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CASES

ARGUED AND ADJUDGED

IN

The Supreme Court

OF

THE UNITED STATES,

OCTOBER TERM, 1873.

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.

——— ———.*

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.

CLERK.

DANIEL WESLEY MIDDLETON, ESQUIRE.

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* Chief Justice Chase died on the 7th of May, 1873. All the cases in this volume were decided while the office which he had filled was vacant.

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.	——.
——— ———,	MARYLAND, WEST VIRGINIA, VIRGINIA, NORTH CAROLINA, AND SOUTH CAROLINA.	———.
——.		——— ———.
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,

OCTOBER TERM, 1873.

ALLEN & CO. *v.* FERGUSON.

A debtor by original obligation, in one of the Southern States, writing to his creditor, after he, the debtor, had applied for the benefit of the Bankrupt Act, and while the proceedings were pending, a discharge in which was finally granted to the debtor, gave, in the letter, a statement of his affairs and of the causes which led to his applying for the benefit of the Bankrupt Act. He continued:

"Be satisfied; all will be right. I intend to pay all my just debts, if money can be made out of hired labor. Security debt I cannot pay."

Adding in a postscript:

"All will be right betwixt me and my just creditors."

Held, that the debt having been discharged by the discharge of the debtor under the Bankrupt Act, was not revived by what was written as above; that the promise to pay it was not clear, distinct, and unequivocal; short of which sort of promise none would revive a debt once discharged.

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

P. H. Allen & Co. sued A. H. Ferguson upon a promissory note, dated March 20th, 1867, payable one day after date, with interest.

Ferguson appeared and pleaded his discharge in bankruptcy in bar to the action.

The plaintiffs replied a new promise in writing made while the proceedings in bankruptcy were pending. This promise the plaintiffs averred that they relied upon, and in consequence of it made no efforts to collect their debt. The

alleged promise was contained in the following letter, which the plaintiffs made part of their replication, viz.:

"CROCKETT'S BLUFF, ARKANSAS, January 7th, 1868.

"MESSRS. T. H. ALLEN & Co.

"DEAR SIR: I avail myself of this opportunity to give you a fare statement of my pecuniary affa'res. First, I failed to make a crop; secondly, find myself involved as security to the amount of five or eight thousand dollars; was sued, and judgments was render'd against me at the last turm of our co'rt for about $4000, a sum suf'ic'ent to sell all the avai'ble property that I am in possession of. I lost about $3000 by persons taking the bankrupt law. This is my situation. I was, as you can re'dily conclude, in a bad fix. To remain as I was, at that time, my property would be sold to pay security debts, and my just creditors would not get any part of it, and that I would be redused to insolvency and still ju'gments against me. As a last resort concluded to render a skedule myself in order to forse a *prorater* division of my affects. The five bales cotton I shipt you was all my crop, to pay you for the meat that you had sent me, to enable me to make the little crop that I did make. The cash that I requested you to send me was, for myself and William Ferguson, to pay his hands for labor; and one hundred and fifty yards of the bag'ing was for W. Ferguson, and one barel of the salt. I have been absent from home for the last two weeks; got home last night, and has not sean him yet, but suppose he has shipt you some cotton. If he has not done so, I will see that he sends you cotton at once. *Be satisf'ed; all will be right I intend to pay all my just debts, if money can be made out of hired labor. Security debt I cannot pay.* I shall have a hard time, I suppose, this se'son, but will do the best I can.

"JAN. 8.—Since the above was writ'en I have seen William Ferguson. He says he ship'ed you two bales cotton, ten or twelve days ago, and ship'ed in my name, as the baggin' was order'd by me for him. William Ferguson will be in Memphis betwixt this and the first of March, and will call and see you on bisness matters betwixt me and you'self. *All will be right betwixt me and my just creditors.* Don't think hard of me. Attribet my poverty to the unprincipel'd Yankey. Let me heare from you as usel.

"Yours, very respectfully,

"A. H. FERGUSON."

To this replication the defendant demurred. The demurrer was sustained by the Circuit Court, and this appeal was taken by the plaintiffs.

Mr. A. H. Garland, for the plaintiff in error; Messrs. Clark and Williams, contra.

Mr. Justice HUNT delivered the opinion of the court.

The question is, does the letter of the defendant, set forth in the replication, contain a sufficient promise to pay the debt in suit?

All the authorities agree in this, that the promise by which a discharged debt is revived must be clear, distinct, and unequivocal. It may be an absolute or a conditional promise, but in either case it must be unequivocal, and the occurrence of the condition must be averred if the promise be conditional. The rule is different in regard to the defence of the statute of limitations against a debt barred by the lapse of time. In that case, acts or declarations recognizing the present existence of the debt have often been held to take a case out of the statute. Not so in the class of cases we are considering. Nothing is sufficient to revive a discharged debt unless the jury are authorized by it to say that there is the expression by the debtor of a clear intention to bind himself to the payment of the debt. Thus, partial payments do not operate as a new promise to pay the residue of the debt. The payment of interest will not revive the liability to pay the principal, nor is the expression of an intention to pay the debt sufficient. The question must be left to the jury with instructions that a promise must be found by them before the debtor is bound.*

The plaintiffs in error contend that such promise is to be found in the letter of the defendant, forming a part of their replication. They rely chiefly on these expressions: "Be satisfied; all will be right. I intend to pay all my just debts, if money can be made from hired labor. Security

* Hilliard on Bankruptcy, 264 to 266, where the cases are collected.

debt I cannot pay," and on the postscript where he adds, "All will be right betwixt me and my just creditors."

There can be no more uncertain rule of action than that which is furnished by an intention to do right. How or by whom is the right to be ascertained? What is right in a particular case? Archbishop Whately says: "That which is conformable to the supreme will is absolutely right, and is called right simply, without reference to a special end. The opposite to right is wrong." This announces a standard of right, but it gives no practical aid. What may be right between the defendant and his creditors is as difficult to determine as if he had no such standard. It is not absolutely certain that it is right for a creditor, seizing his debtor, to say, Pay me what thou owest, or that it is wrong for the debtor to resist such an attack. It is not unnatural that the creditor should think that payment of the debt was right, and that it was the only right in the case. It is equally natural that the debtor should entertain a different opinion. The law holds it to be right that a debtor shall devote his entire property to the payment of his debts, and when he has done this that after-acquired property shall be his own, to be held free from the obligation of all his debts, just debts as well as unjust, principal debts as well as security debts. Neither the supreme will, so far as we can ascertain it, nor the laws of the land, require that a debtor whose family is in need, or who is himself exhausted by a protracted struggle with poverty and misfortune, should prefer a creditor to his family; that he should appropriate his earnings to the payment of a debt from which the judgment of the law has released him, rather than to the support of his family or to his own comfort. What an honest man should or would do under such circumstances it is not always easy to say. When, therefore, the debtor in this case said to the plaintiff: "Be satisfied; I intend to do right; all will be right betwixt my just creditors and myself," he cannot be understood as saying that he would certainly pay his debt, much less that he would pay it immediately, as the plaintiff assumes. What is or what may be right depends upon

many circumstances. The principle is impracticable as a rule of action to be administered by the courts. There is no standard known to us by which we are able to say that it is wrong in the defendant not to pay the plaintiff's debt.

We are of the opinion that the letter produced does not contain evidence of a promise to pay the debt in suit, and that the judgment appealed from must be

AFFIRMED.

RAILROAD COMPANY *v.* PENISTON.

1. The exemption of agencies of the Federal government from taxation by the States is dependent, not upon the nature of the agents, nor upon the mode of their constitution, nor upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or hinder the efficient exercise of their power. A tax upon their *property* merely, having no such necessary effect, and leaving them free to discharge the duties they have undertaken to perform, may be rightfully laid by the States. A tax upon their *operations* being a direct obstruction to the exercise of Federal powers may not be.
2. This doctrine applied to the case of a tax by a State upon the real and personal property, as distinguished from its franchises, of the Union Pacific Railroad Company, a corporation chartered by Congress for private gain, and all whose stock was owned by individuals, but which Congress assisted by donations and loans, of whose board of directors the government appoints two, which makes annual reports to the government, whose operations in laying, constructing, and working its railroad and telegraph lines, as well as its rates of toll, are subject to regulations imposed by its charter, and to such further regulations as Congress may hereafter make; on whose failure to comply with the terms and conditions of its charter, or to keep the road in repair and use, Congress may assume the control and management thereof, and devote the income to the use of the United States; the loan of the United States to which, amounting to many millions, is a lien on all the property, and on failure to redeem which loan, the Secretary of the Treasury is authorized to take possession of the road with all its rights, functions, immunities, and appurtenances, for the use and benefit of the United States; and, finally, where all the grants made to the company are declared to be upon the condition that, besides paying the government bonds advanced, the company shall keep the railroad and telegraph lines in repair and use, and shall at all times transmit dispatches and transport mails, troops,

and munitions of war, supplies and public stores for the government, whenever required to do so by any department thereof; and that the government shall have the preference at rates not to exceed those charged to private parties, and payable by being applied to the payment of the bonds aforesaid; and in addition to which control, and the obligations and liabilities of the company, Congress, not forbidding a State tax, reserves the right to add to, alter, amend, or repeal the charter.

3. The unorganized territory in Nebraska west of Lincoln County and the unorganized county of Cheyenne having been attached by statute to the county of Lincoln, in Nebraska, for *revenue* purposes, the authorities of Lincoln County were the proper authorities to levy taxes upon property thus placed under their charge.

APPEAL from the Circuit Court for the District of Nebraska; the case being thus:

By act of Congress of July 1st, 1862,* entitled "An act to aid in the construction of a railroad and telegraph line from the Mississippi River to the Pacific Ocean, and to secure the government the use of the same for postal, military, and other purposes," Congress incorporated certain individuals, their associates and successors, as the "Union Pacific Railroad Company," with authority to build a continuous railroad and telegraph from a point on the one hundredth meridian to the western boundary of Nevada Territory. The act fixed the amount of the capital stock and shares, and declared that "the stockholders should constitute said body politic and corporate." The government had no stock in the road, though through the President of the United States it was to appoint two directors, not stockholders, out of fifteen, which the charter provided for as the number to be appointed in all. Annual reports were to be made to the Secretary of the Treasury. The act granted to the company the right of way through the public lands, and "for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and the public stores thereon," made to it an extensive grant of lands, and provided for the issuing of patents therefor. And

* 12 Stat. at Large, 489.

for the same purposes the United States agreed to, and did issue its 6 per cent. bonds, payable in thirty years, to the company, to the amount of $16,000 per mile, for each section of forty miles; which bonds the original act declared "shall, *ipso facto*, constitute a first mortgage on the whole of the railroad and telegraph, together with the rolling stock, fixtures, and property of every kind," and made specific provision as to proceedings on the failure of the company to redeem the bonds.

By an act of July 2d, 1864,* this was changed, and the company authorized to issue its "first mortgage bonds to an amount not exceeding the bonds of the United States," and the lien of the bonds of the United States was declared to be subordinate to the bonds so issued by the company, with the exception relating to the transportation of dispatches, troops, mails, &c., for the government.

The grants to the company were declared by the original act to be made upon condition that the company shall (1) pay the bonds of the United States at maturity; (2) keep their line and road in repair and use; (3) "transmit dispatches over said telegraph line, and transport mails, troops, and munitions of war, supplies, and public stores upon said railroad for the government," &c., giving the government the preference at fair and reasonable rates of compensation, not exceeding those charged to private individuals, the amount thus earned to be applied in payment of the bonds, as well as 5 per cent. of the net earnings of the road after its completion.

By the seventeenth section of the same act it was provided that if the road, when finished, should for any unreasonable time be permitted to remain out of repair, or unfit for use, Congress should have authority to put the same in repair and use, and from the income of the road reimburse the government for expenditures thus caused.

The eighteenth section provided that when the net earnings of the road should exceed 10 per cent. of its cost, Con-

* 13 Stat. at Large, 356.

gress might reduce, fix, and regulate rates of fare thereon, and declared that "the better to accomplish the object of this act, to wit, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure the government at all times (but particularly in times of war) the use and benefits of the same for postal, military, and other purposes, Congress may at any time, having due regard for the rights of said companies named herein, add to, alter, amend, or repeal this act."

The act also contained provisions, that so far as the public and government were concerned the railroad and branches should be worked as one connected and continuous line.

There was no provision, in any act of Congress relating to this company, respecting the taxation of it or its property by the States through which its roads might run.

The road was completed and put in operation in May, 1869, and with the Central Pacific Railroad formed a continuous line from the Missouri River and the Eastern States to California and the Pacific, thus uniting the extremities of the country. At the time of granting the charter, the territory over which this line was projected all belonged to the United States. But Nevada was admitted into the Union as a State in 1864, and Nebraska in 1867, and the road, as constructed, crosses the latter State in its whole breadth, from east to west.

So far as to the history of the Union Pacific Railway. Now as to a certain tax laid upon it, the subject of this suit.

On the 15th of February, 1869, the legislature of Nebraska passed an act "to define the western boundary of Lincoln County," which, after defining it, provided,

"That all the unorganized country lying west of the western boundary of Lincoln, and east of the east line of Cheyenne County, and south of the North Platte River be, and the same is hereby, attached to the said county of Lincoln, for judicial and revenue purposes, and that the county of Cheyenne be, and

the same is hereby, attached, for judicial and revenue purposes, to said county of Lincoln."*

In this state of things the authorities of Lincoln County, in the State of Nebraska, under a revenue law of the State, passed on the same 15th of February, 1869, laid a tax upon the property of the railroad company, embraced within the taxation, upon the valuation of $16,000 per mile, for a length of one hundred and seventy-six miles.†

The property of the company thus rated and taxed consisted of its road-bed, depots, wood-stations, water-stations, and other realty; telegraph-poles, telegraph-wires, bridges, boats, books, papers, office furniture and fixtures, money and credits, movable property, engines, &c.

The population of Lincoln County and all the attached territory, by the census of 1870, was 1352 persons. The whole amount of the tax list was $4,081,904, of which was

Property of the company,	$3,936,000
Property of other taxpayers,	145,904

The tax levied by the county was $41,328 upon the company's property, and $6350.45 upon the property of other taxpayers.

The tax levied upon the company's property was distributed under the following heads or purposes of taxation:

For State general fund,	$7,872
For State sinking fund,	3,936
For State school fund,	3,936
For county general fund,	19,680
For county sinking fund,	3,936
And for district school purposes,	1,968

The length of the company's road lying within the territory ascribed to Lincoln County for taxation, was as follows: In Lincoln County, eight miles; in Cheyenne County (unorganized), one hundred and five miles; between the two

* Laws of Nebraska, 1869, p. 249.

† The tax was, in fact, laid on two hundred and forty-six miles; but, as it was admitted by the defendant that there was seventy miles of excessive computation, the only question here was as to the tax on the remaining one hundred and seventy-six miles.

counties, sixty-three miles; making a total of one hundred and seventy-six miles.

In this state of things, one Peniston, Treasurer of Lincoln County, being about to collect the tax laid, the Union Pacific Railroad Company filed a bill in the Circuit Court of the United States in the District of Nebraska against him, to restrain his doing so; assigning as grounds for the bill among others—

That the State of Nebraska had no power to subject to taxation for State purposes the road-bed, rolling-stock, and other property necessary for the use and operation of the road; such power resting, as it was asserted by the bill, exclusively in the government of the United States.

That Lincoln County was not by law authorized to tax any portion of the road-bed or property of the company, except such as was situate within its geographical limits.

The cause was heard upon pleadings and agreed proofs, and the Circuit Court refused to restrain the collection of the tax against the one hundred and seventy-six miles of the road, holding the same to have been lawfully imposed, and the property of the company to be open to State taxation. Upon this decree being brought here by the present appeal, the following errors were assigned:

First. That it was error to hold the tax a valid imposition upon the property of the Union Pacific Railroad Company subjected to it, such property being exempt from State taxation, by virtue of the incorporation of the company by the United States as a means for the performance of certain public duties of the government, enjoined and authorized by the Constitution.

Second. That it was error to hold the rating and taxing of the property of the company, outside the county of Lincoln, by the authorities of that county, valid and lawful under the legislation of the State.

Mr. W. M. Evarts, for the appellant:

I. The tax and the statute of Nebraska, so far as it au-

thorized the tax, were void, and the company's property should have been relieved, and protected therefrom by the judgment of the court.

1. The railroad company was created and endowed by Congress, with its franchises, powers, and property, as a means, instrument, and agency for the execution of the powers vested in the General government by the Constitution of the United States.

2. At the time of the passage of the act of Congress, under which the corporate powers were created and conferred, the government of the United States exercised the sole and undivided dominion over the territories to be traversed by the railroad, or affected by the powers of this corporation or their administration.

3. The tax here authorized by the statute of Nebraska, and actually laid by the county of Lincoln, is rated and assessed upon whatever constitutes the property and the means of the company as collected, combined, prepared, and worked (under or by authority of the act of Congress) as the instrument and agent of the General government, for the execution of its constitutional powers and the performance of its constitutional duties, so far as this instrument and agent has its structure, capital in any and every form of use or investment, and its operations within the local range of the taxing power.

The theory of the taxation is an apportionment of the total and aggregated means of the corporation per mile of its railroad, and a valuation and taxation of the ratable share of the length of the railroad found within the different counties of the State.

4. If the tax be looked at in its circumstances as well as in its principle, it is not too much to say that the introduction and operation of this means and agency of the General government within the territorial limits of what now constitutes the State of Nebraska, is made the occasion, and the means and agent made the subject, of taxation for local and general State purposes, in exoneration of the property of the population which should bear those burdens.

II. The settled doctrines of this court, in expounding the relations which the means, instruments and agencies, created by the General government for the execution of its constitutional powers bear to the States, and taxation under the authority of the States, exempt the Union Pacific Railroad Company from the taxation to which it is sought to be subjected.

The *principles* established in the celebrated cases of *McCulloch* v. *Maryland*,* and *Osborn* v. *Bank of United States*,† stand unbroken and impregnable. Neither the force of their reason, nor the weight of their authority, is, in the least, abated by any subsequent adjudications *in pari materia.*

The late Chief Justice Chase thus speaks of these decisions :‡

"That Congress may constitutionally organize or constitute agencies for carrying into effect the National powers granted by the Constitution; that the agencies may be organized by the voluntary association of individuals, sanctioned by Congress; that Congress may give to such agencies, so organized, corporate unity, permanence, and efficiency; and that such agencies in their being, capital, franchises, and operations, are not subject to the taxing power of the States, have ever been regarded, since those decisions, as settled doctrines of this court.

"Those decisions were the judgments of great men and of great judges. They were pronounced by the most illustrious of their number, and are distinguished by his peculiar clearness and cogency of reasoning. For nearly half a century the principles vindicated by them have borne the keen scrutiny of an enlightened profession and the sharp criticism of able statesmen, and they remain unshaken. All the judges who concurred in them have descended long since into honored graves, but their judgments endure, and gathering vigor from time and general consent, have acquired almost the force of constitutional sanctions."

A concise and authoritative statement of what principles were decided in *McCulloch* v. *Maryland*, and *Osborn* v. *Bank*

* 4 Wheaton, 316. † 9 Id. 738.

‡ Van Allen *v.* The Assessors, 3 Wallace, 591.

of the United States, is given by this court in its opinion, as delivered by Marshall, C. J., in *Weston* v. *Charleston.**

"We will not repeat the reasoning which conducted us to the conclusion thus formed; but that conclusion was, that all subjects to which the sovereign power of a State extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation.

"'The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission;' but not to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States.

"The attempt to use the power of taxation on the means employed by the government of the Union in pursuance of the Constitution, is in itself an abuse, because it is the usurpation of a power which the people of a single State cannot give.

"The States have no power by taxation, or otherwise, to retard, impede, burden, or in any manner control the operation of the constitutional laws enacted by Congress, to carry into execution the powers vested in the General government."

III. But, if the State act be constitutional, in its application to the property of this company subjected to it, it is submitted that the property *outside of the county of Lincoln* is not lawfully taxable by the authorities of that county under the laws of the State.

Mr. J. M. Woolworth, contra:

The main objection to these taxes is, that they are imposed upon an agent of the Federal government. The objection cannot be supported as an original proposition. We concede that those agencies which Congress has established for the purpose of carrying into execution the powers conferred in the Federal Constitution, are in no way liable to interference by the States. This court has reiterated that principle many times, and with great emphasis. But there is another principle which this court has as often and as emphatically asserted, and which is equally necessary to the

* 2 Peters, 466.

harmonious relations of the State and Federal powers. It is, that the taxing power exists in the States unrestricted by the Federal Constitution or government, except as to the means necessary to the latter to discharge its functions.

This matter received full exposition from this court (Chase, C. J., speaking for it), in *Lane County* v. *Oregon*.*

These two principles are fundamental in our complex system:

1. The taxing power of a State extends to every matter of value within its sovereignty.

2. But that power cannot reach those agencies which are employed by Congress to carry into execution the powers conferred in the Federal Constitution.

These principles are coefficient. By the one, the just and necessary powers of the States, by the other the just and necessary powers of the Nation are preserved. But they are not co-ordinate. The first is the rule, the second the exception thereto. It devolves upon those who would withdraw "any property, business, or persons, within their respective limits, from the taxing power of the States," to show the same to be within the exception.

But there are many agencies of the Federal government which do not enjoy any exemption whatever from taxation by the States. They do not claim such exemption, even in respect of property which they use when serving the government.

The steamship on the ocean, which bears the ambassador to a foreign court, and the dispatches by which the diplomatic intercourse of the nation is guided, are agents of the government, and discharge most necessary, valuable, and efficient service. The railroad companies, in every one of whose trains is a postal car, bearing the orders of the executive to subordinate officers scattered all through the wide country, and by which the domestic policy and operations of the government are directed, are its agents, also dis-

* 7 Wallace, 71; and see the previous cases of Nathan *v.* Louisiana, 8 Howard, 73; Hamilton Company *v.* Massachusetts, 6 Wallace, 632.

charging most necessary, valuable, and efficient service. The stage-coach upon the frontier, taking up and carrying into remote parts these orders, so that from this centre the volitions and pulsations are obeyed and felt to the extremities of the land, shares in the vast service of the republic. And, for all this service, these agents, and thousands of others like them, are paid by the government. Not a small proportion of their earnings, and the dividends which they distribute among their stockholders, is derived from the government. They even pay to the State taxes upon these earnings. They have conveniences for doing this service, used for this service exclusively; the steamship, apartments; the railroad, postal cars; the stage-coach, wagons; and they pay taxes thereon; and yet they never claim exemption from State taxes. Or if one of them, the Kansas Pacific Railroad, is any exception, if it has claimed exemption on that ground, it stands solitary and alone in asserting such claim, and it has signally failed in establishing it.*

But, as all know, there are agencies to which such exemption is conceded. The line of separation is clearly drawn by Chief Justice Marshall in *Osborn* v. *The Bank of The United States.*† He says:

"The foundation of the argument in favor of the right of a State to tax the bank, is laid in the supposed character of that institution. The argument supposes the corporation to have been originated for the management of an individual concern, to be founded upon contract between individuals, having private trade and private profit for its great and principal object.

"If these premises were true, the conclusion drawn from them would be inevitable. This mere private corporation, engaged in its own business, with its own views, would certainly be subject to the taxing power of the State, as any individual would be; and the casual circumstance of its being employed by the government in the transaction of its fiscal affairs, would no more exempt its private business from the operation of that power, than it would exempt the private business of any individual employed in the same manner. But the premises are not

* Thompson *v.* Railroad Company, 9 Wallace, 579. † 9 Wheaton, 859.

true. The bank is not considered as a private corporation, whose principal object is individual trade and individual profit, but as a public corporation, created for a public and national purpose. That the mere business of banking is, in its own nature, a private business, and may be carried on by individuals or companies, having no political connection with the government, is admitted; but the bank is not such individual or company. It was not created for its own sake, or for private purpose. . . .

"Why is it that Congress can incorporate or create a bank? This question was answered in the case of *McCulloch* v. *The State of Maryland*. It is an instrument which is 'necessary and proper' for carrying on the fiscal operations of government."

From the exposition of the relations and immunities of the agencies of the government, traced in the case cited, these principles are deducible:

1. A private corporation, whose principal object is individual trade and individual profit, is not exempted from State taxation by the casual circumstance of being employed by the government in the transaction of its fiscal affairs.

2. While it is true that the agent entitled to exemption may transact private business, its capacity so to do must be an incident to its agency, and be in aid thereof.

3. Its operations in transacting private business must be necessary to its character and efficiency, as a machine employed by the government.

But it is not all of the property of any agents of the Federal government that may be withdrawn from the taxing power of the States. The Bank of the United States was a fiscal agent of the government; it bore a most intimate relation to that government; and yet in *McCulloch* v. *Maryland*,* Marshall, C. J., said:

"This opinion does not deprive the States of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with other real property within the State."

* 4 Wheaton, 436.

Argument in support of the tax.

And again, in *Osborn* v. *The Bank of the United States*,* he said, that the local property of the bank may be taxed by the State, the same as the property of other citizens.

But there is a position in which the Federal officer is entitled to the protection of the Federal power. While the property of the officer in general is subject to State taxation, his salary is entirely exempt therefrom.† And the same is true of the corporate agent. If "the tax be upon its operations, and consequently upon the operation of an instrument empowered by the government of the Union, to carry its powers into execution," then the tax is unconstitutional. The reason of the rule marks its limitations. The National government must be free to use such means as it selects, to carry out its functions, else it cannot exist. When a State tax impairs the efficiency of any instrumentality which Congress selects to carry out the legitimate purposes of the Federal government, it is unconstitutional. When it does not have that effect, it is within the competency of the State to impose it.

Miller, J., delivering the unanimous opinion of the court, in *National Bank* v. *Commonwealth*,‡ one of the cases of the bank taxes, distinguishes the cases in the way we do, where the State may and where it may not tax. He says:

"It is argued that the banks, being instrumentalities of the Federal government, by which some of its important operations are conducted, cannot be subjected to such State legislation. It is certainly true that the Bank of the United States, and its capital, were held to be exempt from State taxation on the ground here stated; and this principle, laid down in the case of *McCulloch* v. *The State of Maryland*, has been repeatedly affirmed by the court. But the doctrine has its foundation in the proposition, that the right of taxation may be so used in such cases, as to destroy the instrumentalities by which the government proposes to effect its lawful purposes in the States; and it certainly cannot be maintained that banks, or other corporations

* 9 Wheaton, 867.

† Dobbins *v.* The Commissioners of Erie County, 16 Peters, 435.

‡ 9 Wallace, 353, 361.

or instrumentalities of the government, are to be wholly withdrawn from the operation of State legislation. The most important agents of the Federal government are its officers; but no one will contend that when a man becomes an officer of the government he ceases to be subject to the laws of the State. The principle we are discussing has its limitation; a limitation growing out of the necessity on which the principle itself is founded. That limitation is, that the agencies of the Federal government are only exempted from State legislation so far as that legislation may interfere with or impair their efficiency, in performing the functions by which they were designed to serve that government. Any other rule would convert a principle founded alone in the necessity of securing to the government of the United States the means of exercising its legitimate powers, into an unauthorized and unjustifiable invasion of the rights of the States. The salary of a Federal officer may not be taxed; he may be exempted from any personal service which interferes with the discharge of his official duties, because those exemptions are essential to enable him to perform those duties. But he is subject to all the laws of the State which affect his family or social relations, or his property; and he is liable to punishment for crime, though that punishment be imprisonment or death. So of the banks. They are subject to the laws of the State, and are governed in their daily course of business, far more by the laws of the State than of the nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on State laws. It is only when the State law incapacitates the banks from discharging their duties to the government, that it becomes unconstitutional."

Indeed, it is believed that no case adjudged by this court can be found, of a tax on the property of a third party—meaning by this term some agency, other than an integral part of the machinery of government—made use of by the National government, which has been held invalid. The tax in question, in *McCulloch* v. *Maryland*, and *Osborn* v. *The United States Bank*, was upon the operations of the bank, and not upon its property.

And in one of the cases of the bank tax,* the taxation of the present national banks has been supported upon the same theory: the theory, to wit, that it was upon the new use, in the business of banking, to which the Federal bonds were put, and not upon the bonds nor upon the banks that the taxes were imposed.

It may be that the language of some of the judges, and even the reasoning which they have pursued, seem to favor the doctrine of total exemption of the property of an agent of the National government from State taxes. But, as Chase, C. J., said in *Thompson* v. *The Pacific Railroad*, these decisions are limited to the cases before the court.

It is obvious, upon the principle of the cases above cited, that there are agencies of the government, like the old Bank of the United States, the nature of which places them beyond the reach of the States. But there are other agencies, as the new banks, whose principal business is private, and the public business is an incident thereto, which cannot be placed in the same category. As to this latter class, it is not too much to insist that exemption from State regulation should be secured by express direction of Congress; that if Congress does not in terms grant the exemption the State sovereignty is not displaced. It is not needful to this case, to go through the judgments of this court in order to ascertain whether the State power is displaced without a direct enactment of Congress to that effect. There was a long disagreement between the judges on this subject.† But in *Gilman* v. *Philadelphia*,‡ Swayne, J., delivering the opinion of the court, assigned as one of the reasons for sustaining the State law authorizing the bridge, against objections that it conflicted with the commercial power of the nation, the fact that "Congress may interpose whenever it shall be deemed necessary, by general or special laws," the inference being, that until such interposition the power of the State must be respected; and in *Woodruff* v. *Parham*,§ Miller, J., also

* Van Allen *v.* The Assessors, 3 Wallace, 573.

† See the License Cases, 5 Howard, 504. ‡ 3 Wallace, 713.

§ 8 Wallace, 123, 140.

speaking for the court, pretty clearly intimates the same view.

Turning now to the immediate case before us. Is this railroad company entitled to exemption from State taxation because it is an agency of the Federal government?

It is a private corporation whose principal object is individual trade and individual profit. True, it is incorporated by Congress; but, when regard is had to the circumstances, this fact has no significancy. It was authorized to build a road from a point on the one hundredth meridian* to "the western boundary of Nevada Territory." At that time, and when the amendatory act of 1864 was passed, that whole section was territory not within any State. Again: there was a careful abstinence from the claim of any power to authorize the building of a road within any State. It was important, in order to secure all the advantages of the work, to construct parts of it and branches of it in States; but those parts and those branches were to be built by State corporations, and not by the Union Pacific Railroad Company appellant here.

The Central Pacific, a California corporation, was to build from the Pacific coast, or the headwaters of the Sacramento, to the eastern boundary of California.† The Leavenworth, Pawnee, and Western, a Kansas corporation, was to build from the Missouri, near the Kansas River, to the one hundredth meridian.‡ The Hannibal and St. Joseph, a Missouri corporation, with the consent of Kansas, was to build into that State, either under its own franchise or one derived from Kansas.§ And so on. Every mile of road to be built within the limits of any State was to be built by a State corporation. And these several corporations received the same aid in bonds and lands from the United States as did the railroad company which is now here as the appellant in this case.

This corporation, we say, was formed for private trade

* This point, as the Reporter understands it, is on a north and south line, dividing Nebraska about equally.

† See Act of 1862, § 9. ‡ Id. § Id. § 10.

and private profit. The service which it renders to the government is only an incident to its general business. Its operations are only accidentally, they are not inseparably connected with those of the government. Between it and the old Bank of the United States there is in this respect the widest possible distinction. The bank, by the system of exchanges which it maintained between different sections of the country, was converted into a convenient agency for transferring the public funds from place to place. Every bill drawn at one branch upon another, transmitted and paid, was an operation not only of which the government might avail itself, but it increased to a degree the facility of communication which the treasury had need of. And the necessity to the treasury of the most facile and certain and efficient means for the transmission of funds was what justified the incorporation of the bank. But who shall say of this railroad company, that the running of its daily trains is thus needful or useful to the government?

What are the services required of it by the government? They are stated to be to "transmit dispatches over said telegraph line, and transport mails, troops, and munitions of war, supplies, and public stores upon said railroad for the government." Every grant of land ever made by Congress to a railroad has provided in the same terms for the same services.

Not to go farther back than 1850, the grant to Illinois in aid of what became the Illinois Central, contains this clause:*

"The said railroad and branches shall be and remain a public highway for the use of the United States, free from toll or other charge, upon the transportation of any property or troops of the United States."

And—

"The United States mail shall, at all times, be transported on the said railroad, under the direction of the Postoffice Department, at such price as the Congress may by law direct."

* 9 Stat. at Large, 467.

These exact words are found in the grant to Missouri, for the Hannibal and St. Joseph Railroad,* in that to Arkansas and Missouri,† to Minnesota,‡ Iowa,§ Florida and Alabama,‖ Alabama,¶ Louisiana,** Wisconsin,†† Michigan,‡‡ Mississippi,§§ and so on down to the last act of the kind passed by Congress.

The service stipulated for by Congress, to be rendered by every land-grant railroad in this country, is as large, as necessary, as valuable as that to be rendered by the company appellant. And yet, it will not be argued that all these agencies are rendering this service as the principal part of their business, and rendering only an incidental service to the public.

Congress has not interposed any claim of exemption on behalf of the government of the character set up by the appellant.

Neither the title of the act nor the terms used in the act have such reach or force.

The objects of the act, as declared in the eighteenth section,‖‖‖‖ are twofold: first, to promote the public interest, &c.; and secondly, to secure to the government the use of the road. One of these objects was evidently as prominent in the mind of Congress as the other. The circumstances of the company's incorporation are matters of common knowledge. Congress was moved to pass the original act by the consideration, at the time greatly agitating the public mind, that the Pacific States and Territories, by reason of their separation from the other parts of the country, might follow the example of the Southern States and seek to withdraw from the Union. To bind those distant parts more closely to the rest, by the bands of commerce, was the argument most pressed upon Congress. Facility in the transportation of the mails, troops, and stores of the government was rather the incident to this broad and patriotic policy. So that

* 10 Stat. at Large, 9. † Id. 156. ‡ Ib. 302.
§ 11 Id. 9. ‖ Ib. 16. ¶ Ib. 18.
** Ib. 19. †† Ib. 20. ‡‡ Ib. 22.
§§ Ib. 31. ‖‖‖‖ *Supra*, pp. 7, 8.

whether we regard the words of the acts or the circumstances of their passage, it is obvious that those services, on account of which exemption from State taxation is here claimed, must be considered incidental only.

There is nothing in this record to show that the taxes here complained of will interfere with or impair the efficiency of the railroad company in performing the service required of it by the acts. And if we look to the effect of taxation generally, upon the services to be rendered, nothing appears at all within the rule as laid down by Miller, J., in the *National Bank* v. *The Commonwealth.** Congress gave the corporation power to make contracts, which implies also the power to make debts. A creditor could sue his demand and recover judgment, and, by proper process, enforce it. These duties and liabilities would be as much interfered with by such judicial process as by sale for taxes; and the supreme rights of the government may as reasonably be interposed in one case as the other. Those rights, however, find their protection in the fact that, whether the property remains in the corporation or passes to another, it is bound to those duties and liabilities; that is to say, the purchaser takes the property subject to them in both instances.

There is no need of words to show that this tax is upon the property of the corporation and not upon its operations, and that it is not a constituent element in the government, but a third party made use of by it incidentally to render to it a certain service.

A private corporation, organized for private trade and private profit, rendering to the government a service incidentally in the course of its private business, and not inseparably connected with the government operations; not a constituent part of the machinery of the government, but called in to discharge a duty for which it is compensated; not claimed by Congress as an agency entitled to freedom from State control; its efficiency to discharge its duty, not impaired by the taxation complained of, and its property

* 9 Wallace, 353.

only, and not its operations, subjected to taxes;—this company must submit, in common with all citizens and all corporations, to those reasonable exactions which the State must make to support the government which gives protection and value to its business and its property.

But this case has been substantially decided by this court. In *Osborne* v. *The United States Bank*, it is emphatically said that the circumstance that the bank was a Federal corporation was not important. The question, and the only question, there treated as vital was, what was the nature of the services required of it by the government?

In the bank-tax cases of *Van Allen* v. *The Assessor* and *National Bank* v. *The Commonwealth*, the distinction which we seek to maintain between what interests of a Federal corporation are taxable by a State and what non-taxable is clearly taken.

In *Thompson* v. *The Railroad Company*,* the services, duties, liabilities, relations of the company in question, were all precisely the same as those of this plaintiff. They were all imposed by these same acts we have been considering. In the words of section nine, of the first:

> "The Leavenworth, Pawnee, and Western Railroad Company of Kansas, are hereby authorized to construct a railroad and telegraph line . . . upon the same terms and conditions, in all respects, as are provided in this act for the construction of the Union Pacific Railroad."

And yet those services, duties, liabilities, relations, grants, and subsidies did not secure the exemption sought. It is true that the opinion of the Chief Justice was confined to a State corporation. But put the case of *Osborne* v. *The Bank of the United States* with that case and the rule of this case is directly established. The case of *Thompson* v. *The Railroad Company* holds that a State corporation, rendering the same services, subject to the same duties and liabilities, sustaining the same relations as this appellant, must pay its State taxes. The case of *Osborne* v. *The Bank of the United States* holds

* 9 Wallace, 579.

Reply—Against the tax.

that a State corporation and a Federal corporation are on precisely the same footing in these respects. The conclusion covers this company.

And, after all, on plain principles, it must be so. Here is a corporation running the whole length of Nebraska, four hundred and fifty miles, owning millions of property, conducting an immense and profitable traffic. Every day it appeals to the officers of the State for protection. Why should it not contribute to the State a due share and portion of what is necessary to maintain the State's power of protecting it?

II. It is further objected that only eight miles of road is in Lincoln County, and that there is no provision of law for its authorities taxing what lies in the other sections. But the Revised Statutes of Nebraska provide that "all unorganized counties shall be attached to the nearest organized county directly east of them, for election, judicial, and revenue purposes." This seems conclusive.

Reply: The adjudications in the bank tax cases cited by the opposing counsel, or the reasoning upon which they rest, do not in the least impair the scope or vigor of the principles, and the authorities already cited by us, in their efficient protection from State taxation, of the means and agencies created by the General government, in execution of its constitutional powers. The cases mentioned simply hold that it is competent for Congress, in its establishment and arrangement of these means and agencies, to *concede* to the States such measure and modes of taxation, as *Congress* deems consistent with the safety and efficiency of these means and agencies, of executing the powers of the General government. This is taxation, not by predominance of State authority, but by favor of Federal submission of the subject to State taxation, upon motives of Federal policy. But this concession is not a judicial question. The *judicial* conclusion excludes the taxation of the States from the province of Federal means and agencies, and requires the *express* assent of Federal authority to support the State taxation, and fix its measure and its modes. To make the measure or mode

of State taxation, as allowable or excessive, a *judicial* question, is flatly repugnant to the celebrated cases cited, and subversive of their reasoning.*

The doctrine of this court, as declared in *Thompson* v. *Pacific Railroad*,† also much relied on by the opposing counsel, that the adoption by Congress of the aid or operation of *corporations created by the States*, in performing services in connection with the execution of the constitutional power of the Federal government (in the absence of all indication on the part of Congress that the State agencies so employed should be exempted, in consequence of such employment, from State taxation), does not exempt such State corporations from State taxation, has no application to the case of this Union Pacific Railroad Company, an incorporation of the General government confessedly, under acts of Congress. That decision rests upon the distinction between the case of the *employment* of the State corporation for a Federal service and the creation of a corporation as a Federal means and agency, within the discretion of Congress, for the execution of the constitutional powers of the General government. The court held that, in case of the employment of State corporations by Congress, it was competent for Congress to "exempt, in its discretion, the agencies employed in such services from any State taxation which will really prevent or impede the performance of them."

The only question, therefore, raised and decided by the court in this case was thus stated by the court:

"But can the right of this road to exemption from such taxation be maintained in the absence of any legislation of Congress to that effect?"

The argument that the doctrine of the court in *McCulloch* v. *Maryland* exempted the Bank of the United States, with

* Bank of Commerce *v.* New York City, 2 Black, 620; Van Allen *v.* The Assessors, 3 Wallace, 592; The Banks *v.* The Mayor, 7 Id. 16; National Bank *v.* Commonwealth, 9 Id. 353.

† 9 Wallace, 579.

its branches, from taxation by the State of Maryland, although no express exemption was found in the charter, and that under that doctrine a *State corporation*, employed as an agent of the operations of the General government, was equally exempt, is thus disposed of by the court:*

"But it must be remembered that the Bank of the United States was a *corporation created by the United States;* and, as an agent of the constitutional forms of the government, was endowed by the act of creation with all its faculties, powers, and functions. It did not owe its existence or any of its qualities to State legislation. And its exemption from taxation was put upon this ground."

And again:†

"The State tax, held to be repugnant to the Constitution, was imposed directly upon an operation or an instrument of the government. That such taxes cannot be imposed on the operations of the government is a proposition which needs no argument to support it. And the same reasoning will apply to instruments of the government created by itself for public and constitutional ends."

And the doctrine of the court is thus expressed:‡

"But it will be safe to conclude, in general, *in reference to persons and State corporations employed in government service*, that when Congress has not interposed to protect their property from taxation, such taxation is not obnoxious to that objection" (*i. e.*, to the objection that the State taxation is used "to defeat or hinder the operations of the National government.")

The tax under consideration does not fall, as the counsel opposed to us argue, within the limitation suggested by the court, in *McCulloch* v. *Maryland*, and incorporated in the National Bank Act by Congress. The court say of the exemption asserted, that—

"It does not extend to a tax paid by the real property of the bank, in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Mary-

* Thompson *v.* Pacific Railroad, 9 Wallace, 589.

† Ib. 590. ‡ Ib. 591.

land may hold in this institution in common with other property of the same description throughout the State."

The tax of the State of Nebraska is not laid upon the shares of the Union Pacific Railroad Company held by citizens of that State, nor upon the real property of the company in common with the other real property within the State. The tax is upon the universal possessions and resources of the company, as collected, combined, prepared, and applied, within the State, in the operations of the government services, for which this instrument was created and endowed by Congress. This tax, then, in the final proposition of the court, after the statement of the above limitation, "is a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional."*

It is not necessary to suggest that the intimated liability in *McCulloch* v. *Maryland*, of the *real estate* of the bank to the State taxation, could not by parity of reason be held to expose the real estate of a railroad—the very *corpus* of its structure for the operations of the government for which the company was created and endowed—to State taxation. The real estate of the bank is manifestly referred to as of merely incidental, and not substantial, relation to the public uses of the bank, for which it was created by Congress.

No intendment can be drawn from the absence of any express exclusion of State taxation by the act of Congress, that the exposure of this company to State taxation was contemplated by Congress. The whole road, to which the act of incorporation applies, was within the Territories of the United States, and there was no State government whose operation needed to be considered or provided against by Congress. Manifestly, nothing could have been further from the expectations of the capitalists who entered into the enterprise proposed to them by the acts of Congress incorporating and endowing this company, than that their property invested in this National road was to be rated and taxed

* McCulloch *v.* Maryland, 4 Wheaton, 436.

to support the local government of the States that should come into being along its route. They accepted the established doctrines of this court as possessing, in the language of Chase, C. J., "the force of constitutional sanctions."

Mr. Justice STRONG delivered the judgment of the court.

That the taxing power of a State is one of its attributes of sovereignty; that it exists independently of the Constitution of the United States, and underived from that instrument; and that it may be exercised to an unlimited extent upon all property, trades, business, and avocations existing or carried on within the territorial boundaries of the State, except so far as it has been surrendered to the Federal government, either expressly or by necessary implication, are propositions that have often been asserted by this court. And in thus acknowledging the extent of the power to tax belonging to the States, we have declared that it is indispensable to their continued existence. No one ever doubted that before the adoption of the Constitution of the United States each of the States possessed unlimited power to tax, either directly or indirectly, all persons and property within their jurisdiction, alike by taxes on polls, or duties on internal production, manufacture, or use, except so far as such taxation was inconsistent with certain treaties which had been made. And the Constitution contains no express restriction of this power other than a prohibition to lay any duty of tonnage, or any impost, or duty on imports or exports, except what may be absolutely necessary for executing the State's inspection laws. As was said in *Lane County* v. *Oregon*:* "In respect to property, business, and persons within their respective limits, the power of taxation of the States remained, and remains entire, notwithstanding the Constitution. It is, indeed, a concurrent power (concurrent with that of the General government), and in the case of a tax upon the same subject by both governments, the claim of the United States as the supreme authority must be pre-

* 7 Wallace, 77.

ferred; but with this qualification it is absolute. The extent to which it shall be exercised, the subjects upon which it shall be exercised, and the mode in which it shall be exercised, are all equally within the discretion of the legislatures to which the States commit the exercise of the power. That discretion is restrained only by the will of the people expressed in the State constitutions, or through elections, and by the condition that it must not be so used as to burden or embarrass the operations of the National government. There is nothing in the Constitution which contemplates or authorizes any direct abridgment of this power by National legislation. To the extent just indicated it is as complete in the States as the like power within the limits of the Constitution is complete in Congress." Such are the opinions we have expressed heretofore, and we adhere to them now.

There are, we admit, certain subjects of taxation which are withdrawn from the power of the States, not by any direct or express provision of the Federal Constitution, but by what may be regarded as its necessary implications. They grow out of our complex system of government, and out of the fact that the authority of the National government is legitimately exercised within the States. While it is true *that* government cannot exercise its power of taxation so as to destroy the State governments, or embarrass their lawful action, it is equally true that the States may not levy taxes the direct effect of which shall be to hinder the exercise of any powers which belong to the National government. The Constitution contemplates that none of those powers may be restrained by State legislation. But it is often a difficult question whether a tax imposed by a State does in fact invade the domain of the General government, or interfere with its operations to such an extent, or in such a manner, as to render it unwarranted. It cannot be that a State tax which remotely affects the efficient exercise of a Federal power is for that reason alone inhibited by the Constitution. To hold that would be to deny to the States all power to tax persons or property. Every tax levied by a

State withdraws from the reach of Federal taxation a portion of the property from which it is taken, and to that extent diminishes the subject upon which Federal taxes may be laid. The States are, and they must ever be, coexistent with the National government. Neither may destroy the other. Hence the Federal Constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the States, or prevent their efficient exercise.

These observations are directly applicable to the case before us. It is insisted on behalf of the plaintiffs that the tax of which they complain has been laid upon an agent of the General government constituted and organized as an instrument to carry into effect the powers vested in that government by the Constitution, and it is claimed that such an agency is not subject to State taxation. That the Union Pacific Railroad Company was created to subserve, in part at least, the lawful purposes of the National government; that it was authorized to construct and maintain a railroad and telegraph line along the prescribed route, and that grants were made to it, and privileges conferred upon it, upon condition that it should at all times transmit dispatches over its telegraph line, and transport mails, troops, and munitions of war, supplies and public stores, upon the railroad for the government, whenever required to do so by any department thereof, and that the government should at all times have the preference in the use of the same for all the purposes aforesaid, must be conceded. Such are the plain provisions of its charter. So it was provided that in case of the refusal or failure of the company to redeem the bonds advanced to it by the government, or any part of them, when lawfully required by the Secretary of the Treasury, the road, with all the rights, functions, immunities, and appurtenances thereunto belonging, and also all lands granted to the company by the United States which at the time of the default should remain in the ownership of the company, might be taken possession of by the Secretary of the Treasury for the use and benefit of the United States. The char-

ter also contains other provisions looking to a supervision and control of the road and telegraph line, with the avowed purpose of securing to the government the use and benefit thereof for postal and military purposes. It is unnecessary to mention these in detail. They all look to a purpose of Congress to secure an agency competent and under obligation to perform certain offices for the General government. Notwithstanding this, the railroad and the telegraph line are neither in whole nor in part the property of the government. The ownership is in the complainants, a private corporation, though existing for the performance of public duties. The government owns none of its stock, and though it may appoint two of the directors, the right thus to appoint is plainly reserved for the sole purpose of enabling the enforcement of the engagements which the company assumed, the engagements to which we have already alluded.

Admitting, then, fully, as we do, that the company is an agent of the General government, designed to be employed, and actually employed, in the legitimate service of the government, both military and postal, does it necessarily follow that its property is exempt from State taxation?

In *Thompson* v. *The Union Pacific Railway Company*,* after much consideration, we held that the property of that company was not exempt from State taxation, though their railroad was part of a system of roads constructed under the direction and authority of the United States, and largely for the uses and purposes of the General government. The company, in that case, were agents of the government, precisely as these claimants are, to the same extent and for the same purposes. Congress had made the same grants to them, and attached to the grants the same conditions. They, too, had received from Congress grants of land, and of bonds, and of a right of way for the purpose of aiding in the construction of their railroad and telegraph line, but with the condition that they should keep their railroad and telegraph line in repair and use, and should at all times transmit dis-

* 9 Wallace, 579.

patches over their telegraph line, and transport mails, troops, and munitions of war, supplies and public stores, upon their railroad for the government, whenever required to do so by any department thereof, and that the government should at all times have the preference in the use thereof for the purposes aforesaid. There is no difference which can be pointed out between the nature, extent, or purposes of their agency and those of the corporation complainants in the present case. Yet, as we have said, a State tax upon the property of the company, its road-bed, rolling-stock, and personalty in general, was ruled by this court not to be in conflict with the Federal Constitution. It may, therefore, be considered as settled that no constitutional implications prohibit a State tax upon the property of an agent of the government merely because it is the property of such an agent. A contrary doctrine would greatly embarrass the States in the collection of their necessary revenue without any corresponding advantage to the United States. A very large proportion of the property within the States is employed in execution of the powers of the government. It belongs to governmental agents, and it is not only used, but it is necessary for their agencies. United States mails, troops, and munitions of war are carried upon almost every railroad. Telegraph lines are employed in the National service. So are steamboats, horses, stage-coaches, foundries, ship-yards, and multitudes of manufacturing establishments. They are the property of natural persons, or of corporations, who are instruments or agents of the General government, and they are the hands by which the objects of the government are attained. Were they exempt from liability to contribute to the revenue of the States it is manifest the State governments would be paralyzed. While it is of the utmost importance that all the powers vested by the Constitution of the United States in the General government should be preserved in full efficiency, and while recent events have called for the most unembarrassed exercise of many of those powers, it has never been decided that State taxation of such property is impliedly prohibited.

It is, however, insisted that the case of *Thompson* v. *The Union Pacific Railroad Company* differs from the case we have now in hand in the fact that it was incorporated by the Territorial legislature and the legislature of the State of Kansas, while these complainants were incorporated by Congress. We do not perceive that this presents any reason for the application of a rule different from that which was applied in the former case. It is true that, in the opinion delivered by the Chief Justice, reference was made to the fact that the defendants were a State corporation, and an argument was attempted to be drawn from this to distinguish the case from *McCulloch* v. *The State of Maryland.** But when the question is, as in the present case, whether the taxation of property is taxation of means, instruments, or agencies by which the United States carries out its powers, it is impossible to see how it can be pertinent to inquire whence the property originated, or from whom its present owners obtained it. The United States have no more ownership of the road authorized by Congress than they had in the road authorized by Kansas. If the taxation of either is unlawful, it is because the States cannot obstruct the exercise of National powers. As was said in *Weston* v. *Charleston*,† they cannot, by taxation or otherwise, "retard, impede, burden, or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the General government." The implied inhibition, if any exists, is against such obstruction, and that must be the same whether the corporation whose property is taxed was created by Congress or by a State legislature.

Nothing, we think, in the past decisions of this court is inconsistent with the opinions we now hold. *McCulloch* v. *The State of Maryland* and *Osborn* v. *Bank of the United States*‡ are much relied upon by the appellants, but an examination of what was decided in those cases will reveal that they are in full harmony with the doctrine that the property of an agent of the General government may be

* 4 Wheaton, 316. † 2 Peters, 467. ‡ 9 Wheaton, 738.

subjected to State taxation. In the former of those cases the tax held unconstitutional was laid upon the notes of the bank. The institution was prohibited from issuing notes at all except upon stamped paper furnished by the State, and to be paid for on delivery, the stamp upon each note being proportioned to its denomination. The tax, therefore, was not upon any property of the bank, but upon one of its operations, in fact, upon its right to exist as created. It was a direct impediment in the way of a governmental operation performed through the bank as an agent. It was a very different thing, both in its nature and effect, from a tax on the property of the bank. No wonder, then, that it was held illegal. But even in that case the court carefully limited the effect of the decision. It does not extend, said the Chief Justice, to a tax paid by the real property of the bank, in common with the other real property in the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in the institution, in common with the other property of the same description throughout the State. But this is a tax on the operations of the bank, and is, consequently, a tax on the operations of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional. Here is a clear distinction made between a tax upon the property of a government agent and a tax upon the operations of the agent acting for the government.

In *Osborn* v. *The Bank* the tax held unconstitutional was a tax upon the existence of the bank—upon its right to transact business within the State of Ohio. It was, as it was intended to be, a direct impediment in the way of those acts which Congress, for National purposes, had authorized the bank to perform. For this reason the power of the State to direct it was denied, but at the same time it was declared by the court that the local property of the bank might be taxed, and, as in *McCulloch* v. *Maryland*, a difference was pointed out between a tax upon its property and one upon its action. In noticing an alleged resemblance between the bank and a government contractor, Chief Jus-

tice Marshall said: "Can a contractor for supplying a military post with provisions be restrained from making purchases within a State, or from transporting the provisions to the place at which the troops were stationed? Or could he be fined or taxed for doing so? We have not heard these questions answered in the affirmative. It is true the property of the contractor may be taxed; and so may the local property of the bank. But we do not admit that the act of purchasing, or of conveying the articles purchased, can be under State control." This distinction, so clearly drawn in the earlier decisions, between a tax on the property of a governmental agent, and a tax upon the action of such agent, or upon his right to be, has ever since been recognized. All State taxation which does not impair the agent's efficiency in the discharge of his duties to the government has been sustained when challenged, and a tax upon his property generally has not been regarded as beyond the power of a State to impose. In *National Bank* v. *The Commonwealth of Kentucky*,* when the right to tax National banks was under consideration, it was asserted by us that the doctrine cannot be maintained that banks, or other corporations or instrumentalities of the government, are to be wholly withdrawn from the operation of State legislation. Yet it was conceded that the agencies of the Federal government are uncontrollable by State legislation, so far as it may interfere with, or impair their efficiency in performing the functions by which they are designed to serve that government.

It is, therefore, manifest that exemption of Federal agencies from State taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they

* 9 Wallace, 353.

have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of Federal powers.

In this case the tax is laid upon the property of the railroad company precisely as was the tax complained of in *Thompson* v. *Union Pacific*. It is not imposed upon the franchises or the right of the company to exist and perform the functions for which it was brought into being. Nor is it laid upon any act which the company has been authorized to do. It is not the transmission of dispatches, nor the transportation of United States mails, or troops, or munitions of war that is taxed, but it is exclusively the real and personal property of the agent, taxed in common with all other property in the State of a similar character. It is impossible to maintain that this is an interference with the exercise of any power belonging to the General government, and if it is not, it is prohibited by no constitutional implication.

It remains only to notice one other position taken by the complainants. It is that if the act of the State under which the tax was laid be constitutional in its application to their property within Lincoln County, the property outside of Lincoln County is not lawfully taxable by the authorities of that county under the laws of the State. To this we are unable to give our assent. By the statutes of Nebraska the unorganized territory west of Lincoln County, and the unorganized county of Cheyenne, are attached to the county of Lincoln for judicial and revenue purposes. The authorities of that county, therefore, were the proper authorities to levy the tax upon the property thus placed under their charge for revenue purposes.

The decree of the Circuit Court is affirmed.

Mr. Justice SWAYNE, concurring in the judgment: I concur in the affirmance of the judgment in this case. I see no reason to doubt that it was the intention of Congress not to give the exemption claimed. The exercise of the power may be waived. But I hold that the road is a National instrumentality of such a character that Congress may interpose and protect it from State taxation whenever that body

shall deem it proper to do so. For some of the leading authorities in support of the principle involved in this view of the subject I refer to the *Chicago and Northwestern Railway* v. *Fuller*,* decided by this court a short time ago.

DECREE AFFIRMED.

Mr. Justice BRADLEY, with whom concurred Mr. Justice FIELD, dissenting.

One of the errors assigned to the decree of the court below is: That the State of Nebraska has no power to subject to taxation, for State purposes, the road-bed, rolling stock, and other property necessary for the use and operation of the complainants' road; and whether the State has such power is the controlling question in this cause. In my judgment, no such power exists, and my opinion is based upon the principles established in the cases of *McCulloch* v. *Maryland*,† and *Osborn* v. *The United States Bank*.‡ Those principles, as summed up by Chief Justice Marshall himself, in the later case of *Weston* v. *The City of Charleston*,§ were as follows:

1. "That all subjects to which the sovereign power of a State extends, are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation."

2. "That the sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission; but not to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States."

3. "That the attempt to use the power of taxation on the means employed by the government of the Union in pursuance of the Constitution, is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give."

4. "That the States have no power by taxation, or otherwise, to retard, impede, burden, or in any manner control

* 17 Wallace, 560. † 4 Wheaton, 316. ‡ 9 Id. 738. § 2 Peters, 466.

the operation of the constitutional laws enacted by Congress, to carry into execution the powers vested in the General government."

If we needed an example to show that the application of these principles extends to such a case as the present, we could not frame one more to the purpose than that of the United States Bank, in respect to which they were announced in the cases referred to. The parallel between it and the Union Pacific Railroad is striking, and, for the purposes of the question, complete. In the case of the bank a *corporation* was created, with full banking powers. The capital stock was mostly subscribed by individuals, the government reserving an interest of seven millions out of thirty-five. Its affairs were managed by twenty-five directors, of whom five were appointed by the President of the United States, by and with the advice and consent of the Senate. The powers of the directors were defined and restricted by the charter. The Secretary of the Treasury was authorized, from time to time, to call upon the bank for a statement of its affairs. For the privileges and benefits conferred, the bank was required to pay to the United States a bonus of $1,500,000. The books of the bank were to be always open to the inspection of a committee of either house of Congress, appointed for that purpose. Penalties and forfeitures were imposed for the breach of certain limitations and directions; and, finally, the bills and notes of the bank were to be receivable in payment of public dues; the public moneys were to be deposited in the bank and its branches, unless the Secretary of the Treasury should otherwise order; and, on his requisition, the bank was to give the necessary facilities for transferring the public funds from place to place within the United States, and for distributing the same in payment of the public creditors, without charging commissions or exchange.* Here, then, was a corporation, constituted mainly of private individuals, created by Congress, established by its aid, regulated by its laws, amenable to its

* 3 Stat. at Large, 266.

committees and to the executive department, and subservient to the uses and purposes of the government, in executing and carrying out a particular part of its constitutional functions.

Now in all of these respects, except the single one of ownership of a portion of its capital stock, the Union Pacific Railroad presents a parallel case. The corporation is the creature of Congress; it receives large aid from the General government, both in donations and loans; the President appoints two of its directors; and all the operations of the company in laying, constructing, and working its railroad and telegraph lines, as well as its rates of toll, are subject to regulations imposed by its charter, and to such further regulations as Congress may hereafter make. On failure to comply with the terms and conditions of the charter, or to keep the road in repair and use, Congress may assume the control and management thereof, and devote the income to the use of the United States. Annual reports are to be made to the Secretary of the Treasury. The loan of the United States to the company, amounting to many millions, is a lien on all the property, and on failure to redeem it, the Secretary of the Treasury is authorized to take possession of the road, with all its rights, functions, immunities, and appurtenances, for the use and benefit of the United States; and, finally, all the grants made to the company are declared to be upon the condition that, besides paying the government bonds advanced, the company shall keep the railroad and telegraph lines in repair and use, and shall at all times transmit dispatches and transport mails, troops, and munitions of war, supplies and public stores for the government, whenever required to do so by any department thereof; and that the government shall have the preference at rates not to exceed those charged to private parties, and payable by being applied to the payment of the bonds aforesaid; and in addition to all this control of Congress, and the obligations and liabilities of the company, Congress reserves the right to add to, alter, amend, or repeal the charter.

In these provisions we see the same close connection be-

tween the government and the corporation, the same control reserved by the former, the same or an equal interest in the scheme, and a like creation of means for carrying into execution the powers conferred upon Congress. In the one case, the object was to facilitate the financial transactions of the government, and the bank was used as a means to that end; in the other, the object is to establish a National post-road for the mails, and a telegraph line for the transmission of intelligence, and to facilitate government transportation of every kind between the East and the West, as well as to promote and regulate the commerce between those sections; and the railroad company is used as a means to these ends.

It seems to me that unless we are prepared to overrule the decisions referred to, we must apply the same law to this case which was applied to the United States Bank. I trust we are not prepared to overrule those decisions. Whilst no one disputes the general power of taxation in the States, which is so elaborately set forth in the opinion of the majority, it must be conceded that there are limits to that power. The States cannot tax the powers, the operations, or the property of the United States, nor the means which it employs to carry its powers into execution. The government of the United States, within the scope of its powers, is supreme, and cannot be interfered with or impeded in their exercise.

The case differs *toto cœlo* from that wherein the government enters into a contract with an individual or corporation to perform services necessary for carrying on the functions of government—as for carrying the mails, or troops, or supplies, or for building ships or works for government use. In those cases the government has no further concern with the contractor than in his contract and its execution. It has no concern with his property or his faculties independent of that. How much he may be taxed by, or what duties he may be obliged to perform towards, his State is of no consequence to the government, so long as his contract and its execution are not interfered with. In that case the con-

tract is the means employed for carrying into execution the powers of the government, and the contract alone, and not the contractor, is exempt from taxation or other interference by the State government.

But where the General government creates a corporation as a means of carrying out a national object, that corporation and its powers, property, and faculties, employed in accomplishing the service, are the instrumentalities by which the government effects its objects. Hence the corporation is not taxable by State authority. And it matters not that private individuals are interested for their private gain in the stock of the corporation. Such individual interest may be taxable by itself, but the corporation and its property and operations cannot be, without interfering with the agencies used by the government for the accomplishment of its objects.

This distinction between private corporations performing services for the government and public corporations created by the government for the purpose of carrying on its operations, and the consequences resulting therefrom, are forcibly drawn by Chief Justice Marshall in *Osborn* v. *The United States Bank*. He says:

"The foundation of the argument in favor of the right to tax the bank is laid in the supposed character of that institution. The argument supposes the corporation to have been originated for the management of an individual concern, to be founded upon contract between individuals, having private trade and private profit for its great end and principal object. If these premises were true, the conclusion drawn from them would be inevitable. This mere private corporation, engaged in its own business, with its own views, would certainly be subject to the taxing power of the State, as any individual would be; and the casual circumstance of its being employed by the government in the transaction of its fiscal affairs would no more exempt its private business from the operation of that power than it would exempt the private business of any individual employed in the same manner. But the premises are not true. The bank is not

considered as a private corporation, whose principal object is individual trade and individual profit, but as a public corporation, created for public and national purposes. That the mere business of banking is, in its own nature, a private business, and may be carried on by individuals or companies, having no political connection with the government, is admitted; but the bank is not such an individual or company. It was not created for its own sake, or for private purposes. It has never been supposed that Congress could create such a corporation. The whole opinion of the court in *McCulloch* v. *Maryland* is founded on and sustained by the idea that the bank is an instrument which is necessary and proper for carrying into effect the powers vested in the government of the United States. It is not an instrument which the government found ready made, and has supposed to be adapted to its purposes, but one which was created in the form in which it now appears for national purposes only. It is, undoubtedly, capable of transacting private as well as public business. While it is the great instrument by which the fiscal operations of the government are effected, it is also trading with individuals for its own advantage. The appellants endeavor to distinguish between this trade and its agency for the public, between its banking operations and those qualities which it possesses in common with every corporation, such as individuality, immortality," &c.

The suggestion of Chief Justice Marshall in the above quotation, that Congress cannot create any corporations except for public and national purposes, is worthy of particular notice. The inference is obvious, that any corporation rightfully created by Congress, being necessarily public and national in its object, is beyond the reach of State taxation. That suggestion, it is true, was made in reference to a corporation established for business purposes within the States of the Union. And in such a case, it is evident that the proposition must be true, namely, that Congress cannot create a corporation except for a public and national purpose. But in a Territory of the United States, Congress is supreme, and is the fountain of local as well as public and national

law. It usually exercises its municipal powers over such Territories by the agency of Territorial governments. But it is not obliged to do this. It might exercise them directly, for the greater power includes the less. As the source of municipal legislation in the Territory of Nebraska, therefore, Congress undoubtedly could have established local and private corporations for manufacturing, mining, financial, and other business purposes, the same as it has been accustomed to do in reference to the District of Columbia, prior to the recent establishment of a legislature therein. Now, any such private and local corporations created by Congress in a Territory, would cease to be United States corporations when such Territory became a State. They would then become subject to State control by reason of not possessing a national character. A *quo warranto* from the State courts could be issued for the repeal of their charters in case of forfeiture for misfeasance or non-feasance. The admission of a Territory as a State would be a virtual assignment by Congress of all control over such institutions to the State as the proper successor in the municipal sovereignty. But this would not be the case with regard to corporations of a public and national character, such as Congress could have created if the Territory had been a State at the time. They will remain United States corporations, subject to Congressional, and not to State control.

The Union Pacific Railroad was authorized to be constructed entirely in Territories then belonging to the United States. But the work was public and national in its character, and the corporation was a public and national corporation, as much so as would be a company created by Congress to construct a railroad from New Orleans to New York, through the old or long-admitted States. The circumstance, therefore, that the road was originally authorized in the United States territory, does not detract from the importance of Chief Justice Marshall's suggestion in its bearing upon the case in hand. The very fact that the charter of the company can stand at all as a Congressional instead of a State charter, which has not been seriously questioned, is proof

of its national character; for without such national character it would cease to be subject to national control.

That Congress has the power under the Federal Constitution to create and establish such a corporation for such purposes of a national character was demonstrated by the unanswerable argument of Mr. Hamilton on the creation of the first National bank, and was set at rest by the equally unanswerable argument of Chief Justice Marshall in the case of *McCulloch* v. *Maryland*.

"Although among the enumerated powers of government," says the Chief Justice,* "we do not find the word 'bank' or 'incorporation,' we find the great powers to levy and collect taxes, to borrow money, to regulate commerce, to declare and conduct war, and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its government. It can never be pretended that these vast powers draw after them others of inferior importance merely because they are inferior. Such an idea can never be advanced. But it may with great reason be contended that a government intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be intrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. . . . Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require that the treasure raised in the North should be transferred to the South, that raised in the East conveyed to the West, or that this order should be reversed. Is that construction of the Constitution to be preferred which would render these operations difficult, hazardous, and expensive? . . . The government which has the right to do an act, and has imposed on it the duty of performing that act, must, ac-

* 4 Wheaton, 407.

cording to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception. . . . The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished. No contributions are made to charity for the sake of an incorporation, but a corporation is created to administer the charity; no seminary of learning is instituted in order to be incorporated, but the corporate character is conferred to subserve the purposes of education. No city was ever built with the sole object of being incorporated, but is incorporated as affording the best means of being well governed. The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else. No sufficient reason is, therefore, perceived why it may not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them."

Now, I think it cannot be doubted at the present day, whatever may have been contended in former times, that the creation of national roads and other means of communication between the States, is within the power of Congress in carrying out the powers of regulating commerce between the States, establishing postoffices and postroads, and in providing for the national defence and for military operations in time of war. And no one will contend that, if the creation of a corporation is a suitable agency and means of carrying on the financial operations of the government, the creation of a corporation is equally apposite as an agency and means of carrying out the objects above mentioned. This has been so forcibly stated by one of the justices of this court, in the case of The Clinton Bridge, decided in the

Eighth Circuit, in October, 1867,* that I shall not further enlarge upon the point.

The Union Pacific Railroad Company, therefore, being a United States corporation created for national objects and purposes, and deriving its existence, its powers, its duties, its liabilities, from the United States alone; being responsible to the United States, now as formerly, for a whole congeries of duties and observances; being subjected to the forfeiture of its corporate franchises, powers, and property to the United States, and not to any individual State; being charged with important duties connected with the very functions of the government: every consideration adduced in the cases of *McCulloch* v. *Maryland*, and *Osborn* v. *The Bank*, would seem to require that it should be exempt not only from State taxation, but from State control and interference, except so far as relates to the preservation of the peace, and the performance of its obligations and contracts. In reference to these and to the ordinary police regulations imposed for sanitary purposes and the preservation of good order, of course, it is amenable to State and local laws.

As an instrument of national commerce as well as government operations, it has been regulated by Congress. Can it be further regulated by State legislation? Can the State alter its route, its gauge, its connections, its fares, its franchises, or any part of its charter? Can the State step in between it and the superior power or sovereignty to which it is responsible? Such an hypothesis, it seems to me, is inadmissible and repugnant to the necessary relations arising and existing in the case. Such an hypothesis would greatly derogate from and render almost useless and ineffective that hitherto unexecuted power of Congress to regulate commerce by land, among the several States. If it be declared in advance that no agency of such commerce, which Congress may hereafter establish, can be freed from local impositions, taxation, and tolls, the hopes of future free and un-

* 1 Woolworth, 150.

restricted intercourse between all parts of this great country will be greatly discouraged and repressed.

These considerations show how totally different this case is from that of *Thompson* v. *The Kansas Pacific Railroad Company*. That was a State corporation, deriving its origin from State laws, and subject to State regulation and responsibilities. It would be subversive of all our ideas of the necessary independence of the National and State governments, acting in their respective spheres, for the General government to take the management, control, and regulation of State corporations out of the hands of the State to which they owe their existence, without its consent, or to attempt to exonerate them from the performance of any duties, or the payment of any taxes or contributions, to which their position, as creatures of State legislation, renders them liable.

But, it may be asked, if the States cannot tax a United States corporation created for public and national purposes, on what principle can the General government tax local corporations created by the State governments for local and State purposes? If the States cannot tax a National bank, how can the United States tax a State bank? The answer is very manifest, and is stated by Chief Justice Marshall in *McCulloch* v. *Maryland*.* "The government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one State may be willing to control its operations, no State is willing to allow others to control them." Again: "It has also been insisted that, as the power of taxation in the General and State governments is acknowledged to be concurrent, every argument which would sustain the right of the General government to tax banks chartered by the States, will equally sustain the right of the States to tax banks chartered by the General government. But the two cases are not on the same reason. The people of all the States have

* 4 Wheaton, 405.

created the General government, and have conferred upon it the general power of taxation. The people of all the States, and the States themselves, are represented in Congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the States, they tax their constituents; and these taxes must be uniform. But when a State taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by the people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole—between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme."

But it is contended that the laying of a tax on the road-bed of the company is nothing more than laying a tax on ordinary real estate, which was conceded might be done in the case of the United States Bank, in reference to its banking-house or other lands taken for claims due in the course of its business. This is a plausible suggestion, but in my apprehension, not a sound one. In ascertaining what is essential in every case, respect must always be had to the subject-matter. The State of Maryland undertook to tax the circulation of the United States branch bank established in that State by requiring stamps to be affixed thereto; the State of Ohio imposed a general tax of $50,000 upon the branch established therein. These taxes were declared unconstitutional and void. They impeded the operations of the bank as a financial agent. Real estate was not a necessary appurtenant to the exercise of the functions of the bank. It might hire rooms for its office, or it might purchase or erect a building.

But the primary object of a railroad company is commerce and transportation. In its case, a railroad track is just as essential to its operations as the use of a currency, or the

issue or purchase of bills of exchange is to the operations of a bank. To tax the road is to tax the very instrumentality which Congress desired to establish, and to operate which it created the corporation.

Besides, all that a railroad company possesses in reference to its road-bed is the right of way, and the right to use the land for the purpose of way. This is a franchise conferred by the government, and inseparately connected with the other franchises which enable it to perform the duties for the performance of which it was created. Any estate in the land—the soil—the underlying earth—beyond this, belongs to the original proprietor; and that proprietor in the present case is the government itself. So that, look at it what way we will, there is no room for the taxing power of the State. The estate in the soil cannot be taxed, for that remains in the United States; the franchise of right of way and materials of track cannot be taxed, because they are essentially connected with and form a part of the powers, faculties, and capital by which the national purposes of the organization are accomplished.

If the road-bed may be taxed, it may be seized and sold for non-payment of taxes—seized and sold in parts and parcels, separated by county or State lines—and thus the whole purpose of Congress in creating the corporation and establishing the line may be subverted and destroyed.

In my judgment, the tax laid in this case was an unconstitutional interference with the instrumentalities created by the National government in carrying out the objects and powers conferred upon it by the Constitution.

Mr. Justice HUNT: I dissent from the opinion of the court.

Statement of the case.

THE SAPPHIRE.

1. The rule in admiralty that where both vessels are in fault the sums representing the damage sustained by each must be added together and the aggregate divided between the two, is of course applicable only where it appears that both vessels have been injured.
2. And although a cross-libel may not always be necessary in such case, in order to enable the owners of the vessel libelled to set off or recoup the damages sustained by such vessel if both it and the other vessel be found in fault, yet if it be meant to set off or recoup such damages, it ought to appear in some way that the libelled vessel was injured, and if such injury is not alleged by a cross-libel, it may well be questioned whether it ought not to appear in the answer.
3. At all events where, in neither the District nor in the Circuit Court, the libellee has set up an allegation that there were other damages sustained than those which the libellant alleged had been sustained by his vessel, the libellee cannot make a claim in this court for damages which he alleges here, for the first time, have been sustained also by him.
4. Accordingly, where a decree in the Circuit Court which, assuming that the fault in a collision case was with the libelled vessel alone, gave $15,000 damages to the libellant, was reversed in this court, which held "that both vessels were in fault, and that the damages ought to be equally divided;" and remanded the case with a mandate, directing that a decree should be entered "in conformity with this opinion," *held*, there having been no allegation in any pleadings, nor any proofs that the libelled vessel had sustained injury, that a decree was rightly entered against her for $7500.
5. The libellant, in such a case, *held* entitled to his costs in the District and Circuit Court as given originally in those courts; deducting from them the costs of the appellant on reversal; the matter of costs in admiralty being wholly under the control of the court giving them.

APPEAL from the Circuit Court for the District of California.

In December, 1867, in the District Court of California, the Emperor of the French, Napoleon III, filed a libel in the admiralty against the ship Sapphire, averring that shortly before, a collision had occurred between the Euryale, a vessel belonging to the French government, and the Sapphire, by which the former was damaged to the extent of $15,000; that the collision was occasioned wholly by the negligence and inattention, and want of proper care and skill on the

part of the ship Sapphire, her master and crew, and not from any fault, omission, or neglect on the part of the Euryale, her master and crew.

The owners of the Sapphire in their answer, admitting the collision, denied that it had been caused by the fault of those on board the Sapphire; and averred that the Sapphire had her full complement of men and officers on board, was fully and properly manned and equipped, that the officers and crew, before and at the time of the collision, were on deck ready to adopt and use any and all measures to prevent any danger or accident happening to her; and they averred that on the contrary the Euryale *ran into and collided with the Sapphire*, without any fault or negligence on the part of the officers, or any of them, or the crew, or any of them, of the Sapphire; that whatever damage was done to the Euryale or the Sapphire, was occasioned *solely and exclusively by reason of the fault and negligence* of the officers of the Euryale. Wherefore they prayed that the court would pronounce against the libel and condemn the libellant in costs, and *otherwise law and justice administer in the premises.*

No cross-libel was filed, and as the reader will have observed the answer put in, though denying the alleged fault of the Sapphire, and averring that whatever damage was done was due solely to the fault and negligence of the libellant's vessel, made no averment that any injury had been sustained by the Sapphire.

Upon the pleadings, as thus mentioned, the case went to trial, and decree was that the libellant recover the amount of his damages sustained by him in consequence of the collision described in his libel. A commissioner was then appointed to ascertain and compute the amount of the damages due to the libellant, and to make report to the court. Subsequently that commissioner reported the amount of those damages to be $16,474, whereupon the court decreed that the claimants and owners of the Sapphire pay to the libellant the sum of $15,000, a part of the sum thus reported and the amount claimed in the libel.

This decree was affirmed in the Circuit Court, and the

Statement of the case.

case being brought here for review this court was of the opinion that "both parties were in fault, and that *the damages ought to be equally divided between them;*" and sent down a mandate directing that a decree should be entered "in conformity with this opinion."*

The Circuit Court thereupon reversed its prior decision, and decreed that the libellant recover against the Sapphire and her claimants the sum of $7500, the same being one-half of the damages decreed by this court in favor of the libellant and against the claimants. It further decreed that the libellant recover against the ship the costs in the District Court taxed at $115.50, together with his costs in the Circuit Court taxed at $299.70, amounting in all to $415.20, less the sum of $137.43, costs of the claimants expended in the prosecution of their appeal to the Supreme Court of the United States. From this decree the owners of the Sapphire again appealed to this court, alleging that this last decree also of the Circuit Court was erroneous, and did not conform to the mandate—

First. In that it decreed in favor of the libellant for $7500, being one-half of $15,000, the sum previously awarded to the libellant, by the Circuit Court, as and for damage sustained by the libellant as owner of the Euryale, without taking into consideration the damage sustained by the Sapphire.

Second. In that the Circuit Court did not ascertain the amount of damage which had been sustained by the Sapphire, without which ascertainment the court could not divide the damages sustained by the two vessels equally between them.

Third. In that it allowed the libellant his costs in the District and in the Circuit Courts, to which he was not entitled.

Fourth. In that it did not enter a decree in favor of the claimants for $137.43, the costs allowed them by the Supreme Court, and in deducting this amount from the costs allowed the libellant.

* 11 Wallace, 164.

Argument for the appellants.

Mr. C. B. Goodrich, for the appellants:

1. The Supreme Court did not direct the Circuit Court to enter a decree in favor of the libellant for the sum of $7500, nor for any other specified sum. The mandate and the opinion of the Supreme Court settled that the libellant was not entitled to recover upon the case stated in the libel, which was based upon the supposed exclusive fault and wrong of the claimants; it decided that both parties were in fault, and remanded the suit to the Circuit Court with directions to proceed and dispose of the same upon the principles applicable to such case.

Now in a cause of collision between two vessels resulting from the fault of both parties, the damages sustained by each of the vessels are to be ascertained, and the entire aggregate sum divided between them. This is the well-settled law of the admiralty which has been recognized and established by this court.*

It appears by the pleadings in this case that distinct issues were presented, each vessel charging the other as solely and exclusively in the wrong; and each asking the court to administer law and justice in the premises. This invited an investigation into the whole case. But neither in the District Court, nor in the Circuit Court had the claimants an opportunity to show the nature, extent, or amount of damage sustained by the Sapphire, because of the interlocutory decree of the District Court holding the claimants alone as in the wrong, which was carried into the final decree, and a decree subsequently affirmed by the Circuit Court. It follows that upon a reversal of the decree of the Circuit Court and a remand of the cause, the claimants had a right to show the nature, extent, and amount of their damage under the pleadings as they now stand, and if necessary to protect themselves they were at liberty in the court below to specify more particularly their damage or to file an amended or supplementary answer stating the amount and

* The Gray Eagle, 9 Wallace, 505; The Mabey, 10 Id. 420; The Sapphire, 11 Id. 171; The Maria Martin, 12 Id. 31; The Ariadne, 13 Id. 475.

character of the damages sustained by the Sapphire in the collision.

2. In a case of collision, in which both parties are in fault, each party pays his own costs.* In the case at bar, the original decree was reversed, and the cause after the mandate required the court below to act upon a new state of facts; so that the question of costs arises subsequent to the mandate.

3. The claimants were entitled to the costs awarded them on their appeal to the Supreme Court, because they were compelled to appeal to protect their rights; these costs stand upon grounds distinct from those applicable to the costs of the parties in the District and Circuit Courts. The Circuit Court should have entered judgment therefor, instead of deducting the amount from the costs allowed to the libellant.

4. Finally, we submit that the Circuit judge mistook the import and requirements of the mandate and opinion to which it refers, and that the decree of the Circuit Court should be reversed, and the cause remanded with directions to ascertain the nature, extent, and amount of the damages sustained by the Sapphire, and thereupon to render such judgment as will carry the mandate into effect.

Mr. Caleb Cushing, contra.

Mr. Justice STRONG delivered the opinion of the court.

The question now presented is whether the new decree which the Circuit Court has made conforms to our mandate. Our mandate was not an order to take further proceedings in the case, in conformity with the opinion of this court (as was directed in *The Schooner Catharine*†), or to adjust the loss upon the principles stated in our opinion (as was directed in *Cushing et al.* v. *Owners of the Ship John Frazer et al.*),‡ but it was specially to enter a decree in conformity with the

* The Monarch, 1 William Robinson, 21. † 17 Howard, 170.

‡ 21 Id. 184; see also Rogers *v.* Steamer St. Charles, 19 Id. 108.

opinion of this court. Of what damages did we order an equal division? There were no others asserted or claimed than those sustained by the libellant. We do not say that a cross-libel is always necessary in a case of collision in order to enable claimants of an offending vessel to set off or recoup the damages sustained by such vessels, if both be found in fault. It may, however, well be questioned whether it ought not to appear in the answer that there were such damages. It is undoubtedly the rule in admiralty that where both vessels are in fault the sums representing the damage sustained by each must be added together and the aggregate divided between the two. This is in effect deducting the lesser from the greater and dividing the remainder. But this rule is applicable only where it appears that both vessels have been injured. If one in fault has sustained no injury, it is liable for half the damages sustained by the other, though that other was also in fault. And, so far as the pleadings show, that is the case now in hand. But, without deciding that the claimants of the Sapphire were not at liberty to show that their ship was damaged by the collision, and to set off those damages against the damages of the libellant, it must still, we think, be held they have waived any such claim. If our mandate was not a direction to enter a decree for one-half the damages of the libellant, if its meaning was that a decree should be made dividing the aggregate of loss sustained by both vessels, which may be conceded, it was the duty of the respondents to assert and to show that the Sapphire had been injured. This they made no attempt to do. When the cause went down they neither asked to amend their pleadings, nor to offer further proofs, nor to have a new reference to a commissioner. So far as the record shows, they set up no claim, even then, or at any time before the final decree, that there were any other damages than those which the libellant had sustained. It is not competent for them to make such a claim first in this court. We cannot say, therefore, the court below did not decree in accordance with our mandate.

The appellants further complain that it was erroneous to

allow the libellant his costs in the District and Circuit Courts, deducting therefrom the costs allowed them by this court, *i. e.*, the costs of the reversal of the former decree. We do not perceive, however, in this any such error as requires our interposition. Costs in admiralty are entirely under the control of the court. They are sometimes, from equitable considerations, denied to the party who recovers his demand, and they are sometimes given to a libellant who fails to recover anything, when he was misled to commence the suit by the act of the other party.* Doubtless they generally follow the decree, but circumstances of equity, of hardship, of oppression, or of negligence induce the court to depart from that rule in a great variety of cases.† In the present case, the costs allowed to the libellant were incurred by him in his effort to recover what has been proved to be a just demand, and a denial of them, under the circumstances of the case, would, we think, be inequitable.

DECREE AFFIRMED.

WEBER *v.* THE BOARD OF HARBOR COMMISSIONERS.

1. Upon the admission of California into the Union upon equal footing with the original States, absolute property in, and dominion and sovereignty over, all soils under the tidewaters within her limits passed to the State, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several States, the regulation of which was vested in the General government.
2. The legislature of California, on the 26th of March, 1851, at its first session after the admission of the State into the Union, passed an act granting to the city of San Francisco for the term of ninety-nine years the use and occupation of portions of the lands covered by the tidewaters of the bay of San Francisco in front of the city, lying within a certain designated line, described according to a map of the city on record in the recorder's office of the county, and declared that the line thus desig-

* Benedict's Admiralty, § 549. † Id. § 549.

nated should "be and remain a permanent water front" of the city. It also provided that the authorities of the city should keep the space beyond the line, to the distance of five hundred yards, "clear and free from all obstructions whatsoever;" and reserved to the State the right to regulate the construction of wharves and other improvements, so that they should not interfere with the shipping and commercial interests of the bay and harbor. A subsequent act of the legislature, passed on the 1st of May, 1851, authorized the city of San Francisco to construct wharves at the end of all the streets commencing with the bay, the wharves to be made by extending the streets into the bay for a distance not exceeding two hundred yards beyond the line established as the permanent water front of the city; and provided that the space between the wharves, when extended, should remain free from obstructions and be used as public slips for the accommodation and benefit of the general commerce of the city and State. After the passage of these acts the predecessors of the complainant acquired the title of the city, under the grant of the State abovementioned, to lots lying along the line of the said water front, and erected a wharf in front of the lots into the bay:

Held:

1st. That the complainant took whatever interest he obtained, in subordination to the control by the city over the space immediately beyond the line of the water front, and the right of the State to regulate the construction of wharves and other improvements; and that he was not a riparian proprietor, having a right to wharf out into the bay.

2d. That the erection of the wharf was an interference with the rightful control of the city over the space occupied by it, and an encroachment upon the soil of the State which she could remove at pleasure. Having the power of removal, the State could, without regard to the existence of the wharf, authorize improvements in the harbor, by the construction of which the use of the wharf would necessarily be destroyed.

3. The statute of limitations of California declares that the people of the State will not sue any person for or in respect of any real property, or the issues or profits thereof, by reason of the right or title of the people to the same, unless—

1st. Such right or title shall have accrued within ten years before any action or other proceeding for the same shall be commenced; or unless,

2d. The people, or those from whom they claim, shall have received the rents or profits of such real property, or some part thereof, within the space of ten years:

4. The predecessors of the complainant in 1854 erected a wharf, projecting it into the bay of San Francisco, and in 1867 obstructions to its use were made, for which the present suit was brought, the complainant contending among other things that he had acquired a title to the wharf by operation of the above statute. Before ten years had elapsed after the erection of the wharf the legislature passed an act creating a board of harbor commissioners, and directing them to take possession of and hold the water front to the distance of six hundred feet from the estab-

lished front line abovementioned, with the improvements, rights, privileges, franchises, easements, and appurtenances, and to institute suits for the recovery of wharves and the removal of obstructions to the harbor, and generally to hold the property for the construction of wharves, landings, and other improvements intended for the safety and convenience of shipping. *Held:*

1st. That the words in the statute of limitations, "*shall have accrued,*" are used in the sense of "*shall have existed.*"

2d. That the act creating the board of harbor commissioners rebutted any presumption against the title of the State from the lapse of time, and prevented the complainant from acquiring that title by operation of the statute of limitations.

APPEAL from the Circuit Court for the District of California; in which court one Weber filed a bill against the board of State harbor commissioners of California, to make them abate and remove certain erections made by them on the water front of San Francisco, which he alleged interfered with a wharf rightfully put there by him. The case was thus:

The State of California was admitted into the Union on the 9th of September, 1850. At the first session of its legislature afterwards, namely, on the 26th of March, 1851, an act was passed entitled "An act to provide for the disposition of certain property of the State of California," which granted to the city of San Francisco the use and occupation, for ninety-nine years, of certain lands lying in front of the city covered by the tidewaters of the bay of San Francisco. This act is generally designated in California as "The Beach and Water-Lot Act of 1851." It describes the outer boundary line of the lands according to the survey of the city, and a map or plat of the same on record in the office of the recorder of the county of San Francisco, and in its fourth section declares that this line—

"Shall be and remain a permanent water front of said city, the authorities of which shall keep clear and free from all obstructions whatever the space beyond said line to the distance of five hundred yards therefrom."

And the sixth section provides that—

"Nothing in the act shall be construed as a surrender by the

State of its right to regulate the construction of wharves or other improvements, so that they shall not interfere with the shipping and commercial interests of the bay and harbor of San Francisco."

The permanent water-front thus established is in many places at a great distance from the line of the shore of the bay as that existed at the time California was admitted into the Union. Ships of the largest size then floated at the lowest tide at many points along this line. Such was the case at the point where the wharf of the complainant hereafter mentioned was constructed.

The act abovenamed was followed, on the 1st of May, 1851, by another act, as follows:

"SECTION 1. The city of San Francisco is hereby authorized and empowered to construct wharves at the end of all the streets, commencing with the bay of San Francisco; the wharves to be made by the extension of said streets into the bay, in their present direction, not exceeding two hundred yards beyond the present outside line of the beach and water lots, and the city is authorized to prescribe the rates of wharfage that shall be collected on said wharves, when constructed. The space between said wharves, when they are extended, which is situated outside of the outer line of beach and water-lot property, as defined by the legislature, shall remain free from obstructions and be used as public slips for the accommodation and benefit of the general commerce of the city and State."

In 1853 the predecessors of the complainant acquired the title of the city to certain lots lying along its water front, and being about one hundred and twenty feet in extent. In 1854 they built a platform along and adjoining this front the whole length of the lots, and then constructed a wharf projecting from the centre of the platform into the bay, eighty-four feet long and forty feet wide, leaving a space on each side for the approach and dockage of vessels. From that time until the interference by the defendants, in 1867, the then owners and their successors continued in the uninterrupted possession of the wharf and collected tolls and wharfage for its use.

Statement of the case.

On the 24th of April, 1863, the legislature of California passed an act entitled "An act to provide for the improvement and protection of the wharves, docks, and water front, in the city and county of San Francisco." It created a board of State harbor commissioners, and by its second section required that they should

"Take possession of and hold all that portion of the bay of San Francisco lying along the water front of said city and county of San Francisco, and adjacent thereto, to the distance of six hundred feet into the waters of said bay, from the line of the water front, as defined by an act of the legislature, approved March 26th, 1851, together with all the improvements, rights, privileges, franchises, easements, and appurtenances connected therewith, or in anywise appertaining thereto, excepting such portions of said water front as may be held by parties under valid leases; and the commissioners shall also take possession and have control of any and all such portions of said water front, with the improvements, rights, privileges, franchises, easements, and appurtenances, as are held under valid leases, as soon as said leases shall respectively expire and become void."

They were also

"Authorized and empowered to institute actions at law or in equity for the possession of any wharf or wharves, or other rights, privileges, franchises, &c., named in this section, or for the recovery of the tolls, dockage, rents, and wharfage thereof; also, for the removal of obstructions, and abatement of any and all nuisances on the water front mentioned in this act, and to prosecute the same to final judgment."

The third section proceeded:

"SECTION 3. The commissioners shall have and hold possession and control of the said water front, with the improvements, rights, privileges, franchises, easements, and appurtenances connected therewith, or in anywise appertaining thereto, for the following purposes and uses:

"*First.* To keep in good repair all the sea-walls, embankments, wharves, piers, landings, and thoroughfares, for the accommodation and benefit of commerce.

"*Second.* To dredge such number of the docks as the commerce of the harbor may require, to a depth that will admit of the easy ingress and egress of the vessels which load and unload at said wharves and piers.

"*Third.* To construct such new wharves, piers, landings, and thoroughfares, at the foot of the streets, as the wants of commerce may require.

"*Fourth.* To construct all works necessary for the protection of wharves, piers, docks, landings, and thoroughfares, and for the safety and convenience of shipping.

"*Fifth.* To provide for the construction, out of the surplus funds growing out of the revenues arising from said wharves, such sea-wall or other structure along the water front of said city and county of San Francisco, as shall, upon accurate surveys made for that purpose, be found to be necessary for the protection of the harbor and water front of said city and county. . .

"*Sixth.* To collect such rents, tolls, wharfage, craneage, and dockage, as may, from time to time, be fixed under the authority of this act, and to disburse and dispose of the revenues arising therefrom as in this act provided."

The twentieth section provided that no person or company should, after the commissioners were qualified, "collect any tolls, wharfage, and dockage, upon any portion of the water front of the city and county of San Francisco," nor "land or ship any goods, wares, or merchandise, or other thing, upon or from any portion of the said water front of said city and county of San Francisco, unless authorized so to do by the said commissioners, excepting such persons or companies as might hold possession of some portion of the property described in this act by valid leases." And it provided that any person violating or offending against the prohibition should be deemed guilty of a misdemeanor, and upon conviction thereof be punished by fine or imprisonment.

The defendants, the harbor commissioners, in 1867 proceeded, under this act, and an act amendatory of and supplementary to it, passed on the 6th of March, 1864, to make improvements in the harbor of San Francisco, intended for its protection and the convenience of shipping, and in the

execution of their works caused piling to be had, and capping and planking on both sides of the complainant's wharf, so as to prevent any approach to it by vessels. To obtain a decree of the court that the erections thus caused were a nuisance, and to compel the defendants to abate and remove them, the complainants filed the present bill, asserting title to the land upon which the wharf was constructed, and alleging that if any adverse claim to it was made, it was barred under the statute of limitations of the State.

The statute of limitations provides that—

"The people of the State will not sue any person for, or in respect of, any real property, or the issues or profits thereof, by reason of the right or title of the people to the same, unless—

"*First.* Such right or title shall have accrued within ten years before any action or other proceeding for the same shall be commenced; or unless,

"*Second.* The people, or those from whom they claim, shall have received the rents or profits of such real property, or some part thereof, within the space of ten years."

The court below dismissed the bill, and from the decree the complainant appealed to this court.

Messrs. S. Heydenfelt and W. Irvine, for the appellant, argued:

That the ownership of the land on the water front conferred the right on the owner to wharf out into the bay, so long as he did not obstruct navigation, and that he could not be cut off from the water.*

That the complainant had acquired a perfect title to the wharf by lapse of time and the statute of limitations of the State of California; as the shore below high-water mark might become private property by prescription;† and the title to a franchise be acquired and secured by lapse of time and the statute of limitations, as much as a title to land.

* Angell on Tidewaters, ch. 6, p. 171; Chapman *v.* Kimball, 9 Connecticut, 41; East Haven *v.* Hemingway, 7 Id. 202; Nichols *v.* Lewis, 15 Id. 137.

† 2 Kent, Lecture 52, p. 427, 3d edition; Leffingwell *v.* Warren, 2 Black, 599.

That the establishment of the permanent water front of San Francisco by the act of March 26th, 1851, was a contract between the public and the owners of the property, or those who should afterwards purchase under the grant to the city, and could not be changed, except by the assertion of the rights of eminent domain, and that obstructions could not be authorized without compensation.

That the present case was governed by that of *Yates* v. *Milwaukee*,* where Miller, J., delivering the opinion of the court, says:

"But whether the title of the owner of such a lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream; and among those rights are access to the navigable part of the river from the front of his lot; the right to make a landing, wharf, or pier, for his own use or for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose, for the protection of the rights of the public, whatever those may be." . . .

"This riparian right is property, and is valuable, and though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right which, when once vested, the owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good, upon due compensation."

Messrs. J. F. Swift and T. P. Ryan, contra, relied on the statutes of California ceding to the city of San Francisco the title of the State, and the act creating the board of harbor commissioners, and investing them with control of the water front of the city.

Mr. Justice FIELD delivered the opinion of the court.

It is unnecessary for the disposition of this case to question the doctrine, that a riparian proprietor, whose land is bounded by a navigable stream, has the right of access to the navigable part of the stream in front of his land, and to

* 10 Wallace, 497.

construct a wharf or pier projecting into the stream, for his own use, or the use of others, subject to such general rules and regulations as the legislature may prescribe for the protection of the public, as was held in *Yates* v. *Milwaukee*.* On the contrary, we recognize the correctness of the doctrine as stated and affirmed in that case. Nor is it necessary to controvert the proposition that in several of the States, by general legislation or immemorial usage, the proprietor, whose land is bounded by the shore of the sea, or of an arm of the sea, possesses a similar right to erect a wharf or pier in front of his land, extending into the waters to the point where they are navigable. In the absence of such legislation or usage, however, the common-law rule would govern the rights of the proprietor, at least in those States where the common law obtains. By that law the title to the shore of the sea, and of the arms of the sea, and in the soils under tidewaters is, in England, in the king, and, in this country, in the State. Any erection thereon without license is, therefore, deemed an encroachment upon the property of the sovereign, or, as it is termed in the language of the law, a *purpresture*, which he may remove at pleasure, whether it tend to obstruct navigation or otherwise.†

But in this case no inquiry as to the rights of a riparian proprietor, by either the common law or local usage or regulation, is needed. The complainant is not the proprietor of any land bordering on the *shore* of the sea, in any proper sense of that term. His land is situated nearly half a mile from what was the shore of the bay of San Francisco, at the time California was admitted into the Union, and over it the water at the lowest tide then flowed at a depth sufficient to float vessels of ordinary size. Although the title to the soil under the tidewaters of the bay was acquired by the United States by cession from Mexico, equally with the title to the upland, they held it only in trust for the future State. Upon the admission of California into the Union upon equal footing with the original States, absolute property in, and do-

* 10 Wallace, 497.

† Angell on Tidewaters, 198, 199.

minion and sovereignty over, all soils under the tidewaters within her limits passed to the State, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several States, the regulation of which was vested in the General government.*

Acting upon the rights thus acquired, the legislature of the State, on the 26th of March, 1851, at its first session after the admission, passed an act disposing of portions of the lands covered by the tidewaters of the bay, in front of the city of San Francisco. That act is generally known in the State as the Beach and Water-Lot Act.† It granted to the city, for the term of ninety-nine years, the use and occupation of lands thus covered, with some specified exceptions, lying within a certain designated line, described according to a map of the city on record in the recorder's office of the county, and declared that the line thus designated should "be and remain a permanent water front" of the city. It also provided that the authorities of the city should keep the space beyond the line to the distance of five hundred yards, "clear and free from all obstructions whatsoever;" and reserved to the State the right to regulate the construction of wharves and other improvements, so that they should not interfere with the shipping and commercial interests of the bay and harbor.

A subsequent act of the legislature, passed on the 1st of May, 1851, authorized the city of San Francisco to construct wharves at the end of all the streets commencing with the bay, the wharves to be made by extending the streets into the bay for a distance not exceeding two hundred yards beyond the outside line of the beach and water-lots, the line established as the permanent water front of the city; and

* Pollard's Lessee *v.* Hagan, 3 Howard, 212; Mumford *v.* Wardwell, 6 Wallace, 436.

† The act is entitled "An act to provide for the disposition of certain property of the State of California." Laws of California for 1851, p. 307.

provided that the space between the wharves, when extended, should remain free from obstructions, and be used as public slips for the accommodation and benefit of the general commerce of the city and State.

It was after the passage of these acts that the predecessors of the complainant acquired all the title to the lots which he holds; and they took whatever interest they obtained in subordination to the control by the city over the space immediately beyond the line of the water front, and the right of the State to regulate the construction of wharves and other improvements.

There is, therefore, no just foundation for the claim by the complainant as a riparian proprietor of a right to wharf out into the bay in front of his land. He holds, as his predecessors took the premises, freed from any such appendant right. The erection of his wharf, the obstruction to the use of which is the cause of the present suit, was, therefore, not only an interference with the rightful control of the city over the space occupied by it, but was an encroachment upon the soil of the State which she could remove at pleasure. Having the power of removal she could, without regard to the existence of the wharf, authorize improvements in the harbor, by the construction of which the use of the wharf would necessarily be destroyed.

But it is contended by the complainant that he had acquired by prescription a perfect title to the wharf when the present suit was commenced; in other words, that he or his grantors had been in the uninterrupted possession of the wharf for a period which barred the right of the State under her statute of limitations. The wharf was constructed in 1854; the defendants commenced the piling, capping, and planking, which constitute the obstruction complained of, in 1867; and the statute of limitations of the State declares that, "The people of the State will not sue any person for, or in respect of, any real property, or the issues or profits thereof, by reason of the right or title of the people to the same, unless—

"First, such right or title shall have accrued within ten

years before any action or other proceeding for the same shall be commenced; or unless,

"Second, the people, or those from whom they claim, shall have received the rents or profits of such real property, or some part thereof, within the space of ten years."

Upon the supposed operation of this statute the pretension of the complainant rests.

In answer to this pretension it is contended with much force that the statute only applies to lands which the State holds, as private proprietor, for sale or other disposition, and in respect to which the title may be lost by adverse possession, as defined in the same statute, and not to lands which she holds as sovereign in trust for the public. To constitute sufficient adverse possession under the statute to bar the owner, when the claim of title is not founded upon a written instrument, the land must have been protected by a substantial inclosure, or been usually cultivated or improved, conditions inapplicable to the possession of land covered by tidewater, or of a wharf constructed thereon.

Where lands are held by the State simply for sale or other disposition, and not as sovereign in trust for the public, there is some reason in requiring the assertion of her rights within a limited period, when any portion of such lands is intruded upon, or occupied without her permission, and the policy of the statute would be carried out by restricting its application to such cases.

The terms, "shall have accrued," are used in the sense of "shall have existed" within the period designated. The title of the State to soils under the tidewaters of the bay accrued on her admission into the Union twenty-three years ago, but yet it would not be pretended that the State could not sue for any portion of such soils upon which a party had encroached, because ten years had elapsed since such admission. A literal construction of the terms used would denude the State of nearly the whole of her property. It would prevent her from suing an intruder of yesterday upon a title of twenty years.

But assuming that the statute applies to lands held by the

State, as sovereign, in trust for public purposes equally as to other lands, before the ten years prescribed had elapsed after the erection of the wharf, namely, in April, 1863, the legislature passed an act creating the Board of State Harbor Commissioners, the defendants in this suit, and provided that the commissioners should take possession of and hold all that portion of the bay lying along the water front of the city and county of San Francisco, and adjacent thereto, to the distance of six hundred feet into the waters of the bay, from the line of the water front, together with all the improvements, rights, privileges, franchises, easements, and appurtenances connected therewith or appertaining thereto, except such portions of the water front as were held by parties under valid leases, and of those portions when the leases expired. That act also authorized the commissioners to institute suits for the possession of any wharf or wharves, and other rights and privileges, for the recovery of tolls, dockage, and wharfage, and for the removal of obstructions, and the abatement of nuisances on the water front, and to prosecute the suits to judgment; and declared that the possession and control of the water front, with its improvements, rights, privileges, franchises, easements, and appurtenances, were vested in the commissioners for certain specified purposes, all of which related to the protection of the harbor, the construction of wharves, landings, and other improvements intended for the safety and convenience of shipping and consequent promotion of commerce. The act also prohibited any subsequent collection of tolls, wharfage, and dockage by any person or company, on any part of the water front, without authority of the commissioners, and made a violation of the prohibition a public offence, punishable by fine or imprisonment or both.

There is in these provisions a most emphatic declaration on the part of the legislature, that the State did not intend to abandon her control over the water front of the city, or to allow by silence any rights therein, which she held as sovereign in trust for the public, to pass into private ownership.

Statutes of limitation, as observed in a recent case in this court,* "are founded upon the general experience of mankind, that claims which are valid are not usually allowed to remain neglected. The lapse of years without any attempt to enforce a demand, creates, therefore, a presumption against its original validity, or that it has ceased to subsist. This presumption is made by these statutes a positive bar; and they thus become statutes of repose, protecting parties from the prosecution of stale claims, when by loss of evidence from the death of some witnesses and the imperfect recollection of others, or the destruction of documents, it might be impossible to establish the truth."

Although this language was used with reference to a demand upon a policy of insurance, it applies equally to claims for property in the possession of others. They are not generally held for long periods without some attempt at their enforcement. When, therefore, no claim to property is made for years against the possessor, the presumption arises that his possession is founded in right, and by statute the presumption being conclusive, the possessor is said to have acquired title by operation of the statute or by prescription. The presumption to which the statute gives this effect extends, however, only against individual claimants; their personal interest is supposed to be sufficient to induce vigilance in the enforcement of their claims. It does not extend against the State, which acts through numerous agents, having no such incentive to prosecute her claims. The rule, therefore, with respect to her rights is that they are not lost or impaired by the negligence of her officers, a rule which has been found by experience essential to the preservation of the interests and property of the public. Statutes of limitation are not for this reason held to embrace the State, unless she is expressly designated, or necessarily included by the nature of the mischiefs to be remedied.

The statute of California is exceptional in this particular. It declares that the State will not sue for or in respect to

* Riddlesbarger *v.* Hartford Insurance Company, 7 Wallace, 390.

real property, unless her title or right has existed within a prescribed time, or rents or profits have been received within that period. She thus allows a presumption to arise in favor of any occupant of her lands, and that presumption to become absolute, that she possesses no title or interest therein, if within that period no assertion of her title or interest is made. But this presumption is rebutted when such assertion is made, and it may be made by her as well by legislative act as by judicial proceeding.

In the present case, the act creating the harbor commissioners and authorizing them to take possession and improve the water front, was a public act relating to a matter of public concern, of which the complainant and all others were bound to take notice. Hardly anything, which we can readily conceive of, would be more expressive of the intention of the legislature that the State should conserve her title and interest in the whole water front of the city. In our judgment, it prevented the complainant from acquiring the title of the State by operation of the statute of limitations, as effectually as if that statute had not been in existence.

DECREE AFFIRMED.

SUPERVISORS *v.* UNITED STATES.

Section 3275 of the Code of Iowa, which says:

> "In case no property is found upon which to levy, which is not exempted by the last section (section 3274), or if the judgment creditor elect not to issue execution against such corporation (a municipal one), he is entitled to the amount of his judgment and costs in the ordinary evidences of indebtedness issued by that corporation. And if the debtor corporation issues no scrip or evidences of debt, a tax must be levied as early as practicable, sufficient to pay off the judgment with interest and costs"—

confers no independent power to levy a specific tax in order to pay a judgment recovered against a municipal corporation on warrants for ordinary county expenditures issued by such corporation since 1863, in which year (as repeatedly since) the Supreme Court of Iowa decided this to be the true interpretation of the section, and that where the power had not otherwise been conferred it was not given by that section.

Butz v. *City of Muscatine*, where some language tending perhaps to a different conclusion was used, distinguished from this case, in that here the judgment was obtained after 1863, when the meaning of the section had been passed on by the Supreme Court of Iowa, and that there the bonds sued on were issued prior to 1863, and when no decision as to the meaning of the section had been made by the Supreme Court of Iowa, and when this court "felt at liberty to adopt its own construction and apply it to the case of the holder of the bonds, though it was adverse to that announced by the State court years after the bonds had been issued."

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

On the 13th of May, A.D. 1869, one Reynolds obtained in the court just named a judgment against Carroll County, Iowa, for the sum of $19,946. The judgment was for the amount due upon sundry county warrants issued *for the ordinary expenditures of the county;* all issued after January 1st, 1865. An execution having been awarded upon the judgment and returned "*nulla bona*," Reynolds sued out a writ of mandamus to compel the board of supervisors of the county to levy a specific tax sufficient to pay the debt, interest, and costs, and to apply the same, when collected, to the payment. To this writ the supervisors returned, in substance (after averring that the judgment had been obtained upon ordinary county warrants issued *for the ordinary expenditures of the county*), that they had levied a county tax for the current year of four mills on the dollar of the taxable property of the county, and that they proposed to levy a similar tax for each succeeding year until the judgment should be paid. They further returned that they had no power to levy a tax at any higher rate. A general demurrer to this return was then interposed, and the Circuit Court sustained it. Hence this writ of error.

The question was whether, under the laws of Iowa, the board of supervisors had power to levy a special tax, beyond four mills on the dollar of the county assessment, in order to pay the relator's judgment.

The solution of this question and the consequent correctness of the action of the Circuit Court depended upon the

fact whether that court had rightly interpreted certain sections in the Revised Code of Iowa.

Section 710, of the revision of 1860, is as follows:

"The board of supervisors of each county in this State shall annually, as hereinafter provided, levy the following taxes upon the assessed value of the taxable property in the county:

"1st. For State revenue, one and one-half mills on a dollar, when no rate is directed by the census board, but in no case shall the census board direct a levy to be made exceeding two mills on the dollar.

"2d. *For ordinary county revenue, including the support of the poor, not more than four mills on a dollar*, and a poll tax of fifty cents.

"3d. For support of schools, not less than one nor more than two mills on a dollar.

"4th. For making and repairing bridges, not more than one mill on the dollar, whenever the board of supervisors shall deem it necessary."

By an act of April 2d, 1860, which took effect on the 1st of January, 1861, the board of supervisors became the financial agents in place of the county judge.

Section 250* is this:

"The county judge [or as in consequence of the abovementioned act it now was *the board of supervisors*] may submit to the people of his county at any regular election, or a special one called for that purpose, the question whether the money may be borrowed to aid in the erection of public buildings; whether the county will construct or aid to construct any road or bridge which may call for an extraordinary expenditure; whether stock shall be permitted to run at large, or at what time it shall be prohibited, and the question of any other local or police regulation not inconsistent with the laws of the State. And when the warrants of the county are at a depreciated value, he may in like manner submit the question whether a tax of a higher rate than that provided by law shall be levied, and in all cases when an additional tax is laid in pursuance of a vote

* Revision of 1860, or § 114 of the Code of 1851.

of the people of any county, for the special purpose of repaying borrowed money, or of constructing or aiding to construct any road or bridge, such tax shall be paid in money and in no other manner."

The sections following, to 260, contain the details for the submission of questions, and provide for carrying into effect the propositions mentioned in section 250, which may be adopted by a vote.

Section 252 declares:

"When a question so submitted involves the borrowing or the 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, as directed in the following section, and no vote adopting the question proposed will be of effect unless it adopt the tax also."

Sections 3274 and 3275, in a chapter entitled "EXECUTION," are as follows:

"SECTION 3274. Public buildings owned by the State, or any county, city, school district, or other civil corporation, and any other public property which is necessary and proper for carrying out the general purposes for which any such corporation is organized, are exempt from execution. The property of a private citizen can in no case be levied upon to pay the debt of a civil corporation.

"SECTION 3275. In case no property is found on which to levy, which is not exempted by the last section, or if the judgment creditor elect not to issue execution against such corporation, he is entitled to the amount of his judgment and costs in the ordinary evidences of indebtedness issued by that corporation. *And if the debtor corporation issues no scrip or evidences of debt, a tax must be levied as early as practicable, sufficient to pay off the judgment with interest and costs.*"

The Circuit Court in overruling the demurrer considered, of course, that the provision in italic letters in the above-quoted section 3275 authorized a levy sufficient to pay the judgment.

Argument for the mandamus.

Mr. Isaac Cook, for the plaintiffs in error:

The Supreme Court of Iowa has held uniformly that section 3275 does *not* invest corporations with the power to levy taxes. That court holds that this section directs duties to be performed by the taxing officers, under powers given elsewhere in the statute, but does not extend their powers beyond the limits prescribed in other parts of the statutes, where the power to levy taxes is expressly given, and the limit fixed beyond which taxes cannot be levied. The decisions of that court on this subject have been uniform, and extend through a term of about ten years. This was the point adjudged in *Clark, Dodge & Co.* v. *The City of Davenport*,* decided in 1863; and in *The Iowa Railroad Land Company* v. *Sac County and Duffy*, and in the case of the *Same Plaintiff* v. *Sac County and Hobbs*, decided in 1873, and not yet officially reported.

In addition to the decisions of the Supreme Court of Iowa above cited, attention must be called to the fact, of which this court will take judicial cognizance, that the legislature by a code of 1873,† has re-enacted in the same language the material parts of section 3275 of the revision of 1860. The legislature has thus adopted the construction given to that statute by the Supreme Court. The re-enactment of a previous statute operates as a legislative adoption of the judicial construction of such statute. It is, therefore, as fully settled as legislative enactments and judicial determination can settle anything, that by the laws of Iowa, a special tax cannot be levied to pay a judgment against a county rendered upon ordinary county warrants. And that when the board of supervisors have levied an ordinary county tax of four mills on the dollar, they have levied the greatest tax which they have the power to levy for the payment of such judgment.

The construction given to a statute of a State by the highest judicial tribunal of such State, is regarded as a part

* 14 Iowa, 494.

† Section 3049.

of the statute, and is as binding upon the courts of the United States as the text.*

Mr. James Grant, contra:

We are aware of the construction put by the Supreme Court of the State of Iowa upon section 3275. But with that construction full before it, this court, in *Butz* v. *City of Muscatine*,† has put an exactly opposite construction on it. Speaking by SWAYNE, J., this court there said that "the limitation . . . touching the power of taxation by the city council, applies to the *ordinary course* of their municipal action. . . .

"But when a judgment has been recovered, the case is within the regulation of the code. . . . The extent of the necessity is the only limitation expressed or implied in the code, of the amount to be levied."

The learned justice still speaking for the court says, in words which apply directly to the present case:

"If these views be not correct the position of the judgment creditor is a singular one. All the corporate property of the debtor is exempt by law from execution. The tax of 1 per cent. is all absorbed by the current expenses of the debtor. There is neither a surplus nor the prospect of a surplus, which can be applied upon the judgment. The resources of the debtor may be ample, but there is no means of coercion. . . . The judgment though solemnly rendered is as barren of results as if it had no existence. . . . Nothing less than the most cogent considerations could bring us to the conclusion that it was the intention of the law-making power of so enlightened a State, to produce by its action such a condition of things in its jurisprudence."

After such language as this, it is no answer to us to say that the case of *Butz* v. *City of Muscatine* differed in some minor points of fact or date from this case.

So in respect to the obligation of this court to follow the

* Leffingwell *v.* Warren, 2 Black, 599; Christy *v.* Pridgeon, 4 Wallace, 196.

† 8 Wallace, 575.

decisions of the Supreme Court of Iowa, "more or less adverse" to the views above expressed, the learned justice continues:

"Entertaining the highest respect for those by whom they were made, we have yet been unable to concur in the conclusions which they announce. It is alike the duty of that court and of this to decide the questions involved in this class of cases as in all others when presented for decision. This duty carries with it investigation, reflection, and the exercise of judgment. It cannot be performed on our part by blindly following in the footsteps of others and substituting their judgment for our own. Were we to accept such a solution we should abdicate the performance of a solemn duty, betray a sacred trust committed to our charge, and defeat the wise and provident policy of the Constitution which called this court into existence."

This court accordingly—disregarding the construction put upon the Code of Iowa by the Supreme Court of that State—reversed a judgment which refused a mandamus, and ordered a contrary judgment.

Mr. Justice STRONG delivered the opinion of the court.

It is very plain that a mandamus will not be awarded to compel county officers of a State to do any act which they are not authorized to do by the laws of the State from which they derive their powers. Such officers are the creatures of the statute law, brought into existence for public purposes, and having no authority beyond that conferred upon them by the author of their being. And it may be observed that the office of a writ of mandamus is not to create duties, but to compel the discharge of those already existing. A relator must always have a clear right to the performance of a duty resting on the defendant before the writ can be invoked. Is it, then, the duty of the board of supervisors of a county in the State of Iowa to levy a special tax, in addition to a county tax of four mills upon the dollar, to satisfy a judgment recovered against the county for its ordinary indebtedness? The question can be answered only by reference to the statutes of the State.

By an act of the legislature enacted on the 22d of March, 1860,* it was declared that in each organized county of the State there should be a board of supervisors, the duties of which were defined. Prior to that time the financial affairs of the several counties had been, by the law, committed to the charge of a county judge. But on the 2d of April, 1860, a further act was passed, to take effect on the first day of January, 1861, which enacted that all laws in force at the time of its taking effect, devolving any jurisdiction or powers on county judges, should be held to apply to and devolve such jurisdiction upon the county board of supervisors, in the same manner and to the same extent as though the words "county board of supervisors" occurred in said laws instead of the words "county judge."† Whatever power, therefore, the county judge possessed prior to that enactment to levy taxes for any purpose, was devolved upon the county board, with all its limitations. They may levy those taxes which he was empowered to levy, and no more, unless larger authority has, by other statutes, been given to them. By the act of April 3d, 1860 (Civil Code, section 710), they are required to levy the following taxes annually upon the assessed value of the taxable property in the county: 1st. For State revenue one and one-half mills on a dollar when no rate is directed by the census board, and that board is prohibited from directing a rate greater than two mills on a dollar. 2d. For ordinary county revenue, including the support of the poor, not more than four mills on a dollar, and a poll tax of fifty cents. 3d. For support of schools not less than one and not more than two mills on a dollar. And, 4th, for making and repairing bridges not more than one mill on the dollar, whenever they shall deem it necessary. This act confers all the powers which the county board possess to levy a tax for ordinary county revenue. It is not claimed that larger authority was ever given. And this, it is to be observed, is expressly limited to the levy of a tax of not more than four mills upon the dollar.

* Civil Code of 1860, § 302, *et seq.* † Ib. § 330.

The board, however, have authority, in certain specified cases, to levy a special tax to defray certain extraordinary expenditures. Succeeding, as they did, to the powers and duties of the county judge, whatever he was authorized to do in this behalf they may do. He had been empowered by section 250 of the code to submit to the people of the county at any regular election, or at a special one called for that purpose, the questions whether money might be borrowed to aid in the erection of public buildings; whether the county would construct, or aid to construct, any road or bridge which might call for an extraordinary expenditure; whether stock should be permitted to run at large, and, generally, any question of local or police regulation not inconsistent with the laws of the State. He was also empowered, whenever the warrants of the county were depreciated in value, to submit the question whether a tax of a higher rate than that provided by law should be levied, and the 252d section enacted that when a question so submitted involved the borrowing or expenditure of money, the submission of the question should be accompanied by a provision to lay a tax for the payment thereof, in addition to the usual tax, and that no vote approving the borrowing or expenditure should be of any effect unless the tax was also adopted. Thus it appears that the statutes of the State have made provision for ordinary county taxes, limiting them to a rate not exceeding four mills, and, also, for special taxes beyond that limit, in certain defined contingencies. No statute was in existence when this writ was sued out authorizing the county board to levy a special tax for ordinary revenue, or for ordinary expenditure, or, indeed, for any purpose except those we have noticed, unless it be found in section 3275 of the code, to which we shall presently refer. And the legislature of the State has made a clear distinction between ordinary county taxation, which the board of county supervisors may, at their discretion, levy within prescribed limits, and special taxation for extraordinary emergencies, which can only be imposed in obedience to a popular vote.

In this case the warrants upon which the relator's judg-

ment was obtained were all ordinary warrants, drawn upon the treasurer of the county, and, as is admitted by the demurrer, drawn for the ordinary expenses of the county. None of them were issued in pursuance of a popular vote, or for any extraordinary expenditure. They were such instruments as the legislature contemplated might be employed in conducting the current and usual business of the county. The act which empowers the county board to levy a tax for ordinary county revenue speaks of them and evidently intends that they shall be satisfied, either from the proceeds of that tax, or by their being received in payment thereof. They are simply a means of anticipating ordinary revenue.

But it has been argued on behalf of the relator, that section 3275 of the code confers upon the county board the power, and makes it their duty to levy a special tax beyond the tax authorized by section 710, whenever a judgment has been recovered against the county, even though that judgment may be for ordinary county indebtedness. That section is found in a statute relating to executions, and it is as follows: "In case no property is found upon which to levy, which is not exempted by the last section (section 3274), or if the judgment creditor elect not to issue execution against such corporation (a municipal one), he is entitled to the amount of his judgment and costs in the ordinary evidences of indebtedness issued by that corporation. And if the debtor corporation issues no scrip or evidences of debt, a tax must be levied as early as practicable, sufficient to pay off the judgment with interest and costs." The next preceding section had enacted that public buildings owned by the State or any municipal corporation, and any other public property necessary and proper for carrying out the general purpose for which any such corporation is organized, should be exempt from execution; and that the property of a private citizen should in no case be levied upon to pay the debt of such a corporation. Neither of these sections declares that a *special* tax shall, or may be levied to pay any judgment against a municipal body. All that is said is, that in certain

contingencies, a tax must be levied sufficient to pay off the judgment. But whether this tax is to be a special one, or the tax authority to levy which was given to the county board by the 710th section, the act does not say. It is certainly remarkable, that if it was intended to grant a new power to levy a tax for the payment of ordinary county indebtedness, when that indebtedness has been brought to judgment, the power should be granted in a statute relating solely to executions, without any direction by whom it should be exercised, and that the additional grant should be left to inference, instead of being plainly expressed. The powers committed to the county board were declared in the statutes relating to it and to its duties. If others were intended to be given, it is strange, to say the least, that the gift was not made when the legislature had the subject of the board and its powers under consideration. And if a special tax to pay a judgment was contemplated, it is hard to see why it was not provided for when the legislature had the subject of special county taxes before it, and when provision was made for levying such a tax to pay depreciated county warrants, if approved by a popular vote. We do not propose, however, to discuss the question now. It has already been answered, and we must accept the answer. The Supreme Court of Iowa has decided in several cases that section 3275 confers no independent power to levy a specific tax in order to pay a judgment recovered against a municipal corporation, and that when the power has not otherwise been conferred, it is not given by that act. This was decided in 1863, in the case of *Clark, Dodge & Co.* v. *The City of Davenport*,* before any of the warrants were issued upon which the relator's judgment was founded, and the construction then given to the statute has been repeatedly asserted and consistently maintained. It is, therefore, and it always has been the settled law of the State. That the construction of the statutes of a State by its highest courts, is to be regarded as determining their meaning and generally as binding upon United States

* 14 Iowa, 494.

courts, cannot be questioned. It has been asserted by us too often to admit of further debate.* We have even held that when the construction of a State law has been settled by a series of decisions of the highest State court, differently from that given to the statute by an earlier decision of this court, the construction given by the State courts will be adopted by us.† And we adopt the construction of a State statute settled in the courts of the State, though it may not accord with our opinion.‡ There is every reason for this in the consideration of statutes defining the duties of State officers. It is true, that when we have been called upon to consider contracts resting upon State statutes, contracts valid at the time when they were made according to the decisions of the highest courts of the State, contracts entered into on the faith of those decisions, we have declined to follow later State court decisions declaring their invalidity. But in other cases we have held ourselves bound to accept the construction given by the courts of the States to their own statutes.

It is insisted, however, that in *Butz* v. *The City of Muscatine*,§ this court ruled that section 3275 of the code did give power to the city councils of Muscatine to levy a special tax beyond the statutory limit of ordinary city taxation, sufficient to pay a judgment which had been recovered against the city. This is true. But the facts of that case must be considered. The judgment had been recovered upon bonds issued by the city in 1854. At the time they were issued no decision had been made by the Supreme Court of the State to the effect that section 3275 was not an enabling statute authorizing a tax beyond that allowed by other statutes. It was not until nine years afterwards that the Supreme Court of the State was called upon to determine its meaning. Hence this court felt at liberty to adopt its own

* See numerous cases, Brightly's Federal Digest, 163.

† Green *v.* Neal's Lessee, 6 Peters, 291; Suydam *v.* Williamson, 24 Howard, 427; Leffingwell *v.* Warren, 2 Black, 599.

‡ McKeen *v.* Delancy, 5 Cranch, 22.

§ 8 Wallace, 575.

construction and apply it to the case of the holder of the bonds, though it was adverse to that announced by the State court years after the bonds had been issued. But at the same time it was said, "if the construction given to the statute by the State court had preceded the issuing of the bonds, and become the settled law of the State before that time, the case would have presented a different aspect."

In the case we have now in hand, it appears that the warrants upon which the relator recovered his judgment, not only were for the ordinary indebtedness of the county, but that they were issued after it had become the settled law of the State, announced in the decisions of its highest court, that the section of the statute relative to executions, now under consideration, did not enlarge the authority of a county board of supervisors, and did not authorize the levy of a tax beyond that provided for in section 710; that is, a tax in excess of the rate of four mills on the dollar. The holders of the warrants were, therefore, informed when they took them, that by the laws of the State no special tax could be levied for their payment, unless the question whether such a tax might be laid should first be submitted to the people and by them answered in the affirmative, according to the directions of sections 250 and 252, to which reference has heretofore been made. In this particular the case differs from *Butz* v. *The City of Muscatine*. Looking at the difference, we think there is no sufficient reason why we should now depart from the construction which the courts of the State have uniformly given to its statutes.

It follows that, in our judgment, the return to the alternative mandamus was a sufficient return, that the respondents had no power to levy the special tax called for, and as a writ of mandamus can compel the performance only of some act which the law authorizes, that the demurrer to the return should not have been sustained.

Judgment reversed, and the record remitted with directions to give judgment on the demurrer

FOR THE DEFENDANTS BELOW.

Statement of the case.

Mr. Justice CLIFFORD, with whom concurred Mr. Justice SWAYNE, dissenting:

I dissent from the judgment of the court in this case, holding that this court should adhere to its former decision, as it appears that the State statute when the bonds in that case were issued had not been construed by the State court.

Where the construction of a State statute is involved in a case presented here for decision, and it appears that the statute in question has not been construed by the State court, I hold that it is the duty of this court to ascertain and determine what is its true construction, and that this court, under such circumstances, will not reverse its decision in the same or a subsequent case, even though the State court may afterwards give a different construction to the same statute.

STUART *v.* UNITED STATES.

1. A contractor with the government to transport from port to port, remote from any seat of war, stores and supplies not forming any portion of the stores or supplies of an advancing or retreating army, is not a person "in the military service of the United States" within the second section of the act of March 3d, 1849, "to provide for the payment of horses and other property lost" in that service.
2. A petition which represents that a party transporting, &c., was "attacked by *a band of hostile Indians*," who, without any fault of the party transporting or his agents, captured certain oxen part of the property in transit, which had never been recovered, is not sufficiently full and specific to answer the requirement of the said section, which provides compensation for "damage sustained by the capture or destruction *by an enemy.*"

APPEAL from the Court of Claims; the case being thus:

An act of March 3d, 1849,* entitled "An act to provide for the payment of horses and other property lost or destroyed *in the military service* of the United States," makes provision, in its first section, for payment for horses killed

* 9 Stat. at Large, 414.

or wounded in battle, or which shall have been injured or destroyed by dangers of the seas on a United States transport vessel, or which shall have been abandoned for want of forage by order of a superior officer, with certain provisions respecting deductions from future pay, which apply to enlisted men. The payment is limited by the words of this section to "officers, volunteers, rangers, mounted militiamen, or cavalry engaged in the military service of the United States."

The second section is as follows:

"That any person who has sustained, or shall sustain, damage by the capture or destruction *by an enemy*, or by the abandonment or destruction by the order of the commanding general, the commanding officer, or quartermaster, of any horse, mule, ox, wagon, cart, boat, sleigh, or harness, while such property was *in the military service of the United States*, either by impressment or contract, except in cases where the risk to which the property would be exposed was agreed to be incurred by the owner;

"And any person who has sustained, or shall sustain, damage by the death or abandonment and loss of any such horse, mule, or ox, while in the service aforesaid, in consequence of the failure on the part of the United States to furnish the same with sufficient forage, and any person who has lost, or shall lose, or has had, or shall have, destroyed by unavoidable accident, any horse, mule, ox, wagon, cart, boat, sleigh, or harness, while such property was in the service aforesaid, shall be allowed and paid the value thereof at the time he entered the service:

"*Provided*, It shall appear that such loss, capture, abandonment, destruction, or death was without any fault or negligence on the part of the owner of the property, and while it was *actually employed in the service of the United States.*"

This statute being in force, Stuart entered into a contract with the United States.

By the first article thereof it was agreed that he "should receive such military stores and supplies as may be offered or turned over to him *for transportation, and to transport the same* with all possible dispatch," between the months of

April and September, from Forts Riley and Leavenworth and the town of Kansas to New Mexico or Colorado; receiving for such transportation $1.97 per hundred pounds.

By the second article, that he should transport "any number of pounds of military stores and supplies from and between one hundred thousand pounds and ten millions of pounds in the aggregate."

By the tenth article, that he should be furnished with a "suitable escort for the protection of the supplies, should he be required to transport in any one train a less quantity than one hundred and twenty-five thousand pounds, but whenever required to transport one hundred and twenty-five thousand pounds, or more, then no escort shall be furnished."

Other articles, as the fourth, fifth, sixth, eighth, eleventh, twelfth, thirteenth, and sixteenth, described the duty of the contractor as that of transporting and delivering.

Stuart while executing his contract having, as he alleged, been attacked by a "band of hostile Indians," and having so lost fifty-six oxen, filed a petition in the Court of Claims, making claim under the second section, above quoted, of the act of 1849, for indemnity by the United States. . . . The petitioner setting forth the particulars of his case in his petition alleged:

"That in the month of July, 1864, while he was proceeding in execution of his contract, with a train of wagons from Fort Leavenworth, Kansas, to Fort Union, New Mexico Territory, the said train was, on the 12th day of July, 1864, in the vicinity of Cow Creek, Kansas, attacked by *a band of hostile Indians*, and without any fault or neglect on the part of the petitioner or of his agents, fifty-six head of oxen, employed in moving the said train, were captured by the said band of hostile Indians, and no part thereof has been recovered."

To the claim thus set forth the United States demurred; and the Court of Claims having sustained the demurrer and decreed against the petitioner, he brought the case here.

Mr. T. J. Durant, for the appellant; Mr. C. H. Hill, Assistant Attorney-General, contra.

Mr. Justice HUNT delivered the opinion of the court.

Three questions arise upon the case:

1st. Was the capture of the property made "by an enemy," within the meaning of the statute?

2d. Was the property, at the time of its capture, "in the military service of the United States?"

3d. Does the tenth article of the contract, made in the case, impose upon the owner the risk to which the property was exposed?

So far as it may be necessary, these questions will be considered.

First. The allegations of the petition respecting the character, numbers, nation, or position of the capturing party are quite meagre. It is said merely, that the train "was attacked by a band of hostile Indians," and that the oxen "were captured by the said band of hostile Indians." A "band" means a company of persons, perhaps a company of armed persons, as we may well assume to have been the case in this instance. We have no means of knowing how many persons composed this band, what was their organization if any, or under what pretence, name, or authority they made the attack and capture. We know only that they were Indians, and that they were hostile. The fact that they were Indians gives no light. Many Indians, both in tribes and as individuals, were friendly to the United States in its late civil contest, as others were hostile. The Indian tribes and individuals are subject to the laws of the United States, and of the States in which they are located.* The claimants do not even state to whom or to what these Indians were hostile. They may have been hostile to the government of the United States, they may have been hostile, inimical, or unfriendly to the owners of the cattle only. The hostility may have been from the enmity of an organized community to the United States as a party engaged in war, or it may have been a hostility to the owners of cattle, because they had the cattle and because the Indians desired

* The Cherokee Tobacco, 11 Wallace, 619.

the animals for their own use. In the one case the capture would have been that of an enemy, in the other that of marauders and plunderers only. The petition should have been more full and more specific in its statements. The law assumes that these deficiencies in it exist because the petitioner could not with advantage to his case supply them.

Second. Was the property thus captured in "the military service of the United States?" By his contract of the 25th of July, 1864, did Stuart enter into the military service of the United States, and was he acting in such military service when his property was captured, or was he a transporter, a carrier, a contractor merely? By the first article of his contract he undertakes to "*transport*" "all such military stores or supplies as may be turned over to him for *transportation*," from Forts Riley and Leavenworth, and the town of Kansas, to New Mexico or Colorado. In the second, fourth, fifth, sixth, eighth, eleventh, twelfth, thirteenth, and sixteenth articles the duty is clearly pointed out and named as that of transporting and delivering. A contractor or carrier is in no sense a soldier. In no just sense is he engaged in war, although he may transport the articles used in war. He carries forth and he carries back supplies and stores for those who are engaged in war, but takes no personal part in it. He carries, in the present case, during the period between April and September, of the year 1864, from the points to the points named. There is no allegation that in the month of July, when the capture took place, actual war was going on in Kansas, or in the region between Kansas and New Mexico, or Colorado, or that the train from which the capture was made was a part of a military expedition. The stores, supplies, baggage trains, the "*impedimenta*" of an army, are undoubtedly a portion of the army, and those engaged in the management and control of them are in the military service. These are indeed vital to its existence, and their collection and protection are among the most anxious duties of a careful commander. But the collection and transportation from post to post of stores and supplies, remote from the seat of actual war, not forming a portion of

an advancing or retreating army, is quite another thing. These latter duties are those of a commissary or quartermaster, and not of a commanding officer. They may be performed by soldiers or by civilians, by the army or by contractors. Those engaged in them may or may not form a portion of an army.

That the statute of 1849, under which this claim is made, was intended for the indemnity of those engaged in the actual military service of the United States, that is, for enlisted men while in the performance of their duties as such, is plain enough.

This second section, under which the present claim is made, provides in its first clause for an indemnity for the loss of any horse, mule, ox, wagon, &c., arising from capture or destruction by an enemy, or where the property has been abandoned or destroyed by the order of a commanding officer, while such property was in the military service of the United States, either by impressment or by contract. This military service is the same as that spoken of in the first section, to wit, in battle, or service as soldiers under the command of officers of the army. The destruction, abandonment, or capture is that of the same enemy, to wit, an organized hostile force. And the same rule is applicable whether the property was in such actual service by the consent and agreement of the owner, as by hire, or whether it had been forcibly seized by the government, that is to say, "either by impressment or contract," unless the owner had agreed himself to bear the hazard of the loss.

The next paragraph of the section provides for a loss by death or abandonment in consequence of failure on the part of the United States to supply sufficient forage, or where the loss has occurred "by unavoidable accident" while such property "was in the service aforesaid." In each case the value of the article to be paid, is its value at the time such person "entered the service."

To all these provisos is added the final and sweeping qualification, in these words: "*Provided*, it shall appear that such loss, capture, abandonment, destruction, or death was

without fault or negligence on the part of the owner of the property, and while it was actually employed in the service of the United States."

Was the claimant personally in the service of the United States, and when did he enter it, if at all, and what were his duties? It does not appear that he was obliged to be with the train in person, or even that he was with it at the time of the loss.

Upon the claimant's construction of the statute, if his whole train had been destroyed by lightning or by tempests, by unexpected drouth or overwhelming heat, his claim for indemnity would have been perfect. A destruction "by unavoidable accident" of any horse, mule, ox, wagon, or cart is provided for with equal clearness as where the loss occurs by abandonment or by the capture of an enemy.

This construction is not admissible. The claimant was a carrier or transporter of stores or supplies for the United States, which stores and supplies were of a military character, and which would be used by the United States as their convenience or necessity required. He contracted to carry the stores, and the government contracted to pay him $1.97 per hundred pounds. He was not in the military service of the United States, and can, therefore, claim no benefit under the statute of 1849.

It is not perceived that the claimant's case is aided by the statute of 1863.* That statute enacts that the provisions of the act of 1849 shall be "applicable to steamboats and other vessels, to railroad cars and engines, when destroyed under the circumstances provided for in the said act."

We know, from the recent events of our history, that steamboats and railroad trains were actually and usefully employed as adjuncts of the army, that they were used in military expeditions, and on some occasions that the trains were captured and destroyed by the enemy. These engines, both of war and of peace, when employed in the actual military service of the United States, are entitled to the same indemnity as the other property referred to.

* 12 Stat., 743, § 5.

Statement of the case.

The tenth article of the contract requires no discussion. It is quite immaterial in any view of the case.

JUDGMENT AFFIRMED.

WILLETT *v.* FISTER.

The testimony of a wife and daughter, undertaking to swear from mere memory after a lapse of several years, as to the exact year (as *ex. gr.*, whether 1865 or 1866) when they saw a particular paper, discredited; there being circumstances leading to the inference that they were mistaken as to the year; and the purpose of the suit which their testimony was brought to sustain being to disturb, in favor of the husband and father, after a lapse of nearly five years, and after the death of one of the opposite parties to it, a settlement apparently fair.

APPEAL from the Supreme Court of the District of Columbia; the case being thus:

John Fister, a butcher, had a stall in market where he sold pork. He bought his hogs of V. Willett and W. E. Clark, trading as V. Willett & Co., and there was a pass-book held by Fister in which the debits and credits were entered of the transactions between the parties; the *original entries* being made on the commercial books of Willett & Co. On Fister's pass-book, under date of 21st November, 1865, was the following entry:

"By cash, on 30th of October, $1500."

And on Willett & Co.'s books:

"1865, October 30th, by cash, for proceeds of stall, $1500."

The account on the pass-book, as well as the account on Willett & Co.'s books, were all closed on December 14th, 1865, by "a note, at four months from this date, for $1726.69."

The pass-book and the defendant's commercial books were all in the handwriting of Willett, who died in 1869.

On the 15th of June, 1866, Fister confessed to V. Willett & Co. a judgment for $6226, the amount of several notes

which he had given for balances due from him in running account; and subsequently conveyed several lots of ground, the proceeds of which on sale of them were to be applied towards payment of the judgment.

In this state of things, on the 15th of December, 1870, Willett being now dead, Fister filed a bill in the court below against his executors and Clark, praying that the judgment which he had confessed might be set aside; the ground of the bill being, as was alleged, that he, Fister, was an ignorant man, scarcely able to write his name, and had been induced to give the judgment for $6226, not observing that Willett & Co. had not credited him with a payment of $1500 made some months before the confession of it, for which payment he, Fister, had then and still had a receipt. The receipt was without date, and in these words:

"Received of John Fister, fifteen hundred dollars on account, which is not on his book, owing to his not having it along to-day.

"V. WILLETT & Co."

It did not appear that any other receipt than this, excepting one for $800, signed by Clark, and dated October 20th, 1863, had ever passed between the parties. The pass-book and Willett & Co.'s books were apparently the only records.

The answer, both by the defendant Clark and the executors of Willett, gave full details of the transactions between Fister and V. Willett & Co.; averred that Fister made but one payment to them of $1500; denied that he had a receipt for $1500 for which he had not already received credit; averred that the judgment was properly entered for the amount due and no more, "and that all the credits to which the plaintiff was entitled were allowed him; and that he at that time well understood the same, and was perfectly satisfied with the said settlement."

The only question in the case was one of fact: Did the receipt *without date* refer to the transaction of 30th October, 1865, or to another amount of $1500 which Fister alleged had been paid in April, 1865?

The case being at issue, Adeline Fister, wife of the com-

plainant, was examined; this examination being on the 5th of February, 1871; and the defendants objecting to her testimony as not competent under the acts of Congress, in virtue of which it was offered.* Mrs. Fister said:

"I attended to the principal part of my husband's business in market; received and paid out the money for him; I was in fact the banker of my husband. I got the receipt in April, 1865; I know it was then, because I was cleaning some shad and wanted some change, and I went up to where my husband's jacket was hanging on the sideboard, and run one of my hands down one of his pockets to see if there was any money in it; I pulled out this paper; I then called in my daughter, Maria, and she read it. . . . After she read it, I carelessly threw it in the drawer and didn't think anything more about it for some time; I looked at it again afterwards, and put it in an old book which Mr. Willett had laid aside, and did not take it out again until a year subsequent; I never showed the receipt to my husband; he never saw it; I did not think it was anything of any account; I merely laid it aside; I did not know exactly what it was for; I did not call my husband's attention to it when he went to make the settlement with Willett, for I did not know of a settlement till he came back; I did not call his attention to it when he came back; I found it in 1865; Mr. Willett died in 1869; I cannot say for what that receipt was given; it might have been given for the $1500, or it might not, that I sent my husband with; I can only swear as to the time I got the receipt." "I had often sent Mr. Willett a roll of money of $1500 or $2000 at a time; the way he did not have it on the books is this: this $1500 or $2000 was in payment, perhaps, of two or three lots of hogs, and I got credit on the books for each lot of hogs separately."

"*Question.* Did you ever pay him as much as $2000 in one day?"

"*Answer.* I don't know as I paid him $2000, but I know I paid him $1700 in one day, and I paid large amounts at other times; I remember that *in January or February*, 1865, *I sent him* $1500; my husband was going down, and having worried me a great deal about the book, not being able to find it, I said, 'I wish to

* Act of July 2d, 1864, and the amendment to it of March 3d, 1865 (13 Stat. at Large, 351, 533).

heaven you and Mr. Willett would settle your business together and not trouble me.' I wrapped up one roll of $600 with red string, and I took a piece of flannel and tied up another bundle of $900 with it; he put the $600 into his side-pocket and the other bundle of $900 into his pantaloons pocket."

Mrs. Maria Clements, daughter of the complainant, was also examined. She said:

"One day my mother called me to her and said she had a receipt there that she could not understand; it had Willett's name on it; I read it, she holding it; I told her it was a receipt for $1500, with no day and date; that was in the month of April, 1865; after I read it, I gave it back to her and told her to take care of it; I know it was in April, 1865, because she asked me to remember, and I did; I also mentioned the day, but I have now forgotten that."

"*Question.* What makes you recollect it was April, 1865?"

"*Answer.* When I said, 'There is no day and date,' she said, 'This is the way your father has been doing business; he takes a receipt without day or date; now we will remember this;' that is what makes me recollect it was in April, 1865—my telling her it was in April, 1865; that impressed it on my memory; it could not have been in 1866."

"*Question.* Have you had any conversation with her about it since April, 1865, until to-day?"

"*Answer.* We have often talked it over, but I could not state how often; I know nothing further touching the matter in controversy."

Fister's pass-book contained entries thus:

John Fister in account with V. Willett & Co.

1865.			
January 5.	By cash, $402.13; 12, cash, $219.12,	. .	$621 25
12.	" 349.00; 20, cash, 371.51,	. .	720 51
20.	" 403.50; 29, do., 249.85,	. .	653 35
29.	" 525.15; 7 February, do., $90.22,	.	615 37
February 7.	" 809.78; 14 " do., 116,	.	925 78
14.	" 519.10; 21 " do., 369.52,	.	888 62
21.	" 325.52; 28 " do., 516.09,	.	841 61
28.	By *note at 6 months, for*		1000 00
28.	By cash, $44, ...		44 00
28.	By *note at 6 months, for*		1000 00
28.	By *amount over*, ...		120 19

The pass-book showed that, taking the various sums total of cash paid by Fister, from January to November, 1865, the addition of $1500 to the amount paid in any one month would make a much larger sum than was ever paid in any other month. For example, the cash receipts were:

January, 1865,	$2610 48
February,	2655 91
March,	2771 12
April,	2327 00
May,	2501 00
June,	2520 00
July,	2183 00
August,	2408 00
September,	1984 00
October,	2696 00
November,	1989 30

Clark, one of the defendants, was also examined, and he testified that in his presence, in the autumn of 1865, Fister paid Willett $1500, saying that he had not his pass-book with him; that Willett gave him a receipt; that so far as the witness knew, Fister had never paid any other sum of $1500 afterwards; that Fister, in confessing the judgment to secure the notes which he had given, said "that he thought he had done right, as he owed the debt and could not pay the money and wanted to secure it," and that he had never made to the witness any complaint that the judgment had been confessed for too much.

The court below sustained the claim of the complainant to the *two* credits and the defendants appealed.

Messrs. Reginald Fendall and T. J. Durant, for the plaintiff in error; Messrs. C. Ingle and B. H. Webb, contra.

Mr. Justice STRONG delivered the opinion of the court.

We need not inquire whether the deposition of Adeline Fister, the wife of the complainant, was properly received, for, with her testimony, there is not sufficient evidence to support the decree of the court below.

The bill was not filed until December 15th, 1870, four

years and a half after the alleged mistake. During that long period the complainant made no pretence that he had not received all the credits to which he was entitled. Constantly assenting by his silence to the correctness of the settlement, and of the judgment he had confessed, he conveyed several lots of ground to the defendants and others, that the proceeds of the sales thereof might be applied in payment, and it was not until after the death of the person who received the money which he now claims was not credited that this suit was brought. Certainly after such delay, and after such long apparent acquiescence in the correctness of the settlement, the evidence ought to be very clear that a mistake was in fact made, in order to justify unravelling what was done.

The settlement included several notes which the complainant had given for balances due from him, according to a running account. This account had been kept in the books of Willett & Co., and also in a pass-book held by him. It is not contended that the judgment was not taken for the sums for which the notes had been given, or that the notes were for a larger aggregate than appeared to be due by the accounts kept, both in the complainant's pass-book and in the books of the defendants. The contention is that a payment was made by the complainant, which did not appear on any of the books, and which was not credited to him. The evidence of this is an undated receipt for $1500. But the books of the defendants show a credit given for that sum on the 30th of October, 1865, and in the pass-book there is an entry of credit for the same sum, under date of November 21st, 1865, as having been received October 30th. As the receipt itself is the only receipt which appears ever to have been given, except one for $800, dated October 20th, 1863, signed W. E. Clark, and as it states that the complainant had not his pass-book along when the payment was made, it would seem to be a reasonable presumption that it refers to the payment made on the 30th of October, and which was afterwards, on the 21st of November, credited in the pass-book. If so, there was plainly no mistake in the notes and

none in the judgment. Then certainly the complainant received every credit which was his due.

But Mrs. Fister testifies that she saw the receipt in April, 1865, before the payment of October 30th was made. If she is correct in that, then the payment made in October was a different payment from that acknowledged in the receipt. But we are satisfied that her memory in regard to the time when she first saw the paper is at fault. There is nothing in regard to which a witness is more likely to be mistaken than in fixing the date at which a transaction long past took place. She was examined as a witness in 1871, nearly six years after the time when she says she found the receipt in her husband's pocket. When she found it, according to her own account, she did not think it of any importance. She "carelessly threw it in a drawer, and did not think any more about it for some time." Then she put it in an old book and laid it aside, and did not take it out for a year. She did not call her husband's attention to it before he settled with the defendants. She "was not aware she had it." She "never showed it to her husband," though she knew when he went to make the settlement. She did not think it was of any account, and there was no circumstance associated with her finding it that could have tended to impress the time upon her memory. She says she knows it was in April, 1865, because she was cleaning shad and wanted change; but she may as well have been cleaning shad in 1866 as in 1865. The same remarks are applicable to the testimony of Maria Clements, the daughter. She says she remembers it was in April, 1865, because her mother told her to remember, saying, "This is the way your father has been doing business. He takes a receipt without day or date. Now, we will remember this." Rather inconsistent this is with the testimony of the mother, who declares that she thought the paper of no importance. It may be these witnesses have persuaded themselves they saw the receipt in April, 1865. They have often talked the matter over with each other. But there are many improbabilities in their statements. Mrs. Fister says she was in fact her husband's

banker. She chiefly made the payments. She even goes so far as to say that she sent to the defendants, in January or February, 1865, $1500. Not, indeed, in one sum. Her language is: "I wrapped up one roll of $600 with red string, and I took a piece of flannel and tied up another bundle of $900 with it. He (her husband) put the $600 into his side pocket, and the other bundle of $900 into his pantaloons pocket." Such a minute recollection of a six-year-old transaction is almost too remarkable to be credited. But it is still more remarkable that neither the husband nor the wife discovered that they had no credit for so large a payment. The accounts show that on the 28th of February, 1865, on the transactions running through the months of January and February there was a balance of $2120.19, for $2000 of which he then gave his notes. If he had made the payment which he now asserts, the balance would have been only $620.19. It is incredible that he would have given notes for $2000 under such circumstances, for the payment must then have been fresh in his recollection. In addition to this we have the habit of business between the parties during the years 1864 and 1865, exhibited at large in the defendants' books and in the complainant's pass-book. If $1500 were paid in any month in addition to the sums credited, it would have been entirely outside of the usual course of business. It must have made an impression upon the complainant's memory when he gave the notes and confessed the judgment.

Looking, therefore, at the probabilities of the case as deduced from the evidence, at the long delay of the complainant to assert any claim, and at the fact that Mr. Willett had died before the bill was filed, we think there is no sufficient proof of a mistake to warrant a decree sustaining to any extent the complainant's bill.

DECREE REVERSED, and the case remitted with instructions to

DISMISS THE BILL.

Statement of the case.

MASTERSON, ASSIGNEE, *v.* HOWARD.

1. Where a decree is entered upon an order taking a bill in equity as confessed by defendants for want of an answer, the only question for the consideration of this court on appeal is whether the allegations of the bill are sufficient to support the decree.
2. While the existence of war closes the courts of each belligerent to the citizens of the other, it does not prevent the citizens of one belligerent from taking proceedings for the protection of their own property in their own courts, against the citizens of the other, whenever the latter can be reached by process.
3. Before the late civil war certain citizens of California and Illinois had brought suit in the Circuit Court of the United States in Texas, against citizens of that State to quiet the title of the complainants to a tract of land there situated, and prevent harassing and vexatious litigation from a multiplicity of suits. On the 20th of June, 1866, a final decree was entered in that suit, the Circuit Court being then open in Texas, and active hostilities having there ceased, although the proclamation of the President announcing the close of the war in that State was not made until the 20th of August afterwards. *Held*, that the complainants had a right to proceed in the Circuit Court of the United States to protect their property situated in Texas from seizure, invasion, or disturbance by citizens of that State, so soon as that court was opened, whether official proclamation were made or not of the cessation of hostilities.

APPEAL from the Circuit Court for the Western District of Texas; the case being thus:

On the 17th of February, 1851, Bainbridge Howard, a citizen of Louisiana, filed his bill in the court below against a certain Herndon, and one Maverick, residents of Texas, setting forth that "on or about the 22d November, A. D. 1766, the government of Spain, according to the forms of law and by the regularly constituted officers of the government, granted to the Indians of the population of the Mission of San José, a certain tract or parcel of land, situated, lying, and being in what is now the county of Medina, in the State of Texas," &c., describing it.

The bill alleged that through regular mesne conveyances he, Howard, the complainant, was the owner of the land, "all of which will more fully and at large appear by the

grant to said Indians, and the chain of conveyances to your orator, to which for greater certainty at the hearing your orator begs leave to refer." It stated further that he was in possession, and that the defendants had made sundry locations of land certificates upon, and claimed patents to the said land, which constituted a cloud upon his title; wherefore, and to avoid a multiplicity of suits, he brought his suit in equity.

The defendants were interrogated as to what locations, &c., they had made within the boundaries of the described tract, and in conflict with the complainant's claim; and what locations and surveys others had made; and the bill prayed,

"That, by decree to be rendered herein, the locations, surveys, and patents, if any, made within the limits of your orator's tract or parcel of land aforesaid, may be determined and held to be void, and thereby the cloud impending over the title of your orator be removed; or that after establishment of the right in such manner as this court may direct by final decree to be then rendered, your orator may be quieted in his title and possession aforesaid, and all obstruction to the full and peaceable enjoyment of his property removed; or that, if your orator is mistaken in the special relief hereby asked, such other or further relief be extended to him, or decree rendered in the premises, as the nature of the case may require."

The complainant having died, a supplemental bill in the nature of a bill of revivor was filed, and presented in the name of his heirs, representing themselves, one as a citizen of California and the others as citizens of Illinois. Adopting the allegations of the original bill touching the grant of the land from Spain, it represented that the title granted by Spain to the Indians of San José became vested in one John McMullen, with actual possession; that McMullen's title had become equitably vested with possession in Howard; that Howard's title and possession were now in the complainants; and that the heirs of McMullen (whom the supplemental bill made parties) neglected to convey the legal title.

In October, 1860, the default of the defendants, Herndon and Maverick, in not answering the supplemental bill, was

entered, with an order that the bill be taken as confessed against them. In January, 1861, the court set aside this order so far as it affected the defendant, Herndon, and granted leave to him, "upon condition that he shall pay all the costs of the complainant in this case, for which execution may issue upon this decree," to answer until March following; but confirmed the order as to the defendant, Maverick, and decreed that the complainants "have and recover of said Maverick the tract of land in the original bill described; and that their title to the same be and is hereby decreed to be free from all clouds cast thereupon by said Maverick, and all persons claiming by, through, or under him. And that the patents, locations, and surveys obtained by said Maverick, in conflict with the title of the complainants, *which is decreed to be a good title*, are hereby adjudicated to be null and void." A reference was made to a master to ascertain the facts sought to be discovered, and a decree of specific performance was decreed against the heirs of John McMullen. An execution subsequently issued and a certain part of the costs were obtained, but not all.

The answer of Herndon having been filed without (as the complainant alleged, though this was denied on the other side) his having complied with the terms imposed, his default was entered on the 4th of March, 1861, and an order made taking the supplemental bill as confessed against him. On the 20th of June, 1866, the court ordered the answer of Herndon to be struck from the files, and confirmed and made final the order taking the supplemental bill as confessed against him. The court then proceeded to enter a decree joint in form against both Maverick and Herndon.

From this decree both parties appealed; the defendant, Herndon, through his assignee in bankruptcy, he having since the decree become bankrupt. This appeal had, by consent of the assignee, been dismissed as to him.

Messrs. W. W. Boyce and G. W. Paschall, for the appellant:

1. The decree against Maverick, entered January, 1861, was not a final decree. A reference was made to a master

to ascertain the facts sought to be discovered; and until the coming in of his report and subsequent action on the part of the court by way of decree, there was nothing finally decreed in the case.

2. Neither should Herndon's answer have been stricken from the files. An execution issued and the costs were certainly paid in part. No proof is given that they were not fully paid, and the assumption that they were not is hardly justified.

3. There was nothing in the bill or in the prayer of it, which justified the decree made that the title of the complainants was "a good title." This part of the decree was supererogatory. The claim of the defendants, their locations, &c., which the bill sought to have cleared away, might all have been bad without the complainant's title being good.

4. But without pressing these points, there remains an objection that goes to the foundation of the decree. The decree covers action had upon a motion of 4th March, 1861 (on which final action was had 20th June, 1866), without notice to the defendants, in behalf of citizens of California and Illinois against citizens of Texas. Now this court historically knows that secession was as much an accomplished fact on the 4th of March, 1861, as it ever was; that the army of the United States in Texas had surrendered to the State convention; that the secession ordinance had been ratified by the people, and all Federal officers in that State had ceased their functions. The civil war had in fact commenced. Neither party could take any order under the motion or upon the answer. The District Courts of Texas were not organized for any purpose, until the spring of 1866. And it was by the proclamation of 20th August, 1866, that the President declared that "subsequently to the second day of April, 1866, the insurrection in the State of Texas has been everywhere suppressed and ended, and the authority of the United States has been successfully and completely established in said State of Texas," &c.*

* Paschal's Annotated Digest, 1502.

The decree then being in behalf of citizens of California and Illinois (loyal States), against citizens of Texas (a State in rebellion), was, according to decisions of this court, a decree between alien enemies before the termination of the war, and, therefore, a nullity.* The case of *The Protector*† settled that the civil war was not closed in Texas until 20th August, 1866. And *Dean* v. *Nelson*,‡ and *The Railroad Company* v. *Trimble*,§ hold such decrees to be void.

Mr. T. T. Crittenden, contra.

Mr. Justice FIELD delivered the opinion of the court.

It is unnecessary to determine whether the decree against Maverick, entered in January, 1861, is to be deemed final or interlocutory. The subsequent decree against Herndon, entered in June, 1866, is in form against both of the defendants. The court below, in its subsequent proceedings, treated the latter decree as the one which finally determined the rights of the parties in the case, and from that decree the appeal is taken.

It is also unnecessary to determine whether the court erred in striking Herndon's answer from the files, as his assignee makes no objection to the ruling, or to the decree which followed. He has consented through his counsel to the dismissal of his appeal.

The only question, therefore, for our consideration upon the record, is whether the allegations of the supplemental bill, and of the original bill to which it refers, are sufficient to support the decree thus entered upon the default of the defendants. And upon this question there can be no doubt.

The suit was brought on the equity side of the court to quiet the title of the complainant to a tract of land situated in the State of Texas, and prevent harassing and vexatious litigation from a multiplicity of suits. The original bill alleges, in substance, that the complainant is in possession and seized in fee of the tract, deraigning his title from a

* United States *v.* Anderson, 9 Wallace, 70; Hanger *v.* Abbott, 6 Id. 532.
† 12 Wallace, 702. ‡ 10 Id. 160, 172. § Ib. 377.

grant issued by the government of Spain, in 1766, to Indians of the mission of San José, in Texas; that the defendants have made locations and surveys of large parcels of the tract under certificates or warrants issued by the Republic of Texas, by virtue of which they assert a right to the parcels thus located and surveyed, and have thereby created a cloud upon the title of the complainant, and disturbed his possession. The bill prays that the surveys and locations, and patents thereon, if any have been obtained, may be determined and declared void, and the cloud impending over the title of the complainant, be thereby removed; or that the right of the complainant being established, he may be quieted in his title and possession, and all obstruction to the peaceable enjoyment of his property be removed; or that he may have such other or further relief as the nature of the case may require. The original complainant having died, a supplemental bill, in the nature of a bill of revivor, was filed and prosecuted in the name of his heirs. It shows a change of parties consequent upon the death of the original complainant, and the death of several of the original defendants; and brings in as new parties the heirs of one John McMullen, through whom the complainant traced his title. But so far as it concerns the defendants, Maverick and Herndon, who are alone represented by the appellants, its allegations are substantially the same as those of the original bill.

The decree of the court entered on the 20th of June, 1866, responded substantially to these allegations. It adjudged the title of the complainants to the tract in question "to be free from all clouds cast thereon" by the defendants, Maverick and Herndon, and all persons claiming under them, and that "all patents, locations, and surveys obtained or owned" by them, in conflict with the title of the complainants, which was decreed to be a good title, were null and void, and directed the defendants to cancel and remove them. The clause of the decree directing that the complainants have and recover the land of the defendants may be supported under the general prayer of the bill, if, pending the suit, the defendants had gone into possession of any

of the parcels located and surveyed by them; and, if such were not the case, the clause could not in any way prejudice their rights.

But the counsel of the appellant Maverick, looking outside of the record to the condition of the country at the time the decree was rendered, takes the position that the decree is null and void because rendered by the court before the proclamation of the President of August 20th, 1866, announcing the close of the war in Texas, contending that, as the complainants were citizens of California and Illinois, and the defendants citizens of Texas, it was a decree in a suit between public enemies, and, therefore, void.

If it were true, which is not admitted, that the parties to the present suit were to be regarded as public enemies after the cessation of hostilities in Texas, and the restoration of the authority of the United States, until the proclamation of the President was issued, in August, 1866, the conclusion drawn by counsel would not follow. The existence of war, does, indeed, close the courts of each belligerent to the citizens of the other, but it does not prevent the citizens of one belligerent from taking proceedings for the protection of their own property in their own courts, against the citizens of the other, whenever the latter can be reached by process. The citizens of California and Illinois had a right to seek the courts of the United States in Texas, or to proceed with suits commenced therein previous to the war, to protect their property there situated from seizure, invasion, or disturbance by citizens of that State, so soon as those courts were opened, whether official proclamation were made or not of the cessation of hostilities.

In the case of *The Protector*,* it was held that the war began in the Gulf States at the date of the proclamation of intended blockade of their ports by the President. That was the first public act of the executive in which the existence of the war was officially recognized, and to its date the courts look to ascertain the commencement of the war.

* 12 Wallace, 700.

And, so far as the operation of the statutes of limitation in the several States is concerned, to determine the period which must be deducted for the pendency of the war from the limitation prescribed, it was held in the same case that the war continued until proclamation was in like manner officially made of its close. This is the extent of the decisions of this court.*

It is well known that before such official proclamation was made courts of the United States were held in the several States which had been engaged in the rebellion, and their jurisdiction to hear and determine the cases brought in them, as well before as after such proclamation, is not open to controversy.

JUDGMENT AFFIRMED.

[See the next case.]

UNIVERSITY *v.* FINCH.

1. A sale of real estate made under a power contained in a deed of trust executed before the late civil war is valid, notwithstanding the grantors in the deed, which was made to secure the payment of promissory notes, were citizens and residents of one of the States declared to be in insurrection at the time of the sale, made while the war was flagrant.
2. This court has never gone further in protecting the property of citizens residing in such insurrectionary States from judicial sale than to declare that where such citizen has been driven from his home by a special military order, and forbidden to return, judicial proceedings against him were void.
3. The property of such citizens found in a loyal State is liable to seizure and sale for debts contracted before the outbreak of the war, as in the case of other non-residents.

APPEAL from the Circuit Court for the District of Missouri; the case being thus:

Daily and Chambers purchased of Elliott, in March, 1860, certain real estate in St. Louis, Missouri. For the principal part of the purchase-money they gave him their promissory

* Brown *v.* Hiatts, 15 Wallace, 184; Adger *v.* Alston, 1b. 560.

notes, and to secure the payment of these notes they made a deed of trust to one Ranlett, conveying the property thus purchased, with authority to sell it, on giving notice in a newspaper of the sale, in satisfaction of these notes if they were not paid as they fell due.

The notes were assigned by Elliott to the Washington University, and the money being unpaid and due, the real estate so conveyed was sold by Ranlett in accordance with the terms of the trust deed, to the University, on the 9th day of December, 1862. The trustee made to the University, which was a corporate body, a deed for the land, and the University afterwards sold it for value to one Kimball.

Daily and Chambers were both citizens of the State of Virginia, residing in the county of Mecklenburg, when they bought the land of Elliott, and have resided there ever since. Daily having been declared a bankrupt, and one Finch having been appointed his assignee, Finch, along with Chambers, the other purchaser, filed a bill on the chancery side of the Circuit Court of the United States for the District of Missouri to have the sale decreed void, and to have the proceeds of the sale of the land by the University to Kimball declared a trust fund for their use; and the court decreed accordingly. The ground of this decree was that the sale by the trustees took place during the late civil war, and that Daily and Chambers were citizens of the State of Virginia, resident within that part of the State declared by the President to be in a state of insurrection. From the decree thus made the present appeal was taken.

Mr. J. M. Krum, for the appellant, citing *Hanger* v. *Abbott*,* and *Dean* v. *Nelson*,† argued that inasmuch as all commercial intercourse was forbidden between the people of the loyal States and those residing in the insurrectionary districts, both by virtue of the act of Congress and by the principles applicable to nations in a state of war, all processes for the collection of debts were suspended, and that the

* 6 Wallace, 532.

† 10 Id. 158.

complainants being forbidden by these principles to pay the debt, there could be no valid sale of the land for default of such payment. He also argued that the power in the deed to sell, which required a notice in a newspaper of the sale, was intended to apprise the complainants of the time and place of sale; and that inasmuch as it was impossible for such notice to reach them, situated as they were, no valid sale could be made.

Mr. W. H. Letcher, *contra.*

Mr. Justice MILLER delivered the opinion of the court.

The case before us was not one of a sale by judicial proceeding. No aid of a court was needed or called for. It was purely the case of the execution of a power by a person in whom a trust had been reposed in regard to real estate, the land, the trustee, and the *cestui que trust* all being, as they had always been, within a State whose citizens were loyally supporting the nation in its struggle with its enemies. The conveyance by the complainants to Ranlett vested in him the legal title of the land, unless there was a statute of the State of Missouri providing otherwise, and if there was such a statute it still gave him full control over the title for the purposes of the trust which he had assumed. No further act on the part of the complainants was necessary to transfer the title and full ownership of the property to a purchaser under a sale by the trustee.

The debt was due and unpaid. The obligation which the trustee had assumed on a condition, had become absolute by the presence of that condition. If the complainants had both been dead, the sale would not have been void for that reason, if made after the nine months during which a statute of Missouri suspends the right to sell in such cases. If they had been in Japan it would have been no legal reason for delay. The power under which the sale was made was irrevocable. The creditor had both a legal and moral right to have the power made for his benefit executed. The enforced absence of the complainants, if it be conceded that it

was enforced, does not in our judgment afford a sufficient reason for arresting his agent and the agent of the creditor in performing a duty which both of them imposed upon him before the war began. His power over the subject was perfect, the right of the holder of the note to have him exercise that power was perfect. Its exercise required no intercourse, commercial or otherwise, with the complainants. No military transaction would be interfered with by the sale. The enemy, instead of being strengthened, would have been weakened by the process. The interest of the complainants in the land might have been liable to confiscation by the government, yet we are told that this right of the creditor could not be enforced, nor the power of the trustee lawfully exercised. No authority in this country or any other is shown to us for this proposition. It rests upon inference from the general doctrine of absolute non-intercourse between citizens of States which are in a state of public war with each other, but no case has been cited of this kind even in such a war.

It is said that the power to sell in the deed of trust required a notice of the sale in a newspaper, that this notice was intended to apprise the complainants of the time and place of sale, and that inasmuch as it was impossible for such notice to reach the complainants no sale could be made. If this reasoning were sound, the grantors in such a deed need only go to a place where the newspaper could never reach them to delay the sale indefinitely, or defeat it altogether. But the notice is not for the benefit of the grantor in the sense of notice to him. It is only for his benefit by giving notoriety and publicity of the time, the terms, and the place of sale, and of the property to be sold, that bidders may be invited, competition encouraged, and a fair price obtained for the property. As to the grantor, he is presumed to know that he is in default and his property liable to sale at any time; and no notice to *him* is required.

But the authority of certain cases decided in this court is relied on, in which the effect of the state of the late civil war

is considered, in judicial proceedings, between parties residing on different sides of what has been called the line separating the belligerents.

The first of these is that of *Hanger* v. *Abbott*. That case laid down the proposition that when a citizen of a State adhering during that war to the national cause brought suit afterwards against a citizen residing during the war within the limits of an insurrectionary State, the period during which the plaintiff was prevented from suing by the state of hostilities should be deducted from the time necessary to bar the action under the statute of limitations. It decided nothing more than this. It did not even decide that a similar rule was applicable in a suit brought by the latter against the former. And it decided nothing in the question now before us, even if the sale here had been under a judicial proceeding.

Another case is that of *Dean* v. *Nelson*. If the present had been a sale under judicial order, that case would bear some analogy to this, and some expressions in the opinion more general than was intended may, as this court has already said, tend to mislead. That case was a proceeding within an insurrectionary district, but held by our military forces, in a court established by military orders alone. It was a proceeding to foreclose a mortgage on personal property, and it was instituted against parties who had been expelled by military force from their residence, and who were forbidden absolutely by the order which expelled them, and which was addressed to them by name, from coming back again within the lines of the military authority which organized the court. Inasmuch as, without their consent and against their will, they were thus driven from their homes, and forbidden to return by the arbitrary though probably necessary act of the military power, we held that a judicial decree by which their property was sold during the continuance in force of this order was void as to them. To that doctrine we adhere, and have repeated it at this term in the case of *Lasere* v. *Rochereau*.*

* 17 Wallace, 437.

But this court has never decided nor intentionally given expression to the idea that the property of citizens of the rebel States, located in the loyal States, was, by the mere existence of the war, exempted from judicial process for debts due to citizens of the loyal States contracted before the war. A proposition like this, which gives an immunity to rebels against the government not accorded to the soldier who is fighting for that government, in the very locality where the other resides, must receive the gravest consideration and be supported by unquestioned weight of authority before it receives our assent. Its tendency is to make the very debts which the citizens of one section may owe to another an inducement to revolution and insurrection, and it rewards the man who lifts his hands against his government by protection to his property, which it would not otherwise possess, if he can raise his efforts to the dignity of a civil war.

The case of *Mc Veigh* v. *United States*,* holds that an alien enemy may be sued though he may not have a right to bring suits in our courts. And that when he is sued he has a right to appear and defend. "Whatever," says the court, "may be the extent of the disability of an alien enemy to sue in the courts of the hostile country, it is clear that he is liable to be sued, and this carries with it the right to use all the means and appliances of defence."

And this proposition is supported by the authorities there cited as well as by sound reason. If such be the rule in regard to alien enemies in a war between independent states, it should be quite as applicable, if not more so, between citizens of the same government who are only enemies in a qualified sense in a civil war.†

We are of opinion that the sale by the trustee in the case under consideration was a lawful and valid sale, and that the bill of the complainants should have been dismissed. The decree of the Circuit Court is, therefore, REVERSED, with directions to

DISMISS THE BILL.

* 11 Wallace, 259.

† See Masterson *v.* Howard, *supra*, 99.

BEST *v.* POLK.

1. The treaty of May 24th, 1834, with the Chickasaw Indians (7 Stat. at Large, 450) conferred title to the reservations contemplated by it, which was complete when the locations were made to identify them.
2. A patent (as often decided before) is void which attempts to convey lands previously granted, reserved from sale, or appropriated.
3. Reservees under the treaty above named are not obliged, in addition to proving that the locations were made by the proper officers, to prove also that the conditions on which these officers were authorized to act had been observed by them.
4. Copies of records appertaining to the land office, certified by the register of the district where they are, are evidence in Mississippi.
5. An officer commissioned to hold office during the term of four years *from* the 2d of March, 1845, is in office *on* the 2d of March, 1849. The word "from" excludes the day of date.

ERROR to the District Court for the Northern District of Mississippi; the case being thus:

By virtue of a treaty made October the 20th, 1832,* the Chickasaw Nation of Indians, in the belief that it was better to seek a home west of the Mississippi, ceded their lands to the United States, who agreed to survey and sell them on the same terms and conditions as the other public lands, and to pay the proceeds to the nation. In order, however, that the people of the tribe should not be deprived of a home until they should have secured a country to remove to, they were allowed, after the survey and before the first public sale of their lands, to select out of the surveys a reasonable settlement for each family, and to retain these selections as long as they were occupied. After this occupation ceased the selected lands were to be sold and the proceeds paid to the nation.

On the 24th of May, 1834, a little more than a year after the date of the first treaty, another treaty† was made with these Indians, essentially changing the provisions of the former one. These changes were made owing to the supposed inability of the Chickasaws to obtain a country within the

* 7 Stat. at Large, 381. † Ib. 450.

territorial limits of the United States adequate to their wants, and to the desire expressed by them to have within their own direction and control the means of taking care of themselves. Accordingly they abandoned the idea of selecting, out of the surveys, lands for temporary occupancy, and, in lieu thereof, reservations of a limited quantity were conceded to them. The scheme embraced the whole tribe—heads of families as well as all persons over twenty-one years of age, male and female, who did not occupy that relation. The sixth article of the treaty reserved a section of land to each of this latter class of Indians, a list of whom, within a reasonable time, seven chiefs (named in the treaty) were to make out and file with the agent. On this officer certifying that the list was believed to be accurate, the register and receiver were to cause the locations to be made.

In this state of things, the United States, on the 13th of March, 1847—reciting that one James Brown had paid, "according to the provisions of two several treaties with the Chickasaw Indians, dated October 20th, 1832, and May 24th, 1834," &c., for the section 23, in township 5, of range 11 west, in the district of lands subject to sale at Pontotoc, Mississippi, containing, &c., "according to the official plat of the survey returned into the General Land Office by the surveyor-general, which said tract has been purchased by the said James Brown"—granted the section of land described to the said Brown in fee.

Brown granted it to one Polk. Hereupon, a certain Best being in possession, Polk sued him in ejectment. The defendant set up that prior to the issuing of the patent to Brown the section had been located to an Indian, named Bah-o-nah-tubby, of the Chickasaw Nation, under the terms of the second treaty, and that he held under the said Indian.

On the trial the defendant offered in evidence a paper certified by one A. J. Edmondson, styling himself register of the land office of the United States at Pontotoc, Mississippi, to be "a true copy of the roll, number, reserves, and locations under the sixth article" of the treaty between the United States and Chickasaw Indians, &c., "and of the list

of persons furnished by the Chickasaw agent to the register and receiver as Indians entitled to land under said article." The paper ran thus:

Reservations under the sixth article of the Chickasaw treaty.

No.	Reserve.	S.	T.	R.	Date.
774	Tah-pin-tah-umby.	7	6	11 W	June 17, 1839.
775	Chah-caw-mubby.	10	5	11 "	" " "
776	**Bah-o-nah-tubby.**	23	5	11 "	" " "

The certificate of Edmondson to this exhibit was dated March 2d, 1849, while the commission of Edmondson himself, which was produced and put in evidence by the other side, was dated on March 2d also, four years previously; and appointed him register of the land office at Pontotoc "during the term of four years *from* the 2d day of March, 1845."

The plaintiff objected to the paper offered in evidence, upon the ground that it did not purport to be a copy of the record of the land office; that the certificate was not authorized by any act of Congress; that it stated facts and legal conclusions; that it did not show that the list was made by the person named in the articles of the treaty, or that the agent certified to its believed accuracy; that it was not founded on any order of survey, donation, pre-emption, or purchase; that it did not purport to be a copy of the plat of the general office; that it could not be set up to defeat a patent; that the present action being one of ejectment the legal title alone was involved, and that such title could only pass by a patent; that a patent could not be impeached at law except for defects apparent on its face; that the treaties did not convey the title in fee to the Indian Bah-o-nah-tubby, for the section of land sued for, but that the title remained in the United States till it passed out by patent.

The court decided that the paper was incompetent, and verdict and judgment having been rendered for the plaintiff, the defendant brought the case here, assigning for error the exclusion of the paper.

Mr. T. J. D. Fuller, in support of the ruling below:

In addition to the reasons taken on the trial for the rejection of the paper—reasons here iterated and relied on—it may be urged:

1. That the contemplated reservees were unknown and uncertain persons till designated and fixed in a prescribed manner and on specific proofs. The certificate offered in evidence should have therefore shown, in addition to what it did show (if it showed anything), that a list including Bah-o-nah-tubby was furnished by the "seven chiefs," in accordance with the sixth article of the treaty to the agent, and that he certified to the receiver and register that he believed it accurate.

2. The paper offered was not authenticated in the manner prescribed by statute. It should have been certified by the Commissioner of the Land Office, under the seal of the Department of the Interior, accompanied with the *survey*, *maps*, and *reservations marked* thereon, as they must be if the record exists.*

3. The paper was inadmissible, because the officer certifying, and at the time he certified, was not in office. The day of the date of his commission is to be included within the computation of the four years. His office, or term of office, expired on the night of March 1st, 1849. And such is understood to be the practice and holding of the government. It is in analogy to the rule of law for computing time under the statute of limitations.

4. The paper, if competent for any purpose, could be so for one purpose only, and that was to disprove seizin of the plaintiff. But the defendant offered no evidence to connect himself with the alleged outstanding title.

Mr. J. W. C. Watson, contra.

Mr. Justice DAVIS delivered the opinion of the court.

In order to carry out in good faith Indian treaties, effect

* See act of January 23d, 1823, 3 Stat. at Large, 721; 10 Id. 297; and Brightly's Digest, 267 and footnotes.

must be given to the intention of the parties to them; and from the different provisions of the treaties which are applicable to this case, no well-founded doubt can exist of the proper construction to give to the sixth article. The cession in the first treaty contemplated the ultimate abandonment of the lands by the Indians. This treaty did not prove satisfactory, and the Indians asked, and the United States conceded to them, a limited quantity of land for a permanent home. This object could not be obtained if it were meant to give only an equitable title to the Indians. Such a title would soon become complicated by the encroachments of the white race; and that the Indians supposed they were providing for a good title to their "reservations" is manifest enough, because they declare, in the second treaty, that they wish to have the management of their affairs in their own hands.

This disposition, which was natural under the circumstances, the United States yielded to, and agreed, when the body of the lands were surveyed, to reserve from sale certain limited portions on which the reservations should be located. This was done in obedience to a just policy, for it would have been wrong, considering the dependent state of these Indians, to hold them to their original engagement. The United States could not afford to do this, and, therefore, willingly consented to re-cede to the Indians enough lands for their wants. Can it be doubted that it was the intention of both parties to the treaty to clothe the reservees with the full title? If it were not so there would have been some words of limitation indicating a contrary intention. Instead of this there is nothing to show that a further grant, or any additional evidence of title, were contemplated. Nor was this necessary, for the treaty proceeded on the theory that a grant is as valid by a treaty as by an act of Congress, and does not need a patent to perfect it. We conclude, therefore, that the treaty conferred the title to these reservations, which was complete when the locations were made to identify them. This was the view taken of this subject by the highest court of Mississippi soon after this treaty went into

operation, in litigations which arose between the white race and the Indians themselves concerning the effect to be given to these reservations.* In all these cases the Indian reservee was held to have preference over the subsequent patentee, on the ground that the United States had parted with the title by the treaty. These decisions, furnishing a rule of property on this subject in Mississippi, were not brought to this court for review, as they could have been, but have been acquiesced in for a quarter of a century. To disturb them now would unsettle titles *bonâ fide* acquired.

It has been repeatedly held by this court that a patent is void which attempts to convey lands that have been "previously granted, reserved from sale, or appropriated."† "It would be a dangerous doctrine (say the court in *New Orleans* v. *United States*‡) to consider the issuing of a grant as conclusive evidence of right in the power which issued it. On its face it is conclusive, and cannot be controverted; but if the thing granted was not in the grantor no right passes to the grantee. A grant has been frequently issued by the United States for land which had been previously granted, and the second grant has been held to be inoperative."

If, therefore, the location of the land in controversy was properly made, the legal title to it was consummated, and the subsequent patent was unauthorized. And this brings us to the consideration of the question whether the evidence on the subject of the location ought to have been received by the court.

This evidence consists of the certificate of the register of the land office at Pontotoc that the reserve of a Chickasaw Indian (naming him) was located on the disputed section in June, 1839, under the provisions of the sixth article of the Chickasaw treaty, and a copy of the roll, number, reserve,

* Wray *v.* Doe, 10 Smedes & Marshall, 461; Newman *v.* Doe, 4 Howard (Mississippi), 555; Niles et al. *v.* Anderson et al., 5 Id. 365; Coleman *v.* Doe, 4 Smedes & Marshall, 46.

† Stoddard *v.* Chambers, 2 Howard, 284; United States *v.* Arredondo, 6 Peters, 728; Reichart *v.* Felps, 6 Wallace, 160.

‡ 10 Peters, 731.

and location is given, showing this to be the case. It is insisted that this certificate did not go far enough; that it ought to have shown that a list, including this Indian, was furnished by the seven chiefs to the agent, and that the agent certified to the register and receiver, prior to the location, that he believed the list to be accurate. If this were so no presumption could arise that local land officers, charged with the performance of a duty, had discharged it in conformity with law.

It would be a hard rule to hold that the reservees under this treaty, in case of contest, were required to prove not only that the locations were made by the proper officers, but that the conditions on which these officers were authorized to act had been observed by them. Such a rule would impose a burden upon the reservees not contemplated by the treaty, and, of necessity, leave their titles in an unsettled state. The treaty granted the land, but the location had to be fixed before the grant could become operative. After this was done, the estate became vested and the right to it perfect, as much so as if the grant had been directly executed to the reservee. It has been frequently held by this court that a grant raises a presumption that the incipient steps required to give it validity have been taken.*

The grant, in this case, was complete when the location was made, and the location is, in itself, evidence that the directions of the treaty on the subject were observed, and it cannot be presumed that the officers empowered to make the location violated their duty. Even if the agent neglected to annex a proper certificate to the roll of Indians entitled to the reservations, it is difficult to see how the Indians could be prejudiced by this neglect. We conclude, therefore, that the certificate of the register was competent evidence, and if the locations were not as there stated, it is easy for the plaintiff below to show that fact. The same effect was given to a similar certificate of this same officer,

* Polk's Lessee *v.* Wendell, 5 Wheaton, 293; Bagnell *v.* Broderick, 13 Peters, 436.

by the High Court of Errors and Appeals of Mississippi, as early as 1848, in an action of ejectment brought by a Chickasaw Indian, for a tract of land claimed by him in virtue of a location made in his behalf as a reservee, against a party claiming by patent subsequent in date to the location of his reservation. And this decision was reaffirmed by the same court in 1854, in the case of another Indian suing for his land under similar circumstances.* It must have been supposed at the time by the losing parties that these decisions were correct, or else the opinion of this court would have been asked on the point involved. After such a length of acquiescence, it would produce great mischief to hold this evidence to be incompetent.

It is objected that the paper offered in evidence should have been certified by the Commissioner of the General Land Office; but this was not necessary, for copies of records appertaining to the land office, certified by the register, are evidence in Mississippi, and similar statutes exist in nearly all the Western and Southwestern States.†

Another objection is taken to the certificate of Edmondson, on the ground that when it was given his term of office had expired. This objection cannot be sustained, for the certificate bears date the 2d March, 1849, and he was commissioned to hold the office of register "during the term of four years from the 2d day of March, 1845." The word "from" always excludes the day of date.‡

It is argued that in ejectment a stranger to the outstanding title cannot invoke it to defeat the action. Whether this be so or not depends on the laws of the State; but the point does not arise in this case, for there was no opportunity for the defendant to connect himself with the Indian title after the court refused to let the evidence on the subject of this title go to the jury.

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* Wray *v.* Doe, 10 Smedes & Marshall, 452; Hardin *v.* Ho-yo-ho-Nubby's Lessee, 27 Mississippi, 567.

† See Revised Code of Mississippi.

‡ See 1 Parsons on Notes and Bills, 385, and the authorities therein cited.

Statement of the case in the opinion.

The decision respecting this evidence necessarily disposed of the case.

JUDGMENT REVERSED, and a

VENIRE DE NOVO AWARDED.

COFFIN *v.* OGDEN.

1. When, in a patent case, a person claims as an original inventor and the defence is a prior invention by the defendant, if the defendant prove that the instrument which he alleges was invented by him was complete and capable of working, that it was known to at least five persons, and probably to many others, that it was put in use, tested, and successful, he brings the case within the established severe tests required by law to sustain the defence set up.
2. Barthol Erbe anticipated William S. Kirkham in the invention of door locks with reversible latches.

APPEAL from the Circuit Court for the Southern District of New York, in which court Coffin filed a bill against Ogden et al. to enjoin them from making door locks of a certain kind, the exclusive right to make which he alleged belonged by the assignment of a patent right to him.

The case was one chiefly of fact, involving the question of priority of invention. The court below was of the opinion that the complainant, or rather the person under assignment of whose patent he claimed and was working, had been anticipated in his invention; and dismissed the bill. From that decree the defendants took this appeal.

Mr. George Gifford, for the appellant; Mr. B. F. Thurston, contra.

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

The appellant was the complainant in the court below, and filed this bill to enjoin the defendants from infringing the

Statement of the case in the opinion.

patent upon which the bill is founded. The patent is for a door lock with a latch reversible, so that the lock can be applied to doors opening either to the right or the left hand. It was granted originally on the 11th of June, 1861, to Charles R. Miller, assignee of William S. Kirkham, and reissued to Miller on the 27th of January, 1863. On the 10th of June, 1864, Miller assigned the entire patent to the complainant. No question is raised as to the complainant's title, nor as to the alleged infringement by the defendants. The answer alleges that the thing patented, or a material and substantial part thereof, had been, prior to the supposed invention thereof by Kirkham, known and used by divers persons in the United States, and that among them were Barthol Erbe, residing at Birmingham, near Pittsburg, and Andrew Patterson, Henry Masta, and Bernard Brossi, residing at Pittsburg, and that all these persons had such knowledge at Pittsburg. The appellees insist that Erbe was the prior inventor, and that this priority is fatal to the patent. This proposition, in its aspects of fact and of law, is the only one which we have found it necessary to consider.

Kirkham made his invention in March, 1861. This is clearly shown by the testimony, and there is no controversy between the parties on the subject.

It is equally clear that Erbe made his invention not later than January 1st, 1861. This was not controverted by the counsel for the appellant; but it was insisted that the facts touching that invention were not such as to make it available to the appellees, as against the later invention of Kirkham and the patent founded upon it. This renders it necessary to examine carefully the testimony upon the subject.

Erbe's deposition was taken at Pittsburg upon interrogatories agreed upon by the parties and sent out from New York. He made the lock marked H. E. (It is the exhibit of the appellees, so marked.) He made the first lock like it in the latter part of the year 1860. He made three such before he made the exhibit lock. The first he gave to Jones, Wallingford & Co. The second he sent to Washington, when he applied for a patent. The third he made for a

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friend of Jones. He thinks the lock he gave to Jones, Wallingford & Co. was applied to a door, but is not certain.

Brossi. In 1860 he was engaged in lockmaking for the Jones and Nimmick Manufacturing Company. He had known Erbe about seventeen years. In 1860 Erbe was foreman in the lock shop of Jones, Wallingford & Co., at Pittsburg. In that year, and before the 1st of January, 1861, he went to Erbe's house. Erbe there showed him a lock, and how it worked, so that it could be used right or left. He says: "He (Erbe) showed me the follower made in two pieces. One piece you take out when you take the knob away. The other part—the main part of the follower—slides forward in the case of the lock with the latch, so you can take the square part of the latch and turn it around left or right, whichever way a person wants to." He had then been a lockmaker eight years. He examined the lock carefully. He had never seen a reversible lock before. He has examined the exhibit lock. It is the same in construction. The only difference is, that the original lock was made of rough wrought iron. It was a complete lock, and capable of working. Erbe thought it a great thing. Erbe showed him the lock twice afterwards at Jones, Wallingford & Co's. He saw such a lock attached to the office door there and working, but don't know whether it was the first lock made or one made afterwards.

Masta. In 1860 he was a patternmaker for Jones, Wallingford & Co. Had known Erbe fourteen or fifteen years. Erbe showed him his improvement in reversible locks New Year's day, 1861. He examined the lock with the case open. "You had to pull out the spindle, and the hub was fitted so that it would slide between the spindle and the plate and let the latch forward." . . . "The whole hub was made of three pieces. One part was solid to the spindle or hub shanks, and then the hub that slides between the plate and case, and a washer at the other side of the spindle." "There is not a particle of difference between the exhibit and the original lock. It is all the same." He identifies the time by the facts that he commenced building a house in 1861,

and that year is marked on the water conductor under the roof.

Patterson. Until recently he was a manufacturer of locks and other small hardware. In the year 1860 he was the superintendent of the lock factory of Jones, Wallingford & Co., and their successors in Pittsburg. He had known Erbe since 1856. About the 1st of January, 1861, Erbe showed him an improved reversible lock of his invention like the exhibit lock. The improvement "consisted in constructing the hub or follower, so that when the spindle was withdrawn, the hub would slide forward between the cases so that the head of the latch would protrude beyond the face of the lock, so as to permit its reversal from right to left; the latch-head being connected with the yoke by a swivel joint, so that it might be reversed. . . . It was our uniform practice to put our new locks on the doors about the office to test them, and I believe that one was put on; but at this distance of time I cannot say positively that it was."

There is no proof that Erbe made any locks according to his invention here in question but those mentioned in his testimony. He applied for a patent in 1864, and failed to get it. Why, is not disclosed in the record.

The appellants called no witnesses at Pittsburg or elsewhere to contradict or impeach those for the appellees. Brossi was subjected to a rigorous cross-examination, but, in our judgment, it in nowise diminishes the effect of his testimony in chief. The counsel for the appellants asked with emphasis, in the argument here, why the defendants had not called Jones, of the firm of Jones, Wallingford & Co.? The question was well retorted, why was he not called by the other side? He does not appear in a favorable light. He prevented Erbe, who was in his employ, from going to New York to testify in behalf of the defendants, and avowed a determination to prevent, if it were possible, their obtaining the testimony of Brossi, Masta, and Patterson. It is difficult not to regard him with a feeling akin to that which attends the presumptions *in odium spoliatoris.* We entertain no doubt that the testimony of all these witnesses is true in

every particular, including the statement of Brossi as to putting the lock on the door. If that were false, doubtless Jones would have been called to gainsay it. His hostility to the defendants is a sufficient reason for their not calling him for any purpose.

The case arose while the Patent Act of 1836 was in force, and must be decided under its provisions. The sixth section of that act requires that to entitle the applicant to a patent, his invention or discovery must be one "not known or used by others before his invention or discovery thereof." The fifteenth section allowed a party sued for infringement to prove, among other defences, that the patentee "was not the original and first inventor of the thing patented, or of a substantial and material part thereof claimed to be new."

The whole act is to be taken together and construed in the light of the context. The meaning of these sections must be sought in the import of their language, and in the object and policy of the legislature in enacting them.* The invention or discovery relied upon as a defence, must have been complete, and capable of producing the result sought to be accomplished; and this must be shown by the defendant. The burden of proof rests upon him, and every reasonable doubt should be resolved against him. If the thing were embryotic or inchoate; if it rested in speculation or experiment; if the process pursued for its development had failed to reach the point of consummation, it cannot avail to defeat a patent founded upon a discovery or invention which was completed, while in the other case there was only progress, however near that progress may have approximated to the end in view. The law requires not conjecture, but certainty. If the question relate to a machine, the conception must have been clothed in substantial forms which demonstrate at once its practical efficacy and utility.† The prior knowledge and use by a single person is sufficient.

* Gayler *v.* Wilder, 10 Howard, 496.

† Reid *v.* Cutter, 1 Story, 590.

The number is immaterial.* Until his work *is done*, the inventor has given nothing to the public. In *Gayler* v. *Wilder* the views of this court upon the subject were thus expressed: "We do not understand the Circuit Court to have said that the omission of Conner to try his safe by the proper tests would deprive it of its priority; nor his omission to bring it into public use. He might have omitted both, and also abandoned its use and been ignorant of the extent of its value; yet if it was the same with Fitzgerald's, the latter would not, upon such grounds, be entitled to a patent; provided Conner's safe and its mode of construction were still in the memory of Conner before they were recalled by Fitzgerald's patent." Whether the proposition expressed by the proviso in the last sentence is a sound one, it is not necessary in this case to consider.

Here it is abundantly proved that the lock originally made by Erbe "was complete and capable of working." The priority of Erbe's invention is clearly shown. It was known at the time to at least five persons, including Jones, and probably to many others in the shop where Erbe worked; and the lock was put in use, being applied to a door, as proved by Brossi. It was thus tested and shown to be successful. These facts bring the case made by the appellees within the severest legal tests which can be applied to them. The defence relied upon is fully made out.

DECREE AFFIRMED.

UNITED STATES *v.* BUZZO.

1. When, on a view of the record, it appears that from some fatal defect in the proceedings, no judgment can be entered against the defendant in the court below, on a suit there pending, this court will decline to answer a question certified to it on division of opinion between the judges of the Circuit Court, upon a contrary assumption.
2. On an information under the ninth section of the Internal Revenue Act of July 13th, 1866, which enacts that any person who shall issue any in-

* Bedford *v.* Hunt, 1 Mason, 302.

strument, &c., for the payment of money, without the same being duly stamped, "with intent to evade the provisions of this act, shall forfeit and pay," &c., an intent to evade is of the essence of the offence, and no judgment can be entered on a special verdict which, finding other things, does not find such intent.

ON certificate of division of opinion between the judges of the Circuit Court for the Eastern District of Michigan; the case being thus:

An Internal Revenue Act* of 1866 enacts

"That any person who shall make . . . . or issue any instrument, document, or paper, of any kind or description whatsoever, ... for the payment of money, without the same being duly stamped, ... *with intent to evade the provisions of this act*, shall for every such offence forfeit the sum of $50," &c.

Under this act an information was filed against one Buzzo, charging him, as clerk of the Calumet Mining Company, with making and issuing a certain written and printed evidence of money to be paid without the same being duly stamped, and *with intent to evade the provisions of the act.* The form of the paper was as follows, to wit:

[X.] **CALUMET MINING COMPANY.** [TEN.]

CALUMET, MICH., June 25th, 1870.

At sight pay to my order

Ten Dollars,

Value received, and charge the same to account of

T. W. BUZZO,
Clerk.

TO CHARLES W. SEABURY, Treasurer,
114 State Street, Boston.

The defendant pleaded Not Guilty, and the jury found a special verdict, setting forth the circumstances under which he issued the draft in question, and others of the same character, which he did on behalf of the Calumet Mining Company (a corporate body), at its mines in Michigan, in

* Act of July 13th, 1866 (§ 9, 14 Stat. at Large, 142), amendatory of the 158th section of the act of June 30th, 1864 (13 Id. 293).

payment for labor and other things; the defendant being superintendent of the mines, and Seabury, the drawee of the draft, being the treasurer of the company at Boston, where the drafts were redeemed. The special verdict stated that the drafts were issued without being stamped, but it did not state that this was done *with intent to evade the provisions of the act.*

Upon the special verdict as thus found, the district attorney of the United States moved for judgment, and thereupon the question arose, whether, upon the facts stated in the verdict (and under certain provisions of the Internal Revenue Act, not necessary, in view of the point adjudged in the case by this court, here to be stated),* the instrument set forth in the information was subject to a stamp when issued. Which question, the judges being divided in opinion upon it, was certified to this court for decision.

Messrs. B. R. Curtis and J. Hubley Ashton, for the defendant:

The act of Congress expressly makes the *intent* to evade the provisions of the act a necessary ingredient of the offence defined by it. It is clear that it was necessary that the information should contain an allegation, as it does, that the omission of the stamp was with *intent* to evade the act, and that the jury could not have found the defendant guilty of the offence without finding an intentional omission of the stamp with the purpose of evading the act.

The special verdict, however, is entirely silent in regard to the matter of the intent of the defendant.

It does not find that, if the instrument was liable to stamp duty, it was issued without a stamp with intent to evade the act; and, therefore, however this court might answer the question certified for its decision, the Circuit Court could not enter judgment for the United States upon the verdict.

Therefore, this court will not decide the question upon which the judges of that court have divided in opinion, and will remand the cause to that court either with directions to award a new trial, or without any direction.

* They may be seen in United States *v.* Isham, 17 Wallace, 496.

Mr. G. H. Williams, Attorney-General, and Mr. S. F. Phillips, Solicitor-General, contra:

What is said by opposing counsel is not sufficient to prevent a response by this court to the question about which the judges below differed.

The facts (supposing the instrument to be liable to a stamp) show that the defendant has *actually evaded* the provisions of the act. In a similar case* this court has said:

"When the acts which create the obstruction [evasion] are in themselves unlawful, the intention to obstruct [evade] will be imputed to their author, although the attainment of other ends may have been his primary object."

This is in accordance with long-established principles.†

To the same effect with *United States* v. *Kirby* is a passage in Tidd's Practice:‡

"And if a special verdict on a mixed question of fact and law find facts from which this court can draw clear conclusions, it is no objection to the verdict that the jury have not themselves drawn such conclusions, and stated them as facts in the case."

Whatever may be the true doctrine in a case where the special verdict finds only such *evidence* as, in the judgment of a court, makes it competent for a jury to decide either positively or negatively as to a fact in question, it seems that if the evidence so found be such as should form the basis of an instruction by the court that from it the jury *must find* in a particular way, it is immaterial whether the jury find the specific fact, or only the *proofs* of it. That is the case here.

Mr. Justice BRADLEY delivered the opinion of the court.

As in this case the intent is the essence of the crime,§ and is not found, no judgment can be entered on the verdict,

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

† Rex *v.* Furnival and State *v.* Jones, as reported in Bennett & Heard's Leading Criminal Cases, 2d vol. 45, with notes.

‡ 2d vol. 897.

§ 1 Bishop's Criminal Procedure, § 280, or 2d edition, 523; People *v.* Lehman, 2 Barbour, 218, 219.

whether the facts disclosed therein required a stamp to be affixed to the draft or not. To decide the question proposed, therefore, would avail nothing. An imperfect verdict, or one on which no judgment can be rendered, must be set aside, and a *venire de novo* awarded.* The case must therefore be dismissed.

It is proper to observe that in the case of *United States* v. *Isham*,† recently decided by this court, we held that no stamp is required on drafts of the kind above described, when not exceeding ten dollars in amount.

CASE DISMISSED.

BARTEMEYER *v.* IOWA.

1. The usual and ordinary legislation of the States regulating or prohibiting the sale of intoxicating liquors raises no question under the Constitution of the United States prior to the fourteenth amendment of that instrument.
2. The right to sell intoxicating liquors is not one of the privileges and immunities of citizens of the United States which by that amendment the States were forbidden to abridge.
3. But if a case were presented in which a person owning liquor or other property at the time a law was passed by the State absolutely prohibiting any sale of it, it would be a very grave question whether such a law would not be inconsistent with the provision of that amendment which forbids the State to deprive any person of life, liberty, or property without due course of law.
4. While the case before the court attempted to present that question, it failed to do it, because the plea, which is taken as true, did not state, in due form and by positive allegation, the time when the defendant became the owner of the liquor sold; and, secondly, because the record satisfied the court that this was a moot case, made up to obtain the opinion of this court on a grave constitutional question, without the existence of the facts necessary to raise that question.
5. In such a case, where the Supreme Court of the State to which the writ of error is directed has not considered the question, this court will not feel at liberty to go out of its usual course to decide it.

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* Bacon's Abridgment, title "Verdict" (M.); Tidd's Practice, 922, 9th ed.; Holland *v.* Fisher, Orlando Bridgman, 187, 188.

† 17 Wallace, 496. [The case had not been decided when the present one was argued.—REP.]

Statement of the case.

6. Per Justices BRADLEY and FIELD. This case distinguished from the *Slaughter-House Cases.*

ERROR to the Supreme Court of Iowa; the case being thus:

Bartemeyer, the plaintiff in error, was tried before a justice of the peace on the charge of selling intoxicating liquors, on the 8th of March, 1870, to one Timothy Hickey, in Davenport Township, in the State of Iowa, and was acquitted. On an appeal to the Circuit Court of the State the defendant filed the following plea:

"And now comes the defendant, F. Bartemeyer, and for plea to the information in this cause says: He admits that at the time and place mentioned in said information he did sell and deliver to one Timothy Hickey one glass of intoxicating liquor called whisky, and did then and there receive pay in lawful money from said Hickey for the same. But defendant alleges that he committed no crime known to the law by the selling of the intoxicating liquor hereinbefore described to said Hickey, for the reason that he, the defendant, was the lawful owner, holder, and possessor, in the State of Iowa, of said property, to wit, said one glass of intoxicating liquor, sold as aforesaid to said Hickey, prior to the day on which the law was passed under which these proceedings are instituted and prosecuted, known as the act for the suppression of intemperance, and being chapter sixty-four of the revision of 1860; and that, prior to the passage of said act for the suppression of intemperance, he was a citizen of the United States and of the State of Iowa."

Without any evidence whatever the case was submitted to the court on this written plea, the parties waiving a jury, and a judgment was rendered that the defendant was guilty as charged, and he was sentenced to pay a fine of $20 and costs. A bill of exceptions was taken, and the case carried to the Supreme Court of Iowa, and that court affirmed the judgment of the Circuit Court and rendered a judgment for costs against the defendant, who now brought the case here on error.

There was sufficient evidence that the main ground relied on to reverse the judgment in the Supreme Court of Iowa

was, that the act of the Iowa legislature on which the prosecution was based, was in violation of the Constitution of the United States.

The opinion of that court was in the record, and, so far as the general idea was involved, that acts for suppressing the use of intoxicating drinks are opposed to that instrument, the court contented themselves with a reference to the previous decisions of that court, namely: *Our House*, *No.* 2, v. *The State*,* *Zumhof* v. *The State*,† *Santo* v. *The State*;‡ cases in which the negative of the idea is maintained. But, referring to the allegation in the plea that the defendant was the owner of the liquor sold before the passage of the act under which he was prosecuted, they said that the transcript failed to show that the admissions and averments of the plea were all the evidence in the case, and that other testimony may have shown that he did not so own and possess the liquor. [This, however, rather seemed, as the Reporter understood it, to be a mistake; at least the record,§ if he read it correctly, stated, as he has already said, that the plea was all the evidence given and received on the trial.]

The case was submitted on printed arguments some time ago, and when the *Slaughter-House Cases*, reported in 16th Wallace, 36, were argued; the position of the plaintiff in error in this case being, as it partly was in those, that the act of the State legislature, the maintenance of which by the courts below was the ground of the writ of error, was in violation of the fourteenth amendment to the Constitution, which runs thus:

"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.

"*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."

* 4 G. Greene, 171. † Ib. 526. ‡ 2 Iowa, 165.

§ See bottom of page 6 of the same.

The judgment was announced at the present term.

Mr. W. T. Dittoe, for the plaintiff in error; Mr. H. O'Connor, Attorney-General of Iowa, for the State, contra.

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

The case has been submitted to us on printed argument. That on the part of the plaintiff in error has taken a very wide range, and is largely composed of the arguments familiar to all, against the right of the States to regulate traffic in intoxicating liquors. So far as this argument deals with the mere question of regulating this traffic, or even its total prohibition, as it may have been affected by anything in the Federal Constitution prior to the recent amendments of that instrument, we do not propose to enter into a discussion. Up to that time it had been considered as falling within the police regulations of the States, left to their judgment, and subject to no other limitations than such as were imposed by the State constitution, or by the general principles supposed to limit all legislative power. It has never been seriously contended that such laws raised any question growing out of the Constitution of the United States.

But the case before us is supposed by counsel of the plaintiff in error to present a violation of the fourteenth amendment of the Constitution, on the ground that the act of the Iowa legislature is a violation of the privileges and immunities of citizens of the United States which that amendment declares shall not be abridged by the States; and that in his case it deprives him of his property without due process of law.

As regards both branches of this defence, it is to be observed that the statute of Iowa, which is complained of, was in existence long before the amendment of the Federal Constitution, which is thus invoked to render it invalid. Whatever were the privileges and immunities of Mr. Bartemeyer, as they stood before that amendment, under the Iowa statute, they have certainly not been abridged by any

action of the State legislature since that amendment became a part of the Constitution. And unless that amendment confers privileges and immunities which he did not previously possess, the argument fails. But the most liberal advocate of the rights conferred by that amendment have contended for nothing more than that the rights of the citizen previously existing, and dependent wholly on State laws for their recognition, are now placed under the protection of the Federal government, and are secured by the Federal Constitution. The weight of authority is overwhelming that no such immunity has heretofore existed as would prevent State legislatures from regulating and even *prohibiting* the traffic in intoxicating drinks, with a solitary exception. That exception is the case of a law operating so rigidly on property in existence at the time of its passage, absolutely prohibiting its sale, as to amount to depriving the owner of his property. A single case, that of *Wynehamer* v. *The People*,* has held that as to such property the statute would be void for that reason. But no case has held that such a law was void as violating the privileges or immunities of citizens of a State or of the United States. If, however, such a proposition is seriously urged, we think that the right to sell intoxicating liquors, so far as such a right exists, is not one of the rights growing out of citizenship of the United States, and in this regard the case falls within the principles laid down by this court in the *Slaughter-House Cases*.†

But if it were true, and it was fairly presented to us, that the defendant was the owner of the glass of intoxicating liquor which he sold to Hickey, at the time that the State of Iowa first imposed an absolute prohibition on the sale of such liquors, then we concede that two very grave questions would arise, namely: 1. Whether this would be a statute depriving him of his property without due process of law; and secondly, whether if it were so, it would be so far a violation of the fourteenth amendment in that regard as would call for judicial action by this court?

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* 3 Kernan, 486.

† 16 Wallace, 36.

Both of these questions, whenever they may be presented to us, are of an importance to require the most careful and serious consideration. They are not to be lightly treated, nor are we authorized to make any advances to meet them until we are required to do so by the duties of our position.

In the case before us, the Supreme Court of Iowa, whose judgment we are called on to review, did not consider it. They said that the record did not present it.

It is true the bill of exceptions, as it seems to us, does show that the defendant's plea was all the evidence given, but this does not remove the difficulty in our minds. The plea states that the defendant was the owner of the glass of liquor sold prior to the passage of the law under which the proceedings against him were instituted, being chapter sixty-four of the revision of 1860.

If this is to be treated as an allegation that the defendant was the owner of that glass of liquor prior to 1860, it is insufficient, because the revision of the laws of Iowa of 1860 was not an enactment of new laws, but a revision of those previously enacted; and there has been in existence in the State of Iowa, ever since the code of 1851, a law strictly prohibiting the sale of such liquors; the act in all essential particulars under which the defendant was prosecuted, amended in some immaterial points. If it is supposed that the averment is helped by the statement that he owned the liquor before the law was passed, the answer is that this is a mere conclusion of law. He should have stated when he became the owner of the liquor, or at least have fixed a date when he did own it, and leave the court to decide when the law took effect, and apply it to his case. But the plea itself is merely argumentative, and does not state the ownership as a fact, but says he is not guilty of any offence, because of such fact.

If it be said that this manner of looking at the case is narrow and technical, we answer that the record affords to us on its face the strongest reason to believe that it has been prepared from the beginning, for the purpose of obtaining the opinion of this court on important constitutional ques-

tions without the actual existence of the facts on which such questions can alone arise.

It is absurd to suppose that the plaintiff, an ordinary retailer of drinks, could have proved, if required, that he had owned that particular glass of whisky prior to the prohibitory liquor law of 1851.

The defendant, from his first appearance before the justice of the peace to his final argument in the Supreme Court, asserted in the record in various forms that the statute under which he was prosecuted was a violation of the Constitution of the United States. The act of the prosecuting attorney, under these circumstances, in going to trial without any replication or denial of the plea, which was intended manifestly to raise that question, but which carried on its face the strongest probability of its falsehood, satisfies us that a moot case was deliberately made up to raise the particular point when the *real* facts of the case would not have done so. As the Supreme Court of Iowa did not consider this question as raised by the record, and passed no opinion on it, we do not feel at liberty, under all the circumstances, to pass on it on this record.

The other errors assigned being found not to exist, the judgment of the Supreme Court of Iowa is affirmed.

Mr. Justice BRADLEY, concurring:

Whilst I concur in the conclusion to which the court has arrived in this case, I think it proper to state briefly and explicitly the grounds on which I distinguish it from the *Slaughter-House Cases*, which were argued at the same time. I prefer to do this in order that there may be no misapprehension of the views which I entertain in regard to the application of the fourteenth amendment to the Constitution.

This was a prosecution for selling intoxicating liquor, in Iowa, contrary to a law of that State which prohibits the sale of such liquor. The defendant pleaded that he was the lawful owner of the liquor in Iowa and a citizen of the United States prior to the day on which the law was passed, being chapter sixty-four of the revision of 1860. Judgment

was given against the defendant on his plea. The truth is, that the law in question was originally passed in 1851 and was incorporated into the revision of 1860, in the chapter referred to in the plea. Whether the plea meant to assert that the defendant owned the liquor prior to the passage of the original law, or only prior to its re-enactment in the revision, is doubtful, and, being doubtful, it must be interpreted most strongly against the pleader. It amounts, therefore, only to an allegation that the defendant became owner of the liquor at a time when it was unlawful to sell it in Iowa. The law, therefore, was not in this case an invasion of property existing at the date of its passage, and the question of depriving a person of property without due process of law does not arise. No one has ever doubted that a legislature may prohibit the vending of articles deemed injurious to the safety of society, provided it does not interfere with vested rights of property. When such rights stand in the way of the public good they can be removed by awarding compensation to the owner. When they are not in question, the claim of a right to sell a prohibited article can never be deemed one of the privileges and immunities of the citizen. It is *toto cœlo* different from the right not to be deprived of property without due process of law, or the right to pursue such lawful avocation as a man chooses to adopt, unrestricted by tyrannical and corrupt monopolies. By that portion of the fourteenth amendment by which no State may make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, or take life, liberty, or property, without due process of law, it has now become the fundamental law of this country that life, liberty, and property (which include "the pursuit of happiness") are sacred rights, which the Constitution of the United States guarantees to its humblest citizen against oppressive legislation, whether national or local, so that he cannot be deprived of them without due process of law. The monopoly created by the legislature of Louisiana, which was under consideration in the *Slaughter-House Cases*, was, in my judgment, legislation of this sort

and obnoxious to this objection. But police regulations, intended for the preservation of the public health and the public order, are of an entirely different character. So much of the Louisiana law as partook of this character was never objected to. It was the unconscionable monopoly, of which the police regulation was a mere pretext, that was deemed by the dissenting members of the court an invasion of the right of the citizen to pursue his lawful calling. A claim of right to pursue an unlawful calling stands on very different grounds, occupying the same platform as does a claim of right to disregard license laws and to usurp public franchises. It is greatly to be regretted, as it seems to me, that this distinction was lost sight of (as I think it was) in the decision of the court referred to.

I am authorized to say that Justices SWAYNE and FIELD concur in this opinion.

Mr. Justice FIELD, concurring:

I concur in the views expressed by Mr. Justice BRADLEY, but will add a few observations.

I accept the statement made in the opinion of the court, that the act of Iowa of 1860, to which the plea of the defendant refers, was only a revision of the act of 1851, and agree that, for this reason the averment of the ownership of the liquor sold prior to the passage of the act of 1860 did not answer the charge for which the defendant was prosecuted. I have no doubt of the power of the State to regulate the sale of intoxicating liquors when such regulation does not amount to the destruction of the right of property in them. The right of property in an article involves the power to sell and dispose of such article as well as to use and enjoy it. Any act which declares that the owner shall neither sell it nor dispose of it, nor use and enjoy it, confiscates it, depriving him of his property without due process of law. Against such arbitrary legislation by any State the fourteenth amendment affords protection. But the prohibition of sale in any way, or for any use, is quite a different

thing from a regulation of the sale or use so as to protect the health and morals of the community. All property, even the most harmless in its nature, is equally subject to the power of the State in this respect with the most noxious.

No one has ever pretended, that I am aware of, that the fourteenth amendment interferes in any respect with the police power of the State. Certainly no one who desires to give to that amendment its legitimate operation has ever asserted for it any such effect. It was not adopted for any such purpose. The judges who dissented from the opinion of the majority of the court in the *Slaughter-House Cases* never contended for any such position. But, on the contrary, they recognized the power of the State in its fullest extent, observing that it embraced all regulations affecting the health, good order, morals, peace, and safety of society, that all sorts of restrictions and burdens were imposed under it, and that when these were not in conflict with any constitutional prohibition or fundamental principles, they could not be successfully assailed in a judicial tribunal. But they said that under the pretence of prescribing a police regulation the State could not be permitted to encroach upon any of the just rights of the citizen, which the Constitution intended to guard against abridgment; and because, in their opinion, the act of Louisiana, then under consideration, went far beyond the province of a police regulation, and created an oppressive and odious monopoly, thus directly impairing the common rights of the citizens of the State, they dissented from the judgment of the court.

They could not then, and do not now, see anything in the act which fell under the denomination of a police or sanitary regulation, except the provisions requiring the landing and slaughtering of animals below the city of New Orleans and the inspection of the animals before they were slaughtered; and of these provisions no complaint was made. All else was a mere grant of special and exclusive privileges. And it was incomprehensible to them then, and it is incomprehensible to them now, how, in a district of country nearly as large as the State of Rhode Island, and embracing a pop-

ulation of over two hundred thousand souls, any conditions of health or morals should require that the preparation of animal food, a prime necessity of life, should be intrusted to a single corporation for twenty-five years; or how in all that vast district, embracing eleven hundred and fifty-four square miles, there could be only one locality and one building in which animals could with safety to the public health be sheltered and slaughtered. And with all the light shed upon the subject by the elaborate opinion of the majority, they do not yet understand that it belongs to the police power of any State to require the owner of animals to give to the butcher a portion of each animal slaughtered. If the State can say the owner shall give the horns and the hoofs, it may say he shall give the hide and the tallow, or any part of the animal. It may say that the butcher shall retain the four quarters and return to the owner only the head and the feet. The owner may require the very portions he is compelled to surrender for his own business—the horns, for example, for the manufacture of combs, and the hoofs for the manufacture of glue, and other portions for equally useful purposes.

It was because the act of Louisiana transcended the limits of police regulation, and asserted a power in the State to farm out the ordinary avocations of life, that dissent was made to the judgment of the court sustaining the validity of the act.

It was believed that the fourteenth amendment had taken away the power of the State to parcel out to favored citizens the ordinary trades and callings of life, to give to A. the sole right to bake bread; to B. the sole right to make hats; to C. the sole right to sow grain or plough the fields; and thus at discretion, to grant to some the means of livelihood, and withhold it from others. It was supposed that there were no privileges or immunities of citizens more sacred than those which are involved in the right to "the pursuit of happiness," which is usually classed with life and liberty; and that in the pursuit of happiness, since that amendment became part of the fundamental law, every one was free to

follow any lawful employment without other restraint than such as equally affects all other persons.

Before this amendment and the thirteenth amendment were adopted, the States had supreme authority over all these matters, and the National government, except in a few particulars, could afford no protection to the individual against arbitrary and oppressive legislation. After the civil war had closed, the same authority was asserted, and, in the States recently in insurrection, was exercised to the oppression of the freedmen; and towards citizens of the North seeking residence there, or citizens resident there who had maintained their loyalty during the war for nationality, a feeling of jealousy and dislike existed which could not fail soon to find expression in discriminating and hostile legislation. It was to prevent the possibility of such legislation in future, and its enforcement where already adopted, that the fourteenth amendment was directed. It grew out of the feeling that a union which had been maintained by such costly sacrifices was, after all, worthless if a citizen could not be protected in all his fundamental rights everywhere—North and South, East and West—throughout the limits of the Republic. The amendment was not, as held in the opinion of the majority, primarily intended to confer citizenship on the negro race. It had a much broader purpose; it was intended to justify legislation, extending the protection of the National government over the common rights of *all* citizens of the United States, and thus obviate objections to the legislation adopted for the protection of the emancipated race. It was intended to make it possible for *all* persons, which necessarily included those of every race and color, to live in peace and security wherever the jurisdiction of the nation reached. It, therefore, recognized, if it did not create, a National citizenship, and made all persons citizens except those who preferred to remain under the protection of a foreign government; and declared that their privileges and immunities, which embrace the fundamental rights belonging to citizens of all free governments, should not be abridged by any State. This National citi-

zenship is primary, and not secondary. It clothes its possessor, or would do so if not shorn of its efficiency by construction, with the right, when his privileges and immunities are invaded by partial and discriminating legislation, to appeal from his State to his Nation, and gives him the assurance that, for his protection, he can invoke the whole power of the government.

This case was considered by the court in connection with the *Slaughter-House Cases*, although its decision has been so long delayed. I have felt, therefore, called upon to point out the distinction between this case and those cases, and as there has been some apparent misapprehension of the views of the dissenting judges, to restate the grounds of their dissent.

I concur in the judgment in this case.

JUDGMENT AFFIRMED.

SYKES *v.* CHADWICK.

A woman's right of dower being a valuable right which she cannot be compelled to resign, and which the law protects very carefully from her husband's control, her release of it is a good consideration for a promise to pay money to her separate use. Accordingly, where a husband and another, owning a piece of land in the District of Columbia, which they wanted to sell, applied to the wife (all parties being residents of the District) to release her dower, which she did in consideration of the husband and the other executing to her directly a joint promissory note for a sum of money; *Held:*

1st. That in virtue of the act of 10th April, 1869 (14 Stat. at Large, 45), regulating the rights of property of married women in the District of Columbia, by which it is enacted, "that the right of a married woman to any property belonging to her at the time of marriage, or acquired during marriage, in any other way than by gift or conveyance from her husband, shall be as absolute as if she were a feme sole, and not subject to the disposal of her husband or liable for his debts; and that she may convey or bequeath the same as if she were unmarried; also, that any married woman may contract and sue and be sued in her own name in all matters having relation to her sole and separate property in the same manner as if she were unmarried." And in virtue of the further act, to amend the law of the District of Columbia in rela-

tion to judicial proceedings therein, of February 22d, 1867 (14 Id. 405), by the twentieth section of which it is enacted "that where money is payable by two or more persons jointly or severally, one action may be sustained and judgment recovered against all or any of said parties by whom the money is payable, at the option of the plaintiff," she could sue the joint obligor of her husband at law.

2d. That though by the laws of the District as construed, the wife might, in fact, under the special circumstances of the case, really have had no right of dower, still if her release was deemed requisite to secure the sale of the property, such release was a good consideration for the promise to pay her money.

ERROR to the Supreme Court of the District of Columbia, the case being thus:

James Sykes and H. A. Chadwick (the latter a married man, his wife being Eleanor Chadwick), owning a piece of real estate in the city of Washington, and wishing to borrow money on it, conveyed it by deed of trust—that is to say, mortgaged it—to Hyde to secure a sum which he lent them; Mrs. Chadwick joining in the mortgage, and her acknowledgment of the same being taken separately and apart from her husband, in the way prescribed by the laws of the District in order to pass the estate of a *feme covert*.

Desiring afterwards to sell the same property (the mortgage being still unpaid), Sykes and Chadwick requested Mrs. Chadwick to join them in a deed to the purchaser for the purpose of releasing her right of dower.

She did so; and, in consideration therefor, they gave her a note in this form:

$5000.] WASHINGTON, October 15th, 1869.

Six months after date, we promise to pay to the order Eleanor Chadwick five thousand dollars, value received.

JAMES SYKES,
H. A. CHADWICK.

At the time when this note was thus given, there prevailed in the District an act of Congress, passed April 10th, 1869,* in these words:

* 16 Stat. at Large, 45.

Argument against the wife's right.

An Act regulating the Rights of Property of Married Women in the District of Columbia.

SEC. 1. The right of any married woman to any property, personal or real, belonging to her at the time of her marriage, or acquired during marriage in any other way than by gift or conveyance from her husband, shall be as absolute as if she were *feme sole*, and shall not be subject to the disposal of her husband, nor liable for his debts; but such married woman may convey, devise, and bequeath the same, or any interest therein, in the same manner and with like effect as if she were unmarried.

SEC. 2. Any married woman may contract and sue and be sued, in her own name, in all matters having relation to her sole and separate property, in the same manner as if she were unmarried; but neither her husband, nor his property, shall be bound by any such contract, nor liable for any recovery against her in any such suit; but judgment may be enforced by execution against her sole and separate property, as if she were sole.

Also another act, of February 22d, 1867,* in these words:

An Act to amend the law of the District of Columbia in relation to Judicial Proceedings therein.

SEC. 20. Where money is payable by two or more persons jointly or severally, as by joint obligors, covenantors, makers, drawers, or indorsers, one action may be sustained and judgment recovered against all *or any of said parties, by whom the money is payable, at the option of the plaintiff.*

In this state of facts and of statutes, the note to Mrs. Chadwick not being paid, she brought suit upon it against Sykes alone, at law, in the court below, a court having jurisdiction both in equity and at common law.

The court below sustained the suit; and from its judgment in the matter this writ of error was taken.

Messrs. W. F. Mattingly and R. T. Merrick, for the plaintiff in error:

1st. *There was no consideration for the note.* The deed of

* 14 Stat. at Large, 405.

trust to Hyde, executed previously to the deed of sale (or mortgage), in connection with which the note was given, passed Mrs. Chadwick's right of dower, and in the District, where the ancient rule of the English law, inherited by the District from the colonial law of Maryland, prevails, a widow has no dower in an equity of redemption.* It will not do to allege that her mere execution of the deed was a sufficient consideration for the note.

2d. Even if she had a right of dower in the real estate, it was not her sole and separate property within the meaning of the law. The right of dower is not an estate in lands.† If the contrary view is held to be law, then every married woman, whose husband happens to own real estate, has a sole and separate property, with reference to which she may contract.

3d. The note was a joint note, and being void as to her husband, one of the makers, the plaintiff was not entitled to recover.‡

4th. This case, in no view of it, comes within the letter or spirit of the acts of Congress. Mrs. Chadwick has no separate property, and therefore could not make any contract as to it. The note itself could not be her separate estate, under the law, for the note is merely the evidence of the contract, which she was incapable of making. Moreover, it is void, as already said.

Messrs. A. G. Riddle, C. M. Hawley, and F. Miller, contra.

Mr. Justice BRADLEY delivered the opinion of the court.

The question is whether the note on which this suit is brought against Sykes is valid, as against the defendant, so as to sustain the present action. In aid of the plaintiff's case certain acts of Congress relating to the District of Columbia have been referred to. First, an act regulating the

* Stelle *v.* Carroll, 12 Peters, 201.

† Jackson *v.* Vanderheyden, 17 Johnson, 167.

‡ Edwards *v.* Stevens et al., 3 Allen, 315.

rights of property of married women in the District of Columbia, passed April 10th, 1869, by which it is enacted, in substance, that the right of a married woman to any property belonging to her at the time of marriage, or acquired during marriage, in any other way than by gift or conveyance from her husband, shall be as absolute as if she were a feme sole, and not subject to the disposal of her husband or liable for his debts; and she may convey or bequeath the same as if she were unmarried. Also, that any married woman may contract and sue and be sued in her own name in all matters having relation to her sole and separate property in the same manner as if she were unmarried. Secondly, an act to amend the law of the District of Columbia, in relation to judicial proceedings therein, passed February 22d, 1867, by the twentieth section of which it is enacted that where money is payable by two or more persons jointly or severally, as by joint obligors, covenantors, makers, drawers, or indorsers, one action may be sustained and judgment recovered against all or any of said parties by whom the money is payable, at the option of the plaintiff.

With regard to the first-mentioned statute, relating to a married woman's property possessed at the time of marriage or acquired afterwards, we think it clear that it does not refer to her contingent interest in her husband's estate, but to property owned by or coming to her independent of her husband—property which, but for the statute, he would acquire an interest in by right of marriage. The sole object of the statute was to prevent his acquiring such interest in her property. Her right of dower in his property stands as it did before the statute. She cannot dispose of it independently of her husband; nor can she, without his consent, separate it from his estate in the land.

Still her right of dower is a valuable interest, which she cannot be compelled to resign, and which the law very carefully protects from the control of her husband. When she does part with it an officer must examine her apart from her husband, to ascertain whether she does it freely and voluntarily. And whilst this interest is a valuable right of the

wife, it is a corresponding incumbrance upon the land to which it attaches. By the aid of modern science it is capable of a definite valuation. Hence it is easy to ascertain whether an undue valuation is placed upon it. In this case no suggestion of that kind is made. For all that appears the transaction was made in good faith. At all events the parties to it cannot allege the contrary.

The wife's interest being valuable, and one that may be disposed of by her with her husband's concurrence, the question arises whether her release of her right of dower is a good consideration for a separate provision for her benefit, or of a promise to pay money to her separate use. And of this we have no doubt. The question would hardly have been raised had the arrangement been made with the purchaser instead of the vendors of the land, one of whom was the plaintiff's husband. But arrangements of this kind made with the husband are sustained in equity by very high authority. In *Garlick* v. *Strong*,* where a husband who was about to sell his estate agreed with his wife that if she would release her dower she should share a portion of the purchase-money to her separate use, it was held by Chancellor Walworth that the agreement was valid, and that a note given by the purchaser to a trustee for the wife for the amount allowed to her in the arrangement became her separate property, and though the money due on the note was paid and invested by the trustee in a bond in the wife's name, which bond was afterwards disposed of by the husband without her consent, the fund was followed into the hands of the party receiving it with notice, and decreed to belong to the wife. The chancellor said: "It is well settled that a post-nuptial agreement between the husband and wife, by which property is set apart to her separate use, will be sustained in equity though void at law. The relinquishment of the dower in this case was a sufficient consideration to support this agreement on the part of the husband. Although as against creditors, whose debts existed at the time, post-

* 3 Paige, 440.

nuptial agreements will not be permitted to stand beyond the value of the consideration, that principle cannot be applied to this case, which appears to be an attempt on the part of these defendants to defraud the wife of the moneys to which she is equitably entitled under this agreement." These views of the chancellor seem to us to be founded in justice and good sense. The same principle was decided in Virginia in the case of *Harvey* v. *Alexander*,* and in *Quarles* v. *Lacy*.† In each of these cases property was conveyed to the separate use of the wife, by the procurement of her husband, in consideration of releases of dower made by her in his lands. It was held in the latter case that such a transaction was good as against creditors to the extent of the value of the dower released. Indeed, as far back as the time of Chief Justice Hale, it was held that if a wife join in a fine so as to relinquish her dower, it will be a good consideration for a settlement.‡

We may therefore regard the transaction under consideration as valid and binding in equity both on the defendant and the husband of the plaintiff. The note given to the plaintiff was the fruit of this transaction. The transaction itself was a good and sufficient consideration for the note. The latter is her separate property, as much so as an equal amount of money would have been, if it had been placed by the vendors to her credit in bank. She having performed her part of the agreement, there became due to her so much money for her separate use, and as her separate property. The note is no part of the contract by which her dower was released. It is a mere security given to her for the money growing due to her out of that contract. Her husband and his copartner became indebted to her, and gave her this note as her separate property. Such a note must be just as valid as if she had lent them the amount out of her separate estate, and taken their note as security for the payment of

* 1 Randolph, 219. † 4 Munford, 251.

‡ Lavender *v.* Blackstone, 2 Levinz, 147; Atherley, 161; and see 2 Kent, 166; 2 Scribner on Dower, p. 6, § 6; Bank of the United States *v.* Lee, 13 Peters, 110; Niemcewitz *v.* Gahn, 3 Paige, 614.

it. The transaction is virtually the same as if they had paid her the money, and she had lent it to them on the note in question.

The case may be shortly stated thus:

By the act of 1869 the plaintiff, as a married woman, acquired the capacity at law to receive property to her separate use, and subject to her separate and exclusive control as if she were unmarried, provided it does not come to her by gift or conveyance from her husband—by which is undoubtedly meant voluntary gift or conveyance. Having this capacity, she did receive and acquire, for a good and valid consideration moving from herself, the promissory note in question.

This note, then, being her separate property, not acquired by gift or conveyance from her husband in the sense in which the statute uses those terms, she is entitled to the benefit of the statute in reference to the exclusive possession and enjoyment of the note, and to the exclusive right of suing upon it. As to it, she is relieved from the incapacity which the common law imposed upon her, and is as if she were unmarried. The technical reasons, therefore, which, at the common law, rendered void a note or other obligation made by the husband to the wife, no longer exist in this case. And if there are still any such reasons which would compel the plaintiff in enforcing the note as against her husband to seek the aid of a court of equity, there are none to prevent her from suing the defendant upon it in a court of law. The statute of 1867, above referred to, enables the holder of a joint obligation to sue either or any of the parties to it without suing the others. The defendant, therefore, has no legal ground of defence to the action. The note is founded upon a good and valid consideration. Whether a right to sue the other maker of it exists or not is of no consequence to the defendant. As to him, there can be no doubt that the plaintiff is invested with all the capacities and rights which are necessary to enable her to maintain an action at law on the note.

It is contended, however, that prior to the sale of the

property and the giving of the note the plaintiff had joined the defendant and her husband in a deed of trust for the same property, given to secure the payment of a loan made by them, and that by this outstanding deed of trust her right of dower was extinguished.

If it be true, as contended for by counsel, and as the cases seem to show, that in this District the antiquated rules on this subject still prevail—so as to bar a widow of all dower in an equity of redemption—if, instead of being a mere security for money, a mortgage or deed of trust in nature of a mortgage, transfers the legal estate so as to deprive the mortgagor of the ownership of his property, yet the plaintiff would have been reinvested with her right to demand dower in the land whenever the purposes of the trust should be accomplished, and no purchaser would deem it safe to take a conveyance of the equity of redemption from the mortgagors without a release of her contingent right. And whatever technical obstacles the trust-deed may have raised against her right to recover dower at law, in case of the death of her husband, no one desiring to purchase the property would be willing to incur the hazard of those obstacles being removed. At all events, the defendant when he was endeavoring to negotiate the sale of his property deemed it of sufficient importance to give the note in question in consideration of the plaintiff joining in the deed, and releasing any contingent right she might have. This very act of hers may have been necessary, and we have a right to infer that it was deemed important, to the closing up of the transaction and securing the sale of the property. If any release is deemed requisite to confirm the title of lands with which one has been connected, though by a proper construction of the law he has no interest in them whatever, still such release will be a good consideration for a promise or for the payment of money.

JUDGMENT AFFIRMED.

Mr. Justice MILLER, dissenting:

This is a common-law action brought on a promissory

note on the law side of a court which possesses and exercises in separate forums both common law and equity jurisdiction.

The District of Columbia, for which that court sits, and whose laws it administers, has preserved the principles of the common law less affected by statutes than any part of America, and, perhaps, less than England herself.

That a married woman could make no express contract, except as she joined her husband with her, by that law is, I think, too clear for argument. It is, therefore, a waste of learning to inquire under what circumstances she could contract with her husband. The plaintiff in this case could make no lawful contract with Sykes unless under very special circumstances.

The act of Congress relied on, and which is deemed necessary to the validity of the note, so far removed this general disability as to enable her to make contracts in respect to her separate property, and I agree to the definition of the court as to what is separate property within the meaning of that act. Her dower interest in her husband's land is not separate property. This is conceded.

On the other hand, it is undoubtedly true that a release of dower is a good consideration for a promise, whether in writing or otherwise, and the promise would be valid if made to a person capable of contracting. But this leaves untouched the question of plaintiff's capacity to make the contract.

The release of dower and the agreement to pay a certain sum for it was one contract. The execution of the deed of release and of the notes were each the consideration for the other. I cannot see the force of the dialectics by which, after the contract is made, the note given as evidence of one part of it is called the separate property of the wife, concerning which the contract was made. That is to say, this contract was made in reference to the paper, and it constitutes the material part of the note, and, this being her separate property, enables her to make the contract by which Sykes became her debtor.

But suppose no note had been taken, the promise would

have been just as good as it is with it. Where would then have been her separate property, about which she was authorized to contract?

It is clear to me that, to enable a married woman to contract, she must have and own separate property at the time of making the contract, and that to make that contract valid it must relate to that property. If the proposition on which this case is rested be sound, the wife need have no separate property to enable her to contract; but she can make any agreement by which she is to receive something, put it in writing, call the paper which evidences the agreement her separate property, and the thing is done.

As to the invasions which courts of equity have made on the rigid and unjust rules of the common law on this subject, they are wise and beneficent, and they were made *because* the common law courts afford no remedy, and if this were a suit in equity by Mrs. Chadwick to recover the value of her dower after she had legally conveyed it, I would gladly enforce her right. But that is not the case, and I do not think the courts have an unlimited right to overturn the clearest principles of the common law because legislation has lagged behind the progress of the age in the jurisprudence which governs the rights of married women.

I regret to have to dissent, but I think the precedent of making laws in this manner too pernicious to be acquiesced in by my silence.

BATESVILLE INSTITUTE *v.* KAUFFMAN.

1. Where the assignees of a claim on a third party have parted completely with their interest in it and, by a transfer, vested the entire title in others, they are not necessary parties in an equity proceeding by these others to enforce it.
2. An assignment of a debt carries with it an assignment of a judgment or mortgage by which it is secured.
3. Where a trustee is dead the trust being still alive and unexecuted, a court of equity will carry it out through any other appropriate person in whom

the control of the property may be; or if necessary, through its own officers and agents without the intervention of a new trustee.

4. The civil war was flagrant in Arkansas from April, 1861, to April, 1866; and during this time the operation of the statute which limited the duration of liens to three years was suspended.

APPEAL from the Circuit Court for the Eastern District of Arkansas; the case being thus:

Womach and Welsh, builders, having a mechanics' lien against an edifice and the grounds on which it stood at Batesville, Arkansas, owned by a corporation of that State, known as the Batesville Institute, got judgment on the lien on the 15th of January, 1861. By the laws of Arkansas the liens of judgments continue three years from the day that they are rendered. Having thus got their judgment, and being indebted by promissory notes to a firm known as Hirsch & Adler, they assigned their lien by deed to one Gibbs, in trust, authorizing him to make the lien effectual in any and all ways, to pay Hirsch & Adler the notes out of its proceeds, and to return any surplus. Hirsch & Adler, in turn, assigned the notes to Kauffman & Co., of Louisiana, and by indorsement on it, in their firm name, all their "rights and interests" in the deed of trust.

In the spring of 1861 the rebellion broke out in Arkansas, and continued till the spring of 1866.

In this state of things, and the Batesville Institute having conveyed the legal title of the ground on which the building was, to one Cox, Kauffman & Co., setting forth in the same,

"That during the existence of the recent rebellion it was impossible, by reason of the resistance to the laws of the United States, to have said mechanics' lien foreclosed, all judicial proceedings in the courts of the United States being interrupted and suspended during a period of several years within the State of Arkansas; and also that before the close of the said rebellion the trustee named in the said deed of trust departed this life, and that there was no one left to execute the same,"—

now, on the 5th of March, 1868, filed their bill in the court below against the Batesville Institute and Cox, to enforce

payment of the lien against the edifice and lot, and in default of payment have them sold.

The defendants demurred, assigning as reasons:

1st and 2d. That the complainants showed no title which authorized a suit by them; the point of the objection being that the transfer of the *notes* of Hirsch & Adler did not pass the title to the judgment obtained on the mechanics' lien; and it being insisted that Hirsch & Adler were necessary parties to the suit.

3d and 4th. That Gibbs, the trustee, was dead, and no successor appointed in his place.

5th. That the lien of the judgment had been lost by lapse of time; the judgment having been recovered in March, 1861, and the present suit brought in March, 1868; an interval of seven years.

Womach, one of the defendants, made a further defence that the debt of the complainants had been paid by the rents and profits of the bulding received by them for several years past, or which they should have received.

The court below overruled the demurrer, and referred the matter of defence, set up, as just mentioned by Womach, to a master to take testimony and to report upon the subject. He took much testimony, and made a report, fixing the amount due to the plaintiffs at $14,410, for which sum the lien was ordered to stand, with interest at *ten* per cent., and the property decreed to be sold; costs to be paid by the defendants. From this action of the court below the present appeal was taken.

Mr. A. H. Garland, for the appellants; Mr. W. M. Rose, contra.

Mr. Justice HUNT delivered the opinion of the court.

The demurrants object, first, that the complainants show no title which authorizes a suit by them. The point of this objection is that the transfer of the notes of Hirsch & Adler did not pass the title to the judgment on the mechanics' lien obtained for the security of the notes. It is further in-

sisted, under this head, that Hirsch & Adler were necessary parties to the suit.

Neither of these objections is sound. Hirsch & Adler had parted with their interest in the notes and in the judgment, and by their assignment had vested the entire title thereto in their assignees. The sole right of recovery is in the latter parties; and, if equities exist between them and their assignors, they are to be settled between them at their convenience and in their own manner. These defendants have no interest in that part of the transaction.*

Again, no principle is better settled than this, that the assignment of a debt carries with it an assignment of a judgment or mortgage by which it is secured. If a part only of the debt is assigned, a *pro tanto* portion of the security follows it.†

The third and fourth points of the demurrer rest upon the objection that Gibbs, the trustee, being dead, and no successor having been appointed, the trust cannot be enforced.

That the court have power to appoint a new trustee, and to compel the performance of the trust by him, is quite certain. It is, however, equally within the power of a court of equity to decree and enforce the execution of the trust through its own officers and agents, without the intervention of a new trustee.‡ If by the deed to Cox the legal title to the property is now in him or his representatives, a perfect execution of the trust may be effected through a decree that they shall convey the property to the parties entitled to it; or, the property may be decreed to be sold, and payment made from the proceeds of sale.

The remaining point of the demurrer alleges that the lien of the judgment has been lost by lapse of time; that the

* Allen *v.* Brown, 44 New York, 228; Danklessen *v.* Braynard, 3 Daly, 183.

† Pattison *v.* Hull, 9 Cowan, 747; Jackson *v.* Blodget, 5 Id. 202; Green *v.* Hart, 1 Johnson, 580; Martin ex dem. Weston *v.* Mowlin, 2 Burrow, 979; Prescott *v.* Hull, 17 Johnson, 284.

‡ Story, Equity Jurisprudence, §§ 976, 1060, 1061.

judgment was recovered more than three years before the filing of the bill, and that no good reason appears for not enforcing the same within the three years. The bill alleges, "that during the existence of the recent rebellion it was impossible, by reason of the resistance to the laws of the United States, to have said mechanics' lien foreclosed, all judicial proceedings in the courts of the United States being interrupted and suspended during a period of several years within the State of Arkansas." The judgment was recovered in March, 1861. The present suit was commenced in March, 1868. If from this period of seven years we except the time when civil war was flagrant in Arkansas, to wit, from April, 1861, until April, 1866, there remain but two years in which the statute of limitations was in force against this judgment. These are the dates at which the war was officially recognized, and at which it was by proclamation officially declared to be at an end in Arkansas.* It has been repeatedly held in this court that the statute of limitations was suspended in the rebellious States during the existence of the war.

We perceive no occasion to find fault with the principles on which the sum of $14,410 was fixed by the master as the amount due the complainants, or with the rate of interest given by the court below. No authority is cited to show that this is a greater rate of interest than may be ordered by the courts of Arkansas in such cases.

The defendants resisted the complainants' claim, and, as the court held, unjustly. It was competent to the court to decree that the defendants should personally pay the costs of such resistance.

JUDGMENT AFFIRMED.

* See Brown *v.* Hiatts, 15 Wallace, 182; The Protector, 12 Id. 700.

DAY *v.* MICOU.

1. Under the act of July 17th, 1862, known as the Confiscation Act, and the Joint Resolution, of the same date, explanatory of it, only the life estate of the person for whose offence the land has been seized, is subject to condemnation and sale. The fact that the decree may have condemned the fee does not alter the case.
2. When such person has, previously to his offence, mortgaged the land to a *bona fide* mortgagee, the mortgage is not divested. His estate and property in the land being but the land subject to the mortgage, any sale made in pursuance of the act passes the life estate subject to the charge.

ERROR to the Supreme Court of the State of Louisiana.

An act of Congress, commonly called the Confiscation Act, passed July 17th, 1862,* during the rebellion, and entitled "An act to suppress insurrection, to *punish treason* and rebellion, to seize and confiscate the property of rebels, and *for other purposes*," after providing in its *first* section that *treason shall be punished with death*, and in its *second* that persons inciting, setting on foot, assisting, or engaging in rebellion, &c., shall be punished with fine and imprisonment; in the *third* that every person guilty of either of the offences described in the act shall be incapable to hold any office under the United States; with a limitation in the fourth section that the act should not affect those guilty before its date, &c., enacted further:

"SEC. 5. That to insure the speedy termination of the present rebellion, it shall be the duty of the President to cause the seizure of all the estate and property of the persons hereinafter named, and to apply and use the same and the proceeds thereof for the support of the army of the United States."

The section proceeded to name six classes of persons whose property should be liable to seizure: officers of the army and navy of the rebels in arms against the government, or officers of the so-called "Confederate" States, and among them any person thereafter acting as a "Cabinet officer" of

* 12 Stat. at Large, 589.

such States, or agents of the same, or officers or agents of some one of the rebel States, or persons who gave aid and comfort to the rebellion.

The sixth section was thus:

"If any person within any State or Territory of the United States, other than those named as aforesaid, being engaged in armed rebellion against the government of the United States, or aiding or abetting such rebellion, shall not within sixty days, &c., cease to aid, countenance, and abet such rebellion, all the estate and property, moneys, stocks, and credits of *such* person shall be liable to seizure as aforesaid; and it shall be the duty of the President to seize and use them as aforesaid or the proceeds thereof."

The seventh section provided:

"That to secure the condemnation of *any such property* after the same shall have been seized, so that it may be made available for the purpose aforesaid, proceedings *in rem* shall be instituted in the name of the United States in any District Court thereof or in any Territorial Court, or in any United States District Court within which the property *above described* or any part thereof may be found, ... which proceedings shall conform as nearly as may be to proceedings in admiralty and revenue cases; and if said property . . . . shall be found to have belonged to a person engaged in rebellion, or who has given aid or comfort thereto, the same shall be condemned *as enemies' property*, and become the property of the United States, and may be disposed of as the court shall decree."

By a Joint Resolution, explanatory of this act, passed on the same day with it, it was resolved by Congress that no punishment or proceedings under the act should be "so construed as to work a forfeiture of the real estate of the offender beyond his natural life."*

This statute, thus explained, being in force, a libel of information was filed, in January, 1865, in the District Court for the Eastern District of Louisiana, against "two squares of ground [described], property of J. P. Benjamin," which

* See Forrest *v.* Bigelow, 9 Wallace, 341.

property the said Benjamin had, in 1858, by proper instrument duly inscribed, mortgaged to one Madame Micou. In the libel of information Mr. Benjamin was charged to have been owner of the property at the date of the act just named, and the ground on which a forfeiture was claimed was that subsequently to the passage of the act he had acted as a Cabinet officer of the so-called Confederate States. An order of publication was made, by which all persons interested in the property were required to appear on the 13th of February, 1865, to answer and to show cause "why said property and real estate, *and the right, title, and interest therein of the said J. P. Benjamin*, should not be condemned and sold according to law." There was no opposition, and on the 18th day of March, 1865, the judgment of condemnation was entered; the decretal order describing the property as belonging to J. P. Benjamin. The property was sold May 15th, 1865, and a deed was executed to the purchaser, Madison Day.

In this state of things Madame Micou or her representatives filed, in 1868, a bill of foreclosure of the mortgage against Benjamin as mortgagor and Day as a "third possessor" or *terre tenant*. Benjamin made no opposition, but Day set up a claim as owner of the property in fee simple, discharged of all liens; the foundation of such his claim being the already mentioned proceeding *in rem* in the District Court under the Confiscation Act.

The court in which the bill was filed held that under this act no estate of any kind in fee simple passed, but at best the life estate of Mr. Benjamin, and that this was subject to the mortgage of Madame Micou, regularly created and in existence before the rebellion began. The decree founded on this view being affirmed in the Supreme Court of the State, the case was now brought here.

Mr. Madison Day, appellant, propriâ personâ:

The court below erred, among other ways,

1st. In its view that no estate but the life estate of Mr. Benjamin passed, and

Argument for the appellant.

2d. In its view that the mortgage of Madame Micou was not discharged.

1. The Confiscation Act, as it is called, is an exercise of both sovereign authority and the belligerent right of confiscating enemy property on land during a state of war.

The first four sections of the statute relate to the punishment of treason and rebellion. This is an exercise of sovereign authority, and constitutes alone the criminal portion of the act. The other provisions of the act providing for the seizure and condemnation of the property seized, "*as enemies' property*," is but an exercise of the belligerent right of confiscating enemy property in time of war.

These different provisions of the act are, therefore, to be taken and regarded as distinct from each other, as if they were embodied in two separate acts. The one relates to citizens and proceedings in time of peace; the other relates to enemies and proceedings in time of war. And they also differ from each other as to the mode of procedure and the rules of law which apply to and govern the same. A resolution or provision of law, therefore, which only embraces the one cannot be said to extend to and include the other. And this being so, it follows, as a matter of course, that the joint resolution which says "nor shall any punishment or proceedings under the act be so construed as to work a forfeiture of the real estate of the offender beyond his natural life," only applies to punishments and proceedings against *offenders* under the criminal portion of the act, and does not extend to or limit the confiscation of property under the other provisions of the statute, *as enemies' property*, to a mere life estate.

2. As it is provided in the Confiscation Act that the proceedings were to be *in rem*, and that if the property seized was found to belong to a person named in the act, the same was to be condemned as *enemies' property*, it follows as a matter of course, that the operation and effect of the decree of condemnation and sale must be the same as that which attaches to other decrees and sales in a proceeding *in rem*. Now what is the known and established operation and effect of a decree and sale *in rem?*

In the *Propeller Commerce*,* the court says:

"Process *in rem* is founded on a right *in the thing*, and the object of the process is to obtain *the thing itself*, or a satisfaction out of it, for some claim resting on a real or *quasi* proprietary right in it."

In such a proceeding there are no adversary parties—no personal defendant. The thing itself is seized and impleaded as the defendant. But all persons who have any claim upon, or right in or to the thing, may, if they choose, come in as claimants and propound their interest in the thing and be heard, and are, therefore, deemed parties and bound accordingly, whether any party actually appears or not. Hence all persons who have this right may be, and are fairly considered as parties to the suit, and bound by the result thereof. Every party in interest is, therefore, estopped by a decree *in rem* from disputing the judgment, which, as is well said by the court in *Parker* v. *Overmann*,† "is conclusive against the absent claimant as well as the present contestant."

Mr. Thomas Allen Clarke (*whom the court declined to hear*), *contra.*

Mr. Justice STRONG delivered the opinion of the court.

Most of the questions in this case were settled adversely to the claims of the plaintiff in error by our decision of *Bigelow* v. *Forrest*.‡ We then determined that under the act of Congress of July 17, 1862, known as the Confiscation Act, and the Joint Resolution of the same date explanatory thereof, only the life estate of the person for whose offence the land had been seized was subject to condemnation and sale. We also determined that nothing more was within the jurisdiction or judicial power of the District Court, and that consequently a decree condemning the fee could have no greater effect than to subject the life estate to sale. This in effect disposes of the present case.

* 1 Black, 580–1. † 18 Howard, 140. ‡ 9 Wallace, 339.

Opinion of the court.

It is insisted, however, the Supreme Court of Louisiana erred in holding that the property condemned and sold remained in the hands of the purchaser at the sale, subject to the mortgage given in 1858 to the ancestor of the defendants in error. The argument rests upon a misconception of the act of 1862. That act, for the purpose of insuring the speedy termination of the rebellion, authorized the seizure of all the estate and property, money, stocks, credits, and effects of six classes of persons described in the fifth section. The persons designated in those several classes were either officers in the army or navy of the rebels in arms against the government of the United States, or officers of the so-called Confederate States, or agents thereof, or officers or agents of some one of the States of that confederacy, or persons who gave aid and comfort to the rebellion. So the sixth section directed the seizure of all the estate and property of the persons described in that section. It was not *any* property in which the persons described in these two sections might have an interest that was made subject to seizure, but it was *their* estate and property, *their* interest in it, whatever that interest might be. The act manifestly contemplated no seizure of anything more than that which belonged to the offending person, and the thing seized, or its proceeds, was by the fifth section directed to be applied for the use of the army of the United States. If now we proceed to the seventh section, it will appear plainly that only that which was seized, seized lawfully in accordance with the directions of the two preceding sections, was made the subject for condemnation and sale. That section commences thus: "That to secure the condemnation and sale of *any such property*, after the same shall have been seized, so that it may be made available for the purpose aforesaid, proceedings *in rem* shall be instituted in the name of the United States in any District Court thereof, or in any Territorial Court, or in the United States District Court for the District of Columbia, within which the property *above described* or any part thereof may be found," &c. What property is this thus brought within the jurisdiction of the District Court? Beyond

doubt the property which had been seized, that is, the estate and property of the offending person, and no other. If it was a term, or an estate at will, or a life estate, or an estate in joint tenancy, or in common, whatever it was, it was the subject alike of seizure and of condemnation. It is true proceedings *in rem* were ordered to be instituted in the District Court, but the question remains, what was the *res* against which the proceedings were directed? The answer must be, that which was seized and brought within the jurisdiction of the court. A condemnation in a proceeding *in rem* does not necessarily exclude all claim to other interests than those which were seized. In admiralty cases and in revenue cases a condemnation and sale generally pass the entire title to the property condemned and sold. This is because the thing condemned is considered as the offender or the debtor, and is seized in entirety. But such is not the case in many proceedings which are *in rem*. Decrees of courts of probate or orphans' courts directing sales for the payment of a decedent's debts or for distribution are proceedings *in rem*. So are sales under attachments or proceedings to foreclose a mortgage, *quasi* proceedings *in rem*, at least. But in none of these cases is anything more sold than the estate of the decedent, or of the debtor or the mortgagor in the thing sold. The interests of others are not cut off or affected.

If then, as we hold, the property and estate of J. P. Benjamin was all that was seized, or all that could be seized and condemned in these confiscation proceedings, those who held other interests in the land were not bound to come in and assert their claims. Their interests did not pass to the purchaser at the sale, and they remain unaffected by the decree of condemnation and the sale thereunder.

There is, therefore, no error in the judgment of the Supreme Court, and it is

AFFIRMED.

[See the next case, *infra*, p. 177.]

Statement of the case.

EX PARTE LANGE.

1. The doctrine of this court affirmed, and the cases in support of it cited, that where a prisoner shows that he is held under a judgment of a Federal court, made without authority of law, the Supreme Court will, by writs of *habeas corpus* and *certiorari*, look into the record, so far as to ascertain that fact, and if it is found to be so, will discharge the prisoner.
2. The general principle asserted as applicable to both civil and criminal cases, that the judgments, orders, and decrees of the courts of this country are under their control during the term at which they are made; so that they may be set aside or modified as law and justice may require.
3. But it is also declared that this power cannot be so used as to violate the guarantees of personal rights found in the common law, and in the constitutions of the States and of the Union.
4. If there is anything settled in the jurisprudence of England and America, it is that no man shall be twice punished by judicial judgments for the same offence.
5. The provisions of the common law and of the Federal Constitution, that no man shall be twice placed in jeopardy of life or limb, are mainly designed to prevent a second punishment for the same crime or misdemeanor.
6. Hence, when a court has imposed fine *and* imprisonment, where the statute only conferred power to punish by fine *or* imprisonment, and the fine has been paid, it cannot, even during the same term, modify the judgment by imposing imprisonment instead of the former sentence.
7. The judgment of the court having been executed so as to be a full satisfaction of one of the alternative penalties of the law, the power of the court as to that offence is at an end.
8. A second judgment on the same verdict is, under such circumstances, void for want of power, and it affords no authority to hold the party a prisoner, and he must be discharged.

ON petition for writs of habeas corpus and certiorari.

Edward Lange filed a petition to this court at a former day, praying for a writ of habeas corpus to the marshal for the Southern District of New York, on the allegation that he was unlawfully imprisoned under an order of the Circuit Court of the United States for that district. On consideration of the petition, the court was of opinion that the facts which it alleged very fairly raised the question whether the Circuit Court, in the sentence which it had pronounced, and

Statement of the case.

under which the prisoner was held, had not exceeded its powers. It therefore directed the writ to issue, accompanied also by a writ of certiorari, to bring before this court the proceedings in the Circuit Court under which the petitioner was restrained of his liberty.

From the record of the case in the Circuit Court, and the return of the marshal in whose custody the prisoner was found, the following facts appeared, and were stated, by the learned justice who delivered the opinion of the court, as the case:

"The petitioner had been indicted under an act of Congress, passed 8th June, 1872,* for stealing, purloining, embezzling, and appropriating to his own use certain mail-bags belonging to the Post-office Department. Upon the trial, on the 22d day of October, 1873, the jury found him guilty of appropriating to his own use mail-bags, the value of which was less than twenty-five dollars; the punishment for which offence, as provided in said statute, is imprisonment for not more than one year *or* a fine of not less than ten dollars nor more than two hundred dollars. On the 3d day of November, 1873, the judge presiding sentenced the petitioner under said conviction to one year's imprisonment, *and* to pay two hundred dollars fine. The petitioner was, on said day, committed to jail in execution of the sentence, and on the following day the fine was paid to the clerk of the court, who, in turn, and on the 7th day of November, 1873, paid the same into the Treasury of the United States.

"On the 8th day of the same month the prisoner was brought before the court on a writ of habeas corpus, the same judge presiding, and an order was entered vacating the former judgment, and the prisoner was again sentenced to one year's imprisonment from that date; and the return of the marshal to the writ of habeas corpus showed that it was under this latter judgment that he held the prisoner. It was conceded that all this was during the same term at which his trial took place before the jury. A second writ of habeas

* 17 Stat. at Large, 320, § 290.

corpus, issued by the circuit judge, was returned into the Circuit Court, when the two district judges sat with him on the hearing, and the writ was discharged and the petitioner remanded to the custody of the marshal."

Mr. H. H. Arnoux, in support of the discharge, made a full citation of cases, as well the British and Irish as our own, on the power of courts over their own judgments; certain of the cases denying all right to change the judgment after once enrolled; and made, further, an elaborate argument to prove that whatever its general power in the matter might be, the court in this case having imposed fine *and* imprisonment, and the fine having been paid, it could not, even during the term, modify the judgment as it had sought to do.

Mr. C. H. Hill, Assistant Attorney-General, contra, relied on the doctrine sufficiently long established, that during the term at which they are made, all courts have power over their judgments; arguing, moreover, that the judgment first rendered in this case being erroneous, was to be treated as void; in other words, as not entered, or no judgment; and that, therefore, the court could enter a valid judgment, and had done so in what it finally did. In support of his propositions, he relied much on the case of *Bassett* v. *United States*, decided by this court at December Term, 1869; in which it is said that "it is competent for good cause to set aside at the same term at which it was rendered a judgment of conviction on confession, though the defendant had entered upon the imprisonment ordered by the sentence."

The last judgment, he also said, though, perhaps, erroneous, was not void; and so no power to discharge existed.

Mr. Justice MILLER delivered the opinion of the court.

On consideration of the petition which was filed in this case at a former day, the court was of opinion that the facts therein recited very fairly raised the question whether the Circuit Court, in the sentence which it had pronounced, and under which the prisoner was held, had not exceeded its

powers. It therefore directed the writ to issue, accompanied also by a writ of certiorari, to bring before this court the proceedings in the Circuit Court under which the petitioner was restrained of his liberty. The authority of this court in such case, under the Constitution of the United States, and the fourteenth section of the Judiciary Act of 1789, to issue this writ, and to examine the proceedings in the inferior court, so far as may be necessary to ascertain whether that court has exceeded its authority, is no longer open to question. The cases cited in the note below* will, when examined, establish this proposition as far as judicial decision can establish it.

Disclaiming any assertion of a general power of review over the judgments of the inferior courts in criminal cases, by the use of the writ of habeas corpus or otherwise, we proceed to examine the case as disclosed by the record of the Circuit Court and the return of the marshal, in whose custody the prisoner is found, to ascertain whether it shows that the court below had any power to render the judgment by which the prisoner is held.

The first inquiry which presents itself is as to the nature and extent of the power of the Circuit Court over its own judgments in reversing, vacating, or modifying them.

We are furnished by counsel with a very full review of the cases in the English and American courts on the question of the power of courts over their judgments once rendered in criminal cases. Many of these decisions in the English courts are on writs of error and have but little bearing on the question before us. Others, which seem to present cases of judgments vacated or modified during the term at which they were rendered, are based upon the doctrines of the English courts, that there is no judgment or decree until the decree in chancery is enrolled or the judgment has

* Hamilton's Case, 3 Dallas, 17; Burford's Case, 3 Cranch, 448; Ex parte Bollman, 4 Id. 75; Ex parte Watkins, 3 Peters, 193; Same Case, 7 Id. 568; Ex parte Metzger, 5 Howard, 176; Ex parte Kaine, 14 Id. 103; Ex parte Wells, 18 Id. 307; Ex parte Milligan, 4 Wallace, 2; Ex parte McCardle, 6 Id. 318; Same Case, 7 Id. 506; Ex parte Yerger, 8 Id. 85.

been signed by the judge of the court of law, and become technically a part of the judgment roll.*

These decisions, some of which go to the extent of denying all right to amend or change the judgment after it becomes a part of the roll, are inapplicable to our system, where a judgment roll, strictly speaking, is no part, or, at least, not a necessary part of our system of judicial proceedings. In most, if not all, our courts a minute-book, or a record of the proceedings of the court, is kept, and is the appropriate repository of all the orders and judgments of the court; and this book with all its entries is, *as a general rule*, under the complete control of the court during the term to which such entries relate.

The general power of the court over its own judgments, orders, and decrees, in both civil and criminal cases, during the existence of the term at which they are first made, is undeniable. And this is the extent of the proposition intended to be decided in the case of *Bassett* v. *United States*.† That was a case like this, in which, in a prosecution for misdemeanor, the prisoner had been sentenced to imprisonment. But it was by a judgment rendered on confession. He was afterwards, during the same term, brought into court and the judgment vacated, his plea of guilty withdrawn, and leave given to plead anew; and then he gave bail and his case was continued. It was in an action on the bail-bond which he had forfeited, that the sureties raised the question of the right of the court to vacate the former judgment.

In general terms, without much consideration, for no counsel appeared for the sureties, this court sustained the right. If it was intended in that case to raise the question of the right of the court to inflict a new and larger punishment on the prisoner, without reference to the time of his imprisonment on the one set aside, that point was not presented so as to receive the attention of the court, and certainly was not considered or decided.

It would seem that there must, in the nature of the power

* Archbold's Criminal Pleading, 176.

† 9 Wallace, 38.

thus exercised by the court, be in criminal cases some limit to it.

The judgment of the courts in this class of cases extends to life, liberty, and property. The terms of many of them extend through considerable periods of time, often many months, with adjournments and vacations in the same term, at the discretion of the judge. A criminal may be sentenced to a disgraceful punishment, as whipping, or, as in the old English law, to have his ears cut off, or to be branded in the hand or forehead.

The judgment of the court to this effect being rendered and carried into execution before the expiration of the term, can the judge vacate that sentence and substitute fine or imprisonment, and cause the latter sentence also to be executed? Or if the judgment of the court is that the convict be imprisoned for four months, and he enters immediately upon the period of punishment, can the court, after it has been fully completed, because it is still in session of the same term, vacate that judgment and render another, for three or six months' imprisonment, or for a fine? Not only the gross injustice of such a proceeding, but the inexpediency of placing such a power in the hands of any tribunal is manifest.

If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence. And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offence, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offence.

The principle finds expression in more than one form in the maxims of the common law. In civil cases the doctrine is expressed by the maxim that no man shall be twice vexed for one and the same cause. *Nemo debet bis vexari pro una et*

eadem causa. It is upon the foundation of this maxim that the plea of a former judgment for the same matter, whether it be in favor of the defendant or against him, is a good bar to an action.

In the criminal law the same principle, more directly applicable to the case before us, is expressed in the Latin, "*Nemo bis punitur pro eodem delicto*,"* or, as Coke has it, "*Nemo debet bis puniri pro uno delicto*."† No one can be twice punished for the same crime or misdemeanor, is the translation of the maxim by Sergeant Hawkins.

Blackstone in his Commentaries,‡ cites the same maxim as the reason why, if a person has been found guilty of manslaughter on an indictment, and has had benefit of clergy, *and suffered the judgment of the law*, he cannot afterwards be appealed.

Of course, if there had been no punishment the appeal would lie, and the party would be subject to the danger of another form of trial. But by reason of this universal principle, that no person shall be twice *punished* for the same offence, that ancient right of appeal was gone when the punishment had once been suffered. The protection against the action of the same court in inflicting punishment twice must surely be as necessary, and as clearly within the maxim, as protection from chances or danger of a second punishment on a second trial.

The common law not only prohibited a second punishment for the same offence, but it went further and forbid a second trial for the same offence, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted.

Hence to every indictment or information charging a party with a known and defined crime or misdemeanor, whether at the common law or by statute, a plea of *autrefois acquit* or *autrefois convict* is a good defence.

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* 2 Hawkins's Pleas of the Crown, 377.

† 4 Reports, 43, *a*; 11 Id. 95, *b*.

‡ Vol. 4, 315, Sharswood's edition.

In the case of *Crenshaw* v. *The State of Tennessee*,* it was held by the Supreme Court of that State that the common-law principle went still further, namely, that an indictment, conviction, and punishment in a case of felony not capital was a bar to a prosecution for all other felonies not capital committed before such conviction, judgment, and execution.

If in civil cases, says Drake, J., in *State* v. *Cooper*,† the law abhors a multiplicity of suits, it is yet more watchful in criminal cases that the crown shall not oppress the subject, or the government the citizen, by unreasonable prosecutions.

These salutary principles of the common law have, to some extent, been embodied in the constitutions of the several States and of the United States. By Article VII of the amendments to the latter instrument it is declared that no fact once tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law; and by Article V, that no person shall for the same offence be twice put in jeopardy of life or limb . . . nor be deprived of life, liberty, or property without due process of law.

It is not necessary in this case to insist that other cases besides those involving life or limb are *positively* covered by the *language* of this amendment; or that when a party has had a fair trial before a competent court and jury, and has been convicted, that any excess of punishment deprives him of liberty or property without due course of law. On the other hand it would seem to be equally difficult to maintain, after what we have said of the inflexible rules of the common law against a person being twice punished for the same offence, that such second punishment as is pronounced in this case is not a violation of that provision of the Constitution.

It is very clearly the *spirit* of the instrument to prevent a second punishment under judicial proceedings for the same crime, so far as the common law gave that protection.

In the case of *The Commonwealth* v. *Olds*,‡ one of the

* 1 Martin & Yerger, 122.

† 1 Green's New Jersey, 375.

‡ 5 Littell, 137.

best common law judges that ever sat on the bench of the Court of Appeals of Kentucky* remarked, "that every person acquainted with the history of governments must know that state trials have been employed as a formidable engine in the hands of a dominant administration. . . . To prevent this mischief the ancient common law, as well as Magna Charta itself, provided that one acquittal or conviction should satisfy the law; or, in other words, that the accused should always have the right secured to him of availing himself of the pleas of *autrefois acquit* and *autrefois convict*. To perpetuate this wise rule, so favorable and necessary to the liberty of the citizen in a government like ours, so frequently subject to changes in popular feeling and sentiment, was the design of introducing into our Constitution the clause in question."

In the case of *Cooper* v. *The State*,† in the Supreme Court of New Jersey, the prisoner had been indicted, tried, and convicted for arson. While still in custody under this proceeding he was arraigned on an indictment for the murder of two persons who were in the house when it was burned. To this he pleaded the former conviction in bar, and the Supreme Court held it a good plea. It is to be observed that the punishment for arson could not technically extend either to life or limb; but the Supreme Court founded its argument on the provision of the constitution of New Jersey, which embodies the precise language of the Federal Constitution. After referring to the common law maxim the court says: "The constitution of New Jersey declares this important principle in this form: 'Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.' Our courts of justice would have recognized and acted upon it as one of the most valuable principles of the common law without any constitutional provision. But the framers of our Constitution have thought it worthy of especial notice. And all who are conversant with courts of justice must be satisfied that this great principle

* Mills, J.—REP.

† 1 Green, 361.

forms one of the strong bulwarks of liberty. . . . Upon this principle are founded the pleas of *autrefois acquit* and *autrefois convict*."

And Hawkins in his Pleas of the Crown* says that both the pleas of *autrefois acquit* and *autrefois convict* are grounded on the maxim that a man shall . . . not be brought into danger of his life for one and the same offence more than once.

In *Moor* v. *The People of Illinois*,† the defendant was fined four hundred dollars under the criminal code of that State for harboring and secreting a negro slave. The case came to this court under the twenty-fifth section of the Judiciary Act, on the ground that the right to legislate on that subject was exclusively in Congress. The court did not concur in that view of the question. But it was also urged that the party might be subjected twice to punishment for the same offence if liable to be prosecuted under statutes of both State and National legislatures. In regard to this Judge McLean said, in a dissenting opinion, that "the exercise of such a power by the States would, in effect, be a violation of the Constitution of the United States and of the respective States. They all provide against a second punishment for the same act." "It is contrary," said he, "to the nature and genius of our government to permit an individual to be twice punished for the same act."

Mr. Bishop, in the latest edition of his work on criminal law,‡ speaking of this constitutional provision, says the construction of these words is that properly the rule extends to treason and all felonies, not to misdemeanors. Yet practically and wisely the courts have applied it to misdemeanors, and that in view of the liberal construction of statutes and constitutions in favor of persons charged with crime he cannot well see how courts can refuse to apply this constitutional guarantee in cases of misdemeanor.

Chitty§ also drops the words life and limb in speaking of

* Pages 515, 526.

† 14 Howard, 13.

‡ Sections 990, 991, 5th edition.

§ 1 Criminal Law, 452–462.

the pleas of *autrefois acquit* and *autrefois convict*, and declares that they both depend on the principle that no man shall more than once be placed in peril of legal penalties upon the same accusation.

If we reflect that at the time this maxim came into existence almost every offence was punished with death or other punishment touching the person, and that these pleas are now held valid in felonies, minor crimes, and misdemeanors alike, and on the difficulty of deciding when a statute under modern systems does or does not describe a felony when it defines and punishes an offence, we shall see ample reason for holding that the principle intended to be asserted by the constitutional provision must be applied to all cases where a second punishment is attempted to be inflicted for the same offence by a judicial sentence.

For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict? Why is it that, having once been tried and found guilty, he can never be tried again for that offence? Manifestly it is not the danger or jeopardy of being a second time found guilty. It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution. But if, after judgment has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he can be again sentenced on that conviction to another and different punishment, or to endure the same punishment a second time, is the constitutional restriction of any value? Is not its intent and its spirit in such a case as much violated as if a new trial had been had, and on a second conviction a second punishment inflicted?

The argument seems to us irresistible, and we do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it.

But there is a class of cases in which a second trial is had without violating this principle. As when the jury fail to

agree and no verdict has been rendered,* or the verdict set aside on motion of the accused, or on writ of error prosecuted by him,† or the indictment was found to describe no offence known to the law.

And so it is said that the judgment first rendered in the present case being erroneous must be treated as no judgment, and, therefore, presenting no bar to the rendition of a valid judgment. The argument is plausible but unsound. The power of the court over that judgment was just the same, whether it was void or valid. If the court, for instance, had rendered a judgment for two years' imprisonment, it could no doubt, on its own motion, have vacated that judgment during the term and rendered a judgment for one year's imprisonment; or, if no part of the sentence had been executed, it could have rendered a judgment for two hundred dollars fine after vacating the first. Nor are we prepared to say, if a case could be found where the first sentence was wholly and absolutely void, as where a judgment was rendered when no court was in session, and at a time when no term was held—so void that the officer who held the prisoner under it would be liable, or the prisoner at perfect liberty to assert his freedom by force—whether the payment of money or imprisonment under such an order would be a bar to another judgment on the same conviction. On this we have nothing to say, for we have no such case before us. The judgment first rendered, though erroneous, was not absolutely void. It was rendered by a court which had jurisdiction of the party and of the offence, on a valid verdict. The error of the court in imposing the two punishments mentioned in the statute, when it had only the alternative of one of them, did not make the judgment wholly void. *Miller* v. *Finkle*‡ is directly in point. But we think that no one will contend that the first sentence was so absolutely void that an action could be maintained

* United States *v.* Perez, 9 Wheaton, 579.

† People *v.* Casborus, 13 Johnson, 351.

‡ 1 Parker Criminal Reports, 374.

against the marshal for trespass in holding the prisoner under it.

The petitioner, then, having paid into court the fine imposed upon him of two hundred dollars, and that money having passed into the Treasury of the United States, and beyond the legal control of the court, or of any one else but the Congress of the United States, and he having also undergone five days of the one year's imprisonment, all under a valid judgment, can the court vacate that judgment entirely, and without reference to what has been done under it, impose another punishment on the prisoner on that same verdict? To do so is to punish him *twice* for the same offence. He is not only put in jeopardy twice, but put to actual punishment twice for the same thing.

The force of this proposition cannot be better illustrated than by what occurs in the present case if the second judgment is carried into effect. The law authorizes imprisonment not exceeding one year *or* a fine not exceeding two hundred dollars. The court, through inadvertence, imposed both punishments, when it could rightfully impose but one. After the fine was paid and passed into the treasury, and the petitioner had suffered five days of his one year's imprisonment, the court changed its judgment by sentencing him to one year's imprisonment from that time. If this latter sentence is enforced it follows that the prisoner in the end pays his two hundred dollars fine and is imprisoned one year and five days, being all that the first judgment imposed on him, and five days' imprisonment in addition. And this is done because the first judgment was confessedly in excess of the authority of the court.

But it has been said that, conceding all this, the judgment under which the prisoner is now held is erroneous, but not void; and as this court cannot review that judgment for error, it can discharge the prisoner only when it is void.

But we do not concede the major premise in this argument. A judgment may be erroneous and not void, and it may be erroneous *because* it is void. The distinctions between void and merely voidable judgments are very nice,

and they may fall under the one class or the other as they are regarded for different purposes.

We are of opinion that when the prisoner, as in this case, by reason of a valid judgment, had fully suffered one of the alternative punishments to which alone the law subjected him, the power of the court to punish further was gone. That the principle we have discussed then interposed its shield, and forbid that he should be punished again for that offence. The record of the court's proceedings, at the moment the second sentence was rendered, showed that in that very case, and for that very offence, the prisoner had fully performed, completed, and endured one of the alternative punishments which the law prescribed for that offence, and had suffered five days' imprisonment on account of the other. It thus showed the court that its power to punish for that offence was at an end. Unless the whole doctrine of our system of jurisprudence, both of the Constitution and the common law, for the protection of personal rights in that regard, are a nullity, the authority of the court to punish the prisoner was gone. The power was exhausted; its further exercise was prohibited. It was error, but it was error because the power to render any further judgment did not exist.

It is no answer to this to say that the court had jurisdiction of the person of the prisoner, and of the offence under the statute. It by no means follows that these two facts make valid, however erroneous it may be, any judgment the court may render in such case. If a justice of the peace, having jurisdiction to fine for a misdemeanor, and with the party charged properly before him, should render a judgment that he be hung, it would simply be void. Why void? Because he had no power to render such a judgment. So, if a court of general jurisdiction should, on an indictment for libel, render a judgment of death, or confiscation of property, it would, for the same reason, be void. Or if on an indictment for treason the court should render a judgment of attaint, whereby the heirs of the criminal could not inherit his property, which should by the judgment of the

court be confiscated to the State, it would be void as to the attainder, because in excess of the authority of the court, and forbidden by the Constitution.

A case directly in point is that of *Bigelow* v. *Forrest.** In that case, under the confiscation acts of Congress, certain lands of French Forrest had been condemned and sold, and Bigelow became the holder of the title conveyed by those proceedings. After Forrest's death his son and heir brought suit to recover the lands, and contended that under the joint resolution of Congress, which declared that condemnation under that act should not be held to work a forfeiture of the real estate of the offender beyond his natural life, the title of Bigelow terminated with the death of the elder Forrest.

In opposition to this it was argued that the decree of the court confiscating the property in terms ordered *all* the estate of the said Forrest to be sold, *and that though this part of the decree might be erroneous, it was not void.* Here was a case of a proceeding *in rem* where the property was within the power of the court, and its authority to confiscate and sell under the statute beyond question; but the extent of that power was limited by the statute. The analogy to the case before us seems almost perfect. In that case the court said: "It is argued, however, on behalf of the plaintiff in error that the decree of confiscation of the District Court of the United States is conclusive, that the entire right, title, and interest of French Forrest was condemned and ordered to be sold; and that as his interest was a fee simple that entire fee was confiscated and sold. Doubtless, a decree of a court having jurisdiction to make the decree cannot be impeached collaterally, *but under the act of Congress the District Court had no power to order a sale which should confer upon the purchaser rights outlasting the life of French Forrest. Had it done so it would have transcended its jurisdiction.*" The doctrine of that case is reaffirmed in the case of *Day* v. *Micou* at the present term,† where it is said that in *Bigelow* v. *Forrest* "we also determined that nothing more was within the ju-

* 9 Wallace, 339.

† *Supra*, 156.

risdiction or judicial power of the District Court (than the life estate), and that consequently a decree condemning the fee could have no greater effect than to subject the life estate to sale."

But why could it not? Not because it wanted jurisdiction of the property or of the offence, or to render a judgment of confiscation, but because in the very act of rendering a judgment of confiscation it condemned more than it had authority to condemn. In other words, in a case where it had full jurisdiction to render one kind of judgment, operative upon the same property, it rendered one which included that which it had a right to render, and something more, and this excess was held simply void. The case before us is stronger than that, for unless our reasoning has been entirely at fault, the court in the present case could render no second judgment against the prisoner. Its authority was ended. All further exercise of it in that direction was forbidden by the common law, by the Constitution, and by the dearest principles of personal rights, which both of them are supposed to maintain.

There is no more sacred duty of a court than, in a case properly before it, to maintain unimpaired those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman; and in such cases no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied. Without straining either the Constitution of the United States, or the well-settled principles of the common law, we have come to the conclusion that the sentence of the Circuit Court under which the petitioner is held a prisoner was pronounced without authority, and he should therefore be discharged.

DISCHARGED ACCORDINGLY.

Mr. Justice CLIFFORD, dissenting:

Provision is made by the act of the eighth of June, 1872, that any person who shall steal, purloin, or embezzle any mail-bag or other property in the use of or belonging to the

Post-office Department, or who shall, for any lucre, gain, or convenience, appropriate any such property to his own use, or to any other than its proper use, or who shall, for any lucre or gain, convey away any such property to the hindrance or detriment of the public service, his aiders, abettors, and counsellors, shall, if the value of the property be twenty-five dollars or more, be deemed guilty of felony, and on conviction thereof the offender shall be imprisoned not exceeding three years; and if the value of the property be less than twenty-five dollars, the party offending shall be imprisoned not more than one year or be fined not less than ten nor more than two hundred dollars.*

Pursuant to that act of Congress the petitioner was indicted in the Circuit Court of the United States for the Southern District of New York, held by adjournment on the seventh of October, 1873; and it appears that the indictment contained twelve counts, in each of which he is charged either with unlawfully, knowingly, wilfully, and feloniously stealing, purloining, or embezzling fifty mail-bags belonging to the Post-office Department, each of the value of fifty cents, or with unlawfully, knowingly, wilfully, and feloniously appropriating the same to his own use or to some other than its proper use, or with unlawfully, knowingly, wilfully, and feloniously conveying away the same to the hindrance and detriment of the public service.

Doubt cannot be entertained that each of the twelve counts of the indictment is well drawn, and that they embody an offence which is legally defined in the aforesaid act of Congress. By the record it also appears that a jury was duly impanelled on the fifteenth of October in the same year, for the trial of the defendant upon that indictment, and that the jury, on the twenty-second of the same month, returned their verdict that the defendant is guilty, and that the value of the said mail-bags is less than twenty-five dollars.

Convicted as the defendant was upon a valid indictment, he was liable to be punished by being imprisoned not more

* 17 Stat. at Large, 320.

than one year or to be fined not less than ten nor more than two hundred dollars, but the judge presiding at the trial, without authority of law, on the third day of November in the same year sentenced the defendant "to be imprisoned for the term of one year and that he pay a fine of two hundred dollars," and it appears that he was remanded to prison in execution of the sentence. Plenary proof is also exhibited that the defendant, on the following day, paid the fine in full to the clerk and the clerk certifies under that date that "said sum is now on deposit in the registry of the court."

Two days after the sentence was pronounced, to wit, on the fifth of the same November, application in behalf of the defendant was made to the district judge of that district for a habeas corpus, and it appears that the writ was immediately granted and made returnable to the Circuit Court on the eighth of the same November. Due return was made of the same by the marshal, and the return shows that he produced the defendant and a certified copy of the sentence, stating that the sentence was the cause of the imprisonment and detention of the petitioner. Regular proceeding, therefore, was instituted for a review of the sentence before the money paid for the fine passed out of the registry of the court, as it appears that the amount of the fine was not deposited to the credit of the Treasurer of the United States until the day before the return day of the writ of habeas corpus. On the following day the Circuit Court came in by adjournment, within the same term as that when the indictment was tried, and the same judge presiding who sat in the trial and who passed the sentence which is the subject of complaint. Attention was called to the return of the marshal to the writ of habeas corpus, and the parties having been heard the following proceedings took place:

By the court.—Ordered that the sentence pronounced against the defendant on the third of the present month be, and the same is hereby, vacated and set aside, and the record states that "the court thereupon proceeds to pass judgment anew and resentence the prisoner, Edward Lange, to be imprisoned for the term of one year."

Application was subsequently made to the circuit judge, on the seventeenth of December in the same year, for a writ of habeas corpus and a writ of certiorari, to the end that the prisoner might be discharged from custody, and it appears that the circuit judge granted a rule requiring the district attorney and the marshal to show cause before the Circuit Court, on the twenty-fourth of the same month, at 11 o'clock in the forenoon, why the two writs mentioned should not issue. Service was made and the parties appeared and were heard before the circuit judge and the district judge for that district and the judge who sat on the trial of the indictment and who passed the two sentences.

Counsel on both sides were heard, and the court denied the application upon the ground that the judgment, being for a punishment expressly authorized by an act of Congress, cannot be impeached by a writ of habeas corpus, unless it appears that the court had no jurisdiction to pronounce the sentence. They proceed to answer that inquiry, commencing with the remark that the jurisdiction is questioned only upon the ground that the court had, on a previous day in the same term, pronounced judgment imposing a different sentence, and they might have added that the sentence first pronounced imposed a punishment not authorized by the act of Congress under which the indictment was found.

Vacated as the former judgment was by the order of the court, they proceed to consider the case, in that aspect, and remark that if the court had power to vacate that judgment it became of no effect, and that it was the duty of the court to deal with the prisoner upon his conviction of the offence charged in the indictment, and for the reasons given, as more fully set forth in the record, they discharged the rule and denied the application.

Subsequently, to wit, on the twenty-ninth of the same December, the Circuit Court again came in by adjournment, the judge presiding who sat on the trial of the indictment and who passed the respective sentences against the defendant, and it being suggested that the rights of the prisoner would be better preserved if the writ of habeas corpus was

granted as prayed in the preceding application, it was ordered that the writ issue returnable on the same day, and the return having been made, the counsel were again heard, but it being conceded that the second sentence was pronounced in the same term as the first sentence, it was ordered that the writ of habeas corpus be dismissed and that the prisoner be remanded for the reasons given by the court on the last preceding occasion. Whereupon the petitioner, by his counsel, applied to this court for a writ of habeas corpus directed to the marshal having the prisoner in custody, commanding him to produce the prisoner at such time as the court shall direct, and that the marshal then and there show the cause of the prisoner's detention, to the end that he may be discharged from custody; and the petitioner also prayed that a writ of certiorari might issue to the clerk of the Circuit Court for that district, commanding him to certify to this court all the record of that court respecting the case of the prisoner, to the end that errors therein may be corrected.

Both writs were ordered, but with the understanding that the writ of habeas corpus would not be issued and served until the counsel were further heard upon the return of the writ of certiorari, and upon the return of the writ of certiorari the counsel were fully heard, and the majority of the court decided that the prisoner was entitled to be discharged from his imprisonment. Unable to concur in that conclusion, I will proceed to state the reasons of my dissent.

By the fourteenth section of the Judiciary Act it is provided, among other things, that either of the justices of the Supreme Court as well as the judges of the District Courts shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment, provided that writs of habeas corpus shall in no case extend to persons in jail unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify. Properly construed the principal provision empowers the Supreme Court as well as the

justices thereof to issue the writ and to grant the relief as prayed to the petitioner.*

Authority upon the subject is also conferred by other acts of Congress, but it is unnecessary to refer to any other act, as the petition in this case is obviously founded upon the provision in the Judiciary Act.

Courts of justice may refuse to grant the writ of habeas corpus where no probable ground for relief is shown in the petition, or where it appears that the petitioner is duly committed for felony or treason plainly expressed in the warrant of commitment, but where probable ground is shown that the party is in custody under or by color of authority of the United States, and is imprisoned without just cause, and, therefore, has a right to be delivered, the writ of habeas corpus then becomes a writ of right which may not be denied, as it ought to be granted to every man who is unlawfully committed or detained in prison or otherwise restrained of his liberty. Authorities in support of these propositions are unnecessary, as wherever the principles of the common law have been adopted or recognized they are universally acknowledged.

Civil society, however, could not exist if it were permitted that crimes should go unpunished, nor is it true that the writ of habeas corpus was ever intended to operate as the means of delivering a prisoner from his imprisonment if he had been duly indicted, convicted, and sentenced, and is in prison by virtue of a lawful conviction under a valid indictment and a legal sentence passed in pursuance of a constitutional law of the jurisdiction where the offence was committed. No objection is made in this case to the validity of the indictment, nor is it questioned that the defendant was duly convicted of the offence set forth in the several counts of the indictment. Beyond all question, therefore, it follows that he was liable to be "imprisoned not more than one year, or to be fined not less than ten nor more than two hundred dollars."

* 1 Stat. at Large, 82.

None of these propositions can be successfully controverted, as it is impliedly conceded that the act of Congress is a valid law, and it is not even suggested that the indictment is defective or that there was any error in the trial or in the verdict of the jury. Concede these several propositions, and it follows beyond peradventure that the defendant might have been sentenced to imprisonment for the term of one year or he might have been sentenced to pay a fine of two hundred dollars, but the court sentenced him to both, that is, that he should be imprisoned for the term of one year, and that he should pay a fine of two hundred dollars, which is a sentence not authorized by the act of Congress which defines the offence and under which the indictment was found.

It is insisted by the petitioner that the sentence pronounced in such a case is an entirety, and that if it exceeds the punishment provided by law it is wholly illegal, and in that proposition I entirely concur. He cites cases* which fully support the proposition. Most of these cases were decided in appellate tribunals and in jurisdictions where there was no legislative act conferring any authority to impose the proper sentence or to remand the prisoner to the court of original jurisdiction for that purpose, and of course the only judgment which the appellate court could render was that of reversal, which operated to discharge the prisoner. Legislative defects of the kind, in many jurisdictions, have been corrected, and wherever that has been done the proper sentence is either imposed by the appellate court or the case is remanded to the court of original jurisdiction for that purpose.†

Congress has never empowered this court to exercise any

* Rex *v.* Ellis, 5 Barnewall & Cresswell, 395; King *v.* Bourne, 7 Adolphus & Ellis, 58; Queen *v.* Silversides, 3 Q. B. 406; King *v.* The Queen, 7 Id. 795; Holt *v.* Regina, 2 Dowling & Lowndes, 774; Ex parte Page, 49 Missouri, 291; Holland *v.* Queen, 2 Jebb & Symes, 357; O'Leary *v.* People, 4 Parker's Criminal Reports, 187; Shepherd *v.* Commonwealth, 2 Metcalf, 419; Stevens *v.* Same Defendant, 4 Id. 360; Fitzgerald *v.* State, 4 Wisconsin, 395; Fellinger *v.* People, 15 Abbott's Practice Reports, 128; Ratzky *v.* People, 29 New York, 124.

† Ratzky *v.* People, 29 New York, 124.

appellate power over the judgments of the Circuit Courts in criminal cases, except where the Circuit Court is held by two judges and they differ in opinion and certify the question in difference here for the decision of this court. Except in that limited class of cases this court cannot re-examine any ruling or decision of the Circuit Court in any criminal case, nor will a writ of error lie from this court to the Circuit Court in such case. Exceptions, under the statute of Westminster, were never allowed in criminal cases in the parent country, and from the moment that statute was adopted as the rule of decision in the Federal courts to the present time, its application, without any exception, has uniformly been confined to civil actions.*

Authority to re-examine the rulings and decisions of the Circuit Courts in criminal cases might undoubtedly be vested in the Supreme Court, but the insuperable difficulties in the way of exercising any such power at the present time is that Congress has not conferred any such jurisdiction. Congress, it is true, has not declared in express terms that the appellate jurisdiction of the Supreme Court shall not extend to criminal cases, nor to civil actions or suits in equity where the matter in dispute, exclusive of costs, does not exceed the sum or value of two thousand dollars, but Congress has described affirmatively the appellate jurisdiction of the Supreme Court, and that affirmative description has always been held "to imply a negative on the exercise of such appellate power as is not comprehended within it."†

Governed by those principles this court has decided in repeated instances that a writ of error will not lie, under any circumstances, to a Circuit Court in a criminal case.‡

* 1 Chitty Criminal Law, 622; 1 Levinz, 68; 1 Siderfin, 65; Rex *v.* Stratton, 21 Howell's State Trials, 1187; United States *v.* Gibert et al., 2 Sumner, 22; People *v.* Holbrook, 13 Johnson, 90; Ex parte Barker, 7 Cowen, 143; People *v.* Vermilyea, Ib. 108; 2 Phillips on Evidence, 997.

† United States *v.* More, 3 Cranch, 170; Durousseau *v.* United States, 6 Id. 314.

‡ Ex parte Kearney, 7 Wheaton, 42; Ex parte Watkins, 3 Peters, 201; Forsyth *v.* United States, 9 Howard, 571; In re Kaine, 14 Id. 120; Ex parte Watkins, 7 Peters, 568; Ex parte Gordon, 1 Black, 505.

Even if a writ of error would lie in such a case still the concession would not advance the argument in favor of the petitioner, as no such writ has been sued out or served, nor is the record here under any process which authorizes this court to reverse or affirm the judgment of the Circuit Court, as the writ of habeas corpus is not addressed in any sense to the judgment with any view to correct anything which it contains, nor is the judgment removed here for any other purpose than as evidence to support the representation set forth in the petition, that the petitioner is unlawfully imprisoned or restrained of his liberty. Hence it follows, that inasmuch as the record shows that the indictment is in due form, and that the conviction is valid, and that the judgment is legal in form and such as the act of Congress authorized the Circuit Court to impose, the only proper order which this court could give in the case was to remand the prisoner, as nothing more than that can be done in the case without exercising appellate power such as the court might exercise if Congress had authorized the court to grant a writ of error to re-examine the judgment as in a civil action.

Grant that a writ of error would lie, still it is manifest that the alleged error could not be corrected without a bill of exceptions, as the error is not apparent in the record. On the contrary, the sentence under which the petitioner is imprisoned is as perfect as one can be framed, as it follows the conviction, and no one pretends either that the conviction is invalid or that the indictment is in any respect erroneous. Unless, therefore, the writ of habeas corpus can properly perform the office both of a bill of exceptions and a writ of error the decision of this court must be erroneous; and if it be true that the writ of habeas corpus may perform both of those offices, then it follows that this court has been in error throughout its whole history, as it has always been competent for the court to re-examine the judgments of the Circuit Court in criminal cases, which, as it seems to me, it is impossible to admit.

Legislation to provide for a bill of exceptions in criminal cases or to authorize a writ of error is certainly unnecessary

if a petition for habeas corpus, well filled with the affidavits of the jurors who tried the case and of the counsel who conducted the defence, will answer the purpose, as it will be easy to strengthen such proofs, if need be, by the opinions of chamber counsel and by the affidavits of sympathizing bystanders and of the short-hand writers employed for the occasion. Plenty of material of that kind can readily be obtained, and if that will answer the purpose of a bill of exceptions to correct the rulings of a Federal judge, made in the trial of a criminal case, it is quite evident that no further legislation upon the subject is necessary.

Opposed to this it may be suggested that the writ of habeas corpus in this case is accompanied by the writ of certiorari, which must be admitted, and it must also be admitted that the office of the writ of certiorari is to bring up the record from the subordinate court for the inspection of this court, in order that the court, by virtue of the writ of habeas corpus, may inquire into the cause of commitment; but if it appear that the cause of commitment is the judgment of a court of competent jurisdiction in a case, not revisable by this court, the settled law is that the judgment is of itself a sufficient cause for the commitment, as neither the writ of habeas corpus nor the writ of certiorari will perform the office of a bill of exceptions. Hence the appellate court, unless specially authorized by legislative authority to do more, cannot look beyond the judgment, nor can it re-examine the proceedings which led to it, for the reason, as Marshall, C. J., says, that a judgment in its nature concludes the subject on which it is rendered and pronounces the law of the case, and he adds that the judgment of a court of record whose jurisdiction is final is as conclusive on all the world as the judgment of this court would be. It puts an end to inquiry concerning the fact by deciding it.*

It is to be understood, said Judge Story, that this court has no appellate jurisdiction confided to it in criminal cases by the laws of the United States. It cannot entertain a writ

* Ex parte Watkins, 3 Peters, 202; Ex parte Kearney, 7 Wheaton, 43.

of error to revise the judgment of the Circuit Court in any case where a party has been convicted of a public offence. If then, says the same learned judge, this court cannot *directly* revise a judgment of the Circuit Court in a criminal case, what reason is there to suppose that Congress intended to invest it with the authority to do it indirectly?*

Apply those rules to the case before the court and it is clear that the petitioner should be remanded, as it appears by the return that he is in prison by virtue of a sentence of the Circuit Court in regular form, which was pronounced by the court in pursuance of a legal conviction founded upon a valid indictment.

By virtue of the conviction the defendant became liable to be punished by imprisonment for a term of not more than one year or to be fined not less than ten nor more than two hundred dollars, and the court sentenced him to imprisonment for the term of one year.

Much stress, however, is placed upon the alleged fact that the first sentence imposed was of a different character, that it included imprisonment for the term of one year and a fine of two hundred dollars, but it is a sufficient answer to that suggestion to say that neither the ruling of the court in imposing that sentence nor the subsequent ruling of the court in vacating it and setting it aside is in any proper sense any part of the record. Statements to that effect are found in the minutes, but those are no part of the record nor can they be made so in any other mode than by a bill of exceptions, which is a proceeding wholly unknown except in civil actions. Nothing is properly included in the record of a criminal case except the indictment, the arraignment and the plea of the defendant, the impanelling of the jury, the conviction of the defendant and the sentence pronounced by the court, and the warrant for his removal in case the punishment is imprisonment. Affidavits cannot add anything to the record, and it is as clear as anything can be that neither

* Ex parte Kearney, 7 Wheaton, 42; Johnson *v.* United States, 3 McLean, 89.

the writ of habeas corpus nor the writ of certiorari can bring into review anything, not apparent on the face of the record.

Certain defects in the proceedings are alleged in this case, none of which are apparent on the face of the record. Reference will only be made to two of the alleged defects, as they are the only ones much pressed in argument. They are as follows: (1.) That a different sentence was first pronounced by the court, to wit, that the defendant should be imprisoned for the term of one year and that he should pay a fine of two hundred dollars. (2.) That he was remanded to prison in pursuance of that sentence.

Enough has already been remarked to show that the first sentence was wholly illegal, as the court, under the act of Congress defining the offence, could not lawfully pronounce such a sentence, and that the court, as soon as the error was discovered, directed that the defendant should be brought into court and vacated the sentence and set it aside, which, as all must agree, had the effect to render it a complete nullity, even if it ever had any force or effect, which is not admitted. Strong doubts are entertained whether any of these matters are the proper subjects of consideration, but it must be admitted, I think, that the affidavits, if they are admissible at all, are the proper subjects of reference to show what really did take place.

Certainly a sentence, vacated and set aside by the court which pronounced it, within the same term, for reason that it was plainly erroneous, to the prejudice of the prisoner, must, from the moment it was vacated and set aside, be regarded as a nullity. Such being the necessary legal conclusion, the state of the case before the court was just the same as it would have been if no sentence had ever been passed, as the record showed that the defendant was legally convicted of an offence against the authority of the United States, upon a valid indictment, and that the sentence which the law imposed upon such an offender had never been pronounced in the case. No motion for new trial was pending, and as all the other proceedings in the case were ended, it

was the plain duty of the court to pronounce the sentence which the law imposed in the case.

Two principal objections are taken to the right of the court under those circumstances to impose the sentence, though it is admitted that the sentence pronounced is one which the act of Congress under which the indictment is framed authorized the court to impose in the case. Those objections are as follows: (1.) That the defendant, after having been remanded under the first sentence, remained in prison five days before the court passed the order vacating the sentence and setting it aside. (2.) That the defendant, on the fourth of November, the day after the first sentence was passed, paid the amount of the fine imposed to the clerk of the Circuit Court, and that the clerk, on the seventh of the same month, the day before the existing sentence was imposed, deposited the amount of the fine to the credit of the Treasurer of the United States.

All must agree that neither of the defects suggested, if such they be, is apparent in the record, as the former sentence was before that vacated and set aside, and the evidence of the payment of the fine consists of the unsworn certificate of the clerk. Great difficulty exists in regarding a sentence in a criminal case, which has been vacated and set aside, as a part of the record, and it seems past belief that any one should for a moment contend that the certificate of the clerk that he had received the amount of fine from a prisoner in execution should be regarded as any part of the record in the present case.

Aside from those difficulties, however, there are several other questions involved which are of very great importance in the administration of criminal justice, which will be separately considered.

Confessedly all of the facts are without dispute, as it is conceded that the conviction of the defendant, the first sentence, the granting of the first writ of habeas corpus, the order vacating the first sentence and setting it aside, and the sentence as it now appears in the record, all took place during the same term of the Circuit Court; and it also ap-

pears that the sentence under which the defendant is detained in prison was pronounced by the same judge who presided at the trial of the prisoner and who imposed the sentence which was vacated and set aside.

Four principal propositions are maintained by the United States: (1.) That a sentence passed upon a prisoner duly convicted of an offence defined by an act of Congress, if erroneous, may be vacated and set aside like any other judgment during the term in which it was pronounced, by the court which awarded it, and that the prisoner may be sentenced in the same term, as provided by law, for the offence of which he stands convicted. (2.) That an erroneous sentence, when vacated and set aside during the same term by the judge who pronounced it, becomes void and of no effect, and that the prisoner, if duly convicted under a valid indictment, may be sentenced to such punishment as the law provides for the offence of which he is convicted just as if the erroneous sentence had never been pronounced. (3.) That the power of the court to sentence a prisoner legally convicted is not superseded or withdrawn by the fact that the first sentence pronounced in such a case was erroneous, if the erroneous sentence, within the same term, is promptly vacated and set aside as soon as the error is discovered. (4.) Nor can it be held that the power of the court in that behalf is affected by the fact that the prisoner in the meantime, as in this case, paid the fine which was imposed by the court as a part of the sentence, provided the error is discovered within the same term and it appears that the judge who imposed the erroneous sentence immediately vacated the sentence and set it aside.

1. Exactly the same question in principle was presented in the case of *King* v. *Price*,* to the King's Bench, where it was decided very early in the present century. Suffice it to say that the charge was perjury, and that the court, after overruling a motion for a new trial, sentenced the prisoner to be imprisoned in Newgate for one calendar month, and

* 6 East, 327.

that he then be transported beyond the seas for seven years. Subsequent researches, however, satisfied the court that the sentence was erroneous because not warranted by law, and the case shows that the court, a few days before the close of the term, vacated it and set it aside, and on the last day of the term the prisoner was again brought into court and set at the bar, as Lord Ellenborough stated, for the purpose of passing upon him a different judgment, which, as he observed, might be done at any time within the same term; and it also appears that Mr. Justice Grose, after having stated to the prisoner that the former sentence had been vacated, pronounced the sentence of the court in the case, that the prisoner should forfeit £20 and be imprisoned in Newgate for the term of six months without bail, that his oath from thenceforth should not be received in any court of record within the realm, and that after the expiration of his imprisonment he should be transported beyond the seas for the term of six years. Seventy years have elapsed since that decision was made, and yet it has never been called in question by the court where it was made. Based on that decision this court said, in the case of *Basset* v. *United States*,* that the control of the court over its own judgments during the term is of every day's practice, which is a proposition supported by the highest authority.†

Courts of common law possessed the power to vacate their judgments during the term in which they were rendered, and the rule is still the same in all courts exercising jurisdiction in common-law cases, whether civil or criminal; and the remark is equally correct whether applied to a State or Federal court. Power of a court over its judgments during the entire term in which they are rendered is unlimited.‡ Every term continues until the call of the next succeeding term, unless previously adjourned *sine die;* and until that time the judgment may be modified or stricken out.§ Dur-

* 9 Wallace, 41. † Doss *v.* Tyack, 14 Howard, 312.

‡ Freeman on Judgments, § 90.

§ Noonan *v.* Bradley, 12 Wallace, 129; King *v.* Justices, 1 Maule & Selwyn, 442.

ing the same session or assize or any adjournment thereof, says Mr. Archbold, the court may vacate the judgment passed upon the defendant, before it has become matter of record, and pass another less or even more severe.*

Unqualified support to the proposition that an erroneous sentence may be corrected or altered at any time during the term is also found in the case of *Rex* v. *Fletcher*, decided in 1803 by the twelve judges.†

Amendments may be made while the proceedings are in paper, that is, until judgment is issued, for until the end of the term the proceedings, except, perhaps, in capital cases, are considered only *in fieri*, and consequently they are subject to the control of the court.‡ Equally decisive also is the language of Mr. Starkie in his valuable work on criminal pleading, in which he lays down the rule that, during the term, assizes, or session in which judgment is given it remains in the breast of the court, and he states that the fine imposed or any other discretionary punishment may be varied, but he adds that after the term it becomes matter of record and admits of no alteration.§

It is clear, says Mr. Chitty, in the case of misdemeanors, that the court may vacate the judgment passed before it becomes matter of record, and may mitigate or pass another, even when the latter is more severe.‖

If, by inadvertence in passing a sentence, says Colby, a requirement of the statute has been overlooked, the court may correct the judgment at the same term before the sheriff has proceeded to execute it, and he adds that such correc-

* Archbold's Pleading and Evidence, by Welsby, 15th ed. 177; Comyn's Digest, Title Indictment, N.

† Russell & Ryan Crown Cases, 60.

‡ 3 Blackstone's Commentary, 407; George *v.* Wisdom, 2 Burrow, 756; King *v.* Knolles, 1 Salkeld, 47; Turner *v.* Barnaby, 2 Id. 566; Greenwood *v.* Piggott, 3 Id. 31; Co. Litt. 260, a; 1 Chitty's Archbold Practice, 11th ed. 541.

§ Citing 1 Institutes, 260; Cro. Car. 251; 2 Hawkins's Pleas of the Crown, 48, § 25; 1 Starkie's Criminal Pleading, 262; Blackamore's Case, 8 Reports, 460.

‖ 1 Chitty's Criminal Law, 722.

tion may be made by expunging or vacating the first sentence and passing a new one.*

Coke states the rule at common law to be that the record of any judicial act done remaineth during the term in the breast of the judges of the court and in their remembrance, hence, as he says, the roll is alterable during that term as the judges shall direct, but when that term is past then the record, as he states the rule, is in the roll and admitteth of no alteration, averment, or proof to the contrary.

Judgments in criminal cases, it is admitted by Gabbett,† may be vacated before they become matter of record, but he insists that no court can make any alteration in the same when once the judgment is solemnly entered on the record, except that it may be reversed by writ of error if any material defect appear on the face of it.

What is meant by the final record is nowhere better explained than by the Supreme Court of Massachusetts in the case of *Commonwealth* v. *Weymouth*,‡ in which the opinion was given by the chief justice. Minutes of the proceedings in a criminal trial are made on the docket by the clerk as they take place, but the record, except in capital cases, is not made until the end of the term or session of the court, when the whole proceedings are spread upon the record in a book or books kept for that purpose, which is, in the Federal courts, the proper substitute for what is called the roll in the practice of the parent country. Such a record is never made up in ordinary criminal trials during the term, but the legal evidence of the proceedings rests in the minutes of the clerk, which, if need be, may be verified by his oath. Hence it is that even the strictest authorities admit that erroneous sentences may be corrected during the term in which it was imposed, as that could always be done in the parent country, although a writ of error would lie to correct the error if it was apparent on the face of the record.

* Criminal Law, vol. 1, p. 391; Miller *v.* Finkle, 1 Parker's Criminal Reports, 376.

† 2 Criminal Law, 564; Rex *v.* Walcott, 4 Modern, 396.

‡ 2 Allen, 144.

Accordingly it was held there that if the error was not corrected during the term it could only be corrected by the appellate court, and inasmuch as the appellate court could only reverse or affirm the judgment of the court of original jurisdiction, it followed, in case the judgment was reversed, that the prisoner was discharged.

State legislatures also, in some instances, have created appellate courts in criminal cases without investing such courts with the power either to impose the sentence which the subordinate court should have imposed or to remand the prisoner to the subordinate court for that purpose, and cases are referred to which show that the prisoner in such jurisdictions was necessarily discharged, but all such difficulties in most jurisdictions where they existed for a time have been obviated by more discreet legislation.*

Unsupplied as the jurisprudence of the United States is with any appellate tribunal for the correction of errors in criminal cases, it seems necessary to preserve all the corrective power legally vested in the courts of original jurisdiction to that end. Errors and mistakes will occur, but it is settled law that a writ of error will not lie from this court to a Circuit Court, and it is equally well settled that a writ of error will not lie in the circuit for any such purpose.† Resort to that remedy has certainly been had in a few instances in the Circuit Court in civil cases, but all the authorities agree that if the error be in the judgment itself and not in the process, a writ of error does not lie in the same court.‡ Errors of fact in the process sued out in a civil action, or such as happened through the fault of the clerk in the record of the proceedings prior to the judgment, might be corrected at common law by a writ of error returnable in the court where the action was commenced and where the judg-

* Ratzky *v.* People, 29 New York, 124; McKee *v.* People, 32 Id. 239; Campbell *v.* Regina, 11 Queen's Bench, 810; Jacquins *v.* Commonwealth, 9 Cushing, 279.

† Pickett's Heirs *v.* Legerwood, 7 Peters, 147.

‡ Kemp *v.* Cook, 18 Maryland, 137; Hawkins *v.* Bowie, 9 Gill & Johnson, 437.

ment was rendered. When granted to re-examine a judgment rendered in the King's Bench it was called a writ of error *coram nobis*, because it was founded upon a record and process described in the writ as remaining "before us," in accordance with the theory that the sovereign of the kingdom presided in the court.* Such a writ might also be sued out in the common pleas for a like purpose, but the writ, when sued out and returnable in the latter court, was denominated a writ of error *coram vobis*, because the writ was directed to "you and your associates," meaning the chief justice and the other justices of that court.† Proceedings under such a writ of error, in respect to a civil action, never extended to the judgment, as the rule was universal that a writ of error for that purpose must issue from another and a superior tribunal.‡ Such a writ, when returnable in the King's Bench, might extend to a criminal case as well as to a civil case, and might, within the scope of its operations, embrace questions of law as well as questions of fact, but it never extended to the correction of any error in the judgment, because the writ of error for that purpose must be issued from the proper appellate tribunal.§

Sufficient has already been remarked to show that such an error in the judgment in a criminal case cannot be corrected at all unless the correction can be made in the mode adopted by the Circuit Court in this case, as it is clear that a writ of error will not lie from this court to a Circuit Court in a criminal case for any purpose, nor will a writ of error *coram vobis* lie in a Circuit Court to correct any error of law or fact in a Circuit Court.‖

2. Such an error, it is said, cannot be corrected in that

* 2 Tidd's Practice, 1136; 2 Williams's Saunders, 101, note 1; Dewitt *v.* Post, 11 Johnson, 460; 3 Blackstone's Commentaries, by Cooley, 407, note 4.

† 1 Archbold's Practice, 6th ed. 504.

‡ Pickett *v.* Legerwood, 7 Peters, 148; 1 Rolle's Abridgment, 746; 2 Sellon's Practice, 484; 3 Blackstone's Commentaries, 407, note 5.

§ The Queen *v.* O'Connell, 7 Law Rep. (Irish), 356, 357; 9 Viner's Abridgment, 491.

‖ United States *v.* Plumer, 3 Clifford, 59.

mode in this case because the prisoner had been in confinement five days under the sentence before the order was made vacating the sentence and setting it aside, and the proposition is advanced in argument that no such correction can be made in any case after the prisoner is removed from the court in pursuance of the sentence, which is equivalent to the proposition that it cannot be made at all in that mode, as it will seldom or never happen that such a mistake will be discovered at the time it is made.

Cases may be imagined where the denial of such a remedy would shock the public sense; as if the Circuit Court, in a case where the prisoner was duly convicted of murder upon the high seas under the Crimes Act of the third of March, 1825, should, through inadvertence, sentence the prisoner not only that "he shall suffer death," but that the body of the offender "shall be delivered to a surgeon for dissection," as the sentence may be in a case where the indictment and conviction are under the original Crimes Act.*

Execution seldom or never immediately follows the sentence, but the sentence is that the prisoner be remanded to the place whence he came, and that he be there imprisoned until the day fixed for his execution, which shows that the term of imprisonment from the date of the sentence to the time of execution is an essential part of the sentence. Suppose in the case suggested the error is not discovered before the expiration of ten days, will any one contend that it cannot be corrected? If not, then it must be executed as it stands, or the prisoner must be set free, perhaps to repeat his offence.

3. Assume that the rule adopted by the majority of the court in this case is correct, and it follows beyond peradventure that the court could not vacate the sentence and pass the sentence authorized by law, and if not, then it is clear that it could not be corrected in any other mode, as it is settled law that a writ of error will not lie for the purpose either from this court or in the court where the error was

* 1 Stat. at Large, 113; 4 Id. 115.

committed. Public justice must, therefore, be defeated, as all will agree, if the error cannot be corrected that the prisoner would be entitled to a discharge on habeas corpus, as every sentence in a criminal case is an entirety, so that if any part of it is unauthorized by law the whole sentence is illegal. Any rule which will peremptorily discharge a prisoner, legally convicted of an offence, whether it be a felony or misdemeanor, merely because the court committed an error in pronouncing the sentence, cannot be a sound one, nor is it believed that it will be satisfactory to any who have much acquaintance with the administration of criminal justice in the Federal courts.

Many cases are cited by the petitioner, but an examination of them will show that not one of the number supports any such proposition as that which it is necessary to adopt to sustain the ruling of this court in ordering the discharge of the prisoner, nor can any case be found where such a doctrine is directly laid down.

Where the sentence imposed is legal in all respects, it is held in Maine that the judge, after the prisoner has been remanded in execution of the sentence, cannot order him to be brought up and set at the bar for the purpose of revising the sentence and increasing the punishment. In that case the prisoner had been duly sentenced to six months' imprisonment in the county jail, and he had served out nineteen days of the time, when the court ordered that he should again be brought up, and the court imposed a new sentence of imprisonment for the term of three years in the State's prison; but it is apparent that, the first sentence being regular and according to law, there was no error to correct, which shows that the case is as widely different from the one before the court as truth is from error.*

Doubts may well arise whether the decision in that case is correct, but it is not necessary to call it in question in this case, as the first judgment in this case, as conceded by the petitioner, was wholly illegal, and in such a case the author-

* Brown *v.* Rice, 57 Maine, 56.

ities appear to be uniform that the sentence authorized by law may be imposed at any time within the same term, and in some of the cases it is held that it may even be done in a subsequent term.* Promptitude in criminal trials is enjoined by the Constitution, but delays will occur in spite of every effort to expedite the result. Time for proper deliberation is indispensable, nor is it reasonable to expect that an error will be corrected before it is discovered. Beyond all doubt an erroneous judgment may be vacated and set aside if the error is discovered within the term, and when such a judgment is set aside the case stands just as it would have stood if the erroneous judgment had never been passed, as the proceeding is still *in fieri* until the regular sentence is imposed.† Errors even in the administration of criminal law will occur, and the ends of justice imperatively require that when they do occur there shall be some appropriate mode for their correction without discharging a prisoner legally convicted, as it cannot be admitted that an error of the court in passing the sentence of the law can have the effect to expiate the offence of the prisoner or to condone the criminal act of the offender.

4. All other objections failing, it is contended in the next place that the fact that the clerk deposited the amount of the fine imposed by the first sentence to the credit of the Treasurer of the United States the day before the second sentence was passed operated as an estoppel against the act of the court in vacating the first sentence and imposing the existing sentence.

Dates are of much importance in this case, and by reference to the petition subsequently presented to the circuit judge it appears that a habeas corpus in behalf of the prisoner was issued by the district judge on the same day the clerk deposited the amount of the fine as aforesaid, and that the writ of habeas corpus was made returnable on the fol-

* Easterling *v.* State, 35 Mississippi, 212; Jeffries *v.* State, 40 Alabama, 384.

† 3 Blackstone's Commentaries by Cooley, 407; Cook *v.* Wood, 24 Illinois, 296; Taylor *v.* Lusk, 9 Iowa, 445.

lowing day, which is the day when the illegal sentence was vacated and set aside and when the sentence authorized by the act of Congress was imposed, and much reason exists to suppose that the clerk was induced to make the deposit thus early in order that the prisoner might have the benefit of that proof in the hearing upon the petition for habeas corpus, which was previously set down for the following day. If that deposit had not been made the amount of the fine would have remained in the registry of the court, in which case it might have been returned to the prisoner by the order of the court. Such a payment made under such circumstances cannot expiate the offence of the prisoner or condone the criminal act of which he was legally convicted by the verdict of a jury duly summoned, impanelled, and sworn.* Measures for the correction of the illegal sentence had been instituted in behalf of the prisoner, and it cannot be that the power of the court to perform the mandate of the act of Congress can be thwarted by the mere circumstance that the clerk of the court, of his own motion or at the suggestion of the prisoner or his counsel, deposited the amount of the fine paid to him by the prisoner to the credit of the Treasurer of the United States. When the first sentence was vacated and set aside the money paid to the clerk for the fine became *ipso facto* the money of the prisoner, and wherever it may be now it is his money, nor can it make any difference even if it be held that it cannot be paid back without the consent of Congress, as it is money which *ex æquo et bono* belongs to the prisoner. Money paid under a mistake of fact may be recovered back, and it does not change the legal status of the right because the holder happens to be the government, which cannot be sued.

Suggestions of various kinds are made to avoid, if possible, the force of the conceded fact that the conviction remains undisturbed and that it rests upon the solid foundation of a valid indictment, one or two of which will be briefly noticed.

Attention is called to the constitutional provision that no

* Cooley on Constitutional Limitations, p. 325.

person shall be subject for the same offence to be twice put in jeopardy of life or limb, which, as Judge Story says, means that a party shall not be tried a second time for the same offence after he has once been convicted or acquitted of the offence charged by the verdict of a jury, and judgment has passed thereon for or against him. But the existing sentence is founded upon the same conviction as the first sentence, which of itself shows that the provision referred to has no application to the case, nor does the provision mean that the accused shall not be tried a second time if the jury have been discharged without giving any verdict, or, if having given a verdict, judgment has been arrested upon it or a new trial has been granted in his favor, for in such a case, says the learned author, his life or limb cannot judicially be said to have been put in jeopardy.* What is meant by the phrase "twice put in jeopardy of life or limb" has been judicially defined, and the definition cannot now be enlarged to help out a predetermined unsound judicial conclusion. It means that a party shall not be tried a second time for the same offence after he has once been acquitted or convicted, unless the judgment has been arrested or a new trial has been granted, on motion of the party; but it does not relate to a mistrial.† Even in a capital case the court may discharge a jury without their giving a verdict, whenever in the opinion of the court there is a manifest necessity for such an act, or the ends of justice will otherwise be defeated; and for the same reason the court, during the same term, may vacate an erroneous judgment and render the judgment which the law requires.‡

One trial and verdict, says Cooley, must as a general rule protect the accused against any *subsequent accusation* of the same offence, whether the verdict be for or against him, and

* 2 Story on Constitution, § 1787; Vaux *v.* Brook, 4 Reports, 39, *b;* Fox *v.* State, 5 Howard, 432; United States *v.* Marigold, 9 Id. 560; Moore *v.* State, 14 Id. 20.

† United States *v.* Haskell, 4 Washington, 410; United States *v.* Perez, 9 Wheaton, 579.

‡ 2 Graham & Waterman on New Trials, c. 2, pp. 51–135.

whether or not the court is satisfied with the finding, if it be in his favor and he was put upon trial before a court of competent jurisdiction and upon an indictment which is sufficient in form and substance to sustain the conviction. But if the court had no jurisdiction of the suit, or if the indictment was so far defective that no valid judgment could be rendered upon it, or if by any overruling necessity the jury were discharged without a verdict, from the sickness or death of the judge or of a juror, or from the inability of the jury to agree upon a verdict, after reasonable time allowed for deliberation, or if the term of the court as fixed by law comes to an end before the trial is finished, or the jury are discharged with the consent of the defendant expressed or implied, or if the verdict is set aside, on motion of the defendant, or on a writ of error in a jurisdiction where provision for a second trial is made by law—in any of these cases the accused may be again tried for the same offence, and the rule is well settled that the former trial will afford him no protection or defence.*

Where the verdict and judgment are set aside on a writ of error in an appellate tribunal, if the law of the jurisdiction makes no provision for a second trial the prisoner must be discharged, but it is settled law that it is competent for the legislature to provide that on reversing the judgment in such a case the court, if the prior proceedings are regular, shall remand the case for the proper sentence.†

Exceptions of the kind have their foundation in necessity, as all experience shows that errors and casualties will sometimes intervene in the administration of criminal justice. *Autrefois acquit* or *autrefois convict*, where the indictment is valid and the conviction is regular, in a court of competent jurisdiction, is a bar to a second prosecution for the same offence, but even that rule is subject to all the exceptions named and to many others of like character.‡

* Cooley's Constitutional Limitations, 2d ed. 327.

† McKee *v.* People, 32 New York, 239.

‡ 4 Blackstone's Commentaries, by Cooley, 335, note 5; Rex *v.* Emden, 9 East, 437.

Beyond all doubt it is the duty of the court to render the judgment required by law in the first instance, but the experience of ages makes it evident that mistakes in that behalf will sometimes occur, even in the courts of general jurisdiction, and hence the rule, which may be traced to the very origin of the common law, that a court may vacate and set aside an erroneous judgment, during the same term, and render in its stead the judgment required by law.

Trials upon bad indictments are governed by the same rule, and in my judgment the provision can have no application whatever in a case like the present, where the conviction is undisturbed and the illegal sentence is vacated and set aside as soon as the error is discovered. Judge Story, it is said, decided that a new trial could not be granted in the case of a good indictment after a trial by a competent and regular jury, whether the accused was acquitted or convicted, and the argument is that if a new trial cannot be granted in such a case that it is not competent for the court to vacate an illegal sentence and impose another, even though the latter be in substance and form what the law requires.

Even should it be admitted that a new trial cannot be granted in such a case, it by no means follows that the action of the Circuit Court in this case was unwarranted, as it is sanctioned by a long course of decisions founded upon acts of Parliament applicable to criminal as well as civil cases.*

New trials, however, in misdemeanors have always been granted in England in proper cases, as appears by numerous adjudications of the highest authority.†

Whether a new trial can be granted in felony in the courts of that country is more doubtful. Certainly it was decided

* Bingham on Judgments, pp. 71–73.

† Arundel's Case, 6 Reports, 14; Rex *v.* Curril, Lofft, 156; Rex *v.* Simmons, 1 Wilson, 329; Rex *v.* Mawbey, 6 Term, 638; Rex *v.* Tremaine, 7 Dowling & Ryland, 687; Same Case, 5 Barnewall & Cresswell, 256; Campbell *v.* Regina, 11 Q. B. 810.

in the case of *Regina* v. *Scaife et al.*,* that a new trial may be granted in such a case.† But in certain later cases it is decided the other way.‡ Be that as it may, it is nevertheless settled law in this country that a new trial may be granted in favor of the prisoner, whether the charge be felony or only a misdemeanor.§ Much effort was expended by Judge Story in the case of *United States* v. *Gibert et al.*,‖ to prove the negative of that proposition, but his views in that regard have never been accepted by the bench or bar, as appears by the decisions of the Circuit Courts and by the decisions of nearly all of the State courts, many of which are collected in the following reported cases: *People* v. *Morrison*,¶ *United States* v. *Williams et al.*,** in which it is stated that since the decision in Gibert's case the point has been discussed in twenty of the States of the Union, in every one of which it has been held that a new trial may be granted on the application of the accused in any criminal case for good cause shown.††

Fine or imprisonment may be imposed in a case like the present, and the suggestion is that if the court by the second sentence had imposed a fine the prisoner would have been compelled to pay the fine a second time, but it is so obvious that the money in the registry of the court, or on deposit to the credit of the treasurer, belonged to the prisoner the moment the first sentence was vacated and set aside that it seems to be a work of supererogation to employ any time in discussing the point, and it is accordingly dismissed.

Authority to issue writs of habeas corpus is not claimed to be among the enumerated cases of original jurisdiction conferred upon the Supreme Court, consequently if it exists

* 2 Denn Cr. C. 281. † Same Case, 17 Q. B. 238.

‡ Reg. *v.* Bertrand, Law Reports, 1 Privy Council, App. 528; Same Case, 10 Cox Cr. C. 621; Reg. *v.* Murphy, Law Reports, 2 Privy Council, App. 546.

§ 1 Leading Criminal Cases, 584; Commonwealth *v.* Green, 17 Massachusetts, 515.

‖ 2 Sumner, 37.

¶ 1 Parker's Criminal Cases, 625; 1 Leading Criminal Cases, 2d ed. 587.

** 1 Clifford, 17.

†† Bishop's Criminal Law, 5th ed. § 1004.

at all, it must be found in the appellate power of the court, which is given with such exceptions and under such regulations as Congress may make, from which it follows that the appellate jurisdiction conferred by the Constitution can only be exercised by this court in pursuance of an act of Congress conferring the authority and prescribing the mode in which it shall be performed.*

Power to grant the writ of habeas corpus was never intended to confer authority upon this court to review the judgment of a Circuit Court in a criminal case, and hence it follows that this court cannot look beyond the sentence where the tribunal which pronounced it had jurisdiction of the case.†

Enough has already been said to show that the judgment under which the prisoner is held is perfect in form, and inasmuch as he was put to trial upon a valid indictment and was duly convicted of the offence charged in the indictment, I am of the opinion that he is not entitled to be discharged under the writ of habeas corpus.

Mr. Justice STRONG also dissented.

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* Wiscart *v.* Dauchy, 3 Dallas, 327; United States *v.* More, 3 Cranch, 172; Durousseau *v.* United States, 6 Id. 308.

† Ex parte Kearney, 7 Wheaton, 38; Ex parte Watkins, 3 Peters, 193; Johnson *v.* United States, 3 McLean, 89; Ex parte Van Aernam, 3 Blatchford, 160; Barry *v.* Mercein, 5 Howard, 103; Ex parte Gifford, 5 American Law Register, New Series, 659; 1 Curtis's Commentaries, § 240, p. 259; Ex parte Burford, 3 Cranch, 448.

Syllabus.

THE DELAWARE RAILROAD TAX.

[MINOT *v.* THE PHILADELPHIA, WILMINGTON AND BALTIMORE RAILROAD COMPANY AND OTHERS.]

1. Although it has been repeatedly held by this court that the legislature of a State may exempt particular parcels of property or the property of particular persons or corporations from taxation, either for a specified period or perpetually, or may limit the amount or rate of taxation to which such property shall be subjected, and that when such immunity is conferred, or such limitation is prescribed by the charter of a corporation, it becomes a part of the contract, and is equally inviolate with its other stipulations; yet before any such exemption or limitation can be admitted, the intent of the legislature to confer the immunity or prescribe the limitation must be clear beyond a reasonable doubt. All public grants are strictly construed, and nothing can be taken against the State by presumption or inference. The established rule of construction in such cases is that rights, privileges, and immunities not expressly granted are reserved.
2. Accordingly, a provision in an act of the legislature of Delaware, under which the original Wilmington and Susquehanna Railroad Company was united with the Delaware and Maryland Railroad Company, requiring the new company to pay annually into the treasury of the State a tax of one-quarter of one per cent. upon its capital stock of $400,000, did not prevent a subsequent legislature from imposing a further or different tax upon the company. The amount designated was only a declaration of the tax payable annually until a different rate should be established.
3. By an act of the legislature of Maryland, passed in 1831, and its supplement, a corporation called the Delaware and Maryland Railroad Company was created, with authority to construct and maintain a railroad from a point on the Delaware and Maryland line to some point on the Susquehanna River; and by the nineteenth section of the act it was provided that the shares of the capital stock of the company should be exempt from the imposition of any tax or burden by the State assenting to the act, except upon that portion of the permanent and fixed works of the company, which might be within the State of Maryland. By an act of the legislature of Delaware, passed in 1832, and its supplement, another corporation was created, called the Wilmington and Susquehanna Railroad Company, with authority to construct and maintain a railroad from a point on the boundary line of Pennsylvania and Delaware to the city of Wilmington, and thence towards the Susquehanna in the direction of Baltimore. In 1835 these two companies were, under acts of the legislatures of Maryland and Delaware, consolidated into one company, under the name of the latter—the Wilmington and Sus-

Syllabus.

quehanna Railroad Company. The act of Delaware, authorizing the consolidation on her part, provided that the holders of the stocks of the two companies should, when consolidated, hold, possess, and enjoy all the property, rights, and privileges, and exercise all the power granted to, and vested in, the companies, or either of them, by that law, or any other law or laws of that State, or of Maryland. The act of Maryland, authorizing the consolidation on her part, contained a similar provision. *Held*, that the purpose of the two provisions was to vest in the new company the rights and privileges which the original companies had previously possessed under their separate charters; the rights and privileges in Maryland which the Maryland company had there enjoyed, and the rights and privileges in Delaware which the Delaware company had there enjoyed; not to transfer to either State and enforce therein the legislation of the other. The new company, after the consolidation, stood in each State as the original company had previously stood in that State, invested with the same rights, and subject to the same liabilities. The act of consolidation, so far as Delaware was concerned, had only this effect.

4. The consolidated company abovementioned was, in 1838, united with two other railroad companies, one called the Baltimore and Port Deposit Railroad Company, chartered by the legislature of Maryland in 1831, with authority to construct and maintain a railroad from Baltimore to Port Deposit, on the Susquehanna River; and the other called the Philadelphia, Wilmington and Baltimore Railroad Company, chartered by the legislature of Pennsylvania in the same year, with authority to construct and maintain a railroad from Philadelphia to the Delaware State line. These three companies were, under acts of the legislatures of these States, Delaware, Maryland, and Pennsylvania, consolidated into one company with a common stock, retaining as its corporate name the name of the company chartered by Pennsylvania. The act of the legislature of Delaware, under which the consolidation was effected, declared that the respective companies should "constitute one company, and be entitled to all the rights, privileges, and immunities which each and all of them possess, have, and enjoy, under and by virtue of their respective charters." *Held*, that this latter provision in no respect changed the position with reference to taxation of the new company, in one of the States, from that of the old company in such State.

5. An act of the legislature of Delaware, taxing railroad and canal companies, was passed on the 8th of April, 1869. The fourth section of the act provided that every company of the class designated should, in addition to other taxes, also pay to the treasurer of the State for its use, on the first day of July then next, and on the first day of July of each year thereafter, or within thirty days from such period, a tax of *one-fourth of one per cent. upon the actual cash value of every share of its capital stock*; with a proviso that when the line of the railroad or canal belonging to a company liable to the tax lay partly in the State and partly in an adjoining State or States, the company should only be re-

quired to pay the tax on such number of the shares of its capital stock as would be in that proportion to the whole number of shares, which the length of the road or canal within the limits of the State should bear to the whole length of such road or canal. *Held*,

1st. That the tax was not imposed upon the shares of the individual stockholders, or upon the property of the corporation, but was a tax upon the corporation itself, measured by a percentage upon the cash value of a certain proportional part of the shares of its capital stock,—a rule which, though an arbitrary one, was approximately just in the case.

2d. That the tax did not conflict with the power of Congress to regulate commerce among the several States, nor interfere with the right of transit of persons and property from one State into or through another.

6. The State may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property. And the manner in which its value shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion.

7. A tax upon a corporation may be proportioned to the income received as well as to the value of the franchise granted or the property possessed.

8. The fact that taxation increases the expenses attendant upon the use or possession of the thing taxed, of itself constitutes no objection to its constitutionality.

9. The exercise of the authority which every State possesses to tax its corporations and all their property, real and personal, and their franchises, and to graduate the tax upon the corporations according to their business or income, or the value of their property, when this is not done by discriminating against rights held in other States, and the tax is not on imports or tonnage, or transportation to other States, cannot be regarded as conflicting with any constitutional power of Congress.

APPEAL from the Circuit Court of the United States for the District of Delaware; in which court William Minot filed a bill against the Philadelphia, Wilmington and Baltimore Railroad Company and the State Treasurer and Collector of State Taxes of Delaware, to enjoin the collection of certain taxes.

The case was thus:

On the 8th of April, 1869, the legislature of the State of Delaware passed an act taxing railroad and canal companies in the State. The first section of the act provided that all railroad and canal companies, incorporated under the laws of the State and doing business therein, should, on the first day of January then next, and on the first day of January

of each year afterwards, pay to the treasurer of the State for the use of the State, in addition to the taxes then imposed by law upon such companies, a tax of *three per cent. upon their net earnings or income received from all sources during the preceding year;* with a proviso, that when a line of railroad or canal belonging to any company liable to the tax lay partly in the State and partly in an adjoining State or States, the part or share of such net earnings or income of the company only should be subject to the tax, as would be in that proportion to the whole net earnings or income of the company, which the length of the road or canal within the limits of the State should bear to the whole length of such road or canal.

The fourth section of the act provided that every company of the class designated should, in addition to other taxes, also pay to the treasurer of the State for its use, on the first day of July then next, and on the first day of July of each year thereafter, or within thirty days from such period, a tax of *one-fourth of one per cent. upon the actual cash value of every share of its capital stock;* with a proviso similar in its character to that of the first section, namely, that when the line of the railroad or canal belonging to a company liable to the tax lay partly in the State and partly in an adjoining State or States, the company should only be required to pay the tax on such number of the shares of its capital stock as would be in that proportion to the whole number of shares, which the length of the road or canal within the limits of the State should bear to the whole length of such road or canal.

Another section of the act further provided that every railroad company should also pay to the State treasurer on the first day of January then next, and on the first day of January of each year thereafter, or within thirty days from such period, *for the use in the State* of every locomotive belonging in whole or in part to the company, and used by it at any time during the preceding year, a tax of $100; and for the like use of each passenger car thus owned and used,

a tax of $25, and of each freight car and truck thus owned and used, a tax of $10.

The act required the president or treasurer of every company liable to these several taxes, to furnish the State treasurer with statements showing its net earnings or income from all sources during the preceding year, the number of locomotives, passenger cars, freight cars of every description, and trucks belonging to the company and used by it in the State at any time during that period, and the number of shares of the capital stock of the company, with an estimate and appraisement of the actual cash value of each share, and to pay the taxes chargeable. The act also made provision for an estimate of the earnings and an assessment of the taxes in case the statement required was not furnished, and for the collection of the taxes by sale of the property of the company, if they were not voluntarily paid.

The defendant, the Philadelphia, Wilmington and Baltimore Railroad Company, is a corporation created under the laws of Delaware, so far as it exists in that State. By connection with other companies with which under one common name it is consolidated by the legislation of Pennsylvania and Maryland, hereafter particularly mentioned, its road extends to Philadelphia in one State, and to Baltimore in the other. It is, therefore, a corporation liable to taxation by the terms of the act of April 8th, 1869, and is within the provisos of both its first and fourth sections.

The tax upon this company, imposed by the fourth section, became due for the first time in July, 1869, and in October following, in response to demands of the State treasurer, the president of the company furnished to that officer a statement showing that the capital stock of the company consisted of 186,088 shares of the value of $50 each, accompanied by a protest against the legality of the tax. Soon afterwards, Minot, the complainant, a citizen of Massachusetts, and a stockholder in the company, addressed a written communication to its president inquiring whether the company intended to protect his interests as a stockholder by resisting the collection of the tax, and stating that

as the tax was not a legal one protection against its levy should be provided. This communication was submitted to the directors, who, in answer, resolved that while they protested against the legality of the tax, they declined to take the responsibility of interfering to prevent its collection, leaving the stockholders at liberty to assert their rights in such way as they might think proper. Minot thereupon filed the present bill. Though the immediate occasion of the bill was the apprehended attempt on the part of the State of Delaware to enforce the tax imposed upon the company by the fourth section of the act of April 8th, 1869, the complainant charged that all the taxes imposed by the act in question were illegal, and sought to have the legislation imposing them, so far as it affected the Philadelphia, Wilmington, and Baltimore Railroad, the corporation defendant, declared to be unconstitutional and invalid and the collection of the taxes enjoined.

The Circuit Court adjudged the tax imposed for the use of the rolling stock to be invalid, and enjoined its enforcement, but sustained the legality of the other taxes, and a decree in conformity with this ruling was entered, from which both parties appealed to this court. On the hearing in this court the State officers of Delaware withdrew their appeal, and the inquiry of the court was thus limited to the validity of the act of April, 1869, so far as it imposed the taxes specified in its first and fourth sections.

The invalidity of that act, so far as it imposed these taxes upon the defendant corporation, was asserted upon the following grounds:

1st. That it violated the contract between the State of Delaware and the company contained in the charter of the latter.

2d. That it imposed taxes upon property beyond the jurisdiction of the State.

3d. That it conflicted with the power of Congress to regulate commerce among the several States; and,

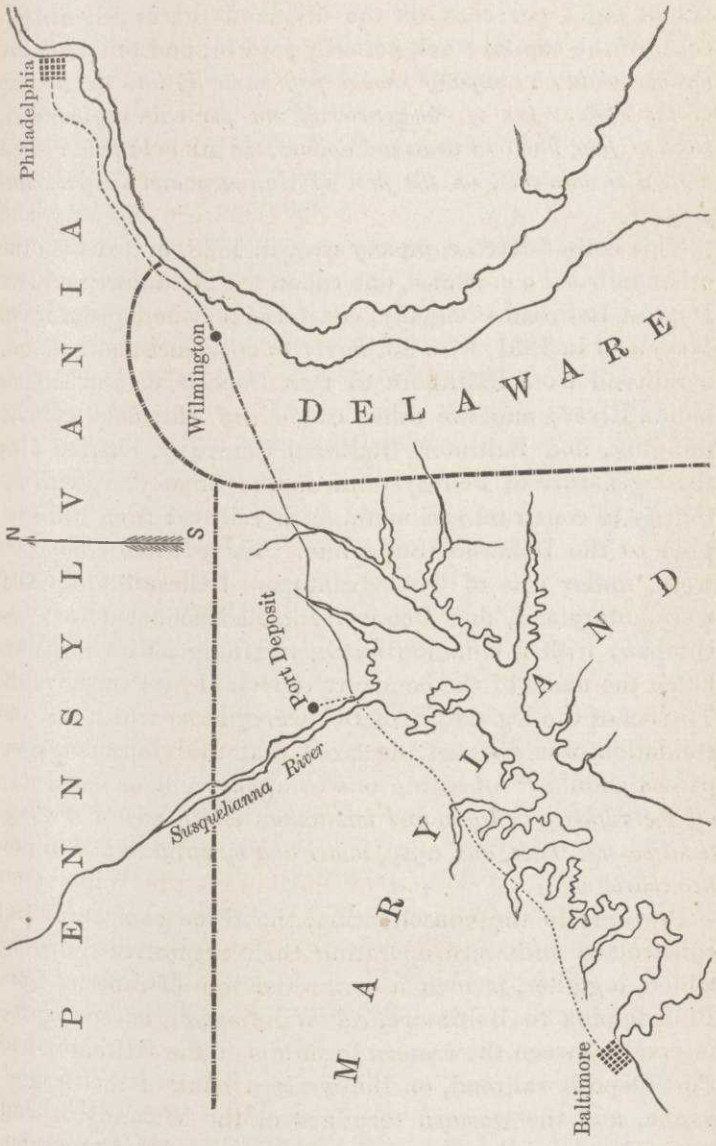
4th. That it interfered with the right of transit for persons and property from one State into or through another.

Statement of the case.

The defendant corporation, as already mentioned, was formed by union with companies chartered by other States, and to understand fully the positions of the appellant, reference must be had to the original corporations, and the legislation by which they were created. By an act of the legislature of Maryland, passed in 1831, and its supplement, a corporation called the Delaware and Maryland Railroad Company was created, with authority to construct and maintain a railroad from a point on the Delaware and Maryland line to some point on the Susquehanna River; and by the nineteenth section of the act it was provided *that the shares of the capital stock of the company should be exempt from the imposition of any tax or burden by the State's assenting to the act, except upon that portion of the permanent and fixed works of the company, which might be within the State of Maryland.* By an act of the legislature of Delaware, passed in 1832, and its supplement, another corporation was created, called the Wilmington and Susquehanna Railroad Company, with authority to construct and maintain a railroad from a point on the boundary line of Pennsylvania and Delaware to the city of Wilmington, and thence towards the Susquehanna in the direction of Baltimore to the Delaware and Maryland line. The act provided that the company should pay annually into the treasury of the State a tax of eight per cent. on the dividends exceeding six per cent. of the capital stock actually paid in.

In 1835 these two companies were, under acts of the legislatures of Maryland and Delaware, consolidated into one company, under the name of the latter—the Wilmington and Susquehanna Railroad Company. The act of Delaware, authorizing the consolidation on her part, provided that *the holders of the stocks of the two companies should, when consolidated, hold, possess, and enjoy all the property, rights, and privileges, and exercise all the power granted to, and vested in, the companies, or either of them, by that law, or any other law or laws of that State, or of Maryland.* The act of Maryland, authorizing the consolidation on her part, contained a similar provision. The act of Delaware, at the same time, repealed the pro-

Diagram of the railroads.



vision in the charter of the original Wilmington and Susquehanna Railroad Company, requiring the payment of the tax of eight per cent. on the dividends exceeding six per cent. of the capital stock actually paid in, and provided that *the consolidated company should pay annually into the treasury of the State, a tax of one-quarter of one per cent. on its capital stock of four hundred thousand dollars, the tax to be paid in semi-annual instalments, on the first of January and July of each year.*

This consolidated company was, in 1838, united with two other railroad companies, one called the Baltimore and Port Deposit Railroad Company, chartered by the legislature of Maryland in 1831, with authority to construct and maintain a railroad from Baltimore to Port Deposit, on the Susquehanna River; and the other called the Philadelphia, Wilmington, and Baltimore Railroad Company, chartered by the legislature of Pennsylvania in the same year, with authority to construct and maintain a railroad from Philadelphia to the Delaware State line. These three companies were, under acts of the legislatures of these States, Delaware, Maryland, and Pennsylvania, consolidated into one company with a common stock, retaining as its corporate name the name of the company chartered by Pennsylvania. The act of the legislature of Delaware, under which the consolidation was effected, declared that the respective companies should "constitute one company, and be entitled to *all the rights, privileges, and immunities which each and all of them possess, have, and enjoy, under and by virtue of their respective charters.*"

Previous to the consolidation, the three companies had constructed and were operating their respective railroads, which, together, formed a connected line of railroad from Philadelphia to Baltimore, *viâ* Wilmington, excepting the interval between the eastern terminus of the Baltimore and Port Deposit railroad, on the western bank of the Susquehanna, and the western terminus of the Wilmington and Susquehanna railroad, on the eastern bank of the same river, which interval was supplied by a ferry; but the line

was inferior in structure and equipment to that since maintained by the consolidated company.

Since the consolidation, the Philadelphia, Wilmington, and Baltimore Railroad Company had built a bridge across the Susquehanna, in the State of Maryland, at a great expense, and had thus established and now maintains a continuous railroad route between Philadelphia and Baltimore, and had expended large sums in laying an additional main track, sidings and turnouts, and in building depots and stations, and in furnishing an adequate equipment of rolling-stock. The capital stock of the company when the bill was filed was represented by 186,088 fully paid shares of the par value of $50 each, of which 184,524 shares were held by persons who were neither citizens nor residents of Delaware.

The capital stock of the Maryland and Pennsylvania companies, previous to and at the time of the consolidation of these companies with the Delaware company, represented real and personal estate of great value (locally situated in these States) belonging to stockholders not domiciled in Delaware.

The entire length of the railroad of the consolidated Philadelphia, Wilmington, and Baltimore Railroad Company, including a branch in the State of Maryland, known as the Port Deposit Branch, is $97\frac{74}{100}$ miles, of which $23\frac{8}{10}$ miles are in the State of Delaware; but the value of the property of the company locally situated in the State of Delaware is much less than $\frac{23}{97}\frac{08}{74}$ of its entire property; the bridge across the Susquehanna, in the State of Maryland, representing alone an expenditure exceeding $1,500,000, and the value of the depot and station grounds, in the States of Pennsylvania and Maryland, with the buildings and structures thereon, exceeding $\frac{76}{97}\frac{66}{74}$ of the value of the entire depot and station property of the company.

Messrs. J. E. Gowen, G. C. Gordon, and J. P. Comegys, for the appellant:

1st. *The tax imposed upon the shares of the capital stock of the Philadelphia, Wilmington and Baltimore Railroad Company*

by the act of April 8th, 1869, was a violation of the contract between the State of Delaware and the company contained in the charter of the latter.

There is no doubt that a State may by contract exempt particular property from taxation. All that is necessary is that the language of the contract be plain, and the purpose to relinquish unquestionable. The exemption relied on in the present case is not founded on an ordinary charter. In assenting to the creation and organization of the present Philadelphia, Wilmington and Baltimore Railroad Company, the State of Delaware contracted with corporations and citizens of other States whose property was not in any way subject to her power of taxation. The question to be determined was not so much as to what right of taxation should be relinquished by the State, as to what right of taxation should be assumed by it. It can scarcely be thought that the negotiation between the State of Delaware and the foreign corporations, proceeded on the basis that the State of Delaware would, in the absence of any provision on the subject, acquire an unlimited right to tax the franchises of these corporations. If such a theory had been entertained, it would necessarily have occurred to the parties interested that the States of Maryland and Pennsylvania could exercise the same prerogative, and that the proposed corporation would be subjected to the taxation of three distinct sovereignties in none of which would the corporators be adequately represented.

When, then, the State of Delaware prescribed the terms of taxation on which she would consent to the proposed consolidation, these terms may fairly be considered, not in the light of the release, but in that of the acquisition of a privilege; so far, indeed, as the foreign companies were concerned.

What now are the provisions of the charter on the subject of taxation?

By the original act of incorporation of the Wilmington and Susquehanna Railroad Company (act of January 18th, 1832), the company was required to pay an annual tax of

eight per cent. on all dividends which may exceed six per centum on the capital stock actually paid in, and this was the only measure of taxation specifically prescribed in the act.

Such being the status of the company, the act of July 24th, 1835, providing for its consolidation with the Delaware and Maryland Railroad Company of Maryland, repealed this provision of the original act, and then enacted that the consolidated company "shall pay annually into the treasury of the State a tax of one-quarter of one per cent. on the capital stock thereof of $400,000; the said tax to be paid semi-annually, &c., *in each and every year hereafter.* This provision, we contend, meant that the tax on capital stock, for which the consolidated company was to be liable, should be that specified, viz., a quarter of one per cent. on the sum of $400,000, and that no greater or other tax should thereafter be imposed on its capital. This tax was to be imposed annually *thereafter;* that is, annually during the existence of the consolidated corporation. A suggestion that the State of Delaware might, immediately after the Maryland company had accepted the terms on which it was authorized to unite with the Delaware company, impose a more onerous rate of taxation on the capital stock of the united companies than that specified, would undoubtedly have been treated as an injurious imputation on the good faith of the legislature of Delaware.

Doubtless it may be said that notwithstanding that the act specified the tax which it would lay, it did so without saying that no further or different tax should ever be laid, and that, therefore, a further and different one may be laid. Such seems to have been the doctrine held by the Supreme Court of Pennsylvania in *The Easton Bank* v. *The Commonwealth of Pennsylvania*,* where it was said that a bank rechartered under a law relating to it and a number of other banks, which provided that dividends should be taxed at a certain rate, was not exempt from the operation of a subsequent general law which increased the tax on dividends.

* 10 Pennsylvania State, 442.

But the doctrine is met and denied by this court in a case decided since the case in Pennsylvania; the case of *Raleigh and Gaston Railroad Company* v. *Reid*.* There the charter contained an exemption from taxation for a term of fifteen years; but, after the expiration of this limitation, the legislature was to be at liberty to tax the individual shares of the stockholders whenever their annual profits exceeded eight per cent., provided that the tax did not exceed twenty-five cents a share per annum; and it was held that a tax levied on the company after the expiration of the fifteen years, but before the annual profits had reached eight per cent., was a violation of the contract. "When a statute," said Davis, J., in delivering the opinion of this court, "limits a thing to be done in a particular mode, it includes a negative of any other mode." Is not this case in point? The legislature had asserted its right to tax the stock in a particular way after the expiration of a certain period, but it had not expressly said that it would not tax the stock in some other way, or that it would not tax the lands or personal property of the company; but the court held that the mode of taxation specified in the charter excluded any other mode. In the present case the legislature agreed that the tax on the capital stock of the consolidated company should be one thousand dollars a year, and by so doing did they not agree that it should not be ten thousand dollars, or twenty thousand dollars, or anything else than one thousand dollars?

Indeed in Pennsylvania in a case much later than that of the Easton Bank,† the same court that made the decision there, declared the following to be one of the conclusions derivable from a review of the decisions of this court on the subject of charter contracts between the State and corporations:

"If the legislature, in creating a corporation, prescribe a rate of taxation, and expressly release the power to impose further taxes, *or do not expressly reserve the power to themselves*, a subse-

* 13 Wallace, 269; and see Home of the Friendless *v.* Rouse, 8 Id. 431, and the Binghamton Bridge Case, 3 Id. 51.

† Iron City Bank *v.* The City of Pittsburgh, 37 Pennsylvania State, 340.

quent tax law does impair the obligation of the contract, and is void."

A conclusion which is plainly inconsistent with the decision in the Easton Bank case.

But the contract immunity from taxation claimed for the capital stock of the present consolidated Philadelphia, Wilmington and Baltimore Railroad Company rests on other grounds.

The Maryland act by which the "Delaware and Maryland Railroad Company" was incorporated contained the following provision:

"And the shares of the capital stock of said company shall be deemed and considered personal estate, *and shall be exempt from the imposition of any tax or burden by the State's assenting to this law, except upon that portion of the permanent and fixed works of said company which may lie within the State of Maryland.*"

The Delaware act of July 24th, 1835, providing for consolidation of the Wilmington and Susquehanna Railroad Company of Delaware with the Delaware and Maryland Railroad Company of Delaware, declared that the two companies, when consolidated, should be styled "The Wilmington and Susquehanna Railroad Company," and that by and under that corporate name the holders of the stock of the said railroad companies should

"*Hold, possess, and enjoy all the property, rights, and privileges, and exercise all the powers granted to and vested in the said railroad companies, or either of them, by this or any other law or laws of this State or of the State of Maryland.*"

These terms are as broad and general as they could be made. The consolidated company was to possess every *right and privilege* which *either* of the original companies possessed or enjoyed under any law of Maryland or Delaware. It was not said that the consolidated company should possess and enjoy every right, privilege, &c., which the laws of Delaware conferred on the Delaware company. The *purport and effect* of the act is, "that they shall, when united,

have all the rights and immunities in this State (Delaware) which each of them had in the State by which it was chartered." It is true that the phrase, "in this State," is not actually used; but the legislature which passed the act was the legislature of Delaware, and they were confirming rights and privileges to be exercised and enjoyed in Delaware, and not elsewhere. We, therefore, contend that, as immunity from taxation of its capital stock was a privilege which the Maryland company enjoyed, the consolidated company succeeded to the same immunity. The stock of the Delaware and Maryland Railroad Company is now represented by and forms an integral part of the stock of the consolidated company, and when the stock of the latter company is taxed that of the former is taxed also. The theory that the Delaware act of consolidation was merely intended to secure to the consolidated company all the privileges in Maryland which the Maryland company possessed, and in Delaware all the privileges which the Delaware company formerly possessed, disregards the terms of the Delaware act, and imputes to the Delaware legislature the assumption of legislative power in the State of Maryland.

It is true that the exemption from taxation contained in the original charter of the Delaware and Maryland Railroad Company referred to Maryland taxation only; but still it was an exemption from State taxation, and as such a *privilege* of the company; and when this, with all other privileges of the Maryland company, was conferred upon the consolidated company in Delaware, the latter company thereby acquired the privilege of exemption of its capital stock from State taxation, and that in Delaware meant Delaware State taxation.

2d. *The tax on capital stock imposed by the fourth section of the act of April 8th*, 1869, *was an unlawful usurpation by the State of Delaware of the right to tax property beyond its jurisdiction.*

The tax is imposed, in the first instance, upon the actual cash value of every share of the capital stock of every railroad and every canal company in Delaware; but with a proviso that where the line of railroad or canal belonging to

any company liable to the tax lies partly in Delaware and partly in an adjoining State or States, "such company shall only be required to pay the tax aforesaid on such number of the shares of its capital stock as will be in that proportion to the whole number of shares of such capital stock which the length of said railroad or canal within the limits of this State bears to the whole length of such railroad or canal."

The tax, therefore, whether considered as a tax upon shares of stock as representing the property of the corporation, or as representing the property of the individual stockholders, was not imposed upon the Delaware property of the corporation or upon property of the Delaware stockholders only; and if it can be sustained at all, must be sustained on a theory which would sustain the taxation of the entire capital stock of the company by each of the three States of Delaware, Maryland, and Pennsylvania, irrespective of the amount invested in each State, or of the residence of the stockholders. For it is obvious that any apportionment of taxation according to the mileage of the road in each State must be purely arbitrary. No one would expect to find that the ratio of mileage of the road in Delaware, to its entire length, was the same as that of the capital invested in Delaware to the entire capital of the company, or that the proportion of Delaware stockholders could be ascertained in the same way. In fact, it is admitted in this case, that while the entire length of the railroad is $99\frac{74}{100}$ miles, of which $23\frac{8}{10}$ are in Delaware, the value of the property of the company locally situated in the State of Delaware is much less than that which would be indicated by the ratio of these figures; and that of the 186,088 shares of the capital stock of the present company, 184,524 are held by persons who are neither citizens nor residents of Delaware.

Treating the question then as practically and substantially whether the State of Delaware can lawfully tax the entire capital stock of the Philadelphia, Wilmington and Baltimore Railroad Company, we have a question which is decisively answered in the negative by the judgment of this court in

the case of *Railroad Company* v. *Jackson*.* It was there held that "a State has no power to tax the interest on bonds secured in this case by mortgage given by a railroad corporation, and binding every part of the road, when the road is partially in another State; one road incorporated in two States." The decision was placed on the ground that to permit such taxation would be giving effect to State legislation upon property and interests lying beyond the State jurisdiction.

3d. *The tax on capital stock imposed by the fourth section of the act of April 8th, 1869, was a violation of the clause of the Constitution of the United States which confers upon Congress the power "to regulate commerce with foreign nations and among the several States."*

4th. *It was an unlawful interference with the constitutional right of transit for persons and property from one State into or through another.*

These two points may be considered together.

That the imposition of a tax upon the capital invested in the railroad between Philadelphia and Baltimore does really regulate the interstate commerce upon the railroad, seems evident; and that such a tax does interfere with and burden the right of passage for persons or property from one State to another may be said to be equally evident.

It is true that the same objections could be made to a State tax upon the railroad or the capital stock or the earnings of a railroad company where operations were confined to the territory of the State which levied the tax; and it is equally true that a tax upon horses and wagons in one State would to some extent affect commerce between the States. But the answer to the argument implied by this suggestion is, that the agencies and instruments of commerce must be subject to the taxation of the States within whose jurisdiction they exist, and the power of Congress to regulate commerce between the States must *ex necessitate*, be qualified by the indirect operation of the exercise of this power as well

* 7 Wallace, 262.

as of the State power to regulate its own domestic commerce. Where, however, a State undertakes to tax, even within its own jurisdiction, interstate commerce, much more when it undertakes to tax interstate commerce, or the agencies or instrumentalities of interstate commerce, beyond its jurisdiction, it usurps the prerogative of the Congress of the United States, and infringes the constitutional rights of citizens of the United States, since its taxing power does not extend to such subjects.

If the State of Delaware had, in plain terms, imposed a tax upon the capital invested in the Pennsylvania and Maryland sections of the Philadelphia, Wilmington and Baltimore Railroad, or the earnings derived from the use of these sections, the tax would probably be admitted by all to be a burden laid upon interstate commerce or intercourse. Those who denied it to be such would have to establish that a tax upon a railroad used almost entirely for commerce and intercourse between the States was not a tax upon such commerce or intercourse.

The tax actually imposed by the State of Delaware is a tax upon the railroad in Maryland and Pennsylvania. A certain portion of the entire capital of the company is taxed, and that portion represents the railroad in the three States. It is an admitted fact in this case that the capital thus selected greatly over-represents, the property of the company locally situated in Delaware. The excess taxed is invested in Maryland and Pennsylvania. It has already been attempted to be shown that the taxing power of Delaware cannot be exercised over property beyond its jurisdiction; and as the property here sought to be taxed is a railroad extending through three States and used almost entirely for interstate intercourse and the earnings of that railroad, we submit that this tax is an unconstitutional interference with, and taxation of, interstate commerce and intercourse.

If this tax can be sustained then it would seem to follow that Pennsylvania, Maryland, and Delaware can each and all tax the entire capital and the entire earnings of this one railroad; and that the same rule would hold good in the

case of a railroad chartered by a much greater number of States. The effect of such a system of taxation upon the commerce and intercourse between the States is too obvious to be stated.*

Messrs. T. F. Bayard and E. Saulsbury, for the State officers of Delaware, contra.

Mr. Justice FIELD, after stating the facts of the case, delivered the opinion of the court, as follows:

It is contended by the appellant that the act of Delaware of April 8th, 1869, so far as it imposes taxes upon the corporation defendant, violates the contract between the State and the corporation contained in the charter of the latter. His position is that the provision, in the act of Delaware of 1835, by which the Wilmington and Susquehanna Railroad Company was united with the Delaware and Maryland Railroad Company, that the new company should pay annually into the treasury of the State a tax of one-quarter of one per cent. upon its capital stock of four hundred thousand dollars, being accepted by the stockholders of the two companies by their union into one company, constituted a contract between the new company and the State of Delaware, which precluded that State from imposing any greater or different tax upon the capital stock of the new company; and that the provision in the same act of Delaware, that the new company should possess all the rights and privileges vested in the original companies, or either of them, by that law, or any other law of that State or of Maryland, extended to the new company the same exemption from taxation on its shares of capital stock, which was possessed by the Maryland corporation under its charter; and that the same limitation upon the taxation of the capital stock, and the same immunity of the shares from any taxation, were extended to the corporation defendant by the provisions of the act of Delaware under which this latter company was formed.

* See Crandall *v* Nevada, 6 Wallace, 35; Case of the State Freight Tax, 15 Id. 232.

That the charter of a private corporation is a contract between the State and the corporators, and within the provision of the Constitution prohibiting legislation impairing the obligation of contracts, has been the settled law of this court since the decision in the Dartmouth College case.* Nor does it make any difference that the uses of the corporation are public, if the corporation itself be private. The contract is equally protected from legislative interference, whether the public be interested in the exercise of its franchise or the charter be granted for the sole benefit of its corporators. This doctrine is not controverted by any one; it is the established law; and the question in all cases, when it becomes necessary to apply it, is whether the particular legislative interference alleged does in fact impair the obligation of the contract; for it is not every kind of legislative interference with the powers, action, and property of the corporation which will have that result.

It has also been repeatedly held by this court that the legislature of a State may exempt particular parcels of property or the property of particular persons or corporations from taxation, either for a specified period or perpetually, or may limit the amount or rate of taxation, to which such property shall be subjected. And when such immunity is conferred, or such limitation is prescribed by the charter of a corporation, it becomes a part of the contract, and is equally inviolate with its other stipulations. But before any such exemption or limitation can be admitted, the intent of the legislature to confer the immunity or prescribe the limitation must be clear beyond a reasonable doubt. All public grants are strictly construed. Nothing can be taken against the State by presumption or inference. The established rule of construction in such cases is that rights, privileges, and immunities not expressly granted are reserved. There is no safety to the public interests in any other rule. And with special force does the principle, upon which the rule rests, apply when the right, privilege, or im-

* 4 Wheaton, 518

munity claimed calls for any abridgment of the powers of the government, or any restraint upon their exercise. The power of taxation is an attribute of sovereignty, and is essential to every independent government. As this court has said, the whole community is interested in retaining it undiminished, and has "a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear."* If the point were not already adjudged it would admit of grave consideration, whether the legislature of a State can surrender this power, and make its action in this respect binding upon its successors any more than it can surrender its police power or its right of eminent domain. But the point being adjudged, the surrender when claimed must be shown by clear, unambiguous language, which will admit of no reasonable construction consistent with the reservation of the power. If a doubt arise as to the intent of the legislature, that doubt must be solved in favor of the State.

If, now, we apply this rule of construction to the provision of the act of Delaware, under which the original Wilmington and Susquehanna Railroad Company was united with the Delaware and Maryland Railroad Company, requiring the new company to pay annually into the treasury of the State a tax of one-quarter of one per cent. upon its capital stock of four hundred thousand dollars, the position of the appellant falls to the ground. That provision is not accompanied with any words indicating the intent of the legislature that no further or different tax should not be subsequently levied. Had the provision in question been embodied in an independent act, no one would pretend that the designation of the amount and character of the tax carried with it any implication, that the tax should remain unchanged in these particulars for all future time during the existence of the corporation. And it is not perceived how a different conclusion is warranted because the tax is designated in an independent section of the act, under which the

* Providence Bank *v.* Billings, 4 Peters, 561.

new company was formed, instead of being designated in an independent act. As already observed, nothing can be taken from the power of the State in this respect by presumption or inference.

In the case of *The Commonwealth* v. *The Easton Bank*,* we have an adjudication of the Supreme Court of Pennsylvania upon the precise question here presented. The Easton Bank had been chartered under a general law which prescribed the payment of taxes on its dividends at a fixed rate. A subsequent statute increased that rate, and it was argued, as here, that the designation in the original act created a contract on the part of the State that no additional tax should be laid, and that the latter act, therefore, impaired the obligation of the contract. But the court held that the designation in the original act was nothing more than a simple declaration of the tax *then* to be paid by the bank, and did not give the slightest intimation of an agreement or understanding, that the tax should not be increased during the existence of the charter. "To deduce," said the court, "from premises so insufficient, a consequence of such magnitude, would, indeed, be a gross violation of the wholesome principle that an abandonment of the power of taxation is only to be established by clearly showing this to have been the deliberate purpose of the State."

The position of the appellant, as to the effect of the provision in the same act of Delaware, that the new company should possess all the rights and privileges vested in the original companies, or either of them, by that act, or any other law of that State or the State of Maryland, is more plausible, but equally unfounded. It proceeds, we think, as stated by the Circuit Court, upon a misapprehension of the purpose of the provision. A similar provision, as already stated, is contained in the Maryland act authorizing, on her part, the consolidation of the companies. The purpose of the two provisions was to vest in the new company the rights and privileges which the original companies had previously

* 10 Pennsylvania State, 451.

possesed under their separate charters; the rights and privileges in Maryland which the Maryland company had there enjoyed, and the rights and privileges in Delaware which the Delaware company had there enjoyed; not to transfer to either State and enforce therein the legislation of the other. The new company was clothed by the legislature of Delaware, so far as that legislature could clothe it, with all the rights and privileges of both the original companies; but as the Maryland company took under the legislation of Maryland only exemption from taxation of its shares in Maryland, the privilege of the new company in this matter could only be a similar exemption in that State, not a similar exemption of the shares of its capital stock from taxation in Delaware. The new company stood in each State as the original company had previously stood in that State, invested with the same rights, and subject to the same liabilities. And the act of consolidation, so far as Delaware was concerned, had only this effect.

The act of that State under which the three companies were consolidated into one, and the present defendant corporation was formed, contained a similar provision to the one we have been considering, that the new consolidated company should be entitled to all the rights, privileges, and immunities which each and all of them possessed and enjoyed under their respective charters, a provision which, in no respect, changed the position with reference to taxation of the new company in one of the States from that of the old company in such State. Such is substantially the construction given by this court in the case of the Philadelphia, Wilmington, and Baltimore Railroad Company against Maryland, reported in the 10th of Howard.* In that case the question arose whether the qualified exemption of the line of road which belonged to one of the companies was extended to the consolidated company under the provision in question; and the court said that, "as these companies held their corporate privileges under different charters, the evi-

* 10 Howard, 377. In the title given in 10th Howard the word "Baltimore" is omitted by mistake.

dent meaning of this provision is, that whatever privileges and advantages either of them possessed should in like manner be held and possessed by the new company, to the extent of the road they had respectively occupied before the union; that it should stand in their place, and possess the power, rights, and privileges they had severally enjoyed in the portions of the road which had previously belonged to them."

We are, therefore, of opinion that the act of April 8th, 1869, is not obnoxious to the objection that it violates any contract between the State of Delaware and the company contained in the charter of the latter.

We proceed, therefore, to the second objection to the act, that it imposes taxes upon property beyond the jurisdiction of the State. If such be the fact the tax to that extent is invalid, for the power of taxation of every State is necessarily confined to subjects within its jurisdiction. The objection of the appellant is directed principally to the tax imposed by the fourth section of the act, and assumes that the tax must be considered as laid upon the shares as representing the separate property of the individual stockholders, or as representing the property of the corporation. And the argument is that if the tax be laid upon the shares of the stockholders it falls upon property out of the State, because nearly all the stockholders, at least a much greater number than the ratio of the mileage of the road in Delaware to its entire length, are citizens and residents of other States; and if the tax be laid upon the shares as representing the property of the corporation, it falls upon property out of the State, because the ratio of the mileage of the road in Delaware to its entire length is not that which the capital invested by the company in that State bears to the entire capital of the company, or that which the value of the property of the company there situated bears to the value of its entire property.

If the assumption of the appellant were correct, there would be difficulty in sustaining the validity of the tax.

In the first place, the share of a stockholder is, in one aspect, something different from the capital stock of the com-

pany; the latter only is the property of the corporation; the former is the individual interest of the stockholder, constituting his right to a proportional part of the dividends when declared, and to a proportional part of the effects of the corporation when dissolved, after payment of its debts. Regarded in that aspect it is an interest or right which accompanies the person of the owner, having no locality independent of his domicile.* But whether, when thus regarded, it can be treated as so far severable from the property to which it relates as to be taxable independent of the locality of the latter is a question not necessary now to decide. The argument of the appellant assumes that it is thus severable.

In any aspect, if provision for the taxation of the shares at the locality of the company be made in its charter, their taxability at such locality is annexed as an incident to the shares, and it does not matter where the domicile of the owner may be. The tax may then be enforced through the corporation by requiring it to withhold the amount from the dividends payable thereon. The shares in the national banks created under the act of Congress of June 3d, 1864, are made taxable at the place where the bank is located, and not elsewhere; and in the case of *The National Bank* v. *Commonwealth*, reported in the 9th of Wallace, a law of Kentucky requiring the banks in that State to pay the tax laid on their shares was sustained by this court.† But in the act of Delaware under which the corporation defendant was formed, there is no such provision for the taxation of the shares of the individual stockholders.

In the second place, assuming that the tax is upon the property of the corporation, if the ratio of the value of the property in Delaware to the value of the whole property of the company be less than that which the length of the road in Delaware bears to its entire length, and such is admitted

* Van Allen *v.* Assessors, 3 Wallace, 583; Union Bank *v.* State, 9 Yerger, 501; Richmond *v.* Daniel, 14 Grattan, 385; Savings Bank *v.* Nashua, 46 New Hampshire, 398; Dwight *v.* Mayor, 12 Allen, 322; Redfield's Supplement to Law of Railways, 507–510.

† 9 Wallace, 353.

to be the fact, a tax imposed upon the property in Delaware according to the ratio of the length of its road to the length of the whole road must necessarily fall upon property out of the State. The length of the whole road is in round numbers one hundred miles; the length in Delaware is twenty-four miles. The tax upon the property estimated according to this ratio would be in Delaware $\frac{24}{100}$ or $\frac{6}{25}$ of the amount of the tax upon the whole property. But the value of the property in Delaware is not $\frac{6}{25}$ of the value of the whole property, but much less than this proportion would require.

We repeat, therefore, that upon the assumption made by the appellant there would be difficulty in sustaining the tax.

We do not think, however, the assumption is correct. As we construe the language of the fourth section, the tax is neither imposed upon the shares of the individual stockholders nor upon the property of the corporation, but is a tax upon the corporation itself, measured by a percentage upon the cash value of a certain proportional part of the shares of its capital stock; a rule which, though an arbitrary one, is approximately just, at any rate is one which the legislature of Delaware was at liberty to adopt.

The State may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property. And the manner in which its value shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion. It is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the State; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction.

Nothing was urged in the argument specially against the tax upon the corporation under the first section of the act, which is determined by the net earnings or income of the company. Whatever objections could be presented are answered by the observations already made upon the tax under the other section. A tax upon a corporation may be pro-

portioned to the income received as well as to the value of the franchise granted or the property possessed.

It remains to notice the objections that the act of 1869 conflicts with the power of Congress to regulate commerce among the several States, and interferes with the right of transit of persons and property from one State into or through another.

The tax imposed by the act in question affects commerce among the States and impedes the transit of persons and property from one State to another just in the same way, and in no other, that taxation of any kind necessarily increases the expenses attendant upon the use or possession of the thing taxed. That taxation produces this result of itself constitutes no objection to its constitutionality. As was very justly observed by this court in a recent case, "Every tax upon personal property, or upon occupations, business, or franchises, affects more or less the subjects, and the operations of commerce. Yet it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the Constitution."*

The exercise of the authority which every State possesses to tax its corporations and all their property, real and personal, and their franchises, and to graduate the tax upon the corporations according to their business or income, or the value of their property, when this is not done by discriminating against rights held in other States, and the tax is not on imports, exports, or tonnage, or transportation to other States, cannot be regarded as conflicting with any constitutional power of Congress.

From the views expressed, it follows that the judgment of the Circuit Court must be

AFFIRMED, AND IT IS SO ORDERED.

* State Tax on Railway Gross Receipts, 15 Wallace, 293.

RAILWAY COMPANY *v.* ALLERTON.

Where the charter of a corporation says that the capital stock of the corporation shall be a sum named, as *ex. gr.*, $100 000, "and may be increased from time to time at the pleasure of *the said corporation*," the directors alone, and without the matter being submitted to and approved by the stockholders, have no power to increase it unless expressly authorized thereto; and the fact that the charter declares that "*all the corporate powers* of the said corporation shall be vested in and exercised by a board of directors and such officers and agents as said board shall appoint" does not alter the case. The powers thus granted to the directors, &c., refer to the ordinary business transactions of the corporation.

APPEAL from the Circuit Court for the Northern District of Illinois; the case being thus:

The Chicago City Railway Company was a corporation owning a street railroad in Chicago. The directors of the company, without consulting the stockholders or calling a meeting of them, resolved to increase the capital stock of the company from $1,250,000 to $1,500,000. To this one Allerton, who was a stockholder, objected, and filed a bill praying for an injunction to prevent the increase. His position was that it could not be lawfully made without the concurrence of the stockholders, and in support of this view he relied upon the constitution of Illinois, adopted in July, 1870, by the thirteenth section of the eleventh article of which it is declared as follows:

"No railroad corporation shall issue any stock or bonds, except for money, labor, or property actually received and applied to the purposes for which such corporation was created, and all stock-dividends, and other fictitious increase of the capital stock, or indebtedness of any such corporation, shall be void. The capital stock of no railroad corporation shall be increased for any purpose, except upon giving sixty days' public notice in such manner as may be provided by law."

He also relied on an act of the legislature of Illinois, passed March 26th, 1872, to execute and carry out the above provision of the constitution, by which, amongst other

things, it was enacted that no corporation should change its name or place of business, increase or decrease its capital stock, or the number of its directors, or consolidate with other corporations, without a vote of two-thirds of the stock at a stockholders' meeting.

The railway company, in its answer, relied upon its charter, granted February 14th, 1859, the third and fourth sections of which were as follows:

"SECTION 3. The capital stock of said corporation shall be one hundred thousand dollars, and may be increased from time to time, at the pleasure of said corporation.

"SECTION 4. All the corporate powers of said corporation shall be vested in and exercised by a board of directors, and such officers and agents as said board shall appoint."

The position of the company was that the third section conferred an unrestricted right to increase the capital stock at will, and that the fourth vested this power in the board of directors, and that the constitutional provision and act above referred to, if applied to this corporation, would impair the validity of the contract. It was further set up, however, that the said provision did not apply to railways worked by horse-power. The court below decreed in favor of the complainant and the company took the present appeal.

Mr. Charles Hitchcock, for the appellant; Mr. E. A. Storrs, contra.

Mr. Justice BRADLEY delivered the opinion of the court.

Without attempting to decide the constitutional question, or to give a construction to the act of the legislature, we are satisfied that the decree must be affirmed on the broad ground that a change so organic and fundamental as that of increasing the capital stock of a corporation beyond the limit fixed by the charter cannot be made by the directors alone, unless expressly authorized thereto. The general power to perform all corporate acts refers to the ordinary

business transactions of the corporation, and does not extend to a reconstruction of the body itself, or to an enlargement of its capital stock. A corporation, like a partnership, is an association of natural persons who contribute a joint capital for a common purpose, and although the shares may be assigned to new individuals in perpetual succession, yet the number of shares and amount of capital cannot be increased, except in the manner expressly authorized by the charter or articles of association.

Authority to increase the capital stock of a corporation may undoubtedly be conferred by a law passed subsequent to the charter; but such a law should regularly be accepted by the stockholders. Such assent might be inferred by subsequent acquiescence; but in some form or other it must be given to render the increase valid and binding on them. Changes in the purpose and object of an association, or in the extent of its constituency or membership, involving the amount of its capital stock, are necessarily fundamental in their character, and cannot, on general principles, be made without the express or implied consent of the members. The reason is obvious.

First, as it respects the purpose and object. This may be said to be the final cause of the association, for the sake of which it was brought into existence. To change this without the consent of the associates, would be to commit them to an enterprise which they never embraced, and would be manifestly unjust.

Secondly, as it respects the constituency, or capital and membership. This is the next most important and fundamental point in the constitution of a body corporate. To change it without the consent of the stockholders, would be to make them members of an association in which they never consented to become such. It would change the relative influence, control, and profit of each member. If the directors alone could do it, they could always perpetuate their own power. Their agency does not extend to such an act unless so expressed in the charter, or subsequent enabling act; and such subsequent act, as before said, would not bind

the stockholders without their acceptance of it, or assent to it in some form. Even when the additional stock is distributed to each stockholder *pro rata*, it would often work injustice, because many of the stockholders might be unable to take their respective shares, and might thus lose their relative interest and influence in the corporate concerns.

These conclusions flow naturally from the character of such associations. Of course, the associates themselves may adopt or assent to a different rule. If the charter provides that the capital stock may be increased, or that a new business may be adopted by the corporation, this is undoubtedly an authority for the corporation (that is, the stockholders) to make such a change by a stockholders' vote, in the regular way. Perhaps a subsequent ratification or assent to a change already made, would be equally effective. It is unnecessary to decide that point at this time. But if it is desired to confer such a power on the directors, so as to make their acts binding and final, it should be expressly conferred.

Where the stock expressly allowed by a charter has not been all subscribed, the power of the directors to receive subscriptions for the balance may stand on a different footing. Such an act might, perhaps, be considered as merely getting in the capital already provided for the operations and necessities of the company, and, therefore, as belonging to the orderly and proper administration of the company's affairs. Even in such case, however, prudent and fair directors would prefer to have the sanction of the stockholders to their acts. But that is not the present case, and need not be further considered.

DECREE AFFIRMED.

INSURANCE COMPANY *v.* FOLSOM.

1. The doctrine reasserted, as often adjudged in this court before, that where a case is tried by the Circuit Court under the act of March 3d, 1865, if the finding be a general one, this court will only review questions of law arising in the progress of the trial and duly presented by a bill of exceptions, or errors of law apparent on the face of the pleadings.
2. Under the act above named the Circuit Court is not required to make a special finding.
3. Where parties mean to insure a vessel "lost or not lost," the use of that phrase is not necessary to make the policy retrospective. It is sufficient if it appear by the description of the risk and the subject-matter of the contract that the policy was intended to cover a previous loss.
4. Where a policy of insurance, following the exact language of the application, insured on the 1st of March, 1869, a vessel then at sea, "at and from the 1st day of January, 1869, at noon, until the 1st day of January, 1870, at noon," nothing being said in either policy or application as to "lost or not lost," nor about who was the master of the vessel, nor as to what voyage she was on: *held*, on a suit on the policy—and the company not having shown that the name of the master or the precise destination were material facts—that the application had no tendency to show that the assured when he made the application did not communicate to the defendants all the material facts and circumstances within his knowledge, and answer truly all questions put to him in regard to those several matters.

ERROR to the Circuit Court for the Southern District of New York; the case being thus:

On the 6th of January, 1869, the schooner B. F. Folsom (*John Orlando, master*), and owned by a person whose name she bore, Mr. B. F. Folsom, resident in Philadelphia, together with Orlando, the captain and husband, sailed from *Boston* for Montevideo and *Buenos Ayres*. When out six days she sprung a leak, and in a few days afterwards became wholly disabled. Another vessel, bound for Bremen, passing along, took off all aboard and carried them to Bremerhaven, an outer port of Bremen, where, on the 18th of February, 1869, all were safely landed. The vessel itself was lost. At Bremerhaven, the master being wholly without funds or credit, could not telegraph. But he wrote two days after his arrival, that is to say, he wrote on the 20th of

February, to Mr. Folsom, at Philadelphia, and mailed the letter on the day on which it was written.

On the 1st of March, 1869, the Mercantile Mutual Insurance Company of New York insured the vessel, valued at $35,000, on Folsom's application, "at and from the first day of January, 1869, at noon, until the first day of January, 1870, at noon;" nothing being said in the policy about "lost or not lost," nor about who was the master of the vessel, nor on what voyage she then was.

The letter of the master to Folsom which had been mailed at Bremen on the 20th of February, 1869, arriving in due course at Philadelphia was received by Folsom, and the loss of the vessel being indisputable, Folsom claimed the insurance-money. The company declining to pay, he brought suit in ordinary form on the policy. Plea, the general issue.

The cause was tried without a jury, the jury having been waived by a stipulation duly filed, pursuant to the act of Congress of March 3d, 1865, which authorizes such mode of trial and enacts in regard to it,*

"The findings of the court upon the facts, *which findings* MAY *be either general or special*, shall have the same effect as the verdict of a jury. The rulings of the court in the case, *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."

On the trial the policy having been put in evidence, and it being admitted that the proper preliminary proofs of loss and of interest had been furnished by the plaintiff to the company, the plaintiff rested. The record proceeded:

"Whereupon the counsel for the said defendant did then and there insist before the judge of the said Circuit Court, on the behalf of the said defendant, that the said several matters so produced and given in evidence on the part of the said plaintiff,

* Section 4, 13 Stat. at Large, 501.

as aforesaid, were insufficient and ought not to be admitted or allowed as decisive evidence to entitle the said plaintiff to a verdict. But to this the counsel for the said plaintiff did then and there object, and insist before the judge of the said Circuit Court that the same were sufficient and ought to be admitted and allowed to entitle the said plaintiff to a verdict, and the judge of the said Circuit Court did then and there declare and deliver his opinion, that the said several matters so produced and given in evidence on the part of the said plaintiff were sufficient to entitle the said plaintiff to a verdict."

To this ruling the defendant excepted.

The insurance company then showed that on the 22d of February, 1869, there had been published in various newspapers in New York, as also in two newspapers in Philadelphia, this telegraphic despatch:

"LIVERPOOL, February 21st.

"The *Orlando*, from *Baltimore* for *Buenos Ayres*, has been lost at sea. Crew saved and landed at Bremerhaven."

Folsom had seen and read this despatch, and the insurance company which took, at its office in New York, the papers containing it, kept what was called a despatch-book, in which the despatch, together with records of seventeen other marine disasters, was, on the same 22d of February when it appeared, posted by a clerk, whose duty it was to post in such book notices of all marine disasters. Over the despatch was written in large letters "ORLANDO."

It was admitted by the plaintiff that in Lloyd's Register there was no schooner named Orlando, but that there was a bark named Orlanda, a whaler, and that a bark of the name of Orlando had been owned, within two or three years, by a person who was then a partner of the plaintiff; and that at the time when he applied for the insurance he did not call the company's attention to the publication which had appeared in the papers, and that he made the application himself.

The company in turn admitted that in the Register for the year 1869, which they used in their office, as in the

Register of 1868, which they also had used, the schooner "B. F. Folsom" was rated, and that under such name and rating there appeared the name of "J. Orlando, captain."

The company then offered in evidence Folsom's application for insurance, which was in these words:

"Insurance is wanted by B. F. Folsom for account of whom it may concern, loss, if any, payable to him, for $3000, on schooner B. F. Folsom; vessel valued at $35,000, and to be insured at and from the first day of January, 1869, at noon, until the first day of January, 1870, at noon."

The purpose of the offer of this evidence was apparently to show that in applying for insurance Folsom had suppressed the name of the master, Orlando, and the ports to which the vessel was sailing, to wit, Montevideo and *Buenos Ayres*, and so to bring on the inference that in the application he meant to divert the company's recollection or attention from the despatch previously received by it and on its books, in which it was mentioned that a vessel, where the peculiar name of "Orlando" appeared, and which vessel the despatch mentioned was on her way to *Buenos Ayres*, as one port, had been lost at sea.

The plaintiff objected to the reception of the evidence on the ground that the application was merged in the policy, and that the plea did not allege that the policy was obtained by any fraud or misrepresentation. The court rejected the evidence.

The company's counsel then requested the court to rule on numerous propositions, substantially as follows:

First. That as the loss occurred before the issuing of the policy, and the words, "lost or not lost," were not contained therein, the insurance never took effect, and that, therefore, the plaintiff could not recover.

Second. That at the time of the application for insurance, and the issuing of the policy, the plaintiff ought to have communicated to the company—

(*a.*) The existence of the despatch appearing in the newspapers.

(*b.*) That he had seen it.

(*c.*) The surmises or conjectures, if any, which he had with reference to the same.

Third. That it was incumbent upon the plaintiff to prove affirmatively, that at the time of application for insurance and of the issuing of the policy, he had communicated to the company the information that the vessel had sailed on a voyage from Boston to Montevideo and Buenos Ayres, and that the name of her master was John Orlando.

Fourth. That the master having failed to advise the owner by telegraph of the loss of the vessel, the plaintiff could not recover.

But the judge of the Circuit Court refused to rule in accordance with any one of these several requests; to which refusals the counsel for the defendant excepted.

Both parties here rested. The record proceeded:

"And the counsel for the defendant, after the putting in of the evidence was completed, and before the conclusion of the trial, further insisted that the matters so proved and given in evidence, on the part of the said defendant, as hereinbefore set forth, taken in connection with the matters proved and given in evidence, on the part of the plaintiff, as hereinbefore set forth, were sufficient and ought to be admitted and allowed as decisive evidence to entitle the said defendant to a decision in their favor, and to bar the said plaintiff of his action aforesaid, and did then and there pray the said court to admit and allow the said matters so proved and given in evidence, in connection as aforesaid, to be conclusive evidence in favor of the said defendant, to entitle them to a decision in their favor, and to bar the said plaintiff of his action aforesaid; but the said court decided that the matters so proved and given in evidence on the part of the said defendant, taken in connection with the matters so proved and given in evidence on the part of the said plaintiff, were not sufficient to bar the said plaintiff of his action aforesaid, and refused to make and render its decision in favor of the said defendant, but found in favor of the plaintiff, upon the evidence, for the sum of $3348.20; to which decision the said counsel for the defendant then and there duly excepted."

Argument for the insurers.

Thereupon the counsel for the defendant requested the court to make the certain special findings of fact [setting them out], to the end that the same might be reviewed. The record proceeded:

"But the court refused to make any special findings of fact herein, to which refusal the counsel for the defendant did then and there except."

The company brought the case here on error.

Mr. J. C. Carter, for the Insurance Company, plaintiff in error:

1. A radical error of the court below was in refusing to make any special finding of facts. The chief argument of the other side will be that it has not done so, and that, *therefore*, under the act of March 3d, 1865, we have not got the case which we wish to have the judgment of this court upon at all before it. But this omission of the court below to comply with our request we assign as error. The right of having an appellate tribunal pass upon matters of law in all contests between parties, is regarded in some sort as a sacred right by our people. It is given in the broadest terms by the great Judiciary Act of 1789.* The act of March 3d, 1865, could not have meant to deprive the suitor of this right, by leaving it to the discretion of the *judge* to say whether or not he will have his judicial capacity passed on by a higher tribunal. Such a construction would make the act a trap, to injure suitors, instead of an enactment for their benefit. It is the suitor, therefore, not the judge who, under the provision that "the findings may be either general or special," is to elect in what form he will have them.

2. But if this were not so we have enough left to ask a reversal. At the close of the plaintiff's case we insisted that the plaintiff's evidence was insufficient to entitle him to a verdict. He had introduced and relied on his policy; a policy which was fatally defective in the fact that it contained neither the expression "lost or not lost," nor any equivalent expression. Now, when a chattel has been de-

* Section 21.

stroyed it has ceased to be the subject of ownership; and every contract in reference to it, based on the implied understanding and agreement that it is in existence, is void. This undoubtedly is the general principle. And though an exception exists in the contract of insurance, it exists only—in view of the very hazardous nature of the assumption—when the insurer expressly agrees to assume the risk of a prior total loss of the thing, and though it thus at the time of the contract have no existence at all. This sort of agreement is made by the long-used and well-defined words "LOST OR NOT LOST." And from the language of good text-books it would seem as if the very words were essential.

Arnould says:*

"A time policy, like a voyage policy, may be effected retrospectively *if it contain* the clause 'lost or not lost.'"

So Smith in his work on Mercantile Law:†

"When the words 'lost or not lost' (Gallicé *sur bonnes et mauvaises nouvelles*) are inserted, they render the underwriters liable in respect of loss by any of the above perils, though the ship be lost at the time of insurance, a circumstance which *but for those words* would avoid the policy."

And yet again Hilliard:‡

"These words, 'lost or not lost,' which follow the word 'insured' in the policy, are words of the greatest importance in this contract."

Certainly if these exact words are not essential, some words of equivalent meaning are. But no words of like effect with the confessedly proper ones were used in this policy; for making the policy cover the past month in terms, by fixing the date instead of the place of departure, will not alter the effect of the contract, or make the risk greater.

The court also erred in refusing to admit the application for insurance. It was made by Folsom himself, and by

* On Insurance, vol. 2, 2d American edition, 416.

† Page 347.

‡ On Marine Insurance, 10.

showing what he had stated and what he had not stated, it tended directly to the purpose for which it was offered.

[The counsel then went into a learned argument to show that Folsom had knowledge of facts material to the risk and had concealed them; that the burden of proof rested on him to show the communication of them to the company, and that no presumption existed in his favor that he had done so, or that he was ignorant of a material fact which it was shown might have been known to him; that concealment might be proved as a defence under the plea of the general issue. He also argued that it was the duty of Orlando, captain and part owner of the vessel, to communicate by telegraph (that being a usual mode of communication) to the other owners the loss of the vessel, and that the omission to do so rendered void the policy issued after such loss might by that means have been communicated.]

Mr. C. A. Seward, contra:

It is perfectly settled, under the act of March 3d, 1865, that if the finding be a general one, the appellate court will only review questions of law arising on the exceptions contained in the bill of exceptions, and the errors of law apparent on the face of the pleadings.* The finding here was general, and of course all that latter part of the learned counsel's argument† is irrelative to what is before the court.

Neither was the court *bound* to find specially. There is nothing in the act which obliges it to do so. If the party cannot dictate to a jury whether it shall find specially or generally, why shall he to a court?

So as to what was insisted on below at the close of the plaintiff's case. It was in effect a motion for a peremptory nonsuit against the plaintiff's will, a thing which by the

* Insurance Co. *v.* Tweed, 7 Wallace, 44; Generes *v.* Bonnemer, Ib. 564; Flanders *v.* Tweed, 9 Id. 425; Coddington *v.* Richardson, 10 Id. 516; Generes *v.* Campbell, 11 Id. 193; Kearney *v.* Case, 12 Id. 276; Bethell *v.* Mathews, 13 Id. 1; Dirst *v.* Morris, 14 Id. 484; City of Richmond *v.* Smith, 15 Id. 429, 437, 438.

† The part within brackets.—REP.

settled modern practice of the Federal courts is not allowable. But if it were not this sort of motion and were allowable, the assumption made in it is a wrong one, and the whole argument is without weight; it being perfectly settled that the words "lost or not lost," however usual, are not essential words, and that any other words by which a meaning to insure "lost or not lost" is shown, are as good. That here the purpose to make what was in effect "a lost or not lost" policy is plain. If it was not the purpose, the clause by which it was provided that the insurance was to take effect two months before the date of the policy would be nugatory, and the absurd result would follow that the assured was paying for insurance during two months when the company assumed no risk whatever. In *Hammond* v. *Allen*,* the court (Story, J.) says:

"The policy would be binding though the ship were lost at the time, and though the policy had not the words, 'lost or not lost.'"

There is nothing in text-writers, which, rightly interpreted, denies what we say.†

The court did not err, as the exception implies, in refusing to receive Folsom's application for insurance. The policy, which confessedly was the company's act, followed it exactly. It did not state any more than the application, who the master of the vessel was, or to what port she was sailing. The application had no tendency to show that Folsom did not communicate all material facts which he knew, and answer truly all questions put to him which the company thought material. The very fact that the application was retrospective showed that it was for a vessel that might be lost. Besides all which it is notorious as matter of fact, that the applications are never filled by the applicant for insurance. The secretary or clerks of the company fill them, after such inquiries as they please to make, and the applicant simply signs the blank filled up. More especially was

* 2 Sumner, 387.

† See 1 Phillips on Insurance, § 925; 2 Parsons on Marine Insurance, 44; 1 Arnould on Insurance, 26; 3 Kent, 259, marginal.

it inadmissible to bring on an inference of fraud after the company had admitted that in the Lloyd's Register used by it, both in the years 1868 and 1869, the name and rating of the schooner B. F. Folsom appeared, as well as the fact that John Orlando was her master, and when, in addition, the insurance company had introduced no evidence tending to show that such concealment, if any took place, was material to the risk.

As to the other points made by opposing counsel,* though they are not, in view of the fact that the finding was general and not special, upon matters which are before this court at all, it may be observed that the company knew of the despatch as well as Folsom; that the assured is not bound to communicate to underwriters intelligence of so general and indifferent a nature—as here, where neither the correct name of the vessel, her correct port of departure, or her correct first port of destination was given—as that its application to the subject is doubtful and remote; nor to communicate to them what is in newspapers taken by themselves, especially what they have actually cut out and signalized as matter to be noted; nor to communicate to them the mere surmises or conjectures which were in the mind of the assured, and which may or may not have led to the insurance. As to the objection that no telegram was sent, it is answer enough that Captain Orlando was penniless and could not send a telegram, even if one were obligatory in ordinary cases. But, as already said, none of these points, in view of the general finding, come before *this* court.

Mr. Justice CLIFFORD delivered the opinion of the court.

Underwriters in a policy of marine insurance undertake, in consideration of a certain premium, to indemnify the party insured against loss arising from certain perils of the sea, or sea risks to which the ship, merchandise, or freight of the insured may be exposed during a particular voyage or for a specified period of time. Long experience shows

* Within brackets, *supra*, 244.—REP.

that such a system is essential to commerce, as it tends to promote the spirit of maritime adventure by diminishing the risk of ruinous loss to which those who engage in it would otherwise be exposed. Losses of the kind cannot be prevented by any degree of human forecast or skill, but the system of insurance, as practiced among merchants, enables those engaged in such pursuits to provide themselves with indemnity against the consequences of such disasters. By such contracts either associated capital becomes pledged for such indemnity, or the loss is so distributed among different underwriters that the ultimate sufferers are not in general seriously injured. Indemnity is the great object of the insured, but the underwriter pursues the business as a means of profit.

On the first of March, 1869, the defendant subscribed a time policy of insurance in the sum of three thousand dollars, for a premium of twelve per cent. net, upon the schooner B. F. Folsom, her tackle, apparel, and other furniture, valued at thirty-five thousand dollars; in which policy it is recited that the insurance is to the plaintiff on account of whom it may concern, and in case of loss, to be paid in funds current in the city of New York; and the policy contains the clause following, to wit: "insured at and from the first day of January, 1869, at noon, until the first day of January, 1870, at noon," with liberty to the insured, if on a passage at the expiration of the term, to renew the policy for one, two, or three months, at the same rate of premium, provided application be made to the company on or before the expiration of the first term. Also "privileged to cancel the policy at the expiration of six months, *pro rata* premium to be returned for time not used, no loss being claimed." Prior to the date of the policy, to wit, on the sixth of January in the same year, the schooner set sail and departed from the port of Boston, bound on a voyage to the port of Montevideo, laden with an assorted cargo, and during the voyage she met with tempestuous weather, and on the thirtieth of the same month, by the force of the wind and waves was

wrecked, foundered, and sunk, and was wholly lost to the plaintiff. Seasonable notice of the loss was given to the defendants, and payment being refused the plaintiff brought an action of assumpsit to recover the amount insured. Service having been made the defendants appeared and pleaded the general issue, and the parties having in due form waived a trial by jury, went to trial before the court without a jury. Matters of fact were accordingly submitted to the court, and the court found that the defendants did undertake and promise the plaintiff in manner and form as he, the plaintiff, in his writ and declaration had alleged, and assessed damages for the plaintiff in the sum of three thousand three hundred and forty-eight dollars and twenty cents, and the court rendered judgment for the plaintiff for the amount so found. Exceptions were filed by the defendants, and they sued out a writ of error and removed the cause into this court.

By the terms of the act of Congress permitting issues of fact in civil cases to be tried and determined by the court without the intervention of a jury, it is provided that the finding of the court upon the facts may be either general or special, and that the finding shall have the same effect as the verdict of a jury.*

Where a jury is waived, as therein provided, and the issues of fact are submitted to the court, the finding of the court may be either general or special, as in cases where an issue of fact is tried by a jury; but where the finding is general the parties are concluded by the determination of the court, except in cases where exceptions are taken to the rulings of the court in the progress of the trial. Such rulings, if duly presented by a bill of exceptions, may be reviewed here, even though the finding is general, but the finding of the court, if general, cannot be reviewed in this court by bill of exceptions or in any other manner.† Facts

* 13 Stat. at Large, 501.

† Miller *v.* Insurance Co., 12 Wallace, 297; Norris *v.* Jackson, 9 Id. 125; Coddington *v.* Richardson, 10 Id. 516.

found by a jury could only be re-examined under the rules of the common law, either by the granting of a new trial by the court where the issue was tried or to which the record was returnable, or by the award of a *venire facias de novo* by an appellate court for some error of law which intervened in the proceedings.* Nothing, therefore, is open to re-examination in this case except such of the rulings of the court made in the progress of the trial as are duly presented by a bill of exceptions.† All matters of fact, under such a submission, must be found by the Circuit Court and not by the Supreme Court, as the act of Congress provides that the issues of fact may be tried and determined by the Circuit Court where the suit is brought. Inferences of fact must also be drawn by the Circuit Court, as it is the Circuit Court and not the Supreme Court which, by the agreement of the parties, is substituted for a jury.‡ None of these rules are new, as they were established by numerous decisions of this court long before the act of Congress in question was enacted.§ Propositions of fact found by the court, in a case where the trial by jury is waived, as provided in the act of Congress, are equivalent to a special verdict, and the Supreme Court will not examine the evidence on which the finding is founded, as the act of Congress contemplates that the finding shall be by the Circuit Court; nor is the Circuit Court required to make a special finding, as the act provides that the finding of the Circuit Court may be either general or special, and that it shall have the same effect as

* Parsons *v.* Bedford, 2 Peters, 448; 2 Story on the Constitution, § 1770.

† Copelin *v.* Insurance Co, 9 Wallace, 461; Basset *v.* United States, Ib. 40.

‡ Tancred *v.* Christy, 12 Meeson & Welsby, 323.

§ Bond *v.* Brown, 12 Howard, 254; Penhallow *v.* Doane, 3 Dallas, 102; Wiscart *v.* Dauchy, Ib. 327; Jennings *v.* Brig Perseverance, Ib. 336; Talbot *v.* Seeman, 1 Cranch, 38; Saulet *v* Shepherd, 4 Wallace, 502; Faw *v.* Roberdeau, 3 Cranch, 177; Dunlop *v.* Munroe, 7 Id. 270; United States *v.* Casks of Wine, 1 Peters, 550; Hyde *v.* Booream, 16 Id. 176; Archer *v.* Morehouse, Hempstead, 184; Parsons *v.* Bedford, 3 Peters, 434; Craig *v.* Missouri, 4 Id. 427; United States *v.* King et al., 7 Howard, 853.

the verdict of a jury.* Where a case is tried by the court without a jury, the bill of exceptions brings up nothing for revision except what it would have done had there been a jury trial.† Tested by these considerations, it is clear that the exceptions of the defendants to the rulings of the court refusing to make any special finding, as requested by their counsel, may be overruled without any further remark.

Exception is also taken by the defendants to the refusal of the court to decide that the evidence introduced by the plaintiff in the opening was not sufficient to entitle the plaintiff to a verdict.

Having introduced the policy, the plaintiff proved by the master that the schooner, on the sixth of January prior to the date of the policy, departed on her voyage, and that she was lost at the time and by the means before stated. In addition to the incidents of the loss, he also proved the circumstances under which the master and crew were saved from the wreck and carried to the port of Bremerhaven, by the vessel which rescued them; that the master wrote to the owner by the first mail from that place after their arrival there, and that he was unable to use the telegraph, as he had no funds to prepay a telegram. Due notice of the loss and of the interest of the plaintiff having been admitted the plaintiff rested, and the defendants moved the court to decide that the evidence was not sufficient to entitle the plaintiff to a verdict, which the court refused to do.

Suppose the motion is regarded as a motion for a nonsuit, it was clearly one which could not be granted, as it is well-settled law that the Circuit Court does not possess the power to order a peremptory nonsuit against the will of the plaintiff.‡ Power to grant a peremptory nonsuit is not vested in a Circuit Court, but the defendant may, if he sees fit, at the close of the plaintiff's case, move the court to instruct

* Copelin *v.* Insurance Co., 9 Wallace, 461; Folsom *v.* Insurance Co., 9 Blatchford, 201.

† Norris *v.* Jackson, 9 Wallace, 125; Coddington *v.* Richardson, 10 Id. 516; Miller *v.* Insurance Co., 12 Id. 285.

‡ Elmore *v.* Grymes, 1 Peters, 469; Castle *v.* Bullard, 23 Howard, 172.

the jury that the evidence introduced by the plaintiff is not sufficient to warrant the jury in finding a verdict in his favor, and it is held that such a motion is not one addressed to the discretion of the court, but that it presents a question of law, and that it is as much the subject of exceptions as any other ruling of the court in the course of the trial.* All things considered the court is inclined, not without some hesitation, to regard the motion as one of the latter character, and in that view it presents the question whether, by the terms of the policy, the risk was within it, as the proofs show that the loss occurred before the policy was issued.

Policies of insurance intended to have a retroactive effect, usually contain the words "lost or not lost," and the defendants contend that the policy in this case, inasmuch as it does not contain those words, does not cover the loss described in the declaration; but it is well-settled law that other words may be employed in such a contract which will have the same operation and legal effect, and it appears that the policy in this case, by its express terms, was to commence on the first day of January, 1869, and to continue until the first day of January, 1870. Elementary writers and the decisions of the courts make it perfectly certain that the phrase "lost or not lost" is not necessary to make a policy retroactive. It is sufficient if it appear by the description of the risk and the subject-matter of the contract that the policy was intended to cover a previous loss. Contracts of the kind are as valid as those intended to cover a subsequent loss, if it appears that the insured as well as the underwriter was ignorant of the loss at the time the contract was made.†

Viewed in the light of these suggestions, it is quite clear

* Schuchardt *v.* Allens, 1 Wallace, 370; Parks *v.* Ross, 11 Howard, 362; Bliven *v.* New England Screw Co., 23 Id. 433; Toomey *v.* Railway Co., 3 C. B., New Series, 150; Ryder *v.* Wombwell, Law Reports, 4 Exchequer, 39; Giblin *v.* McMullen, Law Reports, 2 Privy Council, App. 335.

† Hammond *v.* Allen, 2 Sumner, 396; 1 Phillips on Insurance, § 925; 2 Parsons on Marine Insurance, 44; 1 Arnould on Insurance, 26; 3 Kent (11th ed.), 344; Hallock *v.* Insurance Co., 2 Dutcher, 268.

that it would have been error if the Circuit Court had decided as requested by the defendants, and that the decision made by the Circuit Court in denying the motion was correct.

Attempt was also made at the trial to set up the defence that the plaintiff concealed material facts from the defendants at the time the policy was granted, but the Circuit Court found that the charge was not sustained by the evidence, which is all that need be said upon the subject, as it is quite clear that the finding of the Circuit Court, where the trial by jury is waived, as in this case, is not the proper subject of review in the Supreme Court, to which it may be added, that if the rule were otherwise the court here would be compelled to come to the same conclusion as that reached by the Circuit Court.

Issues of fact, however, under such a submission, are to be tried and determined by the Circuit Court, and it is equally clear that the findings of the Circuit Court, even when special, cannot be reviewed by the Supreme Court, except for the purpose of determining whether the facts found are sufficient to support the judgment, as the express provision is that the finding of the Circuit Court in such a case shall have the same effect as the verdict of a jury.*

Exception was also taken to the ruling of the court in refusing to admit as evidence the application for insurance when tendered by the defendants in support of the defence of concealment.

Apparently it was offered to show that it did not state where the vessel was at that time or from what port she had sailed or on what voyage she was bound, but the court was of the opinion, and ruled, that inasmuch as the instrument contained no statement in respect to any one of those matters, and that its terms were exactly the same as those of the policy, the contents were immaterial to the issue, as the contents could have no tendency to show that the plaintiff, when he made the application, did not communicate to the

* Insurance Co. *v.* Tweed, 7 Wallace, 51; Generes *v.* Bonnemer, Ib. 564; Norris *v.* Jackson, 9 Id. 127; Flanders *v.* Tweed, Ib. 428; Dirst *v.* Morris, 14 Id. 490; Richmond *v.* Smith, 15 Id. 437; Bethel *v.* Mathews, 13 Id. 2.

defendants all the material facts and circumstances within his knowledge, and answer truly all questions put to him in regard to those several matters.* Evidently the burden of proof to establish such a defence is upon the party pleading it, and the court here is of the opinion that the ruling of the Circuit Court, as fully explained in the opinion given at the time, and in the opinion subsequently given denying the motion for new trial, was correct.†

Special findings of fact were requested by the defendants, and they excepted in numerous instances to the rulings of the court refusing to comply with such requests, all of which are overruled upon the ground that the finding of the Circuit Court upon the facts may be either general or special, as heretofore more fully explained.‡ Requests that the court would adopt certain conclusions of law were also presented by the defendants, in the nature of prayers for instruction, as in cases where the issues of fact are tried by a jury, which were refused by the Circuit Court, and the defendants also excepted to such refusals. None of these exceptions have respect to the rulings of the court in admitting or rejecting evidence, nor to any other ruling of the Circuit Court which can properly be denominated a ruling in the progress of the trial, as every one of the refusals excepted to appertain to some request made to affect or control the final conclusion of the court as to the plaintiff's right to recover. Such requests or prayers for instruction, in the opinion of the court, are not the proper subjects of exception in cases where a jury is waived and the issues of fact are submitted to the determination of the court.§ Exceptions are allowed to the rulings of the court in the progress of the trial, and the provision is that the review, if the finding is special, may also extend to the determination of the sufficiency of the facts found to support the judgment. Where the finding is gen-

* Same Case, 8 Blatchford, 170; Same Case, 9 Id. 202.

† Vandervoort *v.* Columbia Insurance Co., 2 Caines, 160; Insurance Co. *v.* Lyman, 15 Wallace, 670; Rawls *v.* American Mutual Life Insurance Co, 27 New York, 297.

‡ 13 Stat. at Large, 501.

§ Dirst *v.* Morris, 14 Wallace, 490.

eral, as in this case, nothing is open to review but the rulings of the court in the progress of the trial, and as none of the last-named exceptions, which are the ones now under consideration, were of that class, they are all overruled.* Like a special verdict, a special finding furnishes the means of reviewing such questions of law arising in the case as respect the sufficiency of the facts found to support the judgment, but where the finding is general the losing party cannot claim the right to review any questions of law arising in the case, except such as grow out of the rulings of the Circuit Court in the progress of the trial, which do not in any proper sense include the general finding of the Circuit Court nor the conclusions of the Circuit Court embodied in such general finding, as such findings are in the nature of a general verdict and constitute the foundation of the judgment. No review of such a finding can be made here under a writ of error, unless it is accompanied by an authorized special statement of the facts, without imposing upon this court the duty of hearing the whole case, law and fact, as on an appeal in a chancery or in an admiralty suit, which would operate as a repeal of the provisions in the act of Congress, that issues of fact in such cases may be tried and determined by the Circuit Court, and would also violate that clause of the twenty-second section of the Judiciary Act, which prohibits this court from reversing any case "for any error in fact."†

Whether any ruling of the Circuit Court other than the rulings in admitting or rejecting evidence can properly be regarded "as rulings in the progress of the trial," within the meaning of that phrase in the act of Congress, it is not necessary in this case to decide, as it is clear that neither the general finding of the Circuit Court nor the conclusions of the Circuit Court as embodied in the general finding fall within that category.

JUDGMENT AFFIRMED.

* Dirst *v.* Morris, 14 Wallace, 490.

† 1 Stat. at Large, 85.

Syllabus.

HENSHAW ET AL. *v.* BISSELL.

1. In an action of ejectment, where both parties claim the premises in controversy under patents of the United States issued upon a confirmation of grants of land in California made by the former Mexican government, both of which patents cover the premises, the inquiry of the court must extend to the character of the original grants, and the controversy can only be settled by determining which of these two gave the better right to the premises.
2. In determining such controversy a grant of land identified by specific boundaries, or having such descriptive features as to render its identification a matter of absolute certainty, gives a better right to the premises than a floating grant, although such floating grant be first surveyed and patented.
3. *Semble*, that as between two floating grants of quantity within the same general tract which is sufficiently large to satisfy both, where neither grantee had received official delivery of possession under the former government, and where, as a consequence, there was no measurement or severance of the claim of either from the public domain, the party whose claim is first surveyed and patented will hold the better right to the land covered by his patent, and that the other party will be compelled to have his claim located outside of that patent.
4. The present case distinguished from cases in this court, and in the Supreme Court of California, in which imperfect or equitable claims, or interests arising since the acquisition of the country, were set up against the legal title held under patents.
5. A survey under a grant approved by the District Court of the United States under the act of June 14th, 1860, is conclusive as against adverse claimants under floating grants.
6. Whilst proceedings are pending before the tribunals of the United States for the confirmation of claims to land under grants of the former Mexican government, the statute of limitations of California does not run against the right of the claimants to the land subsequently confirmed to them. That statute only begins to run against the title perfected under the legislation of Congress from the date of its consummation.
7. For the application of the doctrine of equitable estoppel, such as will prevent a party from asserting his legal rights to property, there must be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud. Accordingly, when a claimant under a Mexican grant located his claim on land different from that which was finally surveyed and patented to him, and announced to others that his claim covered the land thus selected, but the government interfered and located the claim elsewhere, *held*, that he was not estopped from asserting a right to the premises surveyed and patented to him.

Statement of the case.

ERROR to the Circuit Court for the District of California.

Bissell brought ejectment in the court below against Henshaw and others, to recover one league square of land, situated in the county of Butte, in the State of California. The action was commenced May 15th, 1857, and was tried by the court without a jury by stipulation of the parties. The material facts of the case were as follows:

On the 24th of March, 1852, one Larkin, pursuant to the provisions of the act of Congress of March 3d, 1851, entitled "An act to ascertain and settle private land-claims in the State of California," filed a petition with the board of land commissioners created under the act, praying a confirmation of a claim made by him to a tract of land containing four square leagues of land, situated in the county of Butte, in the State of California, his claim being founded on a Mexican grant made by Governor Micheltorena to Charles William Flugge on the 21st day of February, A. D. 1844, upon his petition bearing date on the 22d of December, A. D. 1843. Flugge, in his petition, described the land solicited as "situated on the western side of Feather River, and stretching along ('*sobre*') the said river from 39° 33′ 45″ northern latitude, to 39° 48′ 45″, and forming on this line a square one league in breadth. It is called Boga, as it is rendered manifest by the adjoining sketch." The grant described the land granted as "consisting of five *sitios ganado mayor* [square leagues], situate on the westerly side of Feather River, in the centre of which there is a piece of land called Boga, the first boundary of the said land beginning at 39° 33′ 45″ *degrees* north latitude, as appears from the corresponding plan." The grant was made subject to the approval of the Departmental Assembly, and was approved by that body June 13th, 1845. The map accompanying the petition, called "sketch" or "plan" in the translation, in the record, lays down the line of latitude intended as the first boundary of the tract, and designates it by the degree of latitude specified in the petition and grant. The designation of this line turned out to be inaccurate; the degree of latitude mentioned being several leagues farther north. There was,

however, no difficulty in fixing the line intended on the surface of the earth by measurement, from the junction of the two rivers Sacramento and Feather, which was several leagues south, and which junction was marked by a line designated by a degree of latitude containing a similar error.

The natural objects indicated on the map—Feather River, which was the eastern boundary, and a creek called Honcut, emptying into Feather River, and three conspicuous peaks in the immediate neighborhood called "The Three Buttes,"—rendered the identification of the tract a matter easy to any surveyor. Notwithstanding these natural objects Larkin, the claimant, who had acquired the interest of the grantee, contended that the parallel of latitude designated should govern the location of the land, and accordingly he selected the land he desired under the grant, several leagues farther north than the line actually intended, and finally adopted by the government. The surveyor-general of California made a survey of the tract for the information of the land commission before confirmation, and in that survey he committed a similar error. Subsequent to the confirmation he made another survey following substantially the preliminary one. With both the surveys thus made Larkin was satisfied, and he stated to persons inquiring, that his claim under the grant covered the land selected by him and thus surveyed. The grant was confirmed by the board on the 17th of July, 1855; and an appeal from its decree having been taken by the United States, the attorney-general gave notice that the appeal would not be prosecuted; and on the 9th of February, 1857, the appeal was dismissed by the District Court, and the claimant allowed to proceed upon the decree of the board as upon a final decree.

The survey of the tract made by the surveyor-general of California, as above stated, under this decree, was set aside by the Commissioner of the General Land Office, and a new survey ordered. A new survey was accordingly made, and being objected to was ordered into the District Court for

examination under the act of June 14th, 1860.* This act authorizes the court "to make an order requiring any survey of a private land claim . . . to be returned into it for examination and adjudication," and makes it "the duty of the surveyor-general to transmit said survey and plat forthwith to said court." It requires "that before proceeding to take the testimony or to determine on the validity of any objection so made to the survey and location as aforesaid, the said courts shall cause notice to be given by public advertisement, or in some other form to be prescribed by their rules, *to all parties in interest*, that objection has been made to such survey and location, *and admonishing all parties in interest to intervene for the protection of such interest.*" It enacts further that "on hearing the allegations and proofs the court shall render judgment thereon; and if, in its opinion, the location and survey are erroneous, it is hereby authorized to set aside and annul the same, or correct and modify it; and it is hereby made the duty of the surveyor-general, on being served with a certified copy of the decree of said court, forthwith to cause a new survey and location to be made, or to correct and reform the survey already made, so as to conform to the decree of the District Court, to which it shall be returned for confirmation and approval." An appeal is given to the Supreme Court.

Under this act such proceedings were had that on the 15th of January, 1863, a new survey was approved by decree of the District Court, which became final, June 26th, 1865, by dismissal of an appeal taken therefrom. A patent of the United States was issued for the land, in accordance with this survey, to the claimant, October 5th, 1865. The plaintiff deraigned by due conveyances from the heirs of the patentee an undivided three-fourths interest in the premises patented, which include the land in controversy.

On the 19th of March, 1852, Dionisio Fernandez, Maximo Fernandez, J. Beeden, and W. R. Basham, filed a petition,

* 12 Stat. at Large, 33.

under the act of 1851, with the board of land commissioners, praying a confirmation of a claim made by them to a tract containing four square leagues of land situated in the county of Butte, and State of California, their claim being founded on a Mexican grant made by Pio Pico, governor of California, to Maximo and Dionisio Fernandez, on the 12th day of June, A. D. 1846. The grant describes the land granted as "a tract of unoccupied land, in the vicinity of the river Sacramento, bounded on the north by the slopes [*faldas*] of the Sierra Nevada; on the south by John A. Sutter's lands, and on the east by Feather River," consisting of four square leagues, and refers to a plan or map accompanying the petition of the grantees. This map represents the land as lying on Feather River, with its northern boundary resting on the *faldas* of the Sierra Nevada mountains, but with no other descriptive features to indicate its northern or southern boundary. The grant was subject to the approval of the Departmental Assembly, but never received such approval. The country passed into the possession of the United States in the following month, July 7th, 1846. Between the slopes or base of the mountains and the line of Sutter's land many leagues intervened.

The grant was confirmed by the board of land commissioners July 17th, 1855, and its decree was affirmed by the District Court on appeal March 2d, 1857. The attorney-general having given notice that no further appeal would be prosecuted, the District Court entered an order, on the ninth of the same month, that the claimants be allowed to proceed under the decree of March 2d as a final decree.

A survey of the tract confirmed was made under the directions of the surveyor-general, and was approved by him on the 29th of May, 1857. This survey was also approved by the Commissioner of the General Land Office; and on the 14th of October, 1857, a patent of the United States, in accordance with it, was issued to the claimants. This patent covers the premises in controversy, and the defendants have acquired the interests of the patentees, and have been in the open, continuous, exclusive, and adverse possession of

the premises since 1852, claiming title under the Mexican grant, proceedings for confirmation, and patent of the United States.

The statute of limitations of California, passed in 1863, enacted that no action for the recovery of real property, or its possession, should be maintained, unless the plaintiff, his ancestor, predecessor, or grantor was seized or possessed of the premises within five years before the commencement of the action, with a *proviso* in substance to the effect that parties claiming real property under title derived from the Spanish or Mexican governments, or the authorities thereof, which had not been finally confirmed by the United States, or its legally constituted authorities, should be limited to five years after its passage, within which to bring an action for the recovery of the property or its possession, but if the title had been thus finally confirmed, the parties should be subject to the same limitations as though they derived their title from any other source, that is, they should have five years from such final confirmation. The statute, in another section, declared that by *final confirmation* was meant the patent of the United States, or the final determination of the official survey of the land under the act of Congress of June 14th, 1860. The proviso has since then been repealed, but before the repeal the present action was brought.

The Circuit Court gave judgment for the plaintiff for the premises, and the defendants brought the case to this court on writ of error for review.

Messrs. R. M. and Q. Corwine, for the plaintiffs in error:

1st. The patent of the United States first issuing to Henshaw and the others gave to them paramount title, at law and in equity, to the land in controversy. This is settled in *Beard* v. *Federy*,* *Waterman* v. *Smith*,† *Moore* v. *Wilkinson*,‡ *Stark* v. *Barrett*,§ *Estrada* v. *Murphy*,‖ *Leese* v. *Clark*,¶ and *Biddle Boggs* v. *Merced Mining Co.***

* 3 Wallace, 479.
† 13 California, 407.
‡ Ib. 488.
§ 15 Id. 366.
‖ 19 Id. 260.
¶ 18 Id. 537.
** 14 Id. 362.

2d. The act of June 14th, 1860, providing as it does that a citizen may be deprived of his property by a proceeding to which he is not a party, is unconstitutional, and the proceedings of the District Court in the case of Larkin, *after* the order dismissing the case, and remitting it and the parties to the board of land commissioners for final action, to wit, on the 9th of February, 1857, were void and inoperative, and do not amount to an estoppel against the defendants. The whole subject of surveys is under the control of the political department of the government, and not subject to management by the courts.

3d. The statute of limitations of California, which was pleaded by the defendants, is a complete bar to this action, and should have been so found by the Circuit Court.

4th. The conduct of Larkin, from whom the plaintiff deraigns title with respect to the land in controversy, prior to and at the time the title to the same was confirmed in those under whom the defendant claims, and subsequently, was in fact and did in law amount to an estoppel of Larkin and those claiming under him.

Messrs. M. Blair and F. A. Dick, contra.

Mr. Justice FIELD delivered the opinion of the court.

This is an action of ejectment for the possession of certain real property situated in the county of Butte, in the State of California. Both parties claim the demanded premises under patents of the United States, issued upon a confirmation of grants made by the Mexican government. The plaintiff claims under the junior patent issued upon the earlier grant; the defendants claim under the senior patent issued upon the later grant. Both patents cover the premises in controversy, one square league of land, and the main question in the case, as in all cases where patents founded upon previously existing concessions overlap, is which of the two original concessions carried the better right to the premises.

The question, as here presented, arising upon conflicting

patents issued upon confirmed Mexican grants, has not been, heretofore, before this court for consideration, but the principles which must govern its determination are neither new nor difficult.

The grant to Flugge, upon the confirmation of which the patent was issued, from which the plaintiff deraigns his title, was made by the governor of California in February, 1844, and was approved by the Departmental Assembly in June, 1845. It in terms ceded to the grantee, subject to such approval and other conditions, five square leagues of land situated on the westerly side of Feather River, as represented on a map which accompanied the petition of the grantee, and designated as the first boundary of the tract a certain degree of north latitude. This designation afterwards proved to be erroneous, but the line intended was susceptible of being accurately traced by measurement from the junction of Feather and Sacramento Rivers, which was marked on the same map by a degree of latitude containing a similar error. The map represented a tract stated in the petition, and the statement was accepted and acted upon by the governor as correct, to be one league in breadth, and indicated natural objects of such marked character as to make the identification of the land a matter perfectly easy to any surveyor. Feather River, which constitutes the eastern boundary, with its meanderings, is traced; the position of Honcut Creek entering the river is given, and the point on the river where the erroneously designated line of latitude crosses, constituting the commencement of the boundary, is plainly shown by the bend of the river. With the breadth of the tract stated, the quantity limited, the southern and eastern lines designated, all the elements are given essential to the complete identification of the land. A grant of land thus identified, or having such descriptive features as to render its identification a matter of absolute certainty, entitled the grantee to the specific tract named. His title, it is true, was imperfect in its character, and subject to various conditions, but when approved by the Departmental Assembly it became, in the language of the regulations of 1828, "defini-

tively valid," and the estate granted was not afterwards liable to be divested except by regular proceedings on denouncement.* The power of the governor over it had ceased. He could neither revoke the grant nor impair the interest of the grantee by any attempted transfer to others.

The grant to the Fernandez, upon the confirmation of which the patent was issued, from which the defendants trace their title, was made by the governor of California in June, 1846, but was not submitted to the Departmental Assembly for approval, although made subject to that condition. The country passed under the control of the United States a few weeks afterwards, and the authority of that body ceased. The grant is for four square leagues of land, which it designates as unoccupied land, in the vicinity of the river Sacramento, and as bounded on the north by the *faldas* of the Sierra Nevada, a term which is sometimes translated slope and sometimes base of the mountains; on the south by the lands of John A. Sutter, and on the east by Feather River. As thus appears, there was no certainty or precision in the boundaries designated. The term slope or base of the mountains, whichever may be the correct translation, is of the vaguest import. The point where the mountains of the Sierra Nevada may be said to commence was then, and always must be, one of great uncertainty. No two persons would ever agree as to the precise point where their slope commenced or ended. Between the base, or any supposed slope, and the line of Sutter's land, many leagues intervened, and no western boundary of the tract is given. If we look at the map to which the grant refers we find the land represented as lying on Feather River, with its northern boundary on the "faldas" of the Sierra, with no other descriptive features to indicate either its northern or southern line. It is clear that no specific tract was intended by the governor, but only that the quantity designated should be selected on Feather River, at the base or along the side of the mountains, the precise line of which was to

* Hornsby *v.* United States, 10 Wallace, 238.

be determined by the magistrate delivering possession to the grantees. As a grant of quantity it required, under the Mexican laws, such delivery of possession to attach it to any particular tract, called, in the language of the country, juridical possession, and that proceeding was never had. But it is immaterial for the disposition of the present case whether the grant to the Fernandez be treated as one of specific boundaries, or of quantity; it could not interfere with and displace a prior grant of defined boundaries.

On the argument great stress was placed by counsel upon the fact that the claim under the Fernandez grant, though later in date, was first surveyed and patented. But this fact is not a matter of any weight in this case. Both parties holding under patents have a standing in a court of law, and the court is thus compelled to look beyond the patents, to the original source of title, and to the character of that title as it existed under the former government. The protection which by the treaty the United States promised to the grantees extended to rights which they then held. The confirmation established the validity of the claims of the parties as they then existed; that is, it determined that their claims were founded upon concessions of the former government, which were genuine and entitled to recognition so far as they did not interfere with previously existing rights of others, which the government was also bound to respect. Confirmation established nothing more; it did not change the character of the grant to Flugge as one of specific boundaries, nor that to the Fernandez as one of quantity. The surveyor in surveying the claim upon the first grant was still under as great obligations to follow the boundaries which it specified, repeated in the decree of confirmation, as though the second grant had never been issued or confirmed.

It is true, as stated by counsel, that the whole subject of surveys is under the control of the political department of the government, and is not subject to the supervision of the courts, except in those cases arising under the act of 1860, to which we shall presently refer. The courts must, how-

ever, determine, whenever the question arises, whether prior rights of other parties have been interfered with by the survey of a confirmed claim upon which a patent has issued. They cannot, in the action of ejectment, correct the survey made, but they can determine its inconclusiveness to the extent essential to the protection of the prior rights of other parties. And whenever two surveys covering the same tract are approved by the political department, and a legal controversy arises respecting the land between claimants under the different surveys, the question which of the two surveys appropriates the premises in dispute is necessarily transferred to the judiciary. The fact that two surveys embrace the same land is itself proof that either one of the original concessions was improvidently issued and to the extent of its interference with the other was inoperative, or that error has intervened in one of the surveys.

There is nothing in the language of this court, or of the Supreme Court of California, in the several cases cited by counsel, which conflicts with this view.* Those cases were all actions of ejectment, in which imperfect or equitable claims, or interests arising since the acquisition of the country, were set up against the legal title held under patents; and the subjects there considered were the effect of the patent as a conveyance of the government, and as evidence of the validity of the patentee's claim, and of its confirmation and survey, as against parties having such imperfect or mere equitable claims, or subsequently acquired interests. The patent, treated merely as the deed of the government, is held in those cases to have the operation of a quit-claim, or rather of a conveyance of such interest as the United States possessed in the land, and to take effect by relation at the time when proceedings were instituted before the board of land commissioners. The patent is also held in those cases to be record evidence of the action of the government upon the claim of the patentee under the Mexican grant,

* Beard *v.* Federy, 3 Wallace, 479; Waterman *v.* Smith, 13 California, 407; Moore *v.* Wilkinson, Ib. 488; Stark *v.* Barrett, 15 Id. 366; Teschemacher *v.* Thompson, 18 Id. 26; Leese *v.* Clark, Ib. 537.

establishing without other proof the validity of the claim and its rightful location as against all parties asserting, in the action of ejectment, merely imperfect or equitable titles, or interests acquired since the country passed under the jurisdiction of the United States. Actions of ejectment are founded upon the legal title, and parties contesting the title of the patentee in a court of law, it is there said, must show a superior legal title.

But in this case both parties stand upon patents; both have in these instruments the conveyance of the government, and a recognition of their respective concessions under the former government. In a controversy founded upon either patent as against imperfect or equitable claims or interests obtained since the acquisition of the country, the same language might be repeated which is used in the cases cited. But in the present controversy between parties claiming under two patents, each of which reserves the rights of other parties, the inquiry must extend to the character of the original concessions. The controversy can only be settled by determining which of these two gave the better right to the demanded premises.

As between two floating grants of quantity within the same general tract, which is sufficiently large to satisfy both, where neither grantee had received official delivery of possession under the former government, and where, as a consequence, there was no measurement or severance of the claim of either from the public domain, it may be that the party whose claim is first surveyed and patented will hold the better right to the land covered by his patent, and that the other party will be compelled to have his claim located outside of that patent. There would be great difficulty in finding any legal reason for invalidating the action of the government in locating the claim of the patentee in such case in any part of the general tract it might deem proper.

The language of this court in Fremont's case would seem to justify the conclusion that the floating claim first surveyed, and thus severed from the public domain, would carry the title to the premises. The grant to Alvarado, which was

then under consideration, was for ten leagues lying within exterior boundaries embracing several times the quantity designated; and the court, whilst holding that, as between the government and the grantee, the grant passed to the latter a right to the quantity of land designated, to be laid off by official authority in the territory described, said: "It is true that if any other person within the limits where the quantity granted to Alvarado was to be located had afterwards obtained a grant from the government, by specific boundaries, before Alvarado had made his survey, the title of the latter grantee could not be impaired by any subsequent survey of Alvarado. As between the individual claimants from the government, the title of the party who had obtained a grant for the specific land would be the superior and better one. For by the general grant to Alvarado, the government did not bind itself to make no other grant within the territory described until after he had made his survey."* A second floating grant, the claim under which is first surveyed and patented, and thus severed from the public domain, would seem to stand, with reference to an earlier floating grant within the same general limits, in the position which the subsequent grant with specific boundaries mentioned in the citation would have stood to the general grant to Alvarado.†

But it is unnecessary to decide definitely this point now. The present is not a case of conflicting patents issued upon a confirmation of two floating grants within exterior boundaries embracing land capable of satisfying both. It is a case where one of the grants upon which a patent has issued, and that the earlier one, has specific boundaries, or such descriptive features as to render its limits easily ascertainable. With the right of the grantee to the land thus designated the claim of the donee of the second and floating grant could not interfere.

But there is another view of this case which is equally

* 17 Howard, 558.

† Ledoux *v.* Black, 18 Id. 475; Waterman *v.* Smith, 13 California, 416, 417.

conclusive in favor of the plaintiff. We have thus far treated the survey of the two grants upon which the respective patents were issued, as made and approved under the act of March 3d, 1851. But the survey of the claim under the Flugge grant possesses, with respect to the claim under the Fernandez grant, greater force than any such approval could give. It has received judicial sanction under the act of June 14th, 1860, which makes it conclusive as against all adverse claimants under floating grants. That act provided that the surveyor-general, when he had completed and plotted the survey of any confirmed claim, should give public notice of the fact by publication in two newspapers once a week for the period of four weeks; that during this time the survey and plat should be retained in his office subject to inspection; that upon the application of any party having such an interest in the survey and location of the land as to make it just and proper that he should be allowed to intervene for its protection, or on motion of the United States, the District Court should order the survey and plat to be returned into court for examination and adjudication; that when thus returned notice should be given by public advertisement, or in some other form prescribed by rule, to all parties interested, that objection had been made to the survey and location, and admonishing them to intervene for the protection of their interests; that such parties having intervened, might take testimony and contest the survey and location; and that on hearing the allegations and proofs, the court should render its judgment approving the survey, if found to be accurate, and correcting it or ordering a new survey when found to be erroneous. The act also provided for an appeal from the decree of the District Court to the Supreme Court.

By the proceedings thus authorized, the approval of the survey brought before the court had, as against claimants under floating grants, the force and conclusiveness of a judicial determination in a suit *in rem*, and all such claimants were concluded by it.

The survey of the claim under the Flugge grant was, under the act in question, brought before the District Court

and there subjected to judicial examination, and finally received the approval of the court. If the defendants or those under whom they hold failed to appear and contest the survey, they cannot now be heard in this action to question its correctness.*

The objection to the authority of the court to pass upon the survey, because ordered into court before the act of June 14th, 1860, is untenable. The act in terms applies to surveys which had been previously returned into court and in relation to which proceedings were then pending, as well as to surveys subsequently made.†

Nor does it matter that a different survey had been previously approved by the surveyor-general of California. The whole subject of surveys is under the control of Congress, and until the patent issues thereon, any survey may be set aside and a new one ordered by its authority.

But the defendants, to defeat a recovery by the plaintiff, also insist that his right of action is barred by the statute of limitations of California; and also that he is estopped from asserting a claim to the demanded premises by the conduct and declarations of his predecessor, the claimant before the land commission, in claiming land under his grant situated in a different locality.

The statute of limitations of California, passed in 1863, provided in substance that no action for the recovery of real property or its possession should be maintained, unless the plaintiff, his ancestor, predecessor, or grantor was seized or possessed of the premises within five years before the commencement of the action, or the property was claimed under title derived from the Spanish or Mexican governments, which had not been previously confirmed by the United States or their legally constituted authorities; in which latter case the parties were allowed five years after the passage of the act within which to bring their action. If the title had been thus finally confirmed the parties were limited to five years after such confirmation. The statute also de-

* Rodrigues *v.* United States, 1 Wallace, 591.

† United States *v.* Halleck, Ib. 453.

cleared that by final confirmation was meant the patent of the United States, or the final determination of the official survey of the land under the act of Congress of June 14th, 1860. The provision of the statute relating to actions where the property is claimed under title derived from Spanish or Mexican authorities, has since then been repealed; but before the repeal and within the time designated after final confirmation of the grant, the present action was commenced. The repeal could not, however, have any effect upon the rights of the plaintiff.

Whilst proceedings were pending before the tribunals of the United States for the confirmation of the claim under the Flugge grant, the statute did not run and could not run against the right of the claimant to the land in controversy. He was obliged by the legislation of Congress to present his claim for investigation and determination, under pain of being held to have abandoned it, and was subjected to numerous and expensive proceedings to establish its validity. As a result of the proceedings required, the government, in effect, promised, in case his claim was found to be valid, to give him in its patent such evidence of title as would secure to him the possession and enjoyment of his land. The legislation of Congress imposing this burden upon the claimant and promising this benefit to him, is not the subject of any constitutional objection, and it is not, therefore, within the power of the legislature of a State to defeat its operation. It was adopted by the government in the discharge of its treaty obligations, with respect to which its authority is absolute and supreme. The action of the government thereunder, and the rights which perfected title insures to its possessor, cannot be impaired or defeated in any respect by the statute of limitations of the State. That statute can only begin to run against the title perfected under the legislation of Congress from the date of its consummation.*

The alleged estoppel of the plaintiffs is asserted from the fact that Larkin, who prosecuted the claim under the

* Montgomery *v.* Bevans, 1 Sawyer, 680.

Flugge grant for confirmation, had previously located it on land selected farther north than the tract finally surveyed and patented to him, and had announced to others that his claim covered the land thus selected. It was undoubtedly his desire to have his claim located where he had placed it. The survey made by the surveyor-general, both preliminary and subsequent to the confirmation, placed the land in the same locality. Both claimant and surveyor seem to have acted on the supposition that the erroneously designated parallels of latitude should govern the location, instead of the natural boundaries indicated on the map. There does not appear to have been any intention on the part of Larkin to mislead any one as to the nature of his rights. He was satisfied to keep the land originally selected by him; and he contended, and those who succeeded to his interests contended for the correctness of his selection; but the government, through its appropriate officers, interfered and asserted that another and different location was required by the grant.

There is, therefore, no case for the application of the doctrine of equitable estoppel. For its application there must be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud.

An estoppel *in pais* is sometimes said to be a moral question. Certain it is that to the enforcement of an estoppel of this character, such as will prevent a party from asserting his legal rights to property, there must generally be some degree of turpitude in his conduct which has misled others to their injury. Conduct or declarations founded upon ignorance of one's rights have no such ingredient, and seldom work any such result. There are cases, it is true, where declarations may be made under such peculiar circumstances, that the party will be estopped from denying any knowledge of his rights; but these are exceptional, and do not affect the correctness of the general rule as stated.*

* Commonwealth *v.* Moltz, 10 Pennsylvania, 531; Copeland *v.* Copeland, 28 Maine, 529; Whitaker *v.* Williams, 20 Connecticut, 104; Delaplaine *v.*

Statement of the case.

We see no ground for interfering with the judgment of the Circuit Court, and it is, therefore,

AFFIRMED.

ATKINS *v.* THE DISINTEGRATING COMPANY.

1. An entry on the record of an admiralty case, that on the return of a process of attachment Mr. B. "appears for the respondent, and has a week to perfect an appearance and to answer," is an appearance, the entry being followed by the execution by the respondent or his agents of different bonds, reciting "that an appearance in the case had been entered."
2. A District Court of the United States, when acting as a court of admiralty, can obtain jurisdiction to proceed *in personam* against an inhabitant of the United States not residing within the district (within which terms a corporation incorporated by a State not within the district is meant to be included), by attachment of the goods or property of such inhabitant found within the district.

APPEAL from the Circuit Court for the Eastern District of New York.

Atkins filed a libel in the District Court for *the Eastern District of New York*, in a cause civil and maritime, against the Fibre Disintegrating Company; styling it "a corporation duly incorporated," but not saying by what State incorporated, nor anything else about it; the company having in fact been incorporated by the State of New Jersey, a State not within the limits of any judicial district of New York, but on the contrary forming in itself the judicial "district of New Jersey."

The libel was on a charter-party of the ship Hamilton, executed in New York, and was to recover:

1. Freight due the ship for bringing a cargo from Kingston and Port Morant in the island of Jamaica.

2. For demurrage for the ship while getting a cargo.

3. For damage to the ship by getting on a reef at Port Morant.

Hitchcock, 6 Hill, 16; Brewer *v.* Boston and Worcester Railroad Company, 5 Metcalf, 479; Biddle Boggs *v.* Merced Mining Company, 14 California, 368; Davis *v.* Davis, 26 Id. 23.

Statement of the case.

It alleged that the company had chartered the ship to proceed to Kingston, a deep-water and safe port for a full cargo, freight to be paid at a price named; that twenty running lay days were allowed for loading, and, for any delay beyond that, $100 per day demurrage; that if a full cargo should not be provided at Kingston, then the company had the privilege of sending the vessel to *a second safe port;* that the company, in violation of the charter, had sent the ship to Port Morant, an unsafe port, whereby the vessel was delayed, and, by the unsafeness of the port, got aground and was damaged.

It prayed for process and a citation to appear, *and if the defendants should not be found, that an attachment might issue against their property in the district.*

Process according to the prayer issued accordingly, June 14th, 1866, returnable June 20th, 1866.

The process was returned as follows:

Respondents not found in my district, and I attached all the property of the respondents found in their factory in Red Hook Point, in the city of Brooklyn.

A. F. CAMPBELL,
United States Marshal.

June 20th, 1866.

The record, under date of this same 20th of June, noted a return of the service, with an entry thus (Mr. Beebe being a proctor of the court):

"Mr. Beebe *appears for the respondent, and has a week to perfect appearance,* and to answer."

And on the same day with Mr. Beebe's action, the said 20th, a motion was made on the part of the defendants, with stay of proceedings, to show cause why the property attached should not be discharged; the ground of *this* motion being that the business of the company was carried on at Brooklyn, in the Eastern District of New York, and that its officers were all at its factory there during business hours, and that service of process could have been made on them, but that such service had purposely not been made in order to attach property. The hearing of the motion being deferred,

the defendants, by consent, were allowed to give stipulations for value and to take the property attached, without prejudice to the motion already made, and with an agreement that if the motion to discharge the property should be granted, the stipulations should be cancelled.

The stipulation for costs, acknowledged July 6th, 1866, contained a recital that "an appearance had been filed in the cause by the said Disintegrating Company." The stipulation for value, which was signed by the president of the company and two of the directors, and which was acknowledged July 7th, 1866, contained a recital that *an appearance had been duly filed by said Fibre Disintegrating Company*, and provided for notice of the final decree to Beebe, Dean, and Donohue, *proctors for the claimants of the property attached, and the defendant;* and the papers were signed and indorsed "Beebe, Dean, and Donohue, proctors."

The motion to discharge the property attached was never decided. But a motion was made in March, 1867, to set aside and vacate the clause of attachment contained in the motion and all proceedings under it; *this* motion being based upon this clause in the eleventh section of the Judiciary Act:

"And no CIVIL SUIT shall be brought before either of said courts against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ."

The ground of the application was that the respondents at the time of the issuing and serving the process were non-residents of the Eastern District of New York, and had not been found therein at the time of serving the writ.

The motion was opposed by the libellants, who argued that a cause in the admiralty was not a "civil suit" within the meaning of the clause relied on, and, therefore, that the clause did not apply; while for the rest, that the proceeding by attachment against an absconding, absent, or non-resident debtor, was one, they argued, inherent in courts of

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admiralty and practiced from the earliest times. In support of this view reliance was had on Clerke's *Praxis*, an old but authoritative book of the time of Elizabeth, and on Browne's *Civil Law and Law of Admiralty*. Clerke's *Praxis*, translated, read thus:

"SECTION 24. If the defendant so conceals himself, or perhaps he is absent from the kingdom, that he cannot be arrested, then if he shall have any goods, wares, or ship, or any part of a ship, or boat upon the sea or within the flow and reflow of the sea, then a warrant is to be taken out to this effect, to arrest such goods or such a ship, &c., belonging to N., that is, to the defendant debtor, in whosesoever hands they may be, and to cite, with such goods, N., the debtor, specially, and all others generally who have or pretend to have any right or interest in the said goods, to appear on such a day to answer the plaintiff in a certain civil and maritime cause."

Browne's language* was thus:

"Let us, lastly, suppose that a person against whom a warrant has issued cannot be found, or that he lives in a foreign country: here the ancient proceedings of the admiralty court provided an easy and salutary remedy. . . . They were analogous to the proceedings by foreign attachment under the charters of the cities of London and Dublin. The goods of the party were attached to compel his appearance."

Opposed to this it was said that the present cause was palpably a "civil suit;" that the clause of the eleventh section relied on, therefore, did apply. But that if this were otherwise, and if there were no statutory prohibition, that the attachment ought to be set aside; for that while the ancient usage of the admiralty allowed the process of attachment if the defendant concealed himself, or had absconded, or were an alien non-resident—to which cases the language of Clerke and Browne, as of other writers, applied—neither such ancient practice nor any proper practice allowed it, nor would the language of either of the authors cited justify it in application to a case where the defendant was not alien

* Volume 2, page 434; and see pages 333 and 433.

to the United States (in whose courts the case was), had not concealed himself, and had not absconded, but contrariwise was a person (an artificial person), incorporated by one of the United States, owing and paying allegiance to the government, and neither absent, nor concealed, nor absconding; but contrariwise again, at its own home in an adjoining judicial district of the United States, the district of New Jersey, in the *third* Federal circuit, where by crossing the Hudson it could be sued just as well as, and much more properly and effectively than, where it had been sued, to wit, in the Eastern District of New York, in the *second*.

The District Court denied the motion to vacate and set aside the attachment.*

The defendants then put in their answer averring performance of the charter-party and the acceptance of the cargo; that the second port had been voluntarily accepted as a safe port by the master; and also setting up that they were a foreign corporation, incorporated under the laws of New Jersey, and not residents of the Eastern District of New York, and that the libel did not allege that they resided or were in the district.

The District Court, after full argument, considering that the company, so far as the proceeding against *it* individually was concerned, had by the appearance and action of its proctor, come into court, and considering further that the merits were with the libellants, decreed against *it* individually for $13,302, an amount found due by a master; and considering also that the proceeding was not "a civil suit" within the meaning of the clause in the eleventh section, and that, independently of the prohibition there contained, the ancient usage of the admiralty did authorize the attachment, as an inherent power of the court, decreed against the property seized; or to speak, in this particular case, more literally, decreed that the stipulators should cause the stipulations which they gave on the discharge of the property from seizure, to be performed.

* 1 Benedict, 118.

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On appeal the Circuit Court reversed the decree.

As to the matter of appearance—remarking that it was according to the ancient practice in admiralty in cases of attachment not to recognize anything as an appearance but putting in of bail—it thought that what had been done by Mr. Beebe was not to be regarded as a general appearance; that, on the contrary, he had been allowed time "to *perfect* an appearance," and had immediately moved to set aside the proceeding as unauthorized; that this motion being denied and the respondent compelled to answer, the answer was made by setting up again an invalidity; and that the libellants had stipulated expressly that the subsequent bond for value should not operate as a waiver of the respondent's motion.

Upon the other and greater question—whether a court of admiralty in one judicial district of the United States can obtain jurisdiction against an inhabitant of another district by an attachment of his goods,—the Circuit Court also disagreed with the District Court, and accordingly the whole decree was reversed.*

From that reversal the case was now on appeal here; there being, in this court, less dispute perhaps about the merits, and about whether there was a sufficient "appearance" to authorize a decree *in personam* against the corporation, than whether the proceeding was a "civil suit" within the meaning of the clause already quoted of the eleventh section of the Judiciary Act, and if it was not, whether the inherent power of the court of admiralty authorized an attachment in a case like that here issued, and where the defendant was not an alien, nor absent from his own home, nor absconding, nor anywhere concealed.

What answer should be given to the first part of this chief question, it was admitted on both sides, was a matter which received light from certain provisions in the Constitution, and also from enactments of Congress other than the exact clause of the eleventh section, on which the question turned.

* Of course, in the view taken in the Circuit Court, no discussion about merits was necessary.

Some of these may be recited.

The Constitution, as sent forth by the Convention of 1787, and as adopted, in the same article* which ordains—

"That the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction"—

Ordains also:

"The trial of all crimes, except in cases of impeachment, shall be held in the State where the said crime shall have been committed."

And as amended in 1789, by the first Congress:†

"In criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed."

Passing now to legislative enactments. The "Act to establish the Judicial Courts of the United States," commonly called the Judiciary Act, and passed September 29th, 1789,‡ enacts:

"SECTION 9. That the District Courts shall have, exclusively of the courts of the several States, cognizance of all crimes and offences that shall be cognizable under the authority of the United States, committed within their respective districts, . . . where no other punishment than whipping, &c., is to be inflicted:

"And shall also have exclusive original cognizance of all *civil causes of admiralty and maritime jurisdiction*, including all seizures under laws of impost . . . . 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. . . .

"And shall also have exclusive original cognizance of all seizures on land or other waters than as aforesaid made, and of all *suits* for penalties incurred under the laws of the United States:

"And shall also have cognizance concurrent with the courts of the several States or the Circuit Courts, as the case may be, of *all causes* where an alien sues for a tort only in violation of the law of nations or a treaty of the United States:

* Article III, section 2. † Amendment VI. ‡ 1 Stat. at Large, 73.

"And shall also have cognizance, concurrent as last mentioned, of all *suits at common law*, where the United States sue and the matter in dispute amounts, exclusive of costs, to the sum or value of $100:

"And shall also have jurisdiction, exclusively of the courts of the several States, of *all suits against consuls or vice-consuls*, except for offences above the description aforesaid:

"And the trial of issues in fact, in the District Courts, in all causes *except civil causes of admiralty and maritime jurisdiction*, shall be by jury."

Next in order of matter comes the eleventh section, in which is found the clause upon which the case turned:

"The *Circuit* Courts shall have original cognizance, concurrent with the courts of the several States, of *all suits of a civil nature, at common law or in equity*, when the matter in dispute exceeds, exclusive of costs, the sum or value of $500, and the United States are plaintiffs, or petitioners, or an alien is a party, or the suit is between a citizen of the State where the suit is brought and a citizen of another State.

"And shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the District Courts of the crimes and offences cognizable therein; *but no person shall be arrested in one district for trial in another, in any civil action, before a Circuit or District Court. And no civil suit shall be brought before either of said courts against an inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant or in which he shall be found at the time of serving the writ.*"

Then follows:

"SECTION 21. From final decrees in a District Court, in *causes of admiralty and maritime jurisdiction*, where the matter in dispute exceeds the sum or value of $300 . . . an appeal shall be allowed to the next Circuit Court to be held in such district.

"SECTION 22. Final decrees and judgments in *civil actions* in a District Court, where the matter in dispute exceeds the sum or value of $50, . . . may be re-examined and reversed or affirmed

in a Circuit Court holden in the same district upon *a writ of error*."

So far as to the Judiciary Act.

"An act to regulate processes in the courts of the United States"—a temporary Process Act—passed September 29th, 1789,* five days after the passage of the Judiciary Act, enacted:

"That until further provision shall be made, and except where by this act or *other statutes of the United States* is otherwise provided, the forms of writs and executions . . . and mode of process, and rates of fees, . . . in the Circuit and District Courts, *in suits at common law*, shall be the same in each State respectively as are now used . . . in the Supreme Court of the same.

"*And the forms and modes of proceeding in causes of equity and of admiralty and maritime jurisdiction shall be according to the course of the civil law.*"

And "An act for regulating processes," &c.—the permanent Process Act—of May 8th, 1792,† enacts:

"SECTION 2. That the forms of writs, executions, and other process, . . . and the forms and modes of proceeding in *suits*—

"In those of the common law shall be the same as are now used in the said courts, respectively, in pursuance of the act entitled 'An act to regulate processes in the courts of the United States' [the last above-quoted act]—

"In those of equity and in those of admiralty and maritime jurisdiction, according to the principles, rules, and usages which belong to courts of equity and to courts of admiralty respectively, as contradistinguished from courts of common law, *except so far as may have been provided for by the act to establish the Judicial Courts of the United States*, subject, however, to such alterations and additions as the said courts respectively shall, in their discretion, deem expedient, or to such regulations as the Supreme Court of the United States shall think proper, from time to time, by rule, to prescribe to any Circuit or District Court concerning the same."

By an act of 23d August, 1842,‡ in the nature of a process act, it is enacted:

* 1 Stat. at Large, 93. † Ib. 276. ‡ 5 Id. 517.

Argument in support of the jurisdiction.

"That the Supreme Court of the United States shall have full power . . . to prescribe, regulate, and alter the forms of writs, and other process to be used and issued in the District and Circuit Courts, . . . and the forms and modes of framing and filing libels, bills, and answers, and other proceedings, and pleadings in suits at common law, or in admiralty, or in equity, and *generally to regulate the whole practice of the said courts.*"

Under the power given by these acts, the said court, by its second Rule in Admiralty, provided that:

"In suits *in personam* the mesne process may be by a simple warrant of arrest of the person of the defendant in the nature of a capias; *or 'by a warrant of arrest of the person of the defendant, with a clause therein that if he cannot be found to attach his goods and chattels,'* &c., or by a simple monition in the nature of a summons to appear and answer."

Messrs. E. C. Benedict, for the libellants, appellants here; a brief of Messrs. George Willey, J. E. Cary, and H. L. Terrill, on the same side, though in another case, being filed in this case by leave of the court:

Assuming, as we think is sufficiently plain, that the defendants did enter their appearance, and that, on the merits, the case was with the libellants, we pass directly to the great question of the case,—the question, namely, whether the right exists to attach in the admiralty the property of a defendant who was not found in the district.

The question is not new. It was raised in the year 1802, only ten years after the passage of the Process Act of 1792, in *Bouysson & Holmes* v. *Miller & Ryley*,* in the District Court of South Carolina, before Judge Bee, then the judge of that court. That cause appears to have been fully and ably argued as "a new question," where it was necessary to investigate the jurisdiction of the admiralty as to matters civil and maritime, and the learned judge declares:

"I have fully considered the circumstances and arguments brought before me, and am clearly of opinion that attachments

* Bee, 186.

against the goods, or debts of absent persons, may issue out of this court of admiralty. If the actors cannot proceed in this way they lose all remedy, whatever may be their right of action."

Judge Bee was an able judge; one of the sages of the law. His construction may be properly called contemporaneous with the Judiciary Act.

This right of attachment was not again questioned before 1825, when it was understood to be settled in this court by the case of *Manro* v. *Almeida*.*

This court then said:

"Thus this process has the clearest sanction in the practice of the civil law, and during the three years that the admiralty courts of these States were referred to the practice of the civil law for their 'forms and modes of proceedings,' there could be no question that this process was legalized. Nor is there anything in the different phraseology adopted in the act of 1792 that could preclude its use. That it is agreeable to the principles, rules, and usages which belong to courts of admiralty is established not only by its being resorted to in one at least of the courts of the United States, but by the explicit declaration of a book of respectable authority and remote origin, Clerke's *Praxis*, article 28."

The question was, nevertheless, again raised on the circuit, in Rhode Island, in 1841, in *Clarke* v. *The New Jersey Steam Navigation Company*.† The opinion of Story, J., in this case has greater weight, because he was a member of the Supreme Court when the case of *Manro* v. *Almeida* was decided. He says:

"Ever since the elaborate examination of the whole subject, in the case of *Manro* v. *Almeida*, this question has been deemed entirely at rest."

And again:

"And the case does not fall within the prohibitory clause of the eleventh section of the Judiciary Act."

* 10 Wheaton, 473.

† 1 Story, 531.

Argument in support of the jurisdiction.

Indeed, in the case of *The Invincible*,* Judge Story had said:

"I accede to the position that in general, in cases of maritime tort, the court of admiralty will sustain jurisdiction where either the person *or his property* is within the territory. It is not even confined to the mere offending thing."

The question was also really involved in the case of *The New Jersey Steam Navigation Company* v. *The Merchants' Bank*,† but court and counsel appear to have considered it too plain to be raised and discussed as doubtful, while the practice is distinctly recognized by this court in *Waring* v. *Clarke*,‡ where it specifies as among the cases of undoubted admiralty jurisdiction,

"Cases to enforce judgments of foreign admiralty courts, when the person *or his goods* are within the jurisdiction."

The practice, as appears by *Boyd* v. *Urquhart*,§ was familiar practice to Judge Sprague, eminent as an admiralty judge, and was discussed in *Smith* v. *Milne*,‖ and other cases of Judge Betts, not less eminent, without the suggestion of a doubt as to its regularity. And the high authority of Judge Parsons in his work on Maritime Law,¶ and also on Shipping,** after the question had been raised, is positive in support of the validity of the practice.

Independently of authority, and by reference to the language of acts of Congress, and of the Judiciary Act especially, the matter is clear.

The eleventh section of the Judiciary Act does not extend to "*causes civil and maritime*" in the court of admiralty. It embraces only "suits of a civil nature at common law or in equity," which are specified in the first clause of the section.

It has not been usual to consider admiralty causes as in-

* 2 Gallison, 41. † 6 Howard, 344. ‡ 5 Id. 452.

§ 1 Sprague, 423; and see Shorey *v.* Rennel, Ib. 418.

‖ 1 Abbott's Admiralty Reports, 373, 382; and see Reed *v.* Hussey, 1 Blatchford & Howland, 525.

¶ Page 686, note. ** Page 390.

cluded in practice legislation, unless specified. Admiralty proceedings are *sui generis*, and there are other instances in which language has been used in the statutes, which at first reading would seem to include them, but which the courts have held not to include them.

Thus the act of February 29th, 1839,* ordered that no person should be imprisoned for debt in any State on process issuing out of a court of the United States, where, &c. But this was held not to include process issuing out of a court of admiralty, and parties were arrested by the admiralty courts notwithstanding this act, until this court abolished the practice by the forty-eighth rule, adopted in 1851.†

The act of 1803, ch. 40,‡ directed that "from all final judgments or decrees in any District Court, an appeal shall be allowed," &c. But Story, J., held that this did not include judgments at common law, the word "appeal" having a technical admiralty meaning.§

The act of August 23d, 1842,‖ provided that, "on *all judgments in civil cases* hereafter recovered in the Circuit or District Courts of the United States, interest shall be allowed," &c. Yet this is held not to embrace admiralty judgments.¶

But the Judiciary Act itself plainly distinguishes the different sorts of controversy.

By the twenty-first section of that act, Congress provided that "from final decrees in a District Court *in causes of admiralty and maritime jurisdiction*, where the matter in dispute exceeds $300, an *appeal* shall be allowed to the next Circuit Court."

And by the twenty-second section of the same act, Congress provided that "final decrees and judgments in *civil actions* in a District Court, where the matter in dispute exceeds $50, may be re-examined and reversed, or affirmed in

* 5 Stat. at Large, 321.

† Gaines *v.* Travis, 1 Abbott's Admiralty Reports, 422.

‡ 2 Stat. at Large, 244. § United States *v.* Wonson, 1 Gallison, 11.

‖ 5 Stat. at Large, 518.

¶ Hemmenway *v.* Fisher, 20 Howard, 258; The Ann Caroline, 2 Wallace, 550.

a Circuit Court holden in the same district, upon a *writ of error.*"

No one will think that Congress intended by this different language to allow judgments and decrees in any admiralty causes whatever, to be reviewed on *writ of error.* But unless they did so intend, they used the words "civil actions," as *contradistinguished* from "admiralty causes."

Furthermore, it is apparent, from a comparison of the language used in the ninth, eleventh, twenty-first, and twenty-second sections of the Judiciary Act, that admiralty causes were intended to be excluded from the eleventh section. The analogy between the provisions of the ninth and eleventh sections on the one hand, and the twenty-first and twenty-second sections on the other, is obvious.

In the ninth section, Congress gave jurisdiction to the District Courts of two classes of proceedings: (1) "of civil causes of admiralty and maritime jurisdiction," and (2) of certain suits; and in the eleventh section, they gave jurisdiction to the Circuit Court of "all suits of a civil nature at common law, or in equity," &c., &c.

In the twenty-first section, they provided for the review of decrees of the District Court, in "causes of admiralty and maritime jurisdiction," *by appeal;* and in the twenty-second section, for a review of "decrees and judgments in *civil actions*" in District Courts, by *writ of error*, and also of "decrees and judgments, in *civil actions*" in the Circuit Courts, by *writ of error.*

Can it be rightly doubted that Congress intended, by this language in the twenty-first section, the same kind of actions which they intended by the *first* class mentioned in the ninth section; and that they intended, by the language in the first clause of the twenty-second section, the same kind of actions as they intended by the *second* class mentioned in the ninth section; and by the second clause of the twenty-second section, the same kind of actions as they intended by the eleventh section? Or can it be rightly doubted that, by the words "suits of a civil nature" and "civil actions," used in the eleventh and twenty-second sections, they did not mean

what they meant in the *first* clause of the ninth and in the twenty-first sections, viz., admiralty causes?

But it will be seen that the words in question, in this case, form part of the eleventh section, and are *in pari materiâ* with the first sentence of that section. They should, therefore, be construed as having the same meaning, which excludes admiralty causes.

Can any sufficient reason be given why the words, "civil suit," in the eleventh section, should have a broader meaning than the words, "civil actions," in the twenty-second section? But the latter words, by universal consent, do not include admiralty causes.

The ninth section of the Judiciary Act gave to the District Courts the full jurisdiction of the admiralty. This cause is fully within that jurisdiction. And no limitation of that jurisdiction is to be inferred.

From the earliest periods, the distinction between common law proceedings and proceedings in causes of admiralty and maritime jurisdiction, has been maintained in the phraseology of the law. In the Constitution, when the word admiralty first occurs, and in the laws of the United States *passim*, this difference appears.

Admiralty causes are not usually called "suits" or "actions" (words which are usually applied to common law actions), but "causes,"—"a *cause* civil and maritime," a "cause of collision, civil and maritime," "a cause of contract, civil and maritime," &c. This descriptive and peculiar language is found in the commissions of the Colonial admiralty judges.* It has come down from the earliest precedents collected in Clerke's *Praxis*, which has always been accepted as the most authoritative exposition extant of the early course and usages in admiralty proceedings. Wherever Clerke has occasion to speak of an admiralty proceeding, he uses the language, "*causa civilis et maritima*."†

In the organization of the judiciary of the United States, in 1787, the characteristic difference between the courts of

* Benedict's Admiralty, §§ 126, 127, 151. † Articles 1, 9, 24, 25, 37.

common law and courts of admiralty was fully recognized and acted upon.

In the Constitution, where the word admiralty first occurs in the laws of the United States, this difference appears: "All *cases* of admiralty and maritime jurisdiction."

In the same phraseology does the Judiciary Act make a grant of jurisdiction to the District and Circuit Courts. The distinction is obviously observed in the ninth section, which speaks in one place of "civil causes of admiralty and maritime jurisdiction," and in another of "suits at common law."*

If it is asked what the words "civil suit" and "civil action" refer to in the eleventh section, as to the District Courts, the answer is, that they refer to the cases mentioned in the ninth section, suits by an alien, suits at common law for $100, suits against consuls, &c.

The same distinguishing language, above mentioned as so common in the Judiciary Act, is used in other acts of Congress. Thus, in an act of April 3d, 1818,† we find the expression:

"In any suit at common law, or in any civil cause of admiralty and maritime jurisdiction."

The temporary Process Act of September 29th, 1789 (five days after the Judiciary Act), provided separately for suits at common law and causes of admiralty and maritime jurisdiction. It provided that the process and proceedings "in the Circuit and District Courts in suits at common law" shall be like those in the State courts. And that "the forms and modes of proceedings in causes in equity and of

* See also the thirtieth section, prescribing the mode of taking depositions. Instead of saying "all actions" or "all civil actions," the legislature mentions admiralty in this peculiar language, "as well in the trial of causes in equity, and of admiralty and maritime jurisdiction, as of actions at common law." And in other portions of the same section occur the phrase "causes of admiralty and maritime jurisdiction."

† 3 Stat. at Large, 414; see also act of September 29th, 1789; act of May 8th, 1792; and act of July 16th, 1862.

admiralty and maritime jurisdiction shall be according to the course of the civil law." This, if at all inconsistent with the Judiciary Act, modified and controlled that act, being passed of a later date.

Thus the admiralty system of the United States, in its very inception, adopted and embraced this very proceeding of attachment, which is a familiar and undisputed proceeding of the civil law. That practice prevailed as the civil law practice till May, 1792, when the new Process Act was passed, which enacted that the practice of the common law courts should be as before established, and that in those of equity and of admiralty and maritime jurisdiction it should be "according to the principles, rules, and usages which belong to courts of equity and to courts of admiralty respectively, as contradistinguished from courts of common law." Thus the old practice was continued without change, the admiralty process and the civil law process being identical, so far as this proceeding is concerned.

There is an exception upon which some stress will perhaps be laid, "except so far as may have been provided for by the Judiciary Act." Many things are provided for in the Judiciary Act which were not to be repealed by this Process Act, such as the power to make rules, to grant injunctions, to consolidate actions, to regulate arrests, bail, and imprisonment, to cure and amend defects in proceedings, to regulate clerks, marshals, jurors, lawyers, district attorneys, &c., &c.

Besides this exception, this practice was to be "subject, however, to such alterations and additions as the courts" may make in their own practice, and "to such regulations as the Supreme Court shall think proper by rule to prescribe." The District Court of New York made its rules authorizing this proceeding in question in 1828, which have been continued to this day. And the Supreme Court in 1842 made the admiralty rules authorizing this practice.

Therefore, even if this provision of the eleventh section did include admiralty causes, still, unless that section was beyond repeal or modification, the Process Act of 1789, and

the Process Act of 1792, and the act of 1842, §§ 6, 7, and the second admiralty rule, have modified the practice and fully authorized this mode of proceeding, which is the familiar practice of the civil law and of the admiralty courts from the earliest periods.

Difficulties were found to arise, in suits at law and in equity, under this clause of the eleventh section, owing to the residence of defendants in different districts. In 1839, therefore, Congress passed an act which, as Mr. Law says,* "was intended to remove the many difficulties arising in practice, in cases of law and equity, under the third clause of the eleventh section of the act of 1789."

These difficulties, which, if that clause of the eleventh section had included admiralty causes, would have been *more certainly* experienced in them than in suits at law or equity, had not been met with in admiralty, owing to the course of decisions which we have cited above sustaining the admiralty process of attachment against absent debtors. To this fact, doubtless, it is due that, by this act of 1839, the difficulties in question were removed from the practice in "suits at law or in equity," while causes of admiralty jurisdiction are not mentioned.

The passage of such an act is the strongest legislative approbation of the judicial interpretation which had been put upon the Judiciary Act. In no other way can the failure to mention admiralty causes be accounted for.

Mr. C. Donahue (*a brief of Mr. G. B. Hibbard on the same side, though in another case, being filed by leave of the Court*), *contra:*

It would seem rather out of strict practice, on a great question of Federal jurisprudence—one which nothing but a solemn decision of this the highest court of the land can settle,—to be citing as authority—citing especially on an appeal from a *Circuit* Court—such cases as *Bouysson & Holmes* v. *Miller & Ryley*, or *Smith* v. *Milne*, decided in *District* Courts, or even to be citing *Clark* v. *The New Jersey Steam*

* Law's United States Courts, 84, n.

Navigation Company, *The Invincible*, and other cases decided by a Circuit Court. The appeal here being from a Circuit Court, presumptively as right and certainly of technical authority equal to that of other Circuit Courts, such citations seem of small value. Certainly, if the cases cited did all pass on the very point here under discussion, and if they would thus bind the courts which decided them, they have no authority in this court. If they had, the decision by Mr. Justice Washington, of the Third Circuit, in *Ex parte Graham*,* by Mr. Justice Hoffman, of the California District, in *Wilson* v. *Pierce*,† of Mr. Justice Shipman, of the Connecticut District, in *Blair* v. *Bemis* (not perhaps reported), and the very adjudication from which the present appeal is taken—could be opposed to them.

The decision here and now must be rested upon cases in this court, of which it is not pretended by opposing counsel that more than one—*Manro* v. *Almeida*—has adjudged the chief question under argument. If an analysis of that only case presented, shows that while its general purpose has been rightly conjectured, its precise limitations and bearings have not been attended to, and that it has no real bearing on the matters now in issue, then we must examine, in their exactness of phrase, the great statutory enactments which lie at the base of the jurisdiction set up, and if the language is at all obscure or difficult, then the history, and principles, and objects of these enactments. The examination in all its branches is thus made by Mr. Justice Woodruff, in the opinion of the court below; an opinion which refers, moreover, to some minor cases which we have named. We refer to the opinion not as authority, but as an argument which we think cannot be answered. It says:

"The general proposition deducible from the Judiciary Act, and from the act of August 23d, 1842, was decided by the Supreme Court of the United States, in the case of *Manro* v. *Almeida*, in 1825, and is not open for discussion in this court, namely, that the courts of the United States, proceeding as

* 3 Washington's Circuit Court, 460.

† 15 Law Reporter, 137.

courts of admiralty and maritime jurisdiction, may issue the process of attachment to compel appearance, in cases of maritime torts and contracts.

"As that is the only case in which the question appears to have been raised and passed upon in that court, and as the decision of that court is conclusive, it is important to state what the case was in which the above general proposition is held, and to what precise extent the decision goes. The libel was filed in the District of Maryland, charging Almeida with having committed a tort, on board a certain vessel off the Capes of the Chesapeake, in taking therefrom $5000 in specie, and converting it to his own use. It appears, by the statement of the case, that Almeida resided in the district, but had absconded from the United States, and fled beyond the jurisdiction of the court; and the libel averred, that the libellants had no means of redress but by process of attachment against his goods, chattels, and credits, which were, also, about to be removed, by his orders, to foreign parts. The goods, &c., were attached by the marshal, and a copy of the monition was left at the late dwelling-house of Almeida, and a copy affixed at the public exchange, and on the mast of the vessel containing the attached goods, &c. On demurrer to the libel, the questions decided were raised, and, from the decision dismissing the libel, an appeal was taken to the Supreme Court, and the decree was reversed. The decision affirms, therefore, that it is within the power and jurisdiction of the District Court, as a court of admiralty, to issue process of attachment to compel the appearance of a respondent proceeded against by a suit *in personam;* and that, in the United States, such process may issue against the goods of a resident of the district in which the suit is brought, whenever the defendant has concealed himself, or absconded from the country. The case of *Bouysson* v. *Miller* is referred to as an authority in this country, and Clerke's *Praxis* is cited for the general practice of the civil law. The opinion of the court shows, further, that the attachment was originally devised, and is still maintained, as a means of compelling the respondent to appear in the suit to answer, and that this is its primary object, while, if he does, nevertheless, not appear, the goods, &c., may be sold to satisfy the libellant.

"In *Cushing* v. *Laird*, recently decided in the District Court of the United States for the Southern District of New York,

Judge Blatchford has examined the subject further, and concludes, mainly upon the authority of the case of *Manro* v. *Almeida*, and of the text of Clerke's *Praxis*, that the jurisdiction and power to attach property to compel an appearance also exists in this country, where the defendant is not an inhabitant of the United States, but is an alien not found within the district, but having property there which can be attached.

"With these decisions, the present case raises no controversy. They are in perfect consistency with the ground relied upon by the respondents here, to wit, that, being in a legal sense inhabitants of the District of New Jersey, they could not be sued in the Eastern District of New York, by process of attachment and seizure of their goods. And it is of great pertinency to say that, recognizing the principles and practice sanctioned by the decisions above referred to, completely satisfies the provisions of the acts of Congress already cited, and gives a proper and sufficient field for the operation of the act regulating the practice of the court, and of the rule of the Supreme Court of the United States prescribing the process of attachment when the defendant cannot be found within the district; for, by these decisions, if he be concealed, or have absconded, or be an alien non-resident, there is occasion for the process.

"The question then recurs—and entirely without conflict with those statutes, or with the rule of the Supreme Court, or with those decisions—can an inhabitant of the United States be sued, in a court of admiralty, by process of attachment of his goods, issued and served to compel his appearance, in any other district than that whereof he is an inhabitant?

"It is of some significance to note that the Constitution of the United States had provided, prior to the passage of the Judiciary Act, that 'the trial of all crimes, except in cases of impeachment, . . . shall be held in the State where the said crime shall have been committed;' and an amendment proposed by the same Congress, and at the same session, at which the Judiciary Act was passed, provides that, 'in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed.'

"That an attachment of goods to compel appearance, and a holding thereof to answer any claim which a plaintiff may recover, is 'original process,' within the meaning of the language

of the clause in question of the eleventh section of the Judiciary Act, is not doubtful. That the Circuit and District Courts of the United States cannot send their process into another district, in suits at common law or in equity, and thereby obtain jurisdiction of the person, is also clear. That, in actions at the common law or in equity, they cannot proceed by attachment, and so obtain jurisdiction of a person who is an inhabitant of another district, is settled. In such actions, the statute applies according to its very terms; and, in order to jurisdiction, the defendant must be an inhabitant of the district in which the suit is brought or be found therein, if the defendant be an inhabitant of any of the United States. If, then, the present is a 'civil suit,' within the meaning of the act, there is an end of the question, and jurisdiction of the defendant could not be acquired by attachment of goods.

"1. The restriction cited, and which forms part of the eleventh section, is not confined, in its operation, to the jurisdiction conferred by that section. This is clear, because no civil jurisdiction is, by that section, conferred upon the District Courts; and yet the restriction forbids that any civil suit shall be brought before either the District or Circuit Court in any other district, &c. The words 'District Court,' and 'either of said courts,' would be senseless and inoperative if the restriction did not apply to other actions than those which were authorized by that section. The terms, therefore, plainly apply to the District Court in the exercise of some jurisdiction theretofore mentioned, and must operate to limit or explain the powers given to those courts in the previous ninth section. Including both courts in terms, the limitation operates upon the jurisdiction of each conferred by that section. This is also settled by the cases cited; for, if it were otherwise, then the District Court could, in the exercise of such common-law jurisdiction as is given by the ninth section, proceed by attachment.

"2. The Congress of the United States, when this restriction was imposed, were in the very act of framing a judicial system. They provided for the organization of the courts, for a distribution thereof throughout the States, bringing the Federal tribunals within easy approach by every citizen, for the determination of controversies deemed appropriate to those tribunals. Their jurisdiction as to subject-matter was made to depend chiefly upon the nature of the subjects and the residence of the

parties, who, when of different States, might prefer a tribunal existing and acting in freedom from State influence. The courts of original jurisdiction were located in each district. As they acted not under local authority, but derived their power from a government embracing the entire Union, they might seem warranted in entertaining suits against defendants residing in any State, however remote, and in sending process for service compelling appearance. It was, therefore, of great and manifest importance, that some rule on this subject should be prescribed; and it was done so as to prevent parties proceeded against from being called to a great distance to defend actions brought against them, when there was a Federal tribunal at their own door competent to administer justice.

"3. There is, therefore, no possible reason for any distinction in this respect between a suit in admiralty and a suit in equity or a suit at law. A suit *in personam* in the court of admiralty is within the jurisdiction of that court, when founded on a maritime contract, or prosecuted for a marine tort. But no reason can be stated for requiring a party living in New Orleans or San Francisco, to come to New York to defend an action or suit on the covenants in a charter-party, when he ought not to be required to come there to defend a suit at law or in equity founded on any commercial or common-law contract. For a marine tort committed by a resident of New Orleans, he is liable at common law, and may also be held liable in the court of admiralty. There is no just reason for holding him to answer in such case in any District Court of the United States, however remote, if the plaintiff elects to proceed in admiralty; while, if the plaintiff proceeds at common law, he must sue in the district of the defendant's residence, or in the district in which he may be found. The reason of the act of Congress includes suits *in personam* in admiralty, as fully as in equity or at law.

"4. The word 'civil' is used in the act in distinction from 'criminal.' In the ninth and eleventh sections, conferring jurisdiction on the District and Circuit Courts, Congress had spoken of 'crimes and offences,' 'civil causes of admiralty and maritime jurisdiction,' 'suits for penalties and forfeitures,' 'causes where an alien sues for a tort,' 'suits at common law,' 'suits against consuls' other than 'for offences,' and 'suits of a civil nature at common law or in equity.' They then declare that 'no civil suit' shall be brought, &c. A civil cause of admiralty and mari-

time jurisdiction is prosecuted by a suit. It is within the terms of the restriction as closely as a cause 'where an alien sues for a tort.' It was wholly unnecessary, in the restrictive clause, to recite again the several terms previously employed, as suits for forfeitures, suits against consuls, suits at common law, &c., and civil causes in admiralty. These are all civil in their nature. A cause in admiralty is so expressly described. It is a civil cause. The general term 'civil suit' was apt to describe all these actions and causes of action, and it was so employed. And, as the Constitution provided that criminal prosecutions, jurisdiction whereof was given by this act to the Circuit and District Courts, should be had in the State where the crime was committed; so, also, civil suits against an inhabitant of the United States were required to be brought in the district whereof he was an inhabitant. Jurisdiction of crimes and offences, as well as of proceedings of a civil nature, being conferred on these courts by the sections mentioned, this classification, by the word 'civil,' as distinguished from 'criminal,' was an essential conformity to the constitutional requirement, that crimes and offences should be prosecuted where committed. The restriction, therefore, made the system in this respect complete.

"5. This view of the effect of this statute, securing to inhabitants of the several States the right of being sued within the district whereof they are respectively inhabitants, is, therefore, in perfect consistency with the claim, that courts of admiralty have general power to proceed *in personam* by attachment of goods, where the defendant cannot be found within the district, so far as that is asserted in *Manro* v. *Almeida*,* in *King* v. *Shepherd*,† in *Boyd* v. *Urquhart*,‡ or in *Bouysson* v. *Miller*.§ The limitation is the result of the act of Congress, and does not deny the original jurisdiction or practice of those courts, or their present power or jurisdiction where the respondent is an alien non-resident; or, being an inhabitant of the district, conceals himself or absconds, so that he cannot be found.

"6. To the suggestion, that the acts of Congress regulating the process and practice of the courts are in such general terms that they and the rule of the Supreme Court in admiralty have operated to modify the act of 1789 limiting jurisdiction in this

* 10 Wheaton, 473. † 3 Story, 349. ‡ 1 Sprague, 423. § Bee, 186.

Recapitulation of the facts in the opinion.

respect, it is sufficient to say, that these acts are not designed to alter or enlarge the jurisdiction of the courts, but only to regulate the exercise of jurisdiction where it exists. I understand this to be distinctly affirmed in *Toland* v. *Sprague*.* Indeed, if these acts are held to authorize the Supreme Court in any respect, by rule, to abrogate the restriction in the act of 1789, it cannot be confined to the jurisdiction of courts of admiralty. For the act of 1842 gives the same power touching proceedings at the common law and in equity as in admiralty; and the construction and effect contended for would enable that court practically to repeal all the restrictions contained in the act of 1789 on this subject, and to authorize common law actions against inhabitants of any State to be brought in any district of the United States.

"Of the cases of *Clarke* v. *The New Jersey Steam Navigation Company*,† and *The New Jersey Steam Navigation Company* v. *Merchants' Bank*,‡ it is sufficient to say, that the point discussed in this case was neither raised nor decided in either; and the first named case is full to the effect above asserted, that, on this question, a corporation stands in the same position as a natural person. The effect of the eleventh section of the Judiciary Act on the power of the court to proceed against either, was not raised, discussed, or decided. The decision in the last-named case related, first, to the merits; and, second, to the inquiry whether the case was, in its nature, cognizable in a court of admiralty. The synopsis of the case first named, as reported, would suggest that the point in question was decided adversely to the views here expressed; but, in truth, the point was not raised, the opinion stating that it had not been doubted, and referring to the general doctrine of *Manro* v. *Almeida*, with which these views are in no conflict."

Mr. Justice SWAYNE recapitulated the facts of the case and delivered the opinion of the court.

The libel is founded upon a charter-party and seeks to recover freight earned by the ship Elizabeth Hamilton in bringing a cargo of bamboo from Kingston and Port Morant, in the island of Jamaica; for demurrage while the ship

* 12 Peters, 300. † 1 Story, 531. ‡ 6 Howard, 344.

Recapitulation of the facts in the opinion.

was obtaining the cargo, and for damages to the ship by getting on a reef when leaving Port Morant.

The libel alleges that the respondents are a corporation, and have property in the district, and prays for process against them, and, if they were not found, that a foreign attachment issue against their property in the district, and for a decree for the amount claimed, with interest and costs. The libel was filed on the 13th of June, 1866. On the day following a citation was issued with a foreign attachment clause. On the 20th of the same month the marshal returned that the respondents were not found in his district, and that he had attached all the property found in their factory at Red Hook Point, in the city of Brooklyn. In a journal entry of the same date it is stated: "Mr. Beebe *appears* for respondent, and has a week to perfect appearance and to answer." On the 19th of July following the respondents executed a stipulation for costs. It recited that "an appearance has been filed in said cause by said disintegrating company." On the same day the proctors for the libellants consented that the property attached should be discharged from custody upon the respondents giving a stipulation for its value in the sum of $25,000, and they agreed that in case the judge should grant the motion to discharge the property, the stipulation should be cancelled, and that "the stipulation for value is given without prejudice to such motion." The stipulation for value was thereupon filed. That also recited "that an appearance has been filed by said company." On the 3d of May, 1867, the respondents filed their answer. Among other things it averred that they were a foreign corporation, created by the laws of New Jersey, and were not residents of the Eastern District of New York; and that it was not alleged in the libel that they were either found in the district or resided in the district, and they craved the same benefit and advantage as if they had formally excepted to the libel. It does not appear that the motion to discharge the attachment was ever decided. But by an entry of the 22d of March, 1867, it appears that a motion had been made to vacate the attachment

clause in the monition, and all the proceedings under it, upon the ground that under the circumstances the eleventh section of the Judiciary Act of 1789 denied jurisdiction to the court, and that the motion was overruled. The cause was heard in the District Court upon the merits on the 16th of December, 1867. The court made an interlocutory decree, disallowing the claim for damages to the ship, but referred the case to a commissioner to ascertain the amount which the libellants were entitled to recover in respect of their other claims. The commissioner made his report. No exception was taken by either party. The court confirmed the report and decreed accordingly. The libellants appealed from so much of the decree as refused them damages for the injury sustained by the ship in leaving Port Morant. The respondents appealed from the whole decree. The Circuit Court reversed the entire decree, and the libellants thereupon appealed to this court. The case is thus brought before us.

The statement of the case, which we have given, shows that the defendants entered their appearance without reservation. If there could be any doubt upon the subject it is removed by their repeated subsequent recognitions of the fact. This made their position just what it would have been if they had been brought in regularly by the service of process. In this aspect of the case all defects were cured and the jurisdiction of the court over their persons became complete.* This warranted the decree *in personam* for the amount adjudged to the libellants.

But the stipulation for value was entered into subject to the motion to discharge the property attached; the stipulation to be cancelled if the motion prevailed. Though this motion was not decided, the subsequent motion, founded upon the eleventh section of the Judiciary Act, took its place and had the same effect. The latter motion was overruled, and the decree required the stipulators to perform

* Pollard *v.* Dwight, 4 Cranch, 421; Knox *v.* Summers, 3 Id. 496.

their undertaking. The Circuit Court reversed the decree by reason of the facts relied upon in support of the motion to vacate. If the attachment clause was void for want of jurisdiction in the District Court to issue it, the seizure of the property was a trespass, and the stipulation a nullity, irrespective of the reservation which it contained. These considerations render it necessary to examine the case both as to the merits and the jurisdictional question thus presented.

In regard to the merits—after a careful examination of the record—we have found no reason to dissent from the views of the learned district judge by whom the case was heard.* However full might be our discussion, we should announce the same conclusions. They are clearly expressed and ably vindicated in his opinion. To go again through the process by which they were reached would be a matter rather of form than substance.

The question of jurisdiction is of a different character, and requires more consideration.

The Constitution† declares that the judicial power of the United States shall extend to "all cases of admiralty and maritime jurisdiction."

The act of Congress of the 24th of September, 1789,‡ known as the Judiciary Act, provides that "the District Courts . . . shall have also original cognizance of *all civil causes of admiralty and maritime jurisdiction*, including all seizures under all 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."

The Short Practice Act of September 29th, 1789,§ required that "the forms and modes of proceedings in causes

* Atkins *v.* The Fibre Disintegrating Co., 2 Benedict, 381.

† Article 3, § 2. ‡ 1 Stat. at Large, 76. § Ib. 93.

of equity and of admiralty and maritime jurisdiction shall be according to the course of the civil law."

By the second section of the Practice Act of 1792,* it was declared "that the forms of writs, executions, and other process shall be, in suits in equity and *in those of admiralty and maritime jurisdiction*, according to the principles, rules, and usages which belong to courts of equity and to courts of admiralty respectively, as contradistinguished from courts of common law, except so far as may have been provided for by the act to establish the judicial courts of the United States, subject, however, to such alterations and additions as the said courts respectively shall, in their discretion, deem expedient, or to such regulations as the Supreme Court of the United States shall think proper, from time to time, by rule to prescribe to any Circuit or District Court concerning the same."

The act of the 23d of August, 1842,† authorized the Supreme Court "generally to regulate the whole practice" of the Circuit and District Courts in all their proceedings.

This controversy turns upon the eleventh section of the Judiciary Act of 1789. The importance of the section in this case induces us to set it out in full:

"The Circuit Court shall have original cognizance, concurrent with the courts of the several States, of *all suits of a civil nature, at common law or in equity*, when the matter in dispute exceeds, exclusive of costs, the sum or value of $500, and the United States are plaintiffs, or petitioners, or an alien is a party, or the suit is between a citizen of the State where the suit is brought and a citizen of another State, and shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the District Courts of the crimes and offences cognizable therein; but no person shall be arrested in one district for trial in another, *in any civil action*, before a Circuit or District Court. *And no civil suit shall be brought before*

* 1 Stat. at Large, 276.

† 5 Id 517.

either of said courts, against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ.

"Nor shall any District or Circuit Court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange. And the Circuit Courts shall also have appellate jurisdiction from the District Courts, under the regulations and restrictions hereinafter provided."

The prohibition to bring a "civil suit" against an inhabitant of the United States in a district other than that whereof he is an inhabitant, or in which he shall be found, is the hinge of the controversy between these parties. The appellees maintain that a cause of admiralty jurisdiction is a "civil suit" within the meaning of this prohibition. The appellants maintain the contrary. Our views coincide with those of the appellants, and we will proceed to state succinctly the considerations which have brought us to this conclusion.

It may be admitted that an admiralty case is *a civil suit* in the general sense of that phrase. But that is not the question before us. It is whether that is the meaning of the phrase as used in this section. The intention of the lawmaker constitutes the law.* A thing may be within the letter of a statute and not within its meaning, or within its meaning though not within its letter.† In cases admitting of doubt the intention of the lawmaker is to be sought in the entire context of the section—statutes or series of statutes *in pari materia*.‡

* United States *v.* Freeman, 3 Howard, 563.

† Slater *v.* Cave, 3 Ohio State, 85; 7 Bacon's Abridgment, title Statutes, 1, 2, 3, 5.

‡ Patterson *v.* Winn, 11 Wheaton, 389; Dubois *v.* McLean, 4 McLean, 489; 1 Cooley's Blackstone, 59; Doe *v.* Brandling, 7 Barnewall & Cresswell, 643; Stowel *v.* Zouch, 1 Plowden, 365.

The general language found in one place, may be restricted in its effect to the particular expressions employed in another, if such, upon a careful examination of the subject, appears to have been the intent of the enactment.*

The first paragraph of the eleventh section defines the jurisdiction of the Circuit Court as extending to "all suits of a civil nature, at common law or in equity, where," &c. The criminal jurisdiction of the Circuit Court is next defined. Then follows the provision that no one shall be arrested in one district for trial in another "in a civil action" before a Circuit or District Court, and next the prohibition here in question.

Construing this section, down to the second prohibition, inclusive, by its own light alone, we cannot doubt that by the phrase "civil suit," mentioned in this prohibition, is meant a suit within the category of "all suits of a civil nature at common law or in equity," with which the section deals at the outset. This view derives further support from the ninth, twenty-first, and twenty-second sections of the act. The ninth section gives to the District Court its admiralty jurisdiction, its common-law jurisdiction, and its criminal jurisdiction. With reference to that first named, the language is "of all *civil causes of admiralty and maritime jurisdiction.*" As to the second, it is "*of all suits at common law*," &c. The twenty-first section allows appeals from the District to the Circuit Court "*in causes of admiralty and maritime jurisdiction* where the matter in dispute exceeds the sum of three hundred dollars." The twenty-second section provides "that final decrees and judgments *in civil actions*," where the matter in dispute exceeds fifty dollars, may be reviewed in the Circuit Court upon error. The distinction is thus made between admiralty and other *civil actions*, and the terms "*causes of admiralty and maritime jurisdiction*," are applied to the former, and the phrases "*civil actions*" and "*suits at common law*" to the latter.

* Brewer *v.* Blougher, 14 Peters, 198, 199; Miller *v.* Salomons, 7 Exchequer, 546; Same Case in error, 8 Id. 778; Waugh *v.* Middleton, Ib. 356, 357.

Opinion of the court.

We think the conclusion is inevitable that the terms *civil suit*, in the eleventh, and *civil actions*, in the twenty-second section, were intended to mean the same thing. The meaning of the phrase employed in the latter admits of no doubt. The language there is "civil actions," and it is used to distinguish them from "causes of admiralty and maritime jurisdiction," provided for in the preceding section. The twenty-first and twenty-second sections are *in pari materia* with the eleventh, and throw back a strong light upon the question arising under the latter. We think it dispels all darkness and doubt if any could otherwise exist upon the subject.

Our attention has been called to other instances in the laws of Congress where the same phrases are used for the same purposes of distinction between admiralty and other causes. It is unnecessary to refer to them in detail. The argument could not be strengthened by further support drawn from that quarter.

The use of the process of attachment in civil causes of maritime jurisdiction by courts of admiralty, as in the case before us, has prevailed during a period extending as far back as the authentic history of those tribunals can be traced. "Its origin is to be found in the remotest history of the civil as well as of the common law."* The rules by which it was regulated in the English admiralty are found in Clerke's *Praxis*, a work still of authority, published in the time of Elizabeth.

Browne in his Civil and Admiralty Law† says: "Let us, lastly, suppose that a person against whom a warrant has issued cannot be found, or that he lives in a foreign country: here the ancient proceedings of the admiralty court provided an easy and salutary remedy, though according to Huberus, not authorized by the example of the civil law; they were analogous to the proceedings by foreign attachment under the charters of the cities of London and Dublin. The goods of the party were attached to compel his appearance. . . .

* Manro *v.* Almeida, 10 Wheaton, 473.

† Vol. 2, page 434.

This process of attachment went not only against those in the actual possession of himself, his factors or agents, but also against those in the hands of his debtors, since the maxim taken from the Justinian Code was *debitor creditoris est debitor creditori creditoris.*"

As in the practice of our courts of admiralty, the attachment of the goods or credits gave jurisdiction, and the cause proceeded to decree whether the defendant appeared or not.

The Constitution, in the grant of the admiralty jurisdiction, refers to it as it existed in this and other maritime countries at the time of the adoption of that instrument. It was then greatly larger here than in England. The hostility of the common-law courts there had wrought the reduction.*

While the mode of proceeding in the admiralty courts of the United States was required by the Practice Act of 1789 to be according to the course of the civil law, the process of attachment to compel the appearance of an absent defendant had the sanction of that system of jurisprudence.† It has the sanction of the act of 1792, because it is according to the principles, rules, and usages which belong to courts of admiralty. It has also the sanction of the act of 1842. Under that act this court, at the December Term, 1844, prescribed "rules of practice for the courts of the United States in admiralty and maritime jurisdiction on the instance side." The second of those rules is as follows: "In suits *in personam* the mesne process may be by a simple warrant of arrest of the person of the defendant in the nature of a capias, or by a warrant of arrest of the person of the defendant, with a clause therein that if he cannot be found to attach his goods and chattels to the amount sued for; or, if such property cannot be found, to attach his credits and effects to the amount sued for in the hands of the garnishees

* Manro *v.* Almeida, *supra;* Waring *v.* Clarke, 5 Howard, 455; New Jersey Steam Navigation Company *v.* Merchants' Bank, 6 Id. 389; The St. Lawrence, 1 Black, 527; The Genesee Chief, 12 Howard, 454; Insurance Company *v.* Dunham, 11 Wallace, 24; Story on the Constitution, § 1666.

† Manro *v.* Almeida, *supra.*

named therein, or by a simple monition in the nature of a summons, to appear and answer to the suit, as the libellant shall in his information pray for or elect."

The fourth and thirty-seventh rules relate to the same subject. The process in question in the case before us was issued according to the formula prescribed in the second rule, and that rule did not transcend the authority in pursuance of which it was framed.

This subject came under the consideration of the District Court of South Carolina, sitting in admiralty, in 1802.* The court held, without qualification, that it had the power to issue the process of attachment to compel the appearance of an absent defendant, and proceeded accordingly.

In the case of *The Invincible*,† decided in 1814, Mr. Justice Story said: "The admiralty may, therefore, arrest the person or the property, or by foreign attachment the choses in action, of the offending party, to answer *ex delicto*."

The question was elaborately considered by this court in *Manro* v. *Almeida*.‡ It was unanimously held that the power existed as an established mode of admiralty procedure, and an element of admiralty jurisdiction. This case was decided in 1825.

In 1841, in *Clarke* v. *New Jersey Steam Navigation Company*,§ Mr. Justice Story said: "Ever since the elaborate examination of this whole subject, in the case of *Manro* v. *The Almeida*, this question has been deemed entirely at rest."

In the *New Jersey Steam Navigation Company* v. *The Merchants' Bank*,‖ determined by this court in 1848, the defendant was a corporation foreign to the locality of the suit. Jurisdiction was obtained, as in the case before us, by attachment. Another question of jurisdiction was argued with exhaustive learning and ability; but the point here under consideration was not adverted to either by the court or the counsel.

Neither in the rules of this court nor in either of the cases

* Bouysson & Holmes *v.* Miller & Ryley, Bee, 186.
† 2 Gallison, 41. ‡ *Supra.* § 1 Story, 537. ‖ *Supra.*

referred to is there any reference, express or implied, to the eleventh section of the act of 1789. It does not seem to have occurred to any one that the limitations in that section could have any application to proceedings in admiralty.

These facts are full of significance. They are hardly less effectual than an express authoritative negation upon the subject.*

The case of *Ex parte Graham*† is relied upon by the counsel for the appellee. It was decided by Mr. Justice Washington in 1818. Graham was arrested in Pennsylvania under process for contempt, issued in a prize case pending in the District Court of Rhode Island. Mr. Justice Washington ordered his discharge upon two grounds: (1.) That process would not run in such a case from Rhode Island into Pennsylvania. (2.) That the prohibitions in the eleventh section of the act of 1789, as to the locality of arrests and suits, applied as well to suits in admiralty as to other civil actions. It is a sufficient answer to the second proposition, that it was clearly overruled by this court in *Manro* v. *Almeida.* Mr. Justice Washington sat in that case, and must then have changed his opinion. His silent concurrence admits of no other construction.

The earliest case exactly in point, maintaining the proposition contended for by the appellee, to which our attention has been called, is *Wilson* v. *Pierce.*‡ It was decided by the learned district judge of California in 1852. He adopted the view of Judge Washington, and ruled accordingly. This case was followed by two others, one of them being the case before us.§ The other one arose in the District of Connecticut and is said not to have been reported. The cases upon the other side are numerous. We shall refer to but two of them: *Cushing et al.* v. *Laird,*‖ and *Smith* v. *Milne.*¶ The opinion of the court in each of these cases is learned

* Edwards *v.* Darby, 12 Wheaton, 206.

† 3 Washington's Circuit Court, 456.

‡ 15 Law Reporter, 137.

§ 7 Blatchford, 555.

‖ 3 American Law Times Reports, 50.

¶ 1 Abbot's Admiralty Reports, 373.

and elaborate. Two eminent American law writers have taken the same view of the subject.* They hold that the prohibition in question does not apply to suits in admiralty.

DECREE OF THE CIRCUIT COURT REVERSED, and the case remanded with directions to

AFFIRM THE DECREE OF THE DISTRICT COURT.

Dissenting, Justices MILLER and STRONG.

NOTE.

At the same time was argued the case of *The New England Mutual Insurance Company and others* v. *The Detroit and Cleveland Steam Navigation Company*, a case from the Circuit Court for the Northern District of Ohio, and involving the question arising in the preceding case, under the eleventh section of the Judiciary Act of 1789. It was decided in favor of the appellants; the court referring to the opinion above printed as controlling it. Dissenting, Justices MILLER and STRONG. The briefs filed in this last case, by *Messrs. Willey, Cary, and Terrill, for the appellants*, and by *Mr. G. B. Hibbard, contra*, were, by leave of the court, filed also in the preceding case.

LAMB *v.* DAVENPORT.

1. Unless forbidden by some positive law, contracts made by actual settlers on the public lands concerning their possessory rights, and concerning the title to be acquired in future from the United States, are valid as between the parties to the contract, though there be at the time no act of Congress by which the title may be acquired, and though the government is under no obligation to either of the parties in regard to the title.
2. The proviso of the Oregon Donation Act of September 27th, 1850, which forbade the *future* sale of the settler's interest until a patent should

* 2 Parsons's Maritime Law, 686, note; 2 Parsons's Shipping and Admiralty, 390; Benedict's Admiralty, § 425.

issue, so far from invalidating contracts for sale made before its passage, raises a strong implication in favor of their validity.

3. Whether the husband or wife who takes as survivor the share of the deceased under the said Donation Act, takes as purchaser or by inheritance: *held*, that contracts of the husband concerning the equitable interest of the part allotted to him, made before the act was passed, are binding on the title which comes to his children by reason of a patent issued after the death of both husband and wife.

APPEAL from the Circuit Court for the District of Oregon; the case being this:

Prior to March 30th, 1849, one Lownsdale was in control of what was then known in Oregon Territory as "a land claim;" that is to say, he was in possession, claiming it as owner, of a tract of land. The tract contained 640 acres. Thinking it a good site for a town, he laid it out in blocks and lots, which he offered for sale. Several lots were sold; a town grew upon them, and the city of Portland now stands upon the "claim."

At the date named the fee of the whole Territory was in the United States; and, of course, Lownsdale had no patent, nor indeed any warrant, survey, or title of any kind from the government. Nevertheless such "claims" were recognized by the immigrants, to a greater or less degree among themselves. The holders of claims sold them in whole or divided; agreeing to get a patent; and the hope and expectation of all parties was that the government, in time, would acknowledge the validity of what had been done.

On the 30th of March Lownsdale transferred his claim to one Coffin, excepting from the transfer the blocks and lots which he had already sold. Coffin agreed to endeavor to obtain title to the whole 640 acres from the United States; and both parties agreed that they would contribute equally to all expenses, and divide equally the proceeds of sales of lots, &c., so long as the agreement should remain in force, and that when it should be dissolved by consent Coffin should convey Lownsdale one-half the land remaining unsold.

In November, 1849, Coffin sold to one Fowler two lots, which were numbered Nos. 5 and 6, in block 13, and Fowler sold them in January, 1854, to one Davenport.

Statement of the case.

On the 13th of December, 1849, Lownsdale and Coffin entered into an agreement with one Chapman, by which, describing themselves as joint owners of the claim, they sold to him an undivided third part of it, the town lots and improvements; it being agreed that the three contracting parties should be equal partners in said property, except as to town lots already sold, and should take steps to obtain title from the United States. They were each to enter upon the business of selling the lots and account to each other for the proceeds.

On the 27th of September, 1850, Congress passed what is called "The Oregon Donation Act."* By its fourth section the act gave, on certain terms, to every actual settler (if a single man) a certain amount of land, 320 acres; and if a married one, twice the amount; in this latter case "one-half to himself and the other half to his wife, to be held by her in her own right." The act went on to say:

"And in all cases where . . . either shall have died before patent issues, the survivor and children or heirs of the deceased shall be entitled to the share or interest of the deceased in equal proportions, except where the deceased shall otherwise dispose of it by testament."

It contained also a proviso, thus:

"*Provided*, That all *future* contracts by any person or persons entitled to the benefit of this act, for the sale of the land to which he or they may be entitled under this act before he or they have received a patent therefor, shall be void."

In this state of things, on the 10th of March, 1852, and after the passage of the act, the said three partners, by deed, reciting therein that in order to obtain title from the United States it was necessary that each should designate the precise and particular portion of said land claim which each, by agreement with the other, claimed, in order that he might obtain a patent, as a preliminary measure, entered into certain covenants *with each other under seal.* It was re-

* 9 Stat. at Large, 496.

cited that they had sold lots to each other and to third persons, obliging themselves to make to the grantees deeds of general warranty, wherein the grantor should obtain a patent from the United States, and the said three parties mutually covenanted that each would fulfil all contracts he had made with each other or with other persons, and also that when a patent should be obtained, he would make good deeds for all lots patented to him which had been sold by the said parties jointly or any of them separately, such deeds to be made to the original grantee or his assigns. They also covenanted to endeavor to obtain title from the United States, and not to abandon their claim, &c.

On the next day, 11th of March, 1852, Lownsdale made before the surveyor-general, under the Donation Act, his designation of the part of the land claimed by him.

In January, 1857, Coffin (already mentioned as the person to whom Lownsdale, in March, 1849, transferred his claim) sold two other lots, in block 13, Nos. 2 and 7, to a purchaser who soon afterwards sold them to Davenport, who had bought, as we have said, Nos. 5 and 6 in the same block.

Lownsdale was a married man. Accordingly, under the Donation Act, Mrs. Lownsdale was entitled to 320 acres, and Lownsdale himself to a like amount. Mrs. Lownsdale's half was set aside. It did not include the four lots sold by Coffin; but Lownsdale's half did.

On the 17th of October, 1860, a patent certificate issued to Lownsdale. He died May 4th, 1862, his wife having died not long before him, leaving him and four children surviving. By the laws of Oregon, in such a case, the wife's estate is directed to be divided between the husband and children "in equal proportions;" though whether this meant, in this case, that the husband should have one-half or one-fifth, was not so clear.

On the 6th of January, 1865, that is to say, after Lownsdale's death, a patent issued, conveying to Lownsdale his half of the tract; this part including, as already said, the lots 5, 6, 2, and 7, in block 13.

By the common law, of course, such a patent would have

been void. An act of Congress of May 20th, 1836,* gave it validity by enacting,

"That in all cases where patents for public lands have been ... issued to a person who had died ... before the date of such patent, the title to the land designated therein shall enure to, and be vested in, the heirs, devisees, or assignees of such deceased patentee, as if the patent had issued to the deceased person during life."

Whatever Lownsdale's interest was, vested, therefore, in his heirs.

In this state of things, Lamb and others, who were a portion of his heirs, filed a bill against the residue of them, to have a partition of these lots; and made Davenport a party as a person in possession and claiming the whole of them.

In the progress of the suit, Davenport filed a cross-bill, in which, while admitting the legal title to the lots to be in the plaintiffs and the other heirs of Lownsdale before the court, he asserted that he was the rightful and equitable owner of them, and prayed for a decree against the heirs of Lownsdale for a conveyance of the title.

The court decreed as prayed by Davenport, and the complainants in the original bill brought this appeal.

Messrs. G. H. Williams and W. L. Hill, for the appellants:

Prior to the 27th of September, 1850, the date of the passage of the Donation law, neither party to this controversy, nor those under whom they claim, except the United States, had any title to, or interest whatever in, the premises in dispute, or in said land claim. This, in effect, was so declared by the Supreme Court of the United States in the case of *Lownsdale* v. *Parrish*.† The Supreme Court of Oregon, in *Leland* v. *City of Portland*,‡ says:

"Any acts (of parties) before the 27th of September, 1850, affecting the disposal of lands in Oregon were simply void."

It follows that no form of conveyance made prior to the

* 5 Stat. at Large, 31.

† 21 Howard, 293.

‡ 2 Oregon, 48; and see Lownsdale *v.* City of Portland, Deady, 1.

passage of the Donation Act could operate to transfer any interest, either legal or equitable, in the land, and that a conveyance, without covenants for further assurance, would be ineffectual for any purpose, except perhaps to transfer the bare occupancy. A purchaser could not have been deceived. He must have known that he could obtain nothing but naked possession, no matter what the deed said.

Again, the fourth section of the Donation Act invalidated all future sales of lands which the act gave, if made before the party got a patent.

The result was that prior to the 27th of September, 1850, parties had no interest whatever in land in Oregon, and that while after that time they could acquire the title thereto, their contracts for the sale thereof, before their title became complete under the provisions of the act, were void. We submit, therefore, that Davenport could derive no benefit from any so-called sale of the four lots in question made subsequent to the aforesaid date, nor claim them on account of any deed made prior to that time; and that all such contracts and deeds must be construed in view of this condition of circumstances.

This invalidates the whole of the tripartite agreement of March 10th, 1852 (the latest written agreement between Lownsdale, Coffin, and Chapman); for it was all made after the passage of the act.

The Donation law was not retrospective in its operation, nor did it vest rights of an equitable character which related back to the date of the settlement. There is nothing in the act that justifies the position that it did.

Descending more to particulars, and as to Davenport. To no one of the four lots did Davenport acquire any title till after the date of the Donation Act, while as to two of them, Nos. 2 and 7, even Coffin's conveyance of them was posterior to the act. The sale to him in the case of each one of the four lots was the sale of lands by a party who was claiming the benefits of the Donation Act, and, to say the least, came within the mischief which the prohibitory clause in question was intended to prevent.

Further. The agreement of March 10th, 1852, is a deed, *inter partes;* Lownsdale, Coffin, and Chapman. We know of no principle of law which would allow Davenport, a person not a party to the instrument (an instrument under seal, and executed as that evidently was, *to settle and adjust the personal individual rights of the parties to it as between themselves*), to claim the benefit of its provisions as a matter of legal right.*

Finally. Under the Donation Act, the heirs of Lownsdale, he being dead before the patent issued, took not by descent but by purchase.† They took not through him, but under the act. The land which Congress thus gave them would not have been subject to his debts, nor is it to his contracts. It never vested in him. In *Davenport* v. *Lamb*,‡ the Circuit Court held that under the act the husband did not take as heir to his wife, but as statutory donee, and this view was not denied in this court.

Messrs. J. M. Carlisle and J. D. McPherson, contra.

Mr. Justice MILLER delivered the opinion of the court.

There is no question that at the commencement of the suit the legal title to the lots was in the heirs of Lownsdale.

The equity which Davenport sets up in his cross-bill, arises from transactions antecedent to the issue of the patent certificate of Lownsdale, and indeed antecedent to the enactment of the Donation law by Congress, under which Lownsdale's title originated.

It is not necessary to recite in this opinion all of those transactions. It is sufficient here to say that several years before that act was passed, and before any act of Congress existed by which title to the land could be acquired, settlement on and cultivation of a large tract of land, which includes the lots in controversy, had been made, and a town

* See Ellison *v.* Ellison, 1 Leading Cases in Equity, 232*.

† Fields *v.* Squires, 1 Deady, 382; Delay *v.* Chapman, 3 Oregon, 459.

‡ 13 Wallace, 431.

laid off into lots, and lots sold, and that these are a part of the present city of Portland. Of course, no legal title vested in any one by these proceedings, for that remained in the United States—all of which was well known and undisputed. But it was equally well known that these possessory rights, and improvements placed on the soil, were by the policy of the government generally protected, so far, at least, as to give priority of the right to purchase whenever the land was offered for sale, and where no special reason existed to the contrary. And though these rights or claims rested on no statute, or any positive promise, the general recognition of them in the end by the government, and its disposition to protect the meritorious actual settlers, who were the pioneers of emigration in the new Territories, gave a decided and well-understood value to these claims. They were the subjects of bargain and sale, and, as among the parties to such contracts, they were valid. The right of the United States to dispose of her own property is undisputed, and to make rules by which the lands of the government may be sold or given away is acknowledged; but, subject to these well-known principles, parties in possession of the soil might make valid contracts, even concerning the title, predicated upon the hypothesis that they might thereafter lawfully acquire the title, except in cases where Congress had imposed restrictions on such contracts.*

Acting on these principles, the tract of land in question, valuable for a town site, seems to have become the subject of controversies, and of contracts and agreements, which culminated in an amicable arrangement between Lownsdale, Coffin, and Chapman, by which the rights of each were recognized and adjusted among themselves. The first of these agreements, reduced to writing, was made before the passage of the Donation law. The last seems to have been made in consequence of that enactment, and was evidently designed to give effect to their previous compromise agree-

* Sparrow *v.* Strong, 3 Wallace, 97; Myers *v.* Croft, 13 Id. 291; Davenport *v.* Lamb, Ib. 418; Thredgill *v.* Pintard, 12 Howard, 24.

ments, to enable each to acquire under that act the title to the property, according to those agreements, and to protect each other and their vendees when the title should have been so acquired. We are satisfied that by the true intent and meaning of these agreements the equitable right to all the lots in controversy had been transferred by Lownsdale to Coffin before the passage of the Donation Act, and that, as between Lownsdale, Coffin, and Chapman, the equitable interest, such as we have described it, of the lots in controversy, was in Coffin or his vendees.

The record shows that this interest or claim, whatever it was, at the commencement of this suit was vested in Davenport, while the legal title was in the heirs of Lownsdale.

According to well-settled principles of equity often asserted by this court, Davenport is entitled to the conveyance of this title from those heirs, unless some exceptional reason is found to the contrary.

Counsel for appellants urge two propositions as inconsistent with this claim of right on behalf of Davenport:

1. It is said that the proviso to the fourth section of the Donation Act renders void the agreements between Lownsdale, Coffin, and Chapman. The proviso referred to declares that all future contracts by any person or persons entitled to the benefit of this act for the sale of the land to which he may be entitled under the act, before he or they have received a patent therefor, shall be void. The act was on its face intended to cover settlements already made, and the careful limitation of this proviso to *future* contracts of sale, that is, sales made after the passage of the act, raises a strong implication of the validity of such contracts made before the passage of the statute. It was well known that many actual settlers held under such contracts, and while Congress intended to protect the donee from future improvident sales, it left contracts already made undisturbed.

But counsel, resting solely on the latest written agreement between Lownsdale, Coffin, and Chapman, insist that it was void because made after the Donation Act was passed.

That agreement was only designed to give effect to the

previous contracts on the same subject, and is in accord with the spirit of the proviso. And if this latter agreement is rejected as altogether void, it is still apparent that by the contracts made prior to the Donation Act, the equitable right of Coffin to these lots is sufficiently established.

The same error is found in the argument that two of the lots in controversy were sold by Coffin after the passage of that act, and the sale is, therefore, void. The answer is that Coffin is not the donee who takes title under the act of Congress, but Lownsdale, and Lownsdale had made a valid agreement by which his interest in them was transferred to Coffin, before that statute was passed.

2. The Donation Act provides that where the settler has a wife, the quantity of land granted is double that to a single man, and that one-half of it shall be set apart to the wife by the surveyor-general, and the title to it vests in her, and that if either of them shall have died before the patent issues, the survivor and children, or heirs of the deceased, shall be entitled to the share or interest of the deceased.

Lownsdale's wife died first, and both before the patent issued. But prior to the death of either, Mrs. Lownsdale's half had been set apart to her, and did not include the lots now in controversy. It is said that the title vested in the heirs of Lownsdale, under the peculiar provision of this statute, is one of purchase and not of inheritance, and that it comes to them directly from the government, divested of any claim of third parties under Lownsdale.

This proposition was much discussed in the case of *Davenport* v. *Lamb*,* but the court did not then find it necessary to decide it, as the only parties who were entitled to raise the question had not appealed from the decree of the Circuit Court.

Nor do we propose to decide now whether the title in the hands of the children and heirs of Lownsdale would be liable for his debts, or to what extent that title might be affected by the contracts of Lownsdale, concerning the land

* 13 Wallace, 418, already cited.

itself, made *after* the passage of the Donation Act, or after his assertion of claim under it. Nor do we decide whether the interest in the wife's share of the land which came to him by survivorship, would be affected by any contracts of his or hers, made before her death at any time.

But we hold that as to the portion of the land which was allotted to him by the surveyor-general, and the title of which vests in his heirs by the act of 1836, without which the patent would be void, his contract of sale made before the Donation Act was passed, and while he was the owner of the possessory interest before described, was a valid contract, intentionally protected by the Donation Act itself, and binding on the title which comes to his heirs by reason of his death.

These considerations dispose of the case before us, and the decree of the Circuit Court is accordingly

AFFIRMED.

SNOW *v.* UNITED STATES.

Under the organic act of September 9th, 1850, organizing the Territory of Utah, the attorney-general of the Territory, elected by the legislature thereof, and not the district attorney of the United States, appointed by the President, is entitled to prosecute persons accused of offences against the laws of the Territory.

ERROR to the Supreme Court for the Territory of Utah; the case being thus:

By the organic act, passed September 9th, 1850, establishing the Territory of Utah, it was enacted:

"SECTION 6. The legislative power shall extend to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of this act."

By the ninth section, the judicial power was vested in a supreme court, district courts, probate courts, and justices of the peace, whose jurisdiction was to be limited by law;

provided, that justices should not try land titles, nor cases exceeding $100 in amount; and that the Supreme and District Courts should possess chancery as well as common-law jurisdiction. Each District Court was invested with the same jurisdiction in cases arising under the Constitution and laws of the United States as is vested in the Circuit and District Courts of the United States; and the first six days in each term were appropriated to such cases.

Another section thus enacted:

"An attorney-general shall be elected by the joint vote of the legislative assembly, whose term of office shall be one year, unless sooner removed by the legislative assembly, or until his successor is elected and qualified. It shall be the duty of the attorney-general to attend to all legal business on the part of the Territory before the courts where the Territory is a party, *and prosecute individuals accused of crime*, in the judicial district in which he keeps his office, *in cases arising under the laws of the Territory*, and such other duties as pertain to his office."

Another section provided for the election of *district* attorneys, whose duty it was made to "attend to legal business before the courts in their respective districts where the Territory is a party, prosecute individuals accused of crimes in cases arising under the laws of the Territory, and do such other duties as pertain to their office."

Then, following all, was:

"SECTION 10. There shall be appointed an attorney for said Territory, who shall continue in office for four years, unless sooner removed by the President, and who shall receive the same fees and salary as the attorney of the United States for the present Territory of Oregon. There shall also be a marshal."

The marshal's duties were defined, being declared to be to execute all process issuing from the courts constituted by the act, when exercising their jurisdiction as Circuit and District Courts of the United States. But about the duties of the district attorney of the United States, to be appointed as above mentioned, nothing at all was said.

In this state of things the legislative assembly, by joint

vote, on the 19th of January, 1869, elected Zerubbabel Snow, "attorney-general of the Territory," and on the 3d of April, 1870, the President of the United States appointed C. H. Hempstead, to be "the attorney of the United States" for the same Territory.

Hereupon, Mr. Snow having undertaken to prosecute in one of the District Courts of the Territory certain offenders "against the laws of said Territory," a *quo warranto* was issued by the United States on the relation of Mr. Hempstead against him; the purpose of the writ being to have it judicially settled which of the two persons,—whether the attorney of the United States for the said Territory, appointed by the President, or "the attorney-general of the Territory," elected by its legislature,—was entitled to prosecute in Utah persons accused of offences against the laws of the Territory.

The Supreme Court of the Territory, assuming that the Supreme Court and the District Courts of Utah were courts of the United States, were of the opinion that the attorney of the United States was the proper person; and adjudged accordingly.

The attorney-general of Utah thereupon brought the case here.

Messrs. C. J. Hillyer and T. Fitch, on his behalf, referred to *Clinton* v. *Englebrecht*,* in which this court decided that the Supreme Court and the District Courts of the Territory were not courts of the United States, but legislative courts of the Territory. The base, therefore, on which the Supreme Court of the Territory rested its judgment being removed, the judgment, they argued, fell also.

Mr. G. H. Williams, Attorney-General, and Mr. C. H. Hill, Assistant Attorney-General, contra, submitted the case.

Mr. Justice BRADLEY delivered the opinion of the court.

The government of the Territories of the United States

* 13 Wallace, 434.

belongs, primarily, to Congress; and secondarily, to such agencies as Congress may establish for that purpose. During the term of their pupilage as Territories, they are mere dependencies of the United States. Their people do not constitute a sovereign power. All political authority exercised therein is derived from the General Government.

It is, indeed, the practice of the government to invest these dependencies with a limited power of self-government as soon as they have sufficient population for the purpose. The extent of the power thus granted depends entirely upon the organic act of Congress in each case, and is at all times subject to such alterations as Congress may see fit to adopt.

The organic act establishing the Territorial government of Utah constituted a governor, a legislative assembly, and certain courts, and judicial and executive officers. Amongst the latter are an attorney for the Territory and a marshal.

By the sixth section of the act, it is enacted that the legislative power shall extend to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of that act. By the ninth section, it is enacted that the judicial power shall be vested in a supreme court, district courts, probate courts, and justices of the peace, whose jurisdiction shall be limited by law; *provided*, that justices shall not try land titles, nor cases exceeding one hundred dollars in amount; and that the supreme and district courts shall possess chancery as well as common-law jurisdiction; and each of the district courts is invested with the same jurisdiction in cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts of the United States; and the first six days in each term are appropriated to such cases.

The duties of the attorney are not specified in the act. The marshal is required to execute all processes issuing from said courts when exercising their jurisdiction as circuit and district courts of the United States.

This recital shows that the business of these courts, when acting as circuit and district courts of the United States, is to be kept distinct from their business as ordinary courts

of the Territory; and gives countenance to the idea upon which the Territorial legislature seems to have acted in appointing separate executive officers for attending the courts when sitting as Territorial courts. By an act of that legislature, passed March 3d, 1852, it is, amongst other things, provided that an attorney-general shall be elected by the legislative assembly to attend to all legal business on the part of the Territory before the courts where the Territory is a party, and to prosecute individuals accused of crime in the judicial district in which he shall keep his office, in cases arising under the laws of the Territory; and that for the other districts, district attorneys shall be elected in like manner with like duties. This law, it is understood, has always been acted upon until the recent decision of the Supreme Court of Utah, denying its validity. Similar laws have been passed and acted upon in other Territories, organized under similar organic acts. The attorney appointed by the President for the Territory has been accustomed to attend to the business of the General Government, the same as is done by United States district attorneys in the several States; and the attorney-general and district attorneys of the Territory have attended to the business of the latter, and prosecuted crimes committed against the Territorial laws.

It must be confessed that this practice exhibits somewhat of an anomaly. Strictly speaking, there is no sovereignty in a Territory of the United States but that of the United States itself. Crimes committed therein are committed against the government and dignity of the United States. It would seem that indictments and writs should regularly be in the name of the United States, and that the attorney of the United States was the proper officer to prosecute all offences. But the practice has been otherwise, not only in Utah, but in other Territories organized upon the same type. The question is whether this practice is legal; or, in other words, whether the act of the Territorial legislature was authorized by the organic act. If it was, the plaintiff in error in this case was erroneously ousted from perform-

ing the duties of his office of attorney-general of the Territory.

The power given to the legislature is extremely broad. It extends to all rightful subjects of legislation consistent with the Constitution and the organic act itself. And there seems to be nothing in either of these instruments which directly conflicts with the Territorial law. If there is any inconsistency at all, it is in that part of the organic act which provides for the appointment by the President of an attorney for the Territory. But is that necessarily an inconsistency? The proper business of that attorney may be regarded as relating to cases in which the government of the United States is concerned. The analogous case of the marshal, and the separation of the business of the courts as to Government and Territorial cases, seem to give some countenance to this idea. At all events, it has sufficient basis for its support to establish the conclusion that there is no necessary conflict between the organic and the Territorial laws. The organic act is susceptible of a construction that will avoid such conflict. And that construction is supported by long usage in this and other Territories. Under these circumstances it is the duty of the court to adopt it, and to declare the Territorial act valid. In any event, no great inconvenience can arise, because the entire matter is subject to the control and regulation of Congress.

JUDGMENT REVERSED.

WESTRAY *v.* UNITED STATES.

1. Under the "act to increase duties on imports," &c., passed June 30th, 1864, the collector is under no obligation to give notice to the importer of his liquidation of duties on merchandise imported. The importer who makes the entries is under obligation himself, if he wishes to appeal from it, to take notice of the collector's settlement of them.
2. The right of the importer to complain or appeal begins with the date of the liquidation whenever that is made.

Statement of the case.

3. The ordinary warehouse bond, in the form prescribed by the regulations of the Secretary of the Treasury, in which the condition provides in the alternative, that the penalty may be avoided by the payment, within one year, of a sum of money fixed, OR by the payment of whatever duties may be ascertained to be due whenever the goods should become subject to duty by withdrawal for consumption, is hardly an ordinary pecuniary bond, but is rather a bond given to secure the payment of whatever duties may be by law chargeable on the merchandise to which it refers. At all events, if the obligor pay but part of the sum of money fixed as above said, and the whole of the sum thus fixed, proves, on liquidation of the duties for which the bond was given, to be less than the sum with which the goods are rightly chargeable, he cannot come in after the expiration of the year, and when, at law, a forfeiture has occurred, and tender payment of the difference (with interest) between the sum named in the bond and the amount which he has actually paid. He can be relieved from the forfeiture only upon doing complete equity, and that, in such a case, is nothing less than payment of all the duties to secure which he gave the bond.

ERROR to the Circuit Court for the Southern District of New York; the case being thus:

"An act to increase duties on imports," &c., passed June 30th, 1864,* enacts:

"SECTION 14. That on the entry of any merchandise, the decision of the collector of the customs at the port of importation and entry, as to the rate and amount of duties to be paid on such merchandise, shall be final and conclusive against all persons interested therein, unless the owner, importer, consignee, or agent of the merchandise shall, within ten days after the ascertainment and liquidation of the duties by the proper officer of the customs, as well in cases of merchandise entered in bond as for consumption, give notice in writing to the collector on each entry, if dissatisfied with his decision, setting forth therein, distinctly and specifically, the grounds of his objection thereto, and shall, within thirty days after the date of such ascertainment and liquidation, appeal therefrom to the Secretary of the Treasury, whose decision on such appeal shall be final and conclusive. And such merchandise shall be liable to duty accordingly, unless suit shall be brought within ninety days after the decision of the Secretary of the Treasury on such appeal, for

* 13 Stat. at Large, 214

any duties which shall have been paid before the date of such decision on such merchandise, or within ninety days after the payment of duties paid after the decision of the secretary."

This act being in force, Westray & Co. imported into New York a cargo of rice; the duty on which article, when in the form commercially known and designated as "uncleaned," is two cents per pound, and when in the form commercially known and designated as "cleaned" is two and a half cents per pound. The rice was entered for warehouse in October, 1864, and the usual warehouse bond given on that day by the importer. The bond was in $25,049.90, and was conditioned that the importer should,

"On or before the expiration of one year, to be computed from the date of importation, . . . pay . . . unto the collector of the customs, &c., the sum of $12,524.95, OR the amount of duties *to be ascertained* under the laws now existing, or hereafter to be enacted, to be due and owing, &c., OR shall in the mode prescribed by law, on or before the expiration of three years from date of said importation, withdraw said goods from the bonded store or public warehouse where they may be deposited, . . . and actually export the same beyond the limits of the United States, OR shall within three years . . . transport said merchandise in bond to any port of the Pacific or western coast of the United States."

Westray & Co. within a year after giving the bond withdrew the rice for consumption, and paid thereon two cents per pound as upon "uncleaned rice;"

Thus paying, as it turned out, the sum of . .	$12,352 15
Or less by	172 80
Than the sum conditioned named in the bond, .	$12,524 95

The rice was afterwards appraised as "cleaned rice," and on entry the collector liquidated the same as such, and the dutiable rate thereof at two and a half cents per pound. The additional half cent, thus charged, made a difference of $2111.17 between the sum which had been paid and that with which the rice as cleaned rice was now chargeable.

It did not appear that the collector had at any time given

notice to Westray & Co., the importers, of the liquidation, nor did the importers within ten days after the ascertainment and liquidation give any notice of their dissatisfaction, nor make any appeal to the Secretary of the Treasury.

In this state of things the United States brought suit on the bond, alleging as breach that though the time of one year mentioned in it had expired, Westray & Co. had not within the said year paid the $12,524.95 OR the amount, when ascertained, of the duties imposed by laws then existing, &c. Plea, *nil debet.*

On the trial the defendants offered in evidence samples of the rice, and offered to prove that it was in fact and as commercially designated "uncleaned rice," and, therefore, liable to pay no more duty than two cents per pound, which the government admitted had been paid within one year from date of importation, and that by the said payment of two cents per pound the bond became void.

The government objected to this evidence on the ground that by the act of Congress, above quoted, the decision of the collector was final and conclusive as to the rate and amount of duties, no notice of dissatisfaction with such decision having been given to him within ten days after the liquidation, and no appeal therefrom having been made to the Secretary of the Treasury.

The court sustained the objection, and held that the defendants could give no evidence respecting the character of the rice or its commercial designation in trade, or the rate of duty chargeable thereon. The defendants excepted.

The defendants then requested the court to rule that, there being no evidence that notice of the aforesaid liquidation by the collector was at any time given to them, or that they ever had knowledge of such liquidation, the time within which to serve notice of dissatisfaction upon the collector, and to appeal from his decision to the Secretary of the Treasury, if required by law, as ruled by the court, did not run till notice of liquidation was given to defendants, or till they had knowledge of the same.

The court refused thus to rule, on the ground that the collector was not bound to give any notice of his liquidation to the defendants, nor to bring his decision to the defendants knowledge, and that the time within which to give notice of dissatisfaction as aforesaid, and appeal, must run from the date of such liquidation, whenever made. To which decision the defendants excepted.

The defendants then requested the court to admit the evidence offered by them as to the commercial designation of the rice, on the grounds that the collector had given no notice of liquidation as aforesaid, and that, therefore, they were not debarred by the limitations of the statute from giving such notice of dissatisfaction and appeal, as required by the ruling of the court.

The court refused to admit the evidence, on the ground that, having ruled that no notice of liquidation from the collector to the defendants was required, the defendants were barred, and the evidence inadmissible. To which decision the defendants excepted.

The defendants then requested the court to instruct the jury that it was a condition of the bond that the same should be cancelled upon the payment of $12,524.95, within one year from date of importation, and as it was admitted that $12,352.15 had been paid within one year, that the jury could lawfully find no greater amount of damage than the difference between these two amounts, and interest on this difference.

The court refused to so instruct the jury. To which decision the defendants excepted.

The court then directed the jury to bring in a verdict for the plaintiffs for $2111.77, gold, with interest, to which direction of the court the defendants excepted.

Verdict and judgment having gone for the United States, the defendants brought the case here.

Mr. Ethan Allen, for the plaintiffs in error:

The liquidation of the duties, and the decision of the col-

lector is a secret proceeding, so far as the merchant is concerned. No date is fixed when the act shall be done. The appraiser notes his classification of the merchandise on the invoice when his convenience permits, and his clerk extends in figures on the entry the amount of the duty according to this classification; and this constitutes the decision of the collector, of which, according to the ruling of the court below, no notice whatever need be given to the importer, although from the moment this decision is made, the ten days limitations begin to run within which the importer must protest and appeal. As this statute takes away the common-law right of the citizen to defend himself, as in this case, against an alleged illegal exaction, it is a severe statute, and should be interpreted liberally. Indeed the treasury department, by regulations adopted in 1869, directs notice to be given to the merchant of the time when the decision of the collector is made, by ordering collectors to "keep a daily record of the entries liquidated," &c., and to "give notice of the liquidation of such entries by posting a transcript of such record in some conspicuous place in the custom-house, &c., for ten days." As these regulations, however, were issued in 1869, and as the bond upon which this suit is brought was made in 1864, these regulations do not cover this case. They show, however, that the treasury recognizes it as a duty to give notice to the merchant of the decision of the collector. Before this regulation was made, it was the custom for the collector to send a special notice to the importer, informing him of any decision made. This notice, however, was not given to the importers in this case, as was admitted on the trial.

2. In an action on a bond, of many separate conditions—like the one in suit—the performance of either one of which cancels the bond, the maker of the bond is entitled to choose which condition he will fulfil in satisfaction of it.

In part fulfilment of the first condition, it was admitted on the trial that $12,352.15 had been paid within one year. The only breach, then, on the part of the importers, was in not paying the balance of $172.80 within the year. Had

this balance been paid within the year, clearly the importers could have demanded cancellation of the bond.

The condition of an obligation is considered as the language of the obligee, and so is construed in favor of the obligor, and shall always be taken most favorably for the obligor. The law never overcomes by implication the express provisions of parties. Nor will equity enforce the penalty, the party being ready and desirous fully to perform any one of several alternate conditions.

Mr. G. H. Williams, Attorney-General, and Mr. S. F. Phillips, Solicitor-General, contra.

Mr. Justice STRONG delivered the opinion of the court.

The acts of Congress which regulate the collection of duties upon imported articles are imperative that, on the entry of any goods, wares, or merchandise, the decision of the collector of customs, at the port of importation and entry, as to the rate and amount of duties to be paid on such goods, wares, and merchandise, and the dutiable costs and charges thereon, shall be final and conclusive against all persons interested therein, unless the owner, importer, consignee, or agent of the merchandise shall, within ten days after the ascertainment and liquidation of the duties by the proper officers of the customs, as well in cases of merchandise entered in bond as for consumption, give notice in writing to the collector on each entry, if dissatisfied with his decision, setting forth therein distinctly and specifically the grounds of his objection thereto, and shall, within thirty days after the date of such ascertainment and liquidation, appeal therefrom to the Secretary of the Treasury.*

This act expressly applies to liquidations made when imported articles are entered for warehousing, and to those made when they are entered for consumption. In neither case is there any provision for notice of the decisions or liquidations, and for the obvious reason that such a provision

* Act of June 30th, 1864, § 14, 13 Stat. at Large, 214.

would be superfluous. The importer is instructed by the law at what time the collector or officers of the customs must liquidate the duties. The statute, and the treasury regulations established under it, require that the duties must be ascertained whenever an entry is made, whether it be for warehousing or for withdrawal. In practice, it is true, the liquidation at the time of entry for warehousing is little more than an approximate estimate, and it is mainly for the purpose of determining the amount of the bond to be given. It is made, and the bond is given, before the goods are sent to the warehouse, or even to the appraisers' stores, and before they are weighed, gauged, or measured. But the importer enters them and gives the bond, the amount of which is regulated by the estimated amount of duties. It is due to his inattention, therefore, if he does not know what that estimate is at the time when it is made. Equally true is it that he has ample means of knowledge of the second or corrected liquidation—that made at the time of the withdrawal entry. One of the conditions of his bond is that he pay the amount of duties *to be ascertained* under the laws then existing or thereafter enacted. He is thus informed that there is to be another liquidation, and that the law requires it to be made at the time when he shall make his withdrawal entry and when the duties are required to be paid. There is, then, no reason for requiring a notice to be given to him of the collector's decision. But, if this were not so, it is certain that the statute requires none; and it is not for us to rule that what Congress has declared to be conclusive shall not be so, unless something has been done more than the lawmakers required. It follows that the Circuit Court was not in error when it refused to receive evidence to show that the rice which the officers of the customs had decided was "cleaned rice," and subject to duty as such, was "uncleaned," and therefore subject to less duty. No notice of dissatisfaction with the duty assessed, or with the liquidation made, was given to the collector within the period defined by the statute; no appeal was made to the Secretary of the Treasury, and the decision of the collector was, therefore,

by the express declaration of the act of Congress, final and conclusive upon the plaintiffs and upon all persons interested.

The same considerations lead to the conclusion that the Circuit Court correctly refused to rule that the ten days prescribed by the statute, within which notice of dissatisfaction is required to be given, did not begin to run until notice of the collector's liquidation was given to the plaintiffs in error, or until they had knowledge thereof. The limitation of the right to complain or to appeal commences with the date of the liquidation, whenever that is made. No notice is required, but the importer who makes the entries is under obligation to take notice of the collector's settlement of the amount of duties. The claim of the government upon the goods is in the nature of a proceeding *in rem*, of every step in which the claimant, owner, or importer is presumed to have notice, and since, as we have remarked, the liquidation of the duties is required by the law to be made when the entries are made, the presumption is not unreasonable.* This disposes of the first four assignments of error.

The bond upon which the suit was brought was for the penal sum of $25,049.90, and its conditions were that it should be void if the obligors, or either of them, should, within one year, pay unto the collector of the customs the sum of $12,524.95 (half the penalty), *or* the amount of duties to be ascertained under the laws then existing, or thereafter to be enacted, due and owing on the imported goods described, *or* should, in the mode prescribed by law, on or before the expiration of three years from the date of importation, withdraw the goods from the bonded warehouse where they might be deposited, and actually export them, *or* within three years should, under the regulations of the Secretary of the Treasury, transport them to the Pacific coast. It was an ordinary warehouse bond, in the form prescribed by the regulations of the Treasury Department.† Its purpose was to secure the payment of the duties which might be owing upon the goods, when they should be withdrawn from the

* See Treasury Regulations, 1857, ch. 3, §§ 2, 3. † Regulations, p. 221.

warehouse for consumption, should they be so withdrawn. It was impossible to ascertain at the time when it was given what the amount of duties would be when the goods might be withdrawn. The defeasance was, therefore, in the alternative that the penalty might be avoided by payment of a sum mentioned within one year, or by the payment of whatever duties might be ascertained to be due and owing, that is, ascertained to be due and owing whenever the goods should become subject to duty by withdrawal for consumption. It was not, therefore, an ordinary pecuniary bond. Hence, when the defendants requested the Circuit Court to instruct the jury that it having been admitted $12,352.15 had been paid within one year, no verdict could be returned for any greater sum than the difference between the amount paid and $12,524.95 (the sum mentioned in the defeasance), with interest thereon, we think it was not error to refuse the instruction. At law the penalty was forfeited by the non-performance of any one of the conditions. The defendants' claim to relief was in equity alone, and though in the case of an ordinary pecuniary bond, with a simple pecuniary penalty, compliance with the condition to pay at a specified day is allowed even in a court of law to be compensated for by the payment of the sum mentioned in the condition, with interest thereon, the rule may well be otherwise in the case of such a bond as this. If it be admitted that the obligors might have selected the condition with which they would comply before a legal forfeiture had been commenced, it must still be held that, considering the nature of the bond and the purpose for which it was given, such an option was not theirs after they had come into default. They can be relieved from the forfeiture only upon their doing complete equity, and that is nothing less than the payment of all the duties, to secure which they gave the bond.

It follows that the jury were properly directed to return a verdict for the plaintiffs for the amount of duties unpaid, as ascertained and liquidated by the collector, with interest thereon.

JUDGMENT AFFIRMED.

COOK *v.* TULLIS.

1. The ratification by one of the unauthorized act of another operates upon the act ratified precisely as though authority to do the act had been previously given, except where the rights of third parties have intervened between the act and the ratification. The retroactive efficacy of the ratification is only subject to this qualification, that intervening rights of third persons are not defeated by the ratification.
2. An exchange of values may be made at any time, though one of the parties to the transaction be insolvent. There is nothing in the Bankrupt Act which prevents an insolvent from dealing with his property—selling or exchanging it for other property—at any time before proceedings in bankruptcy are taken by or against him, provided such dealing be conducted without any purpose to defraud or delay his creditors or to give preference to any one, and does not impair the value of his estate.
3. Accordingly, where a depositary of certain government bonds used some of them without the permission of the owner and substituted in their place a bond and mortgage, and the owner of the bonds upon hearing of the transaction ratified it, *Held*, that the creditors of the depositary, who had become insolvent when such approval was made, could not complain of the transaction, there being no pretence that the property substituted was less valuable than that taken, or that the estate of the bankrupt was less available to his creditors.
4. The trustees of a bankrupt take his property subject to all legal and equitable claims of others. They are affected by all the equities which can be urged against him.
5. Where property held upon any trust to keep, or use, or invest it in a particular way, is misapplied by the trustee and converted into different property, or is sold and the proceeds are thus invested, the property may be followed wherever it can be traced through its transformations, and will be subject, when found in its new form, to the rights of the original owner or *cestui que trust*. It does not alter the case that the newly acquired property, instead of being purchased with the proceeds of the original property, is obtained by a direct exchange for it.

APPEAL from the Circuit Court for the Southern District of Ohio.

Cook and others, trustees in bankruptcy of the estate of Homans, filed a bill in equity in the court below to set aside the transfer of a certain note for $7000, secured by mortgage, alleged to have been made by the said Homans to the defendant, Tullis, in violation of the provisions of the Bank-

rupt Act, and to compel an assignment of the note and mortgage to them.

It appeared from the record that in August, 1869, and for two years before, Homans, the bankrupt, was engaged in business as a banker, in Cincinnati, in the State of Ohio; that on several occasions during this period he had purchased bonds of the United States for the defendant, Tullis; that these bonds were left with him on special deposit for safe keeping; that the bonds were inclosed in envelopes and kept in a package by themselves, marked with the name of Tullis, and placed in a separate box; that on one occasion, about eighteen months before his failure, Homans had been permitted by the defendant to use $20,000 of the bonds thus purchased, upon condition of substituting for them in the package an equivalent in amount in bills receivable, and agreeing to replace the bonds when called for; that the bonds thus used were subsequently replaced; that on another occasion, about a year afterwards, in March, 1869, he took, without any such permission, from the package and used $6000 of the bonds, substituting in their place an equivalent amount in bills receivable; that in April following he removed these bills receivable and substituted in their place, for the bonds taken, a note and mortgage belonging to him, of one Hardesty, for $7000, the note bearing date April 17th, 1869, and payable in ninety days, and the mortgage being on real property; that this note was not paid at maturity, and in August following was placed by Homans, with the mortgage, in the hands of attorneys, with instructions to give notice to the maker of the note that if it were not paid by the beginning of the next term of the court, proceedings by suit would be taken for its collection; that Homans failed on the 26th of August, 1869; that soon afterwards Tullis was informed of the substitution of the note and mortgage for his bonds; and that thereupon he signified his acceptance of the same and his satisfaction with the transaction, and directed proceedings to be commenced by the attorneys, in whose hands the papers had been placed, for the foreclosure of the mortgage.

Statement of the case.

It further appeared from the record that, on the 20th of September following, Homans was adjudged a bankrupt upon a petition in involuntary bankruptcy, filed on the 13th of the month, and that in December afterwards the complainants were appointed trustees of his estate.

The deposition of Homans was taken in the case, and he stated in explanation of his conduct in appropriating the bonds in question, that as on a former occasion Tullis had consented to his using a much larger amount, he inferred that there would be no objection to his using a smaller amount if it could be done without risk to Tullis; that at this time he was carrying on his business as usual, and did not apprehend insolvency or bankruptcy; that he did not think it necessary when he placed the note and mortgage with his attorneys to give them notice that they belonged in Tullis's package, and did not do so until the day of his failure, when, remembering the omission, he gave them notice to that effect, and directed them to account to Tullis for $6000 of the note, stating that this proportion of it belonged to him. It did not appear that Tullis had any knowledge leading him to suppose that Homans, until the day of his failure, was insolvent, or contemplated insolvency.

The trustees of Homans by this suit sought, as already said, to set aside the transfer to the defendant of the note and mortgage, and to obtain possession of the same, on the alleged ground that the transfer was made for the purpose of giving the defendant a preference over the other creditors of the bankrupt, and preventing a distribution of the proceeds of the note equally among his creditors, in violation of the provisions of the Bankrupt Act.

The provisions relied on by the trustees are in the thirtieth section of the act (by the forty-third made applicable to trustees), and in these words:*

"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 payment, pledge, assignment, transfer or conveyance of any part of his property, either directly or indirectly, . . . the person receiving such payment, pledge, assignment, transfer or conveyance, or to be benefited thereby, . . . having reasonable cause to believe such person is insolvent, and that such . . . payment, 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 court below adjudged that the defendant was entitled to $6000 of the proceeds of the note of Hardesty; and that he held the balance of the proceeds as trustee for the complainants, and entered a decree to that effect. From that decree the complainants appealed to this court.

Messrs. George Hoadly and E. M. Johnson, for the appellants:

1. The Hardesty note and mortgage were part of Homans's assets, procured by him, as we may reasonably presume, by means obtained from his general creditors. There is no evidence by which to apply the rule that the proceeds of a trust estate may be followed by the *cestui que trust* as far as they can be traced. We admit that property held in trust does not pass to the assignee by the proceedings in bankruptcy, but we assert that the trust must be such that the property can be followed or distinguished. "When the trust property does not remain *in specie*, but has been made way with by the trustee, the *cestui que trust* has no longer a specific remedy against the estate, and must come in *pari passu* with the other creditors."*

Homans took and used the bonds, but he does not suggest that he applied their proceeds, or anything bought with such proceeds, in obtaining this note and mortgage. For aught that appears he lost the proceeds of these bonds in his business.

* In re Janeway, 4 Bankrupt Register, 26; and see Paley on Agency, 90, by Dunlap, and cases cited.

2. The ratification could not retroact, for several reasons:

First. The doctrine of relation is a fiction applicable only when demanded by considerations of justice, and therefore not required when it will defeat the intervening rights of third persons, as here of Homans's trustees, representing his creditors, whose rights, for the same reason, and by the express provision of the act, relate back four months, for the purpose of avoiding preferences.*

Secondly. This fiction cannot apply to this case, because its effect would be the evasion of a statute enacted in the interests of morality. "Directly or indirectly" shall no preference be permitted, says the Bankrupt Act. Now, with the ratification, a preference is achieved; without it, none. The ratification is the consummation of an incomplete preference; and, as such, is itself forbidden by the act, and therefore to be treated as not having taken place at all, in fact or in law.

Thirdly. A ratification is not allowed by law when the act ratified is itself forbidden at the time of ratification. As Homans after he broke could not prefer Tullis directly, neither could he prefer him by the indirect way of ratification. If an agent, without authority, assumes to do that which is afterwards prohibited by law, it is too late to give validity to the act by a ratification subsequent in date to the prohibition. To permit this is to defeat the law.†

In *Bird* v. *Brown*,‡ Baron Rolfe discussing the effect of ratification, says:

"But this doctrine must be taken with the qualification, that the act of ratification must take place at a time, and under circumstances, when the ratifying party might himself have lawfully done the act which he ratifies."

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* Fleckner *v.* Bank of the United States, 8 Wheaton, 363; Stoddart *v.* United States, 4 Court of Claims, 511; Taylor *v.* Robinson, 14 California, 396; Wood *v.* McCain, 7 Alabama, 806; Reed *v.* Powell, 11 Robinson's Louisiana, 98; Smith *v.* McMicken, 12 Id. 653; Augusta Insurance Co. *v.* Packwood, 9 Louisiana Annual, 83.

† McCracken *v.* City of San Francisco, 16 California, 591.

‡ 4 Exchequer, 799.

He cites *Lord Audley's Case*,* reported alike by Croke, Moore, and Popham, which seems in point, and is cited with approval by Lord Coke in *Margaret Podger's Case*.†

Fourthly. The alleged ratification amounts to nothing. What was there to ratify? Nothing but the conversion of the bonds, which made Tullis the creditor of Homans. By ratifying this Tullis could deprive the transaction of its tortious aspect, and make the liability one by contract also, instead of sounding both in trover and assumpsit. But he could do no more.

Mr. H. A. Morrill, contra.

Mr. Justice FIELD, after stating the facts of the case, delivered the opinion of the court, as follows:

It is evident from the statement of the transaction, that the transfer by Homans to the defendant of the note and mortgage of Hardesty does not present a case of preference made by a bankrupt to one creditor over another, within the meaning of the Bankrupt Act. It was not a transfer to prefer a creditor. There was no debt at the time to the defendant to be preferred. The transaction was not one of borrowing. There was no loan made nor credit given. It was the case of an exchange of one species of property for another, made by one party without authority from the other, and subsequently ratified by the latter, or it was the case of the conversion to his use by the depositary of property in his hands, and his substituting property equivalent in value as the investment of the property converted.

This suit must proceed, therefore, if at all, not on the ground of an alleged preference to a creditor in violation of the Bankrupt Act, but upon the ground that the title to the note and mortgage never passed from the bankrupt, because the ratification of his unauthorized transaction was not made until after the period when the rights of the trustees attached; or on the ground that the note and mortgage never

* Croke, Eliz. 561; Moore, 457; Popham, 176. † 9 Reports, 104*a*.

became subject in the hands of the bankrupt to the claim of the defendant as the investment of the latter's property, because the bonds appropriated were not first sold and their proceeds used in the purchase of the note and mortgage.

Both of these grounds were urged by counsel of the appellants, and it is on their disposition that the case must be determined.

The substitution of the note and mortgage in place of the bonds was approved by the defendant immediately upon being made acquainted with the facts. This approval constituted a ratification of the transaction. The general rule as to the effect of a ratification by one of the unauthorized act of another respecting the property of the former, is well settled. The ratification operates upon the act ratified precisely as though authority to do the act had been previously given, except where the rights of third parties have intervened between the act and the ratification. The retroactive efficacy of the ratification is subject to this qualification. The intervening rights of third persons cannot be defeated by the ratification. In other words, it is essential that the party ratifying should be able not merely to do the act ratified at the time the act was done, but also at the time the ratification was made. As said in one of the cases cited by counsel, "the ratification is the first proceeding by which he (the principal ratifying) becomes a party to the transaction, and he cannot acquire or confer the rights resulting from that transaction unless in a position to enter directly upon a similar transaction himself. Thus, if an individual pretending to be the agent of another should enter into a contract for the sale of land of his assumed principal, it would be impossible for the latter to ratify the contract if, between its date and the attempted ratification, he had himself disposed of the property. He could not defeat the intermediate sale made by himself, and impart validity to the sale made by the pretended agent, for his power over the property or to contract for its sale would be gone."* On the same prin-

* McCracken v. City of San Francisco, 16 California, 624.

ciple liens by attachment or judgment upon the property of a debtor are not affected by his subsequent ratification of a previous unauthorized transfer of the property.*

The question, therefore, in this case is whether any rights of third parties did thus intervene between the act of substitution made by Homans and its adoption and ratification by Tullis, which defeated the retroactive efficacy of the ratification. And the test is, as already indicated, could the parties have made the transaction at the time of the ratification without contravening the provisions of the Bankrupt Act? It is asserted by the appellants that the rights of the trustees extend not only to all property of the bankrupt in his possession when proceedings in bankruptcy were instituted against him, but also to all property transferred by the bankrupt within four months previously to a creditor in order to give him a preference over other creditors, or transferred by the bankrupt within six months previously to any one to defeat or evade the operation of the Bankrupt Act, the grantee in both cases knowing or having reasonable cause to believe that the grantor was at the time insolvent or that he then contemplated insolvency. Admitting this to be so, it does not follow that the trustees acquired any right to the note and mortgage in question. They were not transferred to the defendant, as already stated, to give a preference to one creditor of the bankrupt over another, for the defendant was not a creditor of Homans at the time, nor were they transferred to him to evade or defeat any of the provisions of the Bankrupt Act; the transaction was neither designed nor calculated to have any such effect. Homans was not insolvent at the time, nor did he contemplate insolvency. But even if he had been then insolvent, the transaction would not have been the subject of just complaint on the part of his creditors, if made with the approval of the defendant whose bonds were taken. There is no pretence that the property substituted was not equally valu-

* Taylor *v.* Robinson, 14 California, 396; Wood *v.* McCain, 7 Alabama, 806; Bird *v.* Brown, 4 Exchequer, 799.

able with that taken, or that the estate of the bankrupt was any the less available to his creditors. A fair exchange of values may be made at any time, even if one of the parties to the transaction be insolvent. There is nothing in the Bankrupt Act, either in its language or object, which prevents an insolvent from dealing with his property, selling or exchanging it for other property at any time before proceedings in bankruptcy are taken by or against him, provided such dealing be conducted without any purpose to defraud or delay his creditors or give preference to any one, and does not impair the value of his estate. An insolvent is not bound, in the misfortune of his insolvency, to abandon all dealing with his property; his creditors can only complain if he waste his estate or give preference in its disposition to one over another. His dealing will stand if it leave his estate in as good plight and condition as previously.

We do not think, therefore, that the rights of the trustees, though relating back four months so as to avoid preferences to creditors, and six months to avoid transfers to others, in fraud of the act, and thus going back of the ratification, touched the transaction in question or prevented the ratification from having complete retroactive efficacy.

The position of counsel, that the ratification, if sustained, only extended to the conversion of the bonds, and merely operated to deprive the transaction of its tortious aspect, all else consisting of dealings by Homans with his own property, is not tenable. The answer to it is, that the ratification was of the whole transaction taken together; that of the appropriation of the bonds upon substituting an equivalent in value for them, not of a part without the rest, not of the appropriation without the substitution.

Nor do we perceive the force of the objection to the validity of the transaction, because Homans intended to limit the transfer to the value of the bonds, to wit, six thousand dollars. The transfer was in form of the whole note, with a reservation to himself of the surplus over the amount of the bonds received from its proceeds. The note being indivisible, the legal title to a part could only be made by a

transfer of the instrument itself. The reservation of the surplus was not forbidden by any rule of law, and a court of equity would, and, in this case has, given effect to it.

But if we lay aside the doctrine of ratification as inapplicable, and assume that the transaction could not have been made by the parties after the failure of Homans, and, therefore, that the previous substitution could not then have been ratified, and treat the case as one of simple misappropriation of property of the defendant, still the trustees must fail in their suit. They took the property of the bankrupt subject to all legal and equitable claims of others. They were affected by all the equities which could be urged against him. Now, it is a rule of equity jurisprudence, perfectly well settled and of universal application, that where property held upon any trust to keep, or use, or invest it in a particular way, is misapplied by the trustee and converted into different property, or is sold and the proceeds are thus invested, the property may be followed wherever it can be traced through its transformations, and will be subject, when found in its new form, to the rights of the original owner or *cestui que trust.*

In the case of Taylor, assignee of a bankrupt, against Plumer,* this doctrine is well illustrated. There a draft for money was intrusted to a broker to buy exchequer bills for his principal, and the broker received the money and misapplied it by purchasing American stock and bullion, intending to abscond with them, and did abscond, but was taken before he quitted England. Thereupon he surrendered the stock and bullion to his principal, who sold the whole and received the proceeds. The broker became bankrupt on the day he received and misapplied the money, and his assignees sued for the proceeds of the stock and bullion. But the court decided that the principal was entitled to the proceeds as against the assignees, holding that if property in its original state and form is covered with a trust in favor of the principal, no change of that state and form can divest

* 3 Maule & Selwyn, 562.

it of such trust and give to the trustee, or those who represent him in right, any more valid claim in respect to it than he previously had; and that it makes no difference in reason or law into what other form, different from the original, the change may have been made, for the product of, or substitution for, the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such, and that the right only ceases when the means of ascertainment fail.

It is contended that the doctrine of this case does not apply, because the note and mortgage were not purchased with the proceeds of the bonds taken, but were substituted for them. We do not think this fact takes the present case from the principle upon which the other proceeds, that property acquired by a wrongful appropriation of other property covered by a trust, is itself subject to the same trust. It cannot alter the case that the newly acquired property, instead of being purchased with the proceeds of the original property, is obtained by a direct exchange for it. The real question in both cases is, what has taken the place of the property in its original form? Whenever that can be ascertained, the property in the changed form may be claimed by the original owner or the *cestui que trust*, and assignees and trustees in bankruptcy can acquire no interest in the property in its changed form which will defeat his rights in a court of equity.

DECREE AFFIRMED.

Mr. Justice MILLER dissented.

MULHALL *v.* KEENAN ET AL.

1. Where, on a suit to recover a balance of a draft claimed because consignments of cattle against which the draft was drawn, have not proved adequate to protect it, the question is whether the draft was drawn under a letter of instructions and in behalf of the doings of another person, one T., *an agent of the drawees*, or whether it was drawn by the drawer in

behalf of transactions *on his own account*, a letter from the drawer in which he says, "I ship you twelve cars of cattle. *I may buy some more before Mr. T. gets back. Do the best you can*," is admissible evidence against him to show that it was on his own account.

2. Entries in the defendant's own books, whose purport was to show that the transaction was on account of T., are not admissible.
3. When the letter of instructions told the person to whom it was written to draw "when there is a sufficient margin," evidence as to the fact whether there was sufficient margin or not is clearly admissible, unless there be something special to render it not so.
4. The fact that a bill of particulars filed with the declaration is made up of the debit of the draft sued on, sundry credits and the balance claimed, does not tend so clearly to show that the only question which the plaintiff meant to raise was whether the transaction was one on account of T., or an individual one, as that he may not, admitting that the transaction was on account of T., give evidence to show that the recipient of the letter had not obeyed his instructions to draw only when there was a sufficient margin.
5. The only remedy for surprise is a motion for new trial, and the refusal of a court below to grant one is not reviewable here.

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

Keenan & Co. were residents of Chicago, and commission dealers in live stock there. On the 7th of July they gave W. L. Tamblyn, then about to go to St. Louis to buy cattle for them, a letter of introduction to Joseph Mulhall, a similar dealer of that place, and who previously to this had had dealing in cattle on his own account with Keenan & Co. The letter was in these words:

MR. JOSEPH MULHALL. CHICAGO, July 7th, 1870.

DEAR SIR: The bearer, W. L. Tamblyn, goes to your city to buy cattle, and any favors conferred will be reciprocated. You will make advances on any stock consigned to me, and draw sight or time drafts *when there is sufficient margin*, and oblige,

Yours, respectfully,
KEENAN & Co.

Cattle were accordingly forwarded from St. Louis to Keenan & Co. at Chicago; and at the conclusion of one transaction Keenan & Co. claimed a balance of $2336.26, from

Mulhall, on account of a draft for $9070.73, drawn by Mulhall on the 20th of July, 1870, and paid by them, which draft had not been discharged by the price for which the cattle against which it was drawn had been sold.

That Keenan & Co. by the transaction in this particular lot of cattle had got out of pocket to the extent asserted by them was apparently not denied. The question was whether Mulhall was liable to repay to them the deficit.

He asserted that he was not, that he had drawn on Keenan & Co. pursuant to the above-quoted letter, for cattle bought by Tamblyn, and that regard being had to the value of the cattle sent he had kept his drafts within such limits that he had left a "sufficient margin;" the inference being, of course, that if Keenan & Co. were out of pocket, they had made injudicious sales or had acted negligently. Keenan & Co. asserted, on the other hand, that Mulhall had not sent the cattle under the above-quoted letter, but had sent them on his own account, and independently of the letter. It was admitted that Mulhall when forwarding his draft had not advised Keenan & Co. that it was drawn in pursuance of the letter of credit, and that the cattle were Tamblyn's. And further, that after the cattle in connection with which the draft had been drawn reached Chicago, Keenan & Co. thus telegraphed to Mulhall:

July 25th, 1870.

To JOSEPH MULHALL,
St. Louis, Mo.

Sold forty-four tails ($4.40), car natives, 7 cents; balance unsold; four half best offer. Can ship New York $50 car. Answer.

W. T. KEENAN & Co.

And that the bookkeeper of Mulhall (Mulhall himself at the time being ill, and, as the bookkeeper testified, "not having been consulted," and he the bookkeeper "acting on his own judgment and responsibility from his general position in Mulhall's office, and never thinking of the cattle being Tamblyn's, nor looking at the books,") returned a telegram thus:

Statement of the case.

To W. T. KEENAN & Co.,
Chicago.

Ship one-half cattle to William Thompson; 100th Street, New York; other half to your consignees.

JOSEPH MULHALL.

The questions thus were whether Mulhall had sent the cattle about which the deficit arose, under the letter.

If he had not, there was, of course, an end of his defence from that source. If he had, then arose a further question, to wit:

Whether he did keep his drafts within such limits as that, regard being had to the value of the cattle, he had left a "sufficient margin."

The parties being unable to agree, Keenan & Co. sued Mulhall in assumpsit, and filed with their narr a bill of particulars thus:

CHICAGO, August 6th, 1870.

Joseph Mulhall in account with Keenan & Co.

1870.		DR.	
July 26.	To draft,		$9070 73
Aug. 4.	" protest on draft,		2 60
" 6.	" exchange on money dep.,		3 08
" " "	" " draft drawn,		4 90
			$9081 31

		CR.	
July 26.	By account sales,	59 cattle,	$3112 28
Aug. 6.	" " "	126 " Thompson & Co.,	1610 13
" " "	" " "	114 " Ranken,	1892 74
July 30.	" " "	1 cow,	10 00
	Balance due,		2456 16
			$9081 31

On the trial, the plaintiffs, in order to show that the draft was drawn on Mulhall's own account, offered in evidence a letter of Mulhall's thus:

ST. LOUIS, July 12th, 1870.

W. T. KEENAN.

DEAR SIR: I ship you 12 cars of catle Mr. Tamlyn has one

half Entrust* he allso has th cst of th catle I will put fore thousand Dollars charges or moore on th catl and draw for th ballens *I may by som moore Befor Mr. Tamblyn gets back Dow th best you can*

yurs truly
JOSEPH MULHALL.

To the admission of this evidence the defendant objected, but the court received it.

The defendant then, in order to show that the cattle were sent on account of Tamblyn, offered in evidence his own books, in which an account of the cattle was entered, with a heading thus:

"PURCHASE CATTLE. (*Tamblyn.*)"

The plaintiff objected to the evidence, and the court excluded it.

Mulhall himself swore that it was always the rule in their business where a party advanced for another, as he said "in this case I did for Tamblyn on Keenan's credit," to ship the cattle in the name of the person who advances, and he added, "These cattle were shipped in my name."

The plaintiff, then, near the close of the trial, offered evidence to show that assuming that the cattle were sent on account of Tamblyn, and under the letter of July 7th, 1870, Mulhall in his drafts had not allowed for shrinkage of the cattle on their way to Chicago, and for bad markets; in other words, had not left, as in the letter of July 7th he had been directed to leave, a "sufficient margin."

To this evidence the defendant objected, but the court received it.

The court, to which by a stipulation of the parties the case had been submitted, found for the plaintiffs $2336.26, the amount claimed, with interest.

The defendant and his counsel thereupon filed affidavits,

* The meaning of this is not quite clear. It was perhaps explained by what Tamblyn swore, to wit, that after he got to St. Louis, Mulhall bought some cattle for himself and then resold one-half of them to him; though Tamblyn swore that these "were not the cattle sued for."

Recapitulation of the case in the opinion.

very full to the point, that they had been completely taken by surprise by the admission of the testimony to prove that the margin was not sufficient; that they had supposed that the only issue was whether Mulhall was liable for the draft as his individual transaction. The counsel swore that he had so informed Mulhall near the close of his trial; and that no question as to margin could arise. Mulhall swore that in point of fact there was sufficient margin, and that he had informed his counsel when evidence was given to the contrary, that he could prove this, and that the deficit sued for had arisen from the negligence of Keenan & Co., but that the counsel informed him that the case was closing, and that the witnesses (who were at stock-yards between one and two miles from the place of trial) could not be got in time. He swore further that he could still prove all that he thus alleged, if opportunity was given to him. The affidavits of other persons were filed to show that there was a sufficient margin. A new trial was accordingly moved for; but the court refused it.

The case was now here on exceptions by the defendant:

1st. To the admission of his letter of July 12th.

2d. To the exclusion of the entries in his own books.

3d. To the admission of testimony about margins.

Objections were also made here that the court below had improperly disregarded the affidavits of Mulhall and his counsel about surprise, which it was argued it ought not to have done, since the bill of particulars filed with the declaration showed that the claim was on Mulhall as for an individual transaction, and naturally led to the belief that no question about margins would be raised.

Messrs. M. Blair and F. A. Dick, for the appellants, insisting chiefly on the first and third exceptions; Mr. J. M. Krum, contra.

Mr. Justice SWAYNE delivered the opinion of the court.

The defendants in error, under the name of Keenan & Co., sued Mulhall to recover a balance alleged to be due to them upon a draft drawn by him and accepted and paid by them.

The parties waived the intervention of a jury, and submitted the cause to the court. The court found for the plaintiffs, and assessed their damages at $2336.26. Judgment was entered accordingly. There was no special finding of facts. A bill of exceptions in the record shows, that during the progress of the trial, the defendant excepted to the admission of evidence offered by the plaintiffs, and to the rejection of evidence offered by himself. Three specific errors have been assigned in this court.

(1.) The admission in evidence of the letter of Mulhall—of the 12th of July, 1870—to the plaintiffs.

(2.) The exclusion of certain entries on the defendant's books.

(3.) The admission of the testimony relating to margins.

The second assignment has been virtually abandoned, and need not, therefore, be considered. It is too clear to admit of doubt that the ruling to which it relates was correct.

The letter of the 12th of July, 1870, stated, among other things, that Mulhall might buy more cattle before Tamblyn got back. It said nothing of Tamblyn having any interest in such purchase, or in any further purchase the defendant might make. Mulhall testified that the cattle were shipped to Keenan & Co., in his name. When consulted by them about the disposition of the cattle unsold, his authorized agent directed them to be shipped to New York. The draft was drawn after the cattle were shipped to Chicago. No explanation whatever accompanied it to Keenan & Co. Mulhall insisted that the cattle belonged to Tamblyn, subject to his advances upon them, and that the advances were made and the draft drawn upon the faith of the letter of credit addressed to Mulhall in favor of Tamblyn, which Keenan & Co. had given to the latter. Keenan & Co. claimed that they believed, and, under the circumstances were warranted in believing, that the cattle belonged to Mulhall, and that the draft was drawn solely on his own account. The letter in question was an important link in the plaintiffs' chain of evidence touching this issue. As such, it was clearly com-

petent and proper to be received in evidence. Its weight and effect, in connection with the other testimony upon the subject, were questions for the jury. There was no error in this ruling.

Whether it was incumbent upon Mulhall, when the draft was forwarded, to notify Keenan & Co. that it was drawn in pursuance of the letter of credit, and that the cattle were Tamblyn's, is a point not raised and upon which we need, therefore, say nothing.*

The third assignment remains to be considered. It relates to the admission of testimony as to the margins.

The letter of credit authorized Mulhall "to make advances on any stock consigned" by Tamblyn to Keenan & Co., and to "draw sight or time drafts when there was sufficient margin." The limits within which the authority to draw was given, were thus distinctly marked. Beyond them it did not subsist, and Keenan & Co. were in no wise liable to the drawer. The case presented four questions:

Whether the draft was drawn by Mulhall for his own account.

If not, whether he was estopped from denying that it was so drawn.

Whether it was drawn in pursuance of the letter of credit.

If so drawn, whether there was such margin in respect to the value of the cattle, as conformed to the requirement of the letter of credit, and made it obligatory on Keenan & Co. to pay the draft.

In the view presented by the last inquiry, the testimony was clearly admissible.

This is not denied by the counsel for the plaintiff in error; but it is insisted that this phase of the case took the defendant and his counsel by surprise, and that they did not come to the trial prepared to meet it.

It is insisted further, that this proposition is not consistent with the bill of particulars filed with the declaration. The bill of particulars is made up of the debit of the draft in

* Lent *v.* Padelford, 2 American Leading Cases, note, 59 and post.

question, sundry credits, and the balance claimed by Keenan & Co. It is alike consistent with either phase of the case. If the plaintiffs were entitled to recover in any view of the facts to be developed upon the trial, the amount to be recovered was thus shown. The ground or grounds upon which the recovery was to be insisted upon were in nowise indicated. That was not the purpose of the paper. If there were surprise, the only remedy for it was a motion for a new trial. Such a motion was made, supported by the affidavits of Mulhall, his counsel, and others, and was overruled by the court. With that motion and its result we have nothing to do. They cannot be made the subject of review by this court. Our duty is to ascertain whether there is any error in the record of which we can take cognizance. We have found none, and the judgment is

AFFIRMED.

GALPIN *v.* PAGE.

1. Where in suits brought in a State court to settle an alleged copartnership between the plaintiffs and a deceased partner, the Supreme Court of the State decided that there had been no sufficient service on an infant defendant who had succeeded to an undivided interest in the property of the deceased partner, and consequently that the lower court had had no authority to appoint a guardian *ad litem* for such infant, and therefore reversed a decree directing a sale of the property of the deceased, such adjudication is the law of the case, and is binding upon the Circuit Court of the United States in an action brought by a grantee of the heirs of the deceased against a purchaser at a sale under such decree.
2. A superior court of general jurisdiction, proceeding within the general scope of its powers, is presumed to have jurisdiction to give the judgments it renders until the contrary appears; and this presumption embraces jurisdiction not only of the cause or subject-matter of the action in which the judgment is given, but of the parties also. The rule is different with respect to courts of special and limited authority: *their* jurisdiction must affirmatively appear by sufficient evidence or proper averment in the record, or their judgments will be deemed void on their face.
3. The presumptions which the law implies in support of the judgments of superior courts of general jurisdiction only arise with respect to jurisdictional facts, concerning which the record is silent. When the record

states the evidence or makes an averment with reference to a jurisdictional fact, it will not be presumed that there was other or different evidence respecting the fact, or that the fact was otherwise than as averred.

4. The presumptions indulged in support of the judgments of superior courts of general jurisdiction are also limited to jurisdiction over persons within their territorial limits, and over proceedings which are in accordance with the course of the common law.
5. The tribunals of one State have no jurisdiction over the persons of other States, unless found within their territorial limits.
6. When by legislation of a State constructive service of process by publication is substituted in place of personal service, and the court upon such constructive service is authorized to proceed against the person of an absent party, not a citizen of the State nor found within it, the statutory provisions must be strictly pursued.
7. Where special powers conferred upon a court of general jurisdiction are brought into action according to the course of the common law, that is, in the usual form of common-law and chancery proceedings, by regular process and personal service, where a personal judgment or decree is asked, or by seizure or attachment of the property where a judgment *in rem* is sought, the same presumption of jurisdiction will usually attend the judgments of the court as in cases falling within its general powers. But where the special powers conferred are exercised in a special manner, not according to the course of the common law, or where the general powers of the court are exercised over a class not within its ordinary jurisdiction upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court The facts essential to the exercise of the special jurisdiction must appear in such cases upon the record.
8. The law imputes to an attorney knowledge of defects in legal proceedings for the sale of property taken under his direction.
9. The title of an attorney purchasing property at a judicial sale decreed in proceedings in which he acted as an attorney, falls by the law of California, with the reversal of the decree directing the sale, independent of defects in the proceedings; and conveyances after such reversal pass no title as against a grantee of the original owner of the property.

ERROR to the Circuit Court for the District of California.

Philip Galpin brought an action against Lucy Page for the possession of certain real property situated in the city of San Francisco. The case was tried by the court by stipulation of the parties without the intervention of a jury. Both parties claimed title to the premises from the same source, Franklin C. Gray, deceased, who died in the city of New York, in July, 1853, intestate, possessed of a large property

in California, both real and personal. Of the real property the premises in controversy were a portion. The deceased left surviving him a widow, Matilda, of whom a posthumous child was born in December afterwards, named Franklina. By the statute of California the entire estate of the deceased vested in the widow and child in equal shares.

The plaintiff asserted title to the demanded premises through conveyances authorized by the Probate Court of the City and County of San Francisco, which administered upon the estate of the deceased. The defendant claimed title under a purchaser who bought at a commissioner's sale had under a decree of the District Court of the State rendered in an action brought to settle the affairs of an alleged copartnership between the deceased and others. It was admitted that the plaintiff acquired the title unless it had previously passed to the purchaser at the commissioner's sale. It was, therefore, upon the validity of the decree in the District Court and the consequent sale and deed of the commissioner that the present case was to be determined.

The action in which that decree was rendered arose in this wise: In February, 1854, William H. Gray, a brother of the deceased, brought a suit in equity in the District Court of the State (which embraced at the time the city of San Francisco), against Joseph C. Palmer and Cornelius J. Eaton, who had been appointed administrators of the estate of the deceased, and against the widow, Matilda, and James Gray, the father of the deceased. In his bill the complainant alleged that a copartnership had existed between himself and the deceased, which embraced commercial business in which the latter was engaged, and the purchase and sale of real estate; that the copartnership business was carried on, and the titles of the real property purchased were taken in the individual name of the deceased, but that the complainant was interested in all its business and property to the extent of one-third. The object of the suit was to have the affairs of the alleged copartnership settled, and to obtain a decree awarding one-third of its property to the complainant.

Statement of the case.

The allegation of the bill that a dormant and universal copartnership had existed between the complainant and the deceased was without any just foundation in fact, for, as hereinafter mentioned, it was afterwards held by the Supreme Court of the State to be unsupported by the evidence in the case.

The bill omitted to make the child, Franklina, a party, and accordingly, in June following, a supplemental or amendatory bill was filed by the complainant, referring to the original bill, and stating the birth of the child, that she was entitled to share in the estate of the deceased, and that she was absent from the State, a resident with her mother in Brooklyn, in the State of New York, and praying that she might be made a party defendant, that a guardian *ad litem* might be appointed for her, and that the complainant might have the same relief prayed in the original bill.

Subsequently an order was made by the court directing service of the summons upon the new defendant by publication. It was preceded by a recital that it appeared to the satisfaction of the court that the defendant resided out of the State, and that she was a necessary party to the action. It was not stated in the order in what way the facts recited appeared. It seemed probable that the court might have acted upon the statements of the supplemental complaint. The statute of the State, which authorizes constructive service by publication, is as follows:

"When the person on whom the service is to be made resides out of the State, or has departed from the State, or cannot, after due diligence, be found within the State, or conceals himself to avoid the service of summons, and the fact shall appear by *affidavit*, to the satisfaction of the court or a judge thereof, or a county judge, and it shall *in like manner* appear that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action, such court or judge may grant an order that the service be made by the publication of the summons."*

* Civil Practice Act of California, section 30; Hittel's General Laws of California, page 724.

In December following, upon the petition of the plaintiff, a guardian *ad litem* was appointed for the child. The other defendants appeared by attorneys and answered.

In January, 1855, Eaton, who had been a clerk of the deceased, and who, as administrator, was made defendant in the above action of Gray, resigned his trust and commenced a suit in the District Court of the State against Palmer, the remaining administrator, and against the widow and child. In his bill he also alleged that a copartnership had existed between him and the deceased, that such copartnership embraced all the business and real estate transactions of the deceased, and that his interest in the partnership and its property was one-fourth.

In this action publication was made of the summons issued against the defendant, Franklina, but it nowhere appeared in the record that any application was ever made to the court or judge thereof for an order directing the publication, or that any such order was ever made. So far as appeared from the record it was the voluntary act of the complainant without judicial authority or sanction. The Supreme Court afterwards held that no sufficient service was ever made of the summons issued. In September following, after the publication thus made, upon application of the complainant, the same person was appointed guardian *ad litem* for the infant defendant in this action, who had previously been appointed such guardian *ad litem* in the other action. The other defendants appeared by attorney and answered.

On the 23d of October following, upon the stipulation of the guardian thus appointed and the attorneys of the other defendants, the two actions were consolidated into one. Four days subsequently a decree was entered in this consolidated action, and from a certificate of the judge appended to the decree, it would seem to have been entered without trial and by consent and agreement of the parties. By this decree it was adjudged that a copartnership had existed between Eaton and the deceased, which embraced all the property, real and personal, and all the business of each

of them, and that in this copartnership Eaton had an interest of one-fourth; that there had also existed at the same time a copartnership between Gray and the deceased, which also embraced all the property, real and personal, and all the business of each, and that in this copartnership Gray had an interest of one-third; that the latter copartnership was subject to the copartnership with Eaton, and that, therefore, Eaton should take one-fourth of the estate, and Gray one-third of the remaining three-fourths, and that the residue should be equally divided between the widow and child. By the decree a reference was also ordered to a commissioner to take and state an account of the business profits and property of the two copartnerships, with directions upon the confirmation of his report to sell all the property, real and personal, of both copartnerships, and upon the confirmation of the sales to execute proper conveyances to the purchasers.

The commissioner stated an account as required, his report was confirmed, and by a decree of the court, made in April, 1856, a sale of the entire property of the two alleged copartnerships was ordered. The sale was had under this decree in May following. At that sale the premises in controversy were bid off by Gwyn Page, one of the attorneys of the plaintiff, Gray, and to him the commissioner executed a deed. Page subsequently sold and conveyed an undivided half of the premises to J. B. Crockett, his law partner, also one of the attorneys of the plaintiff, Gray, and the latter in June, 1863, conveyed his interest to Lucy Page, the defendant in the case. The interest of Gwyn Page in the remaining half passed by devise to the defendant.

On appeal to the Supreme Court of the State the decree of the District Court was, at the October Term of 1857, reversed, on the ground that no sufficient service of summons was made upon the infant, Franklina, under the statute, in the case of Eaton against Palmer, and that until such service no guardian *ad litem* could be appointed for her; and on the further ground that the evidence presented had not established a copartnership between William H. Gray and the

deceased. The case was accordingly remanded to the District Court, and afterwards both suits were dismissed.

The Circuit Court gave judgment in the suit below for the defendant, and the plaintiff thereupon brought the case here on writ of error. In its opinion, which accompanied the record, and in which the Circuit Court went into an elaborate argument to show that the District Court of California had, when its decree was rendered, apparently, jurisdiction, the Circuit Court held that the record in the State court could not be attacked collaterally unless it affirmatively showed that the court did not have jurisdiction. Its language was as follows:

"The record in the consolidated action is here attacked collaterally, and not on appeal, or in a direct proceeding of any kind to reverse, set aside, or vacate the decree. The rule is different in the two cases. When attacked collaterally it is not enough that the record does not affirmatively show jurisdiction, but, on the contrary, it must affirmatively show that the court did not have jurisdiction, or the decree will be valid until reversed on appeal, or vacated on some direct proceeding taken for that purpose."

Mr. Galpin, plaintiff in error, in propriâ personâ:

The court below erred in holding that the judgment of a court of general jurisdiction cannot be attacked collaterally, except for matters apparent on the record, and that in the absence of matters affirmatively disclosing a want of jurisdiction the judgment is conclusive; in other words, in holding that the record imports such absolute verity that it can never be contradicted or questioned collaterally.

One illustration will show that the doctrine is not sound, or at any rate is subject to exceptions. Suppose a judgment is rendered against a party by publication of summons, and property sold under it, could not the heirs of the party defend against an ejectment brought by the purchaser, by showing that the party had been dead years before the suit was commenced, and that his estate, including the property in question, had been administered upon and settled? Would

it be pretended in any court that the record imported such absolute verity that it must be taken as true that the party was at the time alive, even though courts in other States had pronounced him dead, and had distributed his effects accordingly? All rules of evidence are intended to secure justice, and to hold the record conclusive in such a case would make the general rule of presumption with respect to judgments of superior courts of general jurisdiction, which is a wise one when properly applied, an instrument of monstrous wrong and injustice.

Take another case: A probate court on evidence deemed sufficient adjudges a man dead, and administers his estate. Although an inferior court, when it once gets jurisdiction, its proceedings are entitled to the same presumptions in their favor as the proceedings of courts of general jurisdiction. Having acquired jurisdiction apparently—that is, the jurisdictional fact being declared established—property is sold by the decree of the court. Now, would it not be competent for a purchaser from the man adjudged to be dead to show, in a suit brought by the purchaser under the decree of the court, that the man was alive all the time, and to make bodily profert of him in court? or must the doctrine of the court below prevail, and the man be held to be dead notwithstanding his vocal disclaimer?

Such cases show the error of the ruling of the court below. The true doctrine is that the jurisdictional fact must always be open to inquiry; for if the court has in truth no jurisdiction, it cannot cut off inquiry into its authority.

In *Williamson* v. *Berry*,* the Supreme Court of the United States says:

"We concur that neither orders nor decrees in chancery can be reviewed *as a whole* in a collateral way. But it is an equally well-settled rule in jurisprudence, that the jurisdiction of any court exercising authority over a subject, may be inquired into in every other court, when the proceedings in the former are relied upon, and brought before the latter, by a party claiming

* 8 Howard, 540.

the benefit of such proceedings. The rule prevails whether the decree or judgment has been given in a court of admiralty, chancery, ecclesiastical court, or court of common law, or whether the point ruled has arisen under the laws of nations, the practice in chancery, or the municipal laws of States."

In support of this doctrine numerous cases are cited.*

In *Starbuck* v. *Murray*,† Marcy, J., dissipates the doctrine contended for in the court below; and in that case there was an allegation that the party had appeared. There is nothing of that kind here. He says:

"But it is strenuously contended that if other matter may be pleaded by the defendant, he is estopped from asserting anything against the allegation contained in the record. It imports perfect verity, it is said, and the parties to it cannot be heard to impeach it. It seems to me that this proposition assumes the very proposition to be established which is the only question in issue. For what purpose does the defendant question the jurisdiction of the court? Solely to show that its proceedings and judgments are void, and therefore the supposed record is not in truth a record. If the defendant had not proper notice of, and did not appear to the original action, all the State courts with one exception agree in opinion that the paper introduced as to him is no record; but if he cannot show even against the pretended record that fact, on the alleged ground of the uncontrollable verity of the record, he is deprived of his defence by a process of reasoning that is to my mind little less than sophistry. The plaintiff in effect declares to the defendant: The paper declared on is a record, because it says you appeared, and you appeared because the paper is a record. This is reasoning in a circle. The appearance makes the record uncontrollable verity, and the record makes the appearance an unimpeachable fact."

In *Dozier* v. *Richardson*,‡ the Supreme Court of Georgia says:

"It is no doubt true, that a judgment rendered against a man,

* Glass et al. *v.* Sloop Betsey, 3 Dallas, 6; Rose *v.* Himely, 4 Cranch, 241; Elliott *v.* Peirsol, 1 Peters, 328–40; Wilcox *v.* Jackson, 13 Id. 499; Shriver's Lessee *v.* Lynn, 2 Howard, 59; Lessee of Hickey *v.* Stewart, 3 Id. 750.

† 5 Wendell, 158.

‡ 25 Georgia, 92.

by a court that has jurisdiction to render it, is conclusive against him if not obtained by fraud. But does a court have jurisdiction to render judgment against a man who has never had notice of the suit, and who does not appear to the suit? Most certainly not. Can it get this jurisdiction by falsely reciting, in some proceeding in the suit, that the man was notified of the suit, or that he appeared to it? Nobody will say so. But we have to say so in effect, if we say that such recitals are conclusive on the man. This must be manifest. It follows, then, that we cannot say so."

The legal chicane exposed in these cases, from New York and Georgia, offends the sense of justice of every one; and every logical mind revolts from its wretched sophistry.

There is no presumption of law from the existence of a judgment that process was served, because no presumption can arise except in favor of a valid record; and there is no proof that the papers are a valid record, unless they contain proof of service. Otherwise a record possibly invalid proves service, and the service thus presumed proves the record.

That the record must show proof of service appears from many cases.*

But if any presumption of service would ordinarily be raised from the existence of a judgment, no such presumption can be raised in favor of this record, because,

1. The record shows affirmatively that Franklina was *not within the jurisdiction* of the court prior to the entry of the judgment, and this fact would overthrow the presumption referred to, if any such existed.

2. The record proves affirmatively that a constructive service was attempted, which failed.

In the case at bar the court will observe also that the purchaser at the sale, under the decree of the District Court, was one of the attorneys of the plaintiff Gray, and that he

* See Kinnier *v.* Kinnier, 45 New York, 541; Kerr *v.* Kerr, 41 Id. 275; Brown *v.* Nichols, 42 Id. 36, see dissenting opinion of Grover; Robson *v.* Eaton, 1 Term, 62; Shelton *v.* Tiffin, 6 Howard, 186; Thatcher *v.* Powell, 6 Wheaton, 127; Buchanan *v.* Rucker, 9 East, 192; 1 Campbell, 63; Bissel *v.* Briggs, 9 Massachusetts, 462, and other cases.

conveyed one undivided half interest to his law partner, also attorney of the plaintiff Gray. They took their interests with knowledge of all the defects in the proceedings. They do not stand in the position of strangers ignorant of all the proceedings. The defendant took from Page, one of the attorneys, by devise, and from the other attorney long after the reversal of the decree.

Messrs. E. L. Goold, Carlisle, and McPherson, contra:

I. *The decree of the District Court in the two consolidated cases of Gray* v. *Palmer et al. and Eaton* v. *Palmer, cannot be collaterally attacked. The tribunal being a superior court, clothed with jurisdiction of the subject-matter, its record imparts plenary proof of its jurisdiction over the person of the defendant, without explaining the steps by which that jurisdiction had been acquired.*

When a judgment has been rendered by a superior court, having jurisdiction of the subject-matter involved, it is not necessary that the record should disclose the proof of the mode by which the process was served upon the losing party. In this instance it is certain that the court did have jurisdiction of the subject-matter, for the case was one of the settlement of a partnership, and the partnership property was found within the jurisdictional limits of the court.

That the court had jurisdiction to determine such questions as were involved in these two cases, was decided by the Supreme Court of California, where they were considered on appeal.

In *Gray* v. *Palmer*,* the language of the court was:

"The primary object was to obtain the control of the partnership property, and the sale of so much of it as would be required to pay the partnership debts, and for a partition of the remainder of the real estate, if any. These complex objects could only be accomplished by proceedings in the District Court. The Probate Court had no judicial means to do this."

This language shows that the jurisdiction of the subject-matter of the controversy cannot be put in contest.

* 9 California, 637.

Argument for the defendant in error.

And now, as to that of the person.

On this head, many of the authorities are collected in Smith's Leading Cases. Hare and Wallace's notes* say:

"Superior courts are presumed to act by right and not by wrong, and their acts and judgments are consequently conclusive in themselves, unless plainly beyond the jurisdiction of the tribunals whence they emanate."

In *Foot* v. *Stevens*,† it was held that where a court of general jurisdiction has rendered judgment, it will be presumed that it has jurisdiction over the person of the defendant. The court, after citing from several decisions, says:

"All these authorities are but an iteration, in another form, of the rule so strongly and clearly expressed in *Peacock* v. *Bell*,‡ in 19 Car. II. 'The rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of a superior court but that which specially appears to be so.' This, too, was said of a county court, which though inferior to the K. B., yet say the court, 'that does not prove it to be an inferior court in the sense that it ought to certify everything precisely,' and this too was on error. The record did not show jurisdiction, but the K. B. '*intended it*' until the contrary should be shown.

"Indeed, it may be asked where is the case which ever held a judgment record of a court of general jurisdiction void because it omitted to assert some formal step in the acquiring of jurisdiction? The omission in *Peacock* v. *Bell* was essential. The declaration fails to show a territorial power. All the cases are against this objection, and would fill a page of quotation. Shall it be said that the law will not presume until the record first asserts the fact in a line of circumstances which give jurisdiction? I answer, such a construction of the rule again contradicts the leading case of *Peacock* v. *Bell*, and confounds all distinction between courts of general and limited jurisdiction. Even as to the latter, its record asserting the fact becomes *primâ facie* evidence. In such case there is no need of presumption; there is direct proof. And does the rule mean to say no more in respect to a court of record? It seems to me a solecism. In

* Vol. 1, p. 816; note to Crepps *v.* Durden et al.

† 17 Wendell, 486.

‡ 1 Saunders, 74.

Argument for the defendant in error.

regard to limited courts, not proceeding according to the course of the common law, it will not presume; and therefore they must state by their record. While as to the superior court, though it omit a formal ingredient, it shall be intended in respect to the solemnity of the main proceedings. It is unreasonable and contrary to presumption, to suppose a judgment recorded by a court in all its important forms without the usual notice."

This principle was enforced in California at an early day.*

II. *Assuming that a record of a superior court, which contains some words reciting steps towards the jurisdiction, fails to recite them all, the law will intend that the remaining necessary steps were taken, and that in reference to them the court judicially passed upon evidence necessary to support the jurisdiction, unless it affirmatively appear that these steps were omitted.*

This is the doctrine of the Supreme Court of California.†

Something was done in the District Court of California towards bringing in Franklina by publication; and nothing of an affirmative character appears tending to show she was not served. The very act of naming a guardian *ad litem* involves a declaration by the judge that the infant whose rights are to be protected had already been served with process. The statute did not authorize the appointment of a guardian until service had been made. Such service must be presumed from the action of the court in selecting the guardian. How *guard* the infant's rights if they were not in question? And how could they be brought in question if no service had been made? That the written evidence of this service does not appear is a matter of no moment. It may have been lost or may have been mislaid. It is enough that the court was empowered to determine this *jurisdictional* fact, and did so determine it by the appointment. That determination can no more be assailed collaterally, than can any other decree in the cause.

This court said in *Erwin* v. *Lowry*:‡

"We hold that whenever a judgment is given by a court

* Alderson *v.* Bell, 9 California, 321.

† Hahn *v.* Kelly, 34 Id. 391.

‡ 7 Howard, 181.

having jurisdiction of the parties and of the subject-matter, the exercise of jurisdiction warrants the presumption in favor of the purchaser that the facts which were necessary to be proved to confer jurisdiction were proved."

And in *Voorhees* v. *Bank of the United States*:*

"There is no principle of law better settled than that every act of a court of competent jurisdiction shall be presumed to have been rightly done, till the contrary appears; and this rule applies as well to every judgment or decree, rendered in the various stages of their proceedings from the initiation to their completion, as to their adjudication that the plaintiff has a right of action. Every matter adjudicated becomes a part of their record; which thenceforth proves itself, without referring to the evidence on which it has been adjudged."

Under this view, complete protection is afforded a purchaser at a judicial sale.

In the late case of *McCauly* v. *Fulton*,† the Supreme Court of California said:

"It has been repeatedly held by this court that upon collateral attack recitals in the judgment of service on the defendant are conclusive of the position of jurisdiction of the person, when the judgment is rendered by a court of superior jurisdiction."

Reply: None of the authorities cited sustain the theory that a judgment may be presumed valid from the fact that it exists. The authorities to the effect that recitals of the existence of jurisdictional facts are binding, do not apply, because *there are no such recitals of service in this record.* Furthermore, those authorities may be divided into three general classes:

1. Attachment cases, where the jurisdiction is acquired by the issuing of the writ of attachment and seizure of the *rem;* jurisdiction being thus acquired, no notice to the parties is necessary other than that given by the seizure.

This principle is illustrated in *Cooper* v. *Reynolds*.‡

* 10 Peters, 449. † Decided at the October Term, 1872.

‡ 10 Wallace, 318; and see Miller *v.* United States, 11 Id. 326.

2. Probate proceedings, which have always been held to be proceedings *in rem*, of which all the world is bound to take notice, without either personal or constructive service of summons.

3. Cases where, *after* jurisdiction *over the person* had been acquired, the jurisdictional question passed on was involved in the issues, or was one which the court had power to pass on; and having done so, and exercised the power, the matter determined had passed out of the region of jurisdiction and became *res adjudicata* so far as other courts were concerned, especially on a collateral attack.

Mr. Justice FIELD, after stating the facts of the case, delivered the opinion of the court as follows:

The Supreme Court of the State in its opinion, to which we are referred in the findings, speaks of its decision as though there were two separate decrees before it; but this is an evident inadvertence, as there was but one decree, and that was reversed for the reasons assigned as applying to proceedings in the separate suits before their consolidation. After the reversal of the decree it is possible that the suits proceeded independently of each other as before their consolidation, until the dismissal disposed of them entirely.

The defendant relies upon the validity of the decree of the District Court, notwithstanding its subsequent reversal, to uphold the commissioner's sale and deed. Her position is this: that the District Court of the State was a court of general jurisdiction; that being such it is presumed to have had jurisdiction both of the subject-matter and persons which authorized the rendition of the decree in question; that such presumption is conclusive, and the validity of the decree cannot be collaterally attacked by any matter outside of the record, and that, therefore, the sale made under the decree before it was reversed is not affected by the reversal.

The position of the defendant was sustained by the Circuit Court. "The record in the consolidated action," says that court, "is here attacked collaterally, and not on appeal, or in a direct proceeding of any kind to reverse, set aside,

or vacate the decree. The rule is different in the two cases. When attacked collaterally it is not enough that the record does not affirmatively show jurisdiction, but, on the contrary, it must affirmatively show that the court did not have jurisdiction, or the decree will be valid until reversed on appeal, or vacated on some direct proceeding taken for that purpose."

If the rule as thus stated were universally true it would not support the decree in the case at bar, for the record in the consolidated action does affirmatively show that the District Court never acquired jurisdiction over the person of Franklina C. Gray in one of the actions; and, therefore, had no more authority to appoint a guardian *ad litem* for her in that action than it had to appoint attorneys for the other defendants. That record embraces the judgment of the appellate court as well as the decree of the District Court; and it contains an express adjudication of the appellate court to that effect. The record of itself establishes, therefore, the invalidity of the decree. The adjudication of the appellate court constitutes the law of that case upon the points adjudged, and is binding upon the Circuit Court and every other court when brought before it for consideration. The Circuit Court possesses no revisory power over the decisions of the Supreme Court of the State, and any argument to show that that court mistook the law and misjudged the jurisdictional fact would have been out of place. There were no facts before the Circuit Court which were not before the Supreme Court of the State when its judgment was pronounced.

But the rule of law as stated by the Circuit Court is not universally true. It is subject to many exceptions and qualifications, and has no application to the case at bar.

It is undoubtedly true that a superior court of general jurisdiction, proceeding within the general scope of its powers, is presumed to act rightly. All intendments of law in such cases are in favor of its acts. It is presumed to have jurisdiction to give the judgments it renders until the contrary appears. And this presumption embraces jurisdic-

tion not only of the cause or subject-matter of the action in which the judgment is given, but of the parties also. The former will generally appear from the character of the judgment, and will be determined by the law creating the court or prescribing its general powers. The latter should regularly appear by evidence in the record of service of process upon the defendant or his appearance in the action. But when the former exists the latter will be presumed. This is familiar law, and is asserted by all the adjudged cases. The rule is different with respect to courts of special and limited authority; as to them there is no presumption of law in favor of their jurisdiction; that must affirmatively appear by sufficient evidence or proper averment in the record, or their judgments will be deemed void on their face.

But the presumptions, which the law implies in support of the judgments of superior courts of general jurisdiction, only arise with respect to jurisdictional facts concerning which the record is silent. Presumptions are only indulged to supply the absence of evidence or averments respecting the facts presumed. They have no place for consideration when the evidence is disclosed or the averment is made. When, therefore, the record states the evidence or makes an averment with reference to a jurisdictional fact, it will be understood to speak the truth on that point, and it will not be presumed that there was other or different evidence respecting the fact, or that the fact was otherwise than as averred. If, for example, it appears from the return of the officer or the proof of service contained in the record, that the summons was served at a particular place, and there is no averment of any other service, it will not be presumed that service was also made at another and different place; or if it appear in like manner that the service was made upon a person other than the defendant, it will not be presumed, in the silence of the record, that it was made upon the defendant also. Were not this so it would never be possible to attack collaterally the judgment of a superior court, although a want of jurisdiction might be apparent upon its face; the answer to the attack would always be

that, notwithstanding the evidence or the averment, the necessary facts to support the judgment are presumed.

The presumptions indulged in support of the judgments of superior courts of general jurisdiction are also limited to jurisdiction over persons within their territorial limits, persons who can be reached by their process, and also over proceedings which are in accordance with the course of the common law.

The tribunals of one State have no jurisdiction over the persons of other States unless found within their territorial limits; they cannot extend their process into other States, and any attempt of the kind would be treated in every other forum as an act of usurpation without any binding efficacy. "The authority of every judicial tribunal, and the obligation to obey it," says Burge, in his Commentaries, "are circumscribed by the limits of the territory in which it is established."* "No sovereignty," says Story, in his Conflict of Laws, "can extend its process beyond its own territorial limits, to subject either persons or property to its judicial decisions. Every exertion of authority of this sort beyond this limit is a mere nullity, and incapable of binding such persons or property in any other tribunals."† And in *Picquet* v. *Swan*,‡ the same learned justice says: "The courts of a State, however general may be their jurisdiction, are necessarily confined to the territorial limits of the State. Their process cannot be executed beyond those limits; and any attempt to act upon persons or things beyond them would be deemed a usurpation of foreign sovereignty, not justified or acknowledged by the law of nations. Even the Court of King's Bench, in England, though a court of general jurisdiction, never imagined that it could serve process in Scotland, Ireland, or the colonies, to compel an appearance, or justify a judgment against persons residing therein at the time of the commencement of the suit. This results from the general principle that a court created within

* Commentaries on Colonial and Foreign Law, p. 1044.

† Section 539.

‡ 5 Mason, 40.

and for a particular territory is bounded in the exercise of its powers by the limits of such territory. It matters not whether it be a kingdom, a state, a county, or a city, or other local district. If it be the former, it is necessarily bounded and limited by the sovereignty of the government itself, which cannot be extra-territorial; if the latter, then the judicial interpretation is that the sovereign has chosen to assign this special limit, short of his general authority."

In *Steel* v. *Smith*, Mr. Chief Justice Gibson, of the Supreme Court of Pennsylvania, after referring to the citations we have made from the treatises of Burge and Story, says: "Such is the familiar, reasonable, and just principle of the law of nations; and it is scarcely supposable that the framers of the Constitution designed to abrogate it between States which were to remain as independent of each other, for all but national purposes, as they were before the Revolution. Certainly it was not intended to legitimate an assumption of extra-territorial jurisdiction which would confound all distinctive principles of separate sovereignty."*

Whenever, therefore, it appears from the inspection of the record of a court of general jurisdiction that the defendant, against whom a personal judgment or decree is rendered, was, at the time of the alleged service, without the territorial limits of the court, and thus beyond the reach of its process, and that he never appeared in the action, the presumption of jurisdiction over his person ceases, and the burden of establishing the jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree. This is so obvious a principle, and its observance is so essential to the protection of parties without the territorial jurisdiction of a court, that we should not have felt disposed to dwell upon it at any length, had it not been impugned and denied by the Circuit Court. It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, and

* 7 Watts & Sergeant, 451.

has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered.

When, therefore, by legislation of a State constructive service of process by publication is substituted in place of personal citation, and the court upon such service is authorized to proceed against the person of an absent party, not a citizen of the State nor found within it, every principle of justice exacts a strict and literal compliance with the statutory provisions. And such has been the ruling, we believe, of the courts of every State in the Union. It has been so held by the Supreme Court of California in repeated instances. In *Jordan* v. *Giblin*,* decided in 1859, service of publication was attempted, and the court said that it had already held, "in proceedings of this character, where service is attempted in modes different from the course of the common law, that the statute must be strictly pursued to give jurisdiction. A contrary course would encourage fraud and lead to oppression." In *Ricketson* v. *Richardson*,† decided in 1864, the court, referring to the sections of the statute authorizing service by publication, said: "These sections are in derogation of the common law, and must be strictly pursued in order to give the court jurisdiction over the person of the defendant. A failure to comply with the rule there prescribed in any particular is fatal where it is not cured by an appearance." In *McMinn* v. *Whelan*,‡ decided in 1866, the plaintiff in ejectment traced his title from one Maume. The defendants endeavored to show that the title had passed to one of them under a previous judgment against Maume. This judgment was recovered against Maume and others, who were non-residents of the State, upon service of summons by publication. It appeared from the record that a supplemental complaint had been filed in the action, and that the summons published was issued upon

* 12 California, 100. † 26 Id. 149. ‡ 27 Id. 300.

the original complaint, and not after that had been superseded by the supplemental complaint. It was objected that the publication thus made was insufficient to give the court jurisdiction of the person of the absent defendants; the objection was answered by the position that the judgment could not be questioned collaterally for the reason that the jurisdiction of a court of general or superior jurisdiction would be presumed in the absence of evidence on the face of the record to the contrary. But the court held the objection well taken, and after referring to the case of *Peacock* v. *Bell*, in Saunders, said that that case "involved the question of jurisdiction as to the subject-matter of the action and not as to the person of the defendant, and it may be doubted if a case can be found which sanctions any intendment of jurisdiction over the person of the defendant when the same is to be acquired by a special statutory mode without personal service of process. If jurisdiction of the person of the defendant is to be acquired by publication of the summons in lieu of personal service, the mode prescribed must be strictly pursued."

But it is said that the court exercises the same functions and the same power whether the service be made upon the defendant personally or by publication, and that, therefore, the same presumption of jurisdiction should attend the judgment of the court in the one case as in the other. This reasoning would abolish the distinction in the presumptions of law when applied to the proceedings of a court of general jurisdiction, acting within the scope of its general powers, and when applied to its proceedings had under special statutory authority. And, indeed, it is contended that there is no substantial ground for any distinction in such cases. The distinction, nevertheless, has long been made by courts of the highest character, both in this country and in England, and we had supposed that its existence was not open to discussion. "However high the authority to whom a special statutory power is delegated," says Mr. Justice Coleridge, of the Queen's Bench, "we must take care that in the exercise of it the facts giving jurisdiction plainly appear, and

that the terms of the statute are complied with. This rule applies equally to an order of the Lord Chancellor as to any order of Petty Sessions."*

"A court of general jurisdiction," says the Supreme Court of New Hampshire, "may have special and summary powers, wholly derived from statutes, not exercised according to the course of the common law, and which do not belong to it as a court of general jurisdiction. In such cases, its decisions must be regarded and treated like those of courts of limited and special jurisdiction. The jurisdiction in such cases, both as to the subject-matter of the judgment, and as to the persons to be affected by it, must appear by the record; and everything will be presumed to be without the jurisdiction which does not distinctly appear to be within it."†

The qualification here made that the special powers conferred are not exercised according to the course of the common law is important. When the special powers conferred are brought into action according to the course of that law, that is, in the usual form of common-law and chancery proceedings, by regular process and personal service, where a personal judgment or decree is asked, or by seizure or attachment of the property where a judgment *in rem* is sought, the same presumption of jurisdiction will usually attend the judgments of the court as in cases falling within its general powers. Such is the purport of the language and decision of this court in *Harvey* v. *Tyler*.‡ But where the special powers conferred are exercised in a special manner, not according to the course of the common law, or where the general powers of the court are exercised over a class not within its ordinary jurisdiction upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court. The facts essential to the exercise of the special jurisdiction must appear in such cases upon the record.

* Christie *v.* Unwin, 3 Perry & Davison, 208.

† Morse *v.* Presby, 5 Foster, 302. ‡ 2 Wallace, 332.

The extent of the special jurisdiction and the conditions of its exercise over subjects or persons necessarily depend upon the terms in which the jurisdiction is granted, and not upon the rank of the court upon which it is conferred. Such jurisdiction is not, therefore, the less to be strictly pursued because the same court may possess over other subjects or other persons a more extended and general jurisdiction. Upon this subject the commentators on Smith's Leading Cases, after referring to numerous decisions holding that in such cases the record must show a compliance with the provisions of the statutes conferring the special jurisdiction, very justly observe that, "the inconveniences which may occasionally result from this course of decision are more than compensated by the lesson which it teaches, that from whatever source power may come it will fail of effect when unaccompanied by right."*

In the supplemental complaint filed in the action of *Gray* v. *Eaton* and others, and in the original complaint of *Eaton* v. *Palmer*, the absence of Franklina from the State and her residence in another State are alleged. The record in the two actions, and of course in the consolidated action, shows that she was thus beyond the reach of the process of the court. All presumption of jurisdiction over her person by the District Court, which otherwise might have been indulged, is thus repelled, and it remains for the defendant to show that by the means provided by statute such jurisdiction was obtained. The statute provides, in case of absent and non-resident defendants, for constructive service of process by publication. It requires an order of the court or judge before such publication can be made; it designates the facts which must exist to authorize the order, the manner in which such facts must be made to appear, the period for which publication must be had, and the mode in which the publication must be established. These provisions, as already stated, must be strictly pursued, for the statute is in derogation of the common law. And the order, which is

* Vol. 1, p. 1012.

the sole authority for the publication, and which by statute must prescribe the period and designate the paper in which the publication is to be made, should appear in the record with proof of compliance with its directions, unless its absence is supplied by proper averment. If there is any different course of decision in the State it could hardly be expected that it would be followed by a Federal court, so as to cut off the right of a citizen of another State from showing that the provisions of law, by which judgment has been obtained against him, have never been pursued.

The provisions mentioned were not strictly pursued with respect to the infant defendant. There were various omissions and irregularities in the proceedings taken which prevented the jurisdiction over her from ever attaching. It is unnecessary to specify them, as the effect of some of them has been the subject of judicial determination by the Supreme Court of the State. That court has adjudged that no sufficient service was ever made upon her, and that until such service no guardian *ad litem* could be appointed for her; and that adjudication is conclusive. It follows that the decree against her, and all proceedings founded upon such decree, so far as her rights are concerned, necessarily fall to the ground. Judgment without jurisdiction is unavailing for any purpose.

The decree being thus reversed, the title acquired by Page, the purchaser at the commissioner's sale, falls with it. He was one of the attorneys of the plaintiff Gray, and the law imputes to him knowledge of the defects in the proceedings, which were taken under his direction and that of his copartners, to obtain service upon the infant. The conveyance by him of an undivided half to his law partner, also one of the plaintiff's attorneys, was made after the decree of the District Court had been reversed for want of jurisdiction over the infant. The partner also took his interest with knowledge of this defect. The protection which the law gives to a purchaser at judicial sales is not extended in such cases to the attorney of the party, who is presumed to be cognizant of all the proceedings.

In many of the States it is the law that a purchaser at a judicial sale loses his title upon a reversal of the judgment or decree under which the sale was made, where such purchaser is a party to the judgment or decree. In *Reynolds* v. *Harris* it was held by the Supreme Court of California that, where a plaintiff bought property under a judgment, he must restore it to the defendant on a reversal of the judgment; the court observing, after citing several cases, that the current of authority, broken only by a case or two, went "directly to the point that a party obtaining through the judgment before reversal any advantage or benefit, must restore what he got to the other party, after the reversal."* The writer of this opinion endeavored to combat this doctrine in a case in the Circuit Court of the United States, where a purchase had been made under a decree in that court for the enforcement of a mechanic's lien. In that case the complainant was mentioned in the decree as a possible bidder, and provision was made for crediting his bid on the amount adjudged due to him. On a reversal of the decree the court sustained the sale, and endeavored in its opinion to show that on principle the same protection should extend to purchasers under judgments and decrees when parties as when strangers. The law, however, of the State does not appear, so far as we are enabled to discover from the decisions of its Supreme Court, to have been changed since the decision in *Reynolds* v. *Harris*. And according to that law the purchasers being the attorneys of the parties, and standing in the same position as the parties, could not maintain their title independent of any defects of jurisdiction in the proceedings.

The same doctrine prevails in Missouri. "The restitution," says the Supreme Court of that State, "to which the party is entitled upon the reversal of an erroneous judgment, is of everything which is still in the possession of his adversary. Where a man recovers land in a real action, and takes possession or acquires title to land or goods by sale under

* 14 California, 680.

execution, and the judgment is afterwards reversed, so far as he is concerned his title is at an end, and the land or goods must be restored in specie; not the value of them, but the things themselves. There is an exception where the sale is to a stranger *bonâ fide*, or where a third person has *bonâ fide* acquired some collateral right before the reversal."* The same doctrine is asserted in *McJilton* v. *Love*, by the Supreme Court of Illinois,† and is there stated to be well established by authority, and numerous cases in support of the position are cited. In New York the doctrine would seem to be settled in the same way.‡ As this case must go back for a new trial, this position can be more fully considered than it appears to have been by the court below.

The defendant in this case acquired her interest, one-half, by devise from the purchaser, Page; and the other half by conveyance from one of the attorneys years after the reversal of the decree.

It follows that the judgment must be REVERSED, AND THE CAUSE

REMANDED FOR A NEW TRIAL.

DAVIS, J., did not sit in the case, and took no part in its decision.

TIFFANY *v.* BOATMAN'S INSTITUTION.

1. Although a loan of money may be usurious and the contract to return it void, yet, in the absence of statutory enactment, it does not follow that the borrower, after he has once repaid the money, nor even that his assignee in bankruptcy, whose rights are in some respects greater than his own, can recover the principal and illegal interest paid. Equity, however, in its discretion may enable either to get back whatever money the borrower has paid in excess of lawful interest; and in the present suit it did enable an assignee in bankruptcy to do so; both in a case

* 41 Missouri, 416. † 13 Illinois, 486.

‡ Jackson *v.* Cadwell, 1 Cowen, 644.

where before his bankruptcy the money was lent directly to the bankrupt, and in a case where the money had been given to brokers, upon indorsed notes, which, the evidence made sufficiently plain, were accommodation notes, drawn to enable the bankrupt to raise money on them, and were understood by the lender of the money so to be.

2. A man really insolvent, but not having yet openly failed, and hoping to overcome his difficulties and to carry on his business, violates no provision of the Bankrupt Act by pledging his property for money lent; the money being lent at the time when the pledge is made, and the lender having no reason to suppose otherwise than that the purpose of the loan is to give effect to hopes, such as above described, of the party borrowing.

APPEAL from the Circuit Court for the District of Missouri; the case being thus:

There was living in St. Louis in 1869, and for many years previously, a person named Darby, originally, as it seemed, a member of the bar, but who afterwards entered into various sorts of business, including, as a chief one, that of an exchange broker and a so-called "banker." He had no capital worth speaking of, when he entered into them, nor any considerable cash means at any time. He was always scheming, and as respected ready money always more or less embarrassed. He was, however, regarded as a man of wonderful energy and capacity for business, and though "suspending" in seasons of fiscal embarrassment, would manage to get on his feet again when the monetary crisis would be passed, and so go on anew. In this way he managed to work along for many years, never at any time being broken up. In 1868 he found himself with large property and with large debts—these being due to a considerable number of creditors, not a few of them by deposit with him as a banker—and all the time needing ready money in order to keep up appearances and to save himself from open failure. Whether he was at this time, in fact, insolvent was a matter about which different people differed. For the purposes of this case, he was conceded by the court to have been so; though it seemed that he never so regarded himself.

There existed at the same time in St. Louis, and in the later part of Darby's career, a corporation called the Boat-

man's Savings Institution, a company authorized by its charter to lend money. The charter, however, forbade the institution to lend at more than 8 per cent. for any loan; but prescribed no penalty, nor declared what should otherwise follow as a consequence for lending at higher rates.

The general statutes of Missouri concerning interest, declares that no person shall receive more than 10 per cent.* The act proceeds:

"SECTION 5. If any action or suit shall hereafter be commenced upon any bond, note, mortgage, specialty, agreement, contract, promise or assurance whatever, which shall be made within this State, the defendant may in his answer show that a higher or greater rate of interest than 10 per cent. per annum was therein or thereby agreed for, or received or taken; and if the answer of the defendant to any such suit shall be sustained by the verdict of a jury, or the finding of the court, the court shall render judgment on such verdict or finding for the real sum of money or price of the commodity actually lent, advanced or sold, and interest on the same at the rate of 10 per centum per annum; upon which judgment the court shall cause an order to be made, setting apart the whole interest for the use of the county in which such suit may be brought, for the use of common schools; and the same, when collected, shall be paid over accordingly, and go to and form a part of the common school fund of such county; and the defendant may recover his costs."

With these provisions by way of penalty, the whole subject seemed to end; and if the debtor voluntarily paid the money borrowed no penalties were prescribed.

Among Darby's borrowings of money, were two with the Boatman's Institution.

The first was in this way. The county of St. Louis wishing to build a jail issued proposals for sale of its bonds, which for convenience were to be issued in sums of $1000 each. Darby took one hundred and fifty of them ($150,000), at rates considerably below par, and borrowed the money to pay the county from the National Bank of Missouri; pledg-

* General Statutes of Missouri, 1865, p. 401, chap. 89, § 4.

ing the bonds as security collateral to his notes for the sum borrowed. For some reason not specifically disclosed, Darby after a certain time wished to pay his debt to this bank. In this condition of things, one Hogeman, the cashier of the Boatman's Institution, offered, in behalf of the institution, to lend him, at 10 per cent. interest, $135,000 (with which sum he could withdraw the bonds then in pledge with the National bank), and to take the bonds as collateral security for a note which Darby should give; Darby to have full power to sell the bonds from time to time at his own price; the amount received to be credited on his note. This arrangement was completed, that is to say Darby gave his note for $135,000, at 10 per cent., to the institution, withdrew the bonds from the National Bank of Missouri, deposited them with the institution, sold them at such rates as he saw good—fair ones—and by which (throwing out of consideration the usurious rates that he paid for money) he rather gained than lost, and with the proceeds paid his note to the institution with the 10 per cent. interest.

Next, as to the other of the two transactions abovementioned; this other, however, being rather a series of transactions, six in number, than a single one.

As already said, Darby was always embarrassed for ready money; always borrowing, and always wanting to borrow. As a banker his creditors by deposit amounted to $170,000, while he seldom or never had more than about $5000 to meet their drafts. To meet these and other claims he was constantly raising money through street-brokers, especially through one named Stagg. Darby, generally speaking, would come to him for money, proposing to draw notes which should be indorsed by Messrs. Brotherton & Knox, gentlemen of known character and means, for the amount wanted. Stagg would then go to the Boatman's Institution, see the cashier, and learn whether the institution was disposed to lend the amount wanted. If the reply was in the affirmative, Darby would draw and sign a note, Messrs. Brotherton & Knox would indorse it, Stagg would take it and get the money, deduct his broker's commission, and

pass the balance to Darby. This sort of operation was carried on for a certain time, the Boatman's Institution at the end of it, that is to say in January, 1869, being the holder of six notes for $5000 each, which, with interest on them, at rates never less than 10 per cent., and sometimes near 18 per cent., were paid, by a sale of certain real property of Darby's, made in April, 1869, through the agency of Hogeman.*

Before the 17th of June, of the year just mentioned, Darby had become too notoriously embarrassed to go on longer with his business; and at a meeting of his creditors held on that day he was told by one of them that he must file his petition to be adjudged a bankrupt, or that he would be forced into bankruptcy. He did accordingly file such his petition, on the 1st of July, and on the 12th was adjudged a bankrupt, one Tiffany being appointed his trustee.

Hereupon Tiffany, as such trustee, filed a bill in the court below against the Boatman's Institution to recover from it, as having been lent at usurious rates and in violation of the Bankrupt Act, the moneys which it had lent to Darby, that is to say, the $135,000, for which he had given the one note, and the $30,000 for which he had given the six notes, and both and all of which loans, as already said, Darby had paid. The provisions of the Bankrupt Act relied on were certain ones in the thirty-fifth section, thus:

"And if any person, being insolvent or in contemplation of insolvency or bankruptcy, within six months before the filing of the petition . . . 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 . . . and that such payment, sale, assignment, transfer, or other conveyance is made with a view to prevent his property coming to his assignee in bankruptcy, or to prevent the same being distributed under 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."†

* This sale is described in Tiffany *v.* Lucas, 15 Wallace, 411.

† 14 Stat. at Large, 534. The word "payment," in the last paragraph, is left out in the statute as printed.

Statement of the case.

The bill did not ask for a decree for the *excess* of interest reserved and taken, over lawful rates, but asked for all the money lent to Darby and repaid by him. The grounds on which it proceeded were apparently these:

I. That at the time of the making of all these notes and of the payments on and of them, Darby was insolvent, and that both he and the Boatman's Institution had cause to know, and did know, that fact; that the payments were thus made with an intent to give the defendant a preference over other creditors, and in violation of the provisions of the Bankrupt Act, and were received with knowledge that such preference was intended and given; and finally, that such violation and fraud was contemplated and accomplished.

II. That the general statute of Missouri declaring the effects of usury and diverting the interest from the lender but saving the principal to him, applied only to "persons," that is to say, to natural persons, and did not include corporations; that therefore loans by corporations at rates forbidden by law—usurious loans—stood upon general principles; and being illegal were wholly void; that applying these principles—

1st. *To the case of the* $135,000, *evidenced by the one note;* that the loan being illegal and not anything which the law would regard as a loan, the note given as evidence of it was void, and the attempted transfer of jail-bonds as security no valid transfer; that therefore there was in law no security held by the Boatman's Institution for the note of $135,000; that accordingly any payments made to the Boatman's Institution stood upon the same ground as any other payments made by an insolvent debtor to an unsecured creditor.

2d. *To the case of the* $30,000, *evidenced by the six notes;* that the money had undoubtedly been lent to Darby, and was known by the Boatman's Institution (Hogeman's, its cashier's, knowledge being *its* knowledge) to have been so; that the loan being at above 8 per cent. it was void, and the payments, transfers, or gifts of money without consideration.

III. That independently of these general principles, the matter of the $135,000 was specially open to censure; that

the manner in which the subject of the jail-bonds, given for the purpose of securing the $135,000, had been arranged by Darby and the company (Darby taking the bonds from the National Bank of Missouri, where he had them on just the same sort of loan as he was about to put them with the Boatman's Institution, except apparently that the bank would not let him appear as owner of them and sell them, and being allowed to put them in the Boatman's Institution on pledge, and yet to manage as his own and sell them as if he were absolute owner), gave to him a fictitious credit and enabled him to defraud his creditors. The special form of the transaction thus involved the Boatman's Institution in complicity with his fraudulent intent.

That though equity might not enable Darby, he being a party to the unlawful dealings, to recover what he had once voluntarily paid, it would enable his assignee under the Bankrupt Act, who was acting for creditors, and was therefore not to be affected by Darby's complicity in the unlawful arrangements, when its effect was to injure *them*.

The bill was resisted on various grounds, including the one that the general statute of Missouri about usury did apply to corporations, a position for which *The Bank of Louisville* v. *Young** was cited, as also a provision in the General Statutes "on the construction of statutes," in which it was thought to be declared that under the term "person" corporations were included;† and that for the rest, equity would not enable the assignee of a bankrupt to pay even the bankrupt's just debts, out of other men's money, because the bankrupt had borrowed money at illegal rates and repaid it, and that the most it would do would be to put him where he would have been had he paid no more than lawful interest; that is to say, would enable him to recover the surplus.

The court below thought that the first transaction—that of the $135,000—it being a transaction directly with Darby—

* 37 Missouri, 406. † General Statutes of 1865, p. 83, chapter 9, § 4.

was unlawful so far as concerned any interest above 8 per cent., the lawful rate, but that it was lawful for the residue. While, as to the other transaction or series of transactions—the transaction or transactions about the six notes of $5000 each, $30,000 in all—assuming, as the court did, that none of these loans were to Darby directly, but were purchases by the Boatman's Institution in the market of negotiable paper, made by Darby to third parties, by them indorsed, and which the institution might naturally believe that *such third parties had thrown on the market for their own purposes*—it held that there was *nothing* unlawful—not even the excess of interest—in *them*.

From a decree to this effect and from a ruling which had excluded certain evidence tending to prove Darby's insolvency at the time of the transactions, the assignee took this appeal.

Messrs. E. R. Hoar and S. Knox, for the assignee in bankruptcy, appellant; Mr. T. T. Gantt, contra.

Mr. Justice DAVIS delivered the opinion of the court.

The general statute of Missouri concerning usury allows an individual to receive ten per cent. per annum interest for the loan of money; but, if more be taken and suit is brought to enforce the contract, and the plea of usury be interposed, the whole interest is forfeited to the proper county for the use of schools. The debtor is not released from his obligation to pay, but the interest is diverted from the parties and appropriated for school purposes. If, however, the borrower suffers judgment to go against him, without pleading usury, or if, without suit, he pays the usurious interest, he cannot, either at law or in equity, maintain an action for its repayment. This was settled in *Ransom* v. *Hays*,* and affirmed in *Rutherford* v. *Williams*,† and these decisions would be conclusive of this controversy, unless it is affected by the Bankrupt law, if the legislature intended the general provisions

* 39 Missouri, 448.

† 42 Id. 35.

of this act to apply to loans by artificial as well as natural persons, although the former might be restricted to a less rate of interest than the latter. It is contended by the defendant that this act was meant to apply to corporations, and that if a bank, discounting a note in the course of business, commits usury, it is subject to precisely the same consequences with an individual. On the other hand, the complainant insists that the legislature did not intend in this matter to place corporations on the same footing with natural persons, and cites in support of this position *The Bank of Louisville* v. *Young*.* But the facts of that case did not involve the construction of a contract made by a corporation created by an act of the legislature of Missouri. The point decided there was that a note given to secure a loan made in foreign bank notes by a foreign corporation doing business by an agent in St. Louis, contrary to the provisions of an act to prevent illegal banking, was void.

We have been referred to no case in the courts of Missouri, nor are we aware of any, in which the question has been directly presented whether the general law relating to usury applies to and has the same effect upon a contract made in violation of its charter by a bank as upon a contract made by an individual. The question is one of great importance to the business interests of that State, and may be far-reaching in its consequences, and as it is not necessary to decide it in order to dispose of this case, in accordance with the principle on which the Circuit Court placed its decree we prefer to leave its decision to the State tribunals. Assuming, then, that this defendant is not within the purview of the general usury statute of the State, what are the consequences that must attach to it for taking excessive interest from Darby? The bill proceeds on the idea that the provision of the charter being violated all the loans to Darby were *ultra vires* and void, and as they were made to him within four and six months of his adjudication as a bankrupt, with the knowledge of the defendant during the whole

* 37 Missouri, 406.

course of its dealing with him that he was insolvent, the complainant has, in his character of trustee, the right to recover for the use of his trust all the sums of money paid to the defendant by Darby, because paid in fraud of the Bankrupt Act.

The defendant is by its charter authorized to lend money on interest, but is forbidden to exact more than 8 per cent. for the loan. No penalty is prescribed for transgressing the law, nor does the charter declare what effect shall be given to the usurious contract. This effect must, therefore, be determined by the general rules of law. The modern decisions in this country are not uniform on the question whether, if the bank takes more than the rate prescribed, the contract shall be avoided or not on these general rules; nor is this a matter of surprise if we consider the growing inclination to construe statutes against usury so as not to destroy the contract. It is, however, unnecessary to review these cases, or the earlier ones in England and this country, which uniformly hold that the contract is avoided, because this court has in the case of *The Bank of the United States* v. *Owens*,* decided the question. The bank in that case brought suit upon a promissory note that was discounted at a higher rate of interest than 6 per cent., which was the limit allowed by its charter upon its loans or discounts. The charter, like that of the Boatman's Institution, did not declare void any contract transcending the permitted limits, nor affix any penalty for the violation of the law. It was contended in that case, as it has been in this, that a mere prohibition to take more than a given per cent. does not avoid a contract reserving a greater rate, and that when a contract is avoided, it is always in consequence of an express provision of law to that effect. But the court held otherwise, and decided that such contracts are void in law upon general principles; "that there can be no civil right where there is no legal remedy, and there can be no legal remedy for that which is illegal." Chief Justice Taney, in the Maryland circuit, as

* 2 Peters, 527.

late as 1854, in a similar case, held similar views, and supported them by the decision in this case.* It must, therefore, be accepted as the doctrine of this court, that a contract to do an act forbidden by law is void, and cannot be enforced in a court of justice.

But it does not follow in cases of usury, if the contract be executed, that a court of chancery, on application of the debtor, will assist him to recover back both principal and interest. To do this would be to aid one party to an illegal transaction and to deny redress to the other. Courts of equity have a discretion on this subject, and have prescribed the terms on which their powers can be brought into activity. They will give no relief to the borrower if the contract be executory, except on the condition that he pay to the lender the money lent with legal interest. Nor, if the contract be executed, will they enable him to recover any more than the excess he has paid over the legal interest.† In recognition of this doctrine the court below rendered a decree for the excess of interest over 8 per cent. per annum exacted of Darby on the note for $135,000, and dismissed the bill as to all other claims.

The six accommodation notes, which the defendant alleges were purchased from note brokers, were really taken on loans to Darby, and the illegal interest received above 8 per cent. on them should, on the principle of that decree, be refunded, as much as that upon the larger note. It is true that usury is only predicable of an actual loan of money, and equally true that a negotiable promissory note, if a real transaction between the parties to it, can be sold in the market like any other commodity. The real test of the salability of such paper is whether the payee could sue the maker upon it when due. He could do this if it was a valid contract when made, otherwise not. Mere accommodation paper can have no effective or legal existence until it is transferred to a *bonâ fide* holder. It follows, then, that the

* Dill *v.* Ellicott, Taney's Circuit Court Decisions, 233.

† Story's Equity Jurisprudence, 1 vol., 10th edition by Redfield, §§ 300, 301, 302.

discounting by a bank at a higher rate of interest than the law allows of paper of this character, made and given to the holder for the purpose of raising money upon it, in its origin only a nominal contract, on which no action could be maintained by any of the parties to it if it had not been discounted, is usurious, and not defensible as a purchase. The point was decided in New York at an early day,* and this decision recognized and approved by this court in *Nichols* v. *Fearson*,† and the general current of decision is in the same direction.‡

There are cases which hold that the purchaser of such paper is protected, if he took it in good faith of the holder, without knowledge of its origin, and in the belief that it was created in the regular course of business.§ Whether this limitation of the rule be correct or not, it is not important to inquire, as the decision of the question under consideration does not rest upon it.

The six notes which are the basis of the transaction complained of, were executed by Darby, solely for the purpose of raising money upon them, indorsed by Brotherton & Knox for his accommodation, and delivered by him to Stagg and other street brokers to be negotiated. This negotiation was effected with the Boatman's Institution, and it is perfectly manifest that the cashier, in purchasing the paper, did not suppose he was advancing the money for the benefit of the brokers who held them, or of Brotherton & Knox, who indorsed them. They were doubtless purchased because the security was deemed sufficient, but it is impossible to conceive that the cashier did not know the paper to be of that class called accommodation, as it is conceded that Brotherton & Knox were gentlemen of large pecuniary ability, and had no occasion to go upon the street to get paper held

* Munn *v.* Commission Co., 15 Johnson, 55. † 7 Peters, 103.

‡ Munn *v.* Commission Co., 15 Johnson, 55; Powell *v.* Waters, 17 Id. 176; Wheaton *v.* Hillard, 20 Id. 289; Powell *v.* Waters, 8 Cowen, 669; Corcoran & Riggs *v.* Powers, 6 Ohio State, 37; 3 Parsons on Contracts, 6th ed., p. 144, and cases cited in note S.

§ 3 Parsons on Contracts, p. 145, and cases cited in the note on that page.

by them *bonâ fide*, against Darby or any one else, discounted. Indeed, Stagg says the notes were negotiated for Darby s benefit, and explains in some instances how it was done. Darby would apply to him for money on his paper, and he would go to the Boatman's Institution to see if the cashier would take it, and if the reply was in the affirmative, the paper would be made, taken to the bank, and the money obtained on it. Can any rational person suppose, in the absence of any direct evidence, that the cashier in dealing with Stagg thought he was dealing with the owner of the notes? The presumption is that street brokers act for others, not themselves, and that the cashier was well acquainted with this course of business. If so, he knew, or ought to have known, that Darby wanted the money, and that the paper was made to enable him to get it, and for no other purpose. This being the case, the transaction can be viewed in no other light than as a loan of money directly to Darby, and as he paid more than 8 per cent. for its use, the Circuit Court erred in not ordering the excess to be refunded.

The remaining question to be considered is, whether, in this case, the rights of the trustee are greater than those of Darby. It is certainly true, in very many cases, he can do what the bankrupt could not, because he represents the creditors of the insolvent. If, for instance, the bankrupt should create a trust which was designed to conceal his property from creditors, although equity would not lend its aid to him to enforce the trust, it would to his assignee for the benefit of creditors.* And many other examples might be cited in illustration of the rule, but it would be a waste of labor to do so. The point is whether, under the facts of this case, the bill will lie to recover back both principal and interest paid on the loans by Darby, when, as we have seen, if he had not been declared a bankrupt, and had filed it in his own behalf he could have only recovered the excess of interest paid beyond the charter rate.

It is very clear if the loans in controversy had been made

* Carr *v.* Hilton, 1 Curtis, 235.

at legal rates, and were not fraudulent in fact, they could not be impeached. There is nothing in the Bankrupt law which interdicts the lending of money to a man in Darby's condition, if the purpose be honest and the object not fraudulent. And it makes no difference that the lender had good reason to believe the borrower to be insolvent if the loan was made in good faith, without any intention to defeat the provisions of the Bankrupt Act. It is not difficult to see that in a season of pressure the power to raise ready money may be of immense value to a man in embarrassed circumstances. With it he might be saved from bankruptcy, and without it financial ruin would be inevitable. If the struggle to continue his business be an honest one, and not for the fraudulent purpose of diminishing his assets, it is not only not forbidden, but is commendable, for every one is interested that his business should be preserved. In the nature of things he cannot borrow money without giving security for its repayment, and this security is usually in the shape of collaterals. Neither the terms nor policy of the Bankrupt Act are violated if these collaterals be taken *at the time* the debt is incurred. His estate is not impaired or diminished in consequence, as he gets a present equivalent for the securities he pledges for the repayment of the money borrowed. Nor in doing this does he prefer one creditor over another, which it is one of the great objects of the Bankrupt law to prevent. The preference at which this law is directed can only arise in case of an antecedent debt. To secure such a debt would be a fraud on the act, as it would work an unequal distribution of the bankrupt's property, and, therefore, the debtor and creditor are alike prohibited from giving or receiving any security whatever for a debt already incurred if the creditor had good reason to believe the debtor to be insolvent. But the giving securities *when* the debt is created is not within the law, and if the transaction be free from fraud in fact, the party who loans the money can retain them until the debt is paid. In the administration of the bankrupt law in England this subject has frequently come before the courts, who have uniformly held that advances

may be made in good faith to a debtor to carry on his business, no matter what his condition may be, and that the party making these advances can lawfully take securities at the time for their repayment. And the decisions in this country are to the same effect.* Testing this case by this rule, there is no difficulty about it on the theory that the loans were not made in excess of lawful interest.

There is nothing to invalidate the jail-bond transaction. If it was unwise in Darby to purchase these bonds the defendant did not advise it, and is not, therefore, chargeable with the fictitious credit which, it is alleged, he obtained by reason of the purchase. So far as the evidence shows the purchase was accomplished before the defendant knew of it. It is a fair inference of fact that the National Bank of Missouri was tired of carrying the loan which Darby made of it in order to buy the bonds, and that the effect of the loan from this defendant was to prevent their sacrifice. At any rate the creditors of Darby were not harmed by the transaction, for the bonds when sold realized more than they cost; nor was any wrong intended by Darby. The money was not borrowed to conceal it from creditors, but to take valuable securities out of pledge. This Darby had the right to do, and the defendant in helping him to do it was guilty of no fraud on creditors, nor was any contemplated. On the contrary, so far as we can see, the creditors were benefited by the substitution of the Boatman's Institution for the National Bank of Missouri. At all events Darby's estate was in no wise impaired by the transaction. The securities were valid in the hands of the defendant, and Darby could lawfully apply the proceeds arising from their sale to repay the advances made by it.

If the six accommodation notes had been discounted at

* Hilliard on Bankruptcy, ch. 10, p. 333, § 10; Hutton v. Cruttwell, 1 Ellis & Blackburn, 15; Bittlestone v. Cooke, 6 Id. 296; Harris v. Rickett, 4 Huristone & Norman, 1; Bell v. Simpson, 2 Id. 410; Lee v. Hart, 34 English Law and Equity, 569; Hunt v. Mortimer, 10 Barnewall & Cresswell, 44; Ex parte Shouse, Crabbe, 482; Wadsworth v. Tyler, 2 Bankrupt Register, 101.

legal rates the loan would have been equally unimpeachable. Conceding that the bank had good reason to believe Darby to be insolvent, the proceeding, as we have seen, was not necessarily fraudulent as a matter of law, and there is nothing in the evidence to show that it was fraudulent in fact. The loans were not made to defeat creditors or delay them, or to conceal property from them, nor was such their effect. The paper on which they were based was taken as other paper with good indorsers is taken in the regular course of business. There is no evidence that the money was used improperly, or that the bank supposed it would be. Darby, doubtless, raised the money hoping to be able to go on with his business; not to defeat his creditors, but to pay them.

If it were clear at the time to his mind that he could overcome his difficulties (as we think it was), notwithstanding the real state of his affairs did not justify the belief, his conduct was not in fact fraudulent, nor is it condemned by any provision of the Bankrupt law.

Does the fact, then, that the interest reserved on the notes in controversy exceeded the charter rate, change these transactions, which were lawful if not tainted with usury, so that the trustee can recover back the whole sum; when, as we have seen, Darby, if suing personally, could only recover the excess? We think not. The trustee in this matter has no larger interest than the bankrupt. The estate of Darby is diminished, by reason of his dealings with this defendant, to no greater extent than the usurious interest which he has paid. This the trustee should obtain as proper assets to be administered, but to allow him to get what he asks, would be to transfer to the creditors of Darby, a sum of money exceeding $150,000, which he never owned, by way of punishment of the bank for taking excessive interest. A court of equity does not deal with contracts affected with usury in this way. The relief it gives is always based on the idea that the money borrowed with legal interest shall be paid.*

We have not considered the point raised about the exclu-

* 1 Story's Equity, §§ 301–302.

sion of evidence, because, at the most, the evidence, if admitted, would only have been cumulative on the subject of Darby's insolvency and the defendant's knowledge; and we have treated the case on the theory that the officers of the institution knew, when they made the loans and received payment of them, that Darby was insolvent.

The case will have to go back for the purpose of enabling the Circuit Court to ascertain in some proper way the excess of interest over the charter rate paid on the six accommodation notes, and to enlarge the decree so as to cover that sum. In all other respects the disposition of this case by the Circuit Court was correct.

DECREE REVERSED, and the cause remanded with directions to proceed

IN CONFORMITY WITH THIS OPINION.

TRASK *v.* MAGUIRE.

A railroad company exempted by the legislature of a State from taxation accepted bonds for large sums of money from the State by way of loan, the statute which authorized the transaction declaring that the acceptance by the company of the bonds should operate as "a mortgage of the *road* of the company and every part and section thereof, and its *appurtenances*;" and that if the company did not provide for the payment of the bonds it should be lawful for the governor to sell "their road and its *appurtenances*" at auction to the highest bidder, or to buy in the same . . . subject to such disposition, in respect to *such road* or its proceeds, as the legislature might thereafter direct.

Subsequently to this the State made for itself a new constitution, provisions of which were in these words:

"No property, real or personal, shall be exempt from taxation, except such as may be used exclusively for public schools and such as may belong to the United States, to this State, to counties, or to municipal corporations within this State.

"The General Assembly shall not pass special laws . . . exempting any property of any named person or corporation from taxation."

At the same time it adopted in a separate form "An ordinance for the payment of State and railroad indebtedness;" which was to "have full force and effect as a part of the constitution," which ordinance, after

referring to the particular railroad company now under consideration and then in default, and to some other railroad companies, ordained that "the General Assembly shall provide by law for the sale of the railroad and other property, and the *franchises* of the company that shall be in default under the lien reserved to the State." And ordained further that "whenever the State shall become the purchaser of any railroad or other property, or the *franchises sold as hereinbefore provided for*, the General Assembly *shall provide by law in what manner the same shall be sold.*" It added that no sale should be made "without reserving a lien upon all the property and franchises thus sold."

Subsequently to this the governor took the opinion of the judges of the Supreme Court of his State (as its constitution authorized him to do) upon the meaning of parts of this ordinance, but not specially upon the relations of any of them to the provision already quoted of the constitution; and the judges returned for answer, among other things, that no sale could be made by the State without reserving a lien, but that "the legislature was left unrestricted further as to the time, *terms, and conditions* of sale."

The legislature after this passed a law to foreclose the State lien; the law enacting that if the State should buy the road in and afterwards sell it the persons purchasing should have all the rights, franchises, privileges, and immunities which were enjoyed by the companies for whose default the road was sold. The road was sold, the State purchased it in, and afterwards sold it to certain persons, the vendees of whom organized themselves, as the laws of the State allowed them to do, into a new corporation. A collector of State and county taxes having sought to enforce the payment of State and county taxes from this new corporation, which preserved the name of the old one, a stockholder in the new one filed a bill to enjoin him. *Held*—

1st. That when the State became the purchaser of the railroad and its appurtenances, and held them, the immunity from taxation previously granted ceased of necessity, the property belonging now to the State.

2d. That the ordinance did not mean to say that the legislature might provide for the sale in any manner which the new constitution forbade.

3d. That the new constitution forbade the renewal of an exemption from taxation as much as it did the creation of one in an original form.

APPEAL from the Circuit Court for the District of Missouri; in which court Trask filed a bill against Maguire, collector of State and county taxes at St. Louis, to restrain him from collecting taxes upon the property of the St. Louis and Iron Mountain Railroad Company, a corporation organized in the State of Missouri, July 26th, 1867, and to have the property of the said company decreed exempt from liability to such taxes.

Statement of the case.

The case was this:

A general corporation law of Missouri, in force in 1845, thus ordained:*

"The charter of every corporation that shall hereafter be granted by the legislature shall be subject to alteration, suspension, and repeal, at the discretion of the legislature."

This provision of general law being in force, the legislature of Missouri, on the 3d of March, 1851, passed "An act to incorporate the St. Louis and Iron Mountain Railroad Company." The capital stock of the company was $6,000,000, and it was enacted that—

"The *stock of said company* shall be exempt from all State and county taxes."

On the 17th of February, 1853, it was enacted that the railroad abovementioned as having been incorporated should be exempted from the provisions of the general corporation law already quoted. The statute further enacted:

"All the engines, cars, wagons, machines and other property belonging to said company, shall be deemed a part of the capital stock of the company, and shall be vested in the respective *shareholders* of the company forever, *according to their respective shares*, and transferable by them in the transfer of stock, as personal property."

Subsequently to this, and to aid it in making the road, the State of Missouri lent to the company (in the shape of bonds, the principal and interest of which the company agreed to pay) a large sum of money. The act authorizing the transaction enacted that none of the bonds should be delivered to the company until it filed in the office of the secretary of state certificates of acceptance of them, executed under the corporate seal, &c. The act then proceeded:

"SECTION 4. Each certificate of acceptance so executed and filed as aforesaid, shall be recorded in the said office of the secretary of state, and shall thereupon become and be, to all intents

* Revised Statutes of Missouri, 1845, p. 232.

and purposes, *a mortgage of the road of the company* executing and filing their acceptance, as aforesaid, *and every part and section thereof, and its appurtenances*, to the people of this State, for securing the payment of the principal and interest of the sums of money for which such bonds shall from time to time be issued and accepted.

"SECTION 11. In case the said companies, or either of them, shall make default in the payment of either interest or principal of the said bonds . . . it shall be lawful for the governor to sell their *road and its appurtenances*, by auction to the highest bidder, or to buy in the same at such sale for the use and benefit of the State, subject to such disposition in respect to such *road* or its proceeds as the legislature may thereafter direct."

On the 4th of July, 1865, the State of Missouri adopted a new constitution of government. It contained the following provisions:

"No property, real or personal, shall be exempt from taxation, except such as may be used exclusively for public schools, and such as may belong to the United States, to this State, to counties, or to municipal corporations within the State.

"The General Assembly shall not pass any special laws . . . exempting the property of any named person or corporation from taxation."

At the same time that it adopted this new constitution it adopted, in the separate form of AN ORDINANCE, entitled "An ordinance for the payment of State and railroad indebtedness," certain provisions which were to have "full force and effect as a part of the constitution of the State."

The ordinance was thus:

"SECTION 1. There shall be levied and collected from the Pacific Railroad, the North Missouri Railroad Company, and the *St. Louis and Iron Mountain Railroad Company*, an annual tax of 10 per centum of all their gross receipts for the transportation of freight and passengers . . . from the 1st of October, 1866, to the 1st of October, 1868, and 15 per centum thereafter; which tax shall be appropriated by the General Assembly to the payment of the principal and interest now due, or hereafter to become due, upon the bonds of the State, and the bonds guaranteed by the State, issued to the aforesaid railroad companies.

Statement of the case.

"SECTION 3. The tax in this ordinance specified shall be collected from each company hereinbefore named only for the payment of the principal and interest on the bonds, for the payment of which such company shall be liable; and whenever such bonds and interest shall have been fully paid, no further tax shall be collected from such company.

"SECTION 4. Should either of said companies refuse or neglect to pay said tax as herein required, and the interest or principal of any of said bonds, or any part thereof, remain due and unpaid, *the General Assembly shall provide by law* for the sale of the railroad and other property, *and the franchises of the company* that shall be thus in default, *under the lien reserved to the State*, and shall appropriate the proceeds of such sale to the payment of the amount remaining due and unpaid from said company.

"SECTION 5. Whenever the State shall become the purchaser of any railroad or other property, *or the franchises* sold as hereinbefore provided for, *the General Assembly shall provide by law in what manner the same shall be sold*, for the payment of the indebtedness of the railroad company in default; but no railroad or other property, or *franchises* purchased by the State, shall be restored to any such company until it shall have first paid . . . all interest due from said company; and no sale or other disposition of any such railroad or other property, *or their franchises*, shall be made without reserving a lien upon all the property and franchises thus sold or disposed of, for all sums remaining unpaid; and all payments therefor shall be made in money or in bonds or other obligations of this State."

On the 1st of November, 1865—soon after the adoption of the new constitution and of this ordinance—the General Assembly met, and bills were introduced providing for the sale of several railroads, including the St. Louis and Iron Mountain, then in default on its obligations. Pending these bills, questions as to the effect of the ordinance arose in the mind of the governor, and on the 27th of the same month of November he propounded to the judges of the Supreme Court, as it was his right to do under the constitution of Missouri, certain interrogatories as to the operation of the ordinance, and among the rest one as follows:

"If you are of opinion that the sale of the railroads may be

ordered before such refusal or neglect, I request you to say whether such sale can be made 'without reserving a lien upon all the property and franchises thus sold for all sums remaining unpaid,' as provided by section five of the ordinance. In other words: Does this clause in the ordinance constitute a condition of *all* sales of railroads ordered by the State, or does it refer only to sales made, under the ordinance, for refusal or neglect to pay the tax?"*

To these questions the judges replied. In the course of their reply they say that one of the things provided for by the ordinance is a tax to pay the debts of the railroad companies to the State, and another thing provided for is, "in what manner railroads purchased by the State under her lien shall be sold again;" that "the fifth section relates to all sales of railroads under liens reserved to the State," whether sold for the non-payment of the tax or for the non-payment of the mortgage-debt. "The fifth section," say the judges, "provides further that no sale or other disposition of any such railroad or other property, *or their franchises*, shall be made by the State without reserving a lien upon the property sold for all sums remaining unpaid—that is to say by the purchaser, and the purchaser is required to make all payments therefor in money, or in bonds, or other obligations of this State; but the legislature is left *unrestricted* further as to the time, *terms, and conditions* of sale."

After this, that is to say, on the 16th of February, 1866, the legislature passed an act "to foreclose the State lien and to secure the early completion of the road."

By the act it was made the duty of the governor to advertise for sale the different roads in default, "their appurtenances, rolling stock, and property of every description, *and all rights and franchises.*" A board of commissioners was to attend the sale, and on a contingency named purchase for the State. The commissioners, in case the State should purchase, were to give notice of their authority to sell, and to invite proposals to purchase. The governor, on a sale

* Advisory Constitutional Opinions, 37 Missouri, 129.

being made by the commissioners, was to make a deed to the purchaser, which, it was provided, should have "the effect to convey, transfer, and make over to the purchaser said road and *all of the franchises*, privileges and rights, title and interests appertaining to the road." And the act further provided, that the purchaser should acquire by his purchase "all the rights, franchises, privileges, and *immunities* which were had and enjoyed by" the original corporation "under the charter and the laws amendatory thereof."

One month after the passage of the act just quoted, and pending proceedings thereunder for the sale of the road, another act was passed, approved March 20th, 1866, entitled, "An act authorizing the incorporation of the purchaser or purchasers of any railroad, or of any part, section, or branch thereof, which has heretofore or may hereafter become forfeited to and sold by the State." That act enacted thus:

"SECTION 4. Each corporation provided under this act shall have the same power, franchises, rights, and privileges, and be subject to the same liabilities and restrictions as the corporation to which it shall become the successor may have had by its original charter, and the amendments thereto, into and over the property and franchises forfeited and sold as aforesaid."

At the sale, which the governor advertised, the State bought the railroad and its appurtenances in: and the commissioners sold it to three persons, who afterwards sold it to one Allen. Allen, availing himself of the privileges of the last above-quoted act, organized himself and certain other persons, including Trask, already named as the complainant below, into a new corporation having the name of the old one.

Hereupon the defendant, Maguire, a collector, as already said, of State and county taxes in Missouri, having sought to levy certain State and county taxes on this new corporation, Trask filed a bill in the court below to enjoin him, and that court dismissed the bill. Trask now appealed from that decree.

Messrs. B. R. Curtis and Drydens, for the appellant:

That the property of the original corporation was exempt from taxation is undeniable. It is nearly or quite as clear that if the purchaser at the sale which was made had been a private person, or a corporation—any purchaser other than the State—such purchaser would have held what he bought, equally exempt. The lien of the mortgage was "on the road of the company, and every part and section thereof, and its appurtenances." That by the word appurtenances it was meant at the time that all rights, franchises, privileges, and immunities should pass under the lien is hardly questionable. In any but a purely technical sense—the sense in which the word is used in a deed—appurtenances would certainly include them. They would certainly do so alike in the popular and in the legislative sense, and these are the only important senses to be considered here; for the transaction was between managers of a railroad and a body of legislators. The State expected to get and the road meant to give as a security all that it had. Why retain an immunity from taxation when "the road and every part and section thereof, and its appurtenances," were put in mortgage and liable to be gone? Of what use would the immunity be when there was no property to which it could apply? Further than this, there would be ground to argue that in a stricter sense the word appurtenances would include the immunity.*

The only difficulty in the case is that the *State* has purchased; that becoming owner of the road, she held it, of necessity and independently of any contract with the mortgagors, free from liability to taxation. And then, the further difficulty, that before she sold, the provisions of the new constitution intervened, and prevented her granting, as she undeniably meant to do, free from her own ability to tax.

The difficulty vanishes in the face of the "ordinance," which has "the same force and effect" as the constitution.

* Pickering *v.* Steples, 5 Sergeant and Rawle, 107; Bouvier's Law Dictionary, title "Appurtenances."

Argument against the tax.

1. The constitution and the ordinance being parts and parcels of one law ought not to be construed separately, but in the construction of the one the other ought to be taken into consideration.

Inasmuch as the ordinance, by its plain words, intended to pass to the purchaser all the franchises of the railroad companies named in it; and as one of the franchises of at least one of the companies was exemption of its property from taxation, the ordinance was of necessity an exception, and intended to be an exception to the general rule established by the constitution, subjecting all property to taxation. There is room for both parts of the law to operate; the rule and the exception each in its place. And the law should be so construed as that both may stand and have effect.

2. The rule and the exception are not inharmonious in their general objects. The primary object of the rule is *revenue*. If revenue was not the primary object of the exception it was at least a prominent one, as a recurrence to the situation of the State and the history of the times will show. At the time of the adoption of this constitution and ordinance, it is matter of common knowledge that the State was staggering under the burden of an enormous debt, with resources wasted by a devastating war. In such an exigency what measure would so likely add to the wealth of the people and to the resources of the State as the extension of her railroads, then but just begun, into the mineral and agricultural regions of the State, lying as yet undeveloped? It was in this view, and in a large degree as a measure of finance, that the convention resolved upon the project of selling these roads and extending them to their ultimate destinations. But in order to the success of the project, privileges and franchises had to be offered to induce the embarkation of capital apparently, but not really, at the expense of the public revenue.

3. Upon a fair construction of the ordinance, power was given to the legislature to grant to the purchasers of the property of the defaulting corporations the exemption insisted upon by the complainant. The fourth section of the

ordinance relates to a period of time prior to the foreclosure, while yet the title to the property remains with the mortgagor, and contemplates a then future sale in foreclosure at which the State might become the purchaser. The fifth section looks to a period after foreclosure and presupposes the purchase of the mortgaged property by the State at the foreclosure sale. Both sections direct that provision be made by law for sales. What is it that the fourth section requires to be sold? "The railroad and other property, and *the franchises.*" Not one franchise, merely, but the plural; franchises, *all* of the franchises of the company. What by the fifth section is to be sold? The answer is, the *same railroad*, the *same other property*, the *same franchises* "as hereinbefore provided for" in the fourth section. All, without exception or diminution, that the State acquired at the sale under the fourth section was to be sold by it to its own vendee under the fifth section; the vendee of the State was to take every right that the State acquired at the sale for foreclosure. The State acquired at the foreclosure sale every right that the mortgagor had. If the mortgagor had the right to hold its property exempt from taxation, that right, by the provisions of the ordinance, would pass by the sale under the mortgage to the State and then from the State to its vendee. If it be objected that the franchises of the St. Louis and Iron Mountain Railroad Company did not, for want of apt words, pass by the mortgage, and that therefore the franchises of the company did not pass to the State at the foreclosure sale; we reply: first, as we have already once said, that the words of the mortgage were and are sufficient in law to pass the franchises of the mortgagor. But, second, this ordinance was the work of the people acting as lawmaker in their sovereign capacity. The sovereign possesses within himself all fulness of franchises. He is the author and source of all franchises. The sovereign people professed in this ordinance to possess and to be able to impart the franchises of these defaulting companies. Their lawfully appointed agents sold, and for them professed to convey these franchises, and having done this they will not be per-

mitted now to stultify themselves by the plea that they did not possess the things which they professed to grant. But if they did not then possess them specifically they must be held to supply the lack from their original inexhaustible stores.

It was the clear intention of the convention to give to the purchaser all that was enjoyed by the companies in default, and it was just as clearly within the competency of the convention to give what it thus intended to give, whether the franchises previously given out had come back to the State or not. And as all parties, vendor and vendee, here contracted upon the idea that the one was giving and the other receiving the franchises claimed, it is no hardship to hold nor is it any stretch of judicial authority to decide that in law the convention gave what it then intended to give, and had the power to give.

Mr. R. E. Rombauer, contra.

Mr. Justice FIELD delivered the opinion of the court.

The question presented for our determination in this case is, whether the property of the present St. Louis and Iron Mountain Railroad Company, a corporation created under the laws of Missouri, is, by an irrepealable legislative grant, forever exempted from all State and county taxes. Two corporations bearing that name have existed in Missouri, the second succeeding the first in the possession and ownership of its road and property. The first was created by an act of the legislature of the State, passed in March, 1851; the second was formed in July, 1867, under an act of the previous year authorizing the incorporation of the purchaser or purchasers of any railroad, or any part, section, or branch thereof, which had previously been, or might thereafter be, forfeited to or sold by the State.

The property of the first corporation was undoubtedly exempt from State and county taxes. The act of incorporation adopted as part of it a provision of another act, which declared in terms that the stock of the company should be thus

exempt.* It is true that at this time a statute was in existence, passed in 1845, which declared that the charter of every corporation subsequently granted should be subject to alteration, suspension, and repeal at the discretion of the legislature. But from the operation of this provision the company was expressly exempted by an act amendatory of its charter, passed in 1853.† From that time at least the exemption of its stock from State and county taxation was placed beyond legislative interference. The amendatory act also declared that all the engines, cars, wagons, machines, and other property belonging to the company should be deemed a part of its capital stock, and be vested in its respective shareholders, according to their respective shares. All the property of the company was thus placed within the exemption which attached to the original stock; that designated was to be deemed a part of such stock, as well as that originally embraced by this term.

On the argument some attempt was made, from the use of the term *stock* in the original act, and the language of the amendatory act, that the property should be vested in the respective shareholders according to their respective shares, to establish the position that the exemption extended only to the separate shares of the individual stockholders. But the argument does not strike us as possessing much force. The terms "stock of the company," imported the capital stock of such company, the subscribed fund which the company held, as distinguished from the separate interests of the individual stockholders. The language of the amendatory act did not qualify this meaning; that only declared that other property of the company should also be deemed capital stock, and the additional provision that it should be vested in the respective shareholders, according to their respective shares, only meant that they should have the interest of shareholders in the property, according to their respective shares.

The corporation in question was created to construct a

* Laws of Missouri of 1851, p. 479. † Ib. 1853, p. 296.

railroad from a point in the city of St. Louis to the Iron Mountain and Pilot Knob, in Missouri, with liberty to extend the road to the Mississippi River, or to the southern part of the State. This road was constructed from St. Louis to Pilot Knob, a distance of about eighty-seven miles, with a branch to Potosi. During the progress of the work, and in order to aid in its construction, the legislature of the State, previous to 1860, passed various acts providing for the loan of the bonds of the State to the company. All the acts referred for the terms of the loans to an act passed in 1851 to expedite the construction of the Pacific Railroad and of the Hannibal and St. Joseph Railroad.* That act provided that no part of the bonds should be delivered to the company until it signified its acceptance of them to the secretary of state, by filing in his office a certificate of such acceptance under the corporate seal of the company and the signature of its president; that such acceptance should be recorded, and upon its record should become to all intents and purposes a mortgage of the road of the company, and every part and section thereof, and its appurtenances, to the people of the State, to secure the payment of the principal and interest of the bonds. That act authorized the governor, in case default was made in the payment of either the interest or principal of the bonds, to sell the road and its appurtenances at auction to the highest bidder, or to buy in the same at such sale for the use and benefit of the State, subject to such disposition in respect to the road or its proceeds as the legislature might thereafter direct.

Under the different acts bonds of the State to a large amount were issued to the company; its acceptance of them in proper form was given to the secretary of state, and the acceptance was duly recorded, and from the date of such record the State acquired, for the payment of the principal and interest of the bonds, a lien upon the road and every part and section thereof and its appurtenances.

The company failed to pay the interest on these bonds.

* Laws of Missouri of 1851, p. 267.

It does not appear for how long a period the company was thus in default, nor is this material. It is sufficient to say that in 1865 the right of the State, under the provisions of the acts cited, to interfere and sell the property, had become complete. Before a sale, however, was made the legislature passed another act for the sale of this and other railroads by the governor, and the foreclosure of the State lien thereon. This act, which was approved in February, 1866, among other things required the governor to advertise for sale the different railroads, with their appurtenances, rolling stock, and property of every description, and all rights and franchises thereto belonging; and to sell the same at auction to the highest bidder, in pursuance of the several acts creating a lien thereon. It also provided for the appointment of three commissioners to attend the sale of the different roads as advertised, and to bid in the same for the use and benefit of the State for an amount not exceeding the respective liens thereon; and in case the roads were struck off and sold to them, to take possession of and hold the same, with their appurtenances and property, and again, after due advertisement, inviting proposals for the purchase of the different roads, their lands, appurtenances, and franchises, to resell the same. Under this act the St. Louis and Iron Mountain Railroad was advertised for sale, with its rights and privileges, and at the sale was bid in by the commissioners for the State. However broad the terms of the advertisement, the interest sold could not extend beyond the property upon which the State at the time held a lien, and this was the entire road of the company and its appurtenances. But as the property was sold to the State it is unnecessary to determine whether, if the sale had been made to a third party, the immunity from taxation possessed by the company would have passed to the purchaser. When the State became the purchaser the immunity ceased; the property stood in its hands precisely the same as any other unincumbered property of the State, exempt from taxation, not by virtue of any previous stipulation with the company, but as all property of the State is thus exempt. Subsequently the road and its

appurtenances, and all the franchises, which, under the new constitution of Missouri, adopted in 1865, were transferable by the State, were sold by the commissioners to McKay, Vogel, and Simmons, who conveyed the same to Thomas Allen, who with others, in July, 1867, became incorporated under the name of the St. Louis and Iron Mountain Railroad Company. That company is still in existence, and is one of the defendants herein. To it Allen transferred all the rights and privileges acquired by him from his vendors, and all which they acquired from the State. The act under which the sale was made provided that the purchasers of the road should have all the rights, franchises, privileges, and immunities which were enjoyed by the defaulting company under its charter and laws amendatory thereof, subject to the limitations and conditions therein contained, and not inconsistent with the act authorizing the sale. The new company thus acquired all the immunity from taxation which the original company had possessed, if it were competent for the legislature at the time, under the new constitution, to confer this privilege. The question, therefore, is, whether the legislature was competent to grant the immunity claimed, under that constitution, which went into operation on the 4th of July, 1865, previous to the passage of any of the acts authorizing the proceedings under which the new company acquired its rights.

The sixteenth section of the eleventh article of that instrument provides that "no property, real or personal, shall be exempt from taxation, except such as may be used exclusively for public schools and such as may belong to the United States, to this State, to counties, or to municipal corporations within this State;" and the twenty-seventh section of the fourth article declares that "the General Assembly shall not pass special laws . . . exempting any property of any named person or corporation from taxation."

These provisions require no explanation; they are absolute prohibitions against the grant of any new immunity from taxation, unless railroad companies of the State existing at the time are excepted from their operation. Such

exception is claimed under the "ordinance for the payment of State and railroad indebtedness," which accompanied the constitution and was adopted with it. That ordinance first provides for the levy and collection from different railroads, and among others from the St. Louis and Iron Mountain Railroad Company, an annual tax of ten per cent. on all their gross receipts for the transportation of freight or passengers (not including amounts received from and taxes paid to the United States) from the 1st of October, 1866, to the 1st of October, 1868, and fifteen per cent. thereafter; and then enacts that the tax shall be collected from the companies only for the payment of the principal and interest on the bonds of the State issued for their benefit, or on bonds guaranteed by the State; that if any of the companies refuse or neglect to pay the tax thus required, and the principal or interest of any of the bonds, or any part thereof, remain due and unpaid, the General Assembly shall provide by law for the sale of the railroad and other property and the franchises of such company under the lien reserved to the State; and that whenever the State becomes the purchaser of any railroad or other property, or the franchises thus sold, the General Assembly shall provide by law in what manner the same shall be sold for the payment of the indebtedness of the company; that no railroad or other property or franchises purchased by the State, shall be restored to the defaulting company until it shall have first paid the interest due from it, and that no sale or other disposition of any such railroad or other property, or its franchises, shall be made without reserving a lien upon the property and franchises thus sold or disposed of for all sums remaining unpaid.

Now, the argument of the appellants is that as the ordinance authorizes the legislature to provide for the sale of the franchises of a defaulting corporation, it can transfer under that designation immunity from taxation, if the company ever possessed such immunity; and that this was the effect of the sale of the St. Louis and Iron Mountain railroad and its franchises to McKay, Vogel, and Simmons.

And authority for this position is supposed to be found in the answers given by the judges of the Supreme Court of Missouri, in November, 1865, to certain questions propounded by the governor under a provision of the constitution authorizing him to take their opinion on important questions of constitutional law. The questions propounded were substantially these:

1st. Whether the provisions of the ordinance operated to suspend the right of the State to sell the roads named, or either of them, until there was a refusal or neglect to pay the tax imposed by the ordinance; or whether the State might order the sale of the railroads or either of them, prior to such refusal or neglect;

2d. If the judges were of opinion that a sale of the railroads might be ordered before such refusal or neglect, whether such sale could be made "without reserving a lien upon all the property and franchises thus sold for all sums remaining unpaid," or, in other words, whether this clause constituted a condition of *all* sales of railroads ordered by the State, or referred only to sales made under the ordinance for refusal and neglect to pay the tax.

3d. If the judges should be of opinion that all sales of railroads by authority of the State were subject to the restriction mentioned, whether the words "all sums remaining unpaid" referred to the sums for which the railroad sold was in default, or to that portion of the purchase-money not paid in cash at the time of sale; and,

4th. Whether upon a sale of a railroad under a lien of the State the constitution authorized the State to receive, in payment of the purchase-money, preferred or other shares of stock issued by a corporation purchasing the road.

None of these questions, as will be perceived, call for any opinion as to the effect of the sale of the franchises of a road, or the meaning of that term. They call only for an opinion upon the power of the legislature to order a sale of the roads, the liens to be reserved, the payments to be made, and the right to receive shares of stock of a purchasing corporation. The answer of the judges stated that the fifth

section of the ordinance related to all sales of railroads, whether in default for not paying the interest on the bonds of the State or not paying the tax levied; that when the State had become the purchaser of any railroad sold under the lien of the State, the General Assembly could provide in what manner such railroad could again be sold for the payment of the indebtedness which the State had incurred on account of bonds loaned to it or guaranteed for its benefit; that it would have had this power without the aid of the ordinance, but that no sale or other disposition of any such railroad, or other property, could be made by the State without reserving a lien upon the property sold for all sums remaining unpaid, and that the purchaser was required to make all payments therefor in money or in bonds or other obligations of the State; and then adds that the "legislature is left unrestricted further as to the time, terms, and conditions of the sale." This language is supposed to determine that in the sale of such property the legislature is not bound by the provisions of the constitution we have cited.

But we do not think the language used justifies any such conclusion, but was rather intended to indicate that the ordinance imposes no other restrictions than those designated, and has no reference whatever to the clauses of the constitution in respect to which no opinion was asked.

It seems to us that the plain meaning of the ordinance, when it says that the General Assembly shall provide by law in what manner the railroad and its franchises shall be sold, is that they shall be sold in conformity with such law as the legislature may constitutionally pass, not in conformity with any law which the legislature could devise if it had unlimited discretion in the matter. It would conflict with well-settled rules of construction to hold that the language used authorizes any legislation regardless of the provisions of the constitution. And there is nothing in the authority conferred to provide for the sale of its franchises with the road of the defaulting company, which requires immunity from taxation to be embraced within them. The language

evidently refers to such franchises as are essential to the operation of the road sold, without which the ownership of the road would be comparatively valueless, such as the franchise to run cars, to take tolls, and the like.

But if we are mistaken in this particular, we are clear that it never was intended by the ordinance to sanction, by the sale of the franchises of a defaulting corporation, the renewal of an exemption which had once ceased to exist, and which the constitution had declared should never thereafter be created. The inhibition of the constitution applies in all its force against the renewal of an exemption equally as against its original creation; and this inhibition the legislature could not disregard in providing for the sale of the property which it had purchased.

JUDGMENT AFFIRMED.

TIFFANY v. NATIONAL BANK OF MISSOURI.

Under the thirtieth section of the National Banking Act, which enacts that National banks "may take, receive, reserve, and charge on any loan . . . interest at the rate allowed by the laws of the State or Territory where the bank is located, *and no more;* except that where, by the laws of any State, a different rate is *limited* for banks of issue, organized under State laws, the rate so limited shall be allowed for associations organized in any such State under the act:" National banks may take the rate of interest allowed by the State to natural persons generally, and a higher rate, if State banks of issue are authorized by the laws of the State to take it.

ERROR to the Circuit Court for the District of Missouri.

Tiffany, trustee of Darby, a bankrupt, brought an action of debt in the court below against the National Bank of Missouri, a corporation organized under the National Banking Act of June 3d, 1864, to recover under the provisions of the thirtieth section of the act twice the amount of interest paid by the said Darby, on certain loans made by the bank to him before he was adjudged a bankrupt. The ground of the action was, that the interest reserved and paid

was 9 per cent.; a rate averred to be greater than the amount allowed by law, to wit, 8 per cent.

The provisions of the thirtieth section of the act, under which the suit was brought, are as follows:

"Every association organized under this act, may take, receive, reserve, and charge on any loans . . . *interest at the rate allowed by the laws of the State or Territory where the bank is located, and no more;* except that where, by the laws of any State, a different rate *is limited* for banks of issue organized under State laws, the rate *so limited* shall be allowed every association organized in any such State under this act. And when no rate is fixed by the laws of the State or Territory, the bank may take, receive, reserve or charge a rate not exceeding 7 per centum. . . .

"And in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back, in any action of debt, twice the amount of interest thus paid from the association taking or receiving the same." . . .

In Missouri, the banks of issue, organized under the State laws, are *limited to* 8 *per cent.*, but the rate of interest *allowed* by the laws of the State generally *is* 10 *per cent.* As already signified, this bank had taken 9 per cent.

On demurrer the question was, whether the National banks in Missouri were allowed to charge more than 8 per cent. The court below adjudged that they were.

Mr. S. Knox, for the appellant; Mr. J. O. Broadhead, contra.

Mr. Justice STRONG delivered the opinion of the court.

In an action like the present, brought to recover that which is substantially a statutory penalty, the statute must receive a strict, that is, a literal construction. The defendant is not to be subjected to a penalty unless the words of the statute plainly impose it. The question, therefore, is whether the thirtieth section of the act of Congress of June 3d, 1864, relative to National banking associations, clearly prohibits such associations in the State of Missouri from re-

serving and taking a greater rate of interest than 8 per cent., the rate limited by the laws of that State to be charged by the banks of issue organized under its laws. It is only in case a greater rate of interest has been paid than the National banking associations are allowed to receive that they are made liable to pay twice the interest. The act of Congress enacts that every such association "may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State or Territory where the bank is located, and no more; except that where, by the laws of any State, a different rate is limited for banks of issue, organized under State laws, the rate so limited shall be allowed for associations organized in any such State under the act." What, then, were the rates of interest allowed in Missouri when the loans were made by the defendants that are alleged to have been usurious? It is admitted to have been 10 per cent. per annum, allowed to all persons, except banks of issue organized under the laws of the State, and they were allowed to charge and receive only 8 per cent.

The position of the plaintiff is, that the general provision of the act of Congress that National banking associations may charge and receive interest at the rate allowed by the laws of the State where they are located, has no application to the case of these defendants, and that they are restricted to the rate allowed to banks of issue of the State, that is, to 8 per cent. This, we think, cannot be maintained. The act of Congress is an enabling statute, not a restraining one, except so far as it fixes a maximum rate in all cases where State banks of issue are not allowed a greater. There are three provisions in section thirty, each of them enabling. If no rate of interest is defined by State laws, 7 per cent. is allowed to be charged. If there is a rate of interest fixed by State laws for lenders generally, the banks are allowed to charge that rate, but no more, except that if State banks of issue are allowed to reserve more, the same privilege is allowed to National banking associations. Such, we think, is the

fair construction of the act of Congress, entirely consistent with its words and with its spirit. It speaks of allowances to National banks and limitations upon State banks, but it does not declare that the rate limited to State banks shall be the maximum rate allowed to National banks. There can be no question that if the banks of issue of Missouri were allowed to demand interest at a higher rate than 10 per cent. National banks might do likewise. And this would be for the reason that they would then come within the exception made by the statute, that is, the exception from the operation of the restrictive words "no more" than the general rate of interest allowed by law. But if it was intended they should in no case charge a higher rate of interest than State banks of issue, even though the general rule was greater, if the intention was to restrict rather than to enable, the obvious mode of expressing such an intention was to add the words "and no more," as they were added to the preceding clause of the section. The absence of those words, or words equivalent, is significant. Coupled with the general spirit of the act, and of all the legislation respecting National banks, it is controlling. It cannot be doubted, in view of the purpose of Congress in providing for the organization of National banking associations, that it was intended to give them a firm footing in the different States where they might be located. It was expected they would come into competition with State banks, and it was intended to give them at least equal advantages in such competition. In order to accomplish this they were empowered to reserve interest at the same rates, whatever those rates might be, which were allowed to similar State institutions. This was considered indispensable to protect them against possible unfriendly State legislation. Obviously, if State statutes should allow to their banks of issue a rate of interest greater than the ordinary rate allowed to natural persons, National banking associations could not compete with them, unless allowed the same. On the other hand, if such associations were restricted to the rates allowed by the statutes of the State to banks which might be authorized by the State laws, un-

friendly legislation might make their existence in the State impossible. A rate of interest might be prescribed so low that banking could not be carried on, except at a certain loss. The only mode of guarding against such contingencies was that which, we think, Congress adopted. It was to allow to National associations the rate allowed by the State to natural persons generally, and a higher rate, if State banks of issue were authorized to charge a higher rate. This construction accords with the purpose of Congress, and carries it out. It accords with the spirit of all the legislation of Congress. National banks have been National favorites. They were established for the purpose, in part, of providing a currency for the whole country, and in part to create a market for the loans of the General government. It could not have been intended, therefore, to expose them to the hazard of unfriendly legislation by the States, or to ruinous competition with State banks. On the contrary, much has been done to insure their taking the place of State banks. The latter have been substantially taxed out of existence. A duty has been imposed upon their issues so large as to manifest a purpose to compel a withdrawal of all such issues from circulation. In harmony with this policy is the construction we think should be given to the thirtieth section of the act of Congress we have been considering. It gives advantages to National banks over their State competitors. It allows such banks to charge such interest as State banks may charge, and more, if by the laws of the State more may be charged by natural persons.

The result of this is that the defendants, in receiving 9 per cent. interest upon the loans made by them, have not transgressed the act of Congress, consequently they are under no liability to the plaintiff.

JUDGMENT AFFIRMED.

EUNSON *v.* DODGE.

Where a person during the original term of a patent bought from one who had no right to sell it, a machine which was an infringement of the patent, and afterwards himself bought the patent for the county where he was using the machine, *held* that on an extension of the patent the owners of the extension could not recover against him for using the machine after the original term had expired; but that such purchase of the interest in the patent, removed, as to the purchaser, all disability growing out of the wrongful construction of the machine then used by him, and rendered the use of it legal.

APPEAL from the Circuit Court for the Southern District of New York; the case being this:

On the 23d of May, 1854, the United States granted to Myers et al. a patent for a sawing machine for fourteen years, in other words, till the 23d of May, 1868.

About two years after the grant of the patent, that is to say, in April, 1856, the patentees assigned to one Schureman, for himself, his legal representatives, and assigns, all their right, title, and interest in and to the same for, in, and to Hudson County, New Jersey, to the end of the term for which the patent had been granted.

In May, 1865, and subsequently to the assignment just mentioned, Dodge & Co., a firm of the same Hudson County, New Jersey, already mentioned, bought from strangers *who had no right or license to make or vend it* a sawing machine which was an infringement of the patent. Dodge & Co. used this machine for about fifteen months, in good faith and without knowledge that it was an infringement. When receiving notice from Schureman that it was so, and that he was assignee of the patent for Hudson County, they, on the 22d of September, 1866, purchased of him the letters and all his right and interest therein for the said county. This invested them, of course, with all the rights of the patentee, for Hudson County, during the term of the patent, in other words, till the 23d of May, 1868.

On the 13th of May, 1868, after the transfer by the paten-

tees to Schureman and by him to Dodge & Co., the patent was extended to Myers and the other patentee, from the 23d of May, 1868, until the 23d of May, 1875.

Their right in this extension these parties transferred to Eunson et al.

Hereupon, in July, 1871, these last-named parties finding that Dodge & Co. were still using this machine, originally made as already said, *without license and unlawfully*, and conceiving that in thus using it, after the date when the original patent had expired and in the term of the extension which had been assigned to *them*, Dodge & Co. were infringing their rights, filed this bill to enjoin the use and to recover compensation.

Dodge & Co. set up that they were protected in the use of the machine by the terms of the eighteenth section of the Patent Act of July 4th, 1836. That act, after providing for renewals or extensions, enacts 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 interest therein."

The court below held that the defendants were thus protected, and a decree having been given accordingly, the complainants brought the case here.

Mr. F. H. Betts, for the appellants:

We concede that if the defendant's machine had been one which was *lawfully* constructed by or purchased from the patentees or their assignees, the defendants would be protected under the rule established in *Wilson* v. *Rousseau*,* and other cases in this court.†

This rule is founded upon the doctrine stated in one of these cases,‡ that the patentee should "be entitled to but one royalty for a patented machine, and consequently when

* 4 Howard, 646.

† Bloomer *v.* McQuewan, 14 Howard, 539; Chaffee *v.* Boston Belting Company, 22 Id. 217, 223; Bloomer *v.* Millinger, 1 Wallace, 340.

‡ Chaffee *v.* Boston Belting Company.

a patentee has himself constructed the machine, or authorized another to construct and sell it, or to construct and use and operate it, and the consideration has been paid to him for that right, he has then to that extent parted with his monopoly and ceased to have any interest in the machine." By the lawful sale of a machine, the right to use it has passed to the purchaser in perpetuity, or so long as the machine exists.

But this case is distinguished from the cases referred to by the absence of the very fact that in each of those cases brought these defendants within the permission of the statute, viz., the fact that the machine had been "lawfully made," and the patentee had sold it, and with it *ipso facto* the perpetual right to use it; in the present case the defendant's machine was not "lawfully made." It was "built and sold without right or license under said patent." The patentees never have been paid for the perpetual right to use it. The defendants, therefore, do not come within the terms of the eighteenth section, as construed by this court.

Mr. S. D. Law, contra.

Mr. Justice HUNT delivered the opinion of the court.

This court has decided many times that the eighteenth section of the Patent Act of 1836 gives to an assignee of the patent during the original term the right to continue during the extended term the use of a machine used by him during the original term.*

The complainants seek to distinguish the present from the cases cited in this manner: In those instances they say the machines were lawfully constructed by the patentees, or purchased from the patentees or their assignees, whereas the machine purchased by the defendants in this case was not a lawfully made machine, and was never purchased from the owner of the patent.

* Wilson *v.* Rousseau, 4 Howard, 646; Bloomer *v.* McQuewan, 14 Id. 539; Chaffee *v.* Boston Belting Company, 22 Id. 217; Bloomer *v.* Millinger, 1 Wallace, 340.

Statement of the case.

We are of the opinion that this distinction is not well taken. That the purchase of the machine was made from an infringer, and a wrong done, is true. When informed of the offence, the purchaser at once corrected the evil by purchasing the entire right of the patentees for the county where his machine was then used, and where it has since been used. This was equivalent to an original lawful purchase or manufacture of the machine. By the purchase of the right for Hudson County, and from the moment of that purchase, the defendants held and used the machine by a lawful title, as perfect and complete against the patentees as if the original purchase had been from them. They then became, in the language of the statute, "grantees of the right to use the thing patented," so continued to the time of the expiration of the original patent, and the right so to use was, in the further language of the statute, "the extent of their interest therein."

We are of the opinion that the decree of the Circuit Court was correct, and that it should be

AFFIRMED.

Mr. Justice STRONG took no part in this judgment, not having sat in the case.

EX PARTE STATE INSURANCE COMPANY.

1. Prior to the act of March 3d, 1873, the District Court of the United States for the Middle District of Alabama was possessed of circuit court powers, and among these was the right to hear and decide cases properly removable from the State courts within the limits of that district.
2. An order of a State court within those limits ordering the removal of a case into the Circuit Court for the *Southern* District of Alabama was, therefore, void, and that court was right in refusing to proceed in such case when the papers were filed in it.

ON petition for a mandamus to the Circuit Court for the Southern District of Alabama, at Mobile. The case was thus:

Between December 14th, 1819, when Alabama was ad-

Statement of the case.

mitted into the Union, and the 3d of March, 1873, various statutes were passed fixing the judicial districts of the State and the powers of District Courts established for them. Among them were two acts, one of March 10th, 1824,* and the other of February 6th, 1839,† whose conjoint effect apparently was to divide the State into three districts, a northern, a middle (this latter embracing Barbour County, one of the counties of Alabama), and a southern, whose terms and sessions were to be held at Mobile. These acts gave to these different District Courts, in general terms, the jurisdiction and powers of Circuit Courts.‡

With these various acts in force, one Kolb, a citizen of Barbour County, already mentioned as in the judicial district designated by Congress as the middle one, sued the State Insurance Company of *Missouri*, by process in attachment, in a State court sitting at Euphala, in the county of Barbour aforesaid. On the 11th December, 1872, the insurance company applied to the said State court where the suit was brought, alleging its incorporation by and citizenship in Missouri, and praying for the removal of the suit "into the next *Circuit* Court of the United States to be held in this the district where the suit is pending." This petition was made, of course, pursuant to the right given in the twelfth section of the Judiciary Act, which says:

"If a suit be commenced in any State court . . . by a citizen of the State in which the suit is brought, against a citizen of another State, . . . and the defendant shall . . . file a petition for the removal of the cause from that into the next *Circuit* Court to be held in the district where the suit is pending, &c., . . . the cause shall *there* proceed as if it had been brought there by original process."

The State court, on the 11th of January, 1873, made an order that the cause be removed out of this court into the

* 4 Stat. at Large, 9. † 5 Id. 315.

‡ The briefs of the petitioner's counsel referred to many acts having more or less bearing on the case. The Reporter refers to those which he deems specially pertinent; though he cannot affirm that it was on these that this court based its judgment.

Circuit Court of the United States *at Mobile, Alabama, that being the Circuit Court of the United States for this district.* And, on the 18th following, the proper papers were filed with the clerk of the Southern District.

On the 3d of March, 1873, after all this had been done, Congress passed an act relating to the Circuit and District Courts for the *Middle* and Northern Districts of Alabama, one section of which enacted, "that so much of any act or acts of Congress as vested in the District Court for the Middle District of Alabama, . . . the power and jurisdiction of a Circuit Court be and the same is hereby repealed." The act, which in two places spoke of the Circuit Court at Mobile as the Circuit Court for the District of Alabama, made several important changes in previously existing things.

On the 23d of December, 1873—after the passage of the statute just mentioned—Kolb, the plaintiff in the suit, appeared in the Circuit Court and moved to have the case stricken from the docket for want of jurisdiction, which order was made by the court, the circuit judge presiding.

The insurance company now applied to this court for a mandamus to the said Circuit Court, requiring it to proceed to try and determine the case.

Messrs. P. Phillips and J. T. Morgan, for the petitioner, made an elaborate examination of different statutes, including specially that of March 3d, 1873, and argued that in view of this legislation the Circuit Court at Mobile had original circuit court jurisdiction over the entire State, or made the State, so far as said Circuit Court was concerned, but one district. The learned counsel conceded that the act of March 3d, 1873, did not, in express terms, confer such jurisdiction upon the Circuit Court at Mobile, nor expressly enact that the State should constitute but one district for circuit court purposes.

Mr. Justice MILLER delivered the opinion of the court.

Much argument is addressed to us on the construction of the act of March 3d, 1873, concerning the District and Cir-

cuit Courts of Alabama, especially whether by that act the Circuit Court sitting at Mobile has circuit court jurisdiction over the whole State or not. In the view we take of the present case it is not necessary for us to decide that question.

Prior to that time the District Court of the United States for the Middle District of Alabama was a court invested with circuit court powers. Among those powers, in our opinion, was that of receiving and exercising jurisdiction over cases removed from the State courts within its territorial limits. The case before us was of that class. No question is raised that the requirements of the law for the removal were complied with. The order for the removal was made on the 11th day of January, 1873, and the papers filed in the office of the clerk of the Circuit Court for the Southern District on the 18th day of the same month.

The order of the State court was that "this cause be removed out of this court into the Circuit Court of the United States at Mobile, Alabama, that being the Circuit Court of the United States for this district." The county of Barbour, in which the State court sat and made this order, was in the Middle District of Alabama, and as, in our judgment, the case, if to be removed at all, should have been removed to the District Court for that district, to be disposed of in the exercise of its circuit court powers, we think the order of the State court was void. That it conferred no jurisdiction of the case on the Circuit Court for the Southern District of Alabama, because it could take none as the law then stood. Whatever may be the effect of the subsequent act of March 3d, 1873, on the jurisdiction of all these courts, there is nothing in it which removes the difficulty in the present case.

The Circuit Court at Mobile was, therefore, right in refusing to hear the case, and ordering it to be stricken from the docket, and the mandamus now asked for is

DENIED.

Statement of the case.

MILTENBERGER *v.* COOKE.

1. When a collector of internal revenue in a rural district of Mississippi—where, owing to the lawless condition in which the rebellion, then but recently suppressed, had left the region, it was not safe to have gold and silver in one's house—in violation of the provisions of the Independent Treasury Act, but with an apparently good motive—openly and without indirection, and because he thought it more safe thus to act than to take gold and silver—took in payment of taxes on cotton, accepted drafts drawn by the shippers of it on consignees of it in New Orleans (which was the place of deposit for taxes collected in Mississippi), afterwards (the drafts not being paid, and he having in his accounts with the government charged himself and been charged by it with the tax as if paid in gold and silver), sued the acceptors, the fact that in taking the drafts instead of gold and silver, he had acted in violation of the statutes of the United States, does not so taint his act with illegality as that he cannot recover on them; the government not having repudiated his act nor called on the shipper to pay, but on the contrary, leaving the account of the collector open to see if he could not himself get the amount from the acceptor of the drafts.
2. As between the parties the collector's charging himself with the tax and reporting it to the government as paid, would be payment by the collector of the tax.
3. Where a party authorized another to draw different drafts on him upon different consignments to be made, and this other made different consignments and drew different drafts, the party authorizing the drafts accepts them in advance, and should set aside and hold enough money from the proceeds of the consignments to pay them, come in for payment when they may. If after such promise to accept, drafts are drawn through a term beginning in October of one year and running into February of another (the drawee as the drafts are drawn being advised of the fact that the drafts have been drawn), it is no excuse when the drafts do come in, as, *ex. gr.*, in the middle of April of the second year, for the drawee to say that from their not being presented in due course, he supposed that the drawer had taken them up, and that on this assumption he had closed accounts with him and paid over to him the balance found. He is bound to pay the drafts.

ERROR to the Supreme Court of Louisiana; the case being thus:

An act of August 6th, 1846,* commonly known as the "Independent Treasury Act," thus enacts:

"SECTION 18. All duties, taxes, . . . debts, and sums of money

* 9 Stat. at Large, 59.

accruing or becoming due to the United States, . . . shall be paid in gold or silver coin *only*, or in treasury notes.

"SECTION 19. Any receiving . . . officer or agent, who shall neglect, evade or violate the provisions . . . of the last preceding section of this act, shall by the Secretary of the Treasury be immediately reported to the President of the United States with the facts of such neglect, evasion, or violation, and also to Congress."

Other sections of the act most carefully provide that no officers with whom money is deposited shall in any manner alter the condition of this money. They are not to use it, lend it, exchange it, deposit it with other persons or depositories except those described in the act. The sixteenth section of the act provides for exact entries of every official transaction of receipt, payment, or transfer, and provides that all irregular or unclean dealing with this public money shall be deemed a felony.

An act of July 13th, 1866,* after enacting that subsequently to the 1st of August following "there shall be paid . . . a tax of three cents per pound on cotton," proceeds:

"And said tax shall be paid to the collector of internal revenue within and for the collection district in which said cotton shall have been produced, and before the same shall have been removed therefrom. And every collector to whom any tax upon cotton shall be paid shall mark the bales . . . upon which the tax shall have been paid in such manner as may clearly indicate the payment thereof, and shall give to the owner or other person having charge of such cotton a permit for the removal of the same, stating therein the amount and payment of the tax, the time and place of payment, and the weight and marks upon the bales . . . so that the same may be fully identified."

These statutes being in force, Cooke, resident at Hazlehurst, Mississippi, some one hundred and fifty miles north of New Orleans, and collector of internal revenue for the district of Mississippi, in September, 1866—at which date, the rebellion having been suppressed only within about eighteen months, and the whole rural districts of Mississippi being

* 14 Stat. at Large, 98.

still more or less in a disorganized and lawless condition, it was not desirable for either collectors in them or their deputies to have on hand large sums of money,—gave public notice in newspapers that the owners or holders of cotton in Mississippi might bring it to the usual shipping-places, adding that as the amount received for taxes on all this cotton would have to be deposited in New Orleans [which was the place of deposit for the Mississippi District], it would suit him and might afford facilities to shippers if he received the amount by draft of the shipper on the consignees in New Orleans, and that he would receive such drafts if the consignees would recognize them so as to make the amount available to him, the collector, at his place of deposit, New Orleans.

Thereupon, Caruthers & Co., residents at Osyka, in the interior of the State, and about half-way between Hazlehurst and New Orleans, having certain cotton which they wished to ship to Miltenberger & Co., their correspondents at New Orleans, wrote to these last:

"October 24th, 1866.

"Please to inform us whether it would suit you if we were to give a draft on you for the internal revenue tax; the collector here preferring the same to money."

To this Miltenberger & Co., in two days after, replied:

"October 26th, 1866.

"We have no objection to your drafting to us in payment of the internal revenue tax on cotton shipped to us. Your drafts for same will, therefore, be duly honored."

Hereupon Caruthers & Co., shipping cotton to Miltenberger & Co., at different times, did at or about these same times, draw on them to the order of Cooke, the deputy, some eight or ten drafts, most of them at sight, others at short date, for the taxes chargeable on it. These drafts were given to the deputy collector,—he having seen the letter of Miltenberger & Co., promising to accept, &c.,—the bales were marked in the way that the above-quoted statute of 1866 required when the tax was paid, and a permit was given for

the removal of the cotton to New Orleans. The collector charged himself with the tax as paid; reported it to the government as paid to him; and was charged with it by the government accordingly. His commissions were 5 per cent. on all amounts paid over. Caruthers & Co. shipped the cotton to Miltenberger & Co. at the city named, and advised them, as they drew the different drafts, of the fact that they had done so. All the drafts drawn were indorsed by the deputy collector, to whom they were given, to Cooke, the principal collector, and two of them went in at once and were paid; but either from the deputy's not sending them to his principal as he got them, or from the principal's not sending them on in regular course to New Orleans for collection, or from some other cause, six of them—drawn between October, 1866, and February, 1867—did not go in for payment till April of the latter year. Miltenberger & Co. then refused to pay, alleging that they now had no cotton belonging to Caruthers & Co., that the non-presentment of the drafts, in due course, had led them to suppose that Caruthers & Co. had themselves in some way taken them up, and that the account of the house had been settled upon that assumption.

Hereupon Cooke sued Miltenberger & Co. to recover on the drafts, and upon what was alleged to be an acceptance of them made in the letter of the said Miltenberger & Co., of October 26th, 1866.

Miltenberger & Co. set up as defence the matters already indicated, and more particularly:

That the laws of the United States did not authorize or permit the collectors of revenue to take or accept drafts for the payment of taxes, or any other thing, except the lawful money of the United States; but, on the contrary, particularly and explicitly prohibited the mode of collection set forth and described in the petition of the plaintiff, and that what had been done was a violation of the acts of Congress in this behalf.

The court below gave judgment for the plaintiff, and the defendants took this writ of error.

Argument for the acceptor.

It was testified to by Cooke himself, on the trial of the case below, that while the Treasury Department had not "sanctioned" what he had done, it authorized him "to avail himself of exchange;" that he had collected, through drafts by shippers of cotton, on its consignees, nearly all the revenue of his district, $500,000 or more; that in the then condition of Mississippi he deemed it safer so to collect it than to collect it in any other way; and that the Treasury Department had left his account open to see whether he could get this money.

Messrs. J. A. and D. G. Campbell, for the plaintiff in error:

A collector of taxes charged with the duty of receiving gold or silver or treasury notes, or notes of the National banks, for the taxes imposed upon cotton, and upon the receipt of the amount, to enter the fact upon his books; stamp it upon the bales of cotton; declare it as a fact in the permit for the removal of the cotton from the district; and faithfully report it to the government,—*neglects*, *evades*, and *violates* his duty when he takes a draft on a commission merchant at a distance, upon a promise contained in a letter to a taxpayer, for the amount of the tax, and treats that draft as lawful money, and allows the removal of the cotton and facilitates its removal and sale by false stamps and false statements in his permits, and does not pay the taxes to the United States.

And the question is, whether a collector of the United States who neglects, evades, and violates his duty, can through the courts of the United States get the benefit of his neglect, evasion, and violation of duty, when he finds that they have failed to secure to him the benefits of compliance with, conformity to, and performance of duty?

The interest of the United States as declared in the acts of Congress is that the collecting, receiving, and disbursing officers of the United States shall know, that all the money which shall pass through their hands as public officers, belongs to the United States, and under no conditions or circumstances shall they presume to deal with it as if they had

Recapitulation of the case in the opinion.

any sort of ownership, estate, or authority to make any other disposition of it than the law prescribes. The danger from persons in fiscal offices is their forgetfulness of this essential knowledge. The statutes permit no use of the government money, nor exertion of the powers for its collection, receipt or disbursement for any private object. A slight deviation from the austere and self-denying habit prescribed in the rule of the treasury is treated as an infamous offence, a felony. By the light of these statutes it is apparent that this collector's acts are reprobated acts. He has assumed to dispense with the fundamental principle of the acts of Congress relative to the currency in advance. He establishes commercial relations with mercantile partnerships, and the factors of country dealers, on behalf of the treasury of the United States. If he had farmed the revenues in his district from the government by contract, his control over the tax collections could not have been more decidedly that of an owner.

If Cooke had acted with motives the best, the most completely above suspicion, all these observations would apply. But it is not difficult to assign a motive for what was his confessedly irregular and illegal conduct. In the first place his commissions depended upon the amount of his collections and was not limited by a maximum; then there were incidental advantages, supposed to arise from a dispensation on his part, of the laws and the treasury regulations. We find that these drafts were not presented regularly or promptly.

Mr. O. D. Barret, contra

Mr. Justice SWAYNE delivered the opinion of the court.

The question presented for our determination is whether the securities upon which the judgment was recovered, are fatally tainted with illegality.

Cooke was the collector of internal revenue for one of the collection districts of Mississippi. Curtis was his deputy. New Orleans was the designated place of deposit for the

Recapitulation of the case in the opinion.

revenue collected. In the state of things then existing in Mississippi, it was dangerous for the collector to have money about him. He, therefore, advertised that he would receive payment of the tax upon cotton by drafts upon New Orleans. He took such drafts instead of money as a matter of safety. Nearly all the revenue paid was thus collected. He received a half million of dollars or more in this way. All the drafts taken were paid, except those in question in this case and one or two others. None were received but such as were considered good. The collector was authorized to transmit to New Orleans the moneys collected by buying exchange. When the drafts were given the bales were marked as if the tax had been paid, and the requisite permit for their removal was delivered. The drafts in question were taken by Curtis, by the authority of Cooke, and indorsed by the former to the latter. They were all received for the tax not otherwise paid, upon cotton shipped to Miltenberger & Co. by Caruthers & Co., the drawers of the drafts. Caruthers & Co. drew them pursuant to a letter from the plaintiffs in error, which, under such circumstances, authorized them to be drawn, and promised to accept and pay them. Curtis took the drafts upon the faith of this letter. Miltenberger & Co. were advised at the time of the drawing of each draft and of the shipment of the cotton, upon which it was founded. Cooke, in these as in all other instances of the kind, reported the tax to the government as paid, and charged himself accordingly, and was so charged upon the books of the Treasury Department. He considered the tax paid by such transactions, and the drafts wholly at his risk. The proper officers of the revenue bureau, with knowledge of the facts, have left his account open as to the amount of these drafts, and given him time to collect them.

Such is the case upon the facts as presented in the record.

The act of August 6th, 1846,* requires all taxes and duties accruing to the government to be paid in gold and silver, or treasury notes. The act of July 13th, 1866,† imposed a tax

* Brightly's Digest, 888.

† 14 Stat. at Large, 98.

of three cents per pound upon all cotton raised in the United States, and required the tax to be paid in the district where it was produced before its removal, with an exception which does not affect this case. The collector, upon receiving payment, was required to mark the bales and packages accordingly, and to give the owner or person in charge of the cotton a permit for its removal, stating the amount and payment of the tax, the time and place of payment, and the marks upon the bales and packages, so that they could be identified; and it was made his duty to keep an account of all cotton inspected and of the marks and identifications, and of all permits for removal issued, and of all his transactions in relation thereto, and to make full returns monthly to the Commissioner of Internal Revenue.

The judgment of the court below must be sustained upon several grounds:

As between the parties, the tax was paid by Cooke for Caruthers & Co. His marking the bales, giving the permit, charging himself with the amount, and reporting it to the government as paid, had that effect. The result was the same to Caruthers & Co. as if so much money had been advanced at their request, and so applied for their benefit. They were permitted to ship the cotton to the plaintiffs in error, in all respects as if the money had been actually paid and the requisite vouchers had been given upon the basis of such payment. The assumpsit of the collector supplied the place of the money. No demand has been made by the government against Caruthers & Co. They have had the full benefit of the arrangement. As between them and Cooke, the transaction is as if Cooke had lent Caruthers & Co. the amount in gold or silver, or treasury notes, with one hand, and received it back with the other. It has been held that promissory notes given under such circumstances can be enforced by the payee.*

* St. Alban's Bank *v.* Dillon & McGowan, 30 Vermont, 122; Kelley *v.* Noyes, 43 New Hampshire, 211; see also Smith *v.* Mawhood, 14 Meeson & Welsby, 463.

Conceding that the transaction was illegal, the statutory provisions relied upon by the plaintiffs in error are for the protection and benefit of the United States, and it was for the latter to object or not as they deemed proper. In this view of the case, they could have repudiated the transaction and called upon Caruthers & Co. for payment. With full knowledge of the facts they chose not to do so. The matter was one between them and their agent. The option to object belonged to the government and cannot be exercised by those who have not and could not have been injured.

The written promise of the plaintiffs in error to accept these drafts was equivalent to acceptance. No question is raised upon that subject by their counsel. After notice of the drawing of the drafts, and the sale of the cotton, they had so much money in their hands to be applied according to their engagement. There was no stipulation between them and Cooke. Their contract was with Caruthers & Co. When the money was received for the cotton they held it in trust for Cooke, and their sole duty and business in relation to it was to pay it over upon the drafts when called for, according to their agreement. If they paid it to Caruthers & Co. they did so in their own wrong. The fact in no wise affected their liability to Cooke and is not an element in the case to be considered. In no view can they be permitted to keep the money for their own use, or avail themselves of a payment made in violation of Cooke's rights and their duty. They can no more object to the consideration of the drafts than if the money were still in their hands. For the purposes of this case, it must be regarded as there when payment of the drafts was demanded.

It is a consideration of weight, though not controlling, that there is nothing disclosed which looks like fraud on the part of the defendant in error. There was neither concealment, indirection, nor oppression. Nothing beyond the tax was demanded or stipulated to be paid. Caruthers & Co. received in full the consideration upon which the drafts were drawn, and the defendants in full the consideration upon which they agreed to accept and pay them. It would

Statement of the case.

be contrary to equity and good conscience, as well as the law, to permit the plaintiffs in error to cast upon the defendant in error the burden of the loss to which they have endeavored to subject him.

JUDGMENT AFFIRMED.

BRENT *v.* MARYLAND.

1. Where in a proceeding to sell the real estate of a decedent for the payment of his debts the solicitor who presents the petition for the decree of sale is himself appointed trustee to make the sale, and himself becomes bound in bonds for the performance of the duties belonging to such appointment, and himself makes all the motions and procures all the orders under which the trustee's liability in the matter arises, he may, if he is liable for the non-payment of money which he was ordered by the court to pay, be sued without formal notice to him. He has notice in virtue of his professional and personal relations to the case.
2. Where a trustee in such a case has given bonds with surety in a penal sum to the State conditioned for the performance of his duties, children, entitled equally to a share in any surplus remaining after debts, expenses, &c., are paid from the proceeds of the sale, may, by the practice in the District of Columbia, after the exact amount of such share has been found by an auditor whose report is confirmed by the court, bring joint suit against the surety—the trustee being dead—in the name of the State, on the bond for the penal sum; and a judgment for that sum to be discharged on the payment of the shares or sums certain found as above-said is regular.
3. Such joint suit, though against the surety of the trustee (the trustee in his lifetime having had notice of everything), may, in the District, be at law.

ERROR to the Supreme Court of the District of Columbia.

Boteler, of Prince George County, Maryland, died possessed of considerable real estate and of some personalty; owing to one Warner a debt which the personalty was not sufficient to pay, and leaving a widow and minor children. Administration being taken by his widow upon his estate, a petition was filed by Warner, February, 1853, in accordance with the laws of Maryland, against the widow and children, to subject this real estate to the payment of the debts.

Statement of the case.

Daniel Digges, Esquire, was the solicitor of the petitioner, and as such signed the petition praying for a decree of sale. The court made the decree prayed for, and appointed the said Digges, the solicitor, trustee to make it. He was required to give bond in $15,000 for the faithful performance of his duties as such trustee. This bond he gave with Norah Digges as one of his sureties; the bond being in the form usual in Maryland, that is to say, to the State, for the use of the parties interested in the real estate to be sold. By the decree ordering a sale the trustee was ordered to bring into court the money arising from such sale, and the bonds or notes taken for the same, all to be disposed of under the direction of the court. The trustee made sale and reported it to the court, but never brought into court the money, notes, or bonds.

In June, 1854—Digges still maintaining his relations to the case—an auditor was appointed to distribute the funds in the hands of the trustee. The auditor reported that of this fund there was due to each of the minor children the sum of $704.39¼. Thereupon the court, on the 11th of April, 1860—Digges still acting as solicitor—confirmed the report and ordered the trustee to pay over these sums to the parties entitled. The trustee did not pay over as ordered, and afterwards, in 1860 apparently, or 1861, died insolvent. His surety being also dead, and J. C. Brent being his executor, suit was brought *at law*, on the bond, against Brent, in the name of the State, by the children *jointly*. The auditor's report which was in the record did not mention that Daniel Digges, the solicitor in the case, had appeared before him or had notice of the report's being made. Nor did the declaration in the case aver or the evidence show that any service of any order to pay or any demand of payment had been specifically made on the said Daniel Digges, the trustee.

The defence was,

1. That the trustee, Daniel Digges, had no sufficient notice of the auditor's report and its confirmation.
2. That the plaintiffs could not *jointly* maintain their action.
3. That the remedy was in equity alone.

Argument for the surety.

But the court overruled all the defences, and gave judgment for $15,000, the penalty of the bond, to be discharged upon payment of a sum specified to each of the plaintiffs therein. Thereupon the defendant brought the case here.

Mr. T. T. Crittenden, for the plaintiff in error:

1. The plaintiffs to sustain their suit ought to aver and prove a service of the order on the trustee, and a demand of payment of the sum specified therein. Nothing of that sort appears. It is, therefore, not pretended that Digges, the trustee, had notice of the auditor's report, yet he should have had it.

In *Oyster* v. *Annan*,* the highest court of Maryland says:

"The trustee, as to the suit, is not in the situation of a common debtor who knows his liability, and whose business it is to look to a compliance with his engagement. The creditors are known to the trustee but through the medium of the court of chancery, where they file their respective demands to be adjusted by the auditor, and where disputes among them are disposed of by the chancellor, who finally determines what proportion of the sum of money reported is to be paid to each of them. This proceeding as to the trustee, is *res inter alios acta*, and it is but reasonable that when it terminates he shall be notified of the result, before any steps are taken against him, either by attachment or by action on his trustee's bond, against him and his sureties."

The point which we here make is one of substance, and we present it as a chief point of our case.

2. The suit is joint. It should have been several. The report found that there was due to each child a sum certain, to wit, $704.39¼. Each person could, therefore, have sued for himself.

3. So too the proceeding should have been in equity. The death of the trustee having rendered it impossible to give notice to him or to make demand of him, the surety should not be placed in a position of responsibility which had not attached to the principal. The death of the trustee was

* 1 Gill & Johnson, 452, citing People *v.* Byron, 3 Johnson's Cases, 53.

such an accident as entitled the sureties to relief in equity. Such seems to be the doctrine of *State* v. *Digges*,* and of *Brooks* v. *Brooke*,† both of them Maryland cases of authority.

Mr. S. S. Hencle, contra:

1. All that is decided in *Oyster* v. *Annan*, is that the trustees should have notice. Digges, the trustee, had it. Numerous cases, English and American,‡ some of them referring to *Harris* v. *Ferrand*, reported by Hardres,§ so far back as the time of Charles II, show that if a party is solicitor in the case he has notice as of course.

2. That in such a case as this the parties can sue jointly, appears also by many cases.‖

3. The third point of the opposite counsel rests on an assumption that the trustee had no notice. The assumption having been shown to be untrue the point disappears.

Mr. Justice HUNT delivered the opinion of the court.

The point chiefly insisted upon in the argument of the counsel for the plaintiff in error, is this: that Digges, the trustee, had no notice of the auditor's report and of its confirmation, and that for the want of such notice this action cannot be maintained. We are of the opinion that this point is not well taken. We recognize the soundness of the decision in *Oyster* v. *Annan* and other decisions in the State of Maryland, cited to us, that before a suit can be brought against a trustee, he must have had notice of the duty he is required to perform, and must have had an opportunity to perform it. In the case just named the court say: "The trustee, as to the suit, is not in the situation of a common debtor who knows his liability, and whose business it is to

* 21 Maryland, 240. † 12 Gill & Johnson, 319.

‡ Roper *v.* Holland, 3 Adolphus & Ellis, 99; Nichols *v.* Rensselaer, 22 Wendell, 127; Lessee *v.* Marckel, 2 Ohio, 263; Watson *v.* Walker, 3 Foster, 471; Lent *v.* Padelford, 10 Massachusetts, 230.

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‖ Hazlehurst *v.* Dallas, 4 Dallas, 95; McMechen *v.* The Mayor, 2 Harris & Johnson, 41; Kiersted *v.* The State, 1 Gill & Johnson, 231.

look to a compliance with his engagements. . . . This proceeding, as to the trustee, is *res inter alios acta*, and it is but reasonable that when it terminates, he shall be notified of the result before any steps are taken against him, either by attachment or by action on his trustee's bond against him and his sureties." These remarks are founded in good sense, and do not conflict with the authorities cited on the other side,* to the effect that where the trustee is himself an actor in the transaction, and has full knowledge of his duties, such notice and demand are not required.

Daniel Digges, the principal in the bond sued on, was not only the trustee, but he was the solicitor or attorney who procured himself to be appointed trustee, and as such solicitor himself procured the court to grant and the clerk to enter the orders, out of which the liability arises. Thus, after he had obtained the orders for the sale of the property, had sold the same and received the proceeds thereof, he caused an order to be entered in November, 1853, ratifying all that he had done. In June, 1854, he caused an order to be entered, referring it to an auditor to make distribution of the trust fund among the creditors and parties thereto entitled. In the execution of this order, Mr. Hance reported, in 1859, that there was due and payable to each of the plaintiffs, the sum of $704.39\frac{1}{4}$. On the 11th of April, 1860, Mr. Digges causes an order to be entered, finally ratifying the auditor's report, and ordering that the trustee be directed to pay all the trust fund to the several parties named in the auditor's report. Here was a positive direction to the trustee to pay specific sums to persons named, and without qualification or delay. He became an absolute debtor to each of them for the amount payable to each. The order was of his procuring, made and entered through his agency. That it should be necessary to give a man notice of what he had himself done, or that a demand of performance should be required of that which he had himself directed should be done by himself at once and without condition, would be

* See *supra*, p. 433.

quite remarkable. No such necessity exists. The case falls within the other principle referred to, that notice and demand are not necessary where the trustee is himself an actor and has full knowledge of all that is required to be done. He was, in the language of the court in *Oyster* v. *Annan*, "a common debtor who knows his liability, and whose business it is to look to a compliance with his engagements." No case has been cited to support the views of the plaintiff in error, and we think none can be found. In *State* v. *Digges*,* the court place their dismissal of the suit upon other grounds, and the circumstance that Mr. Digges was both the trustee and solicitor in the transaction, is not alluded to, either in the argument of counsel or in the opinion of the court.

The remaining objections, that the bond cannot be sued upon by the plaintiffs below jointly, and that the action cannot be maintained in a court of law, but that equity must be resorted to, are not sustained by the authorities. The suit in the present form in the name of the State, for the use of parties interested, is according to the practice in Maryland and in the District of Columbia.†

In *Brooks* v. *Brooke*, it was decided that the action against the sureties upon the bond could properly be brought in a court of law; and the circumstance that the trustee died before notice was given to him, where notice was necessary, it was held would justify the interposition of a court of equity. To the same purport is the case of *State* v. *Digges*, where it was held that the death of the trustee without having received notice of the order and demand of payment, required the action to be brought in a court of equity. The case is not applicable to an instance like the present, where notice and demand is not required to be given.

JUDGMENT AFFIRMED.

* 21 Maryland, 24.

† See Oyster *v.* Annan, cited *supra*.

Syllabus.

LUCAS *v.* BROOKS.

1. A person in possession of land who takes a lease from another who has bought and claims the land leased, is estopped from denying the title of such other person, or showing that such person was but trustee of the land for him.
2. The act of Congress of July 2d, 1864, which says that there shall be no exclusion of any witness in civil actions because he is a party to or interested in the issue tried does not give capacity to a wife to testify in favor of her husband.
3. A writing bearing even date with a paper having the form of and purporting to be the last will and testament of the party, and disposing clearly and absolutely of all his estate,—which writing refers to the paper as the party's "will" and speaks of itself as "a letter" written for the information and government of the executors, so far only as they see fit to carry out the testator's present views and wishes,—has no testamentary obligation, even though it direct the persons to whom it is written to allow such and such persons to have specific benefits named in specific items of property.
4. Evidence which may divert the attention of the jury from the real issue —that is to say, immaterial evidence—should be kept from the jury.
5. The improper exclusion of a record is not error when the party offering it has proved, in another way, every fact which the record, if it had been admitted, would prove.
6. Prayers for instructions which overlook facts of which there is evidence, or which assume as fact that of which there is no evidence, are properly refused.
7. The question of waiver of a notice to quit is always in part a question of intent, and there can be no intent to waive notice, when the act relied on as a waiver has been the act of the party's agent, unknown to the principal and unauthorized by him.
8. An assignment of error which alleges simply that the court below erred in giving the instructions which were given to the jury in lieu of the instructions asked for—it not being stated in what the error consisted or in what part of the charge it is—is an insufficient assignment under the 21st Rule of court.
9. Where one writes to a man's wife (there being a relationship by blood between the party writing and the wife) proposing to her to occupy a certain farm on which she and her husband were then living, and to pay a certain rent therefor, which offer she accepts, and there is nothing in the correspondence beyond the fact that the property is offered to the wife, and that the wife accepts it, to infer a purpose to give it to her to the exclusion of her husband, the husband is not excluded. The lease enures to his benefit and brings him into the relation of a tenant to the lessors.

Statement of the case.

ERROR to the Circuit Court for the District of West Virginia; in which court P. C. Brooks brought ejectment against Robert Lucas for a farm. The case was thus:

The farm, in 1844, was owned by Edward Lucas, the father of this Robert Lucas. In the year mentioned one Towner recovered three judgments against Edward Lucas, which became liens on the farm. In 1848, Edward Lucas, being embarrassed, conveyed the farm with general warrantee to his son, the said Robert.

In 1858, Towner (Edward Lucas being now dead) filed a bill against his executor, against Robert Lucas, purchaser of the farm, and other heirs, to have satisfaction. Robert Lucas answered, admitting the liens and his purchase of the farm from his father; alleging that it was subject to other liens by judgments and deeds of trust older than these of Towner, and stating that to enable him to make the purchase he had borrowed $9000 from one R. D. Shepherd (whose niece Catharine he had married), and paid the same upon such prior liens; that these were assigned and now held by the said Shepherd as security for the loan, and should be paid before the liens of the complainant. The court, after various references and reports, ordered a sale of the farm, and it was sold; Shepherd, who in the meantime had become the owner of all the liens reported by the master as existing, becoming the purchaser and paying only the costs. Lucas and his wife, the niece, as already said, of Shepherd, were at this time in possession.

Shepherd thereupon, by writing, dated August 30th, 1859, agreed that *Lucas* (nothing being said about the wife) should continue on the land as his tenant until the 1st of April, 1861, at a rent of $600.

Shepherd died in November, 1865. His will, proved on the 12th of March following, ran thus:

"*First.* Having given property and money at different times to my family connections, the greater part of which stands charged on my books under the head of an account there opened and called 'Family Accounts,' I will and bequeath to each

therein named whatever may have been so given and charged, or anything that I may hereafter give during my lifetime.

"*Second.* I will and bequeath to my daughter, Ellen Brooks, and to her two sons, Peter C. Brooks . . . and Shepherd Brooks . . . all my property, real, personal, and mixed, . . . giving one-third to each; and *I direct that they may be put into possession of it without delay.*

"*Third.* I appoint my said two grandsons, P. C. Brooks and S. Brooks, executors of this my will, giving *them seizin of my entire estate.*"

Accompanying this will, and of the same date with it, was a sealed letter of the testator to his daughter and two grandsons named, in which he says:

"I have this day made my *will*, in original and duplicate, one copy with this letter deposited with you, . . . *but write this letter for your information and government so far only as you may see fit to carry out my present views and wishes.* Circumstances frequently change, so as to make what was proper and expedient at one time the reverse at another time. I therefore rely on your doing what is right, keeping in view what you believe my wishes would be were I living."

He mentions that a brother of his, named James, had died in 1837, with debts exceeding half a million of dollars; that he, the writer, had wound up his estate, and after years of toil and anxiety had worked through and saved himself from ruin; that he had derived no benefit whatever from his said brother's estate, and had most strictly complied with all the requests which his brother had made as to the residue of it, after paying certain debts.

He says further:

"I take very little interest in any of my family connections here, except Henry Shepherd and J. H. Shepherd, my two nephews; for all the others, of both sexes, I have done as much as I ever wish done for them, and more than some of them deserve. Should ever Henry or James require aid or assistance, give it to them in such way as you may deem best."

And after some expression of regard for a young man, whom he requests his executors to befriend, and a request

that a ship, which was then named Montgomery, should be called Alexander Hamilton, a great admiration for which statesman he avows, he adds:

"As to the plantation in this county, belonging to me and known as the Lucas farm, allow Catharine Lucas, my niece, to live upon it during her lifetime, on the condition that she pay you a small rent of three or four per cent. on its cost, which is $24,000, but don't sell it unless you get the cost. Then give my said niece $10,000 out of the proceeds, well secured on her children."

Though the lease by Shepherd to Lucas, mentioned some distance back, was by its terms limited as there stated to the 1st of April, 1861, Lucas and his wife remained on the farm after that time, and were living on it when Shepherd died.

After that event, P. C. and S. Brooks, named by him, R. D. Shepherd, as his executors, though the will was not yet proved, wrote to Mrs. Lucas as follows:

"BOSTON, MASS., November 29th, 1865.

"DEAR MADAM: As *executors* of the estate of Mr. R. D. Shepherd, we address you regarding the disposition of the farm belonging to him, on which you live. We have two propositions to make to you, either of which you can accept. First, to occupy the place and pay therefor to us, or our agent, the yearly rent of $600, on the 1st of December of each year; the lease to begin January 1st, 1866. If the rent should be increased, or any other change made, you are to receive one year's notice of it in advance; you are to make all repairs and to pay all expenses on the property excepting taxes, not allowing it to deteriorate. Second, the place to be sold as soon as convenient; to be paid for one-half in cash, to come to us; the other half to remain on mortgage, which will be put in trust for your benefit during your life, and go to your children outright at your death. Meanwhile, until the sale, and as long as you occupy the place, we expect you to pay rent at the rate of $600 per annum, beginning January 1st, 1866.

"Yours, &c.,

"P. C. BROOKS,

"SHEPHERD BROOKS."

To this Mrs. Lucas replied:

"ELMWOOD, VA., December 11th, 1865.

"MESSRS. P. C. AND S. BROOKS.

"DEAR SIRS: Your letter of November 29th was received the 2d instant. I have concluded to accept of your first proposition, that is, rent this farm at $600 a year. As all property is rented here the 1st of April, I wish to make one request, which is to change the date. The rent to be paid the 1st of January, the lease to begin the 1st of April. My reason for making this request is, in case I should be required to leave the farm, I would then have time to find another home.

"Yours, &c.,

"CATHARINE LUCAS."

Subsequently, the commencement of the lease was by mutual agreement fixed for the 1st of April, instead of the 1st of January. After this Mrs. Lucas continued to pay the stipulated rent until 1868, but the rent subsequent to that time was withheld. On the 19th of May, 1866, Mrs. Ellen Brooks and Shepherd Brooks, describing themselves as, with the said P. C. Brooks, equal and only devisees of R. D. Shepherd, conveyed to P. C. Brooks all their right, title, and interest in the land, to hold to him in fee simple; and on the 15th of February, 1869, he gave to Lucas and his wife notice that he terminated the lease on the 1st day of April, 1870, and required them to surrender possession of the land on that day. They declining to do this, P. C. Brooks brought an action of ejectment in the court below to recover it.

The defence was, that the possession and right of possession were in the defendant's wife, as her separate estate, after the expiration of Mr. Shepherd's lease to him; that is, after April 1st, 1861. For this purpose the defendant offered in evidence another lease from Shepherd to his wife for one year from April 1st, 1861, at the yearly rent of $900, and offered proof that this was followed by the lease of 1865, already mentioned. This evidence was received.

The defendant then offered the deposition of his wife to

prove a part of his case, contending that it was admissible under the act of Congress of July 2d, 1864,* which enacts that—

"In courts of the United States there shall be no exclusion of any witness . . . in civil actions because he is a party to, or interested in, the issue tried."

The court excluded the deposition, and its action herein was the first error assigned.

He then offered in evidence certain depositions, which tended to prove the following facts, viz., that James Shepherd (the brother already referred to of R. D. Shepherd) died unmarried in 1837, leaving a large estate, and leaving also several brothers and sisters, one of the brothers being father of the defendant's wife; that R. D. Shepherd was in affluent circumstances and a large creditor of the decedent, whilst the other brothers and sisters were poor; that having great confidence in the honor and generosity of his brother R. D. Shepherd, and to secure his debts to him, James Shepherd devised all his estate to his rich brother R. D. Shepherd; that at the same time he left therewith a sealed letter, directed to this brother, directing that out of his estate, after the payment of his debts, his sisters should receive certain sums named, and his nephews and nieces the residue; that the estate (probably by reason of good management upon the part of R. D. Shepherd) yielded a considerable sum after paying the debts, and that therefore R. D. Shepherd paid the amounts to his sisters as directed in the sealed letter, and for a time aided certain of his brothers and nephews and nieces by distribution of the surplus, by virtue of the will and sealed letter aforesaid.

These depositions tended to prove also by admissions of R. D. Shepherd, that he bought the land in controversy for the defendant's wife, and as her separate property; that it was first purchased in 1848, from the father of the defendant, in the name of the defendant, but in equity for his wife;

* 13 Stat. at Large, 351.

that when it was purchased in 1859, in the name of R. D. Shepherd, it was purchased for her benefit.

The plaintiff objected to the reception of this testimony, "and the court sustained the objection so far as it tended to prove that Catharine Lucas derived title to the property in controversy under the will of R. D. Shepherd, and so far as it referred to conversations and other verbal statements held between said witnesses and R. D. Shepherd concerning his purposes as to said farm, to which ruling the defendant excepted."

This action of the court was the ground of the defendant's second assignment of error.

The defendant, for the same purpose of showing the interest of his wife in the land, and the character of their occupancy, offered in evidence the letter already referred to, bearing even date with the will of R. D. Shepherd, written by him, and addressed to the devisees in his will, which the court permitted to be read in evidence only for the purpose of showing the intention of the executors in executing the lease to Catharine Lucas, which restriction of it the defendant assigned as a third error.

The defendant then, for the purpose last stated, and to show the recognition of the plaintiff that his wife had and controlled the possession of the farm, by the service of a notice upon her the year previous to the one given in evidence by the plaintiff, and a subsequent waiver thereof, offered in evidence a transcript of a record from the Circuit Court of Jefferson County, duly certified, in a proceeding in forcible detainer in the case of *P. C. Brooks* v. *R. A. Lucas*, which contained as the foundation of the suit a notice of the plaintiff upon the defendant's wife, dated March 16th, 1867, and giving notice to *her* that she would be required to surrender possession of the premises and remove therefrom on the 1st of April, 1868. To this transcript the plaintiff objected, and the objection was sustained and the transcript excluded from the jury. The defendant excepted; this being his fourth assignment of error.

The defendant then offered in evidence a transcript of a

distress warrant (issued upon the affidavit of W. A. Chapline, representing himself to be agent of P. C. Brooks in the matter), for rent sworn to be due for the year ending April 1st, 1871, a distress accordingly on the defendant's property, and a replevin and forthcoming bond by the defendant. The transcript was certified by the deputy clerk of the court, and was not under the court seal. It was, therefore, objected to and excluded as not properly certified. To this exclusion the defendant excepted, the same being made his fifth assignment of error.

The defendant then proved orally the same thing which the transcript if received would have shown, but his witness (Chapline himself) testified also that he had not been authorized by Brooks to issue the said distress warrant.

The defendant also gave in evidence (to show that the legal title was not in the plaintiff), two deeds of trust with the bonds secured by them, executed by Edward Lucas and his wife, whilst he was the owner of the land; one to R. H. Lee, dated in February, 1847, in trust for Peter Saurwien, the other to H. Berry, dated in 1843, to secure said bonds of him the said Edward Lucas, to Saurwien and Douglass, which had been assigned by them to Robert Lucas, and by him to J. H. Shepherd, trustee, for the sole and separate use of Catharine Lucas, wife of the said Robert.

The testimony being closed, the defendant asked for four separate instructions:

"1st. That the distress warrant sued out by Chapline, as agent of the plaintiff, for rent claimed as due for the year ending April, 1871, levied as it was on the property of the defendant, who had given a forthcoming bond, and being still pending, constituted a waiver of the notice to quit, and, therefore, that the defendant was entitled to a verdict.

"2d. That no expression of disapprobation by the plaintiff or his attorney of the act of the agent in issuing the distress warrant could defeat its operation as a waiver of the notice to quit, while the proceedings on the warrant were pending, and so long as the plaintiff held the forthcoming bond for the property distrained.

"3d. That if there was an outstanding deed of trust, made February 18th, 1847, conveying the legal title to the farm in question to R. H. Lee, in trust for Peter Saurwein, and if neither he nor the *cestui que trust*, nor any one entitled to receive payment of said debt so secured, were made parties to the suit of *Towner* v. *Lucas, executor, and others*, and if the said outstanding lien was of older date than the lien of Towner's judgment, and if the said first-mentioned lien was still subsisting and unpaid, they would find for the defendant.

"4th. That if the debts secured by the deeds of trust from Edward Lucas to R. H. Lee and H. Berry, were assigned to J. H. Shepherd as trustee for Catharine Lucas, and if the said R. D. Shepherd was not the owner of the said debts, at the time of the sale under the decree of the Circuit Court of Jefferson County, that proceeding could not defeat the title of the trustees to the deeds of trust to secure their payment, although they may have been audited and credited to him in that proceeding, unless the said J. H. Shepherd and Catharine Lucas were parties to that proceeding."

The court, on its own motion, in lieu of instructions requested, instructed the jury thus:

"The will of R. D. Shepherd grants the land in controversy to the three devisees and legatees, Ellen Brooks, P. C. Brooks, and Shepherd Brooks, and the sealed letter accompanying said will in no wise alters or modifies it, and creates no new estate in any one, and it having been produced at the instance of the defendants, and by them offered in evidence, they are bound by its contents, and are not permitted to impeach the correctness of its statements.

"The letter of P. C. Brooks and Shepherd Brooks, addressed to Mrs. Lucas, the wife of the defendant in this cause, and her reply, and the subsequent agreement by letters changing the time of the commencement of the lease from the 1st of January to the 1st of April, as well as the time of the payment of the rents from the 1st day of January to the 1st of December, constitutes a lease of the premises to her by them, which she may take, but being a married woman, by operation of law, the lease becomes the absolute property of her husband, and thereby creates the relation of landlord and tenant between him and the lessors; and the fact that no particular time is mentioned in the

contract of lease, when such relation should cease between the parties, taken in connection with the fact, that the plaintiffs reserved in the contract the right to increase the rent thereafter, or to make other changes in it, upon giving one year's notice, creates a tenancy from year to year, which may be terminated upon one year's notice as prescribed by said contract of lease.

"The relation of landlord and tenant, having been established, as set forth in the preceding instruction, the tenant is estopped from denying his landlord's title.

"And the fact that there were outstanding liens upon the said land, or that the defendant was in possession of the same at the time that the testator, R. D. Shepherd, became the purchaser under the decree of the Circuit Court of Jefferson County, at the suit of *Towner* v. *Lucas, executor, et al.*, does not warrant the defendant, under the circumstances of this case, in disclaiming his landlord's title.

"Before the plaintiff can recover, the jury must be satisfied that the notice required by the contract of lease was given, and, if given by the plaintiff, and there was afterwards a distress warrant sued out to recover rent due and in arrear for the leased premises, in favor of the plaintiff by his agent Chapline, the presumption of law would be that it was sued out with the assent of the plaintiff, in which event he could not maintain this action, unless the evidence satisfies the jury, that the agent Chapline exceeded his authority in suing out such warrant, acting without the knowledge or consent of his principal, after his principal, the plaintiff, had, by notice, according to the contract of lease, terminated the tenancy, in which event he would be entitled to recover."

The record adds:

"*To which instructions the defendant excepted.*"

The instructions were assigned as the seventh error.

Messrs. C. W. B. Allison and D. B. Lucas, for the plaintiff in error:

As to the first error. Was the testimony of the wife properly excluded? The testimony of the husband himself would have been competent. But the interest of the wife

is the interest of the husband. Cases may indeed be well conceived where, in a suit by her husband, the wife's testimony should be excluded upon the ground of public policy, or of domestic peace. But this rule does not apply here, because the testimony was given with the assent of the husband, and in entire harmony with his wishes.

As to the second error. The restriction placed upon the evidence given by the depositions of the witnesses, was calculated to mislead the jury by reason of its indefiniteness. As a whole the testimony had a bearing upon the questions of possession, how, when, and from whom obtained, under what lease, if any; whether held by the defendant or his wife, as her separate property, whether by an equitable interest in the fee, with the right of possession, or as tenant for years, from year to year, at will or sufferance, or for life. Some of these questions were important to be ascertained by the jury, before the doctrine of estoppel could be applied. It was thus competent generally, and if any portions were incompetent, they should have been pointed out and excluded.

As to the third error. The testamentary letter of Shepherd, dated on the day that his will was, and found with it, should not have been restricted as it was, but was competent in connection with the other testimony, to go to the jury to enable them to determine the character of the occupancy of the defendant and his wife, and particularly whether she had a separate interest in the land. Analyze the letter of November 29th, 1865, by P. C. and S. Brooks to Mrs. Lucas, and then place in juxtaposition with it this testamentary letter.

The former letter (November 29th, 1865), begins thus:

"AS EXECUTORS of the estate of R. D. Shepherd, we address you."

Now, does not this offer, made as *executors*, naturally cause us to recur to the *will*, whence all their representative authority was derived? But, upon recurring to the will, as probated, we find no such authority as this letter would in-

dicate. We must look beyond the formal will for any such power in the executors. We find it in the letter accompanying the will, and bearing even date. Here then, we have the key to the action of the executors; the authority under which, as *executors*, they were proceeding to dispose of the Lucas farm. Here is the *trust*, which the executors (who are also, with Ellen Brooks, the only devisees) accepted, in favor of Catharine Lucas, and which they proceeded to execute. It matters not, as far as the present question is concerned, whether this letter were mandatory or only advisory. The present question is: Did the executors *intend*, in their letter to Catharine Lucas of November 29th, 1865, to offer to her, substantially, the alternative propositions which the sealed letter sets out?

If they did, the court below erred in pronouncing the lease from year to year only.

But if we be wrong, still, was not this duty of construing and comparing separate papers, with a view to extract therefrom the true intent of the contracting parties, a labor for the *jury*, of which the court could not relieve them? Did not this *duty*, if it devolved upon the jury, correspond to a *right* on the part of the appellant, of which the court below erroneously deprived him?

As to the fourth error. The transcript of the record of proceedings in forcible detainer, commenced by the plaintiff in 1868, was proper evidence to show that the plaintiff, when he gave the notice therein shown, looked upon and treated the defendant's *wife* as the tenant in her own right, by giving the notice to her alone, and the abandonment of the suit when she paid the rent.

As to the fifth error. Was the transcript of the proceedings under the distress warrant properly excluded? We understand it to be settled, that in the courts of the United States no other certificate or authentication is required, than is required in the courts of the State in whch the Federal court is sitting. If this transcript was excluded because the attestation was by the deputy, and not the clerk himself, or for want of the *seal of the court*, the ruling in either case

was erroneous.* Now, when the court erroneously excluded primary evidence, and drove us to prove by secondary and inferior testimony the same facts which we proposed so to prove by the record, we were substantially injured. We were driven to examine the plaintiff's agent, who stated that what he did was unauthorized. Were we not thus injured? If the record had been received the authority of the agent could not have been drawn in question, without the principal's first dismissing the proceeding.

As to the sixth error. 1. The first instruction asked by the defendant should have been given, because the jury from the evidence before them would and should have found the facts stated therein, that such facts did constitute a waiver, upon the part of the plaintiff, of the notice to quit which he had given in evidence.

2. So, too, the defendant's second instruction asked for was proper. The plaintiff should have repudiated the act of the agent by a positive act, in discharging the forthcoming bond and dismissing the proceeding.

3. The third and fourth instructions asked for should have been given. They seem to have been refused because the court was of the opinion that the defendant "under the circumstances of the case," that is, that by reason of some one or more of the leases was estopped denying the plaintiff's title and right of possession, and that the question of estoppel under the facts proved should not be left to the jury, but should be settled by the court. We treat of this matter further on.

As to the seventh error. I. The first instruction given by the court was calculated to mislead the jury.

Both the legal title and right of possession must be in the plaintiff to entitle him to recover in this action. By the second clause of the will it would seem to be vested in the daughter and grandchildren in equal proportions. But by the third it is vested in the executors as such. "Seizin" (the term used in the third clause) means the legal title, or

* Cooke *v.* Hunter, 2 Overton, 113; Code of West Virginia, p. 615, § 5.

lawful right of possession. What else could the testator have meant by the sentence "giving them *seizin of my entire estate?*"

Both clauses should be construed together and reconciled if possible. This can be done by giving to the executors the possession or right of possession and control for a time, and the legal title, and making the devisees the sole beneficiaries with the right to receive the possession from the executors. If the two clauses cannot be reconciled by reason of being in conflict, then, by the rule for construction of wills, the last clause must prevail.* The plaintiff below recognized the right of the executors to rent, control, and dispose of the land under the will, by the correspondence with Mrs. Lucas and the lease in the name of the executors.

II. The court erred in its second instruction. The lease should be construed in connection with the other evidence, showing her former interest in the land derived from the testator, and thus construed. The lease to Mrs. Lucas was her separate estate and not the property of the husband by operation of law or otherwise. No particular phraseology is necessary to create a separate estate for a *feme covert.*† There was enough here to show the purpose.

This second instruction is erroneous on several other grounds:

1. It removed and precluded from the consideration of the jury an important question of fact depending upon the interpretation of a series of documents, including the sealed letter, viz.: was this a lease from year to year, or for life?

2. It wrongly stated the law, in saying that "a lease to the wife by operation of law becomes the absolute property of the husband." There must be proof of his *assent* expressed or implied; and his property in it is only *qualified*, there being a right of survivorship in the wife.

Again, the lease from the executors did not create a tenancy from year to year.

* Sherratt *v.* Bentley, 2 Mylne & Keen, 149; 2 Jarman on Wills, 741, Rule 7.

† Prout *v.* Roby, 15 Wallace, 471.

Argument for the plaintiff in error.

If the rent should be increased, or any other change made, Mrs. Lucas was to have one year's notice of it in advance. It will be seen that no limit is made to the term, but it contemplates a continuance for years. Power is reserved to increase the rent after a year's notice, and also to make other *changes* after a like notice. Does the reservation of the power to make a *change* authorize a *termination* of the lease, as held by the court below?

III. The third instruction of the court is erroneous, because:

1. It touched on the province of the jury; it declared that the relation of landlord and tenant *had been established* [proved], and that the tenancy was *established* [proved], to be from year to year.

2. A person having *entered* under a lease is estopped from denying it. The rule is founded on the importance which the law attaches to good faith. But there was no such entry here. Lucas and wife were already in possession under another title. The lease was at best but an acknowledgment of tenancy by one previously in possession, and the court should have so qualified the application of the doctrine of *estoppel* as to have allowed the jury to determine whether the acknowledgment of tenancy was not procured by fraud or undue influence, or made by mistake, or through ignorance.

There was no deed, and hence no *technical* estoppel; and where possession is not derived from the lease, a mere acknowledgment of tenancy is no *equitable* estoppel. The alleged landlord has not been placed in any worse position, and the question is whether, all things considered, the supposed tenant, by such acknowledgment, ought to be precluded from asserting a superior title in himself.

IV. The fourth instruction was erroneous, because:

1. An outstanding unsatisfied mortgage is a good defence in an action of ejectment, when the defendant has an equitable title.*

* Peltz *v.* Clarke, &c., 5 Peters, 481; Marsh *v.* Brooks, 8 Howard, 222.

2. The court repeats the error of deciding upon the "circumstances [facts] of this case," which ought to have been left to the jury.

Mr. C. J. Faulkner, contra.

Mr. Justice STRONG delivered the opinion of the court.

Before proceeding to a consideration of the several errors assigned, it may be remarked that if the defendant was in possession under a lease from the plaintiff, or from any one to whose reversion the plaintiff had succeeded, he was not at liberty to controvert the title of the plaintiff or of that reversioner, while he remained in possession. In view of this undoubted principle it is impossible to see how he could have resisted a recovery, if in fact he was the tenant of the plaintiff, or if the plaintiff had succeeded to the title of R. D. Shepherd. But it is very plain that during the lease of 1859, he was Shepherd's tenant, and that after its expiration he continued a tenant from year to year under that lease; unless the one made in 1861, or that made in 1865, supplanted it. Both the later leases were made to his wife. As he did not dissent, they became her chattels real, and during the coverture they belonged to him. Necessarily, therefore, his possession was in law under those leases, or one of them, or it was as a tenant of Mr. Shepherd from year to year, in virtue of his holding over after the expiration of the lease of 1859. How then he could show, so long as he retained that possession, that Shepherd had no title, or that Shepherd held in trust for his wife, or that any one who had succeeded to Shepherd's title, or one, though not thus succeeding, to whom he had attorned by the payment of rent, had no title or held in trust for his wife, we are not informed, nor can we be. That was a defence which he was not at liberty to set up, even upon his own showing of the facts. That the plaintiff had succeeded to Shepherd's title is, we think, very certain. The will, as we have seen, devised and bequeathed to Ellen Brooks, the testator's daughter, and to her two sons, all his property, real, personal, and

mixed, and directed that they should be put into possession of it without delay. If this stood alone, it could not be doubted that the devisees named took the entire estate of the testator. The third item of the will, however, it is insisted, gave the estate to the executors. Its language is: "I constitute and appoint my two grandsons, Peter C. Brooks, the younger of that name, and Shepherd Brooks, executors of this my will, giving them seizin of my entire estate." But this clause must be construed consistently, if possible, with the other provisions of the will, so as to give effect to all its parts. Hence, it is clear that the testator intended by the word "seizin," possession; and that he gave it to his executors for the purposes which he had in view when he constituted them executors. The will exhibits no reason why they should be invested with the title to the testator's real estate, and such an investiture is directly in conflict with the second item, which casts the title by apt words upon his daughter, the plaintiff, and Shepherd Brooks. Hence, it must be held that by force of the will and the deed from Mrs. Brooks and Shepherd Brooks, the plaintiff had succeeded to the reversion of Mr. Shepherd, and to all the right which his co-devisees ever had. His title, therefore, was unassailable by the defendant, and his right to the possession as against the defendant was unquestionable, if notice of the termination of the lease, and of his intention to resume possession, was duly given.

This view of the case makes the consideration of the specific errors assigned very easy. So far as they are aimed at showing that the defendant did not stand in the relation of a tenant of the plaintiff, or of one to whose reversion the plaintiff had succeeded, they are material, but unless that was shown, they can have no effect upon the judgment which has been obtained.

The first is, that the court refused to admit in evidence the deposition of Catharine Lucas, the wife of the defendant. That it is a rule of the common law, a wife cannot be received as a witness for or against her husband, except in suits between them, or in criminal cases where he is prose-

cuted for wrong done to her, is not controverted. But it is argued, because Congress has enacted that in civil actions in the courts of the United States there shall be no exclusion of any witness because he is a party to, or interested in the issue tried, the wife is competent to testify for her husband. Undoubtedly the act of Congress has cut up by the roots all objections to the competency of a witness on account of interest. But the objection to a wife's testifying on behalf of her husband, is not and never has been that she has any interest in the issue to which he is a party. It rests solely upon public policy. To that the statute has no application. Accordingly, though statutes similar to the act of Congress exist in many of the States, they have not been held to remove the objection to a wife's competency to testify for or against her husband. And in West Virginia it has been expressly enacted that a husband shall not be examined for or against his wife, nor a wife for or against her husband, except in an action or suit between husband and wife.* Were there any doubt respecting the question, this statute would solve it, for the act of Congress of July 6th, 1862,† declares that the laws of the State in which the court shall be held, shall be the rules of decision as to the competency of witnesses in the courts of the United States.

The second assignment of error is, that the court sustained the plaintiff's objections to certain other depositions offered by the defendant, so far as they tended to prove that Catharine Lucas obtained title to the property in controversy under the will of R. D. Shepherd, and so far as they referred to conversations of the witness with Mr. Shepherd concerning his purposes respecting the farm. The objection sustained by the court was to the subject-matter of the testimony, and it was sustained because it was inadmissible for the defendant to introduce evidence to impeach his landlord's title. There can be no doubt the ruling was correct. For the same reason the ruling complained of in the third assignment was unobjectionable. Indeed, it is difficult to

* Civil Code of 1868, page 620.

† 12 Stat. at Large, 588.

perceive what possible bearing upon the case the letter of Mr. Shepherd to his daughter and grandsons could have. Certainly it contained nothing that tended in the slightest degree to support any defence the defendant was at liberty to set up.

Nor can we perceive that the record of the proceeding for a forcible detainer, commenced by the plaintiff in 1868, was pertinent in any degree to any matter in controversy in this case. It was, therefore, properly excluded. A judge well performs his duty when he guards the jury against having their attention diverted from the real issue by the introduction of immaterial evidence.

The fifth assignment is, that the court erred in excluding what is called a transcript of a distress warrant issued by Chapline, agent for the plaintiff, against the defendant, and also in excluding the forthcoming bond. They were offered apparently to show that the notice to quit on the 1st of April, 1870, had been waived by the plaintiff, but they were rejected by the court because not properly certified. Whether the court erred in this or not is of no importance, for the fact that such a distress warrant was issued the defendant was allowed to prove by other evidence, and he had the full benefit of such proof. There was not a fact stated in the transcript which did not otherwise appear, and the facts were not controverted. The error of the court, therefore, if there was an error, was perfectly harmless, and it would not justify directing a new trial.

The remaining assignments which require any notice all relate to the charge. The first instruction asked by the defendant and refused by the court was, in substance, that the distress warrant sued out by Chapline, as agent of the plaintiff, for rent claimed to be due for the year ending April, 1871, levied as it was on the property of the defendant, who had given a forthcoming bond, and being still pending, constituted a waiver of the notice to quit, and, therefore, that the defendant was entitled to a verdict. The prayer overlooked the fact, of which there was evidence, that Chapline had no authority from the plaintiff to issue the distress war-

rant, and that his act had been disapproved by the plaintiff's attorney. The second prayer was, in effect, that no expression of disapprobation by the plaintiff or his attorney of the act of the agent in issuing the distress warrant could defeat its operation as a waiver of the notice to quit, while the proceedings on the warrant were pending, and so long as the plaintiff held the forthcoming bond for the property distrained. This prayer assumes as a fact that of which there was no evidence. It assumes that the plaintiff held the forthcoming bond. But it is very manifest that the defendant was not entitled to have either of these instructions asked for by him given to the jury. It is true the notice to quit might have been waived, and doubtless should have been regarded as waived by the distress warrant if it had been issued by the plaintiff, or by his authority. But waiver is always in part a question of intent, and there could have been no intent to waive if the act claimed to have been a waiver was either unknown to the plaintiff, or unauthorized by him, or not ratified by him. That the distress warrant was unauthorized, and, indeed, disavowed, is a fact of which there was evidence, and no attempt was made to show that it had ever been ratified. The defendant has, therefore, no reason to complain that his prayer for the instruction mentioned was refused. The court did charge that notice to quit was necessary to entitle the plaintiff to recover, and that if notice was given, and afterwards a distress warrant was sued out to recover rent due and in arrear for the leased premises, the presumption of law would be that it was sued out with the assent of the plaintiff, in which event he could not maintain the action unless the evidence satisfied the jury that the agent, Chapline, exceeded his authority in suing out such warrant, acting without the knowledge and consent of his principal. More than this the defendant had no right to ask.

The third and fourth instructions asked for were also properly denied. They were in keeping with the efforts made by the defendant throughout the trial to attack the title under which he had held as tenant. If not still retain-

ing possession under the first lease made to him, he was in under a subsequent lease made to his wife, which he himself had given in evidence. It was not open to him, therefore, to show that some other person had the legal title, or a better title than that of the landlord.

It would be sufficient to say of the seventh assignment of error that it has been made in entire disregard of the rules of this court. It avers simply that the court below erred in giving the instructions which were given to the jury, on its own motion (that is, in the general charge), in lieu of the instructions asked for by the parties, but in what the error consisted, or in what part of the charge it is contained, is not specified. That under the twenty-first rule this is an insufficient assignment is very plain. Were it, however, made as directed by our rule it could not be sustained. We have already said that, under the will of R. D. Shepherd, his daughter and two sons took the legal estate in the lands devised by him. We might have added that the sealed letter accompanying the will was not testamentary, and that it in no respect created any estate, legal or equitable, in any one.

It has been conceded in the argument, as it should have been, the court properly ruled that the letter of P. C. Brooks and Shepherd Brooks, executors, to the defendant's wife, dated November 29th, 1865, with her reply to it, and the subsequent modification agreed upon, constituted a lease of the premises to her. But it is denied that the lease enured to the benefit of her husband, and brought him into the relation of a tenant under the lessors, because, as it is claimed, it was a lease for her separate use. This claim, however, is without any foundation in the contract. There is no word that looks to the exclusion of the husband. No particular phraseology, it is true, is necessary for the creation of a separate estate for a feme covert, but there must be something to show an intent to create it, and nothing of the kind appears in this case. The court, therefore, correctly charged the jury, in the absence of any proof of dissent by the defendant, that the lease became his property, and that in force of it he became the tenant of the lessors.

That the lease created a tenancy from year to year is too plain to need argument.

There is nothing more in the record or in the assignments of error that requires notice. We fail to perceive anything of which the defendant below, now plaintiff in error, can justly complain, and the judgment is, therefore,

AFFIRMED.

THOMPSON *v.* WHITMAN.

1. Neither the constitutional provision, that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State, nor the act of Congress passed in pursuance thereof, prevents an inquiry into the jurisdiction of the court by which a judgment offered in evidence was rendered.
2. The record of a judgment rendered in another State may be contradicted as to the facts necessary to give the court jurisdiction; and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist.
3. Want of jurisdiction may be shown either as to the subject-matter or the person, or, in proceedings *in rem*, as to the thing.
4. By a law of New Jersey non-residents were prohibited from raking clams and oysters in the waters of that State under penalty of forfeiture of the vessel employed; and any two justices of the county in which the seizure of the vessel should be made were authorized, on information given, to hear and determine the case: *Held*, that if the seizure was not made in the county where the prosecution took place, the justices of that county had no jurisdiction, and that this fact might be inquired into in an action for making such seizure brought in New York, notwithstanding the record of a conviction was produced which stated that the seizure was made within such county.

ERROR to the Circuit Court for the Southern District of New York; the case being thus:

A statute of New Jersey, approved April 16th, 1846, and commonly known there as the Oyster Law, thus enacts:

"SECTION 7. It shall not be lawful for any person who is not at the time an actual inhabitant and resident of this State, . . . to rake or gather clams, oysters, or shell-fish, . . . in any of

the rivers, bays, or waters of this State, on board of any . . . boat or other vessel; and every person who shall offend herein shall forfeit and pay $20; . . . and the said . . . boat or other vessel, used and employed in the commission of such offence, with all the clams, oysters, clam-rakes, tongs, tackle, furniture, and apparel, shall be forfeited, and the same seized, secured, and disposed of, in the manner prescribed in the ninth and tenth sections of this act.

"SECTION 9. It shall be the duty of all sheriffs . . . to seize and secure any such . . . boat or other vessel as aforesaid, and immediately thereupon give information thereof *to two justices of the peace of the county where such seizure shall have been made*, who are hereby empowered and required to meet at such time and place as they shall appoint for the trial thereof, and hear and determine the same; and in case the same shall be condemned, it shall be sold by the order and under the direction of the said justices, who, after deducting all legal costs and charges, shall pay one-half of the proceeds of said sale to the collector of the county in which such offence shall have been committed, and the other half to the person who shall have seized and prosecuted the same."

This statute being in force, Whitman, a citizen of New York, sued Thompson, sheriff of Monmouth County, New Jersey, in the court below in an action of trespass, for taking and carrying away a certain sloop of his, named the Anna Whitman, her cargo, furniture, and apparel.

The declaration charged that on the 26th of September, 1862, the defendant, with force and arms, on the high seas, in the outward vicinity of the Narrows of the port of New York, and within the Southern District of New York, seized and took the said sloop, with her tackle, furniture, &c., the property of the plaintiff, and carried away and converted the same. The defendant pleaded not guilty, and a special plea in bar. The latter plea justified the trespass by setting up that the plaintiff, a resident of New York, on the day of seizure, was raking and gathering clams with said sloop in the waters of the State of New Jersey, to wit, within the limits of the county of Monmouth, contrary to a law of that State, and that by virtue of the said law the defendant, who

was sheriff of said county, seized the sloop within the limits thereof, and informed against her before two justices of the peace of said county, by whom she was condemned and ordered to be sold. In answer to this plea the plaintiff took issue as to the place of seizure, denying that it was within the State of New Jersey, or the county of Monmouth, thus challenging the jurisdiction of the justices, as well as the right of the defendant to make the seizure. On the trial conflicting testimony was given upon this point, but the defendant produced a record of the proceedings before the justices, which stated the offence as having been committed, and the seizure as made, within the county of Monmouth, with a history of the proceedings to the condemnation and order of sale. The defendant, relying on the provision of the Constitution* which says that—

"Full faith and credit 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:"

and on the act of Congress of May 26th, 1790,† which, after prescribing a mode in which the records and judicial proceedings of the courts of any State shall be authenticated, enacts that—

"The said records and 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 may be taken:"

asserted that this record was conclusive both as to the jurisdiction of the court and the merits of the case, and that it was a bar to the action, and requested the court so to charge the jury. But the court refused so to charge, and charged that the said record was only *primâ facie* evidence of the facts therein stated, and threw upon the plaintiff the burden of proving the contrary. The defendant excepted,

* Article iv, § 1.

† 1 Stat. at Large, 122.

and the jury, under the direction of the court, found for the plaintiff generally, and, in answer to certain questions framed by the court, found specially, first, that the seizure was made within the State of New Jersey; secondly, that it was not made in the county of Monmouth; thirdly, that the plaintiff was not engaged on the day of the seizure in taking clams within the limits of the county of Monmouth. Judgment being rendered for the plaintiff, the case was brought here for review.

The chief error assigned was the charge of the court, abovementioned, that the record from New Jersey was only *primâ facie* evidence of the facts which it stated; though the counsel for the plaintiff in error also argued that if the record was not conclusive of the facts stated in it, and if the seizure was first made outside of the limits of Monmouth County, yet that confessedly the vessel was brought right into Monmouth County, so that the seizure, being continuous, might properly enough be held to have been made there; and that this was particularly true, if it was assumed, as it was on the other side, that the vessel, when first seized, though seized within the State, was not seized within the limits of any county.

Mr. C. N. Black, for the plaintiff in error; Mr. R. Gilchrist, attorney-general of New Jersey, intervening and arguing in the same interest. Messrs. W. M. Evarts and J. L. Cadwalader, contra.

Mr. Justice BRADLEY delivered the opinion of the court.

The main question in the cause is, whether the record produced by the defendant was conclusive of the jurisdictional facts therein contained. It stated, with due particularity, sufficient facts to give the justices jurisdiction under the law of New Jersey. Could that statement be questioned collaterally in another action brought in another State? If it could be, the ruling of the court was substantially correct. If not, there was error. It is true that the court charged generally that the record was only *primâ facie* evidence of

the facts stated therein; but as the jurisdictional question was the principal question at issue, and as the jury was required to find specially thereon, the charge may be regarded as having reference to the question of jurisdiction. And if upon that question it was correct, no injury was done to the defendant.

Without that provision of the Constitution of the United States which declares that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State," and the act of Congress passed to carry it into effect, it is clear that the record in question would not be conclusive as to the facts necessary to give the justices of Monmouth County jurisdiction, whatever might be its effect in New Jersey. In any other State it would be regarded like any foreign judgment; and as to a foreign judgment it is perfectly well settled that the inquiry is always open, whether the court by which it was rendered had jurisdiction of the person or the thing. "Upon principle," says Chief Justice Marshall, "it would seem that the operation of every judgment must depend on the power of the court to render that judgment; or, in other words, on its jurisdiction over the subject-matter which it has determined. In some cases, that jurisdiction unquestionably depends as well on the state of the thing as on the constitution of the court. If by any means whatever a prize court should be induced to condemn, as prize of war, a vessel which was never captured, it could not be contended that this condemnation operated a change of property. Upon principle, then, it would seem that, to a certain extent, the capacity of the court to act upon the thing condemned, arising from its being within, or without, their jurisdiction, as well as the constitution of the court, may be considered by that tribunal which is to decide on the effect of the sentence."*

The act of Congress above referred to, which was passed 26th of May, 1790, after providing for the mode of authenticating the acts, records, and judicial proceedings of the

* Rose v. Himely, 4 Cranch, 269. To the same effect see Story on the Constitution, chap. xxix; 1 Greenleaf on Evidence, § 540.

States, declares, "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." It has been supposed that this act, in connection with the constitutional provision which it was intended to carry out, had the effect of rendering the judgments of each State equivalent to domestic judgments in every other State, or at least of giving to them in every other State the same effect, in all respects, which they have in the State where they are rendered. And the language of this court in *Mills* v. *Duryee*,* seemed to give countenance to this idea. The court in that case held that the act gave to the judgments of each State the same conclusive effect, as records, in all the States, as they had at home; and that *nil debet* could not be pleaded to an action brought thereon in another State. This decision has never been departed from in relation to the general effect of such judgments where the questions raised were not questions of jurisdiction. But where the jurisdiction of the court which rendered the judgment has been assailed, quite a different view has prevailed. Justice Story, who pronounced the judgment in *Mills* v. *Duryee*, in his Commentary on the Constitution,† after stating the general doctrine established by that case with regard to the conclusive effect of judgments of one State in every other State, adds: "But this does not prevent an inquiry into the jurisdiction of the court in which the original judgment was given, to pronounce it; or the right of the State itself to exercise authority over the person or the subject-matter. The Constitution did not mean to confer [upon the States] a new power or jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within their territory." In the Commentary on the Conflict of Laws,‡ substantially the same remarks are repeated, with this addition: "It" (the Constitution) "did not make the

* 7 Cranch, 484. † Sec. 1313. ‡ Sec. 609.

judgments of other States domestic judgments to all intents and purposes, but only gave a general validity, faith, and credit to them, as evidence. No execution can issue upon such judgments without a new suit in the tribunals of other States. And they enjoy not the right of priority or lien which they have in the State where they are pronounced, but that only which the *lex fori* gives to them by its own laws in their character of foreign judgments." Many cases in the State courts are referred to by Justice Story in support of this view. Chancellor Kent expresses the same doctrine in nearly the same words, in a note to his Commentaries.* "The doctrine in *Mills* v. *Duryee*," says he, "is to be taken with the qualification that in all instances the jurisdiction of the court rendering the judgment may be inquired into, and the plea of *nil debet* will allow the defendant to show that the court had no jurisdiction over his person. It is only when the jurisdiction of the court in another State is not impeached, either as to the subject-matter or the person, that the record of the judgment is entitled to full faith and credit. The court must have had jurisdiction not only of the *cause*, but of the *parties*, and in that case the judgment is final and conclusive." The learned commentator adds, however, this qualifying remark: "A special plea in bar of a suit on a judgment in another State, to be valid, must deny, by positive averments, every fact which would go to show that the court in another State had jurisdiction of the person, or of the subject-matter."

In the case of *Hampton* v. *McConnel*,† this court reiterated the doctrine of *Mills* v. *Duryee*, that "the judgment of a State court should have the same credit, validity, and effect in every other court of the United States which it had in the State courts where it was pronounced; and that whatever pleas would be good to a suit therein in such State, and none others, could be pleaded in any court in the United States." But in the subsequent case of *McElmoyle* v. *Cohen*,‡

* Vol. 1, p. 281; see also vol. 2, 95, note, and cases cited.
† 3 Wheaton, 234. ‡ 13 Peters, 312.

the court explained that neither in *Mills* v. *Duryee*, nor in *Hampton* v. *McConnel*, was it intended to exclude pleas of avoidance and satisfaction, such as payment, statute of limitations, &c.; or pleas denying the jurisdiction of the court in which the judgment was given; and quoted, with approbation, the remark of Justice Story, that "the Constitution did not mean to confer a new power of jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within the State."

The case of *Landes* v. *Brant*,* has been quoted to show that a judgment cannot be attacked in a collateral proceeding. There a judgment relied on by the defendant was rendered in the Territory of Louisiana in 1808, and the objection to it was that no return appeared upon the summons, and the defendant was proved to have been absent in Mexico at the time; but the judgment commenced in the usual form, "And now at this day come the parties aforesaid by their attorneys," &c. The court pertinently remarked,† that the defendant may have left behind counsel to defend suits brought against him in his absence, but that if the recital was false and the judgment voidable for want of notice, it should have been set aside by *audita querela* or motion in the usual way, and could not be impeached collaterally. Here it is evident the proof failed to show want of jurisdiction. The party assailing the judgment should have shown that the counsel who appeared were not employed by the defendant, according to the doctrine held in the cases of *Shumway* v. *Stillman*,‡ *Aldrich* v. *Kinney*,§ and *Price* v. *Ward*.‖ The remark of the court that the judgment could not be attacked in a collateral proceeding was unnecessary to the decision, and was, in effect, overruled by the subsequent cases of *D'Arcy* v. *Ketchum* and *Webster* v. *Reid*. *D'Arcy* v. *Ketchum*¶ was an action in the Circuit Court of the United States for Louisiana, brought on a judgment rendered in New York under a local statute, against two defendants, only one of

* 10 Howard, 348. † Page 371. ‡ 6 Wendell, 453.
§ 4 Connecticut, 380. ‖ 1 Dutcher, 225. ¶ 11 Howard, 165.

whom was served with process, the other being a resident of Louisiana. In that case it was held by this court that the judgment was void as to the defendant not served, and that the law of New York could not make it valid outside of that State; that the constitutional provision and act of Congress giving full faith, credit, and effect to the judgments of each State in every other State do not refer to judgments rendered by a court having no jurisdiction of the parties; that the mischief intended to be remedied was not only the inconvenience of retrying a cause which had once been fairly tried by a competent tribunal, but also the uncertainty and confusion that prevailed in England and this country as to the credit and effect which should be given to foreign judgments, some courts holding that they should be conclusive of the matters adjudged, and others that they should be regarded as only *primâ facie* binding. But this uncertainty and confusion related only to valid judgments; that is, to judgments rendered in a cause in which the court had jurisdiction of the parties and cause, or (as might have been added) in proceedings *in rem*, where the court had jurisdiction of the *res*. No effect was ever given by any court to a judgment rendered by a tribunal which had not such jurisdiction. "The international law as it existed among the States in 1790," say the court,* "was that a judgment rendered in one State, assuming to bind the person of a citizen of another, was void within the foreign State, when the defendant had not been served with process or voluntarily made defence, because neither the legislative jurisdiction, nor that of courts of justice, had binding force. Subject to this established principle, Congress also legislated; and the question is, whether it was intended to overthrow this principle and to declare a new rule, which would bind the citizens of one State to the laws of another. There was no evil in this part of the existing law, and no remedy called for, and in our opinion Congress did not intend to overthrow the old rule by the enactment that such faith and credit

* Page 176.

should be given to records of judgments as they had in the States where made."

In the subsequent case of *Webster* v. *Reid*,* the plaintiff claimed, by virtue of a sale made under judgments in behalf of one Johnson and one Brigham against "The Owners of Half-Breed Lands lying in Lee County," Iowa Territory, in pursuance of a law of the Territory. The defendant offered to prove that no service had ever been made upon any person in the suits in which the judgments were rendered, and no notice by publication as required by the act. This court held that, as there was no service of process, the judgments were nullities. Perhaps it appeared on the face of the judgments in that case that no service was made; but the court held that the defendant was entitled to prove that no notice was given, and that none was published.

In *Harris* v. *Hardeman et al.*,† which was a writ of error to a judgment held void by the court for want of service of process on the defendant, the subject now under consideration was gone over by Mr. Justice Daniel at some length, and several cases in the State courts were cited and approved, which held that a judgment may be attacked in a collateral proceeding by showing that the court had no jurisdiction of the person, or, in proceedings *in rem*, no jurisdiction of the thing. Amongst other cases quoted were those of *Borden* v. *Fitch*,‡ and *Starbuck* v. *Murray*;§ and from the latter the following remarks were quoted with apparent approval. "But it is contended that if other matter may be pleaded by the defendant he is estopped from asserting anything against the allegation contained in the record. It imports perfect verity, it is said, and the parties to it cannot be heard to impeach it. It appears to me that this proposition assumes the very fact to be established, which is the only question in issue. For what purpose does the defendant question the jurisdiction of the court? Solely to show that its proceedings and judgment are void, and, therefore, the

* 11 Howard, 437.
† 14 Howard, 334.
‡ 15 Johnson, 141.
§ 5 Wendell, 156.

supposed record is, in truth, no record. . . . The plaintiffs, in effect, declare to the defendant,—the paper declared on is a record, because it says you appeared, and you appeared because the paper is a record. This is reasoning in a circle."

The subject is adverted to in several subsequent cases in this court, and generally, if not universally, in terms implying acquiescence in the doctrine stated in *D'Arcy* v. *Ketchum*.

Thus, in *Christmas* v. *Russell*,* where the court decided that fraud in obtaining a judgment in another State is a good ground of defence to an action on the judgment, it was distinctly stated,† in the opinion, that such judgments are open to inquiry as to the jurisdiction of the court, and notice to the defendant. And in a number of cases, in which was questioned the jurisdiction of a court, whether of the same or another State, over the general subject-matter in which the particular case adjudicated was embraced, this court has maintained the same general language. Thus, in *Elliott et al.* v. *Peirsol et al.*,‡ it was held that the Circuit Court of the United States for the District of Kentucky might question the jurisdiction of a county court of that State to order a certificate of acknowledgment to be corrected; and for want of such jurisdiction to regard the order as void. Justice Trimble, delivering the opinion of this court in that case, said: "Where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But, if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void."

The same views were repeated in *The United States* v. *Arredondo*,§ *Vorhees* v. *Bank of the United States*,‖ *Wilcox* v. *Jackson*,¶ *Shriver's Lessee* v. *Lynn*,** *Hickey's Lessee* v. *Stewart*,†† and *Williamson* v. *Berry*.‡‡ In the last case the authorities are reviewed, and the court say: "The jurisdiction of any

* 5 Wallace, 290.
§ 6 Peters, 691.
** 2 Howard, 59, 60.
† Page 305.
‖ 10 Id. 475.
†† 3 Id. 762.
‡ 1 Peters, 328, 340.
¶ 13 Id. 511.
‡‡ 8 Id. 540.

court exercising authority over a subject may be inquired into in every other court when the proceedings in the former are relied upon and brought before the latter by a party claiming the benefit of such proceedings;" and "the rule prevails whether the decree or judgment has been given in a court of admiralty, chancery, ecclesiastical court, or court of common law, or whether the point ruled has arisen under the laws of nations, the practice in chancery, or the municipal laws of States."

But it must be admitted that no decision has ever been made on the precise point involved in the case before us, in which evidence was admitted to contradict the record as to jurisdictional facts asserted therein, and especially as to facts stated to have been passed upon by the court.

But if it is once conceded that the validity of a judgment may be attacked collaterally by evidence showing that the court had no jurisdiction, it is not perceived how any allegation contained in the record itself, however strongly made, can affect the right so to question it. The very object of the evidence is to invalidate the paper as a record. If that can be successfully done no statements contained therein have any force. If any such statements could be used to prevent inquiry, a slight form of words might always be adopted so as effectually to nullify the right of such inquiry. Recitals of this kind must be regarded like asseverations of good faith in a deed, which avail nothing if the instrument is shown to be fraudulent. The records of the domestic tribunals of England and some of the States, it is true, are held to import absolute verity as well in relation to jurisdictional as to other facts, in all collateral proceedings. Public policy and the dignity of the courts are supposed to require that no averment shall be admitted to contradict the record. But, as we have seen, that rule has no extra-territorial force.

It may be observed that no courts have more decidedly affirmed the doctrine that want of jurisdiction may be shown by proof to invalidate the judgments of the courts of other States, than have the courts of New Jersey. The subject was examined and the doctrine affirmed, after a careful re-

view of the cases, in the case of *Moulin* v. *Insurance Company*, in 4 Zabriskie,* and again in the same case in 1 Dutcher,† and in *Price* v. *Ward*;‡ and as lately as November, 1870, in the case of *Mackay et al.* v. *Gordon et al.*§ The judgment of Chief Justice Beasley in the last case is an able exposition of the law. It was a case similar to that of *D'Arcy* v. *Ketchum*, in 11 Howard, being a judgment rendered in New York under the statutes of that State, before referred to, against two persons, one of whom was not served with process. "Every independent government," says the chief justice, "is at liberty to prescribe its own methods of judicial process, and to declare by what forms parties shall be brought before its tribunals. But, in the exercise of this power, no government, if it desires extra-territorial recognition of its acts, can violate those rights which are universally esteemed fundamental and essential to society. Thus a judgment by the court of a State against a citizen of such State, in his absence, and without any notice, express or implied, would, it is presumed, be regarded in every external jurisdiction as absolutely void and unenforceable. Such would certainly be the case if such judgment was so rendered against the citizen of a foreign State."

On the whole, we think it clear that the jurisdiction of the court by which a judgment is rendered in any State may be questioned in a collateral proceeding in another State, notwithstanding the provision of the fourth article of the Constitution and the law of 1790, and notwithstanding the averments contained in the record of the judgment itself.

This is decisive of the case; for, according to the findings of the jury, the justices of Monmouth County could not have had any jurisdiction to condemn the sloop in question. It is true she was seized in the waters of New Jersey; but the express finding is, that the seizure was not made within the limits of the county of Monmouth, and that no clams were raked within the county on that day. The authority

* Page 222.
† Page 57.
‡ 1 Dutcher, 225.
§ 34 New Jersey, 286.

to make the seizure and to entertain cognizance thereof is given by the ninth section of the act, as follows:

"It shall be the duty of all sheriffs and constables, and may be lawful for any other person or persons, to seize and secure any such canoe, flat, scow, boat, or other vessel as aforesaid, and immediately thereupon give information thereof to *two justices of the peace of the county where such seizure shall have been made*, who are hereby empowered and required to meet at such time and place as they shall appoint for the trial thereof, and hear and determine the same; and in case the same shall be condemned, it shall be sold by the order of and under the direction of the said justices, who, after deducting all legal costs and charges, shall pay one-half of the proceeds of said sale to the collector of the county in which such offence shall have been committed, and the other half to the person who shall have seized and prosecuted the same."

From this it appears that the seizure must be made in a county, and that the case can only be heard by justices of the county where it is made—"two justices of the peace of the county where such seizure shall have been made." The seizure in this case as specially found by the jury, was not made in Monmouth County; but the justices who tried the case were justices of that county. Consequently the justices had no jurisdiction, and the record had no validity.

It is argued that the seizure was continuous in its character, and became a seizure in Monmouth County when the sloop was carried into that county. This position is untenable. Suppose the seizure had been made in Cumberland County, in Delaware Bay, could the sloop have been carried around to Monmouth County and there condemned, on the ground that the seizure was continuous, and became finally a seizure in Monmouth County? This would hardly be contended. But it is said that the seizure was made within the State, off the county of Monmouth, and not within the limits of any county; and, hence, that Monmouth County was the first county in which the seizure took place. If this had been true (as it undoubtedly was), and the jury had so

found, still it would not have helped the case. The major proposition is not correct. A seizure is a single act, and not a continuous fact. Possession, which follows seizure, is continuous. It is the seizure which must be made within the county where the vessel is to be proceeded against and condemned. The case may have been a *casus omissus* in the law; it is certainly not included in it.

As this disposes of all the errors which have been assigned, the judgment must be

AFFIRMED.

RAILROAD COMPANY *v.* ORR.

Where a railroad corporation, by mortgage, whose sufficiency to secure what it is given to secure is doubtful, mortgages its property directly to all its bondholders by name, to secure specifically to each the amount due on the bonds to *him*, no one bondholder, even when professing to act in behalf of all bondholders who may come in and contribute to the expenses of the suit, can proceed alone against the company, and ask a sale of the property mortgaged.

He is incapacitated to do this—

1st. Because the sufficiency of the security being doubtful and it being thus his interest to diminish the amount of debt, in the whole to be paid, all other creditors should have such notice as may enable them to see that on a sale the most possible is got for the property mortgaged.

2d. Because, even in equity, a suit on a written instrument must be brought in the name of all who are formal parties to it, and retain an interest in it.

APPEAL from the District Court for the Middle District of Alabama.

Orr, a citizen of Mississippi, suing for himself and in behalf of all others, holders of bonds of the county of Limestone, in the State of Alabama (secured by a certain mortgage hereinafter specifically described and which the bill set forth), who might come in and contribute to the expenses of the suit, filed a bill in the court below against the said county and "The Nashville and Decatur Railroad Company," both corporations of Alabama.

Statement of the case.

The bill set forth that in the year 1853 a railroad company, under the name of "The Tennessee and Alabama Central Railroad Company," was incorporated by the legislature of Alabama for the purpose of making and working a railroad within the limits of Limestone County; a further purpose of the incorporation being, however, that the railroad thus incorporated might be connected and ultimately consolidated with railroads in Tennessee; that in 1855 the legislature of Alabama authorized the county of Limestone to subscribe $200,000 to the stock of the said company, and in payment thereof to issue and deliver to the company the bonds of the county to that amount; that the county did issue and deliver such bonds; that in 1858 the company was authorized by the legislature to sell the said bonds, and for the purpose of securing their redemption, to mortgage all its property and franchises; that on the 29th of July, 1858, the company did execute such mortgage, and sold and assigned the said bonds to various persons, and among others to the complainant to the amount of $10,000; that the mortgage, dated as just said, was made between the railroad company on the one part and James McDonald, James Sloss, Booth Jones, and twelve other persons, including the complainant, all named specifically in the mortgage (and in the recital of it given in the bill) and holders, all of them, of the bonds intended to be secured by the mortgage; that the mortgage, after reciting the debts due to each of the said persons, the amounts, manner in which the debt accrued, granted, bargained, and sold all the land which made the bed of the road and its appurtenances to the said James McDonald, James Sloss, Booth Jones, and the twelve others, including the complainant, as security to each person for the payment to each of the bonds held by him; that the complainant, now, at the time of filing his bill, remained the owner of about $6500 of them, of which both the interest and principal remained unpaid; that in 1866 and 1867 "The Tennessee and Alabama Central Railroad Company" was consolidated with other railroad companies, and that the consolidation became known as "The Nashville and Decatur

Railroad Company," and that the property and assets of the former company passed into the hands of the latter; that the complainant presented his bonds for payment to the proper authorities of Limestone County, in 1866, and that payment was refused; and that "The Nashville and Decatur Railroad Company," though fully aware of the default of the county, neglected and refused to provide for the payment of the bonds, and that the rights and interests of the bondholders were greatly endangered. The prayer of the bill was for an account, for a decree requiring the company to pay the amount that should be found to be due to the complainant, for the foreclosure of the mortgage, and the sale of the mortgaged property.

The county of Limestone failed to appear, and a decree *pro confesso* was taken against it. "The Nashville and Decatur Railroad Company" appeared, and demurred for want of proper parties and other causes. The court below overruled the demurrer, and considering, on certain pleas put in, that the case was with the complainant, decreed a sale of the road, &c., unless, within a time named, the company paid the amount due on the complainant's bonds.

On appeal here the question was whether the demurrer was rightfully overruled for want of proper parties.

Mr. R. T. Merrick, for the appellant; no opposing counsel.

Mr. Justice HUNT delivered the opinion of the court.

The principal question in the case, and the one upon which the decision is now placed, is whether there are the proper parties present in the suit?

It is a general rule in equity that all parties entitled to litigate the same questions are necessary parties. All persons having an interest, although remote, in the subject-matter of the bill must be made parties, or the bill must be so framed as to give them an opportunity to come in and be made parties.* The principle that all must be made parties

* Bailey *v.* Inglee, 2 Paige, 278; La Grange *v.* Merrill, 3 Barbour's Chancery, 625.

whose interests may be affected by the decree is only departed from where it becomes extremely difficult or inconvenient to enforce the rule.*

The principle is also well settled that when it appears on the face of the bill that there will be a deficiency in the fund, and that there are other creditors or legatees who are entitled to a ratable distribution with the complainants, and who have a common interest with them, such creditors or legatees should be made parties to the bill, or the suit should be brought by the complainants in behalf of themselves and all others standing in a similar situation, and it should be so stated in the bill.† The rule in the United States courts is thus expressed: "That all persons who have any material interest in the subject of the litigation should be joined as parties, either as complainants or defendants."‡

The frame of the mortgage now sought to be enforced differs from the ordinary trust-deed or mortgage by which the payment of railroad bonds is secured. A trustee is ordinarily named, to whom the security runs as mortgagee, and the instrument recites that the mortgage is made to him in trust to secure the bonds described to the holders thereof. Here the mortgage is made directly to the persons holding the bonds, who are named, and their several interests described.

The bill does not distinctly allege the insufficiency of the fund to pay all the debts secured by it. It does, however, allege that the county of Limestone, the maker of the bonds, has refused to pay them, that the railroad company neglects to make payment, and that the rights and interests of the bondholders are greatly endangered.

Upon two grounds, therefore, it would seem to be necessary that the other bondholders should be parties to this suit:

* Wendell *v.* Van Rensselaer, 1 Johnson's Chancery, 344.

† Egberts *v.* Wood, 3 Paige, 517; Mitchell *v.* Lenox, 2 Id. 280; Baldwin *v.* Lawrence, 2 Simons & Stuart, 18.

‡ Mechanics' Bank of Alexandria *v.* Seton, 1 Peters, 299; Story *v.* Livingston, 13 Id. 359.

1st. The adequacy of the security of the mortgage for the payment of all the bonds purporting to be secured by it is quite doubtful. The fund is, to some extent, "*tabula in naufragio.*" It is the interest of every bondholder to diminish the debt of every other bondholder. In so far as he succeeds in doing that, he adds to his own security. Each holder, therefore, should be present, both that he may defend his own claims and that he may attack the other claims should there be just occasion for it. If upon a fair adjustment of the amount of the debts there should be a deficiency in the security, real or apprehended, every one interested should have notice in advance of the time, place, and mode of sale, that he may make timely arrangements to secure a sale of the property at its full value.

2d. It is a rule of general application, both at law and in equity, that a suit upon a written instrument must be brought in the name of all who are formal parties to it, and who retain an interest in it. No reason is shown in this bill to take the case out of the rule. No reason is assigned why the fifteen persons named do not unite in the action. No allegation is made that they have been requested so to unite, and have refused. The general rule is applicable to this action.*

For the cause set forth in the demurrer, to wit, a want of proper parties, the decree must be REVERSED, AND THE CAUSE REMANDED with directions to

DISMISS THE BILL WITHOUT PREJUDICE.

* See Ribon *v.* Railroad Companies, 16 Wallace, 450; Shields *v.* Barrow, 17 Howard, 130

Statement of the case in the opinion.

GLENN ET AL. *v.* JOHNSON ET AL.

The personal acquisitions of a wife, in Georgia, being by statute of that State not subject to the debts of her husband, her separate earnings from her individual labor and business, carried on with his consent, cannot be reached by his assignees in bankruptcy.

APPEAL from the District Court for the Northern District of Georgia.

Glenn and another, assignees in bankruptcy of George Johnson, who, in 1868, in proceedings instituted on his own petition, had been declared a bankrupt by the District Court of Georgia, filed a bill in the court below against the said George, his wife, and a certain Flynn, trustee of the wife, to reach certain real property situated in the city of Atlanta, standing in the name of Flynn, as such trustee, and to subject it to the payment of his debts.

The court below dismissed the bill, and the assignees of the bankrupt took this appeal.

Messrs. E. N. Broyles and R. Arnold, for the appellants; no opposing counsel.

Mr. Justice FIELD stated the facts of the case, and delivered the opinion of the court, as follows:

It appears that in July, 1863, one Thomas S. Powell conveyed to the trustee the property in question, for the alleged consideration of four thousand dollars; and that subsequently, in 1867, buildings and other improvements were placed upon the property to the value of two thousand dollars. The deed recites that the consideration was paid by Mrs. Johnson, and declares that the property is conveyed to the trustee in trust for her sole and separate use, and is not to be liable for the debts or contracts of her husband.

The bill alleges, upon the belief of the complainants, that the consideration was paid, and the improvements were made, out of the funds of the husband, who, at the time the

property was purchased, was greatly embarrassed by debts, and at the time the improvements were made was wholly insolvent. It, therefore, charges that the conveyance to the wife and the improvements upon the property were made in fraud of the creditors of the husband, and prays that the conveyance may be declared fraudulent, and the property decreed to be sold and the proceeds administered by the complainants under the provisions of the Bankrupt Act; or, if the conveyance be not thus declared fraudulent, that the property be sold and the proceeds, to the extent of the value of the improvements, be thus administered.

The husband, the wife, and the trustee separately answered the bill, and all averred, the husband and wife positively, and the trustee upon information and belief, that the consideration of the conveyance and the cost of the improvements were paid out of the earnings of the wife from her individual labor and business carried on with the consent of her husband. The answers are under oath, and their averments in this particular were subsequently sustained by the testimony of the parties as well as by the testimony of other persons.

The position of the complainants that this fact constitutes no defence to the suit, would be a sound one if the case were to be determined independently of the statute of Georgia. At common law, an agreement after marriage between husband and wife that the latter may carry on business on her own account and retain her earnings, is invalid as against his creditors, unless founded upon a valuable consideration; a voluntary agreement to that effect is only good as against him.*

But the statute of Georgia comes to the aid of the wife and protects her separate earnings from his creditors. Section 1702, of the code of that State, whilst providing that all property given to the wife during the coverture, or acquired by her, shall vest in the husband, declares that "any words

* 2 Story's Equity, §§ 1385–1387.

in the gift or bequest indicating a wish for the personal enjoyment thereof by the wife, such as a gift to the wife by name, shall create a separate estate therein for her, and in no case shall the personal acquisitions of the wife be subject to the debts of the husband."*

The earnings of the wife are thus placed beyond the reach of his creditors and of course of his assignees in bankruptcy.

DECREE AFFIRMED.

STEAMBOAT COMPANY *v.* THE COLLECTOR.

1. Under the ninth section of the act of July 13th, 1866, laying on the owners of steamboats a tax of "2½ per cent. of the *gross receipts from passengers*," the owners of a night-boat which receives a certain sum for the mere transportation of persons (that is to say, for their passage, or barely being on the boat during its transit), and also a certain sum for the use of berths and state-rooms (which berths and state-rooms it was not obligatory on the passengers to take, or pay for, and which persons who were willing to sit up all night did not take), is chargeable with 2½ per centum on the latter sort of receipts as well as on the former.
2. A proviso to an existing act, *held* to have been repealed by an act which "*amended*" the former act, "by striking out all after the enacting clause and inserting in lieu thereof, the following;" this "following" being in part an iteration of the words of the section amended, and in part new enactments.
3. The proviso in the fourth section of the act of March 3d, 1865, exempting a certain class of steamboats from a tax of 2½ per cent., which was laid on all steamboats by the one hundred and third section of the act of June 30th, 1864, fell by the enactment of the ninth section of the act of July 13th, 1866, which "amended the first-named act by striking out all after the enacting clause and inserting in lieu thereof the following;" this "following" being in part an iteration of the words of the section of the act of June 30th, 1864, amended, and in part new enactments.

ERROR to the Circuit Court for the Southern District of New York.

The New Jersey Steamboat Company had a night-line of steamboats which ran between New York and Albany, and

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* Code of Georgia in force in 1863, p. 338, §§ 1701–2.

which paid tonnage duty in conformity with the laws of the United States. The boats were furnished with berths and state-rooms. But it was not obligatory on passengers going on the boats to take either. They might pay for a passage only, that is to say pay for the "bare right" to be on the boat, while it was going from one place to the other, in which case they would have to sit up all night; or they might pay in addition to the passage-money a certain sum, in which case they had the privilege to occupy a berth or a state-room. The accounts of passage-money received were kept distinct from those of money received for berths or state-rooms.

In this state of things, the collector of the United States at New York, asserting that he was justified by the ninth section of an act of Congress of July 13th, 1866, hereinafter set forth, demanded from the company the sum of $7972.66, which he alleged to be a tax assessed at the rate of 2½ per cent. on the company's "gross receipts from passengers" during the summer of 1869.

The sum just mentioned was thus made up:

For the transportation of passengers (passage-money), .	$4831 99
For berths or state-rooms, ...	3140 67
	$7972 66

If the government had a right to lay a tax on the company for passage-moneys, and the price of berths and state-rooms let, it was not denied that the sums charged were the right ones, but the company denied—

1st. That it was bound by the act relied on by the collector, or by any other act, to pay a tax on either item of its receipts.

2d. That, if it was bound by that act or any other act to pay the tax on the first item, it was bound to pay it on the second.

Having, however, paid both on compulsion, and under protest, it now, December, 1869, sued the collector to recover both, or at least the latter.

Whether the company was bound to pay any tax depended

upon the fact whether the statute relied on by the collector and giving generally a tax, had repealed a previous statute relied on by the company, and discharging specifically from tax all companies which paid a tonnage duty, which confessedly this company did pay.

The case as to these statutes was thus:

An act of July 14th, 1862,* entitled "An act increasing temporarily the duties on imports and for other purposes," by its fifteenth section laid a tonnage tax of 10 cents per ton on all steamboats.

An act of June 30th, 1864,† to provide revenue to support the government, and to pay interest on the public debt and for other purposes, by its one hundred and third section laid, in addition, "a tax of 2½ per centum upon the gross receipts" of steamboats, "engaged or employed in transporting passengers or *property* for hire." It made certain other provisions about taxation.

An act of March 3d, 1865,‡ by its fourth section increased the tonnage duty on steamboats to 30 cents per ton, and by a proviso to the section enacted,

"That the receipts of vessels paying tonnage duty shall not be subject to the tax provided in section one hundred and three of 'An act to provide revenue,' &c., approved June 30th, 1864, *nor by any act amendatory thereof.*"§

* 12 Stat. at Large, 558. † 13 Id. 275. ‡ Ib. 493.

§ As it is mentioned in the opinion of the court, *infra*, p. 491–2, that this section four of the act of 1865, "contains other matters besides the proviso in question," and as an argument is drawn from that fact, the whole section is here given. It is thus:

"SECTION 4. And be it further enacted, that section fifteen of an act entitled 'An act increasing temporarily the duties on imports, and for other purposes,' approved July 14th, 1862, be, and the same hereby is amended so as to impose a tax or tonnage duty of thirty cents per ton in lieu of ten cents, as therein mentioned.

"*Provided*, That the receipts of vessels paying tonnage duty shall not be subject to the tax provided in section one hundred and three of an act to provide internal revenue to support the government, and to pay interest on the public debt, and for other purposes, approved June 30th, 1864, nor by any act amendatory thereof.

"*Provided further*, That no ship, vessel, or steamer, having a license to trade between different districts of the United States, or to carry on the bank, whale, or other fisheries, nor any ship, vessel, or steamer to or from any port or place in Mexico, the British Provinces of North America, or any of the West India Islands, or in all these trades, shall be required to pay the tonnage duty, contemplated by this act, more than once a year."

Statement of the case.

An act of July 13th, 1866, entitled "An act *to reduce* internal taxation, and to amend an act entitled, &c., approved June 30th, 1864, and acts amendatory thereof," by its ninth section,* amended the one hundred and third section of the act of June 30th, 1864, "by striking out all after the enacting clause and inserting in lieu thereof the following."

It then inserted provisions laying the same tax of $2\frac{1}{2}$ per centum of gross receipts on "steamboats, engaged or employed in the business of transporting *passengers* for hire," and made some other changes, *more* or *less* considerable, in other matters provided for in this one hundred and third section. Its seventieth section was thus:

"All provisions of any former act *inconsistent with* the provisions of this act are hereby repealed."

I. The reader will perceive from what has been thus far said that the question was whether this ninth section of the act of July 13th, 1866, which "amended" the one hundred and third section of the act of June 30th, 1864, "*by striking out all after the enacting clause* and inserting in lieu thereof" certain provisions in part identical with the old ones and in part not so, did not only abrogate *that* section of *that* act, but whether it swept away also with it, as something in its nature inseparable from it, the proviso in the fourth section of the act of March 3d, 1865, exempting steamers paying tonnage from the tax.

The solution of this question requires a fuller exhibition than that which, for the purpose of a general idea, is above given, of the *whole* language of the two enactments; that is to say, of the one hundred and third section of the act of June 30th, 1864, and the ninth section of the act of the date just given, which the collector contended had not only repealed this section of the act of June 30th, 1864, but annihilated also the proviso in the fourth section of that of March 3d, 1865. The two sections of the two acts are here put in parallel columns, words existing in one and not existing in

* 14 Stat. at Large, 135.

the other being put in italics, and the parts of the two sections relating to the same matter being put as nearly opposite as may be to each other.

ACT OF JUNE 30, 1864.

SECTION 103. That every person, firm, company, or corporation, owning or possessing, or having the care or management of, any railroad, canal, steamboat, ship, barge, canal-boat, or other vessel, or any stage-coach or other vehicle,

engaged or employed in the business of transporting passengers *or property* for hire, or in transporting the mails of the United States,

or any canal, the water of which is used for mining purposes, shall be subject to and pay a tax of two and one-half per cent*um* the gross receipts

of such railroad, canal, steamboat, ship, barge, canal-boat, or other vessel, or such stage-coach or other vehicle: ["Provided, That this section shall not apply to those teams, wagons, and vehicles used in the transportation of silver ores from the mines where the same are excavated to the place where they are reduced or worked:"]*

Provided, That the *duty* hereby imposed shall not be *charged* upon receipts for the transportation of persons *or property*, or mails between the United States and any foreign

ACT OF JULY 13, 1866.

SECTION 9. *That section* 103 (*of act of June* 30, 1864) *be amended by striking out all after the enacting clause, and inserting in lieu thereof the following:* That every person, firm, company, or corporation owning or possessing, or having the care or management of, any railroad, canal, steamboat, ship, barge, canal-boat, or other vessel, or any stage-coach or other vehicle, *except hacks or carriages not running on continuous routes,*

engaged or employed in the business of transporting passengers for hire, or in transporting the mails of the United States *upon contracts made prior to August 1st*, 1866,

shall be subject to and pay a tax of two and one-half per cent. *of* the gross receipts *from passengers and mails*

of such railroad, canal, steamboat, ship, barge, canal-boat, or other vessel, or such stage-coach or other vehicle:

Provided, That the *tax* hereby imposed shall not be *assessed* upon receipts for the transportation of persons or mails between the United States and any foreign

* So amended March 3, 1865. 13 Stat. at Large, 478.

port; [" but such *duty* shall be assessed upon the transportation of persons *and property* from a port within the United States through a foreign territory to a port within the United States, and shall be assessed upon and collected from persons, firms, companies, or corporations within the United States, receiving such *freight or* transportation."]*

and any person or persons, firms, companies, or corporations, owning, possessing, or having the care or management of any toll-road, ferry, or bridge, authorized by law to receive toll for the transit of passengers, beasts, carriages, teams, and freight of any description over such toll-road, ferry, or bridge, shall be subject to and pay a *duty* of three per cen*tum on* the gross amount of all their receipts of every description. But when the gross receipts of any such bridge or toll-road

shall not exceed the amount necessarily expended to keep such bridge or road in repair, no tax shall be *imposed* on such receipts

Provided, That all such persons, companies, and corporations shall,

have the right to add the *duty or* tax imposed hereby to their rates of fare whenever their liability thereto may commence, any limitations which may exist by law or by agreement with any person or

port; but such *tax* shall be assessed upon the transportation of persons from a port within the United States through a foreign territory to a port within the United States, and shall be assessed upon and collected from persons, firms, companies, or corporations within the United States, receiving *hire or pay for* such transportation *of persons and mails; and so much of section* 109 *as requires returns to be made of receipts hereby exempted from tax when derived from transporting property for hire is hereby repealed: Provided also, That* any person or persons, firms, companies, or corporations, owning, possessing, or having the care or management of any toll-road, ferry, or bridge, authorized by law to receive toll for the transit of passengers, beasts, carriages, teams, and freight of any description over such toll-road, ferry, or bridge, shall be subject to and pay a *tax* of three per cent. *of* the gross amount of all their receipts of every description. But when the gross receipts of any such bridge or toll-road, *for and during any term of twelve consecutive calendar months,* shall not exceed the amount necessarily expended *during said term* to keep such bridge or road in repair, no tax shall be *assessed upon* such receipts *during the month following any such term:* Provided *further*, That all such persons, companies, and corporations, shall, *until the 30th day of April*, 1867, have the right to add the tax imposed hereby to their rates of fare whenever their liability thereto may commence, any limitations which may exist by law or by agreement with any person or

* So amended March 3, 1865. 13 Stat. at Large, 478.

company which may have paid or be liable to pay such fare to the contrary notwithstanding:

"And provided further, That no tax under this section shall be assessed upon any person, whose gross receipts do not exceed one thousand dollars per annum."

company which may have paid or be liable to pay such fare to the contrary notwithstanding.

And whenever the addition to any fare shall amount only to the fraction of one cent, any person or company liable to the tax of two and a half per centum may add to such fare one cent in lieu of such fraction; and such person or company shall keep for sale, at convenient points, tickets in packages of twenty and multiples of twenty, to the price of which only an amount equal to the revenue tax shall be added:

And provided further, That no tax under *the foregoing provisions of* this section shall be assessed upon any person, *firm, company, or corporation*, whose gross receipts do not exceed one thousand dollars per annum:

And provided further, That all boats, barges, and flats not used for carrying passengers, nor propelled by steam or sails, which are floated or towed by tug-boats or horses, and used exclusively for carrying coal, oil, minerals, or agricultural products to market, shall be required hereafter, in lieu of enrolment fees or tonnage tax, to pay an annual special tax for each and every such boat of a capacity exceeding twenty-five tons, and not exceeding one hundred tons, five dollars; and when exceeding one hundred tons, as aforesaid, shall be required to pay ten dollars; and said tax shall be assessed and collected as other special taxes provided for in this act.

SECTION 7. . . . *All provisions of any former act inconsistent with the provisions of this act, are hereby repealed.*

The question was, did the proviso of the act of March 3d, 1865, exempting from the tax laid by section one hundred and three of the act of 1864 (the act above, in the left-hand column), on all steamers which paid a tonnage tax, remain

notwithstanding the ninth and seventieth sections of the later act of July 13th, 1866 (the act above, in the right-hand column)?

But the question was, perhaps, not dependent even upon all that precedes; for finally came an act of Congress, of July 14th, 1870,* which in its twenty-fifth section referred to the proviso in the one hundred and third section of the act of June 30th, 1864, as apparently then in force, and repealed it. This act ran thus:

"SECTION 25. And be it further enacted, that section fifteen of the act approved July 14th, 1862, entitled '*An act increasing temporarily the duties on imports, and for other purposes,*' and section four of the act in amendment thereof, approved March 3d, 1865, be, and the same are hereby, so amended that no ship, vessel, steamer, boat, barge, or flat, belonging to any citizen of the United States, trading from one port or point within the United States to another port or point within the United States, or employed in the bank, whale, or other fisheries, shall hereafter be subject to the tonnage tax or duty provided for in said acts; and the *proviso* in section one hundred and three of the '*act to provide revenue to support the government and to pay interest on the public debt, and for other purposes,*' approved June 30th, 1864, requiring an annual special tax to be paid by boats, barges, and flats, is hereby repealed."

II. But if the act of 1866 was in force, unqualified by the proviso, and if the company was "to be subject to and pay a tax of 2½ per cent. of the gross receipts from *passengers*," the next question was whether the $3140.67 came within that enactment; this sum not having been received for passage, and being for another thing, to wit, for the right to occupy and sleep in berths and state-rooms.

The court below was of opinion against the steamboat company on both points, and, giving judgment for the collector, the company brought the case here.

Messrs. J. M. Carlisle and W. P. Prentice, for the appellant:

I. The proviso quoted in the act of March 3d, 1865, con-

* 16 Stat. at Large, 256.

fessedly had not been repealed in express terms when this cause of action arose. We assert that it had not been repealed by implication.

The general intention of the act of 1866, as expressed in the title, was "to reduce internal taxation." This, as we shall hereafter see, was also the real intention of the act.

It would have been very easy for Congress to repeal the proviso in express terms. It did not do this. On the contrary, by its act of July 14th, 1870, it recognizes the existence and force of the proviso in section four of the act of March 3d, 1865.

The act of July 13th, 1866 was amendatory of the act of June 30th, 1864. But the act of March, 1865, had provided that—

> "The receipts of vessels paying tonnage tax shall not be subject to the tax provided in section one hundred and three of 'An act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes,' approved June 30th, 1864, *nor by any act amendatory thereof.*"

Did not the Congress of 1866 see the words which we italicize? And if they did, why did they not expressly repeal the proviso if they meant to repeal it at all?

When Congress, in 1866, found the word "steamboat" in the law written in the statute-book and simply left it there, no change in the law was thereby intended or made.

After the passage of the act of 1866, as before, there were only two statutes governing the subject, viz., the act of 1864, as *amended*, and the act of 1865. The act of 1864 laid the tax, and the act of 1865 exempted the plaintiff from it. These statutes acted directly upon the taxpayer; but the act of 1866 acted only upon the act of 1864, changing some of its provisions, but not affecting steamboat companies.

The matter under consideration is one relating to the revenue system, a great system, made up of many acts, many amendments, many repeals, &c. The system is like a fabric dovetailed, patched, and pieced all over. Peculiarly

applicable, therefore, to the matter in hand are certain rules, which apply to cases of implied repeal generally, and where there is less need of them. Some of them are these:

1. Wherever two acts of the legislature are susceptible of a construction which will give effective operation to both without doing violence to either, it is incumbent on the court to search for some allowable means to give them such construction.*

2. A repeal of all acts inconsistent with the repealing statute does not affect a statute, not especially mentioned, and which relates to the same subject-matter, and which is not inconsistent with the repealing act.†

3. An express law, creating certain special rights and privileges, is held never to be repealed by implication by any subsequent law couched in general terms, nor by any express repeal of all laws inconsistent with such general law, unless the language be such as clearly to indicate the intention of the legislature to effect such repeal.‡

4. A statute amending a prior act does not repeal an intermediate statute, limiting the operation of such prior statute, unless there is a new inconsistency between the amended statute and that limiting its operation. There is no new inconsistency between the amended statute, *i. e.*, the section one hundred and three of the act of 1864, as amended in section nine of the act of 1866, and the act of March 3d, 1865. The tax is the same. Only one class, *i. e.*, vessels that have paid the tonnage tax, are exempted from it; other vessels, not enrolled, are in another class; and the same reason exists for the same law in the same language. Thus only can the intention of Congress, expressed in the title to the law of July 13th, 1866, *to reduce internal taxation*, be carried out.

Double taxes, such as were claimed of the steamboat company, are not favored.

* Attorney-General *v.* Brown, 1 Wisconsin, 513; Harford *v.* United States, 8 Cranch, 109.

† People *v.* Durick, 20 California, 94; Ely *v.* Holton, 15 New York, 595

‡ The State *v.* Branin, 3 Zabriskie, 484; The State *v.* Minton, Ib. 529.

Look, too, in accordance with the canons of construction in statutes, at "the occasion and necessity of the law, the defect in former laws, and the designed remedy."

In 1861 and 1862, when we were just entering on the war of the rebellion, the necessity was felt of increasing the revenue, and the titles of the various acts indicate this, but in 1866, when the rebellion was completely suppressed, the government was in less need of money, and the act of July 13th expresses in its title its object, "*to reduce taxation.*"

Again. The act of March 3d, 1865, with the proviso of its section four, equalized the taxation of steamboats to that on other property, and no intention to repeal it can be discovered in subsequent legislation, but the contrary. Thus, in 1862, a tonnage duty of ten cents per ton was laid, and in 1864 another tax on steamboats was laid, by the act of June 30th, 1864, section one hundred and three, the section in question, viz., on the receipts of vessels. It is apparent that, as carriers, the steamboats had thus to pay double taxes. On the 3d of March, 1865, by act of that date, this double taxation was remedied. The tonnage duty was increased to thirty cents per ton, in section four; and vessels paying tonnage duty were exempted from the tax under section one hundred and three of the act of 1864.

II. The claim of the collector for $3140.67, the tax collected from the receipts from state-rooms and berths, is denied on independent grounds.

Whatever tax the statute does lay, it lays upon persons owning steamboats "engaged in the business of *transporting passengers* for hire." The statute says the tax shall not be assessed upon "receipts for the *transportation of persons* between the United States and any foreign port," but "shall be assessed upon the *transportation of persons* from a port within the United States through a foreign territory to a port within the United States." The entire section relates solely to the subject of transportation. The tax is meant by the statute to be assessed upon gross receipts *from passengers;* that is, from passengers *as such.* In other words, it is assessed upon money paid for transportation. State-room re-

ceipts are therefore not "receipts from passengers" within the meaning of the act.

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

Mr. Justice SWAYNE delivered the opinion of the court.

The plaintiffs in error instituted the suit to recover back the amount of a tax which they allege was exacted from them without warrant of law. They were the owners of a night-line of steamers running between the cities of New York and Albany. The tax was upon the gross receipts from their passengers. Payment was required by the collector under the ninth section of the act of July 13th, 1866.* The facts, agreed by the parties, make *primâ facie* a clear case of liability within the language of this law. The tax was exacted only to the amount prescribed and upon a subject specified. There is no complaint as to either of these particulars. If this were the whole case there could be no controversy between the parties, and, doubtless, the case would not be here. But the plaintiffs in error insist that, by reason of certain provisions in the acts of June 30th, 1864, and of March 3d, 1865, the ninth section of the act of 1866 does not apply to receipts from passengers upon their steamers.

The one hundred and third section of the act of 1864† imposed a tax of $2\frac{1}{2}$ per cent. of the gross receipts from passengers, freights, and the transportation of the mails, earned by steamboats within the category of those of the plaintiffs in error.

A proviso in the fourth section of the act of 1865‡ declared "that the receipts of vessels paying tonnage duty shall not be subject to the tax provided in section one hundred and three of the act of 1864, nor by any act amendatory thereof."

The steamers of the plaintiffs in error paid such tonnage

* 14 Stat. at Large, 135. † 13 Stat. at Large, 275. ‡ Ib. 493.

duty. Under these acts they were entitled to the exemption claimed.

But the ninth section of the act of 1866 declared that the one hundred and third section of the act of 1864 should "be amended by striking out all after the enacting clause and inserting in lieu thereof the following." It then proceeds to tax the receipts from passengers and for carrying the mails under contracts made prior to the taking effect of the act, as was done by the section amended; but it wholly omits the tax upon freights and upon receipts for carrying the mails under contracts thereafter made, to which they would have been liable under that section, standing alone, before it was amended. Three things were taxed by the original section, and but one of them, with the limited exception as to the mails, by the section which superseded it and took its place. The seventieth section declares "that this act shall take effect, where not otherwise provided, on the 1st day of August, 1866, and all provisions of any former act inconsistent with the provisions of this act are hereby repealed."

The one hundred and third section of the act of 1864 was thus superseded and annulled. The proviso in the fourth section of the act of 1865 fell with it. The latter referred to the former. When the former ceased to exist there was nothing left for the latter to operate upon. The ninth section was much more limited in the taxes which it imposed than the one hundred and third. The two sections were the same neither in letter nor substance.

The tonnage duty in question was imposed by the fifteenth section of the act of July 14th, 1862.* It was thirty cents per ton, and was to be paid once a year. The exemptions in the ninth section must have exceeded it largely in amount. It may well be that, by reason of these remissions, it was deemed proper by Congress that the tax upon the receipts from passengers, as well as the tonnage duty, should thereafter be paid, and that the exemption as to the former, given by the act of 1865, should no longer continue. Such, in our

* 12 Stat. at Large, 558.

judgment, was the intent and effect of the ninth section of the act of 1866. It is said that the proviso in the act of 1865 is not expressly repealed. There was no necessity for an express declaration upon the subject. It was superseded by the abrogation of the one hundred and third section. And the seventieth section of the act of 1866 in terms repealed "all the provisions in any former act inconsistent with the provisions of this act." The ninth section of this act declares that the tax here in question shall be paid. The proviso in the act of 1865 declares that it shall not be paid.

Can there be a clearer inconsistency than that which subsists between these provisions? If Congress intended that the exemption should continue under the act of 1866 as it was under the act of 1864, it would have been easy to say so, and, doubtless, this would have been done.

It is insisted that the twenty-fifth section of the act of July 14th, 1870,* recognizes the continuing existence and force of the proviso in question. That section is as follows:

"SECTION 25. And be it further enacted, that section fifteen of the act approved July 14th, 1862, entitled 'An act increasing temporarily the duties on imports, and for other purposes,' and section four of the act in amendment thereof, approved March 3d, 1865, be, and the same are hereby, so amended that no ship, vessel, steamer, boat, barge, or flat, belonging to any citizen of the United States, trading from one port or point within the United States to another port or point within the United States, or employed in the bank, whale, or other fisheries, shall hereafter be subject to the tonnage tax or duty provided for in said acts; and the proviso in section one hundred and three of the 'Act to provide revenue to support the government and to pay interest on the public debt, and for other purposes,' approved June 30th, 1864, requiring an annual special tax to be paid by boats, barges, and flats, is hereby repealed." This section suggests several remarks.

(1.) Section four of the act of 1865 contains other matters

* 16 Stat. at Large, 269.

besides the proviso in question. There is a reference in the twenty-fifth section to one of those *other* matters, but none to the proviso.

(2.) The abrogation of the tonnage duty as thus declared, may have been because of the imposition of the tax here in question by the ninth section of the act of 1866, in addition to tonnage duty. It was a return to the liberal spirit manifested by the act of 1865, but instead of remitting the tax upon passengers and retaining the tonnage duty, it remits the latter and retains the former. It is not to be supposed that Congress intended to give up both. This legislation gives no support to the views of the plaintiffs in error.

(3.) The reference to the one hundred and third section of the act of 1864 involves an error of fact. That section contains no such proviso or provision as is mentioned, and, as before shown, it was wholly superseded by the act of 1866. The proviso referred to is in the ninth section of the last-named act. The reference to it does not in any wise affect the case before us.

JUDGMENT AFFIRMED.

Mr. Justice BRADLEY, dissenting:

I dissent from the judgment of the court in this case. The act of March 3d, 1865, exempted vessels which paid tonnage duty from paying the $2\frac{1}{2}$ per cent. on gross receipts imposed by the one hundred and third section of the Internal Revenue Act of 1864. The act of 1866 amended this section by exacting the $2\frac{1}{2}$ per cent. on receipts from passengers and mails only, and not on receipts from freight. A few other minor alterations were made. Such an amendment as this, in my judgment, cannot have the effect of repealing the exemption granted to vessels paying tonnage duty. It is contended that the mode of making the amendment makes a difference, namely, by striking out all after the enacting clause of the one hundred and third section and re-enacting it with the modification alluded to. It seems to me that the substance rather than the form should govern the construction. The several laws on the subject of internal revenue

constitute one system, all *in pari materia;* and if modifications of certain sections by amendment are to have the effect of making those sections absolute law, discharged from all qualifications and exemptions created by other parts of the system, the result will be to derange the harmony of the system as a whole. If farm products generally are taxed one per cent., but by a special law cotton is taxed ten dollars a bale, and by another special law wheat is taxed twenty cents a bushel, can it be that an alteration of the section taxing farm products generally, from one per cent. to two per cent., will abrogate the special tax on cotton and wheat? It is a rule that special laws are not abrogated by general ones, unless the intent to do it be very clear. It seems to me that this rule is lost sight of in the judgment of the court.

CLARKE *v.* BOORMAN'S EXECUTORS.

1. The construction of a will on the question of estate in fee, or life estate with vested remainder, left undecided, with comments on the inefficiency of rules of decision and decided cases as guides.
2. A violation of trust growing out of a mistaken construction of a will by the executors, unaccompanied by fraudulent intent, is within the ten years statute of limitation of the State of New York concerning actions for relief in cases of trust not cognizable by courts of law.
3. The court expresses itself as inclined to the opinion that such a case is not within the protection of the statute which allows bills for relief on the ground of fraud, to be filed within six years after the discovery of the fraud.
4. Where the party interested in his lifetime had notice of all the facts which constituted the ground of fraud alleged in the bill, and for eight years that he lived after the cause of action accrued to him, with notice of his rights and of the whole transaction, brought no suit nor set up any claim, his heirs are not entitled to the benefit of this exemption from the bar of the statute on the ground of recent discovery of the fraud.
5. When a trustee has closed his trust relation to the property and to the *cestui que trust*, and parted with all control of the property, the statutes of limitation run in his favor, notwithstanding it is an express trust.
6. The general doctrines of courts of equity concerning lapse of time, laches,

Statement of the case.

and stale claims, will protect the executors of a trustee sued after his death for matters growing out of the trust which occurred forty years before suit brought, which were known to the ancestor under whom the plaintiffs claim for over twenty years before his death, and where the suit is brought by those heirs fourteen years after *his* death, and two years after the death of the trustee, and where no person connected with the transactions complained of remains alive.

APPEAL from the Circuit Court for the Southern District of New York; the case being thus:

James R. Smith, a merchant of New York, died in June, 1817, leaving a will, which was duly proved on the 11th day of that month. By this will he appointed as his executors Hannah Smith, his widow, Andrew Foster, John Thomson, James Boorman, and Matthew St. Clair Clarke. All of them qualified as trustees except Foster, but before any of the transactions under the will which were the subject of the present suit took place, the acting executors were reduced to Boorman and Clarke. The testator authorized his executors to sell the whole or any part of his real estate in their discretion, and by a codicil he directed the disposition of that part of his estate destined for his children. Of these there were four, namely, Jeanet (then married to John X. Clarke), Hannah (married to Matthew St. Clair Clarke, one of the executors), Elizabeth (a minor, unmarried), and James (a minor, unmarried).

After providing for the payment of specific bequests, education and care of the minors, and declaring that the residue of his estate should be equally divided among these four children, share and share alike, and directing that his son James should not come into the full possession of his portion until he arrived at the age of twenty-five years, this paragraph of the twelfth clause of the codicil succeeds, which was the foundation of the present suit. It was verbatim, as follows:

"I further direct that my daughters Jeanet, Hannah, and Elizabeth, if she should arrive at the age of twenty-one years, shall have the privilege of expending and appropriating, by and with the consent of the executors, one-third part of their por-

tion of my estate herein devised to them, in such manner as they may think proper, and over which, when so appropriated, they shall have absolute control; and the remaining two-thirds of the portions or shares of my daughters shall be held separate and distinct and not liable to the control, debts, or engagements of either of their husbands which they now have or may hereafter have, as well those who are married as she who may hereafter marry [giving, however, to the husbands of either or all of them in case the wife shall die first, either with or without issue, the income of said reserved part of my estate, as long as he shall live, arising from his wife's portion, and after his death then to the child or children of my said daughter so dying], and if either of my daughters shall die without lawful issue, or having issue which shall not attain the age of twenty-one years and [*sic*] without issue, then the share or portion of my said daughter after the death of her husband, or if there be no husband living at her death, shall go and be divided among my other children, share and share alike, and to their issue, in case of the death of either of them, share and share alike, such issue to take the portion that would have belonged to his, her, or their father or mother."

The controversy concerned the interest here devised to Jeanet Clarke. At the time of the making of this codicil, and of the death of the testator, she had a son, George, born in 1815, who died in October, 1855. His father, John X. Clarke, died in 1824, and his mother, Jeanet, died in 1847. The complainants in this suit were the children of the said George, the grandchildren of Jeanet Clarke, mentioned in the codicil, and the great-grandchildren of the testator. They alleged that by the true construction of this codicil, as applied to the foregoing facts, Jeanet Clarke took but a life estate in the real property, or a life interest in the proceeds of sale so far as it might have been sold, and that their father, George, son of Jeanet, had a vested remainder or interest in the property so devised to Jeanet. They charged that the two executors, Boorman and Clarke, in violation of their duties as executors and trustees, and in fraud of the rights of said George, sold the real estate which was the chief part of the testator's property left to the opera-

tion of this codicil, and contrived that it should come to the hands of said Jeanet Clarke, divested of his interest or title in it; that settlements and arrangements were made with her by reason of undue influence of Matthew St. Clair Clarke, one of said executors, with whom she resided, by which the executors pretended to have been discharged from the obligations of their trust, and that said Clarke, in effect, reaped all the benefit of such arrangements at the expense of their ancestor, the said George.

The real estate having passed by these conveyances of the executors into the hands of innocent purchasers, divested of the trust in favor of said George, and Matthew St. Clair Clarke having long since died insolvent, and the said Boorman having also died in 1866, these complainants sought by the present bill against the executors of Boorman, to hold his estate responsible for the wrong done to their father by Boorman's participation in the violation of the trust, and the fraud upon his rights.

The transaction which was charged upon Boorman as a violation of his trust, and a fraud on the rights of George Clarke, was thus: In 1829, the minor son, James Smith, having arrived at majority, the debts and specific legacies left by the testator being paid, and the estate being settled except as respected the general residue, he, the three daughters, and the executors Boorman and Matthew St. Clair Clarke, proceeded to settle this residue. It was divided by them into four parts, agreed to be of equal value. One of these parts the executors and the three daughters conveyed, on the 15th of November, 1829, to James Smith, in fee, as his share under his father's will, and he accepted it in form as such. Conveyances were made on the same day in similar form, *mutatis mutandis*, to each of the daughters, of specific property agreed on and valued as one-third of their fourths, which thirds by the terms of the codicil were to be at their "absolute control."

Up to this point of what was done, no objection was taken in the present proceeding.

But there still remained, of course, in the hands of the

executors two-thirds of three several one-fourths. The objection was as to what was now done with these, or rather with the two-thirds of the fourth devised for Mrs. Jeanet Clarke and her children, husband, &c. That part of the matter was thus:

On the 26th of December, 1829, the two executors, James Smith, and the three daughters, with their husbands, conveyed by deed—the executors reciting in it that they were acting in pursuance of the power contained in the will—the whole, in a body, of this remaining residue—the same being composed chiefly of lots of ground in the city and State of New York—to one Robert Dyson in fee for the consideration as expressed in the deed of $64,710.39, in cash paid to Matthew St. Clair Clarke, and which sum he acknowledged to have received. This conveyance included, of course, the two-thirds of Mrs. Clarke's fourth. In all this transaction Boorman seemed to have taken a passive rather than active part. In what he did, however, he acted under the advice of P. W. Radcliffe, Esq., of the New York bar, a gentleman well reputed at that bar for integrity, law-learning, and care in all that he either did or advised.

As a part of this arrangement, Matthew St. Clair Clarke, James Smith, Jeanet Clarke, and her sister Elizabeth, executed an instrument of indemnity to Boorman. It recited the provisions of the twelfth clause of the codicil, the conveyance of real estate to the son for his one-fourth share, the conveyance of other real estate for the one-third part of the share of each daughter, the conveyance to Dyson, the fact that no portion of the consideration of the sale to Dyson had been received by Boorman, but that it had, with the consent of all parties interested, gone exclusively into the hands of Matthew St. Clair Clarke, and the fact that Boorman had accounted for all the effects of the estate which had come to his hands, and had discharged himself of all the trusts reposed in him by the will and codicil, and then discharged Boorman from all moneys which he could have received in his trust, and from all claims concerning the estate of the testator, or any trust relating thereto, and agreed "to

indemnify him from all demands by reason of his having executed any of the conveyances thereinbefore mentioned, or by reason of any other thing by him done, committed, or suffered, concerning the estate of the testator, whether under the trusts in the will and codicil, or otherwise."

On the same day that the conveyance abovementioned was made to Dyson, Dyson reconveyed to each of the three daughters one-third in specific lots of the whole, the consideration as expressed in the deeds being,

Jeanet, ...	$21,573 13
Hannah, ...	21,614 56
Elizabeth, ...	21,522 70
	$64,710 39

The lots in New York City having increased in value, Mrs. Jeanet Clarke in 1843 advertised for sale at public auction all the lots conveyed to her, and they were so sold. She was at this time resident in Washington, and in the family of Matthew St. Clair Clarke, of that city, who, as already said, had married her sister Hannah. Her son George, already mentioned, who was born in 1815, and was therefore twenty-eight years old, and at the time about to marry, went to New York to attend to the matter of the sales. When he got there, he called upon L. B. Woodruff, Esq., then at the bar and now the Circuit judge for the Second Circuit of the United States, to obtain Mr. Woodruff's professional assistance in the preparation of the deeds, bonds, and mortgages, and generally to superintend the closing of the matter of the sale of the lots. The deeds having been prepared (five in number), George took them to Washington, where they were executed by his mother. The consideration-money was $7515. Soon after the deeds had been thus prepared and ready for delivery to the purchasers, Mr. Woodruff was called on by Mr. Andrew Thomson, Mr. Stephen Cambreleng, and Mr. Peter De Witt, members of the bar, who had been requested by different purchasers at the sale, to examine the title of the lots sold, and informed by them that they had doubts about the validity of the title

which Mrs. Clarke proposed to convey, the doubts being founded on the language of her father's will. The question, as the same was now recalled by Mr. Woodruff after a lapse of twenty-seven years, was "whether under the codicil Jeanet Clarke took an estate in fee; or whether her death without issue would devolve the title upon her brother and sisters or their issue, and, connected with that, whether on the birth of issue, which issue should attain twenty-one years, her estate became absolute; whether it was so before or not, and hence, if she had issue then living who was twenty-one years of age, whether his conveyance would not remove all chance of doubt."

The will of Mr. Smith, the father, being put before Mr. Woodruff, the last-named gentleman endeavored to satisfy the objecting counsel that their doubts were unfounded. Two of them were apparently convinced; but they had already advised their clients to decline the title. Being however now informed that Mrs. Jeanet Clarke had a son—the said George, then in New York—it was finally agreed, if *he* would execute an instrument by way of release or confirmation of the sale, that the hesitating or declining purchasers would be satisfied. George, either "by his presence at all or some of these interviews, or by direct and immediate communication" from Mr. Woodruff, "was informed of the objection made in behalf of the purchasers by their counsel, and that they desired the execution by him of the release or grant," such as is abovementioned. Extracts of the will were had in this discussion; whether a copy of it entire was before the parties did not so plainly appear.

George did accordingly execute a release or grant prepared by Mr. Woodruff, received what money was to be paid, and went home to Washington again. He was soon afterwards married, and long held the post of a clerk (not of the higher grades) in the Treasury. He died in 1855, that is to say, twelve years after these transactions, never having set up title to any of these lots then sold by his mother. His mother, as already said, had died in 1847, having been a widow since 1824.

Statement of the case.

The children of George—two infants, one aged fifteen and the other eighteen—now, April, 1869, filed this bill, as already said, against the executors of Boorman.

It appeared as part of the case, that in 1861 Boorman, as surviving executor, received the dividends in arrear on $50 worth of stock in a New York bridge company, and sold the stock itself; the produce of both transactions amounting in the whole to $115.

The defendants set up that Jeanet Clarke at the time of the conveyances which she made, A.D. 1829, had a fee simple estate in her two-thirds. They set up also in their answer the New York statutes of limitation, and long acquiescence by George, father of the complainants.

The statutes of limitation then in force were the New York Revised Statutes of 1830, and were as follows:

"ARTICLE FIRST.

"*Of the time of commencing actions relating to real property.*

"No action for the recovery of any lands, tenements, or hereditaments, or for the recovery of the possession thereof, shall be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question, within twenty years before the commencement of such action."*

"ARTICLE SIXTH.

"*Of the time of commencing suits in courts of equity.*

"Whenever there is a concurrent jurisdiction in the courts of common law and in courts of equity, of any cause of action, the provisions of this title limiting a time for the commencement of a suit for such cause of action in a court of common law shall apply to all suits hereafter to be brought for the same cause in the court of chancery.

"Bills for relief, in case of the existence of a trust not cognizable by the courts of common law, and in all other cases not herein provided for, shall be filed within ten years after the cause thereof shall accrue, and not after.

"Bills for relief, on the ground of fraud, shall be filed within

* 2 Revised Statutes of New York, 1st ed., A.D. 1830, p. 293, § 5.

six years after the discovery, by the aggrieved party, of the facts constituting such fraud, and not after that time."

The complainants contended, as already said, that Jeanet Clarke's estate was one but for life, with remainder to her son. They also contended that the statutes set up did not apply for several reasons: *First.* Because the claim was for a breach of trust, which no lapse of time would bar. *Secondly.* Because the act of Boorman was a *fraud*, which no time would bar; and, *thirdly*, because George never discovered the fraud; was poor, wholly occupied in providing through the labors of his office for the day that was passing over his head, and subject to the control of Matthew St. Clair Clarke, one of the executors. They further contended that the peculiar remedy in equity against a concealed fraud before adverted to, was allowable against a party who by *mistake* committed or participated in injurious acts.

The defendants denied all *fraud*, and asserted full knowledge of the material facts on the part of George; notice of all material facts to him and ratification by him of the acts complained of as vesting in his mother full control over her reserved two-thirds And they also denied the said allegations of control, undue influence, &c.

The court below considered that when Jeanet sold she had an estate in fee. This view rendered unimportant a consideration of any other parts of the case.

The court observed, however, in regard to the instruments of indemnity taken by Boorman:

"At the time the two-thirds of Jeanet Clarke's share of the estate was conveyed to her (1829) her son was but fourteen years old. So far, therefore, as her share was concerned, Mr. Boorman needed indemnity against the contingency that such son might die under the age of twenty-one years, and without issue, in which case the mother and sisters of Jeanet Clarke, or their issue, would come to take the two-thirds of her share."

The case was elaborately argued on principle and on the authorities, by Messrs. P. Phillips and L. Janin, for the appellants; and by Mr. Charles O'Conor, contra.

Opinion of the court.

Mr. Justice MILLER delivered the opinion of the court.

The plaintiffs assume, as the foundation of their bill, that by the true construction of the codicil as applied to the facts of the case, Jeanet Clarke took but a life estate in the real property of her father, or a life interest in the proceeds of the sale, so far as it may have been sold, and that their father, George Clarke, had a vested remainder or interest in the property so devised to Jeanet.

The first question, then, which naturally arises in the case as thus presented is, whether the construction which the plaintiffs place upon the codicil is the true one.

Very few classes of questions are more frequent or more perplexing in the courts than the construction of wills. If rules of construction laid down by the courts of the highest character, or the authority of adjudged cases, could meet and solve these difficulties, there would remain no cause of complaint on that subject, for such is the number and variety of these opinions that every form of expression would seem to be met. Especially is this true of the question whether a vested remainder in interest is created after a particular estate, or whether the first taker has a fee simple or full ownership of the property devised. And, in point of fact, when such a question arises the number of authorities cited by counsel, supposed to be conclusive of the case in hand, is very remarkable. Unfortunately, however, these authorities are often conflicting, or arise out of forms of expression so near alike, yet varying in such minute shades of meaning, and are decided on facts or circumstances differing in points, the pertinency of which are so difficult in their application to other cases, that the mind is bewildered and in danger of being misled. To these considerations it is to be added that of all legal instruments wills are the most inartificial, the least to be governed in their construction by the settled use of technical legal terms, the will itself being often the production of persons not only ignorant of law but of the correct use of the language in which it is written. Under this state of the science of the law, as applicable to the construction of wills, it may well be doubted if any other

source of enlightenment in the construction of a will is of much assistance, than the application of natural reason to the language of the instrument under the light which may be thrown upon the intent of the testator by the extrinsic circumstances surrounding its execution, and connecting the parties and the property devised with the testator and with the instrument itself.

These remarks are well illustrated in the case under consideration. It has been argued fully by able counsel on each side. Extensive reference has been made to authorities, the result of careful labor; but, after a full consideration of these, we prefer to decide the case on a point which is equally conclusive of the whole matter, which has been equally well presented, and about which we have no doubt or hesitation.

The transaction which is charged upon Boorman as a violation of his trust and a fraud upon the rights of George Clarke occurred in 1829. The minor, James Smith, had reached the age of twenty-five; the debts of the testator had all been paid, and the specific bequests of his will carried into effect. It seemed desirable to distribute the assets on hand, consisting mainly of the unsold real estate, among the four children of the testator, for whom it was intended.

This was done first by the executors and the other three devisees conveying to James, in fee, certain real estate which was valued and agreed upon by the parties, and accepted by him as his full, equal one-fourth of the estate of his father under the will.

Similar deeds were made to the three female devisees of the property agreed upon as the one-third part of their respective shares, which was, by the will, to be placed at their unconditional control. These deeds left in the hands of the executors two-thirds of each one-fourth devised to the daughters, in regard to which alone the question of life interest or absolute interest or life estate and remainder arises. The deeds abovementioned are dated November 15th, 1829, and on the 26th day of December the two executors, Boorman and Clarke, and James Smith, Jeanet, Hannah, and Eliza-

beth, and their husbands, united in a conveyance of all the remaining real estate to Robert Dyson.

This deed recited on its face that it was made by the executors in pursuance of the power contained in the will, for the consideration of $64,710.59, paid by Dyson to Matthew St. Clair Clarke, one of the executors. On the same day Dyson, by conveyances to Jeanet, Hannah, and Elizabeth, conveyed to each of them parts of the real estate so conveyed to him, the three deeds covering it all, reciting the consideration at sums in each case as near one-third of the $64,710.59, the consideration of the deed to him, as could well be arranged. These were all deeds purporting to convey the title in fee; and the property has since passed into the hands of *bonâ fide* holders for value. We do not see in these proceedings any reason to believe that either Boorman or Matthew St. Clair Clarke was governed by a fraudulent design. No money was received by either of them. The $64,710.59, recited in the deed to Dyson, as paid to Clarke, was evidently merely nominal, and was satisfied by his conveyances the same day, dividing the property conveyed to him between the three daughters of the testator. The title to all the property came to him, and the title to the specific portions of it passed to them without a dollar actually paid, and the whole of it was a plan carefully devised by a good lawyer, to close up the trust in the hands of the executors, and to partition the property among those supposed to be entitled to it. It does not appear that either Boorman or his lawyer ever believed that the son of Jeanet Clarke, then alive, had any vested interest in the property, and they could have had, therefore, no thought of defrauding him. It is said, in opposition to this view of the matter, that the executors required and received a bond of indemnity, with mortgages upon the property, to save them harmless in regard to this violation of their trust. But we think it sufficiently appears by the evidence that this indemnity had reference to possibilities under supposable doubtful constructions of the will, other than such as gave to the son, George, any interest, cut off or discharged by these transactions.

We do not enter into the question whether the trustees so far departed from their obligations to him under the will, as to make them legally or equitably liable to him for the injury arising from their misconduct; but we only mean to say, that we do not find in the record any evidence of positive, actual fraud with corrupt motive, nor of any effort to conceal what they did from him, or from any one else interested in the transaction.

The reason for not entering into the inquiry any further is, that the plaintiffs come too late.

Whether we look to the statutes of limitations of the State of New York, governing such cases in that State, and, of course, in this court; or to the more general and universal doctrines of courts of equity on the subject of the lapse of time, laches, and stale demands, we are of opinion that this suit cannot be maintained.

The limitation prescribed by the statutes of New York for the recovery of real estate is twenty years in an action at law.

Where there is a concurrent jurisdiction in the courts of common law and in courts of equity, the limitation prescribed by the court of law shall govern the court of equity.

Bills for relief in cases of trust, not cognizable by courts of law, are to be filed within ten years after the cause of action accrued.

Bills for relief on the ground of fraud, must be filed within six years after the discovery of the fraud.

If this were a suit to recover the real estate devised by the testator, the action would be barred at law by the statute, because the right of action of the plaintiffs' ancestor, George Clarke, accrued upon the death of his mother, in 1847, and this suit was commenced in 1869, more than twenty years afterwards. The bill of complaint does, in terms, ask this relief, that is, the possession of the property; and though this is impossible, because the property has passed beyond the control of the defendants, it would seem reasonable that when the plaintiffs ask, in the alternative, for such relief as the court can give instead of the property, the same rule of limi-

tation should govern the courts of equity as would govern the courts of law; and such is the express declaration of the New York statute as regards concurrent remedies in courts of law and chancery.

But, as we have already shown, this is a bill for relief, if any relief can be granted in a case of trust not cognizable in a court of law. It is not for land in possession of the defendant, nor for money in his possession received for the use of the plaintiffs' ancestor, nor for such money which ought to be in his possession, but it is for a well-defined violation of trust by which plaintiffs' ancestor lost the title to property which would otherwise have come to him on the death of his mother, and in failing to secure to him his reversionary interest, when they conveyed it as trustees. It is, therefore, a case falling within the limitation of ten years of the New York statute; because it is a bill for relief in a case of trust not cognizable at law.

It is insisted, however, that in cases of fraudulent violation of trust no length of time will operate as a bar to a suit in equity; and some general expressions found in the language of the courts are much relied on.*

These authorities are all based upon the proposition of actual intentional fraud practiced upon a *cestui que trust* by his trustee. We have already said such is not the case before us.

The statute we have referred to as governing this case makes no such exception, though it is, in terms, applicable alone to cases of trust and to suits in equity.

That statute does, however, contain an exception to the general rule of limitation of ten years, which it prescribes. It is that bills for relief on the ground of fraud must be filed within six years after the discovery of the fraud. The plaintiffs contend that their case comes within the protection of this clause.

We are favored by learned counsel, in answer to this construction, with a very forcible argument in support of the

* Michoud *v.* Girod, 4 Howard, 504; Prevost *v.* Gratz, 6 Wheaton, 481; Bowen *v.* Evans, House of Lords Cases, 281.

proposition that the provision above recited is only applicable to a case of fraud intentionally concealed by the party committing it, from the knowledge of the party injured, until the ordinary remedies would be barred by the statute. The argument and authorities cited in its favor are of great weight, and we are not prepared to say the proposition is unsound. We think, however, we are relieved from the necessity of deciding it by the facts in the case before us.

We are of opinion that the record shows that George Clarke had such knowledge or notice of his rights under the will, and of the transactions of the trustees now complained of, as precludes his heirs from setting up ignorance of these transactions.

It appears that as agent for his mother in the year 1843, when he must have been twenty-eight years old, he went to New York to complete the sale of five different parcels of the land conveyed by Dyson to his mother. At his request L. B. Woodruff acted as counsel, and prepared the conveyances to the purchasers. These conveyances he carried to Washington, where they were executed by his mother, and by Matthew St. Clair Clarke as trustee, and were witnessed by him, and carried back by him to New York for delivery. At least two of the purchasers declined to complete the purchase on the ground of a defect of title growing out of the construction of the clause of the will of his grandfather, which is here in dispute. This difficulty was explained to Woodruff, his mother's counsel, and to him. It had relation to his own connection with the will, and it related directly to the question whether, under the circumstances, that he was then in existence, and had attained the age of twenty-one years, his mother's interest in the property was a life estate or a fee simple title. Counsel for purchasers advised their clients to accept the title, if George would execute a deed of grant or release to the lots, and he did so, warranting the title. It is not clear whether the will of his grandfather was present during these discussions. But it is clear that extracts from the will were used. That he was fully informed that he was referred to in the will in such a manner

as made prudent counsel require a conveyance of *his* rights before they would advise their clients to pay for and accept the title conveyed by his mother, and by Matthew St. Clair Clarke, the executor of that will. The will itself, with all the deeds on which the title depended, was of record, and accessible to him without difficulty. The value of the property conveyed by the five deeds which he witnessed, and in regard to which he acted as his mother's agent in delivering them, and receiving the money, was considerable. The consideration of the five deeds amounted to $7515.

This money passed through his hands, and he signed deeds parting with his interest to perfect the title in the only cases in which he was asked to do so. At this time both Boorman and Matthew St. Clair Clarke were alive. He lived twelve years after this, during eight years of which time, after his mother's death, all his rights were perfect, and his cause of action against them free from obstruction. But during all this time he asserted no claim. If he had rights he was content to waive them. There was nothing to prevent his fullest investigation into all the transactions now complained of. His attention had been called to his interest under the will, to the nature of his mother's title, to the fact that able lawyers considered him as having an interest in the property under that will, yet he lived for more than eight years after his mother's life interest had expired and asserted no claim. His children cannot now, twenty years after this, be heard to say that he was in such ignorance of his rights that the curative influence of statutes of repose shall not operate against him and them.

We think it is equally clear, upon the general principles by which courts of equity are governed in regard to lapse of time as a bar to relief, that plaintiffs come too late. The acts of the trustees, of which complaint is made, were completed in 1829, forty years before the suit is commenced for a redress of the wrong then done to plaintiffs' father. During twenty-two years of that time his right and the right of his children to bring suit was without obstruction or hindrance. Within that time the party injured, the party who

committed the wrong, and all others engaged in the transaction, died. The testator of defendants, the persons whose estate is to be charged if plaintiffs recover, was the last of these to depart, and it would almost seem as if the delay until he who could best explain all that needed explanation, and could most effectually defend his own part in the transaction, had passed away, was intentional.

The fact that these transactions had relation to a trust does not in this instance take the case from within the influence of those salutary principles intended to give protection against stale claims.

It may be conceded that, so long as a trustee continues to exercise his powers as trustee in regard to property, that he can be called to an account in regard to that trust. But when he has parted with all control over the property, and has closed up his relation to the trust, and no longer claims or exercises any authority under the trust, the principles which lie at the foundation of all statutes of limitation assert themselves in his favor, and time begins to cover his past transactions with her mantle of repose. Such is the case before us. With the transfer of the title of the property in 1829, Mr. Boorman intended to, and did, terminate his trust relation to that property. If there was any claim against him after that, which could be asserted by plaintiffs' father, it was a claim for a wrong then done him, and not a claim as of an existing relation of trustee and *cestui que trust*. The act of Mr. Boorman, many years after, in disposing, as executor of the will, of fifty dollars of corporation stock discovered to belong to the estate, neither waived nor recognized as existing any such relation. Every principle of justice and fair dealing, of the security of rights long recognized, of repose of society and the intelligent administration of justice, forbids us to enter upon an inquiry into that transaction forty years after it occurred, when all the parties interested have lived and died without complaining of it, upon the suggestion of a construction of the will different from that held by the parties concerned, and acquiesced in by them through all this time.

DECREE AFFIRMED.

BEAN *v.* BECKWITH ET AL.

1. Whenever one justifies an act which in itself constitutes at common law a wrong, upon the process, order, or authority of another, he must set forth substantially and in a traversable form the process, order, or authority relied upon, and no mere averment of its legal effect, without other statement, will answer. Accordingly, where certain military officers of the United States, being sued for the arrest and imprisonment of a person in Vermont, not connected with the military service of the United States, alleged in their pleas that the arrest and imprisonment were made under the authority and by the order of the President, whose orders as commander in chief of the armies of the United States, by the rules and regulations of the army, they were bound to obey, without setting forth any order, general or special, of the President directing or approving of the acts in question, it was held that the pleas were defective and insufficient.
2. The act of March 3d, 1863, entitled "An act relating to habeas corpus, and regulating judicial proceedings in certain cases," and the act of March 2d, 1867, entitled "An act to declare valid and conclusive certain proclamations of the President, and acts done in pursuance thereof, or of his orders in the suppression of the late rebellion against the United States," do not change the rules of pleading, when the defence is set up in a special plea, or dispense with the exhibition of the order or authority upon which a party relies. Nor do they cover all acts done by officers in the military service of the United States simply because they are acting under the general authority of the President as commander in chief of the armies of the United States. Assuming that they are not liable to any constitutional objection, they only cover acts done under orders or proclamations issued by the President, or by his authority.

ON certificate of division of opinion between the judges of the Circuit Court for the District of Vermont; the case being thus:

An act of March 3d, 1863,* entitled "An act relating to habeas corpus, and regulating judicial proceedings in certain cases," enacts that "*any order of the President or under his authority*," shall be a defence to any actions, &c., for any search, seizure, or arrest, &c., made, &c., *under and by virtue of such order*, or *under color of any law of Congress.*

A subsequent act, that of March 2d, 1867,† and entitled

* 12 Stat. at Large, 756. † 14 Id. 432.

"An act to declare valid and conclusive certain proclamations of the President, and acts done in pursuance thereof, or of his orders, in the suppression of the late rebellion against the United States," enacts:

"All acts, proclamations, and orders of the President of the United States, or acts done by his authority or approval after the 4th of March, 1861, and before the 1st of July, 1866, respecting martial law, military trials by courts martial or military commissions, or the arrest, imprisonment, and trial of persons charged with participation in the late rebellion against the United States, or as aiders or abettors thereof, or as guilty of any disloyal practice in aid thereof, or of any violation of the laws or usages of war, or of affording aid and comfort to rebels against the authority of the United States; and all proceedings and acts done or had by courts martial or military commissions, or arrests and imprisonments made in the premises by any person, by the authority of the orders or proclamations of the President, made as aforesaid, or in aid thereof, are hereby approved in all respects, legalized, and made valid, to the same extent and with the same effect as if said orders and proclamations had been issued and made, and said arrests, imprisonments, proceedings, and acts had been done under the previous express authority and direction of the Congress of the United States, and in pursuance of a law thereof, previously enacted and expressly authorizing and directing the same to be done. And no civil court of the United States, or of any State, or of the District of Columbia, or of any district or Territory of the United States, shall have or take jurisdiction of, or in any manner reverse, any of the proceedings had or acts done as aforesaid, nor shall any person be held to answer in any of said courts for any act done or omitted to be done in pursuance or in aid of any of said proclamations or orders, or by authority or with the approval of the President within the period aforesaid, and respecting any of the matters aforesaid, and all officers and other persons in the service of the United States, or who acted in aid thereof, acting in the premises shall be held *primâ facie* to have been authorized by the President; and all acts and parts of acts heretofore passed, inconsistent with the provisions of this act, are hereby repealed."

Between the date of these two acts, that is to say, in

Statement of the case.

August, 1865, Andrew Bean sued Daniel Beckwith and Gilman Henry, in trespass, for an alleged assault and battery upon him, and false imprisonment. The declaration averred that the defendants, in November, 1864, at Newbury, in the county of Orange, in the State of Vermont, assaulted and seized the plaintiff and carried him against his will to Windsor, in that State, and forced him into the State prison in that place, and confined him in a cell constructed for thieves and burglars and other convicts, for the space of seven months; and that by these means his health was destroyed, and he himself subjected to great distress and anguish of mind, and injured in his business, for which destruction of his health, distress, injuries, &c., he claimed damages from the defendants.

The defendants pleaded two pleas precisely alike with the exception of the form of their commencement. One of them averred that the plaintiff ought not to have and maintain his action by reason of the matters stated; the other averred that the cause by reason of these matters ought to be dismissed. The difference was of no consequence upon the questions presented for the consideration of the court.

Both pleas set up that at the time of the commission of the alleged grievances, and long previously, a rebellion existed against the laws and government of the United States, and that the public safety was greatly imperilled; that it became necessary to raise troops to suppress the rebellion and insure the public safety, and for that purpose troops were raised in the Northern States, and especially in the military district embracing the Second Congressional District of Vermont; that the defendant Henry was at the time a military officer of the United States, namely, a provost marshal within and for that district, and the defendant Beckwith was an assistant provost marshal within the same district; that in November, 1864, at Newbury, in the county of Orange, in the State of Vermont, the plaintiff was charged with having been guilty of disloyal practices in aid of the rebellion, and of affording aid and comfort to the rebels, to wit, with enticing soldiers, in June previous, to desert from the army of

the United States; that the defendants thereupon arrested the plaintiff "on the charges aforesaid," and delivered him to the keeper of the State prison for safe custody, until he could be brought before the civil tribunals of the United States upon those charges; that the plaintiff was there detained until May 1st, 1865, when he was brought before the United States commissioner and held to bail for his appearance before the Circuit Court on the fourth Tuesday of July following, to answer those charges; and that from his arrest until this last date, there was no session of the Circuit Court, nor any grand jury in attendance upon any court of the United States within the district.

The pleas also averred that in making the arrest, imprisonment, and detention, the defendant Henry acted in his military capacity of provost marshal, and the defendant Beckwith acted as his aid; that the arrest, imprisonment, and detention were made without unnecessary force and violence, "under the authority and by the order of the President of the United States, Abraham Lincoln, since deceased, whose orders as commander in chief of the armies of the United States, by the rules and regulations of the army, the defendants were bound to obey;" and that the arrest, imprisonment, and grievances in the declaration mentioned, were the same arrest, imprisonment, and detention thus set forth; concluding with an *absque hoc* as to the violence and other circumstances of aggravation and cruelty with which the original imprisonment and subsequent confinement are charged to have been accompanied.

To these pleas the defendants demurred generally, and the judges being divided in opinion as to their sufficiency, the question on certificate of division was, whether either was sufficient.

Mr. E. J. Phelps, for the plaintiff, argued:

1st. That the averments in the pleas did not bring the case within the terms of the statutes in question, or either of them.

2d. That if those statutes were to receive such a construc-

tion as would comprehend this case, then they were in contravention of the Constitution of the United States, and especially of articles four, five, and six of its amendments.

3d. That in any event both pleas were bad, as being pleaded to and assuming to answer the whole declaration, while the provisions of the statutes, even if applicable and constitutional, would afford a defence to only a part of it.

Mr. S. F. Phillips, Solicitor-General, contra:

1st. The facts set up amount to justification, and we rely on them as a justification under the first plea. They show that the plaintiff was guilty of a felony. All private persons had a right to arrest him, and the defendants did not lose their right by being military officers.

2d. The defendants are entitled to the benefit of the indemnity given by the act of 1867, and this they claim under the second plea.

The act is constitutional. As it concerns itself only in indemnifying United States officers against liabilities incurred in the colorable discharge of their duties as such, no objection can be made to it as being outside of the enumerated powers of the General government.

Mr. Justice FIELD, having stated the case, delivered the opinion of the court, as follows:

There is no averment in the pleas that at the time the plaintiff was arrested any rebellion existed in the State of Vermont, against the laws or government of the United States; or that any military operations were being carried on within its limits; or that the courts of justice were not open there, and in the full and undisturbed exercise of their regular jurisdiction; or that the plaintiff was in the military service of the United States, or in any way connected with that service.

Nor is there any averment in the pleas as to the manner in which, or the parties by whom the charges of disloyal practices were made. It is not alleged that they were stated in writing or supported by oath.

Nor do the pleas, whilst asserting that the acts, which are the subject of complaint, were done under the authority and by the order of the President, set forth any order, general or special, of the President directing or approving of the acts in question.

For this last omission all the judges are agreed, without expressing any opinion upon the other omissions, that the pleas are defective and insufficient. It is an old rule of pleading, which, in the modern progress of simplifying pleadings, has not lost its virtue, that whenever one justifies in a special plea an act which in itself constitutes at common law a wrong, upon the process, order, or authority of another, he must set forth substantially and in a traversable form the process, order, or authority relied upon, and that no mere averment of its legal effect, without other statement, will answer. In other words, if a defendant has cause of justification for an alleged trespass, and undertakes to plead it, he must set it forth in its essential particulars, so that the plaintiff may be apprised of its nature and take issue upon it if he desires, and so that the court may be able to judge of its sufficiency.

The defendants intended by their pleas to rest the justification of their conduct upon the provisions of the act of March 3d, 1863, entitled "An act relating to Habeas Corpus, and regulating judicial proceedings in certain cases,"* and of the act of March 2d, 1867, entitled "An act to declare valid and conclusive certain proclamations of the President, and acts done in pursuance thereof, or of his orders, in the suppression of the late rebellion against the United States."†

These statutes were enacted, among other things, to protect parties from liability to prosecution for acts done in the arrest and imprisonment of persons during the existence of the rebellion, under orders or proclamations of the President, or by his authority or approval, who were charged with participation in the rebellion, or as aiders or abettors, or as being guilty of disloyal practices in aid thereof, or any

* 12 Stat. at Large, 756, § 4. † 14 Id. 432

violation of the usages or the laws of war. Assuming for this case that these statutes are not liable to any constitutional objection, they do not change the rules of pleading, when the defence is set up in a special plea, or dispense with the exhibition of the order or authority upon which a party relies. Nor do they cover all acts done by officers in the military service of the United States simply because they are acting under the general authority of the President as commander in chief of the armies of the United States. They only cover acts done under orders or proclamations issued by him, or under his authority; and there is no difficulty in the defendants setting forth such orders or proclamations, whether general or special, if any were made, which applied to their case.

The views thus expressed render it unnecessary to consider any other objections taken by the plaintiff to the pleas before us.

The questions certified must be ANSWERED IN THE NEGATIVE, and the cause

REMANDED FOR FURTHER PROCEEDINGS.

CHAFFEE & CO. *v.* UNITED STATES.

1. The action of debt lies for a statutory penalty, because the sum demanded is certain, but though in form *ex contractu* it is founded in fact upon a tort. The necessity of establishing a joint liability in such cases does not exist; it is sufficient if the liability of any of the defendants be shown. Judgment may be entered against them and in favor of the others, whose complicity in the offence for which the penalty is prescribed is not proved, as though the action were in form as well as in substance *ex delicto*.
2. The general rule which governs the admissibility of entries in books made by private parties in the ordinary course of their business, requires that the entries shall be contemporaneous with the facts to which they relate, and shall be made by parties having personal knowledge of the facts, and be corroborated by their testimony, if living and accessible, or by proof of their handwriting if dead, or insane, or beyond the reach of the process or commission of the court.

Statement of the case.

3. The cases of *Fennerstein's Champagne* and *Cliquot's Champagne*, reported in the 3d of Wallace, commented upon and explained, and distinguished from the present case.
4. It is error to instruct a jury, in an action for penalties for alleged frauds upon the revenue, that after the government has made out a *primâ facie* case against the defendants, if the jury believe the defendants have it in their power to explain the matters appearing against them, and do not do so, all doubt arising upon such *primâ facie* case must be resolved against them. The burden rests upon the government to make out its case beyond a reasonable doubt.

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

The forty-eighth section of the act of June 30th, 1864, "To provide internal revenue to support the government," &c.,* thus enacts:

"All goods, wares, merchandise, . . . on which duties are imposed by the provisions of law, which shall be found in the possession or custody, or within the control of any person . . . for the purpose of being sold or removed by such person . . . in fraud of the internal revenue laws, or with design to avoid payment of said duties, may be seized by any collector . . . who shall have reason to believe that the same are possessed, had, or held for the purpose or design aforesaid, and the same shall be forfeited to the United States.

"And also all articles of raw materials found in the possession of any person . . . intending to manufacture the same for the purpose of being sold by them in fraud of said laws, or with design to evade the payment of said duties, and also all tools, implements, instruments, and personal property whatsoever, in the place or building, or within any yard or inclosure where such articles on which duties are imposed, as aforesaid, and intended to be used by them in the fraudulent manufacture of such raw materials, shall be found, may also be seized by any collector or deputy collector, as aforesaid, and the same shall be forfeited as aforesaid.

"*And any person who shall have in his custody or possession any such goods, wares, merchandise, . . . subject to duty as aforesaid, for the purpose of selling the same with the design of avoiding payment*

* 13 Stat. at Large, 240.

of the duties imposed thereon, shall be liable to a penalty of $500, *or not less than double the amount of duties fraudulently attempted to be evaded, to be recovered in any court of competent jurisdiction.*

"And the goods, wares, merchandise, which shall be so seized by any collector, may, at the option of the collector, during the pendency of such proceedings, be delivered to the marshal of said district, and remain in his care and custody and under his control until final judgment in such proceeding shall be rendered."

This statute being in force, Sidney Chaffee, Highland Chaffee, and Rue Hutchins, trading as Chaffee & Co., were distillers, at Tippecanoe, a small town upon the Miami Canal, a canal which traverses the State of Ohio from Cincinnati on the south line of the State, by a course north and south, to Toledo in the north. The custom of Chaffee & Co. was to ship whiskies in both directions; that is to say, northward towards Toledo and southward to Cincinnati. Going north such whiskies had to pass through a place called Piqua, which was the first place on the canal at which toll was payable when the vessel was going from Tippecanoe in the direction named. Going south, towards Cincinnati, the whiskies had to pass through Dayton, the first place at which toll was payable when the vessel was going from Tippecanoe south. There was no other distillery at Tippecanoe. There were, however, in the whole distance between Piqua and Dayton three others.

The Miami Canal, on which these whiskies were transported, had been made and for some years was managed by the State of Ohio. And a statute for "the regulation of the navigation thereof and for the collection of tolls," enacted that no boat should be permitted to pass on it unless the master had first obtained a clearance for each voyage from the collector of tolls, which clearance the collector nearest to the place at which the boat began her voyage was required to issue. To enable the collector to issue clearances that should truly represent what cargo was on board, the act made it obligatory on the master to exhibit to the collectors "a just and true account or bill of lading" of "each and every article of property on board," when the boat

should depart on her voyage, or which should be taken on board afterwards; and further, to insure accuracy, every collector receiving a bill of lading might require the master to verify it by his oath. The knowingly delivering any false bill was made an indictable offence, punishable with fine in three times the value of the property omitted or falsely stated in the bill. The bill of lading thus required was to be exhibited to the collector where any portion of the cargo should be unladen. The act proceeded:

"It shall be the duty of every collector to whom bills of lading are required to be presented, in order to obtain a clearance for any voyage, to make out from such bill or bills of lading, in a book, *a certificate*, containing a pertinent description of the articles composing the cargo of the boat, for which clearance is about to be issued, *properly classified and designated with reference to the rates and amount of tolls chargeable* thereon; which certificate shall be signed by the master, who shall also attest on oath or affirmation to the correctness thereof, if required by the collector, before the clearance shall be issued.

"In every case where a certificate is required to be made out and signed, the collector shall enter upon the clearance a correct list or statement of all articles of lading contained in such certificate, properly classified and designated, with the amount of tolls charged and received thereon, and shall sign his name thereto.

"On the arrival of any boat at the place of destination, or at any place in the course of the voyage where there is a collector's office, the master thereof shall immediately present to the collector the bill or bills of lading together with the clearance.

"No boat shall proceed on its voyage until the bill or bills of articles of lading on board thereof, together with the clearance and list of passengers, shall have been presented to the collector, nor *until all necessary examinations and comparisons of such bills of lading, clearance, and cargo, shall have been made*, nor until all tolls payable at such office shall have been paid; and the collector may detain both the bills of lading and clearance until the necessary entries shall be made on such clearance, and until all the requisitions of this section shall be complied with.

"No part of the cargo of any boat shall be unladen at the termination of any voyage until the clearance, together with

the bill or bills of lading of the whole cargo, shall have been presented to the proper collector, and a permit obtained from such collector for such unlading, which permit such collector is hereby required to grant, after a reasonable time shall have elapsed for the examination of such clearance, bills of lading and cargo, and on the payment of all tolls which shall remain due."

Though, as already said, the canal had been originally managed by the State, it was not so managed at the time when the whiskies of Chaffee & Co. were transported. The State had leased it, the lease containing this provision:

"Such rights, privileges, and franchises now exercised by the State as may be necessary to manage, control, and keep in repair the public works, and collect tolls for the navigation of the same, together with the right to appoint superintendents, collectors, &c., who shall have and exercise the same power and authority in the collection of tolls and water rents, and the levy of fines, as can now by law be exercised by similar officers and agents appointed by the State; and said lessee or lessees shall be governed by the rules and regulations for navigating the canals now in force, subject to such alterations and additions as may hereafter be established by law," &c.

The purpose of the *company*, which had now leased the canal, apparently was to follow the rules about clearances that the statute had prescribed. But whether the rules had been followed with statutory rigor was less clear. Captains would come, it appeared, to the collector's office and report for a clearance; the collectors generally, though not always, knowing them. The bills of lading were usually produced, but occasionally a captain would happen to have left his bills behind, and in such case, if he was a person known to the collector, and a person whose word the collector thought he could safely take as to what was on board the boat, he would sometimes dispense with the production of the bills, and make out the clearance from the captain's verbal report; though this would not be done *ordinarily* with any master, and never in the case of "new men" whom the collectors did not know. Captains were never interrogated upon their

oaths; nor did the collector ever overhaul and make personal inspection of cargoes, or in this way or in any way have actual and personal knowledge whether the representation of the captains or of the bills was strictly accurate. But however made, the captain would always certify the representation on which the clearance was granted to be true. When, however, arriving at its destination, the boat came to be unladen, it was testified "to be the duty of the collector at such place of unlading to see, when the boat is unloading, that the captain has given in his freight correctly; and if he sees any freight that is not on the clearance, he then brings the captain to an account for it."

The certificates which the captains signed on the books of the collector would be in this form:

"COLLECTOR'S OFFICE,
DAYTON, December 2d, 1865.

"I, H. U. French, master of the boat A. Hopkins, do certify that the following is a full and true statement of all the cargo taken on board said boat for transportation on her present passage, and that I have paid toll thereon as follows, to wit, to Piqua, for original cargo, on clearance No. 893, viz.:

The Boat.	From.	To.		Miles.	Tolls.
	Troy.	Cincinnati.	. . . .	104	$2 06
900 bushels barley, . .	"	"	43,200	"	21 60
	To Dayton.				
50 barrels high wines, .	Tippecanoe.	Cincinnati.	18,000	. . .	7 20
1645.29 bushels oats, .	Troy.	"	51,314	86	18 68
					$49 54

"H. U. FRENCH."

These certificates, as the reader will observe, purport to show the name of the boat and master, what cargo was on the boat, where the cargo came from, and where it was going, the number of miles of the transit, and the amount of toll; but in themselves did not show who owned or who shipped the cargo.

In the particular case of Chaffee & Co.'s whiskies, as they passed through Dayton, the collector was one Brown.

Either he or a young man in his employ kept, for the most part, the books, Brown directing the manner, and the purpose, as testified to, being to keep them regularly. The young man, at the time of the suit hereinafter mentioned as brought by the United States against Chaffee & Co., was dead; but the entries not made by Brown himself, were, without denial, in his handwriting; a few excepted, which were in the handwriting of a grandson of Brown, whose entries Brown represented to be "always reliable."

The collectors at Piqua and at other points where toll was payable, when whiskies were sent in the northern direction, followed the same general mode of making out the clearances, that is to say, they were made out in general from the freight bills, though occasionally where the collector knew the captain, and thought he could trust in his word, from the captain's verbal representations; no actual knowledge being had by the collectors here more than at Dayton, of the truth of what the captain certified to.

At *Cincinnati*, of course, there were no further clearances. What the collector then did, or at least what it was his duty to do, was to check the clearances from other places, and see that they were right. He made memoranda in a book of freights as shown by them, or as found by himself, but these no captain signed.

In one direction or in the other, Chaffee & Co. had sent large quantities of whisky. They had also paid taxes on large quantities, confessedly on as much as 6045 barrels.

In this state of things, and under the forty-eighth section of the statute of June 30th, 1864, already quoted, the United States brought suit in the court below against Highland Chaffee, Sidney Chaffee, Rue Hutchins (all heretofore named), *and William Chaffee*, "late partners, doing business under the firm name of H. D. Chaffee & Co."

The declaration, which was founded on the italicized portion of the section above quoted, of the act of June 30th, 1864,* charged that the "*defendants*," from February 1st,

* See *supra*, pp. 517, 518.

1865, to September 1st, 1866, were residents at Tippecanoe, &c., they, *the defendants*, then and there did "carry on and transact the business of distillers of spirits, *under said firm name of H. D. Chaffee & Co.*, for which they were duly licensed," and were thereby bound to pay all the revenue and taxes imposed upon them, and to comply with the act passed June 30th, 1864, in reference to the spirits by them manufactured and distilled; nevertheless, that the *defendants*, with intent to evade the payment of the lawful duties upon 200,000 gallons of distilled spirits, "*by them distilled* at their distillery," did, between said dates "unlawfully, knowingly, and fraudulently, have in their custody and possession, and under their control, 200,000 gallons of distilled spirits (each gallon subject to a tax of $2 imposed by law, which is unpaid), for the purpose of selling the same, with the design of avoiding the payment of the duties imposed by law thereon," and "*the defendants* did then and there unlawfully and fraudulently sell, dispose of, and remove the same, so that the lien of the plaintiff has been lost, and the taxes remain unpaid; which act of having in their custody and possession, and under their control, said distilled spirits, for the purpose of selling the same, with the design of avoiding the payment of the duties imposed by law thereon, in fraud of the internal revenue laws of the United States, by *said defendants*, was contrary to the form of the statute in such case made and provided, whereby the *defendants* forfeited and became liable to pay to the plaintiffs, for the offence aforesaid, the penalty of $800,000, double the amount of the taxes imposed by law upon said distilled spirits." The declaration concluded with an allegation that "an action hath accrued to the plaintiffs to demand and have of the *defendants* the sum of $1,010,000," &c.

The defendants demurred generally: the ground of the demurrer being, that the penalty prescribed by the act applied only to persons who had at the time of seizure the goods in their possession, and then held them for sale with a design to avoid the payment of duty upon them, and not to those who had held them with that design, but had parted

with them. The demurrer was overruled. The defendants Sidney Chaffee and Hutchins then pleaded *not guilty* and *nil debet*, and the defendant William Chaffee pleaded separately that he was not a member of the firm of H. D. Chaffee & Co., or interested in its business. The district attorney filed the common *similiter* to the pleas of Sidney Chaffee and Hutchins, and traversed by replication the plea of William Chaffee.

The death of Highland Chaffee was then suggested, and it was ordered that as to him "all proceedings be stayed and abate."

The case being subsequently called for trial, the government abandoned, in form, the suit against William Chaffee, the abandonment being entered of record.

On the trial, the defendants having proved that during the time embraced in the controversy, they had paid taxes on full 6045 barrels of whisky made by them during that time, the government, in order to show that the defendants had in their custody or possession, dutiable whisky, "for the purpose of selling the same with the design of avoiding payment of the duties imposed thereon," offered in evidence the books of the collectors at Piqua and Dayton, which the collectors produced, to show by different certificates in them, on which clearances had been granted at Dayton or Piqua, the collection offices nearest to Tippecanoe, at which place, as already said, Chaffee & Co. were the only distillers, that 200,000 gallons more whisky had been moved from the said place than duties were paid on. Certificates from the books at Cincinnati checking the clearances, and showing what whiskies had arrived there, were also offered.

The collectors at Piqua, Dayton, and Cincinnati were examined. As would be inferable from what has been already stated, they had little personal knowledge of any facts bearing on the controversy.

The handwriting of Kaufman, the young man who made some entries at Dayton, and who was dead, was proved, and the grandson of Brown, who made some others, was produced and sworn. But the government examined none of

the captains whose names were signed to the several certificates in the books at Dayton and Piqua, as to the genuineness of their signatures, nor was proof given of the handwriting or death of any of them. The collector at Cincinnati did not testify from any knowledge of his own that his books contained true records of what whiskies had arrived. Some, but not all, of the captains were examined as witnesses, and testified to the carriage of whisky from Chaffee's distillery on their boats, at dates corresponding, and of quantities corresponding to their several certificates respectively. The government also offered evidence tending to prove that the distillery of Chaffee & Co., at Tippecanoe, was of a capacity equal to a production of fifty barrels of whisky per day when run to its fullest capacity; a larger number of barrels than it was admitted that duties had been paid on.

The defendants objected to the reception of the books, on the ground that it was hearsay and *res inter alios acta*. But the evidence was admitted, "not as evidence that whisky came from or belonged to the defendants, but only as competent to show that a given quantity passed a certain point on a given day, and if the government did not connect this whisky with the defendants, the testimony would be stricken out." The defendants excepted. The evidence was never afterwards stricken out.

For the purpose of showing the quantity of whisky on hand on the 26th of October, 1865, the defendants offered the evidence of twenty-three witnesses. This testimony tended to prove that on the 1st day of July, 1864, when the distillery stopped, there was a large quantity of whisky on hand (perhaps 2000 barrels), which was stored in the cellar, grain-rooms, and other places in or about the distillery; that this whisky, or the greater part of it, remained on the premises until the 26th of October, 1865, the several witnesses testifying to seeing it at different times from the 1st of July, 1864, until the 26th of October, 1865.

The government, in rebuttal, offered the evidence of eleven witnesses. This testimony tended to prove that from

the 1st of July, 1864, to the summer of 1865, there was very much less whisky—certain witnesses said not much more than fifty barrels—at the distillery than was asserted by the defendants and testified to by their witnesses; and that, in the autumn of 1865, up to the 26th day of October, there was little if any whisky there.

Sidney Chaffee lived in Tippecanoe, and was about the distillery most of the time, and attended to making purchases, and to other business of the firm of H. D. Chaffee & Co., and Hutchins, during the time he was a partner, was employed about the distillery. He testified that the firm of H. D. Chaffee & Co. kept ordinary books of accounts. He was present in court during the entire trial, and Hutchins was in court at the close of defendant's testimony. Before the commencement of the trial, to wit, on the 3d of March, 1870, the government had caused this notice to be served on the defendants:

"TIPPECANOE, March 3d, 1870.

"*The United States* v. *H. D. Chaffee & Co.*

"The defendants will take notice that the plaintiffs have filed a motion and have thereby moved the court, that the defendants are required to produce, on the 8th of March, 1870, the day set for trial of this case, the following books, papers, and documents, now in their possession and under their control, which contain evidence pertinent to the issue herein, to wit, all books, papers, and statements required by law to be kept or made by defendants, as distillers, at Tippecanoe, Ohio, from July 1st, 1864, to October 1st, 1866, and all other books, papers, statements, and memoranda kept by them, pertaining to their business, during the same period at Tippecanoe.

"W. M. BATEMAN,
District Attorney of the United States."

At the close of the defendants' testimony, the books and papers not having been produced, the counsel for the government called for their production. The counsel for the defendants stated that they were at Buffalo. The counsel for the government refused to receive the statement as an excuse for the non-production of the books, and demanded

their production; and that S. L. Chaffee should be called as a witness for the defence to explain why they were not produced, and to testify generally in the case. The defendants did not produce the books and papers, and did not call either S. L. Chaffee or Hutchins as a witness in the case.

Before charging, the court informed the counsel that it would allow evidence to be introduced at any stage of the case, to supply any omission or by way of explanation.

It then proceeded to charge. Commenting on the books of the different collectors which had been received by it, and relying on the case of *Fennerstein's Champagne*, reported along with the case of *Cliquot's Champagne*, in 3 Wallace,* it said:

"So far as the nature of this testimony is concerned there has been, in modern times, a very great change of opinion; and I do not know that if I should search all the books I ever read, or call to mind all my experience at the bar, I could select a more fitting instance to illustrate my own opinion of the respective values of these two classes of testimony than the contrast between the persuasive effect of memoranda, made in the ordinary course of business by those who have no motive to falsify—whose duty it was to record them at the time the transactions took place—on the one hand, and on the other the grossly conflicting verbal testimony given in this cause as to the amount of whisky on hand in October, 1865. Compare the two and see upon which, in its own nature, as men of common sense, you can repose your credence with most confidence. The one is plain, simple, and direct, without a motive of falsification. The other presents a spectacle like this: A phalanx of twenty men swearing on their oaths to some two thousand barrels of whisky, at a given time, in a given place, and two-thirds as many, equally intelligent and equally respectable, with equal opportunities of knowledge, swearing there is not fifty barrels there. It is a hapless conflict, leaving the mind in uncertainty, with nothing whatever to rest upon.

"It is, however, before you, and you will look carefully over its details, and give due weight to the ingenious and able criticisms

* Pages 145, 114.

which have been made by the distinguished counsel for the defendants."

Passing to the proofs generally, and to the effect to be given to the non-production of the books of the firm, and relying on *Clifton* v. *United States*,* in 4 Howard, it instructed the jury among other things, as follows:

"The proof in the outset may be defective. It may not be sufficient to enable you, without any doubt or hesitation, to find against the defendants, and still it may be your duty, nevertheless, so to find; for although I instruct you that the case must be made out beyond all reasonable doubt in this, as well as in criminal cases, yet the course of the defendants may have supplied, in the presumptions of law, all which this stringent rule demands. In determining, therefore, in the outset whether a case is established by the government, you will dismiss from your minds the perplexing question, whether it is so made out beyond all doubt. It needs not, in the exigencies of this case, be so proved in order to throw the burden of explanation upon the defendant, if from the facts you believe he has within his reach that power. In the end all reasonable doubt must be removed; but here, at this stage, you need say only 'is the case so far established as to call for explanation?'

"If, then, you conclude that, unexplained and uncontroverted by any testimony, the opening proof would enable you to find against the defendants for the claim of the government, or any material part of it, you will then take up their testimony in view of the principle announced. Although the counsel for the defence, when this principle was announced, with spirit and energy begged leave to differ with the court in reference to the effect of not producing the books, and not swearing the defendants, still the presumption of law is that client and counsel have deliberately, and with full knowledge of the law and all its presumptions, elected to withhold this proof, and you will not in the smallest degree abate the full application of the principle on any notion that it may have been misapprehended. The rule is one which I am confident will commend itself to your common reason. It is this: 'Without exception, where a party has proof in his power, which, if produced, would render certain

* Page 242.

material facts, the law presumes against a party who omits it, and authorizes a jury to resolve all doubts adversely to his defence. The same rule is applicable in a case where a party once had proof in his power which had been voluntarily destroyed or placed beyond his reach.'

"If you believe the books were kept which contained the facts necessary to show the real amount of whisky in the hands of the defendants, in October, 1865, and the amount which they had sold during the next ten months, or that the defendants, or that either of them, could, by their own oath, resolve all doubts on this point; if you believe this, then the circumstances of this case seem to come fully within this most necessary and beneficent rule."

To the instructions thus given the defendants excepted.

The jury found that "*the defendants owe* to the plaintiffs the sum of $235,680, *in manner and form* as the plaintiffs have complained against them."

Motions by the defendants for a new trial and in arrest of judgment were overruled, and the court entered judgment on the verdict.

The defendants now brought the case here, alleging that the court had erred among other ways—

1. In overruling the defendant's demurrer.
2. In overruling the motion in arrest of judgment.
3. In admitting the entries contained in the certificate-book of the collectors at Dayton, Piqua, and Cincinnati.
4. In instructing the jury as it had done.

The case was thoroughly and interestingly argued on both sides, with a full citation of authorities.

Messrs. G. Hoadly and J. F. Follett (with whom were E. M. Johnson and J. D. Cox), for the plaintiff in error:

1. The demurrer should not have been overruled, and the judgment should still be arrested for a misconception of the meaning of the section of the act on which the suit is brought. The whole section on which the suit is brought is homogeneous; its purpose was to insure the forfeiture of dutiable articles, "*found*" in the possession or custody or

within the control of any person for this unlawful purpose, and the punishment of the person in the custody or possession of "*such* goods." The act does not refer to a design merely conceived or entertained by the owner of dutiable property, to sell it with the design of defrauding the government. It is aimed at an overt act, a fraudulent attempt, and this is defined as custody, possession, or control, for the purpose of selling or removing, and not merely possession or control coincident with such purpose. In other words, the punishable possession is not that which is simultaneous with, but that which is "*for the purpose*" of fraud.

2. Independently of this the judgment should be arrested. The action is *debt* brought against Highland Chaffee, Sidney Chaffee, *William Chaffee*, and Rue Hutchins, partners, as H. D. Chaffee & Co. During the progress of the cause Highland Chaffee died. William Chaffee, by plea traversed the averment that he was a partner, and the jury having been sworn and testimony given, the government abandoned the claim against him.

This verdict, therefore, which was given, that "the *defendants*" owe, was bad in law. The action being *ex contractu*, upon an issue made up in part by the plea of *nil debet*, and the verdict expressing, not that the defendants are guilty, but that they *owe*, there could be in law no judgment against less than the whole number of those original defendants who were surviving, except upon a plea of personal disability of the acquitted defendant, not inconsistent with the truth of the declaration, as of lunacy, coverture, infancy, bankruptcy.

Sir William Blackstone,* speaking of implied contracts, says:

"Of this nature are such as are necessarily implied by the fundamental constitution of government, to which every man is a contracting party. And thus it is that every person is bound and hath virtually agreed to pay such particular sums of money as are charged on him by the sentence, or assessed by

* 3 Commentaries, 159.

the interpretation of the law. . . . Whatever, therefore, the laws order any one to pay, that becomes instantly a debt which he hath beforehand contracted to discharge."

Chief Baron Comyn* says:

"Debt lies upon every *contract, in deed or in law.* As if an act of Parliament gives a penalty, and does not say to whom nor by what action it shall be recovered, an action of debt lies upon such statute by the party grieved."

So also Smith Thompson, J.:†

"Actions for penalties are civil actions, both in form and in substance, according to Blackstone. The action is founded upon that implied contract which every person enters into with the state to obey its laws."

So also the Supreme Court of Massachusetts, in *Burnham* v. *Webster*,‡ in which Parsons, C. J., says:

"But if debt *qui tam* be sued against several, demanding a joint forfeiture, on a plea of *nil debet* all the defendants ought to be found indebted, because the form of the action and plea is on a joint contract, although the debt arises from a tort."

The action in *Burnham* v. *Webster* was brought, in debt, to recover four penalties of $15 each, for taking fish by a seine or drag-net, against the form of the statute. A passage in Chitty, and the case of *Bastard* v. *Hancock*, in Carthew, may indeed be cited, opposed to this view; but the great authority of Comyn, Blackstone, Thompson, and Parsons,§ the first names on either side of the Atlantic, cannot be set aside by a passage of Chitty on Pleading, sustained by a case in Carthew, a reporter, the accuracy of whose work Lord Thurlow questioned.

3. The court erred in its rulings upon the admission of testimony. The Cincinnati book being a record of arrivals, while the Dayton and Piqua books are records of clearances,

* Comyn's Digest, Title, Debt, A, 1.

† Stearns et al. *v.* United States, 2 Paine, 301, 311.

‡ 5 Massachusetts, 270; and see Stilson *v.* Tobey, 2 Id. 521; and Hill *v.* Davis, 4 Id. 140.

§ Wallace's Reporters, 246.

different questions would present themselves as to each, if each was admissible. But no one of the books was a public record, nor as such had any one superior value, or any freedom from the ordinary conditions of admissibility of private books of entry. The collector at Cincinnati was not bound to keep any record of discharges. He gave no clearances after a vessel arrived. *His* books certainly were not made in pursuance of statute.

By specifying the required contents of the certificates, viz., a pertinent description of the articles composing the cargo "properly classified and designated, *with reference to the rate and amount of tolls chargeable thereon*," the statute of Ohio shows that the State meant to keep only such a record of the movement of property on its canals as might be necessary to secure its tolls. The same barrel, if it went forward and back on the canal, would be regarded and entered on clearances as two barrels. But was it two barrels, and is the distiller to be charged for two?

The entries here were secondary evidence. The bills of lading from which they were made were the primary sources of knowledge; but no foundation was laid for the introduction of secondary evidence in the case.

Again, the entries were not competent as the declarations of *collectors*, for the collectors had no knowledge on the subject. They merely prepared the records from an examination of the bills of lading, or from what was a much less certain source, the recollections of captains as stated to them orally.

Nor were they competent as the certificates of the *captains*, because the certificates, considered as entries or declarations of the captains, were incompetent without proof of the death or non-accessibility of the captains, if they were not called. In the Cincinnati cases the captains signed nothing.

It will not be argued that any of these certificates would be admitted in any English court; they do not come within the leading case of *Price* v. *Lord Torrington*,* nor any of the later cases.

* 1 Salkeld, 285; 1 Smith's Leading Cases, 390.

4. As to the errors in the charge. In substance, the charge was this: That while, in the end, the government must prove its claim true beyond a reasonable doubt, yet if before the defendants gave any proof it made out a plausible, reasonably-proved case, so far established as to call for explanation as to any material part of its claim, then, if the defendants failed to produce their books and to testify in their own exculpation, *the law* presumed against them, resolving all doubts adversely to their defence; and all reasonable doubts having been thus removed by their fatal omission to prove their innocence by their own testimony and their books, it became the duty of the jury to resolve all doubts against the defendants in ascertaining the amount of the penalty to be assessed, by starting with the government's *primâ facie* case for $750,000, or whatever other sum such case established, and marking out any or all of it, as far only as the jury could so do without any doubt or hesitation.

This is no caricature, but a fair summary of the charge. Such a charge substantially withdrew from the defendants their constitutional right of trial by jury, and converted what at common law and in equity would have been their protection, viz., the right to refuse to testify to their own conviction, into the machinery for their sure destruction, actually placing them in no better position than if they had failed to plead and the jury had been sworn to assess the debt and damages upon default.

Mr. S. F. Phillips, Solicitor-General, contra:

1. The clause in the forty-eighth section, upon which the declaration was framed, and which in the section as quoted *supra*, p. 517, is italicized, differs from the preceding clause in that it does not require a present possession for the institution of proceedings. On the contrary, such proceedings may be founded upon any previous possession. The draftsman of the section commences by providing punishments for two specific offences, and then reverts to the first-named punishment for the purpose of providing for certain details

in the proceedings incident to the enforcement of such punishment.

Legislators often use the word *shall* for *shall have*. It is rarely that they provide punishment for a man who *shall have* committed crime; on the contrary, they almost always say (*ex. gr.*) he who *shall* commit treason shall suffer death, &c.

2. The action being *debt upon a penal statute* against *three*, *two* only of whom are found indebted, judgment may well be given against the two. The particular distinction, first taken in *Bastard* v. *Hancock*,* reported by Carthew, between debt upon penal statutes and other forms of debt, was not under consideration by Blackstone, or Comyn, or Smith Thompson, J., referred to on the other side. The authorities relied on by the other side are, therefore, no authorities against that distinction. There remains for the plaintiffs in error the great authority of the elder Parsons. The case in Carthew, however, was not cited before him. And even Parsons, C. J., must yield a point of pleading to the extraordinary authority of Chitty and Sergeant Williams.† The passage in Chitty has stood the test of twenty editions without change. The case in Carthew is the leading authority, and according to the reporter, it was decided on the point of the proper *entry*, "after great debate" in the C. B. Lord Thurlow was fond of undervaluing persons who stood in his way. His judgment of a common-law reporter like Carthew may be questioned. Two better common-lawyers, Willes and Kenyon, speak highly of Carthew as a reporter.‡

3. As to the admissibility of evidence. Conceding that the entries in the canal books are but ordinary entries in books kept in the course of official duty, how do they stand?

The canal books had been kept at three different offices, Piqua, Dayton, and Cincinnati; the first, of *clearances northwardly* from the place where the distillery was located; the second, of those *southwardly*; and the third, of *arrivals* at the

* Page 361.

† For the latter, see Coryton *v.* Lithebye, note, 2 Saunders, 117, *c.*

‡ Wallace's Reporters, 246, 3d edition.

southern termination of the canal. The course of business made it the duty of three persons to keep such books at the above places, respectively. The books of the latter were a check upon those of the former for all freight coming down from, or from above, those points; and it was the duty and practice of collectors at such points to *inspect the freight as the boat was unloaded*, above, for the purpose of checking the books at the clearing offices, &c. For all entries at Dayton there are corresponding ones at Cincinnati.

So far as entries were made by persons whose duty it was, and who are living, and shown not to have *known* the truth of those entries, the principle which underlies the competency of this class of evidence is a confidence in the general honesty and truthfulness of such entries, like that felt in the general uniformity of all natural phenomena. All intelligent business persons feel great confidence in its revelations, irrespective of any inquiry into the intelligence of the officer who made the entries. It is enough to know that *these* are the freight books, say of such and such a steam navigation, or railroad, or canal company, to cause one to conciliate at once favor for their contents.

Much evidence quite as reliable as that of most other classes will be excluded, if it be required of clerks of companies doing transportation business by ships, railways, or canals, that they shall have a personal knowledge of the truth of every detail of freight entered by them in the course of duty; or, otherwise, that their books, kept in the only practicable way, shall not be competent evidence of such matters. A vast mass of facts intimately connected with commercial business, and therefore of great importance in litigation, is every day recorded in such books, in cases where it is impracticable, not to say impossible, that the entry-maker should know their truth.

The principle in *Price* v. *Lord Torrington* was as great a shock to the conservative thought of the profession at the beginning of the last century as its development administered by the court below is claimed to be to such thought now. It may well be said that such development is as nec-

essary to the condition of commerce now as the form in which it originated was to the *business* of 1704. Such seems to be the tendency of those views of this court in *Fennerstein's Champagne* and *Cliquot's Champagne*, the former of which cases especially the court considered as making these entries evidence.

4. As to the exceptions to the charge. In considering any paper *piecemeal*,—taking particular passages and excepting to *them*—risk is run of doing injustice to its meaning by tearing connected passages asunder. Certain words attributed to the learned judge below may not have been just the words which he would have selected in his study, with opportunity for weighing them and fixing their exactest import, but the general drift is intelligible, and as reflected in the whole (the practical import of which is, that the jury was authorized to resolve all doubts against a party who continued silent when he ought to speak) is correct. The abstract rule laid down is not only applicable to the present case but universally applicable, and as the court had already announced that it would *at any stage of the case* allow evidence to be introduced by way of explanation or to supply an omission, objection to it seems unreasonable.*

Mr. Justice FIELD delivered the opinion of the court.

The object of the demurrer to the declaration was to raise the question whether the penalty prescribed by the forty-eighth section of the Revenue Act of June 30th, 1864, was intended to apply to any persons except those in whose possession, custody, or control the goods seized are found, and who then hold them for the purpose of sale, with design to avoid the payment of the duties. That section authorizes the forfeiture of dutiable goods when held for sale with that design, and of the raw materials and tools intended for use in the manufacture of such goods, and imposes a penalty upon the person who, with that purpose and design, has the goods

* See what is said by Alderson, B., in Boyle *v.* Wiseman, 10 Exchequer, 650.

in his possession or custody, or under his control. It is the possession with the unlawful purpose that the act was intended to reach by a forfeiture of the goods found with the party, and the punishment of such party. The defendants contend that such possession must exist when the seizure is made; the government insists that it is immaterial when the possession existed, if it was accompanied at the time with the unlawful purpose.

When this case was argued the court consisted only of eight judges, and upon the question raised by the demurrer they are equally divided in opinion, and therefore no decision can be had thereon.

It does not appear by the record on what special grounds the motion in arrest of the judgment was made, but it was assumed in the argument of counsel that not only the question, which we have already mentioned as arising upon the demurrer, was presented on the motion, but also the further question, whether the action, being debt against several, and the plea being *nil debet*, judgment could be entered against any less than the whole number surviving, except upon a plea of personal disability of the acquitted defendant, not inconsistent with the truth of the original declaration, such as coverture, infancy, or bankruptcy. The action was originally brought against four defendants, Highland Chaffee, Sidney Chaffee, William Chaffee, and Hutchins, who are described as late partners doing business under the firm name of H. D. Chaffee & Co. During the progress of the cause Highland Chaffee died. William Chaffee pleaded that he was not, at the time designated in the declaration, or at any other time, a member of the firm of H. D. Chaffee & Co., or interested in its business, and on the trial the plaintiffs abandoned their claim against him and allowed judgment to pass in his favor. Sidney Chaffee and Hutchins pleaded both not guilty, and *nil debet*, and the verdict of the jury was that the defendants owed the plaintiffs the sum of two hundred and thirty-five thousand and six hundred and eighty dollars, in manner and form as they had complained against them. Now the argument is, that as the declaration

alleges a joint liability of all the defendants, the plea of *nil debet* by two of them—that they were not indebted to the plaintiffs in manner and form as alleged—puts in issue such joint liability, and the finding against the two with the acquittal of the other, showed that the plea of *nil debet* was true, and that there was no such joint liability, but the contrary established; and, therefore, the judgment should be arrested. The answer to the argument is, that the rule stated as to the effect of the plea of *nil debet* only applies where the action is debt upon a simple contract. The action of debt lies for a statutory penalty, because the sum demanded is certain, but though in form *ex contractu*, it is founded in fact upon a tort. The necessity of establishing a joint liability in such cases does not, therefore, exist; it is sufficient if the liability of any of the defendants be shown. Judgment may be entered against them and in favor of the others, whose complicity in the offence, for which the penalty is prescribed, is not proved, precisely as though the action were in form as well as in substance *ex delicto*.

The testimony admitted on the trial, to which the defendants specially excepted, consisted of the certificate-books of certain collectors of tolls on the Miami Canal. That canal extends from Cincinnati to Toledo, in Ohio, passing through Tippecanoe. The nearest collector's office north of this place was at Piqua, the nearest south of it was at Dayton. Between these points there were four distilleries, three besides that of the defendants. The canal belongs to the State, but was leased in 1861 to private parties for ten years, which term was extended, in 1867, for ten years more. The act of the legislature authorizing the lease provided that it should vest in the lessees such rights, privileges, and franchises then exercised by the State, as might be necessary to manage, control, and keep in repair the canal and collect tolls for its navigation, with the right to appoint superintendents and collectors, who should exercise the same power and authority in the collection of tolls and water rents and the levy of fines, as could then be exercised by similar officers and agents appointed by the State; and that the lessees

should be governed by the rules and regulations for navigating the canals then in force, subject to such alterations as might thereafter be established by law. By an act of the State then in force, passed in 1840,* no boat or float was allowed to start on a voyage on the canal without having a clearance from the collector at the nearest point of departure, or to pass any collector's office on the canal without producing the clearance with its bills of lading. In order to obtain the clearance, the master of the boat or float was required to present the bills of lading to the collector, and before it could be issued, it was the duty of the collector to make out from the bills of lading, in a book to be provided for that purpose, a certificate containing a description of the articles composing the cargo of the boat or float, properly classified and designated with reference to the rates and amount of tolls chargeable thereon; and that certificate was to be signed by the master, and, if required, its correctness was to be attested by his oath or affirmation. On the arrival of the boat or float at its place of destination, no part of the cargo could be unladen, landed, or removed from the canal until the clearance and bills of lading were presented to the collector at the place and his permit obtained.

It was proved on the trial that, between the dates mentioned in the declaration, the defendants had paid taxes on over six thousand barrels of whisky manufactured by them. But the plaintiffs endeavored to prove that a larger quantity was transported by vessel or rail from Tippecanoe between these dates, and that there was no other distillery at that place, except the one owned by the defendants, from which it could have been received; and thus show that the defendants had had in their possession or custody within that period, distilled spirits for sale with the design of avoiding the payment of duties thereon, as alleged in the declaration. For this purpose they gave in evidence, against the objection of the defendants, the certificate-books of the collectors of

* Entitled "An act to provide for the protection of the canals of the State of Ohio, the regulation of the navigation thereof, and for the collection of tolls;" approved March 28th, 1840.

tolls at Piqua, above Tippecanoe, and at Dayton, below it; and also a certificate-book kept by the collector at Cincinnati, showing the arrivals of freight at that port. The certificates stated the place from which the whisky was received, and its quantity, but not the parties to whom it belonged, or by whom it was shipped. The collector at Dayton testified as to the sources of information from which he made up the certificates, and it was admitted that the collectors at the other points would testify substantially to the same effect as to the sources of the information on which they acted. These were generally the freight bills presented by captains of boats, as required by the act of 1840; but sometimes the bills were not presented, and then the simple statements of the captains were received, if they were well known. The collectors had no personal knowledge of the truth of the statements contained in the certificates; and though when a clearance was wanted they were at liberty to require the oath or affirmation of the captains signing the certificates to their correctness, it does not appear that either oath or affirmation was ever exacted. Some of the captains, but not all of them, were produced as witnesses at the trial as to their carriage of whisky from the distillery of the defendants, but they were not examined as to the genuineness of their signatures to the certificates; nor were the signatures of the other captains, who were not produced, proven, nor their death shown or absence accounted for. All the certificates were admitted without distinction. When the books were offered, objection was taken to their introduction, on the general ground that they were hearsay evidence and transactions between third parties. Subsequently a similar objection was taken to each of the certificates on a motion to exclude them from the jury.

The books were not public records; they stood on the same footing with the books of the trader or merchant. The fact that the lease was from the State did not change the character of the entries made by the collectors, who were simply agents of the lessees, and not public officers of the State. Their admissibility must, therefore, be deter-

mined by the rule which governs the admissibility of entries made by private parties in the ordinary course of their business.

And that rule, with some exceptions not including the present case, requires, for the admissibility of the entries, not merely that they shall be contemporaneous with the facts to which they relate, but shall be made by parties having personal knowledge of the facts, and be corroborated by their testimony, if living and accessible, or by proof of their handwriting, if dead, or insane, or beyond the reach of the process or commission of the court. The testimony of living witnesses personally cognizant of the facts of which they speak, given under the sanction of an oath in open court, where they may be subjected to cross-examination, affords the greatest security for truth. Their declarations, verbal or written, must, however, sometimes be admitted when they themselves cannot be called, in order to prevent a failure of justice. The admissibility of the declarations is in such cases limited by the necessity upon which it is founded.

We do not deem it important to cite at length authorities for the rule and its limitation as we state it. They will be found in the approved treatises on evidence, and in the numerous cases cited by counsel on the argument. In this court the case of *Nicholls* v. *Webb*, reported in 8 Wheaton,* and that of *Insurance Company* v. *Weide*, reported in 9 Wallace,† are illustrations of the rule. In the first case, it was held that after the death of a notary, his record of protests was admissible upon proof of his death and handwriting, the court observing that it was the best evidence the nature of the case admitted of, that the party being dead, his personal examination could not of course be had, and that the question was, whether there should be a total failure of justice or secondary evidence should be admitted to prove the facts. In the second case, the books and ledger of the plaintiffs were admitted in evidence to show the amount and value

* Page 326. † Page 677.

of goods lost by the burning of their store, upon the testimony of the parties who made the entries that they were correct, the court holding that the books "would not have been evidence *per se*, but with the testimony accompanying them, all objections were removed;" and referring to cases decided in the Supreme Court and Court of Appeals of New York, in support of the ruling. In both of these cases the entries were made by parties personally cognizant of the facts. This knowledge of the party making the entry is essential to its admissibility. His testimony, if living, would be rejected if ignorant of the facts entered, and it would be strange if his death could improve its value in that respect.

The cases of *Fennerstein's Champagne* and *Cliquot's Champagne*, reported in the 3d Wallace,* do not infringe upon this rule. Those were cases where it became necessary to establish the market value of certain wines in France, and such value could only be ascertained by sales made by dealers in those wines in different parts of the country, and the prices at which they were offered for sale, and circumstances affecting the demand for them. It would not be proved by a single transaction, for that may have been exceptional; the sale may have been made above the market price, or at a sacrifice below it. Market value is a matter of opinion which may require for its formation the consideration of a great variety of facts. To arrive at a just conclusion prices-current, sales, shipments, letters from dealers and manufacturers, may properly receive consideration. A party, without having been previously engaged in any mercantile transaction, may be able to give with great accuracy the market value of an article the dealing in which he has watched, and in stating the grounds of his opinion as a witness, he may very properly refer to all these circumstances, and even the verbal declarations of dealers.† Now in the cases in 3d Wallace, statements of dealers in the champagne, or of agents of dealers, made in the course of their duties as agents, and letters from dealers and prices-current, were

* Pages 114, 145.

† Alfonso *v.* United States, 2 Story, 426.

admitted as bearing upon the point sought to be established, the market value of the wines. There is no analogy between these cases and the one at bar. What was the market value of the wines in France was, as already said, a matter of opinion. Whether the defendants had in their possession or custody, between certain dates, 200,000 gallons of distilled spirits, or any other quantity, for the purpose of selling the same with a design to avoid the payment of duties thereon, was a question of fact and not of opinion.

If now we apply the rule which we have mentioned to the certificate-books of the canal collectors their inadmissibility is evident. They were not competent evidence as declarations of the collectors, for the collectors had no personal knowledge of the matters stated; they derived all their information either from the bills of lading or verbal statements of the captains. Nor were the books competent evidence as declarations of the captains, because it does not appear that the bills of lading were prepared by them, or that they had personal knowledge of their correctness, or that their verbal statements, when the bills of lading were not produced, were founded upon personal knowledge; and besides, many of the certificates were admitted without calling the captains who signed them, and without proof of their death or inaccessibility.

It remains to consider the exceptions taken to the charge to the jury. These are sixteen in number, and are directed principally to the error which pervades the whole charge, consisting in the instruction reiterated in different forms, that after the government had made out a *primâ facie* case against the defendants, if the jury believed the defendants had it in their power to explain the matters appearing against them, and did not do so, all doubt arising upon such *primâ facie* case must be resolved against them. As we have stated, the defendants had paid taxes on over six thousand barrels of whisky manufactured by them between the dates mentioned in the declaration. Nearly this number was traced to consignees. By the canal certificates and railroad receipts the government had shown in that way a trans-

portation from Tippecanoe of over two thousand barrels more. It was admitted that no charge was to be made to the defendants for any amount they had on hand in October, 1865, although the declaration charges the possession with the unlawful purpose to have been between February 1st, 1865, and September 1st, 1866. The defendants endeavored to show that they had on hand at that time between two and three thousand barrels, and for that purpose called in a large number of witnesses, neighbors, and others, who had visited the distillery during that period. The estimates of the amount by these witnesses differed materially, being made from recollection. The defendants were present at the trial, but were not called as witnesses. It was proved that they kept books, consisting of day-books, journals, and ledgers.

Now the court instructed the jury that it was a rule, without exception, that where a party has proof in his power which, if produced, would render material facts certain, the law presumes against him if he omits to produce it and authorizes a jury to resolve all doubts adversely to his defence; that although the case must be made out against the defendants beyond all reasonable doubt in this case as well as in criminal cases, yet the course of the defendants may have supplied in the presumptions of law all which this stringent rule demanded. "In determining, therefore, in the outset," said the court to the jury, "whether a case is established by the government, you will dismiss from your minds the perplexing question whether it is so made out beyond all doubt. It need not, in the exigencies of this case, be so proved in order to throw the burden of explanation upon the defendant, if from the facts you believe he has within his reach that power. In the end, all reasonable doubt must be removed, but here, at this stage, you need say only, is the case so far established as to call for explanation." . . . "If, then, you conclude that, unexplained and uncontroverted by any testimony, the opening proof would enable you to find against the defendants for the claim of the government, or any material part of it, you will then take up their testimony in

view of the principle" stated, that of presuming against a party who fails to produce proofs in his possession. And again, the court instructed the jury that the law presumed that the defendants kept the accounts usual and necessary for the correct understanding of their large business and an accurate accounting between the partners, and that the books were in existence and accessible to the defendants unless the contrary were shown, and then said to the jury, "If you believe the books were kept which contained the facts necessary to show the real amount of whisky in the hands of the defendants in October, 1865, and the amount which they had sold during the next ten months, or that the defendants, or either of them, could by their own oath resolve all doubts on this point; if you believe this, then the circumstances of this case seem to come fully within this most necessary and beneficent rule."

The purport of all this was to tell the jury that, although the defendants must be proved guilty beyond a reasonable doubt, yet if the government had made out a *primâ facie* case against them, not one free from all doubt, but one which disclosed circumstances requiring explanation, and the defendants did not explain, the perplexing question of their guilt need not disturb the minds of the jurors; their silence supplied in the presumptions of the law that full proof which should dispel all reasonable doubt. In other words, the court instructed the jury, in substance, that the government need only prove that the defendants were presumptively guilty, and the duty thereupon devolved upon them to establish their innocence, and if they did not they were guilty beyond a reasonable doubt.

We do not think it at all necessary to go into any argument to show the error of this instruction. The error is palpable on its statement. All the authorities condemn it.* The case of *Clifton* v. *United States*, in 4 Howard, cited by the court below, was decided upon a statute which cast the

* Doty *v.* State, 7 Blackford, 427; State *v.* Flye, 26 Maine, 312; Commonwealth *v.* McKie, 1 Gray, 61.

burden of proof upon the claimant in seizure cases after probable cause was shown for the prosecution, and, therefore, has no application.* The instruction sets at naught established principles, and justifies the criticism of counsel that it substantially withdrew from the defendants their constitutional right of trial by jury, and converted what at law was intended for their protection—the right to refuse to testify—into the machinery for their sure destruction.

JUDGMENT REVERSED, and the cause

REMANDED FOR A NEW TRIAL.

BOYCE *v.* TABB.

1. It is no defence to a suit brought on a promissory note executed in Louisiana, in February, 1861, by the holder against the maker, to allege and prove that such note was given as the price of slaves sold to the maker.
2. That such sale was at the time lawful in the said State was a sufficient consideration for a note, and the obligation could not be impaired by laws of the State passed subsequently to the date thereof.
3. No law of the United States has impaired such obligation.
4. The thirty-fourth section of the Judiciary Act of 1789, enacting "that the laws of the several States . . . shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply," does not apply to questions of a general nature not based on a local statute or usage, nor on any rule affecting the titles to land, nor on any principle which has become a rule of property.

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

The thirty-fourth section of the Judiciary Act of 1789 enacts:

"That the laws of the several States . . . shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply."

This provision of law being in force, Boyce, on the 13th of February, 1861, gave to Tabb a promissory note, as the

* 1 Stat. at Large, 678; Locke *v.* United States, 7 Cranch, 339.

consideration for the sale of certain slaves. At the time the note was given, as ever before in Louisiana since it had been settled by the whites, slavery existed, and the sale of slaves was lawful. But in 1865 an amendment, the 13th, to the Constitution of the United States was adopted, in these words:

"Neither slavery nor involuntary servitude . . . shall exist within the United States or any place subject to their jurisdiction."

And in 1867 the Supreme Court of Louisiana adjudged it to be a principle of jurisprudence in that State that contracts for the sale of persons were void, and should not be enforced in their courts. After this decision, that is to say, in July, 1868, Tabb sued Boyce on the note. Boyce pleaded that the consideration of the note was the sale of slaves, and that the decisions of the Supreme Court of Louisiana had fully and unequivocally established that all obligations thus contracted were void and of no effect.

The court thus charged:

"It is not a legal defence to a suit brought on a promissory note executed in this State on the 13th of February, 1861, by the holder against the maker thereof, to allege and prove that such note was given as the price, or a part of the price, of slaves sold to the maker.

"That such sale was at the time lawful and valid in the said State is a sufficient consideration for a note, and the obligation cannot be impaired by laws of a State passed subsequently to the date thereof.

"No law of the United States has impaired such obligation."

Verdict and judgment having gone for the plaintiff, the defendant brought the case here.

Mr. P. Phillips, *for the plaintiff in error*, relied on the decisions of the Supreme Court of Louisiana, already referred to, and the thirty-fourth section of the Judiciary Act of 1789, above quoted.

Mr. L. L. Conrad, *contra.*

Mr. Justice DAVIS delivered the opinion of the court.

If, when the note in question was executed, slavery existed in Louisiana under the protection of law, and contracts relating to it were enforceable in the courts, which is conceded to be the case, the defendant cannot be released from his obligation to pay it by anything which the State has done subsequently. This subject received the careful attention of this court in *White* v. *Hart*,* and we are satisfied of the soundness of the views there presented. The case of *Osborne* v. *Nicholson*† is also decisive of the last point in the charge. In that case it was held that contracts relating to slaves, valid when made, were not impaired by the thirteenth amendment to the Constitution, and it would serve no useful purpose to restate the argument by which that decision was supported. It is sufficient to say that we have seen no reason to question the correctness of the interpretation given to that amendment in its application to that case.

It is urged on the part of the plaintiff in error, as the highest court in Louisiana has, on grounds of public policy, refused to enforce contracts like this since the abolition of slavery, that the thirty-fourth section of the Judiciary Act of 1789 obliges this court to follow that rule of decision. This is an erroneous view of the obligation imposed by that section on this court, as our decisions abundantly show.‡ The provisions of that section do not apply, nor was it intended they should apply, to questions of a general nature not based on a local statute or usage, nor on any rule of law affecting titles to land, nor on any principle which had become a settled rule of property. The decisions of the State courts, on all questions not thus affected, are not conclusive authority, although they are entitled to, and will receive from us, attention and respect.

JUDGMENT AFFIRMED.

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* 13 Wallace, 647. † Ib. 655.

‡ Swift *v.* Tyson, 16 Peters, 1; Watson *v.* Tarpley, 18 Howard, 520; Delmas *v.* Insurance Company, 14 Wallace, 665.

Statement of the case.

TACEY *v.* IRWIN.

Under the act of June 7th, 1862, "for the collection of the direct tax in insurrectionary districts," &c., as construed in *Bennett* v. *Hunter* (9 Wallace, 326), a tender by a relative of the owner of the tax due upon property advertised for sale is a sufficient tender. And if the tax commissioners have, by an established general rule announced and a uniform practice under it, refused to receive the taxes due unless tendered by the owner in person, even a formal offer by another to pay is unnecessary. It is enough if a relative of the owner "went to the office of the commissioners to see after the payment of the tax on the property, but made no formal offer to pay because it was in effect waived by the commissioners, they declining to receive any tender unless made by the owner in person."

ERROR to the Circuit Court for the Eastern District of Virginia; the case as found by that court being thus:

Under an act of Congress approved June 7th, 1862, and entitled "An act for the collection of the direct tax in insurrectionary districts," &c., certain direct taxes which had been laid by former law, were specifically charged on every parcel of land in the rebellious States, according to divisions and valuations in the act prescribed. And in default of payment of the tax the statute ordered the land to be advertised for sale and sold. The act, however, allowed "*the owner or owners of the land*" to pay the tax to certain tax commissioners mentioned, and to take a certificate therefor, by virtue of which the lands should be discharged of the tax.

In 1864, one Irwin owned a piece of land, subject to this statute, in Alexandria, Virginia, he himself being away. The taxes on it being unpaid, the commissioners gave notice that they would be at their office in Alexandria at certain times named, to receive the direct tax assessed and fixed by law on the lots and tracts of land in Alexandria, under and by virtue of the act of Congress abovementioned. But the commissioners adopted a rule not to receive the taxes due on property advertised for sale, unless tendered by the owner in person. This rule was adopted in pursuance of instruc-

tions from some officer of the Treasury Department, and was so rigidly enforced that neither friend, relative, nor agent was allowed to pay for the absent owner; their applications to pay and save the property from sale being uniformly refused by the commissioners, under the operations of the rule in question. After the premises belonging to Irwin were advertised for sale, one of his relatives went to the office of the commissioners to see after the payment of the tax on the property, but made no formal offer to pay because it was in effect waived by the commissioners; they declining to recognize any tender, unless made by the owner in person. The land was accordingly sold by the commissioners as land on which the taxes had not been paid, and was bought by one Tacey. Hereupon Irwin brought suit against him to recover it, and by judgment of the court upon the preceding case, did recover it. To reverse that judgment this writ of error was taken.

Mr. Willoughby, in support of the ruling below, relied on *Bennett* v. *Hunter*,* where a tenant of the owner went and tendered payment of the tax on certain lands sold, the owner being away, which tender was held by this court in the case cited to be sufficient.

Mr. S. F. Beach, contra, sought to distinguish this case from that, since here there had been no tender at all; and no specific refusal.

Mr. Justice DAVIS delivered the opinion of the court.

The case is not distinguishable in principle from that of *Bennett* v. *Hunter*. In that case it was insisted in support of the tax deed, that the right to pay the tax before sale was limited to the owner in person, and could not be exercised by the tenant in possession who had offered to pay it. This position was not sustained, but the court held that the payment of the tax which the act requires to be made by the

* 9 Wallace, 326.

owner, need not, necessarily, be made by him in person. It is enough, if it be made by any person for him, on the ground that an act done by one for the benefit of another is valid if ratified, either expressly or by implication, and that such ratification will be presumed in furtherance of justice.

It is difficult to see how, upon the case as found here, the sale can be sustained. The law does not require the doing of a nugatory act, as would have been a formal tender of payment, after the action of the commissioners, declining to receive the taxes from any person in behalf of the owner. *Bennett* v. *Hunter* decides that the owner has the right to pay, either in person or through any one not disavowed by him, who is willing to act for him. This right the commissioners, by the rule which they established and the uniform practice under it, effectually denied. The friends and agents of absent owners were informed that it was useless to interpose in their behalf, and that unless the owner appeared in person and discharged the tax, the property would be sold. This was equivalent to saying that a regular tender by any other person would be refused. While the law gave the owner the privilege of paying by the hands of another, the commissioners confined the privilege to a payment by the owner himself. This was wrong, and was a denial of the opportunity to pay accorded to the owner by the act, and the lands were, therefore, not delinquent when they were sold.

If an offer in a particular case to pay the tax before sale, and refused by the commissioners because not made by the owner in person, renders a subsequent sale by the commissioners void,* surely a general rule announced by the commissioners, that in all cases such an offer would be refused, must produce the same effect. Such a rule of necessity dispenses with a regular tender in any case. In the absence of any proof to the contrary, it is a legal presumption that the tax in this case, though not actually offered, would have been offered and paid before sale but for the known refusal

* Bennett *v.* Hunter, *supra.*

of the commissioners to accept any offer when not made by the owner in person.

If so, the commissioners were not authorized to make the sale in controversy, and the judgment must be

AFFIRMED.

TOWN OF OHIO *v.* MARCY.

A judgment affirmed because there was no question of law which this court could consider, in a case where a trial by jury was waived in writing and the case submitted to the court, where the finding of the court was general; where the bill of exceptions embodied all the testimony in the case, but where no exception was taken to the admission or rejection of testimony or to any ruling of the court on the trial, and where no question was raised in the case on the pleadings.

ERROR to the Circuit Court for the Northern District of Illinois.

Marcy brought assumpsit in the court below against the town of Ohio, in Illinois, on the interest warrants of certain bonds which the said town had issued, and which warrants it neglected to pay. The parties waived a jury in writing and submitted the case to the court. The finding of the court was general, namely, "That upon the matters submitted, the court finds the issue for the plaintiff, and assesses his damages at the sum of $4286.60." Judgment was rendered for this sum.

A bill of exceptions embodied all the testimony in the case, but no exception was taken to the admission or rejection of evidence, or to any ruling of the court on the trial. The town brought the case here on error. No question was raised on the pleadings.

Messrs. M. T. Peters and J. B. Hawley, for the plaintiff in error; Messrs. Paddock and Ide, contra.

Mr. Justice MILLER announced the judgment of the

court, AFFIRMING THE JUDGMENT below, because, upon the case as above given, there was nothing in the record which raised any question of law which this court could consider.

CASE OF THE SEWING MACHINE COMPANIES.

A case in which the plaintiff is a citizen of the State where the suit is brought and two of the defendants are citizens of other States, a third defendant being a citizen of the same State as the plaintiff, is not removable to the Circuit Court of the United States under the act of March 2d, 1867, upon the petition of the two foreign defendants.

ERROR to the Supreme Judicial Court of Massachusetts.

The Florence Sewing Machine Company, a Massachusetts corporation, sued, in assumpsit, in the court just named, three other sewing machine companies; one of them, like itself, a Massachusetts corporation, another a Connecticut corporation, and the third a New York corporation. The writ was returnable to April Term, 1871.

The purpose of the suit was to recover of the three defendant corporations an alleged overpayment which the plaintiff company alleged that it had made to them, under a license agreement which they had granted to it. Service of the writ was made upon all the defendants, according to the laws of Massachusetts; upon the two foreign corporations by attachment of the property of each within the State, &c. The Massachusetts corporation which was thus sued appeared at the April Term, 1871, by counsel, and filed its answer, and at the April Term, 1872, the Connecticut and New York corporations did the same.

At the said April Term, 1872, and before the trial of the case, the Connecticut corporation filed a petition, under the act of March 2d, 1867, hereinafter particularly set forth,* for the removal of the cause to the Circuit Court of the United

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* *Infra*, p. 557–8.

States for the District of Massachusetts, assigning as a reason that the plaintiff corporation was a citizen of the State of Massachusetts, and that it the defendant corporation was a citizen of the State of Connecticut; that a controversy existed between them in the said suit, and that the petitioner had reason to believe, and did believe, that from prejudice and local influence it would not be able to obtain justice in the State court. An affidavit to this effect was also made in its behalf, by its president, and filed; and also a bond with sufficient sureties as required by law.

On the same day, a similar petition, affidavit, and bond were made and filed by and in behalf of the New York corporation.

Subsequently, at the same term, and before the trial of the cause, these petitions were heard before the presiding judge. The judge (Ames, J.) refused to grant the petitions, and ordered the case to proceed to trial, reserving the question, whether his refusal was right, for the consideration of the whole bench. The defendants excepted. A verdict was given for the plaintiff.

The exception was afterwards heard before the whole bench of the court below, which held that the petition to remove the case was rightly refused. Final judgment having been entered accordingly, the case was now brought here by the three defendant corporations.

The question thus presented was whether a case in which the plaintiff is a citizen of the State where the suit is brought and two of the defendants are citizens of other States, a third defendant being a citizen of the same State as the plaintiff, is removable to the United States Circuit Court upon the petition of the two foreign defendants under the statute of March 2d, 1867, upon their complying with the several requirements of that statute.

To understand the arguments of counsel and the opinion of the court, it is necessary to refer to certain clauses of the Constitution, and of two acts of Congress preceding that of 1867: one, the Judiciary Act of 1789; the other, an act of 1866.

The following clauses of the Constitution are referred to:

"ARTICLE III.—SECTION 2. The judicial power shall extend:

"To all *cases* in law and equity arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority.

"To all *cases* affecting ambassadors, other public ministers, and consuls.

"To all *cases* of admiralty and maritime jurisdiction.

"To *controversies* to which the United States shall be a party.

"To *controversies* between two or more States; between a State and citizens of another State; *between citizens of different States;* . . . between *citizens of the same State*, claiming lands under grants of different States, and between a State or the citizens thereof and foreign states, citizens, or subjects.

"In all *cases* affecting ambassadors, other public ministers, and consuls, and *those* in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other *cases beforementioned* the Supreme Court shall have appellate jurisdiction," &c.

The following are the acts of Congress which bear on the case:

First. The Judiciary Act of 1789, which thus enacts:

"SECTION 11. The Circuit Courts shall have original cognizance, concurrent with the courts of the several States, of all *suits* of a civil nature, at common law or in equity, where . . . the *suit is between a citizen of the State where the suit is brought, and a citizen of another State.*

"SECTION 12. If a *suit* be commenced in any State court against an alien, or *by a citizen of the State in which the suit is brought against a citizen of another State*, and the matter in dispute exceeds the aforesaid sum of $500, . . . and the defendant shall *at the time of entering his appearance* in such State court file a petition for the removal of the cause for trial into the next Circuit Court, 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 said process against him, and also for his there appearing, . . . it shall then be the duty of the State court . . . to proceed no further in the cause, . . . and the said copies being entered as aforesaid in

such court of the United States, the cause shall there proceed in the same manner as if it had been brought there by original process," &c.

[These sections, as interpreted by this court,* have been always understood to apply only to those cases in which all the individuals making up the plaintiffs are citizens of the State where the suit is brought; and all the individuals making up the defendants are citizens of another State or States.]

Next came an act of July 27th, 1866, entitled "An act for the removal of causes in certain cases from State courts."† It was thus:

"If in any *suit* . . . in any State court against an alien, or *by a citizen of the State in which the suit is brought against a citizen of another State*, and the matter in dispute exceeds the sum of $500, . . . a citizen of the State in which the suit is brought is or shall be a defendant, and if the suit, so far as relates to the alien defendant, or to the defendant who is the citizen of a State other than that in which the suit is brought, is or has been instituted or prosecuted for the purpose of restraining or enjoining *him*, or if the suit is one in which there can be a final determination of the controversy, so far as it concerns him, without the presence of the other defendants as parties in the cause, then, and in every such case, the alien defendant, or the defendant who is a citizen of a State other than that in which the suit is brought, may, *at any time before the trial or final hearing of the cause*, file a petition for the removal of the cause as against him 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 . . . copies of said process against him, and of all pleadings, depositions, testimony, and other proceedings in said cause affecting or concerning him, and also for his there appearing, . . . and it shall be thereupon the duty of the State court to accept the surety and proceed no further in the cause as against the defendant so applying for its removal, . . . and the said copies being entered

* Strawbridge *v.* Curtiss, 3 Cranch, 267; Coal Company *v.* Blatchford, 11 Wallace, 172.

† 14 Stat. at Large, 306.

as aforesaid in such court of the United States, the cause shall there proceed in the same manner as if it had been brought there by original process against the defendant who shall have so filed a petition for its removal as above provided. . . .

"And such removal of the cause, as against the defendant petitioning therefor, into the United States court, shall not be deemed to prejudice or take away the right of the plaintiff to proceed at the same time with the suit in the State court as against the other defendants, if he shall desire to do so."

Finally came the act of March 2d, 1867,* upon which the application for removal in the case was made. Its title is,

"An act to *amend* an act entitled 'An act for the removal of causes in certain cases from State courts,'" approved July 27, 1866.

It runs thus:

"*Be it enacted*, That the act entitled 'An act for the removal of causes in certain cases from State courts,' approved July 27th, 1866, be and the same is hereby amended as follows: That where a suit is now pending, or may hereafter be brought in any State court, in which there is *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 the sum of $500, . . . such citizen of another State, *whether he be plaintiff or defendant*, if he will make and file in such State court an affidavit, stating that he has reason to and does believe that from prejudice or local influence he will not be able to obtain justice in such State court, may, *at any time before the final hearing or trial of the suit*, 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 doing such other appropriate acts as, by the act to which this act is amendatory, are required to be done upon the removal of a suit into the United States court; and it shall be, thereupon, the duty of the State court to accept the surety and proceed no further in the suit;

* 14 Stat. at Large, 558.

and the said copies being entered as aforesaid in such court of the United States, the suit shall there proceed in the same manner as if it had been brought there by original process," &c.*

The plaintiff in error asserted that under the last-named act the case was removable upon the petition of the two foreign defendants, and that it was error in the State court to retain and try it.

The defendants in error, on the other hand, asserted that under this act, as under the eleventh and twelfth sections of the Judiciary Act of 1789, the right of removal was confined to cases where the parties on one side were all citizens of one State and the parties on the other were *all* citizens of another State.

Messrs. J. G. Abbot, B. R. Curtis, and E. Merwine, for the plaintiff in error:

Three inquiries are involved:

1. The extent of the judicial power of the United States under the Constitution of the United States.

2. The extent to which Congress has made provision for the exercise of that power, by the act of March 2d, 1867.

3. Is the present case within the terms of that act.

I. The provision of the Constitution is as follows:

"The judicial power shall extend . . . to *controversies* between citizens of different States."

That by the word "controversies" the Constitution meant something different from "cases," is to be inferred from the fact that after using the word cases in certain instances, it uses the word controversies in others. The language of the provision is very comprehensive, and the jurisdiction which it confers necessarily includes any and every judicial controversy which may exist between citizens of different States. Speaking, as this provision of the Constitution does,

* It was settled by this court in Railway Company *v.* Whitton (13 Wallace, 270) that this act was constitutional, and also that corporations were embraced within the constitutional provision relating to controversies between citizens of different States.

in reference to judicial matters, we may say that interpreting it rightly, a "case" between parties is a "suit" between parties. There is a plaintiff and there is a defendant; and who the parties to that "case" or to that "suit" are, appears by a memorial kept in courts and known as the docket. But one party to the *case* or *suit* may have little or no interest in the *controversy*. A., a citizen of Pennsylvania, may sue B., another citizen of Pennsylvania, when B. is but a nominal defendant, and when the only person really interested as a defendant in the *controversy* is C., a citizen of New York, not a party to the "case," to the "suit," at all. The case or the suit is between A. and B.; the controversy is between A. and C.

Our case does not require us to say that such a case could be removed; we mean but to illustrate. But certainly a controversy between citizens of different States is none the less a controversy between citizens of different States because others are also parties to it. Therefore to confine the Federal jurisdiction to cases wherein the controversy is between citizens of different States *exclusively*, is to interpolate into the Constitution a word not placed there by those who ordained it, and one which materially limits and controls its express provisions.

One object of this article of the Constitution was to allay apprehensions of injustice from State prejudice, and to "form a more perfect union," by holding out to every citizen of the United States the assurance that in all judicial controversies between himself and a citizen of any other State, his controversy might be tried and determined by an impartial tribunal, and one in reference to which no fear could exist that it would be biased in favor of his adversary, by any local prejudices or considerations.

The terms of the grant of judicial power are full, general, and unequivocal, and were made so designedly, in order that the power might be commensurate with every possible exigency. The Constitution does not descend to details. It remits to Congress the duty to create (with one exception) the necessary Federal tribunals; to prescribe under what

circumstances and in what mode their jurisdiction shall be exercised; and also to determine from time to time, in view of the condition of the country, under what restrictions it shall be exercised; and whether or not the necessary or unnecessary joinder of other parties shall deprive a citizen of the opportunity to have his controversy with the citizen of another State tried by the National tribunal. The Federalist, in discussing this article of the Constitution, first treats of the absolute necessity of a National tribunal for the decision of controversies in which foreigners are concerned, and then proceeds thus:

"In order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the National judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens. To secure the full effect of so fundamental a provision *against all evasion and subterfuge*, it is necessary that its construction should be committed to that tribunal, which, having no local attachments, will be likely to be impartial between the different States and their citizens, and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded."*

A construction which would forever preclude the possibility of a resort to a Federal tribunal in controversies between citizens of different States, simply for the reason that in the same case there was also a controversy between citizens of the same State, would be in derogation of the terms of this provision of the Constitution, and subversive of the purposes which it intended to secure. Such a construction would put it in the power of the plaintiff always to deprive the citizen of another State of the right to a trial of his controversy in the Federal tribunal, by merely joining with him as co-defendant a citizen of the plaintiff's State. And thus the power to determine in which tribunal the controversy shall be tried, whether in the local and prejudiced one, or in the Federal and impartial one, is forever committed to

* Federalist, No. 80.

the very party against whom it was the sole purpose of this constitutional provision to afford protection.

As already said, the language used in other clauses of this judicial article of the Constitution confirms the view that the term "*controversies*," as used in this particular clause, was so employed for a purpose, and in distinction to the word "suit" or "case." A controversy between citizens of different States must exist in the suit,—and, if so, the jurisdiction will attach,—but the suit or case may not be between them exclusively. There may be other parties to it.

The same rule of construction which is applied to this clause, must govern the other clauses of this section. They are in *pari materiâ*. A reference to these clauses will show that the proposed limitation cannot be engrafted on this article without in effect annulling it.

One clause provides that the judicial power shall extend "to all cases affecting ambassadors, other public ministers, and consuls." Can it be pretended that this jurisdiction can be defeated by joining some one else as a party with an ambassador, public minister, or consul; or because the case may affect some one else than those officers?

Another clause provides that the judicial power shall extend "to all controversies between two or more States." Can this jurisdiction be defeated, by joining as a party defendant a private person or corporation?

Another clause provides that, "the judicial power shall extend to all cases in law and equity arising under this Constitution, *the laws of the United States*, and treaties made, or which shall be made, under their authority."

Does the jurisdiction cease to exist in a case because other questions are involved in it than those arising under the Constitution, laws, or treaties of the United States? It was settled in *Osborne* v. *Bank of the United States*,* that the jurisdiction did not cease to exist in such a case. The question there was, whether the act of Congress, so far as it authorized the bank (created by a law of the United States) to sue

* 9 Wheaton, 738; and see Railway Company *v.* Whitton, 13 Wallace, 288.

in any Circuit Court of the United States, was constitutional. The defendant contended that it was not, and that the suit in question was not a "suit," or "case," within the meaning of the Constitution, or of the act of Congress, because several questions might arise in it which would depend on the general principles of the law, and not on any act of Congress. In other words, it was there attempted, as it is now attempted by the defendants in error, to add to this clause of the Constitution, the word "*exclusively.*" But what said Marshall, C. J.?

"If this were sufficient to withdraw a case from the jurisdiction of the Federal courts, almost every case, although involving the construction of a law, would be withdrawn; and a clause in the Constitution relating to a subject of vital importance to the government, and expressed in the most comprehensive terms, would be construed to mean almost nothing. . . . If the existence of other questions be sufficient to arrest the jurisdiction of the court, words which seem intended to be as extensive as the Constitution, laws, and treaties of the Union, which seem designed to give the courts of the government the construction of all its acts, so far as they affect the rights of individuals, would be reduced to almost nothing."

This decision applies to the provision now under discussion, and furnishes the true rule for its construction. The cases are parallel. The Federal jurisdiction is made by the Constitution to depend upon one of two things, either the nature of the subject-matter of the controversy or the character of the parties to the controversy. It extends to every case in which a question arises under its own laws, or in which a controversy exists between citizens of different States. Either one of these conditions confers the jurisdiction, and it cannot be defeated because other questions or other parties are involved in the controversy.

The decisions made upon the eleventh and twelfth sections of the Judiciary Act of 1789, do not conflict with the views here presented. Those cases all relate to the proper construction of the Judiciary Act, and not of the clause of the Constitution.

The eleventh section limited the jurisdiction of the Circuit Court to suits where an alien is a party, "or the *suit* is between a citizen of the State where the suit is brought, and a citizen of another State."

And the twelfth section limited the right of removal to "a *suit* commenced in any State court, against an alien, or by a citizen of the State in which the suit is brought against a citizen of another State."

The Judiciary Act industriously employed the word "suit" throughout, in distinction from the broader term "controversy," used in the Constitution; and it was also expressly confined to a suit between a citizen of the State where the suit is brought, and a citizen of another State.

Nor can it be argued for this act that it was a contemporaneous declaration of the view entertained by Congress as to the extent of the judicial power created by the Constitution. It has never been so held or understood. On the contrary, it is obvious, as has been frequently stated in judicial opinions, that the Judiciary Act did not exhaust the judicial power; and that it went only so far as the condition of the country, in the opinion of Congress, then seemed to require or render expedient.

II. *Construction of the statute of March 2d*, 1867.

Having ascertained that the provision of the Constitution confers Federal jurisdiction over cases like the present, the next question is whether Congress has provided for the exercise of that jurisdiction by the act of March 2d, 1867.*

The language of this act—differing from that of the Judiciary Act, which gave the right of removal when the "*suit*" was by "a citizen of the State in which the suit was brought against a citizen of another State"—gives the right where there is a "controversy between a citizen of the State and a citizen of another State." Now, if we have ascertained the true meaning and scope of the words in the Constitution, "controversies between citizens of different States," there can be no doubt as to the true meaning of the act of

* See it, *supra*, p. 557–8.

1867, nor of its application to the present case. For that act, departing from the limited and technical phraseology employed in the preceding statutes, employs, for the first time, the more comprehensive language of the Constitution and legislates concerning "*controversies* between citizens of different States."

That our construction of the act of 1867 is the true one is apparent, from the language of the act itself, and from the previous legislation upon this subject.

The Judiciary Act of 1789 confined the right of removal to suits commenced "by a citizen of the State in which the suit was brought against a citizen of another State;" and also required that the petition for removal should be filed by the defendant at the time of entering his appearance. This provision, as was uniformly held, applied only to a suit between a citizen of the State in which the suit was brought and a citizen of some other State, and clearly did not apply to a case where a resident defendant was also a party. In 1866, however, a very important change took place in the legislation upon this subject, and Congress then began, under the pressure of a new exigency, to secure more completely, by appropriate legislation, to non-resident defendants their constitutional right to have their controversies tried in the Federal tribunals. The act of 1866* for the first time made provision for the removal of a suit to the Federal court by a non-resident defendant, although a citizen of the State where the suit was brought was also a defendant therein. That act made two changes in the previous law. First, it allowed the cause to be removed to the Federal court so far as the non-resident defendant was concerned, "if the suit was one in which there could be a final determination of the controversy, so far as it concerned *him*, without the presence of the other defendants as parties in the cause," but leaving the suit in the State court so far as it related to the resident defendant; and secondly, it allowed the petition for removal to be filed at any time before the

* See it, *supra*, p. 556.

trial, instead of requiring it to be filed with the defendant's first appearance, as in the Judiciary Act.

It was soon apparent that this act could not effect much practical change or relief, as the number of cases to which it could be applicable was very limited indeed; as cases seldom arise "in which there can be a final determination of the controversy as to one co-defendant without the presence of the other defendants as parties in the cause." Accordingly, in pursuance of the policy indicated by that act, to provide what was supposed to be a more impartial tribunal for non-resident defendants in every case, Congress passed the act of March 2d, 1867, to supply the obvious deficiencies of the statute of 1866, and to allow a non-resident to remove the cause to the Federal tribunal, whenever he had reason to believe that from prejudice or local influence he would be unable to obtain justice in the State courts, although there were other co-defendants who were residents of the State in which the suit was brought. The act was a fruit of the rebellion.

The statute of 1867 cannot be confined to those cases where non-residents are the only defendants without violating its language and intent.

(*a.*) It is an act "*to amend the act of* 1866." Now, the sole purpose of the act of 1866 was to provide for a removal of suits in behalf of non-resident defendants in those cases in which *resident* parties were also defendants. The obvious purpose of the statute of 1867 was to add another case to the list, which might be removed by non-resident defendants, although resident parties were also defendants; and it was thus, as it professed to be, and thus only could it be, an amendment of the act of 1866.

Neither the act of 1866 nor the Judiciary Act, section twelve, is repealed by the statute of 1867. All subsist and each provides for a distinct case, thus:

The statute of 1789, for removal where the defendants are all non-residents; the statute of 1866, where part only are non-residents, but the cause is divisible as to them; the statute of 1867, where part only are also non-residents, but

where local prejudice exists, and for that reason the entire cause is made removable.

(*b.*) Under the statute of 1789, non-residents (if the only parties defendant) can now remove a case to the Federal tribunal, under the provisions of that act, without affidavit, and without the cause of local prejudice. If the statute of 1867 is also to be confined to the same class of cases (where all the defendants are non-residents), then, as it requires cause and affidavit for removal, it is a restriction upon the right of removal as originally given by the statute of 1789; a result which is obviously absurd.

(*c.*) The peculiar phraseology of the statute of 1867 fairly admits of no other interpretation than that which we give it.

The language is, that "where a suit is now pending, or may hereafter be brought in any State court, *in which there is controversy between a citizen of the State in which the suit is brought and a citizen of another State*," &c.

The language italicized is used for the first time in this act, and is significant.

The language of the statute of 1789 was, "if a suit be commenced *by a citizen* of the State, &c., against a citizen of another State," &c.; but here the striking phrase is, "where a suit is now pending, . . . *in which there is controversy between* a citizen," &c. This language excludes the idea that the suit must necessarily be one in which all the parties on one side are citizens of one State and all the parties on the other are citizens of another State. It is enough, however the parties may be distributed as to citizenship, if in the suit there is controversy between a citizen of one State, as plaintiff, and a citizen of another as one of the defendants. If there are these parties to the controversy, the right of removal exists, although there may be other parties to the suit and the controversy. The statute does not limit the right of removal to the case where a citizen of one State, as plaintiff, and the citizen of another State, as defendant, are the only parties to the controversy.*

* Johnson *v.* Monell, Woolworth, 390; Fields *v.* Lamb et al., Deady, 430; Sands *v.* Smith, 1 Dillon, 290.

Argument against the right of removal.

Messrs. E. R. Hoar and A. L. Soulé, contra:

I. The act of March 2d, 1867, did not mean to authorize the removal from the State court of a suit against joint defendants, one of whom, with the plaintiff, is a citizen of the State in which the suit is brought.

II. If it had so meant its purpose would have been unconstitutional.

1. The word "controversies," as used in the Constitution, is a general term, broad enough to cover all branches and technical forms of litigation, being equivalent to "suits or cases at law and in equity." It cannot have any other meaning or force than as a designation of judicial proceedings, whether those proceedings be called suits, actions, petitions, or bills in equity. "The judicial power," says Marshall, C. J., in *Osborne* v. *Bank of the United States*, "is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case." There is no "controversy" known to the judicial power under the Constitution, except the case or suit which is instituted according to the forms prescribed by law. Therefore the phrase "suit in which there is controversy between" is equivalent to the phrase "suit between." Any other interpretation would involve the idea that the courts of the United States have jurisdiction in controversies between parties outside of and apart from the suits which are in those courts.

If we are right in the interpretation of the words of the act, it results that the meaning and effect of the act have already been settled by the construction given to sections eleven and twelve of the Judiciary Act.

But it is argued that this cannot be so, because the act of 1867 is an amendment of the act of July, 1866, which provides for the removal of suits in which the plaintiff and a part of the defendants are citizens of the State in which the suit is brought.

Undoubtedly the title of an act is of value in determining what are its purpose and effect. But it is not to be used to wrest the language of the amendatory act, to a meaning

contrary to that which has been given by judicial authority to language substantially the same in former acts. And it is manifest, on reference to the title of the act of 1866, that no such strained construction is necessary to satisfy the call of the title of the act of 1867. The act of 1866 is entitled "An act for the removal of causes in certain cases from State courts." An act in amendment thereof may be in effect an act for the removal of other causes in certain cases, quite as well as an act to remove the same causes in certain other cases. And the act of 1867 has as real and as wide an operation, if construed as the defendant in error contends that it should be construed, as it would have if construed as applying only to the class of cases described in the act of 1866; indeed a much wider operation. As understood by the defendant in error, the act of 1867 works a large addition to the power of removal. The Judiciary Act provided for a removal at the time of entering appearance, by the whole party defendant, citizen of another State, the whole party plaintiff being citizen of the State in which the suit is brought. The act of 1866 provides for a partial removal at any time before final hearing or trial, when the interest of the defendants is separate and distinct, on petition of an alien defendant, if a part of the defendants are citizens of the State where the suit is brought, wherever the plaintiff may have citizenship; and on petition of a defendant, citizen of another State, where the plaintiff, and a part of defendants, are citizens of the State where the suit is brought. The act of 1867 provides for the removal, at any time before trial or final hearing, of the whole suit by the whole of either plaintiff or defendant, citizen of another State, when the whole of the adverse party has citizenship in the State where the suit is brought; this being the first provision made for removal of suit by a plaintiff.

Moreover, to adopt the construction of the act of 1867, contended for by the plaintiffs in error, would be to give to the Circuit Courts of the United States jurisdiction in a large class of cases originally brought in State courts, in which they would have no jurisdiction if originally brought

in the Circuit Courts. And it cannot be supposed that it was the purpose of the act to extend and enlarge the jurisdiction of the courts by indirection.

There is no analogy between the question here and that decided in *Osborne* v. *Bank of the United States.* In that case, Marshall, C. J., said that, inasmuch as the bank was chartered by the United States, with specified powers and rights, and the question on which the case arose was a question as to its powers and rights, the grant in the charter of the right to sue in the Circuit Courts was within the provision of the Constitution which extends the judicial power to all cases arising under the laws of the United States; and that the fact that other questions *might* arise in the progress of the case did not oust the court of its jurisdiction.

2. If the act of 1867 is construed as authorizing the removal of suits in which the plaintiff and a part of the individuals making up the party defendant are citizens of the State where the suit is brought, the act is, in that regard, unconstitutional. It provides for removing the suit, as to all the parties, to the Federal court, and that after the petition is filed, with proper surety and the proper affidavit, it shall be the duty of the State court to proceed no farther in the suit. This construction presupposes a jurisdiction in the United States courts of controversies between citizens of the same State, and a power to oust the State courts of jurisdiction in controversies between its own citizens, at the request of citizens of another State; and even against the will of both plaintiff and those of the defendants who are citizens of the State where the suit is brought. We say "controversies" between citizens of the same State, because this construction of the act can be maintained only on the ground that in it the word "controversy" is used in another and more popular sense than that in which it is used in the Constitution.

The Constitution provides for jurisdiction in the United States courts in a few great classes.

1st. In *all* cases arising under the Constitution, the laws of the United States, and treaties.

2d. In *all* cases *affecting* ambassadors, other public ministers and consuls.

3d. All cases of admiralty and maritime jurisdiction.

4th. Controversies in which the United States shall be a party.

5th. Controversies between States.

6th. Controversies between a State and citizens of another State.

7th. Between citizens of different States.

8th. Between citizens of the same State, claiming lands under grants of different States.

9th. Between a State or the citizens thereof, and foreign States, citizens or subjects.

In the first, second, third, and fourth of these classes, the jurisdiction in nowise depends on the citizenship of individuals.

The fifth class relates only to States.

The sixth class relates only to controversies in which a State is a party.

In the seventh class the jurisdiction depends entirely on the citizenship of the parties.

In the eighth, on the subject-matter of the controversy.

In the first three classes, citizens of the same or of different States may be both plaintiffs and defendants.

In the fourth class, citizens of the same and of different States may be joined together in the same party to the controversy.

But it is submitted that in the *seventh* class, the individuals on one side of the controversy must all be citizens of the State in which the suit is brought; on the other, all citizens of another State or States.

As we have already seen, "the judicial power under the Constitution is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law," that is to say, in a suit of some kind. The suit is the "controversy" contemplated by the Constitution. And in order that the Federal courts may have jurisdiction, the suit, if the interpretation of the Constitu-

tion is to be consistent with the interpretation already and repeatedly given to the Judiciary Act, must be between citizens of one State, and no one else, on the one side, and citizens of other States, and no one else, on the other side.

We have not a separated controversy with any of the three defendants; no more than in a suit against a corporation we should have a controversy with each one of the corporators. The suit might affect each, but that would not make the suit a controversy with each. We have a controversy with the opposing parties to the suit, that is to say, with the three corporations. The controversy is the entire controversy between the parties who are parties to the suit; one side of them being a composite body over which the Constitution does not authorize the Federal courts to take jurisdiction.

Nor does the interpretation of the clause which we assert impair the end which it was designed to attain. It leaves uninterfered with, the power to legislate as to all the cases which come fully within the language of the clause; that is to say, as to all controversies which are fully and completely described as being between citizens of different States. Nor is it to be inferred that the word "controversies" is used in this clause in any other sense than that which is here contended for, from the fact that it is used in a different sense by the legislative branch of the government in 1866 or 1867. The meaning of the Constitution is not dependent on subsequent acts of Congress. But those acts are operative or invalid as they accord with or violate the provisions of the Constitution. Nor should the clause be given a wider and larger operation than its language naturally imports, under the assumption that the construction contended for by the defendant in error, impairs the end which it was designed to attain. It is said that the clause in question had for its end to protect citizens of different States from danger of injustice in the State courts through local influence or prejudice; and that viewed as a permanent grant of power to legislate, the end *may be* seriously impaired if the power to legislate is arrested merely by the

joinder of other parties. But, *non constat*, that it was the intention of the Constitution to throw this protection over citizens suing or sued in another State than their own, when citizens of the State where the suit is brought, are suing or sued with them. To assume that this is the intention of the Constitution is to beg the question. And there is no reason why such should be the intention of the Constitution. The danger to be avoided, exists only when all the individuals on one side of the suit are citizens of the State where the suit is brought, and all the individuals on the other side are citizens of another State. When citizens of the State where the suit is, are on both sides in the suit, the local prejudice or influence is destroyed, or balanced. It favors one side as much as the other.

When it is remembered that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people, it seems clear that the construction of the clause in question by the plaintiffs in error is erroneous. That clause does not purport to extend the judicial power of the United States to controversies between citizens of the same State, and it is only by asserting that when there are defendants, citizens of the same State with the plaintiff in a suit, they must be regarded as merely incidental parties, that the clause can be held broad enough to reach the case at bar. It is plain, however, that the suit is just as much a controversy between citizens of the same State, as it is a controversy between citizens of different States. The interest of the defendants is joint and inseparable. The defendant, citizen of the State, is no more *incidental* to the controversy, than the defendants, citizens of another State. There seems to be no principle nor rule under which the suit can be described as a controversy between citizens of different States.

If the meaning of the clause in question were doubtful in itself, it is made clear by the clause which immediately succeeds it, and which specifies the cases in which the judicial power shall extend to controversies between citizens of

the *same* State, being the *eighth* class in the enumeration hereinbefore given. The rule of *expressio unius exclusio est alterius* applies.

Mr. Justice CLIFFORD delivered the opinion of the court.

Original cognizance of all suits of a civil nature, at common law or in equity, is given to the Circuit Courts by the eleventh section of the Judiciary Act, concurrent with the courts of the several States, where the matter in dispute exceeds, exclusive of costs, the sum or value of $500, . . . and an alien is a party, or the suit is between a citizen of the State where the suit is brought and a citizen of another State, subject, however, to the restriction that no civil suit shall be brought before any Circuit Court against any inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant or in which he shall be found at the time of serving the writ.*

Suits commenced in a State court against an alien, or by a citizen of the State in which the suit is brought against a citizen of another State, may, under the twelfth section of the same act, be removed for trial by the defendant into the Circuit Court for the same district if the matter in dispute exceeds the sum or value of $500, provided the defendant file a petition requesting such removal at the time of entering his appearance in the State court, and offer good and sufficient surety that he will enter copies of the process against him in such Circuit Court on the first day of its next session, and for his appearance, and that he will give special bail in the case if such bail would be requisite in the State court.†

Jurisdiction in such a case is concurrent between the proper State court and the Circuit Court for the same district, and the provision is that such a suit, if commenced in the State court, may be removed by the defendant for trial into the Circuit Court, subject to the conditions before mentioned, the privilege being given to the defendant only, as

* 1 Stat. at Large, 78. † Ib. 79.

the plaintiff, when he institutes his suit, may elect in which of the two concurrent jurisdictions he prefers to go to trial.

These expressions in the act of Congress, where an alien is a party or the suit is between a citizen of a State where the suit is brought and a citizen of another State, says Marshall, C. J., the court understands to mean that each distinct interest should be represented by persons all of whom are entitled to sue or may be sued in the Federal courts; or, in other words, that where the interest is joint each of the persons concerned in that interest must be competent to sue or be liable to be sued in the court to which the suit is removed.* All of the complainants in that case were citizens of Massachusetts, and so also were all of the respondents, except one, who, it was admitted, was a citizen of Vermont. Due service was made upon the resident respondents, and the record showed that the subpœna had also been served upon the other respondent in the State where he resided. Want of jurisdiction was set up by the respondents in the Circuit Court, and the judge presiding in the Circuit Court entered a decree dismissing the bill of complaint. Appeal was taken to the Supreme Court, and the Supreme Court unanimously affirmed the decree of the Circuit Court. Repeated decisions have since been made by this court and by many other courts, State and Federal, to the same effect. Prior to the case of *Railroad* v. *Letson*,† it had frequently been held by this court that a corporation aggregate, as such, was not properly included in the word citizen, as used in the Judiciary Act, and consequently that such a corporation, if regarded merely as an artificial being, could not sue in the Federal courts, yet the court decided, in several cases, that the court would look beyond the corporate character of such an artificial being to the individuals of whom it was composed, and if it appeared that they were citizens of a different State from the party sued, that the suit, whether an action at law or a suit in equity, could be maintained in the

* Strawbridge et al. *v.* Curtiss et al., 3 Cranch, 267; Conolly *v.* Taylor, 2 Peters, 564; Curtis's Commentaries, § 75.

† 2 Howard, 550.

proper Circuit Court. Cases of that description are quite numerous, and yet in all of them it was held by this court that all of the corporators must be citizens of a different State from the party sued, else the jurisdiction could not be sustained.* Corporations, it is true, are now regarded by this court as inhabitants of the State by which they are created and in which they transact their corporate business, and it is also held that a corporation is capable of being treated as a citizen for all purposes of suing and being sued in a Circuit Court, but the rule as modified, in that regard, does not diminish the authority of those cases as precedents to show that by the true construction of the Judiciary Act it requires that each of the plaintiffs, if the interest be joint, must be competent to sue each of the defendants in the Circuit Court to sustain the jurisdiction under the eleventh section of that act.†

Certain sums of money, it is alleged, in excess of what could properly be exacted by the defendant corporations, had been paid to those corporations by the plaintiffs, and the corporation defendants refusing to refund the amount of such alleged excess the corporation plaintiffs instituted an action at law, in the Supreme Judicial Court of the State, against the corporation defendants, to recover back the amount of the alleged overpayments. Patent rights, it seems, are owned by the three corporation defendants, for the exclusive privilege to construct, use, and vend certain patented sewing machines, and the inference is that the corporation plaintiffs are or have been licensees of the corporation defendants. What the precise terms of the license are or were does not very satisfactorily appear, but it may be inferred that the plaintiffs covenanted to pay to the defendants a certain pat-

* Bank of the United States *v.* Deveaux, 5 Cranch, 61; Railroad Bank *v.* Slocomb, 14 Peters, 63; Irvine *v.* Lowry, 1b. 299; Breithaupt *v.* Bank, 1 Id. 238; West *v.* Aurora City, 6 Wallace, 142.

† Marshall *v.* Railroad, 16 Howard, 325; Railroad *v.* Wheeler, 1 Black, 295; Drawbridge Company *v.* Shepherd, 20 Howard, 227; Same Case, 21 Id. 112; Coal Company *v.* Blatchford, 11 Wallace, 172.

ent rent or tariff for the use of the patent right, subject to be reduced in amount in case the defendants granted licenses to other parties at a lower rate, and the charge is that the defendants did grant licenses to others at a lower rate without making to the plaintiffs the stipulated reduction; that the corporation defendants have ever since exacted the higher patent fee or tariff in violation of the terms of the license. Payments having been made the plaintiffs commenced this suit to recover back the amount. They joined as defendants the Grover & Baker Sewing Machine Company, which is a corporation established under the laws of Massachusetts; the Wheeler & Wilson Manufacturing Company, which is a corporation established under the laws of Connecticut; and the Singer Manufacturing Company, which is a corporation established under the laws of New York. Seasonable appearance was entered by the company first named at the return term, and they filed an answer within the time required by the rules of the court. Neither of the other corporation defendants entered a general appearance at the return term, but the plaintiffs caused an order of notice to issue to those corporations respectively to appear at the next term of the court, and subsequently filed proof that the order of notice was duly served by publication. By the return of the marshal it appears that personal property of those respective corporations was attached on the original process, and the plaintiffs claim that by virtue of the attachment and the due service of the order of notice the State court acquired jurisdiction of all the parties. Subsequently, however, both of the non-resident corporations appeared and, having obtained the leave of the court for the purpose, filed their answers to the action, and on the same day they filed their several petitions for the removal of the cause for trial to the Circuit Court for that district. Each of the petitions was accompanied by an affidavit executed by the president of the company, and by a bond of the company in usual form as required by law in such a case. Hearing was had and the State court refused to grant the prayer of the respective petitions, and directed that the parties

should proceed to trial, to which rulings the defendants then and there excepted, and the verdict and judgment were for the plaintiffs. Exceptions were also taken by the defendants to the rulings of the court in the progress of the trial and to certain instructions given by the court to the jury, but it will not be necessary to re-examine the exceptions taken during the trial, as the only question to be determined under this writ of error is whether the rulings of the court in overruling the respective petitions for the removal of the cause into the Circuit Court, and in directing that the parties should proceed to trial in the State court were or were not correct.

Circuit Courts do not derive their judicial power, immediately, from the Constitution, as appears with sufficient explicitness from the Constitution itself, as the first section of the third article provides that "the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish." Consequently the jurisdiction of the Circuit Court in every case must depend upon some act of Congress, as it is clear that Congress, inasmuch as it possesses the power to ordain and establish all courts inferior to the Supreme Court, may also define their jurisdiction. Courts created by statute can have no jurisdiction in controversies between party and party but such as the statute confers.* Congress, it may be conceded, may confer such jurisdiction upon the Circuit Courts as it may see fit, within the scope of the judicial power of the Constitution, not vested in the Supreme Court, but as such tribunals are neither created by the Constitution nor is their jurisdiction defined by that instrument, it follows that inasmuch as they are created by an act of Congress it is necessary, in every attempt to define their power, to look to that source as the means of accomplishing that end.† Federal judicial power,

* Turner *v.* Bank, 4 Dallas, 10; Sheldon *v.* Sill, 8 Howard, 448; McIntire *v.* Wood, 7 Cranch, 506; Kendall *v.* United States, 12 Peters, 616.

† Cary *v.* Curtis, 3 Howard, 245.

beyond all doubt, has its *origin* in the Constitution, but the organization of the system and the distribution of the subjects of jurisdiction among such inferior courts as Congress may from time to time ordain and establish, within the scope of the judicial power, always have been, and of right must be the work of the Congress.

Attempt is made in argument to maintain the right, claimed by the defendants, to remove the cause for trial in this case from the State court where it was commenced into the Circuit Court, as being derived under the act of the 2d of March, 1867, which is entitled an act to amend a prior act entitled an act for the removal of causes, in certain cases, from State courts.

Reference will first be made to the prior act referred to in the title of the amendatory act, as the prior act followed the Judiciary Act in many respects and, like that act, limits the right of removal to the alien defendant and the defendant who is a citizen of a State other than that in which the suit is brought. Subsequent to those preliminary recitals it provides, in effect, that where the suit is commenced in the State court against an alien, or by a citizen of the State against a citizen of another State, the non-resident defendant or the alien defendant, as the case may be, may remove the cause from the State court into the Circuit Court, even though it appears that a citizen of the State where the suit is brought is also a defendant, if the suit, so far as it relates to the alien defendant or the non-resident defendant, was instituted and is prosecuted for the purpose of restraining or enjoining such defendant; or if the suit is one which, so far as it respects such alien or non-resident defendant, can be finally determined without the presence of the other defendant or defendants as parties in the cause, then and in every such case the alien or non-resident defendant may, at any time before the trial or final hearing of the cause, file a petition for the removal of the same, as against the petitioner, into the Circuit Court; but the provision in the same act also is, that such removal of the cause shall not be deemed to prejudice or take away the right of the plaintiff

to proceed, at the same time, with the suit in the State court, if he shall see fit, against the other defendants.*

Remarks to show that the act referred to contains nothing to support the view that Congress intended by it to depart from the essential principle embodied in the Judiciary Act are hardly necessary, as it is obvious that the language of the act does not empower any defendant, unless he be an alien or non-resident, to remove the cause or to elect any other forum for the trial of the same than the one to which the suit is returnable, nor does it give any sanction whatever to the proposition that the resident defendant shall be compelled or permitted under any circumstances to go elsewhere to answer the suit. Defendants in certain cases may sever, after final judgment, for the purpose of prosecuting an appeal or writ of error, which is effected by a proceeding usually called summons and severance, which will enable one of several defendants, or any number less than the whole, to sue out a writ of error or take an appeal in a case where the other defendants or respondents refuse to join in the petition for the same.† Modes of effecting a severance among executors, so that less than the whole number may sue, were also known at common law, but in such a case it was necessary that such a proceeding should be perfected before the suit was instituted.‡ By virtue of the provision under consideration the alien defendant or the defendant who is a citizen of a State other than that in which the suit is brought is empowered, subject to the conditions specified, without any summons and severance, to remove the cause, as between him and the plaintiff, into the Circuit Court for trial, leaving the cause, as between the plaintiff and the other defendants, to proceed in the State court where the suit was commenced, wholly unaffected by such removal, the only effect of the removal in such a case being to sever to that

* 14 Stat. at Large, 306.

† Williams *v.* Bank, 11 Wheaton, 414; Wilson's Heirs *v.* Insurance Co., 12 Peters, 140; Todd *v.* Daniel, 16 Id. 521.

‡ 2 Williams on Executors, 4th Am. ed. 1186, note *t*; Goodyear *v.* Rubber Co., 2 Clifford, 368.

extent the defendants in the cause for the special purpose provided in the enactment, but the provision affords no support whatever to the theory set up by the defendants in the case before the court.* Before the passage of that act no removal could be made in such a case, as some of the defendants are by that act supposed to be citizens of the State where the suit is brought, and all the courts, Federal and State, had uniformly decided that unless the cause was removable as to all the defendants it could not be removed at all, as the act of Congress contained no provision warranting any such proceeding as summons and severance for any purpose.† Unlike the Judiciary Act, however, the alien defendant or the defendant who is a citizen of a State other than that in which the suit is brought may, under the "Act for the removal of causes in certain cases from State courts," have the cause removed, as to himself, subject to the condition that such severance or partial removal shall not prejudice or take away the right of the plaintiff to proceed, at the same time, with the suit in the State court as against the other defendants, showing that the right of removal is still confined to the alien and non-resident defendant, and that no removal of the cause as to any other defendant can be made under that enactment.

Grant all that, still it is insisted by the defendants that the rulings of the State court in refusing to grant the prayers of their petitions and in directing that the parties should proceed to trial was erroneous, as the petitions were filed under the later act of Congress, which, as they contend, very much enlarges the right to remove causes from the State courts into the Circuit Courts for trial.

Important changes undoubtedly are made by that act in the law upon that subject, as it clearly extends the privilege

* Smith *v.* Rines, 2 Sumner, 338; Ward *v.* Arredondo, 1 Paine, 410; Sayles *v.* Insurance Co., 2 Curtis, 212; Hazard *v.* Durant, 9 Rhode Island, 608; Beardsley *v.* Torrey, 4 Washington, 286.

† Moffat *v.* Soley, 2 Paine, 103; Bissell *v.* Horton, 3 Day, 281; Tuckerman *v.* Bigelow, 21 Law Reporter, 208; Herndon *v.* Ridgway, 17 Howard, 424; Railway Co. *v.* Whitton, 13 Wallace, 289.

to a non-resident plaintiff as well as to a non-resident defendant, subjecting both, however, to a new condition, wholly unknown in the prior acts of Congress, vesting such a right in an alien defendant or in a defendant who was a citizen of a State other than that in which the suit is brought. Where a suit is now pending or may hereafter be brought in any State court in which there is controversy between a citizen of the State in which the suit is brought and a citizen of another State, such citizen of another State, whether he be plaintiff or defendant, if he will make and file in such State court an affidavit stating that he has reason to believe and does believe that, from prejudice or other local influence, he will not be able to obtain justice in such State court, may, at any time before the final hearing or trial of the suit, file a petition in such State court for the removal of the suit into the next Circuit Court to be held in the district where the suit is pending. Aliens it will be seen are not included in the provision, but the right to petition for the removal is extended to the non-resident plaintiff as well as to the non-resident defendant, in a case where it appears that a resident defendant is sued by a non-resident plaintiff, as in such a case there is controversy between a citizen of the State in which the suit is brought and a citizen of another State, just as much as there is in a case where a resident plaintiff sues a non-resident defendant in his own district, the defendant being found within the same district and served there with the original process.

Under the Judiciary Act and the succeeding act for the removal of certain causes, the plaintiff, if he elected to commence his suit in a State court, whether he was resident or non-resident, was bound by his election, nor was it ever supposed that he could subsequently be permitted to remove the cause from the State court into the Circuit Court in ordinary circumstances, as neither of those acts of Congress vest in the plaintiff any such right, nor do they contain any language to warrant the conclusion that Congress ever intended to confer upon a plaintiff any such power. Non-resident defendants and alien defendants might cause such

removal to be made, but under the Judiciary Act the condition was that such a defendant must file his petition requesting such removal at the time he entered his appearance in such State court; which condition is relaxed in this act, so far as it respects non-resident defendants and non-resident plaintiffs, and it is provided that the right may be exercised "at any time before the final hearing or trial of the suit."

Viewed in the light of these suggestions it is clear that it is a mistake to suppose that the act will operate to limit the right conferred by the Judiciary Act unless the court give it the broad construction assumed by the defendants, as it extends the right to a non-resident plaintiff as well as to a non-resident defendant, and allows both to file the necessary petition at any time before the final hearing or trial of the suit, leaving the case of the alien defendant unaffected by any of its provisions.

Mere regulation, such as requiring the cause of removal to be stated, and that the petition should be supported by an affidavit, is not sufficient change in the principle of the Judiciary Act to support the proposition, as the great purpose of the new enactment is to extend the right to a non-resident plaintiff as well as to a non-resident defendant, and to enlarge the time within which the petition may be filed, leaving the alien defendant wholly unaffected by the new regulations.

Apply these rules of construction to the three acts of Congress referred to in this case, and it is clear that they will work out the following results: (1) In a case where the suit is commenced by a plaintiff in the court of a State of which he is a citizen, against a defendant who is a citizen of another State, the defendant may remove the cause into the Circuit Court of that district for trial. (2) Where the plaintiff brings his suit in the court of a State other than that of which he is a citizen, against a defendant who is a citizen of the State where the suit is brought, the plaintiff may remove the cause into the Circuit Court under the last-named act.*

* Beery *v.* Irick, 22 Grattan, 485.

Suppose, however, the plaintiff brings his suit in the court of a State other than that of which either he or the defendant is a citizen, the defendant having been found therein and been duly served with the original process, then neither the plaintiff nor the defendant can remove the cause from the State court into the Circuit Court for trial under any existing act of Congress, as in that case there is not controversy between a citizen of a State in which the suit is brought and a citizen of another State, nor is the suit one commenced by a citizen of a State in which the suit is brought against a citizen of another State, as the condition is as provided in the Judiciary Act. Both plaintiff and defendant being non-residents, the acts of Congress make no provision for the removal of such a cause into the Circuit Court for trial.

Unaffected as the Judiciary Act is by the latest of the three acts mentioned, the law still is that if the suit is commenced against an alien in a State court, he may file a petition for the removal of the same for trial into the next Circuit Court to be held in the district, at the time of entering his appearance in such State court. Non-resident defendants or alien defendants may also remove certain causes from a State court into a Circuit Court for trial, under the intermediate act of Congress, as before explained. Where the suit is commenced in a State court against an alien, or by a citizen of the State in which the suit is brought against a citizen of another State, the non-resident defendant or the alien defendant, as the case may be, may remove the cause from the State court into the Circuit Court for trial, even though it appears that a citizen of the State where the suit is brought is also a defendant, if the suit, so far as it relates to the non-resident or alien defendant, was instituted and is prosecuted for the purpose of restraining or enjoining such defendant, or if the suit is one which, so far as it respects such defendant, can be finally determined without the presence of the other defendants as parties in the cause. Considering the stringent conditions which are embodied in the last-named act, it is doubtful whether it will prove to be one

of much practical value, but as it remains in full force it cannot be properly overlooked in this investigation. Suggestion is made that it is a step in advance of the Judiciary Act, but the force of the suggestion is not perceived, as it makes no provision that any party shall go into the Circuit Court for trial except such as may go or be sent there under the twelfth section of the Judiciary Act. Divest that act of the feature which provides for the severance of the defendants and that which empowers the plaintiff to proceed with the suit in the State court as against the other defendants, and it is exactly the same as the corresponding feature of the Judiciary Act, except that it extends the time for filing the petition for the removal of the cause from the time the petitioner enters his appearance in the State court to the time of the trial or final hearing of the cause. Separately considered the language employed in the "act for the removal of causes in certain cases from the State courts" to describe the parties and the suit in which the alien defendant or the non-resident defendant may remove the cause into the Circuit Court for trial, is identical with the language employed in the Judiciary Act, the two provisions differing only in the particulars heretofore sufficiently explained, showing that the well-established rule applies in construing the later act, that words and phrases, the meaning of which in a statute have been ascertained by judicial interpretation, are, when used in a subsequent statute, to be understood in the same sense.* Such a construction in the case supposed becomes a part of the law, as it is presumed that the legislature in passing the later law knew what the judicial construction was which had been given to the words of the prior enactment. Support, therefore, to the theory put forth by the defendants cannot be derived either

* Potter's Dwarris, 274; Bacon's Abridgment, title "Statute," I; Pennock *v.* Dialogue, 2 Peters, 18; Cathcart *v.* Robinson, 5 Id. 280; McCool *v.* Smith, 1 Black, 469; Commonwealth *v.* Hartnett, 3 Gray, 450; Ruckmaboye *v.* Mottichund, 32 English Law and Equity, 84; Bogardus *v.* Trinity Church, 4 Sandford's Chancery, 633; Rigg *v.* Wilton, 13 Illinois, 15; Adams *v.* Field, 21 Vermont, 256.

from the Judiciary Act or from the later act entitled An act for the removal of causes in certain cases from State courts.*

Admit that and still it is insisted by the defendants that they had the right to remove the cause from the State court under the act to amend the act called the Removal Act.† Much stress is placed upon the particular language of that act, which is that "when a suit is now pending or may hereafter be brought in any State court, *in which there is controversy between a citizen of the State in which the suit is brought and a citizen of another State.*" Instead of that the corresponding language of the Judiciary Act is, if a suit be commenced in any State court by a citizen of the State in which the suit is brought against a citizen of another State.

Different words are certainly employed in the two provisions, but it is difficult to see in what particular the jurisdiction of the State court is lessened by the last act or in what respect the difference of phraseology supports the theory of the defendants, as "a suit by a plaintiff against a defendant" must mean substantially the same thing in the practical sense as "a suit in which there is controversy between the parties," as each provision includes the word suit, which applies to any proceeding in a court of justice in which the plaintiff pursues his remedy to recover a right or claim.‡ Indubitably they differ in this, that it is the defendant only who can remove the cause under the Judiciary Act, but the last-named act empowers the non-resident plaintiff, in a proper case, as well as the non-resident defendant, to exercise the same privilege, as in the former case, as well as in the latter, there is a suit pending in which there is controversy between a citizen of the State in which the suit is brought and a citizen of another State, and the express enactment is that in the case supposed "such citizen of another State, whether he be plaintiff or defendant," if he will comply with the conditions stated, may, at any time

* 14 Stat. at Large, 306. † Ib. 559.

‡ 2 Bouvier's Law Dictionary, 558; Weston *v.* Charleston, 2 Peters, 449; 1 Curtis's Commentaries § 73, p. 85; Webster's Dictionary, "Suit."

before the final hearing or trial of the suit, file a petition for the removal of the cause.* Real parties only are empowered to claim that right under either act, and it is equally clear that the right of the defendant cannot be defeated by joining with him a mere nominal party in the action.†

Special attention is also invited to the fact that the judicial power conferred by the Constitution extends to controversies between citizens of different States, and the proposition is submitted in argument that it would be competent for Congress to pass a law empowering one of a number of plaintiffs, or one of a number of defendants, to remove such a suit for trial from a State court into the Circuit Court for the same district, if it appeared that the petitioner, whether plaintiff or defendant, was a citizen of a State other than that in which the suit was brought, even though all the other plaintiffs or other defendants were citizens of the State in whose court the suit was pending, but the court is of the opinion that the question does not arise in this case, as the act of Congress in question, in the judgment of the court, does not purport to confer any such right. Were it true that the Circuit Courts derive their judicial power immediately from the provisions of the Constitution, it might be necessary to examine that proposition, but inasmuch as it is settled law that the jurisdiction of such courts depends upon the acts of Congress passed for the purpose of defining their powers and prescribing their duties, it is clear that no such question can arise in a case like the present, unless it first be ascertained that Congress has passed an act purporting to confer the disputed power. Courts are disinclined to adopt a construction of an act of Congress which would extend its operation beyond what is warranted by the Constitution, but the suggestion that

* Cooke *v.* Bank, 1 Lansing, 502; Bryant *v.* Rich, 106 Massachusetts, 191; Cooke *v.* Bank, 52 New York, 96.

† Dodge *v.* Perkins, 4 Mason, 435; Rateau *v.* Bernard, 3 Blatchford, 245; Ward *v.* Arredondo, 1 Paine, 410; Wormley *v.* Wormley, 8 Wheaton, 451; 1 Curtis's Commentaries, § 74.

Congress possesses the power to confer a new privilege is not a sufficient reason to induce the court to extend an existing enactment by construction so as to embrace the privilege, unless the words of the enactment are of a character to warrant the construction.

Either the non-resident plaintiff or non-resident defendant may remove the cause under the last-named act, provided all the plaintiffs or all the defendants join in the petition, and all the party petitioning are non-residents, as required under the Judiciary Act, but it is a great mistake to suppose that any such right is conferred by that act where one or more of the plaintiffs or one or more of the petitioning defendants are citizens of the State in which the suit is pending, as the act is destitute of any language which can be properly construed to confer any such right unless all the plaintiffs or all the defendants are non-residents and join in the petition.*

Two cases only, besides the opinion given in this same case in the Circuit Court, to wit, *Johnson* v. *Monell*,† *Sands* v. *Smith*,‡ are cited to support the assumed theory, neither of which necessarily involved any such question, and the reasons given for the conclusion by the learned circuit judge, on the motion to dismiss the case in the Circuit Court, are not satisfactory.

JUDGMENT AFFIRMED.

Justices MILLER and BRADLEY dissented from the preceding opinion of the court in reference to the construction of the act under consideration, and for this reason dissented from the judgment.

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* Bryant *v.* Scott, 6 North Carolina, 392; Hazard *v.* Durant, 9 Rhode Island, 609; Waggener *v.* Cheek, 2 Dillon, 565; Case *v.* Douglas, 1 Id. 299; Bixby *v.* Couse, 8 Blatchford, 73; Ex parte Andrews, 40 Alabama, 648; Peters *v.* Peters, 41 Georgia, 251; Cooke *v.* State Bank, 52 New York, 113.

† 1 Woolworth, 390.

‡ 1 Dillon, 290.

MOORE *v.* ROBBINS.

A decree in a court below, reversing a decree where, on a bill to foreclose a mortgage, a court below *it* had decreed in favor of the complainant, and "remanding" the case to such inferior court for "such other and further proceedings as to law and justice shall appertain," is not a final decree within either the Judiciary Act of 1789 or the act of 1867 amendatory of it. A writ taken on a contrary assumption dismissed.

ON motion by *Mr. R. E. Williams* (*the plaintiff in error himself opposing*), to dismiss a writ of error to the Supreme Court of Illinois; the ground of the motion being that no final judgment or decree had been rendered.

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

The suit was a bill in equity, filed by Robbins in the Circuit Court of De Witt County to foreclose a mortgage. That court decreed in favor of complainant. The defendants removed the case by appeal to the Supreme Court of the State. There the decree of the lower court was reversed and the case was "remanded to the Circuit Court for such other and further proceedings as to law and justice shall appertain." The ground of reversal does not appear in the record. A rehearing was applied for by the defendants and granted by the court. The case was reheard and the former decree was affirmed. The defendants thereupon prosecuted this writ and are the plaintiffs in error in this court.

Both the Judiciary Act of 1789,* and the amendatory act of 1867,† limit the jurisdiction of this court in this class of cases to final judgments and decrees. The decree of the Supreme Court of Illinois before us is not of that character.‡

WRIT DISMISSED.

* Section 25, 1 Stat. at Large, 85. † 14 Id. 585.

‡ Brown *v.* The Union Bank of Florida, 4 Howard, 465; Pepper et al. *v.* Dunlap et al., 5 Id. 51; Tracy *v.* Holcombe, 24 Id. 426.

Statement of the case.

BULLARD *v.* BANK.

1. A National bank, organized under the National Banking Act of 1864, cannot, even by provisions framed with a direct view to that effect in its articles of association and by direct by-laws, acquire a lien on its own stock held by persons who are its debtors.
2. Where a thing is against the spirit and policy of a statute (as this sort of lien is here declared to have been contrary to the spirit and policy of the Banking Act of 1864), a permission in favor of it cannot be implied from general expressions; even supposing that liberally construed they embraced the case.
3. A by-law giving to a bank a lien on stock of its debtors is not "a regulation of the business of the bank, or a regulation for the conduct of its affairs," within the meaning of the National Banking Act of 1864, and, therefore, not such a regulation as under the said act National banks have a right to make.

ON certificate of division in opinion between the judges of the Circuit Court for the District of Massachusetts; the case being thus:

Congress in February, 1863, passed an act authorizing voluntary associations for the purpose of banking; the act by which a system of National banks was established.*

The eleventh and twelfth sections of the act gave to these associations power to make by-laws, not inconsistent with the provisions of the act for the management of their property, the regulation of their affairs, and *for the transfer of their stock.*

The thirty-sixth section enacted:

"No shareholder in any association under this act shall have power to transfer or sell any share held in his own right so long as he be liable, either as principal debtor, surety, or otherwise, to the association for any debt which shall have become due and remained unpaid."

In June, 1864, Congress passed a new act on the same subject of the National banks.† This new act retained or re-enacted many or most of the provisions of the old one,

* 12 Stat. at Large, 665.

† 13 Id. 99.

but did not retain or re-enact the thirty-sixth section above-quoted. On the contrary, the new act by its thirty-fifth section enacted,

"That no association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser nor holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith."

The new act in terms repealed the old act. It provided, however,

"That such repeal shall not affect any appointments made, acts done, or proceedings had, or the organization, acts or proceedings of any association organized or in the process of organization under the act aforesaid."

And provided also,

"That all such associations so organized or in process of organization, shall enjoy all the rights and privileges granted, and be subject to all the duties, liabilities, and restrictions imposed by this act . . . without prejudice to any right acquired . . . under any act hereby repealed."

The new Banking Act, that, namely, of 1864,—after providing by its fifth section, that associations for carrying on banking might be formed "by any number of persons not less than five, who shall enter into articles of association which shall specify, in general terms, the object for which the association is formed, and *may contain any other provisions not inconsistent with the provisions of this act which the association may see fit to adopt for the regulation of the business of the association, and the conduct of its affairs*,"—enacted:

"SECTION 8. That every association formed pursuant to the provisions of this act, shall from the date of the execution of its organization certificate be a body corporate . . . and its board of directors shall have power to define and regulate by by-laws *not inconsistent with the provisions of this act*, the manner in which its stock shall be transferred . . . its general business conducted, and all the privileges granted by this act to associations organized under it shall be exercised and enjoyed.

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"SECTION 12. That the capital stock of any association formed under this act shall be divided into shares of $100 each, and be deemed personal property and transferable on the books of the association in such *manner* as may be prescribed in the by-laws or articles of association."

Under this said new act, a bank styled the National Eagle Bank was formed at Boston on the 29th of March, 1865. The articles of association constituting it, referring to the act of 1864, contained a provision that the directors of the association shall

"Have the power to make all by-laws that it may be proper and convenient for them to make under said act, for the general regulation of the business of the association, and the entire management and administration of its affairs; *which by-laws may prohibit, if the directors so determine, the transfer of stock owned by any stockholder who may be liable to the association,* either as principal debtor or otherwise, without the consent of the board."

Subsequently, on the 22d of November, 1871, at a meeting of the directors, the following by-law was adopted:

"In pursuance of one of the articles of association, and to carry the same into effect, and in the exercise of an authority conferred by an act, under which the bank was organized, to define and regulate the manner in which its stock may be transferred, it is hereby declared,

"'All debts actually due and payable to the bank (days of grace for payment being passed) by a stockholder, as principal debtor or otherwise, requesting a transfer, must be satisfied before such transfer shall be made, unless the board of directors shall direct to the contrary.'"

And on the 7th of December, 1871, this by-law was amended by adding the words,

"And no person indebted to the bank shall be allowed to sell or transfer his or her stock without the consent of a majority of the directors, and this whether liable as principal or surety, and whether the debt or liability be due or not."

Of this bank, one Clapp became a stockholder, purchasing one hundred and fifty shares. He afterwards (in July,

August, September, and October) borrowed money from the bank on several notes, having different dates of maturity. On the 8th of November he failed to pay some of it then due, and on the 19th of January, 1872, was decreed a bankrupt therefor. His trustee in bankruptcy, one Bullard, claiming the stock as part of the assets in bankruptcy, demanded of the bank a transfer of it to him. The bank, asserting a lien to the extent of the notes held by it, refused to allow the transfer asked for. Certain of the notes given in October, 1871, had not fully matured when Bullard made his application.

Bullard now brought suit against the bank for refusing to allow the transfer asked for. The judges in the court below differed in opinion as to what judgment should be given, and certified to this court for answer these questions:

First. Whether a National bank organized under and controlled by the act of 1864 can acquire a valid lien upon the shares of its stockholders by the articles of association or by-laws, as proved in this case?

Second. Whether if such articles of association and by-laws, or both, created any valid lien upon the shares of the stockholders in a national bank organized under the act of 1864, such lien attached to the shares before the time when there was an existing debt, from the stockholders to the bank, due and unpaid?

Third. Whether the National Eagle Bank is entitled to hold the interest of Clapp, in the stock mentioned, by way of lien or security, for all or any of the notes mentioned?

Mr. B. R. Curtis relied on the case of *Bank* v. *Lanier*,* as decisive against the lien now set up by the bank; arguing, moreover, that even in a general view of the matter, a by-law giving the bank a lien upon the stock of its debtors was not "a regulation of the business of the association and the conduct of its affairs," but, on the contrary, was an attempt to derogate from the rights of the stockholders as

* 11 Wallace, 369.

such, and to create a lien on their property, while in view of the whole spirit of the act of 1864, against a lien, it was especially not so to be considered; and arguing, finally, that as the by-law was passed after the act of bankruptcy was committed, it contravened the Bankrupt Act.

Mr. C. B. Goodrich, *contra*, sought to distinguish this case from the one just mentioned. He argued that though the act of 1864 (herein unlike the act of 1863) did not itself and directly create a lien, yet that it did, in its fifth section, authorize the creation of such a lien by the articles of association and by-laws made under them; that the difference was that now the matter was left to the good judgment of the stockholders and directors alone. And he referred the court to a printed opinion of Mr. Justice Clifford, in the case of *Knight* v. *The Old National Bank of Providence*, in the Circuit Court for the District of Rhode Island, A.D. 1871, in which case, after a long and elaborate consideration of the question, the said learned justice ruled in favor of the validity of such a lien as the bank here sought to maintain.

Mr. Justice STRONG delivered the opinion of the court.

The extent of the powers of National banking associations is to be measured by the act of Congress under which such associations are organized. The fifth section of that act enacts that the articles of association "shall specify in general terms the object for which the association is formed, and may contain any other provisions, not inconsistent with the provisions of this act, which the association may see fit to adopt for the regulation of the business of the association and the conduct of its affairs." And the eighth section of the same act empowers the board of directors "to define and regulate by by-laws, not inconsistent with the provisions of this act, the manner in which its stock shall be transferred." There are other powers conferred by the act, but unless these confer authority to make and enforce a by-law giving a lien on the stock of debtors to a banking association, very plainly it has not been given.

Opinion of the court.

What, then, were the intentions of Congress respecting the powers and rights of banking associations? The act of 1864 was enacted as a substitute for a prior act, enacted February 25th, 1863, and in many particulars the provisions of the two acts are the same. But the earlier statute, in its thirty-sixth section, declared that no shareholder in any association under the act should have power to transfer or sell any share held in his own right so long as he should be liable, either as principal debtor, surety, or otherwise, to the association for any debt which had become due and remained unpaid.

This section was left out of the substituted act of 1864, and it was expressly repealed. Its repeal was a manifestation of a purpose to withhold from banking associations a lien upon the stock of their debtors. Such was the opinion of this court in *Bank* v. *Lanier*.* In that case it appeared that a bank had been organized under the act of 1863, and that it had adopted a by-law, which had not been repealed, that the stock of the bank should be assignable only on its books, subject to the provisions and restrictions of the act of Congress, among which provisions and restrictions was the one contained in the thirty-sixth section, that no shareholder should have power to sell or transfer any share so long as he should be liable to the bank for any debt due and unpaid. And when the bank was sued for refusing to permit a transfer of stock, it set up, in defence, that the stockholder was indebted to it, and that under the by-law he had no right to make the transfer. But this court said, "Congress evidently intended, by leaving out of the act of 1864 the thirty-sixth section of the act of 1863, to relieve the holders of bank shares from the restrictions imposed by that section. The policy on the subject was changed, and the directors of banking associations were, in effect, notified that thereafter they must deal with their shareholders as they dealt with other people. As the restrictions fell so did that part of the by-law relating to the subject fall with them."

* 11 Wallace, 369.

But this could have been only because the restriction was regarded as inconsistent with the policy and spirit of the act of 1864. It cannot truly be said that the by-law was founded upon the thirty-sixth section, though it doubtless referred to that section. It was not in that the power to make by-laws was given. The eleventh section was the one which authorized associations to make by-laws, not inconsistent with the provisions of the act, for the management of their property, the regulation of their affairs, and for the transfer of their stock; and that was substantially re-enacted in the act of 1864. Moreover, the sixty-second section of the latter act, while repealing the act of 1863, enacted that the repeal should not affect any appointments made, acts done, or proceedings had, or the organization, acts, or proceedings of any association organized, or in the process of organization under the act aforesaid, and gave to such associations all the rights and privileges granted by the act, and subjected them to all the duties, liabilities, and restrictions imposed by it. It is, therefore, manifest that it was not the repeal of the thirty-sixth section which caused the by-law to fall. It fell because it was considered a regulation inconsistent with the new Currency Act, the policy of which was to permit no liens in favor of a bank upon the stock of its debtors. It is impossible, therefore, to see why the decision in the case of *The Bank* v. *Lanier* does not require that the certified question should be answered in the negative.

An attempt was made in the argument to distinguish that case from the present by the fact that the articles of association of the Eagle Bank contain the provision to which we have referred, namely, that the directors should have the power to make by-laws which may prohibit the transfer of stock owned by any stockholder, who may be a debtor to the association, without the consent of the board, a provision which, it is said, the associates were justified in making by the fifth section of the act of 1864. The argument is that, though the act of Congress does not itself create a lien on a debtor's stock (as did the act of 1863), it does by the words of its fifth section authorize the creation of such a lien by

the articles of association, and by by-laws made under them. This leads to the inquiry whether the fifth section does authorize any provision in the articles of association that by-laws may be made prohibiting the transfer of stock of debtors to a bank, for if it does not the foundation of the argument is gone. Certainly there is no express grant of authority to make such a prohibition contained in that section. There is no specification of such a power. And if such a grant could be implied from the words used by Congress, the implication would be in direct opposition to the policy indicated by the repeal of the thirty-sixth section of the act of 1863, and the failure to re-enact it, as well as by the provisions of the thirty-fifth section, which prohibit loans and discounts by any bank on the security of the shares of its own capital stock, and prohibit also every bank from purchasing or holding any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith. Surely an implication is inadmissible which contradicts either the letter or the spirit of the act. Surely when the statute has prohibited all express agreements for a lien in favor of a bank upon the stock of its debtors, there can be no implication of a right to create such a lien from anything contained in the fifth section. But were there no such policy manifest in the act, the words of the fifth section would not bear the meaning attributed to them. The articles of association required by that section to be entered into must specify in general terms the object for which the association is formed, and may contain any other provisions, not inconsistent with the provisions of the act, which the association may see fit to adopt *for the regulation of its business and the conduct of its affairs.* To us it seems that a by-law giving to the bank a lien upon its stock, as against indebted stockholders, ought not to be considered as a regulation of the business of the bank or a regulation for the conduct of its affairs. That Congress did not understand the section as extending to the subject of stock transfers is very evident in view of the fact that in another part of the statute express provision was made for such transfers.

The eighth section empowers the board of directors of every banking association to define and regulate by by-laws, not inconsistent with the provisions of the act, the manner in which its stock shall be transferred. This would be superfluous if the power had been previously given in the fifth section. That Congress considered it necessary to make such an enactment is convincing evidence that they thought it had not elsewhere been made. Whatever power, therefore, the directors of a bank possess to regulate transfers of its stock, they derive, not from the fifth section of the act, and not from the articles of association, but from the eighth and twelfth sections by express and direct grant. It cannot, therefore, be maintained that the present case is not governed by the decision made in *Bank* v. *Lanier*, because the articles of association for the Eagle Bank authorized the directors to make a by-law restricting the transfer of stock. In that case there was a by-law prohibiting the transfer, as in this. Independent of the thirty-sixth section of the act of 1863, there was as much authority to make and enforce such a by-law as is given by the act of 1864. The eleventh and twelfth sections of the act of 1863 enacted that associations formed under it might make by-laws, not inconsistent with the laws of the United States or the provisions of the act, for the transfer of their stock, and that the stock should be transferable on the books of the association "in such manner as might be prescribed in the by-laws or articles of association." These powers given to the associates under that act are quite as large as those given by the act of 1864. Yet this court held that after the passage of the latter act a by-law giving a lien upon a debtor's stock was inconsistent with its provisions and invalid. Of course, if the act destroyed an existing by-law, it must prevent the adoption of a new one to the same effect.

We hold, therefore, on the authority of *Bank* v. *Lanier*, that the first question certified must be answered in the negative, and consequently the same answer must be given to the other two questions.

ANSWERED IN THE NEGATIVE.

Mr. Justice CLIFFORD, dissenting:

I dissent from the judgment and opinion of the court in this case for the reasons assigned in the opinion delivered by me in the case of *Knight et al.* v. *Bank*, decided in the Circuit Court, Rhode Island District, June Term, 1871, which I still believe to be correct, and consequently refer to that case as a full expression of the reasons of my dissent in the present case.

THE FAVORITA.

1. A large ocean steamer, running at the rate of eight or ten miles an hour, and close in with the Brooklyn shore, on the East River, and across the mouths of the ferry slips there, in order to get the benefit of the eddy, condemned for a collision with a New York ferry-boat coming out of her dock on the Brooklyn side, and which, owing to vessels in the harbor, did not see the ocean steamer.
2. Demurrage charged also against the ocean steamer for the time that the ferry-boat was repairing, though her owners, a ferry company, had a spare boat which took her place on the ferry.

APPEAL from the Circuit Court for the Eastern District of New York; this being the case:

Among the numerous ferries between Brooklyn and New York is that known (from the name of its New York dock) as the Catharine Street Ferry. The dock on the Brooklyn side is at Main Street, not opposite to Catharine Street, but considerably to the east of it; so that all ferry-boats coming out of it and on their way to the Catharine Street dock on the New York side have, after getting out of their dock, to turn considerably to the westward, and so run over to New York. To the west of Main Street the Brooklyn shore projects somewhat and then falls off towards the south.

On the afternoon of April 14th, 1865, the Manhassett, a ferry-boat belonging to the Union Ferry Company, a company having several other ferries between New York and Brooklyn, was coming out of her dock at Main Street, on

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one of her regular trips. A good deal of shipping was lying at anchor outside and to the southwest of the dock, in a way that intercepted the view westward by a boat coming out.

At the same time that the Manhassett was thus coming out of her dock, the ocean steamship Favorita was coming *up* the river (eastwardly or northeastwardly), and with a view of getting or keeping the eddy was running, as this court assumed on the weight of the evidence, "close in with the Brooklyn shore and across the mouths of the ferry slips," which line it.

A statute of New York makes it obligatory on all vessels passing up or down this part of the river to keep the centre and to move slowly. The Favorita was not at her full speed at all, but was still running at the rate of eight or ten miles an hour.

The pilot of the Manhassett, on account of the shipping lying adjacent to the pier, and perhaps in part from the curve in the shore, was unable to see the Favorita until he had passed out of the slip. As soon as this was done, and the vision to the southwest was unobstructed, he discovered the Favorita coming up the river within such close proximity to the Brooklyn side as to render the danger of collision imminent. Acting on the exigency of the moment, he rang his bell to stop, then to back, and blew two whistles, indicating to the Favorita his wish that she should sheer to the New York shore, and endeavored by a pressing signal to his engineer "to back her strong," so as to get his boat again into her slip. The Favorita, if she heard the whistles, did not respond to them, and if she changed her course at all it was in the direction opposite to that called for by the signal. A collision ensued; the Manhassett was struck forward of her port wheel-house, and suffered material injury.

The owners of the ferry-boat put another boat, which they owned, on the ferry, and sent the Manhassett for repairs. These it took ten days to make. They then libelled the Favorita for damages.

A good deal of testimony was taken, and it conflicted in

certain parts, including especially that as to whether the Manhassett had executed the proper manœuvres when she saw her peril—that is to say, whether she ought not to have gone straight on—and as to what the distance was at which the Favorita was running from the Brooklyn shore. The court, as already said, assumed that the Favorita was running "close to the Brooklyn shore and across the mouths of the ferry slips."

The District Court decided that both boats were in fault, and apportioned the damages, while the Circuit Court, imputing no fault to the Manhassett, fixed the blame on the Favorita alone, and decreed accordingly, and decreed also a certain sum, based upon the evidence, for demurrage. From that decree the present appeal was taken.

Mr. R. D. Benedict, for the appellant; Mr. B. D. Silliman, contra.

Mr. Justice DAVIS delivered the opinion of the court.

It is not necessary for the proper disposition of this case to reconcile conflicting testimony, as is frequently required in causes of collision. It is true the witnesses differ in opinion on the question whether the Manhassett pursued the proper course when threatened with danger, and also in the matter of distances, but these differences do not affect the main points on which we rest our decision.

It is manifest, on account of the extent of the shipping constantly passing through the East River at this point of it, that the greatest vigilance is required in the navigation of the stream by vessels passing up or down it. More especially is this so by reason of the constant passage of ferry-boats across the river. The extent of this business can hardly be overstated. Millions of passengers are transported between Brooklyn and New York annually, and, of necessity, the boats must make their trips with regularity by night as well as by day, and in all kinds of weather. All persons who seek the waters of this river must observe the rules which tend to the safety of navigation. This ob-

servance involves no hardship, and does not assert any exclusive or prior right in behalf of ferry-boats. It is necessary for the protection of all the different interests centring in this great harbor, and these interests are all to be recognized and considered in determining what is or is not good navigation under the circumstances. Manifestly the rules of navigation must vary according to the exigencies of business and the wants of the public. The rule which would be applicable in a harbor where the business was light and the passage of vessels not liable to be impeded, would be inapplicable in a great thoroughfare like the East River. In the former it might be that vessels could with safety run across the mouths of ferry slips in going to or from their wharves, while in the latter such navigation would necessarily be hazardous. It is hazardous, because ferry-boats are constantly emerging from their slips, and their masters generally unable, on account of the shipping moored about the piers, to discover approaching vessels until they have got their boats out into the open river. Common prudence, therefore, requires that vessels in the situation of the Favorita should occupy as near as possible the middle of the river. This is necessary for the mutual safety of all concerned in its navigation, and is required for the protection of life as well as property. If the middle of the river be previously occupied, and the ship is obliged to go nearer to shore in order to avoid other vessels pursuing the same track, she must run at such a slow rate of speed as to be easily stopped, so as not to endanger boats pursuing their regular and accustomed occupation. Any other rule than this would tend to the confusion rather than the safety of navigation, and put in jeopardy the lives of hundreds of people. The great and varied business interests conducted in this harbor require the rigid enforcement of this rule. Indeed, the necessity for it was so apparent that the legislature of New York, doubtless in order to render it more effective, embodied it in a statute. The Favorita, without excuse, violated this rule. It is plain from all the evidence that her object in going where she did was to seek and

keep the eddy. This may have made her navigation easier, but she cannot escape in this way, for there was no difficulty in running the boat out in the river, and the excuse that she went close in shore to avoid other vessels is not sustained by the evidence. There were no more vessels than usual in the river at the time, and no reason given why a departure from the usual path was necessary under the circumstances. Besides, suppose there was, the Favorita is condemned by her rate of speed. If she was placed in the predicament which compelled her to take the shore track, obviously her speed should have been lowered, so that the boat could have been readily stopped, and on a moment's warning changed to the right or left, as the necessities of the case may have required. It may be that in the middle of the river she could have been safely run at eight or ten miles an hour (a point on which we express no opinion), but clearly, running along across the pier ends and ferry slips of the East River at such a rate of speed is at all times dangerous, and the result proves that it was particularly so at this time.

There is a good deal of testimony bearing on the point of the distance of the Favorita from the shore at the time of the collision, but it is unnecessary to consider it, for the estimate of witnesses in times of sudden peril on such a subject is mere conjecture, and necessarily inconclusive. That the ship was out of the path she should have occupied, and improperly close to the Brooklyn shore, is evident enough, because both vessels were in perilous proximity the moment the Manhassett emerged from her slip. Had she been at a suitable distance from the shore, or going with a materially lessened speed, the collision would not have happened, and the inquiry arises whether she must alone suffer for the loss that occurred. On a consideration of the whole evidence we are unable to see in what respect blame can be cast on the Manhassett.

It is clear that the officers of the Manhassett did not see the Favorita, on account of intervening vessels, until the former had emerged from her slip, and equally clear that

they had no right to expect the Favorita to be in the wrong place in the river. The peril was imminent as soon as the Manhassett had cleared her slip, and both vessels were in full view of each other. Both at once applied the means and took the course deemed proper by their officers to prevent the catastrophe. It is said if the Manhassett had advanced instead of stopping she would have cleared the steamship. This may or may not be true, but if true, she is not in fault for this error of judgment. It was a question whether to advance or to stop and back, and the emergency was so great that there was no time to deliberate upon the choice of modes of escape. In such a moment of sudden danger, caused by the misconduct of the Favorita, the law will not hold the pilot of the Manhassett, acting in good faith, guilty of a fault, if it should turn out after the event that he chose the wrong means to avoid the collision, unless his seamanship was clearly unskilful. And this we do not find to be the case. On the contrary, if there were error at all, it was such a mistake of judgment as would likely be committed by any one in similar peril. If the Favorita had been where good navigation required her to be, or had she slackened her speed so as to be able to stop as soon as she discovered the Manhassett, the danger would not have existed, nor the accident happened. She is, therefore, in our opinion, chargeable with all the consequences that flow from this collision.

The appellants object to the allowance of demurrage by the commissioner on the ground that the ferry company suffered nothing by the loss of the use of the Manhassett while undergoing repairs, because her place was supplied by a spare boat kept for emergencies, and which would otherwise have been idle. This subject was fully discussed in the case of *The Cayuga** by the learned circuit judge of the second circuit, who sustained a similar allowance, and as that case was affirmed on argument in this court,† and

* 7 Blatchford, 385.

† 14 Wallace, 278.

his views adopted, we must consider the question as no longer open to discussion.

DECREE AFFIRMED.

ESPY *v.* BANK OF CINCINNATI.

A check drawn by S. & M. on the bank for $26.50, in favor of H., was raised to $3920, and the payee's name changed to E. H. & Co., and offered to the latter by a stranger in payment for bonds and gold purchased by him. E. H. & Co. sent the check for information to the bank, whose teller replied "It is good," or "It is all right." In a suit brought by the bank against E. H. & Co. a judgment was given for plaintiff. On error to this court it was *held*—

1. That where money is paid on a raised check by mistake, neither party being in fault, the general rule is that it may be recovered back as paid without consideration.
2. But that, if either party has been guilty of negligence or carelessness by which the other has been injured, the negligent party must bear the loss.
3. That where a party to whom such a check is offered sends it to the bank on which it is drawn for information, the law presumes that the bank has knowledge of the drawer's signature and of the state of his account, and it is responsible for what may be replied on these points.
4. That unless there is something in the terms in which information is asked that points the attention of the bank officer beyond these two matters, his response that the check is good will be limited to them, and will not extend to the genuineness of the filling-in of the check as to payee or amount.
5. *Quære:* Would the indorsement of the word "good," with the officer's initials, under such circumstances, make the bank liable beyond the genuineness of the signature and the possession of funds to meet the check as certified?
6. Where a check is certified for the purpose (known to the bank) of giving it credit for negotiation or circulation, to be used as money, and it is so passed into the hands of third persons, the bank would be bound, though the case might be otherwise when it was only certified to give the party presenting it assurance that it was good for his own satisfaction in taking it.
7. But a verbal reply that a check is good, given for the information of the party about to receive it, extends only to matters of which the bank had knowledge, or is presumed to have by the law, unless he is told that more extended information is expected or asked for as to the validity of the check.

Statement of the case.

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

Stall & Meyer were grocers of Cincinnati, and kept a deposit account in the First National Bank there. Espy, Heidelbach & Co., were brokers in the same city, dealing in government bonds and gold. On the 26th of April, 1870, a well-looking stranger entered the office of these last, and proposed to purchase of them certain bonds and a specified quantity of gold. They agreed to sell both to him at a price named, $3920. He then told them that he would go to Stall & Meyer, with whom he represented that he had dealings, get their check for the amount, and return in about two hours. He went away and returned in about two hours with a check of Stall & Meyer, drawn apparently to the order of Espy, Heidelbach & Co., and for the sum of $3920, which he offered to them for the bonds and gold that he had bought. The firm sent one of their clerks, named Snarenberger, to the bank with directions to ascertain if the check was good, and to say that it was presented by a stranger. Snarenberger presented the check to the teller of the bank, a person named Sanford, who examined it, looked at the account of Stall & Meyer on the bank books, and said to Snarenberger, "It is good," or "It is all right" (the witnesses did not agree which), "send it through the clearing-house."

According to Snarenberger's account, he told Sanford that the check was offered by a stranger. Sanford denied that he was told this; but he asserted notwithstanding that he told Snarenberger that if the check was offered to Espy, Heidelbach & Co. by a stranger, he would advise them to have nothing to do with him, no matter how well-looking he was.

After this interview, examination, and answers, Snarenberger went back to the office of Espy, Heidelbach & Co., and informed them that the teller had said, "It is all right, send it through the clearing-house." They thereupon delivered to the stranger the bonds and the gold that he had contracted for, and he went his way and was no more heard of.

The check was put through the clearing-house and paid. But on the next day it was discovered that it was an altered or "raised" check; that the stranger had gone to Stall & Meyer professing to purchase some groceries for a Mrs. E. Hart; that having purchased $23.50 worth, he handed them a $50 bill in payment, asking them to pay him the difference, $26.50, by a check of their own, so that Mrs. Hart might see that he had taken no commission, which they accordingly did, the check being drawn to the order of Mrs. E. Hart; and that the stranger had very ingeniously altered the instrument by substituting as the sum to be paid $3920 instead of $26.50, and by substituting the name of Espy, Heidelbach & Co., for that of Mrs. E. Hart as payee.

Espy, Heidelbach & Co. not being willing to pay back the money got upon the check, the bank sued them in assumpsit to recover the amount improperly paid.

On the trial the plaintiff called one Goodman, who, having testified that he had been a banker in Cincinnati all his life, and was familiar with the customs and usages of banks and bankers there, was asked,

"When a check is sent by a bank, to which it is offered, to the bank upon which it is drawn, to know whether it is good or not, and the answer is, 'That is good,' or 'All right,' has that answer . . . acquired any peculiar or limited meaning? If so, state what that meaning is, and to what it is limited."

The court allowed the question under objection and exception, and the witness having testified that this language had acquired a peculiar or limited signification, and was understood to refer to the genuineness of the signature, and whether the money was in bank to meet the check; and on cross-examination, that he had never heard the meaning of the terms discussed, or any question made as to the same, or known of any transaction requiring a decision as to their meaning before April 26th, 1870,—and having further testified that the terms "It is good," or "It is all right; *send it through the clearing-house*," had not acquired any peculiar or limited meaning—the defendants moved to exclude the

answer given to the question last aforesaid, as incompetent and irrelevant, which motion the court overruled, and the defendants excepted.

Similar evidence from other witnesses was received, under objection and exception.

The plaintiff made ten requests for charges, including as a fifth and sixth, these two:

"*Fifth.* If the defendants, before receiving this check, sent their messenger to the plaintiffs' bank to examine the check carefully, and if it appears from the evidence that among bankers at that time such a request was understood to refer to the genuineness of the signature and state of the account, this inquiry must be presumed to be intended to refer to those parts of the check to which they had the means of giving accurate information, and nothing else; and if as to these matters true answers were given, and the plaintiffs' teller gave his honest judgment as to the general character of the check, and had no knowledge of and could not readily discover this alteration by an inspection of the check, then the plaintiffs are not estopped from recovering this money.

"*Sixth.* If at the time of this transaction the words 'good' or 'all right' among bankers was simply understood to refer to the genuineness of the signature and the state of the account, and the said words were so used and intended to be used by Mr. Sanford at that time when he said the check was 'good' or 'all right,' and if the said check had a fraudulent alteration, so skilfully done as not to be readily discovered by an inspection, and which was not known to either party at the time the said check was presented to Mr. Sanford, and if the signature of the check was genuine, and the account good, then the plaintiffs are not estopped from recovering the said money in this action by reason of the said answer given by Mr. Sanford."

The two, thus above given, were *refused.*

The defendants made eight requests for charges, including this one as a fourth, which the court *gave.*

"*Fourth.* A verbal certification of a check is equally valid with a written certification, and constitutes a contract, obligatory on the party giving the certification, the consideration of

which is the property parted with by the party receiving the certification on the faith of the certification."

The whole ten instructions requested by the plaintiff were given, with the exception of the fifth and sixth ones, quoted *supra*, p. 607, which two, as already said, were refused.

On the other hand, the eight instructions requested by the defendants were refused (or granted only in modified forms), with the exception of the fourth one, as above quoted.

To the grant of the eight requests of the plaintiff granted, and to the refusal (or grant only in modified forms) of the seven not granted or only so granted, and requested absolutely by the defendants, *the defendants* excepted.

However, neither the instructions which, at the plaintiff's request, were granted, nor those which in face of the defendants' request were denied, or granted only in modified forms, need here be set out; since the court, of its own motion, summed up (as this court considered) the substance of every instruction given at the request of the plaintiff, and of all its denials of requests by the defendants, in certain propositions made thus in a charge of its own:

"1. If the object of the defendants in sending the check to the plaintiff was to have them examine the same and pass upon the genuineness of the signature of the drawers, and the state of their account with them, and the plaintiff so understood their object, and returned to them the answer, that 'It is good,' or 'All right; send it through the clearing-house,' such answer would be a parol certification of the check, as to the genuineness of the signature, and that the drawers had funds in their hands to meet it, and the plaintiff by such parol certification would be estopped from denying either that the signature was genuine or that the drawers had funds to meet the check.

"2. If the defendants, in order to test the genuineness of the signature of the drawers, that they had funds in their hands to meet it, and to test its genuineness in all other respects, sent it to the plaintiff for inspection and examination, and the plaintiff, knowing the full extent of the object for which it was sent, sent back the reply, 'It is good,' or 'It is all right,' and if the defendants relied upon that answer, and were induced to act

upon it, and parted with their bonds and gold upon the assurance of the answer, the plaintiff will be estopped from setting up the fact that the check was a raised check.

"3. If the defendants had no suspicion of the check being a raised check, and sent the check to the plaintiff for the purpose of examination, without specifying the particulars to which they wished the examination directed, the plaintiff had a right to presume that such examination was desired in relation to such points of which the law presumed them to have knowledge, to wit, the genuineness of the drawers' signature, and the state of their account, and if in good faith they made examinations in regard to these points, and they had no knowledge of the raising of the check, or had no particular means not common to the defendants of knowing that it had been raised, their answer to the inquiry must be confined to the genuineness of the signature of the drawers and the state of their account, and cannot be extended as an assurance or guarantee that the check is not a raised check, and plaintiffs are not estopped from setting up such fact.

"4. If the defendants and the plaintiffs were mutually ignorant of the fact of the raising of the check, and neither party had any suspicion that it had been so raised, and the parties having within their power equal means of ascertaining that fact, the law did not impose upon the plaintiff more than upon the defendant the duty of calling upon the drawers to ascertain whether such check had been so raised, and if the plaintiff under such circumstances paid the amount of said check to the defendants, such payment is not an adoption of the check as genuine, and the plaintiffs are not bound by said payment, and are not estopped from showing that the check was so raised."

To the part three of these instructions the defendants excepted.

Messrs. G. Hoadly and E. M. Johnson, for the plaintiff in error:

I. *As to the admission of incompetent testimony.*

This consists of several particulars, among them may be mentioned the allowing Goodman to testify to a peculiar meaning attributed, by usage of Cincinnati bankers, to the words, "that is good," or "all right;" no one having pre-

tended that those were the words used; and he testifying that the words, which were in fact used,—"It is good," or "It is all right; *send it through the clearing-house*,"—had not acquired a peculiar meaning, and further, that before the day of the transaction in controversy, April 26, 1870, he had never known of a transaction requiring a decision as to the meaning of the words, "It is good," or "All right," and had never heard their meaning discussed, or any question made as to the same.

II. *As to the legal effect of the words used by plaintiff's teller to the defendants' messenger.*

Both parties agreed that the check was shown to Sanford; that he was the proper officer to certify checks, or furnish information of their value; that he knew it was offered to Espy, Heidelbach & Co., and that the offer was pending and undetermined, awaiting his reply; that he examined the check, and said, with the design of having the statement repeated to the defendants, and that they should act upon it, "It is good," or "All right," "send," or "put it through the clearing-house."

1. *These words constituted a verbal certification, equivalent in law to a written certification of the check.*

In the leading case of *Merchants' Bank* v. *State Bank*,* the form of certification adopted was,

"Good. C. H. SMITH, Cashier."

In *Meads, Receiver, &c.*, v. *The Merchants' Bank of Albany*,† the form adopted was,

"Good. KIRTLAND, Teller."

Not only is the form of words thus used for written certification almost identical with those in the present case, but in essential meaning it is quite the same. Both the written and spoken phrase assures the holder that the check, in the form in which it then appears, is good, and will be paid to the holder on presentation. It is an engagement by the

* 10 Wallace, 604. † 25 New York, 143.

bank, upon which will rest the duty of paying the check, that it will comply therewith.

Wherein does, or can the written "certificate of the bank that a check is good," differ, in legal effect, from the same certificate by parol? The form of words is the same; the consideration the same; the intent and meaning the same.

The authorities concur in holding a verbal certification equivalent to a written, or to acceptance.*

2. *Being equivalent to a written certification, the examination and statement of the teller constitute an original obligation, in the nature of an acceptance, which the certifying bank must comply with by payment, and cannot recover back after payment.*

In *Merchants' Bank* v. *State Bank*, this court says:

"The certification of a check, is an undertaking that the check is good then, and shall continue good, and this agreement is as binding on the bank as its notes of circulation, a certificate of deposit payable to the order of the depositor, or any other obligation it can assume. The object of certifying a check as regards both parties, is to enable the holder to use it as money. The transferee takes it with the same readiness and sense of security that he would take the notes of the bank. It is available also to him for all the purposes of money. Thus it continues to perform its important functions until in the course of business it goes back to the bank for redemption, and is extinguished by payment."

This authority is of course conclusive, and it is in full accord with the other decisions.†

3. *The certifying bank cannot escape its duty of payment, or, having paid, recover back the money, under pretence of a fraudulent alteration of the check before certification.*

* Robson *v.* Bennett, 2 Taunton, 388; Barnet *v.* Smith, 10 Foster, 256.

† Farmers' and Mechanics' Bank *v.* Butchers' and Drovers' Bank, 16 New York, 125; Barnes *v.* Ontario Bank, 19 Id. 159; The Girard Bank *v.* The Bank of Penn Township, 39 Pennsylvania State, 92; Bickford *v.* First National Bank of Chicago, 42 Illinois, 238; Brown *v.* Leckie et al., 43 Id. 497; Clarke National Bank *v.* Bank of Albion, 52 Barbour, 599; Salt Springs Bank *v.* Syracuse Savings Institution, 62 Id. 108–9.

Alteration *after* execution will discharge the maker or other party to a promissory note, bill of exchange, or check. But alteration *before* execution is quite different.

In *Sanderson* v. *Collman*,* Tindal, C. J., says:

"The first point in this case is whether the drawee, after accepting and thereby giving an apparent validity to a bill, has a right in an action against him as acceptor to set up as a defence that the name of the drawer was forged, *or other matter invalidating the bill.* And it appears to me that he has no such right."

In "assumpsit by the indorsee against the acceptor of a bill of exchange, the plea was that before the bill became due, and whilst it was 'in full force and effect,' the date of it was altered by the drawer, whereby it became void: *Held*, that the plea was bad, because it did not allege the alteration to have been made *after* acceptance."†

In *Ward* v. *Allen*,‡ the court say:

"It is no defence to an action by a *bona fide* holder of a bill of exchange against the acceptor, that the bill was fraudulently altered before acceptance."

It seems clear from these considerations and authorities, that the theory of law applied to the case by the court below was founded in error.

III. *As to the plaintiff's supposed right to recover for money paid by mistake.*

It is obvious that this right does not extend to every case of mistake. At law, the right to recover money paid by mistake is limited to the cases where no consideration passed.§ In the case at bar, there was a consideration; the consideration consisting of the detriment to the defendant in receiving the check, and delivering the gold and bonds, upon the faith of the plaintiff's representation that the

* 4 Manning & Granger, 218.

† Langton *v.* Lazarus, 5 Meeson & Welsby, 629. ‡ 2 Metcalf, 53.

§ Hoffman *v.* Bank of Milwaukee, 12 Wallace, 181; Ellis & Morton *v.* Ohio Life Insurance and Trust Co., 4 Ohio State, 628; Koontz *v.* Central National Bank, 51 Missouri, 279.

check was good, and its promise to pay at the clearing-house.

In equity, a complainant seeking to set aside and cancel a transaction, and recover moneys paid or other property transferred or conveyed, can succeed only on condition that he replace the defendant in *statu quo*, by returning him the consideration he parted with. If part of this consideration consists of money paid at the complainant's instance to a third person, that money must be restored, as a condition of decree.

This rule is recognized even at law, in Pennsylvania. Chief Justice Gibson in *Boas* v. *Updegrove*,* states it thus:

"Money voluntarily paid by mistake cannot be recovered back where the parties cannot be placed in *statu quo;* for where the blunder necessarily imposes a loss on some one, it must be borne by the author of it."

Who was the author? Certainly no one but the plaintiff, whose teller, after careful inspection of the check, replied, "The check is good, or all right; send it through the clearing-house." Upon the faith of this representation and promise the defendants parted with their gold and bonds. Return the value of this gold and bonds, or cease to press for a rescission of the dealings between the parties.

Concede that the whole matter was a blunder, that both parties were equally ignorant, and that neither of them suspected, or could have discovered it was a raised check, the first blunderer was the plaintiff, and therefore it was in law the author of the blunder. This principle was recognized and enforced in the *Irving Bank* v. *Wetherald.*†

IV. *The plaintiff is estopped in pais to dispute its liability upon the acceptance.*

A case quite similar to that under discussion was disposed of in Alabama by the principle of estoppel.‡ The court say:

"If the maker of a promissory note tells one seeking to

* 5 Pennsylvania State, 518.

† 36 New York, 335.

‡ Brooks v. Martin, 43 Alabama, 360.

trade for it, and desirous to know if he has any defence against it that it is 'all right,' he will not be permitted afterwards to dispute this admission when sued on the note by the party to whom the admission was made."

The principle of estoppel in pais was thus stated by Lord Denman in *Pickard* v. *Sears*.*

"Where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time."

The word "wilfully" as here used has since been construed to mean "voluntarily:"†

Had Sanford refused to answer, or said, "Inquire of Stall & Meyer," or, "The amount stands to their credit, and the signature is genuine," there would have been no dispute. He chose not thus to limit his assurance, but preferred rather the enlarged statement, "the check is good;" not "the signature and amount," but "the *check* is good, or *all* right; send it through the clearing-house." Thus he created the possibility of injury, giving to the stranger the opportunity of fraud, and his principal should bear the loss.

Mr. T. D. Lincoln, contra.

Mr. Justice MILLER delivered the opinion of the court.

Stall & Meyer, customers and depositors with the First National Bank of Cincinnati, made their check on that bank for the sum of $26.50, payable to the order of Mrs. E. Hart, and delivered it to a stranger to all the parties to the transaction, out of which this controversy arose. This man erased the name of the payee and the amount for

* 6 Adolphus & Ellis, 475.

† Cornish *v.* Abington, 4 Hurlstone & Norman, 549; and see Dezell *v.* Odell, 3 Hill, 215; Eldred *v.* Hazlett's Administrator, 33 Pennsylvania State, 309; and Weaver *v.* Lynch, 25 Id. 451; Buchanan *v.* Moore, 13 Sergeant & Rawle, 306; Jorden *v.* Money, 5 House of Lords Cases, 212

which it was given and inserted the name of Espy, Heidelbach & Co., bankers and brokers, and also the sum of $3920, and passed it to Espy, Heidelbach & Co., in payment of bonds and gold which he purchased from them. The check was paid by the bank through the clearing-house, and the next day the fraud was discovered, and the bank made a demand on Espy, Heidelbach & Co., for the amount as paid through a mistake.

If this were all the case there could be no doubt of their right to recover. The principle that money so paid under a mistake of the facts of the case can be recovered back is well settled, and in the case of raised or altered checks so paid by banks on which they were drawn there are numerous well-considered cases where the right to recover has been established, when neither the party receiving nor the party paying has been in any fault or blame in the matter. Of course if there is fault on the part of the party receiving pay for such a check it strengthens the right of recovery.

But in the case before us the rights of the parties are to be determined by what took place between themselves before the check was paid. It appears by the bill of exceptions that the man who perpetrated the fraud, having ascertained from Espy, Heidelbach & Co. the price of the bonds and gold which he proposed to buy of them, told them that he had dealings with Stall & Meyer and would get their check for the amount, and after an absence of two or three hours returned with the check in question. Not wishing to take it from this stranger without further information, they sent Mr. Snarenberger, one of their clerks, to the bank with instructions to ascertain if the check was good, and to say that it was presented by a stranger. Snarenberger presented it to Mr. Sanford, the proper officer of the bank, who, after examining the check and the state of Stall & Meyer's account, said, "It is good," or "It is all right; send it through the clearing-house."

There is a slight disagreement between Snarenberger and Sanford as to the precise words used, but we do not deem the difference of any importance. But there is difference in

another point between these two, which with the jury might have had some weight. Snarenberger testifies that he told Sanford that the check was offered to his house by a stranger, which Sanford denies; and Sanford says that he told Snarenberger that if the check was offered by a stranger he would advise them to have nothing to do with him; that he would be careful and not pay so large a check to a stranger, no matter how good-looking he was.

On the return of Snarenberger, Espy, Heidelbach & Co. delivered the bonds and gold to the stranger and received the check in payment, and in the language of the record the stranger went his way and was heard of no more. Espy, Heidelbach & Co. indorsed the check, and it was paid, as stated already, through the clearing-house.

In a suit brought by the bank to recover the money it had a judgment, to reverse which this suit is brought.

The defendants excepted to the admission of certain testimony given by the plaintiffs on the trial for the purpose of proving that the words "all right," "it is good," when used in reference to a check presented at the bank on which it is drawn, had, by the custom and usages of the bankers of Cincinnati, acquired a limited and well-understood meaning, namely, that it had reference exclusively to the genuineness of the drawer's signature and to the state of his account at the bank. The objections made to this evidence were that in its nature it was inadmissible; that the person testifying showed his want of knowledge on the subject, and that the expressions "all right" and "it is good" were not the precise expressions used. But we need not inquire whether the court was right in admitting this testimony, because in the subsequent progress of the trial it became immaterial. The court refused to charge the jury, as requested by the plaintiffs in their fifth and sixth prayers, that if there was such an understanding among bankers as to the use of the terms mentioned, it limited the responsibility of the bank to these two matters; and in the charge of the court of its own motion it placed the case beyond the influence of such testimony, by instructing the jury that as matter of law such

was the effect of the words supposed, when used under the circumstances suggested by the interrogations of plaintiff's counsel in regard to the understanding of them among bankers.

We are relieved also, by an attentive consideration of the instructions given by the court, from another very grave question much discussed by counsel in this court, that is, whether a verbal statement by the proper officer to certify checks that the one presented is good, is, or is not, the equivalent of a written certification of the check in the usual manner. For the fourth instruction asked by the defendants and granted by the court is precisely what is claimed by counsel here as to the effect of such verbal statement, as will be seen at once by its inspection. It is as follows: "A verbal certification of a check is equally valid with a written certification, and constitutes a contract obligatory on the party giving the certification, the consideration of which is the property parted with by the party receiving the certification on the faith of the certification." The plaintiff in error, against whom the jury rendered their verdict, notwithstanding the instruction thus given, must be held to have had the benefit of the principle thus asserted with the jury, whether the court was right in giving it or not.

The plaintiffs on the trial below prayed ten distinct instructions to the jury, all of which were granted except the fifth and sixth, which we have considered. The defendants prayed eight instructions, all of which were refused or modified except the fourth, to which attention has just been called. Upon all these rulings of the court as well as upon the charge of the court of its own motion, errors are assigned.

But we are of opinion that the whole case turns upon the latter charge of the court. This consisted of four distinct propositions:

1. That if defendants below sent the check to the bank for the purpose of having the latter pass upon the genuineness of the signature and the state of the account of the drawer, the statement that it was good, or all right, would

estop them from denying that the signature was genuine, and there were funds to meet it.

2. If defendants sent the check for the purpose of testing the genuineness of the signature of the drawers, the state of their account, and to test its genuineness in all other respects, and plaintiff knowing the full extent of the object for which it was sent, replied "It is good," or "It is all right," plaintiff is estopped to set up that the check was raised.

3. That if the defendants had no suspicion that the check was raised, and sent it to plaintiffs for examination without specifying the particulars to which they wished the examination directed, the plaintiffs had a right to presume that it was desired in relation to such points as the law presumed them to have knowledge, namely, the genuineness of the drawer's signature and the state of his account, and if they answered in good faith and had no means other than those of defendants of knowing that the check was raised, they were not estopped from setting up that fact.

4. That if the parties were mutually ignorant and unsuspicious concerning the check being raised, the law did not impose upon plaintiffs more than the defendants, the duty of calling on the drawers for information on that subject.

The plaintiffs in error, defendants below, can have no cause to complain of the first and second proposition laid down by the court below.

If the bank officers had their attention turned to the matter of the raising of the check, or even had notice that in applying to them for information the parties presenting it did so for the purpose of getting information which would include that subject, they could have limited their general statement that it was good so as to exclude its application to that point, or might have declined answering altogether. If, with this notice, says the court, they gave a general statement that the check was good, or all right, these words must be held to have reference to all the matters on which they knew that the other party asked or desired their opinion. Unless we are prepared to hold to the fullest extent the principle asserted by the plaintiffs in error, that the

general statement that the check is good binds the party making it as to everything connected with its validity, this charge of the court is as favorable to them as it should have been, and is only doubtful as it militates against the bank.

We think it is equally clear on principle that there was no error in the fourth proposition of the court. Undoubtedly, where there exists a suspicion that the check has been altered in the amount, or in the name of the payee, the proper party to be inquired of is the maker of the check. He and he alone has the means of settling that question conclusively. The bank, as a general rule, can know this no better than the party to whom it is presented for negotiation. It is the latter who first parts with his money or property on the faith of the check, and he is as much bound to diligent inquiry on that question as the bank. The latter is held by the law to know the drawer's signature and the state of his account. He is no more bound to know or to answer beyond these two matters than the party who presents it for information. So if there be no suspicion of the fraud in raising the check, the parties are equally innocent, and no question of the relative degree of diligence in making inquiry on that subject arises between them. This is certainly true unless the bank, if it consents to give any information at all about the validity of the check, is bound to answer as to everything which may affect its validity. As this contention is the turning-point of the case and is the one which is responded to in the third of the propositions laid down by the court, we turn now to consider that.

This assumes that neither party had any suspicion that the check was raised and that no special reference was made to that point in the inquiry of the defendants below. It is also to be considered that the bank was not asked to certify it in the usual way by indorsing it as good, and that the party who asked information was the one whose name was in the check as payee. We do not propose to decide here what would have been the legal effect in the present case if the bank officer had, under precisely these circumstances,

been requested to indorse the check as good, and had done so, affixing his name or his initials in the ordinary way.

The strong argument of the plaintiff in error is that such an indorsement would bind the bank for the entire validity of the check, and that what was said verbally by Sanford was the legal equivalent of such an indorsement. If this latter point were conceded no case precisely in point has been produced where this would be held to bind the bank under the circumstances of the present case. The authorities relied on are mainly acceptances of drafts or bills of exchange; and it is the same class of cases that are relied on to show that a verbal acceptance, or promise to accept, is equivalent to a written acceptance. The highest courts in this country and England have regretted the decisions which gave original sanction to this latter proposition.*

Bank checks are not bills of exchange, and though the rules applicable to each are in many respects the same, they differ in important particulars.† Among these particulars is that a check is drawn against funds on deposit with the banker, and the indorsement that it is good implies that when the indorsement is made there were funds there to pay it. A bill of exchange is not drawn on such deposits necessarily, and its acceptance raises no implication that the drawer has such funds to meet it. It is a new promise by the acceptor to pay, funds or no funds. In both cases the bank is supposed to know the signature of its correspondent, and cannot, after indorsing it as good or accepted, dispute the signature. But as one of the main elements of utility in a bill of exchange is that it shall circulate freely, and it may thus pass through many hands on the faith of the acceptor's signature, it may possibly be that he should be responsible for the promise contained in it, as it came from his hands, for it was drawn on no special fund, and the possession of such fund by him does not affect his liability. By such acceptance he becomes primarily liable, as if he were

* Boyce *v.* Edwards, 4 Peters, 122; Johnson *v.* Collings, 1 East, 103.

† Merchants' Bank *v.* State Bank, 10 Wallace, 647.

the maker of a promissory note. How far these reasons should be applied to a certification that a check was good seems extremely doubtful, both on principle and authority. Where the object is to use the indorsement to put the check in circulation, or raise money on it, or use it as money, and this object is known to the certifying bank, it may be argued with some force that the bank should, as in the case of an acceptance of a bill of exchange, be held responsible for the validity of the check as it came from the hands of the certifying bank. Such a rule would seem to be just when checks are certified, as we know they often are, without reference to the presence of funds by the drawer, and when the well-known purpose is to give the drawer a credit by enabling him to use the check as money by putting it in circulation.

But such a verbal statement as was made in the present case cannot come within that principle. There was no design or intent on the part of the bank to assume a responsibility beyond the funds of the drawer in their hands, nor to enable the payee of the check to put it into circulation. Nothing was said or done by the bank officer which could be transferred with the check as part of it to an innocent taker of it from the payee. Such subsequent taker would have no right to rely on what was said by the bank officers, any further than the payee would.

We are of opinion that the court was entirely right in treating the case as one in which information was sought and obtained by Espy, Heidelbach & Co. for their own use, and to govern their own action. For such information as the bank was willing to give, and did give, it was, no doubt, responsible, because it had reason to believe that the other party would act upon it. But only to this extent and only on this principle is it liable. It is not liable as for accepting or indorsing a draft or check with intent that it might go upon the market for general use and negotiation with the credit of its name attached to the paper, just as it was placed on the market.

Under these circumstances we are of opinion that the Circuit Court was right in holding that in the absence of any-

thing tending to direct his attention to other matters, the bank officer had a right to suppose that information was desired of him only in regard to the signature of the drawers and the state of their account. These were material facts to be known, which both common sense and commercial law presumed to be within his knowledge. The answer he gave that the check was good or was all right must be supposed to be responsive only to these two points. The genuineness of the payee's name and of the sum filled in the body of the check were as well known and as easily ascertainable by the payees themselves as by the bank officer, and unless the inquiry was so framed as to call his attention to these points, he had no reason to suppose, in the nature of the transaction, that he was expected to give information in regard to them. So the response of "good" should not on sound principle be held to extend to them. He was under no moral or legal obligation to give an opinion on these points. He had no reason to suppose that he was asked for such an opinion, and because he did give an opinion that the check was good in the only points of which he knew anything, it would be illogical to hold the bank liable on the ground that the response meant good absolutely and for all purposes.

The court told the jury very clearly that if the bank officer had any reason to believe that the defendants were seeking information in regard to the general validity of the check, or if they had been asked any question which related to the genuineness of the check as to amount or the names of the payees, his statement that it was all right would bind the bank. This was as far as the court ought to have gone in that direction, for they were not bound to answer such a question, nor, as we have already said, does the law or the nature of the business imply that they had any superior information on these points to that which the defendants had.

The case was certainly very fairly put before the jury, so far as the rights of the plaintiffs in error are concerned, if the views here advanced are sound, and the judgment must be

AFFIRMED.

GRANT *v.* STRONG.

A builder's lien held not to have attached where a builder took a real security for payment of the work which he was to do, and afterwards, the work being all done, gave it up and took a mere note.

APPEAL from the Supreme Court of the District of Columbia.

Strong filed a bill in equity in the court below against Grant to establish a mechanic's lien for the sum of $1547. There was no denial that work was done, nor that it was of the value alleged, nor that it was of that character for which liens are allowed by the laws of the District.

The question was whether, under all the circumstances of the case, such a lien ever attached.

The material facts were these:

On the 14th day of October, 1869, the parties made an agreement that Strong should do the brickwork on sixteen houses which Grant was building. The price of the work per thousand bricks was agreed upon, and that Strong should take one of the houses in payment for his work, the price of which was also fixed; and this contract was reduced to writing. A conveyance was made by Grant of the lot which Strong was to have, and the deed duly acknowledged and recorded and placed in the hands of Enoch Totten, as an escrow, to be delivered to Strong when the work was completed. During the progress of the work dissatisfaction arose between the parties after the larger part of it had been done, and on the 27th of November, a new written contract was made. This, after reciting the former agreement, says that it is agreed that Strong shall finish all the brickwork up to the first floor joists without delay. The price was changed, but the old agreement was referred to for the mode of measurement. It is then said that the same is to be paid for in Grant's negotiable note, payable within three months from the date of the completion of the work, and then the agreement of October 14th shall be cancelled and declared

null and void, and of no effect, and the escrow in the hands of Totten be delivered up to Grant, otherwise said agreement to remain in full force and effect.

Another paper, signed by both parties, dated January 1st, 1870, recites the former agreements, and that the work had been finished and measured, and that Grant had given his promissory note for the amount, according to the contract of November 27th; and that, therefore, the escrow in Totten's hands is declared null and void, and is to be delivered to Grant by Totten.

A good deal of evidence was found in the record as to what was said and done by the parties in the matter, and the court below decreed that a lien existed. From that decree this appeal was taken.

Messrs. W. A. Meloy and F. Miller, for the appellant, referred to *Barrows* v. *Baughman*,* *Haley* v. *Prosser*,† and numerous other cases, to show that a builder's lien cannot exist where the agreement provides for another sort of security.

Mr. W. A. Cook, contra, cited *The Kimball*,‡ and many cases, arguing from them, and on principle, that a lien is never extinguished by a mere note, except on the plainest evidence of an intention to extinguish it; but on the contrary, when a lien clearly exists, that a note is always regarded as but cumulative.

Mr. Justice MILLER delivered the opinion of the court.

We have much argument in the case as to the effect of the note as a negotiable security operating as a release of the mechanic's lien. We think this has but little pertinency to the case. We admit that when a lien has once attached, the taking of such a note does not of itself operate as a release. The question whether a lien is obtained, or is displaced when it once attaches, is largely a matter of intention to be inferred from the acts of the parties and all the surrounding

* 9 Michigan, 213. † 8 Watts & Sergeant, 133. ‡ 3 Wallace, 37.

circumstances. In the case before us, much conflicting testimony as to what was said and done by the parties, is found in the record. We need not consider this, for in our view the decision of the case must rest on the written agreements we have mentioned, and from them we are forced to the conclusion that the appellee always relied wholly upon other security than a mechanic's lien for his pay, which he deemed sufficient, and which he voluntarily agreed to surrender.

It is very clear that under the first contract, the one under which the larger part of the work was done, he was to take his pay, not in money, but in the lot on which one of the houses was built; and that to secure the completion by Grant of the sale when the work was done, the deed was made and placed in the hands of Totten. Under these circumstances no lien could accrue for the work on that, or on the other buildings. When the second contract of November 27th was made, Strong did not give up this security, but still retained and relied on it, and it was made a part of the new contract, that the escrow should remain in the hands of Totten, and should be in full force until the work was completed, measured, and the sum due on it paid by the promissory note of Grant. Now with this security in Totten's hands during all the time the work was going on, looked to and relied upon by Strong, how can it be said that Strong relied upon a mechanic's lien, or that Grant intended in addition to that deed for one lot to allow Strong to obtain a lien upon all the others? And so much reliance was placed on this escrow by Strong, that only after all was settled, the work measured and paid for, as the parties had stipulated by Grant's note, did Strong sign the order for the delivery to Grant of the deed. During this time all the facts repel the idea of a lien.

We do not think that the giving up of the escrow, and the taking of the note in its place, according to the terms of an agreement previously made, and which obviously did not look to a mechanic's lien as part of the transaction, would create a lien where none existed before.

In short, we are of opinion that these agreements show an

acceptance and reliance by Strong on another and very different security for the payment for his work, inconsistent with the idea of a mechanic's lien, and that no such lien ever attached in the case.

DECREE REVERSED, with directions to

DISMISS THE BILL.

Mr. Justice SWAYNE dissenting.

DAVENPORT *v.* DOWS.

Although a stockholder in a corporation may bring a suit when the corporation refuses, yet, as in such case the suit can be maintained only on the ground that the rights of the corporation are involved, the corporation should be made a party to the suit, and a demurrer will lie if it is not so made.

APPEAL from the Circuit Court for the District of Iowa.

Dows, a citizen of New York, in behalf of himself and all other non-resident citizens of Iowa, who were stockholders in the Chicago, Rock Island, and Pacific Railroad Company, filed a bill in the court below against the city of Davenport, and its marshal, to arrest the collection of a tax, alleged to be illegal, levied by the said city for general revenue purposes, on the property of the company within its limits. The bill assigned as a reason for its being filed by Dows, a stockholder in the company, instead of by the company itself, that the company neglected and refused to take action on the subject. A demurrer was interposed to the bill, which was overruled, and on the defendants refusing to answer over, the Circuit Court ordered that the collection of the tax be perpetually enjoined. From this, its action, the defendants appealed, insisting that the Circuit Court erred in overruling the demurrer, for three reasons:

First. Because the railroad company was not made a party to the bill.

Second. Because the complainant had a complete remedy at law; and,

Third. Because the tax in question was a proper charge against the property of the corporation.

Mr. J. N. Rogers, for the appellants; Mr. T. F. Witherow, contra.

Mr. Justice DAVIS delivered the opinion of the court.

It is unnecessary to notice the last two reasons assigned, why the demurrer should not have been overruled, as the first is well taken. Indeed, it would be improper to pass on the merits of the controversy until the proper parties to be affected by the decision are before the court.

That a stockholder may bring a suit when a corporation refuses is settled in *Dodge* v. *Woolsey*,* but such a suit can only be maintained on the ground that the rights of the corporation are involved. These rights the individual shareholder is allowed to assert in behalf of himself and associates, because the directors of the corporation decline to take the proper steps to assert them. Manifestly the proceedings for this purpose should be so conducted that any decree which shall be made on the merits shall conclude the corporation. This can only be done by making the corporation a party defendant. The relief asked is on behalf of the corporation, not the individual shareholder, and if it be granted the complainant derives only an incidental benefit from it. It would be wrong, in case the shareholder were unsuccessful, to allow the corporation to renew the litigation in another suit, involving precisely the same subject-matter. To avoid such a result, a court of equity will not take cognizance of a bill brought to settle a question in which the corporation is the essential party in interest, unless it is made a party to the litigation.†

* 18 Howard, 340.

† Robinson *v.* Smith, 3 Paige, 222, 233; Cunningham *v.* Pell, 5 Id. 607; Hersey *v.* Veazie, 24 Maine, 1; Charleston Insurance and Trust Co. *v.* Sebring, 5 Richardson, Equity, 342; Western Railroad Co. *v.* Nolan, 48 New York, 573; Bagshaw *v.* Eastern Union Railroad Co., 7 Hare, 114-131.

In this case the tax sought to be avoided was assessed against the Chicago, Rock Island, and Pacific Railroad Company, and the decree rendered discharges the company from the payment of this tax. The corporation, therefore, should have been made a party to the suit, and as it was not, the demurrer should have been sustained.

DECREE REVERSED, and the cause remanded for further proceedings,

IN CONFORMITY WITH THIS OPINION.

ST. CLAIR COUNTY *v.* LOVINGSTON.

No judgment is final which does not terminate the litigation between the parties. A judgment reversing the judgment of an inferior court, and remanding the cause for such other and further proceedings as to law and justice shall appertain, does not do this. A writ of error to such a judgment dismissed, on the authority of *Moore* v. *Robbins*, *supra*, p. 588.

ERROR to the Supreme Court of Illinois.

The county of St. Clair, in Illinois, sued Lovingston in the Circuit Court of the county, and got judgment against him. The Supreme Court of Illinois reversed this judgment, and remanded the cause "for such other and further proceedings as to law and justice shall appertain." To that judgment the county took this writ of error.

Mr. G. Koerner, for the plaintiff in error; Mr. W. H. Underwood, contra.

Mr. Justice STRONG delivered the opinion of the court.

The writ of error in this case must be dismissed on the authority of *Moore* v. *Robbins*, decided at this term. The judgment of the Supreme Court of the State cannot be regarded as a final judgment in the sense in which the term was used in the Judiciary Acts. No judgment is final which does not terminate the litigation between the parties to the

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suit. The issue between the parties may be again tried in the Circuit Court, and another judgment may be recovered which may be removed to the Supreme Court for revision. Consequently, then, there has been no final determination of the case.

WRIT DISMISSED.

GRAY *v.* ROLLO.

1. Set-off is enforced in equity only where there are mutual debts or mutual credits, or where there exists some equitable consideration or agreement between the parties which would render it unjust not to allow a set-off.
2. Where a bankrupt owes a debt to two persons jointly, and holds a joint note given by one of them and a third person, the two claims are not subject to set-off under the Bankrupt Act, being neither mutual debts nor (without more) mutual credits.
3. Where one of two *joint debtors* becomes bankrupt, it seems that the creditor may set-off the debt against his separate indebtedness to the bankrupt, because each joint debtor is liable to him *in solido* for the whole debt; but, if this be conceded, it does not follow that if one of two *joint creditors* becomes bankrupt, the common debtor may set-off against the debt a separate claim which he has against the bankrupt, for this would be unjust to the other joint creditor.
4. A. and B. were joint makers of certain notes, which were transferred to an insurance company. B. and C. held policies in this company which became due in consequence of loss by fire. The company being bankrupt, its assignee claimed the full amount of the notes from A. and B. B. sought to set-off against his half of the liability the claim due to him and C. on the policies of insurance, the latter consenting thereto. *Held*, that this was not a case for set-off within the Bankrupt Act, the two obligations having been contracted without any reference to each other.

APPEAL from the Circuit Court for the Northern District of Illinois; the case being thus:

The Bankrupt Act enacts:*

"That in all cases of *mutual debts* or *mutual credits* between the parties, the account between them shall be stated, and one

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* 14 Stat. at Large, 526, § 20.

debt set off against the other, and the balance only shall be allowed or paid."

And a statute of Illinois* enacts that—

"All joint obligations shall be taken and held to be joint and several obligations."

These statutes being in force, Moses Gray filed a bill in the court below against William Rollo, assignee in bankruptcy of the estate of the Merchants' Insurance Company of Chicago, to compel a set-off of alleged mutual debts. The insurance company had become bankrupt by the great fire at Chicago, and at that time held two promissory notes for $5555 each, made by the complainant, Gray, jointly with one Gaylord, which the company had received from the payee in the regular course of business. By the fire referred to, Moses Gray, the complainant, and his brother, Franklin Gray, doing business under the firm of Gray Brothers, suffered in the destruction of buildings, and these being insured by the said insurance company for $30,000 on three several policies, the company became indebted to them in the sum named. The complainant alleged in his bill that his just share of liability on the two notes was one-half of the amount, and he desired to have that half extinguished by a set-off of the like amount due on the policies. The money due on the policies was confessedly not due to him alone, but to Gray Brothers. But he alleged that his brother assented to and authorized such appropriation.

The insurance company demurred, and the demurrer being sustained the court dismissed the bill. From its action herein Gray took this appeal.

Mr. J. S. Norton, for the appellant, argued that under the statute of Illinois the whole debt, under both notes, which Moses Gray owed to the assignee in bankruptcy, was a several debt; that while it would be inequitable that Gaylord's debt should be paid by the application of a policy of insur-

* 1 Gross's Statutes of Illinois, 377.

ance in which he had no interest, the reverse was true in regard to the share of the notes which Moses Gray owed. The counsel cited *Tucker* v. *Oxley*,* in this court, as much in point and binding; a case which he observed was supported by *Wrenshall* v. *Cook*, in the Supreme Court of Pennsylvania,† even more in point, and by other cases in that tribunal.‡

Mr. A. M. Pence, contra.

Mr. Justice BRADLEY delivered the opinion of the court.

The bill being demurred to, the assent of Franklin Gray to the appropriation asked by the complainant must be taken as true; and the question is, whether set-off can be allowed in such a case as the one presented?

The language of the Bankrupt Act, on the subject of set-off, is: "That in all cases of mutual debts, or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid." It is clear that these claims are not mutual debts. They are not between the same parties. The notes exhibit a liability of the complainant and Gaylord; the policies, a claim of the complainant and his brother. But it is said that by the law of Illinois, all joint obligations are made joint and several; and, therefore, that the complainant is separately liable on the notes, and could be sued separately upon them. Granting this to be so, the debts would still not be mutual. If sued alone on the notes, the claim on the policies, which he might seek to set off, *pro tanto*, against the notes, is a claim due not to him alone, but to him and his brother. His brother's consent that he might use the claim for that purpose would not alter the case. Had his brother's interest been assigned to him before the bankruptcy of the company, and without any view to the advantage to be gained by the set-off, the case would be different.

* 5 Cranch, 34. † 7 Watts, 464.

‡ Tustin *v.* Cameron, 5 Wharton, 379; Craig *v.* Henderson, 2 Pennsylvania State, 261.

Nor does the case present one of mutual credit. There was no connection between the claims whatever, except the accidental one of the complainant's being concerned in both. The insurance company, so far as appears, took the notes without any reference to the policies of insurance; and Gray Brothers insured with the company without any reference to the notes. Neither transaction was entered into in consequence of, or in reliance on, the other; and no agreement was ever made between the parties that the one claim should stand against the other. There being neither mutual debts nor mutual credits, the case does not come within the terms of the Bankrupt law. If it can be maintained at all, it must be upon some general principle of equity, recognized by courts of equity in cases of set-off; which, if it exist, may be considered as applicable under an equitable construction of the act. But we can find no such principle recognized by the courts of equity in England or this country, unless in some exceptional cases which cannot be considered as establishing a general rule. In Pennsylvania, it is true, set-off is allowed in cases where the claims are not mutual, and, in that State, under the decisions there, it is probable that set-off would be allowed in such a case as this. But we do not regard the rule adopted in Pennsylvania as in accord with the general rules of equity which govern cases of set-off. We think the general rule is stated by Justice Story, in his treatise on Equity Jurisprudence,* where he says: "Courts of equity, following the law, will not allow a set-off of a joint debt against a separate debt, or conversely, of a separate debt against a joint debt; or, to state the proposition more generally, they will not allow a set-off of debts accruing in different rights. But special circumstances may occur creating an equity, which will justify even such an interposition. Thus, for example, if a joint creditor fraudulently conducts himself in relation to the separate property of one of the debtors, and misapplies it, so that the latter is drawn in to act differently from what he would if he knew the

* Section 1437.

facts, that will constitute, in a case of bankruptcy, a sufficient equity for a set-off of the separate debt created by such misapplication against the joint debt. So, if one of the joint debtors is only a surety for the other, he may, in equity, set off the separate debt due to his principal from the creditor; for in such a case the joint debt is nothing more than a security for the separate debt of the principal; and, upon equitable considerations, a creditor who has a joint security for a separate debt, cannot resort to that security without allowing what he has received on the separate account for which the other was a security. Indeed, it may be generally stated, that a joint debt may, in equity, be set off against a separate debt, where there is a clear series of transactions, establishing that there was a joint credit given on account of the separate debt." Other instances are given by way of illustration of the principle on which a court of equity will deviate from the strict rule of mutuality, allowing a set-off; all of them based on the idea that the justice of the particular case requires it, and that injustice would result from refusing it; but none of them approaching in likeness to the case before the court. There is no rule of justice or equity which requires that Gray Brothers should be paid in preference to other creditors of the insurance company, out of the specific assets represented by the notes of Gray and Gaylord. If the complainant instead of the insurance company were bankrupt, and the notes were valueless, his brother and the creditors of Gray Brothers would think it very hard if the company were allowed to pay the insurance *pro tanto* with that worthless paper.

The case of *Tucker* v. *Oxley*,* which arose out of the Bankrupt Act of 1800, has been pressed upon our attention by the counsel of the appellant, on the supposition that it is decisive in his favor. The clause relating to set-off contained in that act† does not materially differ from the corresponding clause in the act of 1867. Mutual credits given, and mutual debts existing, before the bankruptcy, are made

* 5 Cranch, 34.

† 2 Stat. at Large, 33, § 42.

the ground of set-off in both acts. But the case of *Tucker* v. *Oxley* will be found to differ from the present. There two persons by the name of Moore, being partners, became indebted to Tucker. They afterwards dissolved partnership, and Tucker became indebted to one of them, who continued the business, and who afterwards became bankrupt. Oxley, the assignee, sued Tucker for this debt, but the latter was allowed to set off his claim against the two. The court put the decision upon the ground that the debt due from the two Moores to Tucker could have been collected from the property of either of them, and was provable under the bankruptcy proceedings against the estate of him who became bankrupt, and hence it might be set off against any claim which the bankrupt had against Tucker. The case, therefore, was the same as the case before us would have been if the complainant had been solely entitled to the insurance-money, and if he and not the company had become bankrupt. In such case the company, according to the case of *Tucker* v. *Oxley*, could have set off the notes of the complainant and Gaylord against the claim for insurance. The reciprocal form of this rule would have enabled the complainant to succeed in this case had he been the sole claimant of the money due for insurance. In other words, the case of *Tucker* v. *Oxley* decides that a *joint indebtedness* may be proved and set off against the estate of either of the *joint debtors* who may become bankrupt, and the fact that it may be subject to be marshalled makes no difference. The joint debtors are severally liable *in solido* for the whole debt. But the case does not decide that a *joint claim*, that is to say, a debt due *to* several *joint creditors*, can be set off against a debt due *by* one of them. If a debt is due to A. and B., how can any court compel the appropriation of it to pay the indebtedness of A. to the common debtor without committing injustice toward B.? The debtor who owes a debt to several creditors jointly cannot discharge it by setting up a claim which he has against one of those creditors, for the others have no concern with his claim and cannot be affected by it; and no more can one of several joint creditors, who

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is sued by the common debtor for a separate claim, set off the joint demand in discharge of his own debt, for he has no right thus to appropriate it. Equity will not allow him to pay his separate debt out of the joint fund. And if he had the assent of his co-obligees to do this, it would be unjust to the suing debtor, because he has no reciprocal right to do the same thing.

The case before us, therefore, is clearly distinguishable from that of *Tucker* v. *Oxley*, and the ground on which that case was put is not applicable to this.

DECREE AFFIRMED.

BARTHOLOW *v.* BEAN.

A payment by an insolvent, which would otherwise be void as a preference under sections thirty-five and thirty-nine of the Bankrupt law, is not excepted out of the provisions of those sections because it was made to a holder of his note overdue, on which there was a solvent indorser whose liability was already fixed.

ERROR to the Circuit Court for the District of Missouri; the case, as found by the District Court, and on which the judgment to which the writ of error was taken had been entered below, being in substance thus:

Kintzing & Co. (a firm composed of one Kintzing and a certain Lindsley) were grocers in St. Louis, and kept a bank account with Bartholow & Co., bankers in the same city. On the 15th of January, 1869, these last discounted a note for $2500 of their customers, the said Kintzing & Co., indorsed by J. B. Wilcox, and maturing on the 15–18th of March, 1869.

On the 15th of February, 1869, Kintzing & Co. called a meeting of their creditors. These assembled and "most of them" signed a deed of composition, by which they agreed to take seventy cents on the dollar, in notes of Kintzing, payable in six, twelve, and eighteen months. But there was a provision in the deed that it should not be binding on

any creditors unless agreed to and signed by all. Some did not sign. Some who signed, took the composition notes [the amount so taken having been (apparently) $75,000].*

Among the few who did not sign were Bartholow & Co. They well knew, however, that an agreement such as above described had been entered into by the other creditors.

On the 27th of February, Kintzing & Co. dissolved their partnership, Lindsley retiring, and Kintzing taking all the assets and assuming all the debts of the firm.

Before the day when the note of Kintzing & Co. matured, Wilcox, he, as already said, being confessedly solvent, waived protest and notice; and the note remained unpaid till August 9th, on which day Kintzing, being then "hopelessly insolvent even under the terms of the agreement," paid it.

On the 18th of August, 1869, "the paper given by said Kintzing, pursuant to the terms of said compromise, to the amount of about $25,000, became due," and on the 17th of September a petition in bankruptcy was filed against him, on which he was decreed a bankrupt, and one Bean appointed his assignee in bankruptcy.

Bean brought this suit against Bartholow & Co., to recover the money which Kintzing had paid to the said bankers, in discharge of the note, alleging that he made the payment "with a view to give a preference to them," and in fraud of the provisions of the Bankrupt law.

The thirty-fifth and thirty-ninth sections of the Bankrupt law, which were relied on by the assignee as giving him the right in law to recover, are thus:†

"SECTION 35. If any person being insolvent, or in contemplation of insolvency, within four months before the filing of the

* The case as found by the District Court did not state what the debts of Kintzing & Co. were, nor what their assets, nor what proportion of creditors signed and took notes. But it stated that "on the 18th day of August, 1869, the paper given by the said Kintzing, *pursuant to the terms of the compromise*, to the amount of about $25,000 became due." This must have been the six months' paper, and, therefore, as the Reporter supposes, one-third of the whole of the compromise notes given.

† 14 Stat. at Large, 534, 536.

petition . . . against him, 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, . . . makes any payment, pledge, assignment, transfer or conveyance of any part of his property, either directly or indirectly, *the person receiving such payment, pledge, assignment, transfer or conveyance, or to be benefited thereby, having reasonable cause to believe such person is insolvent, . . . and that such . . . payment, 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. . . .

"And if any person being insolvent, or in contemplation of insolvency or bankruptcy, within six months before the filing of the petition . . . against him makes any payment, sale, assignment, transfer, conveyance, or other disposition of his property, to any person *who then has reasonable cause to believe him insolvent, or to be acting in contemplation of insolvency, and that such payment, sale, assignment, transfer, conveyance, or other disposition, &c., is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same being distributed under this act, or to defeat the object 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.

"SECTION 39. Any person . . . who being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, shall make any payment, grant, sale, conveyance, or transfer of money, or other property or estate, . . . with intent to give a preference to one or more of his creditors, or to any person . . . who . . . is or may be liable for him as indorser . . . shall be adjudged a bankrupt on the petition of one or more of his creditors. . . . And . . . the assignee may recover back the money . . . so paid . . . *provided the person receiving such payment, or conveyance, had reasonable cause to believe that a fraud on this act was intended, or that the debtor was insolvent.*"

The court below, on the case found, gave judgment for the assignee. Bartholow & Co. brought the case here.

Mr. K. H. Spencer, for the plaintiffs in error:

1. Bartholow & Co. were compelled to receive payment

when tendered, since if they had refused to receive payment the indorser, Wilcox, whose liability was contingent only on non-payment by Kintzing & Co., would have been discharged.

2. Bartholow & Co. had no notice of Kintzing's insolvency. The case, as found, is perhaps defective, in not showing more particularly than it does the condition of Kintzing & Co.'s affairs—the relative state of their debts and assets—when they called their creditors together.* But it is clear that it was considered that a release of 30 per cent. would set Kintzing up; and that creditors to the amount of more than $100,000 did not only sign off at the rate of 70 cents on the dollar, but did actually take composition notes; the notes that came due in August—six months from the date of the deed of composition—having as found been $25,000. To this extent, therefore,—a very large extent, it would seem, from the magnitude of the figures,—we may assume as matter of law, that Kintzing was released, notwithstanding the clause in the deed that the composition should not bind any creditor unless all agreed to it. The creditors who not only signed but took and kept the notes, in law waived that clause.† The case then is this: A trader having solid assets, finds himself embarrassed; he calls his creditors together and gets from "the most of them" a release of 30 per cent. of their claims, contingent on all signing. He expects to get the signatures of all. A large proportion not only sign but actually take notes, and so in law release him to the extent of 30 per cent. *After* this, he pays a person who had not released; one who being perfectly secured otherwise had no interest to look into or even to watch his affairs, and doubtless had not looked into or even watched them. Continuing insolvency after such a release is not so violently presumable as that every one dealing with the party afterwards must

* The counsel for the plaintiffs in error spoke in their brief of the debts being $179,000, and the assets $204,000. But there was no such fact found.

† Spottiswoode *v.* Stockdale, Montague on Composition, ed. 1823, Appendix, 125; 1 Cooper's Chancery Cases, 105; Ex parte Kilner, Buck, 104; Ex parte Lowe, 1 Glyn & Jameson, 81; Ex parte Shaw, 1 Maddock, 598.

Recapitulation of the case in the opinion.

be taken, as of course, to deal with him, with legal notice of it; that is to say, with "reasonable cause to believe" it; and if he has no such legal notice,—no "reasonable cause to believe" it,—he cannot have received the payment in fraud of the Bankrupt law. Indeed, in such a case, it is hard to believe that even the debtor can have made the payment with a view to give a preference. The only object which a debtor can have in compromising with creditors is to secure a safe position. Not only Bartholow & Co., but Kintzing himself, may have well believed that such a position had been obtained by Kintzing here; and the fact that the note had lain dishonored for several months is nothing against this view. Kintzing *had*, indeed, been embarrassed (perhaps insolvent), and unable to go on; but now, when he pays, he had by the release of even a portion of his creditors got on his feet. Why had he let the note lie so long? Because during that time he was embarrassed or insolvent. Why does he now pay it? Because his creditors to the amount of more than $100,000 had, in fact and in law, released 30 per cent. of their debts, and extended for six, twelve, and eighteen months the payment of the remaining 70 per cent., and he thinks he is not insolvent. The very fact of the *previous* delay shows on his own part his now supposed solvency; while as to Bartholow & Co., if they had not supposed him now solvent, why would they, as it of necessity is alleged that they did, in fraud of the Bankrupt Act, receive payment, and so incur the danger of a suit just such as the present, when all the while they had Wilcox liable to them, from whom they could have got payment without any danger whatever?

Messrs. N. Myers and E. T. Allen, contra.

Mr. Justice MILLER delivered the opinion of the court.

The plaintiffs in error were bankers in the city of St. Louis, with whom Kintzing & Co. kept a bank account, and they had discounted the note of Kintzing & Co. for $2500, dated July 15th, 1869, payable in sixty days, indorsed by J.

B. Wilcox. Before its maturity Wilcox, who was solvent, waived protest and notice, and the note remained unpaid until August 9th, when Kintzing paid the amount to plaintiffs in error. In the meantime Kintzing & Co. failed in business, and in February attempted a composition with their creditors at seventy cents on the dollar, in notes payable in six, twelve, and eighteen months. The plaintiffs in error did not sign this agreement, though they knew of it, and that effort seems to have failed. It must be conceded that Kintzing was utterly insolvent when he paid the note, and this must have been known to plaintiffs in error. A petition in bankruptcy was filed against Kintzing within less than four months after the payment of the note, and Bean, the defendant in error, having been appointed assignee, brought the present suit to recover the money so paid, as being a preference of a creditor forbidden by the Bankrupt law.

If it were a transaction solely between Kintzing and the bankers there seems to be no reason to doubt that the payment was such a preference as would enable the assignee to recover it back. But the case is not a little embarrassed by the fact that the indorser, Wilcox, was solvent, and was liable on the note to the bankers, and the question arises whether, under such circumstances, they were at liberty to refuse to receive payment of the principal without losing their claim upon the indorser, who was probably a mere accommodation surety. It is a question not without difficulty.

It is very true that an ingenious argument is made to show that by an arrangement between Kintzing and his partner the former assumed all the debts under the attempted compromise, and took all the property of the former, and that, by reason of the partial success of the compromise, Kintzing was no longer insolvent. But the facts in the finding of the court leave no room to doubt that Kintzing was, after the failure, always insolvent, in the sense of being unable to pay his current overdue debts, and of this plaintiffs could not be unaware, since they held the note, on

which they received the money now sued for, about five months after its maturity, without payment, and without their signing the compromise paper. They must, therefore, have known that, in the sense of the Bankrupt law, Kintzing had been insolvent for months before they received payment.

Does the fact that Wilcox, the indorser, was solvent, and was liable, change the rule as to payment as a preference?

The statute in express terms forbids such preference, not only to an ordinary creditor of the bankrupt, but to any person who is under any liability for him; and it not only forbids payment, but it forbids any transfer or pledge of property as security to indemnify such persons. It is, therefore, very evident that the statute did not intend to place an indorser or other surety in any better position in this regard than the principal creditor, and that if the payment in the case before us had been made to the indorser, it would have been recoverable by the assignee. If the indorser had paid the note, as he was legally bound to do, when it fell due, or at any time afterwards, and then received the amount of the bankrupt, it could certainly have been recovered of him. Or if the money had been paid to him directly instead of the holder of the note it could have been recovered, or if the money or other property had been placed in his hand to meet the note or to secure him instead of paying it to the bankers, he would have been liable. He would not, therefore, have been placed in any worse position than he already occupied if the holders of the note had refused to receive the money of the bankrupt. It is very obvious that the statute intended, in pursuit of its policy of equal distribution, to exclude both the holder of the note and the surety or indorser from the right to receive payment from the insolvent bankrupt. It is forbidden. It is called a fraud upon the statute in one place and an evasion of it in another. It was made by the statute equally the duty of the holder of the note and of the indorser to refuse to receive such a payment.

Under these circumstances, whatever might have been

the right of the indorser, in the absence of the Bankrupt law, to set up a tender by the debtor and a refusal of the note-holder to receive payment, as a defence to a suit against him as indorser, no court of law or equity could sustain such a defence, while that law furnishes the paramount rule of conduct for all the parties to the transaction; and when in obeying the mandates of that law the indorser is placed in no worse position than he was before, while by receiving the money the holder of the note makes himself liable to a judgment for the amount in favor of the bankrupt's assignee, and loses his right to recover, either of the indorser or of the bankrupt's estate.

We are of opinion, therefore, notwithstanding the hardship of the case, which is more apparent than real, that the payment must be held to be a preference within the Bankrupt law, and that the judgment of the court below, that the assignee should recover it, must be

AFFIRMED.

DANDELET *v.* SMITH.

1. Under the twentieth section of the Internal Revenue Act of June 30th, 1864, as amended by the ninth section of the act of July 13th, 1866, it is not necessary that an assessor, in making a reassessment for deficiencies, should make his reassessment coincide, month by month, in the terms which it covers, with the monthly returns of the manufacturer; that is to say, it is not requisite that he should make a separate specification of deficiency for each defective return.
2. Nor, under the terms of the act of 1866, when the reassessment was made within fifteen months from the passage of the act, was it necessary that the reassessment should have reference only to returns made within fifteen months prior to the reassessment.
3. Nor, under the act of March 2, 1867, conceding that since the act of 1866 brewers are taxable, in the first instance, by stamps per barrel, and not on monthly returns, would a reassessment for deficiency be void, even though it had been made out on the principle of an assessment for false returns, under the previous act of July 13th, 1866.

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

Statement of the case.

By different Internal Revenue Acts a tax was laid on brewers, by which they were made liable thus:

From September, 1862, to March 1st, 1863, . . .	$1 00 per bbl.*
From March 1st, 1863, to March 31st, 1864, . . .	60 per bbl.†
From April 1st, 1864, ...	1 00 per bbl.‡

And after the 30th of June, 1864, a penalty of 50 cents was added where the return was erroneous because of refusal or neglect.

By the Internal Revenue Act of June 30th, 1864§ (section 20), the assessors were to make out lists containing the names of persons residing in their respective districts, and having property liable to tax, together with the sums payable by each, which lists the assessors were to send to the collectors.

The Internal Revenue Act of July 13th, 1866,‖ enacted further (by its ninth section):

"The assessor may, from time to time, or at any time *within fifteen months from the time of the passage of this act*, or from the time of the *delivery of the list to the collector* as aforesaid, enter on any monthly or special list, . . . the names of the persons or parties, in respect to whose returns as aforesaid there has been or shall be any omission, undervaluation, understatement, or false or fraudulent statement, together with the amounts for which such persons or parties may be liable, over and above the amount for which they may have been, or shall be, assessed upon *any return, or returns* made as aforesaid, and shall certify or return said list to the collector as required by law."

This same act¶ of 1866 changed the mode of assessing and collecting the tax on malt liquors, and made the tax on them after the 1st of September, 1866, payable by stamps. And an act of March, 1867, by its fifth section** enacted:

"That if the manufacturer of any article upon which a tax is required to be paid by means of a stamp, shall have sold or removed for sale any such articles, without the use of the proper

* 12 Stat. at Large, 450.
† Ib. 723.
‡ 14 Id. 164.
§ 13 Stat. at Large, 229.
‖ 14 Id. 104.
¶ Sections 52–58.
** 14 Stat. at Large, 472.

stamp, in addition to the penalties now imposed . . . it shall be the duty of the assessor . . . upon such information as he can obtain, to estimate the amount of the tax which has been omitted to be paid, and to make an assessment therefor, and certify the same to the collector; and the subsequent proceedings for collection shall be in all respects like those for the collection of taxes upon manufactures and productions."

In this state of the law Dandelet, a brewer, in Baltimore, from the year 1862 had made monthly statements or returns to the assessor of what beer he admitted that he made, and these were delivered to the collector. In August, 1867, the assessor made an assessment for alleged deficiencies, the same being in the following form:

F. Dandelet's Assessment.

Deficiency from Sept. 1, '62, to Feb. 28, '63, 522 bbls. @ $1,	$522 00
Deficiency from March 1, '63, to March 31, '64, 922 bbls. @ 60 c.,	555 00
Deficiency from April 1, '64, to June 30, '64, 216 bbls. @ $1,	216 00
Deficiency from July 1, '64, to April 20, '67, 1425 bbls. @ $1,	1425 00
Fifty cents penalty on $1425,	712 50
	$3430 50

This assessment was entered on the monthly list for August, 1867, delivered to one Smith as collector, and after the remission of the penalty of $712.50, the balance was paid under protest. An appeal was duly made by Dandelet to the Commissioner of Internal Revenue, and was dismissed, after which this suit was brought to recover back the tax paid; and being tried by the court, judgment was given for the defendant. That judgment it was which was now brought here for review.

Messrs. G. C. Maunde and J. C. King, for the plaintiff in error:

First. The assessment is void upon its face. Even if the assessor had authority to reassess for the whole term intervening between September, 1862, and April 20th, 1867, he had no right to divide the term arbitrarily, as he has done. He should have reassessed month by month, indicating the

deficiency for each month, so as to make his reassessment coincide in time with the monthly returns of the brewer. The ninth section of the act of July 13th, 1866, was obviously designed to give to the brewer the privilege of knowing which one of his monthly returns was asserted by the assessor to be deficient, and the amount of the deficiency. The accusation of the assessor would then be so specific as to admit of a defence; but how can the brewer defend himself against a reassessment so arbitrary and sweeping in point of time as the one made in this case?

Second. If the section referred to embraces brewers then the reassessment is void, because it disregarded the fifteen months limitation clause contained therein. Instead of confining himself, as he was bound by the law to do, to fifteen months, the assessor in this case covered by his reassessment a term of nearly five years.

Third. But the section does not refer at all to the tax assessed upon brewers. This section only contemplates those persons whose duty it was, under the law, to make returns of what they made. But after September 1st, 1866, brewers were to pay by stamps, and as during that term Dandelet made no returns, and was not required by law to make them, but paid his tax by stamps, this reassessment was unauthorized.

Mr. G. H. Williams, Attorney-General, and Mr. S. F. Phillips, Solicitor-General, contra.

Mr. Justice BRADLEY delivered the opinion of the court.

The question in this case is whether the assessment for alleged deficiencies was or was not illegal.

1. It is contended by the plaintiff in error that the assessment is void upon its face, because not made month by month so as to indicate the deficiency for each month, and to make the reassessment coincide in time with the monthly returns of the plaintiff. It is sufficient to say that the law*

* Section 20, as amended by act of July 13th, 1866, 14 Stat. at Large, 104.

does not require this to be done. All that the statute requires is a list of the names of parties whose returns have been deficient, with the amounts for which they are liable over and above the amount for which they may have been assessed upon any *return or returns.* This language does not, by its terms, require a separate specification of deficiency for each defective return. "The amount for which a person has been assessed upon any return *or returns,*" may be an aggregate of many sums; and it is the deficiency of this amount which is to be reassessed. It may frequently happen that the assessor could not possibly tell in what particular month the deficiencies occurred, and yet he may have demonstrative evidence of the deficiency of the aggregate amount returned.

2. It is contended that, by the act, the assessor could only go back fifteen months. We do not so understand it. The language is: "The said assessor may, from time to time, or at any time within fifteen months from the time of the passage of this act, or from the time of the delivery of the list to the collector as aforesaid, enter in any monthly or special list the names," &c. The first limitation, "within fifteen months from the time of the passage of this act," evidently relates to past deficiencies; the others to future. The reassessment in this case was made within fifteen months after the passage of the act, and the assessor was justified in reviewing the past returns as he did.

3. It is lastly objected, that the law in question, namely, the twentieth section of the Internal Revenue Act of June 30th, 1864, as amended by the ninth section of the act of July 13th, 1866, does not refer at all to the tax assessed upon brewers, inasmuch as they were required, by the same act of 1866, to use stamps, instead of making monthly returns, from and after the 1st of September, 1866; whereas, the amended twentieth section authorizing a reassessment, only applied, by its terms, to defective "returns." The language refers to past as well as future returns; and, therefore, expressly covers all returns made prior to September 1st, 1866. The reassessment in this case is for deficiency

from September 1st, 1862, to April 20th, 1867, namely: prior to March 1st, 1863, 522 barrels; thence to April 1st, 1864, 922 barrels; thence to July 1st, 1864, 216 barrels; thence to April 20th, 1867, 1425 barrels. It is only the last period which embraces a portion of time in which stamps were used. But it embraced twenty-six months during which assessments were made upon monthly returns, and *non constat*, but that the deficiency of 1425 barrels arose in that time. The reassessment does not show that any portion of that deficiency arose after September 1st, 1866.

But suppose that a portion of it did arise after that time, when stamps were required to be used. The brewer may have made more beer than he stamped, and by the fifth section of the act of March 2d, 1867,* it is enacted that "if the manufacturer of any article upon which a tax is required to be paid by means of a stamp, shall have sold or removed for sale any such articles, without the use of the proper stamp, in addition to the penalties . . . imposed, . . . it shall be the duty of the assessor, . . . upon such information as he can obtain, to estimate the amount of the tax which has been omitted to be paid, and to make an assessment therefor, and certify the same to the collector; and the subsequent proceedings for collection shall be in all respects like those for the collection of taxes upon manufactures and productions."

Now, in what more proper form could the assessor make a certificate of "the amount of the tax which has been omitted to be paid," than he did in this case? If a more proper form could be devised, still is not the form used by the assessor in this case admissible?

The exact truth always lies in the knowledge of the manufacturer. His books show, or ought to show, everything that he has produced, and in an investigation of this kind, if he shows that his returns or stamps fully equal the amount of his production and sale, the burden will then be on the government to show a deficiency. The form of the assess-

* 14 Stat. at Large, 742.

ment adopted in this case can neither mislead nor embarrass an honest manufacturer who has kept true and exact books of account.

JUDGMENT AFFIRMED.

HORNBUCKLE *v.* TOOMBS.

1. The practice, pleadings, and forms and modes of proceeding of the Territorial courts, as well as their respective jurisdictions, were intended by Congress to be left to the legislative action of the Territorial assemblies and to the regulations which might be adopted by the courts themselves. In case of any difficulties arising out of this state of things, Congress has it in its power at any time to establish such regulations on this, as well as on any other subject of legislation, as it shall deem expedient and proper.
2. The cases of *Noonan* v. *Lee* (2 Black, 499), *Orchard* v. *Hughes* (1 Wallace, 77), and *Dunphy* v. *Kleinsmith* (11 Id. 610), reconsidered and not approved.

ERROR to the Supreme Court of the Territory of Montana; the case being thus:

The seventh amendment to the Constitution ordains:

"In suits at *common law*, where, &c., the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined than according to the rules of the common law."

An early statute of the United States, the statute commonly known as the Process Act of 1792,* an act still in force, enacts:

"That the forms of writs, executions, and other process, . . . and the forms and modes of proceeding in *suits*—

"In those of the common law shall be the same as are now used in the said courts, respectively, in pursuance of the act entitled 'An act to regulate processes in the courts of the United States.'

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* 1 Stat. at Large, 276.

Statement of the case.

"In those of equity and in those of admiralty and maritime jurisdiction, according to the principles, rules, and usages which belong to courts of equity and to courts of admiralty respectively, as contradistinguished from courts of common law, except so far as may have been provided for by the act to establish the judicial courts of the United States, subject, however, to such alterations and additions as the said courts respectively shall, in their discretion, deem expedient, or to such regulations as the Supreme Court of the United States shall think proper, from time to time, by rule, to prescribe to any Circuit or District Court concerning the same."

In this state of fundamental and of statutory law, Congress, on the 26th of May, 1864,* passed "An act to provide a temporary government for the Territory of Montana." It enacted:

"SECTION 6. 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.

"SECTION 9. The judicial power of said Territory shall be vested in a supreme court, district courts, probate courts, and in justices of the peace. . . . The jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts, . . . shall be limited by law. *Provided*, . . . That the said supreme and district courts, respectively, shall possess chancery as well as common-law jurisdiction.

"SECTION 13. The Constitution and all laws of the United States, which are not locally inapplicable, shall have the same force and effect within the said Territory of Montana as elsewhere within the United States."

The Territory being organized, its legislative assembly, in December, 1867, passed a "Civil Practice Act" containing these provisions:

"SECTION 1. There shall be in this Territory but one form of civil action for the enforcement or protection of private rights and the redress or prevention of private wrongs.

* 13 Stat. at Large, 88.

Argument for the plaintiff in error.

"SECTION 2. In such action, the party complaining shall be known as the plaintiff, and the adverse party as the defendant.

"SECTION 38. The only pleadings on the part of the plaintiff shall be the complaint, demurrer, or replication to the defendant's answer; and the only pleadings on the part of the defendant shall be a demurrer to the complaint, or a demurrer to the replication, or an answer to the complaint.

"SECTION 155. An issue of fact shall be tried by a jury, unless a jury trial is waived, or a reference be ordered, as provided in this act."

In this state of things Toombs brought an action against Hornbuckle in a District Court of the Territory of Montana, for damages caused by the diversion of a stream of water, by which his farm was deprived of irrigation, and for an adjudication of his right to the stream, and an injunction against further diversion. The action was framed and conducted in accordance with the practice as established by the legislative assembly of the Territory, in the provisions last-above quoted.

The case was tried by a jury, who found for the plaintiff, assessed his damage at one dollar, and decided that he was entitled to seventy inches of the water. Upon this verdict the court gave judgment, and awarded an injunction as prayed.

The only errors assigned were based on the intermingling of legal and equitable remedies in one form of action.

Mr. Robert Leech, for the plaintiff in error:

The proceedings are erroneous in that they entirely disregard the distinction between the chancery and common-law jurisdiction conferred by Congress upon the Territorial courts, by the organic act. This court has decided in the cases of *Noonan* v. *Lee*,* *Orchard* v. *Hughes*,† *Dunphy* v. *Kleinsmith*,‡ *Thompson* v. *Railroad Companies*,§ and other cases, that legal and equitable matters cannot be thus confused.

* 2 Black, 499.
† 1 Wallace, 77.
‡ 11 Id. 610.
§ 6 Id. 137.

Argument for the plaintiff in error.

The case of *Dunphy* v. *Kleinsmith* was brought here from the Supreme Court of this very Territory of Montana, and this court, in passing upon this legislation and the organic law of the Territory, said:

"It is apparent that the Territorial legislature has no power to pass any law in contravention of the Constitution of the United States, or which shall deprive the Supreme and District Courts of the Territory of chancery as well as common-law jurisdiction."

In *Thompson* v. *Railroad Companies*,* the court was equally emphatic. It said:

"The Constitution of the United States and the acts of Congress recognize and establish the distinction between law and equity. The remedies in the courts of the United States are, at common law, or in equity, not according to the practice of State courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of these principles. 'And although the forms of proceedings and practice in the State courts shall have been adopted in the Circuit Courts of the United States, yet the adoption of the State practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit.'"

Unless, therefore, this court means to disregard its own solemn precedents made, iterated and reiterated, the judgment and decree below must be reversed.

The precedents rest, too, on obvious reason. The organic act of the Territory does not speak of chancery and common-law jurisdiction otherwise than as distinct systems, and the Process Act of 1792—still in force, undoubtedly contemplating the two systems as distinct systems and to be administered separately, and which act is "not locally inapplicable" to the Territories—has, by the thirteenth section of the or-

* 6 Wallace, 137.

ganic act "the same force and effect within the Territory of Montana as elsewhere in the United States."

Messrs. Montgomery Blair and F. A. Dick, contra.

Mr. Justice BRADLEY delivered the opinion of the court.

The only errors assigned are based on the intermingling of legal and equitable remedies in one form of action.

Such an objection would be available in the Circuit and District Courts of the United States. The Process Act of 1792* expressly declared that in suits in equity, and in those of admiralty and maritime jurisdiction, in those courts, the forms and modes of proceeding should be according to the principles, rules, and usages which belong to courts of equity and to courts of admiralty respectively, as contradistinguished from courts of common law, subject to such alterations and additions as the said courts respectively should deem expedient, or to such regulations as the Supreme Court should think proper to prescribe. The Supreme Court, in prescribing rules of proceeding for those courts, has always followed the general principle indicated by the law. Whether the Territorial courts are subject to the same regulation is the question which is now fairly presented.

In the case of *Orchard* v. *Hughes*† a majority of this court was of opinion that the Territorial courts were subject to the same general regulations in equity cases which govern the practice in the Circuit and District Courts. That was the case of a foreclosure of a mortgage in the Territorial court of Nebraska, and the court, under a Territorial law, not only decreed a foreclosure and sale of the mortgaged premises, but gave a personal decree against the defendant for the deficiency. We had decided in *Noonan* v. *Lee*,‡ that under the equity rules prescribed for the Circuit and District Courts, such a decree could not be made. The majority of the court now applied the same rule in the case of *Orchard* v. *Hughes*, although it was decided by a Territorial court.

* 1 Stat. at Large, 275. † 1 Wallace, 77. ‡ 2 Black, 499.

Following out the principle involved in that decision, we subsequently, in the case of *Dunphy* v. *Kleinsmith*,* reversed a judgment of the Supreme Court of Montana, on the ground that the case (being in nature of a creditor's bill, filed to reach property which the debtor had fraudulently conveyed) was a clear case of equity, whilst the proceedings therein exhibited no resemblance to equity proceedings, there being a trial by jury, a verdict for damages, and a judgment on the verdict.

On a careful review of the whole subject we are not satisfied that those decisions are founded on a correct view of the law. By the sixth section of the organic act of the Territory of Montana, with which that of Nebraska substantially agreed, it was enacted, "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." By the ninth section it was provided "that the judicial power of said Territory shall be vested in a supreme court, district courts, probate courts, and in justices of the peace," and that "the jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts and justices of the peace, shall be limited by law; *Provided*," that "the said supreme and district courts respectively shall possess chancery as well as common-law jurisdiction."

Now, here is nothing which declares, as the Process Act of 1792 did declare, that the jurisdictions of common law and chancery shall be exercised separately, and by distinct forms and modes of proceeding. The only provision is, that the courts named shall possess both jurisdictions. If the two jurisdictions had never been exercised in any other way than by distinct modes of proceeding, there would be ground for supposing that Congress intended them to be exercised in that way. But it is well known that in many States of the Union the two jurisdictions are commingled in one form of action. And there is nothing in the nature

* 11 Wallace, 610.

of things to prevent such a mode of proceeding. Even in the Circuit and District Courts of the United States the same court is invested with the two jurisdictions, having a law side and an equity side; and the enforced separation of the two remedies, legal and equitable, in reference to the same subject-matter of controversy, sometimes leads to interesting exhibitions of the power of mere form to retard the administration of justice. In most cases it is difficult to see any good reason why an equitable right should not be enforced or an equitable remedy administered in the same proceeding by which the legal rights of the parties are adjudicated. Be this, however, as it may, a consolidation of the two jurisdictions exists in many of the States, and must be considered as having been well known to Congress; and when the latter body, in the organic act, simply declares that certain Territorial courts shall possess both jurisdictions, without prescribing how they shall be exercised, the passage by the Territorial assembly of a code of practice which unites them in one form of action, cannot be deemed repugnant to such organic act.

A clause in the thirteenth section of the act, however, has been referred to, by which it is declared "that the Constitution, and all laws of the United States which are not locally inapplicable, shall have the same force and effect within the said Territory of Montana as elsewhere in the United States;" and it is argued that by virtue of this enactment, all regulations respecting judicial proceedings which are contained in any of the acts of Congress, are imported into the practice of the Territorial courts. But this proposition is not tenable. Laws regulating the proceedings of the United States courts are of specific application, and are, in truth and in fact, locally inapplicable to the courts of a Territory. There is a law authorizing this court to appoint a reporter. In one sense this law is not locally inapplicable to the Supreme Court of the Territory; but in a just sense it is so. The law has a specific application to this court, and cannot be applied to the Territorial court without an evident misconstruction of the true meaning

and intent of Congress in the clause of the thirteenth section above referred to. That clause has the effect, undoubtedly, of importing into the Territory the laws passed by Congress to prevent and punish offences against the revenue, the mail service, and other laws of a general character and universal application; but not those of specific application.

The acts of Congress respecting proceedings in the United States courts are concerned with, and confined to, those courts, considered as parts of the Federal system, and as invested with the judicial power of the United States expressly conferred by the Constitution, and to be exercised in correlation with the presence and jurisdiction of the several State courts and governments. They were not intended as exertions of that plenary municipal authority which Congress has over the District of Columbia and the Territories of the United States. They do not contain a word to indicate any such intent. The fact that they require the Circuit and District Courts to follow the practice of the respective State courts in cases at law, and that they supply no other rule in such cases, shows that they cannot apply to the Territorial courts. As before said, these acts have specific application to the courts of the United States, which are courts of a peculiar character and jurisdiction.

Whenever Congress has proceeded to organize a government for any of the Territories, it has merely instituted a general system of courts therefor, and has committed to the Territorial assembly full power, subject to a few specified or implied conditions, of supplying all details of legislation necessary to put the system into operation, even to the defining of the jurisdiction of the several courts. As a general thing, subject to the general scheme of local government chalked out by the organic act, and such special provisions as are contained therein, the local legislature has been intrusted with the enactment of the entire system of municipal law, subject also, however, to the right of Congress to revise, alter, and revoke at its discretion. The powers thus exercised by the Territorial legislatures are nearly as exten-

sive as those exercised by any State legislature; and the jurisdiction of the Territorial courts is collectively coextensive with and correspondent to that of the State courts—a very different jurisdiction from that exercised by the Circuit and District Courts of the United States. In fine, the Territorial, like the State courts, are invested with plenary municipal jurisdiction.

It is true that the District Courts of the Territory are, by the organic act, invested with the same jurisdiction, in all cases arising under the Constitution and laws of the United States, as is vested in the Circuit and District Courts of the United States; and a portion of each term is directed to be appropriated to the trial of causes arising under the said Constitution and laws. Whether, when acting in this capacity, the said courts are to be governed by any of the regulations affecting the Circuit and District Courts of the United States, is not now the question. A large class of cases within the jurisdiction of the latter courts would not, under this clause, come in the Territorial courts; namely, those in which the jurisdiction depends on the citizenship of the parties. Cases arising under the Constitution and laws of the United States would be composed mostly of revenue, admiralty, patent, and bankruptcy cases, prosecutions for crimes against the United States, and prosecutions and suits for infractions of the laws relating to civil rights under the fourteenth and fifteenth amendments. To avoid question and controversy as to the modes of proceeding in such cases, where not already settled by law, perhaps additional legislation would be desirable.

From a review of the entire past legislation of Congress on the subject under consideration, our conclusion is, that the practice, pleadings, and forms and modes of proceeding of the Territorial courts, as well as their respective jurisdictions, subject, as before said, to a few express or implied conditions in the organic act itself, were intended to be left to the legislative action of the Territorial assemblies, and to the regulations which might be adopted by the courts themselves. Of course, in case of any difficulties arising out of

Statement of the case.

this state of things, Congress has it in its power at any time to establish such regulations on this, as well as on any other subject of legislation, as it shall deem expedient and proper.

The judgment is

AFFIRMED.

CLIFFORD, DAVIS, and STRONG, JJ.: We dissent from the judgment in this case for the reason that this court has several times decided that claims at law and claims in equity cannot be united in one action even in the Territorial courts. And we think, if a change in the rule is to be made, that it should be made by Congress.

HERSHFIELD *v.* GRIFFITH.

The preceding case affirmed, the case here having been a proceeding to obtain satisfaction of a mortgage.

APPEAL from the Supreme Court of the Territory of Montana.

Griffith sued Starr in one of the District Territorial courts of Montana, on a mortgage on certain property; the suit being brought under the Civil Practice Act, quoted in the preceding case; an act passed under circumstances there set forth, and which it is necessary for the reader to possess himself of in order to understand at all this case. One Hershfield intervened, asserting that he had a mortgage on the property, of a date prior to that sued on by Griffith. The court gave judgment in favor of Griffith, and Hershfield took the case to the Supreme Court of the Territory, which affirmed the judgment below. Hershfield now brought the case here by *appeal*, assigning among other errors the blending of equity and common-law jurisdiction.

Opinion of the court.

Mr. Lyman Trumbull, for the appellant, adverting to the seventh amendment to the Federal Constitution, the Process Act of 1792, the organic law of the Territory, and the Civil Practice Act—all set forth in the preceding case (*supra*, p. 648–650),—and to the same cases as Mr. Leech referred to in the argument there, argued, that a foreclosure of a mortgage—a proceeding in its essence equitable—had been performed through common-law means, and argued further, as Mr. Leech did in the preceding case, that it was not competent for the Territorial legislature of Montana to abolish, as it had sought to do by its Civil Practice Act, the distinction between chancery and common-law proceedings, which the organic act, adopting the Process Act, had recognized; and that this court had in numerous cases so decided.

Messrs. J. Hubley Ashton and N. Wilson, contra, contended that a proceeding to obtain satisfaction of a mortgage was not necessarily a proceeding in equity, and adverted to the practice in Pennsylvania, where regarding a recorded mortgage as in the nature of a judicial record, a *scire facias* was by statute allowed to be issued thereon through common-law courts; the only courts which, with rare exception, the State of Pennsylvania had ever had. It was not necessary, therefore, to assume that the proceeding below had been an equitable one. Being had in courts not courts of chancery, it was to be regarded as a common-law proceeding, and proper. If, therefore, the appeal was not to be dismissed, the decree should be affirmed.

But the appeal should be dismissed. The proceeding having been, as shown above, one at law, a writ of error was the only proper means to bring it here.

Mr. Justice BRADLEY delivered the opinion of the court.

The only point made in this case is, that being one of equity jurisdiction it was tried by jury as an action at law. This being so it would seem that, under the seventh article of amendments to the Constitution, it should have been removed by writ of error and not by appeal. But that aside,

we have just decided in *Hornbuckle* v. *Toombs* that equitable as well as legal relief may be pursued by the form of action prescribed by the Territorial legislature. There is no complaint that this was not done, or that substantial justice was not administered between the parties.

JUDGMENT AFFIRMED.

Dissenting, Justices CLIFFORD, DAVIS, and STRONG.

DAVIS *v.* BILSLAND.

1. The case of *Hornbuckle* v. *Toombs* (*supra*, p. 648), affirmed.
2. Under the mechanic's lien law and Civil Practice Act of Montana, a mechanic who has completed his claim by filing a lien, may assign it to another, who may institute a proceeding on it in his own name.
3. Under the first-mentioned law the liens secured to mechanics and material-men have precedence over all other incumbrances put upon the property, after the commencement of the building.

ERROR to the Supreme Court of the Territory of Montana.

A mechanic's lien law of the Territory, just named, enacts:

"SECTION 8. The liens for work or labor done, or things furnished, as specified in this act, shall have priority in the order of filing the accounts thereof, as aforesaid, and shall be preferred to all other liens and incumbrances which may be attached to or upon the building, erection, or other improvement, and to the land upon which the same is situated, to the extent aforesaid, or either of them, *made subsequent to the commencement of said building, erection, or other improvement.*"

Under this act Bilsland filed a petition in the Territorial District Court to enforce a mechanic's lien against the International Hotel in the town of Helena, Montana, and the lot on which it is situated, by a sale of the same to pay the plaintiff's claim, and to foreclose the liens and claims of all other parties. The building of the hotel was begun on May 1st, 1869, and one McKillican was employed by the owner to

Statement of the case.

work upon it as foreman from the 8th of May to the 13th of November, and for this labor became entitled to the sum of $1242.50. He duly filed his lien, and afterwards assigned his claim to Bilsland. Bilsland himself was employed on the building as a carpenter from July to November, 1869, and duly filed his lien for $742.87, the amount due to him.

Bilsland's petition alleged that a certain Davis, who, with some other persons, was made a defendant in the case, pretended to have some lien on the property, which at best arose subsequently to that which he, Bilsland, had, which claim of Davis the petition prayed might be barred and foreclosed.

Davis appeared as a defendant and alleged that on the 9th of June, 1869 (after the building was commenced), he lent to the owner of the property $6792, and received as security therefor a mortgage on the property, which was duly filed for record on the same day. He contended that he was entitled to priority of payment over the claims of McKillican and Bilsland.

The court, a jury being waived, rendered a decree in favor of Bilsland for his own claim and for that which was assigned to him by McKillican, and directed a sale of the property to pay the plaintiff, in preference to other parties, Davis among the number. This decree, being taken by appeal to the Supreme Court of the Territory, was substantially affirmed, and was now here on a *writ of error*.

The plaintiff assigned three errors:

First. That the action was a joinder in one suit of an action of assumpsit for work and labor, with a chancery proceeding to foreclose the equity of redemption.

Secondly. That the claim of a mechanic for a statutory lien cannot be enforced by an assignee by a suit in his own name.

Third. That the mortgage of Davis was entitled to priority over the claims of the plaintiff, which were not filed till November, 1869, and that Bilsland did not commence work until after the mortgage was given.

Messrs. Robert Leech and Enoch Totten, for the plaintiffs in error; Messrs. J. H. Ashton and N. Wilson, contra.

Opinion of the court.

Mr. Justice BRADLEY delivered the opinion of the court.

The plaintiff assigns three errors:

First. That the action is a joinder in one suit of an action of assumpsit for work and labor, with a chancery proceeding to foreclose the equity of redemption.

This ground of objection having been already fully considered in the case of *Hornbuckle* v. *Toombs*, needs no further discussion.

Secondly. That the claim of a mechanic for a statutory lien cannot be enforced by an assignee by a suit in his own name.

In answer to this objection it is sufficient to refer to the fourth section of the Civil Practice Act of Montana, which provides that actions shall be prosecuted in the name of the real party in interest. McKillican had completed his claim by filing his lien before assigning it to the plaintiff. It was perfectly lawful for him to assign his claim. It was not against any principle of public policy to do so. When assigned, the claim really belonged to the plaintiff, and according to the code he was the proper person to bring suit upon it.

Thirdly. That the mortgage of the defendant was entitled to priority over the claims of the plaintiff, which were not filed till November, 1869, and Bilsland did not commence work until after the mortgage was given.

The language of the eighth section of the mechanic's lien* law of Montana is unambiguous. The liens secured to the mechanics and material-men have precedence over all other incumbrances put upon the property after the commencement of the building. And this is just. Why should a purchaser or lender have the benefit of the labor and materials which go into the property and give it its existence and value? At all events the law is clear, and the decree was right.

DECREE AFFIRMED.

Dissenting, Justices CLIFFORD, DAVIS, and STRONG.

* Quoted *supra*, p. 659.

JONES ET AL. *v.* UNITED STATES.

On a suit by the government against the sureties of a postmaster on his official bond, it is no defence that the government, "through their agent, the Auditor of the Treasury of the Post Office Department, had full notice of the defalcation and embezzlement of funds of the plaintiff before them, and yet neglectfully permitted the said postmaster to remain in office, whereby he was enabled to commit all the default and embezzlement," &c.

ERROR to the Circuit Court for the Southern District of Georgia.

Jones, Ramsay, and Lauterman, as sureties for one Quillian, were sued by the United States on a bond executed on 13th June, 1867, conditioned that the said Quillian should faithfully discharge the duties of postmaster at Milledgeville, Georgia, and "faithfully, once in three months, or oftener, if thereto required, render account of his receipts and expenditures, and pay the balance of all moneys that shall come to his hands, and keep safely all the public money collected by him."

To the default under this bond the defendants put in the plea:

"That as to any default of the said Quillian, their principal in said bond in the declaration mentioned as postmaster aforesaid, within two years before the commencement of this action, they are not liable in law therefor, but have been and are fully discharged and released, by the acts and conduct of the plaintiff, through their agent, the Auditor of the Treasury of the Post Office Department, of the said plaintiff, who had full notice of the defalcation and embezzlement of funds of the plaintiff before them; and yet neglectfully permitted said Quillian to remain in office as such postmaster, whereby he was enabled to commit all the default and embezzlement aforesaid, within two years before the commencement of this action."

To this plea (a plea of the Statute of Limitations having been withdrawn) the plaintiff demurred, and his demurrer was sustained.

The overruling of the plea, and sustaining the demurrer, was now assigned for error.

Mr. P. Phillips, for the plaintiff in error:

Assuming that the government is subject to the same legal obligation as would be imposed on an individual occupying the like position, it ought not to be allowed to recover. If A. becomes liable for the faithful discharge of duties by B., as clerk for C., and it should come to the knowledge of C., that B. had embezzled his funds, but notwithstanding C. continues him in his employment, it would be a fraud on A., ignorant of this embezzlement, to hold him responsible for any subsequent act of dishonesty. So we say, in this case, that the knowledge of the government that Quillian had embezzled its funds, should have caused his immediate dismissal. This would have terminated the liability of his sureties, and limited it to the amount then due. But when the government chooses to continue in office an officer known to have committed such an act, it takes upon itself the trust of his future honesty.

Mr. S. F. Phillips, Solicitor-General, contra.

Mr. Justice CLIFFORD delivered the opinion of the court, to the effect that it was quite evident that the facts pleaded did not constitute any defence to the action, and that such being the settled law of the court it was not necessary to enter into any discussion of the question.*

JUDGMENT AFFIRMED.

* United States *v.* Vanzandt, 11 Wheaton, 184; Bank of the United States *v.* Dandridge et al., 12 Id. 64; Dox et al. *v.* The Postmaster-General, 1 Peters, 318; United States *v.* Boyd et al., 15 Id. 187.

SHREWSBURY *v.* UNITED STATES.

A *quartermaster* contracted at Fort Leavenworth with A. that he, A., should *transport* to Fort Union, from Fort Leavenworth, all the military stores and supplies for which the quartermaster's department might require transportation from the one place to the other during the year 1865, provided that their weight should not exceed a weight specified.

Within the year, and before A. had been offered for transportation supplies to the weight specified, the *commissary of subsistence* at the same Fort Leavenworth, made a contract with B. and C., that they should *deliver* at the same Fort Union, a certain quantity of supplies, these last agreeing that the supplies should be of a certain sort and quality specified, and should be delivered within a certain time, and be subject to inspection, acceptance, or rejection by the officer receiving the same:

Held, that the making of the second contract was no infringement of the first.

Held, *further*, that the fact that B. and C. had borrowed from the quartermaster at Fort Leavenworth some of the corn which they delivered at Fort Union, under their contract (they having afterwards repaid it in kind), did not show that the government in making the second contract meant to evade its obligations under the first.

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

On the 27th of March, 1865, one Shrewsbury entered, at Fort Leavenworth, Kansas, into a contract with Colonel Potter, a *quartermaster* of the army there, by which it was agreed that he, Shrewsbury, should "receive" at any time from May to September, 1865, from the officers of the quartermaster's department, at Forts Leavenworth and Riley, and town of Kansas, all such military stores and supplies, as might "be turned over to him *for transportation* by the officer or agent of the quartermaster's department at any or all of the above-named places, and *transport* the same" to the officer of the quartermaster's department on duty at Fort Union, in the Territory of New Mexico, or any other depot that may be designated in that Territory.

In a subsequent article of the contract, Shrewsbury contracted to "*transport* all the military stores and supplies for which the quartermaster's department may require trans-

portation by contract, during the year 1865, provided that the weight of such military stores and supplies should not exceed in the aggregate 15,000,000 pounds." The article contained a clause thus:

"Nothing herein shall be so construed as to forbid or prevent the United States from using its own means of transportation for such service, whenever it may be deemed advisable to do so."

Under this agreement stores were furnished to Shrewsbury by the quartermaster's department to the amount of 14,200,000 pounds, for the transportation of which he was paid. He was prepared with the means of transportation, and ready to transport the remainder of the 15,000,000 pounds, which, under the contract, he was bound to carry; but it was not furnished to him for transportation.

On the 29th of September, 1865, Colonel Morgan, *commissary of subsistence* at Fort Leavenworth, entered into a contract with Fuller & Tiernan to deliver "to the officer of *the subsistence department*" at this same Fort Union, 18,000 bushels (or about 1,000,000 pounds), of shelled corn, on or before the 20th of December, 1865, the same to be "of the best quality, well sacked in new gunny-sacks, securely sewed with linen twine; free from dirt, cobs, or other foreign matter, and to be either yellow or white, but not mixed in the sacks." The contract proceeded:

"The parties of the second part agree that said corn shall be subject to the inspection, acceptance, or rejection of the officer receiving the same, and that if default shall be made by the said parties of the second part, or either of them, in the time of delivery, or any of the terms of this contract, the party of the first part, or any person acting for him on behalf of the United States, shall have power to purchase the corn in open market, and the said parties of the second part, and their sureties, shall be charged with the difference between the cost thereof and the price hereinafter stipulated to be paid to the said parties of the second part.

"For and in consideration of the faithful performance of the stipulations of this contract the said party of the first part

agrees to pay, or cause to be paid, to the parties of the second part, at the office of the commissary of subsistence at Fort Leavenworth, Kansas, the sum of $8.54 for each and every bushel of corn *delivered and accepted* in accordance with the terms thereof, payment to be made on vouchers issued and certified by the officer receiving said corn."

This contract was entered into by Morgan with Fuller & Tiernan, in pursuance of an order received by the former from the commissary of subsistence at St. Louis, Missouri, requiring Morgan to send corn to New Mexico to the amount of about 1,000,000 pounds. It being too late in the season for Morgan to advertise for proposals for the corn, and to purchase it under advertisement in time to send it out by the government freighter, and, having an offer from Fuller & Tiernan, who were then furnishing corn to the quartermaster's department at Fort Leavenworth, to deliver the corn required for the subsistence department at Fort Union, he entered into the said contract with them. *This corn was to be sent to the said fort, not for the army, but to feed Mexicans or Indians.* Morgan urging Fuller & Tiernan to send the corn off, they borrowed from the quartermaster of Fort Leavenworth some corn which they were delivering to him; the said quartermaster lending it to Fuller & Tiernan, to accommodate the subsistence department, and to enable Fuller & Tiernan to begin on their contract sooner than they could do if they had to wait to get the corn from St. Louis.

The quantity of corn so lent by the quartermaster's department to Fuller & Tiernan was about one-half of the million pounds which they contracted to deliver at Fort Union; and the amount lent to them was afterwards returned by them, in kind, to the quartermaster's department at Fort Leavenworth. Fuller & Tiernan delivered at Fort Union 858,000 pounds of corn, all of which was received by the government on their contract. About 120,000 pounds of the corn they shipped for Fort Union was stopped and taken by the government at Fort Dodge.

Shrewsbury insisting that the making of this contract by

an officer of the United States, in September, 1865, and its performance, constituted a breach of his contract made with Colonel Potter in March of the same year, filed a petition in the court below, claiming as damages the profit on the transportation of about 800,000 pounds of corn, which, he insisted, should have been furnished for transportation on his contract, instead of being purchased and delivered under the contract with Fuller & Tiernan.

The Court of Claims held adversely to the petitioner and dismissed his claim. He now appealed to this court.

Mr. Durant, for the appellant, contended that Shrewsbury, by his contract, had an exclusive right to carry whatever corn, up to 15,000,000 pounds, the military department of the government sent from Fort Leavenworth to Fort Union; and that in making the new contract, by which the right to deliver the same article at Fort Union was conceded to Fuller & Tiernan (he, Shrewsbury, not having yet carried the 15,000,000 pounds, nor so exhausted his right), the government had violated its contract with him; that the arrangement with these parties just named was but a device to evade the performance of their contract with him.

The learned counsel argued further, that any loan of supplies owned by the government to a private contractor, was a matter against public policy and illegal; and that the fact of such a loan in this case was a further proof of the truth of the position already taken, that the contract with Fuller & Tiernan was but a scheme to avoid the performance of the contract made with Shrewsbury.

Mr. C. H. Hill, Assistant Attorney-General, contra.

Mr. Justice HUNT delivered the opinion of the court.

It can hardly be denied by the most zealous advocate that the two contracts before us differ essentially in their nature and form. The contract made with the claimant is a contract for the transportation of corn, at a price fixed, and in quantity not to exceed 15,000,000 pounds. The sole duty

of the claimant under this contract was to carry and deliver the corn. He did not purchase it nor own it; he had nothing to do with its value or quality, and could neither make nor lose by a fluctuation in the value of the corn.

The later contract with Fuller & Tiernan, on the other hand, is strictly a contract for the purchase of 18,000 bushels of corn, to be delivered at a place and within a time named, and at a price specified, to be paid on the delivery and acceptance of the corn. In this case the corn is the property of Fuller & Tiernan until delivered. They purchase it; they own it. If the price of corn in the market varies essentially they will make a profit or be losers, according as the direction of the variation shall be. Their contract is to furnish the corn at Fort Union, New Mexico, and they are at liberty to obtain it from any source they choose. They have no claim for payment until delivery, and the United States have no ownership of the corn until delivery and payment.

The foundation, however, of the claimant's demand rests upon the identity of these dissimilar contracts. Having contracted to deliver to him for transportation all the corn of which the quartermaster's department required transportation from Fort Leavenworth to Fort Union, he insists that this contract is violated by a purchase by the subsistence department of the United States, made at Fort Leavenworth, of corn to be delivered by the seller of the same at Fort Union. This view cannot be sustained. There is not only not an identity, but there is not a similarity between the contracts. The making of the latter contract, and its performance, was not a breach of the former.

It is suggested in the claimant's brief that the proceeding of the United States in making the contract with Fuller & Tiernan was a device unfairly to evade the performance of the claimant's contract. No such fact is found by the Court of Claims, and their findings of fact are taken by us to be the facts in the case. We discover nothing in the case that would have justified the Court of Claims in coming to such conclusion. We should, at all times, be slow to sustain such an imputation upon the good faith of the government.

The claimant makes complaint that the quartermaster at Fort Leavenworth lent to Fuller & Tiernan a quantity of corn to be used by them in performance of their contract of sale with the commissary of subsistence; that the loan of corn was illegal, the title still remaining in the United States, and that this fact furnishes evidence that the second contract was a device and a pretence only. We have only to say on this branch of the case that the claimant is not invested with authority to supervise the transactions of the different departments of the government. Whether the commissary of subsistence had authority to make the contract with Fuller, whether there was an irregularity in the loan of corn to Fuller, and what was the motive of these dealings, are matters to be investigated by the War Department. They cannot be challenged by the claimant. He rests his claim for damages upon the making and performance of Fuller's contract. That contract has not been repudiated or objected to, so far as we know, by the proper authority. The record contains no evidence that any of the transactions are the subject of censure by the government.

The supplies contracted to be transported by the claimant were those of the quartermaster's department, that is, the supplies to be used for and by the army. The corn purchased by the commissary of subsistence was sent to New Mexico, not for the army, but to feed the Mexicans or Indians. The duties of the quartermaster's department, and of the department of subsistence, are separate and distinct. The departments are managed by different officers, whose authority is confined to the matters connected with their departments.

The contract to transport, in the case before us, relates to supplies for the quartermaster's department. The arrangement which is set forth as a violation of that contract related to supplies needed by the commissary of subsistence, a different subject entirely.

The duty of the commissary department, in general terms, is to feed the army, to provide supplies for its subsistence. Transportation is not understood to be among its

duties. That office belongs to the quartermaster's department. What the commissary provides to feed the army it is the duty of the quartermaster to transport to such points as may be needed. Hence, in the case before us, it was in the ordinary course of business, the contract for transportation being already made, and further supplies being needed, that the purchase of the same should devolve on the commissary department.

JUDGMENT AFFIRMED.

HICKS *v.* KELSEY.

The mere change in an instrument or machine of one material into another —as of wood, or of wood strengthened with iron, into iron alone—is not "invention" in the sense of the Patent Acts, and therefore is not the subject of a patent; the purpose and means of accomplishment, and form and mode of operation of each instrument—the new as of the old—being each and all the same. The mere fact that the new instrument is a better one than the old one—requiring less repair, and having greater solidity than the old one, does not alter the case. It does not bring the case out of the category of more or less excellence of construction.

APPEAL from the Circuit Court for the Northern District of Illinois; the case being this:

Hicks obtained a patent for an improved wagon-reach, and filed a bill against Kelsey, charging infringement and praying the usual relief. The defendant answered, denying the novelty of the alleged invention, and also denying infringement.

The thing called a "wagon-reach"—that is to say, a pole or shaft connecting the front and rear axles of wagons or carriages, and having an upward crook or curve in it, so as to allow the front wheel, which, when a carriage is turned, goes against the reach if straight, to pass under it—had confessedly long been made, and was public property. These had been made of wood, necessarily for the sake of strength of a certain thickness, and consisted of one piece, strengthened by straps of iron attached to each side of the reach.

Statement of the case.

The supposed improvement of the plaintiff consisted precisely and only in leaving out the wood in *the curve* and bolting the iron straps together, whereby the curve became all iron and less bulky, but in all other respects having the same shape and performing the same office as before. About all this there was no dispute whatever. Instead of being bolted together, the straps might be welded so as to make the curve consist of solid iron.

The question was whether this change of material—making the curve of iron instead of wood and iron—was a sufficient change to constitute invention,—the purpose being the same (namely, to turn the wheel under the body of the wagon), the means of accomplishing it being the same (namely, by a curved reach), and the form of the reach and mode of operation being the same.

Witnesses were examined, whose testimony went to show that the iron reach had advantages over those of mere wood, or of wood and iron. One said that of thirty-five, which he had made in about two years, none had come back broken, or needing repairs; that this was not the case with the old sort.

Another said:

"My experience is that, in those made of wood and iron, the wood between the iron plates in summer contracts and loosens the bolts."

Another said:

"Hicks's reach being iron, the two plates come together as one whole substantially soldered. In the wooden one, the moment the shrinkage becomes such that the bolts become loose, each has to take its own part, and the transit of the trucks, moving from the right to the left, turning the friction from that, takes each separate strain from one and throws it on to the other, so it makes only the thickness of the one side—the one piece of iron—where otherwise it would be two plates together. The crooked part, right at the crook, would break, according to that arrangement, because the other part is stronger. It will break whenever it gets so it will vibrate, at the weakest point."

The court below decided that plainly there was nothing

but a change of material, and that this—the purpose, means of accomplishment, form of the instrument, mode of operation, being all as in the old reach—was not a sufficient change to constitute invention. It accordingly dismissed the bill. From its action herein this appeal was taken.

Mr. S. A. Goodwin, for the appellant:

This invention does not consist in the *mere* substitution of a particular material for other material which had been previously used for the same purpose and in the same way. The invention consists in the production of a certain described article by a certain described mechanical process, which process, viewed as a whole, is new in itself. That process is, the making an ordinary wooden reach of two separate parts, in splicing those parts at the front and rear ends by a particular and new mechanical arrangement to a curved metallic intermediary splice, made substantially solid in two plates, or one casting, so that a new article is produced by a new mechanical arrangement or device,—a new curved reach. This article has added advantages and increased utility over the old wooden curved reach improved upon. They are shown in the proofs. Indeed, the matter is intelligible without proofs. The *curved* reach is indispensable, to prevent the wheel, when the carriage is turned and one of the front wheels put under it, from rubbing against the reach, lifting it up, and upsetting the carriage. But a curved reach must be made. One is rarely found in the natural growth of a tree. The curved part, when made, is necessarily weak, being usually made of wood sawed across the grain. To give strength the whole wooden reach has iron plates along it, fastened on both its sides with spikes or bolts. The wood and the iron shrink unequally, and the bolts all become loose. But when the central part is *all* made of iron alone, leaving the ends, for the sake of lightness, to be of wood alone, all this is obviated.

We say, then, that this *new material* in the crook or curve; with the *new method of attachment* at each end (the splice) to the two wooden parts; with the *new construction* of the reach

as a whole; with the *new operation* in consequence of the change; with the *increased utility* and *beneficial results*, thus incontestably proved, bring this patent within the principle of all the cases as a patentable invention.

There are many cases in which the materiality of an invention, whether it be a machine or a process, can be judged of only by its effect on the result, and this effect is tested by the actual improvement in the process of producing an article, or in the article itself introduced by the alleged invention.*

No opposing counsel.

Mr. Justice BRADLEY, having stated the case, delivered the opinion of the court.

The question is whether the mere change of material—making the curve of iron instead of wood and iron—was a sufficient change to constitute invention; the purpose being the same, the means of accomplishing it being the same, and the form of the reach and mode of operation being the same.

It is certainly difficult to bring the case within any recognized rule of novelty by which the patent can be sustained. The use of one material instead of another in constructing a known machine is, in most cases, so obviously a matter of mere mechanical judgment, and not of invention, that it cannot be called an invention, unless some new and useful result, an increase of efficiency, or a decided saving in the operation, is clearly attained. Some evidence was given to show that the wagon-reach of the plaintiff is a better reach, requiring less repair, and having greater solidity than the wooden reach. But it is not sufficient to bring the case out of the category of more or less excellence of construction. The machine is the same. Axe-helves made of hickory may be more durable and more cheap in the end than those made of beech or pine, but the first application of hickory to the purpose would not be, therefore, patentable.

* Roberts *v.* Dickey, 4 Fisher, 532, per Strong, J.; and see McCormick *v.* Seymour, 2 Blatchford, 243—definition of a patentable subject, by Nelson, J.

Cases have frequently arisen in which substantially the question now presented has been discussed. Perhaps, however, none can be cited more directly in point than that of *Hotchkiss* v. *Greenwood*,* in which it was held that the substitution of porcelain for metal in making door-knobs of a particular construction was not patentable, though the new material was better adapted to the purpose and made a better and cheaper knob—having been used for door-knobs, however, before. So, in a case at the circuit, referred to by Justice Nelson in the last-named case,† the substitution of wood for bone as the basis of a button covered with tin was held not patentable.

In *Crane* v. *Price*,‡ it is true, the use of anthracite instead of bituminous coal with the hot-blast in smelting iron ore was held to be a good invention, inasmuch as it produced a better article of iron at a less expense. But that was a process of manufacture, and in such processes a different article replacing another article in the combination often produces different results. The latter case is more analogous to the cases of compositions of matter than it is to those of machinery; and in compositions of matter a different ingredient changes the identity of the compound, whereas an iron bar in place of a wooden one, and subserving the same purpose, does not change the identity of a machine.§

But the plaintiff's counsel alleges that his invention does not consist of the mere substitution of a particular material for another material which had been previously used for the same purpose in the same way, but consists in the production of a certain described article by a certain described mechanical process, which process, viewed as a whole, is new and useful; and then he describes what he supposes to be such new mechanical process. This is his argument; but the facts do not bear out such a view of the case.

In our judgment, the patent in this case is void for want of novelty in the alleged invention.

DECREE AFFIRMED.

* 11 Howard, 248. † Ib. 266. ‡ Webster's Patent Cases, 409.
§ See Curtis on Patents, 3d edition, §§ 70–73.

INDEX.

ACCEPTANCE.

Where a party authorized another to draw different drafts on him upon different consignments to be made, and this other made different consignments and drew different drafts, the party authorizing the drafts accepts them in advance, and is bound to set aside and hold enough money from the proceeds of the consignments to pay them, come in for payment when they may. If he settle an account and pay over his balance without doing so, it is at his own risk. *Miltenberger* v. *Cooke*, 421.

ACTION. See *District of Columbia*, 2, 3; *Ex turpi causâ non oritur actio; Official Negligence.*

ACTUAL SETTLER. See *Oregon Donation Act.*

Unless forbidden by positive law, contracts made by actual settlers on the public lands concerning their possessory rights, and concerning the title to be acquired in future from the United States, are valid as between the parties to the contract, though there be at the time no act of Congress by which the title may be acquired, and though the government is under no obligation to either of the parties in regard to the title. *Lamb* v. *Davenport*, 307.

ADMIRALTY. See *Collision; Demurrage.*

1. Rule of, that damages in collision cases are to be divided, is applicable only to cases where both vessels are injured. *The Sapphire*, 51.
2. Costs in, are wholly under the control of the court giving them. *Ib.*
3. When a vessel libelled for collision means to set up injury to herself and to set off damages therefor against damages claimed for injury which she has herself done, the injury done to her ought to be alleged, either by cross libel or by answer. If not somewhere thus set up below, such damages cannot, and for the first time, be set up in the Supreme Court. *Ib.*
4. An entry on the record of an admiralty case, that on the return of a process of attachment Mr. B. "appears for the respondent, and has a week to perfect an appearance and to answer," is an appearance; the entry being followed by the execution by the respondent or his agents of different bonds, reciting "that an appearance in the case had been entered." *Atkins* v. *The Disintegrating Company*, 272.
5. A District Court of the United States, when acting as a court of admiralty, can obtain jurisdiction to proceed *in personam* against an in-

ADMIRALTY (*continued*).

habitant of the United States not residing within the district (within which terms a corporation incorporated by a State not within the district is meant to be included), by attachment of the goods or property of such inhabitant found within the district. *Atkins* v. *The Disintegrating Company*, 272.

AGENCY. See *Ratification*.

ALABAMA.

1. Prior to the act of March 3d, 1873, the District Court of the United States for the Middle District of Alabama was possessed of circuit court powers, and among these was the right to hear and decide cases properly removable from the State courts within the limits of that district. *Ex parte State Insurance Company*, 417.
2. An order of a State court within those limits ordering the removal of a case into the Circuit Court for the *Southern* District of Alabama was, therefore, void, and that court was right in refusing to proceed in such case when the papers were filed in it. *Ib.*

APPEARANCE.

An entry on the record of an admiralty case, that on the return of a process of attachment Mr. B. "appears for the respondent, and has a week to perfect an appearance and to answer," is an appearance, the entry being followed by the execution by the respondent or his agents of different bonds, reciting "that an appearance in the case had been entered." *Atkins* v. *The Disintegrating Company*, 272.

ARKANSAS. See *Statute of Limitations*, 1.

ASSIGNMENT.

Of a debt carries with it in equity an assignment of a judgment or mortgage by which it is secured. *Batesville Institute* v. *Kauffman*, 151.

ASSIGNMENT OF ERROR. See *Practice*, 3, 5.

ATTORNEY. See *California*, 7; *Notice*.

AUTREFOIS ACQUIT. See *Judgment*.

AUTREFOIS CONVICT. See *Judgment*.

BANK CHECK.

1. Where money is paid on a "raised" check by mistake, neither party being in fault, the general rule is that it may be recovered back as paid without consideration. *Espy* v. *Bank of Cincinnati*, 604.
2. Where a party to whom such a check is offered sends it to the bank on which it is drawn, for information, the law presumes that the bank has knowledge of the drawer's signature and of the state of his account, and it is responsible for what may be replied on these points. *Ib.*
3. Unless there is something in the terms in which information is asked that points the attention of the bank officer beyond these two matters, his verbal response that the check is "good" or "all right," will be limited to them, and will not extend to the genuineness of the filling-in of the check as to payee or amount. *Ib.*

BANK STOCK.

Is not, in National banks organized under the National Banking Act of 1864, subject to lien for discount by the bank to the owner. *Bullard* v. *Bank*, 589.

BANKRUPT ACT. See *Wife's Separate Property.*

1. Nothing short of a clear, distinct, and unequivocal promise will revive a debt once barred by the. *Allen & Co.* v. *Ferguson*, 1.
2. A payment by one insolvent, which would otherwise be void as a preference under sections thirty-five and thirty-nine of the Bankrupt law, is not excepted out of the provisions of those sections because it was made to a holder of his note overdue, on which there was a solvent indorser whose liability was already fixed. *Bartholow* v. *Bean*, 635.
3. An exchange of values may be made at any time, though one of the parties to the transaction be insolvent. There is nothing in the Bankrupt Act which prevents one insolvent from dealing with his property at any time before proceedings in bankruptcy are taken by or against him, provided such dealing be conducted without any purpose to defraud or delay his creditors or to give preference to any one, and do not impair the value of his estate. *Cook* v. *Tullis*, 332; *Tiffany* v. *Boatman's Institution*, 376.
4. Where a bankrupt owes a debt to two persons jointly, and holds a joint note given by one of them and a third person, the two claims are not subject to set-off under the Bankrupt Act, being neither mutual debts nor (without more) mutual credits. *Gray* v. *Rollo*, 629.

BAY OF SAN FRANCISCO. See *California*, 1, 2; *San Francisco, City of.*

BOOK ENTRIES. See *Evidence*, 6, 7.

BUILDER'S LIEN. See *Montana.*

Held not to have attached where a builder took a real security for payment of the work which he was to do, and afterwards the work being all done, gave it up and took a mere note. *Grant* v. *Strong*, 623.

BURDEN OF PROOF. See *Legal Presumptions.*

It is error to instruct a jury, in an action for penalties for alleged frauds upon the revenue, that after the government has made out a *primâ facie* case against the defendants, if the jury believe the defendants have it in their power to explain the matters appearing against them, and do not do so, all doubt arising upon such *primâ facie* case must be resolved against them. The burden rests upon the government to make out its case beyond a reasonable doubt. *Chaffee & Co.* v. *United States*, 516.

CALIFORNIA. See *San Francisco, City of.*

1. The subject of the rights of the city of San Francisco and her grantees in and to lands in front of the city, covered with tide-waters of the bay and within certain designated lines, considered in reference to the rights of the State to the lands on her admission into the Union, and the acts of her legislature passed March 26th and May 1st, 1851, giving to the city certain rights in the said lands. *Weber* v. *Harbor Commissioners*, 58.

CALIFORNIA (*continued*).

2. Her statute of limitations protecting persons from suits for injury to real property, interpreted in connection with the act of the State creating a board of harbor commissioners. *Weber* v. *Harbor Commissioners*, 58.
3. In ejectment, where both parties claim under patents of the United States issued upon a confirmation of grants of land in, made by the former Mexican government, both of which patents cover the premises, the inquiry of the court must extend to the character of the original grants, and the controversy can only be settled by determining which of these two gave the better right. *Henshaw et al.* v. *Bissell*, 255.
4. In determining such controversy a grant identified by specific boundaries, or having such descriptive features as to render its identification a matter of absolute certainty, gives a better right to the premises than a floating grant, although such floating grant be first surveyed and patented. *Ib.*
5. A survey under a grant approved by the District Court of the United States under the act of June 14th, 1860, is conclusive as against adverse claimants under floating grants. *Ib.*
6. Whilst proceedings are pending before the tribunals of the United States for the confirmation of claims to land under grants of the former Mexican government, the statute of limitations of California does not run against the right of the claimants to the land subsequently confirmed to them. It only begins to run against the title perfected under the legislation of Congress from the date of its consummation. *Ib.*
7. The title of an attorney purchasing property at a judicial sale decreed in proceedings in which he acted as an attorney, falls by the law of California, with the reversal of the decree directing the sale, independent of defects in the proceedings; and conveyances after such reversal pass no title as against a grantee of the original owner of the property. *Galpin* v. *Page*, 350.

CERTIFICATE OF DIVISION.

Questions sent here for answer will not be answered when, on a view of the record, it appears that from some fatal defect in the proceedings, no judgment can be entered against the defendant in the court whence the certificate comes. *United States* v. *Buzzo*, 125.

CERTIORARI.

Where a prisoner shows that he is held under a judgment of a Federal court made without authority of law, the Supreme Court will, by writs of *habeas corpus* and *certiorari*, look into the record so far as to ascertain whether the fact alleged be true, and if it is found to be so will discharge the prisoner. *Ex parte Lange*, 163.

CHANCERY. See *Equity*.

CHECK. See *Bank Check*.

CHICKASAW INDIANS.

1. The treaty of May 24th, 1834, with the Chickasaw Indians conferred

CHICKASAW INDIANS (*continued*)
title to the reservations contemplated by it, which was complete when the locations were made to identify them. *Best* v. *Polk*, 112.
2. Reservees under that treaty are not obliged, in addition to proving that the locations were made by the proper officers, to prove also that the conditions on which these officers were authorized to act had been observed by them. *Ib.*

COLLECTOR. *See Customs of the United States.*

COLLISION. See *Admiralty*, 1, 3; *Demurrage.*
An ocean steamer, running at the rate of eight or ten miles an hour, and close in with the Brooklyn shore, on the East River, and across the mouths of the ferry slips there, in order to get the benefit of the eddy, condemned for a collision with a New York ferry-boat coming out of her dock on the Brooklyn side, and which, owing to vessels in the harbor, did not see the ocean steamer. *The Favorita*, 598.

COMMISSARY OF SUBSISTENCE.
His office in the army distinguished from that of a quartermaster. *Shrewsbury* v. *United States*, 664.

CONDONATION OF OFFENCE. See *Official Negligence.*

CONFISCATION ACT
1. Under the act of July 17th, 1862, known as the "Confiscation Act," and the Joint Resolution, of the same date, explanatory of it, only the life estate of the person for whose offence the land has been seized, is subject to condemnation and sale. The fact that the decree may have condemned the fee does not alter the case. *Day* v. *Micou*, 156.
2. When such person has, previously to his offence, mortgaged the land to *a bonâ fide* mortgagee, the mortgage is not divested. *Ib.*

CONSIDERATION OF CONTRACT. See *Dower.*

CONSTITUTIONAL LAW. See *Confiscation Act; Judicial Sentence; Jurisdiction*, 1–3; *Rebellion*, 5; *Slave Contracts*, 3; *Taxation*, 6.
1. Agencies of the Federal government, how far exempt from taxation by State governments. The question considered in the case of a State taxing a railroad corporation chartered by Congress. *Railroad Company* v. *Peniston*, 5.
2. The ordinary legislation of the States regulating or prohibiting the sale of intoxicating liquors raises no question under the Constitution of the United States prior to the fourteenth amendment of that instrument. *Bartemeyer* v. *Iowa*, 129.
3. The right to sell intoxicating liquors is not one of the privileges and immunities of citizens of the United States which by that amendment the States were forbidden to abridge. *Ib.*
4. The provisions of the common law and of the Federal Constitution, that no man shall be twice placed in jeopardy of life or limb, are mainly designed to prevent a second punishment for the same crime or misdemeanor. *Ex parte Lange*, 163.

CONSTRUCTION, RULES OF. See "*From.*"

I. As applied to contracts, etc.

II. As applied to statutes.

1. Where a thing is against the spirit and policy of a statute, a permission in favor of it cannot be implied from general expressions. *Bullard* v. *Bank*, 589.

III. As applied to wills.

2. The construction of a will on the question of estate in fee, or life estate with vested remainder, left undecided, with comments on the small value that rules of decision and decided cases have as guides. *Clarke* v. *Boorman's Executors*, 493.

CONTRACT. See *Dower; Slave Contract.*

CORPORATE STOCK. See *Corporation.*

CORPORATION.

Where the charter of a corporation fixes the amount of its capital stock, but says that it may be increased "at the pleasure of *the said corporation*," the directors alone, and without the matter being submitted to and approved by the stockholders, have no power to increase it. The fact that the charter declares that "*all the corporate powers* of the said corporation shall be vested in and exercised by a board of directors" does not alter the case. *Railway Company* v. *Allerton*, 233.

COSTS.

In admiralty are wholly under the control of the court giving them. *The Sapphire*, 51.

CREDITOR AND DEBTOR. See *Bankrupt Act; Trust Property; Wife's Separate Property.*

CUSTOMS OF THE UNITED STATES.

1. Under the act of June 30th, 1864, "to increase duties on imports," &c., the collector is under no obligation to give notice to the importer of his liquidation of duties on merchandise imported. The importer who makes the entries is under obligation himself, if he wishes to appeal from it, to take notice of the collector's settlement of them. *Westray* v. *United States*, 322.

2. The right of the importer to complain or appeal begins with the date of the liquidation, whenever that is made. *Ib.*

DEBT. See *Discharged Debt.*

The action of, lies for a statutory penalty. *Chaffee & Co.* v. *United States*, 516.

DEBTOR AND CREDITOR. See *Bankrupt Act; Trust Property; Wife's Separate Property.*

DECEDENT'S ESTATE. See *District of Columbia*, 2, 3.

DECREE PRO CONFESSO.

On such decree for want of an answer, the only question for the consideration of this court on appeal is, whether the allegations of the bill are sufficient to support the decree. *Masterton* v. *Howard*, 99.

DEFICIENCY IN RETURN. See *Internal Revenue*, 4, 5, 6.

"DELIVER."

A contract made with a quartermaster of the army to "transport" supplies, distinguished from one made with a commissary of subsistence to "deliver" them. *Shrewsbury* v. *United States*, 664.

DEMURRAGE.

Demurrage charged against a vessel which had been condemned for collision with a ferry-boat, for the time that the ferry-boat was repairing, though her owners, a ferry company, had a spare boat which took the place on the ferry of the injured boat. *The Favorita*, 598.

DIRECT TAX. See *Tender*.

DIRECTORS OF CORPORATIONS.

Have no power to increase the capital stock of a corporation when the charter authorizes it to be increased "at the pleasure of the *corporation*." *Railway Company* v. *Allerton*, 233.

DISCHARGED DEBT.

Nothing short of a clear, distinct, and unequivocal promise will revive a debt discharged by the Bankrupt Act. *Allen & Co.* v. *Ferguson*, 1.

DISTRICT OF COLUMBIA. See *Dower*.

1. Where a husband and another, owning a piece of land in the District of Columbia, which they wanted to sell, applied to the wife (all parties being residents of the District) to release her dower, which she did in consideration of the husband and the other executing to her directly a joint promissory note for a sum of money; *Held*, That in virtue of the act of 10th April, 1869 (14 Stat. at Large, 45), regulating the rights of property of married women in the District, and in virtue of the further act, to amend the law of the District of Columbia in relation to judicial proceedings therein, of February 22d, 1867 (14 Id. 405), she could sue at law the joint obligor of her husband. *Sykes* v. *Chadwick*, 141.
2. Where a trustee appointed to make sale of a decedent's real estate has given bonds with surety in a penal sum to the State conditioned for the performance of his duties, children, entitled equally to a share in any surplus remaining after debts, expenses, &c., are paid from the proceeds of the sale, may, according to the practice in the District of Columbia, after the exact amount of such share has been found by an auditor whose report is confirmed by the court, bring joint suit against the surety—the trustee being dead—in the name of the State, on the bond for the penal sum; and a judgment for that sum to be discharged on the payment of the shares or sums certain, found as aforesaid, is regular. *Brent* v. *Maryland*, 430
3. Such joint suit, though against the surety of the trustee (the trustee in his lifetime having had notice of everything), may, according to the practice in the said District, be at law. *Ib.*

DONATION ACT. See *Oregon Donation Act*.

DOWER. See *District of Columbia*, 1.

The release of a woman's right of, is a good consideration for the payment of money, or promise of payment of it to her separate use; and even where the woman probably or certainly has, in reality, under the statutes of the place where she lives, as judicially expounded, no right of dower, still if a deed of relinquishment by her be thought so necessary by a purchaser of property from the husband, that the purchaser will not take the title without such relinquishment, her execution of the deed is a good consideration for such payment, or promise to pay. *Sykes* v. *Chadwick*, 141.

DUTIES. See *Customs of the United States.*

EQUITY. See *Bankrupt Act*, 4; *Decree Pro Confesso; District of Columbia*, 3; *Estoppel; Laches; New York; Parties; Practice*, 7, 12; *Set-off; Statute of Limitations*, 2; *Usury.*

1. An assignment of a debt carries with it, in equity, an assignment of a judgment or mortgage by which it is secured. *Batesville Institute* v. *Kauffman*, 151.
2. Where a trustee is dead the trust being still alive and unexecuted, a court of equity will carry it out through any other appropriate person in whom the control of the property may be; or if necessary, through its own officers and agents without the intervention of any trustee. *Ib.*

ESTOPPEL. See *Landlord and Tenant.*

For the application of the doctrine of equitable estoppel, such as will prevent a party from asserting his legal rights to property, there must be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud. *Henshaw* v. *Bissell*, 255.

EVIDENCE. See *Burden of Proof; Insurance*, 2; *Legal Presumptions; Practice*, 8, 9, 10.

1. The testimony of a wife and daughter, undertaking to swear from mere memory after a lapse of five or six years, as to which of one or two particular years (as *ex. gr.*, whether 1865 or 1866) they saw a particular paper in, discredited; there being circumstances leading to the inference that they were mistaken as to the year; and the purpose of the suit which their testimony was brought to sustain being to disturb, in favor of the husband and father, after a lapse of nearly five years, and after the death of one of the opposite parties to it, a settlement apparently fair. *Willett* v. *Fister*, 91.
2. The act of Congress of July 2d, 1864, which says that there shall be no exclusion of any witness in civil actions because he is a party to or interested in the issue tried does not give capacity to a wife to testify in favor of her husband. *Lucas* v. *Brooks*, 436.
3. Where, on a suit to recover a balance of a draft claimed because consignments of cattle against which the draft was drawn, have not proved adequate to protect it, the question is whether the draft was drawn under a letter of instructions and in behalf of the doings of

EVIDENCE (*continued*).

another person, one T., *an agent of the drawees*, or whether it was drawn by the drawer in behalf of transactions *on his own account*, a letter from the drawer in which he says, "I ship you twelve cars of cattle. *I may buy some more before Mr. T. gets back. Do the best you can*," is admissible evidence against him to show that it was on his own account. *Mulhall* v *Keenan*, 342.

4. When a letter of instructions told the person to whom it was written to draw "when there is a sufficient margin," evidence as to the fact whether there was sufficient margin or not is clearly admissible, on a suit against the drawee of the bill, as an acceptor in advance, unless there be something special to render it not so. *Ib.*
5. The fact that a bill of particulars filed with the declaration is made up of the debit of the draft sued on, sundry credits and the balance claimed, does not tend so clearly to show that the only question which the plaintiff meant to raise was whether the transaction was one on account of T., or an individual one, as that he may not, admitting that the transaction was on account of T., give evidence to show that the recipient of the letter had not obeyed his instructions to draw only when there was a sufficient margin. *Ib.*
6. Entries in the defendant's own books, whose purport was to show that the transaction was on account of T., are not admissible. *Ib.*
7. The general rule which governs the admissibility of entries in books made by private parties in the ordinary course of their business, requires that the entries shall be contemporaneous with the facts to which they relate, and shall be made by parties having personal knowledge of the facts, and be corroborated by their testimony, if living and accessible, or by proof of their handwriting if dead, or insane, or beyond the reach of the process or commission of the court. *Chaffee & Co.* v. *United States*, 516.
8. Copies of records appertaining to the land office, certified by the register of the district where the lands are, are evidence in Mississippi. *Best* v. *Polk*, 112.

EX TURPI CAUSA NON ORITUR ACTIO.

1. When a collector of internal revenue in a rural district of Mississippi—where, owing to the lawless condition in which the rebellion, then recently suppressed, had left the region, it was not safe to have gold and silver coin in one's house—in violation of the provisions of the Independent Treasury Act, but with an apparently good motive—openly and without indirection, and because he thought it safer thus to act than to take gold and silver coin—took in payment of taxes on cotton, accepted drafts drawn by the shippers of it on consignees of it in New Orleans (which was the place of deposit for taxes collected in Mississippi), afterwards (the drafts not being paid, and he having in his accounts with the government charged himself and been charged by it with the tax as if paid in gold and silver coin), sued the acceptors, the fact that in taking the drafts instead of gold and silver coin, he had acted in violation of the statutes of the United States,

EX TURPI CAUSA NON ORITUR ACTIO (*continued*).
does not necessarily so taint his act with illegality as that he cannot recover on them. *Miltenberger* v. *Cooke*, 421.
2. As between the parties the collector's charging himself with the tax and reporting it to the government as paid, would be payment by the collector of the tax. *Ib.*

"FINAL DECREE." See *Final Judgment.*

"FINAL JUDGMENT."
No judgment or decree is final which does not terminate the litigation between the parties. A judgment or decree reversing the judgment or decree of an inferior court, and remanding the cause for such other and further proceedings as to law and justice shall appertain, does not do this. A writ of error and an appeal to such a judgment and to such a decree dismissed. *St. Clair County* v. *Lovingston*, 628; *Moore* v. *Robbins*, 588.

FINDING.
1. Effect of a general, under the act of March 3d, 1865, as to matters open for review in the Supreme Court. *Insurance Company* v. *Folsom*, 237.
2. Circuit Courts not required under the said act to make a special. *Ib.*

FRAUDULENT PREFERENCE. See *Bankrupt Act*, 2, 3.

"FROM."
The word excludes the day of date. Hence an officer commissioned to hold office during the term of four years from the 2d March, 1845, was held to be in office *on* the 2d of March, 1849. *Best* v. *Polk*, 112.

GEORGIA. See *Wife's Separate Property.*

HABEAS CORPUS.
Where a prisoner shows that he is held under a judgment of a Federal court, made without authority of law, the Supreme Court will, by writs of *habeas corpus* and *certiorari*, look into the record, so far as to ascertain whether the fact alleged be true, and if it is found to be so, will discharge the prisoner. *Ex parte Lange*, 163.

HUSBAND AND WIFE. See *District of Columbia*, 1; *Dower; Oregon Donation Act*, 2; *Wife's Separate Property.*
1. The act of Congress of July 2d, 1864, which says that there shall be no exclusion of any witness in civil actions because he is a party to or interested in the issue tried, does not give capacity to a wife to testify in favor of her husband. *Lucas* v. *Brooks*, 436; and see *Willett* v. *Fister*, 91.
2. Where one writes to a man's wife (there being a relationship by blood between the party writing and the wife) proposing to her to occupy a farm on which she and her husband were then living, and to pay a certain rent therefor, which offer she accepts, and there is nothing in the correspondence beyond the fact that the property is offered to the wife and that the wife accepts it, to infer a purpose to give it to her to the exclusion of her husband, the husband is not excluded. The

HUSBAND AND WIFE (*continued*).
lease enures to his benefit and brings him into the relation of a tenant to the lessors. *Lucas* v. *Brooks*, 436.

IMPLIED REPEAL OF STATUTES.
A proviso to an existing act, *held* to have been repealed by an act which "*amended*" the former act, "by striking out all after the enacting clause and inserting in lieu thereof, the following;" this "following" being in part an iteration of the words of the section amended, and in part new enactments. *Steamboat Company* v. *The Collector*, 478.

IMPORTER. See *Customs of the United States.*

INCREASE OF CORPORATE STOCK. See *Corporation.*

INFORMATION, CRIMINAL. See *Internal Revenue*, 1.

INSURANCE.
1. The use of the phrase "lost or not lost," is not necessary to make a marine policy retrospective. It is sufficient if it appear by the description of the risk and the subject-matter of the contract that the policy was intended to cover a previous loss if one, unknown, existed. *Insurance Company* v. *Folsom*, 237.
2. Where a policy, following the exact language of the application, insured on the 1st of March, 1869, a vessel then at sea, "at and from the 1st day of January, 1869, at noon, until the 1st day of January, 1870, at noon," nothing being said in either policy or application as to "lost or not lost," nor about who was the master of the vessel, nor as to what voyage she was on: *held*, on a suit on the policy—and the company not having shown that the name of the master or the precise destination were material facts—that the application had no tendency to show that the assured when he made the application did not communicate to the defendants all the material facts and circumstances within his knowledge, and answer truly all questions put to him in regard to those several matters. *Ib.*

INTENT. See *Internal Revenue*, 1; *Waiver of Notice.*

INTEREST. See *National Banks*, 3; *Usury.*

INTERNAL REVENUE. See *Implied Repeal of Statutes.*
1. On an information under the ninth section of the Internal Revenue Act of July 13th, 1866, which enacts that any person who shall issue any instrument, &c., for the payment of money, without the same being duly stamped, "with intent to evade the provisions of this act, shall forfeit and pay," &c., an intent to evade is of the essence of the offence, and no judgment can be entered on a special verdict which, finding other things, does not find such intent. *United States* v. *Buzzo*, 125.
2. Under the ninth section of the act of July 13th, 1866, laying on the owners of steamboats a tax of "2½ per cent. of the *gross receipts from passengers*," the owners of a night-boat which receives a certain sum for the mere passage of persons (that is to say, for their barely being on the boat during its transit), and also a certain sum for the use of

INTERNAL REVENUE (*continued*).

berths and state-rooms (which berths and state-rooms it was not obligatory on the passengers to take, or pay for), is chargeable with 2½ per centum on the latter sort of receipts as well as on the former. *Steamboat Company* v. *The Collector*, 478.

3. The proviso in the fourth section of the act of March 3d, 1865, exempting a certain class of steamboats from a tax of 2½ per cent., which was laid on all steamboats by the one hundred and third section of the act of June 30th, 1864, fell by the enactment of the ninth section of the act of July 13th, 1866. *Ib.*
4. Under the twentieth section of the Internal Revenue Act of June 30th, 1864, as amended by the ninth section of the act of July 13th, 1866, it is not necessary that an assessor, in making a reassessment for deficiencies, should make his reassessment coincide, month by month, in the terms which it covers, with the monthly returns of the manufacturer; that is to say, it is not requisite that he should make a separate specification of deficiency for each defective return. *Dandelet* v. *Smith*, 642.
5. Nor, under the terms of the act of 1866, when the reassessment was made within fifteen months from the passage of the act, was it necessary that the reassessment should have reference only to returns made within fifteen months prior to the reassessment. *Ib.*
6. Nor, under the act of March 2d, 1867 (conceding that since the act of 1866 brewers are taxable, in the first instance, by stamps per barrel, and not on monthly returns), would a reassessment for deficiency be void, even though it had been made out on the principle of an assessment for false returns, under the previous act of July 13th, 1866. *Ib.*

INTERPRETATION OF LANGUAGE. See *Construction, Rules of.*

The word "from" excludes the day of date. *Best* v. *Polk*, 112.

INTOXICATING LIQUORS. See *Constitutional Law*, 2, 3.

IOWA.

Section 3275 of its code authorizing municipal corporations to levy a tax to pay judgments for its debts, confers no independent power to levy a specific tax to pay a judgment on warrants issued since 1863, for ordinary county expenditures. *Butz* v. *Muscatine* (8 Wallace, 575) distinguished from this case. *Supervisors* v. *United States*, 71.

JOINT ACTION. See *District of Columbia*, 2.

JUDGMENT. See "*Final Judgment.*"

1. When a court has imposed fine *and* imprisonment, where the statute only conferred power to punish by fine *or* imprisonment, and the fine has been paid, the court cannot, even during the same term, modify the judgment by imposing imprisonment instead of the former sentence. *Ex parte Lange*, 163.
2. A second judgment on the same verdict is, under such circumstances, void for want of power, and it affords no authority to hold the party a prisoner, and he must be discharged. *Ib.*

JUDICIAL COMITY.

1. Where in suits brought in a State court to settle an alleged copartnership between the plaintiffs and a deceased partner, the Supreme Court of the State decided that there had been no sufficient service on an infant defendant who had succeeded to an undivided interest in the property of the deceased partner, and consequently that the lower court had had no authority to appoint a guardian *ad litem* for such infant, and therefore reversed a decree directing a sale of the property of the deceased, such adjudication is the law of the case, and is binding upon the Circuit Court of the United States in an action brought by a grantee of the heirs of the deceased against a purchaser at a sale under such decree. *Galpin* v. *Page*, 350.
2. The thirty-fourth section of the Judiciary Act of 1789, enacting "that the laws of the several States . . . shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply," does not apply to questions of a general nature not based on a local statute or usage, nor on any rule affecting the titles to land, nor on any principle which has become a rule of property. *Boyce* v. *Tabb*, 546.

JUDICIAL PROCEEDINGS. See *Territories.*

JUDICIAL SENTENCE.

1. When a court has imposed fine *and* imprisonment, where the statute only conferred power to punish by fine *or* imprisonment, and the fine has been paid, it cannot, even during the same term, modify the judgment by imposing imprisonment instead of the former sentence. *Ex parte Lange*, 163.
2. A second judgment on the same verdict is, under such circumstances, void for want of power, and it affords no authority to hold the party a prisoner, and he must be discharged. *Ib.*

JURISDICTION. See *Alabama; Legal Presumptions.*

1. The jurisdiction of a court by which a judgment offered in evidence was rendered may always be inquired into. *Thompson* v. *Whitman*, 457; and see *Galpin* v. *Page*, 351.
2. The record of a judgment rendered in another State may be contradicted as to the facts necessary to give the court jurisdiction; and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist. *Ib*
3. Want of jurisdiction may be shown either as to the subject-matter or the person, or, in proceedings *in rem*, as to the thing. *Ib.*
4. Where special powers conferred upon a court of general jurisdiction are brought into action in a special manner, not according to the course of the common law, or where the general powers of the court are exercised over a class not within its ordinary jurisdiction upon the performance of prescribed conditions, a presumption of jurisdiction will not attend the judgment of the court The facts essential to the exercise of the special jurisdiction must appear in such cases upon the record. *Galpin* v. *Page*, 351.

JURISDICTION (*continued*).

I. OF THE SUPREME COURT OF THE UNITED STATES.

(*a*) It HAS jurisdiction—

5. Where a prisoner shows that he is held under a judgment of a Federal court made without authority of law, by writs of *habeas corpus* and *certiorari* to look into the record so far as to ascertain that fact, and if it is found to be so to discharge the prisoner. *Ex parte Lange*, 163.

(*b*) It has NOT jurisdiction—

6. As of a "final judgment," or as of a "final decree," of any judgment or of any decree which does not terminate the litigation between the parties. Hence it has not jurisdiction of a judgment or decree reversing the judgment or decree of an inferior court, and remanding the cause for such other and further proceedings as to law and justice shall appertain. A writ of error and an appeal to such a judgment and such an appeal dismissed. *St. Clair County* v. *Lovingston*, 628; *Moore* v. *Robbins*, 588.

II. OF THE CIRCUIT COURTS OF THE UNITED STATES.

7. A case in which the plaintiff is a citizen of the State where the suit is brought and two of the defendants are citizens of other States, a third defendant being a citizen of the same State as the plaintiff, is not removable to the Circuit Court of the United States under the act of March 2d, 1867, upon the petition of the two foreign defendants. *Case of the Sewing Machine Companies*, 553.

III. OF THE DISTRICT COURTS OF THE UNITED STATES.

8. When acting as courts of admiralty they can obtain jurisdiction to proceed *in personam* against an inhabitant of the United States not residing within the district (within which terms a corporation incorporated by a State not within the district is meant to be included), by attachment of the goods or property of such inhabitant found within the district. *Atkins* v. *The Disintegrating Company*, 272.

LACHES. See *New York; Statute of Limitations*, 2.

The general doctrines of courts of equity concerning lapse of time, laches, and stale claims, will protect the executors of a trustee for matters growing out of the trust which occurred forty years before suit brought, which were known to the ancestor under whom the plaintiffs claim for over twenty years before his death, and where the suit is brought by those heirs fourteen years after *his* death, and two years after the death of the trustee, and where no person connected with the transaction complained of remains alive. *Clarke* v. *Boorman's Executors*, 493.

LANDLORD AND TENANT. See *Husband and Wife*, 2; *Waiver of Notice*.

A person in possession of land who takes a lease from another who has bought and claims the land leased, is estopped from denying the title of such other person, or showing that such person was but trustee of the land for him. *Lucas* v. *Brooks*, 436.

LAST WILL AND TESTAMENT.

1. A writing bearing even date with a paper having the form of and purporting to be the last will and testament of the party, and disposing clearly and absolutely of all his estate,—which writing refers to the paper as the party's "will" and speaks of itself as "a letter" written for the information and government of the executors, so far only as they see fit to carry out the testator's present views and wishes,—has no testamentary obligation, even though it direct the persons to whom it is written to allow such and such persons to have specific benefits named in specific items of property. *Lucas* v. *Brooks*, 436.
2. Comments on the worthlessness of rules of decision and of decided cases on the construction of wills, when the question is on the point whether an estate in fee is devised or only a life estate with a vested remainder. *Clarke* v. *Boorman's Executors*, 493.

"LAW IMPAIRING THE OBLIGATION OF CONTRACTS." See *Slave Contracts*, 2, 3.

LEGAL PRESUMPTIONS. See *Burden of Proof; Jurisdiction*, 1–5.

1. Those implied in support of the judgments of superior courts of general jurisdiction, only arise with respect to jurisdictional facts, concerning which the record is silent. *Galpin* v. *Page*, 351.
2. And they are limited to jurisdiction over persons within their territorial limits, and over proceedings which are in accordance with the course of the common law. *Ib.*

LIEN. See *Builder's Lien.*

National banks do not acquire one on stock in the bank owned by their own debtors. *Bullard* v. *Bank*, 589.

LOAN. See *National Banks; Usury.*

"LOST OR NOT LOST." See *Insurance*, 1.

LOUISIANA. See *Slave Contracts.*

MARRIED WOMEN. See *District of Columbia*, 1; *Dower; Husband and Wife; Oregon Donation Act*, 2; *Wife's Separate Property.*

MECHANIC'S LIEN. See *Builder's Lien.*

"MILITARY SERVICE OF THE UNITED STATES."

1. This expression as used in the act of March 3d, 1849, "to provide for payment of horses or other property lost or destroyed" in, does not include the case of a contractor with the government transporting from post to post, remote from any seat of war. *Stuart* v. *United States*, 84.
2. The said act, giving compensation for "damage sustained by the capture or destruction by an *enemy*," a petition by a contractor for transportation of military supplies, to the Court of Claims for compensation, which represented that the party transporting was "attacked by a *band of hostile Indians*;" was *held*, not sufficiently full and specific, the government not being at the time at war with the Indians. *Ib.*

MISSISSIPPI.

Copies of records appertaining to the land office, certified by the register of the district where they are, are evidence in the State of. *Best* v. *Polk*, 112.

MISSOURI.

1. The ordinance of July 4th, 1865, relating to the payment of State and of railroad debts, adopted by the State of, as part of its then new constitution, did not mean to say that the legislature might provide for the sale of the property of the St. Louis and Iron Mountain Railroad Company in any manner which the new constitution forbade. *Trask* v. *Maguire*, 392.
2. That constitution forbade the renewal of an exemption from taxation as much as it did the creation of one in an original form. *Ib.*

MONTANA.

1. Under the mechanic's lien law and Civil Practice Act of Montana, a mechanic who has completed his claim by filing a lien, may assign it to another, who may institute a proceeding on it in his own name. *Davis* v. *Bilsland*, 659.
2. Under the first-mentioned law the liens secured to mechanics and material-men have precedence over all other incumbrances put upon the property after the commencement of the building. *Ib.*

MOOT CASES.

No opinion will be given on cases devised to obtain an opinion from the Supreme Court upon a state of facts not really existing. *Bartemeyer* v. *Iowa*, 129.

MORTGAGE. See *Confiscation Act*, 2.

MUNICIPAL CORPORATIONS. See *Iowa*.

MUTUAL DEBTS AND CREDITS. See *Bankrupt Act*, 4; *Set-off*.

NATIONAL BANKS.

1. Organized under the National Banking Act of June 3d, 1864, cannot, even by provisions framed with a direct view to that effect in their articles of association and by direct by-laws, acquire a lien on their own stock held by persons who are their debtors. *Bullard* v. *Bank*, 589.
2. A by-law giving to a bank a lien on stock of its debtors is not "a regulation of the business of the bank, or a regulation for the conduct of its affairs," within the meaning of the said act, and, therefore, not such a regulation as under the said act National banks have a right to make. *Ib.*
3. Under the thirtieth section of the said act, National banks may take the rate of interest allowed by the State to natural persons generally, and a higher rate, if State banks of issue are authorized by the laws of the State to take it. *Tiffany* v. *National Bank of Missouri*, 409.

NEBRASKA. See *Taxation*, 7, 8.

NEGATIVE PREGNANT. See *Oregon Donation Act*, 1.

NEMO BIS DEBET PUNIRI, ETC.

This maxim applied in the case where a court, by one sentence, imposed fine *and* imprisonment (under a statute authorizing fine *or* imprisonment), and at the same term of the court modified the judgment by imposing imprisonment instead of the former sentence. The second judgment held void. *Ex parte Lange*, 163.

NEW YORK. See *Laches; Statutes of Limitation.*

1. A violation of trust growing out of a mistaken construction of a will by the executors, unaccompanied by fraudulent intent, is within the ten years statute of limitation of the State of New York concerning actions for relief in cases of trust not cognizable by courts of law. *Clarke* v. *Boorman's Executors*, 493.
2. The court expresses itself as inclined to the opinion that such a case is not within the protection of the statute which allows bills for relief, on the ground of fraud, to be filed within six years after the discovery of the fraud. *Ib.*
3. Where the party interested in his lifetime had notice of all the facts which constituted the ground of fraud alleged in the bill, and for eight years that he lived after the cause of action accrued to him, with notice of his rights and of the whole transaction, brought no suit nor set up any claim, his heirs are not entitled to the benefit of this exemption from the bar of the statute on the ground of recent discovery of the fraud. *Ib.*

NOTICE See *Official Bond; Waiver of Notice.*

Where in a proceeding to sell the real estate of a decedent for the payment of his debts the solicitor who presents the petition for the decree of sale is himself appointed trustee to make the sale, and himself becomes bound in bonds for the performance of the duties belonging to such appointment, and himself makes all the motions and procures all the orders under which the trustee's liability in the matter arises, he may, if he is liable for the non-payment of money which he was ordered by the court to pay, be sued without formal notice to him. He has notice in virtue of his professional and personal relations to the case. *Brent* v. *Maryland*, 430; *Galpin* v. *Page*, 350.

OFFICIAL BOND. See *Official Negligence; Warehouse Bond.*

OFFICIAL NEGLIGENCE.

On a suit by the government against the sureties of a postmaster on his official bond, it is no defence that the government, "through their agent, the Auditor of the Treasury of the Post Office Department, had full notice of the defalcation and embezzlement of funds of the plaintiff before them, and yet neglectfully permitted the said postmaster to remain in office, whereby he was enabled to commit all the default and embezzlement," &c. *Jones et al.* v. *United States*, 662.

OREGON DONATION ACT. See *Actual Settler.*

1. The proviso of the said act of September 27th, 1850, which forbade the *future* sale of the settler's interest until a patent should issue, raises a

OREGON DONATION ACT (*continued*).

strong implication in favor of the validity of a contract for a sale made *before* the passage of the act. *Lamb* v *Davenport*, 307.

2. Whether the husband or wife who takes as survivor the share of the deceased under the said Donation Act, takes as purchaser or by inheritance, the contracts of the husband concerning the equitable interest of the part allotted to him, made before the act was passed, are binding on the title which comes to his children by reason of a patent issued after the death of both husband and wife. *Ib.*

PARTIES.

1. Where the assignees of a claim on a third party have parted completely with their interest in it and, by a transfer, vested the entire title in others, they are not necessary parties in an equity proceeding by these others to enforce it. *Batesville Institute* v. *Kauffman*, 151.
2. Although a stockholder in a corporation may bring a suit when the corporation refuses, yet, as in such case the suit can be maintained only on the ground that the rights of the corporation are involved, the corporation should be made a party to the suit, and a demurrer will lie if it is not so made. *Davenport* v. *Dows*, 626.
3. Where a railroad corporation, by mortgage, whose sufficiency to secure what it is given to secure is doubtful, mortgages its property directly to all its bondholders by name, to secure specifically to each the amount due on the bonds to *him*, no one bondholder, even when professing to act in behalf of all bondholders who may come in and contribute to the expenses of the suit, can proceed alone against the company, and ask a sale of the property mortgaged. *Railroad Company* v. *Orr*, 471.

PATENTS. See *Oregon Donation Act*, 2.

I. General Principles relating to.

1. When, in a patent case, a person claims as an original inventor and the defence is a prior invention by the defendant, if the defendant prove that the instrument which he alleges was invented by him was complete and capable of working, that it was known to at least five persons, and probably to many others, that it was put in use, tested, and successful, he brings the case within the tests required by law to sustain the defence set up. *Coffin* v. *Ogden*, 120.
2. The mere change in an instrument or machine of one material into another is not the subject of a patent; the purpose and means of accomplishment, and form and mode of operation of each instrument—the new as of the old—being each and all the same. *Hicks* v. *Kelsey*, 670.

II. The validity of particular.

3. That of Miller, assignee of Kirkham, of June 11th, 1861, reissued January 27th, 1863, for door-locks with reversible latches, was not valid; the invention patented having been anticipated by Barthol Erbe. *Coffin* v. *Ogden*, 120.
4. That to Hicks for a wagon-reach was void for want of "invention" in making the thing patented. *Hicks* v. *Kelsey*, 670.

PATENTS (*continued*).

III. ASSIGNMENT OF.

5. Where a person during the original term of a patent bought from one who had no right to sell it, a machine which was an infringement of the patent, and afterwards himself bought the patent for the county where he was using the machine, *held* that on an extension of the patent the owners of the extension could not recover against him for using the machine after the original term had expired; but that such purchase of the interest in the patent, removed, as to the purchaser, all disability growing out of the wrongful construction of the machine then used by him, and rendered the use of it legal. *Eunson* v. *Dodge*, 414.

PAYMENT. See *Tender*.

PHILADELPHIA, WILMINGTON AND BALTIMORE RAILROAD COMPANY. See *Taxation*, 1–6.

The different acts of Pennsylvania, Delaware, and Maryland, by which the several roads, incorporated by these three States respectively, and now by consolidation under statutes of the same States made into one road, bearing the title of the Philadelphia, Wilmington and Baltimore Railroad Company, passed upon, so far as relates to certain taxes laid by the State of Delaware on the said road. *The Delaware Railroad Tax*, 206.

PLEADING. See *Official Negligence; Rebellion*, 5; *Territories*.

1. The court refused to pass upon the constitutional question, where on an indictment for selling intoxicating liquors in violation of statute, the defence *intended* to be raised was that the person indicted owned the liquor at the time when the statute was passed, and that in abridging his rights to sell what at that time was his own property the statute was unconstitutional; but where the plea (which was demurred to) did not, in due form and by positive allegation, allege the time *when* the defendant became the owner of the liquor sold. [There were moreover circumstances which satisfied the court that the case was a moot case.] *Bartemeyer* v. *Iowa*, 129.

2. Whenever one justifies an act which in itself constitutes at common law a wrong, upon the process, order, or authority of another, he must set forth substantially and in a traversable form the process, order, or authority relied upon; and no mere averment of its legal effect, without other statement, will answer. *Bean* v. *Beckwith*, 510.

3. This is not changed by the act of March 3d, 1863, relating to *habeas corpus*, &c., nor by that of March 2d, 1867, "to declare valid and conclusive certain proclamations of the President." *Ib.*

POSSESSORY RIGHTS. See *Actual Settler*.

PRACTICE. See *Admiralty*, 1–4; *Equity*, 2; *Judicial Comity; Parties; Territories*.

I. IN THE SUPREME COURT.

(*a*) *In cases generally.*

1. When, on a view of the record, it appears that from some fatal defect in the proceedings, no judgment can be entered against the defendant

PRACTICE (*continued*).

in the court below, on a suit there pending, this court will decline to answer a question certified to it on division of opinion between the judges of the Circuit Court, upon a contrary assumption. *United States* v. *Buzzo*, 125.

2. Though both in civil and criminal cases, the judgments, orders, and decrees of courts are under their control during the term at which they are made, so that they may be set aside or modified as law and justice may require, yet this power of the courts cannot be used to violate the guarantees of personal rights found in the common law, and in the constitutions of the States and of the Union, as, for example, to punish a man twice by judicial judgments for the same offence. *Ex parte Lange*, 163.
3. Where a case is tried by the Circuit Court under the act of March 3d, 1865, if the finding be a general one, this court will only review questions of law arising in the progress of the trial and duly presented by a bill of exceptions, or errors of law apparent on the face of the pleadings. *Insurance Company* v. *Folsom*, 237; *Town of Ohio* v. *Marcy*, 552.
4. The only remedy for surprise is a motion for new trial, and the refusal of a court below to grant one is not reviewable here. *Mulhall* v. *Keenan*, 342.
5. An assignment of error which alleges simply that the court below erred in giving the instructions which were given to the jury in lieu of the instructions asked for—it not being stated in what the error consisted or in what part of the charge it is—is an insufficient assignment under the 21st Rule of court. *Lucas* v. *Brooks*, 436.

(*b*) *In admiralty.*

6. When a vessel libelled for collision means to set up injury to herself and to set off damages therefore against damages claimed for injury which she has herself done, the injury done to her ought to be alleged, either by cross-libel or by answer; and if not somewhere thus set up below, the Supreme Court cannot first award damages. *The Sapphire*, 51.

(*c*) *In chancery.*

7. Where a decree is entered upon an order taking a bill in equity as confessed by defendants for want of an answer, the only question for the consideration of this court on appeal is whether the allegations of the bill are sufficient to support the decree. *Masterton* v. *Howard*, 99.

II. IN THE CIRCUIT COURTS.

8. Evidence which may divert the attention of the jury from the real issue —that is to say, immaterial evidence—should be kept from the jury. *Lucas* v. *Brooks*, 436.
9. The improper exclusion of evidence is not error when the party offering it has proved, in another way, every fact which the evidence, if it had been admitted, would prove. *Ib.*
10. Prayers for instructions which overlook facts of which there is evidence, or which assume as fact that of which there is no evidence, are properly refused. *Ib.*

PRACTICE (*continued*).

11. Under the act of March 3d, 1865, the Circuit Court is not required to make a special finding. *Insurance Company* v. *Folsom*, 237.
12. Where the assignees of a claim on a third party have parted completely with their interest in it and, by a transfer, vested the entire title in others, they are not necessary parties in an equity proceeding by these others to enforce it. *Batesville Institute* v. *Kauffman*, 151.

III. In the District Courts.

13. What constitutes an appearance in admiralty. *Atkins* v. *Fibre Disintegrating Company*, 272.

PREFERENCE. See *Bankrupt Act*, 2, 3.

A payment by one insolvent, otherwise void as a preference under sections thirty-five and thirty-nine of the Bankrupt law, is not excepted out of the provisions of those sections because it was made to a holder of his note overdue, on which there was a solvent indorser whose liability was already fixed. *Bartholow* v. *Bean*, 635; and see *Cook* v. *Tullis*, 332.

PRESUMPTIONS. See *Burden of Proof; Legal Presumptions.*

PUBLIC LANDS. See *Actual Settler.*

PUBLIC LAW. See *Rebellion, The*, 1–4.

While the existence of war closes the courts of each belligerent to the citizens of the other, it does not prevent the citizens of one belligerent from taking proceedings for the protection of their own property in their own courts, against the citizens of the other, whenever the latter can be reached by process. *Masterton* v. *Howard*, 99.

PUBLIC OFFICER. See *Official Negligence.*

PUBLIC POLICY. See *Ex turpi causâ non oritur actio; Slave Contracts*, 1.

QUARTERMASTER.

His office distinguished from that of a commissary of subsistence. *Shrewsbury* v. *United States*, 664.

"RAISED" CHECK. See *Bank Check.*

RATIFICATION.

The ratification by one of the unauthorized act of another operates upon the act ratified precisely as though authority to do the act had been previously given, except where the rights of third parties have intervened between the act and the ratification. *Cook* v. *Tullis*, 332.

REASSESSMENT. See *Internal Revenue*, 4, 5, 6.

REBELLION, THE. See *Confiscation Act; Public Law; Tender.*

1. A sale of real estate made under a power contained in a deed of trust executed before the late civil war is valid, notwithstanding the grantors in the deed, which was made to secure the payment of promissory notes, were citizens and residents of one of the States declared to be in insurrection at the time of the sale, made while the war was flagrant. *University* v. *Finch*, 106.
2. This court has never gone further in protecting the property of citizens residing in such insurrectionary States from judicial sale than to de-

REBELLION, THE (*continued*).

clare that where such citizen has been driven from his home by a special military order, and forbidden to return, judicial proceedings against him were void. *University* v. *Finch*, 106.

3. The property of such citizens found in a loyal State is liable to seizure and sale for debts contracted before the outbreak of the war, as in the case of other non-residents. *Ib.*
4. The civil war was flagrant in Arkansas from April, 1861, to April, 1866, and during this time the operation of the statute which limited the duration of liens to three years was suspended. *Batesville Institute* v. *Kauffman*, 151.
5. The act of March 3d, 1863, entitled "An act relating to *habeas corpus*, and regulating judicial proceedings in certain cases," and the act of March 2d, 1867, entitled "An act to declare valid and conclusive certain proclamations of the President, and acts done in pursuance thereof, or of his orders in the suppression of the late rebellion against the United States," do not change the rules of pleading, when the defence is set up in a special plea, or dispense with the exhibition of the order or authority upon which a party relies. Nor do they cover all acts done by officers in the military service of the United States simply because they are acting under the general authority of the President as commander in chief of the armies of the United States. Assuming that they are not liable to any constitutional objection, they only cover acts done under orders or proclamations issued by the President, or by his authority. *Bean* v. *Beckwith*, 510.

"REGULATION OF BUSINESS." See *National Banks*, 2.

REPEAL OF STATUTE. See *Implied Repeal of Statutes.*

REPRESENTATION. See *Insurance*, 2.

REVERSAL OF JUDGMENT. See *California*, 7.

REVIVAL OF DISCHARGED DEBT.

Is not made except by clear, distinct, and unequivocal promise to pay. *Allen & Co.* v. *Ferguson*, 1.

RIPARIAN OWNERS. See *San Francisco, City of.*

SAN FRANCISCO, CITY OF.

Her rights and those of her grantees in, over, and to lands covered by the waters of the bay of San Francisco, granted to her for ninety-nine years by the act of legislature of the State, March 26th, 1851, and the act of May 1st, 1851; and how far grantees of the city acquired a right to build wharves beyond the line designated as the "permanent water-front of the city;" and the rights of the city and State by improvements to demolish any wharves so built. This whole matter considered. *Weber* v. *Harbor Commissioners*, 57.

SET-OFF. See *Bankrupt Act*, 4.

Is enforced in equity only where there are mutual debts or mutual credits, or where there exists some equitable consideration or agreement between the parties which would render it unjust not to allow a set-off. *Gray* v. *Rollo*, 629.

SLAVE CONTRACTS.

1. It is no defence to a suit brought on a promissory note executed in Louisiana, in February, 1861, by the holder against the maker, to allege and prove that such note was given as the price of slaves sold to the maker. *Boyce* v. *Tabb*, 546.
2. That such sale was at the time lawful in the said State was a sufficient consideration for a note, and the obligation could not be impaired by laws of the State passed subsequently to the date thereof. *Ib.*
3. No law of the United States has impaired such obligation. *Ib*

SPECIAL FINDING. See *Practice*, 3.

Circuit Courts are not required under the act of March 3d, 1865, to make such finding. *Insurance Co.* v. *Folsom*, 237.

STALE CLAIMS. See *Laches.*

STAMP. See *Internal Revenue*, 1.

STATUTE OF LIMITATIONS. See *California*, 2; *Laches; New York.*

1. The civil war was flagrant in Arkansas from April, 1861, to April, 1866; and during this time the operation of the statute which limited the duration of liens to three years was suspended. *Batesville Institute* v. *Kauffman*, 151.
2. When a trustee has closed his trust relation to the property and to the *cestui que trust*, and parted with all control of the property, the statute of limitations runs in his favor, notwithstanding it is an express trust. *Clarke* v. *Boorman's Executors*, 493.

STATUTES. See *Construction, Rules of*, 1; *Implied Repeal of Statutes.*

STATUTES OF THE UNITED STATES.

The following, among others, referred to, commented on, and explained:

1789.	September 24th.	See *Judicial Comity; Jurisdiction*, 5–8.
1790.	May 26th.	See *Jurisdiction*, 1–3.
1846.	August 6th.	See *Ex turpi causâ non oritur actio.*
1849.	March 3d.	See "*Military Service of the United States.*"
1850.	September 9th.	See *Utah.*
1850.	September 27th.	See *Oregon Donation Act.*
1860.	June 14th.	See *California*, 5.
1862.	June 7th.	See *Tender.*
1862.	July 1st.	See *Constitutional Law*, 1.
1862.	July 17th.	See *Confiscation Act.*
1863.	March 3d.	See *Rebellion*, 5.
1864.	June 3d.	See *National Banks.*
1864.	June 30th.	See *Customs of the United States; Internal Revenue*, 3, 4.
1864.	July 2d.	See *Evidence*, 2.
1865.	March 3d.	See *Practice*, 3, 11.
1866.	July 13th.	See *Internal Revenue.*
1867.	February 22d.	See *District of Columbia*, 1.
1867.	March 2d.	See *Bankrupt Act; Internal Revenue*, 6; *Jurisdiction*, 7; *Rebellion*, 5.
1869.	April 10th.	See *District of Columbia*, 1.
1873.	March 3d.	See *Alabama.*

STATUTORY PENALTY.

The action of debt lies for a. *Chaffee & Co.* v. *United States*, 516.

STOCK IN NATIONAL BANKS.

Not subject to lien for debts of the owner due the bank. *Bullard* v. *Bank*, 589.

SURPRISE. See *Practice*, 4.

TAX. See *Tender*.

TAXATION.

1. Where an exemption of particular property, or parcels of property, or a limitation of the general rate is set up, the intent of the legislature to exempt or to limit must be made clear beyond reasonable doubt. *The Delaware Railroad Tax*, 206; *Trask* v. *Maguire*, 391.
2. Accordingly, a provision in an act allowing one railroad corporation to unite itself with another railroad corporation, and so make a new corporation, that the new corporation should pay annually a quarter of one per cent. upon its capital, was held to be only a designation of the tax payable annually until a different rate should be established, and not a restraint upon the legislature from imposing a further tax. *The Delaware Railroad Tax*, 206.
3. The State may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property. And the manner in which its value shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion. *Ib.*
4. A tax upon a corporation may be proportioned to the income received as well as to the value of the franchise granted or the property possessed. *Ib.*
5. The fact that taxation increases the expenses attendant upon the use or possession of the thing taxed, of itself constitutes no objection to its constitutionality. *Ib.*
6. The exercise of the authority which every State possesses to tax its corporations and all their property, real and personal, and their franchises, and to graduate the tax upon the corporations according to their business or income, or the value of their property, when this is not done by discriminating against rights held in other States, and the tax is not on imports or tonnage, or transportation to other States, cannot be regarded as conflicting with any constitutional power of Congress. *Ib.*
7. How far a State may tax an agency created by the Federal government. The question considered in the case of a State taxing a railroad company chartered by Congress. *Railroad Company* v. *Peniston*, 5.
8. Unorganized territory attached by statute to a particular county in it, for *revenue* purposes, gives power to such county to levy taxes on taxable property in it. *Ib.*
9. Where a legislature exempted the property of a particular corporation from taxation and afterwards bought the property at judicial sale, and so, itself, became owner of the same, the previously granted im-

TAXATION (*continued*).

munity from taxation ceased of necessity. And on a subsequent grant by the State, the immunity from taxation was not renewed; a constitution of the State made between the date of the first grant and the last having ordained that no special laws should be made exempting the property of any person or corporation from taxation. *Trask* v. *Maguire*, 391.

TENDER.

Under the act of June 7th, 1862, "for the collection of the direct tax in insurrectionary districts," &c., a tender by a relative of the owner of the tax due upon property advertised for sale is a sufficient tender. And if the tax commissioners have, by an established general rule announced and a uniform practice under it, refused to receive the taxes due unless tendered by the owner in person, it is enough if a relative of the owner "went to the office of the commissioners to see after the payment of the tax on the property, but made no formal offer to pay because it was in effect waived by the commissioners, they declining to receive any tender unless made by the owner in person." *Tacey* v. *Irwin*, 549.

TERRITORIES. See *Utah*.

The practice, pleadings, and forms and modes of proceeding of the Territorial courts, as well as their respective jurisdictions, were intended by Congress to be left to the legislative action of the Territorial assemblies and to the regulations which might be adopted by the courts themselves. The cases of *Noonan* v. *Lee* (2 Black, 499), *Orchard* v. *Hughes* (1 Wallace, 77), and *Dunphy* v. *Kleinsmith* (11 Id. 610), in which a different view was taken, reconsidered and not approved. *Hornbuckle* v. *Toombs*, 648; *Hershfield* v. *Griffith*, 657; *Davis* v. *Bilsland*, 659.

TESTAMENTARY LETTER. See *Last Will and Testament*, 1.

"TRANSPORT."

A contract made with a quartermaster of the army to transport supplies distinguished from one made with "a commissary of subsistence" to "deliver" them. *Shrewsbury* v. *United States*, 664.

TRUST PROPERTY.

1. Where a depositary of certain government bonds used some of them without the permission of the owner and substituted in their place a bond and mortgage, and the owner of the bonds upon hearing of the transaction ratified it, *Held*, that neither the creditors of the depositary, who had become insolvent when such approval was made, nor his trustee in bankruptcy, could complain of the transaction, there being no pretence that the property substituted was less valuable than that taken, or that the estate of the debtor was less available to his creditors. *Cook* v. *Tullis*, 332.

2. Where property held upon any trust to keep, or use, or invest it in a particular way, is misapplied by the trustee and converted into different property, or is sold and the proceeds are thus invested, the

TRUST PROPERTY (*continued*).

property may be followed wherever it can be traced through its transformations, and will be subject, when found in its new form, to the rights of the original owner or *cestui que trust*. It does not alter the case that the newly acquired property, instead of being purchased with the proceeds of the original property, is obtained by a direct exchange for it. *Cook* v. *Tullis*, 332.

USURY. See *National Banks*, 3.

Although a loan of money may be usurious and the contract to return it void, yet, in the absence of statutory enactment, it does not follow that the borrower, after he has once repaid the money, nor even that his assignee in bankruptcy, whose rights are in some respects greater than his own, can recover the principal and illegal interest paid. Equity, however, in its discretion may enable either to get back whatever money the borrower has paid in excess of lawful interest. *Tiffany* v. *Boatman's Institution*, 375.

UTAH.

Under the organic act of September 9th, 1850, organizing the Territory of Utah, the attorney-general of the Territory, elected by the legislature thereof, and not the district attorney of the United States, appointed by the President, is entitled to prosecute persons accused of offences against the laws of the Territory. *Snow* v. *United States*, 317.

WAIVER OF NOTICE.

The question of waiver of a notice to quit is always in part a question of intent, and there can be no intent to waive notice when the act relied on as a waiver has been the act of the party's agent, unknown to the principal and unauthorized by him. *Lucas* v. *Brooks*, 436.

WAIVER OF TENDER AND PAYMENT. See *Tender*.

WAR, STATE OF. See *Public Law; Rebellion, The*, 1–4.

WAREHOUSE BOND.

The ordinary, is hardly a common pecuniary bond, but is rather a bond given to secure the payment of whatever duties may be by law chargeable on the merchandise to which it refers. If a forfeiture has occurred, the obligors can be relieved from the forfeiture only upon doing complete equity. *Westray* v. *United States*, 322.

WHARVES. See *San Francisco, City of*.

WIFE'S SEPARATE PROPERTY. See *District of Columbia*, 1; *Dower; Husband and Wife; Oregon Donation Act*, 2.

The personal acquisitions of a wife, in Georgia, being by statute of that State not subject to the debts of her husband, her separate earnings from her individual labor and business carried on with his consent, cannot be reached by his assignees in bankruptcy. *Glenn et al.* v. *Johnson et al.* 476.