Davidson County*,‡ "means a majority of those who actually vote."

It equally prevails in Missouri. In *State* v. *Mayor of St. Joseph*,§ an act of the legislature required a proposition to create a city debt to be submitted "to a vote of the qualified voters of said city," and two-thirds of such qualified voters to sanction the same, and an election had been held at which three hundred and thirty-six votes were for and fifty-eight against the proposition; but the mayor declined to sign the bond, because he was in doubt whether the matter was to be determined by two-thirds of all the votes polled at the special election called to vote on the question, or by two-thirds of all the voters resident in the city absolutely, whether voting

* People *v.* Warfield, 20 Illinois, 159.

† 47 Illinois, 246; and see People *v.* Wiant, 48 Id. 263.

‡ 1 Sneed, 637.

§ 37 Missouri, 270.

or not. The court ordered a peremptory mandamus, and in the opinion said:

"We think it was sufficient that two-thirds of all the qualified voters who voted at the special election authorized for the express purpose of determining that question on public notice duly given, voted in favor of the proposition. This was the mode provided by law for ascertaining the sense of the qualified voters of the city upon that question. There would appear to be no other practicable way in which the matter could be determined."

These decisions, and none contrary can be found, overthrow the main defence interposed to the collection of the bonds.

III. The fact as to whether an election had been held, and a majority of the voters were in favor of subscription, was by the fourteenth section to be passed upon and decided by the supervisor.

"If it shall appear," says that section. Appear to whom? Evidently to the officer or officers upon whom the statute imposed the duty of subscribing for the stock and executing the bonds. If it appeared to the supervisor of the township that an election had been held, and a majority of the legal voters were in favor of subscription to the railroad, then he had to act on behalf of the town. Some one had to decide when it had become his duty, and no one else—no other officer—was authorized to determine this for him. The supervisor not being authorized or required to execute the bonds until it should "appear" that a majority had voted for subscription, it was proper that he should find and recite in the bond the fact that must appear to him before he could legally act. Such finding and recital on the bond of his conclusion would conclude the township for which he was authorized to act, as well as himself, as to whether the required majority had voted.

In *Commissioners* v. *Nichols*,* it is said:

"A statute, in providing that county bonds should not be de-

* 14 Ohio (N. S.), 260.

livered by the commissioners until a sufficient sum had been provided by stock subscriptions, or otherwise, to complete a specified railroad, and imposing upon them the duty of delivering the bonds, when said provision has been made, without indicating any person or tribunal to determine that fact, necessarily delegates that power to the commissioners, and, if delivered improvidently, the bonds will not be invalidated."

IV. The act of February 28th, 1867, validated the election and cured any irregularities in holding it.

V. The issue of township bonds could be authorized by the legislature without the vote of the electors of the township.

[This point was largely examined on the constitution and laws of Illinois.]

VI. The plaintiff in error is estopped from attempting to impeach the validity of the bonds, not only by the circumstances under which they were issued, and the action of the officers and citizens of the township, but by the recitals in the bonds.

The second instruction does not assert that the plaintiff in error is estopped from showing that *no* election was held, but from denying the fact of a *valid* election. In the cases where bonds have been held by this or other courts void, an election being required by the statute authorizing their issue, *no* election was held, or the election was as to issuing bonds to *a different corporation from the one to which they were issued*, as in *Marsh* v. *Fulton County*, which was *no election*, or where the power to issue the bonds was denied or prohibited, and, therefore, any election illegal. The instruction presents the proposition that the recitals in the bond protect the *bonâ fide* holder for value, against irregularities or erroneous conclusions of the officers in regard to the election held, which might impeach the bonds in the hands of parties, with notice. Whether the word "valid" intends this qualification or not, the authorities fully sustain the instruction.*

* Knox *v.* Aspinwall, 21 Howard, 545; Moran *v.* Miami County, 2 Black, 722; Mercer County *v.* Hacket, 1 Wallace, 83; Gelpcke *v.* City of Dubuque, Ib. 175; Van Hostrup *v.* Madison City, Ib. 291; Meyer *v.* Muscatine, Ib. 384; Supervisors *v.* Schenck, 5 Id. 772; Mayor *v.* Lord, 9 Id. 414.

Restatement of the case in the opinion.

VII. The objection that the election was held on the 4th, instead of the 14th, as recited in the bond, seems sufficiently answered by referring to the law. It was immaterial on what day the election was held, and it was not necessary to state it in the bond. It is one of the facts which the recital should make conclusive.

Mr. Justice CLIFFORD delivered the opinion of the court.

Bonds, payable to bearer, issued by a municipal corporation to aid in the construction of a railroad, if issued in pursuance of a power conferred by the legislature, are valid commercial instruments; but if issued by such a corporation which possessed no power from the legislature to grant such aid, they are invalid, even in the hands of innocent holders.

Such a power is frequently conferred to be exercised in a special manner, or subject to certain regulations, conditions, or qualifications, but if it appears that the bonds issued show by their recitals that the power was exercised in the manner required by the legislature, and that the bonds were issued in conformity with those regulations and pursuant to those conditions and qualifications, proof that any, or all, of those recitals are incorrect will not constitute a defence to the corporation in a suit on the bonds or coupons, if it appears that it was the sole province of the municipal officers who executed the bonds to decide whether or not there had been an antecedent compliance with the regulation, condition, or qualification which it is alleged was not fulfilled.

On the 28th of February, 1867, the legislature amended the articles of association of the Danville, Urbana, Bloomington and Pekin Railroad Company, and enacted that any incorporated town or township, in counties acting under the township organization law, along the route of said railroad, may subscribe to the capital stock of said company in any sum not exceeding $250,000.* No such subscription, however, it was enacted shall be made until the question has been submitted to the legal voters of such town or township

* 2 Private Laws (1867), 761.

Restatement of the case in the opinion.

in which the subscription is proposed to be made. Regulations are also enacted for taking the sense of the legal voters upon such a proposition, which provide that the clerk of the town or township, upon the presentation to him of a petition stating the amount proposed to be subscribed, signed by at least ten citizens who are legal voters and taxpayers therein, shall post up notices in at least three public places in the municipality, not less than thirty days before the day of holding such election, notifying the legal voters thereof to meet at the usual place of holding elections, or some other convenient place named in the notice, for the purpose of voting for or against such subscription. Prior to the passage of that act, however, an election was held in that township to determine whether the municipality would subscribe $25,000 to the capital stock of that railroad company, and the proofs show that a majority of all the legal voters of the township voting at the election voted for the subscription—sixty-two votes being cast in favor of the subscription and seventeen against the proposition. Pursuant to the vote at that election the supervisor of the township subscribed, in the name of the municipality, $25,000 to the capital stock of that railroad company, and executed, in the name of the township, the bonds held by the plaintiff, bearing interest at ten per cent. per annum, payable in ten years from date, which bonds were signed by the party issuing the same as such supervisor, and were attested by the clerk of the township.

Objection is made to the preliminary proceedings because the election approving the subscription was held before the act was passed giving such authority to such municipalities, but two answers are made to that objection, either of which is decisive:

1. By the act conferring that authority it is provided that where elections may have already been held, and a majority of the legal voters of the township were in favor of a subscription to said railroad, then and in that case no other election need be had, and the amount so voted for shall be

Restatement of the case in the opinion.

subscribed as in the act is provided; and the provision is that such elections are legal and valid as if the act had been in force at the time thereof, and that all the provisions had been fulfilled.*

2. Because the legislature passed a subsequent act declaring such subscriptions legal and obligatory. Some of the township officers, it seems, failed to keep a full and perfect record of elections called and held to authorize such subscriptions, and that the clerks of the townships failed in some instances to file the necessary certificate with the county clerk, as required by the fifteenth section of the prior act. Omissions and defects of the kind becoming known, the legislature, on the 25th of February, 1869, enacted that where such informalities and neglect may have occurred and bonds have been issued, or may hereafter be issued, to aid in the construction of said railroad, that no such neglect or omission shall in any way invalidate or impair the collection of said bonds, principal or interest, as they may respectively fall due, and that all assessments that are now made for the payment of the principal or interest are hereby legalized, and the township collectors and county treasurers are hereby authorized and empowered to enforce the collection and payment of said tax as is now provided by law for the collection of all other taxes.

Bonds to the amount of the subscription were accordingly issued, bearing date October 1st, 1867, signed by the supervisor and countersigned by the clerk, and each bond contains the recital that it is issued under and by virtue of the aforesaid law of the State, entitled an act to amend the articles of association of the said railroad company, and to extend the powers of and confer a charter upon the same, and in accordance with the vote of the electors of said township at the special election held August 14th, 1866, pursuant to said act, and pledges the faith of the township for the payment of the said principal sum and interest as stipulated in the instrument.

* 2 Private Laws (1867), 762.

Evidence was introduced by the defendants showing that there is no record of the supposed election, when it is alleged that the question of the proposed subscription was submitted to the legal voters of the township, and that no such certificate as that required by the act conferring the authority to subscribe for the stock of the said company is on file in the office of the county clerk, but the plaintiff proved that the alleged meeting was notified, called, and held, and that sixty-two votes were given in favor of the subscription and seventeen against it, as announced at the election.

Two instructions were given by the court to the jury, to which the defendants excepted: (1.) That the election held as described in the evidence was validated by the act of the 28th of February, 1867, so as to authorize the defendants to subscribe for the stock of the railroad company and to issue the bonds in question, and that the bonds having been issued for the stock subscribed, are binding on the defendants in the hands of a *bonâ fide* holder. (2.) That the recitals in the bonds estop the defendants from denying the fact of a valid election as against a *bonâ fide* holder of the bonds or coupons thereto annexed.

Under the instructions of the court the jury returned a verdict for the plaintiff, and the court rendered judgment on the verdict.

Repeated decisions of the State courts have established the rule that the legislature has the constitutional right to authorize municipal corporations to subscribe for the stock of a railroad company, and to issue their bonds to aid in the construction of such an intended improvement; that the supervisors of the municipality have the power, in case such a subscription is authorized, to subscribe for the stock of the railroad company, and to call an election to ascertain the will of the legal voters in that behalf.* Such corporations are created by the legislature and they derive all their powers

* Prettyman *v.* Supervisors, 19 Illinois, 406; Robertson *v.* Rockford, 21 Id. 451; Perkins *v.* Lewis, 24 Id. 208; Johnson *v.* Stark, Ib. 85; Keithsburg *v.* Frick, 34 Id. 405; Commissioners *v.* Nichols, 14 Ohio State, 260.

from the source of their creation, and those powers are at all times subject to the control of the legislature. Everywhere the construction and repair of highways within their limits are regarded as among the usual purposes of their creation, and the expenses of accomplishing those objects are among their usual and ordinary burdens. Railways also, as matter of usage founded on experience, are so far considered by the courts as in the nature of improved highways and as indispensable to the public interest and the successful pursuit, even of local business, that the legislature may authorize the towns and counties of a State through which the railway passes, to borrow money, issue their bonds, subscribe for the stock of the company, or purchase the same to aid the railway company in constructing or completing such a public improvement. Legislation of the kind may be prohibited by a State constitution, but it is settled everywhere that such an act is not in contravention of any implied limitation of the power of a State to pass laws to promote the usual purposes of municipal corporations.*

Argument to show that defective subscriptions of the kind may in all cases be ratified where the legislature could have originally conferred the power is certainly unnecessary, as the question is authoritatively settled by the decisions of the Supreme Court of the State, and of this court, in repeated instances.†

Suppose that is so, still it is insisted by the defendants that the election held to ascertain whether the legal voters of the township would authorize the subscription, was irregular and a nullity: (1.) Because a majority of the legal voters of the township did not vote at the meeting notified and held for that purpose. (2.) Because the meeting was notified and held before the act was passed providing for such an election.

* Rogers *v.* Burlington, 3 Wallace, 663; Freeport *v.* Supervisors, 41 Illinois, 495; Butler *v.* Dunham, 27 Id. 474

† Cowgill *v.* Long, 15 Illinois, 203; Keithsburg *v.* Frick, 34 Id. 405; Thomson *v.* Lee County, 3 Wallace, 327; City *v.* Lamson, 9 Id. 477; Watson *v.* Mercer, 8 Peters, 111; Bissell *v.* Jeffersonville, 24 Howard, 295.

Responsive to the first objection, it is insisted by the plaintiff that the legislature in adopting the phrase "a majority of the legal voters of the township," intended to require only a majority of the legal voters of the township voting at the election notified and held to ascertain whether the proposition to subscribe for the stock of the company should be adopted or rejected, and the court is of the opinion that such is the true meaning of the enactment, as the question would necessarily be determined by a count of ballots.*

Tested by these considerations, it is clear that an election was held within the meaning of the act of the legislature, and that a majority of the legal voters of the township did vote in favor of the subscription, as the proofs show that a meeting was called and held, and that the majority of the legal voters voting at the meeting, voted in favor of the proposition.

Sufficient has already been remarked to show that the second objection cannot avail the defendants, as the same act provided to the effect that if the election had already been held and a majority of the legal voters had voted in favor of the subscription, no other election need be held, and that the amount so voted shall be subscribed, as provided in the same act. Mistakes and irregularities are of frequent occurrence in municipal elections, and the State legislatures have often had occasion to pass laws to obviate such difficulties. Such laws, when they do not impair any contract or injuriously affect the rights of third persons, are never regarded as objectionable, and certainly are within the competency of the legislative authority.

Even if the legislature may by a subsequent act validate and confirm previous acts of a municipal corporation otherwise invalid, still the defendants insist that a prior legislative act will not have any such effect, which cannot be admitted,

* People *v.* Warfield, 20 Illinois, 163; People *v* Garner, 47 Id. 246; People *v.* Wiant, 48 Id. 263; Railroad *v.* Davidson County, 1 Sneed, 692; Angell & Ames on Corporations, 9th ed., §§ 499–500; Bridgeport *v.* Railroad, 15 Connecticut, 475; Talbot *v.* Dent, 9 B. Monro, 526; State *v.* The Mayor, 37 Missouri, 272.

as it would be competent for the legislature to authorize a municipal corporation to make such a subscription without requiring any such preliminary election.

Concede, however, that a prior act is insufficient to dispense with the preliminary election, still the concession cannot benefit the defendants, as it is clear that the subsequent act entirely obviates all the mistakes and irregularities in the prior proceedings, as it provides that where such informalities and neglect may have occurred, and bonds have been issued, or may hereafter be issued, to aid in the construction of said railroad, no such neglect or omission on the part of township officers shall in any way invalidate or impair the collection of said bonds, principal or interest, as they may respectively fall due.* Authorities to support that proposition are hardly necessary, but another answer may be given to the objection quite as satisfactory as either of the others, which is that the fourteenth section of the act makes it the duty of the supervisor who executed the bonds to determine the question whether an election was held, and whether a majority of the votes cast were in favor of the subscription, and inasmuch as he passed upon that question and subscribed for the stock and subsequently executed and delivered the bonds, it is clearly too late to question their validity where it appears, as in this case, that they are in the hands of an innocent holder.†

Knox County v. *Aspinwall*.‡ Non-compliance with one of the conditions was clearly shown in that case, as 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 the 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, and the court held that after the authority had been executed, the bonds issued, and they had passed into

* 3 Private Laws (1869), 274; Thomson *v.* Lee County, 3 Wallace, 327; Gelpcke *v.* Dubuque, 1 Id. 220; People *v.* Mitchell, 35 New York, 551.

† Private Laws (1867), 762.

‡ 21 Howard, 544.

the hands of innocent holders, it was too late, even in a direct proceeding, to call the power in question, and that it was beyond all doubt too late to call the power in question to the prejudice of a *bonâ fide* holder of the bonds in a collateral way, which is attempted to be done in the case before the court.*

Exactly the same principles were applied in the case of *Royal British Bank* v. *Turquand*,† in which the opinion was given by the chief justice. He said the bond sued upon in the case is allowed to be under the seal of the company and to be their deed, consequently a *primâ facie* case is made for the plaintiff, as the defendants having executed the bond have no defence under the plea of *non est factum*, and consequently the onus is cast upon them of showing that the bond is unlawful and void. No illegality appears on the face of the bond or condition, which shows that the plea, in order that it may be supported, must allege facts to establish illegality, but the plea makes no charge of fraud against the plaintiff and states no facts from which fraud may be inferred. Want of authority to execute the bond, it was conceded, would be an answer to the action, but it was denied that a mere excess of authority by the directors would have that effect, unless it appeared that the plaintiff had knowledge of that fact, as the presumption would be, from what appeared on the face of the bond, that it was issued by lawful authority, and the court held that the plaintiff was entitled to recover, as he had advanced his money in good faith for the use of the company, giving credit to the representations of the directors that they had authority to execute the instrument. Dissatisfied with the judgment the defendant brought a writ of error in the Exchequer Chamber, where the case was reargued, but the Court of Errors unanimously affirmed the judgment.‡

Viewed in any reasonable light the court is of the opinion that the plaintiff is an innocent holder for value, and that the loss, even if the supervisor failed in his duty to his con-

* Supervisors *v.* Schenck, 5 Wallace, 783. † 5 Ellis & Blackburne, 259.

‡ Same Case, 6 Ellis & Blackburne, 331.

Statement of the case.

stituents, cannot be cast upon the *bonâ fide* creditors of the township.*

JUDGMENT AFFIRMED.

Mr. Justice MILLER and Mr. Justice FIELD did not sit in this case.

RAILROAD COMPANY *v.* COUNTY OF OTOE.

1. Unless restrained by a constitutional prohibition of some sort, the legislature of a State may properly authorize a county to aid, by issuing its bonds, and giving them as a donation to a railroad company, the construction of a road outside of the county and even outside of the State, if the purpose of the road be to give to the county a connection which is desirable with some other region.
2. There is no such prohibition on the legislature in the constitution of Nebraska.
3. A legislative act prescribing the mode in which counties shall issue their bonds, is but the act of one legislature; and accordingly a special act giving to a county a right to issue their bonds in disregard of the ordinary legislative provisions, authorizes such last-named sort of issue.

ON certificate of division from the Circuit Court of Nebraska; the case being thus:

An act of the Territorial legislature of Nebraska, approved January 1st, 1861, enacted:

"That the commissioners of any county should have power to submit to the people of any county at any regular or special election, the question whether the county will aid or construct any road; and said commissioners may aid any enterprise designed for the benefit of the county as aforesaid, whenever a majority of the people thereof shall be in favor of the proposition as provided in this section.

"When the question submitted involves the borrowing or expenditure of money, the proposition of the question must be accompanied by a provision to lay a tax for the payment thereof, in addition to the usual taxes under section sixteen of this chap-

* Maclae *v.* Sutherland, 25 English Law and Equity, 114.

ter; and no vote adopting the question proposed shall be valid, unless it likewise adopt the amount of tax to be levied to meet the liability incurred."

This Territorial act being in force, the county clerk of Otoe County, one Bennett, issued the following call:

"In pursuance of the authority in me vested by law, I hereby call a meeting of the commissioners of Otoe County, to be held at their usual place of meeting in Nebraska City, of said county, on Saturday, the 24th day of February, A. D. 1866, to take into consideration the question of submitting to the people of said county the issue of the bonds of said county, not exceeding $200,000 in amount, to be used in procuring to said county an eastern railroad connection.

"ELISHA BENNETT,
"County Clerk."

In pursuance of this notice, the county commissioners met and ordered an election to be held on the 17th day of March, 1866. The order for this election was as follows:

"It is ordered that an election be held on the 17th day of March, 1866, in and throughout the county of Otoe, N. T., for the purpose of ascertaining whether the commissioners of Otoe County shall issue bonds not to exceed $200,000, for the purpose of securing an eastern railroad connection for Nebraska City, N. T."

An election was held accordingly, and at it 1362 votes were cast in favor of the said proposition, and 201 votes cast against it.

The Council Bluffs and St. Joseph Railroad Company having built a railroad from Council Bluffs, in Iowa, to St. Joseph in Missouri, near Nebraska City, $40,000 of the bonds of Otoe County, so as aforesaid voted for, were issued to *it;* the said bonds having been issued to secure an eastern railroad connection, and the same having been secured by way of St. Joseph and by way of Council Bluffs.

After this, that is to say, in February, 1867, Nebraska was admitted into the Union; and adopted a constitution of government. That constitution thus ordains:

"The legislative authority of the State shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives.

"The property of no person shall be taken for public use without just compensation.

"The credit of the State shall never be given or bound in aid of any individual association or corporation.

"For the purpose of defraying extraordinary expenses the State may contract public debts, but such debts shall never in the aggregate exceed $50,000.

"All powers not herein delegated remain to the people."

This constitution being in force, the legislature of the State of Nebraska, on the 15th of February, 1869, passed "*An act to authorize the county commissioners of Otoe County to issue the bonds of said county to the amount of* $150,000 *to the Burlington and Missouri River Railroad Company, or any other railroad company running east from Nebraska City.*" The Burlington and Missouri River Railroad Company, here named, was a foreign corporation; one incorporated by the State of Iowa. The act of the Nebraska legislature was in these words:

"WHEREAS the qualified electors of the county of Otoe, and State of Nebraska, have heretofore, at an election held for that purpose, authorized the county commissioners of said county to issue the bonds of said county in payment of stock to any railroad in Fremont County, Iowa, that would secure to Nebraska City an eastern railroad connection, to the amount of $200,000; and whereas but $40,000 have been issued.

"SECTION 1. *Therefore, be it enacted*, &c., That said commissioners be, and they are hereby authorized to issue $150,000 of the bonds aforesaid to the Burlington and Missouri River Railroad Company, or any other railroad company that will secure to Nebraska City a direct eastern railroad connection, *as a donation to said railroad company*, on such terms and conditions as may be imposed by said county commissioners.

"SECTION 2. Said bonds, when so issued, are hereby declared to be binding obligations on said county, and to be governed by the terms and conditions of an act entitled 'An act to enable counties, cities, and precincts to borrow money or to issue bonds

to aid in the construction or completion of works of internal improvements in this State, and to legalize bonds already issued for such purpose,' approved February, A. D. 1869."

On the 23d day of July, 1869, the board of county commissioners of Otoe County reciting that the people of the county had voted $200,000 in bonds, in aid of an eastern railroad connection, of which bonds there remained unappropriated over $150,000, passed a resolution to the effect that if the said Burlington and Missouri River Railroad Company would within a limited time named, build a certain road described (which it was stated the company proposed to build, upon the condition that Otoe County "will *donate and give* to said company" $150,000 in the bonds above referred to); and if the said company would equip and work the said road as a through eastern connection, then the county commissioners would issue and deliver to the said railroad company $150,000 of the said bonds theretofore voted by the said county to such eastern connection; the resolution to operate as a contract between the county and the railroad company, if accepted by the latter within a time named. The resolution was accepted by the railroad company. The Burlington and Missouri River Railroad Company within the time built and has ever since worked a railroad such as was contemplated.

In this state of things, on the 23d day of July, 1869, the county commissioners passed a resolution directing the county clerk to deliver to the railroad company the bonds with the coupons attached, which was by him accordingly done on the 27th day of September, 1869. *There was no vote of the people other than that above mentioned authorizing the issue of said bonds to said company.*

The Burlington and Missouri River Railroad Company sold and transferred the said bonds with the coupons attached, for value, and before maturity of any of the coupons, to the Chicago, Quincy, and Burlington Railroad Company, another foreign corporation, to wit, a corporation of Illinois. The coupons as they came due were detached from their

respective bonds, but not being paid, that company sued the county of Otoe in the court below. On the trial the judges were divided in opinion on the two following questions, and the questions were certified and sent here for answers:

First. Whether or not the act of February 15th, 1869, authorizing the county to issue bonds in aid of a railroad outside of the State conflicted with the constitution of the State of Nebraska.

Second. Whether the county commissioners of Otoe County, under the act of February 15th, 1869, could lawfully issue the bonds from which the coupons in suit were detached, without the proposition to vote the bonds for the purpose indicated, and also a tax to pay the same, being or having been submitted to a vote of the people of the county as provided by the act of the Territorial legislature of Nebraska, approved January 1st, 1861.

Mr. G. B. Scofield, for the county:

1. By the constitution of Nebraska all power not delegated to the legislature remains with the people. For defraying *extraordinary* expenses, the State may contract a debt not exceeding $50,000. Building a railroad is not an extraordinary occasion; nor was the limit here observed.

2. The constitution of Nebraska ordains that "the property of no person shall be taken for public use without just compensation." Now persons may be properly taxed for the public benefit; that is to say, for the benefit of all. Private property, indeed, is then taken, but a compensation is received. When, however, their property is taken for the benefit of a *private corporation*, as in this case, it is taken without compensation. Certainly the property taken here by tax is, in view of the purpose to which it is applied, taken without any due process of law.

3. But if the preceding propositions were questionable, it seems unquestionable that no legislature can take one man's property to make a present of it—to give it by way of donation—to another man, or to a private corporation, which is but an aggregation of men. This has been judicially de-

cided by respectable courts.* Still less, if possible, can the legislature delegate to the small political divisions which exist under the names of counties, townships, cities, boroughs, &c., a power of this dangerous kind. The objects for which these small political divisions are brought into existence are quite different.

4. Finally, and above all, the railroad to be aided is wholly outside, not only of the county of Otoe, but of the State of Nebraska. It is a foreign corporation. No benefits local and peculiar arise to the county of Otoe from this railroad. The people of the county have no right to use it, except as all people everywhere have; that is to say, on paying for its use. Even the advantages set up as a justification for the tax are of a speculative kind.

Mr. J. M. Woolworth, contra.

Mr. Justice STRONG delivered the opinion of the court.

The first question upon which the judges of the Circuit Court divided was whether the act of the legislature of Nebraska, approved February 15th, 1869, authorizing the county of Otoe to issue bonds in aid of a railroad outside of the State, conflicts with the constitution of that State.

Unless we close our eyes to what has again and again been decided by this court, and by the highest courts of most of the States, it would be difficult to discover any sufficient reason for holding that this act was transgressive of the power vested by the constitution of the State in the legislature. That the legislative power of the State has been conferred generally upon the legislature is not denied, and that all such power may be exercised by that body, except so far as it is expressly withheld, is a proposition which admits of no doubt. It is true that, in construing the Federal Constitution, Congress must be held to have only those powers which are granted expressly or by necessary implication, but the opposite rule is the one to be applied to the

* Whiting *v.* Sheboygan Railway Company, 9 American Law Register, 156; Sweet *v.* Hurlburt, 51 Barbour, 318.

construction of a State constitution. The legislature of a State may exercise all powers which are properly legislative, unless they are forbidden by the State or National Constitution. This is a principle that has never been called in question. If, then, the act we are considering was legislative in its character, it is incumbent upon those who deny its validity to show some prohibition in the constitution of the State against such legislation. And that it was an exercise of legislative power is not difficult to maintain. No one questions that the establishment and maintenance of highways, and the opening facilities for access to markets, are within the province of every State legislature upon which has been conferred general legislative power. These things are necessarily done by law. The State may establish highways or avenues to markets by its own direct action, or it may empower or direct one of its municipal divisions to establish them, or to assist in their construction. Indeed, it has been by such action that most of the highways of the country have come into existence. They owe their being either to some general enactment of a State legislature or to some law that authorized a municipal division of the State to construct and maintain them at its own expense. They are the creatures of law, whether they are common county or township roads, or turnpikes, or canals, or railways. And that authority given to a municipal corporation to aid in the construction of a turnpike, canal, or railroad is a legitimate exercise of legislative power, unless the power be expressly denied, is not only plain in reason, but it is established by a number and weight of authorities beyond what can be adduced in support of almost any other legal proposition. The highest courts of the States have affirmed it in nearly a hundred decisions, and this court has asserted the same doctrine nearly a score of times. It is no longer open to debate.

Then what is there in the constitution of the State of Nebraska which denies this power to the legislature? There is no direct or express prohibition. General legislative power is vested in the legislature. None was reserved to

the people of the State. There are, however, certain restrictions that may be noticed. The constitution declares that "the property of no person shall be taken for public use without just compensation," and it is earnestly contended that this prohibits the legislature from passing any laws in aid of the construction of a railroad that may result in the imposition of taxes. It is said that the act of February 15th, 1869, is taking private property for a public use without compensation. It would be a sufficient answer to this to say that a similar provision is found in the constitution of almost every State, the legislature of which has been held authorized to legalize municipal subscriptions in aid of railroad companies. It has never been held to prohibit such legislation as we are now considering. But the clause prohibiting taking private property for public use without just compensation has no reference to taxation. If it has, then all taxation is forbidden, for "just compensation" means pecuniary recompense to the person whose property is taken equivalent in value to the property. If a county is authorized to build a court-house or a jail, and to impose taxes to defray the cost, private property is as truly taken for public use without compensation as it is when the county is authorized to build a railroad or a turnpike, or to aid in the construction and to levy taxes for the expenditure. But it is taken in neither case in the constitutional sense. The restriction is upon the right of eminent domain, not upon the right of taxation.

We find nothing else in the constitution of the State that can with any reason be claimed to restrain the power of the legislature to authorize municipal aid to railroads, or other highways. There is a clause that declares "the credit of the State shall never be given to, or bound in aid of any individual association or corporation," and another that ordains that the debts of the State shall never, in the aggregate, exceed $50,000, but these refer only to State action and State liability.*

* Patterson v. Board of Supervisors of Yuba, 13 California, 175.

In view, therefore, of the organic law of the State, and of the decisions which have been made in regard to other similar constitutional provisions, both in the highest courts of the States and in this court, we think it cannot be doubted the legislature of Nebraska had authority to authorize its municipal divisions to incur indebtedness and to impose taxation in aid of railroad companies.

It is urged, however, against the validity of the act now under consideration that it authorized a donation of the county bonds to the railroad company, and it is insisted that if even the legislature could empower the county to subscribe to the stock of such a corporation, it could not constitutionally authorize a donation. Yet there is no solid ground of distinction between a subscription to stock and an appropriation of money or credit. Both are for the purpose of aiding in the construction of the road; both are aimed at the same object, securing a public advantage, obtaining a highway or an avenue to the markets of the country; both may be equally burdensome to the taxpayers of the county. The stock subscribed for may be worthless, and known to be so. That the legislature of the State might have granted aid directly to any railroad company by actual donation of money from its treasury will not be controverted. No one questions that in the absence of some constitutional inhibition the power of a State to appropriate its money, however raised, is limited only by the sense of justice and by the sound discretion of its legislature. If the power to tax be unrestricted, the power to appropriate the taxes is necessarily equally so. Accordingly nothing has been more common in the State and Federal governments than appropriations of public money raised by taxation to objects, in regard to which no legal liability has existed. State legislatures have made donations for numerous purposes, wherever, in their judgment, the public well-being required them, and the right to make such gifts has never been seriously questioned. As has been said, the security against abuse of power by a legislature in this direction is found in the wisdom and sense of propriety of its members,

and in their responsibility to their constituents. But if a State can directly levy taxes to make donations to improvement companies, or to other objects which, in the judgment of its legislature, it may be well to aid, it will be found difficult to maintain that it may not confer upon its municipal divisions power to do the same thing. Counties, cities, and towns exist only for the convenient administration of the government. Such organizations are instruments of the State, created to carry out its will. When they are authorized or directed to levy a tax, or to appropriate its proceeds, the State through them is doing indirectly what it might do directly. It is true the burden of the duty may thus rest upon only a single political division, but the legislature has undoubted power to apportion a public burden among all the taxpayers of the State, or among those of a particular section. In its judgment, those of a single section may reap the principal benefit from a proposed expenditure, as from the construction of a road, a bridge, an almshouse, or a hospital. It is not unjust, therefore, that they should alone bear the burden. This subject has been so often discussed, and the principles we have asserted have been so thoroughly vindicated, that it seems to be needless to say more, or even to refer at large to the decisions. A few only are cited.*

One other objection to the constitutionality of the act is urged. It is that it authorized aid to a railroad beyond the limits of the county, and outside the State. There is nothing in this objection. It was for the legislature to determine whether the object to be aided was one in which the people of the State had an interest, and it is very obvious that the interests of the people of Otoe County may have been more involved in the construction of a road giving them a connection with an eastern market than they could be in the construction of any road wholly within the county.

* Blanding *v.* Burr, 13 California, 343; The Town of Guilford *v.* The Supervisors of Chenango County, 3 Kernan, 149; Stuart *v.* Supervisors, 30 Iowa, 9; Augusta Bank *v.* Augusta, 49 Maine, 507; Railroad Co. *v.* Smith, a case decided by the Supreme Court of Illinois and not reported.

But that the objection has no weight may be seen in *Gelpcke* v. *Dubuque*,* and in *Walker* v. *Cincinnati*.†

We conclude, therefore, that the act of the legislature of February 15th, 1869, is not in conflict with the constitution of the State.

The second question upon which the Circuit Court divided was "whether the county commissioners of Otoe County could, under the act of February 15th, 1869, lawfully issue the bonds from which the coupons in suit were detached, without the proposition to vote the bonds for the purpose indicated, and also a tax to pay the same being or having been submitted to a vote of the people of the county, as provided by the act of the Territorial legislature of Nebraska, passed January 1st, 1861."

This question we answer in the affirmative. If the legislature had power to authorize the county officers to extend aid on behalf of the county or State to a railroad company, as we have seen it had, very plainly it could prescribe the mode in which such aid might be extended, as well as the terms and conditions of the extension, and it needed no assistance from a popular vote of the municipality. Such a vote could not have enlarged legislative power. But the act of 1869 was an unconditional bestowal of authority upon the county commissioners to issue the bonds to the railroad company. It required no precedent action of the voters of the county. It assumed that their assent had been obtained. That prior to 1869 the sanction of approval by a local popular vote had been required for municipal aid to railroad companies, or improvement companies, is quite immaterial. The requisition was but the act of an annual legislature which any subsequent legislature could abrogate or annul.

It must, therefore, be certified to the Circuit Court, *first*, that the act of February 15th, 1869, is not unconstitutional; and, *second*, that the county commissioners of Otoe County could lawfully issue the bonds from which the coupons in suit were detached, without any submission to a vote of the

* 1 Wallace, 175.

† 21 Ohio, 14.

people of the county of the proposition to approve the bonds, or a tax for the payment thereof.

CERTIFIED ACCORDINGLY.

The CHIEF JUSTICE, Mr. Justice MILLER, and Mr. Justice DAVIS dissented from the opinion in this case.

OLCOTT *v.* THE SUPERVISORS.

1. This court will follow, as of obligation, the decisions of the State courts only on local questions peculiar to themselves, or on questions respecting the construction of their own constitution and laws.
2. Whether or not the construction and maintenance of a railroad owned by a corporation, and constructed and maintained under a statute of a State authorizing such construction and maintenance, is a matter in which the public has any interest of such a nature as to warrant taxation by a municipal division of the State in aid of it, is not such a question. It is one of general law.
3. If a contract when made was valid under the constitution and laws of a State, as they had been previously expounded by its judicial tribunals, and as they were understood at the time, no subsequent action by the legislature or the judiciary will be regarded by this court as establishing its invalidity.
4. A railroad is a public highway. Being so, and thus a road for public use, a State may impose a tax in furtherance of that use, even though the road itself be built and owned by a private corporation.
5. An act of the legislature of Illinois, authorizing a vote of the people of a particular county upon the question whether they would aid the building of a certain railroad, and if they voted in favor of aiding authorizing the issue of county orders for money to aid in the building, *held*, on an application of the principles just above stated to have been a proper exercise of legislative authority, and the county charged on such orders issued by it, and given to the road by way of donation.

ERROR to the Circuit Court for the Eastern District of Wisconsin; in which court Olcott sued the supervisors of the county of Fond du Lac, Michigan, upon certain county orders issued by the county February the 15th, 1869, in pursuance of an act of Assembly of the State, approved on the 10th of April, 1867, and entitled "An act to authorize the

county of Fond du Lac to aid the completion of the Sheboygan and Fond du Lac Railroad, and to aid the building of a railroad from the city of Fond du Lac to the city of Ripon."

This act authorized the people of the county to vote upon the question whether they would aid the building of the railroads named; and provided, in case the vote should be in favor of granting aid, that "county orders" should be issued as the roads should be completed. The sixth section of the act was thus:

"If, under the provisions of this act, the said county of Fond du Lac shall furnish the aid contemplated in this act, then the railroad companies, or their successors and assigns, shall transport wheat upon the said roads upon the following terms for ten years: Wheat by the car-load from the city of Fond du Lac, and from stations east thereof within the county of Fond du Lac, to the city of Sheboygan, at a price not exceeding five cents per bushel; and from the city of Ripon to the city of Sheboygan, at a price not exceeding seven cents per bushel; and from all stations between the cities of Fond du Lac and Ripon to Sheboygan, at a rate *pro rata* with the freight from Fond du Lac to Sheboygan; and the companies or corporations owning and building the said roads, their successors and assigns, shall make such arrangements between themselves as shall give full effect to the provisions of this section, and the rates of freight above limited shall also apply to the companies owning or operating the said roads over and upon all other railroads where said companies respectively run their cars for the transportation of freight."

A vote was taken under the act, and was in favor of granting the aid. The county orders were accordingly issued in conformity with the act. They were all made payable to the Sheboygan and Fond du Lac Railroad Company, or bearer, and those now sued on had passed, *bonâ fide*, into the hands of Olcott.

In 1870, that is to say, subsequent to the issue of these orders, though prior to the trial of this case in the court below, the Supreme Court of the State of Wisconsin, in the

case of *Whiting* v. *Fond du Lac County*,* held this act to be void, upon the ground that the building of a railroad, to be owned and worked by a corporation in the usual way, was not an object in which the public were interested, and therefore that the act in question was void, for the reason that it authorized the levy of a tax for a *private* and not a *public* purpose. The court there said:

"The question is as to the power of the legislature to raise money or to authorize it to be raised, by taxation, for the purpose of donating it to a private corporation. We held, in *Curtis* v. *Whipple*,† that the legislature possessed no such power, and the conclusion in that case we think follows inevitably in this, from the principles stated in the opinion. The cases are not distinguishable, except in the single circumstance that the corporation here, to which it is proposed to give the money, is a railroad company in behalf of which the power of eminent domain has been exercised by the State for the purpose of enabling it to secure the land over which to build its road. . . . But though a railroad company may be, as to its capacity to assume and exercise in the name of the State the power of eminent domain delegated to it, so far a public or *quasi* public corporation, yet in all its other powers, functions, and capacities it is essentially a private corporation, not distinguishable from any other of that name or character. . . . The road, with all its rolling stock, buildings, fixtures, and other property pertaining to it, is private property, owned, operated, and used by the company for the exclusive benefit and advantage of the stockholders. This constitutes a private corporation in the fullest sense of the term. . . . And if we examine any book of authority on the subject,‡ we shall find that such is and always has been the rule of the law as to the corporate character of such companies, notwithstanding the delegation of power of eminent domain, and their consequent subjection in a certain degree to public use and convenience. They are always classed among private corporations, such as banking, insurance, and manufacturing corporations, and corporations for the building of bridges, turnpikes, canals, &c. . . . Our conclusion, therefore, is that though a rail-

* 25 Wisconsin, 188. † 24 Wisconsin, 350.

‡ See Angell & Ames on Corporations, § 40.

road company may possess this single exceptional corporate characteristic, it is, nevertheless, essentially a private corporation, coming fully within the operation of the principles laid down in *Curtis* v. *Whipple*, and that the taxation complained of cannot be sustained."

The court below, in this case, held that decision to be binding upon the Federal courts, and charged that the act under which the orders were issued was void. Judgment having gone accordingly it was now here for review.

It may here be mentioned that by the constitution of Wisconsin, the legislature of the State has power to alter or repeal charters granted by it.

Mr. M. H. Carpenter, for the plaintiff in error:

This case presents two questions:

First. Was the decision of the State court binding upon the court below? and,

Second. If not binding, was it correct in principle?

I. As to the first point.

1. A leading motive to the adoption of the Constitution was to make the people of all the States one people, for commercial purposes. This object was secured by two provisions of the Constitution; one providing that no State should make any law impairing the obligation of a contract; the other, that a citizen of one State might sue a citizen of another State in the courts of the Union. The Constitution was designed to secure results, and whatever defeats the design of the Constitution is unconstitutional. When the citizen of one State contracts with a citizen of another State, he acquires a constitutional right to have his contract construed and enforced by the Federal courts. Judicial power is the power to determine what are the rights and duties, respectively, of the parties to a particular litigation growing out of such of their transactions as the case involves; and this power the Constitution confers upon the court and denies to Congress. The decision must be the result of the opinions and judgment of the judges who pronounce it; and Congress cannot constitutionally say that the courts shall

decide otherwise, nor can the courts decide otherwise without violating their constitutional duty.

The Judiciary Act provides that the laws of the several States shall be regarded as rules of decision in trials at the common law, in the courts of the United States, "*in cases where they apply.*" The question is where do they apply? In cases of contract, the law of the State in force when the contract was made forms part of the contract, and must be applied in the Federal courts in construing and enforcing the contract. A decision of the State court, made before the contract, settling the law of the State, is authority in the Federal court, without regard to whether it be sound or unsound in principle, because the parties must be presumed to have contracted with reference to it. But a decision made after the contract was entered into, forms no part of the contract; the parties did not contract with reference to such decision; and to hold it binding upon the Federal courts, is to deny to a foreign creditor his constitutional right to have the conscientious opinion and judgment of Federal judges upon his contract. It would be offensive for the Federal courts to say to the creditor: "You may sue in our courts, if you fear the State courts are prejudiced against your claim; but we must decide as the State courts would, because we are bound by all the decisions they have made since you entered into the contract."

The broad principle ought to be declared by this court, that *no* State court decision affecting the validity of a contract, *made after the contract was entered into*, is conclusive upon the Federal courts. All the decisions in this court are consistent with this principle, but the principle itself has not been expressly declared. Yet in no way can injustice to a foreign creditor be prevented but by planting the doctrine upon its proper foundation, and saying that decisions of the State courts pronounced subsequent to the contract are not conclusive upon the Federal courts. If they are, the machinery of a double judiciary, State and Federal, is a mockery and a snare.

2. The decision of the State court is not binding upon the

Argument for the plaintiff in error.

Federal courts, because it was not declaratory of local law. It was based upon general reasoning, and upon the theory that aiding the construction of a railroad was not an exercise of the power of taxation, but taking the property of A. and giving it to B.

No particular provision of the State constitution or principle of local law was relied upon. The decision, if it be sound, invalidates the similar enactments of every State, and the acts of Congress granting aid to the Pacific Railroads. It is only where some principle of *local* law is declared by a State court that its decisions are binding upon the Federal courts.*

The constitutions of Wisconsin and Illinois are precisely alike in this respect. The Supreme Court of the latter State, since the decision of *Whiting* v. *Fond du Lac County*, has decided a similar case exactly the other way, fully considering the question and rejecting the entire reasoning of the court in Whiting's Case, and holding just such a statute valid under just such a constitution as that of Wisconsin, and enforcing obligations like those sued on in this case.

Now, suppose an action in the Federal court of Wisconsin, and one in the Federal court of Illinois, upon the contracts respectively, and both brought at the same term into this court. This court, if bound by such State decisions, would have to decide one case one way and the other the other way, while in every respect which ought to determine the cases they are identical. This would be a remarkable result to be worked out by the judiciary of a Union established especially to give *uniformity* to commercial law and commercial regulations. Then suppose a case in this court involving the constitutionality of the subsidies granted by Congress in aid of the Pacific Railroad. This court would undoubtedly hold, *for that is the law*, that the building of such a road is a proper work for the government, one in which the whole nation is interested, and that such subsidies are valid. Now, in addition to the humiliation of

* Swift *v.* Tyson, 16 Peters, 19.

three such decisions, reported, perhaps, in the same volume, it would logically result that this court had determined that after a citizen of New York had entered into a contract in Wisconsin with a citizen of that State, which was valid upon *principle*, and was not impugned by any decision of the State court, at the time it was entered into—a contract which the Federal court, a year after it was made, would have held valid—had been annulled and destroyed by a decision of the State court, made long subsequent to the contract, in a case to which the creditor was not a party, of which he had no notice, to which he had never assented, and which was wholly wrong in principle. It is submitted that after this the right of a foreign creditor to sue in a Federal court would not be very valuable.

3. This court has repeatedly decided that if a contract be valid by the law of a State as understood and administered by the different departments of the State government at the time the contract was made, no subsequent change of decisions by the State courts can render it invalid.

Prior to the making of the contracts in suit the State court had repeatedly settled all the principles necessary to sustain the validity of these contracts. That court had held that the power of taxation might constitutionally be exercised in favor of any enterprise in which the public had the *least possible* interest. It did so in *Brodhead* v. *Milwaukee*,* and in *Soens* v. *Racine*.† The constitution of Wisconsin forbids the taking of private property except for a public use; that is, a use in which the *public are interested*. In *Robbins* v. *Railroad*,‡ the court held that land might be taken for a railroad under the right of eminent domain, *because such taking was for a public use*. In *Hasbrouck* v. *Milwaukee*,§ the court sustained a tax to build a harbor on Lake Michigan, at Milwaukee, and based their decision upon the ground that such harbor was as much a matter of public interest as a railroad, and that it was well settled that taxation could be exercised to aid in the construction of a railroad.

* 19 Wisconsin, 652.
† 10 Id. 280.
‡ 6 Id. 641.
§ 13 Id. 37.

To show how utterly at war with these decisions, made years before the contracts, is the decision in *Whiting* v. *Fond du Lac County*, holding that taxation in aid of the building of a railroad is not for a public object, and therefore void, let us condense the doctrine of the cases and see how the conclusions agree:

1st. A tax may be authorized by the legislature for any object in which the public have *the least possible interest.*

2d. The right of eminent domain can only be exercised in aid of an object in which the *public have some interest.*

Conclusions:

1st. The power of taxation cannot be exercised in aid of the construction of a railroad, because *the public have no interest in a railroad;* and

2d. The right of eminent domain may be exercised in aid of the construction of a railroad, because *the public have an interest in it.*

The conclusions are obviously such as this court cannot assent to.

II. As to the second point. The decision of the State court in *Whiting* v. *Fond du Lac County* was erroneous.

1. Railroads are public highways. Upon no other ground can the right of eminent domain in favor of a railroad company, be vindicated. Therefore every decision sustaining this right, is an authority in favor of the power to raise money by taxation for that purpose; and such decisions have been made by all American courts, State and National.

2. There is no constitutional objection to raising money to give it as a donation to a railroad company, under the circumstances of this case, which do not exist to an act authorizing the municipalities to subscribe for stock and pay by taxation. Now, the Supreme Court of Wisconsin has decided in two cases,* never reversed, that such aid might be given.

* Clark *v.* Janesville, 10 Wisconsin, 136; and Bushnell *v.* Beloit, Ib. 195; and in several subsequent cases.

Argument for the defendant in error.

3. The building of roads as a means of facilitating commerce, is a proper work of government; a subject clearly within the legislative power, and has been so regarded in every civilized nation from early times. The sixth section of the charter of this particular road tended directly to a public benefit.

Messrs. I. C. Sloan and J. R. Bennett, contra:

I. The question below arose upon an act of the legislature of Wisconsin; an act in its nature a private act. Now the highest court of Wisconsin had interpreted that act; had declared its meaning and effect. It had declared that the act authorized the levy of a public tax for a private purpose; in other words, that it took private property without compensation for a public purpose. Certainly this is an interpretation of a State act by the State court. And it is the established doctrine of this court that it will adopt and follow the decisions of the State courts in the construction of their own State constitutions, and statutes passed in pursuance of them, when that construction has been settled by the highest judicial tribunal of the State. *Primâ facie*, then, the Circuit Court did right to respect it.

Mr. Carpenter would argue that *no* decision—apparently, not even one by the highest court of the State, confessedly upon its own constitution and laws, and though not opposed to prior decisions in the State—should be regarded by this court if made *after* a contract has been entered into by a foreigner. But the risk of a decision upon an *un*interpreted State constitution or law is what a foreigner may be as well asked to take as a citizen.

Mr. Carpenter, however, relies on four cases to show that the decision in *Whiting* v. *Fond du Lac County* was opposed to former ones. But what do they decide?

Brodhead v. *Milwaukee* decided that a State legislature might authorize a municipal corporation to raise money by taxation for bounty to volunteers to suppress an insurrection against the lawful government; in other words, per-

haps, to repel a public enemy entering its own gates from sacking and burning it, and killing its citizens.

Soens v. *Racine* decided that the citizens of Racine were rightly taxed to improve a breakwater, which it was necessary to improve in order to stay the action of the waters of a lake and preserve the very soil of the city, and of course the buildings on it, from being washed away.

In *Robbins* v. *Railroad* it was held that private property might be taken by a railroad for its roadbed under an exercise of the power of eminent domain delegated by the State, and, of course, on compensation being made.

In *Hasbrouck* v. *Milwaukee* the citizens of Milwaukee were taxed to improve a harbor which the city, that is to say, which they themselves in their municipal capacity owned.

These were all cases of taxation for the direct and immediate benefit of the public.

The courts which decided them doubtless in their *opinions* used some general language; but this is but *dictum*. What were the facts? What were *the cases?* What the judgments? These, when the adjudications are cited for precedents, are the lawyer-like and pertinent inquiries. It will not do to sever the language of the court from the facts of the case before it, and to attempt to apply it to a different state of facts; facts where the object of the tax is to promote strictly individual, and to add to or to enhance the value of merely private, property. And particularly is this unallowable, when the power to tax for any private purpose was expressly denied in the opinions.

Still, therefore, *Whiting* v. *Fond du Lac County* was rightly held obligatory independently of its own merits. If so this case is ended.

II. But if it did not bind the Circuit Court technically it was correct in principle.

Cases are cited on the other side which decide that acts of legislature authorizing municipal corporations to subscribe for stock, and pay by taxation, are valid. But since, as before those decisions, the legality of permitting such corporations

to engage in making railroads has been denied by the ablest jurists in this country, including notably Mr. Redfield;* and when this power has been sustained in courts by the decisions, it has generally been by a much-divided court. But whether right or wrong is unimportant, for in *Whiting* v. *Fond du Lac County* the court was asked to go much further, and to hold that counties and towns might be taxed to pay for the stock subscribed for *by others*. It was asked to declare that the State might compel the people to make a *donation* to railroads in which they have no interest; that the State, under the taxing power, might transfer A.'s money to B. without an equivalent. Such an act is in violation of all our State constitutions, and of natural justice. The Supreme Court of Wisconsin declined to take this step, and held that it was unlawful to tax the people for such a purpose. And this appeal is brought to have this court in effect *reverse* that decision. We trust that it will not be reversed. It is maintained by weighty arguments given in the report of it. And the judgment of the court has been supported by the reasoning of the Supreme Court of Michigan in *Ex rel. Howell* v. *Town Board of Salem*.† The leading opinion in this case is delivered by Cooley, J., whose name is familiar in this court by his oft-cited and valuable work on Constitutional Limitations, and who has acquired a national reputation for learning and ability as a constitutional lawyer. We refer to his opinion at large as our best argument.

Mr. Justice STRONG delivered the opinion of the court.

Whether the act of Assembly of the State of Wisconsin, approved April 10th, 1867, under which the county orders or promissory notes sued upon, in this case, were issued, was a lawful exercise of constitutional power, is the only question in the case. In the court below, the jury was instructed, in substance, that the issue of the orders was unauthorized and void, and that the act of Assembly, above referred to, was an unconstitutional exercise of legislative

* 2 Law of Railways, p. 398, note 2.

† 20 Michigan, 452.

power. No other question was made at the trial, and no other is now presented to us for our determination.

At the outset we are met by the fact that the Supreme Court of the State has decided the act was unauthorized by the constitution. It was thus ruled in *Whiting* v. *Fond du Lac County*.* If that decision is binding upon the Federal courts, if it has established a rule which we are under obligations to follow, the matter is settled.

It is undoubtedly true in general, that this court does follow the decisions of the highest courts of the States respecting local questions peculiar to themselves, or respecting the construction of their own constitutions and laws. But it must be kept in mind that it is only decisions upon local questions, those which are peculiar to the several States, or adjudications upon the meaning of the constitution or statutes of a State, which the Federal courts adopt as rules for their own judgments. That *Whiting* v. *Fond du Lac County* was not a determination of any question of local law, is manifest. It is not claimed to have been that. But it is relied upon as having given a construction to the constitution of the State. Very plainly, however, such was not its character or effect. The question considered by the court was not one of interpretation or construction. The meaning of no provision of the State constitution was considered or declared. What was considered was the uses for which taxation generally, taxation by any government, might be authorized, and particularly whether the construction and maintenance of a railroad, owned by a corporation, is a matter of public concern. It was asserted (what nobody doubts), that the taxing power of a State extends no farther than to raise money for a public use, as distinguished from private, or to accomplish some end public in its nature, and it was decided that building a railroad, if it be constructed and owned by a corporation, though built by authority of the State, is not a matter in which the public has any interest, of such a nature as to warrant taxation in its aid.

* 25 Wisconsin, 188.

For this reason it was held that the State had no power to authorize the imposition of taxes to aid in the construction of such a railroad, and therefore that the statute giving Fond du Lac County power to extend such aid was invalid. This was a determination of no local question, or question of statutory or constitutional construction. It was not decided that the legislature had not general legislative power; or that it might not impose or authorize the imposition of taxes for any public use. Now, whether a use is public or private is not a question of constitutional construction. It is a question of general law. It has as much reference to the constitution of any other State as it has to the State of Wisconsin. Its solution must be sought not in the decisions of any single State tribunal, but in general principles common to all courts. The nature of taxation, what uses are public and what are private, and the extent of unrestricted legislative power, are matters which, like questions of commercial law, no State court can conclusively determine for us. This consideration alone satisfies our minds that *Whiting* v. *Fond du Lac County* furnishes no rule which should control our judgment, though the case is undoubtedly entitled to great respect.

There is another consideration that leads directly to the same conclusion. This court has always ruled that if a contract when made was valid under the constitution and laws of a State, as they had been previously expounded by its judicial tribunals, and as they were understood at the time, no subsequent action by the legislature or the judiciary will be regarded by this court as establishing its invalidity.* Such a rule is based upon the highest principles of justice. Parties have a right to contract, and they do contract in view of the law as declared to them when their engagements are formed. Nothing can justify us in holding them to any other rule. If, then, the doctrine asserted in *Whiting* v. *Fond du Lac County* is inconsistent with what was the recognized

* Havemeyer *v.* Iowa City, 3 Wallace, 294; Gelpcke *v.* The City of Dubuque, 1 Id. 175; Ohio Life and Trust Company *v.* Debolt, 16 Howard, 432.

law of the State when the county orders were issued, we are under no obligation to accept it and apply it to this case. The orders were issued in February, 1869, and it was not until 1870 that the Supreme Court of the State decided that the uses for which taxation was authorized by the statute of April 10th, 1867, were not public uses, and therefore that the statute was invalid. Prior to 1870 it seems to have been as well settled in Wisconsin as elsewhere that the construction of a railway was a matter of public concern, and not the less so because done by a private corporation. That the State might itself make such an improvement, and impose taxes to defray the cost, or exercise its right of eminent domain therefor, was beyond question. Yet confessedly it could neither take property or tax for such a purpose, unless the use for which the property was taken or the tax collected was a public one. And it was also the undoubted law of the State that building a railroad or a canal by an incorporated company was an act done for a public use, and thus the power of the legislature to delegate to such a company the State right of eminent domain was justified. In *Pratt* v. *Brown*,* it was said by the Supreme Court of the State that the incorporation of companies for the purpose of constructing railroads or canals affords the best illustration of the delegation of power to exercise the right of eminent domain, by the condemnation and seizure of private property for public use upon making just compensation therefor. It is admitted that the only principle upon which such delegation of power can be justified is that the property taken by these companies is taken for the public use. Similar language was used and a decision to the same effect was made in *Robbins* v. *The Railroad Company*.† In *Hasbrouck* v. *Milwaukee*,‡ a case where the right to tax for the improvement of a harbor was under consideration, the court used this significant language:

"The power of municipal corporations, when authorized by the legislature to engage in works of internal improve-

* 3 Wisconsin, 612. † 6 Id. 641. ‡ 13 Id. 37.

ment, SUCH AS THE BUILDING OF RAILROADS, canals, harbors, and the like, or to loan their credit in aid thereof, and to defray the expenses of such improvements, MAKE GOOD THEIR PLEDGES *by an exercise of the power of taxing the persons and property of their citizens, has always been sustained on the ground that such works, although they are in general operated and controlled by private corporations, are nevertheless, by reason of the facilities which they afford for trade, commerce, and intercommunication between different and distant portions of the country, indispensable to the public interests and public functions.* It was originally supposed that they would add, *and subsequent experience demonstrated that they have added vastly, and almost immeasurably, to the general business, the commercial prosperity, and the pecuniary resources of the inhabitants of cities, towns, villages, and rural districts through which they pass, and with which they are connected.* It is, in view of these results, *the public good thus produced*, and *the benefits thus conferred* upon the persons and property of all the individuals composing the community, that courts have been able to pronounce them *matters of public concern*, for the accomplishment of which *the taxing power might lawfully be called into action.* It is in this sense that they are said to fall so far within the purposes for which municipal corporations are created, that such corporations may engage in, or pledge their credit for their construction."

So also in *Soens* v. *Racine*,* where the validity of a law authorizing a local tax to secure the lake shore was in question, the court discussed at length the nature of a public use for which taxation was lawful, and ruled that the use was a public one though only the property of some inhabitants of the city was saved, remarking that to determine whether a matter is a public or merely private concern we have not to determine whether or not the interests of some individuals will be directly promoted, but whether those of the whole or the greater part of the community will be. And again, in *Brodhead* v. *Milwaukee*,† the court said:

* 10 Wisconsin, 280.

† 19 Id. 652; see also Clark *v.* Janesville, 10 Id. 136; and Bushnell *v.* Beloit, 1b. 195.

"The legislature cannot create a public debt, or levy a tax, or authorize a municipal corporation to do so, in order to raise funds for a mere private purpose. It cannot, in the form of a tax, take the money of the citizen and give it to an individual, *the public interest or welfare being in no way connected with the transaction.* The objects for which the money is raised by taxation must be public, and such as subserve the common interest and wellbeing of the community required to contribute. . . . To justify the court in arresting the proceedings and declaring the tax void, the absence of *all possible* public interest in the purposes for which the funds are raised must be clear and palpable; *so clear and palpable as to be perceptible by every mind* AT THE FIRST BLUSH."

All these expositions of the law of the State were made by its highest court before the county orders now in suit were issued. They certainly did assert that building a railroad, whether built by the State or by a corporation created by the State for the purpose, was a matter of public concern, and that because it was a public use, the right of eminent domain might be exerted or delegated for it, and taxation might be authorized for its aid. It was the declared law of the State, therefore, when the bonds now in suit were issued, that the uses of railroads, though built by private corporations, were public uses, such as warranted the exercise of the public right of eminent domain in their aid, and also the power of taxation.

We are not, then, concluded by a decision, made in 1870, that such public uses are not of a nature to justify the imposition of taxes. We are at liberty to inquire what are public uses, and what restrictions, if any, are imposed upon the State's taxing power.

It is not claimed that the constitution of Wisconsin contains any *express* denial of power in the legislature to authorize municipal corporations to aid in the construction of railroads, or to impose taxes for that purpose. The entire legislative power of the State is confessedly vested in the General Assembly. An implied inhibition only is asserted.

It is insisted that, as the State cannot itself impose taxes for any other than a public use, so the legislature cannot empower a municipal division of the State to levy and collect taxes for any other than such a use, and it is denied that taxation to enable the county of Fond du Lac to aid in the completion of the Sheboygan and Fond du Lac Railroad is taxation for a public use. No one contends that the power of a State to tax, or to authorize taxation, is not limited by the uses to which the proceeds may be devoted. Undoubtedly taxes may not be laid for a private use. But is the construction of a railroad by a company incorporated by a State for the purpose of building it, and endowed with the State's right of eminent domain, a thing in which the State has, as such, no interest? That the legislature of Wisconsin may alter or repeal the charter granted to the Sheboygan and Fond du Lac Railroad Company is certain. This is a power reserved by the constitution. The railroad can, therefore, be controlled and regulated by the State. Its use can be defined; its tolls and rates for transportation may be limited. Is a work made by authority of the State, subject thus to its regulation, and having for its object an increase of public convenience, to be regarded as ordinary private property?

That railroads, though constructed by private corporations and owned by them, are public highways, has been the doctrine of nearly all the courts ever since such conveniences for passage and transportation have had any existence. Very early the question arose whether a State's right of eminent domain could be exercised by a private corporation created for the purpose of constructing a railroad. Clearly it could not, unless taking land for such a purpose by such an agency is taking land for public use. The right of eminent domain nowhere justifies taking property for a private use. Yet it is a doctrine universally accepted that a State legislature may authorize a private corporation to take land for the construction of such a road, making compensation to the owner. What else does this doctrine mean if not that building a railroad, though it be

built by a private corporation, is an act done for a public use? And the reason why the use has always been held a public one is that such a road is a highway, whether made by the government itself or by the agency of corporate bodies, or even by individuals when they obtain their power to construct it from legislative grant. It would be useless to cite the numerous decisions to this effect which have been made in the State courts. We may, however, refer to two or three which exhibit fully not only the doctrine itself, but the reasons upon which it rests.*

Whether the use of a railroad is a public or a private one depends in no measure upon the question who constructed it or who owns it. It has never been considered a matter of any importance that the road was built by the agency of a private corporation. No matter who is the agent, the function performed is that of the State. Though the ownership is private the use is public. So turnpikes, bridges, ferries, and canals, although made by individuals under public grants, or by companies, are regarded as *publici juris*. The right to exact tolls or charge freights is granted for a service to the public. The owners may be private companies, but they are compellable to permit the public to use their works in the manner in which such works can be used.† That all persons may not put their own cars upon the road, and use their own motive power, has no bearing upon the question whether the road is a public highway. It bears only upon the mode of use, of which the legislature is the exclusive judge.‡

It is unnecessary, however, to pursue this branch of the inquiry further, for it is not seriously denied that a railroad, though constructed and owned by a private corporation, is a matter of public concern, and that its uses are so far public that the right of eminent domain of the State may be ex-

* Beekman *v.* The Saratoga and Schenectady Railroad Co., 3 Paige, 45; Bloodgood *v.* The Mohawk and Hudson Railroad Co., 18 Wendell, 1; Worcester *v.* Railroad Co., 4 Metcalf, 564.

† Charles River Bridge Co. *v.* Warren, 7 Pickering, 495.

‡ Cooley's Constitutional Limitations.

erted to facilitate its construction. But it is contended that though the purpose and the use may be public, sufficiently to justify taking private property, they are not public when the right to impose taxes is asserted. It is argued that there are differences between the power of taxation and the power of taking private property for a public use, and that because of these differences it does not follow that wherever the one power may be exerted the other can. We do not care to inquire whether this is so or not. The question now is whether if a railroad, built and owned by a private corporation, is for a public use, because it is a highway, taxes may not be imposed in furtherance of that use. If there be any purpose for which taxation would seem to be legitimate it is the making and maintenance of highways. They have always been governmental affairs, and it has ever been recognized as one of the most important duties of the State to provide and care for them. Taxation for such uses has been immemorially imposed. When, therefore, it is settled that a railroad is a highway for public uses, there can be no substantial reason why the power of the State to tax may not be exerted in its behalf. It is said that railroads are not public highways *per se;* that they are only declared such by the decisions of the courts, and that they have been declared public only with respect to the power of eminent domain. This is a mistake. In their very nature they are public highways. It needed no decision of courts to make them such. True they must be used in a peculiar manner, and under certain restrictions, but they are facilities for passage and transportation afforded to the public, of which the public has a right to avail itself. As well might it be said a turnpike is a highway, only because declared such by judicial decision. A railroad built by a State no one claims would be anything else than a public highway, justifying taxation for its construction and maintenance, though it could be no more open to public use than is a road built and owned by a corporation. Yet it is the purpose and the uses of a work which determine its character. And if the purpose is one for which the State may properly levy a tax

upon its citizens at large, its legislature has the power to apportion and impose the duty, or confer the power of assuming it upon the municipal divisions of the State.* And surely it cannot be maintained that ownership by the public, or by the State, of the thing in behalf of which taxation is imposed, is necessary to justify the imposition. There are many acknowledged public uses that have no relation to ownership. Indeed, most public expenditures are for purposes apart from any proprietorship of the State. A public use may, indeed, consist in the possession, occupation, and enjoyment of property by the public, or agents of the public, but it is not necessarily so. Even in regard to common roads, generally, the public has no ownership of the soil, no right of possession, or occupation. It has a mere right of passage. While, then, it may be true that ownership of property may sometimes bear upon the question whether the uses of the property are public, it is not the test.

The argument most earnestly urged against the constitutionality of the act is that it attempted to authorize Fond du Lac County to assist the railroad company by a donation. It is stoutly contended that the legislature could not authorize the county to impose taxes to enable it to make a donation in aid of the construction of the railroad, even if its ultimate uses are public. But why not? If the county can be empowered to aid the work because it is a public use, what difference can it make in what mode the aid be extended? It is conceded that in Wisconsin municipal corporations may be authorized to become subscribers to the stock of private railroad companies, and to raise money by taxation to meet bonds given in payment of the subscriptions. This has been decided by the highest court of the State.† And the reasons given for the decision are, not that the municipal bodies acquired property rights by their subscriptions, or that they thereby obtained partial control of the railroad companies, but that subscriptions to the stock were

* Cooley's Constitutional Limitations, 262.

† Clark *v.* Janesville, 10 Wisconsin, 136; Bushnell *v.* Beloit, Ib. 195.

a mode of aiding a work in which the public had an interest, a work of such a nature that it might properly be aided by taxation. Never was the right to tax supposed to rest in any degree upon anything else. Whether the stock had value or not was not even considered. Equally with the taxation, the municipal subscription could be justified only because it was for a public use. If taxation is invalid because laid for a private use, the nature of the use cannot be changed by receiving stock for the money raised. There is no substantial difference in principle between aid given to a railroad company by subscription to its stock and aid given by donations of money or land. The burden upon the county may be the same in whichever mode the aid is given, and the uses promoted are precisely the same. And the courts have never attempted to make any distinction in the cases; certainly not until the case of *Whiting* v. *Fond du Lac County*, and even then no real difference is shown. On the other hand, the power to tax for the purpose of making donations in aid of railroads built by private corporations has been affirmed.* We have, however, considered this subject in the case of the *Railroad Co.* v. *County of Otoe*,† and nothing more need now be said. What we have already remarked is sufficient to show that in our opinion the act of the legislature of Wisconsin, approved April 10th, 1867, was a constitutional exercise of legislative power, and consequently that the Circuit Court erred in instructing the jury that it was unconstitutional and void, and in directing a verdict for the defendants.

JUDGMENT REVERSED, and the record remitted, with instructions to award

A VENIRE DE NOVO.

The CHIEF JUSTICE, Mr. Justice MILLER, and Mr. Justice DAVIS dissented from the preceding opinion.

* Gibbons *v.* Mobile and Great Northern Railroad Co., 36 Alabama, 410; Davidson et al. *v.* Commissioners of Ramsay County, Minnesota.

† *Supra*, p. 675.

EX PARTE: IN THE MATTER OF THE UNITED STATES.

1. The power of the Court of Claims, under the second section of the act of June 25th, 1868, to grant a new trial in favor of the United States, if moved for within two years next after the final disposition of the suit, is not taken away by the affirmance of the judgment on appeal, and the filing in that court of the mandate of affirmance.
2. Where a court is, like the Court of Claims, composed of five judges, and a motion for a new trial of a case is argued before, and submitted to, four of them, who, in conference, are equally divided in opinion; but the majority do not order any judgment to be announced in open court based upon such equal division, and none is so announced; and afterwards a majority of the whole court remand the motion to the law docket for reargument; the fact that two of the judges, at the time of such remanding, file their decision that the motion be denied upon the merits, does not decide the question involved in the motion, nor take away the jurisdiction of the court to hear and decide the motion upon reargument.
3. In such a case a peremptory mandamus issues, commanding the court to proceed to hear and decide the motion.

ON motion by the Attorney-General, for an alternative writ of mandamus directed to the Court of Claims, commanding the said court to hear and decide certain motions for a new trial in the case of *Russell* v. *The United States** (in which case the said Russell set up a claim for services of the steamer J. H. Russell, which he alleged had been impressed into the service of the United States during the rebellion), and for stay of payment of a judgment given by the said court against the United States in that case; or in default thereof to show cause to the contrary.

[This case was a continuation in another form of *Ex parte Russell*,† where this court had occasion to consider the meaning of the act of June 25th, 1868, which enacts that the Court of Claims, at any time while any suit is pending before or on appeal from it, or within two years after "the final disposition" of any such suit, "may, on motion, on behalf of the United States, grant a new trial . . . and stay the payment of any judgment;" and where, on the same

* See 13 Wallace, 623.

† Ib. 664.

facts as are hereinafter stated, the Supreme Court held that the words "final disposition" extend to a final disposition of any case before *it*, and that mandamus and not appeal was the proper remedy. The points involved in this case will be better understood by reading the report of that one.]

The rule *nisi* being granted, the chief justice and judges of the Court of Claims, in answer to the rule, submitted to this court the following statement of the facts connected with the motions specified in the rule, and the action of the Court of Claims and the judges thereof, in reference to the first named of the said motions; the said statement by them being dated April 24th, 1872, and signed by the whole five judges of the court.*

"On the 1st of June, 1871, the Assistant Attorney-General of the United States filed in the said Court of Claims, on behalf of the defendants, a motion for a new trial in the case of *Russell* v. *The United States*, and assigned as a ground for the motion that fraud, wrong, and injustice had been done in the premises, in this: that for a part of the amount for which judgment had been rendered by this court in favor of the said Russell, his receipt in full had been found in the office of the Third Auditor of the Treasury, which receipt had come to the knowledge of the Attorney-General after the rendition of said judgment.

"On the 18th of September, 1871, he filed in the clerk's office of the court a specification of additional reasons for a new trial in support of the motion filed by him on the 1st of June, 1871, as aforesaid; one of which specifications indicated that, owing to a variance between the original depositions filed in the cause by the claimant and the printed copies thereof, upon which the judgment was rendered in favor of Russell, the said judgment was largely in excess of the amount which Russell should have recovered, as appeared from the actual evidence in the case, which variance had come to the knowledge of the Attorney-General after the rendition of the judgment in favor of Russell; and the other of the specifications averred that it appeared, from original receipts on file in the office of the Third Auditor of the Treasury, and from original reports on file in the office

* Drake, C. J., and Loring, Peck, Nott, and Milligan, JJ.

of the Quartermaster-General (copies of which receipts and reports were filed with the said specifications), that the steamer J. H. Russell was not seized or impressed into the service of the United States, as alleged by Russell, and as this court found, but was employed by the United States simply as a common carrier; and that Russell had been paid in full for the services of the boat during the time covered by the judgment; and that the said receipts and reports first came to the knowledge of the Attorney-General after the rendition of the judgment in favor of the said Russell.

"On the 22d of November, 1871, the said motion for a new trial having been argued on behalf of the defendants in support of it, and on behalf of the said Russell against it, before the court composed of Drake, Chief Justice, and Loring, Peck, and Nott, Judges, was submitted to the court.

"In conference thereon the said judges were equally divided in opinion; but the majority of them did not authorize any judgment to be entered in open court upon the motion; nor was any such judgment rendered.

"On the 11th of December, 1871, while the said motion was still pending in conference before the judges to whom it had been submitted, the Assistant Attorney-General filed a motion in open court to remand the said motion for a new trial to the law docket for a reargument;* and on the 13th day of the said month, it was ordered by the majority of the court† that a reargument of the motion for a new trial should be granted; whereupon Judges Peck and Nott dissented, and Judge Nott read in open court and placed on file the following opinion, giving reasons for their dissent:

"'The defendants' motion for a new trial in this case was argued before and submitted to four of the judges of this court for their decision. It was also stated on the argument by the counsel for the claimant, and conceded by the counsel for the defendants, that the Supreme Court had affirmed the judgment of this court. Subsequently, and while the motion was still under advisement, an oral suggestion was made by the Assistant Attorney-General

* The Court of Claims has a "General Docket" on which all cases coming into the court are entered in their numerical order, and a "Law Docket" on which questions of law, such as the validity of demurrers, &c., are entered.—REP.

† Milligan, J., had now taken his seat on the bench; thus making a court of five persons.—REP.

that the case be remanded and heard before a full bench, the only legal reason assigned being the decision of the Supreme Court affirming the judgment of this court. The counsel for the claimant objected, on the ground that the decision of the Supreme Court had been known and was announced on the hearing. The suggestion of the Attorney-General was not a motion, according to the rules of the court, but it was subsequently reduced to writing and filed.

"'We are of the opinion on these facts that the final judgment of this court, affirmed by the Supreme Court, is property which cannot be taken away except by proceedings in due form of law, and that it should be protected by the full discharge of our judicial duty; that the four judges who heard the motion constitute a tribunal which can alone decide it, and that it is the right of the parties to have it decided by them; that the fifth member of the court, who did not hear it, and to whom it was not submitted, can take no part in its disposition; that the suggestion of the Assistant Attorney-General presents no legal or just ground for ordering a reargument; and that the defendants' motion for a new trial is unjust, inequitable, and contrary to the intent of both the statute and the common law, and it must be denied.

"'We are also of the opinion that this decision, by a moiety of the four judges constituting the tribunal that heard the motion, and to which it was submitted, does, *ipso facto*, deny the motion, according to the constant and invariable practice of this court and of the Supreme Court; and that on its rendition an order should be entered by the court denying the motion.'

"On the 12th of December, 1871, the attorney of the said Russell produced in open court the mandate of the Supreme Court of the United States, affirming the judgment rendered by this court in favor of said Russell, and the same was ordered by this court to be placed on file.

"On the 29th of January, 1872, the said motion for a new trial came up before a full bench of this court for reargument, when a majority of the court decided, for the reasons stated in the following order entered on the record of the court, that the said motion should be dismissed, the Chief Justice and Loring, J., dissenting:

"'In this case it was ordered that the defendants' motion for a new trial be dismissed for want of jurisdiction, because, since the same was made, the mandate of the Supreme Court has been filed affirming the judgment of the court in this case, and because two of the four judges before whom the motion was argued, and to whom it was submitted on the 21st of November, 1871, have heretofore rendered and filed their decision that the motion be denied upon the merits.'

"Since the making of this order no action has been taken by this court in reference to said motion for a new trial.

Judgment of the court.

"The reasons assigned in said order against the jurisdiction of this court to hear and determine said motion, are the only cause which the majority of the court have to show why the alternative mandamus should not issue from the Supreme Court in this case.

"In regard to the motion for stay of payment of judgment in the case of said Russell, which was filed by the Assistant Attorney-General, on behalf of the defendants, on the 11th of November, 1871, no action has at any time been taken by this court in relation thereto, and it is now on the files of this court undecided. It was a motion to stay payment of the judgment pending the said motion for a new trial, and the Assistant Attorney-General has not heretofore called it up for hearing."

Justices Peck and Nott, for themselves, gave these additional reasons against the rule:

"That the defendants, by voluntarily arguing their appeal in the Supreme Court, after having made their several motions in the Court of Claims, which they did not proceed to argue in apt time, and by allowing the Supreme Court to proceed to judgment thereon while their motions in the Court of Claims were still pending, were guilty of experimenting upon the decisions of both courts, in a manner prejudicial to the ends of public justice; and that the course pursued by them in the Supreme Court while their motions in the Court of Claims were still pending, must be deemed a withdrawal of those motions from the latter court. And that it was against the course of justice for the defendants to subject the claimant to the expense and risk of a needless trial in the Supreme Court."

After argument by *Mr. G. H. Williams, Attorney-General, for the motion, and Mr. William Penn Clarke, contra*, the court, on the 6th of May, 1872, ordered a PEREMPTORY MANDAMUS to issue, commanding the Court of Claims to hear and decide the motions for a new trial.

On the 31st of August following, the claimant, Russell, filed in the Court of Claims a remittitur of $4000 of his judgment, being one of the sums on account of the allowance of which in the judgment of that court, the defendants moved for a new trial; and the remainder of his claim was paid at the Treasury.

APPENDIX.

THE 25th section of the Judiciary Act of 1789, and the 2d section of the act of 1867 much similar to it, being more than once referred to in the body of this book, are here inserted. The reader will observe that words in the act of 1789 omitted in the later act, are here inclosed in brackets, and that words variant in the two enactments are put in italics.

JUDICIARY ACT OF 1789.

[1 STAT. AT LARGE, 85.]

SECTION 25. *And be it further enacted*, That a final judgment or decree in any suit, in the highest court [of law or equity] of a State in which a decision in the suit could be had,

Where is drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision is against their validity,

OR 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 such their validity,

OR *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 said] Constitution, treaty, statute, or commission,

May be re-examined and reversed, or affirmed in the Supreme Court of the United States upon a writ of error, . . . in the same manner and under the same regulations, and the writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a *Circuit Court*. . . . [But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the beforementioned questions of validity or construction of the said Constitution, treaties, statutes, commissions, or authorities in dispute.]

JUDICIARY ACT OF 1867.

[14 STAT. AT LARGE, 385.]

SECTION 2. *And be it further enacted*, That a final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had,

Where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity,

OR 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 such their validity,

OR *where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held, or authority exercised* under the United States, and the decision is against the title, right, privilege, or *immunity* specially set up or claimed by either party under such Constitution, treaty, statute, commission [or authority],

May be re-examined and reversed or affirmed in the Supreme Court of the United States, upon a writ of error . . . in the same manner, and under the same regulations, and the writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a *court of the United States.*

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ABANDONED AND CAPTURED PROPERTY. See *Captured and Abandoned Property Act.*

"ABSENCE."

Under a code which enacts (as does the Code of Iowa), that in case of the "absence" of the county judge the county clerk shall supply his place, the said judge is not, when, owing to his absence from the State the county clerk is acting as county judge in the county—holding a term of the county court there, issuing county warrants, and doing other business, in the county, in discharge of his duties as acting county judge—so wholly superseded in his office as that he may not, when beyond the limits of the county, do certain ministerial acts, as *ex. gr.*, execute and issue bonds, whose purpose is to advance the concerns of the county; and for that purpose buy, at the place where he is, a new county seal; the code having authorized the county judge to procure one. *Lynde* v. *The County*, 6.

ACT OF THE LAW. See *Bail.*

ACTION.

1. Where an incorporated company undertook to work in the streets of a city, agreeing that it would "protect all persons against damages by reason of excavations made by them in doing it, and *to be responsible for all damages which may occur by reason of the neglect of their employés on the premises;*" *held*, on the company's having let the work out to a subcontractor, through the negligence of *whose* servants injury accrued to a person passing over the street, that an action lay against the company for damages. *Water Company* v. *Ware*, 566.
2. What suits an administrator *de bonis non* can and cannot bring against the former administrator. *Beall* v. *New Mexico*, 535.
3. Regularly, a decree of a probate court against the administrator for an amount due, and an order for leave to prosecute his bond, are prerequisites to the maintenance of a suit thereon. *Ib.*

ADMINISTRATOR DE BONIS NON.

1. Cannot sue the former administrator or his representatives for a *devastavit*, or for delinquencies in office; nor can he maintain an action on the former administrator's bond for such cause. The former administrator, or his representatives, are liable directly to creditors and next of kin. The administrator *de bonis non* has to do only with the goods

ADMINISTRATOR DE BONIS NON (*continued*).
of the intestate unadministered. If any such remain in the hands of the discharged administrator or his representatives, in specie, he may sue for them either directly or on the bond. *Beall* v. *New Mexico*, 535.
2. Regularly, a decree of the probate court against the administrator for an amount due, and an order for leave to prosecute his bond, are prerequisites to the maintenance of a suit thereon. *Ib.*

ADMINISTRATOR'S SALE. See *Illinois.*
1. A purchaser at judicial sale by an administrator, does not depend upon a return by the administrator making the sale, of what he has done. If the preliminary proceedings are correct, and he has the order of sale and the deed, this is sufficient for him. *McNitt* v. *Turner*, 353.
2. What amounts to a sufficient description by an administrator in his petition, and in the order of court, of the lands of a decedent which he is about to sell. *Ib.*

ADMIRALTY. See *Collision; Practice*, 7, 8; *Public Law*, 1.
A statute of a State giving to the next of kin of a person crossing upon one of its public highways with reasonable care, and killed by a common carrier by means of steamboats, an action on the case for damages for the injury caused by the death of such person, does not interfere with the admiralty jurisdiction of the District Courts of the United States, as conferred by the Constitution and the Judiciary Act of September 24th, 1789; and this is so, even though no such remedy enforceable through the admiralty existed when the said act was passed, or has existed since. *Steamboat Company* v. *Chase*, 522.

AGREEMENT OF RECORD. See *Evidence*, 2.

ALIENS.
1. The duties of aliens domiciled in the United States stated, and certain ones who made munitions of war knowing that they were to be used for the rebellion, *held* to have given aid and comfort thereto. *Hanauer* v. *Doane* (12 Wallace, 342) affirmed. *Carlisle* v. *United States*, 147.
2. Such aliens were, however, included in the President's proclamation of December 25th, 1868, granting unconditionally and without reservation pardon to every person who participated in the rebellion or adhered to the enemies of the United States; with restoration of all rights, privileges, &c. *Ib.*
3. This pardon and amnesty relieved aliens prosecuting claims in the Court of Claims from the necessity of establishing their loyalty. *Ib.*
4. British subjects may, under the act of July 27th, 1868, prosecute claims in the Court of Claims. *Ib.*

AMENDMENTS TO THE CONSTITUTION. See *Constitutional Law*, 2–5.

AMNESTY AND PARDON. See *Aliens*, 2, 3.

ATTAINDER, BILL OF. See *Constitutional Law*, 8.

ATTORNEY AT LAW. See *Constitutional Law*, 5.

1. The power of a State to prescribe the qualifications for admission to the bar of its own courts is unaffected by the 14th amendment of the Constitution, and this court cannot inquire into the reasonableness or propriety of the rules it may prescribe. *Bradwell* v. *The State*, 130.
2. Its refusal, therefore, to admit a woman to practice is not a subject for review here. *Ib.*

AVOIDANCE OF BOND. See *Bond.*

"AWAITING DELIVERY."

Meaning of the terms as respects goods in a railway station. *Railroad Company* v. *Manufacturing Company*, 318.

BAIL. See *Fugitive from Justice.*

1. The "act of the law" which will discharge bail from an obligation to surrender their prisoner must be one which renders the performance impossible, and must be a law operative in the State where the obligation was assumed, and obligatory in its effect upon her authorities. *Taylor* v. *Taintor*, 367.
2. The fact that there has been placed in the hands of the bail, by some one, not the person arrested nor any one in his behalf, nor, so far as the bail knew, with his knowledge, a sum of money equivalent to that for which the bail and himself were bound, has no effect, in a suit against the bail, on the rights of the parties. *Ib.*

BANK DEPOSIT. See *Deposit.*

BANKRUPT ACT. See *Jurisdiction*, 6; *Landlord and Tenant.*

1. A creditor has reasonable cause to believe his debtor "insolvent" in the sense of the, when such a state of facts is brought to his notice respecting the affairs and pecuniary condition of his debtor, as would lead a prudent business man to the conclusion that he, the debtor, is unable to meet his obligations as they mature in the ordinary course of business. *Buchanan* v. *Smith*, 277.
2. A debtor "suffers" or "procures" his property to be seized on execution, when, knowing himself to be insolvent, an admitted creditor who has brought suit against him—and who he knows will, unless he applies for the benefit of the, secure a preference over all other creditors—proceeds in the effort to get a judgment until one has been actually got by the perseverance of him the creditor and the default of him the debtor. *Ib.*
3. Such effort by the creditor to get a judgment, and such omission by the debtor to "invoke the protecting shield of the," in favor of all his creditors, is a fraud on the, and invalidates any judgments obtained. *Ib.*
4. The fact that the debtor, just before the judgments were recovered, may have made a general assignment which he meant for the benefit of all his creditors equally, does not change the case. Such assignment is a nullity. *Ib.*
5. The transfer by a debtor who is insolvent, of his property, or a considerable portion of it, to one creditor as a security for a pre-existing

BANKRUPT ACT (*continued*).

debt, without making any provision for an equal distribution of its proceeds to all his creditors, operates as a preference, and must be taken as *primâ facie* evidence that a preference was intended, unless the transferee can show that the debtor was at the time ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts. *Wager et al.* v. *Hall*, 584.

6. Such a transfer, if made within four months before the filing by the party of a petition in bankruptcy, is void. *Ib.*
7. A sale by a retail country merchant then insolvent, of his entire stock, suddenly, is a sale "not made in the usual and ordinary course" of his business; and, therefore, *primâ facie* evidence of fraud, within the 35th section of the bankrupt law. *Walbrun* v. *Babbitt*, 577.
8. This presumption of fraud can be overcome only by proof on the part of the buyer that he pursued in good faith all reasonable means to find out the pecuniary condition of the vendor. *Ib.*
9. One purchasing in such a case from a vendee who he knows has used no such means, but on the contrary has bought under other suspicious circumstances, takes with full knowledge of the infirmity of the title. And as against either or both purchasers the assignee in bankruptcy may set the sale aside if made within six months before a decree in bankruptcy, even though a fair money consideration have been paid by each. *Ib.*
10. The District Courts sitting in bankruptcy, have no jurisdiction to proceed by rule to take goods seized, before any act of bankruptcy by the lessees, for rent due by them in Louisiana, under "a writ of provisional seizure"—and then in the hands of the sheriff, and held by him as a pledge for the payment of rent due—out of his hands, and to deliver them to the assignee in bankruptcy to be disposed of under the orders of the bankrupt court; neither the sheriff nor the lessor having been parties to the proceedings in bankruptcy; nor served with process to make them such. *Marshall* v. *Knox*, 551.
11. Where, under the 41st section of the Bankrupt Act of 1867, a trial by jury is had in the District Court in a case of application for involuntary bankruptcy, and exceptions are taken in the ordinary and proper way, to the rulings of the court on the subject of evidence and to its charge to the jury, a writ of error lies from the Circuit Court when the debt or damages claimed amount to more than $500; and if that court dismiss or decline to hear the matter, a mandamus will lie to compel it to proceed to final judgment. *Insurance Company* v. *Comstock*, 258.
12. Where the goods of a tenant seized by a landlord for rent, before any act of bankruptcy, have been taken out of his hands and given to the assignee in bankruptcy, by an order of the District Court acting summarily and without jurisdiction, and sold by such assignee, the Circuit Court, having got possession of the case by bill filed by the lessor, to be regarded as one in an original proceeding, will proceed and decide the whole controversy. *Marshall* v. *Knox*, 551.
13. And where the seizure for rent has been made under a statute like that

BANKRUPT ACT (*continued*).
prevailing in Louisiana, and where the landlord's lien is a perfected one, in the nature of a pledge or execution, it will give the lessor the full value of the goods sold clear of all expenses, whether the assignee obtained that value or not (limited, of course, by the amount of rent which he is entitled to have paid to him), and also to all the taxable costs to which he has been put by the litigation. Damages may be more appropriately claimed at law. *Marshall* v. *Knox*, 551.

BONA FIDE HOLDER. See *Bond; Municipal Bonds*, 3, 6; *Presumptions*, 5.

BONA FIDES. See *Principal and Agent.*

BOND. See *Municipal Bonds.*
A bond regular on its face cannot be avoided even by sureties (the obligee not having had knowledge thereof) by the fact that they signed it on a condition that other persons were to execute it who did not execute it. *Dair* v. *United States*, 1.

BONUS. See *Municipal Bonds*, 7.
A *bonus* is not a gift or gratuity, but a sum paid for services upon a consideration in addition to or in excess of that which would ordinarily be given. *Kenicott* v. *The Supervisors*, 453.

CAPTURED AND ABANDONED PROPERTY ACT.
A claim under, for a vessel taken and sold by the Treasury Department, *held* to have been rightly dismissed, the property which was the subject of it having been used in waging or carrying on war against the United States; and this so *held* although the government, in ignorance of the fact just stated, had hired the vessel in a regular way, and used her for a whole year as if she were belonging to a loyal citizen who had never misused her; after which under some general order it disregarded the owner's claims, and turned her over for sale by the Treasury Department. *Slawson* v. *United States*, 310.

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An amendment to a charter treated as part of the charter, in a subsequent statute giving certain privileges "granted by the charter." *Humphrey* v. *Pegues*, 244.

CHATTEL SALE. See *Statute of Frauds.*

CITIZENS OF THE STATES AND OF THE UNITED STATES. See *Constitutional Law*, 2–5.

COLLISION.
1. A steamer condemned for not changing her course when meeting a sailing vessel. *The Commerce*, 33.
2. A steamer condemned also for an accident while taking a tow around a dangerous point with a too long hawser. *The Cayuga*, 177.
3. Though a sailing vessel having the wind is *primâ facie* bound to adopt

COLLISION (*continued*).

such a course as will prevent collision with other sailing vessels not having it, it is still the duty of these last in an emergency to make their courses so as not to render it difficult for the vessel having the wind to do her duty by rendering it doubtful what movement she should make. *The Mary Eveline*, 348.

COLORADO TERRITORY.

The acts of Congress of May 23d, 1844, and May 28th, 1864, for the relief of the city of Denver, and the act of Colorado Territory of March 11th, 1864, explained and applied. *Cofield* v. *McClelland*, 331.

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"COMMERCIAL BROKERS."

Who act *wholly* as buyers, not liable under the Internal Revenue Act of July 13th, 1866, to the tax of one-twentieth of one per cent. on the amount of "sales" made by commercial brokers. *The Collector* v. *Doswell & Co.*, 156.

COMMISSIONER OF INTERNAL REVENUE. See *Internal Revenue.*

COMMON CARRIER. See *Admiralty.*

1. When goods are delivered to a common carrier to be transported over his railroad to his depot in a place named, and there to be delivered to a second line of conveyance for transportation further on, the common-law liability of common carriers remains on the first carrier until he has delivered the goods for transportation to the next one. His obligation, while the goods are in his depot, does not become that of a warehouseman. *Railroad Company* v. *Manufacturing Company*, 318.
2. Although a common carrier may limit his common-law liability by special contract assented to by the consignor of the goods, an unsigned general notice printed on the back of a receipt does not amount to such a contract, though the receipt with such notice on it may have been taken by the consignor without dissent. *Ib.*
3. The court expresses itself against any further relaxation of the common-law liability of common carriers. *Ib.*
4. The expression "awaiting delivery" defined. *Ib.*

CONDITION.

How far a grant by a State loyal at the time, on condition that certain things shall be done, is absolved from the condition by the State going into rebellion, and by the rebellion rendering the performance by the grantee of the condition impracticable. *Davis* v. *Gray*, 203.

CONFEDERATE NOTES. See *Deposit; Nudum Pactum; Public Policy.*

CONFIDENTIAL RELATIONS. See *Principal and Agent.*

CONFISCATION ACT.

Of August 6th, 1861; the proper mode of proceeding under it set forth, and some very irregular action under it, declared of no effect. *United States, Lyon et al.* v. *Huckabee*, 414.

CONFLICT OF JURISDICTION. See *Admiralty*.

I. Between the Federal Courts and State Officers.

1. A Circuit Court, in a proper case in equity, may enjoin a State officer from executing a State law in conflict with the Constitution or a statute of the United States. *Davis* v. *Gray*, 203.

II. Between Courts of Different States.

2. Where a ship, then at sea, registered in one State (Massachusetts), her owner's place of residence, was on his becoming insolvent passed under statutory law, by an act of the insolvent court of that State, to his assignee in insolvency, and on arriving from sea entered the port of another State (New York), where she was immediately attached by one of the owners' creditors in that State, *held* that the ship while at sea was to be considered as a portion of the territory of Massachusetts, and that the assignee in insolvency under its laws had the prior right. *Crapo* v. *Kelly*, 610.

III. Between Federal and State Courts.

3. A State statute giving to a person's next of kin a right to sue the owners of a steamboat for the injury done them by killing their relation on the public highways of the State (the same being navigable waters of the United States), does not conflict with the admiralty jurisdiction as conferred on the Federal courts by the Constitution and the Judiciary Act. *Steamboat Company* v. *Chase*, 522.

"CONNECTION" OF RAILWAYS.

What will answer the meaning of the expression. This considered in a special case. *Kenicott* v. *The Supervisors*, 452.

CONSIDERATION. See *Nudum Pactum; Public Policy*.

CONSTITUTIONAL LAW. See *Admiralty; Bail; Monopoly; Parties*, 1, 2; *Privileges and Immunities; Texas*.

1. A license tax by a city of one State of a business carried on within the city, of an express company chartered by another State, which business so licensed included the making of contracts within the first-named State for transportation beyond its limits, is not a tax on interstate commerce, and is constitutional. *Osborne* v. *Mobile*, 479.

2. The thirteenth amendment to the Constitution, and the first clause of the fourteenth amendment, explained and construed, and *held* not to forbid the grant by a State legislature of an exclusive right of a power to have and maintain slaughter-houses within a considerable district, including a large Southern city, for a limited time, the same being under proper regulations and obligations prescribed, the grant being one of a character, as the court considered, necessary and proper to effect a purpose which had in view the public good. *The Slaughter-house Cases*, 36; see also *Bradwell* v. *The State*, 130.

3. The histories, purposes, extent, and limits of the said thirteenth and fourteenth amendments stated. *Ib.*

4. The privileges and immunities of citizens of the States and of citizens of the United States, distinguished under the first and second clauses of the fourteenth amendment; and respectively defined by this court. *Ib.*

CONSTITUTIONAL LAW (*continued*).

5. A refusal by the courts of a State to admit a woman to practice violates no provision of the Federal Constitution, nor the fourteenth amendment to it. *Bradwell* v. *The State*, 130.

6. An exemption from taxation granted by one legislative act to a railroad company, as an inducement to it to build its road, cannot by a subsequent one be taken away. *Humphrey* v. *Pegues*, 244.

7. The laws which exist at the time of the making of a contract, and in the place where it is made and to be performed, enter into and make part of it. This embraces those laws alike which affect its validity, construction, discharge, and enforcement. The remedy or means of enforcing a contract is a part of that "obligation" of a contract which the Constitution protects against being impaired by any law passed by a State. And so, if a contract when made was valid under the constitution and laws of a State, as they had been previously expounded by its judicial tribunals, and as they were understood at the time, no subsequent action by the legislature or the judiciary will be regarded by this court as establishing its invalidity. *Walker* v. *Whitehead*, 314; *Olcott* v. *The Supervisors*, 678.

8. The statute of February 15th, 1865, of West Virginia (Acts of 1865, p. 20), by which persons having at that time a right to have cases in attachment reheard under particular circumstances, were deprived for past misconduct, and without judicial trial of such right, was unconstitutional and void. *Pierce* v. *Carskadon*, 234.

9. The clause of the Constitution (article 4, section 2) relating to the delivery of persons charged in one State with crime, and fleeing from justice and found in another, passed upon in connection with the subject of their bail. *Taylor* v. *Taintor*, 366.

CONSTRUCTION, RULES OF.

I. As applied to Contracts.

II. As applied to Statutes.

An act of legislature authorizing a municipal corporation to lend its credit to a railroad company specified, and to "*any other railroad company duly incorporated and organized* for the purpose of constructing railroads," leading in a direction named, "and which in the opinion of common council are entitled to such aid from the city;" authorizes the lending of the city credit to a railroad company *thereafter* duly incorporated and organized, as well as the lending of such credit to those in existence when the act was passed. *James* v. *Milwaukee*, 159.

CONTRACT. See *Constitutional Law*, 6, 7; *Duress; Nudum Pactum; Public Policy.*

CONTRACTOR AND SUBCONTRACTOR. See *Employer and Subcontractor.*

"CONVEYANCE."

Walking is not either a public or private, within the meaning of an accident policy providing against accidents, when travelling by public or private conveyance." *Ripley* v. *Insurance Company*, 336.

COUNTY CLERK. See "*Absence.*"

COUNTY JUDGE. See "*Absence.*"

COURT OF CLAIMS. See *Aliens*, 3, 4; *Captured and Abandoned Property Act.*

Its power under the second section of the act of June 25th, 1868, to order a new trial, after appeal to the Supreme Court. *Ex parte: In the matter of the United States*, 699.

DEBTOR AND CREDITOR. See *Married Woman.*

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DEMAND AND NOTICE. See *Evidence*, 4.

DEPOSIT.

The rule that where *money* has been deposited with a bank, the bank where the deposit is made becomes the owner of the money and consequently a debtor for the amount, and under obligation to pay on demand, not the identical money received, but a sum equal in legal value, does not apply where the thing deposited is not *money*, but a commodity, such as "Confederate notes," and it was agreed that the collections should be made in like notes. *Planters' Bank* v. *Union Bank*, 483.

DESCRIPTION OF LANDS.

What amounts to a sufficient, in an administrator's petition for sale of his decedent's, and in the order of court directing the sale. *Turner* v. *McNitt*, 352.

DISTILLER. See *Internal Revenue.*

DONATION. See *Municipal Bonds*, 7.

DURESS.

Where the agents of the rebel Confederacy came to persons owning iron-works, and informed them that they must either contract to furnish iron at a uniform price, or lease or sell the works to the Confederacy or that they would be impressed, and the owners, then much in debt, after consultation—the works being already in charge of a guard from the Confederacy, which possessed despotic power over skilful laborers—considering that to "contract" would cause a failure of their scheme, and to lease would be ruinous, resolved to sell: *held*, that such a sale was not made under duress. *United States, Lyon et al.* v. *Huckabee*, 414.

EMPLOYER AND SUBCONTRACTOR.

How far an employer (in this case a corporation) is liable in damages for personal injuries caused to others by the acts of subcontractors employed by it, and done during the time of their employment. *Water Company* v. *Ware*, 566.

ENROLMENT OF VESSELS.

A temporary enrolment, from year to year, in the port of one State, does

ENROLMENT OF VESSELS (*continued*).

not so affect the permanent registry of a vessel in the port of another State in which the vessel belongs and has her home, as to subject her to taxation in ports away from the latter State. *Morgan* v. *Parham*, 472.

EQUITY. See *Laches; Negotiable Paper*, 2; *Parties*, 3; *Rebellion*, 1, 2; *Receivers in Chancery*.

1. Affirmative relief will not be granted in equity upon the ground of fraud unless it be made a distinct allegation in the bill. *Voorhees* v. *Bonesteel and Wife*, 16.
2. Nor will a trust alleged in a bill to exist, be considered as proved when every material allegation of the bill in that behalf is distinctly denied in the answer; and the proofs, instead of being sufficient to overcome the answer, afford satisfactory grounds for holding that there was no trust in the case. *Ib.*
3. An "agreement of record" though not made part of the record by the pleadings, received as evidence; the suit being one in equity and not at law. *Burke* v. *Smith*, 390.
4. In a bill to foreclose a mortgage given to secure negotiable railroad bonds, the bonds having been transferred to a *bonâ fide* holder for value, no further defences are allowed as against the mortgage than would be allowed were the action brought in a court of law on the bonds. *Carpenter* v. *Longan*, 271; *Kenicott* v. *The Supervisors*, 452.

ERROR. See *Practice*, 1–4, 6–10.

1. A. brought suit on a policy on vessel and freight, for a total loss. The jury found the whole amount insured *with interest* and $5000 besides for damages, and judgment was entered accordingly. *Held*, that the party could not recover damages beyond legal interest, and that there was error on the face of the record. *Insurance Company* v. *Piaggio*, 378.
2. Under the "Act to further the administration of justice" of June 1st, 1872 (17 Stat. at Large, 197), a *venire de novo* is not required for such error, and the court can reverse the judgment and modify it by disallowing the $5000, and remanding the case with directions to enter judgment for the residue found by the jury with interest;—the case being one where all the facts were apparent in the record. *Ib.*
3. It is not error to charge that a party assured had no right to abandon, when the insurers have accepted the abandonment. *Ib.*
4. Nor to refuse to charge that an abandonment made through error, and so accepted, is void if not warranted by the policy, when no evidence had been given of error by either side. *Ib.*
5. A judgment will not be reversed for want of a charge requested when the record contains no sufficient information that the charge requested was material to the issues. *Ib.*
6. Nor because the court charges in a way which, though right in the abstract, may not be so in application, when the record does not show that sufficient evidence had not been given to warrant the jury in passing on the question. *Ib.*
7. Where on an information in which the party proceeded against was entitled to a trial by jury, his answer has been stricken out, the judg-

ERROR (*continued*).
ment will be reversed, and the cause remanded with directions to permit the claimants to answer, and to award a *venire*. *Garnharts* v. *United States*, 162.
8. When, on the undisputed parts of a case a verdict is clearly right, an appellate court will not reverse, because on some disputed points the charge may have been technically inaccurate. *Walbrun* v. *Babbitt*, 577.

EVIDENCE. See *Equity*, 3; *Municipal Bonds*, 6; *Presumptions*, 1, 2, 5; *Res Judicata; Texas Titles*, 4, 6.
1. Notices required by statute presumed to have been given by a probate judge, he having made a conveyance of land which could have been properly made only after such notices given. *Cofield* v. *McClelland*, 331.
2. An ".agreement of record" not made part of the record by the pleadings, may be received as evidence in a suit in equity, though it might not be in a suit at law. *Burke* v. *Smith*, 390.
3. Where improper evidence has been suffered by the court to get before the jury, it is afterwards properly withdrawn from them. *Specht* v. *Howard*, 564.
4. On a suit by the indorsee of a negotiable note which has no place of payment specified in it, against the indorser who relied on a confessedly defective demand on the maker, of payment; that is to say, on a fruitless effort at demand, in the place where the note was dated, but in which place the maker did not live, parol evidence that at the time when the note was drawn, it was agreed between the maker and the indorsee that it should be made payable in the place where the effort to demand payment had been made, and that this place of payment had been omitted by the mistake of the draughtsman—being evidence to vary or qualify the absolute terms of the written contract—would be improperly let in to the jury and, if let in, would be properly withdrawn. *Ib.*

EX POST FACTO LAW. See *Constitutional Law*, 8.

EXCLUSIVE RIGHT. See *Monopoly*.

EXECUTION. See *Practice*, 6.

FEMALE ATTORNEY AT LAW.
The refusal of a State court to admit a woman to practice law is not a breach of the Federal Constitution nor the subject of review here. *Bradwell* v. *The State*, 130.

FOURTEENTH AMENDMENT, THE.
History, purpose, extent, and effect of stated. *Slaughter-house Cases*, 36.

FRAUD. See *Equity*, 1; *Parties*, 3.

FUGITIVE FROM JUSTICE.
That clause (article iv, § 2) of the Constitution, relating to the delivery of persons charged in one State with crime, fleeing to another and found there, passed upon in connection with the subject of their bail. *Taylor* v. *Taintor*, 366.

GIFT INTER VIVOS. See *Statute of Frauds.*

HIGH SEAS. See *Conflict of Jurisdiction*, 2.

HUSBAND AND WIFE. See *Married Woman.*

ILLEGAL CONSIDERATION. See *Nudum Pactum; Public Policy.*

ILLINOIS. See *Presumptions*, 2, 3; "*Seized of.*"

A purchaser at a judicial sale is a "purchaser" within the recording acts of, enacting that unrecorded deeds shall take effect as to "subsequent purchasers" without notice, after the time for filing the same for record, and not before. *McNitt* v. *Turner*, 353.

IMPLICATION. See *Municipal Bonds*, 1–3

INDIAN TREATIES. See *Wyandotte Float.*

"INSOLVENT."

Meaning of the term in the Bankrupt Law. *Buchanan* v. *Smith*, 277.

INSURANCE. See *Error*, 1–4; *Life Insurance.*

INTEREST. See *Error*, 1.

INTERNAL REVENUE. See *Presumptions*, 4.

1. The court, in the absence of a clear, common conviction on the part of its members, as to meaning of a clause in a statute relating to the, adopted what was shown to have been the unvarying practical construction given to it by the commissioner of. *Peabody* v. *Stark*, 240.
2. Held accordingly, that under the 80 per cent. clause in the 20th section of the act of July 20th, 1868, the distiller is not liable until a survey in which the tax is assessed has been delivered to him as provided in the 10th section. *Ib.*

INTERPRETATION OF LANGUAGE. See *Construction, Rules of.*

"INVOLUNTARY SERVITUDE." See *Constitutional Law*, 2–5; *Monopoly.*

Meaning of the words as used in the 13th amendment to the Constitution, defined. *Slaughter-house Cases*, 36.

IOWA. See "*Absence;*" *Municipal Bonds*, 6.

JUDICIAL COMITY. See *Conflict of Jurisdiction*, 1, 3; *Internal Revenue.*

1. When, in a case of collision between a steamer and a sailing vessel, the District and Circuit Court both condemning the steamer, agree in their estimate of the value of the sailing vessel, this court will not set aside their estimate without satisfactory evidence that they were mistaken. *The Commerce*, 33.
2. How far the Federal courts will follow, as of obligation, the decisions of the State courts. *Olcott* v. *The Supervisors*, 678.

JUDICIAL PRESUMPTIONS. See *Judicial Comity; Presumptions.*

JUDICIAL SALE. See *Administrator's Sale.*

JURISDICTION. See *Admiralty*.

I. Of the Supreme Court of the United States.

(*a*) It has jurisdiction—

1. Under the 25th section of the Judiciary Act, where, on a suit in one State, between a sheriff of that State and an assignee in insolvency appointed by the court of another State, to determine whether the sheriff acting for an attaching creditor or the assignee has the prior right to certain personal property attached, the highest court of the State where the suit was brought decides that the right was with the sheriff. *Crapo* v. *Kelly*, 610.

(*b*) It has not jurisdiction—

2. Of an appeal on a libel *in personam* for a collision by the owners of a schooner against the owners of a sloop that had been sunk in the collision; where the decree was for but $1292.84, and, therefore, "not exceeding the sum or value of $2000." And this although prior to the libel *in personam*, the owners of the sloop had filed in another district a libel *in rem* against the schooner, laying their damages at $4781.84, and that in the District and Circuit Courts below, both cases might have been heard as one; the cases never having, however, been brought into the same district or circuit, nor in any manner consolidated. *Merrill* v. *Petty*, 338.
3. Nor under the 25th section of the Judiciary Act, of a case where neither the record nor the opinion of the Supreme Court, which was in the record, shows any question before that court, except one relating to the interruption of a "prescription" (statute of limitations) set up as a defence, and the opinion shows that this question was decided exclusively upon the principles of the jurisprudence of the State. *Marqueze* v. *Bloom*, 351.
4. Nor under that section, nor under the second section of the act of February 5th, 1867, amendatory of it, of a case dismissed by a State court for want of jurisdiction in such court. *Smith* v. *Adsit*, 185.

II. Of the Circuit Courts of the United States. See *Bankrupt Act*, 11, 12.

5. Where a proceeding in a State court is merely incidental and auxiliary to an original action there—a graft upon it, and not an independent and separate litigation—it cannot be removed into the Federal courts under the act of 2d of March, 1867, authorizing under certain conditions the transfer of "suits" originating in the State courts. *Bank* v. *Turnbull & Co.*, 190.
6. The Circuit Court may under the second section of the Bankrupt Act entertain on bill as an original proceeding, a case involving a question of adverse interest in goods seized by the sheriff before any act of bankruptcy by the tenant, for rent due and held by him, the sheriff, as a pledge for the payment thereof, and claimed, on the other hand, by the assignee in bankruptcy of the tenant. *Marshall* v. *Knox*, 551.

III. Of the District Courts of the United States. See *Admiralty*; *Bankrupt Act*, 10.

KANSAS PACIFIC RAILWAY.

The proviso in the 21st section of the act of July 4th, 1864, amendatory of the act of July 1st, 1862, to aid the said railway in the construction of its road, requiring the prepayment of the cost of surveying, selecting, and conveying the lands, requires the prepayment as to lands granted by the original act, as well as to those granted by the amendatory one. *Railway Company* v. *Prescott*, 603.

LACHES.

A court of equity will, apparently, not be moved to set aside a fraudulent transaction at the suit of one who has been quiescent during a term longer than that fixed by the statute of limitations, after he had knowledge of the fraud, or after he was put on inquiry with the means of knowledge accessible to him. *Burke* v. *Smith*, 401.

LANDLORD AND TENANT. See *Bankrupt Act*, 10, 12, 13.

Under the Civil Code of Louisiana, a lessor has a right to seize, for rent in arrears, goods on the premises, and until he is paid his rent, retain them as against an assignee in bankruptcy subsequently occurring. *Marshall* v. *Knox*, 551.

LANGUAGE, INTERPRETATION OF. See *Construction, Rules of.*

"LEAVING LANDS."

The expression satisfies a statutory requirement, that when an administrator desired to sell his intestate's lands, he should set forth in his petition that the intestate had died "*seized* of" such and such lands. *Turner* v. *McNitt*, 352.

LEGISLATIVE ACT.

Though of a general sort repealable by another, though special. *Railroad Company* v. *County of Otoe*, 667.

LIFE INSURANCE.

Walking, for a certain distance at the end of a journey, *held*, not to be travelling by either public or *private conveyance*, within the meaning of an accident policy of insurance on life while "travelling by public or private conveyance." *Ripley* v. *Insurance Company*, 336.

LOUISIANA. See *Bankrupt Act*, 10, 12, 13; *Landlord and Tenant.*

"MAJORITY OF THE LEGAL VOTERS." See *Presumptions*, 5.

When a statute requires a thing contemplated to be done by a township, to be approved by the votes of the "majority of the legal voters of the township" before it shall be done, the requisition is answered by a majority of the legal voters voting at an election duly notified, though all these voters be but a minority of the legal voters of the township. *St. Joseph Township* v. *Rogers*, 644.

MANDAMUS. See *Bankrupt Act*, 11; *Court of Claims.*

One issued to the Court of Claims, in a special case on a divided court there. *Ex parte: In the matter of the United States*, 699.

MARRIED WOMAN.

Under the laws of New York, may manage her separate property, through

MARRIED WOMAN (*continued*).
the agency of her husband, without subjecting it to the claims of his creditors; and when he has no interest in the business, the application of a portion of the income to his support will not impair her title to the property. *Voorhees* v. *Bonesteel and Wife*, 16.

MASTER AND SERVANT.
How far a master or principal, as *ex. gr.*, a water corporation, is liable in damages for personal injuries caused to others by the acts of persons employed by it, and done during the time of their employment. *Water Company* v. *Ware*, 566.

MEMPHIS, EL PASO, AND PACIFIC RAILROAD COMPANY, THE.
Had not on the 20th of January, 1871, lost its franchise or its right of and to the land grant and land reservation of the company given in its charter. *Davis* v. *Gray*, 203.

MICHIGAN CENTRAL RAILROAD COMPANY.
The section in the charter of, providing that the company shall not be responsible for goods on deposit in any of their depots "awaiting *delivery*," does not include goods in such depots awaiting *transportation;* but refers to such goods alone as have reached their final destination. *Railroad Company* v. *Manufacturing Company*, 318.

MONOPOLY. See *Constitutional Law*, 2–5.
What does and what does not constitute. The whole matter largely considered, and an exclusive grant by the State to a corporation created by it, to have and maintain slaughter-houses within a considerable district, including a large Southern city, for a limited time, and under limitations as to price, and under obligations to provide ample conveniences for all persons, and with permission to all owners of stock to land, and of all butchers to kill their animals at those slaughter-houses, *held* not to be one, nor to be forbidden by the thirteenth amendment to the Constitution nor the first section of the fourteenth, but to be a police regulation within the powers of the State; as well since the adoption of the said thirteenth and fourteenth amendments of the Constitution as before. *The Slaughter-house Cases*, 36.

MORTGAGE.
When held as security for the payment of negotiable paper, is not open, as against *bonâ fide* holders of the paper for value, to defences to which the notes in their hands would not equally be open. *Carpenter* v. *Longan*, 271; *Kenicott* v. *The Supervisors*, 452.

MOUNT VERNON RAILROAD.
In Illinois, certain clauses of its charter construed in a somewhat complicated case. *Kenicott* v. *The Supervisors*, 452.

MUNICIPAL BONDS. See *Construction, Rules of.*
1. The question whether a county shall borrow money for a particular purpose, and which question a statute required should be submitted to the voters of the county before the bonds of the county were issued, may be submitted by implication, as well as directly. *Lynde* v. *The County*, 6.

MUNICIPAL BONDS (*continued*).

2. What amounts to such submission by implication. *Lynde* v. *The County*, 6.
3. A submission implied in favor of *bonâ fide* holders of the instrument. *Ib.*
4. A power to issue county bonds carries with it a power to make them payable out of the State where the county is, and to sell them also out of the State. *Ib.*
5. As also to cancel bonds previously given to a contractor with the county, but not yet put by him on the market, and to issue new ones in a different form. *Ib.*
6. Where a particular officer, as *ex. gr.*, the county judge (as is the county judge in Iowa), is designated by statute to decide whether the voters have given the required sanction to the borrowing of money and issuing of bonds, his execution and issue of bonds setting forth on their face that "all of said bonds are issued in accordance with a vote of the people of said county," and that "the people have voted the levying of sufficient taxes," &c., is conclusive evidence against the county of the popular sanction so far as respects holders *bonâ fide* and for value. *Ib.*; and see *St. Joseph Township* v. *Rogers*, 644.
7. Unless restrained by a constitutional prohibition, the legislature of a State may authorize a county to aid, by issuing its bonds and giving them as a donation, the construction of a road outside the county, and even outside the State, if the purpose of the road be to give to the county a connection with some other region which is desirable. *Railroad Company* v. *County of Otoe*, 667.

NEBRASKA.

There is no prohibition in the constitution of, restraining the ordinary power of State legislatures to confer upon counties a right to aid railroad companies by issuing bonds of the county. *Railroad Company* v. *County of Otoe*, 667.

NEGOTIABLE PAPER. See *Evidence*, 4.

1. The assignment of before maturity, raises the presumption of a want of notice of any defence to it; and this presumption stands till it is overcome by sufficient proof. *Carpenter* v. *Longan*, 271.
2. When a mortgage given at the same time with the execution of, and to secure payment of, is subsequently, but before the maturity of the paper, transferred *bonâ fide* for value, with it, the holder of the paper when obliged to resort to the mortgagee is unaffected by any equities arising between the mortgagor and mortgagee subsequently to the transfer, and of which he, the assignee, had no notice at the time it was made. He takes the mortgage as he did the paper. *Ib.*; and see *Kenicott* v. *The Supervisors*, 452.
3. Where the United States issued its negotiable bonds (bonds payable to bearer) to a State which on receiving them passed (before the rebellion) a law that none of the bonds should be available in the hands of the holder, and then went into rebellion and repealed the law, *held*, notwithstanding what was said in *Texas* v. *White and Chiles* (7 Wallace, 700), and *Texas* v. *Hardenberg* (10 Id. 68), that bonds unindorsed issued in aid of the rebellion could not be recovered on—

NEGOTIABLE PAPER (*continued*).

i. That no presumption arose from the absence of such indorsement on the bonds that they had been issued without authority, and for an unlawful purpose, and that the presumption that they had been issued with authority and for a lawful purpose was in favor of the holders of the bonds, especially after payment by the United States.

ii. That it was primarily the duty of the government (as the United States were the obligors in the bonds, and the rebellion was waged against *them*), to ascertain and decide whether bonds presented to and paid by it had or had not been issued and used in aid of the rebellion; and that after a decision in the affirmative the presumption was that the parties who held the bonds were entitled to payment as against the reconstructed State of Texas.

iii. That whether an alienation of the bonds by the usurping government divested the title of the State, depended on other circumstances than the quality of the government; that if the object and purpose of it were just in themselves and laudable, the alienation was valid; but if, on the contrary, the object and purpose were to break up the Union and overthrow the constitutional government of the Union, the alienation was invalid. *Huntington* v. *Texas*, 402.

NEW ALBANY, CITY OF.

The matter of its relations to the New Albany and Sandusky Railroad Company arising out of its subscription, and the subscription of other persons, conditioned on its subscribing $50,000 or upwards to the road; and how far under the facts of the case the original subscribers and the city were liable, past a certain extent, to creditors of the railroad company on such subscription. The matter considered on a bill in equity, and decided against the complainants. *Burke* v. *Smith*, 390.

NEW MEXICO. See *Territorial Legislation*.

NEW YORK.

Under the laws of, how far a married woman may manage her separate property through the agency of her husband, without subjecting it to the claims of creditors. *Voorhees* v. *Bonesteel and Wife*, 16.

NOTICE. See *Common Carrier*, 2, 3; *Evidence*, 4; *Negotiable Paper*, 1, 2; *Presumptions*, 1, 2.

NUDUM PACTUM.

A promise to pay in "Confederate notes" in consideration of the receipt of such notes and of drafts payable by them, is neither a *nudum pactum* nor an illegal contract. *Planters' Bank* v. *Union Bank*, 483.

OBLIGATION OF CONTRACT. See *Constitutional Law*, 7.

OMNIA RITE ACTA. See *Presumptions*.

PAINS AND PENALTIES. See *Constitutional Law*, 8.

PARDON AND AMNESTY. See *Aliens*, 1–3.

PAROL EVIDENCE. See *Evidence*, 4.

PARTIES. See *Bankrupt Act*, 10.

1. Where a State is concerned, it should be made a party if it can be so

PARTIES (*continued*).

made. If it cannot be, the case may proceed to a decree against its officers. *Davis* v. *Gray*, 203.

2. Making an officer of the State a party does not make the State a party, though a law of the State may prompt the officer's action, and stand behind him as the real party in interest. To make a State a party the bill must be shaped with that view. *Ib.*

3. Where a minority of stockholders and bondholders of a railroad company seek to set aside as fraudulent, a sale made through the co-operation of the residue of the stockholders and bondholders with the trustees of a mortgage on the road, and an amicable foreclosure, a bill by the minority to set the sale aside as collusive, must make not only the purchaser a party but also the consenting stockholders and bondholders. *Ribon* v. *Railroad Company*, 446.

PATENTS.

I. General Principles relating thereto.

II. The Validity of Particular.

III. Assignments of, etc.

A patentee of certain machines, whose original patent had still between six and seven years to run, conveyed to another person the "right to make and use and to license to others the right to make and use four of the machines" in two States "during the remainder of the original term of the letters-patent, *provided*, that the said grantee shall not in any way or form dispose of, sell, or grant any license to use the said machines *beyond* the said term." The patent having, towards the expiration of the original term, been extended for seven years, *held*, that an injunction by a grantee of the extended term would lay to restrain the use of the four machines, they being in use after the term of the original patent had expired. *Mitchell* v. *Hawley*, 544.

PERSONAL PROPERTY, SALE OF. See *Statute of Frauds.*

PLEADING. See *Equity*, 1.

POLICE REGULATION. See *Monopoly.*

PRACTICE. See *Bankrupt Act*, 11, 13; *Equity*, 1; *Error; Judicial Comity; Parties; Presumptions*, 1–4; *Receivers in Chancery*, 2; *Res Judicata; Texas Titles*, 6.

I. In the Supreme Court.

(*a*) *In cases generally.*

1. This court cannot review a judgment given in the Circuit Court where, under the act of March 3d, 1865, that court has meant to act in the place of the jury, unless such court makes a special finding; that is to say, unless it states the ultimate facts of the case—*i. e.*, the facts which it finds that the evidence has proved—in some way having the form of a special verdict. *Dickinson* v. *The Planters' Bank*, 250.

2. When on the undisputed parts of a case a verdict is clearly right, so that if a new *venire* were awarded the same verdict would have to be given, a court will not reverse because on some disputed points a charge may have been technically inaccurate. *Walbrun* v. *Babbitt*, 577.

PRACTICE (*continued*).

3. A principal suit having been decided in one way, a proceeding by way of intervention, and involving the same question, of necessity follows it. *Tweed's Case*, 505.
4. Where a subordinate court, which had no jurisdiction in the case, has given judgment for the plaintiff or defendant, or improperly decreed affirmative relief to a claimant, an appellate court must reverse. It is not enough to dismiss the suit. *United States, Lyon et al.* v. *Huckabee*, 414.
5. Where after judgment for a certain sum a *remittitur* is entered as to part, the *remittitur* does not bind the party making it, if the judgment be vacated and set aside. *Planters' Bank* v. *Union Bank*, 483.
6. Where after judgment for a certain sum, execution is allowed, during a motion for a new trial, to issue for a part of the sum, which part is admitted to be due, this, though anomalous, is not a ground for reversal, where no objection appears to have been made, and where it may fairly be presumed that the defendant assented to what was done; and where, a new trial being afterwards granted, it was limited to a trial as to the excess of the claim above the amount for which the execution was issued. *Ib.*

(*b*) *In Admiralty.*

7. When, in a case of collision between a steamer and a sailing vessel, the District and Circuit Court, both condemning the steamer, agree in their estimate of the value of the sailing vessel, this court will not set aside their estimate without satisfactory evidence that they were mistaken *The Commerce*, 33.
8. A decree will be affirmed in this court where, from the imperfect way in which the record is sent up, the court cannot discover satisfactory evidence of error. *The Cayuga*, 177.

II. In Circuit and District Courts.

9. Where a State is concerned, it should be made a party, if it can be so made. If it cannot be, the case may proceed to a decree against its officers. *Davis* v. *Gray*, 203.
10. Where improper evidence has been suffered by the court to get before the jury, it is properly afterwards withdrawn from them. *Specht* v. *Howard*, 564.

III. Of the District Courts of the United States.

11. Have not jurisdiction in bankruptcy to proceed *summarily*, in cases where an adverse interest in goods is claimed, and to take it out of the hands of a party without notice to parties in interest. *Marshall* v. *Knox*, 551.

PRE-EMPTION AND SETTLEMENT. See *Wyandotte Float.*

PRESUMPTIONS. See *Judicial Comity; Municipal Bonds*, 6; *Negotiable Paper*, 1.

1. Notices required by statute will be presumed to have been given by a probate judge, he having made a conveyance of land which could have been properly made only after such notices given. *Cofield* v. *McClelland*, 331.

PRESUMPTIONS (*continued*).

2. Where a statute enacted that "in all cases where an intestate shall have been a non-resident, &c., but having property in the State, administration should be granted to the *public administrator* of the proper county, and to no one else:" *Held*, that where a person to whom letters of administration on the estate of a non-resident applied, under the statute, to have a sale of his property, and the court, having jurisdiction of the subject, ordered the sale, it is not to be presumed that he was not the *public* administrator. *McNitt* v. *Turner*, 352.
3. Where jurisdiction has attached, whatever errors may occur subsequently in its exercise, the proceeding being *coram judice*, cannot be impeached collaterally except for fraud. *Ib.*
4. Where, on an information for breach of the internal revenue laws, the record shows that an answer of a claimant was stricken out by the court, in a case in which he was entitled to a trial by jury, and judgment rendered against him as upon default, this court will not presume that the order was passed for good cause, unless enough is shown in the record to warrant such a conclusion. *Garnharts* v. *United States*, 162.
5. Where a statute makes it the duty of the supervisor of a township, "if it shall appear that a majority of all the legal voters of such township have voted" for a particular measure, to do a particular act, as *ex. gr.* issue the bonds of the county, it becomes his duty to decide whether an election was held, and whether such a majority voted in favor of the measure; and when he passes upon the question by issuing the bonds, the fact of the election and whether the majority voted in favor of the issue cannot be questioned as against an innocent holder of the bonds. *St. Joseph Township* v. *Rogers*, 665.

PRINCIPAL AND AGENT.

A person having entered, January 23d, 1866, into a contract with the government to purchase, as its agent, "cotton which formerly belonged to the so-called 'Confederate States' now in the possession of individuals in the Red River country (concealed)," was not precluded by the fact of such agency and during it from buying other cotton in that region not formerly belonging to those so-called States; he having discovered, when he went to the region, that there was no cotton upon which his contract operated, and his contract not obliging him by its terms to devote his whole time to the business of the agency, nor from buying cotton if of a kind not such as was described in his agreement. *Tweed's Case*, 505.

"PRIVILEGES AND IMMUNITIES."

1. Of citizens of the States and of the United States respectively, distinguished and defined, in view of the fourteenth amendment. *Slaughter-house Cases*, 36.
2. The right to practice law in a State court is not a privilege or immunity of a citizen of the United States, within the meaning of the fourteenth amendment. *Bradwell* v. *The State*, 130.

PUBLIC LANDS. See *Kansas Pacific Railway; Wyandotte Float.*

The principle that lands sold by the United States may be taxed before the government has parted with the legal title by issuing a patent, is to be understood as applicable only to cases where the *right* to the patent is complete, and the equitable title fully vested without anything more to be paid or any act done going to the foundation of the right. *Railway Company* v. *Prescott*, 603.

PUBLIC LAW.

1. On a question of conflict of jurisdiction between the courts of two States, a ship on the high seas is to be considered as part of the territory of the State where she is registered, and where her owners reside. *Crapo* v. *Kelly*, 610.
2. A military commander commanding the department in which the city of New Orleans was situate, had not the right, on the 17th of August, 1863, after the occupation of the city by General Butler, and after his proclamation of May 1st, 1862, announcing that "all the rights of property of whatever kind will be held inviolate, subject only to the laws of the United States," to seize private property as booty of war, or, in face of the acts of Congress of 6th of August, 1861, and July 7th, 1862, make any order as commander confiscating it. *Union Bank* v *Planters' Bank*, 483.

PUBLIC POLICY. See *Nudum Pactum.*

Where an illegal contract has been executed by the parties themselves, and the illegal object has been accomplished, the money or thing which was the price of it, as *ex. gr.*, "Confederate bonds," may be a legal consideration between the parties for a promise express or implied, and the court will not unravel the transaction to discover its origin. *Planters' Bank* v. *Union Bank*, 483.

PURCHASER. See *Illinois.*

RAILWAYS.

Are public highways, and though undertaken by private corporations may, in certain cases (if the legislature authorize it), properly be aided by counties with money raised by taxation, and given as a donation to assist the building of the road. *Olcott* v. *The Supervisors*, 678; *St. Joseph Township* v. *Rogers*, 662.

REBELLION, THE. See *Aliens*, 1–3; *Deposit; Duress; Negotiable Paper*, 3; *Nudum Pactum; Public Law; Public Policy.*

1. Where one of the Southern States made to a railroad company a large grant of lands, defeasible if certain things were not done within a certain time by the company, the fact that the so-called secession of the State and her plunging into the war, and prosecuting it, rendered it impossible for the company to fulfil the conditions, in law abrogated them. *Davis* v. *Gray*, 203.
2. However, though the conditions were thus abrogated in law, the court acting on an equitable view held the company to a performance of them, as near as might be. *Ib.*
3. The points adjudged in *Texas* v. *White and Chiles* (7 Wallace, 700), and

REBELLION, THE (*continued*).

Texas v. *Hardenberg* (10 Id. 68), stated and limited, and the declaration made that—notwithstanding what may have been said in those cases about the act of the Texas legislature, passed January 11th, 1862, when the State was in rebellion, repealing a former act passed before the rebellion, which declared that certain *negotiable* bonds (bonds payable to bearer) of the United States, and given by the United States to the State of Texas, should not be available in the hands of any holder until indorsed by the Governor of Texas—the repealing act was valid as to bonds issued and used for a lawful purpose, and that the title of the State to such bonds, without indorsement, passed to the holder unaffected by any claim of the State. *Huntington* v. *Texas*, 402.

4. Where land was sold to the "Confederate States" during the rebellion, and was captured by the United States, it became, on the extinction of the Confederacy, and without further proceeding, the property of the United States, and could be properly sold by them. Such sale rendered any proceeding, under the Confiscation Acts, against the persons who owned the land prior to sale to the "Confederate States," wholly improper. *United States, Lyon, et al.* v. *Huckabee*, 414.

RECEIVERS IN CHANCERY.

1. The effect of their reports when affirmed by the court considered, and the doctrine declared, that though they may have acted improperly and have deceived the court, yet when the rights of innocent third parties have intervened, an injured party cannot vacate what has been done, but must seek his remedy against the receiver personally, or on his official bond *Koontz* v. *Northern Bank*, 196.
2. Their office and duties stated, and a liberal interpretation given to them in aid of modern chancery jurisdiction. *Davis* v. *Gray*, 203.

RECORDING ACTS. See *Illinois*.

REGULATION OF COMMERCE. See *Constitutional Law*, 1; *Monopoly*.

REMITTITUR. See *Practice*, 5.

RES JUDICATA.

Where in ejectment a special verdict has been found and judgment entered on it in the court below for the plaintiff, which judgment, in an appellate court, is set aside with directions to enter judgment for the defendant, the special verdict cannot, on the plaintiff's bringing a second ejectment upon a subsequently acquired title, be used to establish a fact found in it, as *ex. gr.* the heirship of one of the parties under whom the plaintiff claimed. *Smith* v. *McCool*, 560.

REVERSAL. See *Error; Presumptions*, 1–4.

SALE. See *Duress; Statute of Frauds*.

"SEIZED OF."

Under a statute authorizing the sale of the real estate of a decedent, and directing the executor to make out a petition "stating therein what real estate the said testator or intestate may have died *seized of*,"

"SEIZED OF" (*continued*).
a statement of the real estate which he died "*leaving*" is sufficient. *McNitt* v. *Turner*, 352.

SERVITUDE, INVOLUNTARY. See *Constitutional Law*, 2–5; *Monopoly*.
Meaning of the term as used in the 13th amendment defined. *Slaughter-house Cases*, 36.

SHIPS.
1. One on the high seas is to be considered, on a question of conflict of jurisdiction between courts of two States, as part of the territory of the State in which she is registered and where her owner resides. *Crapo* v. *Kelly*, 610.
2. Are subject, for the purposes of taxation, to the laws of the port where the vessel is regularly registered and belongs. The temporary enrolment of a vessel as a coaster in the port of another State does not give a right to such other State to tax her. *Morgan* v. *Parham*, 471.

STATE.
1. How far to be made a party, when practicable, in proceedings in which she is concerned. *Davis* v. *Gray*, 203.
2. Making her officers parties does not make her so. *Ib.*

STATUTES. See *Construction, Rules of*.

STATUTE OF FRAUDS.
1. Under a statute enacting (as does article 4 of chapter xliv of the Revised Code of Mississippi),

"That no contract for the sale of any personal property, &c., shall be allowed to be good and valid except the buyer shall receive part of the personal property or shall actually pay or secure the purchase-money, or part thereof, or unless some note or memorandum in writing of the bargain be made and signed by the party to be charged by such contract or his agent thereunto lawfully authorized,"

a parol agreement for the sale of cotton in payment of a mortgage debt, cannot be sustained, where, though the price of the cotton per pound was fixed, the number of pounds was not definitely ascertained, nor any payment was indorsed on the mortgage, nor any receipt given, nor any memorandum in writing made, nor any present consideration paid, nor any change of possession effected, nor any delivery, either actual or symbolic, made. *Mahan* v. *United States*, 143.
2. Such a transaction would, from want of delivery, not be good as a gift *inter vivos*. *Ib.*

STATUTES OF THE UNITED STATES.
The following, among others, referred to, commented on, and explained:

1789.	September 24th.	See *Admiralty; Jurisdiction*, 1–4.
1792.	December 31st.	See *Taxation of Ships*.
1793.	February 12th.	See *Bail*.
1793.	February 18th.	See *Taxation of Ships*.
1836.	July 4th.	See *Patent*.
1844.	May 23d.	See *Colorado Territory*.

STATUTES OF THE UNITED STATES (*continued*).

1861.	August 6th.	See *Confiscation Act.*
1862.	July 1st.	See *Kansas Pacific Railway.*
1863	March 12th.	See *Captured and Abandoned Property Act*
1864.	May 28th.	See *Colorado Territory.*
1864.	July 2d.	See *Principal and Agent.*
1864.	July 4th.	See *Kansas Pacific Railway.*
1865.	March 3d.	See *Practice*, 1.
1866.	July 13th.	See "*Commercial Brokers.*"
1867.	February 5th.	See *Jurisdiction*, 4.
1867.	March 2d.	See *Bankrupt Act*, 10; *Jurisdiction*, 5, 6.
1868.	June 25th.	See *Court of Claims.*
1868.	July 20th.	See *Internal Revenue.*
1868.	July 27th.	See *Aliens*, 2.
1872.	June 1st.	See *Error*, 1, 2.

SUBCONTRACTOR. See *Action.*

SURETIES. See *Bond.*

TAXATION. See *Constitutional Law*, 6; *Public Lands; Railways.*

TAXATION OF SHIPS.

The State in which is the home port of a vessel, that is to say, the port where she is regularly registered and nearest to which her owner, husband, or acting and managing owner usually resides, is the State which has dominion over her for the purposes of taxation. *Morgan* v. *Parham*, 471.

TERRITORIAL LEGISLATURE.

1. A Territorial legislature, having by its organic act power over all rightful subjects of legislation, is competent to pass a statute authorizing judgment against the sureties of an appeal bond, as well as against the appellants, in case of affirmance. *Beall* v. *New Mexico*, 535.

TEXAS.

The articles 5 and 7 of the constitution of, made in 1869, which, on an assumption that the Memphis, El Paso, and Pacific Railroad Company had lost its franchise or its right of and to the land grant and land reservation of the company given in its charter, disposed of the lands away from it, violated the obligation of a contract and were void. *Davis* v. *Gray*, 204.

2. The case of *Texas* v. *White and Chiles* explained and limited. *Huntington* v. *Texas*, 402.

TEXAS TITLES.

1. In Texas titles, before the adoption of the common law, a title of possession issued to an attorney in fact of the original grantee for the latter's use, vested the title in such grantee, and not in the attorney. *Hanrick* v. *Barton*, 166.

2. The original grant by the government was regarded as the foundation of the title; and the extension of that title upon specific lands, if made for the benefit of the original grantee, vested title in him. *Ib.*

TEXAS TITLES (*continued*).

3. The papers of the original title, from the government grant to the title of possession (called the *expediente*), properly belong to the archives of the General Land Office, and include a power of attorney from the grantee to obtain the possessory title. *Hanrick* v. *Barton*, 166.
4. Certified copies of such papers from the General Land Office are admissible in evidence, and are then evidence for all purposes for which the originals could be adduced. *Ib.*
5. Under the Mexican-Spanish law formerly prevailing in Texas, a power of attorney to sell and convey land was properly executed, by the attorney in his own name, specifying that he executed the deed as attorney for his principal. *Ib.*
6. In order to render a certified copy of a deed admissible in evidence in Texas, it must be filed with the papers in the cause at least three days before the commencement of the trial; but the affidavit of loss of the original deed need not be filed until the trial. *Ib.*

THIRTEENTH AMENDMENT, THE. See *Constitutional Law*, 2, 3; *Monopoly*.

TOW AND TUG. See *Collision*, 2.

TRIAL BY JURY.

Presumptions as to the regularity of proceedings not indulged to deprive a person of. *Garnharts* v. *United States*, 162.

TRUST. See *Equity*, 2.

TUG AND TOW. See *Collision*, 2.

"USUAL COURSE OF BUSINESS." See *Bankruptcy*, 7–9.

VERDICT. See *Error*; *Res Judicata*.

WEST VIRGINIA.

Its statute of February 15th, 1865 (Acts of West Virginia, 1865, p. 20), by which persons previously having a right to have cases in attachment reheard under particular circumstances, were deprived, for past misconduct and without judicial trial, of such then existing right, was unconstitutional and void. *Pierce* v. *Carskadon*, 234.

WYANDOTTE FLOAT.

An Indian of the Wyandotte tribe could not, prior to July 9th, 1858, locate a "float" held by him under the treaties made with his tribe October 5th, 1842, and March 1st, 1855. *Walker* v. *Henshaw*, 436.

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