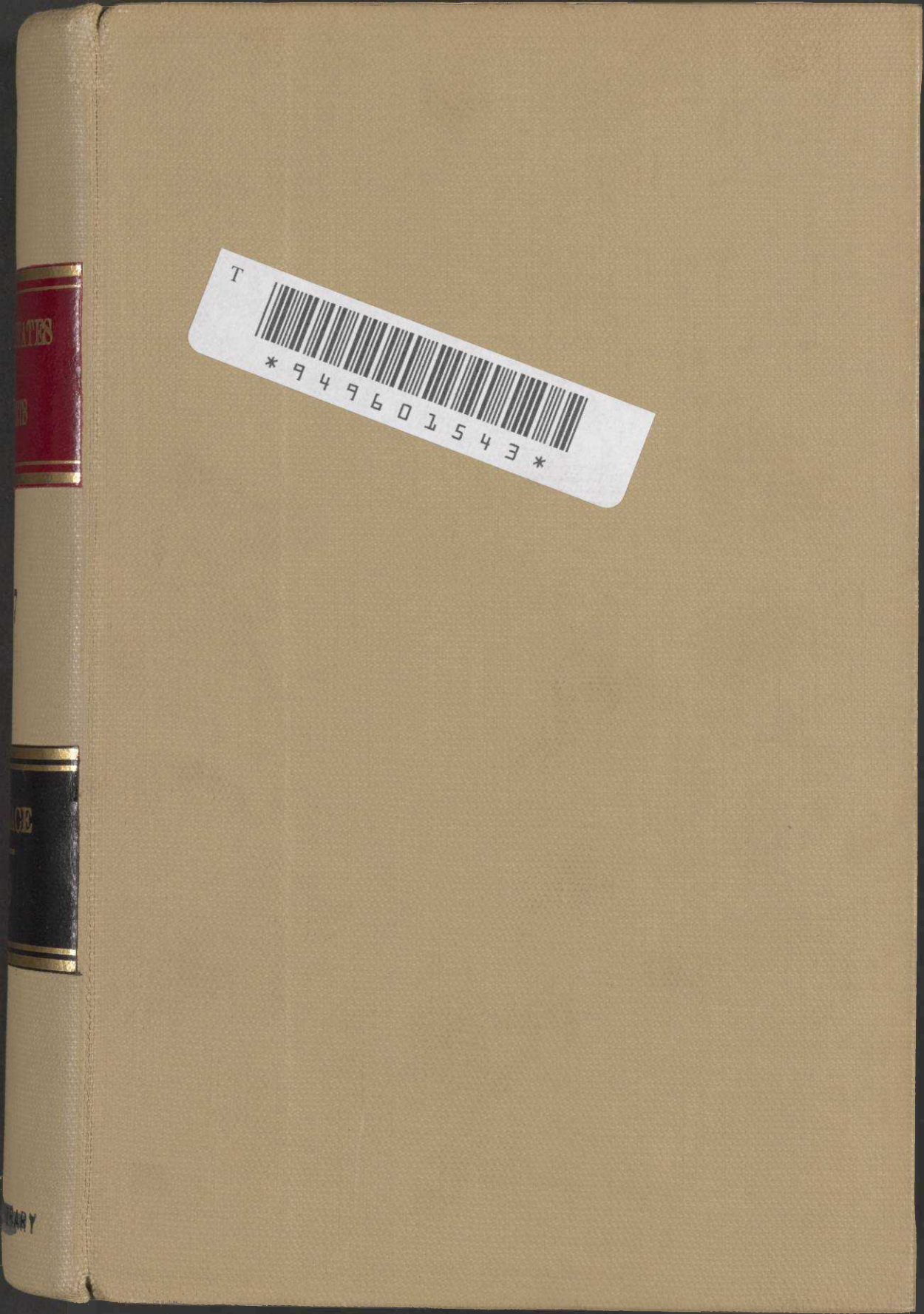

CASES

ARGUED AND ADJUDGED

IN

The Supreme Court

OF

THE UNITED STATES,

OCTOBER TERMS, 1873 AND 1874.

REPORTED BY

JOHN WILLIAM WALLACE.

VOL. XX.

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JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE.

HON. MORRISON R. WAITE.

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 HENRY WILLIAMS.

SOLICITOR-GENERAL.

HON. SAMUEL FIELD PHILLIPS.

CLERK.

DANIEL WESLEY MIDDLETON, ESQUIRE.

ALLOTMENT, ETC., OF THE JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

AS MADE APRIL 1, 1874, 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.		
HON. M. R. WAITE, Ohio.	FOURTH. MARYLAND, WEST VIRGINIA, VIRGINIA, NORTH CAROLINA, AND SOUTH CAROLINA.	1874. January 21st. PRESIDENT GRANT.
ASSOCIATES.		
HON. WARD HUNT, New York.	SECOND. NEW YORK, VERMONT, AND CONNECTICUT.	1872. December 11th. PRESIDENT GRANT.
HON. WM STRONG, Pennsylvania.	THIRD. PENNSYLVANIA, NEW JERSEY, AND DELAWARE.	1870. February 18th. PRESIDENT GRANT.
HON. N. CLIFFORD, Maine.	FIRST. MAINE, NEW HAMPSHIRE, MASSACHUSETTS, AND RHODE ISLAND.	1858. January 12th. PRESIDENT BUCHANAN.
HON. J. P. BRADLEY, New Jersey.	FIFTH. GEORGIA, FLORIDA, ALABAMA, MISSISSIPPI, LOUISIANA, AND TEXAS.	1870. March 21st. PRESIDENT GRANT.
HON. N. H. SWAYNE, Ohio.	SIXTH. OHIO, MICHIGAN, KENTUCKY, AND TENNESSEE.	1862. January 24th. PRESIDENT LINCOLN.
HON. S. F. MILLER, Iowa.	EIGHTH. MINNESOTA, IOWA, MISSOURI, KANSAS, ARKANSAS, AND NEBRASKA.	1862. July 16th. PRESIDENT LINCOLN.
HON. DAVID DAVIS, Illinois.	SEVENTH. INDIANA, ILLINOIS, AND WISCONSIN.	1862. December 8th. PRESIDENT LINCOLN.
HON. S. J. FIELD, California.	NINTH. CALIFORNIA, OREGON, AND NEVADA.	1863. March 10th. PRESIDENT LINCOLN.

MEMORANDA.

BENJAMIN ROBBINS CURTIS.

The Honorable Benjamin Robbins Curtis, for several years one of the judges of this court, but at the time of his death, returned to the bar, departed this life at Newport, R I., September 15th, 1874. On Monday, October 13th, at the opening of the term first following the sad event, the bar of this court met in the court-room, at 12 o'clock, to pay respect to his memory.

The Hon. John Archibald Campbell was appointed Chairman, and D. W. Middleton, Esquire, Secretary.

On motion of the Hon. P. Phillips, the chair appointed the following Committee on Resolutions, viz., Messrs. Reverdy Johnson, Philip Phillips, W. M. Evarts, Benjamin H. Bristow, George H. Williams, John A. J. Cresswell, Richard T. Merrick, T. D. Lincoln, and Richard M. Corwine.

The committee, through its chairman, reported the following resolutions:

The Bar of the Supreme Court of the United States, assembled upon occasion of the death of their brother Curtis, in testimony of their great affection and esteem for him in life, and of their sense of the loss which the courts and the bar of the whole country and the community at large suffer in his death, adopt the following resolutions:

Resolved, That we find in the professional life, labors, and honors of Benjamin Robbins Curtis, as displayed in an elevated and extended career of judicial and forensic duty and distinction, the imposing traits and qualities of intellect and character which, in concurrence, make up the true and permanent fame among men of a great lawyer and a great judge.

Resolved, That the example presented by his life, of great natural powers faithfully disciplined and completely developed, expanded by large acquirements, and kept vigorous and alert by strenuous exercise, applied to noble uses, and effecting illustrious results upon a conspicuous theatre of action and in manifold and diversified opportunities of public service and of public notice, is rare among lawyers as among men, and furnishes a just and assured title to permanent renown in the memory of his countrymen.

Resolved, That in the special qualities which mark him as a consummate forensic advocate and as an authoritative judge, the structure of Mr. Curtis's mind, and its discipline, combined the widest and most circumspect

comprehension of all facts of legal import, however multitudinous; a luminous and penetrating insight into the intricacies and obscurities of the most complex relations; and an efficacious power of reason, which produced the many admirable exhibitions of his faculties at the bar and on the bench, which for forty-two years have served the administration of justice and attracted the attention of the profession and of the public.

Resolved, That we commemorate with no less satisfaction and applause the moral qualities which illustrate the whole professional service of our deceased brother—his justice to all, his kindness to associates, his fidelity to the courts and to the law, his scrupulous contribution of his best powers and his complete attention to every cause whose advocacy he assumed—his resolute maintenance of the just limits which separate the duties of an advocate and the duties of an adviser and of a declarer of the law upon professional opinions—his fidelity to society, to government, to religion, to truth—all these traits of *duty*, as the rule of his life, we present to the living lawyers and to their successors for their sincerest homage.

Resolved, That the Attorney-General be requested to present these resolutions to the Supreme Court, and to move, in our behalf, that they be entered upon its minutes; and that the chairman of this meeting be requested to forward a copy of them to the family of our deceased brother.

After the reading of the resolutions, the Honorable REVERDY JOHNSON said:

MR. CHAIRMAN: Before moving, as I propose to do, the adoption of the report of the committee, I beg leave to trespass for a few moments upon the time of the meeting. The event which has brought us together was a severe blow upon the heart of the entire profession. Of the many bereavements which we have had heretofore to deplore no one has given us more sincere sorrow than the death of BENJAMIN R. CURTIS. In all respects he was a man to be loved and admired. As a friend he was warm and sincere; as a lawyer, learned and accomplished; as a judge, of transcendent ability. To those who knew him intimately (and I am of that number) his death is a great personal affliction.

My acquaintance with him commenced when, in 1851, upon the recommendation of Mr. Webster, he became one of the Associate Justices of the Supreme Court, and this acquaintance soon ripened into a close friendship which continued unbroken to the last. And having been a very constant attendant on the court for the last six years of his connection with it, and during the seventeen years that have elapsed since his resignation, when, at every session, he appeared as counsel, I was afforded the best opportunity of forming an opinion of him as judge and lawyer. I think, therefore, that I have a just estimate of him in both characters. As a judge of this high tribunal, it is impossible to imagine one who could be more fully competent to discharge its high and arduous duties. With a wealth of learning always adequate to the occasion, he was ever felicitous in his application of it to the case before him. His judicial opinions, indeed, all of them, were models of a correct style. It may with perfect truth be said of them, what, upon an occasion like the present, he said of the opinions of the late pure and great judge, Chief Justice Taney, that they were characterized "by purity of style

and clearness of thought." His arguments at the bar possessed equally sterling merit. The statement of his case, and the points which it involved, were always transparently perspicuous. And when his premises were conceded or established, his conclusion was a necessary sequence. His analytical and logical powers were remarkable. In these respects, speaking from the knowledge of the great men whom I have heard during a very long professional life, I think he was never surpassed. And his manner of speaking was excellent. He ever suited "the action to the word, the word to the action," and never overstepped "the modesty of nature." He was always calm, dignified, and impressive, and, therefore, persuasive. No lawyer who heard him begin an argument ever failed to remain until he had concluded. Were I to select instances as exhibiting his highest judicial excellence and his highest forensic ability, I would point, for the one, to his dissenting opinion in what is known as the "Dred Scott Case," and, for the other, to his opening argument in the defence of President Johnson in the Impeachment Trial. Able as was the opinion of the majority of the court in that case, delivered by Chief Justice Taney, it was admitted at the time, I believe, by most of the profession, that the dissenting opinion of Judge Curtis was equally powerful. Lawyers may differ, as they have differed, as to which of these two eminent men were right, but they will all concede that the view of each was maintained with extraordinary ability, whilst those who knew them both will never differ as to the sincerity of their respective convictions.

As to the other,—his defence of President Johnson,—having listened to it, and having more than once read it carefully, I think I am justified in saying that it covered every question which the case involved, and, although it was afterwards enforced by his able associates, it of itself greatly contributed to the defeat of the impeachment. Nothing could have exceeded the clearness of statement, the knowledge pertinent to the contest, or the power of reasoning by which he maintained his conclusions. It was, I believe, and, having been one of the judges, I think I know, generally thought to be fatal to the prosecution. When such a man, lawyer, and judge, in the inscrutable dispensation of Providence, is taken from the profession, they cannot avoid feeling that it is not only a private but a public calamity. And it is due to his memory that we should express the sense of our loss and the great regard we entertained of him as a man, a lawyer, and a judge. And this will be accomplished by adopting the report of the committee. I therefore move its adoption.

Mr. Johnson was followed by the Honorable R. T. MERRICK, who said:

MR. CHAIRMAN: Few men in any age, either in this country or in England, have so faithfully illustrated the power, dignity, and honor of the legal profession as Mr. CURTIS.

His learning was profound and copious; his mind clear, earnest, and powerful, and all his faculties were severely disciplined.

His arguments at this bar, probably the most perfect models of forensic debate know not the profession, rested upon the fundamental principles of the science of law applied and analyzed by deep but seemingly easy thought, and enforced by a logic whose severe features were never disfigured by en-

feebling ornament. An appreciative listener could not refuse to follow him in his course of reasoning, for his statement of his case was so plain, simple, and persuasive, that it commanded attention to the fuller development of his propositions. However voluminous the record or complicated the nature of the case, a statement easy, clear, and concise, though full and comprehensive, disclosed at once the exact questions at issue, and deeply impressed upon all who heard him the convictions in the mind of the advocate. When, in that great trial in which the President of the Republic was arraigned before its Senate, sitting as a High Court of Impeachment, Mr. CURTIS had concluded his opening statement for the defence, there was—*nothing left of the case.*

His convictions were ardent, hearty, and earnest, and he clung to them with a firmness and tenacity that nothing could affect save only the proof that they were erroneous.

In the dark hours of our national trouble his voice was heard above the tempest of loosened passions vindicating the supremacy of law; and when the clash of arms had ceased but the storm still raged, he poured forth in this hall his appeal in behalf of a calm and considerate justice which should bear no sign of wrath or passion.

The death of such a man is a severe loss to the country as well as the profession.

I did not rise for the purpose of pronouncing a eulogy on Mr. CURTIS—that I leave to others—but only to gratify a demand of my own feeling. I knew him well and was honored by his friendship and a reasonable share of his confidence. I have listened to him with instruction and delight in public, and been greatly benefited by his counsels in private; and as I admired and loved him in life, I would place upon his grave an humble tribute of respect for his memory.

The Hon. J. A. CAMPBELL, Chairman, then addressed the meeting as follows:

A natural sorrow exists in the judicial tribunals and among the legal profession of the Union by the event of the death of the late Justice CURTIS.

His connection with the distribution of that justice which constitutions and laws define and regulate during a period of eventful history has been so intimate, so useful to the country, and so honorable to himself and to his profession, that its severance occasions a pause, and is felt as a calamity. To form and to maintain this connection was the aim of his life, the cherished and continuing aspiration of a mind and character well composed. To the members of the same profession, such a life, such a mind, such a character are objects of particular interest. His aspirations were favored in his birthplace, by his education and by his associations. The history of Massachusetts just before the Revolution, during the Revolution, and until the time that Justice CURTIS received his impressions and impulse, was determined in a great measure by its legal profession. During that period its courts were occupied by men of extraordinary endowments, and of large and liberal culture in law, jurisprudence, philosophy, science, and literature. The profession of the law was not misdescribed by the term of a learned profession. Dane and Parsons and Dexter; Otis and Story and Wilde;

Parker and Shaw, had stamped their names and characters upon it. The competitors that Justice CURTIS had to encounter were Webster, Choate, Loring, Bartlett, and others whose impulses were the same as his own. The scrutiny his arguments had to experience was that of Story, Parker, Shaw, Wilde, Putman, Dewey, Metcalf, Sprague.

His first conviction must have been that, to consummate his purpose, he must need to

"Pitch his project high: sink not in spirit."

His first counsel to himself,

"Let thy mind still be bent, still plotting where,
And when, and how the business must be done."

After twenty years of labor on this "project" and under this counsel, in 1851 he was selected, as was the report of that day, by Mr. Webster, as the fittest person to fill the vacancy, occasioned by the death of Justice Woodbury, in the Supreme Court of the United States. Mr. Webster said he wanted a full term of lifelong service. He called for Justice CURTIS in the meridian of professional life. The appointment came to Justice CURTIS. He was not required to pursue it or to beseech it. It came to him by a divine right—as the fittest.

At the time the court was presided over by Chief Justice Taney, who had established, to the acknowledgment of all, that his commission was held by the same title. He was then seventy-three years of age, bowed by years and infirmity of constitution. In the administration of the order and procedure of the court there was dignity, firmness, stability, exactitude, and with these benignity, gentleness, grace, and right coming. The casual visitor acknowledged that it was the most majestic tribunal of the Union, and that the Chief Justice was the fittest to pronounce in it the oracles of justice.

Justice CURTIS at the same time met seven associates—Justices McLean, Wayne, Catron, McKinley, Daniel, Nelson, and Grier.

All of these had passed the meridian of ordinary life before their junior associate had come to the bar. There was much stateliness in their appearance, and, with diversities of character, education, discipline, attainments, and experience, all of them had passed through a career of honorable service, were men of strong resolution, large grasp of mind, and of honorable purpose. The reception of Justice CURTIS was cordial and hospitable, and with all of these his judicial career commenced and terminated with a single exception. The death of Justice McKinley made a vacancy, and that vacancy was supplied by one recommended by the Justices—Justices Catron and CURTIS bearing their recommendation to the President.

The Reports of Howard disclose that during his judicial term he was generally in accord with the majority of the court. He did not dissent often, and his dissent was usually with a large minority—rarely, if ever, did he stand alone. They show that in some of the most important cases, he prepared the opinions of the court. That these opinions embraced intricate questions of constitutionl law, of admiralty jurisdiction, of commercial law, of the law of patents, of common and equity law. The range of his professional experience in Massachusetts had been wide and comprehensive. His professional studies had embraced the principles of law and the under-

standing of jurisprudence, and the court rested with confidence upon his ability to expound principle and procedure. The opinions show elaboration, a mastery of facts, authorities, and arguments, and a skilful employment of precise and accurate statement and discussion. But these Reports exhibit an imperfect history of the duties actually performed.

The duties of the Justices of the Supreme Court consist in the hearing of cases; the preparations for the consultations; the consultations in the conference of the judges; the decision of the cause there, and the preparation of the opinion and the judgment of the court. Their most arduous and responsible duty is in the conference.

It was here that the merits of Justice CURTIS were most conspicuous to his associates. The Chief Justice presided, the deliberations were usually frank and candid. It was a rare incident in the whole of this period the slightest disturbance from irritation, excitement, passion, or impatience. There was habitually courtesy, good breeding, self-control, mutual deference—in Judge CURTIS, invariably so. There was nothing of cabal, combination, or exorbitant desire to carry questions or cases. Their aims were honorable and all the arts employed to attain them were manly arts. The venerable age of the Chief Justice, his gentleness, refinement, and feminine sense of propriety, were felt and realized in the privacy and confidence of these consultations. None felt them more, none has described them so well as Justice CURTIS has done in his graceful tribute to our illustrious Chief Justice since his death, in the Circuit Court of the United States, in Boston.

In these conferences, the Chief Justice usually called the case. He stated the pleadings and facts that they presented, the arguments and his conclusions in regard to them, and invited discussion The discussion was free and open among the Justices till all were satisfied.

The question was put, whether the judgment or decree should be reversed, and each Justice, according to his precedence, commencing with the junior judge, was required to give his judgment and his reasons for his conclusion. The concurring opinions of the majority decided the cause and signified the matter of the opinion to be given. The Chief Justice designated the judge to prepare it. Justice CURTIS always came to the conference with full cognizance of the case, the pleadings, facts, questions, arguments, authorities. He participated in the discussions. His opinion was carefully meditated. He delivered it with gravity, and uniformly it was compact, clear, searching, and free from all that was irrelevant, impertinent, or extrinsic. As a matter of course, it was weighty in the deliberations of the court. The older judges spoke of this period with great satisfaction. Justice Nelson, in a letter written within the last year, said to me that it was the happiest period of his judicial life, and alludes affectionately to the share of Justice CURTIS in these proceedings. The Chief Justice so regarded it. The reverence of the junior Justices was gratefully felt and recognized by him.

The last event at the spring term of the year 1857, was the delivery of the dissenting opinion of Justice CURTIS, in the case of Dred Scott.

The court adjourned then, and it proved to be the last event in the judicial career of Justice CURTIS. I have never supposed that his resignation had any connection with that or any other occurrence in the court. There was nothing in the deliberations in that cause to distinguish it from any

other. Upon the argument in 1856, it was found there was a diversity of opinion upon the matter proper to be decided. A plea in abatement to the jurisdiction, which presented the capacity of a person of African descent to be a citizen, had been demurred to and the plea rejected. There was trial and judgment for the defendant, declaring the plaintiff to be a slave.

The question was, could he insist upon an error in the sustaining of his own demurrer after trial and judgment.

At that term, Chief Justice Taney, Justices Wayne, Daniel, Nelson, and CURTIS, held the affirmative and constituted a majority. A reargument was ordered, and at the next term, Justices McLean, Catron, Nelson, Grier, and Campbell, held the negative. Justice Nelson doubted at the first argument, and moved for a reargument, and upon that joined the minority, and so the plea in abatement and the questions arising upon it in the opinion of the majority of the court were not before the court. The case as reported in 19 Howard, discloses that each member of this majority held to this opinion, and that neither of them in their separate or concurring opinions examined the merits of the plea or passed an opinion on it.

The same report shows that each member of this minority did examine the plea and recorded their opinion of it. It was agreed at a day in the term that the questions should be considered and each Justice might deal with them as his judgment dictated. The abstinence of a portion of the court on the one side, and the discussion by the others, was regulated by their own opinion as before expressed. And the facts being understood, no censure was deserved by any. My belief is, that Justice CURTIS misconceived the facts and supposed a portion of the court had concurred in deciding a case which they had before determined was not before the court. I make this statement in justice to him as well as to my other brethren. The statement I make is confirmed by Justice Nelson in a letter of his published by the biographer of the Chief Justice. In respect to the merits of the respective opinions, I have no design to say a word. They are marked with great ability, and are an honor to the court which was able to produce them. They will be considered hereafter as a link in the chain of historical events, and justice will be done to all parties connected with them.

I am not aware that there was any hostility or unkindness felt or expressed to Justice CURTIS by those who did not concur with him. I can speak positively as to some, and shall speak as to myself. Our relations had been cordial and kindly. He informed me by letter of his resignation. I expressed to him my sincere regret for the occurrence, and I testified to the admiration and respect I bore for his ability and integrity and usefulness in the court. These relations remained undisturbed by time, distance, the corroding effects of sectional strife and civil war, until the hour of his lamented death.

My personal intercourse with Justice CURTIS after his resignation was limited, and I had but little contact with his subsequent professional life. During the period of his connection with the court, his ambition seemed to be to associate his name honorably and permanently with the administration of justice in this country, and for this end he sought to understand the whole science of law and procedure, and to have a clear conception of a legitimate internal policy for the Union. His ambition imposed a necessity

for labor, continual improvement, habitual intercourse with judicial and public administration, and the discussion of constitutional and legal questions, and oversight and counsel in the affairs of individuals and communities.

To reach the eminence to which he aspired and to which he attained he must have realized to himself

"This life of mine,
Must be lived out, and a grave thoroughly earned."

His plan was pursued with constancy, and the lives of few show more consistency and symmetry. The prizes of ambition he accepted were within the scope of this aim; those he relinquished or neglected were inconsonant. His tasks of real life were determined, and to these tasks he confined his appointed work. In his course he found that the justice a state or a nation can distribute bears a small proportion to the demands of society for justice.

He found, likewise, that justice, though the chief, is not the only virtue; that it is the ministry to reason and the master of human action, but is not all of humanity.

So, in his onward progress to the goal he had set before him, besides virtue and knowledge, public reputation for incorrupt integrity, large and useful endowments of mind, influence with courts and tribunals, he also acquired faith, knowledge of religion, and entered into a close communion with his God; and thereby he earned his grave and his rest from his labors.

The tribute which the courts and the members of the legal profession from different States have willingly rendered to his memory, expresses to his family, to his friends, and to the country that "blessings are on the head of the just."

The resolutions were thereupon unanimously adopted, and the meeting adjourned.

On the 23d October (that being the first day of the term when the court was full), Mr. WILLIAMS, the Attorney-General, addressed the court as follows:

MAY IT PLEASE THE COURT: BENJAMIN R. CURTIS, formerly an Associate Justice of this court, and one of the most distinguished members of its bar, departed this life on the 15th day of last month; and his professional associates here, feeling like a family bereft of its head, have expressed the sense of their bereavement in fitting resolutions; which, at their request, I have now the honor to present to the court. Our deceased brother was born at Watertown, Massachusetts, in the year 1809, and came down to his grave with all his faculties unimpaired by decay or the infirmities of age.

I can only speak of Judge CURTIS as a lawyer, and those who knew him in that capacity will not, I am sure, charge me with exaggeration in saying that all that has been said of the ablest and best of our profession may with fitness be applied to him. I was a member of the High Court of Impeachment when the President of the United States was put upon his trial before that body; and had, therefore, an excellent opportunity to see and hear the deceased, who was the leading counsel for the defence in that case. The late Chief Justice presided. Senators and Representatives occupied the floor

of the Senate, and distinguished people from all parts of the world filled its galleries. The political pulses of the nation throbbed with intense anxiety. The scene was thrilling and historic.

When the prosecutors had submitted their evidence in support of the articles of impeachment, Judge CURTIS followed with a statement of the respondent's defence. I was greatly impressed with his presence. When he arose to speak, he seemed to be the personification of solidity and strength. Added to his striking features and form he had a peculiarly firm and broad way of standing while he spoke which seemed to express an inflexible determination not to be moved from his positions. He was not excited or embarrassed. He commenced with the composure of conscious power. He presented the facts and points of the case in such a comprehensive, compact, and logical manner, as to make the speech a model of forensic discussion. Brougham or Burke would have displayed upon that occasion a wealth of imagery and illustration; but the language of Judge CURTIS was as pure and chaste as the lectures of Blackstone.

I will not venture to say that our departed brother was the equal of Webster; but it is safe, I think, to assert that he was more like Webster than any man who has of late years, if ever, appeared in this court. Some one has said of Lord Mansfield, that his statement of the facts of a case was worth the argument of any other man; and few gentlemen will feel disparaged, I presume, if this remark is made applicable to Judge CURTIS.

His eminence as a Justice of this court has been universally acknowledged. His opinions indicate an enlightened and conscientious judgment. Masterly expositions of constitutional law have been given from time to time by the great Judges of this court; but none ever delivered here was more exhaustive in its learning, or far-reaching in its results, than his dissenting opinion in the Dred Scott Case. Chief Justice Taney and his Associates, excepting CURTIS and McLean, labored with great ability to make color a constitutional criterion of American citizenship; but Justice CURTIS, with a broader appreciation of the true principles of our government, affirmed that the free native-born citizens of each State are citizens of the United States; and on account of the overwhelming force with which he made the reason and justice of this declaration to appear, the contrary opinion of the court has been without any considerable weight or influence. Civil war has since followed upon this and cognate questions; but it yet remains for this court to define the rights, immunities, and privileges of citizens of the United States, and to determine to what degree of protection, as such citizens, they are entitled to from the government of the United States.

Our deceased friend was not distinguished in the political world. He was never drawn into the vortex of partisan strife by the prospect of official honors. His ambition was to be a great and successful lawyer. Seventeen years ago he gave up his exalted position upon the bench of this court to resume the practice of his profession, and since then he has hardly been equalled in the number and variety of the great causes in which he has appeared.

His solid and massive intellect was enriched by acquisitions from every branch of jurisprudence. He argued questions as to the functions of government, the construction of statutes, and the doctrines of the unwritten law, with an equal fulness of learning and profoundness of thought. There were

no fanciful quotations or pomp of words about his speeches. They were as plain and simple as they could be. This is the highest style of speaking at the bar. Weakness of argumentative power, as often as otherwise, displays itself in turgid and showy declamation; but to make each word a necessary link in a chain of logic, that draws and binds the judgment of the hearer to the conclusion of him who speaks, is the work of a master mind; and in this Judge CURTIS excelled. Few cases come before this court in which there is not a great variety of debatable points—some vital and others incidental to the controversy—and very often all of these are discussed as though there was no difference in their value; but, in addition to his other fine faculties, Judge CURTIS had the power to detect and eliminate from a case its decisive issues, and with these alone he occupied the time of the court.

I would not seek vainly to pour flattery into the "dull, cold ear of death," or seem to praise one who is dead as though he had none of the infirmities of human nature; but, leaving out of view his personal, domestic, and social qualities and habits (of which I know little or nothing), and judging only from his professional character, I feel at liberty to say that, as nearly as any one I ever knew, he filled the measure of a perfect lawyer. When an intellect so highly gifted by nature, and so developed and invigorated by discipline and culture, is extinguished, society, as well as friends, suffer a great loss. The bench and the bar are stricken with a real sorrow.

Our sad duties to-day forcibly remind us of the brevity of human life. All those who with Judge CURTIS occupied the seats now filled by your Honors are, with one exception, dead; but they are not forgotten, and will not be so long as in this supreme tribunal of justice, questions relating to the powers of government, the relations of states, and the rights of citizens are argued and decided. No more, forever, will they be seen here; but their words of wisdom and authority remain. Grateful memories silently linger around their recorded opinions. Our successors, and those who come after them, will, as we do now, ponder over their imperishable thoughts with pleasure and profit. Humbly following their example and emulating their virtues, we may hope that when our time comes to go from this earthly court to a higher judgment seat, we can look cheerfully into the Great Hereafter, and like them, too, leave behind us "footprints in the sands of time."

After the reading of the resolutions, the CHIEF JUSTICE replied as follows:

The court unites most cordially with the bar in honoring the memory of the late Judge CURTIS. I had not, myself, the pleasure of his personal acquaintance, but it needs no such acquaintance to know that, as a lawyer, he was true to his clients and just to the courts, and that, as a judge, he was upright, learned, and practical. An able and useful lawyer, and an honest and honored judge is dead. The court mourns his loss, and trusts that the time is far distant when his professional and judicial life will not be looked upon as worthy of imitation by lawyers and judges.

The clerk will enter the resolutions of the bar, and the remarks of the Attorney-General in presenting them, upon the records, and as a tribute of respect to one who while a member of this court performed all his duties faithfully and well, we will now

ADJOURN FOR THE DAY.

GENERAL RULES.

Amendment to the Sixth Rule.—Motion-Day.

The court will not hear arguments on Saturday (unless for special cause it shall order to the contrary), but will devote that day to the other business of the court; the motion-day shall be Monday of each week, in lieu of Friday, and motions not required by the rules of the court to be put on the docket shall be entitled to preference immediately after the reading of opinions, if such motions shall be made before the court shall have entered upon the hearing of a cause upon the docket.

[Promulgated December 14th, 1874.]

Amendment to the Fifteenth Rule.—Death of a Party.

When either party to a suit in the Circuit Courts of the United States shall desire to prosecute a writ of error or appeal to the Supreme Court of the United States from any final judgment or decree, rendered in said Circuit Courts, and at the time of suing out such writ of error or appeal the other party to the suit shall be dead, and have no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit cannot be revived in that court, but shall have a proper representative in some State or Territory of the United States, the party desiring such writ of error or appeal may procure the same and may supersede or stay proceedings on such judgment or decree in the same manner as is now allowed by law in other cases, and shall thereupon proceed with such writ of error or appeal as in other cases. And within thirty days after the commencement of the court to which such writ of error or appeal is returnable the plaintiff in error, or appellant, shall make a suggestion to the court, supported by affidavit, that the said party was dead when the writ of error or appeal

was taken or sued out, and had no proper representative within the jurisdiction of the court which rendered said judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some State or Territory of the United States, and stating therein the name and character of such representative, and the State or Territory in which such representative resides; and upon such suggestion he may, on motion, obtain an order that, unless such representative shall make himself a party within the first ten days of the ensuing term of the court, the plaintiff in error or appellant shall be entitled to open the record, and on hearing have the judgment or decree reversed, if the same be erroneous: Provided, however, that a proper citation reciting the substance of such order shall be served upon such representative, either personally or by being left at his residence, at least sixty days before the beginning of the term of the Supreme Court then next ensuing; and provided, also, that in every such case, if the representative of the deceased party does not appear by the tenth day of the term next succeeding said suggestion, and the measures above provided to compel the appearance of such representative have not been taken within the time as above required, by the opposite party, the case shall abate; and provided, also, that the said representative may at any time before or after said suggestion come in and be made a party to the suit, and thereupon the cause shall proceed, and be heard and determined as in other cases.

[Promulgated January 12th, 1875.]

Amendment to the Twentieth Rule.—Printed Arguments.

No brief or argument will be received, either through the clerk or otherwise, after a case has been argued or submitted, except upon leave granted in open court after notice to opposing counsel.

[Promulgated December 14th, 1874.]

Amendment to the Twenty-Sixth Rule.—Call of the Docket.

If, after a cause has been passed under circumstances which do not place it at the foot of the docket, the parties shall desire to have it heard, they may file with the clerk their joint request to that effect, and the cause shall then be by him reinstated for

call ten cases after that under argument, or next to be called at the end of the day the request is filed. If the parties will not unite in such a request, either may move to take up the cause, and it shall then be assigned to such place upon the docket as the court may direct.

No stipulation to pass a cause without placing it at the foot of the docket will be recognized as binding upon the court. A cause can only be so passed upon application made and leave granted in open court.

[Promulgated January 18th, 1875.]

TABLE OF CASES.

DECISIONS

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERMS, 1873 AND 1874.

HABICH *v.* FOLGER.

A corporation of New York was declared to be "dissolved" by one of its courts, acting in professed conformity to a statute of the State; and receivers of its assets were appointed. A creditor of the corporation residing in another State sued it there, in "trustee process" (foreign attachment), by which he attached debts due by certain persons (known in the language of the process as "trustees") to the corporation. The corporation, the receivers, and the trustees all appeared by attorney; the trustees answered; and after the corporation and the receivers had contested the claim of the plaintiff so long as they could, the receivers withdrew their opposition, and a formal judgment was entered, which recited that the trustees were charged on their answer.

To a *scire facias* against the trustees to have execution on this judgment, the trustees pleaded that the corporation had been dissolved by a court of New York, to whose proceedings full faith and credit was due under the Constitution. The court below decided that the court of New York had acted in excess of its jurisdiction, and therefore that faith and credit were not due to its proceedings. This decision being the only error assigned, the judgment below was affirmed; this court holding that whether the judgment below was right or wrong was not a matter which concerned the trustees; since the fact of their debt and their obligation to pay it were admitted, and since in the original suit, where the corporation, the receivers, and the trustees were parties, judgment, after full hearing, and with the consent of the receivers, had been entered against the corporation, and the "trustees charged."

ERROR to the Supreme Judicial Court of Massachusetts; the case being thus:

The Revised Statutes of New York authorize the courts of the State, upon a corporation's mismanaging its affairs by doing certain things specified by the statutes, and plainly inconsistent with corporate duty, to declare it, on the petition of a corporator, dissolved, and to appoint receivers to take charge of and to distribute its assets.

In *professed* execution of the power thus given, the Supreme Court of New York did, on the 2d of February, 1866, declare that the Columbian Insurance Company, a corporation of the State, had mismanaged its affairs, and the court by its judgment declared the said corporation "dissolved" accordingly. The court at the same time appointed two citizens of New York, George Osgood and Cyrus Curtis, receivers of its assets.

In this state of things one Folger, resident in Massachusetts, a creditor of the corporation, sued the corporation in one of the Superior Courts of Massachusetts, in the form of suit known in that State as "trustee process;" a form apparently like that known in some other States as foreign attachment; a suit in which a writ issues against the defendant with a clause directing the sheriff to seize or attach his property, or whatever debts may be due to him, in the hands of persons named, and to summon them into court; these persons in Massachusetts being designated as "trustees," as elsewhere, sometimes, "garnishees." The trustees in the present suit were a certain Habich and others.

The record of that case showed the following facts, viz.: that the summons by which the suit was commenced was served on the insurance company in Massachusetts by levying on a chip as its property on the 18th of June, 1866 (a proceeding of form usual in the "trustee process"); that on the first Tuesday of July the corporation entered its appearance by its attorneys, and filed an affidavit of merits; that on the 30th of July it filed an answer (signed by Joseph Nickerson as its attorney) denying that it was a corporation, and denying the material allegations of the complaint; that

the trustees answered admitting a debt; that on the 3d of October, 1866, Osgood and Curtis (already mentioned as having been appointed by the court in New York, on its judgment of dissolution, receivers of the corporation) made an adverse claim, and filed a petition alleging that they were the receivers of the company, setting forth the manner of their appointment, alleging that all the credits, effects, and assets of the said company were vested in them, claiming the effects and credits in the hands of the said supposed "trustees," and praying to be admitted as parties to the action, this petition being signed by Edward Bangs as attorney; that on the 19th of October their prayer was granted, and that afterwards, in October, 1867, a case agreed on was presented to the court for its judgment, the trustee to be charged on his answer and the plaintiff to have judgment for the funds in the trustees' hands, if in the opinion of the court a judgment could be rendered against the corporation; but if the receivers now claiming had valid title to the funds as against the plaintiff, notwithstanding the admitted fact of a debt due him by the company, then judgment to be entered for the receivers or claimants.

There were thus before the court, the "trustees," the Columbian Insurance Company, by its attorney Bangs, and the receivers, by their attorney Nickerson; all, in short, who were in any manner interested as defendants in the transaction, or entitled to appear in the action.

At the January Term, 1869, the court ordered the following entry to be made, viz.:

"Trustees charged. Judgment for the plaintiff.

By the court:

G. C. WILDE,
Clerk."

At the following April Term a consent was filed by Mr. Bangs, attorney of the defendant, that the judgment be entered for the plaintiff for the sum of $3753, damages and

costs, dated June 10th, 1869. On the 12th of June is made the following entry:

"Claimants withdraw.*

E. BANGS,
Attorney.

J. C. DODGE,
Attorney for plaintiff."

(Filed June 12, 1869.)

On the 14th of June a formal judgment for the amount was rendered for the plaintiff, reciting that the trustees were charged upon their answer and that the claimants withdrew.

Upon *this* judgment Folger issued a *scire facias*, calling on the trustees to show why he, Folger, should not have execution against them. Habich and the other defendants (not denying their debt) pleaded—

That the judgment recovered by the plaintiff against the insurance company was "invalid," for that before the day on which the judgment was alleged to have been recovered, to wit, &c., the company had been dissolved by a decree of the Supreme Court of the State of New York, a copy whereof, duly authenticated, the plea alleged that the defendant now exhibited.

That by the Constitution of the United States it is provided that full faith and credit shall be given in each State to the judicial proceedings of every other State, &c.

The Supreme Court of Massachusetts held, upon an examination of the proceedings in the Supreme Court of New York, and of the statutes on which they purported to proceed, that the judgment of the said Supreme Court, declaring the corporation dissolved, was in excess of the jurisdiction of the court and therefore entitled to no faith and credit in Massachusetts as a judicial proceeding; and accordingly gave judgment for the plaintiff, the original attaching cred-

* In point of fact there had been another suit in "trustee process," and just like the present one, only that the trustee was a certain J. L. Priest. That suit was taken as the test suit, and after a vigorous contest in *it*, the court having decided in favor of Folger and against the receivers, opposition was no longer made in the present one. The claimants withdrew.

itor. From that judgment the case was brought here by Habich and the others, the debtor trustees.

The only record which, strictly speaking, was brought up here was the record of this suit on the *scire facias;* and the argument was chiefly on that; but reference having been made all along on both sides to the record of the suit in which the judgment on which the *scire facias* issued was rendered, a certified copy of the record of that original suit was handed to the court at the close of the argument, with the consent of both sides that it should be considered by it as part of the present case.

Mr. Dudley Field, for the plaintiff in error:

The only errors relied on are:

That the court erred in holding that the Columbian Insurance Company was not dissolved, and

That the company being dissolved, it had no right to enter judgment against it or the trustees.

The courts of Massachusetts had not the right to question the validity of the judgment of dissolution rendered by the Supreme Court of New York. That court had jurisdiction over the parties and the cause, and the record is, therefore, conclusive in Massachusetts.

In New York this judgment could not have been inquired into collaterally.

The Supreme Court of New York was authorized to declare the corporation dissolved.

[The learned counsel here went into an examination of the statutes of New York, and of the proceedings of the Supreme Court of that State dissolving the corporation, and contended that the dissolution was strictly according to the statute.]

If the corporation was dissolved no action could be maintained against it. A corporation dissolved is like to a person who is dead.

Mr. J. C. Dodge, contra.

Mr. Justice HUNT delivered the opinion of the court.

The record of the *scire facias* proceedings upon which the case was argued presents some questions requiring careful examination.

If we correctly apprehend the position of the case as stated in the record in the suit in which judgment was rendered,—and which was handed to the court at the close of the argument, with the consent of both sides that it should be considered by us,—there can be no difficulty in this case in reaching a correct conclusion.

In his first point the plaintiff in error says: "The only errors relied on are that the court erred in holding that the Columbian Insurance Company was not dissolved, and the company being dissolved, it had no right to enter judgment against it or the trustees."

The indedtedness of the plaintiffs in error and their liability to pay the amount of their notes to the defendant in error, as adjudged by the Massachusetts court, are thus admitted. But it is insisted that in reaching its conclusion, and as a part of the process of reasoning by which it was reached, the Supreme Court of Massachusetts erroneously held that the judgment of the New York court that the insurance company was dissolved was without authority and was void.

If this be conceded, of what importance is it to the plaintiffs? How does it concern them whether the judgment dissolving the insurance company was erroneous or whether it was correct? All they have to do is to pay the amount of their notes. This it is conceded that they are bound to do, and this the copy of the record in which the judgment was rendered shows that the insurance company and its receivers consented that it be adjudged they should and must do. Payment under such circumstances is a complete protection to them against a claim for repayment by the receivers upon a suit brought in the New York courts equally as in the courts of Massachusetts.

The copy of the record referred to shows that the trustees (the present plaintiffs in error)—the Columbian Insurance

Company, by its attorney, and the receivers, by their attorney, composing all who in any manner were interested in the transaction or entitled to appear in the action—were before the court; and that on the 14th of June a formal judgment for the amount is rendered for the plaintiff, reciting that the trustees are charged upon their answer, and that the claimants withdrew.

It is impossible to present the case of a judgment which would be more conclusive upon the corporation, and upon the receivers, than the case presented. They were parties in form and in fact. They contested the claim as far as contest was available, and when farther contest was unavailing the attorney for the receivers consented to the entry of the judgment, in terms withdrew their opposition, and a formal judgment was entered.

If the corporation was in existence, so that it could appear in a suit, it was concluded by the appearance of its attorney.* If it was not in existence, the receivers, representing the corporation and its creditors, were bound by the appearance of their attorneys. In either event the result is the same.

This judgment is binding upon the corporation and the receivers, and in the case of a suit brought by either of them against the trustees, would be an indisputable bar to their right of recovery, and this in any State in the Union. The appearance by authorized attorneys was equivalent to a personal service of process upon those parties.

Without intimating for a moment that an error was made by the Supreme Court of Massachusetts, it is too plain for discussion that it is immaterial to the plaintiff whether there was error or not.

It is a point in which they are not concerned. They have but to pay their debt, adjudged to be due in a proceeding which protects them against all the world.†

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* Murray *v.* Vanderbilt, 39 Barbour, 140.

† Magoon *v.* Scales, 9 Wallace, 31, 32; Christmas *v.* Russell, 5 Id. 290; Pruner *v.* United States, 11 Howard, 163; United States *v.* Yates, 6 Id. 605; Harris *v.* Hardeman, 14 Id. 334; Toland *v.* Sprague, 12 Peters, 300; Chaffee

This being the only allegation of error, the judgment must be

AFFIRMED.

CREIGHTON *v.* KERR.

A withdrawal, "without prejudice to the plaintiff," of a general appearance entered by an attorney, for the defendant, means that the position of the plaintiff is not to be unfavorably affected by the act of withdrawal; that all his rights are to remain as they then stood. Hence where there has been error in the beginning of an action, as *ex. gr.*, one of foreign attachment, by reason of want of notice required by statute to be given to the defendant, and an attorney appears generally for such defendant, and so cures the defect, the advantage thus given to the plaintiff is not taken away by a withdrawal declared to be "without prejudice" to him. And the court states that it does not intend to intimate that the result would have been different had the appearance been withdrawn unconditionally.

ERROR to the Supreme Court of the Territory of Colorado; the case being thus:

The statutes of Colorado relating to attachments enact:

"SECTION 54. Whenever a plaintiff in any civil action pending in any court of record in this Territory shall file in the office of the clerk of the court wherein such cause is pending, an affidavit showing that the defendant resides out of this Territory, it shall be the duty of the clerk to cause a notice to be published in some newspaper, published in the county in which such cause is pending, for four successive weeks prior to the next term of the court, which notice shall set forth and state the title of the court in which such action is pending, the nature of the action, and, if such action shall be brought to recover money, the amount claimed by the plaintiff, the names of the parties, and the time when, and the place where, the next term of court in which such action is pending will be held, and that if the defendants shall fail to appear at the term of court, and plead or demur, judgment shall be entered by default.

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v. Hayward, 20 Howard, 208; MacDonogh *v.* Millaudon, 3 Id. 693; Field *v.* Gibbs, 1 Peters's Circuit Court, 155; Com. & R. Bk. *v.* Slocomb, 14 Peters, 60; Eldred *v.* Bank, 17 Wallace, 551.

"SECTION 55. It shall be the duty of the plaintiff, in all cases in which such notice shall be published, in addition to such publication, . . . if upon diligent inquiry the place where the defendant may then be found can be ascertained, to send to such defendant, and to each of them, by mail, a true copy of such notice, properly addressed to such defendant, at the post-office nearest to the place where such defendant may be found, at least thirty days prior to the term of court mentioned in such notice."

This statute being in force, Kerr and another, in May, 1870, sued Creighton in the District Court for Arapahoe County, in Colorado Territory, in attachment. They filed an affidavit, alleging Creighton's non-residence, and that he owed them $5563.

The sheriff returned that he had attached certain shares in the Colorado National Bank, belonging to Creighton, who was not found.

The plaintiffs then filed their declaration, claiming $8000.

No notice of these proceedings was published as required by the statutes.

Subsequently an entry was made in the court as follows:

"Now come the said plaintiffs, by Alfred Sayre, Esq., their attorney, and the said defendant, by Messrs. Charles and Elbert, his attorneys, also comes, and thereupon, on motion of said plaintiff's attorney, the said defendant was ruled to plead ten days from this date."

On the 19th of October the following:

"And now on this day come Messrs. Charles and Elbert and withdraw their appearance as attorneys for the said defendant, *without prejudice* to the plaintiff."

On the 27th of October a judgment was entered, reciting the appearance, its withdrawal "by leave of the court and without prejudice to said plaintiffs;" and the defendant's failure to plead according to the rule. Damages were assessed by a jury at $12,244. A *remittitur* was entered for $4244, and judgment taken for $8000. The Supreme Court affirmed this judgment, and the defendant brought the case here.

Mr. J. M. Woolworth, for the plaintiff in error:

I. If we lay out of view the appearance which Charles and Elbert entered for Creighton, it is obvious that this judgment cannot be sustained for a moment, because—

1. No notice of the proceedings was published, nor mailed to the defendant, both of which things the statute render necessary. If neglected, a judgment may not be collaterally avoided, but on error it must be reversed.

2. The writ of attachment by which the suit was brought is for only $5563, and the affidavit on which the writ is issued alleged only that sum to be due. It was not competent for the court to render a judgment for more than was specified in the writ.

II. The fact that Mr. Creighton appeared generally in the action, does not affect the case.

Had the withdrawal of the appearance been general, and unqualified by the words "without prejudice to the plaintiff," the case would have stood as if no appearance had been entered.* The words "without prejudice," do not retain to the plaintiff the advantage of the appearance. To give to them that effect would make of no effect the withdrawal. The utmost meaning that can be attributed to them is, that the progress of the cause, and all rights of the plaintiff not resting on the appearance, should remain unaffected by the withdrawal.

Mr. R. T. Merrick, contra.

Mr. Justice HUNT delivered the opinion of the court.

In the view we take of this case it is not necessary to examine the alleged irregularities in the conduct of the suit or the alleged defects in its commencement. Without intending, in fact, to decide those points, it may be assumed, as is argued by the plaintiff in error, that there was not that notice of the proceedings required by the laws of Colorado.

* Michew *v.* McCoy, 3 Watts & Sergeant, 501; Lodge *v.* State Bank, 6 Blackford, 557; Dana *v.* Adams, 13 Illinois, 691.

It may be assumed also that in making a claim of damages for $5563 only in the writ of attachment, and in making a claim for $8000 in the declaration, an error was committed. It is insisted that in consequence of this claim in the writ the party would have been justified in assuming that no judgment for a larger amount would be taken against him; and that great injustice might have been done to him. We do not find that the respectable counsel claims that any injustice has actually been done.

But we are of the opinion that there has been no opportunity for the commission of injustice. We find the facts in this respect to be as follows:

After the execution of the writ of attachment the plaintiff filed his declaration claiming damages to the amount of $8000, giving the items of the claim. After this time, viz., on the 12th day of October, the defendant appeared in the suit by his counsel, Messrs. Charles and Elbert. The appearance was general, and, "thereupon," as the record says, on motion of the plaintiff's attorney, the defendant was ruled to plead in ten days.

Within the ten days, in which an order to plead had been entered, upon, or upon the faith of, or in consequence of their appearance, the attorneys came into court and withdrew their appearance as attorneys for the defendant, without "prejudice to the plaintiff." Leave to withdraw was granted upon this condition. Assuming the rule to plead to have been effectual, as it manifestly would have been had there been no withdrawal, and assuming that a failure to comply therewith placed the defendant in default, and entitled the plaintiff to a judgment by *nil dicit*, as would manifestly have been the case had there been no withdrawal, the plaintiff and the court held the action to be undefended, and a judgment was entered for the plaintiff, with damages to be assessed by a jury to be impanelled. The jury received evidence upon this subject, and under instructions from the court rendered a verdict for $12,244. The evidence is not returned in the record, as there was no occasion that it should be, and there is no presumption of law, or

reason in fact, to suppose that the verdict was for a larger sum than was justly due to the plaintiff. For all in excess of $8000 a remission was made, and judgment was entered for that sum.

The leave to withdraw the appearance of the defendant's attorneys was given upon the condition that it should be "without prejudice to the plaintiff." This meant that the position of the plaintiff was not to be unfavorably affected by the act of withdrawal. All his rights were to remain as they then stood.

A general appearance waives all question of the service of process. It is equivalent to a personal service. The question of jurisdiction only is saved.* If there was error in the commencement of this action by reason of a defective notice or otherwise, it was cured by the appearance.

This advantage, among others, was not to be impaired by the withdrawal of the appearance.

A personal appearance by the defendant, through his attorneys, converted into a personal suit that which was before a proceeding *in rem*. This result had been worked when the appearance was entered, and stood in full effect when the withdrawal was made. Any judgment that he could then obtain against the defendant was binding upon the defendant, indisputable and valid against him and his property wherever he or it could be found. To reconstruct this judgment and by means of a withdrawal of the appearance make it a judgment to be enforced upon certain shares of bank stock only, and liable to be re-examined as to that upon the personal application of the defendant, would produce an extremely unfavorable effect upon the plaintiff's position. It would be a "prejudice" to him, and hence it cannot be permitted.

A rule to plead had been served upon the attorneys. This remained in force. At the expiration of the time to plead the action was undefended, and a right to an interlocutory judgment at once arose. To take away this right would be

* United States v. Yates, 6 Howard, 605.

an injury to the plaintiff. Hence under the condition of no prejudice it remained good to him.

The appearance of the defendant may remain, although the attorneys, by whom it was entered, have withdrawn. Its effect cannot be annulled by such withdrawal. The appearance gives rights and benefits in the conduct of a suit, to destroy which by a withdrawal would work great injustice to the other party. Such was the case of *Eldred* v. *Bank*,* where the defendant withdrew his plea, claiming that the withdrawal left the case as though it had never been filed, and that, never having been served with process, he was not liable to a personal judgment. The court say: "We do not agree to this proposition. The filing of the plea was both an appearance and a defence. The withdrawal of the plea could not have the effect of withdrawing the appearance of the defendant, and requiring the plaintiff to take steps to bring him again within the jurisdiction of the court. . . . He was not by the withdrawal of the plea out of court."

None of the cases cited contain anything in hostility to these views. As confirming them see *Lawrence* v. *Yeatman*,† *Rowley* v. *Berrian*,‡ *Thompson* v. *Turner*.§

Second. We do not intend by the argument thus advanced to intimate that the result would have been different had the appearance been withdrawn unconditionally, as was the case in *Eldred* v. *Bank*.

The authorities upon this subject of a voluntary appearance are cited in the case of *Habich* v. *Folger*, recently decided in this court,‖ and it is not necessary to do more than to refer to them as there collected.

In the present case there was not a simple withdrawal, but it was allowed upon the condition that it should be without prejudice to the position of the plaintiff. We decide the case upon the facts as they are presented, and

* 17 Wallace, 551. † 2 Scammon, 17. ‡ 12 Illinois, 198.
§ 22 Id. 389; see also the present case reported in 1 Colorado, 509.
‖ The last preceding case.

nothing would be gained by attempting to go beyond them.

JUDGMENT AFFIRMED.

Mr. Justice BRADLEY did not sit during the argument, and took no part in this decision.

McQUIDDY *v.* WARE.

1. A man who has neglected his private affairs and gone away from his home and State, for the purpose of devoting his time to the cause of rebellion against the government, cannot come into equity to complain that his creditors have obtained payment of admitted debts through judicial process obtained upon constructive notice, and on a supposition wrongly made by them that he had no home in the State, or none that they knew of.
2. Especially is this true when there is no allegation of want of actual knowledge of what they were doing.
3. And still more especially true is it in Missouri, where the statutes of the State allow a bill of review of decrees or judgments obtained on constructive notice at any time within three years after they are obtained, and the complainant has let more than six years pass without an effort to have them so reviewed.
4. Allegations of general ignorance of things a knowledge of which is easily ascertainable, is insufficient to set into action the remedies of equity.

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

At the beginning of the late rebellion, which broke out in 1861, McQuiddy, a resident of Nodaway County, Missouri, and owning a farm there, voluntarily entered the service of the Confederate States under General Sterling Price, and followed the fortunes of that officer and his army when they left Missouri. At this time there were two mortgages on different parts of his farm, or instruments of writing which the holders of them asserted to be mortgages. These were due, and the holders *in May, 1862, and November, 1863*, procured a decree of foreclosure of them. This proceeding

was made in professed pursuance of a statute of Missouri, regulating the subject of the foreclosure of mortgages, and which authorizes an order of publication instead of an actual service when the mortgagee alleges and the court in which the foreclosure is applied for, or its clerk, is satisfied "that the place of residence of the defendant is *unknown*." The foreclosures, therefore, so far as the records of them showed, were made on constructive notices, and on allegations such as above stated.

McQuiddy also owed money, when he left Missouri, to a third creditor; this debt being by a note unsecured. This creditor proceeded to get his debt by a proceeding in attachment, and in professed pursuance of another statute of Missouri, which authorizes a writ in that sort of proceeding to issue whenever the plaintiff files his petition setting forth his cause of action, with an affidavit that he has good reason to believe, and does believe, that the defendant has absconded or absented himself from his usual place of abode in this State, so that the ordinary process of law cannot be served upon him. Such affidavit was made by the unsecured creditor, and under it, in *November, 1863*, judgment was got; a judgment, of course, like the other, on a constructive notice, so far at least as the record of the proceeding showed.

On these three different judgments all parts of his farm were sold; a sale of one part being in 1863, and of the others in 1864, the sales following at no great intervals the dates of the judgments.

By the Revised Statutes of Missouri a party against whom judgment has been rendered on constructive notice simply, may come in at any time within three years afterwards and file a petition for review.*

In this state of things and of law, McQuiddy, *in July, 1871*, filed his bill in the court below, against the purchasers of the farm (one Ware, and others), and against their vendees, to set aside the sales and to have possession again of the property sold.

* Revised Statutes of 1855, p. 1280, §§ 13, 15, 16.

His bill attacked the jurisdiction of the court in all three cases alike.

He averred that the orders of publication were based on false statements, and that in one of the cases, proceeded in as in the case of a mortgage, the instrument proceeded on was not a mortgage, and that the proceeding was in truth a proceeding to enforce a lien on lands, instead of a suit to foreclose a mortgage, and required an affidavit of *non*-residence to authorize the giving of constructive notice; and that jurisdiction could not be acquired on affidavit of *unknown* residence, the sort of affidavit made in the case. He alleged further that his departure from the State was for a temporary purpose and with an intention of soon returning; that he left his wife at his domicile, and that copies of writs could have been served on her, and that he neither absconded nor absented himself from his usual place of abode in the sense of the statute, nor was his residence unknown; that all these facts were known to the parties in interest, including the respondents, who either purchased the property at the sales, or derived title from the person who did purchase.

By way of excuse for his want of diligence in his own affairs, he alleged that the state of feeling was such against him in Nodaway County, on account of the part he took in the rebellion, that he could not with any sort of safety return to the county, and that in 1863 he removed his family to Tennessee, where he had since continued to reside. He also alleged, in continuation of this excuse, that being absent from the State, though a resident of the county when the proceedings were instituted to deprive him of his rights, and no notice of the same having been given to any member of his family he had not a day in court given him, and was in ignorance of what was done until recently; and that as soon as practicable after ascertaining that the said illegal proceedings were had, he had taken steps to assert his rights.

The only charge of fraud in connection with the transactions disclosed in the bill related to the falsity of the affidavits on which the proceedings were based.

The complainant did not make any tender of money at

all; but he prayed that an account might be taken of what was due on the instruments of debt; that an account might be taken also of the rents and profits received by the vendees of the persons who had bought at the judicial sale, and that he, the complainant, might be allowed to redeem on payment of any balance.

The defendants demurred, and the Circuit Court sustained the demurrer. A decree having gone accordingly, McQuiddy brought the case here for review.

Mr. W. H. Letcher, *for the appellant*, cited numerous statutes of the State of Missouri, and decisions of the Supreme Court of the State upon them, to show that the proceedings were not in proper form, and that upon the facts alleged and which, of course, the demurrer admitted, no jurisdiction existed, and that the sales of necessity were void.

Mr. G. P. Strong, *contra*, contended that the statutes applicable to the case had been strictly pursued; and, moreover, that the case was void of equity.

Mr. Justice DAVIS delivered the opinion of the court.

In the view we take of this case we are not required to wade through the various statutes of Missouri, and the decisions of the courts of the State, in order to determine whether or not the proceedings in question are valid. The complainant is not, in our opinion, in a position to invoke the aid of a court of equity to decide that question. The bill presents the case of a man who chose to neglect his private interests for the purpose of devoting his time to the destruction of the government, complaining that his creditors enforced the collection of their debts on a wrong theory of his status, in consequence of entering the service of the enemy. There is no pretence that the debts were not meritorious, or that the judgments were entered for a larger amount than he owed. The real ground of complaint is that he was not an absent or absconding debtor, or a person whose residence was unknown, and was not, therefore, sub-

ject to the proceedings which were instituted against him. Whether this be so or not it is easy enough to see in the anomalous condition of affairs existing at the time in Missouri, that creditors might honestly suppose that an individual leaving his State to destroy the government under which his rights of property were acquired, did not intend to return to it, and proceed to collect their debts under that supposition. The inquiry is whether a party acting in this way has stated such a case as entitles him to equitable relief, because his creditors, who ought to have been provided for before he left, mistook the condition he occupied, and treated him as a person who had permanently abandoned his home.

There is no averment that he did not have *actual notice* of the proceedings against him in time to protect his rights. And it is fair to infer, in the absence of such an averment, that it could not be truthfully made. It is difficult to suppose, when he moved his family to Tennessee, that he did not communicate with friends in Missouri who were acquainted with the true state of his affairs.

Besides, if the proceedings against him were irregular, why did he not seek his remedy under the statutes of Missouri, which concede to the party against whom judgment has been rendered on constructive notice only, the right to come in at any time within three years and file his petition for review. If this had been done, and the State court had permitted the cases to be reopened for the reasons set forth in the bill, his remedy would have been complete, as the bill charges the purchasers at the sale with notice of all irregularities. It cannot be said that there was no opportunity of doing this, for the earliest judgment was in May, 1862, and both the others in November, 1863, and the war was substantially over in May, 1865. There is no averment of the want of this opportunity, nor is the absence of it aided by the general allegation, without specification of time or circumstance, that he could not with safety return to Nodaway County on account of existing prejudices. This might be true, and yet the opening of the judgments obtained by an attorney, as his personal presence was not required for that

purpose. It were easy enough before the three years expired to communicate with St. Louis by letter, or even to go there, and it is very certain that he could not have been under any apprehension while there of being disturbed in the assertion of his legal rights.

But if the proceedings, instead of being irregular and voidable, are null and void, as they are characterized in the bill, the remedy at law is complete, for there is in such a condition of things nothing in the way of the successful maintenance of an action of ejectment, which will result not only in the restoration of the lands, but also their rents and profits.

Apart from all this, the maxim that he who seeks equity must do equity in the transaction in respect to which relief is sought, has not been observed by this complainant. While admitting his indebtedness, and that it has existed for ten years or more, he does not make a tender in court of what is justly due, although he is asking the court to set aside the proceedings by which this indebtedness was satisfied, on the ground of their absolute nullity. The willingness to pay what is found to be due on the adjustment of the accounts for rents and profits is not the sort of offer required of a person in the situation of this complainant.

Moreover, there has been an utter lack of personal diligence, which is required in such a case as this in order to bring into activity the powers of a court of equity. Equity always refuses to interfere where there has been gross laches in the prosecution of rights. There is no artificial rule on such a subject, but each case as it arises must be determined by its own particular circumstances. These proceedings were begun early in the war, and yet no move is made to disturb them until July, 1871, more than six years after hostilities ceased. Why this delay? The complainant says he was in ignorance of them until recently, and that as soon as he ascertained them he took steps to assert his rights. Such a general allegation will not suffice to provoke the interposition of a court of equity. It will not do to remain wilfully ignorant of a thing readily ascertainable. There has been

free and uninterrupted communication between Tennessee and Missouri since the war closed, and the courts everywhere accessible for the prosecution of any cause of action. Besides, in the very nature of things, the complainant must have known soon after it occurred that an improved farm, once occupied by him, was in the possession of adverse claimants. This was notice sufficient to put him on inquiry, and this inquiry would have resulted in ascertaining all the facts stated in the bill. There is no reason given for the delay, nor any facts and circumstances on which any satisfactory excuse can be predicated.

Here, then, is the case of a party engaging in the rebellion without provision for his debts, to which there was no defence, asking a court of equity, after the lapse of many years without sufficient excuse for the delay, to interfere in his behalf because his creditors adopted the wrong methods for the enforcement of their claims against him. And this, too, without any specific charge of fraud, except in the matter of the affidavits on which the proceedings were founded.

Such a charge, under the circumstances, is too weak and unsatisfactory to relieve the complainant from the consequences of his own folly.

In any aspect of the case we think the demurrer was properly sustained, and the decree of the Circuit Court dismissing the bill is therefore

AFFIRMED.

HUMASTON *v.* TELEGRAPH COMPANY.

1. Where a person, on a given contract, covenants to pay a sum whose amount is to be contingent on certain events and is to be ascertained by arbitrators, such person, if he prevent any arbitration, may be sued at law on a *quantum valebat*, and the sum due may be ascertained by a jury under instructions from the court. If the jury, under such instructions, find that only so much is due, the plaintiff can recover nothing more.
2. A contract of a special nature explained and interpreted so as to sustain a charge under which, in a case like that just stated, the jury found as due much less than the plaintiff claimed.

3. Where a person in consideration of property (not money) to be assigned by another, agrees to give a certain number of shares of stock, having on the day of the contract a fixed market value, and, refusing to give the stock, is sued at law for a breach of the contract, evidence of the value of the stock at any other time than at the date of the contract is rightly excluded; its value at that date being agreed on and admitted.

APPEAL from the Circuit Court for the Southern District of New York; the case being thus:

Humaston having invented certain instruments for expediting the transmission and reception of messages by telegraph, and especially for perforating paper for the purpose of such messages, which inventions were patented, and having also, as he alleged, discovered a process by which paper could be chemically prepared, so as to be sensitive to the electric current, and by which its value would be greatly enhanced (a process which he kept secret), entered in April, 1861, along with one Lefferts, who had some interest in the matter with him, into an agreement, as follows, with the American Telegraph Company, a company already established in the business of telegraphing:

"The American Telegraph Company agree to buy, and Humaston agrees to sell a full, perfect, and unincumbered title to all his inventions for all electric telegraph machines and processes, and particularly the patented invention for perforating paper for the purpose of telegraphic messages, and the adaptation and manner of using such perforated paper in the transmission of such messages, including whatever is patented by Humaston in the transmission of messages by telegraph, and also including the secret process of preparing the chemical paper, with the right to procure letters-patent therefor.

"The said Humaston and Lefferts agree not to engage, directly or indirectly, in telegraphing during the period of ten years, in competition with the American Telegraph Company, nor in any way aid, countenance, or encourage any telegraph line doing business in any of the States bordering upon the Atlantic Ocean or Gulf of Mexico, &c., so as to in any way injuriously affect the business or interests of the American Telegraph Company.

"The consideration to be paid by the company for the said

inventions and patents, and agreement against competition, is one dollar, and at least 50 shares of the capital stock of the American Telegraph Company. Upon the execution and delivery by said Humaston of conveyances of the aforesaid inventions and patents, conveying a full, unincumbered, and perfect title to the whole thereof, the said American Telegraph Company are to issue to the said Humaston 100 shares of the stock of said company, *and a further consideration of not exceeding* 400 *shares of the capital stock of said company* is to be paid or issued to the said Humaston upon the following stipulations and conditions: Three disinterested referees or arbiters *are to decide how much (if any) more is to be issued to the said Humaston after such arbiters shall be satisfied as to the capability and value of said patented inventions;* the said referees or arbiters to be mutually selected.

"It being understood that the aforesaid maximum amount of stock consideration is stated under a claim by the said Humaston and Lefferts that his patented inventions will enable the said company to do by the Humaston system, and on one wire, five times as much business, regularly and accurately, as can be done now on one wire, in the same time, by any system now used by said company, it being also understood that compensation is not to be allowed to Humaston for what is now public, but only for what their patented improvements in telegraphy are worth more than any other of said systems.

"The arbiters or referees are also, in estimating the value of said patented inventions, to consider *the comparative reliability, accuracy, rapidity, cost, and also the expense of working and using said inventions with those now in use.* To enable the said Humaston and Lefferts to prove the capacity and value of the said inventions, full, fair, and sufficient trials are to be allowed to them, and made in such manner, and as often, and for such period of time, as the referees may determine, and the final decision is to be given before the expiration of one year from the date hereof. Each party are to have the right to suggest to the referees such experiments for the testing of such inventions as to them may seem proper. The referees to have full opportunity of investigating and deciding in the matter. It is also understood and agreed that the company are to have reasonable opportunity to examine into the validity and patentability of the patented inventions, and place any questions which may

arise thereon before the referees for their decision. But the referees are hereby instructed that under the foregoing paragraph the company are to require only a reasonable amount of evidence as to the validity of the Humaston inventions, and further agreed that, should the referees decide that the invention is wholly invalid, and not patentable, then the company will surrender up and transfer to Humaston, by a good and sufficient assignment, the title to the said patents on the retransfer of 50 shares of stock of the company. Upon the award or decision of said referees, or a majority thereof, being made in writing and delivered to said company, said company are to pay or issue to said Humaston the additional amount, if any, of stock (not exceeding 400 shares), determined or stated in such award."

Humaston made the requisite transfers, and the matter meant to be submitted was referred to the arbitrators. They accepted their office and entered upon the discharge of their duty, but the *telegraph company withdrew its submission.* Humaston now brought special assumpsit against the company, claiming not only the 100 shares of stock which he actually received in 1861 (and then worth $100 a share, or $10,000, and which in 1866 was worth $18,000), but claiming also the value of the other 400 shares. His position was that by the terms of the contract, he was entitled to the 400 shares unless the arbitrators named a smaller compensation, and that as the company had withdrawn its submission, and so prevented the arbitrators from naming any such smaller compensation, he was entitled to the whole 400 shares.

At the trial, the instruments invented by Humaston were submitted to the jury and explained, and experts, mechanics, and telegraphers examined upon them for several days.

After the plaintiff had established what was perhaps a *primâ facie* case, his counsel, for the purpose of furnishing a rule for estimating his damages, offered to show that the market value of the stock of the American Telegraph Company on the 12th day of June, 1866, on which day the company had been consolidated with the Western Union Telegraph Company, was $150. The court excluded the evidence for the purpose for which it was offered, but admitted it as

a fact which the jury might consider in estimating the value of the property sold. Subsequently the parties agreed that the market value of the stock of the company on the 1st day of April, 1861, was $100 per share, and made their agreement known to the court. Thereupon the court held that the evidence as to the value of the stock on the 12th of June, 1866, and at subsequent dates, which had been admitted, was immaterial; and under the plaintiff's exception struck it out and excluded it.

Some of the defendant's evidence tended to show that the plaintiff's invention had no value and had never been used.

The court charged—

That the plaintiff was not entitled, as matter of law, to recover of the defendants the value of the remaining 400 shares:

Also that the plaintiff did not, as matter of law, become entitled to the said 400 shares of stock by reason of the defendants' revocation of the powers of the referees or other breach of contract alleged, but that the plaintiff was entitled, in consequence of the revocation, to bring an action and to recover the excess (if any there was) which the value of what he sold, assigned, and transferred to the defendants (enhanced by the agreement of the plaintiff and Lefferts not to enter into competition with the defendants) had when sold and delivered, over the amount which he had already received (and that this the parties agreed was 100 shares, of the aggregate value of $10,000), with interest on such excess from the 13th of February, 1867; but if in their judgment there was no such excess, then that their verdict should be for the defendant.

To these instructions the counsel for the plaintiff excepted.

The jury found for the plaintiff, and assessed his damages at $7500.

The exclusion of the evidence and the charge of the court were the matters now assigned for error.

Messrs. Truman Smith and Cephas Brainard, for the plaintiff in error, argued the case much at length, and showed, as

they conceived, that it was well established both in England and this country, that a stipulation in a contract for a reference of any matter of difference likely or certain to arise thereunder, might be connected with the principal undertaking in such a manner as to make it a *condition*, and that as such it might essentially qualify or affect the rights of one party, or the obligations of the other; that if it were a condition precedent and was not performed, the obligation would be null; and if it were a condition subsequent and not performed (which the counsel alleged was the case here), then that the condition became null and the obligation absolute. If the party bound by a condition precedent did not submit, or offer to submit, or having submitted, revoked, his right of action was gone; and if a party bound by a condition subsequent refused to submit, or having submitted, revoked, then the qualification of his liability was gone, and that liability became absolute.

The learned counsel referred to twenty-nine different cases, English and American, beginning with *Vynior's Case*, reported by Sir Edward Coke,* which sustained, as they conceived, their views.

Messrs. J. R. Porter and G. P. Lowry, contra, citing *Cowper* v. *Andrews*,† and the opinion of Hobart, C.J., therein; *Brewer* v. *Hill*,‡ and other cases.

Mr. Justice DAVIS delivered the opinion of the court.

Whether or not the court erred in its charge, and in the exclusion of the evidence excluded, depends on the proper interpretation of the contract and the rule of damages which shall be applied in this action to the breach of it.

It is insisted by the plaintiff that the defendant promised to pay him for his invention four hundred shares in addition to the one hundred shares paid on the delivery of the title, unless the arbitrators should relieve the company by fixing some less amount, and a great deal of learning touching the

* 8 Reports, 81*b*. † Hobart, 40. ‡ 2 Anstruther, 413.

doctrine of conditions subsequent and precedent has been invoked in support of this position. But this doctrine has no application here, for, manifestly, this is not an undertaking to which a condition subsequent could be attached. It is easy to determine why this contract was made, the nature of it, and the acts to be performed by the contracting parties. The American Telegraph Company were engaged in carrying on the telegraph business in some portions of the country, and naturally desirous of appropriating to itself any new invention which would facilitate the transmission of telegraphic messages. Humaston claimed that his system just patented would do five times as much business on one wire as the ordinary systems then in use. If it could do this with equal accuracy and reliability and at no greater cost, the value of it could be hardly overestimated, but there had been no experiments to test the question of whether or not it was capable of doing these things. It might do the work claimed for it and yet be so unreliable, or the expense of working and using it so much greater than the expense of working and using the inventions then open to the public or used by the company, that its purchase would be dear at any price. The company, desirous of possessing everything new and useful in the line of their business, were willing to risk something in the acquisition of these inventions, but unwilling to pay the estimate of value which Humaston put upon them without trial of their utility. This estimate was $50,000, as the proof on the trial was that the stock of the company stood at par in the market at the date of the contract. The company said to Humaston, We will take your patents, whether valid or not, and pay you $5000 for them if you and Lefferts stipulate not to compete with us for a period of ten years, and if they are valid, whether useful or not, the compensation shall be increased to $10,000. But we cannot promise additional compensation unless, after proper experiment, your system shall be proved to be worth more. It may be that your claim of rapid performance can be sustained, and yet the system, owing to its greater cost than those now in use, or some other controlling practical

consideration, be of comparatively little value to us. This can only be determined, after trial, by some impartial tribunal. We are willing that this tribunal shall be referees mutually selected, to whom shall be submitted the question of whether we shall pay anything more than the $10,000 already paid, after the merits of your system have been tested by them and its capability and value established. They may reach the conclusion that you are sufficiently compensated already, and if they do, their award must be accepted as a final settlement of the matters of difference between us. If they reach a contrary conclusion they must fix the amount of consideration which we are to pay in addition to what you have already received; but this must be within the limit of four hundred shares of stock equivalent to $40,000.

This is a fair analysis of the provisions of the contract and of the considerations on which it was based. Instead of it binding the company to pay four hundred shares, unless a less number was fixed by the arbitrators, it left them to say whether Humaston was entitled to any more than he had already got, and if so, how much. There was no concession by the company that the inventions were worth any more to it than the hundred shares. It might turn out on the trial that the price already paid was excessive, or, on the contrary, that it was not sufficiently remunerative. This point of value the triers were to determine, and if determined favorably to the plaintiff he would have a cause of action against the defendant. Until this determination, if there had been no interruption to the arbitration, no cause of action could arise. It was a reasonable provision that the value of these inventions should be submitted to the arbitration of practical business men, and if Humaston, instead of the company, had refused to proceed with the arbitration he could not resort to an action, for the defendant would not have been in default, and, therefore, not liable to suit.* But the defendant broke the agreement and revoked the

* Delaware and Hudson Canal Co. v. The Pennsylvania Coal Co., 50 New York, 250.

submission, and Humaston asks that in consequence of this wrongful action of the defendant his rights may be determined by the court and jury, instead of by arbitration.

It becomes, therefore, important to determine what is the measure of liability for the breach of contract by the defendant. If we are correct in our interpretation of the contract, this action cannot be supported as an action seeking damages for breach of contract to deliver stock, for there was no engagement to deliver any, except on a condition which has not happened, and there is no proof that the arbitrators would have found that Humaston was entitled to receive more stock than he had already obtained.

The action can be supported for the value of the property, and this was the proper subject of inquiry at the trial. The company covenanted to pay this value, to be ascertained in a particular mode, and as they have prevented this mode being adopted, they cannot take advantage of their own wrong and deprive the plaintiff of the opportunity of showing to the court and jury what it is. In lieu of the award of the arbitrators the verdict of the jury can be asked by the plaintiff to determine it. The ascertainment of this value was the essence of the contract, the thing on which the submission was based, and the revocation of the submission leaves the jury to settle it. Benjamin, in his Treatise on Sales,* says, if the performance of the condition for a valuation be rendered impossible by the act of the vendee the price of the thing sold must be fixed by the jury on a *quantum valebat*, as in *Clarke* v. *Westrope*,† where the outgoing tenant sold the straw on a farm to the incomer, at a valuation to be made by two indifferent persons, but, pending the valuation, the buyer consumed the straw. And the doctrine of the text is sustained by adjudged cases in this country and England.‡

* First edition, page 430. † 18 Common Bench, 765.

‡ Inchbald *v.* The Western, &c., Plantation Co. (head note), 112 English Common Law (17 Common Bench, New Series), 733; Hall *v.* Conder, 89 Id. (2 Common Bench, New Series), 53; United States *v.* Wilkins, 6 Wheaton, 135, 143; Kenniston *v.* Ham, 9 Foster (N. H.), 506; Holliday *v.* Marshall, 7 Johnson, 213; Cowper *v.* Andrews, Hobart, 40–43.

Opinion of the court.

Nothing is, therefore, due on this contract, unless the court and jury, sitting in the place of the arbitrators, shall decide that the plaintiff is entitled to recover for the sale of his inventions more than he has already received. The case was tried on this theory, and the court charged the jury that the value of a specified amount of stock was not the legal measure of the plaintiff's damages, but that he was entitled to recover the excess (if any there was) which the value of what he sold and transferred to the company, enhanced by the agreement of the plaintiff and Lefferts not to enter into competition with the company, as stipulated in the contract, had, when sold and delivered, over the amount which he had already received; and this the parties agreed was one hundred shares of the defendant's stock, of the aggregate value of $10,000, with interest on such excess from the date of the revocation of the powers of the arbiters. This charge is in conformity with the views we have expressed of the obligations of this contract, and of the rule of damages applicable to the breach of it.

It is urged, however, that the court erred in excluding testimony of the value of the defendant's stock both when they sold out to the Western Union Company, and when the revocation occurred.

It is not perceived how the sale to the Western Union Company changed the rights of the parties, for there is nothing to show that it hindered the defendants from acquiring in the market at any time a sufficient number of shares of its stock to comply with the award which it was expected the arbitrators would be suffered to make long after this sale took place.

If there had been an agreement to deliver a certain quantity of stock, and an action had been brought for the conversion of it, on the ground that the defendant by the sale to another company had put it out of its power to comply with the terms of its agreement, evidence of the value of the stock at the time the sale occurred would be competent. And so would evidence of its value at the date of the revo-

cation, if the plaintiff was in a position to support an action for damages for breach of contract to deliver stock. But as he is limited in his recovery to the value of his inventions when sold and delivered, evidence of the value of shares of stock at all is only proper as tending to show the estimate put upon the property by the parties at the time they made their bargain. And as the value of the stock in 1861, when the contract was concluded, was directly shown, its value at any other time became unimportant. The Circuit Court proceeded on the theory, and we think correctly, that the defendant intended to give for and considered the plaintiff's property worth (if it performed certain conditions) the cash equivalent of five hundred shares of stock. This was $50,000, which the plaintiff must also have adopted as his estimate of the value of the property when he sold it, as he offered evidence tending to show that it was worth that sum, and claimed that the evidence proved the fact. The conflict of testimony on the worth of the Humaston inventions was very great, for the defendant also introduced evidence tending to prove, and claimed it was proved, that these inventions were of no value, or if any, no more than the amount already paid for them.

In this condition of the evidence it was a difficult matter for the jury to settle the issue submitted to them, but as they were able to do it with the aid of the court and eminent counsel, after a lengthy trial, by finding a considerable verdict for the plaintiff, it would seem that he ought to be satisfied with it.

At any rate there is no error in the record, and the judgment must be

AFFIRMED.

Statement of the case.

KEHR *v.* SMITH.

A deed by which a husband, on articles of separation between him and his wife, binds himself to pay, in trust for her, a certain amount of money (capital), and interest on it till paid, becomes a voluntary settlement if, before payment is made, the parties are reconciled, make null all the covenants of the articles of separation, and cohabit again, with an agreement that the settlement shall stand as agreed on, except that the husband shall not pay interest while he and his wife live together.

A voluntary settlement of $7000 cannot be sustained against creditors where the person owes $9306, and has, of all sorts of property, the same being not cash, not more than $16,132.

APPEAL from the Circuit Court for the Eastern District of Missouri.

Smith, assignee of Martin Meyer, a bankrupt, brought a bill in equity in the District Court for the Eastern District of Missouri, to set aside as fraudulent a deed of trust given by the bankrupt in August, 1867, to one Kehr, on a house and lot where he lived, and owned by him, to secure two promissory notes, of even date with the deed, for $2500 each, payable respectively in one and two years from date, with interest, which the bankrupt executed to a certain Schaeffer, as trustee of Clara Meyer, his wife.

The case was thus: In August, 1867, Meyer, a trader in St. Louis, and his wife agreed to separate, and entered into an agreement for this purpose. They were to live separate from each other without molestation, and the rights given to one in the articles of separation were secured to the other. In order that the wife might have sufficient means for her support the husband covenanted with a person named that he would pay to him, as trustee for the wife, the sum of $7000 on the execution of the instrument. In consideration of these and other agreements the trustee and the wife covenanted with the husband to accept the stipulated sum in full satisfaction of any claim for maintenance or support, and also for any claim for alimony or dower in case of the husband's death. The trustee also covenanted to save the husband harmless from any debts the wife might contract

on his account. No fault was imputed by one to the other, but each was left at liberty, if so disposed, to prosecute an action for divorce. Two thousand dollars of the seven was paid in money to the trustee, and the balance was secured to be paid by the deed of trust, which was the subject-matter of this controversy.

At the time of this settlement by Meyer his pecuniary condition, as assumed by the District Court, a report of whose opinion in full is given in the reports for the Eighth Circuit,* was thus:

He owed, ...		$9,306
He had property as follows:		
The property charged in favor of his wife, about the value of which witnesses differed, one valuing it at $10,500, a sum which, free from all incumbrances, it brought at public sale, ...	$10,500	
Other real property, at most, ...	632	
Personalty, ...	5,000	
	$16,132	
Deduct amount settled on his wife, . .	7,000	
Leaving to pay all his debts, ...		$9,132

The Circuit Court estimated the real estate charged at about $2000 more than did the District Court; noting, however, that being the party's homestead, the homestead right (in Missouri $1000) was chargeable on it. The result was, of course, not much different.

After the execution of the deed of separation the parties separated, but within two and a half months became reconciled, and, with the trustee, entered into articles of reconciliation, rescinding the whole of the previous agreement, except in the matter of the separate estate created by it; agreed to forget past differences, and to live together as husband and wife; it being further agreed that the husband was not to pay any interest on the notes during their reconciliation. The covenants in the first articles, except in the particular named, were declared to be void, and each party

* 2 Dillon, 51.

released the other from any breach of them. A "complete condonation" was also declared by the new arrangement.

The husband and wife lived together for some four years, when the husband left the country, and soon after this he was declared a bankrupt. After the filing of the bill in this case, the property on which the notes to Mrs. Meyer were secured was, with the assent of the parties litigant, sold by the order of the court, and the right reserved to the parties to proceed against the fund. The question for decision was whether Mrs. Meyer should have these notes paid to her out of the proceeds of this property to the exclusion of the creditors of her husband.

There was some effort to prove that Mrs. Meyer had received from a first husband's estate a considerable amount of money, which Meyer, who was her second, had received and used for his own purposes; and that this use of it by him was the equitable basis of the settlement of $7000. The deed of settlement, however, did not allude to this as a consideration, nor allude to it otherwise, and there was no sufficient proof of the fact that when she married Meyer she had any property, or that afterwards she ever got any from any source independently of Meyer himself.

The District Court decreed in favor of the assignee, and the Circuit Court having affirmed that decree, the wife and her trustee took this appeal.

Messrs. N. Meyer, M. Blair, and F. A. Dick, for the appellant; Mr. S. Knox, contra.

Mr. Justice DAVIS delivered the opinion of the court.

It is unnecessary to discuss the question whether the settlement made, in view of actual separation, could be upheld or not in the condition of the husband's affairs, because this case must turn on what occurred afterwards. All the elements of value which entered into the composition of the first agreement ceased to exist when the parties became reconciled. The marital relations were resumed on the basis of mutual forgiveness for past misconduct, and the

wife became entitled to support from her husband and to dower in his estate. These rights of the wife had been relinquished in the first contract, and this relinquishment was the only consideration to support it. The withdrawal of the consideration left the notes without any element of value in them, and the execution of the new contract, followed by cohabitation, placed the parties exactly where they would have been if there had been no separation. The notes thus became a voluntary gift, and it can make no difference in their character that they are reserved as a separate estate to the wife. It is not a question in the case whether, as between the parties, they could not be enforced. The question is whether a husband, at the time largely indebted, can make a voluntary donation or even voluntary conveyance to his wife to the prejudice of his creditors. An attempt is made to show that Meyer received from his wife a considerable amount of money obtained by her from her first husband's estate, and that this formed part of the consideration of the settlement when they separated; but there is no evidence of any value to prove such a state of things. Besides, the articles of separation decide this point against the wife, as no notice is taken of it, and it is hardly possible, if the fact were as claimed, that on such an occasion it would not have been mentioned.

In this controversy, therefore, with creditors, the gift must be treated as purely voluntary; a gift being nothing more than the transfer of property without consideration.

We could not profitably add anything to what has been so well said by the district judge in his opinion in this case on the subject of the indebtedness and property of Meyer at the time of the settlement upon his wife. On a careful consideration of the whole evidence we are satisfied that the value of the property was not materially different from the estimate he put upon it. If he erred at all in this estimate it was within a very narrow limit. The homestead on which the notes were secured was the only piece of real estate of any consequence owned by Meyer, and witnesses differed as to its value, but the opinion of one was sustained by what

it brought at the sale, which was the criterion of value adopted by the District Court. In this he may have been mistaken, but if so, the mistake was within the limits of $2000, which the Circuit Court thought was about the worth of the property. Outside of the homestead the assets of Meyer were uncertain, but they did not exceed, if they equalled, the estimate of the District Court. The conclusion reached by that court, after going into particulars, was that the estate of Meyer could not have exceeded the sum of $16,132. Deducting from this the sum of $7000 paid, and agreed to be paid, to the wife, would leave $9132 to meet debts confessedly due, amounting to $9306.

Surely the voluntary provision for the wife, in such a condition of things, is not sustainable against existing creditors. Nor can it be supported on the theory that the whole estate was worth a few thousand dollars more. Suppose it was, there would still be that extent of embarrassment, which would have a direct tendency to impair the rights of creditors. In such a case a presumption of constructive fraud is created, no matter what the motive which prompted the settlement. Meyer was not only largely indebted for a person in his situation, but it is easy to see it would have been close work for his creditors to have made their debts, if they had tried to enforce their collection by judicial process, a surer way of ascertaining the real worth of the property than by the opinions of indifferent persons, as experience has proved that this kind of testimony is often unreliable on such a subject. The ancient rule, that a voluntary post-nuptial settlement can be avoided, if there was some indebtedness existing, has been relaxed, and the rule generally adopted in this country at the present time, will uphold it, if it be reasonable, not disproportionate to the husband's means, taking into view his debts and situation, and clear of any intent, actual or constructive, to defraud creditors.*

Testing this settlement by this rule, it must be taken to

* See the note to Sexton *v.* Wheaton, 1 American Leading Cases, 5th edition, page 37, where the law on this subject is fully considered.

be in bad faith towards existing creditors, as, clearly, it was out of all proportion to the means of the husband, considering his state and condition, and seriously impairs his ability to respond to the demands of his creditors.

It is well settled, where a deed is set aside as void as to existing creditors, that all the creditors, prior and subsequent, share in the fund *pro rata.**

We have considered the contract in this case as if it were executed, because no point is made by the respondents that it is executory, and the case has been argued by both sides on the theory that the law applicable to an executed contract of this sort applied to the one in controversy. It may well be doubted whether in any case a mere promise by the husband, without consideration, to pay money to the wife at a future time, can be enforced against the claims of creditors.

DECREE AFFIRMED.

PACIFIC RAILROAD COMPANY *v.* MAGUIRE.

1. The twelfth section of the act of the Missouri legislature, passed December 25th, 1852, by which it was declared that—

> "The Pacific Railroad shall be exempt from taxation until the same shall be completed, opened, and in operation, and shall declare a dividend, when the road-bed, buildings, machinery, engines, cars, and other property of such completed road, shall be subject to taxation at the actual cash value thereof:
>
> "*Provided*, That if said company shall fail, for the period of two years after said roads respectively shall be completed and put in operation, to declare a dividend, that then said company shall no longer be exempt from the payment of said tax—"

created a contract that, subject to the proviso, the railroad should not be taxed.

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* Magawley's Trust, 5 De Gex & Smales, 1; Richardson *v.* Smallwood, Jacob, 552–558; Savage *v.* Murphy, 34 New York, 508; Iley *v.* Niswanger, Harper's Equity, 295; Robinson *v.* Stewart, 10 New York (6 Selden), 189; Thompson *v.* Dougherty, 12 Sergeant & Rawle, 448, 455, 458; Hoke *v.* Henderson, 3 Devereux, 12–14; Kissam *v.* Edmundson, 1 Iredell's Equity, 180; Sexton *v.* Wheaton, 1 American Leading Cases, 45; Norton *v.* Norton, 5 Cushing, 529; O'Daniel *v.* Crawford, 4 Devereux, 197–204; Reade *v.* Livingston, 3 Johnson's Chancery, 481–499; Townshend *v.* Windham, 2 Vesey, 10; Jenkyn *v.* Vaughan, 3 Drewry, 419–424.

2. The ordinance adopted as part of the State constitution, by the people of Missouri, July 4th, 1865, levying a tax on the gross receipts of the company, within two years after it was completed and put in operation, in order to pay debts of the State, contracted in order to help to build the road (and which the railroad company was, as between itself and the State, primarily bound to pay) impaired the obligation of the contract, and was void.

ERROR to the Supreme Court of Missouri, the question involved having been the right of a tax-collector of the State of Missouri to levy a tax authorized by an ordinance of the State named, on the property of the Pacific Railroad Company, a corporation incorporated by the said State. The case was thus:

By an act of March 12th, 1849, the railroad company was incorporated, as already mentioned, with a capital of $10,000,000, for the purpose of building a railroad across the State, from the city of St. Louis, on the eastern line of the State, to a point indicated in the western line. Authority was given to the counties through which it should pass to subscribe for the stock, and it was invested also with the powers usually conferred upon such companies.

By an act passed February 22d, 1851, it was enacted that when a certain sum had been collected of the capital stock and expended in the survey and construction of the road, the bonds of the State to the same amount should be lent to the road, and further loans were authorized, not to exceed $2,000,000. The loan was made a lien on the road, and the company was required to pay the principal and interest of the bonds.

By an act of December 25th, 1852, certain public lands were vested in the company, and the company were authorized to build a southwestern *branch* road to the western boundary of the State. Provision was made for the issue of an additional $1,000,000 of the bonds of the State, to be used in aid of the work proposed, with precaution that subscriptions should have been made and should previously have been applied by the company to amounts stated, and that the bonds should not be sold at less than their par value,

and that the road should be completed and put in operation within five years after the passage of the act. The companies were to pay the principal and interest of these bonds also, and the State had its lien.

The twelfth section contained the following provision:

"The said Pacific Railroad and the said Southwestern Branch Railroad shall be exempt from taxation respectively until the same shall be completed, opened, and in operation, and shall declare a dividend, when the road-bed, buildings, machinery, engines, cars, and other property of such completed road, at the cash value thereof, shall be subject to taxation at the rate assessed by the State on other real and personal property of like value. . . . *Provided*, that if said company shall fail, for the period of two years after said roads respectively shall be completed and put in operation, to declare a dividend, then the said company shall no longer be exempt from the payment of said tax, nor from the forfeitures and penalties in this section imposed."

This act and its grants were duly accepted by the company, in a mode which the act prescribed, in case the company desired to accept it.

This constituted one ground relied on, in connection with certain other matters, by the company. Now, as to another ground relied on by them, in connection with the same certain other matters, as ground independent of that already stated.

With the outbreak of the rebellion, in 1861, both the railroad company and the State made default in the payment of the interest on the State bonds, and on the 10th of February, 1864, the westernmost sixty-five miles of the road being yet unfinished, the legislature passed an act authorizing the company to issue its bonds for $1,500,000 and to mortgage that unfinished part; the State agreeing to relinquish for this object and to this extent her first lien, and retaining only a second one.

The bonds when issued were to be delivered to a fund commissioner, created by the act, and to be sold by him,

and the money arising from such sale was to be applied by him to the construction and equipment of the road. The act also required all the gross earnings of the road to be paid to said fund commissioner, and that he should, after paying the running expenses of the road and his salary, apply the residue, first to the extension and equipment of the road until it was completed, after reserving sufficient for the payment of the interest accruing semi-annually on the bonds sold; secondly, to the purchase or payment of the bonds; third, to the payment of the interest on certain other bonds authorized by the act, which were never issued; fourth, to the payment of dividends on certain preferred stock, also authorized by the act, which was never issued; the surplus, if any, to the purchase of State bonds with the interest coupons.

This act was duly accepted by the company. The fund commissioner was appointed, the mortgage executed, the bonds issued by the company and sold by the fund commissioner, and the money arising from such sales and from the earnings of the road was applied by him in the manner provided in the act.

The fund commissioner continued in the discharge of the duties imposed by the act until October, 1868, when his office was abolished, the bonds being at that time still unpaid.

On the 4th day of July, 1865, the present constitution of Missouri, together with an ordinance known as the Railroad Ordinance as a part thereof, went into effect. The provisions of the ordinance are as follows:

* "SECTION 1. There shall be levied and collected from the *Pacific Railroad* Company, the North Missouri Railroad Company, and the St. Louis and Iron Mountain Railroad Company, an annual *tax* of ten per centum of all their gross receipts for the transportation of freight and 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 centum thereafter; which *tax* shall be assessed and collected in

the county of St. Louis, in the same manner as *other State taxes* are assessed and collected, *and 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.*

"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, but nothing shall be received by the State in discharge of any amounts due upon said bonds except cash or other bonds or obligations of this State.

"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."

At the time of the passage of this ordinance the road was under construction, and it was not completed and put in operation until the 1st of April, 1866. It was then completed and put in operation.

In pursuance of the ordinance above quoted, one Maguire, a collector of taxes for the State of Missouri, assessed a tax against the company for the year beginning October 1st, 1866, at 10 per cent. on $2,536,440, that being the gross earnings of the road for that year.

The tax was assessed in the same manner as other State taxes were assessed in said county, 10 per cent. as a tax under the ordinance just above recited, amounting to the sum of $253,644. *No dividend had been declared or paid when the levy in question was made, and two years had not elapsed from the completion of the road.*

The company refused to pay the tax and Maguire seized its property. The company sued him for a trespass. He justified under the ordinance.

Positions of the company.—Positions of the collector.

A case setting forth the facts above given was agreed on and stated, for the judgment of the court, and on it the company contended that the ordinance was unconstitutional so far as it affected them, because it was a law passed by the State "impairing the obligation of contracts," and because it deprived the company of its property without due process of law.

It was agreed that if the court adjudged the ordinance invalid it should give judgment in favor of the company for six cents damages and costs, and if valid give judgment against it for costs only. The Supreme Court of Missouri adjudged the ordinance valid, and the company brought the case here.

Messrs. W. M. Evarts, J. Baker, and J. B. Henderson, for the company, plaintiff in error, placed the case on the following among other grounds:

1. That by the twelfth section of the act of December 25th, 1852, the company was exempted from the payment of the tax in question.

2. That by the act of February 10th, 1864, the entire earnings of the road were appropriated to other purposes, wholly inconsistent with the payment of the tax in question, and that they were actually paid to the agent of the State as therein required, and by him paid out under the authority of the said act.

Messrs. Montgomery Blair and F. A. Dick, with whom was Mr. A. H. Buckner, contra, contended:

1. That the twelfth section of the act of 25th December, 1852, referred to tax for general purposes, and applied only to tax on the corporate property, road-bed, machinery, buildings, &c.; and that the act would not prevent a tax on the franchise or on the earnings of the company.

2. That the ordinance did not impose a tax, since it merely applied the income of the company to the payment of debts which were alike debts of the State and of the company.

Mr. Justice HUNT delivered the opinion of the court.

The first question is this: By the acts organizing this company, and by the acts loaning the credit of the State and the proceedings under the same, was an agreement created on the part of the State that the Pacific road should not be taxed until it was built and finished and had declared a dividend, and that for two years after it was finished it should be liable to taxation only in common with other property of the State and at the same rate?

The right of taxation is a sovereign right, and presumptively belongs to the State in regard to every species of property and to an unlimited extent. The right may be waived in particular instances, but this can only be done by a clear expression of the legislative will. The cases of *Tomlinson* v. *Branch*,* and *Tomlinson* v. *Jessup*,† in this court, and many others referred to in those cases, show that when a contract of exemption from taxation is thus established it is binding upon the State, and the action of the State in the passage of laws violating its terms will not be sustained.‡ The principles of law are sufficiently settled. The real question arises upon their application to the facts of the case.

Upon the facts presented by the agreed case before us we are of the opinion—

1st. That the twelfth section of the act of 1852 created a contract between the State and the railroad company, by which the railroad was exempt from taxation until it was completed and put in operation, and until it should declare a dividend on its capital stock, not, however, extending longer than two years after its completion.

2d. That the ordinance of 1865, imposing a tax of ten per cent. upon its gross earnings before the road was completed and in operation, and had declared a dividend, was a violation of this contract, and that the levy for its enforcement was illegal.

We omit a reference to other questions which have been

* 15 Wallace, 469. † Ib. 454.

‡ Osborne *v.* Mobile, 16 Id. 481; Humphrey *v.* Pegues, Ib. 247, where the cases are collected.

argued and express no opinion upon them. We base our opinion upon the effect of the statutes already cited.

The authorities which have been referred to show that a State legislature may make a contract to exempt a corporation from taxation by which it will be bound.

That the facts recited constitute such an agreement we think sufficiently plain. The Pacific corporation was unable to raise funds for completing its road. To induce it to go on with its work and to induce individuals and counties to subscribe for what the legislature evidently deemed an enterprise of public benefit, it made loans of the credit of the State from time to time. To make the franchise still more valuable to the company, and to the end that individuals and counties should be induced to subscribe to the stock, the legislature added an exemption from taxation until the road should be completed and in operation, and should have declared a dividend. That the money value of this exemption was great is evident from the fact that the tax imposed for a single year, commencing October 1st, 1866, amounted to $253,644.

This transaction amounted to a contract between the State and the corporation that there should be no taxation of the company until the occurrence of the stipulated events.* In delivering the opinion in *The Wilmington Railroad* v. *Reid*,† Mr. Justice Davis says: "It has been so often decided by this court that a charter of incorporation granted by a State creates a contract between the State and the corporators, which the State cannot violate, that it would be a work of supererogation to repeat the reasons on which the argument is founded. . . . If the contract is plain and unambiguous, and the meaning of the parties to it can be clearly ascertained, it is the duty of the court to give effect to it the same as if it were a contract between private persons, without regard to its supposed injurious effects upon the public interests."

* Humphrey *v.* Pegues, 16 Wallace, 244; Wilmington Railroad *v.* Reid, 13 Id. 264.

† 13 Wallace, 266.

The statute of 1852 provided for an exemption from taxation of the "Pacific Railroad," its bed, and of its "buildings, machinery, engines, cars, and other property." The tax imposed by the ordinance of 1865 was an "annual tax of ten per centum of all their gross receipts for the transportation of freight and passengers." It was directed "to be levied and collected from the Pacific Railroad." In *The Wilmington Railroad* v. *Reid*,* it was held that a statute exempting all the property of a railroad company from taxation exempts not only the rolling stock and real estate owned by it and required by the company for the successful prosecution of its business, but its franchise also. In the case before us the road-bed, buildings, machinery, cars, and other property not only, but the "Pacific Railroad" is declared to be exempt from taxation. We cannot doubt that a contract not to tax a railroad company or its property is broken by the levy of a tax upon its gross receipts for the transportation of freight and passengers.

A suggestion is made that the imposition in question is not a tax, for the reason that the ordinance imposing it provides that the same shall be appropriated by the General Assembly in payment of the principal and interest due and to become due upon the bonds issued to the company by the State. The purpose to which the State shall apply the proceeds of a tax is not material so long as it is a public purpose, and that the payment of the debts of a State is a public purpose does not admit of doubt. It is called a tax both in the agreed statement of facts before us and in the ordinance imposing it. Thus, "there shall be levied and collected an annual tax of ten per centum of all their gross receipts," &c., "which tax shall be assessed and collected in the county of St. Louis in the same manner as other State taxes are assessed and collected." "The tax in this ordinance specified shall be collected from each company," &c. . . . "Should either of said companies refuse or neglect to pay said tax as herein required," &c. A tax upon receipts

* 13 Wallace, 264.

is one of the recognized modes of taxing corporations, as well under State laws as under the laws of the General Government.

The ordinance of 1852 was either the imposition of a tax or it was an act of high-handed violence, a forcible seizure of private property, without law or authority, an act which, if committed by an individual, would amount to robbery. The case before us will justify no such imputation upon the State of Missouri.

The result of these views is the REVERSAL OF THE JUDGMENT below, and in accordance with the stipulation in the record, judgment is ordered in favor of the plaintiff in error for six cents damages and for costs, and the case is remanded, with directions that a judgment be entered accordingly.

The CHIEF JUSTICE: I concur in the judgment of the court which has just been announced, but not for the reasons assigned. If the assessment complained of is a tax, then I agree with the majority of the court in the opinion that it is a violation of the twelfth section of the act of December 25th, 1852, and void. I think, however, it is not a tax, but an exaction of the payment of the debt due from the railroad company to the State, and as such inconsistent with the provisions of the act of February 10th, 1864, which, upon its acceptance by the company, became a contract between the parties and binding upon each.

Justices CLIFFORD and MILLER dissented from the opinion of the court, because the act of the legislature referred to did not, in their judgment, exempt the company from the tax imposed by the ordinance.

Mr. Justice STRONG did not sit in the case.

NORTH MISSOURI RAILROAD COMPANY *v.* MAGUIRE.

1. A contract by a State to give up its power to tax any property within it, can be made only by words which show clearly and unequivocally an intention to make such a contract.
2. The act of the legislature of Missouri of February 16th, 1865, to provide for the completion of the North Missouri Railroad, does not so show an intention of the State to give up its power to tax the property of the corporation owning that railroad.
3. The ordinance of the 8th of April, 1865, adopted by the people of Missouri, as part of the constitution of the State established on that day, was, as respected the North Missouri Railroad Company, a true exercise of the taxing power of the State, and not a mere change of the order of disbursing the receipts of the earnings of the company as prescribed by the act of legislature above named.

ERROR to the Supreme Court of Missouri, the case being thus:

The North Missouri Railroad Company was incorporated by act of the legislature of Missouri, March 3d, 1851. By an act of January 7th, 1853, its charter was thus amended:

"The capital stock, together with all machines, wagons, cars, engines, or carriages belonging to the company, together with all their works or other property, and all profits which shall arise from the same, shall be vested in the respective *shareholders* of the company forever, in proportion to their respective shares, and the same shall be deemed personal estate, and shall be exempt from any public charge or tax whatsoever for the period of five years from and after the passage of this act."

Under the provisions of several acts of the State legislature between the date of its incorporation and the year 1857, the State issued its own bonds for the benefit of the road, reserving a mortgage on the road to secure their payment. As between the State and the company the latter was bound to pay the bonds and interest on them, and it was provided that, in case the company made default, the governor should foreclose the mortgage.

About the year 1860 the company did make default in the payment of the interest on the bonds, and had paid no part

of either interest or the principal since. No sale, however, was made of the road, and on the 29th of March, 1863, the legislature passed an act forbidding the governor to make a sale until he should be required by it to do so.

By an act of February 16th, 1865, meant to provide for the completion of the road, the company was authorized to issue $6,000,000 of *its* mortgage bonds, which should have priority over the mortgage of this State; and this to the extent named, and no farther, was by the act made a *second* lien. The act provided for the appointment of a fund commissioner for the railroad company. It then proceeded:

"Section 5. And the said railroad company shall pay over to the said fund commissioner all the *gross earnings and daily receipts* of said corporation, which shall be kept in deposit in the bank, subject to the daily draft of said fund commissioner, as the same may be required by said corporation for actual disbursement in operating said railroad, and in *carrying on the ordinary business of said corporation*, and for the other purposes hereinafter provided; and upon the failure of said company to pay said money to said fund commissioner, as herein provided, the said company shall forfeit and pay to the State of Missouri, for each and every such neglect or refusal, the sum of $10,000.

"Section 6. The said commissioner shall pay over to the said corporation, from time to time, out of the funds coming into his hands as aforesaid, the amounts required for purposes of construction and equipment of said railroad, upon vouchers of the chief engineer, and upon the vouchers of the treasurer thereof, he shall pay the amounts required for operating said railroad and carrying on the ordinary business of said corporation; and he shall pay and disburse the funds in the following order of priority, to wit:

"*First.* To the said corporation the amounts required, from day to day, for the actual current expenditures in operating said railroad and carrying on the ordinary business of said corporation, including all sums that may be necessary for keeping said railroad in a good state of repair, and all sums that may be necessary, from time to time, for such additions to the rolling stock, buildings, and appurtenances of said road, as may be required to enable said corporation to accommodate and transact the business of their said railroad; and,

"*Second*, the amount of his salary as fund commissioner, in monthly instalments; and,

"*Third*, the interest upon said mortgage bonds, as the same shall fall due; and,

"*Fourth*, the cost of construction and equipment of said railroad as aforesaid; and,

"*Fifth*, the accruing dividends on preferred stock, not exceeding six per cent. per annum thereon, in accordance with the provisions of this act in relation thereto; and,

"*Sixth*, the interest due on the outstanding bonds of the State of Missouri heretofore loaned to said corporation; and,

"*Lastly*, the surplus remaining shall be applied to the payment of the principal of said first mortgage bonds until the same shall be fully paid off, or, if more of said bonds shall have become due, then to the payment of the principal of the said bonds of the State of Missouri if any still outstanding; and the balance shall be paid to the North Missouri Railroad Company, and the said office of fund commissioner shall then cease and be vacated.

"SECTION 9. The holders of the bonds of the State of Missouri, heretofore issued to the North Missouri Railroad Company, are hereby authorized to convert the same, with interest accrued thereon, into preferred stock of the North Missouri Railroad Company, and the holders thereof shall be entitled to receive a special dividend thereon, not exceeding the rate of six per cent. per annum, *in the manner and in the order of priority above herein provided.*"

The thirteenth section provided for an acceptance of this act by the stockholders, and enacted that in the event of its being so accepted,

"*It shall be and become of full force and binding effect upon the said corporation and the State of Missouri.*"

The act was accepted in due form by the stockholders.

On the 8th of April, 1865, a convention of the people of Missouri adopted "An ordinance for the payment of State and railroad indebtedness." This ordinance levied on the railroad company an annual tax of ten per centum of all its gross receipts for the transportation of freight and passengers, and directed that it should 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 company.

The provisions of the ordinance will be seen more fully on pages 39–40, *supra*, beginning near the bottom of the former page, at the place marked with a *.

Under this ordinance, the assessor of St. Louis County assessed $68,257 (being ten per cent.) upon the gross receipts of the company from October 1st, 1866, to October 1st, 1867, and delivered the same to one Maguire, collector of taxes, who, on the company's refusal to pay the bill, levied upon its engines, cars, &c. The company thereupon sued him in trespass in one of the State courts, where a case was stated for the judgment of the court, and by which it was agreed that if the court should be of opinion that the ordinance referred to was unconstitutional, there should be judgment for the company for costs and nominal damages; and if of the opinion that it was constitutional, judgment for Maguire for costs.

The Supreme Court of Missouri, where the case finally got—referring among other clauses of the act of 1865, to that which provided for the payment in the first place of the "amounts required from day to day, for the actual current expenditures for carrying on the ordinary business of the corporation"—within which it considered the payment of taxes to fall—rendered judgment for Maguire, and the company brought the case here.

One Jessup, who claimed the whole road under a sale, also stood in some way on the record as a plaintiff in error.

Mr. J. C. Orrick, for the plaintiff in error:

I. *The act of February 16th, 1865, is a contract between the company and the State.*

The act itself declares that if accepted by the stockholders it shall become of full force and binding effect upon the said corporation and the State of Missouri. The act was accepted by the stockholders.

In addition, its provisions contain all the elements of a contract. The railroad company was a corporation, vested with certain franchises under a charter from the State, and the act of 1865 gives certain other franchises, and imposes certain restrictions, which required the assent of the corporation to make them valid, and the contract was: That the State would release its lien to a certain extent; authorize the company to issue $6,000,000 of first mortgage bonds, and grant other privileges to the company, in consideration that the State, through an officer of its own, should be permitted to take charge of all the funds and earnings of the company, coming from whatever source, and disburse them in a particular way, and for certain objects specified in the act, amongst which was the payment of these very bonds for which the State was liable, and the accrued interest thereon which the State had paid, and which had thus become a debt due by the company to the State.

An important provision of the contract was that the interest on the $6,000,000 of bonds and the dividends on the preferred stock should be paid before the interest or principal of the State bonds. The ordinance is a violation of this contract.

The ordinance, disregarding the obligation of the State to pay, through its fund commissioner, out of the "*gross earnings and daily receipts of the corporation*" what might be necessary to keep the road in a good state of repair, and what might be necessary for such additions to the rolling stock, buildings, and appurtenances of the road, as may be required to enable the corporation to accommodate and transact the business of the road, the amount of salary to the fund commissioner, the interest on the first mortgage bonds as the same fell due, the cost of construction and equipment, the dividends on preferred stock, the principal of the first mortgage bonds, to all of which the gross earnings were pledged before the principal of the State bonds could be paid; provides for the levy of an assessment of ten per cent. of all *gross receipts* for transportation of freight and passengers for two years, and fifteen per cent. thereafter

for *the payment of the principal and interest of these bonds until they shall be fully paid.*

Thus it will be seen that the contract is impaired in an important particular.

II. *The questions then left for consideration are:*

First. Whether the assessment of ten per cent. on the gross earnings of the road, provided for by the ordinance of the convention, is a tax?

Second. Whether, if it be considered a tax, there is anything in the act of 1865 manifesting an intention on the part of the State to abandon the right of taxation?

As to the first point it appears by the provisions of the ordinance that there was an existing debt due by the company to the State for interest paid, and that there were bonds of the State outstanding for the payment of which the company might become liable to the State. The ten per cent. is to be applied to the payment of this interest and these bonds, and to this purpose only. The amount collected is to be appropriated by the General Assembly, not to the general purposes of the State, but to the payment of a debt already accrued,—the principal and interest of these bonds. And when the bonds and interest shall have been fully paid the assessment and collection of the money is to cease. And if the company should fail to pay the ten per cent., the road and other property and the franchises of the company are to be sold, and the proceeds of the sale are to be applied to the payment of the bonds and the debt, notwithstanding the fact that the State has agreed that they should be paid in another way. In other words, the State says to the railroad company, "You owe a debt, and are likely to owe us more on bonds for which we are liable and which we may have to pay. You must discharge that debt and liability by turning over ten per cent. of your gross receipts until we are satisfied that the debt is paid, and if you do not we will sell your franchise and all your property." What is this but resuming the position of first mortgagee? The ordinance goes farther. It not only makes the State a first

mortgagee, in violation of the provisions of the act of 1865, but it changes the mode and time of payment. Can this be considered a tax? Has it any of the elements of a tax?

Taxes are burdens imposed upon persons or property to raise money for *public purposes*. The money here raised is to be applied to the payment of a particular debt. The road had already been placed, by the act of 1865, in the hands of a receiver or fund commissioner, and the company was required to pay all the gross earnings and daily receipts into his hands under penalty of $10,000 for each instance of neglect to do so.

Calling a thing a tax does not make it a tax; and, as is observed by Cooley in his excellent work on Constitutional Limitations,* "It may happen that an oppressive burden imposed by the government when it comes to be carefully scrutinized, will prove, instead of a tax, to be an unlawful confiscation of property unwarranted by any principle of constitutional government."

As to the second point. The act of 1865 made a complete disposition of all the funds of the company, from whatever source coming. The company as a corporation owned nothing but its road and the property and appliances with which to work it, and everything derived from this source was by the act appropriated. Moreover *who* was to pay the taxes? Not the company; for, under heavy penalty, it was to pay all to the fund commissioner. Not the fund commissioner; for he is directed specifically to pay out all the money in a particular way. How the payment of taxes is any part of the *ordinary business* of the company as the Supreme Court of Missouri argues, it is difficult to understand; but if so, this could not be done by the corporation. The fund commissioner, who was an officer of the State, has control of the funds, and if authority was given to any one to pay the taxes as a part of the expenses of running the road, it was given to him and not to the company.

Indeed, since the passage of the amended charter of January 7th, 1853, the company as a corporation has not been

* Page 486.

taxed either upon its capital stock or any of its property. By the sixth section of that charter, "the capital stock, together with all the machines, wagons, cars, engines or carriages belonging to the company, together with all their works and other property, and all profits which should arise from the same," were vested in the shareholders forever as their personal estate, and as such was exempt from any charge or tax whatsoever for the term of five years. After the expiration of that term the shares were taxable to the individual shareholders, nor was it pretended that any of the property was taxable to the company up to and at the time of the passage of the act of 1865. This was so well understood that there was no necessity of saying anything on the subject of taxation in the act of 1865. That provision of the charter was unchanged by the act of 1865; it was the mode of taxation agreed upon by the State and the corporation. It was left as it was, and to suppose that the State meant, that after the passage of the act of 1865, the corporation should be taxed upon its property or income is to suppose that it should be subjected to a double taxation, because, by the sixth section of the charter all the property and the profits which should arise from the same were vested in the stockholders as their personal property, and as such subject to taxation against them after the expiration of the five years; and if it were taxed again to the corporation it would be double taxation, a thing which the courts will never presume that the legislature intended to do. We do not pretend that there was anything that exempted the shares of stock from taxation; and as the laws of Missouri stood then, and as they stand now, and as they were at the time of the adoption of the convention ordinance, the shares of stock in this corporation were taxable. The ordinance made no change in this respect. The ten per cent. on gross receipts was in addition to the tax on shares, but we do assert that it was the manifest intention of the legislature to exempt the corporation from any tax on its property or its capital.

Messrs. Montgomery Blair and F. A. Dick, contra.

Restatement of the case in the opinion.

Mr. Justice CLIFFORD delivered the opinion of the court.

Much discussion of the evidence in the case will be unnecessary, as the principal facts are embodied in an agreed statement, which is made a part of the record.

By the agreed statement it appears that the plaintiff company is a corporation established by the laws of the State, and that the other plaintiff claims to be the legal owner of all the property lately owned by the corporation. Said company was incorporated on the third of March, 1851, with a capital stock of six millions of dollars divided into shares of one hundred dollars each.

Pecuniary aid in large amounts was furnished to the company by the State, as appears from several legislative acts. Such aid was granted by the act of the twenty-third of December, 1851, in terms as follows: that when evidence is produced satisfactory to the governor that the company has collected fifty thousand dollars on their capital stock, and that they have expended the same in the survey, location, and construction of the railroad, the governor shall cause to be issued and delivered to the company special bonds of the State to the same amount, as a loan of public credit, bearing interest and payable as therein provided. Provision is also made in the same section that upon like proof that the company have expended the whole of the sum realized from those bonds, and that they have also expended a further sum of the same amount of their own moneys, that the governor shall in like manner cause to be issued and delivered to the company further like bonds for the same amount, and so on in like manner as often as the company shall, from time to time, furnish like evidence that they have expended from their own moneys further sums, of not less than fifty thousand dollars, for the construction of the railroad, and that they have expended for the purpose the whole of the proceeds of the bonds previously issued by the State, the governor shall cause to be issued and delivered to the company further like bonds in instalments of the same amount, not exceeding in all the sum of two millions of dollars.

Bonds of the kind were forbidden to be delivered until

the acceptance thereof should be signified to the secretary of state by the filing in his office of a certificate of such acceptance under the corporate seal of the company with the signature of the president, and the provision was that the certificate of acceptance so executed and filed should be recorded in the office of the secretary of state, and that it shall become and be, according to all intents and purposes, a mortgage of said road and every part and section thereof, and its appurtenances, to the people of the 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.

Legislative aid was also furnished in like form to certain other railroad companies of the State to expedite their construction and the completion of the same, amounting in the whole to the sum of nine millions of dollars, including the amount furnished to the plaintiff company, all of which was secured as a first lien on the respective railroads in like manner.

None of the companies, however, were able to complete their railroads without further aid from the State, and on the tenth of December, 1855, the legislature, by an act entitled "An act to secure the completion of certain railroads in the State," enacted that it shall be the duty of the governor, upon the application of any of said companies, with the proof of the investment of any sum in the actual construction and equipment of the trunk line of the railroad, from sources other than the proceeds of the bonds of the State, and not secured upon the road by a lien prior to that of the State, and verified as therein required, to sign and deliver to such company an amount in the bonds of the State equal to twice the amount so proven to have been invested in the construction and equipment of the said railroad since the last application and issue of bonds to such company, and successively from time to time, upon the application for bonds and proof of such investment, the governor shall issue and deliver, in like manner, bonds to such company until the aggregate amount to the plaintiff company shall be

two millions of dollars, one million of which shall be exclusively applied to the construction of a portion of said road therein described; and it is made the duty of the governor to expend the other million of dollars for the purchase of the railroad iron necessary to lay the track of said road, from one described point to another, and to purchase the rolling stock for the same, and the provision is that the said iron and rolling stock so purchased shall belong to the State until placed upon the track for use, after which time the State shall have a first lien on said iron and rolling stock, together with all the road and its equipments, constructed and to be constructed, for the security of the payment of the principal and interest of said bonds, and all bonds issued or that may be issued to said company under this or any former act of the legislature granting the credit of the State to the company.

Power is also reserved to the State to enforce the lien on the railroad for the failure on its part to pay punctually principal and interest on the bonds issued for its benefit, as herein and heretofore provided for in such cases; and the company shall pay at the times herein specified, "to the treasurer of the State one and a quarter per cent., in addition, in each year, on each thirty-year bond, and two and a half per cent. in each year on each twenty-year bond so sold or hypothecated, to be invested at not less than seven per cent. interest, in such securities as are provided in the act."

By the same section it is also provided, that from the net profits arising from the road after the same shall be completed and in operation, a sum equal to not less than ten per cent. per annum upon the net earnings of the railroad shall be paid by the company to the treasurer of the State as a sinking fund, for the purpose of paying at maturity the bonds of the State so issued and to be issued to the company.

Special provision is also made that the treasurer of the company and the treasurer of the State shall be the commissioners of the sinking fund, and that it shall be the duty of the company to pay or remit the semi-yearly interest to the designated place, as therein provided, and in case the

Restatement of the case in the opinion.

company shall fail to pay such interest or to remit the amount to the designated place, it is made the duty of the treasurer of the State to supply the amount and remit the same, in which event he is required to refund the amount from the sinking fund and charge the same to the defaulting company. In that event the provision is that the defaulting company shall not draw any further State bonds. Moneys, funds, and securities belonging to the sinking fund are declared to be subject to the control, care, and management of the fund commissioners, and the provision is that from time to time they may invest the same in the bonds of the State under the conditions therein provided.

All funds derived from the sale of State bonds were expended, but still the railroad was not completed, and on the third of March, 1857, the legislature made a further loan of credit to the company of one and a half millions of dollars, to be issued in bonds and to be expended upon the railroad south of the junction therein described, which bonds were to be issued in instalments of two hundred thousand dollars, upon proof furnished to the governor of the expenditure for the same purpose of a sum equal to their par value in the construction of the railroad, and the company was authorized by the same act to establish and keep a ferry across the Missouri River, where its road strikes the same, for all purposes connected with the company, and for general purposes, by paying the usual license-tax provided by law in such cases.

Bonds could not be lawfully issued under that act until the company accepted the act, and it was provided that the failure to pay any part of the principal or interest of the bonds should be a forfeiture of all right in such company to demand or receive any further issue of bonds, and in that event it was made the duty of the governor to foreclose the mortgage of the State and to enforce her lien on the property of the company.

Before the year expired, to wit, on the nineteenth of November following, the legislature authorized the governor to issue to the plaintiff company a further amount of two hun-

dred and fifty thousand dollars in the bonds of the State, to complete a described portion of the road, and the same act provided that the act should not be construed to release the railroad from any penalty or forfeiture to which the company may be liable under such prior laws.

Authority was conferred upon the company by the act of the sixteenth of February, 1865, to issue their own bonds to the amount of six millions of dollars, and to secure the same by a first mortgage of their railroad and appurtenances, as more fully set forth in the act. Such bonds were to be issued in three classes and were to be applied as therein provided, and to facilitate the sale of the bonds the State relinquished her first lien and mortgage upon the main line of the railroad, retaining *only* a second lien and mortgage thereon until the principal and interest of said bonds are paid in full. By the same act the legislature created a fund commissioner, and enacted that whenever any portion of said bonds shall be issued that they shall be placed in the hands of the fund commissioner to be negotiated, and the proceeds paid over to the corporation for the purposes and under the regulations and restrictions provided in the same act, but the act was not to be operative unless accepted by the company in the mode therein provided. Prior inconsistent provisions in relation to the plaintiff company were repealed by the twelfth section of the act, and the provision is that the work on the west branch should not be expedited to the exclusion of the construction of the main line of the railroad.

Those several acts were duly accepted by the company and were in force on the eighth of April following. Interest was paid by the company on the bonds issued until the year 1860, when the company made default, and such interest has never been paid. On the said eighth of April the people of the State adopted an ordinance as a part of their constitution, which provides to the effect that an annual tax of ten per centum of all their gross receipts, with an immaterial exception, shall be levied and collected of the company and two other companies therein named, for the

period of two years, as therein described, and fifteen per centum thereafter, which tax shall be assessed and collected in the county of St. Louis in the same manner as other State taxes are assessed and collected, and shall be appropriated by the legislature to the payment of the principal and interest now due or hereafter to become due upon the bonds of the State issued to the company.

Such receipts for the transportation of freight and passengers for the first of the two years, not including any sum received from the excepted source, amounted to six hundred and eighty-two thousand five hundred and seventy dollars, and the agreed statement shows that a tax of ten per cent., amounting to sixty-eight thousand two hundred and fifty-seven dollars, was assessed in the proper county on the gross receipts of the railroad for that year, under the provisions of the said ordinance. None of the principal of the bonds was due at the time the tax was assessed, but the interest on the same, to an amount greater than the amount of the tax, was due at that time.

Payment of the tax being refused the defendant, as the collector, seized the property of the company to satisfy the same, and the plaintiffs here brought an action of trespass against the collector to test the validity of the tax, in the State Circuit Court for the county where the tax was assessed. Service was made and the defendant appeared, when the parties waived a jury and submitted the case to the court upon an agreed statement of facts. Hearing was had and the court rendered judgment for the plaintiffs and the defendant excepted and appealed to the Supreme Court of the State, where the judgment of the State Circuit Court was reversed and a judgment rendered for the defendant. Whereupon the plaintiffs sued out a writ of error and removed the cause into this court.

Corporate powers were conferred upon the company by the act of the third of March, 1851, but the act of incorporation contains no provision whatever exempting the property of the company from taxation. Three years later the charter was amended, and the sixth section of the amendatory act

provided that the capital stock, with all machines, wagons, cars, engines, or carriages belonging to the company, with all their works or other property, and all profits which shall arise from the same, shall be vested in the shareholders in proportion to their shares, and that the same shall be deemed personal estate and shall be exempt from any public charge or tax whatsoever for the period of five years from and after the passage of the act, which period has long since elapsed.

Attempt is made in argument to show that an exemption from taxation may be implied from some of the provisions of the act to provide for the completion of the railroad and its west branch. Based solely on that theory the error assigned is that the ordinance of the State imposing the tax is in violation of that provision of the Constitution which prohibits the States from passing any law impairing the obligation of contracts. Pursuant to that theory the plaintiffs contend that the legislative act to complete the railroad enacted a mode of making payments by the company to the State, which, when the act was accepted by the company, became a binding contract between the parties, within the protection of that provision of the Constitution, and that as such it could not be rescinded by any subsequent legislation, and that the ordinance does impair the obligation of that contract by providing another and a different mode of enforcing the payments without the consent of the company.

Serious difficulty would arise in sustaining the judgment of the State court if the view assumed in the proposition was correct, that the ordinance was a mere change of the order of disbursing the receipts and earnings of the company, instead of being what it purports to be on its face, an expression of the sovereign will of the people of the State levying taxes to pay and discharge the indebtedness of the State.

Power to tax is granted for the benefit of the whole people, and none have any right to complain if the power is fairly exercised and the proceeds are properly applied to discharge the obligations for which the taxes were imposed. Such a

power resides in the State government as a part of itself, and need not be reserved when property of any description is granted to individuals or corporate bodies.*

Unless exempted in terms which amount to a contract not to tax, the property, privileges, and franchises of a corporation are as much the legitimate subjects of taxation as any other property of the citizens which is within the sovereign power of the State. Repeated decisions of this court have held, in respect to such corporations, that the taxing power of the State is never presumed to be relinquished, and consequently that it exists unless the intention to relinquish it is declared in clear and unambiguous terms.†

Express exemption is not pretended, nor does the act to provide for the completion of the railroad contain any provision which, when properly construed, affords any support to the proposition that any such contract exists between the company and the State, either express or implied, even if it could be admitted that mere implication is sufficient, which may well be questioned, as the current of the decisions of this court warrant the conclusion that if such an exemption be claimed it must be made to appear in clear, explicit, and unequivocal terms.

Authorities from numerous sources are cited by the plaintiffs, but none of them show that a lawful tax on a new subject, or an increased tax on an old one, interferes with a contract or impairs its obligation, within the meaning of the Constitution, even though such taxation may affect particular contracts, as it may increase the debt of one person and lessen the security of another, or may impose additional burdens upon one class and release the burdens of another, still the tax must be paid unless prohibited by the Constitution, nor can it be said that it impairs the obligation of any existing contract in its true legal sense.‡

* Cooley on Constitutional Limitations, 127–280.

† Society for Savings *v.* Coite, 6 Wallace, 606; Philadelphia and Wilmington Railroad Co. *v.* Maryland, 10 Howard, 393; Providence Bank *v.* Billings, 4 Peters, 561; Jefferson Bank *v.* Skelly, 1 Black, 436; Ohio Life Insurance and Trust Co. *v.* Debolt, 16 Howard, 416.

‡ Blackwell on Tax Titles (2d ed.), 408.

Properties of every kind over which the sovereign power of a State extends are objects of taxation outside of the means and instruments of the Federal government.*

Unrestricted by constitutional limitations the only restraint upon the taxing power of the States is the responsibility of those in whom the power is lodged, and the power of appropriation of the proceeds, when not so restrained, is equally unlimited.†

Questions not involved in the assignment of errors will not be examined, nor is it necessary, as all agree that the main question in the case is whether the ordinance impairs the obligation of any contract made and concluded between the State and the company before the ordinance was adopted.

Unless the power of the State to tax the company was surrendered by the antecedent act to provide for the completion of the railroad, it must be conceded that the power exists, as it is plain that none of the other acts referred to afford any support whatever to such a proposition.

Five years before that act was passed the company made default in the payment of the interest falling due on the bonds which the State issued for their benefit, and by that act the legislature postponed and released the lien of the State, which was a first lien on all their property to the amount of four millions three hundred and fifty thousand dollars, and accepted in its stead a second lien upon the same property, in order that the company might issue six millions of dollars of bonds of their own and be able to secure their payment, principal and interest, by a first mortgage upon the same property, to complete the main line of the road and its west branch and the bridge therein described.

Moneys belonging to the company from that time were to be placed in the hands of the fund commissioner created by the act, and were to be disbursed by him as follows: (1.) Amounts required for the actual current expenditures in operating the railroad and carrying on the ordinary business

* Hamilton Co. *v.* Massachusetts, 6 Wallace, 639.

† Griffin *v.* The Mayor, 4 Comstock, 419; Crowell *v.* Lawrence, 41 New York, 141.

of the corporation, including all sums that may be necessary for keeping the same in a good state of repair, and for such additions to the rolling stock, &c., as may be required to enable the company to transact the business of the railroad. (2.) Amounts sufficient to pay the salary of the fund commissioner. (3.) Amounts sufficient to pay the interest upon said first mortgage bonds, as the same shall fall due. (4.) Amounts necessary to pay the cost of the construction and equipment of the railroad. (5.) Amounts sufficient to pay accruing dividends on preferred stock, not exceeding six per cent. per annum thereon, as provided in the act. (6.) Amounts sufficient to pay the interest due on the outstanding bonds of the State previously loaned to the company. (Lastly.) He shall disburse the surplus to the payment of the principal of said first-mortgage bonds until the same shall be fully paid off, or if none of such bonds shall have become due, then to the payment of the principal of the bonds of the State, if any are still outstanding, and the balance shall be paid over to the company.

Further examination of those provisions is certainly unnecessary, as it is too plain for argument that they do not afford the slightest support to the views of the plaintiffs. On the contrary, they are entirely silent upon the subject of taxation, and fully justify the remarks of the State court when they say that the subject of taxation forms no part of the contract contained in the act under consideration.*

Nothing is said about taxation, and it does not seem to have entered into the contract between the parties, but was obviously left where the law had placed it before the act was passed, nor was any provision made for the payment of taxes unless it may be held that the disbursements for that purpose may fairly be included in such as are required to pay the current expenditures in carrying on the ordinary business of the corporation.†

Reference is also made to some other sections of the act

* City of St. Louis *v.* Insurance and Trust Co., 47 Missouri, 155.

† Railroad Company *v.* Maguire, 49 Missouri, 490; Pacific Railroad *v.* Maguire, 51 Id. 142.

as supporting the proposition submitted by the plaintiffs, but it is so obvious that they cannot be so regarded without departing from the established rules of law applicable in such cases, that it is not necessary to pursue the discussion.

Like controversy exists between the State and another of the railroads mentioned in the ordinance, in which case it is contended that the ten per cent. charge imposed by that instrument is not a tax within any correct meaning of that word, that it is an appropriation of the property of the company without due process of law, or the taking of the property of the company without just compensation, but no such questions are open for examination in this case, as no such errors are assigned in the record.

JUDGMENT AFFIRMED.

The CHIEF JUSTICE dissented. STRONG, J., did not sit.

OREGON STEAM NAVIGATION COMPANY *v.* WINSOR.

Questions about contracts in restraint of trade must be judged according to the circumstances on which they arise, and in subservience to the general rule that there must be no injury to the public by its being deprived of the restricted party's industry, and that the party himself must not be precluded from pursuing his occupation and thus prevented from supporting himself and his family. Accordingly, where A., engaged in navigating waters of California alone, sold in 1864 a steamer to B., engaged in navigating a particular river (the Columbia River), of Oregon and Washington Territories (regions to the north of California), subject to a stipulation that he, B., would not employ it or suffer it to be employed for ten years from the date of the sale, in any waters of California, and B., three years afterwards, *i. e.*, in 1867, sold the same steamer to C., engaged in navigating Puget's Sound (water in the extreme northwest corner of Washington Territory and remote from all the other waters described), subject to a stipulation that she should not be run or employed upon any of the routes of travel, or the rivers, bays, or waters of the State of California, or the Columbia River and its tributaries, for the period of ten years from May 1st, 1867, *held* that the contract was not void as in restraint of trade.

Held, further—the contract in the second case having been for ten years from the date of *it*, and therefore for three years after the first contract

had expired—that it was so divisible in regard to the California portion that it could stand for the seven years for which B. was bound to protect it, though it was void as to the remaining three, and accordingly that B. could sue for a breach of it occurring within the first seven years of it; that is to say, occurring within the time that he was to protect A.

ERROR to the Supreme Court of the Territory of Washington.

The *Oregon* Steam Navigation Company sued Winsor *et al.* in one of the courts of the Territory of Washington, to recover $75,000 as stipulated damages for the breach of a certain agreement between the parties. The complaint set forth the following facts: That in 1864, the *California* Steam Navigation Company being engaged in steam and other transportation on the several routes of travel on the rivers, bays, and waters of the State of *California*, sold to the plaintiff, the said Oregon Steam Navigation Company (being a company engaged in the like business on the Columbia River and its branches, in *Oregon and Washington**), the steamer New World, for $75,000, subject to a stipulation, amongst other things, that the latter company should not run or employ, or suffer to be run or employed, the said steamer upon any of the routes of travel, rivers, bays, or waters of the State of *California*, for the period of ten years from the 1st day of May, 1864; that on the 18th day of February, 1867, the Oregon company sold the same steamer to Winsor and others for the sum of $75,000, subject to a stipulation and covenant that she should not be run or employed upon any of the routes of travel, or the rivers, bays, or waters of the State of California, or the Columbia River and its tributaries, for the period of ten years from the 1st day of May, 1867; and that for a breach of said covenant the vendees should pay $75,000 as actual liquidated damages. The complaint further averred, that at the time of the second sale of the steamer, and up to the commencement of the suit, the California Steam Navigation Company were engaged with numerous steam and other vessels in navigating the waters of the State of California; and that the Oregon

* These Territories are immediately north of California.

company, the plaintiffs, were likewise engaged in the navigation of the Columbia River and its branches; and that at the time of said sale to the defendants, the latter were engaged in navigating the waters of Puget Sound,* and were in nowise engaged in the navigation of the waters of Oregon or California, or of any of the waters described in the stipulation. The breach complained of was that the steamer had been engaged from the 1st of November, 1868, to the commencement of the suit, in the transportation of passengers and freight from the city of San Francisco to Vallejo, in the State of California, being a route of travel on the waters of the State of California embraced in the stipulation and covenant.

The complaint was demurred to, and the demurrer was sustained and the action dismissed. The plaintiff brought a writ of error to the Supreme Court of the Territory, which affirmed the judgment, and that judgment was now here on the present writ of error.

The sufficiency of the complaint was of course the matter brought up; and the case turned mainly upon the question, whether the covenant entered into by the defendants, whereby they agreed "not to run or employ, or suffer to be run or employed, the said steamboat New World upon any of the routes of travel, or the rivers, bays, or waters of the State of California, or the Columbia River and its tributaries, for the period of ten years from the first day of May, 1867," &c., was valid. The objection urged against it was that it was a contract in restraint of trade, and as such contrary to public policy.

Mr. G. H. Williams, for the plaintiff in error; Messrs. B. F. Dennison and L. Holmes, contra.

Mr. Justice BRADLEY delivered the opinion of the court.

It is a well-settled rule of law that an agreement in general restraint of trade is illegal and void; but an agreement

* This bay is in the northwest extremity of Washington Territory, and at quite a distance from all parts of the Columbia River.

which operates merely in partial restraint of trade is good, provided it be not unreasonable and there be a consideration to support it.* In order that it may not be unreasonable, the restraint imposed must not be larger than is required for the necessary protection of the party with whom the contract is made.† A contract, even on good consideration, not to use a trade anywhere in England, is held void in that country, as being too general a restraint of trade; but a contract not to use a trade at a particular place, if it be founded on a good consideration, and be made for a proper and useful purpose, is valid.‡ Of course, a contract not to exercise a trade generally would be obnoxious to the rule, and would be void.

The application of the rule is more difficult than a clear understanding of it. In this country especially, where State lines interpose such a slight barrier to social and business intercourse, it is often difficult to decide whether a contract not to exercise a trade in a particular State is, or is not, within the rule. It has generally been held to be so, on the ground that it would compel a man thus bound to transfer his residence and allegiance to another State in order to pursue his avocation.§

But this mode of applying the rule must be received with some caution. This country is substantially one country, especially in all matters of trade and business; and it is manifest that cases may arise in which it would involve too narrow a view of the subject to condemn as invalid a contract not to carry on a particular business within a particular State. Suppose the case of two persons associated in business as partners, and engaged in a manufacture by which they supply the country with a certain article, but the process of manufacture is a secret; and they agree to separate, and one of the terms of their separation is, that one of the parties shall not sell the manufactured article in Massachu-

* Chitty on Contracts, 576, 8th American edition.

† Ib.; Tindal, C. J., in Horner *v.* Graves, 7 Bingham, 743.

‡ 2 Williams's Saunders, 156, note 1.

§ Taylor *v.* Blanchard, 13 Allen, 375; Dunlop *v.* Gregory, 6 Selden, 241.

setts, where the other resides and carries on business; and that the latter shall not sell the article in New York, where his associate is to reside and carry on business. Can there be any doubt that such an agreement would be valid and binding? Cases must be judged according to their circumstances, and can only be rightly judged when the reason and grounds of the rule are carefully considered.

There are two principal grounds on which the doctrine is founded, that a contract in restraint of trade is void as against public policy. One is, the injury to the public by being deprived of the restricted party's industry; the other is, the injury to the party himself by being precluded from pursuing his occupation and thus being prevented from supporting himself and his family. It is evident that both these evils occur when the contract is general, not to pursue one's trade at all, or not to pursue it in the entire realm or country. The country suffers the loss in both cases; and the party is deprived of his occupation, or is obliged to expatriate himself in order to follow it. A contract that is open to such grave objection is clearly against public policy. But if neither of these evils ensue, and if the contract is founded on a valid consideration and a reasonable ground of benefit to the other party, it is free from objection, and may be enforced.

In accordance with these principles it is well settled that a stipulation by a vendee of any trade, business, or establishment, that the vendor shall not exercise the same trade or business, or erect a similar establishment within a reasonable distance, so as not to interfere with the value of the trade, business, or thing purchased, is reasonable and valid. In like manner a stipulation by the vendor of an article to be used in a business or trade in which he is himself engaged, that it shall not be used within a reasonable region or distance, so as not to interfere with his said business or trade, is also valid and binding. The point of difficulty in these cases is to determine what is a reasonable distance within which the prohibitory stipulation may lawfully have effect. And it is obvious, at first glance, that this must de-

pend upon the circumstances of the particular case; although, from the uncertain character of the subject, much latitude must be allowed to the judgment and discretion of the parties. It is clear that a stipulation that another shall not pursue his trade or employment at such a distance from the business of the person to be protected, as that it could not possibly affect or injure him, would be unreasonable and absurd. On the other hand, a stipulation is unobjectionable and binding which imposes the restraint to only such an extent of territory as may be necessary for the protection of the party making the stipulation, provided it does not violate the two indispensable conditions, that the other party be not prevented from pursuing his calling, and that the country be not deprived of the benefit of his exertions.

To apply these principles to the case before us: The California Steam Navigation Company, being engaged in the business of transportation on the rivers, bays, and waters of California, was willing to sell one of their steamers to the Oregon Steam Navigation Company, which was engaged in a similar business on the Columbia River and its tributaries, provided the latter company would agree that the steamer should not be used in the California waters for the period of ten years from the first day of May, 1864. This stipulation was necessary to protect the former company from interference with its own business. It had no tendency to destroy the usefulness of the steamer, and did not deprive the country of any industrial agency. The transaction merely transferred the steamer from the employment of one company to that of another situated and doing business in another State. It involved no transfer of residence or allegiance on the part of the vendee in order to pursue its employment, nor any cessation or diminution of its business whatever. The presumption is that the arrangement was mutually beneficial to both companies, and that it promoted the general interests of commerce on the Pacific coast. Again, the Oregon company were afterwards willing to dispose of the same steamer to the defendants, who were engaged in the like business of transportation in the waters of

Puget Sound, Washington Territory, provided that the latter would agree that the steamer should not be run or employed upon any of the routes of travel or rivers, bays, or waters of California, or the Columbia River and its tributaries, for the period of ten years from the first day of May, 1867. This stipulation excluded the steamer from the territory covered by the former stipulation exacted by the California company, and also from the territory occupied by the Oregon company itself. The latter portion of the stipulation stands on the same ground and reason as did the first stipulation between the California and Oregon companies. The former portion was necessary in order that the Oregon company might faithfully keep its covenant with the California company. It is true that the stipulation in question covers a period of time which extends three years beyond the period for which the Oregon company is bound to the California company. The latter would expire on the first of May, 1874, and the stipulation in question extends to the first of May, 1877. This extra period of three years, in reference to the waters of California, is not necessary to the protection of the Oregon company. That company is under no obligation with regard to those three years. But the suit is brought and the breach is alleged for a portion of time during which the Oregon company is bound to protect the California company from the interference of said steamer. And the question arises whether the contract is so divisible in relation to the California portion that it can stand for the seven years for which the Oregon company is bound, though it be void as to the remaining three years. We think it is so divisible. It is laid down by Chitty as the result of the cases, and his authorities support the statement, "that agreements in restraint of trade, whether under seal or not, are divisible; and, accordingly, it has been held that when such an agreement contains a stipulation which is capable of being construed divisibly, and one part thereof is void as being in restraint of trade, whilst the other is not, the court will give effect to the latter, and will not hold the agreement to be void altogether." The cases cited in support of this propo-

sition are *Chesman et ux.* v. *Nainby*,* *Wood* v. *Benson*,† *Mallan* v. *May*,‡ *Price* v. *Green*,§ *Nicholls* v. *Stretton*.‖ In *Price* v. *Green* the contract was not to exercise the trade of a perfumer in London, or within six hundred miles thereof; and it was held divisible and good for London only. This case was carried through all the courts. In *Nicholls* v. *Stretton* the stipulation was that an attorney's apprentice, who was to serve five years, should not, after his term expired, be concerned as attorney for any persons who had, previous to the expiration of said apprenticeship, been a client of the attorney with whom the contract was made, or who should at any time thereafter become his client. It was strenuously and fully argued that whilst the contract might have been good as to past clients it was certainly not good as to future ones, and being an entire contract, the whole was bad. But the court followed the previous decision of the Exchequer Chamber in *Price* v. *Green*, held the contract divisible, and sustained the action. We see no reason why this principle should not be followed in the present case. The line of division between the period which is properly covered by the restriction and that which is not so, is clearly defined and easily drawn. It is subject to no confusion or uncertainty, and the court can have no difficulty in applying it.

Regarding this objection, therefore, as removed, the covenant made by the defendant seems to stand on the same ground as that made by the plaintiffs with the California company. The same observations may be made with reference to it. The public was not injured by being deprived of any of the business enterprise of the country. The vendees did not incapacitate themselves from carrying on business just as they had previously done, and in the same locality. Their business was rather facilitated by the arrangement. Finally, the stipulation, it will be presumed, was founded on a valuable consideration in its influence upon the price paid for the steamer; its object and purpose was

* 2 Strange, 739.
† 2 Crompton & Jervis, 94.
‡ 11 Meeson & Welsby, 653.
§ 16 Id. 346.
‖ 10 Queen's Bench, 346.

simply to protect the vendors, and if we except the three years before considered in its relation to California, its restraining effect extended no farther than was necessary for their protection.

We are unable, therefore, to see anything in the contract, so far as it is now in question, which militates against public policy.

There are no other points adverted to which demand the serious consideration of the court.

JUDGMENT REVERSED, and the case remanded to be proceeded in

ACCORDING TO LAW.

Dissenting, Justices CLIFFORD, SWAYNE, and DAVIS.

NATIONAL BANK OF WASHINGTON *v.* TEXAS.

1. A note payable to bearer, though overdue and dishonored, passes by delivery the legal title to the holder, subject to such equities as may be asserted by reason of its dishonor.
2. Any one disputing the title of the holder of such paper takes the burden of establishing, by sufficient evidence, the facts necessary to defeat it.
3. There is no competent evidence in this chancery suit that the bonds in controversy, which were issued by the United States to the State of Texas, though overdue when they passed from the treasury of the State, were issued by the State or received by the person to whom they were delivered for any treasonable or other unlawful purpose.
4. The absence of the indorsement of the governor of the State on the bonds does not raise a presumption of such unlawful purpose under the circumstances of this case.
5. The cases of *Texas* v. *White and Chiles* (7 Wallace, 718), *Same* v. *Hardenberg* (10 Id. 68), and *Same* v. *Huntington* (16 Id. 402), considered, and their true result ascertained and applied to the present case.

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

The United States, on the 1st of January, 1851, issued to the State of Texas for the sale of a portion of her north-

western territory, five thousand coupon bonds of $1000 each, numbered successively from No. 1 to No. 5000, and "redeemable after the 31st day of December, 1864." They were made on their face all payable "to bearer," and declared to be transferable on delivery. The coupons, which extended to December 31st, 1864, and no farther, were equally payable "to bearer." These bonds were known as Texas indemnity bonds.

On the 16th of December, 1851, in anticipation of the bonds being delivered to it, the State of Texas passed an act authorizing their governor to receive them from the United States,

"And when received, to deposit them in the treasury of the State of Texas, *to be disposed of as may be provided by law; provided*, that no bond issued as aforesaid, as a portion of the said $5,000,000 of stock, payable to bearer, shall be available in the hands of any holders *until the same shall have been indorsed in the city of Austin, by the governor of the State of Texas.*"

After this act of December 16th, 1851, and between that day and the 11th of February, 1860, the State of Texas passed thirteen different acts, providing for the sale or disposal of the whole $5,000,000 of these bonds; for lawful State purposes; as *ex gr.*, paying the public debt of the State; the erection of a State capitol; to establish a system of schools, &c., &c., the construction of railroads: the terms of none of *these* acts requiring an indorsement of the bonds by the governor, as required in the above-quoted act of December 16th, 1851, nor any of them designating by numbers on them the particular bonds to be appropriated to the particular objects authorized. Subsequently to this again, the rebellion having broken out, and the State having gone over to the rebel side, and there being a large number of the bonds still undisposed of in the State treasury, the legislature of Texas, by an act of January 11th, 1862, repealed the act of December 16th, 1851 (making an indorsement necessary), and the then authorities of Texas, through its "military board," in January, 1865, sold or transferred, as was said, and as in former cases in this court was sup-

posed to be shown, *certain* of the bonds, but not all of them, to two persons, White and Chiles, *for the purpose of aiding the rebellion.* In those cases—the cases, namely, of *Texas* v. *White and Chiles*,* and *Texas* v. *Hardenberg*,†—it was determined that as against the true, that is to say, the loyal State of Texas (particular citizens of which had stopped payment of them at the Federal treasury), no title had passed to bonds which had been thus transferred; and that notwithstanding the transfer, the reconstructed State might reclaim the bonds or their proceeds.

How many bonds were transferred to White and Chiles, or what were their exact numbers, was not well ascertained; but, as already said, it was well known that the bonds transferred to White and Chiles did not comprise the whole issue for $5,000,000, and that a considerable number of them had been transferred under one or other of the thirteen enactments already mentioned.‡ In particular, it appeared that one hundred and forty-eight of them (numbered from 4694 to 4842 inclusively) had been transferred, in pursuance of a statute, to the Southern Pacific Railroad Company; some of which the company paid out to contractors for work done on the road. These bonds were not indorsed by the governor.

In this state of things the State of Texas brought her complaint in chancery in the court below against the First National Bank of Washington, W. S. Huntington, its cashier, and others, for discovery and relief in regard to certain of these Texas indemnity bonds, of which the bill alleged that the State had been dispossessed by fraud or treasonable practices. The number now claimed was nineteen; thus numbered:

"Numbers 4226, 4227, 4229, 4703, 4705, 4706, 4748, 4813, 4825, 4843, 4844, 4912, 4927, 4928, 4929, 4960, 4961, 4962, 4963."

* 7 Wallace, 700, where the history of the bonds is given in full.

† 10 Id. 68.

‡ See Report of Mr. Comptroller Taylor, submitted to Mr. Secretary McCulloch, August 15th, 1865.

Statement of the case.

The bill alleged that these indemnity bonds were each for the sum of $1000, dated January 1st, 1851, redeemable after December 31st, 1864, and that those in controversy were received and remained in the treasury of the State of Texas until after the period fixed for redemption. It was alleged that in the year 1865 the insurrectionary power which had usurped control of the State, made a contract with White and Chiles by which from one hundred and forty-five to one hundred and sixty-two of the bonds were delivered to them, in consideration of which they agreed to furnish means to carry on the war against the United States in which that State was then engaged, with others, under the name of the Confederate States of America.

It was further alleged that these bonds, then overdue, afterwards came to the hands of the defendants, who purchased them with full notice of the purpose for which they had been delivered to White and Chiles.

It was also alleged that said bonds were never indorsed by the governor of the State of Texas in such manner as by the law of Texas was required, by reason of which no legal title to the same passed from the State, or was vested in the parties to whom they were delivered. The defendants were required to answer under oath, and a decree against them in regard to the bonds left with Taylor, or for other relief, was prayed.

The bank and Huntington answered and admitted the purchase of some of the Texas indemnity bonds, and having others as agents for the owners of them. They gave a list of all these, specifying those held in their own right and those held as agents. They averred that the bonds had all been paid to them in full by the Treasury of the United States before this suit was commenced, and that those owned by themselves were purchased for value (namely, ninety-eight cents to the dollar), without notice of any of the matters set up in the complainant's bill.

They denied all knowledge on their part, that the bonds claimed by them were part of the bonds issued to Chiles and White, or had been issued in aid of the rebellion; and

they denied also the facts that they were so issued. And they denied the statements of the bill in these matters. A general replication was filed and testimony taken.

To make out its case, the State of Texas adduced the testimony of Mr. R. W. Taylor, the Comptroller of the Treasury of the United States, and of Mr. G. W. Paschall, one of the attorneys for the complainant. Mr. Taylor's deposition was a long one. What follows are extracts which bear principally on the case. He is under examination by the complainant's counsel.

"*Question.* I see it stated that these bonds came through the hands of J. P. White. Do your investigations enable you to say they were part of the bonds received by White and Chiles?

"*Answer.* I do not know anything more about that than what is to be gathered from the *general appearance* of the transaction. There was nothing at that time known here about the White and Chiles purchase; at least I had heard nothing of it.

"*Question.* But *from this general appearance* of which you speak, what is your opinion as to their having been part of the same bonds?

"*Answer.* From all the circumstances, *my opinion is*, those were of the White and Chiles bonds. *That is only an opinion, however.*"

CROSS-EXAMINED.

"*Question.* Do you know of your own knowledge that White and Chiles, or either of them, ever saw one of these bonds?

"*Answer.* I knew it only from the papers on file in the department, that is, *from my opinion of what those papers show.*

"*Question.* It would be a very tedious process (and I presume you could not do it) to furnish the various papers from which you make up your opinion?

"*Answer.* They are too numerous for me to present now, and I might add, that one would have to study them very carefully and make his calculations as to the different bonds.

"*Question.* Would you not have to do so by ascertaining the entire number of bonds, and then tracing those bonds into the hands of persons other than White and Chiles; would not your opinion be based upon the conclusion that, inasmuch as so many bonds were in the hands of other people, it followed, as a neces-

sary result, that if White and Chiles had any, they must be those?

"*Answer.* It would be by taking the seven hundred and eighty-two bonds that were not indorsed, and tracing them back, by the evidence, into the hands of those parties who held them at different times, and ascertaining in some instances, the particular numbers that were known to be in the hands of particular parties before the transaction between White and Chiles and the military board, and taking others again, that came from the State of Texas, and then drawing my conclusions as to what were White and Chiles bonds."

Mr. Paschall said in reply to questions in chief and on cross-examination:

"I was employed by Governor Pease to prosecute this suit, and caused it to be instituted in 1868; and judging from a careful examination made in Texas and in the Treasury Department here, I feel confident that the bonds redeemed for the bank, described by Mr. Taylor, were part of the bonds which passed through the hands of White and Chiles. *I judge this from circumstances which he has stated.* . . . I did *satisfactorily to myself*, identify those paid to Huntington, &c., because I found an affidavit of a brother of White attached to them, and was thus able to trace them as having come through White. I *inferred* so from the fact that they passed through the hands of White's brother, and through the hands of a Nashville man named Douglass. I *thought* I saw clearly that they appertained to that class, and from those numbers, knowing that the authorities of Texas had taken off the bonds, consecutively, from No. 1 of the 782. I knew *about* where these numbers would begin, but *I was at a loss about the precise numbers, because I wanted to describe them in Texas, and I could not certainly identify them.*"

Such, in the main, was the complainant's case. As this court held that it was in itself insufficient, the evidence by the other side is but adverted to. That evidence tended to show that in the case of all the bonds the cashier of the bank had gone, prior to purchasing them, to the Treasury of the United States, and had made full inquiry about them, that the Comptroller of the Treasury had advised that *bonâ fide* holders of such bonds should be paid; that many such

bonds were paid, and that the purchases here were made in view of this action; that of the nineteen bonds now in question, fifteen or sixteen had been bought in December, 1865, and in August and September, 1866, from Jay Cooke & Co., and three from Simon Wolf, of New York, acting as agent for various residents there; that of the fifteen or sixteen bought from Jay Cooke & Co., at least six were of the number transferred to the Southern Pacific Railroad Company;* that four had never been delivered to the military board;† that leaving the remaining to rest on the fact (among other facts) that they came from Jay Cooke & Co., who were not shown to have ever stood in relations of any sort with Chiles and White.

The court below decreed in favor of the complainant as to the nineteen bonds, and the defendants took this appeal.

Messrs. E. R. Hoar and J. Hubley Ashton, for the appellants, contended that on the complainant's own case, as proved, the bill ought to have been dismissed; that the testimony of Taylor and Paschall fell within the case of *Carter* v. *Boehm*,‡ in which Lord Mansfield said of such testimony: "It is mere opinion, which is not evidence;" that all the allegations of the bill were denied by answers responsive to it; and was not sustained by any evidence overcoming the denials; that *Huntington* v. *Texas*§ had decided that the State must prove not only unlawful issue and use, but also the *further fact of notice* to the defendant; that though express notice was here averred, none was proved; that the doctrine of constructive notice, applicable to dishonored private mercantile paper, payable to order on a day certain, could not be applied to public securities like these, under the circumstances attending them, when purchased in the open market after the day had passed when, by their tenor, they were redeemable; that they were issued as stock, not payable to bearer on any certain day, but "*redeemable after the* 31*st day of December*,

* Nos. 4703, 4705, 4706, 4748, 4813, 4825.
† Nos. 4960, 4961, 4962, 4963.
‡ 3 Burrow, 1905.
§ 16 Wallace, 412.

1864;" that they stated that interest would be paid for fourteen years, but that *after* December, 1864, the bonds *might* be redeemed at the pleasure of the United States; that the bonds were not *dishonored;* that *dishonor* and non-payment at maturity, in the case of private mercantile paper, were not necessarily the same thing; that a note on demand was mature and demandable at once, but was not dishonored until after such a lapse of time that the law considered the paper ought to have been paid, and that every one was bound to suppose that payment must have been demanded and refused within that time; that Mr. Attorney-General Black had held, after full consideration, that the reason of the rule which makes ordinary bills and notes, when transferred after maturity, subject to prior equities, did not apply to treasury notes of the United States, redeemable after one year from their date, and that a purchaser for value of such a note, *after* maturity, was entitled to the same protection as the *bonâ fide* holder of ordinary commercial paper taken before maturity.*

The counsel contended further, that it was clear enough, viewing the bonds specifically, that these particular bonds had not been the bonds of White and Chiles; ten of them assuredly had not been so, and the presumptions were that the others had not been.

That even if it were clear that they all *had* passed under the White and Chiles transaction, that the State ought not to recover; that this court was reviewing the decree below in its capacity as a court of equity; that the property had been acquired honestly and in good faith for a full consideration, without knowledge or notice of that transaction, and after due and full inquiry instituted at the Treasury Department, whose duty it was, as this court has said, to ascertain and decide whether the bonds had or had not been issued in aid of the rebellion.

Messrs. R. T. Merrick and T. J. Durant, having referred to the case of *Texas* v. *White and Chiles*, to show the history of

* 9 Opinions of the Attorneys-General, 413; and see 11 Id. 332.

the Texas indemnity bonds, and referred to the testimony of Messrs. Taylor and Paschal as that of persons intimately acquainted with the history of the bonds now specifically involved, submitted—

That upon the state of facts shown, the absence of the indorsement of the governor raised a presumption against the validity of the alienation of the bonds; and that the cause of justice would best be subserved by giving effect to this presumption, and requiring the holder of a bond not indorsed to prove that it had been issued by the State for some lawful and proper purpose.

That circumstances having been proved establishing illegality in the original transfer of the bonds, the burden of showing that value was given for them *before maturity* was cast upon the holder; and if it appeared that he took them after they became due, he would be regarded as having taken them subject to all the rights and equities of the State, and could not protect a defective title by any rule of commercial law.*

That the questions involved in this case were all decided in *Texas* v. *White and Chiles;* that they again came before the court in the case of *Texas* v. *Hardenberg*, in which the court, referring to the opinion in the case of *White and Chiles*, says:

"This conclusion leaves but one question for consideration, namely, whether Hardenberg at the time he purchased the bonds had notice of the equity of the State of Texas. This question was not concluded by the decree, but it was *fully considered by the court upon the former argument,* and our conclusion, as stated in the opinion, as then delivered, was that Hardenberg, as well as the other purchasers of indemnity bonds about the same time, was affected by such notice. We will not restate what we then said; it is only necessary to say, that we have reconsidered the grounds of that decision, and are still satisfied with it."

That the expressions in the opinion delivered in *White and*

* Smith *v.* Sac County, 11 Wallace, 146; Lardner *v.* Murray, 2 Id. 121; Andrews *v.* Pond, 13 Peters, 65; Swift *v.* Tyson, 16 Id. 1; Goodman *v.* Simonds, 20 Howard, 365.

Chiles, and referred to in the above extract, would be found on page 732 of 7th Wallace, and were as follows:

"We think it clear, if a State, by a public act of her legislature, imposes restrictions upon the alienation of her property, that every person who takes a transfer of such property must be held affected by notice of them. Alienation, in disregard of such restrictions, can convey no title to the alienee."

The learned counsel, referring to the opinion of the court in the subsequent case of *Huntington* v. *Texas*, as qualifying and explaining the fundamental principles announced in the preceding cases, and regulating their application, submitted that it did not in any way annul the fundamental principles declared in those previous cases, but, on the contrary, reaffirmed them.

Mr. Justice MILLER delivered the opinion of the court.

Waiving for the present the question whether the bonds were overdue in the sense which puts a purchaser of dishonored negotiable paper on the inquiry as to defences which may be set up against it, it is quite clear that they were transferable by delivery after due the same as before. To invalidate the title so acquired by a purchaser, it is necessary to make out some defect in that title.

The main allegation of the bill is that these are part of the bonds issued to White and Chiles, in aid of the rebellion. All knowledge of this fact is denied by defendants, and the fact itself is denied. Conceding that their denial of the fact, about which perhaps they know nothing, had no other effect than to put in issue the allegation of plaintiff's bill on that subject, it remained for plaintiff to establish its truth by evidence.

This it attempted to do. Two witnesses alone are relied on for this purpose, namely, Taylor, the Comptroller of the Treasury of the United States, and Paschal, one of the attorneys for complainants. The former was examined at much length, and gave it as his opinion, from certain calculations made by him, based upon papers in his office and

information received by him from officers of the State of Texas, and other sources, that these bonds were of the White and Chiles issue. He says that it is only an opinion, and it is evident from his deposition that the data on which he bases that opinion are far from conclusive. It is not worth while to waste words in proving that such testimony is wholly incompetent to establish any fact, or rather to show that it is not evidence at all.

The deposition of Paschal is to the effect that by reason of his connection with the suit of *Texas* v. *White and Chiles*, he had become familiar with a number of facts from which he had satisfied himself that these bonds were of the White and Chiles lot. As the matters on which this conclusion was founded were all of them statements of others, some verbal, some written, and all of them capable of being proved, no reason is perceived why the witness should be substituted for the court in weighing these facts, and making the proper inferences. The same observation applies with equal force to Taylor's testimony.

Not only is there no evidence that these bonds were irregularly or improperly issued, or were issued for any treasonable or other unlawful purpose, but there is evidence that there were at the time these depositions were taken, bonds greatly exceeding in amount those in controversy, issued lawfully to a railroad company, which were not identified by their numbers, or in any other manner, so as to prove that the bonds in controversy were not these bonds. Nor was there any evidence tracing all the bonds lawfully issued so as to show where these were or to repel the presumption that they were of that class. In short, the testimony on this branch of the subject is an absolute failure.

But it is said that as these bonds did not bear the indorsement of the governor of the State of Texas, this fact alone was sufficient to prove that they were unlawfully obtained from its treasury, and that the rights of the State should therefore be protected in this suit.

The opinions of this court in the cases of *Texas* v. *White*

and Chiles,* and *Same* v. *Hardenberg*,† are much relied on in support of this proposition, and in fact are supposed to control this case in all respects. But while it is true that the bonds in question in both those cases (they were, in fact, but one case) were the bonds delivered to White and Chiles, and that some very important questions were decided concerning the relation of the State of Texas to the Union, and the validity of her legislation while under control of the enemy during the war of the rebellion, it is also true that the very matters of which the present bill is full, but of which there is a flat denial and no proof whatever, were supported in that case by sufficient evidence. On an examination of the report of that case it will be seen that the court was of opinion that it was established both in evidence and by the answers of some of the parties that the bonds then in controversy were all of them issued to White and Chiles, and the illegal contract on which they were issued was in evidence, and the court was further of opinion that the parties defendant had notice of those facts.

It is true that in the first of these cases the eminent judge who delivered the opinion, in addition to deciding that the bonds were overdue when delivered to White and Chiles, and for that reason subject to an inquiry as to the manner in which they obtained possession of them, gave as an additional reason why defendants could not hold them as *bonâ fide* purchasers, that they had not been indorsed by the governor as required by the statute of Texas. And for that purpose he entered into an argument to show that the State could by statute, while those bonds were in her possession, limit their negotiability by requiring as one of its conditions the indorsement of the governor. He also said in reference to the repeal of that statute by the rebel legislature of Texas, in view of the supposed treasonable purpose of it, that it was void. All of this, however, was unnecessary to the decision of that case, and the soundness of the proposition may be doubted.

* 7 Wallace, 718.

† 10 Id. 68.

In the subsequent case of *Texas* v. *Huntington*,* which was an action at law in reference to some of the bonds in the same category as those now before us, the justice who delivered the abovementioned opinion, qualifies it so far as to say that the repealing statute, though passed by a rebel legislature, is not void in its application to bonds not issued for treasonable purposes. This is sufficient to relieve the present case of any embarrassment growing out of that branch of the opinion in the case of *Texas* v. *White and Chiles.*

This latter case, *Texas* v. *Huntington*, on a careful examination of it must be held to dispose of the one before us. It is said, among other things, "that no one other than a holder of the bonds, or one who having held them has received the proceeds, with notice of the illegal transfer, for an illegal purpose, can be held liable to the claim of the reconstituted State." Again: "Whether there was evidence in the present case establishing the fact of the unlawful issue and use, and the further fact of notice to defendants, within the principles heretofore laid down, as now explained and qualified, is a question for the jury."

In the case before us, which is a suit in equity, it was a question for the chancellor, to be established by evidence. As we have already said, there is no proof either of the unlawful issue or use, or purpose, nor of any notice to defendants of the probable existence of these facts.

DECREE REVERSED, with directions to

DISMISS THE BILL.

Mr. Justice SWAYNE:

I concur in the judgment of the court just announced, but as the case involves important legal principles I prefer to give my views in a separate opinion.

Pursuant to the act of Congress of September 9th, 1850,† the United States issued to the State of Texas their bonds to the amount of five millions of dollars. They were denominated on their face "Texas Indemnity Bonds." They

* 16 Wallace, 402.

† 9 Stat. at Large, 446.

all bore date January 1st, 1851. Each one was for $1000. It was certified on their face "that the United States of America are indebted to the State of Texas or bearer" in that sum, "redeemable after the 31st of December, 1864, with interest at the rate of five per cent. per annum, payable on the first days of January and July in each year, at the Treasury of the United States, on presentation and surrender of the proper coupon hereto attached," and that the bond "is transferable by delivery." Coupons were attached extending to December 31st, 1864. Texas received them and placed them in her treasury. On the 16th of December, 1851, her legislature passed an act whereby it was provided "that no bond issued as aforesaid, as a portion of the five million of stock payable to bearer, shall be available in the hands of any holder until the same shall have been indorsed in the city of Austin by the governor of the State of Texas." A large portion of the bonds were indorsed by the governor and disposed of pursuant to other acts of the legislature. Acts were passed from time to time appropriating other portions for different purposes. Some of these acts prescribed a different mode of transfer, and some were silent upon the subject. Transfers were made in such cases without the governor's indorsement. On the 11th of January, 1861, the provision requiring his indorsement was repealed. On the same day a military board was created and authorized to prepare the State for defence, and for that purpose to use the bonds still in the treasury to the extent of a million of dollars. This action was taken by the State with the view of engaging in the war of the rebellion, then impending, against the United States. On the 12th of January, 1865, the military board entered into a contract with White and Chiles, in pursuance whereof $135,000 of the bonds were sold and delivered to them. On the 15th of February, 1867, the State of Texas filed in this court an original bill against White and Chiles and others, wherein it was charged that the repeal of the requirement of the governor's indorsement and the contract with White and Chiles were in aid of the rebellion and therefore void, and it sought to recover back

the bonds or their value from White and Chiles and the other defendants to whom it was alleged White and Chiles had transferred portions of them. This court decreed against White and Chiles.* The case stood over as against Hardenberg, one of the other defendants. Subsequently a decree was rendered against him.† The State also sued William S. Huntington, at law, in the Supreme Court of the District of Columbia, for the conversion of certain of the bonds redeemed at the Treasury, the proceeds whereof had gone to him. The State recovered as to thirteen of these bonds and failed as to the residue. The judgment was brought to this court upon error and reversed.‡

The case made in the record before us by the complainant, so far as is necessary to state it, is as follows:

It is alleged that the military board for insurrectionary purposes sold and delivered to White and Chiles one hundred and thirty-five of the bonds; that thirty-three of these bonds, after becoming past due, were sold to the bank, or were placed in its hands to collect for White and Chiles, with full knowledge of the manner in which White and Chiles had obtained them, and in bad faith on the part of the bank; and that the bonds had never been indorsed in such manner as to pass the title out of the State of Texas. The prayer is that the bank be enjoined from receiving the amount due on the bonds from the United States; that they may be delivered up to the State, if still in the possession of the bank, and if not, that the bank may be decreed to pay their value to the State. A copy of the contract of the military board with White and Chiles is annexed to the bill.

The bank and Huntington answered jointly. The answer, among other things—

Denies all knowledge of the transactions between the military board and White and Chiles; it denies that they hold or claim the bonds described in the bill; it denies that they were in any way the agents of White and Chiles or bought any bonds from them; it denies that they had any knowl-

* 7 Wallace, 700. † 10 Id. 68. ‡ 16 Id. 402.

edge that their bonds came through White and Chiles; it avers that they had heard there would be difficulty about the White and Chiles bonds, and before purchasing made diligent inquiry at the Treasury Department; that no one there could identify the bonds in question as White and Chiles's bonds, and that the bank bought them believing they were not such; it avers that they knew the Secretary of the Treasury had paid similar bonds, and gives a large list of such bonds; it denies all knowledge of White and Chiles.

The court below decreed against the bank for the value of nineteen bonds and interest. Those bonds are numbered in the decree as follows: 4226, 4227, 4229, 4703, 4705, 4706, 4748, 4813, 4825, 4843, 4844, 4912, 4927, 4928, 4929, 4960, 4961, 4962, and 4963.

The bank removed the case to this court by appeal, and it is now before us for review. The complainant did not appeal. This defines the ground of the controversy in this court between the parties, and narrows the circle of inquiry to the bonds numerically specified in the decree.

There is neither proof nor admission in the record of the execution of the contract of the military board with White and Chiles. It must, therefore, be laid out of view.

Averments by the complainant, vital in the case, are denied by the answer. The answer is responsive and the denials absolute. This throws the burden of proof upon the complainant, and the denials are conclusive unless overcome by the testimony of two witnesses to the contrary, or the testimony of one witness, and circumstances established otherwise equal in effect to the direct testimony of another.

The effort of Texas to leave the Union was revolutionary. All her legislative acts for the accomplishment of that object were void. Her position has been aptly resembled to that of a county in rebellion against the State.* While her enactments outside of the sphere of her normal authority were

* Hickman v. Jones, 9 Wallace, 197.

without validity, those within it, passed for the ordinary administration of her powers and duties as a State, had the same effect as if the rebellion had not occurred. The latter principle springs from an overruling necessity. A different rule would involve the dissolution of the social compact, and resolve society back into its original elements.

The repeal touching the governor's indorsement was an act of ordinary legislation. It was, therefore, within the rule last mentioned. If it had in view the promotion of the rebel cause it was too remote from that end, and its tendency too indirect to render it fatally liable to that objection. The repeal put an end to the existence of the restriction. But if the restriction had not been repealed I cannot admit that the want of the indorsement would have in any wise affected a *bonâ fide* holder, or in other words, one who had honestly bought the bonds for a valuable consideration without knowledge of any infirmity in the title of his vendor. The United States made them payable "to the State of Texas, or bearer." Delivery passed the title. Texas could not restrain their transferability in the markets of the world, according to the law merchant, in any case without bringing home notice to the party sought to be implicated or putting upon the bonds something which must necessarily operate as a notice to every buyer.

Winston v. *Westfeldt** has an important bearing upon this subject. There the holder of a promissory note had been enjoined from transferring it. He transferred it, underdue, by indorsement. The indorsee gave a valuable consideration and took it without notice of any defect. It was held that the title of the indorsee was valid, notwithstanding the injunction.

The fact that the bonds were overdue when the bank bought them does not affect the case. The transferee of overdue negotiable paper takes it liable to all the equities to which it was subject in the hands of the payee. But those equities must attach to the paper itself, and not arise

* 22 Alabama, 760.

from any collateral transaction. A debt due to the maker from the payee at the time of the transfer cannot be set off in a suit by the indorsee of the payee, although it might have been enforced if the suit had been brought by the latter.* The result is the same whether the transfer be made by indorsement or delivery. But the protection of this principle is confined to the maker or obligor. It does not apply as between successive takers. Actual notice is necessary to affect them. There is no adverse presumption. Each one takes the legal title, and his equity is equal to that of his predecessors. "The equities being equal, the law must prevail."† The position of the transferee must be at least as favorable as that of the assignee of a chose in action. There the assignee takes subject to the equity residing in the debtor, but not to an equity residing in a third person against the assignor.

Chancellor Kent, speaking of this rule in this class of cases, says: "The assignee can always go to the debtor and ascertain what claims he may have against the bond or other chose in action which he is about purchasing from the obligee, but he may not be able with the utmost diligence to ascertain the latent equity of some third person against the obligee. He has not any object to which he can direct his inquiries, and for this reason the assignee, without notice, of a chose in action, was preferred in the late case of *Redfearn* v. *Ferrier et al.*,‡ to that of a third party setting up a secret equity against the assignor. Lord Eldon observed in that case that if this were not so no assignment could ever be taken with safety."§ This reasoning is strikingly applicable in the case before us. It was the duty of the cashier to inquire at the Treasury Department. He did so, and learned that there was no objection to any of the bonds but those which had been delivered to White and Chiles, and he be-

* Burrough *v.* Moss, 10 Barnewall & Cresswell, 558; Whitehead *v.* Walker, 10 Meeson and Welsby, 696; Hughes *v.* Large, 2 Pennsylvania State, 103; Gullett *v.* Hoy, 15 Missouri, 400; Story on Bills, § 220.

† Judson *v.* Corcoran, 17 Howard, 614.

‡ 1 Dow, 50. § Murray *v.* Lilburn, 2 Johnson's Chancery, 443.

came satisfied that those involved in this controversy did not belong to that class. It was impossible for him to find and consult all those through whose hands they might have passed before they were offered to the bank.

If negotiable paper, underdue, be in the hands of a *bonâ fide* holder, any subsequent holder may avail himself of that fact against the equity of the maker.* Every holder is presumed to have acquired his title before the maturity of the instrument and *bonâ fide*. The burden of proof rests upon the party alleging the contrary.† It is only in case of dishonor that the equities of the maker, or obligor, can be set up against a *bonâ fide* holder. It may be doubted whether these bonds belonged to that class.‡ I have preferred to consider the case in this aspect, upon the hypothesis most favorable to the complainant. It is unnecessary to resolve, in this case, either way the doubt suggested.

The rights of the holders of commercial paper were largely considered by this court in *Goodman* v. *Simonds*,§ and in *Murray* v. *Lardner*.‖ What was there said need not be repeated.

It remains to consider the case in the light of the evidence. In order to maintain the decree it is necessary for the complainant to establish the following facts:

(1.) That the bonds specified in the decree were of those disposed of by the military board to White and Chiles;

(2.) That the transaction was in aid of the rebellion;

(3.) That the bank, before it bought, had notice of the infirmity of the title of White and Chiles.

And these facts must be established by the measure of proof requisite to overcome the responsive denials of the answer.

It is shown by the complainant's own testimony—and there is none to the contrary—that six of the bonds here in

* 3 Kent's Commentaries, 92; Chitty on Bills, 221; Smith *v.* Hiscock, 14 Maine, 449; Fairclough *v.* Pavia, 9 Exchequer, 690; Oulds *v.* Harrison, 10 Id. 579.

† Byles on Bills, 165.

‡ 9 Opinions of the Attorneys-General, 413; 11 Id. 332.

§ 20 Howard, 343.

‖ 2 Wallace, 110.

question were transferred and delivered by the authorities of the State pursuant to an act of the legislature to the Southern Pacific Railroad Company. They are numbered 4703, 4705, 4706, 4748, 4813, and 4825. It is proved by the same testimony that four more were not of those delivered to White and Chiles. They are numbered 4960, 4961, 4962, and 4963. It is also proved that five of the bonds, Nos. 4843, 4844, 4927, 4928, and 4929, were sold to the bank by Jay Cooke & Co. It is not shown when Cooke & Co. acquired them. It is, therefore, presumed they bought them under-due and *bonâ fide*, and their title enures to the benefit of their vendee. Three of the bonds, Nos. 4226, 4227, and 4229, were bought by the bank of Wolf. There is some testimony tending to show that he bought after they were due. But there is no such proof as to his vendor. The presumption as to the latter is, therefore, otherwise. This ends the controversy as to these eighteen bonds. The remaining bond is No. 4912.

The only testimony in the record in any degree adverse to the bank upon the points in issue, is that of Comptroller Taylor and that of Judge Paschal.

In his examination-in-chief the comptroller said:

"From all the circumstances, my *opinion* is those were of the White and Chiles bonds. *That is only an opinion, however.*"

On cross-examination:

"Q. Do you know, of your own knowledge, that White and Chiles, or either of them, ever saw one of these bonds?

"A. I know it only from the papers on file in the department; that is, *from my opinion of what those papers show.*

"They are too numerous for me to present here now, and I might add, that one would have to study them very carefully, and make his *calculations* as to the different bonds.

"It would be by taking the seven hundred and eighty-two bonds that were not indorsed, and tracing them back by the evidence into the hands of those parties who held them at different times, and ascertaining, in some instances, the particular numbers that were known to be in the hands

of particular parties before the transaction between White and Chiles and the military board, and taking others, again, that came from the State of Texas, and *then drawing my conclusions as to what were White and Chiles's bonds.*"

With these admissions before us it is sufficient to remark that his testimony is clearly incompetent.* And, if not so, it would be insufficient to maintain, in behalf of the complainant, the issue between the parties. The same remarks are applicable to the testimony of Judge Paschal. So far as it affects this case it is liable to the same objections. He says, among other things: "I was employed by Governor Pease to prosecute this suit, and caused it to be instituted in 1868; and judging from a careful examination made in Texas, and in the Treasury Department here, I feel confident that the bonds redeemed for the bank, described by Mr. Taylor, were a part of the bonds which passed through the hands of White and Chiles, and I judge this from the circumstances which he has stated." This is mere opinion, founded upon data not disclosed and in part upon the opinion of another witness. Further remarks upon the subject are unnecessary. There are other defects in the evidence for the complainant, but it is unnecessary to advert to them. Altogether it fails wholly to sustain the case made by the bill. The decree of the court below is, in my opinion, properly reversed.

THE CONFISCATION CASES.

[SLIDELL'S LAND.]

1. An information *in rem* under the fifth, sixth, and seventh sections of the Confiscation Act of July 17th, 1862, for the confiscation of the real estate of a person falling within the provisions of those sections—such information not being in any sense a criminal proceeding—is not, after default made and entered, and after a final judgment of condemnation, to be held fatally defective because it has averred that the property

* Armstrong *v.* Boylan, 1 Southard, 76; Morehouse *v.* Mathews, 2 Comstock, 514.

seized belonged to some one who was one OR another of the persons referred to in the fifth and sixth sections of the act (thus making its allegations in the alternative), and has not averred it otherwise.

2. When an information avers that on a day named a seizure was made by the marshal, under written authority given him by the district attorney, in compliance with instructions issued to *him* by the Attorney-General of the United States, *by virtue of the act of Congress of July 17th*, 1862 (the Confiscation Act above mentioned); and when, to a citation or monition founded on the information, default has been made, it will, after such final judgment and condemnation, be presumed that the requirements of the statute (which direct apparently that a seizure be made *prior* to filing the information, and that this seizure be by order of *the President of the United States*) have been complied with.
3. When an information under the said act, filed in the District Court, is really in common-law form, and the proceeding has the substance and all the requisites of a common-law proceeding, the fact that the information is entitled "a *libel*" of information, and that the warrant and citation is called a "monition," does not convert it into a proceeding on the admiralty side of the court.
4. What amounts to a sufficient service of process under the said act.
5. The fact that the warrant, citation, and monition in the District Court was not signed by the clerk of the court is unimportant, it having been attested by the judge, sealed with the seal of the court, and signed by the deputy clerk.
6. Where, on an information under the said act, the information alleging that the property belongs to A., and that it is liable to forfeiture under the act—all allegations being in form—the court has proceeded, as the act directs it to do after default, to hear and determine the case, and, only after such hearing and consideration, condemns the property, it must be presumed that the property belonged to a person engaged in the rebellion, or one who had given aid and comfort thereto.
7. The President's proclamations of amnesty in the year 1868 did not amount to a repeal of the Confiscation Act.

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

On the 17th of July, 1862, Congress passed an act entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes."*

The act contains fourteen sections. The first prescribes the punishment for treason; punishing it with death, or, in

* 12 Stat. at Large, 589.

the discretion of the court, with imprisonment and fine, and liberating the offender's slaves.

The second provides for the punishment of the offence of inciting, setting on foot, or engaging in any rebellion or insurrection against the authority of the United States or the laws thereof, or engaging in or giving aid and comfort to the rebellion then existing.

The third declares that parties guilty of either of the offences thus described, shall be forever incapable and disqualified to hold any office under the United States.

The fourth provides that the act shall not affect the prosecution, conviction, or punishment of persons guilty of treason before the passage of the act, unless such persons are convicted under the act itself.

The fifth section enacts:

"That to insure the speedy termination of the present rebellion, it shall be *the duty of the President of the United States to cause the seizure* of all the estate and property, money, stocks, credits, and effects of the persons hereinafter named in this section, and to apply and use the same, and the proceeds thereof, for the support of the army of the United States, that is to say:

"*First.* Of any person hereafter acting as an officer of the army or navy of the rebels, in arms against the government of the United States.

"*Secondly.* Of any person hereafter acting as President, Vice-President, member of Congress, judge of any court, cabinet officer, foreign minister, commissioner, or consul of the so-called Confederate States of America.

"*Thirdly.* Of any person acting as governor of a State, member of a convention or legislature, or judge of any court of any of the so-called Confederate States of America.

"*Fourthly.* Of any person who having held an office of honor, trust, or profit in the United States, shall hereafter hold an office in the so-called Confederate States of America.

"*Fifthly.* Of any person hereafter holding any office or agency under the government of the so-called Confederate States of America, or under any of the several States of the said Confederacy, or the laws thereof, whether such office or agency be

national, State, or municipal in its name or character: *Provided*, That the persons, thirdly, fourthly, and fifthly, above described, shall have accepted their appointment or election since the date of the pretended ordinance of secession of the State, or shall have taken an oath of allegiance to, or to support the constitution of the so-called Confederate States.

"*Sixthly.* Of any person who, owning property in any loyal State or Territory of the United States, or in the District of Columbia, shall hereafter assist and give aid and comfort to such rebellion; and all sales, transfers, or conveyances of any such property, shall be null and void; and it shall be a sufficient bar to any suit brought by such person for the possession or the use of such property, or any of it, to allege and prove that he is one of the persons described in this section."

The sixth section makes it the duty *of the President* to seize and use as aforesaid all the estate, property, moneys, stocks, and credits of persons within any State or Territory of the United States, other than those named in the fifth section, who, being engaged in armed rebellion, or aiding and abetting the same, shall not, within sixty days after public warning and proclamation duly made by the President of the United States, cease to aid, countenance, and abet such rebellion, and return to their allegiance to the United States.

The seventh section provides:

"That to secure the condemnation and sale of any of 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, or into which the same, if movable, may first be brought, which proceedings shall conform, *as nearly as may be, to proceedings in admiralty or revenue cases*, and *if* said property, whether real or personal, *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 enemy's property*, and become the property of the United States, and may be disposed of as the court

shall decree, and the proceeds thereof paid into the treasury of the United States, for the purposes aforesaid."

The eighth section authorizes the said courts to make such orders, and establish such forms of decrees of sale, and direct such deeds and conveyances to be executed, where real estate shall be the subject of sale, as shall fitly and efficiently effect the purposes of the act, and vest in the purchasers of the property good and valid titles.

The thirteenth section authorizes the President, at any time thereafter, by proclamation, to extend to persons who may have participated in the existing rebellion, pardon and amnesty, with such exceptions, and at such time and on such conditions, as he may deem expedient.

The fourteenth section gives the courts aforesaid full power to institute proceedings, make orders and decrees, issue process, and do all other things to carry the act into effect.

In pursuance of this act, the United States, on the 15th of September, 1863, filed what it entitled a "*libel*" of information, but what in form and substance was an information, in the District Court of the United States for the District of Louisiana, for the condemnation and forfeiture of certain real property, to wit, eight hundred and forty-four lots and ten squares of ground in New Orleans, all described in the information. One of the averments of the information was that the lots and squares had, on the 15th of August, 1863, been seized by the marshal, in compliance with written instructions issued by the Attorney-General of the United States to the district attorney thereof, by *virtue of the act of Congress of July*, 1862, the act above quoted, and that they belonged to John Slidell. It was not, however, said in terms that the seizure was made by order of the President of the United States. Other averments were the following:

"5th. That the said John Slidell, subsequently to said 17th day of July, in the year of our Lord 1862, did act as an officer of the army or navy of the rebels in arms against the govern-

ment of the United States, OR as a member of Congress, OR as a judge of a court, OR as a cabinet officer, OR as a foreign minister, OR as a commissioner, OR as a consul of the so-called Confederate States of America; OR that while owning property in a loyal State or Territory of the United States, or the District of Columbia, he did give aid and comfort to the rebellion against the United States, and did assist such rebellion.

"6th. That the said John Slidell, subsequently to said 17th day of July, in the year of our Lord 1862, did act as governor of a State, OR as a member of a convention or legislature, OR as judge of a court of one of the so-called Confederate States of America, to wit, the State of Louisiana, OR did hold an office in the so-called Confederate States of America, after having held an office of trust or profit in the United States; OR did hold an office or agency under the government of the so-called Confederate States of America, OR under one of the States thereof, said office being national, State, or municipal in its name and character, which said office or agency he accepted after the date of the pretended ordinance of secession of the State of Louisiana; that he did take an oath of allegiance to, or to support the constitution of the so-called Confederate States.

"7th. That the said John Slidell, subsequently to said 17th day of July, in the year of our Lord 1862, within a State or Territory of the United States, was engaged in armed rebellion against the government of the United States, and did not, within sixty days after public warning and proclamation duly given and made by the President of the United States, on the 25th day of July, in the year of our Lord 1862, cease to aid, countenance, and abet such rebellion, and return to his allegiance to the United States.

"8th. That the said John Slidell, subsequently to said 17th day of July, in the year of our Lord 1862, within a State or Territory of the United States, was engaged in aiding and abetting an armed rebellion against the government of the United States, and did not, within sixty days after public warning and proclamation duly given and made on the 25th day of July, in the year of our Lord 1862, by the President of the United States, cease to aid, countenance, and abet such rebellion, and return to his allegiance to the United States."

On the presentation of the libel of information the Dis-

trict Court directed a warrant to issue to the marshal, commanding him to seize the property described, and to cite and admonish the owner, or owners, and all other persons having, or pretending to have, any right, title, or interest in or to the same, to appear before the court on or before the third Monday from the service thereof, to show cause, if any they had, why the property should not be condemned and sold according to the prayers of the libellants.

The "order of publication," made September 15th, 1863,

"*Ordered*, That notice be given to the owner and owners of said property and real estate, and all persons interested or claiming an interest therein, to appear and answer this information on the 5th day of October, 1863, and show cause, if any they have, why said property and real estate, and the right, title, and interest therein of the said John Slidell should not be condemned and sold according to law; and that notice be given by posting a copy of this order upon the *front* door of the court-house in the district, and by publication in the *Era* newspaper twice a week previous to said 5th day of October, A.D. 1863, the first publication to be on or before 19th instant."

The marshal, on the 3d of October, returned:

"Received, 16th September, 1863, and on the same day, in obedience to the within order of seizure, seized and took into my possession the within described property, posted copies of the warrant, libel, and judge's order on the *door* of the court-house, published *monition* in the *Era*, a newspaper printed and published in New Orleans, on the 18th, 23d, 26th, 30th September, 3d October, 1863, returnable 5th October, 1863."

The warrant, citation, and monition was signed by the *deputy* clerk (not by the clerk), and was attested by the signature of the judge and the seal of the court.

On the 18th of April, 1864, after due monition and proclamation, *no claim or defence having been interposed, a default was entered*, and the information was adjudged and taken *pro confesso*. Depositions were then taken and filed, and on the 18th of March, 1865, after consideration of the law and the evidence, the District Court adjudged and decreed a con-

demnation and forfeiture of the property to the United States; there having been, as the reader will understand without its being said, no jury trial in the case. The exact language of the decree, after its recital, was:

"That the eight hundred and forty-four lots and ten squares of ground, with all the buildings and improvements thereon, *property of John Slidell*, and *fully described in the libel of information on file*, be, and the same are hereby, condemned as forfeited to the United States."

Subsequently, a *venditioni exponas* was issued, under which portions of the property were sold. The money produced, it was said at the bar, was yet in the registry.

On the 17th of March, 1870, the case was removed to the Circuit Court by writ of error, where the judgment of the District Court was reversed and the libel of information was ordered to be dismissed. The sales, however, were confirmed.

That court said:

"The information is a remarkable specimen of loose pleading and uncertain statement. From the allegation in the fifth article no man can tell what John Slidell did. The next article is of the same ambiguous and unconsequential nature. The extreme ambiguity of the charges in it is something more than a matter of form; it amounts to a substantial defect. There is, in truth, no charge at all. There is no charge that Slidell acted as a foreign minister of the confederacy. The allegation is that he either did that or something else; but we are not informed what. If the defect were one of form it might be amended; but being substantial, it seems to me it is fatal.

"The other articles of the information do not save it. The same ambiguity is kept up in the seventh and eighth articles as in the previous ones, but they do not set forth any of the offences which in the statute are made the basis or cause of confiscation. They are evidently meant to be assigned under the sixth section of the act. But that section refers to persons who in any State or Territory of the United States, other than those named as aforesaid, were engaged in the rebellion. Now, the States named, as aforesaid, were the loyal States, which had just been named

in the last clause of the fifth section. Therefore, the States or Territories, other than those, were the disloyal States or rebellious States. So that the sixth section of the act only refers to persons who within any disloyal or rebellious States or Territory were engaged in the rebellion.

"Yet the seventh article of the information merely alleges that Slidell, within a State or Territory of the United States, was engaged in rebellion. It does not make a charge within the statute.

"The whole information, therefore, is substantially defective, and the judgment must be reversed."

From this action of the Circuit Court the case was brought here.

It is proper here to refer to certain proclamations relied on in support of the decree of that court.

On the 4th of July, 1868, the President, in pursuance of authority given to him by Congress, issued his proclamation.* After preamble reciting the then condition of things, it said:

"And whereas it is believed that amnesty and pardon will tend to secure a complete and universal establishment and prevalence of municipal law and order in conformity with the Constitution of the United States, and to remove all *appearances* or *presumptions* of a retaliatory or vindictive policy on the part of the government, attended by unnecessary disqualifications, pains, penalties, confiscations, and disfranchisements, and on the contrary to promote and procure complete fraternal reconciliation among the whole people, with due submission to the Constitution and laws.

"Now, therefore, I hereby proclaim and declare unconditionally and without reservation to all and to every person who directly or indirectly participated in the late insurrection or rebellion, except such person or persons as may be under presentment or indictment in any court of the United States having competent jurisdiction, upon a charge of treason or other felony, a full pardon and amnesty for the offence of treason against the United States, or of adhering to their enemies during the late

* Appendix No. 6, Stat. at Large, 1868.

civil war, with restoration of all rights of property except as to slaves, and except also as to any property of which any person may have been legally divested under the laws of the United States."

On the 25th of December, 1868, another proclamation was made, relinquishing all previous reservations and exceptions, proclaiming and declaring unconditionally and without reservation to all and every person who directly or indirectly participated in the late insurrection or rebellion a full pardon and amnesty for the offence of treason against the United States, or of adhering to their enemies during the late civil war, with restoration of all rights, privileges, and immunities under the Constitution and the laws which have been made in pursuance thereof.

Mr. Thomas Allen Clarke, against the decree of confiscation:

1. *The District Court was without jurisdiction.* The jurisdiction established by the Confiscation Act is special. It does not enlarge the admiralty and revenue jurisdiction. It only refers to the mode of procedure therein as that to be observed. A limited jurisdiction is given to this court. It had no such jurisdiction before. Its powers in this regard are the same as and no greater than such powers would be if a new court had been created to exercise the jurisdiction.

2. *No property is within the seventh section unless it have been seized previously to the filing of the information.* There is nothing like such a seizure in this case.

Further. Such previous seizure must be made by order of the President of the United States. The libel avers that the district attorney, as directed by the Attorney-General, caused the seizure. This is not tantamount to an order from the President. The averment should have been that the President had caused the seizure, and this could have been established by proof of seizure through the intermediate directions. The authority of seizure is intrusted to the President. He alone can exercise that authority. *His* will must be manifested. This court has repeatedly determined that the authority is derived from the war powers which Congress pos-

sesses, and has intrusted to him. In *The Sea Lion*,* Congress authorized the President to license certain traffic with the enemy. The various officers, army, navy, and treasury, sanctioned the trade, but the court determined that their acts were not and could not be within the warrant of the act of Congress. "The President only could grant such a license." The action of his subordinates was not presumable as by his authority. Neither in the duties or authority of the Attorney-General is there any such relation to the President as would authorize him to act as the organ of the President in reference to seizures. On the contrary, it is inferable from the fact that the seizure is a war seizure, that the officers charged with the subordinate executive power in matters of war would be the persons charged with the seizure, rather than a peace officer.

3. *The proceedings were on the admiralty instead of the common-law side of the court.* The proceedings commenced by a *libel* of information, not by an information. The warrant and citation is called a monition. The witnesses were examined out of court; and, greatest of all, the case was tried by the judge without the presence of a jury. This sort of mistake is one which has been made many times under the Confiscation Act, both in Louisiana† and elsewhere.‡ But wherever made it has been fatal; as the cases to which we refer in illustration of the fact, themselves show.

4. *There was no service of process.* The District Court ordered "that notice be given by posting a copy of this order upon the *front* door of the court-house in this district, and *by publication in the Era* newspaper, twice a week previous to said 5th day of October, A.D. 1863, the first publication before 19th instant." All the service made of this order was by posting copies of the order on the door of the court-house. This was no service or substituted service.

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* 5 Wallace, 630; and see the Ouachita Cotton Case, 6 Id. 521; and Coppell *v.* Hall, 7 Id. 542.

† See the case of the Union Insurance Company, the Armstrong Foundry, the St. Louis Foundry, 6 Wallace, 759, *et seq.*

‡ See United States *v.* Hart, Ib. 770; Morris Collier, 8 Id. 508.

5. *The libel of information was informal.* It contained no charge against Slidell. We iterate and invoke to our benefit as unanswerable in this matter what is said by the Circuit Court. The law has long been settled, from the time of Sergeant Hawkins, and before, that charges in the disjunctive are erroneous, and do not authorize judgment on either.*

Still further. The twenty-second admiralty rule ordains that—

"All informations and libels of information upon seizures for breach of the revenue, navigation, or other laws of the United States, . . . shall aver the same to be contrary to the form of the statute or statutes of the United States in such case provided."

The absence of this averment has, upon error, been determined to be fatal both in indictments and informations.†

6. *The warrant, citation, and monition were not signed by the clerk* of the court, who alone was the proper person to sign them.

7. *There is no finding that the property was Slidell's*, nor the property of any one liable to the penalty of the Confiscation Act.

Notwithstanding the default, it was the duty of the court to "proceed to hear and determine the case according to law, as is directed by the 89th section of the act of March 2d, 1799,‡ respecting forfeitures incurred under that act."

The rule in existence at the time of the passage must be regarded as embraced in effect in the statute of 1862.

8. *The proclamations of* 1868 *effect a repeal of the Confiscation Act.* They restore all rights of property. Proceedings hostile to any of the parties engaged in the late civil war would be in violation of the spirit and letter of the proclamations. The war has ceased. Further action "to insure the speedy ter-

* 2 Hawkins's Pleas of the Crown, chapter 25, § 58; State *v.* O'Bannon, 1 Bailey, 144.

† 2 Hawkins's Pleas of the Crown, chapter 25, § 116; chapter 26, § 18.

‡ 1 Stat. at Large, 696.

mination of the (then) present rebellion," is not required. The army is no longer arrayed upon a war footing, and the proceeds of property of the offenders is no longer needed for such a use.

The cases of *Yeaton* v. *The United States*,* and *United States* v. *Preston*,† determine that the repeal of the law pending an appeal leaves nothing to operate upon, and that the decree must be reversed.

In this case the money produced by the sales is in the registry.

Mr. C. H. Hill, Assistant Attorney-General, contra.

Mr. Justice STRONG delivered the opinion of the court.

The Circuit Court was of opinion that the information was insufficient; that it did not aver distinctly and separately what John Slidell had done; that it, in fact, made no charge at all against him, and, therefore, that it was substantially defective. In this opinion we cannot concur. As was said in *Miller* v. *The United States*,‡ the proceedings directed by the fifth, sixth, and seventh sections of the Confiscation Act are proceedings *in rem*, and they are required to conform, as nearly as may be, to proceedings in admiralty or revenue cases. They are in no sense criminal proceedings, and they are not governed by the rules that prevail in respect to indictments or criminal informations. It may be conceded that an indictment or a criminal information which charges the person accused, in the disjunctive, with being guilty of one or of another of several offences, would be destitute of the necessary certainty, and would be wholly insufficient. It would be so for two reasons. It would not give the accused definite notice of the offence charged, and thus enable him to defend himself, and neither a conviction nor an acquittal could be pleaded in bar to a subsequent prosecution for one of the several offences. But in proceedings against real or personal property to obtain a decree of con-

* 5 Cranch, 283. † 3 Peters, 57. ‡ 11 Wallace, 268.

demnation and forfeiture under the Confiscation Act, liability of the property seized to confiscation is alone the subject of inquiry. No judgment is possible against any person. The enactment of Congress was that property belonging to any one embraced within several classes of persons should be subject to seizure and condemnation. Persons were referred to only to identify the property. Not all enemies' property was made confiscable; only such as was designated by the act, and reference to the ownership was the mode selected for designating that which was made liable to confiscation. If the property belonged to a person who had filled either of the offices specified, or who had done any of the acts mentioned in the fifth, sixth, or seventh articles of the information, it was the property which the act had in view. The United States had, therefore, only to aver and prove that the lots and squares seized belonged to some one who was one or another of the persons referred to in the fifth or sixth sections of the act of Congress. In either alternative the property was made subject to confiscation. It may be the information might have been more artificially drawn, and that if the owner had appeared in answer to the citation he might have interposed successfully a special demurrer. But after default was made and entered, and after a final judgment of condemnation, faults in the mode of pleading, mere formal faults, can be of no importance. They cannot have injured any one. If the information set forth, though informally, a substantial right of action, it was sufficient, and the judgment cannot be disturbed because of such faults. And that it did in this particular cannot be questioned, for if the ownership of the property was in a person embraced in either class mentioned in the fifth and sixth sections of the act (no matter which class), it was liable to confiscation. This the information averred. It pursued the words of the law, and that in an admiralty or a revenue case is all that is required. In the case of *The Emily and the Caroline*,* which was a case where

* 9 Wheaton, 381.

the libel described the offence in the alternative, pursuing the words of the law, alleging that the vessel was *fitted out* within a port of the United States, *or caused to be sailed* from a port within the United States, for the purpose of carrying on trade or traffic in slaves, the same objection was raised which has been raised in this case, namely, that the charge was in the alternative. But it was overruled. The court admitted that fitting out and causing to sail were distinct offences, but denied that charging them in the alternative was exceptionable. It was said that in "admiralty proceedings a libel in the nature of an information does not require all the formality and technical precision of an indictment at common law. If the allegations are such as plainly and distinctly to mark the offence, it is all that is necessary. And where it is founded upon a statute, it is sufficient if it pursues the words of the law." Reference was then made with approbation to a note of Judge Story, in the beginning of 7th Cranch, to the case of *The Caroline*,* in which it was said the court did not mean to decide that stating the charge in the alternative would not have been sufficient if each alternative had constituted an offence for which the vessel would have been forfeited. The court then added these observations: "It is said this mode of alleging two separate and distinct offences leaves it wholly uncertain to which of the accusations the defence is to be directed. This objection, if entitled to consideration, would apply equally to an information laying each offence in a separate count," and they concluded that the objection, if available at all, must go to the full length of limiting every information to a single offence, which they thought was not required by any principle of justice or sanctioned by any rule of practice applicable to admiralty proceedings. The same doctrine was asserted by Chief Justice Marshall in *Jacob* v. *The United States*.† So in Parsons on Shipping and Admiralty,‡ the author, in view of the authorities, gives his opinion that a libellant may state his case in the alternative. So in *Cross*

* 7 Cranch, 496.

† 1 Brockenbrough, 520.

‡ Vol. 2, p. 383, edition of 1869.

v. *The United States*,* Judge Story remarked that "in proceedings in admiralty the same strictness is not required as in proceedings in common-law courts. And where the seizure is on land," said he, "although the proceedings would seem to be analogous to informations in the Exchequer, yet I do not know that in our courts the rigid principles of the common law applicable to such informations have been solemnly recognized." These considerations, in our opinion, justify us in ruling that the Circuit Court erred in deciding that the information is fatally defective because it does not aver distinctly and separately what John Slidell had done, but makes its allegations in the alternative.

No other reason than this we have mentioned, and which we regard as insufficient, was assigned by the Circuit Court for reversing the decree of confiscation, and ordering the information to be dismissed. But during the argument in this court, other objections have been urged against the decree, which, if they are valid, would justify its reversal, though some of them would not warrant the dismissal of the libel. It, therefore, becomes necessary to examine and determine whether they exhibit error in the action of the District Court.

The first of these objections, and the one most pressed, is, that the court was without jurisdiction of the case. It is said no other property than such as had, prior to the filing of the information, been seized by the direction of the President of the United States, was within the purview of the seventh section of the Confiscation Act, and, therefore, within the limited jurisdiction of the District Court; and it is insisted the record does not show there had been any executive seizure of the eight hundred and forty-four lots and ten squares of ground before the information was filed, or, indeed, at any time.

Undoubtedly, though not an inferior court, the District Court is one of limited jurisdiction, and that it has jurisdic-

* 1 Gallison, 31.

tion of the particular case which it attempts to adjudicate, must always appear. Undoubtedly, also, only such property as has been seized by executive order is within the power of that court for confiscation proceedings. Thus much is conceded. But it is a mistaken assertion that the record in this case does not show an executive seizure of the property condemned before the District Court assumed any jurisdiction over it. The information avers that such a seizure was made on the 15th of August, 1863, by the marshal, under written authority given him by the district attorney, in compliance with instructions issued to him by the Attorney-General of the United States, by virtue of the act of Congress of July 17th, 1862 (the Confiscation Act); and to a citation or monition founded on the information, default was made. What the effect of this default was we do not propose now to discuss at length. We have gone over the ground recently in the case of *Miller* v. *The United States*,* and to that case we refer. In view of what was there said and decided, and in view of the authorities cited, it must be held that the default established the truth of all the material averments in the information, and among others, that there had been an executive seizure before the information was filed. It was equivalent in effect to a confession. Now, while it is true a party cannot, by consent, confer jurisdiction where none would exist without it, it is equally true that when jurisdiction depends upon the existence of a fact, its existence may be shown as well by the confession of a party as by any other evidence.

It is next contended that the court had no jurisdiction, even if the seizure alleged in the information was made, because it is not averred to have been made by order of the President of the United States. As we have seen, the libel sets forth a seizure made by the marshal, under authority given by the district attorney, in pursuance of instructions issued by the Attorney-General of the United States, *by virtue of the act of Congress* (viz., the Confiscation Act). It is said

* 11 Wallace, 268.

this exhibits no authority given by the President for the seizure, and that the Attorney-General was not empowered to direct it. But if the seizure was made by virtue of the act of Congress, as the information avers it was, it was necessarily caused to be made by the President, for he only was empowered by the act to cause it. Then the Attorney-General must have been the agent of the President to give instructions to the district attorney, and through him to the marshal. The language of the statute is, "it shall be the duty of the President to cause the seizure," &c. This implies that the seizure is to be made by the agents of the President. And a direction given by the Attorney-General to seize property liable to confiscation under the act of Congress must be regarded as a direction given by the President. In *Wilcox* v. *Jackson*,* it was ruled that the President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties. Therefore, where, by an act of Congress, all lands reserved from sale by order of the President were exempted from pre-emption, this court ruled that a request for a reservation made by the Secretary of War for the use of the Indian department, must be considered as made by the President within the meaning of the act. The same doctrine was asserted in *United States* v. *Eliason*.† It may, we think, be properly applied to the present case. While it is true the right of seizure and confiscation grows out of a state of war, the means by which confiscation is effected have a very appropriate relation to the duties of the law department of the government. But whether this is so or not, it is sufficient that the information in this case avers the seizure was made by virtue of the act of Congress. It must, therefore, have been caused by the President.

It is next objected that the suit was on the admiralty, and not on the law side of the District Court. The seventh section of the Confiscation Act enacts that the proceedings shall conform as nearly as may be to the proceedings in ad-

* 13 Peters, 498.

† 16 Id. 291.

miralty or revenue cases. Strict conformity is not required. No doubt in cases of seizure upon land, resort should be had to the common-law side of the court, and such, *in substance*, was, we think, the case here. Everything necessary to a common-law proceeding *in rem* is found in the record. An information was filed (called a libel of information, it is true, but still an information), a citation as well as a monition was issued, a default was taken, and, after consideration of the evidence, condemnation was adjudged. What was lacking in this to a common-law proceeding *in rem?* The principal lack alleged is that there was no jury trial. But in courts of common law no jury is called when there is no issue of fact to be tried. An inquest is sometimes employed to assess damages; but a jury to find facts is never required where there is no traverse of those alleged, and where a defendant has defaulted. What matters it then that the information was called a libel of information, or that the warrant and citation is called a monition? The substance and all the requisites of a common-law proceeding are found in the record. Technical niceties are not required either in admiralty or revenue cases.*

It is next objected there was no sufficient service of the process; but we think the return of the marshal shows exact compliance with the order of the court directing service, and the manner in which it should be made. The order was that notice be given in two ways to the owner or owners of the property, and all persons interested therein, requiring them to appear and answer the information. The first of these ways was by posting a copy of the order on the front door of the court-house, and the second was by publication, viz., publication of the requirement to appear in the *Era* newspaper. In the execution of the order the marshal went beyond it. He posted copies of the information, of the warrant, and of the order of the judge, and he published the monition, which was a citation, as he was directed. The service was, therefore, sufficiently made.

* Samuel, 1 Wheaton, 9; The Hoppet, 7 Cranch, 489.

It is further objected that the information was informal, in that it contained no charge against Slidell, the alleged owner, but that its averments were in the disjunctive. We have already sufficiently answered this. So, too, the absence of any averment that the causes of forfeiture were contrary to the form of the statute or statutes of the United States in such case provided, is no sufficient reason for reversing the judgment of the District Court. Such an averment is required by the twenty-second admiralty rule, but even in admiralty a failure to make it cannot be taken advantage of in a court of errors.* The defect is only formal. It is true the absence of such averment in indictments and criminal informations has been held to be a fatal fault, but for reasons inapplicable to civil proceedings, and we need not repeat that the present is a civil case.

Another objection urged against the proceedings in the District Court is, that the warrant, citation, and monition was not signed by the clerk of the court. It was attested by the judge, sealed with the seal of the court, and signed by the deputy clerk. This was sufficient. An act of Congress authorized the employment of the deputy, and in general, a deputy of a ministerial officer can do every act which his principal might do.†

A further objection urged against the adjudication of forfeiture made by the District Court is, that it was made without any finding that the property belonged to John Slidell, or any person included in either of the classes designated in the fifth and sixth sections of the Confiscation Act. This is a renewal of the complaint so earnestly pressed in *Miller* v. *The United States*, and which we held to be without foundation. It is said that notwithstanding the default, it was the duty of the court to "proceed to hear and determine the case according to law, as is directed by the eighty-ninth section of the act of March 2d, 1799,‡ respecting forfeitures incurred under that act." But were this conceded, of what avail would it be in this case in support of the objection?

* The Merino, 9 Wheaton, 401.
† Comyn's Digest, Officer, D., 3.
‡ 1 Stat. at Large, 696.

The court did proceed to hear and determine the case after the default was entered. And it was not until after such hearing and consideration that the property was condemned. This appears by the record. Having heard and considered evidence, it must be presumed the court found that the property belonged to a person engaged in the rebellion, or one who had given aid or comfort thereto, as well as all other facts necessary to the rendition of the judgment. This is a presumption always made in support of judgments of courts after their jurisdiction is made to appear. No rule of law required the District Court to state in detail in its record its findings of fact, and no such practice has prevailed in any court except some which are both of limited and inferior jurisdiction. Nor is it to be considered in a court of error whether the evidence was sufficient to warrant the findings presumed to have been made, and without which the judgment could not have been given. A less degree of evidence is certainly needed after a default. Even in *United States* v. *The Lion*,* so much relied upon, where a condemnation was sought under an act of Congress which enacted that after the default the court should proceed to hear and determine the case according to law, Judge Sprague said, "To what extent there must be a hearing must depend on the circumstances of the case." "The court," said he, "will at least examine the allegations of the libel, to see if they are sufficient in law, the return of the marshal, and such affidavit or affidavits as the district attorney shall submit." And he added that a wilful omission by the owners to answer might of itself satisfy the court that a forfeiture should be decreed. But without further consideration of this objection, we refer to the opinion delivered in *Miller* v. *United States*, to which we still adhere.

There remains but one other matter which requires notice. It is contended that the proclamations of amnesty in 1868 amounted in effect to a repeal of the Confiscation Act. To this we cannot assent. No power was ever vested in the

* 1 Sprague, 399.

President to repeal an act of Congress. Moreover, the property condemned in this case became vested in the United States in 1865, by the judgment of forfeiture, and the sale under the *venditioni exponas* merely converted into money that which was the property of the government before. No subsequent proclamation of amnesty could have the effect of divesting vested rights. Even the express repeal of a statute does not take away rights of property which accrued under it while it was in force.

We have thus reviewed the whole record of the proceedings in the District Court, and we have been able to discover nothing which justified a reversal of the decree of condemnation.

JUDGMENT OF THE CIRCUIT COURT REVERSED, and the cause remanded with instructions to

AFFIRM THE JUDGMENT OF THE DISTRICT COURT.

Mr. Justice CLIFFORD: I dissent from the opinion of the court in this case because it is repugnant to the repeated decisions of this court, to the eighty-ninth section of the Collection Act, and to the twenty-ninth admiralty rule of this court, which was adopted as the rule of decision more than thirty years ago; and because it is opposed to the whole current of the decisions of the admiralty courts and to the rules laid down by the most approved writers upon admiralty law.*

Apart from that, I also adhere upon the merits to the dissenting opinion in the case of *Miller* v. *United States*.†

Mr. Justice FIELD: I dissent from the opinion and judgment of the court on the grounds stated in the dissenting opinions in the cases of *Miller* v. *United States*, and *Tyler* v.

* The Vengeance, 3 Dallas, 297; The Sarah, 8 Wheaton, 394; 1 Stat. at Large, 696; Admiralty Rules, No. 29; The David Pratt, Ware, 495; Clerke's Praxis, art. 35; The Schooner Lyon, 1 Sprague, 400; 2 Conklin's Admiralty, 2d ed. 178; Benedict's Admiralty, §§ 449, 452; 2 Browne's Civil and Admiralty Law, 401; Dunlap's Practice, 206; 2 Parsons on Shipping and Admiralty, 400.

† 11 Wallace, 314.

Defrees, reported in the 11th of Wallace, so far as they are applicable to the facts of this case; and on the further ground that the libel of information is fatally defective in charging no one offence positively, but several offences in the alternative.

Mr. Justice DAVIS also dissented.

Mr. Justice BRADLEY, not having heard the argument, took no part in the judgment.

NOTE.

CLAIMS OF MARCUARD ET AL.

Holders of liens against real estate sold under the Confiscation Act of July 17th, 1862, should not be permitted to intervene in any proceedings for the confiscation. Their liens will not, in any event, be divested.

IN these cases, which were several appendages to the case just above reported, and which came here on error or appeal from the Circuit Court for the District of Louisiana, Marcuard, the Citizens' Bank of Louisiana, and the Merchants' Bank of New Orleans, alleged that at the time of filing the information mentioned in the foregoing case as the foundation of the sale which was made of the eight hundred and forty-four lots and ten squares of ground in New Orleans, owned by Slidell, they respectively held liens against the said property. And they were permitted by the courts below to intervene for the protection of their claims. Those courts, however—the District Court first, and the Circuit Court affirming its action—refused to let them take the proceeds of the sale.

On the different writs of error or appeals the question was whether this action was right.

Mr. Thomas Allen Clarke, for the parties appellant or plaintiffs in error, denied that it was.

Mr. C. H. Hill, Assistant Attorney-General, contra.

Statement of the case.

Mr. Justice STRONG delivered the opinion of the court.

The parties now before us complain that they were not allowed to take the proceeds of the sales. But they ought not to have been allowed to intervene. They had no interest, even if they were lien holders, in the confiscation proceedings. It was only the right of John Slidell, whatever that right was, that could be condemned and sold, and the sale under the judgment of condemnation in no degree disturbed their liens. By the decree of condemnation the United States succeeded to the position of Slidell, and the sale had no other purpose or effect than to make the thing confiscated available for the uses designated by the Confiscation Act. This was decided in *Bigelow* v. *Forrest*,* and more recently in *Day* v. *Micou* † The District Court, therefore, acted correctly in rejecting the claims of the appellants and plaintiffs in error, even if the reasons given for the rejection were insufficient, and the Circuit Court was not in error in affirming what the District Court did.

The action of the Circuit Court in the premises is, therefore,

AFFIRMED IN EACH OF THE CASES.

Mr. Justice BRADLEY did not sit during the argument, and took no part in the decision of any of the above causes.

CONRAD'S LOTS.

When, under the Confiscation Act of July 17th, 1862, an information has been filed in the District Court and a decree of condemnation and sale of the land seized been made, and the money has been paid into the registry of the court, and on error to the Circuit Court, that court, reversing the decree, has dismissed the information but confirmed the sale, and ordered the proceeds to be paid to the owner of the land—if on error by the United States to this court, this court reverse the decree of the Circuit Court, and affirm the decree of the District Court, that reversal will leave nothing on which a writ of error by the owner can act. The judgment having been reversed, the confirmation of the sale and order to pay the proceeds fall. The only judgment can be reversal again.

ERROR to the Circuit Court for the District of Louisiana.

On an information very similar to that in Slidell's case, filed in the District Court for Louisiana, by *The United States* v. *Ten*

* 9 Wallace, 339.

† 18 Id. 156.

Lots of Ground, the property of C. M. Conrad, the lots had been decreed by that court forfeited to the United States, and were sold accordingly; the money being paid into the registry of the court.

On error to the Circuit Court that judgment was set aside, and the information was ordered to be dismissed, but it was also ordered that the net proceeds of the property sold under the judgment be paid to Conrad, and that the sale stand confirmed.

Two writs of error were sued out, one by the United States and one by Conrad; that by the United States being to the action of the Circuit Court in setting aside the judgment of the District Court and ordering the information to be dismissed, and that by Conrad to the action of the court confirming the *sale* made under the judgment of condemnation and forfeiture.

On the writ taken by the United States this court (just after reversing the judgment in Slidell's case) reversed the judgment in Conrad's case also, and for the same reasons that it had reversed the judgment in Slidell's case, and remanded the cause, with instructions to affirm the judgment or decree of the District Court.

The present case was on the writ of error taken by Conrad, and upon it he now sought here to obtain a reversal of *so much of the judgment* as confirmed the sale made under the judgment of condemnation and forfeiture.

Mr. C. M. Conrad, plaintiff in error, in propriâ personâ; Mr. C. H. Hill, Assistant Attorney-General, contra.

Mr. Justice STRONG delivered the opinion of the court.

We have just decided in the case of the *United States* v. *Ten Lots of Ground, the property of C. M. Conrad* (it being a writ of error sued out by the United States), that the judgment of the Circuit Court was erroneous, and reversed it, ordering that the decree of confiscation be affirmed. This leaves nothing upon which the present writ of error can act. The judgment having been reversed, the order of confirmation of the sale, as well as the order of distribution, fall with it. We can, therefore, only repeat the judgment given in the former case, which was a judgment of reversal.

JUDGMENT REVERSED.

Justices CLIFFORD, DAVIS, and FIELD dissented from the judgment rendered, and were of opinion that only so much of the judgment of the Circuit Court should be reversed as confirmed the sale made under the decree of the District Court.

KNAPP *v.* RAILROAD COMPANY.

1. In determining a question whether a Circuit Court had erred in denying a motion to remand a case removed to it from the State court, and giving judgment as if the case had been rightly removed to it, this court cannot pay any attention to a certificate of the clerk of such Circuit Court, certifying that on the hearing of the motion in the Circuit Court certain things "appeared," "were proved," or "were admitted," or "agreed to" by the parties respectively; such facts not appearing by bill of exception nor by any case stated. Neither party can gain any advantage by such a statement.
2. The act of Congress of March 2d, 1867, allowing either of the parties to a suit—they being of a certain class described—to remove it from a State court into the Circuit Court of the United States, does not change the previously existing and settled rules which determine who are to be regarded as the plaintiff and defendant.
3. Hence, where two persons in one State, trustees, for bondholders, of a mortgage of a railroad owned by a company in another, foreclosed the mortgage, bought in the road in trust for the bondholders, and then leased it to a citizen of the State to which they themselves belonged, and then a majority of the bondholders in the State where the original company was, in pursuance of a statute there, formed themselves into a new corporation, to which the statute gave ownership and control of the road, and suit was brought in a State court against the lessee of the road by the trustees who had made the lease, *held*, that the defendant could not remove the suit from the State court to the Federal court on the ground that it was wholly between the new corporation and the lessee, and that the trustees were now merely nominal parties; they, the trustees, not having been discharged from, or in any way incapacitated from executing their trust, and there having been, in fact, unpaid bondholders who had not joined in the creation of the new corporation, and who had yet a right to call on the trustees to provide for the payment of their bonds.

ERROR to the Circuit Court for the District of Vermont; the only question in the case being whether the suit originally brought in a State court (the County Court for the

County of Bennington), had been rightly removed to the Circuit Court, in pursuance of the act of Congress of March 2d, 1867;* one enactment of which is as follows:

"That where a suit is now pending, or may hereafter be brought in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, and the matter in dispute exceeds the sum of $500, exclusive of costs, 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," &c.

The case was thus:

The Western Vermont Railroad Company, a corporation of Vermont, having issued a large amount of bonds, made a mortgage of the road to Knapp and Briggs, both citizens of New York, in order to secure the payment. By a foreclosure, in regular equity form, of that mortgage under the laws of Vermont, the title of Knapp and Briggs to the railroad became absolute in fee, in trust for the bondholders under the mortgage. They thereupon leased the railroad for a term of years to the Troy and Boston Railroad, a corporation of New York; and, therefore, according to the decisions of this court, a citizen of the same State with Knapp and Briggs. The lease contained various covenants.

In the meantime, and before the expiration of the lease, a new corporation, called the Bennington and Rutland Railroad Company, had been organized by a *majority* of the bondholders, in pursuance, as was said, of certain provisions of a railway act of Vermont. That act, as the new corporation conceived, authorized the *majority* of the bondholders of any railroad company purchasing the road under a foreclosure,

* 14 Stat. at Large, 558.

to form a new corporation, which would own, maintain, and work the purchased railroad.* It vested the company thus formed with all the powers, privileges, and franchises of the original corporation, and empowered it "to proceed in any manner it may deem expedient, either by purchase or otherwise, to obtain the title and ownership, or the use and benefit of the whole estate, and to satisfy the undivided interest or claims of any other party or parties interested in said railroad; and until the interests of such other parties shall become vested in such new corporation, such corporation shall be the trustees thereof, and shall be accountable therefor as tenants in common."

By an act passed November 18th, 1864, the corporation formed under the foregoing provisions was declared entitled to receive rents accruing under leases executed by the trustees who foreclosed.

In this state of things, Knapp and Briggs sued the Troy and Boston Railroad Company, on the covenants already mentioned of their lease to them. The defendants—alleging that the new corporation was, by the provision of the statute under which it was formed, substituted as trustee of the other bondholders, in place of Knapp and Briggs, and had thus become the real party in this suit, and filing such affidavit of local prejudice as the act of March 2d, 1867, requires—asked the State court, in a petition addressed to it, to remove the cause into the Circuit Court. They contended that the subject-matter of the controversy was wholly between the Bennington and Rutland Railroad Company, a Vermont corporation, and themselves, and that Knapp and Briggs were now but nominal parties to it, having no interest in it.

The petition, with the affidavit annexed to it, together with the original writ, declaration, and pleas, were transmitted to the Circuit Court. The plaintiffs, upon these papers, the certified copy of the lease, and the affidavits of certain persons that there were outstanding bonds of the

* Laws 1862, chap. 28, §§ 104, 108.

Western Vermont Railroad, which had not been converted into or exchanged for the stock of the Bennington and Rutland Railroad Company, nor in any other way paid or discharged, moved the Circuit Court to remand the cause to the State court for want of jurisdiction. This motion the Circuit Court denied, and proceeded to hear and adjudge the case; and after suit gave judgment for the company. The plaintiff, Knapp, thereupon (Briggs having died) took this writ of error.

The transcript of the record, as it came to this court, presented in regular form the papers on which the order for removal was founded, and those filed in support of the motion to remand. It contained, in addition, a statement by the clerk of the court below (not authenticated in any way by the judge, nor appearing in a bill of exceptions), occupying three pages of the transcript, of a number of things which according to the statement "appeared" or "were proved" on the hearing of the motion, and of different things that were "admitted" or "agreed to" by the parties respectively. One part of the certificate was thus:

"It further appeared that said Knapp and Briggs had no interest, directly or indirectly, in the commencement or prosecution of this suit; that they had no control whatever over it; paid no part of the expenses of its prosecution; had employed no counsel; and that said suit was prosecuted solely by, and for the benefit of, said Bennington and Rutland Railroad Company, and at its expense; and that the said Bennington and Rutland Railroad Company had indemnified the said Knapp and Briggs against any liability growing out of said suit. And that Knapp and Briggs did not know that said suit was to be brought until after the writ had been served.

"It was admitted by both the plaintiffs and defendants that the said Bennington and Rutland Railroad Company was organized under the same laws of the State of Vermont; that said organization was valid and legal; and that thereby said Bennington and Rutland Railroad Company became the trustees of such bondholders as had not converted their bonds into the stock of said Bennington and Rutland Railroad Company; and of the interests and claims of all other parties in said railroad.

"And it was admitted by the plaintiffs that this suit was brought in their names because, as the plaintiffs claimed under the laws of the State of Vermont, and the rules of pleading then in force in that State, it was necessary so to commence the same in order to recover on said covenant, as no action upon a covenant can be maintained in that State in the name of any other person than the covenantor, unless where the covenant is, in terms, assignable, and runs with land, and has been duly assigned by the warrantee deed of the covenantor conveying the premises to which the covenant applies."

Messrs. L. P. Poland and E. J. Phelps, for the plaintiffs in error; Mr. W. J. Beach, contra.

Mr. Justice DAVIS delivered the opinion of the court.

In the consideration of the question whether or not the Circuit Court had the right to try the case, we are confined to the papers sent up with the order for removal and the papers filed in support of the motion to remand. If anything occurred on the hearing of this motion, which ought to have been preserved, it has not been done, for there is neither a bill of exceptions nor an agreed case in the record. It is true, the clerk makes a recital, running through nearly three pages of the transcript, of the various matters which, he says, were proved on the hearing of this motion, and of certain stipulations and admissions. These recitals form no part of the record and cannot be considered by us. They are not even authenticated by the signature of the judge, nor could they be, to be made available here, except through the mode of a bill of exceptions.

Although this manner of making entries by the clerk is improper and unauthorized, yet the party to the record in whose favor they are made cannot gain by them, or the party against whom they are made be injured by them. If either party, in an action at law, is desirous of preserving the evidence, either at the trial or on a preliminary motion, in order to raise a question of law upon it, he must ask to have it incorporated in a bill of exceptions. This is the only way in which it can be done, unless the parties choose

to make an agreed statement of facts. Neither mode was adopted in this case, and we are, therefore, without the means of knowing what evidence was introduced on either side on the motion to remand. The question of jurisdiction is, therefore, to be decided on the papers properly in the record.

The motion of the plaintiffs to remand the case to the State court was denied, and the Circuit Court rested its decision on the ground that Knapp, the surviving plaintiff, was only a nominal party to the suit. But it is difficult to see how a party who makes a contract and is charged with duties and responsibilities in connection with it can be treated, when he sues for the breach of it, otherwise than as the real plaintiff. In a court of law legal rights alone can be recognized, and in determining the point of jurisdiction, we will not make inquiry outside of the case in order to ascertain whether some other person may not have an equitable interest in the cause of action.

It is conceded on the argument that Knapp and Briggs were trustees of a mortgage upon the property of the Western Vermont Railroad to secure the bonds of the company, and that upon a strict foreclosure of the mortgage their title became absolute in trust for the bondholders. After this they leased the road to the defendants for a term of years, and at the expiration of the lease brought their suit upon the covenants of the lease. It would seem that they not only had the right to sue, but that nobody else could sue. It is said, however, that before the expiration of the lease a new corporation, called the Bennington and Rutland Railroad Company, was organized by a majority of the bondholders of the defunct corporation, under the laws of Vermont, who had converted their bonds into stock, and that the new corporation was, by the provision of the statute under which it was formed, substituted as trustee for the other bondholders in place of the plaintiff in error, and had thus become the real party in this suit. It is not necessary to discuss the question whether the statute of Vermont can bear the construction claimed for it, for manifestly it is not

in the power of the State legislature, without the consent of the *cestuis que trust*, to substitute a new trustee in place of the persons named in the mortgage. This would impair the obligation of the contract. The salability of railroad bonds depends in no inconsiderable degree upon the character of the persons who are selected to manage the trust. If these persons are of well-known integrity and pecuniary ability the bonds are more readily sold than if this were not the case. It is natural that it should be so, and on this account the trustees usually appointed in this class of mortgages are persons of good reputation in the cities where these bonds are likely to sell. To change them is to change the contract in an important particular, and this cannot be done without the consent of the parties for whose benefit the trust was created.

The trustees in this case, so far as the record discloses, have not been discharged from the obligations of their trust or divested of their right of action on this lease by judicial proceeding or otherwise, nor has the trust in fact been closed, for there are bonds outstanding which have never been paid or converted into stock of the new corporation. It can make no difference whether these bonds are few or many. The trust is continued until all are paid, unless in the meantime the trustees are discharged.

They are the real plaintiffs in any suit brought to enforce a claim accruing to them in the execution of their trust, as much so as executors and administrators are, who also sue for the benefit of others and not themselves. Like them they control the litigation, and are charged with the responsibility of conducting it. The true line of distinction between nominal and real parties to an action is pointed out by this court in the recent case of *Coal Company* v. *Blatchford*.* The court, in commenting on the cases of *Browne* v. *Strode*† and *McNutt* v. *Bland*,‡ where the plaintiffs of record were treated as nominal parties merely, say, "There is no analogy between those cases and the case at bar (one of trusteeship). The nominal plaintiffs in those cases were not

* 11 Wallace, 172. † 5 Cranch, 303. ‡ 2 Howard, 9.

trustees, and held nothing for the use or benefit of the real parties in interest. They could not, as is said in *McNutt* v. *Bland*, prevent the institution or prosecution of the actions, or exercise any control over them. The justices of the peace in the one case and the governor in the other were the mere conduits through whom the law afforded a remedy to the parties aggrieved."

The position of Knapp as surviving plaintiff is very different. He is not a mere passive instrument in the litigation. On the contrary, he is active in promoting it, and would be remiss in his duty if he failed in using all proper means to bring it to a successful issue. As the cause of action is vested in him the court looks to his citizenship in determining the question of jurisdiction, and not to the residence of those persons who are beneficially interested in the subject-matter of the litigation. The cases are numerous to this point, and it would be a needless work to cite all of them.*

It may be proper to say that the act of 1867, on the subject of the removal of cases from the State to the Federal courts, which extends the provisions of the act of 1789, so as to allow either the plaintiff or defendant to remove the cause for the reasons stated, at any time before final judgment, does not change the settled rule that determines who are to be regarded as the plaintiff and the defendant. As the plaintiff and the defendant in this action were both citizens of New York, the Circuit Court had no jurisdiction to entertain it.

JUDGMENT REVERSED, with instructions to the Circuit Court to remand the case to the County Court for the County of Bennington, in the State of Vermont, from whence it was improperly removed to the Circuit Court.

Mr. Justice BRADLEY did not sit during the argument, and took no part in this decision.

* Bornafee *v.* Williams, 3 Howard, 574; Davis *v.* Gray, 16 Wallace, 220; Coal Co. *v.* Blatchford, *supra*.

BURTON *v.* DRIGGS.

1. Where a party excepts to the admission of testimony he is bound to state his objection specifically, and in a proceeding for error he is confined to the objection so taken. If he assign no ground of exception, the mere objection cannot avail him. Hence, where an original deposition, regularly taken, sealed up, transmitted, opened, and filed in the case, was lost, and a copy, taken under the direction of the clerk of the court and sworn to as a true copy, was offered in evidence in its place, an objection to the copy "on the ground that it *was not the original*" is too indefinite to let in argument that the witness was alive, and that the lost deposition could only be supplied by another one by the same witness, and that secondary evidence was inadmissible to prove the contents of the first deposition.
2. If the objection had been made in a form as specific as by the argument abovementioned it was sought to be made, it would be insufficient, it appearing that the witness lived in another State, and more than a hundred miles from the place of trial.
3. When it is necessary to prove the results of an examination of many books of a bank to show a particular fact, as *ex gr.*, that A. B. never at any time lent money to a bank, and the examination cannot be conveniently made in court, the results may be proved by persons who made the examination, the books being out of the State and beyond the jurisdiction of the court.
4. Where one, fraudulently exhibiting to another a sealed instrument reciting that the person exhibiting it has a claim for a sum of money on a third party (he having no claim whatsoever), fraudulently induced that other to buy it from him, and such other buying it, pays him in money for it, and takes an assignment under seal on the back of the instrument, the person thus defrauded may recover his money in assumpsit, on a declaration containing special counts setting out the instrument as inducement, and averring the utter falsity of its recitations, and the fraud of the whole transaction; the declaration containing also the common counts.

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

A certain O. A. Burton, of Vermont, in April, 1859, meeting in New York with one William Driggs, of Michigan, offered to sell to him a claim on the Bank of Tioga County, Pennsylvania, which he, Burton, alleged that he had against it; and by way of showing the reality of his claim exhibited to Driggs a paper, under seal, executed by him, Burton,

and three other persons, bearing date October 20th, 1858, whereby it was recited and agreed as follows:

"That the parties had severally furnished to the Tioga Bank, to enable it to redeem its bills promptly, certain sums of money, to wit, O. A. Burton, $7060.18, &c.; that the bank was to refund said moneys as soon as it was in a condition to do so, and that it would lend to said parties, not exceeding $10,000 at any one time, on paper payable in New York, with interest at the rate of five per cent. per annum; that the Tioga Bank had advanced, to be paid in on the stock of the Pittston Bank, of Pennsylvania, $9870, which money belonged to the four parties to the instrument, and it was agreed that each of the parties owned one-fourth part thereof, less cost and expenses."

Driggs bought the claim, paying $7060.18 for it; and Burton made this assignment on the back of the paper which he had shown Driggs:

"For and in consideration of the sum of $7060.18, I do hereby sell, assign, transfer, and set over to William Driggs, my interest of an equal amount in the Tioga County Bank, paid in according to a certain contract made October 20th, 1858, between O. A. Burton, and others, which is hereto attached, with all the rights and privileges therein which I have, or should have had, if this sale had not been made.

"Witness my hand and seal this 29th day of April, 1859.

"O. A. BURTON." [L. S.]

Upon presenting his newly purchased claim soon afterwards at the Tioga County Bank, Driggs was informed that Mr. O. A. Burton had no claim whatever on the bank; that he was not a stockholder in it; that his name was not to be found on its books, and that in the alleged sale a gross fraud had been practiced.

Hereupon, Driggs sued Burton in the court below in assumpsit. The *narr.* contained certain counts setting out the instrument which Burton had shown to him as inducement, and averred that the recitals which it made were wholly false; that Burton had no claim whatever on the bank, and that the plaintiff had got nothing whatever from it.

Burton, admitting that he had no such claim against the bank as was recited in the paper, set up in defence that he did in fact own certain powers of attorney to transfer stock in that bank, executed by parties who owned such stock, and for which he paid $10,000; that he had explained to Driggs at the time of the assignment to him that such was the real nature of the claim transferred to him, and he delivered to him these powers of attorney; and that Driggs had received them and subsequently acted under them, participated in an election of directors, and assisted in redeeming the notes of the bank in circulation.

In reply, Driggs gave evidence tending to prove that this allegation was as false as had been the other, and that he never received any consideration, benefit, or return whatever, directly or indirectly, for the money paid for it.

The powers were not produced by Burton, nor did he give any evidence to show from whom he obtained them, by whom or how they were signed, in what amount, or what became of them.

Driggs gave evidence tending to prove that no such powers to transfer stock had ever been issued by the bank.

Upon these facts Driggs sought to recover back the money paid by him upon the grounds:

1. Of the warranty of Burton, both expressed and implied, that the claim assigned to the defendant in error was genuine:

2. That the money was obtained from him by Burton, through fraud, and without equivalent:

3. That the consideration upon which the money was paid and received, had totally failed.

The case being closed, the court—refusing several requests of the defendants for instructions, and among them a request to charge that the plaintiff was not entitled to recover on his special counts nor to recover in the action—intimated an opinion in favor of the plaintiff, upon the first and third points. But for the purposes of the trial instructed the jury to find whether the sale and representations made by Burton were such as he alleged, or whether they were such as were

alleged by Driggs, and that if they were such as were alleged by Burton that the verdict should be in his favor.

That if they were such as were alleged by Driggs, then to find whether or not they were true; that if true, the verdict should be in favor of Burton.

That if untrue, the jury should then find whether Driggs received any interest in the bank whatever by the assignment, or in the transaction, either such as that described in the paper, or such as Burton alleged that he had transferred to him. If he did, the verdict should be for Burton.

But that the payment of the money and the execution of the assignment being admitted, if the jury found the representations to have been such as Driggs alleged; that they were untrue in fact; that Burton had no such claim as he sold, and that Driggs received nothing whatever under the assignment or in the transaction, then that the verdict should be for the plaintiff, Driggs, for the money which he had paid.

The jury found in favor of the plaintiff, for the amount paid and interest, being $12,078.64; and judgment having been entered accordingly, the defendant brought the case here on error.

In the course of the trial the plaintiff offered to read a *copy* of the deposition of one Vine De Pue, a person who lived in another State, and more than one hundred miles from the place of trial; and whose deposition had been taken under the act of Congress authorizing depositions to be taken. "when the testimony of any person shall be necessary in any civil cause . . . who shall live at a greater distance from the place of trial than one hundred miles." No proof was given that the said De Pue was dead. The bill of exceptions said:

"The plaintiff proved, to the satisfaction of the court, that the original deposition was regularly and properly taken in this cause, sealed up, transmitted to the clerk of this court, and by him properly opened and filed, all in accordance with the provisions of the act of Congress; that said deposition was lost and could not be found; that the copy offered was a true copy, taken under the direction of the clerk, and by him compared with the original and certified.

"The defendant objected to the admission of the copy on *the ground that it was not the original.* The court overruled the objection and admitted the deposition, to which decision the defendant excepted."

This was the first exception.

The plaintiff then proved that the books of the Bank of Tioga County were in Tioga, Pennsylvania, where the bank itself was situated; that he had endeavored to obtain them for use on this trial; but that the officers of the bank who had them in their keeping refused to let them go away from the bank. He then offered the deposition of one C. P. Steers, and of A. C. Turner.

Steers had been cashier of the bank from the 15th of September, 1858, up to the 29th day of April, 1859. He thus testified:

"During the entire period that I was cashier I had charge of the financial affairs of the bank, and was well acquainted and familiar with all the financial business and matters of the bank. O. A. Burton did not, at any time during that period, loan, advance, or furnish to the said Tioga County Bank the sum of $7060.18, nor any other sum of money. The name of O. A. Burton was never on the books of the bank, nor did the bank at any time during the said period owe the said Burton for advance or otherwise; and *don't think* that the name of said Burton appeared upon the books of the bank as a stockholder during said period of time."

Turner, *former cashier of the bank*, and who had served as cashier from December, 1859, to August 18th, 1867, thus testified:

"In July, 1859, I made a careful examination of the books and papers of the bank *for the purpose of ascertaining its condition, assets, and liabilities.* I examined all the books and papers in the bank relating to its affairs from the time of its organization down to July, 1859, and on that examination *I found no evidence* in the bank of any kind that O. A. Burton ever had any connection with the bank, either as debtor, or creditor, or stockholder, or any interest of any kind whatever in the bank. I afterwards examined the books of the bank again at the request

of the plaintiff in this suit, and with direct reference to the matters involved in this suit, and *I did not find* that on the 20th day of October, 1858, or on the 29th day of April, 1859, or at any other time, that the bank was indebted to O. A. Burton in the sum of $7060.18, or in any other sum. *I did not find* the name of O. A. Burton on the books of the bank in any way."

The counsel of the defendant objected to the admission in evidence of such parts of these depositions as referred to what appeared, or did not appear, on the books of the Tioga County Bank. But the court allowed the depositions as above set forth to be read.

Mr. L. P. Poland, for the plaintiff in error:

I. *The court erred in admitting the paper said to be a copy of the deposition of Vine De Pue.*

The Federal courts have ever held parties to strict conformity to the statutes authorizing and prescribing the occasions, mode, and form of taking depositions. No statute of Congress—no decision—authorizes the use, as evidence, of a copy of a deposition, where the original is lost. The action of the court below must rest, for its justification, upon the common-law doctrine, that secondary evidence is admissible, when the primary cannot be had—as, parol evidence of the contents of a lost writing. But there are good reasons why this doctrine should not be extended to the case of lost depositions; as—

1st. The statutes authorizing the use of depositions in cases at law, are variant from common law, and imply the existence of a better kind of evidence, viz., the testimony of the witness in open court; and allow depositions only in peculiar cases, and to prevent a possible failure of justice. As far, therefore, as the statute goes we may follow, but no further. Depositions themselves are regarded as only secondary evidence.*

2d. The rule requiring the best evidence attainable to be used *in the cause*, demands that the witness, who is apparently

* Haupt *v.* Henninger, 37 Pennsylvania State, 138.

in life, should be produced, not to testify to what he once testified to in a deposition, but what he at the time of the trial knows of the matter. For this (the best evidence) the statute allows, in peculiar cases, an inferior grade, viz., a deposition made out of court; but goes no further. The common rule then should exclude evidence of a still inferior grade (as, a copy of a deposition), so long, at least, as the testimony of the witness in court or a new deposition can be obtained.

3d. It might be safely admitted, that if the witness had died, the contents of his deposition, being lost, might be proved; for, in such case, this would have been the best attainable evidence. But it would be of dangerous precedent and practice to allow secondary evidence of the contents of depositions, except in case of such absolute necessity. If proof of what the witness swore could be made by a copy of his deposition, it could be made by any other evidence of contents, as by the recollection of a witness, since there are no degrees in secondary evidence.*

Here, too, the court erroneously determined not only the question of loss of the original, but the accuracy of the copy. Two Vermont decisions, *Follett* v. *Murray*† and *Low* v. *Peters*,‡ are decisive of this question.

II. *The depositions of Turner and Steers were wrongly received.*

1st. The books of the bank were but private writings, and were not evidence *per se*—certainly not as to strangers—though admissible perhaps as *memoranda*, in aid of the testimony of the party making them. They were used purely as substantive evidence.

2d. Before the admission of secondary evidence of the contents of the books, more especially evidence of what does *not* appear upon the books, it should have been proved that the bank had and kept books, and their authenticity; that those books had upon them, in regular entry, items, and all

* Brown *v.* Woodman, 6 Carrington & Payne, 206 (25 English Common Law, 358).

† 17 Vermont, 530.

‡ 36 Id. 177.

items of the class represented by the said defendant's claims. It is only in such case that the absence of an entry representing the defendant's claim could furnish an inference of the non-existence of the claim.

No preliminary evidence of this kind was given, but these preliminary facts were assumed.

Turner's deposition is limited to what he found, and to what he did not find upon what he calls the books of the bank, kept, not by himself, but before he became cashier. This witness's interpretation of the meaning of the books to his mind was clearly not evidence, nor was his construction of the contract, which was exhibited to him. If the contents of these bank books were evidence, and they could be proved without production of the books themselves, then the proof should be by an examined and sworn copy of the books. Instead of this, *Turner* swears only to the result of his examination. As clearly the statements of Steers were not admissible evidence.

III. *As to the charge.*

The contract in this case, as well as the assignment, were under seal. The action proceeds upon an assumpsit of the defendant, that he was the lawful owner of a claim of $7060.18, mentioned in the sealed instrument, against the Tioga County Bank. It is for a breach of this agreement that the suit is brought. Now, if the contract has this force, and there is any such agreement in it, whether expressed or implied, it is a covenant and not a simple assumpsit, and the action should be covenant.* Upon this idea, the first request of the defendant below should have been answered; certainly the first branch of it.

In the charge as given, the case was put wholly upon the ground of want of consideration, or of an implied warranty; grounds which we must suppose may not have entered into the argument for the defence.

This was a double error: 1st. This position was inconsistent with the form of action, as applied to a sealed con-

* Young *v.* Preston, 4 Cranch, 239.

tract. 2d. It was misleading in the argument of the case, working a surprise and a mistrial.

Mr. E. J. Phelps, contra.

Mr. Justice SWAYNE delivered the opinion of the court.

The first assignment of error relates to the admission in evidence of a copy of the deposition of Vine De Pue. The bill of exceptions sets forth that the original deposition was regularly taken, sealed up, and transmitted to the clerk of the court where the cause was pending, and by him properly opened and filed; and that thereafter it was lost and could not be found; and that the copy offered was a true copy, taken under the direction of the clerk, and by him compared and certified. The exception is as follows: "The defendant objected to the copy on the ground that it was not the original. The court overruled the exception and admitted the deposition, to which decision the defendant excepted."

It is a rule of law that where a party excepts to the admission of testimony he is bound to state his objection specifically, and in a proceeding for error he is confined to the objection so taken. If he assign no ground of exception, the mere objection cannot avail him.* In *Hinde's Lessee* v. *Longworth* this court said: "As a general rule, we think the party ought to be confined, in examining the admissibility of evidence, to the specific objection taken to it. The attention of the court is called to the testimony in that point of view only." Here the objection was that the copy was not the original. This, as a fact, was self-evident; but as a ground of objection it was wholly indefinite. It does not appear to have been suggested that the place of the lost deposition could only be supplied by another one of the same witness retaken, and that secondary evidence was inadmissible to prove the contents of the former. If the contents

* Camden *v.* Doremus, 3 Howard, 515; Hinde's Lessee *v.* Longworth, 11 Wheaton, 199.

of the one lost could be proved at all by such evidence, that offered was certainly admissible for that purpose. But the objection was presented in the argument before us in the latter shape, and we shall consider it accordingly.

It is an axiom in the law of evidence that the contents of any written instrument lost or destroyed may be proved by competent evidence. Judicial records and all other documents of a kindred character are within the rule.* But it is said a different rule as to depositions—unless the witness be dead—obtains in Vermont, and the cases of *Follett* v. *Murray*† and *Low* v. *Peters*‡ are referred to as supporting the exception.

Those cases are unlike the one before us. In *Follett* v. *Murray* the witness resided within the State, and there being no copy of the caption it did not appear that the deposition had been regularly taken. In the other case the witness was dead, and no question was raised as to any defect in the lost original. The copy was, therefore, admitted as of course. If a deposition be not properly taken it is not made admissible by the death of the witness.§ In *Harper* v. *Cook*,‖ it was held that the contents of a lost affidavit might be shown by secondary evidence. The necessity of retaking it was not suggested. In the present case the witness lived in another State and more than one hundred miles from the place of trial. The process of the court could not reach him; for all jurisdictional purposes he was as if he were dead. It is well settled that if books or papers necessary as evidence in a court in one State be in the possession of a person living in another State, secondary evidence, without further showing, may be given to prove the contents of such papers, and notice to produce them is unnecessary.¶ Here

* Renner *v.* The Bank of Columbia, 9 Wheaton, 581; Riggs *v.* Tayloe, Ib. 483; 1 Greenleaf's Evidence, § 509.

† 17 Vermont, 530.

‡ 36 Id. 177.

§ Johnson *v.* Clark, 1 Tyler, 449.

‖ 1 Carrington & Payne, 139.

¶ Shepard *v.* Giddings, 22 Connecticut, 282; Brown *v.* Wood, 4 Bennet (19 Missouri), 475; Teall *v.* Van Wyck, 10 Barbour, 376; see also Boone *v.* Dykes, 3 Monroe, 532; Eaton *v.* Campbell, 7 Pickering, 10; Bailey *v.* Johnson, 9 Cowen, 115; Mauri *v.* Heffernan, 13 Johnson, 58.

there was nothing to prevent the operation of the general rule as to proof touching writings lost or destroyed. The deposition was one of the files in the case. The plaintiff was entitled to the benefit of the contents of that document. Having been lost without his fault, he was not bound to supply its place by another and a different deposition, which might, or might not, be the same in effect with the prior one.

There was no error in admitting in evidence the copy to which this exception relates.

The next assignment of error is the admission in evidence "of such parts of the depositions of A. L. Turner and C. P. Steers as refer to what appeared or did not appear on the books of the Tioga County Bank." It was shown by the plaintiff in this connection that the books in question were in the village of Tioga, Pennsylvania, that the plaintiff had endeavored to obtain them for use on this trial, and that those having the custody of them refused to permit them to go. The testimony of Turner was, in substance, that he was the cashier, that he had examined the books and papers in the bank relating to its affairs from its organization down to July, 1859, and that he found no evidence of any kind that the defendant ever had any connection or transaction with the bank, or any interest in it whatever; and that subsequently, at the request of the plaintiff and for the purposes of this suit, he repeated the examination with the same result. Steers testified that he was cashier of the bank from about the 15th of September, 1858, to about the 29th of April, 1859, and that during that time the defendant, Burton, did not furnish to the bank $7060.18, or any other sum of money, that his name was never on the books of the bank, nor did the bank owe him anything on any account during that period, and that the witness did not think his name appeared on the books of the bank as a stockholder during that time. The books being out of the State and beyond the jurisdiction of the court, secondary evidence to prove their contents was admissible.

When it is necessary to prove the results of voluminous facts or of the examination of many books and papers, and the examination cannot be conveniently made in court, the results may be proved by the person who made the examination.* Here the object was to prove, not that the books did, but that they did not show certain things. The results sought to be established were not affirmative, but negative. If such testimony be competent as to the former, *a multo fortiori* must it be so to prove the latter.

The last assignment relates to the charge of the court.

The examination of this subject renders it necessary to refer briefly to the cause of action. The defendant, Burton, and three others, executed an instrument, under seal, bearing date October 20th, 1858, whereby it was recited and agreed as follows: That the parties had severally furnished to the Tioga Bank, to enable it to redeem its bills promptly, certain sums of money, to wit, O. A. Burton, $7060.18, &c.; that the bank was to refund said moneys as soon as it was in a condition to do so, and that it would lend to said parties, not exceeding $10,000 at any one time, on paper payable in New York, with interest at the rate of five per cent. per annum; that the Tioga Bank had advanced, to be paid in on the stock of the Pittston Bank of Pennsylvania, $9870.00, which money belonged to the four parties to the instrument, and it was agreed that each of the parties owned one-fourth part thereof, less cost and expenses. To this paper was annexed a further instrument, under seal, dated April 29th, 1859, whereby the defendant assigned to the plaintiff, for the consideration of $7060.18, his interest in that amount paid by him to the Tioga Bank, according to the instrument first mentioned, with all the privileges relating thereto which the assignor would have had if the assignment had not been made. The declaration contained several counts, setting out the instrument as inducement and averring the utter falsity of its recitals. The common money counts were

* 1 Greenleaf's Evidence, § 93.

added. The defendant admitted the receipt of the $7060.18, stated in the assignment, as the consideration for making it, but gave no evidence tending to prove that the recitals in the instrument to which the assignment related were true. Both parties submitted prayers for instructions. Both sets were refused. Those of the defendant sought to defeat the action because it had not been brought upon the written instrument and the assignment. The court instructed the jury in effect, with full and proper explanations, that if the transaction on the part of the defendant had been a fraud, and there had been an entire failure of consideration, the plaintiff was entitled to recover.

The defendant excepted to these instructions, and to the refusal to give those which he had asked to be given. The former were correct in point of law.* The instructions given covered the whole case. It was not, therefore, the duty of the learned judge to give others suggested by either party. If wrong, they were inadmissible, and if otherwise, unnecessary.† We are satisfied with the charge as it appears in the record.

Judgment affirmed.

Tioga Railroad *v.* Blossburg and Corning Railroad.

1. Where, in a judicial proceeding, the matter passed upon is the right under the language of a certain contract to take receipts on a railroad, the judgment concludes the question of the meaning of the contract on a suit for subsequent tolls received under the same contract.
2. The highest courts of New York, construing the statutes of limitations of that State, have decided that a foreign corporation cannot avail itself of them; and this, notwithstanding such corporation was the lessee of a railroad in New York, and had property within the State, and a managing agent residing and keeping an office of the company.

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* Weaver *v.* Bentley, 1 Caines, 47; Gillet *v.* Maynard, 5 Johnson, 85; D'Utricht *v.* Melchor, 1 Dallas, 428; Wilson *v.* Jordan, 3 Stewart & Porter, 92; Eames *v.* Savage, 14 Massachusetts, 425; Lyon *v.* Annable, 4 Connecticut, 350; Pipkin *v.* James, 1 Humphrey, 325; 1 Swift's Digest, 400.

† Laber *v.* Cooper, 7 Wallace, 565.

3. These decisions upon the construction of the statutes are binding upon this court, whatever it may think of their soundness on general principles.
4. No error can be assigned on a general finding.

ERROR to the Circuit Court for the Northern District of New York.

The Tioga Railroad Company was a corporation duly organized under the laws of Pennsylvania, and was the proprietor of a railroad extending from Blossburg, a town in that State, a little south of the line between Pennsylvania and New York, up to that said line. The Blossburg and Corning Railroad Company was a corporation organized under the laws of the State of New York, and was the proprietor of a railroad connecting with the abovementioned road at the State line and extending thence to Corning in New York; the two roads forming a complete line of railroad from Blossburg to Corning. The latter company had acquired its part of the road by purchase in 1855, succeeding to the rights of a former company called the Corning and Blossburg Railroad Company. By contract made in 1851 the Corning or New York end of the line was leased to the Tioga Railroad Company under certain terms and stipulations, amongst which was the following:

"For the use of the said railroad of the said Corning and Blossburg Railroad Company, and the use of their depots, engine-houses, machine-shops, grounds, water-stations, &c., the Tioga Railroad Company agrees to pay to the Corning and Blossburg Railroad Company two-thirds of the receipts for passengers, mails, and freights which shall be taken for the said Corning and Blossburg Railroad, the expenses charged customers for the loading and unloading coal, lumber, and other freights, and for the warehousing, and *such additional charges, by way of discrimination, as shall be made for short distances for motive power, not to be included in the term receipts, as abovementioned.*"

The parties soon disagreed as to the meaning of the words italicized. The lessees asserted that they were entitled to keep any excess of way-fares and freights for intermediate places and short distances above the through rates for those places, and did not account for, but retained the same; and

for this difference, running through many years, the Blossburg and Corning company, on the 6th of May, 1864, sued the other company in the court below.

Previously to the bringing of this, the present suit, that is to say, in January, 1855, the Blossburg company had brought a suit in the Supreme Court of New York against the Tioga company on the contract in question, in which this question of difference was litigated. The record of that case, which went to final judgment (see 1st Keyes, 486), was given in evidence in this one.

The present suit was brought for the same class of receipts which had accrued since the commencement of the former action. Besides the defence abovementioned, the Tioga company in this case pleaded the statute of limitations as to all receipts which accrued more than six years before the commencement of the suit. The plaintiff replied that the defendant was a corporation organized under the laws of Pennsylvania, and not created or existing under the laws of the State of New York, and that when the supposed cause of action accrued in favor of the plaintiff, the defendant (the Tioga company) was out of the State of New York, and so remained until this action was commenced. The defendant denied that at or since the commencement of the action it had been out of the State.

The significance of these pleadings was derived from the New York statute of limitations. The period limited for bringing an action of this kind is six years. But by the one hundredth section of the Code of Practice it is enacted as follows:

"If, when the cause of action shall accrue against any person, he shall be *out of the State*, such action may be commenced within the terms herein respectively limited after the return of such person into this State; and if, after such cause of action shall have accrued, such person shall depart from and reside out of this State, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action."

The Blossburg company insisted that as the Tioga com-

pany was a Pennsylvania corporation, it could have no legal residence or existence in any other State than Pennsylvania, and hence that it was not in the State of New York when the action accrued, and had not been therein at any time since; and, therefore, could not claim the benefit of the statute of limitations. This the Tioga company disputed; and its counsel relied on certain sections of the Code of Practice of New York, which showed that foreign corporations might be sued in New York under certain circumstances, as where they had property in the State, or where their officers, agents, or directors are found within it, and were served with process. Thus, by act of 1851 (§ 134 of the Code), after providing for service of process on a corporation by delivering a copy to the president, secretary, treasurer, director, or managing agent, it is said:

"Such services can be made in respect to a foreign corporation only where it has property within this State, or the cause of action arose therein."

Or, by the act of 1859,

"Where such service shall be made within this State personally upon the president, treasurer, or secretary thereof."

The case, according to the New York practice, in cases which it is anticipated may involve the examination of long accounts, was referred to and tried by a referee.

Evidence was given which, as the counsel of the defendant asserted, showed—what he alleged was not denied—"that during all the time of the existence of the contract of 1851, the Tioga company had property within the State of New York, an office at Corning, directors, officers, and agents, constantly within that State and at all times amenable to the process of its courts, and in fact, in 1855, that the Blossburg company availed itself of this condition of things by bringing a suit against the defendant for a portion of the demand claimed under the contract now in controversy, recovered judgment and collected the same, and that in fact this suit was commenced by personal service of a summons upon the defendant's agent at Corning."

The referee refused to find as facts what is above stated in regard to the Tioga company, and found generally in favor of the plaintiff. Judgment being entered on the finding the case was now here on error.

Mr. J. H. Reynolds, for the plaintiff in error (after arguing the case on merits):

I. The *same matter* disposed of in the Court of Appeals of New York, in 1855, does not come in question here. No portion of the claim there made is embraced in this action. It is true that the claim arises under the same contract, but that circumstance is not of consequence if this court is not concluded by its construction in the courts of New York, which it clearly is not under the decision in *Swift* v. *Tyson*,* and *Chicago* v. *Robbins*.† Moreover, it is not easy to see that the *same question* was decided in the New York courts. A reference to the cases will show this.

II. The antiquated rule that a corporation cannot migrate must now be regarded as a legal fiction rather than a substantial reality. In actual practice, corporations created by the laws of one State do travel into other States, carry their property, establish offices, locate agents, transact business, and accumulate money, and they are recognized outside of the territorial limits of their creation as legal beings, having legal rights.

It was at one time questioned in this court, whether a corporation created by the laws of a State, made the corporate body a citizen of the State creating it, when the corporators actually resided beyond its territorial jurisdiction, within the meaning of the act of Congress in respect to the removal of causes from a State to a Federal court for trial. It is now the settled law of this court, that a corporation is a *citizen* of the State creating it, and entitled to all the rights and immunities accorded to a *citizen* by the Constitution and the law.‡

* 16 Peters, 1.

† 2 Black, 418–428.

‡ Railroad Company *v.* Letson, 2 Howard, 497; Stevens *v.* Phœnix Insurance Company, 41 New York, 154.

If it be, as it must be, assumed that a corporation is a citizen of the State by which it is created, then it must be accorded the rights of a citizen in all courts and places.

We are aware of certain decisions in New York not in accordance with these views. But there is no greater reason for this court's following the decision of State courts in respect to the limitation of actions, than for its following the laws and decisions respecting the validity of bonds in aid of railroads or any other local improvements. These, certainly, it has not followed.

It was proved and conceded that during all the time of the existence of the contract of 1851, the defendant had property within the State of New York, an office at Corning, New York, directors, officers, and agents constantly within this State, and at all times amenable to the process of its courts; and in fact in 1855 the plaintiff availed itself of this condition of things by bringing a suit against the defendant for a portion of the demand claimed under the contract now in controversy, recovered judgment, and collected the same, and that in fact this suit was commenced by personal service of a summons upon the defendant's agent at Corning. It is, therefore, apparent that the Tioga company has been at all times subject to a suit at law, for any debt it owed to the Blossburg company or any other party.

Mr. D. Rumsey, contra.

Mr. Justice BRADLEY, having stated the case, delivered the opinion of the court.

Some attempt has been made to show that in the suit brought in January, 1855, in the Supreme Court of New York by the Blossburg company against the Tioga company, on the contract now in question, the matter of the difference for which the present suit is brought was not a question decided. But we have looked at the record and proceedings therein, which were in evidence in this case, and are satisfied that it was decided. The report of the case in 1st Keyes, 486, shows that it was the only question before the

Court of Appeals, to which court the case was carried. This point, then, is *res judicata* between the parties. It cannot be litigated again on the same contract.*

We pass, then, to the matter of the statute of limitations.

The counsel for the plaintiff in error (the defendant below) insists "that it was proved and conceded that during all the time of the existence of the contract of 1851, the defendant had property within the State of New York, an office at Corning, New York, directors, officers, and agents, constantly within this State, and at all times amenable to the process of its courts; and, in fact, in 1855, the plaintiff availed itself of this condition of things by bringing a suit against the defendant for a portion of the demand claimed under the contract now in controversy, recovered judgment and collected the same, and that in fact this suit was commenced by personal service of a summons upon the defendant's agent at Corning; and that it is, therefore, apparent that the Tioga company has been, at all times, subject to a suit at law for any debt it owed to the Blossburg company or any other party," and he argues that the statute of limitations is therefore a defence.

If the facts appeared as stated by the counsel, it could not avail the plaintiff in error. The courts of New York have decided (and two of the decisions were made upon the case of this very company), that a foreign corporation cannot avail itself of the statute of limitations of that State.† And this, notwithstanding the defendant was the lessee of a railroad in New York, and had property within the State, and a managing agent residing and keeping an office of the company at Elmira, within the State.‡ These decisions upon the construction of the statute are binding upon us, whatever we may think of their soundness on general principles.§

* Beloit *v.* Morgan, 7 Wallace, 622; Aurora City *v.* West, Ib. 94; Freeman on Judgments, § 256.

† Thompson *v.* Tioga Railroad Co., 36 Barbour, 79; Olcott *v.* Same Defendant, 20 New York, 210.

‡ Rathbun *v.* The Northern Central Railway Co., 50 Id. 656.

§ Harpending *v.* Dutch Church, 16 Peters, 493.

But the facts on which the plaintiff in error relies are not spread upon the record in such a manner that the court can take cognizance of them. They are not found specially by the referee; he refuses to find them. He finds generally in favor of the plaintiff, namely, that the statute of limitations was not a bar to the action. No error can be assigned upon such a finding.

JUDGMENT IS AFFIRMED.

Mr. Justice HUNT, concurring in the judgment.

The question whether, upon the merits, the plaintiff is entitled to recover is no longer an open question. It was settled by the adjudication of the point by the highest courts of New York in an action between the same parties and upon precisely the same facts. The record in the former suit was given in evidence in this suit, and is conclusive.*

The point with which we are principally concerned at this time arises upon the statute of limitations. This action was commenced on the 6th day of May, 1864, and it was insisted that all that part of the claim which became due on or before May 6th, 1858, was barred by the statute of limitations of the State of New York. The court below held against this claim, but it is repeated and renewed on this appeal.

The Civil Code of New York repeals the former laws on the subject of the limitation of actions and enacts as follows:

"SECTION 74. Civil actions can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, except where, in special cases, a different limitation is prescribed by statute.

"SECTION 89. The periods prescribed in section seventy-four for the commencement of actions, other than for the recovery of real property, shall be as follows:

"SECTION 91. Within six years: 1. An action upon a con-

* Thompson *v.* Roberts, 24 Howard, 233; Demarest *v.* Darg, 32 New York, 281; Doty *v.* Brown, 4 Comstock, 71; 1 Greenleaf on Evidence, § 531, and note 2, p. 700.

tract, obligation, or liability, express or implied (excepting judgments and sealed instruments).

"Section 100. If, when the cause of action shall accrue against any person, he shall be out of the State, such action may be commenced within the terms herein respectively limited after the return of such person into this State; and if, after such cause of action shall have accrued, such person shall depart from and reside out of this State, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action."

An examination of the statutes of the different States shows a great similarity in their provisions. They generally provide that if a person shall be out of the State when the cause of action accrues against him the statute does not begin to run until he returns into the State; if, after the cause of action has accrued, such person shall depart from and reside out of the State, the time of his absence shall not be taken to be a part of the time limited for the commencement of the action. As to a resident of the State where the action is brought, his temporary absences after the cause of action shall have accrued do not suspend the running of the statute. As to a non-resident debtor, however long his absence may be continued, he takes no benefit from the statute. Temporary returns do not put the statute in motion. So long as he continues to reside in another State, so long he is liable to an action in the State in which he is sued. These provisions are found in substance in the statutes of Maine, Massachusetts, New Jersey, Vermont, New Hampshire, Michigan, Wisconsin, Arkansas, Oregon, and Iowa.

The State of New York is not singular, therefore, in providing or in holding that although a debtor may have been from time to time within the State, yet while he is a resident of another State, and until he becomes a resident of New York, he cannot ask the protection of the statute of limitation.

It was proved and conceded that during all the time of the existence of the contract in question the defendant had property within the State of New York, an office at Corning,

New York, directors, officers, and agents within the State; that it was at all times amenable to the process of its courts; and that in 1855 the plaintiff availed itself of this condition of things to bring a suit against the defendant for a portion of the demand claimed under the contract now in controversy, and that the present suit was commenced by the service of a summons upon the defendant's agent at Corning, New York.

In 1848 the code of New York authorized the commencement of a suit by the delivery of a copy of the summons to the defendant, and if the suit was against a corporation, to the president or other head of the corporation, secretary, cashier, or managing agent thereof.

In 1851 this section was amended by adding thereto the words "but such service can be made in respect to a foreign corporation only when it has property within this State, or the cause of action arose therein."

In 1859 this subdivision was further amended by adding, at the end, the words "or where such service shall be made within the State, personally upon the president, treasurer, or secretary thereof."

It would appear from this analysis that the legislature intended to authorize the commencement of a suit against a corporation by the delivery of a summons to its president or other officer, without regard to the facts: 1st, whether it was a domestic or a foreign corporation; or 2d, whether it had property within the State; or 3d, whether the cause of action arose within the State; or 4th, whether such service was made within this State or without the State. It amended the proceeding, first by limiting this mode of commencing a suit against a foreign corporation to a case where it had property within this State or where the cause of action arose therein; and second, by requiring such service to be made within this State.

In commenting upon these provisions, the counsel for the plaintiff in error says: "It is then apparent that ever since 1848, it has been in the power of any creditor of the Tioga company to sue it in the courts of New York, and recover a

judgment against it as effectual and conclusive as any that could be obtained against any citizen or domestic corporation, for it has had during all that time property within the State and officers upon whom process could have been personally served; and in this case, the cause of action, if any, arose within the State of New York."

That a judgment could be obtained during that period is apparent, but that an effectual and conclusive judgment could be obtained by the service of a New York summons upon an officer of a Pennsylvania corporation in that State, as was authorized by the code until the year 1859, is not so apparent. The process of the New York courts does not and cannot run beyond the territorial limits of that State. A service of such process within the State of Pennsylvania would be void.* The broad language used in these statutes justifies the construction given it by the New York courts, that they were intended to provide for a judgment not complete and effectual but limited and restricted like that obtained upon publication or by attachment proceedings. The statutes give no evidence that a more perfect judgment was expected to be obtained where the service of the summons was made upon the officer within this State than when it was made without it. A suit was authorized to be commenced against a foreign corporation by any of these various modes, or by attachment and publication. In the latter case no pretence is made that the judgment is effectual and conclusive, and the fact that the cause of action arose within this State or that the corporation had property within the State, can give but little addition to its conclusiveness. Such is the doctrine announced not only in *Rathbun* v. *Northern Central Railroad Co.*,† but in many previous cases.

In the 4th,‡ in the 5th,§ and in the 10th‖ of Howard's Practice Cases, it is held that a judgment obtained in a suit

* Picquet *v.* Swan, 5 Mason, 40; Story's Conflict of Laws, § 539.

† 50 New York, 656.

‡ Hulburt *v.* Hope Mutual Insurance Co., p. 274.

§ Brewster *v.* Michigan Central Railroad, p. 183.

‖ Bank of Commerce *v.* Rutland Railroad Co., p. 1.

commenced by the service of a summons upon an officer of a foreign corporation while in this State is not a personal judgment, that it can only be enforced against property in this State.

In *Rathbun* v. *Northern Central Railroad Co.*,* in delivering the unanimous opinion of the court, Folger, J., after citing the statutes upon the subject and discussing the decisions of the State heretofore made, bases the decision that the statute did not limit the action against the defendant in that suit upon the principle that the judgment to be obtained by service upon the officer of a foreign corporation would not be a full and perfect judgment prevalent against it in a State other than New York. The case as reported in the series does not contain the opinion, but a copy certified by the reporter has been handed to us, and it is full and explicit upon the point now suggested.

The cases establish, that a corporation has its existence and domicile only within the jurisdiction of its origin, and that in its nature it is incapable of migration to another jurisdiction.

In the *Bank of Augusta* v. *Earle*,† it was said: "The artificial person or legal entity known to the common law as a corporation, can have no legal existence out of the bounds of the sovereignty by which it is created, that it exists only in contemplation of law and by force of law, and where that law ceases to operate the corporation can have no existence. It must dwell in the place of its creation."

The same doctrine was reiterated and the above language quoted with approbation by Taney, C. J., in *Ohio and Mississippi Railroad Co.* v. *Wheeler*.‡

In *Day* v. *Newark India-Rubber Manufacturing Company*,§ Mr. Justice Nelson held that a corporation of New Jersey, although it had a place for the store and sale of its goods in New York, was not an inhabitant of that city, and that it could have no corporate existence beyond the territory of

* 50 New York, 656.
† 13 Peters, 521.
‡ 1 Black, 295.
§ 1 Blatchford, 628.

New Jersey. These principles have never been disturbed, although other doctrines contained in these cases in regard to the residence of a corporation, when plaintiff in an action, have been reconsidered.

It is also established in the courts of New York,* that a foreign corporation is a citizen of the State from which it obtains its charter, and that it is incapable of immigration.

We do not say that a corporation cannot run its cars in a State other than that where it is incorporated and where it is domiciled, nor that it cannot by its lawful agents make contracts and do other business in such State. We assume that it can. In doing these things it does not lose its residence in the former State nor become a resident of the latter. It still resides in the State where it is incorporated and does not depart therefrom.

We assume, also, that a foreign corporation may appoint an attorney to appear for it when sued in a foreign State, and that a judgment obtained against it, upon such appearance, would be perfect and complete. We are not aware that this proposition has ever been doubted.†

By section one hundred of the New York code, already quoted in full, the statute of limitations does not apply to the case of a person who shall be "out of the State when the cause of action shall accrue against him." If he "depart from and reside out of the State after such cause of action shall have accrued, the time of his absence shall not be taken as any part of the time limited for the commencement of such action." Although a natural person who has thus departed may return frequently and remain long, yet if his domicile continues in another State, the time of his non-residence forms no part of the time limited by the statute.‡ It was legally impossible for the Tioga Railroad Company to depart from the State of Pennsylvania. Of course, it could not bring its residence into the State of New York.

* Merrick *v.* Van Santvoord, 34 New York, 208; see also Stevens *v.* Phœnix Insurance Co., 41 Id 149, to the same purport.

† McGoon *v.* Scales, 9 Wallace, 31–2; Chaffee *v.* Hayward, 20 Howard, 208.

‡ Burroughs *v.* Bloomer, 5 Denio, 532.

It was resident out of the State when the cause of action accrued against it, and has ever since so continued. There is no limitation of the time in which the action may be brought in such a case.

Statutes of limitation are in their nature arbitrary. They rest upon no other foundation than the judgment of a State as to what will promote the interests of its citizens. Each determines such limits and imposes such restraints as it thinks proper.

In Angell on the Limitation of Actions at Law,* the author says: "Under the thirty-fourth section of the Judiciary Act of 1789, the acts of limitations of the several States, where no special provision has been made by Congress, form a rule of decision in the courts of the United States, and the same effect is given to them as is given in the State courts. In accordance besides to a steady course of decision for many years, the Federal judiciary feel it an incumbent duty carefully to examine and ascertain if there be a settled construction by the State courts of the statutes of the respective States where they are exclusively in force, and to abide by and follow such construction when found to be settled. There is no unwritten or common law of the Union. The rule of action is found in the different States as it may have been adopted and modified by legislation and a course of judicial decisions. The rule of decision must be found in the local law, written or unwritten."†

The decisions of the courts of the State of New York upon the question before us directly, and in its collateral aspects, have been uniform and consistent. They all sustain the view we have taken; *Burroughs* v. *Bloomer*,‡ holding that the time spent by a person in this State while domiciled elsewhere, is not to be deemed as a part of the time required for the running of the statutes; *McCord* v. *Woodhull*,§ to the

* Page 14, § 24.

† McCluny *v.* Silliman, 3 Peters, 270; Bank of the United States *v.* Daniel, 12 Id. 32; Harpending *v.* The Dutch Church, 16 Id. 455; Porterfield *v.* Clark, 2 Howard, 76.

‡ 5 Denio, 532.

§ 27 Howard's Practice Reports, 54.

same purport; *Olcott* v. *Tioga Railroad Company*,* and *Rathbun* v. *Northern Central Railroad Company*,† together with the cases already cited, showing that a judgment obtained by service of a summons upon the agent or officer of a foreign corporation is not personal and conclusive; and *Blossburg Railroad Company* v. *Tioga Railroad Company*,‡ in the Circuit Court of the United States, heretofore referred to, all tend to the same conclusion.

We have not been referred to a single decision of the New York courts in conflict with these authorities, nor are we aware of any. We are not at liberty to depart from this settled construction were we inclined to do so.§

There is nothing in the rulings upon the trial in regard to the admission or exclusion of evidence that requires our interference.

Mr. Justice FIELD concurred in this opinion.

Mr. Justice MILLER, dissenting:

I dissent from that part of the opinion of the court which relates to the defence of the statute of limitations.

If the State courts of New York have construed their statute concerning service of process, to mean that no such service will authorize a judgment against a corporation of another State, which will be valid beyond the limits of the State of New York, it is a most extraordinary and unnecessary decision, for it is the province of those other States, or of the Federal judiciary, to declare the effect of such judgment, outside of the State of New York. Besides it is not asserted that any such decision has ever been made, except with reference to its effect upon the right of such corporations to plead the statute of limitations in the State courts of New York. Nor do I believe that the courts of any State of the Union except New York, have ever held that a person doing business within the State and liable at all times

* 20 New York, 210. † 50 Id. 656. ‡ 5 Blatchford's Circuit Court, 387.
§ Gelpcke *v.* Dubuque, 1 Wallace, 175; 1 Stat. at Large, 92, note A.

to be sued and served personally with process cannot avail himself of the statute of limitations, if the time prescribed by it to bar such action has elapsed before it was commenced. The liability to suit where process can at all times be served, must in the nature of things be the test of the running of the statute. A different rule applied to an individual because he is a citizen or resident of another State, is a violation at once of equal justice and of the rights conferred by the second section of the fourth article of the Federal Constitution, that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States.

I can hardly believe, therefore, that the New York statute means that if two men doing business in adjoining houses in the city of New York, one may avail himself of the statute of the State for limitation of actions, when the time prescribed has elapsed, because he is a citizen of that State, while the other cannot because he is a citizen of New Jersey, when each has been equally and always liable to service of process. Nor do I believe, on a review of all the cases, that the courts of New York have intended to give such a construction to those statutes.

My brother STRONG agrees with me in these views.

SIMPSON *v.* GREELEY.

The doctrine settled in *Williams* v. *Bank* (11 Wheaton, 414), and declared in *Masterson* v. *Herndon* (10 Wallace, 416), to be "the established doctrine of the court"—that all the parties against whom a joint judgment or decree is rendered must join in the writ of error or appeal, or it will be dismissed, except sufficient cause for the non-joinder be shown—again adjudged.

ERROR to the Supreme Court of Kansas.

Carlos Greeley sued William A. Simpson and *eight other persons* in one of the county courts of Kansas, to recover

certain lands, together with damages for the detention of them; and for waste committed by the whole nine.

The nine defendants filed a joint answer.

The plaintiff replied; and after a trial judgment was given—

"That the plaintiffs have and recover of and *from said defendants* the lands and tenements described in the declaration; that they also have and recover of the said William A. Simpson the sum of $4300, the value of the rents, issues, and profits of said lands and tenements, and for the timber taken from said land by the said defendant; that the plaintiffs also have and recover of *the other defendants* the sum of $2600, to be credited as part of the said $4300, if collected, it being the value of the rents above found."

Simpson—none of his co-defendants joining—filed a petition in error to the Supreme Court of Kansas, alleging that the consent of none of his co-defendants could be obtained to join him in the proceeding. However, very soon afterwards they all did file a petition in error just like his own, and praying that the judgment rendered against them be reversed, for the causes and reasons set forth in his petition. The Supreme Court of Kansas affirmed the judgment, and a mandate was issued out of that court reciting,

"That a judgment in a certain civil action, wherein *Carlos Greeley et* AL. were plaintiffs, and *William A. Simpson et* AL. were defendants, was rendered by the latter court in favor of the said *Greeley et* AL., on a transcript of which judgment and record said *Simpson et* AL. prosecuted a petition in error to the Supreme Court within and for the State of Kansas."

From this judgment of the Supreme Court of the State, Simpson *alone* took this writ of error, assigning no cause why the others were not joined.

Mr. W. T. Otto (*with whom was Mr. J. P. Usher*), preliminary to argument upon the merits, asked to have the writ dismissed, observing that it was obvious that the whole nine original defendants were plaintiffs in error in the Supreme

Recapitulation of the case in the opinion.

Court of Kansas, and that a joint judgment affirming the judgment of the inferior court had been rendered against them. It was perfectly settled, he observed, that such a writ as the present one would be dismissed, there having been *no effort made by Simpson to have the other co-defendants join in it, and no cause shown or alleged why they did not.**

Mr. W. W. Nevison, contra.

Mr. Justice CLIFFORD delivered the opinion of the court.

Fee simple title is claimed by the present defendants to the several tracts of land described in the declaration, and they commenced an action of ejectment to recover the possession of the same, and for the rents and profits, and for the value of certain timber which, as they allege, the defendants have cut thereon and converted to their own use.

Eight other persons besides the present plaintiff were joined as defendants in the suit, and they were all duly served with process and appeared and made defence in the first District Court of the State where the writ was returnable.

Two defences were set up, as follows: (1.) They, the defendants, denied every allegation and averment of the declaration. (2.) They pleaded that the title to the several tracts of land was in William A. Simpson; that he acquired the same in the manner and by the means circumstantially set forth in their second plea, and that the other defendants are in the possession of the said several tracts as tenants of the said Simpson, and have large and valuable crops growing thereon, and that they hold the same by lease from the actual owner of the title. Wherefore, they, the defendants, pray and demand judgment against the plaintiffs, and that the plaintiffs be enjoined and restrained from ever claiming, suing for, or setting up any title to the said several tracts of land, or either of them, or any part or portion thereof, and that the pretended estate and interest of the plaintiffs be determined and wholly held for naught.

* See Masterson *v.* Herndon, 10 Wallace, 416.

Recapitulation of the case in the opinion.

Leave was granted to the plaintiffs by the court to file a reply, and they did so, as more fully appears in the record, in which they controvert each and every of the material allegations of the answer, except that the defendants are in the possession of the premises, and allege that the principal defendant acquired the possession by wrongful and unlawful means, and reassert their claim of title, as set forth in the declaration. Subsequently the parties waived a jury and went to trial before the court. Evidence was introduced on both sides, and the court made numerous findings of fact and several conclusions of law. Certain exceptions were also taken both to the rulings and the findings of the court.

Some delay followed, and both parties having been fully heard the court rendered judgment as follows: "That the plaintiffs have and recover of and from said defendants the lands and tenements described in the declaration. That they also have and recover of the said William A. Simpson the sum of $4300, the value of the rents, issues, and profits of said lands and tenements, and for the timber taken from said land by the said defendant. That the plaintiffs also have and recover of the other defendants the sum of $2600, to be credited as part of the said $4300, if collected, it being the value of the rents above found."

Judgment was signed on the 15th of November, 1870, and on the following day the defendant, William A. Simpson, filed a petition in error and a transcript of the record in the clerk's office of the Supreme Court of the State, in which he represents that the other defendants, naming each, will not consent to join in the petition, but the record shows that all the other defendants, on the 12th of January following, filed a petition in error in the Supreme Court, praying that the judgment rendered in the subordinate court should be reversed for the reasons stated in the petition of the first petitioner.

Due notice was given, by a summons issued under the first petition, to the original plaintiffs and all of the defendants except the first petitioner, that the first petitioner had filed such a petition and a transcript of the record in the

clerk's office of the State Supreme Court, but all of the persons named as defendants in the original writ are also named as such in the summons issued by the clerk of the State Supreme Court. Service of the summons was duly acknowledged by the original plaintiffs and by all of the eight defendants who did not sign the first petition in error. Seasonable entry of the case was made in the Supreme Court of the State, and the parties having been fully heard the said Supreme Court affirmed the decree of the subordinate court and sent down their mandate commanding the subordinate court to cause execution to be had of the said judgment of the said Supreme Court, according to law.

Early application was made by the present plaintiff to the clerk of the Circuit Court of the United States for that district for a writ of error, under the twenty-fifth section of the Judiciary Act, to remove the cause into this court, and the record shows that it was duly issued and that it was properly allowed by the chief justice of the State Supreme Court.

Errors of a material character are assigned by the plaintiff as reasons for the reversal of the judgment rendered in the State courts, but it is necessary in the first place to examine the objection taken by the defendants to the jurisdiction of this court, as that objection presents a preliminary question which, if decided in favor of the defendants, will dispose of the case.

They, the defendants, insist that the writ of error should be dismissed because one only of the nine defendants in the court below is made a party in the writ as issued by the clerk of the Circuit Court, and because only one of the number has given bond to prosecute the writ of error with effect, as required by the act of Congress in such case made and provided.

Where there was a joint judgment against several and one only of the defendants sued out a writ of error, without joining the others, it was decided by this court, Marshall, C. J., giving the opinion, that it was irregular, and the court

dismissed the writ of error.* Subsequently the same rule was applied in a case where the cause was removed into this court by appeal, the opinion of the court being also given by the Chief Justice.† Reference was made in the opinion in that case to the former decision, but the court, not relying merely on authority, decided that it was correct as matter of principle that the whole cause ought to be brought before the court at the same time, and that all the parties united in interest ought to unite in the appeal, as appeals are subject to the same rules, regulations, and restrictions as are prescribed by law in case of writs of error. Since those decisions were published the question has frequently been presented to this court, and has uniformly been determined in the same way, where it appeared that the interest was joint and that no severance had been effected either in the judgment or by subsequent summons and severance or by some proceeding of an equivalent character.‡ Undoubtedly those cases show what the general rule is, but it is equally well established, where some of the parties in interest refuse to join in the writ of error or appeal, that the others are entitled to resort to the process and proceeding of summons and severance to enable them effectually to remove the cause from the subordinate court into the appellate tribunal for re-examination.§ Cases arise beyond all doubt where only one of several defendants is affected by the judgment or decree, and it is well settled that in such cases the party whose interest only is affected by the alleged error may carry up the case without joining the others in the appeal or writ of error.‖ Exceptional cases of the kind occasionally arise, but where the interest is joint and the interest of all is affected by the judgment, the rule is universal, that all must join in the writ of error, else it is open to the other

* Williams *v.* Bank, 11 Wheaton, 414.
† Owings *v.* Kincannon, 7 Peters, 402.
‡ Masterson *v.* Herndon, 10 Wallace, 416; Hampton *v.* Rouse, 13 Id. 187.
§ Todd *v.* Daniel, 16 Peters, 523.
‖ Forgay *v.* Conrad, 6 Howard, 203; Germain *v.* Mason, 12 Wallace, 261; Cox *v.* United States, 6 Peters, 182.

party to demand that it be dismissed, unless a severance of the parties in interest has been effected by summons and severance, or by some equivalent action appearing in the record.*

Apply that rule to the present case, and it is clear that the writ of error must be dismissed, as one only of the nine defendants in the original suit is named in the writ of error; nor is there anything in the record to take the case out of the operation of the general rule, as the plaintiffs in the court below have recovered judgment for the several tracts of land described in the declaration, against all of the defendants therein joined. Separate judgment for the damages and the whole of the rents and profits is rendered against the present plaintiff; but the court also rendered judgment against the other eight defendants for the amount of the rents and profits, to be credited to the other defendant when collected, which shows that each defendant is interested in every part of the judgment.

Viewed in the light of these suggestions, it is quite clear that the writ of error in this case must be dismissed, as all the defendants are directly or indirectly affected by the judgment in respect to the damages and rents, issues and profits, as well as the judgment that the title to the lands described in the declaration is in the present defendants. Such a controversy cannot be properly re-examined here by instalments, nor unless all the parties to be affected by the result are before the court.

WRIT DISMISSED.

* Smyth *v.* Strader, 12 Howard, 327; Davenport *v.* Fletcher, 16 Id. 142; Heirs of Wilson *v.* Insurance Company, 12 Peters, 140; O'Dowd *v.* Russell, 14 Wallace, 402; Deneale *v.* Stump, 8 Peters, 526.

Statement of the case.

INSURANCE COMPANY *v.* BARING.

1. If there be no evidence to support facts, assumed in a prayer for a charge, to have been supported by a greater or less weight of evidence, it is the duty of the court to reject the prayer. It would be error to leave a question to a jury in respect to which there was no evidence.
2. Advances made in a foreign port to equip a vessel, and to procure for her a cargo to a port of destination, are *primâ facie* presumed to be made on the credit of the vessel.
3. They are a lien on the vessel and constitute an insurable interest.

ERROR to the Circuit Court for the District of Louisiana; in which court Baring Brothers & Co. sued the Merchants' Mutual Insurance Company, of New Orleans, for advances made by them, as the declaration in the case alleged, to the master and owners of the British bark Fanny, for the purposes of her equipment and to procure a cargo for the vessel, in a voyage from Cadiz, in Spain, to the port of New Orleans. The plaintiffs also alleged that through their agents they had obtained a policy of insurance, dated December 6th, 1867, from defendants. The insurance company above named insuring the hull of the bark for $9000, in the name of the said agents, containing the clauses, "on account of whom it may concern" and "lost or not lost," for the protection of those advances.

They further alleged that the bark, though well officered, manned, and equipped, suffered so much on the voyage, from the violence of weather, that the master found it necessary to put into a port of Cuba for such repairs as would enable him to prosecute the voyage; that their agents gave due notice of those facts to the president of the insurance company; that the company sent an agent to the port to take charge of the interest of all concerned; and that from the moment the agent arrived there he took exclusive charge of the repairs of the vessel and caused such work to be performed as he thought necessary; that he obtained from their agent there the funds necessary to pay for all such repairs; that the bark completed her voyage; that after her arrival

at the port of destination an adjustment of averages was made by the adjusters of averages in that port for costs, charges, and damages in making such repairs, and that in the said adjustment they, the plaintiffs, were awarded $3507 on the said policy of insurance.

The defendants filed an answer (equivalent to the general issue in an action of assumpsit) and a special plea that the bark was unseaworthy.

The insurance company made three prayers for instruction:

(1.) That if the evidence showed that the insurable interest of the plaintiffs was a bottomry bond on the bark, and that the vessel arrived in safety at the port of destination, the jury should find for the defendants.

(2.) That it is only when the vessel insured is lost that the assured on a bottomry bond can recover, and that if the proof was that there was no loss or destruction of the bark, the jury should find for the defendants, if the plaintiffs had insured on a bottomry bond.

(3.) That the defendants were not bound to tender back the premiums of insurance before availing themselves of any defence against the validity of the policy of insurance, or for its avoidance by a subsequent cause.

Verdict and judgment went for the plaintiffs for the amount awarded by the average adjusters. Exceptions were taken by the defendants to the rulings of the court in refusing to instruct the jury as they requested.

Nothing appeared in the record except the declaration, the answer, the verdict and judgment, the three bills of exceptions to the rulings of the court in refusing to instruct the jury as requested, neither of which contained any report of the evidence, and the motion for new trial, which merely stated that the verdict of the jury was contrary to law and the evidence, without giving any statement of the evidence which was submitted to the jury.

Evidence to show that the action was founded upon a bottomry bond, or that such a bond was offered in evidence, or introduced at the trial, was entirely wanting, nor was there

evidence, direct or circumstantial, to show that such a question as that involved in the third prayer for instruction arose or could have arisen in the case, or that the instruction was a proper one, in any view of the controversy, for the consideration of the jury.

Viewed in the light of these facts (as this court said that the case should be viewed), the several rulings of the court below in refusing to grant the three prayers for instruction were considered by this court together.

Mr. W. M. Evarts, for the plaintiffs in error; Messrs. P. Phillips and D. G. Campbell, contra.

Mr. Justice CLIFFORD, having stated the case, delivered the opinion of the court.

Correct instructions, if applicable to the case, the court, as a general rule, is required to give, unless the same are in substance and effect embodied in those previously given by the court to the jury; but the court is never required by law to give an instruction to the jury which is not applicable to the case, even though it be correct as an abstract principle or rule of law; and it may be added that no prayer for instruction, whether presented by the plaintiff or the defendant, can be regarded as applicable to the case when it is wholly unsupported by the evidence introduced to the jury. Competent evidence may be written or oral, direct or circumstantial, but when there is no legal evidence of any kind to support the theory of fact embodied in a prayer for instruction, whether presented by the plaintiff or the defendant, the instruction should always be refused; and such a ruling can never become a good cause for reversing the judgment. It is clearly error in a court, said Taney, C. J., to charge a jury upon a supposed or conjectural state of facts, of which no evidence has been offered, as the instruction presupposes that there is some evidence before the jury which they may think sufficient to establish the fact hypothetically assumed in that way by the court, and if there is no evidence which they have a right to consider, then the

charge does not aid them in coming to a correct conclusion, but its tendency is to embarrass and mislead them, as it may induce them to indulge in conjectures instead of weighing the testimony.* When a prayer for instruction is presented to the court, and there is no evidence upon the subject in the case for the consideration of the jury, it ought always to be withheld, and if it is given under such circumstances, it will, as a general rule, be regarded as error in the court, for the reason that its tendency may be, and often is, to mislead the jury by withdrawing their attention from the legitimate points of inquiry involved in the issue.† Bills of exceptions ought to state that evidence was offered of the facts upon which the opinion of the court is prayed, else the court is under no obligation to give the instruction.‡ Though the judge may refuse to declare the law to the jury on a hypothetical question, yet if he gives the instruction and it is erroneous, it is the proper subject of revision.§ But the true rule, if there be no evidence to support the theory of fact assumed in the prayer, is to reject it, as it is error to leave a question to a jury in respect to which there is no evidence.‖

Attempt is made in argument to maintain that the plaintiffs had no insurable interest in the bark unless it be assumed that it was created by a bottomry bond, but the court is entirely of a different opinion, as it is alleged in the declaration that the advances were made to equip the vessel and to procure for her a cargo in the voyage from a foreign port to the port of destination. Founded as the declaration is upon the policy of insurance it must be construed in con-

* United States *v.* Breitling, 20 Howard, 254.

† Goodman *v.* Simonds, Ib. 359.

‡ Vasse *v.* Smith, 6 Cranch, 226; United States *v.* Dunham, 21 Law Reporter, 591; Caldwell *v.* United States, 8 Howard, 366; Blackburn *v.* Crawfords, 3 Wallace, 176.

§ Etting *v.* Bank of the United States, 11 Wheaton, 59; Beaver *v.* Taylor, 1 Wallace, 637.

‖ Chandler *v.* Van Roeder, 24 Howard, 224; Railroad *v.* Gladmon, 15 Wallace, 409.

nection with the policy. By the terms of the policy the insurance is upon the bark, her tackle, and apparel, which is the proper language to be employed in a case where the insured had an interest in the vessel.

Advances made on the credit of a ship for necessary repairs or supplies in a foreign port create a maritime lien upon the ship, and it is well-settled law that a maritime lien is a *jus in re*, and that it constitutes an incumbrance on the property of the ship which is not divested by the death or insolvency of the owner.* Such a lien may be enforced by a process *in rem*, which is founded on a right in the thing, the object of the process being to obtain the thing itself, or a satisfaction out of it, for some claim resting on a real or quasi proprietary right in the thing.† Liens of the kind constitute an insurable interest, and it is quite clear that enough is alleged in the declaration to warrant the conclusion that the advances made in this case are properly to be regarded as constituting a maritime lien upon the bark.‡ Contracts for repairs and supplies may be made by the master to enable the vessel to proceed on her voyage, and if it appears that they were necessary for the purpose and that they were made and furnished to a foreign vessel or to a vessel of the United States in a port other than a port of the State to which the vessel belongs, the *primâ facie* presumption is that the repairs and supplies were made and furnished on the credit of the vessel, unless it appears that the master had funds on hand or at his command which he ought to have applied to the accomplishment of those objects, and that the material-men knew that fact or that such facts and circumstances were known to them as were sufficient to put them upon inquiry and to show that if they had used due diligence in that be-

* The Young Mechanic, 2 Curtis, 404; Same Case, 3 Ware, 58; 1 Parsons's Maritime Law, 489; 3 Kent (11th ed.), 170; General Smith, 4 Wheaton, 438.

† The Commerce, 1 Black, 580; Buck et al. *v.* Insurance Co., 1 Peters, 164; The Maggie Hammond, 9 Wallace, 456.

‡ Seamans *v.* Loring, 1 Mason, 127; 1 Phillips on Insurance (5th ed.), § 204; Hancox *v.* Insurance Co., 3 Sumner, 132.

half they might have ascertained that the master had no authority to contract for such repairs and supplies on the credit of the vessel.* Whenever the necessity for the repairs and supplies is once made out it is incumbent upon the owners, if they allege that the funds could have been obtained upon their personal credit, to establish that fact by competent proof, and that the material-men knew the same or were put upon inquiry, as before explained, unless those matters fully appear in the evidence introduced by the other party.†

Apply those principles to the case and it is clear that the objection that the plaintiffs had no insurable interest in the bark utterly fails, as it is not controverted that the advances were made to equip the vessel and to procure a cargo for her in the described voyage; and it is sufficient that such an allegation affords a *primâ facie* presumption that the advances were made on the credit of the vessel, as the record fails to disclose any fact or circumstance to overcome that presumption. Such advances constitute a lien upon the ship, and such a lien gives the lender an insurable interest in the ship.‡

Absolutely nothing appears in the record to support the theory that any such defences as those assumed in the prayers for instruction were in fact set up by the defendants in the subordinate court, except what is contained in the prayers for instruction presented to the court. They pleaded a general denial of the allegations of the declaration and that the bark was unseaworthy at the inception of the risk and throughout the voyage, but no mention is made of any such defences as those implied in the prayers for instruction in any other part of the record, nor is there any evidence whatever upon the subject.

* The Lulu, 10 Wallace, 197; The Patapsco, 13 Wallace, 333; 2 Parsons on Shipping, 322 to 337.

† The Grapeshot, 9 Wallace, 141; Thomas *v.* Osborn, 19 Howard, 22.

‡ Seamans *v.* Loring, 1 Mason, 127; 1 Phillips on Insurance (5th ed.), § 204; Godin *v.* Insurance Co., 1 Burrow, 489; Lucena *v.* Craufurd, 5 Bosanquet & Puller, 294; Wells *v.* Insurance Co., 9 Sergeant & Rawle, 103.

Defences in avoidance of the claim made in the declaration must be proved in the court of original jurisdiction, and if not proved there they cannot be successfully set up in the appellate court to support an assignment of error.

Other matters were discussed at the bar, but it is not necessary to examine any other of the propositions submitted, as these suggestions are sufficient to dispose of the case.

JUDGMENT AFFIRMED.

ROACH *v.* SUMMERS.

1. A surety is not discharged by a contract between his principal and their common obligee, which does not place him in a different position from that which he occupied before the contract was made.
2. Answers in chancery not responsive to a bill, and not sustained by other proof, are of no avail as evidence.

APPEAL from the Circuit Court for the Southern District of Mississippi.

Summers & Co. filed a bill in the court below against Eugene and Naylor Roach (the last a representative of I. W. Roach, deceased), and R. B. and B. M. Butler, for an account and for the foreclosure of a mortgage. The bill averred that in the year 1867, the said E. and I. W. Roach, demised a plantation in the State of Mississippi to R. B. and B. M. Butler for the business of cotton planting; that to enable the Butlers to obtain supplies for the plantation from the complainants, Summers & Co., the Messrs. Roach, together with the Butlers, executed two promissory notes, each in the sum of $2500, payable to the complainants, dated February 1st, 1867, and falling due in October and November of that year; that payment of the notes was secured by a mortgage given by the Messrs. Roach, and that it was agreed the cotton raised on the demised plantation *should be shipped to the complainants;* nothing being alleged in the bill as to what was then to be done with it or its proceeds. The bill

further averred that in pursuance of this arrangement the complainants made advances to the Butlers, a part of which was repaid out of the proceeds of the cotton crop of 1867, but that $4774.69 remained unpaid after credit had been given for the cotton shipped in that year; that the Butlers, being desirous to continue planting cotton on the plantation during the year 1868, and being without the necessary money and supplies for that purpose, applied to the complainants to make additional advances, to secure which, as well as the balance then due, they executed a deed of trust of all the crops of corn and cotton they might raise on the plantation, stipulating that the net proceeds should be applied—first, to the payment of the supplies furnished for 1868; and secondly, to the payment of the balance due for the supplies furnished in 1867. It is then averred that after giving credit for all the cotton received there remained a balance due to the complainants of about $3600, the proceeds of the crop of 1868 having more than paid the advances made during that year, and having reduced the balance due at the close of 1867.

The defence set up in the answers was that the Messrs. Roach were only sureties for the repayment of the advances made to the Butlers in 1867, not exceeding $5000; that the notes and mortgage were given as securities for such repayment; that it was agreed that *all the crops of cotton raised on the demised plantation should be applied to the payment of the notes, and that the cotton should be shipped to the complainants by the Butlers for that purpose as rapidly as it could be prepared for market*, but that in fraud of the agreement the complainants subsequently, on the 19th day of February, 1867, entered into an arrangement with the Butlers, without the knowledge of the sureties, by which it was stipulated they should have an interest in the crop of 1867, that the Butlers should pay 2½ per cent. commissions on the advances made, 10 per cent. interest, and the usual commissions for selling the cotton. It was further answered that in their account the complainants did charge 10 per cent. interest on money advanced, and 2½ per cent. commissions; that instead of ad-

vancing supplies for the plantation, as they had agreed to do, they advanced chiefly money, and that by their usurious charges they made up the balance of $4774 as due at the close of the year 1867. The answers then asserted that the agreement of February 19th, 1867, and the subsequent dealings of the complainants with the Butlers, as exhibited by their accounts, in which they charged 10 per cent. interest and commissions, was an abandonment of the original contract and inconsistent with it, and that it operated as a release of the notes and mortgage.

The matter in issue was, therefore, a question of fact. Was the original agreement (a verbal agreement confessedly) which the bill set forth — the agreement that the cotton raised on the demised plantation should *be shipped to the complainants*—accompanied with the further stipulation which the answer alleged that it was accompanied with, to wit, that all the crops of cotton raised on the demised plantation should be applied to the payment of the notes, and that the cotton should be shipped to the complainants by the Butlers for that purpose as rapidly as it could be prepared for market.?

If this further stipulation was not contemporary with the original agreement, then the defence had no merit.

The language of the answer of Eugene Roach was thus:

"This respondent answering, says, that it was agreed and understood by and between said complainants and said Butlers that all the crops of cotton raised on said plantation, *should be applied to the payment of the aforesaid promissory notes, and that the same should be shipped by said Butlers, for that purpose, as rapidly as it could be prepared for market.*"

That of the Butlers (a joint answer), thus:

"They now state and aver that the sole and only consideration for the said notes, as understood and agreed upon by the said Roachs, these respondents and complainants, was plantation supplies to be furnished to these respondents by complainants for the leased plantation for the year 1867, and in no event were the said Roachs to be liable for a greater amount of sup-

plies than the face of said notes. The said Roachs were to be liable only for the supplies for the year 1867, not exceeding $5000. The notes were simply given as security for said advances. It was further agreed between the said parties that the crop of 1867 was to be shipped to said complainants, and the succeeding crops to be also shipped, and that all shipments were to be first applied as credits on the said notes."

Eugene Roach and R. B. Butler were examined as witnesses. The former said:

"The agreement between the parties to the notes mentioned in the bill, in regard to the payment thereof, was that the cotton raised by the Butlers should be shipped to Summers and Brannins, and *proceeds first applied to the payment of the notes.* I was not present when the agreement alluded to was made, but was subsequently informed by my brother, I. W. Roach, that such agreement was made when the notes were executed by the other parties; and at my brother's solicitation, and on account of his statement of such agreement, I also signed the notes."*

The testimony of B. M. Butler as appearing on examination in chief and on cross-examination, was thus:

Examined in chief.

"*Question.* State whether or not, *at the time said notes were made*, there was any agreement that all the cotton shipped and to be shipped by you and your co-defendant, B. M. Butler, for the year 1867, as well as for subsequent years, was to be sold, and the proceeds thereof applied by complainants to the payment of said notes in preference to any other debts against you?

"*Answer.* There was such an agreement."

Cross-examined.

"*Question.* State when the agreement referred to in the interrogatory-in-chief was made, the particular date and year; whether before or after the notes and mortgage referred to in this case were made; with whom and by whom said agreement was made.

"*Answer.* The agreement was made in New Orleans, the 19th day of February, 1867, *after* the notes and mortgage were exe-

* The brother here mentioned was now dead.

cuted, with a member of the firm of Summers & Co., by me, acting for B. M. and R. B. Butler."

Upon the bill, answer, and proofs the Circuit Court decreed in favor of the complainants, but in the settlement of the account and ascertainment of the debt due they were credited with only 8 per cent. interest and 2½ per cent. commissions, while they were charged with the proceeds of all the cotton received by them from the plantation for both the years 1867 and 1868, and no exception was taken to this mode of stating the account.

This appeal was taken by the defendants Roach.

Mr. P. Phillips, for the appellants; Mr. Montgomery Blair (with whom was Mr. J. B. Beck), contra.

Mr. Justice STRONG delivered the opinion of the court.

No exception was taken in the Circuit Court to the mode in which the account was stated. Of course no exception can now be taken.

The only question, therefore, which can be considered in this court is whether the agreement of February 19th, 1867, by which it was stipulated between the complainants and the Butlers that the former should have an interest in the crop of 1867, as well as 10 per cent. interest and 2½ per cent. commissions for advances, operated as a release of the notes and mortgage given by the sureties. The answer to the question depends upon what took place when the Messrs. Roach became sureties.

Waiving attention to the fact that no particular or defined interest was given to the complainants by their arrangement with the Butlers, it is plain it could not work a discharge of the sureties, unless it placed them in a different position from that which they occupied before it was made. If it took away any security they had in virtue of their contract with the complainants, it was doubtless a fraud upon them, and they are not holden by their notes and mortgage. If, when they became sureties, it was agreed by all the parties themselves, the complainants and the Butlers, that all the

cotton crops raised on the demised plantation should be shipped to the complainants and credited against the advances to be made, it was bad faith to the sureties for the creditors to enter into an arrangement with the Butlers that a portion of the crops should be devoted to another use. On the other hand, if there was no such agreement respecting the crops made when the Messrs. Roach assumed their suretyship and gave their notes and mortgage, the subsequent arrangement with the Butlers was no alteration of the original contract, and had no effect upon it.

It is vital, then, to a correct decision of the case, to ascertain whether there was such an agreement made at the time the suretyship was undertaken, an agreement to which the Messrs. Roach were parties. It was averred in the answer of Eugene Roach that such an agreement was made between the complainants and the Butlers, but when it was made, whether at the time when the notes were given or afterwards, is not stated. Nor is it alleged that the sureties were parties to it, or that they executed their notes and mortgage in reliance upon it. The answer of the Butlers is substantially the same, though, perhaps, it may reasonably be construed as averring that such an agreement was made between all the parties when the notes were given. But assuming that the averment is sufficiently made in both answers, since it is new matter not responsive to anything in the bill, it must be sustained by proof to be of any avail as a defence.

And we do not find in the record any proof to sustain it. The only testimony upon the subject is that of Eugene Roach and R. B. Butler, two of the defendants. Roach testifies that it was agreed that the cotton crop raised by the Butlers should be shipped to Summers & Co., and that the proceeds should be first applied to the payment of the notes. But he does not state when or between whom this agreement was made. That he is not speaking from his own knowledge of what took place when the notes were given is certain, for he says he was not present, and that all his knowledge was derived from his brother. And the testimony of B. M. Butler also utterly fails to establish such an agree-

ment. In answer to an interrogatory whether at the time the notes were made there was any agreement that all the cotton shipped or to be shipped by him and R. B. Butler for the year 1867, as well as for subsequent years, was to be sold and the proceeds thereof applied by the complainants to the payment of the notes in preference to any other debts due by him and R. B. Butler, he said there was such an agreement. But in his cross-examination he said the agreement of which he spoke was made in New Orleans on the 19th of February, 1867, after the notes and mortgage were executed. The evidence, then, wholly fails to prove the existence of the agreement made at the time when the suretyship was undertaken, and consequently the subsequent arrangement of February 19th, 1867, as well as the deed of trust for the crop of 1868, had no effect upon the liability of the mortgagors.

DECREE AFFIRMED.

BANK v. COOPER.

After an assignee in bankruptcy, aided by a creditor, has twice contested before the District Court or its referee the claim of a person who has been allowed to prove his claim, and, after all the evidence which could then or afterwards be produced, it has been twice decided that the claim was a valid one, no bill lies in the Circuit Court (either under the general provisions of the Bankrupt Act or under the second section of it, giving to the Circuit Court a general superintendence and jurisdiction of all cases and questions arising under the act) against either the assignee or the person who has been allowed to prove his claim, to have the order allowing it reversed. Such a bill may be demurred to for want of equity.

APPEAL from the Circuit Court for the Northern District of New York; the case being thus:

On the 4th of February, 1870, the Troy Woollen Company was adjudged a bankrupt by the District Court for the Northern District of New York, and on the 11th of March, 1870, one Tappan became the assignee. Soon afterwards Cooper,

Vail & Co. proved a debt against the bankrupt amounting to $67,029, and on the 24th of July, 1870, filed the probate with the assignee. Subsequently, on the 29th of November, on petition of the First National Bank of Troy, which had also proved a debt against the bankrupt, the District Court made an order allowing them and the assignee to contest the validity of the claim of Cooper, Vail & Co. It was then referred to W. Frothingham, Esq., to take the proofs and accounts respecting the claim, to determine its legality and amount, and to report his conclusions to the court. Permission was also given to the assignee, and to any creditor of the bankrupt, if they desired to contest the claim, to attend the proceedings before the referee, and it appears that the bank did attend, that evidence in opposition to the claim was submitted, and that the referee reported the whole of it as due from the bankrupt. To his report joint exceptions were filed on behalf of the bank and the assignee, and argued in the District Court upon the evidence taken before the referee. These exceptions were overruled, and on the 13th of July, 1871, the court made an order allowing the debt as proved by Cooper, Vail & Co., and directing the bank to pay the costs and expenses of the reference.

In this condition of things, the bank filed a bill in the Circuit Court below against Cooper, Vail & Co., and the assignee, to procure a reversal of the order. The bill, after setting forth the facts above stated, made a general averment that Cooper, Vail & Co. had no legal claim against the bankrupt; that they had fraudulently proved their claim; that they knew this when the exceptions were taken to the referee's report as well as when the court made the decree allowing the debt, and that it was thus proved before the District Court. The bill then averred that the decree was erroneous, because there was no legal debt due by the bankrupt to Cooper, Vail & Co.; because the evidence before the court proved that there was no such debt, and because the court should have disallowed it.

This was one aspect of the bill. It further charged that the assets in the hands of the assignee were insufficient to

pay fifty cents on the dollar of the legal debts of the bankrupt, even if the claim of Cooper, Vail & Co. were disallowed, and it averred that the assignee refused to appeal from the decision of the District Court, or to allow the creditors to appeal in his name, stating that he was advised that the bank had a right to have the decree reviewed under section second of the Bankrupt Act, and that if the creditors desired a review they would have to take that course. It then charged that the assignee was guilty of neglect of duty in omitting to appeal from the decree of the District Court, and renewed the averment that the bankrupt was not, and never was, liable for the debt proved against it by Cooper, Vail & Co., or for any part of it.

The prayer of the bill was that the decree made by the District Court might be "reviewed, examined, revised, and annulled, and that the proof of debt filed with the assignee by Cooper, Vail & Co. might be rejected and expunged."

The second section of the Bankrupt Act, through which it was alleged that the assignee had told the creditors if they wished relief they would have to resort, declares that the several Circuit Courts of the United States, within and for the districts where the proceedings in bankruptcy shall be pending, shall have a general superintendence and jurisdiction of all cases and questions arising under the act, and, except when special provision is otherwise made, may, upon bill, petition, or other process of any party aggrieved, hear and determine the case (as) in a court of equity.

Cooper, Vail & Co. demurred:

1. For want of equity.
2. For want of jurisdiction.
3. For want of privity between the complainant and the defendant.
4. That the matters had been adjudicated and that the adjudication was conclusive.
5. That the appeal was not within the time prescribed by law.
6. That the bill showed that the District Court had decided the questions presented by the bill, but that the bill

did not set forth the facts, or the evidence upon which the order or decree of the District Court complained of was made, or any facts or evidence before the court when the order was made, or the grounds upon which that court based its said decision and order or decree.

7. That the bill of complaint did not set forth facts sufficient to enable the court to determine whether or not the District Court erred in making the order or decree complained of.

8. That the bill did not show that the District Court erred in making the order or decree in the bill complained of.

The Circuit Court sustained the demurrer, and the bank took this appeal.

Mr. E. F. Bullard, for the appellants; J. S. Stearns, contra.

Mr. Justice STRONG delivered the opinion of the court.

The demurrer presents the question whether the complainants' bill sets forth any equity sufficient to justify the court in granting the relief sought against the defendants.

No doubt when an executor or administrator colludes with a fraudulent claimant against a decedent's estate, and refuses to take steps to resist the claim, any person interested in the estate may maintain an action against such fraudulent claimant and the executor or administrator for the purpose of contesting the claim. Bills in equity of this nature have been maintained. And if an assignee in bankruptcy, with knowledge, or with reason to believe that one claiming to be a creditor of the bankrupt had proved a debt against the bankrupt's estate which had no existence, or which was tainted with fraud, should neglect or refuse to contest the allowance of such debt, there is no reason why the other creditors, having proved their debts, should not be permitted to interpose and seek the aid of a court of equity to annul the allowance. But the bill before us presents no such case. The assignee has resisted the allowance of the debt claimed by Cooper, Vail & Co. He took part with the appellants in contesting the debt before the referee

to whose consideration it was submitted. He joined with them in filing exceptions to the report allowing the claim. There is no averment of any collusion between him and the claimants. The bill exhibits nothing which ought to cast discredit upon his fidelity to his trust. The referee decided against the appellants after hearing all the evidence they had to submit. The District Court reviewed his decision upon exceptions taken to it, and came to the same conclusion, allowing the debt claimed by Cooper, Vail & Co. Nor is it pretended that any new evidence exists which ought to lead the Circuit Court to any other conclusion than that at which the District Court arrived. In such a state of facts it cannot be maintained that it was the duty of the assignee to enter an appeal to the Circuit Court, or even to allow an appeal in his name. After two trials, in which he was aided by the appellants, after all the evidence had been made use of in opposition to the claim which could then be produced, or which can now be obtained, and after two decisions allowing the claim, he may well have concluded, as he did, that his duty to his trust did not require either expenditure of the bankrupt's estate in further litigation or the delay which might have been consequent upon an appeal. The bill, then, wholly fails in exhibiting any equity against the assignee.

It is equally without equity as against Cooper, Vail & Co. It is true the averment is made that they have no legal or valid claim against the bankrupt, and that their claim was fraudulently proved and made, but there is no allegation wherein the fraud consists, or of any step they have taken in the assertion of their claim which they might not lawfully take. Such a general averment of fraud can be no foundation for an equity. Moreover, it is apparent that the only fraud intended in the averments of the bill is the assertion of a claim which the complainants insist is not sufficiently sustained by evidence. They objected to the claim at the outset. They appealed to the District Court, and they were allowed to contest its validity. It was at their instance a referee was appointed to examine and report upon it. Before that referee they went to trial, without objection. When

defeated they brought the contest into court and renewed it there, but unsuccessfully. And they do not now allege that in either of these trials there was anything unfair, or that Cooper, Vail & Co. were guilty of any fraud in maintaining their claim, other than the assertion of its existence, or that they themselves made any mistake, or that they have any other case now than they had and urged before the referee and the District Court. Their only ground of complaint is that the referee and District Court came to a different conclusion from that which they think should have been adopted. The court thought the evidence established the existence of a debt due Cooper, Vail & Co. They are of a different opinion. They think the evidence did not establish the existence of such a debt, and, therefore, they have filed this bill in the Circuit Court to annul the action of the District Court. In effect they are seeking a new trial of a question of fact which has been decided against them, and this without averring anything more than that the District Court drew a wrong conclusion from the evidence. Very plainly they have made no case for equitable interference. There are some bills in equity which are usually called bills for a new trial. They are sustained when they aver some fact which proves it to be against conscience to execute the judgment obtained, some fact of which the complainant could not have availed himself in the court when the judgment was given against him, if a court of law, or of which he might have availed himself, but was prevented by fraud or accident unmixed with any fault or negligence of his own. But a court of equity will never interfere with a judgment obtained in another court, because it is alleged to have been erroneously given, without more. And such is substantially this case.

But though the bill is destitute of equity, when considered as an original bill, it is contended that it may be regarded as an application for the exercise of the supervisory jurisdiction of the Circuit Court authorized by the second section of the Bankrupt Act. That section declares that "the several Circuit Courts of the United States, within and for the

districts where the proceedings in bankruptcy shall be pending, shall have a general superintendence and jurisdiction of all cases and questions arising under this act, and, except when special provision is otherwise made, may, upon bill, petition, or other process of any party aggrieved, hear and determine the case (as) in a court of equity." The complainants, having proved their debt against the bankrupt, contend that they may be considered parties aggrieved by any order of the District Court allowing the probate of other debts against the same bankrupt, when the assignee refuses to appeal from the order, or allow an appeal to the Circuit Court. It is true their bill was not filed in the Circuit Court until about four months and a half after the order complained of was made. But the act of Congress prescribes no time within which the application for a review must be presented. An appeal is required to be taken within ten days. Not so with a petition or bill for a review. Undoubtedly the application should be made within a reasonable time, in order that the proceedings to settle the bankrupt's estate may not be delayed, but neither the act of Congress nor any rule of this court determines what that time is. At present, therefore, it must be left to depend upon the circumstances of each case. Perhaps, generally, it should be fixed in analogy to the period designated within which appeals must be taken.* It is, however, to be observed that the bill does not charge any fraudulent collusion between the assignee and Cooper, Vail & Co. At most it charges neglect of duty by the assignee in omitting to contest the debt claimed, and in failing to appeal from a decree of the District Court allowing the debt. Whether this presents a proper case for a review under the second section of the Bankrupt Act need not now be decided. For should it be conceded that the complainants had a right to apply to the Circuit Court for a review of the order of the District Court, and conceded also that this bill may be regarded as such an application, the question would still remain whether the court erred in dis-

* Littlefield v. The Delaware and Hudson Canal Co., Bankrupt Register, vol. iv, p. 77.

missing it. Had the court, in the exercise of its superintending jurisdiction, heard the case and decided it, as the District Court did, the decision would have been final, and no appeal could have been taken to this court.* True, if the court had decided that it had no jurisdiction to review, this court might have entertained an appeal, not for the purpose of reviewing, but for the purpose of correcting an erroneous decision respecting the power of the Circuit Court, and enabling the complainants to be heard on their application.† But it does not appear that this bill was dismissed because the court thought it had no power to review the action of the District Court at the suit of these complainants. On the contrary, it rather appears the bill was dismissed because it presented no case that called for the exercise of the superintending jurisdiction of the court. The statute, though conferring the power, does not make it obligatory upon the Circuit Court to retry every decision of the District Court which a creditor supposing himself aggrieved may ask the court to retry. And it may well be that when, as in this case, a question of fact has been twice tried, and twice decided in the same way, when it is not averred that there has been any collusion between the assignee and the creditor who has proved a debt, or that the complaining party has any evidence which he has not already submitted, or that he has been hindered by any accident or fraud from presenting his case as fully in the District Court as he can in another tribunal, when the substance of all he alleges is that, in his opinion, the court should have determined the facts differently, it may well be that the Circuit Court, in the exercise of its discretionary power, looking also at the delay of the application, may properly conclude that no sufficient case is presented calling for a retrial of the facts.

We do not perceive, therefore, in the action of the Circuit Court anything that requires correction, and the

DECREE IS AFFIRMED.

* Morgan *v.* Thornhill, 11 Wallace, 65; Tracey *v.* Altmyer, 46 New York, 598.

† People *v.* New York Central Railroad Co., 29 New York, 418.

Statement of the case.

TWENTY PER CENT. CASES.

1. The *Twenty per Cent. Cases* (13 Wallace, 576) affirmed, and the liberal view there taken of the *joint resolution* of 28th February, 1867, allowing to certain persons in the civil service of the United States at Washington, an additional compensation of twenty per centum upon their respective salaries as fixed by law, or, where no salary is fixed by law, upon their pay respectively, for one year from the 30th of June, 1866, declared to be the true view and applied to other cases essentially like those.
2. But not applied to the case of a person hired at Washington to do service out of Washington, nor to a contractor who contracted to deliver finished work, and who employed another to do it for him.
3. An act passed on the 12th of July, 1870, repealing "all acts and *joint resolutions*, or parts thereof, and all resolutions of either house of Congress granting extra pay," the act "to take effect on the 1st day of July, 1870," did not affect the rights given by the joint resolution abovementioned.

APPEALS in fourteen cases from the Court of Claims; the case being thus:

On the 28th of February, 1867, Congress passed this joint resolution:*

"That there shall be allowed and paid . . . to the following described persons, now employed in the *civil service of the United States, at Washington*, as follows: To civil officers, temporary and all other clerks, messengers, and watchmen, including enlisted men detailed as such, to be computed upon the gross amount of the compensation received by them; and *employés*, male and female, in the executive mansion, and in any of the following named departments, or *any bureau* or *division thereof*, to wit: state, treasury, war, navy, interior, post-office, attorney-general, agricultural, and including civil officers, and temporary and *all other clerks and employés, male and female*, in the offices of the coast survey, naval observatory, navy yard, arsenal, paymaster-general, including the division of referred claims, commissary-general of prisoners, bureau of refugees, freedmen, and abandoned lands, quartermaster's, capitol and treasury extension, city post-office, and commissioner of public buildings, to the photographer and assistant photographer of the treasury de-

* 14 Stat. at Large, 569.

partment, to the superintendent of meters, and to lamplighters under the commissioner of public buildings, *an additional compensation of twenty per centum on their respective salaries as fixed by law, or where no salary is fixed by law, upon their pay respectively, for one year from and after the 30th day of June*, 1866. *Provided*, That this resolution shall not apply to persons whose salaries, as fixed by law, exceed $3500 per annum."

On the 12th of July, 1870,* Congress passed an act in these words:

"All acts and joint resolutions, or parts thereof, and all resolutions of either house of Congress granting extra compensation or pay, be, and the same are hereby repealed, to take effect on the 1st day of July, 1870."

Under the said joint resolution of 28th of February, 1866, fourteen different persons filed at different times—some of them after the passage of the repealing act—claims in the court below for the twenty per cent. given by the statute.

The first was employed by the bureau of yards and docks, as a machinist in the navy yard at Washington, upon daily wages at the agreed sum and price of $3.25 per day.

The second and third as coppersmiths on the treasury extension, upon daily wages. Under specific appropriations for the construction of the treasury extension, contracts were entered into for finished work, comprehending both materials and labor—materials separately, and labor by the day separately. The services in these two cases were rendered under the latter contracts.

The fourth and fifth as watchmen upon the capitol extension, at daily wages, their compensation changing during the year.

The sixth as a laborer upon monthly wages in the quartermaster's department in the city of Washington.

The seventh was employed in the treasury extension as a laborer upon daily wages; working for part of the time at $1.75 per day, and for another part at $2 per day.

The eighth by the authority of the surgeon-general of

* 16 Stat. at Large, 250, § 4.

the army, as a carpenter at the depot for receiving and distributing medical supplies in Washington.

The ninth was a watchman, laborer, and teamster by the quartermaster's department at Washington.

The tenth was a laborer by the commissary department at Washington.

The eleventh was a laborer, upon daily wages, at the Washington arsenal.

The twelfth was in the secret service division of the Treasury Department, in the capacity of detective, at a monthly salary of $150 per month.

The thirteenth, one Hoffman, was employed by one of the quartermasters on duty in the department at Washington, by the day, as sexton *at the Arlington Cemetery, near Washington, but in Virginia, and there rendered his services.*

The fourteenth, one Bell, was a plate-printer in the bureau of engraving and printing in the Treasury Department. He was paid the market price for his work, the price being neither a salary nor a *per diem* compensation, but a fixed rate for the work done; that is to say, per one hundred sheets of face printing and per one hundred sheets of back printing. In the performance of his duties he employed and paid an assistant, but the pay of the assistant was received directly from the disbursing officers of the treasury, and was deducted by them from the amount earned by the claimant. The amount paid him after such deduction was $1184.30, for twenty per cent. of which the court below entered judgment.

Each of the fourteen claimants was paid the highest rate of wages commonly paid for services such as his.

The Court of Claims gave judgment, *pro formâ*, in all the cases, for the claimants, and the government brought the cases here.

The meaning of the joint resolution of February 28th, 1867, it may be well here to state, had been a matter of question in this court on a previous occasion in the cases known as *The Twenty per Cent. Cases;** and the court then said that

* 13 Wallace, 576.

persons are "properly in the civil service, if they were employed by the head of the department, or of the bureau, or any division of the department charged with that duty, and authorized to make such contracts, and fix the compensation of persons employed, even though the particular employment may not be designated in any appropriation" act. It added, that "many persons not employed as clerks and messengers of the departments are in the public service by virtue of an employment by the head of the department or by the head of a bureau of the department authorized by law to make such contracts, and such persons are as much in the service, within the meaning of the joint resolution, as the clerks and messengers employed in the rooms of the department building."

Mr. John Goforth, Assistant Attorney-General, for the United States:

In *The Twenty per Cent. Cases*, already reported, the salary or pay was fixed directly or limited indirectly by law; and was a fixed and arbitrary rate of compensation; and the person employed had no part in naming the amount to be paid him. In the cases now here, the compensation was not fixed or limited by any law or by the head of any department or division, but was the highest ruling rate in the market for similar labor, and was fixed by the person employed, and changed by him as the market changed. The wages were under the restriction of no statute, and the services were such as might be rendered to any employer.

In the former *Twenty per Cent. Cases*, this court, in its opinion, said:

"Certain described persons and classes of persons are plainly entitled to the benefit of the provision, whether regarded as officers or as mere employés, and it is no valid argument against that proposition to show that there are or may be other employés or persons in the civil service here who are not within that description, as the terms of the enactment are special and do not extend to every employment in that service, but only to the described persons and classes of persons therein mentioned."

The claimants in the present cases belong to classes different from those in the case cited. Some are connected with the military service, and not with the civil at all.

The last two claimants are clearly excluded. One, Hoffman, performed his work outside the limits of Washington; and one, Bell, was a contractor for finished work.

The repeal of the joint resolution of February 28th, 1867, prevented the officers of the treasury after its passage from paying the twenty per cent., and left the Court of Claims without jurisdiction of any action for the recovery of anything thereunder. It is true that statutes in general apply only to cases that may hereafter arise. Such an act as this—an act repealing other acts, &c.—cannot in its nature operate on future acts. It applies to existing acts.

Messrs. N. P. Chipman, J. Daniels, and A. P. Culver, contra, relied on *The Twenty per Cent. Cases*, and the language showing its intended scope, as conclusive.

As for the act of July 12th, 1870, they argued that the real purpose of that act was to cut off a general class of extra compensation which had crept into various statutes; the cutting off of which *in future*, Congress thought advisable; and, for obvious reasons, that it could have no reference to a case where the compensation had been allowed, and where presumably (as in the great majority of cases in fact) it had been received three years before.

Mr. Justice CLIFFORD delivered the opinion of the court.

Additional compensation is claimed by the respective appellees, as employés in the civil service of the United States in this city, by virtue of the joint resolution of the 28th of February, 1867, which provides that twenty per cent. additional compensation shall be allowed and paid to certain classes of such employés in Washington, as therein designated.

Civil officers, whose annual salaries do not exceed $3500, and all clerks, whether temporary or permanent, and messengers and watchmen, are specifically named in the resolution,

including enlisted men detailed as such, and the provision is that the additional allowance shall be computed upon the gross amount of the compensation received by such employé as fixed by law, or where no salary is fixed by law, upon the pay of the employé for that fiscal year, and that the benefit of the resolution shall extend to employés, male and female, in the executive mansion and in any of the following named departments, or any bureau or division thereof, to wit: state, treasury, war, navy, interior, post-office, attorney-general, and agricultural, and including civil officers and all clerks and employés, male and female, in the offices of the coast survey, naval observatory, navy-yard, arsenal, paymaster-general, bureau of refugees, freedmen, and abandoned lands, quartermasters, capitol and treasury extension, city post-office, and commissioner of public buildings; to the photographer and assistant photographer of the Treasury Department, to the superintendent of meters, and to lamp-lighters under the commissioner of public buildings.

Judgments rendered by the Court of Claims, involving controversies of a like character, were removed into this court by appeal on a former occasion,* when it became the duty of this court to examine the joint resolution in question and to determine what, in the judgment of the court, is its actual scope and true intent and meaning, as applied to the several cases then before the court.

Attempt was then made in argument to convince the court that the words of the resolution, "in the civil service of the United States," as there employed, should be restricted to persons filling offices or holding appointments established by law, but the court rejected that narrow construction of the phrase and unanimously decided that neither a commission nor a warrant of appointment is necessary to entitle an employé to the benefits of the joint resolution, provided he was actually and properly employed in the executive mansion, or in any of the departments, or in any bureau or division thereof, or in any of the offices specifi-

* Twenty per Cent. Cases, 13 Wallace, 576.

cally designated in the said joint resolution; that persons so employed here are properly to be regarded as employés in the civil service of the United States within the true intent and meaning of that phrase as there used, if they were employed by the head of the department, or of the bureau or any division of the department, charged with that duty and authorized to make such contracts and fix the compensation of the person or persons employed, even though the particular employment may not be designated in an appropriation act.

Such was the unanimous opinion of the court as to the true construction of the joint resolution under consideration on that occasion, and the court, with equal unanimity, adheres to that conclusion in the cases before the court.

Many persons, not employed as clerks or messengers of a department, are in the public service by virtue of an employment by the head of a department, or by the head of some bureau of a department or division thereof authorized to make such contracts, and such persons are as much in the civil service of the United States, within the meaning of the joint resolution, as the clerks and messengers employed in the rooms of the department building.*

Much discussion of that topic, however, is unnecessary, as the question was explicitly determined in our former decision, to which reference is made for a full exposition of the present views of the court upon that subject.

Grant all that, still it is insisted that the joint resolution has been repealed since that decision was made, and that the effect of the repealing act is to bar the right of recovery in all of the cases under consideration; in support of which proposition reference is made to the fourth section of the Appropriation Act of the 12th of July, 1870, which enacts that all acts and joint resolutions or parts thereof, and all resolutions of either house of Congress granting extra com-

* United States *v.* Belew, 2 Brockenbrough, 280; Graham *v.* United States, 1 Nott & Huntington, 380; Commonwealth *v.* Sutherland, 3 Sergeant & Rawle, 149.

pensation or pay, be and the same are hereby repealed, to take effect on the 1st day of July in the same year.*

Two propositions are submitted by the United States, based upon that repealing act, to show that the respective appellants in these cases cannot recover: (1.) That the repeal of the joint resolution prevents the officers of the treasury from paying the additional compensation after the date of its passage. (2.) That the repealing act, even if the resolution created an implied contract and gave jurisdiction to the Court of Claims to enforce it, divested the Court of Claims of all jurisdiction in such controversies.

Both of the propositions, as it seems to the court, overlook the material facts of the case, all of which are undisputed. They are as follows: (1.) That the joint resolution ceased to be operative at the end of the fiscal year in which it was enacted. (2.) That such additional compensation is allowed only for that year. (3.) That the claims in these cases are only for such additional compensation during that fiscal year. (4.) That the joint resolution ceased to be operative at the close of that fiscal year. (5.) That the right to such additional compensation became fixed and vested when the year's services were faithfully performed. (6.) That the repealing act, which it is supposed constitutes a bar to the cause of action in these cases, did not become a law until more than three years after the right to the additional compensation had become fixed and vested, and the joint resolution had ceased to be operative in respect to prospective services.

Viewed in the light of these suggestions grave doubts arise whether the repealing act in question applies at all to the joint resolution, as it is difficult to believe that Congress would deem it necessary to repeal a provision which had expired by its own limitation more than three years before they acted upon the subject.

Mere supererogation, however, it is said, cannot properly be imputed to the National legislature, and there would be

* 16 Stat. at Large, 250.

much force in the suggestion if the joint resolution had at that time been in operation and had been the only provision of the kind to which the descriptive words of the repealing act would apply, but the fact is plainly otherwise, as there are several acts of corresponding import which were in full force at that date, and which, it must be admitted, are unquestionably included within those descriptive words.*

Enough appears in the repealing act itself to show that Congress did not intend to give it any retroactive effect, except as therein provided, as the act expressly enacts that the provision in question shall take effect on the 1st day of July next before the day it was approved, which affords a demonstration that Congress never intended that it should retroact to any other or greater extent.†

Courts of justice agree that no statute, however positive in its terms, is to be construed as designed to interfere with existing contracts, rights of actions, or with vested rights, unless the intention that it shall so operate is expressly declared or is to be necessarily implied, and pursuant to that rule courts will apply new statutes only to future cases, unless there is something in the nature of the case or in the language of the new provision which shows that they were intended to have a retroactive operation. Even though the words of a statute are broad enough in their literal extent to comprehend existing cases, they must yet be construed as applicable only to cases that may hereafter arise, unless the language employed expresses a contrary intention in unequivocal terms.‡

Such a law, if passed by a State, and construed to have the effect claimed for it in this case by the appellants, would be unconstitutional and void; but it is not necessary to discuss any such proposition in this case, as there is not a word in the repealing act to support the conclusion that Congress

* 12 Stat. at Large, 587; 14 Id. 206; 15 Id. 77. † 16 Id. 250.

‡ Potter's Dwarris, 161; Wood *v.* Oakley, 11 Paige, 403; Butler *v.* Palmer, 1 Hill, 325; Jarvis *v.* Jarvis, 3 Edwards, 466; McEwen *v.* Bulkley, 24 Howard, 242; Harvey *v.* Tyler, 2 Wallace, 329; Blanchard *v.* Sprague, 3 Sumner, 535; United States *v.* Heth, 3 Cranch, 399.

intended to rescind any antecedent contract, or to enact any bar to the right of recovery in such cases where the service had been faithfully performed before the repealing act was passed.

Apply those rules to the cases before the court and it is clear the appellees in the first twelve are entitled to recover, as the finding of the court below shows that the claimant in each of those cases is included within the joint resolution as construed and defined by this court.

But the other two claimants, to wit, Hoffman and Bell, are not entitled to recover, the former because he was employed as sexton at the Arlington Cemetery, in the State of Virginia, and not "in Washington," and because, consequently, his claim is not within the words of the joint resolution. Nor is the latter, because he was not in the civil service of the United States within the meaning of that provision, as he was a plate-printer, working under a contract at an agreed rate "per one hundred sheets of face printing and per one hundred sheets of back printing." He employed an assistant, for whose compensation he was responsible; but the finding of the subordinate court shows that the assistant was paid directly by the disbursing officer, and that the sum thus paid was deducted from the gross earnings of the claimant. Suffice it to say that the claimant was a contractor, and that he employed another to do most or all of the work, and in the judgment of the court such a contractor is not entitled to the additional compensation allowed and directed to be paid by the joint resolution under consideration.

JUDGMENT AFFIRMED IN THE FIRST TWELVE CASES.

JUDGMENT REVERSED IN THE LAST TWO CASES, and the causes remanded, with directions to dismiss the respective petitions.

Mr. Justice SWAYNE, in whose opinion concurred the CHIEF JUSTICE, and Mr. Justice DAVIS, dissenting from the judgment in the first twelve cases:

I dissent from the judgment of the court in these cases in

favor of the claimants, and will give my views as briefly as may be. When the resolution giving the twenty per cent. was passed, nearly eight months of the year to which the allowance related had elapsed. The allowance was a mere gratuity. Hence there was no vested right arising from the resolution, and there could be none. But the resolution was operative in each case until the claimant was paid. When repealed, the gratuity which it gave fell with it. The repeal necessarily had that effect. I see no reason for giving the repealing section a more limited construction. It was intended to take away from all those who had not then been paid, the right to be paid thereafter. I think, therefore, that the judgments of the Court of Claims should be reversed.

PAHLMAN *v.* THE COLLECTOR.

Under the act of July 20th, 1868, imposing taxes on distilled spirits, the assessor and his assistant, in estimating the true producing capacity of a distillery, are empowered to fix as the true fermenting period such period as they, after examination and calculation, may deem the true one. They are not bound to take as such the period which the distiller, in the notice which the sixth section of the act requires him to give, has declared that he would use for fermentation, and which, subsequently, he actually did use.

ERROR to the Circuit Court for the Northern District of Illinois.

Pahlman & Co., distillers in the district of Illinois just named, sued Raster, a collector of internal revenue in the same district, to recover of him certain money which they had paid to him under protest, as tax upon distilling from February to July, inclusive, in 1871, the amount sued for being, as was asserted by them, so much *in excess* of what was really due.

The only question involved was one of law, and came up on demurrer to special counts in the declaration. That

question was whether, under the act of July 20th, 1868,* entitled "An act imposing taxes on distilled spirits, tobacco, and for other purposes," the assessor and surveyor, in estimating a *true producing capacity* for a distillery, had power to fix upon a certain period as the *true fermenting period*, or whether they were bound upon this point by the period of which, in his *application*, the distiller has stated that he would make use, and of which in point of fact he did make use.

The distiller denied that they had. The collector took the contrary position.

The statute above referred to enacts:

"SECTION 2. The Commissioner of Internal Revenue, for the prevention and detection of frauds by distillers of spirits, is hereby authorized to adopt and prescribe for use such hydrometers, saccharometers, weighing and gauging instruments, meters or other means for ascertaining the quantity, gravity, and producing capacity of any mash, wort, or beer, used in the production of distilled spirits, and the strength and quantity of spirits subject to tax, as he may deem necessary; and he may prescribe rules and regulations to secure a uniform and correct system of inspection, weighing, marking, and gauging of spirits.

"SECTION 6. Every person intending to be engaged in the business of a distiller or rectifier shall give notice in writing, subscribed by him, to the assessor of the district within which such business is to be carried on, stating . . . the place where said business is to be carried on, and whether of distilling or rectifying. . . . In case of a distiller, the notice shall also state the kind of stills and the cubic contents thereof, the number and kind of boilers, the number of mash-tubs and fermenting-tubs, and the cubic contents of each tub, the number of receiving cisterns and the cubic contents of each cistern, &c. *The notice shall also state the number of hours in which the distiller* WILL *ferment each tub of mash or beer*, the estimated quantity of distilled spirits which the apparatus is capable of distilling every twenty-four hours, &c. In case of any change in the location, form, capacity, &c., of such distillery, or in the time of ferment-

* Chap. 186, § 10, 15 Stat. at Large, 129.

ing the mash or beer, notice thereof, in writing, shall be given to the said assessor or to the assistant assessor of the division within twenty-four hours of said change.

"SECTION 9. Every distiller shall cause to be made an accurate plan and description of the distillery and distilling apparatus, distinctly showing the location of every still, boiler, doubler, worm, tub, and receiving cistern, the course and construction of all fixed pipes used or to be used, . . . and of every cock or joint thereof, and of every valve therein. . . . Such plan and description shall also show the number and location, and cubic contents, of every still, mash-tub, and fermenting-tub, together with the cubic contents of every receiving cistern, and the color of each fixed pipe.

"SECTION 10. Every assessor shall proceed, . . . with the aid of some competent and skilful person, to be designated by the Commissioner of Internal Revenue, to make survey of each distillery registered or intended to be registered for the production of spirits in his district, to estimate and determine its true producing capacity, &c., a written report of which shall be made in triplicate, signed by the assessor and the person aiding in the same, one copy of which shall be furnished to the distiller, one retained by the assessor, and the other immediately transmitted to the Commissioner of Internal Revenue. If the Commissioner of Internal Revenue shall at any time be satisfied that such report of the capacity of a distillery is in any respect incorrect or needs revision, he shall direct the assessor to make in like manner another survey, &c.

"SECTION 20. On receipt of the distiller's first return in each month, the assessor shall inquire and determine whether said distiller has accounted in his returns for the preceding month, for all the spirits produced by him; and to determine the quantity of spirits thus to be accounted for, the whole quantity of materials used for the production of spirits shall be ascertained; and forty-five gallons of mash, or beer brewed or fermented from grain, shall represent not less than one bushel of grain, and seven gallons of mash, or beer brewed or fermented from molasses, shall represent not less than one gallon of molasses. In case the return of the distiller shall have been less than the quantity thus ascertained, the distiller or other person liable shall be assessed for such deficiency at the rate of fifty cents for every proof gallon, together with the special tax of $4 for every

cask of forty proof gallons, and the collector shall proceed to collect the same as in cases of other assessments for deficiencies; but in no case shall the quantity of spirits returned by the distiller, together with the quantity so assessed, be for a less quantity of spirits than eighty per centum of the producing capacity of the distillery, as estimated under the provisions of this act.

"SECTION 103. The Commissioner of Internal Revenue is authorized to make all such regulations, not otherwise provided for, as may become necessary by reason of any change of law in relation to internal revenue made by this act."

In accordance with his construction of the powers given him, the commissioner issued, on the 8th of March, 1870, a general circular regulating surveys, containing the following instructions:

"The true producing capacity of a distillery is not limited to what a distiller may produce by following a particular course which he has marked out, but what may be produced under favorable circumstances.

"The true producing capacity of a distillery is not the amount so proposed to be produced, but the amount which can be produced, using all the machinery and apparatus under competent and skilful management, taking as a basis for the calculation such premises as will produce the best practical results.

"The true spirit-producing capacity of a grain distillery is mainly determined *by its fermenting capacity;* but as this is sometimes affected by the modes of mashing and distilling, these are therefore to be considered.

"Having found the number of bushels which are required to fill the fermenters, the assessor and person designated to aid him will determine what, under all the circumstances, is a reasonable period to be allowed for fermenting, and in so doing they are not bound by the period stated in the distiller's notice, but are to take such period as will, under ordinary circumstances, and with good management, produce the best results. From the best information, it is believed that a fermenting period of sixty hours is as long a period as can be used consistently with good management or a profitable conduct of the business, and where a greater period than this is assumed it must be accompanied with such a statement of the circumstances as will show it to be justified as an exceptional case.

Statement of the case.

"The surveyor, having ascertained by the measurement the cubic contents of the fermenting-tubs, finds it necessary to determine:

"1st. The number of dry inches to be allowed each tub for fermentation.

"2d. *The period necessary to enable the distiller to ferment each tub of mash.*

"3d. The number of gallons of spirits that can be produced from a bushel of grain.

"These are questions coming within the discretion and judgment of the assessor and his skilful assistant, with which the office of internal revenue has no disposition to interfere. But it has been thought proper, for the guidance of the surveyor, to prescribe certain rules on these points. Surveyors are, therefore, to be governed by the following rules in fixing the capacity of a distillery, except where they find that they do not correctly determine its capacity:

"Forty-eight hours is prescribed as the maximum period to be allowed for fermentation in sweet-mash distilleries.

"The only exception to this rule that is thought to be justified by sufficient reasons is where the mashing is done by hand, where hot water is the only heating agent, and the distillation is in copper by furnace heat. It is believed that with this imperfect mode of stirring and regulating the temperature, such a perfectly fermented beer cannot be uniformly produced as is necessary for distillation in copper with furnace heat, to prevent occasional burning of the still; in such cases seventy-two hours will be allowed for fermentation."

The provisions of statutes already given being in force, and the Commissioner of Internal Revenue having issued the regulations just quoted, the plaintiffs, on the 1st of August, 1870, intending to engage in the business of distilling alcohol from grain, gave notice to the assessor, as required in the sixth section of the act of July 20th, 1868, above quoted, that they would ferment each tub of mash, or beer, used by them in the manufacture of alcohol, for the period of *seventy-two* hours. When, however, afterwards the assessor and his skilled assistant estimated and determined the producing capacity of the distillery, pursuant to

the directions of the tenth section of the act, the capacity was determined by assuming the period of fermentation to be *forty-eight* hours; this assumption being made, of course, in accordance with the above-quoted regulations prescribed by the Commissioner of Internal Revenue. The tax was assessed and collected according to the survey thus made.

The court below gave judgment for the collector, and the plaintiff brought the case here.

Mr. W. B. Scales, for the plaintiff in error:

The commissioner, by his regulations, not only treats the sixth section of the act of 1868, and the notice which it requires to be given, as a nullity, but claims the right to fix upon any fermenting period which he thinks proper.

The object of the legislature in taxing distilled liquors was to raise revenue on them, not to cripple or destroy distillers; neither was it to compel them to carry on their business in a manner to produce the largest amount of taxable products without regard to facts or to the reasonable interests of the distillers.

That the notice in section six was intended to give the distiller the right to contract and fix his own period of fermentation is shown, not only by the language of the act, but by the debates upon it while under consideration in the committee of the whole.

The Congressional Globe* of the time shows that when the act was before Congress, Mr. Beck, a member, moved to strike out the word "*will*," in section six,† and insert in lieu the words, "*usually takes to*," so that the passage would read—

"The number of hours in which the distiller *usually takes* to ferment each tub of mash or beer."

He said:

"It is impossible to tell how long it will take to ferment. I know it varies in my district, from three days and a half to five

* Second session, Fortieth Congress, part four, page 3414.

† *Supra*, p. 190, fourth line from the bottom.

days; depending upon the weather and other causes. You should not punish a man who cannot help himself. He should not be held responsible for the failure to ferment within the time when the weather or a thousand other circumstances may prevent the fermentation.

The report continues:

"MR. SCHENCK. When I first read the form of expression contained in other legislation it struck me somewhat in the same way. We called a council of distillers on the subject and found that *this* was just the language they used. They have twenty-four hour, forty-eight hour, and seventy-two hour beer. Although there may be a little difference occasioned by the temperature, they classify their beer in that way, and *every distiller will tell*, in regard to a particular kind of beer, what time he wants for his mode of distillation, so that the bill is, in fact, drawn in conformity with the notions of the distillers themselves. The amendment would make it very vague even as to the rules of the distillers themselves.

"MR. BECK. They should not be punished for failing to do what is inevitable. The time varies in extreme cold or in extreme warm weather. A thunderstorm will so affect it that it will not ferment in a very long time. If the committee, however, think that the word '*will*' leaves margin enough I will not press the amendment.

"MR. ALLISON. I think it does.

"MR. SCHENCK. Permit me to say that our object is to charge upon the capacity, among other things, and if we leave an *uncertainty* about *this* we run the *risk* of not getting the *capacity taxed*. The distillers themselves have their rule on the subject, and whatever time it takes to ferment they designate their beer accordingly, as twenty-four, forty-eight, or seventy-two hour beer.

"MR. BECK. I withdraw the amendment. I only desired to call attention to the subject."

It is thus seen that the wording of section six, in inserting the word "will," and retaining it on debate, was intended by the chairman of the committee which ordered it, and that, too, after conference with distillers, to give distillers the right to fix and control the period of fermentation,

each for himself, and that, too, with reference to the per diem tax. And upon debate the word was retained, because it expressed and would secure that right to distillers.

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

No canon for the interpretation of statutes justifies a reference to what was said by particular members of the legislature on the discussion of a bill which subsequently became a law.

The provision in section two, authorizing the commissioner to adopt and prescribe means for ascertaining the *producing capacity* of such beer, necessarily intrusts to him, in connection with the *skilful* surveyor, his agent, the power of selecting the point of time for applying such means; that is, the point at which such beer becomes most productive, or is *ripe*.

A *true* producing capacity implies a *true* fermenting period, and nature is as uniform in "her fermenting periods," for considerable quantities of beer and lengths of time, as in any other of those operations which render her uniformity proverbial. It seems, upon consideration, to be entirely reasonable to allow the Commissioner of Internal Revenue to determine, as matter of science combined with extensive observation, what within the United States, with rare exceptions, must be the *maximum* fermenting period, and equally so for a skilled surveyor to determine what is the *true fermenting period* of a certain distillery whose location and methods of operation he has examined.

In general, however, it seems enough to say that the statute is as careful in requiring from the distiller minute data for ascertaining actual results, contemplated or accomplished, as it is in leaving the surveyors to use their *skill* untrammelled, under the general superintendence of the commissioner, in determining what *ought* to be the result, at least with a margin of twenty per cent.; and that it will be injurious to confound matters intended to be kept apart, if this *skill* is to be embarrassed by the rules of practice of per-

sons not required to be skilful; persons of whom all that the law knows is, that they *intend to become* distillers.

Mr. Justice STRONG delivered the opinion of the court.

The question is whether, by the act of Congress under consideration, the assessor and his assistant, in estimating the true producing capacity of a distillery, are empowered to fix, as the true fermenting period, any other than that which the distiller in his notice to the assessor, required by the sixth section, has declared he would use for fermentation, and which he actually did use.

That the producing capacity of a distillery is conclusively determined by the survey and estimate made under the tenth section of the act (that survey, however, being subject to revision by the Commissioner of Internal Revenue), was ruled in *Collector* v. *Beggs*.* In that case we said "the survey and estimate of producing capacity made under the tenth section were conclusive while they remained, though subject to revision under the direction of the Commissioner of Internal Revenue. And the extent of liability to taxation was, by the act of Congress, directed to be measured, not by the actual product of spirits, but by what should have been the product of the materials used according to the estimate made under the tenth section." And this is very plainly the intention of the law, for by that section, the only one which expressly provides for the ascertainment of the producing capacity, it was made the duty of the assessor, with the aid of some competent and skilful person to be designated by the Commissioner of Internal Revenue, to make survey of each distillery registered, or intended to be registered, for the production of spirits in his district, not only to estimate, but to *determine* its producing capacity. Of this estimate and determination the assessor and his assistant are required to make a written report in triplicate, signed by them, one original of which is to be furnished to the distiller, one retained by the assessor, and the third is to be

* 17 Wallace, 182.

transmitted to the Commissioner of Internal Revenue. It is also provided that if the commissioner shall at any time be satisfied that such report of the capacity of a distillery is in any respect incorrect, or needs revision, he may direct the assessor to make another survey. Thus a measure of taxation is fixed, and the distiller is notified of it before he commences distilling. All this leaves no doubt that the reported survey was intended by Congress to be conclusive until corrected by direction of the commissioner.

But while this is not denied by the plaintiffs in error as a general proposition, it is insisted that in estimating and determining the producing capacity of the distillery, the assessor must be controlled by the notice which the distiller is required to give him by the sixth section of the act, and must base his calculations upon the period of fermentation fixed in that notice. It is said he has no power to adopt any other period of fermentation, even though ordered to do so by the commissioner, and, if he does, that his estimate and determination are not conclusive. In this objection we cannot concur. It is founded, we think, upon a misapprehension of the statute. The sixth section requires every person engaged in, or intending to be engaged in, the business of a distiller, or rectifier, to give notice in writing to the assessor of the district within which he proposes to carry on the business, stating therein his name, his associates, if any, and his proposed place of business. If he be a distiller, he is required to state in his notice the kind of stills and the cubic contents thereof, the number and kind of boilers, the number of mash-tubs and fermenting-tubs, and the cubic contents of each tub, the number of receiving cisterns and the cubic contents of each cistern, together with a particular description of the lot or tract of land on which the distillery is situated, with the size and description of the buildings thereon, and of what material constructed. The distiller is also required to state in his notice the number of hours in which he will ferment each tub of mash or beer, and the estimated quantity of distilled spirits which the apparatus is capable of distilling every twenty-four hours.

The object of these requirements is too plain to be misunderstood. Clearly it is not to enable the distiller to determine for himself the producing capacity of his distillery, and thereby partially fix the extent of his liability to taxation. It is to furnish protection against frauds, and possibly to assist in the ascertainment of the quantity of spirits actually distilled. If intended at all to bear upon the estimate of the producing capacity of the distillery, it can only be regarded as suggestive, not as controlling. It is after this notice has been given that the assessor and his skilled assistant are required, as by the tenth section of the act, to make an estimate and determination of the producing capacity. They are no more required to take the fermenting period designated in the notice as the true fermenting period than they are controlled by the distiller's statement of the number and cubical contents of the stills, mash-tubs, and cisterns he intends to use, or by his estimate of the capability of his apparatus. They are required to calculate and report what the distillery can produce, not what the distiller proposes to produce, or what the apparatus would produce, if employed in a particular manner. To enable them to discharge this duty the provisions of the ninth section were enacted. That section requires the distiller to furnish to the assessor an accurate plan of the distillery and distilling apparatus, showing the location and mode of construction of the apparatus and the cubical contents of each vessel. Undoubtedly the main elements necessary for a determination of the producing capacity are the size of the stills, mash-tubs, and cisterns, and the duration of the fermenting period. There is unquestionably, in the nature of things, a true fermenting period, dependent on the operation of natural processes, a period which may be variant from that selected by a distiller. This period may vary somewhat in different latitudes, but it is everywhere ascertainable, and the commissioner, we think, is authorized by the second section of the act to prescribe regulations for ascertaining it. By that section he is authorized to adopt and prescribe for use such hydrometers, saccharometers, weighing and gauging instruments,

meters, or other means for ascertaining the quantity, gravity, and productive capacity of any mash, wort, or beer used or to be used in the production of distilled spirits, as he may deem necessary. This is inconsistent with the idea that the notice of the distiller is to determine the producing capacity. And though in his notice he is required to state the time in which he will ferment his mash, and also an estimate of the quantity of distilled spirits which the apparatus is capable of distilling every twenty-four hours, that is his estimate. Nowhere in the act is any provision made that his statement and estimate shall be obligatory upon the assessor and his skilled assistant. Nor is there to be found in the act any rule by which the producing capacity of a distillery is to be determined, except that the commissioner of internal revenue is, by the second and one hundred and third sections, empowered to make necessary regulations. The declaration shows that such regulations were made, and they were followed by the assessor. The survey was made accordingly. If instead of following the instructions given by the commissioner, the assessor must adopt a period for fermentation given to him by the distiller—a period which may, or may not, be a true one; that is, the period within which complete fermentation takes place—it is obvious there can be no certainty in the ascertainment and determination of the actual producing capacity of the distillery, and the object which the law has in view will be defeated. At most, all the assessor and his assistant can do will be to ascertain the actual product. The possible product cannot be ascertained; yet, as we have had occasion to say heretofore, when giving a construction to this act of Congress, both the producing capacity and the quantity of spirits actually produced are made by the law measures of taxation, and provision is made for the determination of each.*

But without pursuing the subject farther, we have said sufficient to show that in our opinion the notice given by the distiller of the time he will ferment each tub of mash or beer does not control the survey. The assessor must deter-

* United States v. Singer, 15 Wallace, 111.

mine and report the true actual capacity, and not what the distillery will produce in the distiller's proposed mode of running it. There is, therefore, no well-founded objection to the conclusiveness of the survey in this case, and as the tax assessed and collected was in accordance with the survey, the plaintiffs have no right of action to recover it back.

Nor is there any such hardship as is suggested. We have seen that a report of the surveyor's determination of producing capacity is by the law required to be placed in the hands of the distiller before he commences business. If dissatisfied with it, he may apply to the commissioner for another survey. He is thus informed of the extent of his liability to taxation. He has, therefore, little reason to complain, when he commences distilling, and does not produce at least eighty per cent. of what his distillery can produce, as determined by the survey, if he is taxed according to a standard which is not false, and of which he had thus early notice.

JUDGMENT AFFIRMED.

THE LOTTAWANNA.

1. It is error and ground of reversal for a Circuit Court to affirm a decree in admiralty of the District Court, and at the same time dismiss the appeal.
2. Where claims on the proceeds in the registry of a vessel sold are not maritime liens, the District Court cannot distribute those proceeds in payment of the claims if the owners of the vessel oppose such distribution.
3. A creditor by judgment in a State court, of the owners of the vessel, even though he have a decree *in personam* also in the admiralty against them, cannot seize, or attach, on execution, proceeds of the vessel in the registry of the admiralty.
4. Where an appeal is taken to the Circuit Court from the decree of the District Court in a proceeding *in rem*, the property or its proceeds follows the cause into the former court.

APPEAL from the Circuit Court for the District of Louisiana; the case—divested of irrelative incidents, with a great number of which, as seen in the record, it had come here confused and perplexed—was thus:

Statement of the case.

In the year 1819 this court, in *The General Smith*,* decided, as the profession has generally understood, that in respect to repairs or necessaries furnished to a ship in the port or State to which she belongs, no lien is implied unless it is recognized by the municipal law of the State; declaring the rule herein different from that where the repairs or necessaries are furnished to a foreign ship; in which case the general maritime law gives the party a lien on the ship itself for his security.

In view of this decision most or all of the States enacted laws giving a lien for the protection of material-men in such cases.

In the year 1833, in the case of *The Planter* (*Peyroux* v. *Howard*),† the converse of the rule in *The General Smith* was laid down, and process against a vessel in her home port was used and supported, the State law giving a lien in the case.

In 1844, this court, acting in pursuance of acts of Congress which authorized it to adopt rules of practice in the courts of the United States in causes of admiralty and maritime jurisdiction‡ (and adhering to the practice declared as proper in the cases mentioned), adopted the following Rule of Practice:

"RULE XII.

"In all suits by material-men for supplies, repairs, or other necessaries for a foreign ship, or for a ship in a foreign port, the libellant may proceed against the ship and freight *in rem*, or against the master and owner alone *in personam;* and the like proceeding *in rem* shall apply to cases of domestic ships, where by the local law a lien is given to material-men for supplies, repairs, and other necessaries."

On the 1st of May, 1859, a new twelfth rule was adopted as a substitute for the one above given. It was thus:

* 4 Wheaton, 443. † 7 Peters, 324.

‡ Acts of May 8th, 1792 (1 Stat. at Large, 275), and of August 23d, 1842 (5 Id. 516).

Statement of the case.

"RULE XII.

"In all suits by material-men, for supplies or repairs, or other necessaries for a foreign ship, or for a ship in a foreign port, the libellant may proceed against the ship or freight *in rem*, or against the master or owner alone *in personam*. And the like proceedings *in personam*, *but not in rem*, shall apply in cases of domestic ships for supplies, repairs, or other necessaries."

The reasons for the substitution of this latter rule for the former one are stated by Taney, C. J., in the case of *The Steamer St. Lawrence*,* to have been that in some cases the State laws giving liens, and the constructions put on them by State courts, were found not to harmonize with the principles and rules of the maritime code, and embarrassed the Federal courts in applying them.

With the case of *The General Smith*, and others following it, unreversed, and with the substituted twelfth rule in force, two sailors, on the 30th December, 1870, filed libels in the District Court, at New Orleans, against the steamer Lottawanna, claiming wages. The libel alleged that the vessel when they shipped was in the port of New Orleans and was making voyages between that port and various ports and places on the Red River and its tributaries, and it was thus, and inferentially, to be gathered that New Orleans was the home port of the vessel.

By consent of the owners the vessel was subsequently sold under an order of court, and the proceeds, $10,500, were brought into the registry.

In the meantime about forty different persons intervened, claiming in the aggregate $35,000. Some were sailors, claiming wages. That *their* claims were a lien on the fund was conceded. But the majority of the claims (in amount $32,804) were for stores, materials for repairs, or for labor and supplies of different sorts furnished to the vessel in the port of New Orleans; the port which, as above said, was apparently her home port, though the fact that it was so was

* 1 Black, 529.

nowhere distinctly asserted, nowhere in any way denied, and nowhere in any way proved.

Among the interveners claiming a share of the fund for supplies furnished to the vessel, in the port of New Orleans, were two firms, Wilson & Co. and Chaffee & Brother; the former claiming $3091 and the latter $10,896.

None of the interveners alleged in direct terms that they had any maritime lien on the vessel, or its proceeds, or prayed for process to enforce such a lien; though the libels of some of them contained a prayer that the court would decree the payment of the intervener's claim *with privilege* on the vessel or its proceeds.

There was also a firm, Bell & Kennett, who claimed the whole fund in the registry. This firm had had something to do with the vessel, and had sued its owners and got judgment against them in one of the State courts of Louisiana; the Sixth District Court for the Parish of Orleans. On this judgment they issued execution and attached the funds in the registry of the District Court. They also had decrees *in personam* against the owners in the admiralty.

A report of a commissioner appointed by the District Court to report distribution showed, that after deducting costs of the marshal, registrar, &c.,

The net proceeds of sale in the registry were . . .	$9,405
That the sailors' wages (the only *admitted* admiralty liens) amounted to	2,629
Leaving a balance of	$6,776

The question was, to whom was this balance to be paid? Bell & Kennett claimed the whole of it, under their attachment in execution.

Wilson & Co., Chaffee & Brother, and the other interveners at New Orleans, for supplies furnished in that port, opposed this claim, and—asserting that on an account *justly* taken between the said Bell & Kennett and the owners of the vessel, it would appear that the former were indebted to the owners, and not the owners to them—were not willing even that Bell & Kennett should come *pari passu* on the fund; much less that they should sweep it all away.

Statement of the case.

The commissioner divided the sum ratably between all the interveners, including with them Bell & Kennett. The owners opposing this, he made a second report, remarking that the only admiralty liens in the case were the claims for sailors' wages (which had now been paid), and that the claims of Wilson & Co., Chaffee & Brother, and the other interveners were not such liens; that though where the owners did not oppose such distribution, a fund in the registry might properly be distributed to material-men, &c., claimants on it for supplies furnished to the ship, who yet had no admiralty lien *in rem*, yet that it could not be so distributed if the owners did oppose the distribution, this principle being settled by the cases of *The Maitland*,* and *The Neptune*,† and not departed from except in the case of remnants unclaimed by the owner. The commissioner concluded, therefore, that nothing could be done but pay the fund either to the owners, or to the sheriff of the parish of Orleans to answer his execution and attaching process; and this last he recommended as the more just disposition of the money.

Upon the case coming before the District Court on exceptions to this report, that court, December, 1871, decreed that the interveners mentioned by the commissioner should be dismissed, and that the fund should be paid, as the commissioner had suggested, to the sheriff, to answer the process issued in the suit of Bell & Kennett against the owners.

From this decree of the District Court the interveners took the case to the Circuit Court, and moved in the District Court that the money in the registry there should be transferred to the registry of the Circuit Court. This motion the District Court denied, and the moneys were paid over to Bell & Kennett. In the Circuit Court objection was made, as also it had been made before, to the regularity of the appeal, on account of some matters of form. The Circuit Court affirmed the judgment of the District Court, but at the same time dismissed the appeal.

* 2 Haggard's Admiralty, 254.

† 3 Id. 130; S. C. on appeal, 3 Knapp, 711.

From this decree Wilson & Co. and Chaffee & Brother brought the case here by appeal; Bell & Kennett being the appellees.

Reference has been made in the opening part of this statement of the case, to the decision in the case of *The General Smith*, decided A.D. 1819, and other cases; and to the two different twelfth rules in admiralty.

In different cases coming here about eight years ago,*— especially in *The Moses Taylor* and in *The Hine* v. *Trevor*,— this court decided that the grant of admiralty jurisdiction given by the Judiciary Act to Federal courts is exclusive, that State statutes which attempt to confer on State courts a remedy for *marine* contracts or torts by proceedings strictly *in rem*, are void. And on the 6th of May, 1872, *after the present suit was brought*, the twelfth rule of 1859, itself an amendment of the rule of 1844, was thus amended anew:

"In *all* suits by material-men for supplies or repairs or other necessaries, the libellant may proceed against the ship and freight *in rem*, or against the master or owner alone *in personam*."

The twenty-sixth rule in admiralty (having no connection, however, with any of the preceding matters, but yet adverted to in the argument), says:

"In suits *in rem*, the party claiming the property shall verify his claim on oath or solemn affirmation, stating that the claimant by whom or on whose behalf the claim is made is the true and *bonâ fide* owner, and that no other person is the owner thereof."

Messrs. J. A. Grow and L. M. Day, for the appellants:

1. The claims of all the interveners were for materials, supplies, repairs, and other necessaries furnished to the boat, undoubted admiralty contracts.

Though under the twelfth rule in admiralty adopted by

* The Moses Taylor, 4 Wallace, 411 (December Term, 1866); The Hine *v.* Trevor, Ib. 555; and see the Rock Island Bridge, 6 Id. 213; The Belfast, 7 Id. 624; Leon *v.* Galceran, 11 Id. 185.

this court in 1859 they could not have proceeded *in rem* against this boat, if New Orleans was her home port, yet it is very questionable whether New Orleans was so. No person filed any claim for the vessel, or her proceeds, according to the twenty-sixth admiralty rule. Consequently there was no one entitled to be heard as owner, nor is there any evidence in the record to show where the owners reside. But the twelfth rule, as made in 1859, was altered in May, 1872, by this court, and the persons who intervened could now undoubtedly proceed *in rem*, no matter where the owners reside. The history of the decisions and rules applicable to the matter shows that the court has always meant to protect *by a lien, enforceable somewhere*, persons furnishing supplies in the home port as much as those furnishing them in a foreign port. *The General Smith*, and *Peyroux* v. *Howard* (*The Planter*), enabled such persons to enforce in the admiralty liens *when given by the State law*, and as liens were given by the law of all the States the protection was complete. But this administration of State lien laws through admiralty courts was found to cause trouble, as explained by Taney, C. J., in *The Steamer St. Lawrence*, and in 1859 the new twelfth rule of practice relegated in effect the furnishers in home ports to their home courts, where they were still abundantly protected. But *The Moses Taylor*, and *The Hine* v. *Trevor*, in December Term, 1866, decided that this was unlawful. Furnishers in home ports were thus left quite unprotected so far as a capacity to enforce a lien was concerned. They could not under the twelfth rule of 1859 sue in the admiralty; nor under the two cases just mentioned enforce admiralty liens in State courts. What in these circumstances did this court do? Availing itself of the power given to it by Congress it enacted the twelfth rule of May, 1872. It plainly meant by this rule to give a remedy *in rem* to furnishers in home ports, and to annul *The General Smith*, and *Peyroux* v. *Howard*. The law and rules of this court, as they now exist, must govern, and not those that existed when the suit was brought.*

* The Peggy, 1 Cranch, 103.

But this court had jurisdiction to distribute these proceeds among the interveners, even if the vessel was in her home port, and the parties not entitled to proceed *in rem*. So well settled is this principle that text-books declare it as elementary. Parsons* says:

"Where a vessel, or other property against which a suit is brought, is sold, and brought into the registry, the power of the court to distribute these proceeds is unquestioned."

And again:†

"When a lien is waived by intendment of law, or lost by neglect to enforce it within a proper time, it has been held that the claim may be enforced against the proceeds."

But the interveners have admiralty liens; they are material-men, and though not entitled to process *in rem* in consequence of the twelfth rule in admiralty, as it existed when this suit was brought, they still all intervened for claims founded upon admiralty contracts, which would create an implied maritime hypothecation and lien.

In *The Steamer St. Lawrence*, this court allowed a material-man a lien for supplies furnished in the home port of the vessel after the repeal of the original or first twelfth rule in admiralty; not on the ground that a State statute gave it, as the State could not confer jurisdiction on the Federal courts, but on the ground that the party had an admiralty contract, and that his proceedings were begun before the repeal of the first twelfth rule.

And in *The Kalorama*, and *The Custer*,‡ this court held that it was no objection to the assertion of an admiralty lien against a vessel for supplies, that the owner was present and ordered them.

2. The proceeds in the registry cannot be attached by the process issued from a common-law court.§ In *The Albert Crosby*,‖ Dr. Lushington said:

* On Shipping and Admiralty, vol. 2, p. 231. † Ib. 233.

‡ 10 Wallace, 204.

§ 2 Parsons on Shipping and Admiralty, 235.

‖ 1 Lushington's Admiralty, 44.

"I should certainly interfere by attaching any person who would meddle with any registrar."

3. The District Court should have transferred the proceeds of the sale of the steamer Lottawanna to the registry of the Circuit Court. If the cause was one proceeding *in rem*, the *res* involved (or the proceeds if converted into money), passed from the District Court to that of the Circuit Court.*

We therefore ask of this court that the decree of the District and Circuit Courts be reversed; that the claim of Kennett & Bell be dismissed; that they deposit in the registry of the Circuit Court the amount which they received, with interest; that the claims of the appellants be recognized as admiralty liens against it, and that the money be paid over to them in proportion to their respective claims.

Messrs. Durant and Hornor, contra:

1. The point decided by the District Court in its confirmation of the commissioner's report was, that where interveners in admiralty have no admiralty lien the proceeds of the sale of the steamboat will not be distributed, if there is any opposition to such distribution. That was quite right as the cases cited by him show. It is clear that the powers and jurisdiction of a bankruptcy or of an equity court would be engrafted upon our admiralty courts, were they to attempt to make distribution of the proceeds of the sale in their registries, in the mode contended for by appellees, in all cases in which a surplus should result. Suppose, for example, that a vessel should be libelled at her home port upon a claim for maritime wages of $50, and should be sold for $20,000, and the proceeds in the registry, amounting to $19,950, should be claimed by creditors of the owners who had no admiralty liens, it is obvious that by indirection the creditors would be extending and enlarging the jurisdiction of the admiralty court so as to embrace causes which could not have been enforced directly and in the first instance as against

* The Collector, 6 Wheaton, 194; Davis *v.* Seneca, Gilpin, 34.

Restatement of the case in the opinion.

the vessel. This would be a great abuse of the admiralty jurisdiction. The admiralty judge, when there is no admiralty lien, can only proceed to the distribution of the surplus in the registry when an act of Congress directs him so to do.*

2. Holding the money of the owners in the registry of the admiralty liable to the garnishee process under execution, of the same or any other admiralty court, is within the necessary incidental jurisdiction of the admiralty. The analogy is perfect between the present case and that of *Jones* v. *Andrews*.†

Mr. Justice CLIFFORD delivered the opinion of the court.

Complicated, as the record is, it will be impossible to state the questions presented for decision, in a manner to be understood, without referring to the original proceedings in the District Court, as the suit, when it was commenced, was a libel *in rem* filed by two mariners, J. D. Cox and J. N. Geren, against the steamboat Lottawanna, her tackle, apparel, machinery, and furniture, in a cause of subtraction of wages, civil and maritime.

Prior to the institution of the suit the allegation is that the steamer had been engaged in commerce and navigation between the port of New Orleans and various other ports and places on Red River and its tributaries, and that the libellants, during that period, were duly employed by the master as the pilots of the steamer, and that they continued in that employment for the respective periods and at the monthly wages specified in the libel. They also allege that they faithfully performed their respective duties, as such pilots, and that there is due to them the respective sums charged in the schedule exhibited in the record. Wherefore they pray for process against the steamer, &c., and that she may be condemned and sold to pay their respective claims.

Pursuant to the prayer of the libel a warrant was issued,

* McLane *v.* United States, 6 Peters, 404.

† 10 Wallace, 327.

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and the return of the marshal shows that he seized the steamer and that he published a monition, citing and admonishing the owners, and all others claiming any right, title, or interest in the steamer, to appear, on a day therein named, at the District Court, and show cause, if any they have, why the prayer of the libel should not be granted. Subsequently, on the same day, the libellants filed a petition in the District Court, representing that the steamer was expensive to keep and perishable, and prayed for an order that she might be sold.

On the same day, also, Moses Morgan filed an affidavit in the case, stating that he owned three-fourths of the steamer, and that he had no objection that she should be sold, and the record shows that the court immediately passed an order that the steamer be sold by the marshal, he giving legal notice of the sale, and that the proceeds be deposited in the registry, subject to the further order of the court. Nothing is exhibited to show that there was any irregularity in the sale, and it appears that the proceeds, amounting to ten thousand five hundred dollars, were deposited in the registry of the court.

Before the other owner of the steamer, Philip Work, appeared, seventeen libels of intervention were filed in the court against the proceeds of the sale of the steamer, embracing some forty interveners, with claims for wages as mariners, and claims for materials for repairs, and for stores and supplies, and for money loaned for the steamer, or for the individual owners, and to pay for debts contracted by the master, or owners, for repairs and supplies during a period of two or more years.

On the fourth of February, 1871, more than a month after the original libel was filed, Philip Work appeared and filed a claim that he was the owner of the other undivided fourth part of the steamer, and he excepted to all of the libels of intervention except the one filed by the mariners, being the libel of intervention first named in the record, and upon three grounds, and prayed that the interventions might be dismissed: (1.) Because the court was without jurisdiction,

ratione materiæ, of the matters alleged in the several libels. (2.) Because the court was without jurisdiction to entertain the interventions or to adjudicate thereon, for the reason that all of the owners of the steamer, at the date of the several causes of action set forth, were citizens of that State and resided in the city of New Orleans, at which port the steamer was registered and enrolled. (3.) Because the respective interveners did not, on filing their libels, give stipulations, with sureties, to abide the final decree rendered in the case, and to pay costs, as required by the rules in admiralty proceedings.

Intervention was subsequently claimed by other parties and other directions were given, which it becomes important to notice, in order to have a full view of all the material proceedings in the District Court.

Libels *in personam* were also filed by the appellees and by John Chaffee and Charles Chaffee, who are the last-named appellants. By the transcript it appears that the libel of the appellees was filed on the sixth of February, 1871, and that the libel of the said appellants was filed on the following day. Service of the original monition was made January first, 1871, and on the seventh of February succeeding the court passed an order that the delay allowed by law having expired, and no answer having been filed, that all persons interested in the property seized be pronounced in contumacy and default, and that the libel in the principal case be adjudged and taken *pro confesso*.

On the thirteenth of the same month the court entered a decree in favor of the libellants, as follows: that J. D. Cox recover the sum of one thousand three hundred and six dollars, and that J. N. Geren, the other libellant, recover the sum of six hundred and seventy-four dollars and twenty-eight cents, from which decree neither the libellants nor the owners of the steamer have ever appealed.

On the third of March, 1871, subsequent to the said decree, Jesse K. Bell filed a libel of intervention, claiming the sum of two thousand two hundred dollars, as paid by him on two claims for fuel furnished to the steamer by the per-

sons named in the libel. Leave was granted to the applicant to file the libel, and on the same day the court passed an order that the cause be referred to a commissioner to report upon a tableau of distribution, and to classify the various claims according to law, giving all parties a right to take further evidence before the commissioner.

Since that time further libels of intervention have been filed as follows, to wit: one by J. Sharp McDonald, on the eighteenth of the same month, for five hundred and forty boxes of coal; another by Thomas Onley & Co., on the thirty-first of the same month, for services, the account being approved by the master and by the mate; and one other by Christian & Hyatt, on the second of May in the same year, for stationery furnished for the use of the steamer.

Besides the libel filed by the two pilots, a libel *in rem* was also filed by the mate against the steamer, on the thirtieth of December, 1870, for the balance due him for wages, and the record shows that the court, on the tenth of February next after the commencement of the suit, entered a decree in his favor for the amount claimed and taxable costs.

Morgan and Work failed to answer the suit *in personam* of Kennett & Bell against them, and the court, on the twentieth of November, 1871, passed an order that the libel be taken *pro confesso*, and that a decree be entered in favor of the libellants, and three days later it was ordered that the suit be consolidated with the record in the original suit *in rem* against the steamer.

Different proceedings took place in the suit *in personam* commenced by Chaffee & Brother, as Joseph Morgan appeared on the same day and confessed judgment in favor of the libellants for the sum of ten thousand eight hundred and ninety-six dollars and fifty-six cents, with eight per cent. interest from the twenty-third of January preceding. Judgment was accordingly rendered in their favor against Morgan for that amount. Work made default, and a decree, dated June 1st, 1871, was entered against him for the same amount in favor of the same libellants.

Report in due form was made by the commissioner, on

the fourth of May in the same year. He decided that none of the creditors, presenting claims for repairs and supplies, had any right to libel the steamer in her home port, and recommended that the proceeds in the registry of the court be distributed as follows: First, that all legal costs be paid in full. Secondly, that all claims of the seamen for wages be paid in full. Thirdly, that all claims for labor, supplies, and materials for repairs, be paid *pro rata*, according to the schedule of claims annexed to the report.

Exceptions of various kinds were filed to the report of the commissioner: (1.) That certain claims were allowed which were not due from the owners of the steamer, or were, in whole or in part, improperly classified as claims for stores or for supplies and repairs. (2.) That the schedule improperly includes claims not having any maritime lien on the steamer or the proceeds in the registry of the court, nor entitled to any preference by attachment or otherwise. (3.) That the compensation charged by the commissioner is excessive.

Pending the hearing of the exceptions to the report of the commissioner the court passed an order that the claims for costs and the claims of the seamen for wages should be paid, and it appears that the order was promptly carried into effect, but the residue of the report was finally referred back to the commissioner for further proceedings. In the meantime the appellees here, having obtained judgment against the owners of the steamer in their suit *in personam*, sued out a garnishee process from the sixth District Court of the State, and attempted to attach the proceeds as money in the hands of the clerk of the District Court. All parties were again heard by the commissioner, and, on the fourth of June following, he made a supplemental report. In his second report, he decided that, where there is a maritime lien upon the vessel, the lien will attach to the proceeds in case the vessel is sold, and the proceeds are paid into the registry of the court, but where there is no maritime lien upon the vessel, that the proceeds should not be distributed, if the owners make opposition to the application, unless the appli-

cants prove that they have some *legal or equitable interest* in the subject-matter, and the commissioner being of the opinion that the interveners had no maritime lien, reported that the proceeds remaining in the registry of the court could not be distributed for their benefit in this case, and recommended that the court order either that the proceeds be paid over to the owners of the steamer or to the sheriff who seized the same in the hands of the clerk acting as registrar, under the garnishee process.

Seasonable exceptions were filed to the report by many of the interveners opposed in interest to its conclusions, including the last-named appellants. Due notice having been given, the parties were heard, and the court entered a decree that all the interventions in the cause, founded on claims which are not liens in admiralty, be dismissed at the cost of the respective parties. All such parties, including the last-named appellants here, claimed an appeal to the Circuit Court, and the record shows that the appeal in their behalf was duly allowed, and that they filed an appeal bond, executed to the owners of the steamer and the appellees in this court. Certain other interveners also petitioned for an appeal, and the court passed an order granting it, without requiring any additional bond, in consequence of which omission the present appellees, on the twentieth of December following, moved the District Court to set aside and dismiss the last-named appeal, and the record shows that the court, on the twenty-fifth of January following, granted the motion and vacated and annulled the appeal.

Seamen's wages and costs having been paid, the interveners whose appeal was allowed moved the court, on the eleventh of January, 1872, that the fund in the registry of the court be transferred to the Circuit Court, which motion was for a time held under advisement. During that period the District Court, on the sixth of February following, entered a decree that the proceeds in the registry of the court be applied, first, to the satisfaction of the judgment of the present appellees against the owners of the steamer; and,

second, that the balance, if any, be paid over to Chaffee & Brother, seizing creditors, next in rank.

Application for an appeal by Chaffee & Brother was made on the following day, and on the twenty-sixth of the same month the court overruled the motion to transfer the fund into the Circuit Court, and the last-named motion for an appeal, and ordered that the fund be paid over as directed in the order previously given upon that subject. Chaffee & Brother, however, were among the petitioners for the appeal which was previously allowed by the court, and their names appear in the bond which was filed to prosecute the appeal, but they were libellants *in personam* and not strictly interveners in the original suit prosecuted *in rem* by the two pilots.

Copies of all the material orders, directions, and proceedings in the original suit, and in the several suits of *Allen* v. *The Steamer*, *Kennett & Bell* v. *The Owners*, and *Chaffee & Brother* v. *The Owners*, were sent to the Circuit Court under the certificate of the clerk of the District Court, together with copies of all documents filed and of the minutes of all the evidence introduced in those several cases, and the case was entered in the Circuit Court, on the twenty-ninth of May, 1872, under the title of *J. D. Cox et al.* v. *The Steamer*, which is the title of the original suit in the District Court, from which no appeal was ever taken, either by the libellants or the owners.

Appearance was entered by Kennett & Bell, and they moved to dismiss the appeal for the following reasons: (1.) Because the appeal was discharged in the District Court, which is not sustained by the record. (2.) Because the bond filed is irregular and not such as the law requires; and the Circuit Court having affirmed the decree of the District Court granted the motion to dismiss.

Immediate application for an appeal to this court was made by the present appellants, which was allowed by the Circuit Court, and the petitioners gave bond with surety to the present *appellees et als.* to pay all such damages as they

may recover against the appellants, in case it should be decided that the appeal was wrongfully obtained.

Irrespective of the question whether the appeal is regular or irregular it is quite clear that the decree of the Circuit Court must be reversed, as one part of it is repugnant to another part. Plainly, if the appeal was regular, it was error to dismiss it; and if it was so irregular that it became the duty of the court to dismiss it, the Circuit Court had no jurisdiction to affirm the decree of the District Court. Cases of admiralty and maritime jurisdiction, where the matter in dispute, exclusive of costs, exceeds the sum or value of fifty dollars, may be removed from the District Court into the Circuit Court by appeal, and the provision is that such appeals shall be subject to the same rules, regulations, and restrictions as are prescribed by law in case of writs of error.* Jurisdiction in such cases is given to the appellate court by the appeal or writ of error, as the case may be, which ceases to exist, even if regular, when the appeal or writ of error is dismissed, or if not regular in essential particulars, then jurisdiction does not attach for the purpose of affirming the decree upon the merits.† Argument to support these conclusions is not necessary, as they are self-evident, but inasmuch as the case must be remanded for a new hearing, it becomes necessary to examine some of the questions which the anomalous proceedings present for consideration.

Most of the claims of the interveners were for stores, materials for repairs, or for labor and supplies furnished to the steamer, either at the request of the master or at the request of one or both of the owners, in the home port of the vessel. More than half a century ago this court decided, in *The General Smith*,‡ that where repairs and supplies are furnished to a ship in her home port, or in a port of the State to which the ship belongs, that no maritime lien is implied, nor any other lien unless it is given by the local law, by which the rights of the parties in such a case is altogether governed.

* 2 Stat. at Large, 244. † 1 Id. 84. ‡ 4 Wheaton, 443.

Where necessary repairs have been made or necessary supplies furnished to a foreign ship, or to a ship in a port of a State to which the ship does not belong, the general maritime law, as all agree, gives the party a lien on the ship itself for his security, which may be enforced in the admiralty by a proceeding *in rem;* but the court decided, in the case before mentioned, that as to such repairs and supplies furnished to a ship in her home port, or in a port of the State to which the ship belongs, the case is governed by the local law, and that no lien arises unless given by the local law. All the Federal courts were governed by those rules for years, and little or no difficulty arose in practice, as most or all of the States enacted laws giving a lien for the protection of material-men in such cases, and this court adopted a rule authorizing a proceeding *in rem* against domestic ships, "where by the local law a lien was given to secure the payment of contracts in such cases for supplies, repairs, or other necessaries." Since that time, however, that rule has been repealed and a new one adopted in its place, which does not authorize a proceeding *in rem*, except where there is a claim founded on a maritime lien against a foreign ship, or against a ship in a foreign port, or the port of a State other than that to which the ship belongs.* Attempts were made by the States to obviate the embarrassment which grew out of the repeal of that rule, and the adoption of the new rule withdrawing the use of the process *in rem* from the District Courts to enforce the payment of claims for repairs and supplies furnished to domestic ships, but this court decided in several cases that the State legislatures could not create a maritime lien, nor could they confer jurisdiction upon a State court to enforce such a lien by a suit or proceeding *in rem* as practiced in the admiralty courts.†

* The Lulu, 10 Wallace, 192; The Belfast, 7 Id. 644; Leon *v.* Galceran, 11 Id. 191; Steamboat Co. *v.* Chase, 16 Id. 533; The St. Lawrence, 1 Black, 522.

† The Moses Taylor, 4 Wallace, 430; The Hine *v.* Trevor, 4 Id. 571; The Belfast, 7 Id. 644; Steamboat Co. *v.* Chase, 16 Id. 534; Leon *v.* Galceran, 11 Id. 192.

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Much embarrassment has existed ever since the old twelfth admiralty rule was repealed, as the new rule makes no provision to enforce the payment of contracts for repairs and supplies furnished to domestic ships, except by a libel *in personam*. Repeated judicial attempts have been made to overcome the difficulty, none of which have proved satisfactory, because they failed to provide a remedy in the admiralty by a proceeding *in rem*. Inconveniences of the kind have been felt for a long time, until the bench and the bar have come to doubt whether the decision that a maritime lien does not arise in a contract for repairs and supplies furnished to a domestic ship is correct, as it is clear that the contract is a maritime contract, just as plainly as the contract to furnish such repairs and supplies to a foreign ship or to a domestic ship in the port of a State other than that to which the ship belongs.* Such a remedy is not given even in the latter case, unless the repairs and supplies were furnished *on the credit of the ship*, and it is difficult to see why the same remedy may not be given in the former case if the repairs and supplies were obtained by the master on the same terms.† These and many other considerations have had the effect to create serious doubts as to the correctness of the decision made more than fifty years ago,‡ that a maritime lien does not arise in such a case.

Expressions, however, to the same effect are found in other opinions of this court, and inasmuch as the question is not satisfactorily put in issue in the pleadings in this case, and does not appear to have been directly presented to the Circuit Court by either party, the court here is not inclined to enter more fully into the consideration of it at the present time.

None of the interveners alleged *in direct terms* that they had a maritime lien upon the steamer or the proceeds in the

* Abbott on Shipping, 143, 148.

† 5 American Law Review, 612; 7 Id.; The St. Lawrence, 1 Black, 529; The Harrison, 2 Abbott, United States Reports, 78; The Belfast, 7 Wallace, 645, 646.

‡ The General Smith, 4 Wheaton, 443.

registry of the court. Many libels of intervention were filed subsequent to the sale of the steamer, and some of them contain a prayer that the court will decree the payment of the claim of the libellant, *with privilege* on the steamer or the proceeds, but in no case does the libellant allege in terms that the contract set forth in the libel constitutes a maritime lien upon the steamer or the proceeds in the registry of the court, nor does the libellant pray for process to enforce any such lien.

Doubtless the maritime lien is, in many cases, well described *as a privilege* in the thing, but the State law, which cannot be enforced in the admiralty, also gives material-men a privilege or lien in such cases, and *in view of that fact* it may well be questioned whether the allegation in the libels is sufficient to apprise the owners of the specific nature of the interest which the libellants claim in the proceeds, as the rule of decision in the Federal courts has been for many years that a maritime lien does not arise in such a case. Any person having an interest in the proceeds may intervene *pro interesse suo*, but he ought to allege enough to apprise the owner of the nature of the interest claimed.*

Most or all of the claims were referred to a commissioner to report a tableau of distribution, and no exception was taken to the order of the court appointing the commissioner. He decided that none of the claims, except those for seamen's wages, constituted a maritime lien, and none of the libellants excepted to the report upon that precise ground. On the contrary they seem rather to have acquiesced in that part of the report; and in the view adopted by the district judge, that it was competent for him to decree that the respective claims should be paid out of the proceeds in the registry of the court, irrespective of the question whether the claimants had or had not any maritime lien or other legal interest in the same. Such must, it would seem, have been the view of the district judge, as he ultimately

* 43 Admiralty Rule, Revised Code of Practice, Art. 3273-4; Revised Statutes of Louisiana, 604.

confirmed the report and directed the proceeds to be paid to two claimants, both of whom were libellants *in personam* and judgment creditors of the owners. By confirming the report he decided that none of the libellants whose claims were for repairs and supplies had any maritime lien, but in the decree ordering the payment of the two claims, he departed from the report of the commissioner, as the latter decided that, inasmuch as opposition was made by the owners, the proceeds could not be distributed among the interveners who had no maritime liens. Apparently the district judge must have been of the opinion that the proceeds were subject to his order of distribution among the creditors of the owners, or that the two claimants acquired some right or interest in the proceeds, either by their judgments against the owners or by virtue of the proceedings under the garnishee process against the clerk as the registrar of the District Court.

Beyond doubt maritime liens upon the property sold by the order of the admiralty court follow the proceeds, but the proceeds arising from such a sale, if the title of the owner is unincumbered and not subject to any maritime lien of any kind, belong to the owner, as the admiralty courts are not courts of bankruptcy or of insolvency, nor are they invested with any jurisdiction to distribute such property of the owner, any more than any other property belonging to him, among his creditors. Such proceeds, if unaffected by any lien, when all legal claims upon the fund are discharged, become by operation of law the absolute property of the owner.*

Subsequent to the seizure any person may enter an appearance to protect any interest he may have in the property, or he may commence a second or subsequent suit to enforce any claim he may have against it, or he may take legal measures to prevent the release of the property under arrest, or to prevent the payment of the proceeds out of the

* Brown *v.* Lull, 2 Sumner, 443; Sheppard *v.* Taylor, 5 Peters, 675; The Europa, Browning & Lushington, 87, 91; The Amelie, 2 Clifford, 448; Same Case, 6 Wallace, 30.

registry.* Defence may be made to a suit *in rem* by any person who has an *interest* in the thing seized; as for example, a mortgagee may appear and defend a salvage or wages suit, or the assignee of a bankrupt owner may appear and contest any claim against the property of the bankrupt, or underwriters, if they have accepted the abandonment, may also appear and defend against any claims adverse to their interest in the property, but a person who has merely a collateral interest in some question involved in the suit and has no actual concern in the subject-matter of it, cannot be allowed to intervene in the proceedings.†

Where the property is already under arrest and a second or subsequent suit is instituted, it is not necessary to take out a second warrant of arrest, as a citation *in rem* is sufficient, instead of a warrant, commanding the marshal to cite all persons who have, or claim to have, any right, title, or interest in the property, to enter an appearance in the cause on or before the day therein named, the service of which is sufficient to protect the rights of the intervener. Notice to the owners in some form must be given in such cases, else the decree will not conclude the owners.‡

Decided cases may be found which afford some support to the proposition that the proceeds in the registry of the court, if the lien claims are all discharged, may be distributed equitably among the intervening creditors of the owners, but the court is of the opinion that the rule that the proceeds in that state of the case belong to the owner is correct in principle, and that the weight of authority is in its favor, notwithstanding those cases, of which *The John*§ is the one most frequently cited. But in that case there was no opposition by the owners, nor was the question much considered. Directly opposed to that case is the case of *The Maitland*,‖ in

* 43 Admiralty Rule; Williams & Bruce's Admiralty Jurisdiction, 229.

† Conkling's Practice (5th ed.), 570; Stratton *v.* Jarvis, 8 Peters, 4; The Killarney, Lushington, 430; Williams & Bruce's Admiralty Jurisdiction, 199; The Julindur, 1 Spinks, 75; The Louisa, Browning & Lushington, 59; The Caledonia, Swabey, 17; The Mary Anne, 1 Ware, 108.

‡ Nations *v.* Johnson et al., 24 Howard, 205; 43 Admiralty Rule.

§ 3 Robinson, 290. ‖ 2 Haggard's Admiralty, 253.

which the admiralty court refused to follow it, remarking that there is no solid distinction between original suits and suits against the proceeds, where there is opposition. Mere remnants, if *unclaimed by the owner*, may stand upon a different footing, and it is upon that ground that the admiralty courts have sometimes decreed the payment of small *unclaimed* sums to a creditor of the owner having a clear equity, to prevent the same from being indefinitely impounded in the registry of the court. Exactly the same point was decided, in the same way, in the case of *The Neptune*,* in which all of the authorities to that time were carefully examined. Where the ship is sold the proceeds are in the hands of the court, which holds the fund in trust, and the court in the following case added that the owner is in some sense entitled to the same, but finally decided that inasmuch as he cannot obtain the fund without the order of the court, that it cannot be attached under the garnishee process.†

Supplemental suits in the nature of a suit *in rem* may unquestionably be entertained in favor of parties having *an interest* in the proceeds, as was held by this court in the case of *Andrews* v. *Wall*,‡ in which this court said that such suits may be entertained to ascertain to whom the proceeds belong and to deliver the same over to the parties who establish the lawful ownership to the property, as in the case of the sale of a ship to satisfy claims for seamen's wages, or for a bottomry bond, or for salvage services, or to discharge a lien for repairs and supplies, the rule being that after the original demand is paid if a surplus remains in the registry, the court may determine to whom the same belongs. Other lien claims are also mentioned for which the ship may be sold, but it is unnecessary to recapitulate them, as those enumerated are sufficient to explain the principle adopted by the court.§

Different views have in some few instances been adopted

* 3 Knapp's Privy Council, 111.

† The Wild Ranger, Browning & Lushington, 88. ‡ 3 Howard, 573.

§ United States *v.* Casks of Wine, 1 Peters, 547; Schuchardt *v.* Ship Angelique, 19 Howard, 241.

by the District Courts, but the right of the court to decree that third persons who could not have proceeded against the property *in rem* may recover a proportion of the proceeds to satisfy their claims against the owner, in a case where the owner appears and opposes the application, seems to be repugnant to every sound principle of judicial proceeding, and it is certainly opposed to the great weight of authority.*

Reference is sometimes made to the case of *Place* v. *Potts*,† as supporting the opposite rule, but the court here is not able to regard the case as having any such tendency, as the judgment in that case in the court of original jurisdiction was founded almost entirely upon the decision of the admiralty judge in the case of *The Dowthorpe*,‡ which is nothing but a simple apportionment of the different liens upon the ship and freight.

Suppose that is so, still it is contended that the appellees acquired the right of preference in the fund by virtue of the proceedings under the garnishee process, as more fully set forth in the record; but the court is entirely of a different opinion, for several reasons:

1. Because the fund, from its very nature, is not subject to attachment either by the process of foreign attachment or of garnishment, as it is held in trust by the court to be delivered to whom it may belong, after hearing and adjudication by the court.§

2. Because the proceeds in such a case are not by law in the hands of the clerk nor of the judge, nor is the fund subject to the control of the clerk. Moneys in the registry of the Federal courts are required by the act of Congress to be

* 2 Parsons on Shipping, 231; The New Eagle, 2 W. Robinson, 441; Gardner *v.* Ship New Jersey, 1 Peters's Admiralty, 226; Clement *v.* Rhodes, 3 Addams, 40.

† 8 Exchequer, 705; Same Case, 10 Id. 370; Same Case, 5 House of Lords Cases, 383.

‡ 2 W. Robinson, 90.

§ The Albert Crosby, 1 Lushington, 101; The Wild Ranger, Browning & Lushington, 8; 1 Chitty's Archbold's Practice (11th ed.), 702.

deposited with the Treasurer of the United States, or an assistant treasurer or designated depositary, in the name or to the credit of such court, and the provision is that no money deposited as aforesaid shall be withdrawn except by the order of the judge or judges of said courts respectively, in term time or vacation, to be signed by such judge or judges and to be entered and certified of record by the clerk.* Regulations substantially to the same effect have existed in the acts of Congress for more than half a century, and within that period it is presumed that no proceeding to attach such a fund by a creditor of the owner has ever been sustained.†

3. Judgments were never a lien upon personal property, unless made so by attachment under mesne process, which is all that need be said in respect to the proposition that the appellees acquired a right of preference to the proceeds in the registry of the court by virtue of their judgment against the owners.

Mention should also be made of another error, which ought if possible to be promptly corrected. Where an appeal is taken from the decree of the District Court in a proceeding *in rem* to the Circuit Court, the property or proceeds thereof follows the cause into the Circuit Court, where it remains until the litigation is ended, as it does not follow the cause into the Supreme Court.‡ Application was made to the District Court to send up the proceeds, and the record shows that the court overruled the same, which is a plain error and one which ought to be promptly corrected, unless the proceeds have been paid over as directed by the court, and if so, they should be recalled, if practicable, and restored to the registry, and then sent up to the Circuit Court, as the Circuit Court in such cases executes its own decree.

Imperfectly tried, as the case has been, the court here is of the opinion and directs that leave be given to both parties

* 17 Stat. at Large, 1. † 3 Id. 395.

‡ The Collector, 6 Wheaton, 194; The Seneca, Gilpin, 34; The Grotius, 1 Gallison, 503; Montgomery *v.* Anderson, 21 Howard, 388; Conklin's Practice (5th ed.), 569.

to amend their pleadings, and if need be to take further proofs. Error was also committed by the Circuit Court in affirming the decree of the District Court, as it is plain it should have been reversed. For these reasons the decree of the Circuit Court is in all things REVERSED, and the cause remanded for further proceedings

IN CONFORMITY TO THIS OPINION.

CORNETT *v.* WILLIAMS.

1. Under the act of July 2d, 1864, providing that in civil actions in 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;" witnesses may, other things allowing, testify (without any order of court) by deposition. And if not satisfied with a deposition which they have given, have a right, without order of court, to give a second one.
2. What evidence so far tended to prove, on the part of a person who, during the late rebellion, removed his slaves from loyal parts of the country to parts in rebellion, a purpose to sell them in these last, and justified a charge on an assumption of possibility, that the jury might find the purpose to have existed. This matter passed upon.
3. When, under the what is known in Texas as its "Sequestration Act," a person has brought suit to recover land, and the marshal, in pursuance of the writ of sequestration, takes possession of the land, it is in the custody of the law. But when replevied (as the said act allows it to be), it passes from the possession of the law into the possession of the party replevying.
4. The rule established by this court as to the introduction of secondary evidence—that it must be the best which the party has it in his power to produce—is to be so applied as to promote the ends of justice and guard against frauds, surprise, and imposition. The court has not gone to the length of the English adjudications, that there are no degrees in secondary evidence. Hence, where the records of a court were all burnt during the rebellion, what appeared to be a copy of an officially certified copy was held properly received; the certified copy, if any existed, not being in the party's custody or plain control, and there being no positive evidence that it existed, though there was evidence tending to show that it did. There is nothing in the act of Congress of March 3d, 1871 (16 Stat. at Large, 474), providing for putting in a permanent form proof of the contents of judicial records, nor in the statute of Texas of 11th

February, 1850 (Paschall's Digest, Article 4969), on the same subject, which changes this rule.

5. Where a county court having jurisdiction to authorize a sale of a decedent's estate for his debts does authorize it, and the sale is made, the sale must be presumed in this court to have been regularly made. In the absence of fraud, the question of its propriety is not open to examination otherwise than in an appellate court in a proceeding had directly for that purpose.

6. Certain instructions quoted further on (*infra*, pp. 235–238) on the subject of fraud approved; though the case was declared hardly sufficient to require them.

ERROR to the Circuit Court for the Western District of Texas, in which court Henry Williams brought trespass to try title against one Cornett, to settle the question of ownership of a certain league of land in Bastrop County, in the said State, which had formerly belonged to Samuel Williams.* The plaintiff claimed under a sale made by an administrator of the estate of the said Samuel, through the proper court, for payment of debt; the defendant through deeds from his heirs at law. The more particular case was thus:

Samuel Williams, of the said Bastrop County, and engaged in business there, having become indebted to his brother Henry, resident in Baltimore, Maryland, the said brother brought suit against him, and on the 20th June, 1850, obtained a judgment against him in the District Court of the United States in Texas for $26,736; and on the 12th July, 1858, to keep alive the evidences of the debt, brought a second suit on this judgment so obtained, and recovered judgment on it for $43,936. These facts were testified to by W. B. Ballinger, Esq., a member of the bar of Texas of high standing; his "office registry" being produced as the evidence of the dates and amounts of the two judgments;

* These two brothers were called, in different parts of the record,—the last Samuel May Williams, S. M. Williams, Samuel M. Williams, and Samuel Williams; the other Henry H. Williams, Henry Williams, and in other ways. There being two other parties Williams (J. H. and W. H.) in the case, I have spoken in my statement of the case and in the report of the argument, of the two brothers constantly by their first names only; that is to say, as Samuel and Henry.

the judicial records, as hereafter mentioned, having themselves been destroyed.

Soon after the entry of the second judgment Samuel Williams died, leaving this league of land, and some other lands; and not long afterwards—about the year 1859—Henry being in Texas, applied to Mr. Ballinger for counsel as to what further steps, if any, he had best follow to secure his debt against the estate of his brother now lately deceased. Mr. Ballinger told him to get a certified copy of the judgment, make affidavit to it, and present it to the administrators of the estate of Samuel Williams; and supposed, as he testified, that he would do this.

This advice of Mr. Ballinger was founded apparently on what seems to be the law of Texas,* under which any claim against the estate of a deceased person, in order to be ranked as a just debt against it, must be duly sworn to and presented to the administrator for allowance, *and to the chief justice (who is the probate judge) for approval.*

It did not appear that Mr. Ballinger ever saw this *certified* copy, such as he had directed Henry Williams to get and present; but another witness (F. W. Chandler), a member of the bar, testified that *he* had had in his possession such a copy of the judgment; that J. H. Williams (the son of Henry Williams) had made several copies of it in his presence; and that the original (that is to say, the copy officially certified) had been lost in the mail in crossing Cummins's Creek. One of the copies thus made was sent to Mr. Ballinger; but Mr. Ballinger could not say that the copy was accurate, and noted that the amount found due by the clerk and that for which the judgment was given varied; Mr. Ballinger's own memorandum, as found in his office register, agreeing in amount and date with the latter. The copy thus sent to Mr. Ballinger, and which was received in evidence under objection, set forth that the clerk of the court in which the judgment was had, had assessed the damages at $43,966.34; and that it was, therefore, considered by the court that the plaintiff recover of the defendant $43,936.34.

* Act of March 20th, 1848, Paschal's Digest, Article 1311.

Statement of the case.

In 1861 the civil war broke out, lasting till the spring of 1865. In 1862 all the original records of the Federal courts in Texas were burned.

Early in the war, J. H. Williams, a son of Henry, already mentioned as of Baltimore, went to Texas, and with his cousin H. H. Williams, a son of Samuel, bought out the right of the other heirs of Samuel to this league of land, and went on it to live. Having done this the two cousins formed partnership, built a cloth factory, and made a contract with a the Confederate government to supply to it military cloth for the Confederate troops. J. H. Williams stated in testimony that he was at the time aware of the incumbrance of his father's judgment on the land, but considered the estate of his uncle so wealthy "that any idea of the land being needed to pay a debt of the estate never occurred to him but as a possibility too remote to be worth consideration."

While the cousins, J. H. and W. H. Williams, were engaged in manufacturing military cloths for the Confederate troops, under their contract, already mentioned, with the Confederate government, a certain Cornett appeared, in October, 1863, in Texas, with a large number of slaves, some mules, and a wagon. Cornett had been a resident and a slaveholder in Missouri, disaffected to the Federal government; and the testimony tended to show that in the autumn of 1861, that State being in a very disturbed condition, owing to the war, and the government troops gradually driving out those of the Confederate States, a son of Cornett said to his father that the Federal army was approaching; that if they did not remove their slaves soon they would lose them all; that thereupon Cornett got his slaves together, and handcuffing or tying with strings some who hid themselves and did not want to go, set off for the South, and after about five weeks of forced journeyings, following the Confederate troops night and day, arrived in Texas; that he hired some of his slaves out for short times, sold certain ones, and in the autumn of 1863 sold all the rest (the bulk of them), and the mules and wagon, to the cousins Williams, they having made the purchase, as one of them tes-

tified, "for the purpose of enabling us to comply with our contract with the Confederate government;" "a thing," continued the witness, "which the said Cornett knew at the time of our purchase and must have known before, it having been matter of common notoriety; and he having further known it from our own statements made to him at the time."

By way of payment for the negroes, mules and wagon, the cousins Williams executed, in February, 1864 (though the sale was in the autumn of 1863), their note to Cornett for $9600 (the $9000 having been the price of the negroes and the $600 the price of the mules and wagon), and to secure the payment of the note conveyed the league of land that they had bought from the heirs of Samuel Williams to one Wildbahn, in trust to secure their note to Cornett, and with power in the trustee to sell if the note was not paid.

In the spring of 1865 the supremacy of the Federal arms became complete; slavery was abolished, and the slaves bought by the cousins Williams of no more value to them.

Henry Williams, the father of J. H. Williams, who was still alive and had been during the war at the North, constituted, in 1865, his son, J. H. Williams, yet in Texas, his general agent there; and peace being now restored and intercourse between all parts of the country, the son (*who, as already mentioned, had with his cousin mortgaged the league to Cornett, to secure the purchase-money of the slaves*), acting as his *father's* agent, at the January Term, 1866, applied through counsel, Mr. Mott, to the County Court of Galveston, for an order that the administrator of Samuel Williams be cited to appear and show cause why "he should not make application to the court for an order to sell enough of the property of said estate to pay a judgment obtained by the said Henry Williams against the said Samuel, to the amount of $40,000; *which said judgment was allowed and approved as a valid claim against said estate, in October*, 1859, with eight per cent. interest per annum," &c.

The application thus made to the court was under and in pursuance with the 1315th article of Paschal's Digest, which

declares that when an administrator shall neglect to apply for an order to sell sufficient property to pay the claims against the estate that have been allowed and approved, or established by suit, such executor shall be required by the chief justice, on the application of any creditor *whose claim has been allowed and approved*, or established by suit, to present a statement, &c.; and on proof that a necessity exists for a sale to pay debts, &c., it shall be the duty of the chief justice to order such sale to be made, having jurisdiction of the case by application made.

The administrator appeared at the same term, and, answering, admitted it to be true that the said Henry, on the 28th of June, 1850, did recover a judgment in the United States District Court at Galveston, against the decedent, for $26,736; that it was not paid at the death of the decedent; that it was presented for allowance against the estate with the usual affidavit and allowed; *that he could not say whether it was approved by the chief justice of Galveston County;* that it had never been paid, and that the reason he had taken no measures to pay it was that the plaintiff had told him that, being against his brother, he did not intend to enforce it. The court thereupon, at the same term, made an order as follows:

"On this day came on to be heard in this cause the motion of Henry Williams, by his agent, J. H. Williams, asking that the administrator be required to sell sufficient property of the estate to pay a certain judgment obtained by the said Henry in the United States District Court, on the 28th day of June, A.D. 1850, for the sum of $26,736, with interest from date of rendition; and it appearing to the court *that this claim has been duly allowed*, and that the administrator has no funds in hand whatever to pay the same, it is ordered that he make sale of sufficient property in pursuance of the prayer of the motion. And the administrator having designated the following piece of property, it is ordered that he shall make public sale of one league of land, situated," &c.

The premises in controversy (*being the same that the son had with his cousin conveyed to Cornett*) were then described, the

mode and time of advertising, and the place and terms of the sale were prescribed, and the administrator was directed "to make due report of his action in the premises to the court." On the 15th of March, 1866, the administrator reported that, pursuant to the order of the court, after due notice according to law, he had offered the premises for sale at public auction, at the time and place required by law, and that they were struck off and sold to Henry Williams, for the sum of $60,000, on a credit of twelve months, secured by a vendor's lien; that Williams was the highest and best bidder, and that the price was a reasonable one.

At the March Term the court confirmed the report and ordered the administrator to make a deed to the purchaser upon his complying with the terms of the sale. On the 15th of April, 1866, the administrator gave a receipt to the purchaser for $60,600, being the amount of the purchase-money with ten per cent. interest, and by the same instrument released his vendor's lien. On the same day he executed a deed of conveyance to the said Henry. It recited all the proceedings touching the sale upon which it was founded.

On the 2d of January, 1868, the administrator executed to the said Henry another deed for the same premises. It recited more fully the proceedings relative to the sale, and set out that there were certain clerical errors of dates in the former deed, and that the second deed was made to correct them.

The counsel (one Mott), who, as counsel, attended to getting this order of sale, and was examined as a witness for the plaintiff, was asked whether in getting the order he had before him "the claim" of Henry Williams, on which the order was based. He replied:

"I have not before me the claim alluded to. I presume it is among the papers in the matter of the administration of Samuel Williams, deceased, on file in the county clerk's office, in Galveston County."

He testified further, in reply to other interrogatories:

"The administrator contested my application for order of

sale, and the matter was referred to the court upon the proof. The matter was one of minor importance, as far as I was concerned, and my recollection of the facts is not clear. My impression is that the proof was mostly oral. I proved by one or two witnesses that judgment had been obtained in the United States District Court by Henry Williams against Samuel Williams, and also proved the destruction of the United States court records by fire. And upon the proof the chief justice adjudicated the matter and gave me the order of sale."

J. H. Williams—the son of Henry, and who had acted as his agent in procuring through Mr. Mott this sale—was also examined, and was asked on a cross-interrogatory:

"How did it happen that, as agent for your father, you managed to have your own homestead sold by order of the Probate Court of Galveston County? Explain particularly why you permitted its sale, when you had warranted the title of it to Cornett, and knew that the sale would injure him?"

He answered:

"My father, for the first time, in 1865, constituted me an agent for the management of his affairs in Texas. I had the interests of my mother and brother to consider as well as my own. I was an enthusiastic believer in the Confederacy, and never expected to see its fall, and I entered into the transaction with Cornett in good faith at the time. The fall of the Confederacy came, however, and with it the destruction of the value of the property I was to have held from Cornett, and a totally new set of laws, of which I had to take the evil, and felt it nothing more than right to extract from them, in return, whatever of good I could. I did not regard the trade as legally binding upon me. My uncle's estate was nearly bankrupted by the results of the war, and this league of land was the only piece of property belonging to the estate. The administrator seemed glad to avail himself of my offer and thus get rid of a large claim, the settlement of which in any stricter way would have ruined all the parties concerned in the estate, and have seriously embarrassed the payment of other debts due by it. I knew that in any event, *my* interest in the land was gone. My sympathies were of course with the rights of my father, mother, and my

brother. I knew the judgment through which, or to satisfy which, my father's title to the league of land in question was obtained was a judgment for a just and *bonâ fide* debt, while I did not feel that Cornett was morally entitled to anything more than a fair rate of hire for his negroes for the time we held them, which was offered him and refused."

In this state of things—that is to say, the trustee Wildbahn having sold the land, and the title derived from the heirs of Samuel Williams having become vested in Cornett, —Cornett, on the 7th of December, 1867, brought a suit (trespass to try title) against the cousins J. H. and W. H. Williams, still in possession; and a writ known in Texas as a writ of sequestration—by which the marshal takes possession of the land and holds it in his official capacity until one party or the other give a bond and replevy it—was issued, under which the marshal took possession of the league of land. To this suit Henry Williams did not interplead as a defendant.

The statute of Texas on the subject of a landlord's interpleading is:

"When a tenant is sued for lands of which he is in possession, the real owner or his agent MAY enter himself on the proceedings as the defendant in the suit, and SHALL be entitled to make such defence as if he had been the original defendant in the action."

On the 19th of February, 1868, Cornett replevied the land.

On the 19th of February, 1868, Henry Williams brought the present suit against Cornett, alleging in his declaration "that he was, *on the 1st day of January*, 1868, and a long time before that date and still is owner," &c., and that the defendant, "*on the 1st day of January*, 1868, with force and arms entered," &c.

On the 19th of June, that is to say, after the present suit was brought by Henry Williams against Cornett, Cornett recovered judgment against the cousins W. H. and J. H. Williams, on *his* suit against them.

Statement of the case.

In the *present* case *two depositions* of Henry Williams, the plaintiff in the case, were read under objection; one had been taken in June, 1868, the other in January, 1869. Both were taken, as respected general formalities, under the thirtieth section of the Judiciary Act of 1789, prescribing the mode of taking depositions generally in the Federal courts; and, though the depositions of the plaintiff himself, were considered by the plaintiff's counsel as coming within the provision of the act of July 2d, 1864, authorizing parties to a case to testify;* an act in these words:

"SECTION 3. The sum of $100,000 is hereby appropriated . . . for the purpose of . . . bringing to trial and punishment persons engaged in counterfeiting treasury notes, bonds, or other securities of the United States. *Provided*, That in the courts of the United States there shall be *no exclusion of any witness* on account of color, *nor in civil actions because he is a party to or interested in the issue tried.*"

One provision of the thirtieth section of the Judiciary Act of 1789, under which the depositions were taken, after prescribing the mode in which the magistrate, taking them, is to take them, says:

"And the depositions so taken shall be retained by such magistrate until he deliver the same, with his own hand, into court; or shall be . . . by him, the said magistrate, sealed up and directed to such court, and remain under his seal until opened in court."

The substance of the testimony of Henry Williams was that the deed of trust made by his son and nephew of the lands to Wildbahn for the security of Cornett, had been made wholly without his knowledge or authority, and that he had never in any way ratified what they had done.

The court charged *inter alia* thus:

"1. With regard to the trust-deed, I instruct you, that if you believe that Cornett brought the slaves from Missouri in August or September, 1861, during the war, for the purpose of disposing

* 13 Stat. at Large, 351.

of the same, being a citizen of Missouri, that it was an unlawful act on his part, contrary to his duty as a citizen of the United States and of Missouri, and that his sale of the slaves here was a transaction void in law, and cannot be enforced in the courts; and if the consideration of the trust-deed was illegal and void, the deed itself was void, and no title can be derived under it by Cornett.

"2. It is argued by the defendants that the plaintiff, Henry Williams, is concluded by the sequestration suit, because the defendants were tenants under him, and one of them was his general agent in Texas. But I instruct you that he is not concluded. He was no party to the suit, and did not undertake the defence of it. A landlord may, if he chooses, come in and defend an action brought against his tenant for the land, but he is not bound to do it. The tenant may be under such complications that the landlord's defence would be prejudiced thereby. The landlord, if he prefer, may await the event of the action, and if his tenant is ousted may then bring his own action, as has been done here, and try his title on its own merits, unembarrassed by the peculiar complications in which his tenant may have been involved.

"3. To the title of the plaintiff, it is objected by the defendant, that the judgment-debt of Henry Williams was not duly presented, allowed, and approved, and that the order of sale was, therefore, void, and that the deed executed by the administrator was also void.

"But the validity of the order of sale cannot be questioned in this collateral way. This is not a revisory proceeding for examining the regularity or legality of that order. This court cannot set it aside nor inquire into any errors committed by the Probate Court in making it, if there were any. All it can do is to ascertain whether the Probate Court had jurisdiction of the matter. Of this I have no doubt. It is conceded that the court had jurisdiction of the succession of Samuel Williams, of which matter this order of sale was a part. But if that was not sufficient to support the order, we have the fact proved that there was a subsisting judgment; that it was duly presented to the administrator for allowance, and sworn to, and admitted, and registered by him; that the plaintiff applied to the court for an order calling upon the administrator to show cause why he should not apply to have the land sold to pay the judgment,

alleging that it had been duly presented, allowed, and approved; that the administrator appeared and answered the application, and that a hearing was had thereupon, and the order made for a sale of the land; that the sale was made, reported, and confirmed, and a deed ordered to be given, which was given accordingly. . . . Having jurisdiction of the case by the application made, it was the duty of the Probate Court to ascertain whether the exigency existed which justified or required an order of sale to be made. It will be presumed, when brought up collaterally, that the court did its duty, and its judgment will be accepted and received without further question.

"4. I therefore instruct the jury that the administrator's deed was good and valid to convey, and did convey, to the plaintiff the title which Samuel Williams had in the land, unless it was rendered void by fraud on the part of the plaintiff in obtaining it.

"If the plaintiff obtained the deed for the purpose of defrauding the creditors of W. H. and J. H. Williams, and especially Cornett, then the plaintiff cannot recover. This is the principal question for you to decide, viz., whether the order of sale made by the Probate Court was procured by the plaintiff, in combination with W. H. and J. H. Williams, for the purpose of defrauding Cornett out of his debt. In deciding this question, you will assume that the judgment of the plaintiff against his brother, Samuel Williams, was a good and valid one. If they agreed to it, none but the creditors of Samuel Williams can question its validity. It cannot be assailed in this suit.

"You are also to assume that the judgment was duly presented to the administrators of Samuel Williams, and allowed by them, and approved by the proper judge of the Probate Court. These points must have been decided, and are concluded by the action of the Probate Court on the application for an order of sale.

"You are also to remember that the plaintiff, having a valid and legal claim against the estate of Samuel Williams, had a right to have any portion of the latter's estate applied to the payment of it, and whoever purchased any part thereof purchased subject to that right.

"You are also to remember the rule of law that fraud must be proved, and cannot be presumed. If, however, it be proved to your satisfaction that either the plaintiff or his agent (for he is bound by the acts of his agent), in collusion and combination

with W. H. and J. H. Williams, or with the administrator, procured the order of sale to be made in order to defraud Cornett, you will find for the defendant. If it be not so proved, you will find for the plaintiff."

Verdict and judgment having gone for the plaintiff, the defendant brought the case here, assigning for error:

1. The admission of the two depositions of Henry Williams.

2. The construction given (in the first item above quoted of the charge) to the deed of trust under which the sale of the land was made to Cornett, the defendant.

3. The effect given (in the second item above quoted of the charge) to the proceedings and judgment in the sequestration suit of *Cornett* v. *J. H. and W. H. Williams*, and not in treating it as a former recovery for the land now in controversy.

4. The permission to introduce such evidence as was introduced, to show the existence, destruction, and contents of the two judgments alleged to have been given in favor of Henry Williams against his brother Samuel.

5. In the view which the court took (in the third item above quoted of its charge) of the jurisdiction of the Probate Court, to order and confirm the sale to Henry Williams, the plaintiff, of the land in suit.

6. In that part of its charge (the fourth item of it above quoted) on the issue of fraud.

Mr. C. S. West (*a brief of Messrs. G. F. Moore and John Hancock being filed*), *for the plaintiff in error:*

1. *The court erred in permitting the two depositions of Henry Williams to be read to the jury.*

The act of July 2d, 1864, removed the disability of a party to a suit to give evidence in it, and he can now testify orally, as any other witness could at common law; but he cannot testify by deposition, because that mode of taking evidence is in derogation of the common law. The power of examining any witness by deposition is purely statutory;

and no statute has yet been made for taking the depositions of parties to suits in their own behalf.

The thirtieth section of the Judiciary Act of 1789, authorizing the taking of depositions *de bene esse*, evidently intended, by its terms, that after the taking of the deposition, it should be returned into court, and remain sealed until published in open court. After that was done, and the deposition opened in the manner required by law, no other deposition of the same witness could be taken unless for good cause shown to the court, and on its order made. The practice adopted in the case at bar enables a party, after he has had time to weigh the effects of his evidence, to amend and supply what it yet needs to carry the case. Such a practice leads to perjury, and is not conducive to the ends of justice. The statute of 1789, authorizing evidence to be taken *ex parte*, has always been rigidly construed.*

2. *The court erred in its charge as to the construction of the deed executed by the trustee to Cornett, for the land claimed.*

There was no evidence whatever "that Cornett brought the slaves from Missouri in August or September, 1861, during the war, *for the purpose of disposing of them.*" The evidence showed that Cornett's sympathies were with the Confederates, and that when their forces abandoned one portion of Missouri, and his immediate home became the theatre of active war, he moved South along with the retreating Confederate forces, and came with his property to Texas, not to sell it or "dispose of it," but to keep and preserve it, and that he did keep possession of it for several years. So far as it showed, the idea of selling the slaves to Williams did not occur to him until the contract of sale was made in September, 1863. The court, therefore, charged upon a state of facts on which there was no evidence. This is error.†

3. *The court erred in the effect which it gave in its charge to the*

* Walsh *v.* Rogers, 13 Howard, 286; Garner *v.* Cutler, 28 Texas, 182.

† Michigan Bank *v.* Eldred, 9 Wallace, 544; Ward *v.* United States, 14 Id. 28.

proceedings and judgment, in the sequestration suit of Cornett v. *J. H. and W. H. Williams.*

The proceedings in the sequestration suit were introduced in evidence for two purposes: one, to show a former recovery that was so binding and conclusive on the plaintiff, Henry Williams, as to prevent his obtaining a judgment in his favor in the present action. The other, to show that at the time this suit was brought the land in controversy was in the custody of the law, and that no action of trespass or for its recovery could be brought until it ceased to be so.

When the suit was brought, W. H. Williams was the tenant of Henry Williams, and J. H. Williams was not only his tenant but was his son and general agent in Texas, and was, as such agent, in possession of the land in suit, in conjunction with W. H. Williams, who was his brother-in-law and first cousin.

4. *The court erred in permitting the existence, destruction, and contents of the two judgments alleged to have been rendered in favor of Henry Williams against Samuel Williams, the one on the 28th of June*, 1850, *for* $26,736, *and the other on the 12th of July*, 1858, *for* $43,936.34, *to be established by the parol testimony of Messrs. Ballinger, Mott, and Chandler.*

The evidence of Mr. Ballinger, disclosing that he was consulted as to procuring a certified copy of the judgment, in 1859, to be sworn to, and presented as a claim against the estate, and the evidence of Mr. Mott, which shows that it was on that claim that Henry Williams asserted a right to be ranked as a creditor, make it apparent that if it ever was approved and ranked as a debt, there was a certified copy of the judgment unaccounted for. Mr. Mott testified that he supposed that "the claim" (by which he meant the certified copy that on the advice of Mr. Ballinger, Henry Williams was said to have obtained and filed) was among the papers of Samuel Williams's estate. Doubtless, if obtained and filed, it was so.

The statute of the United States of the 3d of March, 1871,*

* 16 Stat. at Large, 474.

being an act relating to lost records, in its first section authorizes the loss, when proved, to be supplied by a *duly certified copy*, when the same can be obtained.

The act of the State of Texas of the 11th February, 1850,* which provides for the mode and manner of proving lost records, is almost identical in its requirements with the act of Congress above cited, and provides that when "records are lost or destroyed the same may be supplied by copies *duly certified*."

As to the alleged copy of a certain certified copy of the judgment supposed to have been lost in Cummins's Creek. Even conceding that the copy shown to Mr. Ballinger and received under exception was a correct copy of the certified copy, which the witness, Chandler, had had, and which he says was lost in Cummins's Creek (a great concession for us to make), still nothing is proved. The alleged certified copy, had it been produced, contradicts itself and on its face shows its inaccuracy and untrustworthy character. It asserts in one part that the judgment was for $\$43{,}966\frac{34}{100}$, and asserts in another that it was for $\$43{,}936\frac{34}{100}$; a different sum.

If the plaintiff had shown that the certified copy of the judgment which Mr. Chandler had, and which was lost, was the same one that Mr. Ballinger in 1859 had advised him to procure (and which, from Mott's evidence, was ranked as a claim, and in satisfaction of which the land in suit was sold), and had also accounted for its being in his possession, instead of being on the files of the Probate Court of Galveston County, with the other vouchers of Samuel Williams's estate, it might then have been proper to allow the evidence to be used, loose and unsatisfactory as it was. But, under the circumstances, the objection taken below should have been sustained.

5. *The court erred in permitting the administrator's deeds of the 15th of April*, 1866, *and of the 2d of January*, 1868, *to Henry Williams, to be read in evidence; and in the charges given concerning the legal effect of those deeds.*

* Paschal's Digest, Article 4969.

Numerous reasons might be assigned in support of this view. It is enough to say that the formalities and acts required by law to give the Probate Court jurisdiction and power to order the sale were not shown; because,

1. There does not appear to have been made to the court, or brought before it, a statement or exhibit of the condition of the estate before the order was made, as required by law in cases where the administrator declines to sell, and a sale is sought to be had, on the motion or application of a creditor.

2. It affirmatively appears on the face of the record that the alleged debt of Henry Williams, if any existed, was not established in the mode required by law; the record not disclosing that such a debt was duly sworn to, *allowed by the administrator, and approved by the chief justice*, the order of sale reciting the sale to have been made "on a claim *allowed*," and not on a claim *allowed by the administrator and approved by the chief justice.*

3. The judgment debt for which the court ordered the land to be sold, was one for $26,736, with interest from the 28th of June, 1850, to date, and is a different debt from the judgment debt of $40,000, set up by the plaintiff in his application for a sale.

As to the administrator's second deed (that of the 2d of January, 1868), in addition to all the foregoing objections, it may be further urged that the same was void, and incompetent to establish any right; because,

1. No order of court was produced showing any authority in the administrator to execute such an instrument.

2. Because, having already executed a deed (that of April 15th, 1866), he was, as to this matter, *functus officio*, and had no power, without an order of court, to execute another deed for the same property.

6. *The court erred in its charge to the jury on the issue of fraud, in obtaining the order of sale in the Probate Court of Galveston County.*

There is no special objection to the legal propositions laid down in general terms in this portion of the charge. The

vice in it is, that it restricted the range of inquiry of the jury to so narrow a space as to leave practically nothing to investigate.

The fraud alleged to have been attempted was a sale of the land in suit, to defeat the previously acquired rights of Cornett, under the order of the Probate Court, obtained by fraud, on an old, obsolete debt, which, after sleeping peacefully for sixteen years without so much as an execution having issued, without being approved and ranked as a debt, by collusion between the defendant in error, acting through his son and agent, and the administrator, was revived and made the means of defrauding Cornett of his property.

In such an attitude of the case, for the court to inform the jury that neither the validity nor character of the original debt, nor the question as to whether it was a subsisting and approved claim against the estate, had anything to do with the question of fraud, was practically equivalent to forbidding inquiry at all, or at least restricting it in such a narrow compass as to defeat the object of such inquiry.

In *The Duchess of Kingston's Case*,* Chief Justice De Grey held, that extrinsic evidence could be used to show fraud, remarking—

"In civil suits all strangers may falsify for covin, either fines, or real, or feigned recoveries, and this, whether the covin is *apparent* on the record or *extrinsic*."

In *Butler* v. *Watkins*,† it is said, "that in matters of fraud, large latitude is to be given to the admission of evidence."

Messrs. A. J. Hamilton and J. A. Buchanan (*a brief of Mr. Jackson being filed*), *contra*.

Mr. Justice SWAYNE delivered the opinion of the court.

There was no error in admitting in evidence the two depositions of H. H. Williams. The objections that he was a party to the record, and interested in the event of the suit,

* 2 Smith's Leading Cases, 7th American edition, 653.

† 13 Wallace, 457.

were obviated by the third section of the act of July 2d, 1864.* He was thus placed upon a footing of equality with all other witnesses, and it was competent for him to testify in the case orally or by deposition. The depositions were taken and certified in conformity to the thirtieth section of the act of 1789.† If the deponent was not satisfied with his first deposition, he had the right to give a second one. No order of the court was necessary in either case. The only objections insisted upon are that the statute does not authorize a party to testify by deposition if he can orally, and that if he can by deposition, the right was exhausted by the first one, and that the second one was taken without authority of law. Both objections are without foundation. The statute is remedial and to be construed liberally. We are aware of no case in which it has been held that where a witness has given one deposition in an action at law, he cannot for that reason give another without the sanction of the court. Such a proposition has the support of neither principle nor authority.

The instruction given to the jury touching the trust deeds executed by W. H. and J. H. Williams to Wildbahn, the notes they were given to secure, and the sale by Cornett of the slaves, which was in part the consideration of the notes, was well warranted by the state of the evidence and was correct. It was objected to only upon the ground that the evidence did not tend to prove that the slaves were removed from Missouri to Texas for the purpose of selling them in the latter State, and that hence the instruction, even if correct as matter of law, was, with reference to the case, an abstraction, and must necessarily have had the effect of confusing and misleading the minds of the jury. An examination of the record has satisfied us that the evidence was abundantly sufficient to raise the question of intent in the removal of the slaves, and to make it the duty of the court to say to the jury what was said upon the subject. It is not objected that the rule of law was not correctly stated.

* 13 Stat. at Large, 351.

† 1 Id. 89.

What was done in the suit between Cornett and J. H. and W. H. Williams in no wise affected the rights of H. H. Williams in this action. The marshal seized the premises, and Cornett gave a replevin bond pursuant to the statute of Texas. While the property was in the hands of the marshal it was in the custody of the law. When Cornett gave the bond the premises passed from the custody of the law into his possession, and they were in his possession when this suit was instituted. The bond was given to enable him to effect that result, and it was accomplished. The bond took the place of the property and represented it. The premises were as much in his possession as if no litigation was pending and he had acquired possession in some other way. The defendant in error, having declined to become a party to that suit, everything done in it was, so far as he was concerned, *res inter alios acta.*

The secondary proof of the judgment in favor of H. H. Williams, against Samuel M. Williams, was properly admitted. The original record was destroyed by fire in the year 1862. The proof in question consisted of a copy of a copy of the judgment, the latter duly certified by the clerk of the court by whom the judgment was rendered. It was proved that the certified copy had been destroyed. The judgment in question was recovered upon a prior judgment in favor of the same plaintiff against the same defendant. There was evidence tending to show that a certified copy of the latter existed, but it was not positive. There was no proof of the existence of such a copy of the judgment sought to be proved. There was a discrepancy as to a single word in the copy offered in evidence. It set forth that the clerk had assessed the damages at "forty-three thousand nine hundred and *sixty*-six dollars and thirty-four cents, and that it was, therefore, considered by the court that the plaintiff recover of the defendant the sum of forty-three thousand nine hundred and *thirty*-six dollars and thirty-four cents," &c. It was satisfactorily proved *aliunde* that *thirty*, instead of *sixty*, was correct, the latter being a mistake of the copyist.

The principle established by this court as to secondary evidence in cases like this is, that it must be the best the party has it in his power to produce. The rule is to be so applied as to promote the ends of justice and guard against fraud, surprise, and imposition.* The copy here in question was properly admitted.† This court has not yet gone the length of the English adjudications, which hold, without qualification, that there are no degrees in secondary evidence.‡

The act of Congress of March 3d, 1871,§ provides for putting in a permanent form proof of the contents of judicial records lost or destroyed, such proof to take the place of the original records for all purposes. The statute of Texas upon the subject of proof in cases of lost records,‖ has also been referred to in this connection. There is nothing in either the act of Congress or the statute in conflict with the action of the court we have been considering.

The most important question in the case relates to the proceedings of the County Court of Galveston County, touching the sale and conveyance of the premises in controversy by the administrator of Samuel M. Williams to H. H. Williams. The plaintiffs in error insist that those proceedings were *coram non judice* and void. The defendant in error maintains that they were regular and valid, and that if there be any error or defect, the court having had jurisdiction, its proceedings could not be collaterally assailed upon the trial of this cause in the court below. This renders it necessary to examine the case in this aspect. The record shows the following facts: On the 28th of June, 1850, H. H. Williams recovered in the District Court of the United States held at Galveston, against Samuel M. Williams, then living, a judgment for $26,736. And on the 12th of July, 1858, another

* Renner *v.* The Bank of Columbia, 9 Wheaton, 597; 1 Greenleaf on Evidence, § 84 and note.

† Winn *v.* Patterson, 9 Peters, 676.

‡ Doe *d.* Gilbert *v.* Ross, 7 Meeson & Welsby, 106.

§ 16 Stat. at Large, 474, ch. cxi. ‖ Paschal's Digest, Article 4969.

judgment for the sum of $43,936.34. The second judgment was founded upon the first one, and was for the principal and interest due upon the latter. At the January Term, 1866, of the Galveston County Court, H. H. Williams, by his counsel, applied for an order that the administrator of Samuel M. Williams be cited to appear and show cause why "he should not make application to the court for an order to sell enough of the property of said estate to pay a judgment obtained by the said Henry Williams against the said Samuel M. Williams, to the amount of $40,000; which said judgment was allowed and approved as a valid claim against said estate, in October, 1859, with eight per cent. interest per annum," &c.

The administrator appeared at the same term, and answered that the plaintiff recovered the judgment first hereinbefore mentioned; that it was presented for allowance against the estate with the usual affidavit and allowed; that he could not say whether it was approved by the chief justice of Galveston County; that it had never been paid, and that the reason he had taken no measures to pay it was that the plaintiff had told him that, being against his brother, he did not intend to enforce it. The court thereupon, at the same term, made an order as follows:

"On this day came on to be heard in this cause the motion of Henry Williams, by his agent, J. H. Williams, asking that the administrator be required to sell sufficient property of the estate to pay a certain judgment obtained by the said Henry in the United States District Court, on the 28th day of June, A.D. 1850, for the sum of twenty-six thousand seven hundred and thirty-six dollars, with interest from date of rendition; and it appearing to the court *that this claim has been duly allowed*, and that the administrator has no funds in hand whatever to pay the same, it is ordered that he make sale of sufficient property in pursuance of the prayer of the motion. And the administrator having designated the following piece of property, it is ordered that he shall make public sale of one league of land, situated," &c.

The premises in controversy were then described, the

mode and time of advertising, and the place and terms of the sale were prescribed, and the administrator was directed "to make due report of his action in the premises to the court." On the 15th of March, 1866, the administrator reported that, pursuant to the order of the court, after due notice according to law, he had offered the premises for sale at public auction, at the time and place required by law, and that they were struck off and sold to Henry H. Williams, for the sum of $60,000, on a credit of twelve months, secured by a vendor's lien; that Williams was the highest and best bidder, and that the price was a reasonable one.

At the March Term the court confirmed the report and ordered the administrator to make a deed to the purchaser, upon his complying with the terms of the sale. On the 15th of April, 1866, the administrator gave a receipt to the purchaser for $60,600, being the amount of the purchase-money with ten per cent. interest, and by the same instrument released his vendor's lien. On the same day the administrator executed a deed of conveyance to the said H. H. Williams. It recites all the proceedings touching the sale upon which it was founded.

On the 2d of January, 1868, the administrator executed to Henry Williams another deed for the same premises. It recites more fully the proceedings relative to the sale, and sets out that there were certain clerical errors of dates in the former deed, and that this deed was made to correct them.

The titles adverse to the plaintiff, developed upon the trial in the court below, were all derived from heirs-at-law of Samuel Williams. The premises were liable under a paramount lien for the debts of the ancestor.* The plaintiff's claim was of that character. Hence, if the sale and conveyance to him by the administrator were valid, they were conclusive in his favor. He could recover, however, only upon the strength of his own title. The weakness of the title of his adversaries could not avail him.

* Paschal's Digest, Article 1373.

Most of the objections to the sale by the administrator taken in the brief of the plaintiffs in error, were not insisted upon in the argument at the bar, and are of such a character as to require no observations from the court. One was pressed upon our attention with earnestness and ability, and to that one our remarks will be confined.

A statute of Texas requires all claims against the estate of a decedent to be presented to his legal representative and to be *allowed* by such representative, and to be *approved* by the probate judge. Until so *allowed* and *approved* they have no legal validity and cannot be recognized as debts against the estate. If disallowed, or not approved, they must be sued upon within three months. If sued without a refusal to allow or approve, there can be no recovery. The absence of such fact is fatal to the action.*

The order of sale sets forth that the claim had been allowed by the administrator, but is silent as to its approval by the judge. The plaintiffs in error argued that this omission rendered the order a nullity.

The application of the judgment-creditor and the answer of the administrator gave the judge jurisdiction over the parties and the real estate of the deceased.† Jurisdiction is the power to hear and determine. To make the order of sale required the exercise of this power. It was the business and duty of the court to ascertain and decide whether the facts were such as called for that action. The question always arises in such proceedings—and must be determined—whether, upon the case as presented, affirmative or negative action is proper. The power to review and reverse the decision so made is clearly appellate in its character, and can be exercised only by an appellate tribunal in a proceeding had directly for that purpose. It cannot and ought not to be done by another court, in another case, where the subject is presented incidentally, and a reversal sought in such collateral proceeding. The settled rule of law is that juris-

* Paschal's Digest, Article 1309, 1311; Danzey *v.* Swinney, 7 Texas, 625; Martin *v.* Harrison, 2 Texas, 456.

† Paschal's Digest, Article 1305.

diction having attached in the original case, everything done within the power of that jurisdiction, when collaterally questioned, is to be held conclusive of the rights of the parties, unless impeached for fraud. Every intendment is made to support the proceeding. It is regarded as if it were regular in all things and irreversible for error. In the absence of fraud no question can be collaterally entertained as to anything lying within the jurisdictional sphere of the original case. Infinite confusion and mischiefs would ensue if the rule were otherwise. These remarks apply to the order of sale here in question. The County Court had the power to make it and did make it. It is presumed to have been properly made, and the question of its propriety was not open to examination upon the trial in the Circuit Court. These propositions are sustained by a long and unbroken line of adjudications in this court. The last one was the case of *McNitt* v. *Turner*.* They are not in conflict with the adjudications of Texas upon the subject.

The statute of Texas does not require the evidence upon which the judgment of the court proceeded to be set forth in the record. Such a statement can do no good, and its omission does no harm.

As regards public officers, "acts done which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter."† "Facts presumed are as effectually established as facts proved, where no presumption is allowed." In the case of *Ward's Lessee* v. *Barrows*,‡ a sale for taxes came under examination. It was held that certain acts of the county auditor were presumptive proofs that he had administered to the collector the oath prescribed by law touching the delinquent list. The sale was sustained. Here the judge who made the order of sale was the judge to approve the claim. The order was presumptive proof of the requisite approval. Such approval was necessarily implied, and what is implied in a record,

* 16 Wallace, 366.

† Bank of the United States *v.* Dandridge, 12 Wheaton, 70.

‡ 2 Ohio State, 247.

pleading, will, deed, or contract, is as effectual as what is expressed.*

The proceedings touching the sale were properly admitted in evidence, and the instruction given to the jury upon the subject was correct.

The last assignment of error relates to fraud in obtaining the order of sale.

It seems to us that the evidence disclosed in the record was hardly sufficient to raise any question upon that subject. However that may be, the instruction given to the jury was unexceptionable, and the plaintiffs in error have no right to complain.

JUDGMENT AFFIRMED.

UNITED STATES v. HERRON.

1. A debt due to the United States, though it be by one who owes it as a surety only, is not barred by the debtor's discharge with certificate, under the Bankrupt Act of 1867; although the United States may prove its debt and has priority of other creditors; and though the act provides, in general terms, that the certificate shall release the bankrupt "from *all* debts, claims, liability, and demands, which were or might have been proved against his estate in bankruptcy," and that it may be pleaded "as a full and complete bar of *any* such debts, claims, liabilities, or demands."
2. No general words in a statute divest the government of its rights or remedies.

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

The Bankrupt Act of 1867—which in its general outlines, as in many of its details, follows (as did prior Bankrupt Acts of the United States passed in 1800 and 1841), the British Bankrupt Acts—enacts that a discharge duly granted under the act shall, with the exceptions of debts created by the

* United States *v.* Babbit, 1 Black, 61.

fraud or embezzlement of the bankrupt or by his defalcation as a public officer, or while acting in any fiduciary character, "release the bankrupt from *all debts, claims, liabilities, and demands which were or might have been proved against his estate in bankruptcy*, and may be pleaded . . . as a full and complete bar to all suits brought on *any* such debts, claims, liabilities, or demands."*

Under the act the United States may prove its debt, and it has a priority given to it by the act. But it is not mentioned by name as among the creditors whose debts will be released by the certificate which the act authorizes.

This statute being in force the United States brought suit on a bond executed by one Collins, as principal, and Herron and others as sureties. Herron pleaded a discharge under the said Bankrupt Act, and the question, of course, was whether a discharge under the act barred a debt due to the government.

The court below thought that it did, and gave judgment in favor of Herron, whereupon the government brought the case here.

Mr. C. H. Hill, Assistant Attorney-General, for the United States:

It is a familiar principle that no general words—not even "the most general that can be devised"—divest the sovereign of his rights or remedies. Nothing short of specific and express words can do it. This was old law, in Coke's day, and was asserted by him as such in the *Magdalen College Case.*† It has been just assumed by this court, in the *Dollar Savings Bank* v. *United States*,‡ as plain and as equally applicable to this government, . . . "applied frequently in the different States, and practically in the Federal courts." The same thing had been decided years ago by this court in *United States* v. *Knight.*§

Applying the principle to the exact matter of the Bankrupt Acts, it has been held from the days of Atkyns down, in

* Chapter 517, §§ 32, 34; 14 Stat. at Large, 532, 533.
† 11 Reports, 74. ‡ 19 Wallace, 239. § 14 Peters, 315.

Great Britain (from whose Bankrupt Acts all ours have been in the main derived), as a matter undeniable, that debts due the crown were not barred by a discharge under the acts.*

And the same was decided three-quarters of a century ago, in our own country, in the case of *United States* v. *King*,† in the Circuit Court of the United States as then organized under the Judiciary Act of Mr. Adams; an able tribunal, composed of Mr. Justice Tilghman, afterwards eminent as chief justice of Pennsylvania; Mr. Justice Griffith, one of the most honored lawyers of New Jersey;‡ and Mr. Justice Bassett, well known in the annals of Delaware.

The matter in short is too perfectly settled and plain for more argument. The error of the court below is palpable.

No opposing counsel.

Mr. Justice CLIFFORD delivered the opinion of the court.

Proceedings in bankruptcy are deemed to be commenced from the filing of the petition in bankruptcy, either by a debtor in his own behalf or by any creditor against a debtor; and if it appear to the court that the bankrupt has in all things conformed to the requirements of the Bankrupt Act, it is made the duty of the court to grant him a certificate, under the seal of the court, that he be forever discharged from all debts and claims that by said act are provable against his estate, which existed on the day the petition for adjudication was filed, excepting such debts, if any, as are by said act excepted from the operation of a discharge in bankruptcy.§

With the exception of the debts specified in the thirty-third section, the act provides that a discharge duly granted under the act shall release the bankrupt from all debts, claims, liabilities, and demands which were or might have been proved against his estate in bankruptcy.

* Anonymous, 1 Atkyns, 262; Rex *v.* Pixley, Bunbury, 202; Craufurd *v.* Attorney-General, 7 Price, 5.

† Wallace's Circuit Court, 18.

‡ Wallace's Reporters, 339, 340.

§ 14 Stat. at Large, 533.

Collectors of internal revenue taxes are required by law to give bond for the faithful discharge of their duties, and the record shows that Lewis Collins, having been duly appointed to that office for the third district of Louisiana, gave the required bond, and that the present defendant was one of his sureties. Default having been made by the principal, the United States brought an action of debt on his official bond, joining all the sureties with the principal.

They alleged two breaches, as follows: (1.) That the principal did not pay over all the public moneys he received for the use and benefit of the plaintiffs. (2.) That he did not do and perform all such acts and things as were required of him by the Treasury Department.

Service was made and the defendant appeared and pleaded, as a peremptory exception, that on the thirtieth day of May, 1868, he filed his petition in the District Court to be adjudged a bankrupt, and that the court, on the eighteenth of January following, in due course of law, granted him a discharge under the provisions of the Bankrupt Act, in the words and figures set forth in the record, which, as he alleges, is a full and complete bar to the plaintiff's demand. Hearing was had and the court awarded judgment for the defendant and the plaintiffs sued out a writ of error and removed the cause into this court. Since the case was entered in this court the plaintiffs assign for error that a discharge under the Bankrupt law does not bar a debt due the United States.

1. Debts created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, are not discharged by the certificate required to be given to the bankrupt by the thirty-second section of the Bankrupt Act, nor will any such certificate release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety, or otherwise. Such debts, that is, debts created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or as a fiduciary agent, may be proved, and the dividend thereon, it is pro-

vided, shall be a payment on account of said debt, but the provision that no such certificate shall release, discharge, or affect any person liable for the same debt, for or with the bankrupt as surety, does not apply to this case, as it is *the surety* here who pleads the certificate of discharge, and not *the principal* in the bond set forth in the declaration.*

Instead of that, the question presented by the assignment of error in this court must depend upon other provisions of the Bankrupt Act, when properly construed, in view of the settled rule of construction that the sovereign authority of the country is not bound by the words of a statute unless named therein, if the statute tends to restrain or diminish the powers, rights, or interests of the sovereign.†

Where an act of Parliament is made for the public good, as for the advancement of religion and justice, or to prevent injury and wrong, the king is bound by such act, though not particularly named therein; but where a statute is general, and thereby any prerogative, right, title, or interest is divested or taken from the king, in such case the king is not bound, unless the statute is made to extend to him by express words.‡

Acts of Parliament, says Chitty,§ which would divest or abridge the king of his prerogatives, his interest, or *his remedies*, in the slightest degree, do not in general extend to or bind the king, unless there be express words to that effect. Therefore, says the same learned author, the statutes of limitation, bankruptcy, insolvency, set-off, &c., are irrelevant in the case of the king, nor does the statute of frauds relate to him, which last proposition is doubted by high authority. Exceptions exist to that rule undoubtedly, as where the statute is passed for the general advancement of learning, morality, and justice, or to prevent fraud, injury, and wrong,

* 14 Stat. at Large, 533; United States *v.* Davis, 3 McLean, 483.

† Anonymous, 1 Atkyns, 262; Rex *v.* Earl, Bunbury, 33; Rex *v.* Pixley, Id. 202.

‡ 8 Bacon's Abridgment by Bouvier, title, "Prerogative," E 5; United States *v.* Knight, 14 Peters, 315.

§ On Prerogative, 383; 19 Viner's Abridgment, title, "Statute," E. 10.

or where an act of Parliament gives a new estate or right to the king, as in that case it will bind him as to the manner of enjoying or using the estate or right as well as the subject.

Debts due to the United States, it is expressly provided, shall be entitled to preference or priority over all other claims except the claims for fees, costs, and expenses of suits and other proceedings under the Bankrupt Act, and for the custody of the bankrupt's property.

Five classes of claims are recognized as claims entitled to priority or preference by the twenty-eighth section of the Bankrupt Act, and the provision is that they shall "be first paid in full in the following order:" First, fees, costs, and expenses; second, all debts due to the United States and Federal taxes and assessments; third, all debts due to the State in which the proceedings in bankruptcy are pending, and all State taxes and assessments; fourth, wages due to any operative, clerk, or house servant, to an amount not exceeding fifty dollars, for labor performed within the period therein specified; fifth, all debts due to any persons who, by the laws of the United States, are or may be entitled to a priority or preference, in like manner as if the act had not been passed.

Attempt is made in argument to show that the preference given to debts of the United States does not exclude such debts from the operation of the certificate of discharge, because such debts are not named in the proviso annexed to the description of the fifth class of claims entitled to priority and full payment in preference to general creditors, but the court is not able to concur in that proposition, as it is quite clear that the proceedings in bankruptcy would very much embarrass tax collectors without some saving clause in that behalf, and to that end it was provided that "nothing contained in this act shall interfere with the assessment and collection of taxes by the authority of the United States or any State." Consequently taxes, whether Federal or State, may be collected in the ordinary mode, but if not collected and the property of the bankrupt passes to and is administered by the assignee, the taxes are then entitled to the pri-

ority and preference provided in the same section of the Bankrupt Act. Nothing, therefore, can be inferred from that proviso inconsistent with the proposition that the sovereign authority is not bound by the provisions of the Bankrupt Act, unless therein named.

Confessedly the United States is not named in any of the provisions of the act providing for the discharge of the bankrupt from his debts, nor in any of the required proceedings which lead to that result, unless it can be held that the sovereign authority, having debts against the bankrupt, is included in the word "creditor or creditors," as used many times in the several sections of the Bankrupt Act. Examples of the kind are numerous, of which the following are some of the most material:

Persons applying for the benefit of the Bankrupt Act are required to annex a schedule to the petition, verified by oath, containing a full and true statement of all their debts, and, as far as possible, to whom due, with the place of residence of each creditor, if known to the debtor, and if not known the fact must be so stated, and the sum due to each, and the nature of each debt or demand, whether founded on written security, obligation, contract, or otherwise, and also the true cause or consideration of such indebtedness in each case, and the place where such indebtedness accrued, and a statement of any existing mortgage, pledge, lien, judgment, or collateral or other security given for the payment of the same.

Where the debts exceed three hundred dollars it is the duty of the judge to issue a warrant, directed to the marshal, authorizing him to publish notices in such newspapers as the warrant specifies, and to serve written or printed notices on all creditors whose names are included in the schedule or whose names may be given to him in addition by the debtor, and to give such personal or other notice as the directions of the warrant require. (1.) That a warrant in bankruptcy has been issued against the estate of the debtor. (2.) That the payment of any debts or the delivery of any property belonging to such debtor to him or the transfer of any property by him are forbidden by law. (3.) That a

meeting of the creditors of the debtor will be held at a court of bankruptcy to be holden at the time designated in the warrant.

Due notice to the creditors in that regard is indispensable, as the provision is that if it be not given the meeting shall be adjourned and a new notice given as required. Assignees of the estate of the debtor are to be chosen by the creditors at their first meeting. Creditors not only appoint the assignee or assignees but, in certain cases and under certain conditions, they may remove any assignee, and vacancies in certain cases may be filled by the creditors, as provided in the eighteenth section of the act. Debts due and payable from the bankrupt, at the time he is adjudged as such, and all debts then existing, but not payable until a future day, a rebate of interest being made, when no interest is payable by the terms of the contract, may be proved against the estate of the bankrupt. Contingent debts and liabilities of the bankrupt may also be claimed by creditors, and such claims may be allowed, with the right to share in the dividends, if the contingency shall happen before the order for the final dividend. When a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt. No creditor proving his debt shall be allowed to maintain any suit at law or in equity therefor against the bankrupt. Resident creditors are required to make proofs before one of the registers of the court in the district where the proceedings are pending, but all such proofs, in behalf of non-resident creditors, may be made before a commissioner or before a register in the judicial district where the creditor resides, and corporations may verify their claims by the oath or affirmation of their president, cashier, or treasurer.

Claims against the estate of the bankrupt are required to be signed by the claimant and to be verified by his oath, and the requirement also is that the assignee shall register, in a book to be kept by him for the purpose, the names of the

creditors who have proved their claims, in the order in which such proof is received, stating the time of its receipt and the amount and nature of the debt. Claimants are forbidden to accept any preference, and the provision is that if any one does so, contrary to the prohibition of the act, he shall not prove the debt or claim, nor shall he receive any dividend until he shall first have surrendered to the assignee all property, money, benefit, or advantage received by him under such preference.

Preferences are forbidden in order that equal distribution may be effected, and the act provides that all creditors, whose debts are duly proved and allowed, shall be entitled to share in the bankrupt's property and estate *pro rata*, without any priority or preference whatever, except that wages due from the bankrupt to any operative or clerk or house servant, to an amount not exceeding fifty dollars, for labor performed within six months next preceding the adjudication of bankruptcy, shall be entitled to priority and shall be first paid in full. Annexed to that clause there is also a proviso that any debt proved by any person liable as bail, surety, guarantor, or otherwise for the bankrupt, shall not be paid to the person so proving the same until satisfactory evidence shall be produced of the payment of such debt by such person so liable.

Just and true accounts are to be kept by the assignees, and they are to make full report of the same to the creditors at a meeting to be called for the purpose, and the creditors are to determine whether any and what part of the net proceeds of the estate shall be distributed as a dividend, and if the creditors order a dividend it is made the duty of the assignee to prepare a list of the creditors entitled to the same, and to compute and set opposite to the name of each creditor the dividend to which he is entitled out of the net proceeds of the estate set apart for that purpose. Preparatory to the final dividend the assignee shall submit his account to the court and file the same, and give notice to the creditors of such filing, and shall also give notice that he will apply for a final settlement of his account.

Application for a discharge from his debts may be made by the bankrupt, as provided in the twenty-ninth section of the act, and the provision is that the court shall thereupon order notice to be given to the creditors, as therein specified, to appear, on a day appointed for that purpose, and show cause why a discharge to the applicant should not be granted.

Insolvent debtors may also, in certain cases, be adjudged bankrupts on the petition of one or more of their creditors. Matters necessary to be alleged in such a petition are specifically set forth in the Bankrupt Act, which provides that if the facts alleged are found to be true the court shall forthwith make the required adjudication and issue a warrant to take possession of the estate of the debtor, which shall be directed as in the former case, and the property of the debtor shall be taken thereon and be assigned and distributed in the same manner and with similar proceedings to those provided for taking possession, assignment, and distribution of the property of the debtor upon his own petition.

Sufficient appears from this summary of the proceedings required under the Bankrupt Act to establish two propositions beyond all doubt or cavil: (1.) That the United States are not named in any of the provisions of the act except the one which provides that all debts due to the United States and all taxes and assessments under the laws thereof shall be entitled to priority or preference, as heretofore fully explained. (2.) That many of the provisions describing the rights, duties, and obligations of creditors are in their nature inapplicable to the United States, and that if held to include the United States, could not fail to become a constant and irremediable source of public inconvenience and embarrassment.

Viewed in the light of these suggestions, and of the language employed in the act, the court is of the opinion that the words "creditor or creditors," as used in the several provisions of the Bankrupt Act, do not include the United States.

Twice before, since the Federal Constitution was adopted,

the Congress has enacted similar laws, and it is matter of history that the framework of those acts, as well as much of their details, was drawn from the various acts of Parliament upon the same subject, and the remark is equally applicable to the principal features of the act under consideration, in respect to all the parts of the same, whose construction is involved in the case before the court. Such acts of Parliament have never, in terms, included debts due to the sovereign of the country; and the decisions of the courts of Westminster Hall, for more than a century, have held, without an exception, that such acts or the proceedings under the same do not discharge debts due to the crown.*

Text writers also, of the highest authority, have uniformly promulgated the same rule. Speaking of the order of discharge, Deacon says,† it does not release the bankrupt from a debt due to the crown, for as the crown is not bound by any statute unless specifically named, and crown debts not being mentioned among those of the creditors in general, in any part of the statute relating to the proof of debts or the certificate of discharge, the crown of course will not be barred of the peculiar privileges it possesses for the recovery of its own debts.

Nor does the Bankrupt Act impair or supersede the laws for the collection of taxes, and that rule also is founded upon the same canon of construction, to wit, that the crown is not bound by the bankrupt laws, and, therefore, says Shelford,‡ the appointment of assignees does not relate to the act of bankruptcy *as against the crown process*, but the bankrupt's personal property is bound under an extent even when tested subsequently to the appointment of the assignees. To which he adds, that the bankrupt's certificate is no discharge as against the crown.§

Such a certificate, says Robson,‖ will not release the bankrupt from any debt or liability incurred by means of any

* Attorney-General *v.* Alston, 2 Modern, 248; Anonymous, 1 Atkyns, 262.
† On Bankruptcy, vol. 1 (3d edition), 784; Rex *v.* Pixley, Bunbury, 202.
‡ On Bankruptcy, 303. § Craufurd *v.* Attorney-General, 7 Price, 5.
‖ On Bankruptcy (2d edition), 553.

fraud, nor from debts due to the crown, nor from debts with which the bankrupt stands charged *at the suit* of the crown, or of any person for any offence against a statute relating to any breach of the public revenue, or at the suit of the sheriff or other public officer, on a bail bond entered into for the appearance of any person prosecuted for any such offence.

With a single exception, not material in this case, the views of Cooke are the same as those expressed by Shelford. He says the crown is not bound by the acts relating to bankrupts, not being named in them; therefore an extent served upon the property of the bankrupt will bind it from the teste of the writ and until the actual assignment of the commissioners, but the king is bound by an actual assignment, because the property is then absolutely transferred to a third person.*

Different explanations have been given as the reason of the rule in different adjudications, but perhaps there is none more satisfactory than the original one, that the sovereign is not bound by the act because not named as a creditor in any of its provisions. But the reason for the rule assigned in a recent decision in the Exchequer Chamber is also entitled to much consideration as supporting the original rule. Throughout the Bankrupt Acts the word creditor, says Mr. Justice Blackburn, is used in the sense of a person having a claim which can be proved under the bankruptcy, to which he might have added, and one not required by the act to be paid in full in preference of all other creditors.†

Greater unanimity of decision in the courts or of views among text writers can hardly be found upon any important question than exists in respect to this question in the parent country, nor is there any diversity of sentiment in our courts, Federal or State, nor among the text writers of this country.

Perhaps the earliest decision in this country was that given in the case of *United States* v. *King*,‡ which was made almost at the beginning of the present century. In that case

* Eden on Bankruptcy, 143.

† Woods *v.* De Mattos, 3 Hurlstone & Coltman, 995.

‡ Wallace's Circuit Court, 18.

the question was directly presented and was as directly adjudicated, the court holding that debts due to the United States are not within the provisions of the Bankrupt Act. Other decisions of like character are found in the State Reports.

It is a maxim of the common law, said Savage, C. J., that when an act of Parliament is passed for the public good, as for the advancement of religion and justice, or to prevent injury and wrong, the king shall be bound by such act though not named, but when a statute is general and any prerogative, right, title, or interest would be divested or taken from the king, in such a case he shall not be bound unless the statute is made by express words to extend to him, for which he cites both English and American authorities, and adds, that the people of the State being sovereign have succeeded to the rights of the former sovereign, and that the people of the State are not bound by the general words in the insolvent law.*

Sanctioned as that principle is by two express decisions of this court, it would seem that further discussion of it is unnecessary, as it has never been questioned by any well-considered case, State or Federal, and is founded in the presumption that the legislature, if they intended to divest the sovereign power of any right, privilege, title, or interest, would say so in express words; and where the act contains no words to express such an intent, that it will be presumed that the intent does not exist.†

Such a conclusion, to wit, that Congress intended that the certificate of discharge given to a bankrupt should include his liability as a surety for the faithful performance of duty by a public officer, ought not to be adopted unless such an intention is expressed in clear and unambiguous terms, as the rule, if established, would, in all probability, lead to

* People *v.* Herkimer, 4 Cowen, 348; see also Commonwealth *v.* Hutchinson, 10 Pennsylvania, 466, which is to the same effect; Hilliard on Bankruptcy (2d edition), 295.

† United States *v.* Knight, 14 Peters, 315; Dollar Savings Bank *v.* United States, 19 Wallace, 239; United States *v.* Hoar, 2 Mason, 311; Commonwealth *v.* Baldwin, 1 Watts, 54.

great loss to the public treasury and to great public embarrassment.*

JUDGMENT REVERSED, and the cause remanded with directions to

ISSUE A NEW VENIRE.

McPHAUL v. LAPSLEY.

1. An affidavit filed under the act of the legislature of Texas, approved May 13th, 1846,—requiring an affidavit as to the fraudulent character of an instrument of writing, properly recorded, and filed among the papers of the cause, the purpose of requiring the affidavit being to relieve the party meaning to offer the instrument introduced from the burden, after he has filed it among the papers in the cause, of proving its execution, unless the other side swear that it is a forgery—is properly rejected when not filed within the time prescribed by the act.
2. A testimonio executed, in 1832, by the proper Mexican authorities, of a power of attorney for the conveyance of lands, is within the recording acts of Texas.
3. Such a testimonio, under Spanish law, and the adjudications of the Supreme Court of Texas, is considered as a second original, and of equal validity with the first, and is admissible in evidence though not recorded.
4. Evidence of a person who was not the keeper of the archives, nor in any way officially connected with the office to which they belonged, and which was offered to prove that such a testimonio was not a copy of the protocol (this not being produced), though the witness had in his hand photographs of certain pages of the protocol which did conform in other respects than that of signature and date with the testimonio, and when it was not offered to follow the evidence up in any way, *held* properly rejected; the testimonio being more than forty years old, much litigation having existed on the title made under it; it never having been previously questioned; it having been received in a former case, by this court, as valid, and important rights having grown up on the faith of it; and the instrument being now questioned, not by the parties to it, but by a defendant setting up a hostile title which he failed to establish.

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

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* Regina *v.* Edwards, 9 Exchequer, 50.

Statement of the case.

The State of Texas has made a succession of statutes, on the subject of recording instruments, relating to the titles of real estate. They are thus:

1. An act of 20th December, 1836, after requiring all persons who claim lands, by deed, lien, or any other color of title, to record their instruments of title in the clerk's office of the county where the land lies *within twelve months from the 1st April*, makes it, by the thirty-fifth section, the duty of the clerk to record all deeds, conveyances, mortgages, and other liens, and all other instruments in writing, provided that one of the witnesses shall swear to the signature of the *signer*, or *he, himself, shall acknowledge the same.*

The fortieth section enacts that no deed, conveyance, lien, or *other instruments* respecting lands, shall take effect as to third persons until proved and recorded.

2. An act of 10th May, 1838, *repealed the limitation of twelve months*, in the act of 1836, just referred to.

These acts are cited by the Supreme Court of Texas, in *Guilbeau* v. *Mays*,* with the statement that subsequent legislation had not materially changed them.

The subsequent legislation is thus:

3. An act of January 19th, 1839, makes it the duty of county clerks to record all "deeds, conveyances, mortgages, and other liens affecting the title to land; provided that one of the subscribing witnesses shall swear to the signature of the *signer*, or *he, himself*, shall acknowledge the same before the clerk," &c. All laws in conflict are repealed.

The act further provides in its second section (and the provision bears specially upon this case), that "*copies of all deeds, &c., when the originals remain in the public archives, and were executed in conformity with the laws existing at these dates, duly certified by the proper officer, shall be admitted to record where the land lies.*"

4. An act of May 12th, 1846, makes clerks of the county court recording officers for their several counties.

The fourth section makes it their duty to record "all

* 15 Texas, 414.

deeds, mortgages, conveyances, deeds of trust, bonds, covenants, defeasances, or *other instruments of writing of and concerning any lands.*"

The fifth section makes similar provision for marriage contracts, *powers of attorney*, and official bonds.

The seventh section directs the acknowledgment to be made "by the *grantor or person who executed* the instrument in writing."

The eighth section provides for proof being made by the subscribing witnesses.

The ninth section enacts that when the witnesses are dead, or their residence unknown, or when they reside out of the State, the instrument may be proved by evidence of the handwriting of the "grantor OR person who *executed the same*, and of one of the subscribing witnesses; and this proof is to be made by 'two or more disinterested witnesses.'"

This act was to take effect July, 1846, and all prior laws in conflict with it are repealed.

In A.D. 1858, commenting on the fourth section, above cited, as descriptive of the instruments to be recorded, the Supreme Court of Texas, in *Henderson* v. *Pilgrim*,* say:

"It is the obvious policy to require *all instruments concerning land* to be recorded in the proper county."

And the court, therefore, held that an *assignment of a mortgage* was within the provision of the act.

In the same year it was held that a *covenant for title*, though a mere executory contract, was within the law.†

So far as to the recording acts.

Another statute, that of May 13th, 1846,‡ having for its frequent effect to change the burden of proof as existing at common law, is as follows:

"Every instrument in writing (*properly* recorded), shall be admitted as evidence without the *necessity of proving its execution*, *provided* that the party who wishes to give it in evidence shall

* 22 Texas, 476.

† Secrest *v.* Jones, 21 Texas, 133.

‡ Section 90. Referred to in Hanric *v.* Barton, 16 Wallace, 166.

file the same among the papers of the suit three days before the trial, and give notice to the opposite party, of such filing, and *unless such opposite party, or some other person for him, shall within one day after such notice*, file an affidavit stating that he believes such instrument to be forged."

With the different statutes about recording instruments of title, and this last-quoted act as to the effect, in the matter of evidence, of filing among the papers of the suit of any instrument "*properly* recorded," Lapsley, on the 31st of March, 1863, brought trespass to try title against N. A. McPhaul *and eight other persons*, in the court below, to recover possession of eleven leagues of land described.

The plaintiff claimed under a power of attorney, said to have been executed by Thomas Vega, José Maria Aguerre, and Rafael Aguerre, to Samuel May Williams, dated the 5th of May, 1832.

McPhaul answered, pleading an outstanding title to one league in a certain Fleming, but junior in date to the title of the plaintiff, which he mentioned had been perfected, as he alleged, by a title from Thomas *de la* Vega.

Appended to McPhaul's answer was the statement of *de la* Vega that he had sold this league, in 1860, to McPhaul, and that this was within the eleven leagues claimed by Lapsley, and he asked to be made a party to defend his title warranty, and prayed for a decree confirming the title to said defendants.

This application was never allowed by the court.

Subsequently to this, on the 16th January, 1872, Lapsley filed among the papers of the cause (giving notice to the other side, *on the same 16th*, that he had done so), a paper thus described:

"A testimonio of a power of attorney from Thomas *Vega*, José Maria Aguerre, and Rafael Aguerre, to Samuel May Williams, *dated the 5th of May*, 1832, the said testimonio being executed by Juan Gonzales, with his proper attesting witnesses, and duly recorded in the counties of Falls and McLennan, after being duly proved."

The reader not familiar with the Spanish law, prevalent

until 1836, in what is now the State of Texas—a region till that date a portion of Mexico, itself formerly a colony of Spain—may not know exactly what a testimonio is. For any such it may be stated that in Spain and her colonies, deeds, contracts, and powers of attorney are executed before a regidor, a public officer, a sort of notary or alderman, exercising quasi judicial power. The parties appear before him accompanied by a certain number of their neighbors as "instrumental witnesses." The parties state the matters between them. The officer makes a minute of the terms stated. He then enters in a book the formal agreement. This is the *protocol.* He then furnishes to the party in interest a similar document. This is a testimonio.

What common-law lawyers would call the contract itself, but what lawyers of Spain and her colonies call the *protocol* of the contract, remains with the notary *apud acta;* like the original of a will in a surrogate's office. The testimonio is delivered to the parties, as the surrogate gives letters testamentary preceded by a transcript of the will.

The so-called testimonio, filed in this case, was in Spanish, and when translated into English ran thus:

"*Second seal two reals for the two years* 1832 *and* 1833.

"In the city of Leona Vicaria, on the 5th day of the month of May, in the year 1832, before me, citizen Juan Gonzales, *regidor* (alderman) of the honorable council of this city, and acting *alcadi* (mayor) therein, and in its jurisdiction, during the indisposition of the proper officer who officiates in the treasurer's office, no secretary being allowed him according to the terms of the law, and in the presence of the witnesses who will be named at the close hereof, personally appeared citizens Dr. José Maria Aguerre, Thomas Vega, and Rafael Aguerre, residents of this city, well known to me, and declared that, in the most complete form which may be required by law, they grant, give over, and concede unto Mr. Samuel May Williams, a resident of the city of Austin, full power, as much as may be required and as may be necessary in law, especially, in order that in the names of these appearers, and in representation of their own persons, rights, and actions, so far as is allowed by the colonization law of the

24th March, 1825, he may be able to proceed, and may proceed according to his judgment, to the sales of the tracts of land which, on the 14th June, 1830, the supreme governor of this State granted to them, the appearers."

The document having given the power of sale, concluded thus:

"Thus have they granted and signed it in presence of these witnesses, citizens Antonio Espinosa, Rafael de Leon, and Francisco de la Fuente, Gonzales, residents of this city.

Thomas Vega,
Jose Ma. Aguerre,
Rafael Aguerre.

"I attest:
Juan Gonzales.

"Copy from the original, with which it agrees, the day of its execution; given on two 'useful' pages of paper, of the second stamp, conformable to law. All of which I, the undersigned judge, officiating with those assisting me according to law, hereby attest.

"Juan Gonzales.

"Witnesses:
Jose Nazo Ortiz,
J. M. Moral."

Annexed to the testimonio were certain affidavits, on which it was recorded, in McLennan County, as shown by the certificate of the proper officer, on 7th September, 1856 (twenty years after its date), and again in same county, on 22d September, 1858.

In Falls County, 6th October, 1859.

In Williamson County, 15th October, 1859.

Among the affidavits on the testimonio was one by J. N. Seguin, made on 3d September, 1856, proving the handwriting of Juan Gonzales, by whom the testimonio or copy was made, and of his *assisting* witnesses, Moral and Ortiz, and that these parties, if living, were residents of Saltillo, in the State of Coahuila.

There was also an affidavit from Gonzales himself, made on the 13th July, 1857, testifying that the testimonio was

executed by him, at the personal request of José Maria Aguerre, Rafael Aguerre, and Thomas Vega, and in their presence; that the signature "Juan Gonzales" is his genuine signature, officially signed as regidor of the corporation of Saltillo, and second alcalde in turn, in the year 1832, as expressed therein; and that the signatures of Ortiz and Moral, who signed as assisting witnesses, in his presence, were their genuine signatures; that Thomas de la Vega executed a certain other power of attorney before him to said S. M. Williams, on 28th April, 1832, and that the said Thomas Vega, who was a party to this testimonio, was one and the same person; that he knew of no other Thomas Vega, or Thomas *de la* Vega, in the city of Saltillo, or any other part of Mexico.

Through a deed made on this power of attorney, and other conveyances not disputed, the plaintiff made a title apparently regular, if the power was genuine.

Previous to the trial, which came on, February 5th, 1872, all the defendants except McPhaul were, with the plaintiff's consent, dismissed.

On the 3d of February, while the case was a trying, a certain Simon Mussina, representing himself to be "attorney of Thomas de la Vega," filed an affidavit that the testimonio was, "as he verily believed, a forged instrument."

The plaintiff moved to strike this affidavit from the files as made out of season; the statute requiring it should be made within one day after notice of filing the document sought to be used, and the affidavit not having been made until many days afterwards.

This motion the court granted.

The testimonio, therefore, stood without any affidavit against its genuineness, and IF "*properly* recorded," was entitled, under the already quoted act of May 13th, 1846, to be used "without the necessity of proving its execution." But the question whether it was "*properly* recorded" remained.

On the trial the plaintiff, assuming, of course, that it was, offered it in evidence without proof of its execution; and

the court, under the defendant's exception, received it. Being thus in evidence, the defendant offered one T. J. Walker, to show that it was a forgery. The bill of exceptions said:

"Upon the trial, &c., the defendant introduced in evidence a witness, T. J. Walker, and offered to show the jury that in the year 1868 he went from Austin, Texas, to the city of Saltillo, Mexico, formerly called Leona Vicario, in Coahuila, and that he carefully examined the book of protocols in the office of the secretary of the ayuntamiento of the said Saltillo, and that he found in the book of protocols for the years 1832, 1833, an original protocol or matrix of a power of attorney in the Spanish language, of date *May 5th*, 1832, from *José Maria Aguerre* to Samuel May Williams, giving said Williams the power to sell the land which the government had granted to Thomas de la Vega and Rafael de Aguerre and José Maria de Aguerre, to wit, eleven leagues each; *that said protocol or original has not to it the signature or pretence of the signature of any one or person except José Maria de Aguerre and Juan Gonzales; that the name of neither Rafael de Aguerre or Thomas de la Vega, nor any witnesses, is found on said protocol or original he examined;* that in said protocol book aforesaid, and of date *April 28th*, 1832, he found an original protocol of a power of attorney, signed by José Maria de Aguirre or Aguerre, and *Thomas de la Vega and Juan Gonzales*, and *with assisting witnesses Ortiz and Moral;* that this power is to Samuel M. Williams; and that in said book of protocols, from the power of attorney of the 27th of April, 1832, to the power of the 5th day of May, 1832, inclusive, there were seven leaves and no visible evidence of any mutilation of the book; that there are no protocols of any power of attorney from either Maria de Aguirre or Aguerre, or Thomas de la Vega, to any one in said seven leaves, except the two named above; that he has in his hands, now in court, photographic copies of the said seven leaves of the said book, which show exactly what he states."

To the admissibility of these facts in evidence the plaintiff objected, and the court sustained the objection, to which ruling the defendant excepted.

The plaintiff derived title, under the power already mentioned to Samuel May Williams, from a person who in some

parts of his title-papers was styled Thomas *Vega* and sometimes Thomas *de la* Vega.

Thus it appeared—

That when Williams, as attorney, applied in 1833, for a title of personal possession, he described himself as "attorney of José Maria Aguerre, Rafael Aguerre, and *Thomas Vega*, inhabitants of the town of Leona Vicaria;"

That when Lesassier, alcalde of the town, granted the title, he described the eleven leagues as "denounced by the attorney of Thomas *de la* Vega;"

That when the surveyor made his return, he said he had executed it "by virtue of your decree for the attorney of Thomas *de la* Vega;"

That in the petition of José Maria Aguerre he declared it made "on his own behalf, and also in the name of Thomas *Vega* and Rafael Aguerre;"

That when, in conformity to this petition, Lesassier made his decree, he described it as made in favor of "José Maria Aguerre, Rafael Aguerre, and Thomas *de la* Vega."

The court charged that the title set up by the defendant in Fleming could not defeat the plaintiffs, because it was junior in date to it, and that they would find for the plaintiff unless they believed from the evidence that the testimonio was a forgery; that the registration was only *primâ facie* evidence of its genuineness, and that the fact that the court had admitted the testimonio in evidence did not preclude the defendant from showing that it was forged, and that if the jury believed that Thomas de la Vega never did sign it they would reject it; that there was no evidence of forgery except the difference in the name Thomas Vega and Thomas de la Vega; that the testimonio, "the original and copy of which" was before them, was evidence for their consideration; that it was not necessary that the signature of Thomas de la Vega should be in his own proper handwriting *on the testimonio before the jury*, and that if Thomas de la Vega did sign the original of it in the office at Saltillo then the testimonio given in evidence, with a proof of a conveyance by Williams, under it, would divest Vega of his lands.

The defendant asked the court to charge—

1. That the jury must disregard the paper purporting to be a testimonio;

2. That unless they believed that the original grantee of the land and the person making the instrument (if it ever was made) purporting to be a power of attorney, were one and the same person, they must disregard it;

3. That unless they believed as last abovementioned they must find for the defendant;

The court refused the charge first above requested, and gave the other two, with the qualification that if the jury believed, from either the documentary or oral testimony, that the original grantee was known indifferently by the name of Thomas Vega and Thomas *de la* Vega, the presumption was that he was the person who signed the power; and that the jury would so consider, unless satisfied otherwise from other evidence.

Verdict and judgment having gone for the plaintiff, the defendant brought the case here; the writ of error being in the name of the whole nine original defendants; all of whom, as already said, except McPhaul, had been with the plaintiff's assent dismissed from the case before trial.

"An act to further the administration of justice," passed June 1, 1872,* enacts,

> "That the Supreme Court may, at any time, in its discretion and upon such terms as it may deem just, and where the defect has not injured and the amendment will not prejudice the defendant in error, allow an amendment of a writ of error when there is a mistake in the teste . . . and in all other particulars of form."

In the assignments of error, it was alleged for error that the court erred, among other ways—

1. In admitting the testimonio in evidence.

2. In excluding the testimony of Walker.

3. In charging that the admission in evidence of the testimonio was *primâ facie* evidence of its genuineness;

* 17 Stat. at Large, 196, § 3.

Argument for the plaintiff in error.

And further, that there was before them no evidence that *the testimonio* was not genuine, except the evidence of difference of name;

And in improperly withdrawing the mind of the jury from considering the want of genuineness of the testimonio from a failure of the plaintiff to show the existence of or the genuineness of any protocol at Saltillo.

Mr. T. C. Durant, for the plaintiff in error:

1. *The court erred in receiving the testimonio in evidence, under the act of May 13th*, 1846. That act, by which written instruments on being filed in a cause prove themselves, applies only to those instruments which are "*properly* recorded." Now, a testimonio is but a copy; an *ex parte* copy, made without any opportunity to cross-examine the witnesses as to its authenticity. In the present case the copy purports to be taken from the original *on the day of its date* (5th May, 1832). It was afterwards recorded in different counties; but recorded when afterwards? Not until twenty-four, twenty-six, and twenty-seven years afterwards.

If a registration of a document were provided for by previous laws (and unless it was so plainly the testimonio did not by filing prove itself), no document recorded until so very far from the proper time was "properly recorded."

Further: the law of Texas providing for the registration of *powers of attorney** says they "shall be proved or acknowledged according to law." No such proof or acknowledgment could be made as to the testimonio, for it was without any actual *signature* of De la Vega to it. If Thomas Vega was the name, *that* name was on the copy; but the whole paper, name and all, purports to be a copy written wholly by Juan Gonzales himself, as regidor, second alcalde, and acting in the absence of the notary public, and does not purport to have been written or signed by De la Vega.

But even if the document were one the registration of which was contemplated by the statute, the affidavits are

* Paschal's Annotated Digest, § 5005.

short of the requisitions, and the document is left as an office-copy of a power of attorney without the slightest effect as proof, farther than that there was, *in form*, such a power. Indeed, Gonzales says (more than twenty-five years after the alleged power of attorney was given) that he *executed* the *copy* at the personal request of, &c., &c., and "that the signatures of . . . and . . . were signed as assisting witnesses in his presence, and are their true and genuine signatures," meaning and certifying that the witnesses are to *the fidelity of the copy*, and not to the correctness or genuineness of the original.

Neither of these assisting witnesses is produced. The case is equivalent to that of an office clerk in a common-law State copying a power of attorney, swearing to the execution of the original, having the copy recorded, and hoping by this means to make the copy supply the place of the original, under the special legislation of the several States.

But these assisting witnesses were not the witnesses to the signature of Vega or De la Vega to the original power of attorney. Three citizens and neighbors are declared present at the execution and delivering. Their names are given in full: Antonio Espinoza, Rafael de Leon, and Francisco de la Fuente. Neither is produced, nor is his absence accounted for.

Were these witnesses bound under Spanish law to sign with the principals and notary? Doubtless. But they do not sign. And no one of them was produced to prove the execution and acknowledgment.

But if the testimonio, in virtue of being filed, proved itself, what was it? Nothing, even as pretended, but a copy of an original confessedly existing and capable of being produced.

The testimonio did not profess to be an original. The filing may have dispensed with proof of its being a copy. But if it had not been filed, and had been offered in evidence as a copy, and been conceded by us to be a true copy, how did that help the plaintiff? *In Spain and her colonies* indeed, these testimonios or copies, make *primâ facie* full proof of all they contain, when offered in evidence on a judicial

contestation. But this institution of the *notariat* forms no part of the laws of Texas, where the common-law rules of evidence prevail, except so far as statutes may alter them.

The filing, in short, may have dispensed with certain formal proof, but it does not allow you to prove by a secondary sort of evidence that which you can prove by an original in your control.

2. *The court erred in rejecting the testimony of Walker.*

If a copy became, by filing, under the act of May 12th, 1846, the equivalent of an original of which it purported to be a copy, or even if the rule of the Spanish law prevailed, and this testimonio became as a mere copy evidence, it would not even under that law become more than *primâ facie* evidence; and the court erred in rejecting the evidence of Walker to prove that there was no such original as that of which the testimonio purported to be a copy; in other words, that the testimonio was fraudulently made. Even under Spanish law that could be proved. Now, certainly the testimony of Walker, with his photograph fac similes in his hand, did tend to prove this. In our opinion such testimony tended strongly to prove it. But certainly the testimony tended somewhat to do so, and if it tended at all—tended in the least—it ought to have been received. It will be said that the originals could have been produced, and that such original was better than the photograph. The argument is double-edged. It cuts two ways; and more sharply backwards than forwards. If the argument has any force, why was not the original produced to support the plaintiff's claim? To prove what was in the protocol the photographs were infinitely better than the testimonio.

3. *The court erred in charging.* It charged that there was no evidence that the testimonio was not genuine except the evidence of difference of name. If there was any law authorizing the record (and, as we have already said, unless there was, the testimonio was wrongly admitted without being proved), *some* presumption of fraud (in our view a considerable one) arose, from the non-recording of the paper for nearly thirty years after its date.

The principles of law, as to the testimonio, were entirely disregarded in the instructions. The court says:

"The testimonio, the original and copy of which is before you, of May 5th, 1832, is evidence for your consideration."

Whilst the record shows that only the testimonio or office-copy of the power of attorney was before the jury. It further said that "it was not necessary that the signature of the grantee, Thomas de la Vega, in his own proper handwriting, should be on the testimonio before the jury, and also that if Thomas de la Vega did sign the original of the testimonio and the testimonio before the jury in the office at Saltillo, then the testimonio given in evidence, with proof of a conveyance made by Williams, the attorney, by virtue of it, would divest La Vega of his lands claimed."

This withdrew the minds of the jurors from the consideration of the want of genuineness of the testimonio, arising from a *failure of plaintiffs to show the existence of or the genuineness of any protocol in Saltillo.**

In *Spencer* v. *Lapsley*,† this same testimonio was, indeed, received by this court; but then the court relied for its judgment upon the fact that "its authenticity had never been questioned by La Vega, so far as is shown in the record."

Mr. P. Phillips, contra:

I. *The testimonio was "properly recorded," and, therefore, having been filed, with notice of the filing, was made evidence by the act of May 13th*, 1846.

1. A testimonio is what is known in Texas, deriving its terms from the Spanish law, as a "second original;" and not, as is assumed by the opposing counsel, a copy simply. This was settled by this court in *Mitchel* v. *The United States* so far back as 9th Peters.‡ It is there said:

"The original is a record, and preserved in the office, and cannot be taken out; a testimonio or copy is delivered to the party, which is deemed to be and is certified as an original

* Clarke *v.* Courtney, 5 Peters, 319. † 20 Howard, 273. ‡ Page 732.

paper, having all the effect of one in all countries governed by the civil law."

And in *Herndon* v. *Casiano*,* the Supreme Court of Texas said the same thing:

"The testimonio, though denominated a second original, is still an original."

As an original it was rightly recorded under the recording acts of Texas.

That the testimonio is an "*instrument in writing concerning land*," as described in the fourth section of the act of May 12th, 1846, is plain.

And that the acknowledgment by Gonzales was made by "*the person who executed the instrument.*"

And that his deposition, together with that of Seguin, as to the genuineness of the handwriting of the assisting witnesses (who are residents of a foreign country), bring the case fully within the provisions of the seventh and ninth sections.

In *Edwards* v. *James*,† the officer who executed the testimonio acknowledged the same, and on this it was recorded. The Supreme Court of Texas held this sufficient under the thirty-fifth section of the act of 1836. It said:

"The officer who executed the protocol, and issued the copy or second original, appeared before the county register and acknowledged his signature to the certificate authenticating the testimonio, and this was sufficient, under the thirty-fifth section of the act of 1836, to have authorized its record."

If we compare these words of the act of 1836 with those of 1846, we find them to be substantially the same.

In the first, evidence is to be produced as to the "signature of the *signer*, unless *he*, *himself*, shall acknowledge the same."

By the second, the acknowledgment is to be made by the "grantor, or *person who executed the instrument.*"

The signer of the instrument, and the person who exe-

* 7 Texas, 332.

† Ib. 377.

cutes it, are the same. So that the decision made under the act of 1836 applies in full force to a like acknowledgment made under that of 1846.

In *Paschal* v. *Perez*,* the court say:

"If the instrument be legal and authentic, *without subscribing witnesses*, it would require language too plain to be mistaken to exclude it from record for the want of proof by such witnesses, the signature of the *signer* being substantiated by satisfactory proof."

In this case we not only have this acknowledgment of the *signer*, but the evidence of two witnesses to his signature, and the genuineness of the signature of the assisting witnesses, non-residents.

2. The paper as a "*copy*" of an "original remaining in the public archives, executed in conformity to the laws existing when it was made, duly certified by the proper officer," was properly recorded under the second section of the act of 19th January, 1839.

In *Guilbeau* v. *May*,† decided in the Supreme Court of Texas A.D. 1855, the court says:

"It is believed this act has a direct reference to this description of titles. It is well known that in the titles to land executed prior to our separation from Mexico, the original remained as an archive, and a testimonio was given to the interested party as an evidence of title. . . . The act leaves no doubt that this kind of evidence ought to be recorded."

The recording acts, therefore, applied to the paper whether it was an original or a copy; and as either it was "properly recorded. What if it was not recorded for many years after its execution? Papers do not lose their right to be recorded by delay. If proper papers for record at one time, they are of right recorded at any time; and when recorded of right are properly recorded."‡

Having been properly recorded the document was made evidence by the act of May 3d, 1846.

* 7 Texas, 348. † 15 Id. 410. ‡ Ib. 414.

Argument for the defendant in error.

II. *The testimony of Walker was rightly excluded.* Its purpose was to discredit a testimonio making a title to land, by showing, forty years after the execution of the document, a discrepancy between the testimonio and the *matrix* or protocol.

If evidence to do this is admissible at all, it ought to come from the best source. The officer in charge of the archives should have been examined, and the documents themselves, or authentic copies, should have been produced in court for inspection.

In this case what purported to be a photographic copy of the protocol was no proof at all, because not established by the testimony of any person who made it.

It is by no means admitted that if proper evidence of discrepancy had been produced, this would have invalidated the testimonio.

It is stated by Sala,* that the paper which is *always* signed by the parties and witnesses is the *first draft on common paper.*

That it *ought* afterwards to be extended in the book of protocols, and *should* be again signed by them.

That the first paper, when free from blots, &c., is better evidence than the protocol, because it is *always* signed by the parties, whereas the protocol is *not always signed by them,* and because the former contains the rubric or seal of the officer, while the latter does not.

That the protocol has full faith for which it is intended; *but in court so much faith is not awarded to it as to the testimonio, because it was not established for the purpose, and because it wants the rubric or seal which authenticates it, and which every public instrument ought to have.*

That the testimonio makes full proof except in cases where the instrumental witnesses dispute it.

By a law of Texas all the *archives* were required to be deposited in the General Land Office, whether in possession of an *empressario*, political chief, alcalde, commissary, or commissioner. The failure to do this was visited with a heavy

* 4 Sala, 127, 130, 236.

penalty. Documents so deposited were to remain there, and certified copies were made evidence.

In *Titus* v. *Kimbro*,* a testimonio was offered in evidence and held to be conclusive, and to be better evidence than a certified copy of an *original title* from the General Land Office.

III. *The charge was right.*

The judge was requested to charge, that unless the jury believed that the grantee and Thomas Vega were one and the same person, the instrument must be disregarded. The instruction was given, with the qualification, that if the jury believed that the grantee was known indifferently as Thomas Vega and Thomas de la Vega, then the presumption is that he was the same person, and they would so consider, unless satisfied that such was not the fact.

In view of the documentary evidence on which the two names were used indifferently, there can be no valid objection to this charge.

No instruction was asked for as to the effect of the lapse of time before the instrument was recorded. If such instruction had been asked, it would have been properly refused, as the registration, whenever made, is effective from its date.

We need not assert that the testimonio coming from our possession would have proved itself. We rest its admission in evidence without proof of execution, on the ground that the statute of the State *made it evidence after it had been recorded, and when notice had been given that it was to be used in evidence on the trial.*†

IV. *The writ of error is sued out by McPhaul and all the other eight original defendants to correct a judgment rendered against them.*

There is no judgment such as is described in the writ. The only judgment is against McPhaul alone. He alone petitioned for the writ. The writ must, therefore, be dis-

* 8 Texas, 212.

† Harvey *v.* Hill, 7 Id., 597.

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missed (if amendable in this particular) as to all others than McPhaul.

Mr. Justice SWAYNE delivered the opinion of the court.

The action was ejectment. Lapsley was the plaintiff. The plaintiffs in error were the original defendants. In the progress of the cause the plaintiff dismissed the action as to all of them except N. A. McPhaul, and judgment was rendered against him for their costs. He recovered against McPhaul, and this writ of error is prosecuted to reverse the judgment.

The writ should have been in the name of McPhaul alone as the plaintiff in error. But as the defect is clearly amendable under the third section of the act of June 1st, 1872, it is unimportant.

There are numerous assignments of error. Except those involving points which we deem material to be considered, we shall pass them by without remark.

The affidavit of Mussina was properly stricken from the files.

The law of Texas provides as follows: "Every instrument in writing (properly recorded) shall be admitted as evidence without the *necessity of proving its execution, provided* that the party who wishes to give it in evidence shall file the same among the papers of the suit three days before the trial and give notice to the opposite party of such filing, and *unless such opposite party, or some other person for him, shall within one day after such notice* file an affidavit stating that he believes such instrument to be forged."*

The affidavit was filed by Mussina as the attorney of De la Vega. It set forth that the instrument of writing purporting to be a testimonio or second original of a power of attorney from Thomas de la Vega, by the name of Thomas Vega, to Samuel M. Williams, dated May 5th, 1832, was, as affiant verily believed, a forgery. The testimonio was one of the plaintiff's files in the case for the purposes of evi-

* Section 90, act 13th May, 1846, p. 387, referred to in Hanrick *v.* Barton, 16 Wallace, 166.

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dence upon the trial. The object of the affidavit was to throw the burden of proof upon the plaintiff.

He had given the proper notice to the defendants on the 16th of January, 1872. The affidavit was filed, not within one day thereafter, as the statute required, but on the 5th of February following, while the trial was in progress. De la Vega, in whose behalf it was filed, was not a party to the record.

It is insisted that the testimonio was improperly admitted to record, and that it was not properly admitted in evidence. These objections present questions of local law.

The instrument is as follows:

It bears date on the 5th day of May, 1832, and sets forth that Thomas Vega, Rafael Aguerre, and José Ma. Aguerre, of the city of Leona Vicaria, appeared before Juan Gonzales, regidor of that city, and declared that they conceded to Samuel May Williams, a resident of the city of Austin, full power, "in order that in the names of the appearers" he might proceed to sell the lands therein described. "And to confirm all that may be granted and executed, the appearers bind themselves, their persons, and their property present and to come." It concludes, "Thus have they granted and signed it in presence of these witnesses, Antonio Espinosa, Rafael de Leon, and Francisco de la Fuentes, Gonzales, residents of this city.

"I attest: Juan Gonzales. Thomas Vega, José Ma. Aguerre, Rafael Aguerre."

The following memorandum was affixed:

"Copy from the original, with which it agrees, the day of its execution; given on two 'useful' pages of paper, of the second stamp, conformable to law. All of which I, the undersigned judge, officiating with those assisting me according to law, hereby attest.

"JUAN GONZALES.

"Witness:

JOSE NAZO ORTIZ,

J. M. MORAL."

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Affidavits are annexed upon which it was recorded, in McClennan County, September 7th, 1856, and again, September 22d, 1858; in Falls County, October 6th, 1859, and in Williamson County, October 15th, 1859. The affidavits were all sworn to in Texas. Among them are, one proving the handwriting of Gonzales and the attesting witnesses—Moral and Ortiz—and that, if living, they are residents of Saltillo, in the State of Coahuila; one by Gonzales, made July 13th, 1857, proving that the testimonio was executed by him at the personal request of the grantors named therein and in their presence, and that his signature thereto, and those of Moral and Ortiz, are all genuine; that Thomas de la Vega executed a certain other power of attorney before him to S. M. Williams on the 28th of April, 1832, and that "the said Thomas de la Vega, who executed this testimonio, is one and the same person."

The testimonio here in question being a copy from the protocol, or original instrument, made by the officer by whom the protocol was executed, was, in the eye of the Spanish law and of the law of Texas, "a second original," and of equal validity and effect with the prior one.*

That Gonzales had authority adequate to the function he performed, and that the testimonio was valid, was held by this court in *Spencer* v. *Lapsley*.†

In relation to the recording of the instrument, our attention has been called to the following statutes of Texas: the act of the 20th of December, 1836, sections thirty-five and forty; the act of May 10th, 1838; the act of January 19th, 1839; and the act of May 12th, 1846, sections four, five, seven, eight, and nine. A careful examination of these statutes has satisfied us that the registration was authorized by law. If there could be any doubt upon the subject it is

* 1 Partidas, 222; Owings *v.* Hull, 9 Peters, 625; Mitchel *v.* United States, Ib. 732; Smith *v.* Townsend, Dallam's Digest, 570; Herndon *v.* Casiano, 7 Texas, 332.

† 20 Howard, 274.

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removed by the Texas adjudications* upon the subject, referred to in the argument of the learned counsel for the defendant in error. A certified copy from the office where the testimonio was recorded would, therefore, have been competent evidence. The original, with the recorder's indorsement, would, as a consequence, also have been admissible. In such cases, it would be a solecism to receive the copy and reject the original.

In this case the plaintiff offered the testimonio in evidence, and it was properly received. It would have been admissible without recording. In *Martin* v. *Parker*,† it was objected that an act of sale of real estate, not having been signed by the instrumental witnesses, was inadmissible without proof of its execution. The court replied: "We do not think the objection well taken. In *McKissick* v. *Colquhoun*,‡ Chief Justice Hemphill said: 'The signature of a judge or alcalde acting in place of a notary, authenticated by two assisting witnesses, has all the force and effect of the signature and seal, or rubric, of a notary.'"

The defendant offered to prove by T. I. Walker, a witness present, that in the year 1868 he went from Austin, Texas, to Saltillo, formerly Leona Vicaria, in Coahuila, Mexico, and there examined the books of protocols in the office of the secretary of the ayuntamiento; that he found in the book of protocols for the years 1832 and 1833, among others a protocol of a power of attorney, in the Spanish language, of the date of May 5th, 1832, from José Maria Aguerre to Samuel M. Williams, giving Williams the power to sell the land granted by the government to Thomas la Vega and Rafael and José Maria Aguerre, to wit, eleven leagues each; that said protocol had to it no signatures but those of Gonzales and José Maria Aguerre, and that it had no signatures

* Guilbeau *v.* Mays, 15 Texas, 414; Henderson *v.* Pilgrim, 22 Id. 476; Secrest *v.* Jones, 21 Id. 133; Paschal *v.* Perez, 7 Id. 348; Edwards *v.* James, Ib. 377.

† 26 Texas, 260.

‡ 18 Id. 151.

of witnesses; that in said protocol-book, and of the date of April 28th, 1832, he found an original protocol of a power of attorney, signed by José Maria de Aguirre, or Aguerre, and Thomas de la Vega and Juan Gonzales, with attesting witnesses Ortiz and Moral; that this power was to Samuel M. Williams; and that in said book, from the power of attorney of the 28th of April, 1832, to the power of the 5th of May, 1832, inclusive, there were seven leaves, and no visible evidence of any mutilation of the book; that there are no protocols of any power of attorney from either Maria de Aguirre, or Aguerre, or Thomas de la Vega, to any one, in said seven leaves, except the two named above; and that the witness had in his hands then in court photographic copies of said seven leaves, showing exactly the facts above mentioned as to the protocol-book and the said two powers of attorney as of record therein.

The plaintiff objected to the admission of the evidence. The court sustained the objection and the defendant excepted.

It has been shown that the testimonio is "a second original," and of the same effect with the protocol.* According to an eminent Spanish authority it is full proof, unless the instrumental witnesses contradict it.† Here neither Vega, either of the Aguerres, Gonzales, Moral, nor Ortiz was produced; nor was their absence accounted for. The bill of exceptions states that the witness had the photographic copies in his hands in court—not that they were offered in evidence. But perhaps it is only fair to construe the bill of exceptions so as to give it that effect. Conceding this, the only testimony offered was that of Walker, and the two photographic copies. It does not appear to have been suggested that this was to be followed by any further testimony. The copies had been in the possession of Walker more than three years; yet it is not shown that the plaintiff had any notice

* Mitchel *v.* United States, 9 Peters, 732; Herndon *v.* Casiano, 7 Texas, 332.

† 4 Sala, 127, 130, 136.

of them until they were suddenly produced by the witness in the midst of the trial. It is also significant that the agent who went on the visit of exploration to Saltillo did not claim to have discovered anything whatever adverse to the testimonio, except the state of the protocol as it appeared of record. Nor did the defendant, enlightened as he must have been by Walker, invoke the testimony of the keeper of the archives, or of any other person residing in the locality where they were kept. The plaintiff's petition was filed in 1863. Walker's discovery was made in 1868. The trial was in 1872. There was time between the two periods last mentioned to procure ample testimony from Saltillo and elsewhere touching the fraud and forgery charged, if they were believed to exist. The defendant was silent. The record is a blank as to any such testimony given, offered, or suggested, except the isolated circumstances offered to be proved by Walker and the two photographic copies. These are pregnant facts. Copies of the photographs are not given in the bill of exceptions; nor are the contents of the power to Williams, of the 28th of April, given in whole or part. That is stated to have had upon it the names of José Maria Aguerre and Thomas de la Vega as grantors, and of Gonzales with those of Moral and Ortiz as assisting witnesses. It is possible that the testimonio may, by the mistake of the copyist, have the date of the latter instead of the earlier instrument, or that if the fuller and better evidence, which the defendant was bound to give, had been produced, the apparent discrepancies between the two documents in question might have been explained in a manner consistent with the integrity of all concerned and the validity of the testimonio. It should at least have been shown by some one officially connected with the office, that the book seen by the witness was the book, and the only book there wherein the instrument could have been properly recorded, and that there was no such protocol *anywhere* in that book, or elsewhere in the office. It is also possible it was known in the office that the missing signatures had been removed by some dishonest hand.

The testimony proposed to be elicited from Walker fell far short of the requisite standard. A party is not permitted to give secondary evidence where it presupposes better evidence within his reach, which he fails to produce. In *Renner* v. *Bank of Columbia*,* this court, speaking of such evidence, said: "Every case must depend in a great measure upon its own circumstances. The rule of evidence must be so applied as to promote the ends of justice, and guard against fraud and imposition."

It appears incidentally by the record that there has been a great amount of litigation, extending through a long period of time, touching the lands to which this testimonio relates. The protocol and testimonio bear date more than forty years ago.

The record does not show that during this long period either of the Aguerres ever questioned the validity of the latter, or that La Vega ever assailed it by his own sworn testimony.

Large and diversified interests must have grown up on the faith in its genuineness. In this case the attack upon the instrument is not made by either of the grantors, but vicariously by the defendant, who claimed under a distinct and hostile title which he wholly failed to establish.

Under all the circumstances, we think the testimony of Walker was properly excluded.

In our judgment the court was correct as to the instructions given and those refused, to which the exceptions touching that subject relate.

We direct, *sua sponte*, the writ of error to be amended by striking from it the names of all the plaintiffs except McPhaul; and the judgment of the Circuit Court is

AFFIRMED.

* 9 Wheaton, 581.

Syllabus.

CITY OF MEMPHIS *v.* BROWN.

1. Where an individual contracted with a city corporation to pave its streets, and the corporation afterwards, by way of assisting him with funds, issued to him its bonds, having several years to run (and then worth in the market but fifty cents on the dollar), with the understanding that the bonds might be sold for what they would bring, and that other bonds might be afterwards bought by the contractor, so that the city might have its bonds again when they matured, and the contractor sold the bonds: *Held*, on a suit between the parties for a settlement under the original contract for paving, that the contractor could discharge himself from his obligation to return the bonds to the city by charging himself with and paying their market value at the time of accounting in the suit; and that he was not obliged to return the bonds *in specie* before he could compel the city to pay him for his work. *Held*, *further*, that the fact that the city was pecuniarily embarrassed, and had no money with which it could go into the market and buy the bonds, did not alter the case.
2. Before a court will sanction the exaction of hard conditions made by a city with its contractors, who have been reduced to necessities by the omission of the city itself to keep with strictness its promises to them, it will be careful to know that every stipulation on the part of the city, under any new agreement, has been fully performed by it. Hence, where a city agreed to issue a certain amount of bonds to a contractor who was embarrassed in carrying on his contract with it, the embarrassment being produced in part through the city's own non-payment to the contractor of what it owed him, the contractor agreeing on his part in the new agreement, to release the city from certain obligations under which by the original contract it was bound: *Held*, that the city, not having carried out its new agreement *completely*, could not avail itself of the release; that what was done was not an accord and satisfaction, but an executory agreement for a release, upon the performance of certain conditions, which, not having been performed, left the release without obligatory force.
3. Under the laws of Tennessee and its own charter, the city of Memphis, in the State just named, had full power to make contracts for paving the city, and to bind itself to pay for the work either in cash or in the bonds of the city, or in both. Moreover, the city was liable on such contracts to a suit by the contractor. If the city has guaranteed payment for the paving, in case others (as the owners of property along the street) did not pay, and the highest court of the State decides that such owners cannot constitutionally be charged with the cost, and be compelled to pay, the city cannot allege the illegality of the contemplated mode of the contractor's getting payment as a defence to a claim on *it* for payment. Power given to the city, to assess the expense of paving upon the ad-

joining owner, does not impair the power of the city, itself, to do the work. It is permissive merely.

4. Where a city expressly contracts to pay for paving a street, a subsequent modification of the details of the contract and in which provision is made for the assessment and collection of certain portions of the expense, which mode of collection was subsequently declared by the courts to be illegal, will not be held to be an abandonment or waiver of the original agreement of the city to pay for the paving.

5. Where a city contracts with persons to do work for it, agreeing to pay them in bonds, having some years to run, and with interest warrants or coupons attached, "*principal and interest guaranteed and provided for by a sinking fund set aside for that purpose*," and the contractor takes the bonds, but the city does not provide any sinking fund for the payment of either principal or interest, the contractor to do the work cannot, in a suit against the city to recover what it owes him, adduce evidence of bankers and stockdealers to show what damage, in their judgment, he has suffered by the city's violation of its contract in providing the sinking fund; the witnesses making the value of the sinking fund depend upon the conditions—1st, that it should be actually collected; 2d, that it should be placed in the hands of trustees; and 3d, that the trustees should be persons of integrity—conditions which made no part of the city's contract in the matter. There is no legal standard by which damages founded on such a claim can be fixed. They are speculative. There can be no standard market value of that which never existed.

6. A reception of bonds without this guaranty being fulfilled, and negotiating them as valid debts of the city, waives the claim for the guaranty. The claim for damages for not providing a guaranty (if any exist) belongs to the holders of the bonds and not to the contractor.

7. When the ordinances of a city, which has a "city attorney" as one of its officers, require that such *attorney* prosecute all suits to which the city may be a party, or in which it may be interested, persons who enter into a contract with the city under ordinances and on advertisements made pursuant to them, and on bids put in to pave its streets, with a provision in the contract that the accounts for the paving shall be made out by the city engineer, and delivered to the contractors for collection, and if not paid within ten days after the payment becomes due, "shall be placed in the hands of the *city attorney* for collection, under the city charter," cannot, even though those accounts are numerous and the collection of them onerous and expensive, employ other attorneys, and charge to the city what they pay to the additional attorneys for *their* professional services. A contract made under such circumstances cannot be modified like an ordinary contract made by the city. It must be performed according to its terms.

8. The fact that the mayor and city attorney urged the contractors to make great efforts in the collections, and advised them to retain counsel in looking up titles and to aid in bringing suits, does not alter the case, there being no evidence that the city legislature, or any committee

which was the agent of the city in making the contract, advised or assented to any change in its terms.

9. Where, under large contracts for paving a city, the city and the contractors to do the work having become embarrassed, have resorted to various rather irregular devices to raise money and carry on the work, the city issuing its bonds, and the contractors selling them at half their nominal value, and things between the parties have got into a confused and complicated state, and a suit at law has been instituted, and a bill and cross-bill in chancery filed, a court may, not improperly (even before the case is ready for a decree, and without having settled the rights of the parties), refer the case to a master for an account of labor done and materials furnished, and the value thereof, and to find how many bonds the city has issued to the contractors, and whether such bonds had a value, and when they matured, and how much the city owed the contractors when the suit was brought, and—the parties consenting that the action at law be consolidated with the suits in equity—to hear and report to the court the proofs and his conclusions upon various matters deemed pertinent by the court, and specified by it, including as a final one, that he state an account between the parties, embracing therein all the matters in the cause of the bill and cross-bill, and showing in the result the aggregate of debt of the debtor party to the other. And if the parties do not except to such order, but appear under it before the master and take, both of them, testimony upon the subjects of reference, for as long a term as they desire, and then, announcing that they do not desire to take further evidence, submit the matters of reference for the determination of the master (taking no exception before him), it is no ground of error (the Circuit Court having passed upon his report, and with some modifications confirmed it), that before the cause was ready for a decree, and without settling the rights of the parties, the court referred it to the master for an account, and that the master took and stated an account in accordance with the terms of the order.

APPEAL from the Circuit Court for the Western District of Tennessee; the case, as appeared from a master's report, and otherwise, having been thus:

By a general incorporation act of the State of Tennessee, all cities of the State have full power to provide for the paving of streets, alleys, and sidewalks.*

The charter of the city of Memphis, in the State just named, enacts that "the board of mayor and aldermen shall have power to improve, preserve, and keep in good repair

* 1 Thompson & Stigers's Statutes, 1871, § 1359.

the streets, sidewalks, public landings and squares of the city."*

It enacts also,† that the city may require lot-owners to improve the streets fronting their lots, and that "should any owner fail to comply with any ordinance requiring him to repair, grade, and pave the same, the mayor and board of aldermen may contract with some suitable person for repairing, grading, and paving the same, and pay therefor," and collect the amount from the lot-owner.

It enacts also that the city may issue its bonds "for the construction and pavement of the principal streets of the city;" and an act amendatory of the charter authorizes the issue of bonds "for any public improvement." Nothing was said as to the rates at which it might sell these bonds.

The ordinances of the city require that "the city attorney" should prosecute all suits to which the city might be a party, or in which it might be interested.

These provisions of law and this ordinance being in force, the city of Memphis, in the year 1866, being desirous to have certain of its streets paved with what is known as the Nicholson pavement, passed an ordinance directing the mayor to advertise for twenty days for paving the whole or parts of them according to the plans and specifications of the engineer's office, and further authorized the mayor and the finance committee to make and enter into contract or contracts with the lowest responsible bidder, as to payments and time of completion, with such restrictions as they might think best.

The ordinance went on:

"The city civil engineer shall forthwith proceed to make a plat of said streets and a plat of the lots bounding and abutting the same; and shall by actual measurement ascertain the number of feet front on each lot bounding and abutting the said streets; and shall mark upon his plat the names of the owners of such lot and the number of feet belonging to each. . . . He

* Act February, 1859, Bridges's Digest, 112 and 208. † Ib. 120.

shall also prepare and lay before the board of mayor and aldermen at their first meeting after a contract shall have been made by them for the grading, constructing, and paving of the street, upon which such lots front, an estimate of the entire cost of said improvement under the contract aforesaid, as shall be opposite the respective lot or lots, and shall mark upon said lot the amount thereof; and such amounts are hereby declared to be a special tax upon such lots respectively, and a debt due by the owners thereof in such instalments as the board of mayor and aldermen may determine; and he shall make out and deliver to the attorney for the city a list of the owners and the amounts due respectively, with the number of the lot and time of payment, and *the attorney* shall proceed to collect the same, and in case the owner shall fail to pay on demand, to enforce the lien against the lots given by the charter of the city."

The advertisements and surveys directed were made, and bids put in by different parties. Among the bids were one by Taylor, McBean & Co., and another by Forest, Mitchell & Co. These two bids were accepted.

Accordingly, on the 11th of March, 1867, the city entered into a contract with Taylor, McBean & Co. for the paving, in sections, certain streets. The contract said:

"Upon the completion of each section, the contractors shall receive from the owner or owners of lots fronting upon said section one-half of the price of the same *in cash*, the remaining half to be paid by the said owner or owners in thirty, sixty, and ninety days, they giving their notes for the same, with the lien fixed by the city charter retained in said notes.

"The accounts for said pavement will be made out upon the completion of each section, by the city engineer, against the property owner or owners and delivered to the contractors for collection, and if not paid according to the terms above specified, within ten days after said payment becomes due, said accounts shall be placed in the hands of the *city attorney* for collection under the city charter.

"*The city of Memphis will and does hereby guarantee to the contractors the payment of said accounts, as so assessed against the property owner or owners for the pavement.*"

This contract was called "the cash contract."

Statement of the case.

On the 16th of July, 1867, the city entered into another contract, this one being with Forest, Mitchell & Co., for paving, in like sections, certain other streets. This contract said:

"Upon the completion of each section the contractor shall receive from the city the whole amount due under the conditions of this contract for said section; the same to be paid *in Memphis city paving bonds*, payable in five, ten, and fifteen years, in equal proportions, with six per cent. coupons attached, payable semi-annually. *Principal and interest guaranteed and provided for by a sinking fund* set aside for that purpose. Bonds to be taken at par."

This contract was called "the bond contract."

As the reader will observe, there was no provision in this contract for assessment, nor any reference to property owners, or guarantee of payment. The contract was, however, subsequently modified as to the amount to be paid for certain portions of the work and as to the form of payment, with a provision for assessment and collection of certain portions thereof, as had been made in the cash contract.

Both of the contracting firms above named were unable to perform what they had contracted to do, and with their consent and that of the city, a new firm, that of Brown & Co., was substituted in their places; succeeding to their obligations and to their rights. Brown & Co. paved the streets according to the contract.

The property-holders of the streets paved did not pay for the paving opposite to their respective lots; and this failure of theirs producing embarrassment on the part of Brown & Co., these last sought relief by an application to the city. To give this relief the city, in August, 1868, lent to Brown & Co. its bonds to the nominal amount of $99,000. The bonds were worth at the time not more than fifty cents on the dollar, and they were lent with the understanding that they might be sold for what they would bring, and that other bonds might be bought to replace them when they should mature. Early in November, 1868, another application of the same character was made for $175,000 of the

city bonds; and a resolution was passed on the 18th, by the city councils, and an agreement signed on the 20th of November by the city of the first part and Brown & Co. of the second. The agreement recited:

"That, whereas the party of the first part, in session on the 18th day of November, 1868, did pass the following resolution, to wit:

"'*Resolved, &c.*, That the city will loan Messrs. Brown & Co., the contractors of the Nicholson pavement, one hundred and seventy-five thirty-year $1000 pavement bonds for eighteen months, upon condition that said contractors will place in the hands of the city attorney paving bills against the property holders to the amount of the face value of said bonds; *and upon the further consideration that said contractors* WILL *release the city from all liabilities upon said paving contract, unless it should be decided by the courts of last resort that the property holders are not liable for said pavement.* The interest upon said bonds shall be paid by the said Brown & Co., and at the end of said eighteen months said bonds shall be returned to the city, principal and interest, unless said interest has been previously paid:'

"*Which said resolution embraces all the conditions of said loan, and is accepted by the parties of the second part.*"

The instrument then proceeded:

"It is further agreed by said parties that the city will furnish said bonds as rapidly as they can be executed, and that as said bonds are delivered to the said Brown & Co., the said Brown & Co. will deliver to the city attorney the collaterals to secure the same. This agreement is in no wise to affect or modify the terms and obligations of the original contracts for paving the streets of Memphis with the Nicholson pavement, as now existing between the parties, or the owners of the lots abutting on the streets, *except when said contracts are changed and modified by the above resolution of the board of mayor and aldermen and this agreement.*"

The city did not comply with this contract. The master thus set forth the facts:

"Brown & Co. received, with much delay in their issue, $140,000 in city bonds. The remainder of the loan ($35,000) was wilfully withheld by the then acting representatives of the city, and applied to payment of interest on the general funded debt of the city, the city getting about fifty cents on the dollar for

the bonds thus withheld. The mayor had given to Brown & Co. a letter (called by the city an acceptance, but which does not possess a single quality of a commercial acceptance), stating that Brown & Co. should be entitled to receive $35,000 of Memphis city bonds so soon as they could be signed and ready for delivery. But they were never signed, or if signed, never delivered, and in that particular the city did not comply with the stipulations whereby it received an agreement for release from its guaranty of the cash payments by property holders. The greatest and apparently most inexcusable neglect and delay were exhibited by the city government in the delivery of the bonds promised to Brown & Co. under their loan contracts."

The following was the form of one of the papers termed acceptances:

"MEMPHIS, August 27th, 1868.

"MESSRS. BROWN & CO.: As soon as it is possible for me to sign them I will issue to you, or your order, ten $1000 bonds of the city of Memphis, the same being a part of the number you are entitled to by a recent order of the board. You may use this in any negotiation necessary to accomplish your purpose, and the bonds can be delivered to your order on return of this letter.

"W. LEFTWICH,
Mayor."

Brown & Co. and the city not being able to arrange matters between them, Brown & Co., in 1869, brought a suit at law to recover from the city $600,000, which the firm asserted the city now owed it upon the two contracts for paving. The city set up the agreement of November 20th, 1868, as an accord and satisfaction, and full performance was averred.

At a subsequent date, to wit, in November, 1870, the city filed a bill in equity against Brown & Co., alleging various matters of equitable defence, and asking that the firm be restrained from proceeding in a suit at law. To this bill Brown & Co. made answer, and also filed a cross-bill against the city.

In November, 1870, all proceedings in the suit at law were ordered to be stayed, to the end that the matters in controversy be determined in the equity suit; and in that

same month, Brown & Co. moved for an order of reference, upon the following notice:

"Come, Brown & Co., by solicitors, and move the court in this cause to order an interlocutory decree of reference to the clerk of this court, as master, to find and report to the court, at a future day in this term, or so soon as practicable, of and concerning the following matters:

"1. That he state an account of all the labor done, and materials furnished, and the value thereof, at the agreed prices under all the contracts set out and referred to in the bill and cross-bill herein, distinguishing the value of that paving done opposite the lots of private owners from the remainder, and also of all payments made on account of ——, distinguishing the payments as above in the paving; and also finding how such payments were made, and under what agreement, if any.

"2. That he find how many bonds the city of Memphis loaned Brown & Co.; and whether such bonds had a market value, and what that value was at the date of the loans; also, at the date of the maturity of the loans; also, at the bringing of this suit; also, how much, if any, the city of Memphis was indebted to Brown & Co. at the date of such loans.

"3. That he find and report how many of the city's bonds were delivered under the contracts dated July 16th and November 13th, 1867, in payment, as therein provided; and also the value of such bonds when delivered; and the average value of such bonds in this market and New York, since delivery, to the bringing of this action; also, the value, at such times, in Memphis and New York, of such bonds having the payment of the principal and interest secured by a sinking fund set aside for that purpose.

"4. That he find and report whether any, and if so how much work was done by such contractors for the city, additional to that provided."

In April following, no exception being filed, this motion was granted, and an order entered reciting that the action at law involving an accounting and adjudication of questions arising thereon was by consent joined with the present action, and the cause being at issue and coming on for hearing, it was ordered that it be referred to Mr. Mitchell as

master in chancery to take proof, hear, and report to the court the proof, and his conclusions upon twenty-seven items specified, of which the final was, "that he state an account between the plaintiff and defendant, embracing therein all the matters in the cause of the bill and cross-bill herein, and showing in the result the aggregate balance of debt of the debtor party to the other."

Under this order the master entered upon his office, and evidence was taken before him by the parties.

As already said, the owners of lots along the streets paved, did not in the majority of instances pay the special charges assessed for the paving against the lots. Brown & Co. accordingly put the claims (which the city ordinance had made liens against the lots) into the hands of the attorney of the city. But in addition to this, other attorneys were employed to assist him in enforcing these special assessments or liens for paving, and as appeared, Messrs. Humes and Poston, lawyers of Memphis, were paid for prosecuting between four and five hundred suits through the courts, $10,000, and other attorneys for collecting them without the judicial process, $25,000.

It did not appear that this employment of special counsel was authorized by the city councils, or by any committee intrusted by them with the collection of the liens, though the evidence tended to show that the mayor of the city and the city attorney knew and approved of what was done.

Mr. Waddel, one of the attorneys at law, employed by Brown & Co. to collect the special assessments, testified:

"*As to specific directions given by the mayor, city attorney, or other officers of the corporation, I do not know that I ever heard of any;* but I do know that the mayor and city attorney were apprised of the extraordinary efforts we were making to effect collections without suits, and approved the same, and urged us to make all possible. In several visits which I made to the mayor, he generally expressed his anxiety for us to effect collections in the manner we were pursuing, his idea being to get as much as possible without suit. My recollection is that the city attorney advised the same course."

Brown, himself, testified:

"Both the *mayor* and *city attorney* requested that every effort should be made to collect bills without suit by turns and trades, exchanges and discounts, and putting a large collection force at work, and making every effort to work as many of the bills into the paving of the streets as possible. *Their* advice and direction was followed. After it became evident it was necessary to sue, the *city authorities* advised suits to be brought, and to employ counsel to aid the city attorney in the examination of titles, drafting papers, and the work of suing. The *city attorney* took us to the office of Humes and Poston, saying that the city business outside of this was so large that it would be impossible for him to bring these suits; that he must have assistance, and preferred them. The mayor said substantially the same thing, and under their direction I retained Humes and Poston, who brought about four hundred suits."

The testimony of one Ballard, a sub-contractor, and who was with Brown in his interview with the mayor and city attorney, showed exactly the same facts; and that of the city engineer was to about the like effect.

The city attorney, as the evidence showed, did little in the matter, except show himself in court when the cases were tried, and assist more or less with general counsels.

The "bond contract," as it was called, bound the contractors, as the reader will remember, to take the bonds "at par," and on the other hand, the city engaged that the principal and interest of the bonds should be "*guaranteed and provided for by a sinking fund set aside for that purpose.*"

No sinking fund was ever set aside for the purpose of paying either principal or interest of the bonds. The interest was not paid; and the bonds would bring in the market only about fifty cents on the dollar. Brown & Co. adduced four bankers or stockdealers in Memphis, to testify what the same bonds *would* have been worth, had the city kept its contract in this particular, and had the bonds, principal and interest, been "guaranteed and provided for by a sinking fund set apart for that purpose."

One of them, Mr. Elder, testified that the market value

in Memphis of bonds and stocks was governed by the New York market; that the range of value of Memphis city thirty-year six per cent. bonds, in Memphis, from the 1st day of January, 1868, to 1st January, 1871, had been from forty-six to fifty-two cents on the dollar; that personally he knew nothing of the New York price, but that the price in Memphis would be regulated by the price there; that the value of the bonds had been depressed by the failure to pay the interest; that his opinion was, that if a sinking fund had been actually provided, and placed in the hands of a trustee, the market value, in Memphis and in New York—between the dates just named, of Memphis city short bonds, running five, ten, and fifteen years in equal proportions, with six per cent. coupons attached, payable semi-annually, principal and interest guaranteed, and provided for by a sinking fund set aside for that purpose—*would have been* from eighty-five to ninety cents on the dollar.

Another witness, Mr. Murphy, president of the Memphis Bank, testified that in his "*opinion*," had the city guaranteed and provided for the payment of the bonds, principal and interest, by a sinking fund set aside for that purpose—"had such fund *been actually collected and placed in the hands of trustees of known integrity*, and had that fact been generally known by the community, in Memphis and in the Eastern cities—such bonds would be readily sold from eighty to ninety cents on the dollar."

Mr. Barrett, "dealer in stocks and securities," gave the same estimates. Mr. Tobey, a banker, one slightly higher, eighty-five to ninety cents on the dollar.

On the 6th of June, 1871, the counsel of the respective parties having announced that they had no further evidence to present, submitted to the master's determination the matters which had been referred to him. The master having considered the cases, thus reported:

1. He charged Brown & Co. with the market value, say fifty cents on the dollar, of all the bonds that the city had lent them and which they had sold with a purpose to replace them before maturity.

2. He held that the city not having furnished to Brown & Co. the full $175,000 of bonds, as it had contracted by its contract of June 20th, 1868, to do, the city was not released by the said contractors from all liabilities on the contract, even though the courts of last resort had not decided that the property-owners were not liable for the pavement put before their lots.

3. He held that under its charter, the laws of Tennessee and the city ordinances, the city had a right to bind itself by guaranty to the payment of the cash contracts, and had done so.

4. He held, that the modifications of the bond contract bound the city.

5. He held that the city was liable to Brown & Co. for all damage suffered by failure of the city to guarantee and provide for the payment of paving bonds as stipulated; *the master herein estimating, that had the sinking fund been provided, the bonds would have been worth eighty-five cents on the dollar*, . . $115,216

6. He held that it was bound to pay, as the reasonable value of the services of attorneys employed to prosecute special assessments, by request of the city, ... 10,000

7. And bound to pay further the value of services in the collection of special assessments or paving bills, without process of law, by request of the city, ... 25,000

$150,216

The master, accordingly, including the last three items, amounting to $150,216, as proper charges against the city, found as due to Brown & Co., on the assumption already stated, the sum of $496,352.

Upon the report and the evidence on which the master had acted, coming to the Circuit Court, that court fixed what would have been the value of the bonds had a sinking fund been provided, at *seventy-eight* cents on the dollar; and,

Allowed in the place of the sum allowed by the master, that is to say, ...	$115,216
The reduced sum of	89,808
A difference of	$25,408

And confirming, essentially, the rest of the report, decreed in favor of Brown & Co. for $488,993.

From this decree the city of Memphis took this appeal, alleging that the court below had erred:

1st. (This being in the substance of three different assignments) in decreeing that Brown & Co. could discharge themselves from their obligation to return the bonds lent to them by paying their market value; and that the court ought to have decreed that they return the bonds and coupons, or else pay the city their "face value;" that the same error existed in regard to the bonds overpaid them on the bond contracts, and also in relation to the bonds paid to them on the cash contracts.

2d. In decreeing that Brown & Co. could maintain a suit on the paving contracts before any court of last resort had decided that the property-holders were not liable to pay for the same; the resolution and contract of November 26th, 1868, having released the city from all liability upon that contract, unless such court did so decide.

[N. B. Although no court of last resort had made such a decision when the case was before the master, it appeared that afterwards, and before the case got here, the Supreme Court of Tennessee, in the case of *Taylor* v. *Hart*, did so decide.]

3d. In decreeing the city liable for the payment of the cash contracts, by reason of their guaranty, or for any other reason, for paving laid in front of private property; that the decree should have been that the property-owners were liable therefor, and that the city was not.

4th. In holding the city liable for the paving under the bond contracts, as, after the modifications agreed upon, the contracts contained no agreement by the city to pay or to guarantee.

5th. In holding that the city was chargeable with $89,808 or other sum, as damages suffered by Brown & Co., for its failure to guarantee and provide for the payment of the bonds by a sinking fund.

6th. In allowing the $10,000 and the $25,000 as fees to counsel employed to assist the official attorney of the city.

7th. (This being assigned as an error arising upon the entire record): That the court below, before the cause was ready for decree, and without settling the rights of the parties, referred it to a master for an account, and that the master took and stated the account under his own view of the law and the facts, and virtually decided the entire case, instead of the court.

Messrs. J. M. Carlisle and J. D. McPherson, with whom was Mr. W. M. Randolph, for the appellants.

Mr. P. Phillips, with whom was Mr. S. Sibley, contra.

Mr. Justice HUNT, having stated the general nature of the case, delivered the opinion of the court.

I. The first three assignments of error are based upon a single idea, to wit, that there was error in decreeing that Brown & Co. could discharge themselves from their obligation to return the bonds loaned to them by paying their market value; that the same error existed in regard to the bonds overpaid them on the bond contracts, and also in relation to the bonds paid to them on the cash contracts.

As to each class it is insisted that the bonds in specie should have been returned or their nominal face value allowed to the city. The loan was of 240 bonds of $1000 each. At the time of making the loan there was due to Brown & Co. on the paving contracts several hundred thousand dollars. This indebtedness the city did not wish to pay, or was unable to pay. To meet the emergency the city loaned its bonds to Brown & Co., to be returned in eighteen months with interest.

The argument is that by their contract Brown & Co.

agreed to return the bonds to the city, and that a specific performance of this agreement is necessary to do justice to the city.

Conceding the power of the court to compel the specific performance of a contract relating to personal property, this does not appear to be a case justifying its exercise. Specific performance is never decreed where the party can be otherwise fully compensated.*

If Brown & Co. have received bonds of the city, which they are bound to return, and do not return, what damage does the city suffer? The face of the bonds and interest, it is said, as if they run to maturity, the city will then be liable for the payment of the whole amount. Not so. We are not to inquire what may be the damage to the city eighteen years hence, but what it suffers at the present time by the default of Brown & Co. If Brown & Co. should now be decreed to pay the face of the bonds, instead of an indemnity, the city would make an actual profit. Suppose the amount of bonds in question to be $200,000. With the sum of $100,000 the city could now purchase the whole amount of bonds supposed to be in issue, and retain as a premium or profit the remaining $100,000. In his brief the appellant's counsel says that it is not material that the very bonds loaned shall be returned, so that an equal amount, with corresponding coupons, are returned. That this equal amount may now be purchased by the city at fifty cents on the dollar would seem to be conclusive, that when Brown & Co. are charged with the bonds at fifty cents on the dollar, and the city is credited with that sum, that the damage of the city for the item in question is properly assessed.

But it is said that the city has not the money at command to buy these bonds; that it cannot thus indemnify itself, and, therefore, its loss is the face of the bonds. This consideration can have no legitimate influence. A rule of law is based upon principle, upon sound considerations of justice and public policy, and usually as manifested by the precedents

* Story's Equity, §§ 714 to 730.

and authorities. It is the same for all classes and conditions. None are so high as to be above its claims, none so low as to be beneath its protection. It will be a sad era in the history of any country when the application of a rule of law shall depend upon the wealth or the poverty of a party to a suit; upon his wealth, which would thus enable him to increase that wealth, or his poverty, which would be thereby aggravated.

No court and no government can protect against the misfortunes of poverty. The unfortunate mortgagor who sees his farm sold by his rigid creditor for half its value, for the want of money to redeem it, receives our sympathy, but the rules of law cannot be altered or suspended to aid him. So, in the case before us, the law is the same, whether the city of Memphis is in funds or whether it has no funds. The value of its bonds in the market is fifty cents on the dollar. With that amount of money it can now place in its treasury the bonds which Brown & Co. fail to return. It is difficult to see that the damage sustained can be beyond that amount.

Whether the city had the legal right to loan its bonds does not seem to be a practical question. It did loan them, and the contractors received them. If not a loan, the transaction was a gift, which will not be pretended; or it was a loan of so much money as was realized by their sale. The defence of usury is not set up in the pleadings, or apparently claimed on the trial, and it cannot now be urged. We assume the issue of the bonds to have been a legal transaction, and think the rule of damages for their non-return was properly fixed by the master.

In *Dana* v. *Fiedler*,* the court say: "Complete indemnity requires that the vendee shall receive that sum which, with the price he had agreed to pay, would enable him to buy the article which the vendor had failed to deliver."

In *Griffith* v. *Burden*,† being a suit for the conversion of a State bond, the court say: "Another rule, equally well

* 2 Kernan, 48.

† 35 Iowa, 138.

grounded and more frequently applied, is that the damages ought to be such as will compensate the party for his loss. In this case the plaintiff has lost his bond. Another like bond of precisely equal value to the plaintiff can be purchased in the market for the amount of the verdict in this case, the market value. Hence the verdict compensates him for his loss, and is the precise measure of damages."

These are the general rules upon the subject, and that they control the question in the case before us, sufficiently appears from numerous authorities.*

II. It is insisted, secondly, by the appellants that Brown & Co. cannot maintain a suit on the paving contracts, for the reason that by the resolution and contract of November 20th, 1868, Brown & Co. released the city from all liabilities upon the paving contract, unless it should be decided by the courts of last resort that the property-holders are not liable to pay for the same.

[This resolution, and the contract of November 20th reciting it, are set forth, *supra*, p. 295.—REP.]

In deciding upon the effect of this contract the situation and condition of the parties are to be considered. Brown & Co., the contractors, had embarked in an enterprise involving the expenditure of nearly a million of dollars. The property-owners refused to pay the assessments made upon them. The city was not able or was not willing to meet its guaranty of payment, and was indebted to the contractors in the amount of several hundred thousand dollars. The contractors must have relief or go to the wall, as their predecessors had done. They applied to the city for that relief, and instead of making payments, the city undertook to make a loan of its bonds. It imposed harsh and severe conditions which nothing except the financial desperation of the contractors could justify them in accepting. Their claim against the city for the amount of work done was valid, and

* Griffith *v.* Burden, 35 Iowa, 138; Wheeler *v.* Newbould, 5 Duer, 37; Brown *v.* Ward, 3 Id. 660; Brightman *v.* Reeves, Executor, 21 Texas, 70; Tracy v. Talmage, 14 New York, 162–191.

the amount was then payable. There was no good reason why they should delay a call for its present payment, especially none for its delay until the last possible chance of litigation in the State courts was exhausted. There was no good reason why the large sum due from the city should be thus indefinitely suspended in consideration of a loan of bonds to the nominal amount of $175,000, but which were worth some $80,000 only, about one-fourth of the amount actually owing to the contractors.

It is not necessary to decide whether this presented a case of moral duress, which in equity avoids the contract, or whether a contract can, under any circumstances, be so avoided. It is sufficient to say that it is a hard and oppressive contract, that if the pound of flesh is exacted the party must take care that he violates no law of the State in obtaining it. Before the court will sanction the exaction of conditions so harsh and oppressive it will be careful to know that every stipulation on the part of the creditor has been fully performed.

As the consideration for the release, the city undertook and promised to deliver to the contractors one hundred and seventy-five one-thousand dollar pavement bonds, and to deliver the same as rapidly as the same could be executed by the officers of the city.

How the city performed this agreement is stated by the master in his report.*

In the performance of this contract, to which assent was given by Brown & Co. to obtain immediate relief, we find, first, that there was great delay in delivering $140,000 of the bonds. Delay, we may well assume, was a serious injury to the contractors. Their necessities brooked no delay. Delay was nearly as bad as a refusal.

We find, secondly, that $35,000 of the bonds were never delivered.

We find, thirdly, that this non-delivery was wilful on the part of the city authorities; and fourthly, that they applied

* Set out, *supra*, pp. 295, 296.—REP.

in payment of the other debts of the city the bonds thus pledged and appropriated to Brown & Co.

After taking advantage of their necessities to make a hard and oppressive bargain with those whose necessities placed them at the mercy of any one having money, or the means of raising money, they wilfully and deliberately refuse to perform their part of the agreement. It is difficult to understand how parties standing before a court of equity can ask for the enforcement of a contract thus violated by themselves.

The letter of credit was a shift to avoid a direct refusal to deliver the bonds as agreed. As stated by the master, these letters have no single element of a commercial acceptance. They are equally destitute of every quality by which money could be raised upon their credit. The city had already violated its agreement by delay in issuing the $140,000 of bonds. It was violated again in the delivery of these letters instead of the bonds themselves. What security had any capitalist that further shifts and contrivances would not be resorted to to avoid the delivery of the bonds? None whatever; and it could not be otherwise than, as the fact proved, that they would be unavailing to Brown & Co. for the purposes required by them.

The agreement of November 20th was, in substance, an executory agreement for an accord and satisfaction. The release was to operate when the city actually loaned the bonds, not when it agreed to loan them. It is set up in the pleadings as an accord and satisfaction, and full performance is averred. The consideration for the release was wholly executory, and it was never performed; but the release was dependent entirely on such performance. The language of the release is this: "And upon the further consideration that the said contractors *will* release the city upon all liabilities upon said paving contract, unless it shall be decided," &c. There is no present release, but an agreement to release based upon the performance of the considerations specified. The performance failing, the agreement to release goes with it. It is a case not where the value of the bonds

is sought to be recovered, but where a forfeiture is sought to be enforced. In 1 Smith's Leading Cases it is said:* "The accord must be executed, and a mere executory agreement can never be pleaded as an accord and satisfaction." Again: "If part of the consideration agreed on be not paid the whole accord fails."

Many other considerations might be added to show the invalidity of the claim we are considering. A single one only will be mentioned. It is shown that the court of last resort of the State of Tennessee has recently decided that the property-holders are not liable to pay for this pavement.† The appellate court in equity would scarcely overrule a decision of the court below made under such circumstances, were it conceded that the law was prematurely held by that court to be as it is now found by the court of last resort in that State, and although the suit was commenced prior to such actual adjudication.

We hold that this objection is not well taken.

III. It is alleged also that there was error in decreeing the city to be liable for the payment of the cash contracts, by reason of their guaranty or for any other reason.

The general incorporation act of the State of Tennessee gives to cities of the State full power to provide for the paving of streets, alleys, and sidewalks.

The charter of this city declares that "the board of mayor and aldermen shall have power to improve, preserve, and keep in good repair the streets, sidewalks, public landings, and squares of the city."

It provides also, that the city may require lot-owners to improve the streets fronting their lots, and that "should any owner fail to comply with any ordinance requiring him to repair, grade, and pave the same, the mayor and board of aldermen may contract with some suitable person for repairing, grading, and paving the same, and pay therefor," and collect the amount of the lot-owner.

* Seventh American edition, 604 (*445); 605 (*445) American note, where numerous cases are cited in support of the principles laid down.

† See Taylor *v.* Hart.

By the contract in question, the contractors agreed to do the paving specified, and the city agreed "to pay or cause to be paid to the parties of the second part" the price specified "upon the following terms of payment, to wit: Upon the completion of each section, the contractor shall receive from the owner of lots fronting on said section one-half of the price of the same in cash, the remaining half to be paid by the owners in thirty, sixty, and ninety days, they giving their notes for the same, with the lien fixed by the charter retained in the notes. The city of Memphis will and does hereby guarantee to the contractors the payment of said accounts as so assessed against the property-owner."

It is said that about half of these assessments have been paid by the property-owners, that the residue of the lot-owners have refused to pay. The statutes referred to give the city ample power to undertake the work of paving, and to contract to pay for the same.*

The charter also gives the city power to issue bonds of the city to be used for paving the principal streets of the city.† Under this authority the city passed an ordinance providing for the issue of city bonds to the amount of $900,000 for the purpose of paving the streets and alleys of the city.‡

These references show full authority in the city to make contracts for paving, to be paid for in cash, as was done in the first contract, or in the bonds of the city, as was done in the case of the second contract.

General power and authority over the subject is by law given to the city, and the power also vested in the city to require that the cost may be assessed upon the adjoining owner, does not impair the power of the city itself to do the work.§ It is permissive merely. The city may require the owner to pay, but it is not compelled to do so.

In the contracts we are now considering, the following provision was contained: "The city of Memphis will and does hereby guarantee to the contractors the payment of said accounts as so assessed against the property-owner or

* Bridge's Digest, 132.

† Ib. 192, 233.

‡ Ib. § 110.

§ Ib. 140.

owners for the pavement according to the plans and specifications." It will be perceived that this is a guarantee of payment, and not of collection merely, and upon which, upon general principles of law, a suit may be commenced against the grantor without any previous suit against the principal.*

The thirty, sixty, and ninety days had long passed, and the payments had not been made by the owners. These periods, we think, furnish the limit of delay, that could have been contemplated, before the city became liable to pay. Numerous authorities are cited in the brief of counsel and in the learned opinion of the circuit judge, to show that, upon a contract thus worded, the city is liable in a suit brought by the contractor. They fully sustain the position. The fact, however, that the Supreme Court of Tennessee has now decided that an assessment upon the property-owner for this expense is void, as in violation of the constitution of the State, would seem to render much discussion unnecessary. The work was done under a contract with and by the employment of the city; the claim of the contractor is upon his contract, to which the city alone is the counter party. A particular mode in which payment was expected to be obtained, fails. The city cannot allege the illegality of the proposed detail of payment as a defence to itself. If it "caused" the owners to pay, that was well. If it failed in that, as it has, both in fact and in law, its guarantee of payment remains in force.†

IV. It is further alleged that there was error in holding the city liable for the paving under the bond contracts, as after the modifications agreed upon, the contracts, it is said, contained no agreement by the city to pay or to guarantee.

In the bond contract, dated July 16th, 1867, the under-

* Railroad Company *v.* Howard, 7 Wallace, 407; Zabriskie *v.* Railroad Company, 23 Howard, 381; Leggett *v.* Raymond, 6 Hill, 641.

† Kearney *v.* City of Covington, 1 Metcalfe (Ky.), 339; Baldwin *v.* City of Oswego, 2 Keyes, 141; Sleeper *v.* Bullen, 6 Kansas, 307; City of Louisville *v.* Hyatt, 5 B. Monroe, 199; Cumming *v.* Mayor of Brooklyn, 11 Paige, 596; Manice *v.* City of New York, 8 New York, 130.

taking of the city was direct to make payment to the contractors for the work done, in the bonds of the city. There was no provision for assessment, no reference to property-owners, and no guarantee of payment. This agreement was subsequently modified as to the amount to be paid for certain portions of the work and as to the form of payment, with a provision for assessment and collection of certain portions thereof, as had been made in the cash contracts, and which contracts were declared to be binding on the parties respectively.

The principles laid down in considering the last preceding objection control this one also. The contract was made with the city, and it cannot evade its payment, whether contracted to be paid for directly or through other persons, or by an illegal assessment. The latter contract contains no abandonment or waiver of the original agreement of the city to pay for the work. Such waiver cannot be presumed or implied.

V. By the report of the master there was found to be due to Brown & Co., from the city, and which went to make up the balance, the following item, viz.: "3d. To damage suffered by failure of the city to guarantee and provide for the payment of paving bonds as stipulated, $115,216."

In the judgment of the court, rendered in November, 1872, this item was reduced from the sum of $115,216 to $89,808, and as thus modified the item forms a portion of the judgment in the case. The allowance of this item is the fifth ground of error alleged by the appellant.

By the contract termed the bond contract the contractors undertook to do the work mentioned at prices specified. The city undertook to pay for the same "in Memphis City paving bonds, payable in five, ten, and fifteen years, in equal proportions, with six per cent. coupons attached, payable semi-annually, principal and interest guaranteed and provided for by a sinking fund set aside for that purpose. Bonds to be taken at par."

Several questions arise upon this objection which it is not necessary to discuss. Thus it is argued that this breach

of the contract had occurred before the assignment of the contracts to Brown & Co., that the assignment was taken and assented to by the city, upon the request of Brown & Co., without suggestion of claim for compensation on that account, and that they are estopped now to make such claim again. It is insisted that the duty of providing a fund for redeeming the bonds was a ministerial duty, which could be enforced by mandamus, and for which no other remedy exists, and that this remedy still remains.

We pass by the consideration of these points, and place our objection to the allowance of the item in question upon the ground, first, that the damages allowed are not in their nature capable of legal computation, that there is no legal standard by which they can be fixed, that they are shadowy, uncertain, and speculative.

The claim is based upon the theory that if the city had provided a sinking fund, which it did not do, Brown & Co. could have sold the bonds which were delivered to them for a greater price than they were, in fact, able to obtain for them.

The evidence on the subject was from four bankers or stockdealers in Memphis. The evidence of the first one examined, Mr. Elder, is as follows:

"Q. State, if you know, what establishes the market value in Memphis of bonds and stocks, or how the market value in this city is affected by the New York market.

"A. They are governed by the New York market.

"Q. State what has been the cash market value of Memphis City thirty-year six per cent. bonds, in New York and this city, from 1st day of January, 1868, to 1st January, 1871.

"A. The range here has been from forty-six to fifty-two cents on the dollar. Personally, I know nothing of the New York price, but the price here would be regulated by the price there. The value of the bonds has been depressed by the failure to pay the interest.

"Q. State, if you know, the market value, in this city and in New York, from 1st January, 1868, to 1st January, 1871, of Memphis City short bonds, running five, ten, and

fifteen years in equal proportions, with six per cent. coupons attached, payable semi-annually, principal and interest guaranteed and provided for by a sinking fund set aside for that purpose.

"A. My opinion is that if the sinking fund had been actually provided, and placed in the hands of a trustee, such bonds would have been worth from eighty-five to ninety cents on the dollar.

"Q. State whether or not the city of Memphis ever placed any money in your hands, as trustee, for the payment of either principal or interest on the paving bonds alluded to in the last question and answer; if yea, when, and how much, and whether you so applied it.

"A. The city never placed any money in my hands for any such purpose."

The testimony of Mr. Murphy, a banker, was as follows:

"Q. What, in your judgment, would have been the market value of the bonds described in the last question and answer during the period and at the places referred to, had the city guaranteed and provided for the payment of the bonds, principal and interest, by a sinking fund set aside for that purpose?

"A. Had such fund *been actually collected and placed in the hands of trustees of known integrity*, and that fact generally known by the community here and in the Eastern cities, in my opinion such bonds would be readily sold from eighty to ninety cents on the dollar."

The evidence of the other bankers did not differ materially from that of Elder and Murphy.

In the report of the master, the damages allowed were based upon the conclusion that the bonds would have been worth eighty-five cents on the dollar if the sinking fund had been provided, and the difference between this value and the market value of the bonds as they were, made up the sum of $115,216. The circuit judge fixed the value of the bonds upon the same evidence at seventy-eight cents on the dollar, and reduced the item by some $25,000.

It will be seen upon this statement of the facts that the

bankers allowed themselves a range of ten per cent. in the value of the bonds to be guaranteed by the city, and that the master and the circuit judge differed to the extent of seven per cent. in estimating their value. These differences and the reasons given furnish a strong illustration of the shadowy and unsubstantial character of the claim.

The master reaches his conclusion by finding for what sum the contractors were willing to do the work in cash, for what sum they would do the same work for guaranteed bonds, and from these facts he reaches a conclusion of the cash value of the bonds as estimated by the parties. He argues further that if not actually worth eighty-five cents, they might have been so placed by the contractors as to be worth that rate to them.

The learned judge, on the other hand, repudiates these views, and says that the question is not what the parties estimated the bonds to be worth, as they might have been and most likely were mistaken in their estimate of value, but that the sole question is the market value.

The answer to the argument of the master appears to be a good one, but we think the argument of the judge is no sounder.

How can there be a correct market value of that which never existed? A. contracts to deliver to B., on the first day of October, one thousand bushels of merchantable winter wheat. He delivers the quantity of wheat, but it is spring wheat, is dirty, musty, and unsound. The damages, the difference or value between the article agreed to be delivered and that actually delivered, are readily ascertained. The unsound wheat is there, and the sound, merchantable wheat is there. But it would be very difficult to estimate these damages if sound wheat had never been bought or sold; if, in fact, it had never existed. It would have been equally difficult if the value of standard wheat should be claimed to be more valuable when held by one man than when held by another. By this is meant to indicate the uncertainty and unknown character of what is termed a sinking fund set apart for that purpose by the city of Memphis.

This uncertainty is well illustrated by the evidence of the witnesses before quoted. Mr. Elder says that if "the sinking fund had been actually provided and placed in the hands of a trustee, such bonds would have been worth from eighty-five to ninety cents on the dollar." But the city did not undertake to raise the sinking fund in advance, nor at any time to place it in the hands of a trustee, beyond their own control. It would have been as easy to have paid the cash as to have done this.

Mr. Murphy says: "Had such fund been actually collected and placed in the hands of trustees of known integrity, and that fact generally known by the community here and in the Eastern cities, in my opinion the bonds would be readily sold from eighty to ninety cents on the dollar." The witnesses make the value of the sinking fund depend upon these conditions: 1st. It should be actually collected in advance. 2d. It should be placed in the hands of trustees. 3d. These trustees should be persons of known integrity. These conditions the city never undertook to perform. It was not expected by either party that the money should be raised in advance, or that it should be beyond the control of the city when or so far as raised. When the city made a pretence or an attempt at raising such a fund it was only by directing that a certain portion of its income should be placed in the hands of its own officers as trustees, and, of course, subject to its own control. When paving bonds to the amount of $900,000 were authorized by law, and were executed, the city officers used them at pleasure for the ordinary purposes of the city, regardless of the special purpose for which they were created. What security had any person that they would not do the same with any sinking fund in their possession? No time was specified within which the fund should be raised or commenced; no rate or proportion for any year or years was fixed upon. It was wholly indefinite and uncertain.

The witnesses were quite right in their statement of what constituted a valuable sinking fund.

The market value of a bond security depends chiefly upon

the confidence or want of confidence in its ultimate payment. Its immediate convertibility enters largely into the question. United States six per cent. bonds sell at this time at about twenty per cent. above par. Immediately previous to the late civil war, and during the early part of the contest, they sold at prices ruinously low. The existence of the government and the payment of its bonds were then doubtful. The solvency and the good faith of the government are now undoubted, and its bonds are convertible into money as readily as one species of money may be converted into another. Seven per cent. bonds of the State of New York sell at about seven per cent. above par. Missouri sixes sell at about ninety-five per cent., or five per cent. below par. Of the corporate bonds of railroads secured by mortgage, those of the Chicago, Burlington, and Quincy road (eight per cents) are quoted at one hundred and ten, the Michigan Southern and Northern Indiana (seven per cent.) at one hundred and five, Cleveland and Toledo (seven per cent.) at one hundred and three. The accumulation of interest may make slight difference in some instances, as exemption from taxation may enhance the price of United States securities. These references are made to show how variable and beyond any principle of calculation is the market price of securities, each as good as securities can well be. The genuine recognized bond of the State of New York affords as complete security for the return of the principal and the regular payment of the interest as does a United States bond, but although bearing one per cent. greater interest, its selling price is thirteen per cent. less than that of a United States bond. Liability to taxation can explain but a small portion of this difference. Corporate bonds as perfect in their character as such securities can be, show a like variation. Memphis City bonds of the ordinary character sold at about fifty cents on the dollar at the time the present bonds were issued. No man can undertake to say that this price would be essentially increased or how much by a sinking fund like that we have discussed.

The value of a Memphis City bond, guaranteed by a sink-

ing fund of the city, depended first upon a confidence or want of confidence in the resources of the city. If it was absolutely unable to pay its debts a promissory sinking fund would not raise its credit to any perceptible extent. The value depended next upon the public estimate of the honesty and good faith of those having the city affairs in charge. If they were tricky, dishonest, and unprincipled persons, who would not scruple to misapply or pervert a sinking fund, their bonds would be of little value. A dishonest person is an unsafe debtor. There is no satisfactory evidence of the resources of the city, and certainly no satisfactory evidence that a sinking fund would be of any practical value to the bondholders. The city was liable for the face of the bonds in any event, and that was all there was of the obligation.

We are of the opinion, upon this view of the contract before us, that there was no legal standard by which the damages claimed could be measured, and no legal evidence that such damages existed. The principles and ideas upon which the alleged damages are claimed cannot be reduced to a money standard. They do not form the subject of legal calculation in dollars and cents.

2d. We think that Brown & Co. are not now at liberty to claim damages for the non-existence of the sinking fund.

They were quite aware of the provision in the contract for the sinking fund. They knew that this provision had not been made; they received the bonds as a performance, without objection or protest, and made no demand that this provision should be complied with. They have never offered to return the bonds; they are now outstanding, a valid claim against the city to their face. This was a waiver.*

3d. They negotiated the bonds. They negotiated the coupons. These securities are still outstanding against the city. Whatever claim there may be for a sinking fund, or for damages for the want of it, would seem to belong to the holders of the bonds, and not to the party to whom issued. The right to a fund for redemption of a bond, to enforce it

* Reed v. Randall, 29 New York, 358.

by mandamus, or to ask damages for its violation, is an incident of the bond, attached to and inseparable from it.* There cannot be a cause of action in one to recover the whole face of the bond and interest, and in another to recover damages for the want of a collateral security to the bond. The allowance of damages now to Brown & Co. will be no defence to a claim for the whole face of the bond, to be made by the holder of it. The city would thus be liable to pay the face and interest of the bond to the holder after having paid twenty-eight per cent. to Brown & Co. for the absence of a guaranty of the payment of the same bond. This cannot be sound law.

VI. In the accounts allowed by the master, and sustained by the court, were the following items, viz.:

"4th. To cash paid as the reasonable value of the services of attorneys employed to prosecute special assessments, by request of the city, $10,000.

"5th. To the value of services in the collection of special assessments or paving bills, without process of law, by request of the city, $25,000."

The allowance of these items constitutes the sixth allegation of error. The items are closely akin, and may be considered together.

The ordinances of the city of Memphis required that the city attorney should prosecute all suits to which the city might be a party or in which it might be interested.

By the terms of the cash paving contracts it was provided that the accounts for the paving should be made out by the city engineer, and delivered to the contractors for collection, and if not paid within ten days after the payment became due "said accounts, or so much as shall be due and unpaid, shall be placed in the hands of the city attorney for collection under the city charter."

The duty of the parties under this stipulation is plain. The contractors are to collect the accounts, so far as they are able to do so, within ten days after the payment becomes

* Tracy v. Talmage, 14 New York, 162; Oneida Bank v. Ontario Bank, 21 Ib. 490.

due. They can demand no compensation for this duty, however onerous or expensive it may be. It is a duty imposed upon them by the express terms of the contract. After the lapse of ten days the burden is shifted, and the duty falls upon the city, to proceed through the agency of their attorney to collect the accounts. The contractors have nothing to do with this further proceeding. They are not bound to employ other attorneys, nor are they at liberty to do so and charge the expense to the city. Taking the contract as a guide, the matter seems too plain for argument.

But it is said that these services were rendered by the contractors at the request of the city, and that the employment of the additional attorneys was also at the request of the city. We think this is not an answer to the objection.

1st. This paving contract was entered into under a special and restricted authority, and in a mode specifically pointed out by the local law. The mayor was authorized to advertise for twenty days for proposals for doing the work according to the plans and specifications. The mayor and finance committee were, therefore, authorized "to make and enter into a contract with the lowest responsible bidder as to payments, time of completion, and under such restrictions as they may think best." The city engineer was then directed to make a plat of the work to be done, to lay before the board an estimate of the entire cost of the improvement under the contract, marking upon each lot the amount for which it should be liable, and which amount was declared to be a debt due from the owner, and to be a lien upon the lot.

This authority was pursued in making the contract. Bids were sought by advertisement. Bids were made by different parties. The bid of Taylor, McBean & Co. was accepted, as the most favorable to the city. The formal contract was entered into under these stipulations. We think this contract cannot be modified, as if it were an ordinary contract, made under the ordinary municipal authority. If the common council can vary it by assuming duties and waiving obligations therein imposed upon the contractors, in respect

to the collection of the bills and the employment of attorneys, they may do it by increasing the price to be paid for the work. Instead of favoring the contractors to the extent of $35,000, as is proposed in the present instance, they may give them unlimited favors. This idea is in hostility to the entire scheme of advertising for bids, contracting with the lowest bidder, fixing the amount of the debt and lien of each lot-owner. We think the contract as made must be abided by. It must be performed according to its terms.

2dly. The case fails to show any variation of the contract by authority of the city. No act of the common council appears giving sanction to the changes alleged to have been made. "The mayor and the city attorney," one of the attorneys employed testifies, "were apprised of the extraordinary efforts we were making to effect collections without suit, and approved the same and urged us to make all possible efforts. My recollection is that the city attorney advised the same course." The city engineer, Mr. Ballard and Mr. Brown, all testify on this subject. In no instance is there any other evidence of authority than that the mayor and city attorney urged them to make great efforts in the collections, and advised them to retain counsel in looking up titles and to aid in bringing suits. It is not suggested even that the finance committee, which was the agent of the city in making the contract, advised or assented to any change in its terms. We think that a contract entered into with the solemnities observed in the present instance cannot be modified upon the evidence of authority here referred to. There is no evidence that the city ever assented to the change.*

VII. It is also alleged as error that before the cause was ready for a decree, and without settling the rights of the parties, the court referred it to a master for an account, and the master took and stated the account under his own view of the law and the facts, and virtually decided the case instead of the court.

* Carroll v. St. Louis, 12 Missouri, 444; Butler v. Charlestown, 7 Gray, 12; Clough v. Hart, 11 American Law Register (N. S.), 95; Halstead v. Mayor of New York, 3 Comstock, 430.

In November, 1870, Messrs. Brown & Co. moved for an order of reference upon the notice already set out [see *supra*, p. 297].

No exception was taken to the order of reference. No exception was taken before the master. All the evidence was presented that was desired by either party. Full justice in this respect was attained, and we are of the opinion that this allegation of error is not well grounded.*

The result of our opinion is that the judgment is correct, except as to the items hereinbefore discussed—of $89,608 damages for the want of a sinking fund, of $10,000 for the services of attorneys, and $25,000 for the plaintiff's services in collecting the bills for paving. As to these there was error.

DECREE REVERSED, and the case remitted to the Circuit Court with directions to enter a decree in

ACCORDANCE WITH THESE VIEWS.

Justices FIELD and BRADLEY concurred in the judgment of reversal, but dissented from the opinion, they holding that the contractors ought to be charged with the full amount of bonds received by them, inasmuch as the city of Memphis had no authority to sell its bonds for less than their par value.

* Field *v.* Holland, 6 Cranch, 25; Story *v.* Livingston, 13 Peters, 359; 2 Smith's Chancery Practice, 372; Troy Iron and Nail Factory *v.* Corning, 6 Blatchford, 328.

Statement of the case.

STOCKDALE *v.* THE INSURANCE COMPANIES.

1. The cases of *Barnes* v. *The Railroad* (17 Wallace, 294), and *United States* v. *Railroad Company* (Ib. 322), considered and compared.
2. *Held*, that whether the tax on dividends arising from the earnings of corporations for the year 1869 be viewed as a tax on the shareholder or on the corporation, it was intended to tax the earnings for that year by the section which limited the duration of the income tax.
3. Section seventeen of the act of July 14th, 1870, construing certain sections of the Internal Revenue law of 1864 to extend the tax to the year 1870 is valid, because it is not an attempt to exercise judicial power by construing a statute for the court, but is a mode of continuing or reviving a tax which might have been supposed to have expired.
4. As this merely imposed a tax retrospectively, it was within the legislative power of Congress, and the case differs from an effort to invade private rights by construing a law affecting those rights, over which Congress had no power whatever.

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

The 116th section of the act of June 30th, 1864, as amended by the 13th section of the act of March 2d, 1867,* enacts:

"SECTION 116. That there shall be levied, collected, and paid annually upon the gains, profits, and income of every *person* residing in the United States, or of any *citizen* of the United States residing abroad, whether derived from *any kind of property*, rents, interest, dividends, or salaries, or from any profession, trade, employment, or vocation, carried on in the United States or elsewhere, *or from any other source whatever*, a tax of five per centum on the amount so derived over $1000, and a like tax shall be levied, collected, and paid annually upon the gains, profits, and income of every business, trade, or profession carried on in the United States by persons residing without the United States, and not citizens thereof. And the tax herein provided for shall be assessed, collected, and paid upon the gains, profits, and income for the year ending the 31st day of December next preceding the time for levying, collecting, and paying said tax."

* 13 Stat. at Large, 281; 14 Id. 477.

The 117th section of the same act, as amended in the same way, required that there should be included, *inter alia*, in the estimate of gains, profits, and income, which the act made it obligatory on the taxpayer to return, the share of any person of the gains and profits of all companies, whether incorporated or partnership, who would be entitled to the same if divided, whether divided or otherwise,

"Except the amount of income received from institutions or corporations whose officers, as required by law, withhold a per centum of the dividends made by such institutions, and pay the same to the officer authorized to receive the same, and except that portion of the salary or pay received for services in the civil, military, or naval, or other service of the United States, including senators, representatives, and delegates in Congress, from which the tax has been deducted."

The 118th section related to the manner of the party's making and the assessor's obtaining returns of that portion of the taxpayer's income which was to be paid by such taxpayer directly.

The 119th section, as amended by the already-mentioned section of the act of March 2d, 1867,* enacts:

"SECTION 119. That the taxes on incomes herein imposed shall be levied on the 1st day of March, and be due and payable on or *before the 30th day of April in each year, until and including the year* 1870, *and no longer.*"

The 120th section, as amended by the 9th section of the act of July 13th, 1866,† enacts:

"That there shall be levied and collected a tax of five per centum on all dividends thereafter declared due, whenever the same shall be payable to stockholders, policy-holders, or depositors or parties whatsoever, as part of the earnings, income, or gains of any bank, trust company, savings institution, and of any fire, marine, life, or inland insurance company, in the United States, and on all undistributed sums, or sums made or

* 13 Stat. at Large, 283; 14 Id. 480.

† 13 Ib. 283; 14 Id. 138.

added during the year to their surplus or contingent funds. And said *banks, trust companies, savings institutions, and insurance companies shall pay the said tax*, and are hereby authorized to deduct and withhold from all payments made on account of any dividends or sums of money that may be due and payable as aforesaid, the said tax of five per centum. And a list or return shall be made and rendered to the assessor. And for any default in the making or rendering of such list or return, with such declaration annexed, the bank, trust company, savings institution, or insurance company making such default, shall forfeit as a penalty the sum of $1000."

The 121st section enacted that any bank of issue which should not make a dividend or add to its surplus fund as often as once in six months should make a return to the assessor of the district, where it was, of its profits during every six months preceding the 1st of January and July, &c.

The 122d section, as amended by the 9th section of the act of July 13th, 1866, after enacting that any railroad, canal, turnpike, canal navigation, or slack-water company, indebted by bonds &c., upon which interest is to be paid, or any such company that may have declared any dividend, due or payable to its stockholders, as part of the earnings, profits, income, or gains of such company, and all profits of such company carried to the account of any fund, or used for construction, *shall be subject to and pay a tax of five per centum* on the amount of all such interest, dividends, or profits, whenever the same shall be payable, proceeds:

"*And said companies are hereby authorized to deduct and withhold from all payments on account of any interest, . . . and dividends, due and payable as aforesaid, the tax of five per centum;* and the payment of the amount of said tax so deducted from the interest, or coupons, or dividends, and certified by the president or treasurer of said company, shall discharge said company."

The 123d section of the same act, as amended by the 13th section of the act of March, 1867, enacted:

"SECTION 123. That there shall be levied, collected, and paid on all salaries of officers, or payments for services to persons in

the civil, military, naval, or other employment or service of the United States, including senators, representatives, and delegates in Congress, when exceeding the rate of $1000 per annum, a tax of five per centum on the excess above the said $1000; and it shall be the duty of all paymasters and all disbursing officers under the government of the United States, or persons in the employ thereof, when making any payment to any officers or persons as aforesaid, whose compensation is determined by a fixed salary, or upon settling or adjusting the accounts of such officers or persons, to deduct and withhold the aforesaid tax of five per centum; and the pay-roll, receipts, or account of officers or persons paying such tax as aforesaid, shall be made to exhibit the fact of such payment."

On the 14th of July, 1870, Congress passed an act, entitled "An act to reduce internal taxation and for other purposes." This act repealed certain sections of the previous internal revenue acts; limited the duration of others, and reduced the income tax in certain cases from five to two and a half per cent.; limiting its duration.

By its 17th section it enacted:

"That sections 120, 121, 122, and 123 of the act of June 30th, 1864, &c., as amended by the act of July 13th, 1866, and the act of March 2d, 1867,* SHALL BE CONSTRUED to impose the taxes therein mentioned to the 1st day of August, 1870, but after that date no further taxes shall be levied or assessed under said sections."

In this state of statutory enactment, Stockdale, collector of internal revenue at New Orleans, assessed a tax on the Atlantic Insurance Company (and on certain other insurance, railroad, and banking companies of that city), "on the earnings which had accrued to said company between the 5th day of July, 1869, and the 30th of June, 1870." The dividend was declared after this latter date. The taxes were paid under protest and the companies having brought suits in the court below to recover them, and having there got judgments against the collector for them, that officer brought the cases here by the present writ of error.

* These are the sections quoted *supra*, pp. 324–326, &c.

Two questions accordingly arose here:

1. Was the tax valid as to that part of the dividend which arose from the earnings of the year 1869?

2. Was it valid as to that part which arose from the earnings of the year 1870?

Messrs. Charles Case and J. D. Rouse, in support of the judgment below:

1. *The tax of five per cent. imposed upon the dividends of railroad companies by section* 122 *of the act of June* 30*th*, 1864, *as amended, is a tax upon the income of the stockholder, and not a tax upon the corporation.*

This is expressly decided in *United States* v. *Railroad Company*,* where the government sought to collect a tax from the Baltimore and Ohio Railroad Company, on interest due on bonds of that company held by the city of Baltimore; and where it failed because the revenues of a municipality incorporated by the State are not taxable. If anything to the contrary to this was adjudged in the case of *Barnes* v. *The Railroads*,† decided five weeks previously, it was overruled in the later case. But the official reports of the two cases show plainly, that nothing different was adjudged, and that the learned justice who announced the judgment of the court in the Barnes case, while he rightly announced the judgment, misconceived the ground upon which the majority of the court went; and that the decision in the later case is reconcilable with the *judgment* in the former, though not with certain assertions in the opinion then delivered by the learned judge who announced that judgment,‡ as to what "the *court*" decided.

2. *The tax upon incomes imposed by the act of June* 30*th*, 1864, *as amended, expired by limitation the* 31*st day of December*, 1869.

The limitation is found in section 119, which provides "that the taxes on incomes herein imposed shall be levied

* 17 Wallace, 322. † Ib. 294. ‡ Ib. 335, 336.

on the 1st day of March, and be due and payable on or before the 30th day of April in each year, until and including the year 1870, and no longer." It is elsewhere provided that the taxes so to be levied were to be levied upon the incomes "for the year ending the 31st day of December next preceding the time for levying, collecting, and paying said tax." Therefore the last levying of such tax being for the year 1870, it was limited to income of 1869.

3. *There has been no legislation which could effect an extension of the time during which such tax could be imposed.*

The 17th section of the act of July 14th, 1870, is simply declaratory of the opinion of Congress, and not a re-enactment of the law itself. This very attempt to continue the law in force by construction is an admission that it had expired. Now the construction of statutes belongs, not to Congress but to the judiciary. If the law were still in force, the judiciary would be bound to place upon it a construction given by Congress, and Congressional construction would have the effect of legislation, after the passage of the act. But Congress cannot construe statutes retroactively. This is perfectly settled.*

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

Mr. Justice MILLER delivered the opinion of the court.

This was a suit brought in the court below against the plaintiff in error in his official character to recover taxes collected by him, which are alleged to have been illegally assessed against the insurance company. The appeal of the company to the Commissioner of Internal Revenue having been decided against it, the tax was paid and suit brought within six months, as provided by the act of Congress. The insurance company recovered a judgment in the Circuit Court, and the collector brings a writ of error in the interest

* Ogden *v.* Blackledge, 2 Cranch, 272; United States *v.* Dickson, 15 Peters, 162; United States *v.* Klein, 13 Wallace, 128.

of the government, the object of which is to test the legality of the tax thus levied and collected.

An agreed statement of facts shows that the taxes complained of were assessed upon dividends declared by the insurance company "on the earnings which had accrued to said company between the 5th day of July, 1869, and the 30th day of June, 1870;" and the dividend was declared after the latter date.

This short statement raises two questions: 1. Was the tax valid as to so much of the dividend as arose from the earnings of the year 1869? 2. Was it valid as to that which arose from the earnings of the year 1870?

As regards the first proposition, it was much considered in the Barnes cases.* It was argued in those cases with much ability, and four members of the court were of that opinion that the entire income tax expired with the year 1869, and that as the tax in those cases, as in these, was assessed on dividends declared in the year 1870, they were without authority of law.

The argument in those cases, so far as the opinion of the court was concerned, turned mainly on the question whether the law intended to impose the tax on the income of the corporation, in which case it was obviously the income of 1869 which was taxed, and, therefore, properly taxed; or on the income of the stockholder, ascertained by his dividend, in which case the minority of the court thought that dividends declared in 1870 were not liable to the tax, because the taxing power under the law expired with the preceding year. It is, perhaps, fairly inferable from the report of those cases, and the opinion in the subsequent case of *The United States* v. *Baltimore and Ohio Railroad Company*,† that among those who composed the majority in the Barnes cases, there were some shades of difference in the precise grounds on which the validity of the taxes rested.

Without reopening that subject for an inquiry into those differences, it may be said that the question whether the tax

* 17 Wallace, 294.

† 17 Ib. 322.

was, in those cases, a tax on the shareholder or on the corporation, was, and is, one of form rather than substance.

The tax is imposed by the statute alike on all dividends declared, and on all undistributed earnings of the corporation, and it is made the duty of the corporation to pay it.

It is also made the duty of the corporation to make returns of these dividends and undivided earnings to the proper internal revenue officer, under a heavy penalty.

In the case of dividends declared, the corporation is authorized to deduct the amount of the tax from the dividend due to the shareholder, before paying it to him.

And it follows from this, that when a dividend is declared to any shareholder, whose dividend is for any special reason exempt from such tax, as in the case of the city of Baltimore on her stock in the railroad company, then the corporation declaring the dividend is not liable.

The effect of such a tax on the shareholder is the same, whether it be considered a tax on his share for the dividend earned by his share, or on the corporation on account of said earnings. And it is the same, whether the tax is imposed on the undivided earnings, or on those earnings after they have been divided. He in any and all these cases, in point of fact, ultimately suffers to that extent, or loses the amount of the tax. We are of opinion that the statute intended to tax those earnings for the year 1869, whether divided or undivided, and that the tax now in question is to that extent valid.

The question arising out of the tax in these cases, so far as the dividends are based on the earnings of the corporation for the year 1870, presents other considerations.

In the view taken by this court in the Barnes cases, it did not become necessary to pass upon the validity and effect of the seventeenth section of the act of 1870.* That is entitled an act to reduce internal taxes, and for other purposes. It repealed several sections of the internal revenue law absolutely. It fixed a period in the future for the cessation of

* 16 Stat. at Large, 261.

others, and it reduced the income tax in a certain class of cases from five to two and a half per cent., and provided for its continuance through the years 1870 and 1871; at the end of which all income tax was to cease.

The section we are considering declared that sections 120, 121, 122, and 123 of the internal revenue law of 1864, as modified by subsequent statutes, "shall be construed to impose the taxes therein mentioned to the first day of August, 1870, and after that date no further taxes shall be levied or assessed under said sections; and all acts or parts of acts relating to the taxes herein repealed, and all the provisions of said acts shall continue in full force for levying and collecting all taxes properly assessed, or liable to be assessed, or accruing under the provisions of former acts," &c., &c.

But for the unfortunate and unnecessary use of the word "construe" in this sentence, we apprehend that none of the resistance to the class of taxes now under consideration would have been thought of.

The right of Congress to have imposed this tax by a new statute, although the measure of it was governed by the income of the past year, cannot be doubted; much less can it be doubted that it could impose such a tax on the income of the current year, though part of that year had elapsed when the statute was passed. The joint resolution of July 4th, 1864, imposed a tax of five per cent. upon all income of the previous year, although one tax on it had already been paid, and no one doubted the validity of the tax or attempted to resist it.

Both in principle and authority it may be taken to be established, that a legislative body may by statute declare the construction of previous statutes so as to bind the courts in reference to all transactions occurring after the passage of the law, and may in many cases thus furnish the rule to govern the courts in transactions which are past, provided no constitutional right of the party concerned is violated.*

* Sedgwick on Statutory Law, 253; Municipality No. 1 *v.* Wheeler, 10 Louisiana Annual, 747.

In the case of the *Wheeling Bridge*,* this court, in a suit brought under its original jurisdiction by the State of Pennsylvania, had declared the bridge a nuisance and decreed its modification or abatement. Congress then passed a law declaring it a post route and a lawful structure as it stood, and this court recognizing the right of Congress to regulate such a bridge under the commerce clause of the Constitution, dismissed the case from its further consideration.

This doctrine is reaffirmed in the case of the *Clinton Bridge*.†

It is undoubtedly true that, in our system of government, the law-making power is vested in Congress, and the power to construe laws in the course of their administration between citizens, in the courts. And it may be conceded that Congress cannot, under cover of giving a construction to an existing or an expired statute, invade private rights, with which it could not interfere by a new or affirmative statute.

But where it can exercise a power by passing a new statute, which may be retroactive in its effect, the form of words which it uses to put this power in operation cannot be material, if the purpose is clear, and that purpose is within the power. Congress could have passed a law to reimpose this tax retrospectively, to revive the sections under consideration if they had expired, to re-enact the law by a simple reference to the sections. Has it done anything more? Has it intended to do anything more? Are we captiously to construe the use of the word "construe" as an invasion of the judicial function where the effect of the statute and the purpose of the statute are clearly within the legislative function?

A critical view of the whole of the statute of 1870 shows that it was designed to recast the internal revenue laws, to repeal some taxes, modify others, and declare the re-enactment or continuance of others for a limited time. And this was especially true of the class of taxes embraced under the general head of income taxes of all kinds. The paragraph

* 18 Howard, 421.

† 10 Wallace, 454.

we have been considering was not in its essence an attempt to construe a statute differently from what the courts had construed it, for no construction on this subject had been given by any court. Nor was it an attempt by construing a statute to interfere with or invade personal rights which were beyond the constitutional power of Congress. But it was a legitimate exercise of the taxing power by which a tax, which might be supposed to have expired, was revived and continued in existence for two years longer.

It was, therefore, valid for that purpose, and the tax must be upheld. It follows that on the agreed statement of facts judgment should have been rendered for the defendant in the Circuit Court, and the judgment of that court is reversed and the case remanded, with directions to enter such a judgment.

This opinion disposes of all the cases, thirteen in number, in which Stockdale is plaintiff in error, submitted with this, and the same judgment is rendered in each of these cases.

Mr. Justice BRADLEY (with whom concurred the CHIEF JUSTICE).

Whilst I concur in the opinion of the court, it seems to me that the decision may be placed on a still more satisfactory ground.

The taxes in question were levied in 1870 under the 120th and 122d sections of the Internal Revenue Act of 1864, as amended. They were, in some cases, for earnings made in 1869, but divided in 1870, and in others for earnings made partly in 1869 and partly in 1870 (prior to the first of July, in the latter year), and divided in 1870, prior to July, except in one case, in which the dividend was declared on the 5th of July.

If the 119th section of the Internal Revenue Act, which directed that the income tax should cease to be collected in 1870, did not apply to the taxes imposed by the 120th and 122d sections, there is no doubt of the validity of the taxes in question, for there was no other limitation of time affixed to those sections except that made by the act of July 14th,

1870, which declared that sections 120 and 122 should be in force until the 1st of August, 1870, and no longer. I am clearly of opinion now, as I always have been, that the 119th section did not apply to the taxes imposed by sections 120 and 122. The group of sections from 116 to 119, inclusive, stood by themselves in the Internal Revenue Act of 1862 under the head of "income tax," forming sections 89 to 93 of that act. They related to the annual income tax payable by individuals directly. They did not include the taxes payable by banks, insurance, railroad, and canal companies in respect of their dividends and earnings, and in respect of the interest on the bonds of the latter companies. The latter taxes were payable at a different time and in a different manner. The personal income tax was carefully defined, and the respective duties of the individual and the assessor in reference to it were first fully set forth, and then came the 119th section, which, in conclusion, directed when the tax for each calendar year, thus imposed, should be levied, and when it should be paid, namely (as directed in the last revision), it was to be levied in March and paid before the 30th of April in each year, "until and including the year 1870, and no longer." This last expression is the one on which this whole question has been raised. By the connection of the sentence, the meaning of the terms, and the rules of logic as well as grammar, this phrase can only apply to the annual personal tax of which alone section 119 is treating.

The taxes imposed by sections 120 and 122 on the banks, insurance, railroad, and canal companies (which were never included in the annual income tax, but expressly excluded, or excepted therefrom) may be, as, in the Baltimore and Ohio Railroad case, we decided they were substantially, taxes on the stockholders and bondholders, though nominally, and in form, imposed on the companies. Still, they are not referred to in the 119th section. The only taxes referred to in that section were those annual taxes, payable directly by the individuals themselves, in April (or some other month) of each year. The corporation taxes were not thus payable, and were not included in the limitation.

The phrase in question is first found in the Internal Revenue Act of July 1st, 1862, 12 Stat. 474, sec. 92. That act is divided into various parts, ranged under distinct and separate headings, which are inserted in large capitals in the body of the act. Thus we have sections 68 to 75 under the head of "*manufactures, articles, and products;*" section 76, under "*auction sales;*" section 77, under "*carriages, &c.;*" sections 78 and 79, under "*slaughtered cattle, hogs, and sheep;*" section 80, under "*railroads, steamboats, and ferry-boats,*" imposing a tax of three per cent. on gross earnings; section 81, under "*railroad bonds,*" being the section corresponding to section 122 in the act of 1864; sections 82 to 85, under "*banks, trust companies, savings institutions, and insurance companies,*" corresponding to sections 120, 121 in the act of 1864; sections 86, 87, under "*salaries and pay of officers, &c.;*" section 88, under "*advertisements;*" sections 89 to 93, under "*income duty,*" corresponding to sections 116 to 119 of the act of 1864, and so on. Under the last head, section 92 commences as follows: "That the duties on incomes herein imposed shall be due and payable on or before the 30th day of June, in the year 1863, and in each year thereafter, *until and including the year* 1866, *and no longer;* and to any sum or sums annually due and unpaid for thirty days after the 30th of June, as aforesaid, and for ten days after demand thereof, &c., there shall be levied, in addition thereto, the sum of five per centum, &c., as a penalty, &c." Here we have the exact language of section 119 in the act of 1864 and its subsequent amendments. An inspection of the act of 1862 shows demonstrably that the language of this section refers only to the income tax imposed by section 89, which exactly corresponds to section 116 of the act of 1864. I believe no one who has carefully examined the act of 1862 ever had a doubt on the subject.

Now, all these various provisions for different classes of taxes are contained in the act of 1864 and the several acts amendatory thereof, but somewhat differently collocated. Thus the sections on income duty in the latter act are sections 116 to 119, and come before the sections on railroad

bonds, banks, &c., which are sections 120 to 122. But the general frame of the sections, and the language used in each respectively, are the same. Can it be possible that the phrase, "*until and including the year* 1870, *and no longer*," in section 119 of the latter act, standing, as it does, in substantially the same sentence and relative section as the corresponding words did in the act of 1862, embraced within their scope whole classes of taxes which it did not embrace in the act of 1862? taxes totally repugnant as to time and manner of payment to those described, and specially referred to in the section and sentence where the words occur. Such cannot, it seems to me, be the true construction of the act.

It is not necessary for us to explain why it was that a period was fixed to the income tax proper, and not to the taxes payable by the companies on dividends and interest. The former was an exceedingly odious tax, involving an inquiry into all the sources of every individual's income, and it may well have been the design of Congress to indicate from the start that it was to be only temporary in its operation. But no one, I think, can carefully compare the two acts, of 1862 and 1864, without coming to the conclusion that the limit of the income tax was affixed only to that tax designated as "income tax" in the act of 1862.

JUDGMENT REVERSED.

Mr. Justice STRONG, with whom concurred Justices DAVIS and FIELD, dissenting.

I dissent from the judgments given in these cases, and from the reasons assigned in support of the judgments.

If it ever was claimed, it is no longer contended by any one that the tax on dividends and Federal salaries, for the collection and payment of which provision was made by the 120th, 122d, and 123d sections of the Internal Revenue Act of 1864, and its amendments, was not a tax upon income, and a part of the income tax levied by the 116th section of the act. And, notwithstanding what was decided in *Barnes*

v. *The Railroads*,* I regard it as having been settled by the subsequent case of *The United States* v. *The Baltimore and Ohio Railroad Company*,† that the tax on dividends declared and interest payable by the companies mentioned in the 122d section was a tax upon the stockholders and bondholders of the companies, and not a tax upon the corporations. Of this opinion were all the judges of this court except two. Though the corporations were by the law made agents of the government for collecting it and paying it over, the tax itself was ruled to be a part of the income tax of the persons entitled to the interest or dividends. For the same reasons which compelled such a decision, the tax upon dividends declared by banking, trust, and insurance companies, and the tax upon Federal salaries, for the collection and payment of which provision was made in the 120th and the 123d sections of the act, were income taxes of the shareholders of those companies, and of the officers from whose salaries they were directed to be deducted.

And if this be so, then the tax in controversy in these cases was a tax upon the income of 1870, and not upon the income of 1869. None of the dividends were declared until after January 1st, 1870, and some of them not until many months after that date. True the funds out of which the dividends were made were composed of earnings of the company, in some cases wholly and in others partly, in 1869; but these earnings were not available to the shareholders until the dividends were made out of them. Until then they were in no sense the income of the shareholders and taxable as such. In the express words of the act, it was income *derived* by the taxpayer which alone was made subject to the tax. The language of the law was that the duty on the dividends should be paid "*whenever the same*" (that is the dividends) "*shall be payable.*" And such was the construction which was from the beginning given to the act. Prior to the enactment of 1864 there was an income tax on dividends at the rate of three per cent., and when by that act

* 17 Wallace, 294. † Ib. 322.

the rate was raised to five per cent., the Commissioner of Internal Revenue issued a circular, dated July 1st, 1864, declaring that "all dividends payable on and after July 1st, 1864, no matter when declared, are subject to the duty of five per centum." Much more, if dividends are not income before they are payable, are they not income before they are declared? I repeat, then, the taxes in controversy now were taxes upon the income of the shareholders for the year 1870. They were, therefore, not authorized by the statute.

The 119th section of the act, I think, put an end to all taxes on income derived from any source after December 31st, 1869. Its language was, "the duties on incomes herein imposed shall be levied on the first day of May, and be due and payable on or before the 30th day of June in each year, until and including the year 1870, and no longer." Construing this, as it must be construed, in connection with the 116th section, the matter is plain. That section declared that the income duty provided for in the act should "be assessed, collected, and paid upon the gains, profits, or income for the year ending the 31st day of December next preceding the time for levying, collecting, and paying said duty." The tax authorized to be levied in May, 1870, and the last authorized by the act of 1864, or any of its amendments, was a tax upon the income derived by the taxpayer in 1869.

Returning, then, to the 119th section, it plainly limited the duration of the tax upon income of every kind—all income upon which the act imposed a tax. It excepted none. It did not speak of taxes on income, a return of which was required to be made by the taxpayer, but its language was, "*the duties herein imposed.*" The 119th section imposed no tax. Its reference, therefore, must have been to taxes imposed by other sections of the act; to those imposed by the 116th section, which were taxes on income from any source, whether dividends of railroad companies, or banks, or insurance companies, or any other corporations not particularly specified. It is true the 119th section makes no particular mention of taxes on that portion of income mentioned in the

120th, 122d, and 123d sections; but such mention would have been superfluous. They were included in the large classification, "the duties herein imposed." The taxes upon such dividends had been paid before the expiration of the previous year; and the act guarded against double taxation by authorizing a deduction from the required estimate, by the assessor, of the income on which the tax had been paid.

Indeed, I think it impossible to escape from the conclusion that the 119th section was intended to enact that no tax should be levied or collected upon any income which was not received by the taxpayer or derived by him, or which did not accrue to him on or before the last day of December, 1869. Any other construction would make the law offensively discriminating and grossly unequal. I cannot believe Congress intended that one who had lent his money to a telegraph company, to a bridge company, or to a mining or manufacturing company, or one who might receive dividends made by such companies, should be exempt from a tax upon his interest and dividends received after December 31st, 1869, while one who had lent to a canal, railroad, banking, insurance, savings fund, or trust company, or who derived dividends from them, should continue indefinitely to pay an income tax on his interest and dividends. I cannot believe it was intended to tax the salaries of officers of the United States after the expiration of the tax upon all other salaries. I will not attribute such injustice to Congress. I discover no intent to make such odious discriminations, and, in my opinion, such an intent ought clearly to appear before a court would be justified in giving the construction to the act which works such a result.

I need say no more upon this part of the case. If the tax upon dividends, made by banking, trust, and insurance companies, the tax upon railroad dividends, and upon salaries of Federal officers was a tax upon income; if the tax mentioned in the 120th and 122d sections was a tax upon the shareholder, or loanholder, and not upon the corporations; if dividends declared in 1870 are not income of the shareholders in 1869; and if the 119th section put an end to all

income tax upon income not received by shareholders in companies on or before December 31st, 1869, each of which I have endeavored to show, the right disposition of the cases before us is clear. The several companies who are defendants in error were not authorized to retain any tax out of the dividends made to their shareholders in 1870. No such tax had any legal existence, and the companies were under no obligation to pay it. The judgments they have recovered for the sums illegally exacted from them ought, therefore, to be affirmed.

I do not overlook the later act of Congress, passed July 14th, 1870, to which a majority of my brethren attach some importance as bearing upon these cases. The 17th section of that act enacted "that sections 120, 121, 122, and 123 of the act of June 30th, 1864, entitled 'An act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes,' as amended by the act of July 13th, 1866, and the act of March 2d, 1867, shall be construed to impose the taxes therein mentioned to the first day of August, 1870, but after that date no further taxes shall be levied and assessed under that section." This was, doubtless, intended as a legislative construction of the sections of the act designated. I shall not turn aside to inquire at length how far the law-making power can determine authoritatively the meaning of an existing statute. The construction, or interpretation, of a statute would seem to be, ordinarily, a judicial rather than a legislative function. I know that acts declaratory of the meaning of former acts are not uncommon. They are always to be regarded with respect, as expressive of legislative opinion, and, so far as they can operate upon subsequent transactions, they are of binding force. But it is well settled they cannot operate to disturb rights vested or acquired before their enactment, or to impose penalties for acts done before their passage, acts lawful when they were done. It is always presumed the legislature had no intention to give them such an effect.

Now, if the income tax imposed by the act of 1864 and its supplements expired with the 31st of December, 1869; if

the act did not prescribe a tax upon dividends made after that date, as I have endeavored to maintain, it was not the duty of these defendants in error to pay to the collector five per cent. of the dividends made by them in 1870, and they had no authority to detain any portion of such dividends from their stockholders. On the contrary, it was their duty to pay over the entire dividends to the shareholders, who acquired a vested right in them as soon as they were made, and calling upon them to pay a tax on those dividends was an attempt to enforce a duty that had no existence. It was substantially an effort to enforce a penalty for an omission to do that which they had no right to do, a penalty equal to the amount of a five per cent. tax on the dividends, with an additional five per cent. thereon. The companies, at most, were merely agents of the government to collect a tax from the shareholders and pay it over. Their liability, if any, arose out of an unlawful failure to discharge these duties. But there was no such duty when the dividends were made. Surely the declaratory act of 1870 cannot be regarded as operating retrospectively to make the act, or omission, of these companies unlawful, and punishable as an offence, when the act, or omission, was innocent at the time when it occurred. Were it conceded that the construction given by Congress is binding in all cases where it would not disturb vested rights, or operate practically as an *ex post facto* law, it can have no application to such a case as the present.

Of course, I am not to be understood as maintaining that when the declaratory act was passed Congress had no power to impose a tax upon any income that had been received before that time. What I mean to assert is that it cannot be admitted Congress intended by the act of 1870 to subject any institution to a penalty for not having, before its passage, collected and paid a tax which had not been imposed. The act, therefore, in my judgment, has no application to the present cases, and I think the judgments should be affirmed.

WASHING-MACHINE COMPANY *v.* TOOL COMPANY.

1. The reissued letters-patent (No. 2829) for a new and improved clothes-wringer, granted to Sylvanus Walker, assignee, on the 31st day of December, 1867, construed to be for a U-shaped yoke or frame for supporting a wringing-machine, and for the combination of such a yoke with a clamping device, when employed to hold a clothes-wringer to the side of a wash-tub, and the U form of the frame is essential to it.
2. The use of a portable support for a wringing mechanism which has some of the features of the patentee's device, but which has not the U-formed yoke, or frame, is, therefore, no infringement of the patent.

APPEAL from the Circuit Court for the District of Rhode Island.

The Washing-Machine Company, assignee of Sylvanus Walker, this last being assignee of one Sergeant, filed a bill in the court below against the Providence Tool Company, for an infringement of Division No. 2829, of a patent for an improvement in clothes-wringers. The original patent was granted to Sergeant, July 27th, 1858, and was reissued in two divisions, the one in suit being dated December 31st, 1867. Although the matter which was in issue in the present suit was confined, so far as the complainant's title was concerned, to the reissue No. 2829, it may be well to describe the wringing-machine which was the subject of Sergeant's original patent, and out of which the invention patented in the reissue No. 2829 was carved.

The original machine belonged to the class of clothes-wringers long known as "twist wringers." In these, clothes are wrung by *twisting* them into a rope in the same manner as without a machine the washerwoman twists them by hand. This sort of machine differs from another and well-known class of wringers, in which "squeezing rollers" squeeze out by *pressure* water from clothes passed between them. Both sorts of machines had been in use for many years prior to the patent to Sergeant.

In the original machine of Sergeant, Figure 1 represents a yoke-frame of U form, the curved portion being an arc of

a circle. This yoke had a pair of jaws and a clamp-wedge for securing the frame to the side of a tub. To the yoke frame a hinged frame E was attached, which, when in position, stood at right angles with the yoke, as shown in the engraving. At the middle point of the cross-bar which united the two sides of the hinged frame there was set a "hitching-pin," F, around which the clothes to be wrung were partially wound and held fast by the left hand of the washerwoman, while with her right hand she turned the rotary clamp in Figure 2, which formed a part of the machine, and which gave to the clothes the twist which expelled the water.

The rotary clamp shown at Figure 2 must be supposed to be set in the yoke B of Figure 1. It had a ring, H, with

FIG. 1.

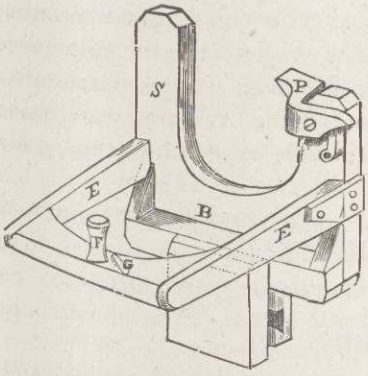
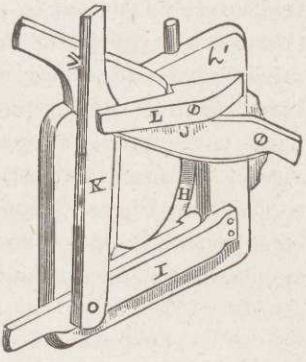


FIG. 2.



flanged edges to hold the clamp in the yoke. I and J were lever jaws which jammed against the portion of the clothes inside the ring, and K was a gag for locking the levers. The outer edge of the ring, H, was furnished at intervals with notches, with which the pawl, P (Figure 1), could be made to engage, so that the rotary clamp, when the clothes were twisted, could be prevented from turning backwards, and the washerwoman would be able, if she wished to do so, to gripe with both hands around the hitching-pin, F, the portion of the clothes "rendered."

With the exception of the model in the Patent Office, there was no evidence that a machine of the kind had ever been constructed. It was too complicated to be practicable.

Such being the machine, the Washing Machine Company, complainant in this case (or Sylvanus Walker, rather, from whom the complainants got it), bought the patent of Sergeant, and obtained the reissue on which this bill was founded.

The apparent idea in getting the reissue was that the apparatus shown at Figure 2 was a wringing mechanism, and was the equivalent of a pair of *squeezing rollers;* that the yoke-frame (Figure 1) was an apparatus separable from the clamp (Figure 2), and performed the office of supporting such wringing mechanism; and furthermore, that such supporting mechanism was peculiar in the fact that it had a clamping jaw attached to it which made it capable of being temporarily fastened to a tub. The complainant proposed, therefore, to divide the machine and to claim the yoke-frame and its device for being clamped to a tub, as a separate structure, without regard to whether the wringing mechanism used with such "supporting and connecting apparatus" were rollers or a twister.

The cut, Figure 3, on the page opposite, represents the structure claimed in the reissue under consideration. The specification and claims in this reissue were thus:

"SPECIFICATION.

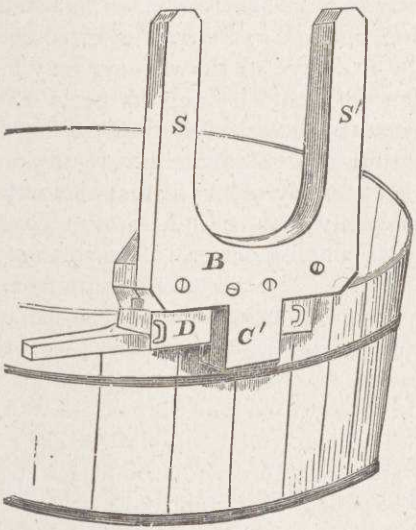
"The first part of this invention consists of a portable machine, which may be temporarily attached to one side of a common wash-tub, or readily disconnected therefrom, whenever desired, and is especially adapted to wringing clothes.

"The second part of this invention consists in a portable frame, and employed for supporting the wringing mechanism of the machine upon one side of a common wash-tub, by means of a clamping device, which is made to gripe one side of a wash-tub, for the purpose of attaching and sustaining temporarily the entire wringing mechanism of the machine upon one side of a common wash-tub, in a firm and expeditious manner, regardless of the diameter of the tub, which greatly accelerates

the operations of washing, rinsing, and wringing of clothes, as will be hereinafter more fully set forth and described.

"In the drawings annexed, A represents a common wash-tub. B is a yoke whose inner margin is of U form, the sides of which extend upwards, forming uprights S S^1. From the lower end of yoke B extend two jaws, C C^1, the latter of which contains,

FIG. 3.



within a dovetail groove, a wedge or key, D, whose exposed side is made slightly concave, as shown in Figure 2. The office of the above-described jaws and wedge is to hold the frame, composed of the yoke B with uprights S S^1 for supporting the wringing mechanism of the machine, in position for use, on one side of a common wash-tub, in a permanent manner, temporarily, regardless of the diameter of the tub or the thickness of its rim, in reference to which service they are termed collectively the 'vise.'

"This arrangement affords great facility for successively washing, rinsing, and wringing out the clothes from several waters in as many tubs, the wringer being readily changed from tub to tub.

"Omitting to describe the general features of the wringing

mechanism of the machine, which will form the subject of another application for letters-patent, of even date with this, and then more particularly the frame for supporting the wringing mechanism in position, and the clamping device by which the frame for holding the wringing mechanism is attached to one side of a common wash-tub, which forms the subject of the present invention.

"When it is desired to have free access to the tub, the wringer may be instantly removed therefrom, so as to allow the operations of washing, rinsing, and wringing to succeed each other, without trouble or delay; or the wringer may be detached instantly, for the purpose of cleaning its parts where dirt is apt to lodge—a common necessity to avoid soiling the next batch after dealing with much soiled or colored garments.

"It will be particularly observed that this wringing-machine differs very materially with those heretofore constructed, in its attachment, by a clamping device, to one side only of a common wash-tub, so it can be constructed separate from and independent of the wash-tub, to which it may be clamped, whenever desired, regardless of its size or diameter; and a further distinctive feature consists in the manner of operation. The wringer being placed in position on one side of the tub, and the jaws made to gripe the same firmly, the clothes are admitted to the wringing mechanism of the machine, and pass through it as fast as the water is expelled therefrom, and they are received at the opposite side of the machine into a basket, piece by piece, as they are wrung out. By this means articles that are of lighter fabric, as lace curtains, can be operated upon lightly, as those that are heavy require more force. By this means lace curtains may be wrung without injury, as the force required to expel the water, when all are wrung together in a bag, will tear the lighter fabrics before the water is sufficiently expelled from those that are stout and heavy.

"I am thus enabled to construct a wringing-machine as a separate and independent device from the wash-tub, box, or other receptacle for receiving the water when expelled from the clothes.

"Wringers heretofore constructed have been attached to the opposite sides of the box or vessel, consequently could not be readily attached to common wash-tubs of various diameters, therefore the box must be of a diameter to correspond to that

for which the wringer is adapted, and would thus constitute a part of the device or wringing-machine. Thus, by means of the portable frame for holding the wringing mechanism adapted to clamp the edge of one side only of a common wash-tub, I am enabled to overcome the serious objections referred to above.

"In the clamping device of the invention, a wedge or set-screw, cam, or spring, when having a bearing, so that when power is applied to them they, in conjunction with the jaws, gripe the edge of the tub, as a 'vise,' may be used, in the manner and for the purposes set forth.

"CLAIM.

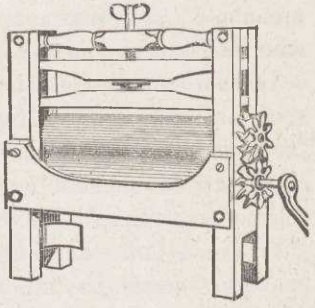
"Having thus described the invention, what is claimed as new, and desired to be secured by letters-patent, is—

"1. The employment or use of a portable frame or yoke, B, with uprights, S S^1, or their equivalents, for supporting a clothes-wringing mechanism in position on one side of a common wash-tub, for the purposes set forth.

"2. The application of an adjustable clamping device, when employed to attach a clothes-wringer to one side only of a wash-tub, substantially in the manner described and for the purposes set forth."

The defendant's machine (of which a drawing appears just below, Fig. 4) had two uprights. It had also a cross-piece connecting the lower parts of these uprights. It also had jaws which extended below the yoke, in positions to embrace the side of a wash-tub, to which the machine was to be applied; these jaws being fitted with a screw for the purpose of securing the machine to the object to which the jaws were to be applied. But, as on reviewing it the court considered, *it had not the U-formed yoke.*

FIG. 4.

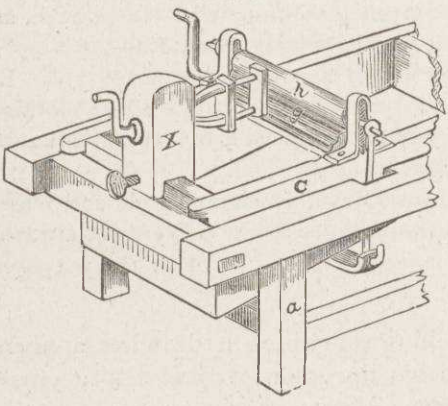


The defendant set up want of novelty in the complainant's invention, so that it became necessary to consider the prior state of the art and fix the extent of the claims in the reissue.

It was not denied that wringing-machines of different forms and of more or less practical value had long been in use, and that devices for clamping or attaching machines of various descriptions to benches, tables, or other articles with which they were used were old and well known. Reels for thread, vises, eyeletting machines, fluting machines, egg-beaters, and small mills had been attached to benches and tables by clamping devices similar in principle to the one described in Sergeant's patent.

It appeared also that a patent for a washing-machine had been issued to H. W. Sabin, August 16th, 1845. The cut, Fig. 5, represents this wringer; the parts marked *h* and *g* being a pair of rollers (one of them fluted), which served as a substitute for the ordinary hitching-pin; one end of the clothes being held fast between these rollers while the other end was secured to a contrivance which held them, so that, by means of the crank supported in the screw-clamp, X, they were twisted and made free from water.

FIG. 5.



In this machine, as the reader will perceive, a wringer—the common twist-wringer—was supported by a standard furnished with jaws and a clamp-screw, the two forming a clamping device such as is in common use in all wringers at the present time. *The standard, however, was not a U-formed yoke-frame*, but was simply a support for the journal of a shaft, although the standard had jaws and a clamping screw adapted to secure the standard to the sides of a wash-tub. Unless, therefore, the U form of the yoke-frame in Sergeant's mechanism was to be considered as an essential part of Sergeant's invention, as distinguished from the standard

in Sabin's machine, which was simply a support for a journal, there was apparently no novelty.

The question, therefore, was whether the U-formed yoke was an essential part of the invention sought to be secured by the reissue. If it was, the defendants did not infringe, since they did not use the U-formed yoke, while the other parts of their machine were old.

The court below held that the reissue was only for a combination, and that "the U-formed yoke-frame in the Sergeant machine was necessary as a device for supporting a clothes-wringing mechanism *in the manner and for the purposes set forth.*"

That court accordingly dismissed the bill, and the complainants appealed.

Messrs. J. H. Parsons and T. A. Jenckes, for the appellants; Messrs. B. H. Thurston and C. L. Woodbury, contra.

Mr. Justice STRONG delivered the opinion of the court.

The only question presented by this appeal is whether the reissued patent has been infringed by the defendants. To a correct determination of this question it is indispensable to understand precisely what the patent covers.

The mechanism described in the specification is not claimed to be a complete clothes-wringer. It is rather a device for suspending a wringer over a common wash-tub, a portable frame which may be attached to one side of the tub, and detached at pleasure. In the description of the drawings accompanying the specification, and a part thereof, it is called a frame for supporting the wringing mechanism of the machine as attached to one side of a common wash-tub by means of a clamping device, and the first part of the invention is said to consist of a portable machine which may be temporarily attached to one side of a common wash-tub or readily disconnected therefrom whenever desired, and is especially adapted to wringing clothes.

The second part of the invention, as described in the specification, consists in a portable frame employed for supporting

the wringing mechanism of the machine upon one side of a common wash-tub by means of a clamping device, which is made to gripe one side of a wash-tub for the purpose of attaching and sustaining temporarily the entire wringing mechanism of the machine in a firm and expeditious manner, regardless of the diameter of the tub. Such is the language of the patentee. The specification then refers to the drawings, in which what is called the first part of the invention is represented as "a yoke whose inner margin is of a U form, the sides of which extend upward, forming uprights." From the lower end of the yoke extend two jaws, one of which contains within a dovetail groove a wedge or key whose exposed side is made slightly concave. The office of the jaws and wedge is to hold the above-described frame or yoke for supporting the wringing mechanism of the machine in position for use on one side of a common wash-tub, in a permanent manner, temporarily, regardless of the diameter of the tub, or the thickness of its rim, in reference to which service they are termed collectively, the "vise." Then follow the claims of the patent, the first of which is "the employment of a portable frame or yoke B (which in the drawings is represented as a U-shaped upright frame), with uprights, S, S′ (the sides of the yoke), or their equivalents, for supporting a clothes-wringing mechanism in position on one side of a common wash-tub, for the purposes set forth."

The second claim is "the application of an adjustable clamping device, when employed to attach a clothes-wringer to one side only of a wash-tub, substantially in the manner described and for the purposes set forth."

Regarding these two claims as descriptive of two distinct things, the first must refer to the U-shaped yoke or frame for supporting a wringing-machine, as exhibited in the drawings, and explained in the specification, and the second to a combination of the yoke with a clamping device, when employed to hold a clothes-wringer to the side of a tub. It need hardly be said that the claims are to be construed with reference to the state of the art at the time when the alleged invention was made. The case shows that clothes-wringers

of many kinds were known and in use before the original patent was granted to Sergeant. These all had frames for holding them in position, some attached permanently to the wash-tub and others detachable. Their prior existence is recognized in this patentee's specification. Clamping devices of many varieties were also old and well-known means of fastening machines or supports for machines to chairs, benches, platforms, tables, and other articles. Apple-paring machines, coffee-grinders, thread-reels, and smith and carpenters' vises had been supported and held in position by devices like in principle to the clamping arrangement described in the complainants' patent. And it is in proof that letters-patent for a washing-machine were granted to H. W. Sabin, on the 16th of August, 1845, in which a clamping device for attaching the support of a wringing-machine to the side of a tub, and in combination with the support was employed; a device consisting of jaws at the lower extremity of the support, with a screw for compression, identical in principle with that claimed by the complainants. It is very obvious, therefore, if their patent can be sustained at all, it cannot be construed as claiming *all* forms of a portable frame or support for a washing-machine, nor a combination of a clamping device with *any and every* kind of such support or frame.

It may well be doubted whether a frame with no distinctive peculiarities, intended for the support of a wringing-machine and sufficient for such a use, though so constructed as to be capable of being attached by projecting jaws to the top of a wash-tub, could be regarded as patentable. Such a mode of attachment has been known and employed time out of mind, and if, before the Sergeant patent was granted, it had not been used in connection with, or as part of a frame or standard for the support of a wringing-machine, the new application, without any novel and useful result, could hardly be considered invention. It would be but a case of double use. Besides, to this extent the Sabin machine had reached years before the Sergeant patent was granted, and, therefore, unless the complainants' patent is limited to some

distinctive features other than the jaws at the bottom of the yoke or frame, it must fail for want of novelty if not for want of invention. And this we do not understand to be seriously questioned. We do not understand the complainants as contending that either of the claims of their patent should not be construed as embracing only the peculiarly constructed frame or yoke described in the specification.

What, then, are the distinctive features of the frame, and what are the proposed offices of these features? Manifestly the thing sought to be secured by the peculiarity of form described was not merely a support for a wringing-machine, not merely a standard to hold the machine in position, but a manner of support. And beyond all doubt the U form of the frame is essential. Indeed, it is the only form exhibited in the drawings and described in the specification. The purpose of the frame is also avowed to be to support the clothes-wringer, and the frame exhibits no means of support except the semicircular bottom of the U, which forms a journal bearer, on which the journal of the wringer may rest, while the uprights serve to keep it in position. By themselves the uprights serve no other purpose, and they are no more essential than is the curvilinear space between them, the bottom of the U in the interior of the yoke. It is true a clothes-wringer might be attached to them by the aid of additional devices, but no such devices are disclosed in the drawings or in the specification, and had they been added the frame would have been substantially different from the one patented. It would have been capable of a new use. Equally well could additional devices have fitted the Sabin standard for use in a manner different from that in which it was employed.

Discarding, then, the jaws and the wedge, or other clamping device, as neither patentable by themselves nor patentable in combination with a wringing-machine supporter, or frame, in view of the state of the art when this patent was issued, unless the structure of the frame was such as to obtain a novel and useful result, it becomes evident that the shape of the frame must be regarded as one of its most im-

portant elements. And if this be so, the novelty of the frame does not consist in its having two uprights standing apart from each other without regard to the figure of the intervening space. As we have seen, if the semicircular shape of what in the specification is called the inner margin of the yoke, that is, of the space between the uprights, is not a necessary constituent, the yoke cannot accomplish the results claimed for it, and no manner of support for a wringer is exhibited. Surely a frame shaped like an inverted M (W), though it would have two uprights separated by a space and connected at the bottom, would be essentially different from that claimed in this patent, because incapable of the same use. It could not support a clothes-wringer in the manner described in the drawings annexed to the patent. A space bounded by right lines is not substantially the same as one bounded by a curve, and unless we throw out of the specification and the claims all that is said respecting the configuration of the interval between the uprights, we must hold that the defendants, in the use of their device, have not been guilty of any infringement of the complainants' rights. They have used a portable support for a wringing mechanism which has some of the features of that of the complainants, but it has not the U-formed yoke, which is essential to the patented combination.

DECREE AFFIRMED.

This case was argued before the CHIEF JUSTICE took his seat, and he did not participate in the judgment.

HAILES v. VAN WORMER.

1. A new combination, if it produces new and useful results, is patentable, though all the constituents of the combination were well known and in common use before the combination was made. But the results must be a product of the *combination*, and not a mere *aggregate* of several results, each the complete product of one of the combined elements.

2. Merely bringing old devices into juxtaposition, and there allowing each to work out its own effect without the production of something novel, is not invention.
3. No one, by bringing together several old devices without producing a new and useful result, the joint product of the elements of the combination, and something more than an aggregate of old results, can acquire a right to prevent others from using the same devices, either singly or in other combinations, or, even if a new and useful result is obtained, can prevent others from using some of the devices, omitting others, in combination.

APPEAL from the Circuit Court for the Northern District of New York.

Hailes & Treadwell, manufacturers of stoves, filed a bill in the court below against Van Wormer et al., engaged in the same business, to enjoin these last from making a certain sort of coal-stoves called "base-burning," "self-feeding," or "reservoir" stoves. These stoves are so called because they have a magazine or reservoir suspended above the fire-pot, which may be filled with coal at its upper extremity. This, when filled, is closed by a cover. The lower end of the reservoir or feeder is left open, and, as the coal in the fire-pot is consumed, that in the reservoir falls and supplies the place of that consumed, the combustion being only in the fire-pot, and not in the reservoir. Every reader, on looking at the diagrams on pages 355, 356 and 357, will recognize the sort of stove referred to.

The value of this sort of stove, which had been in large use in this country for some time, was not a matter of question. But persons were not all agreed as to what was the most economical and otherwise the most advantageous mode of embodying the principle which made the distinguishing characteristic of the stoves.

The bill was founded on two letters-patent; one reissued patent, granted to the complainants, February 3d, 1863, for an "improvement in stoves," the original patent having been granted to Hailes & Treadwell, as inventors, May 7th, 1861; the other a patent granted to one Mead and Hailes, assignees of Hailes & Treadwell, as inventors, August 11th, 1863, for an "improvement in coal stoves;" the interest of Mead in

Base-burning Stove.

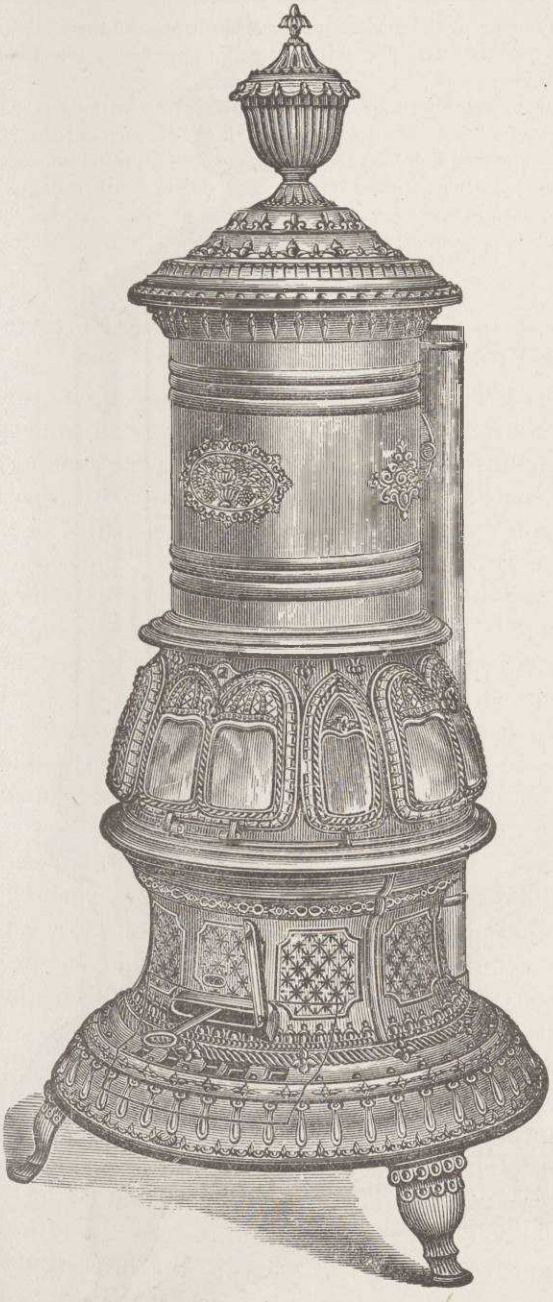


FIG. 1.—Base-burning Stove.

Base-burning Stove without the casing.

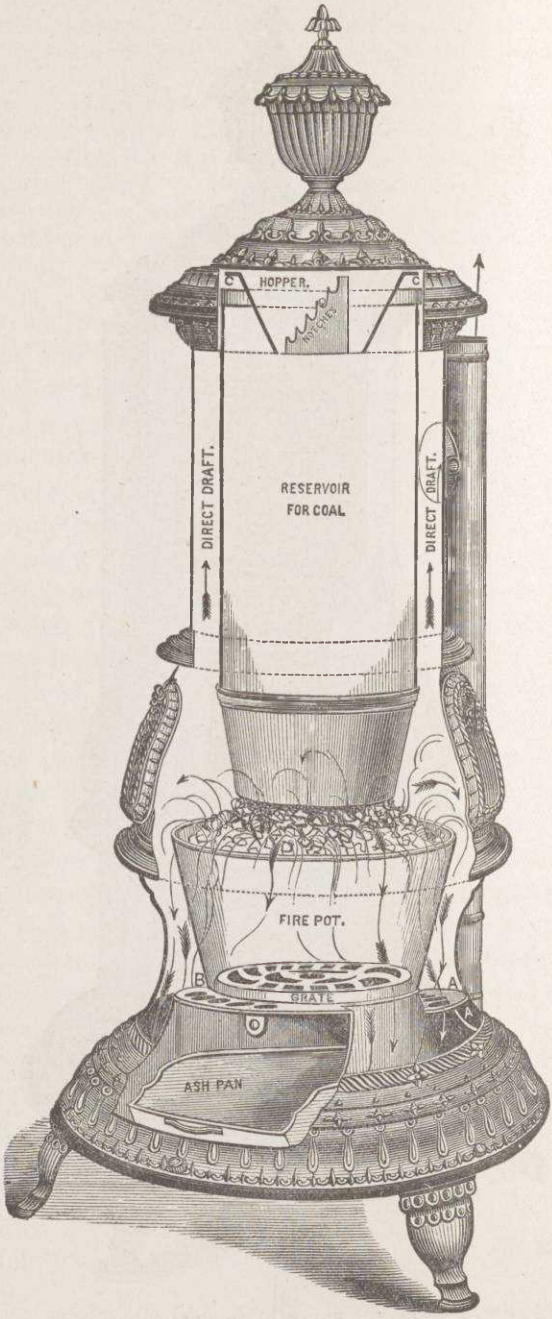


FIG. 2.—Base-burning Stove without the casing.

Vertical section of Base-burning Stove.

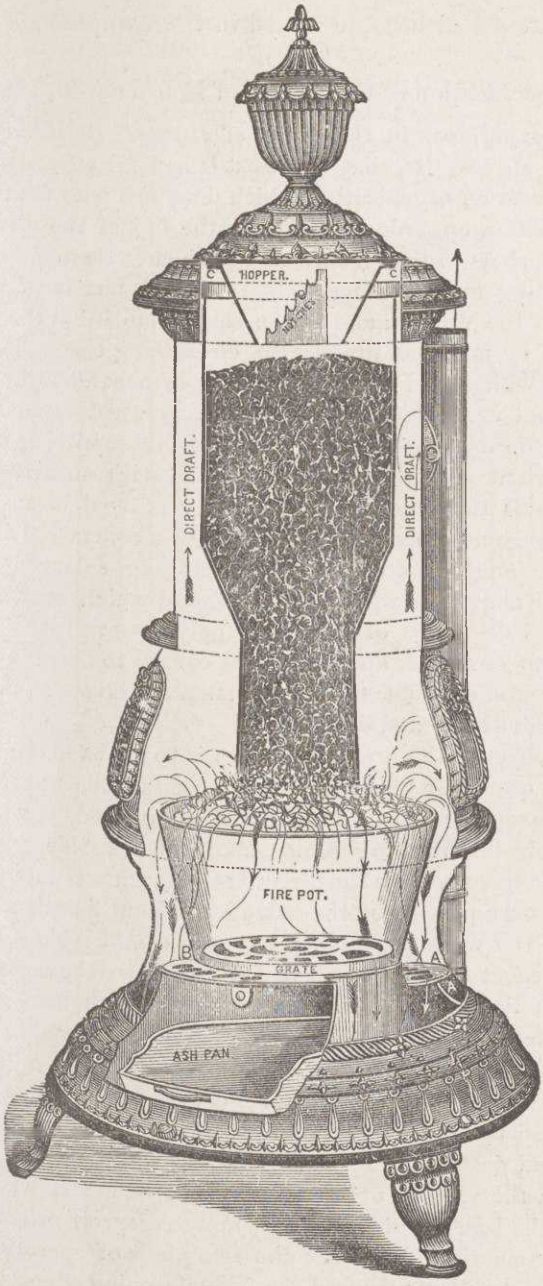


FIG. 3.—Vertical section of Base-burning Stove.

which patent had become vested in the complainant Treadwell.

The specification of the reissue of February 3d, 1863, said:

"Our experience in this class of stoves" (base-burning or reservoir stoves) "is, that the most beneficial effects are to be secured from an organization which does not pass the products of combustion up, around, and over the top of the coal-supply reservoir, so as to heat a surrounding jacket thereof, but heats a circulating or ascending body of air by means of radiated heat from the fire-pot, and at the same time heats the base of the stove by means of direct heat, circulating through descending flues which lead into the ash-pit, or around it, and to the smoke and draft flue; also, that the greatest economy, considering the increased benefit secured from supplying coal continuously out of a reservoir, is attained with an arrangement which holds the superincumbent body of coal in suspension, such arrangement being a reservoir with a contracted discharge extending slightly down into a flaring or enlarged fire-pot, around or above the whole upper edge of which, outside of the contracted discharge of the coal-supply reservoir, the flame is allowed to circulate, and, therefore, caused to descend and circulate around or under the base portion of the stove, in its passage to the smoke and draft flue.

"The effect of the first-named plan is to husband the radiated heat and use it for the purpose of warming the upper part of the stove and the room in which it is situated, as well as for heating air for warming rooms above, if desirable, and at the same time to so confine the direct fire-heat and keep it in contact with the base portion of the stove a sufficient length of time as to insure the warming of the same to a comfortable degree.

"The effect of the second plan is to relieve the incandescent coal from the weight of the body of superincumbent coal, and thus obviate a compression of the incandescent coal in the fire-pot, and secure for the flame a free expansion in a lively and brilliant manner, and thus enable it to act with great heating effect upon the lower portion of the stove in its passage to the smoke and draft flue.

"With the view of organizing a stove or heater which operates on the base-burning or coal-supply reservoir principle, and at the same time embraces the two plans of operation above referred to, we have devised the following plan of construction:

Statement of the case.

"A is a base of our stove, constructed with a chamber B, which extends around and beneath the top plate of the said base. In this chamber air may be admitted through the front passage A. Upon the top-plate of the base A is erected a support C, for horizontal grate D, and a fire-pot E, as shown. The support forms a chamber below the grate, and out of the front of the support

FIG. 4.

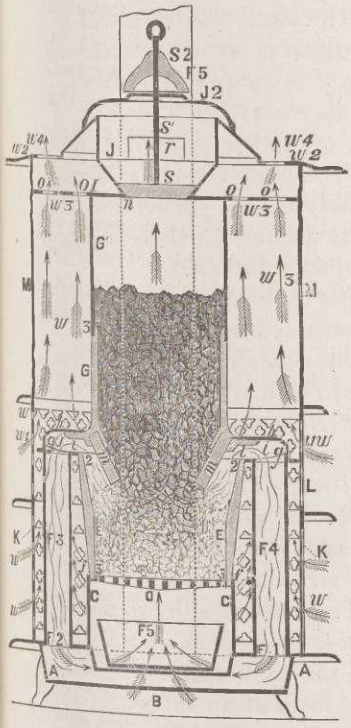
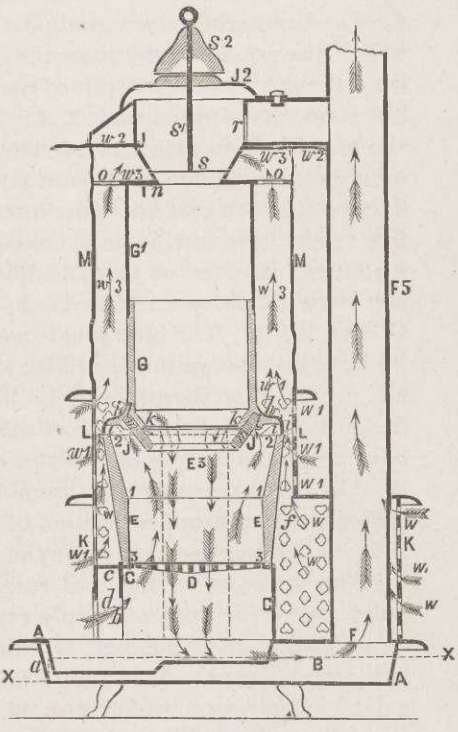


FIG. 5.



a portion of metal is removed as at *b*, so that air to the fire on the grate may have free access when the ordinary regulator or damper is open. In order to insure the passage of the air to the fire only from below the grate, a cut-off, *c*, extends out from the upper front part of the support C, and rests upon the two lateral stops *d*, which extend out from the front of the support, as shown. The top plate of the base, at points outside of the support C, is perforated with three apertures, F, F^1, F^2, which com-

municate with the chamber B. The apertures F^1, F^2, have vertical pipes F^3, F^4, placed in or around them, while the aperture F has the draft and smoke pipe or flue F^5 placed in or around it, as shown. The pipes F^3, F^4, extend up to the upper rim of the fire-pot E, and connect to perforated flanges or ears of said pot, so that a space, *f*, exists between the pipes and fire-pot, as shown. The outer portion of the top edge of the pipes F^3, F^4, protrudes above the flanges to a slight degree, as indicated at g, g.

"The fire pot flares at top and contracts at its bottom; the flare and contraction are gradual. The section of the metal, of which the pot is made, shows a gradual decrease in thickness from the centre of the depth of the pot in an up and downward direction, as indicated at 1, 2, 3. This construction or form of the metal insures an equable heating of the pot at all parts, and a uniform expansion and contraction by the principle of conduction, the thickest and most intensely heated portion imparting to the thinnest or less intensely heated portions a large amount of its heat, on the principle just mentioned.

"Above the fire-pot and vertical pipes the coal-supply reservoir G is arranged. The reservoir is constructed with a flange, *h*, at its base, said flange turning down at its outer edge so as to form a right angle, or thereabouts, as shown at *i*. The rim, *i*, of the flange fits down upon the rim of the fire-pot and incloses the top opening of the fire-pot of the vertical pipes within a continuous chamber J, as represented; the said chamber constituting an enlargement to the upper portion of the fire-pot, as it were, and thus giving increased room for the expansion of the flame.

"The diameter of the coal reservoir is decreased below the point where the body of supply coal is suspended by means of an extension or ring-flange, *k*, which is in form of an inverted frustum of a cone. This flange also serves, in connection with a detachable ring *v*, which, also, is in form of an inverted frustum of a cone, to form a frame or sash for the reception of fire-brick or other fire-proof material, as shown at *m*. The ring v has a horizontal flange, and bolts by the same, to the under side of the flange n of the coal-supply reservoir. The fire-brick are shaped so as to form, when put together, an inverted frustum of a cone, and they, therefore, when clamped between the devices k, v, cannot descend, separately, out of their places, nor can they do so unitedly, as the largest circumference of the conic frustum *m* cannot pass through the space between the lower

ends of the devices k, v. It will be observed that the fire-brick continue the contraction of the coal-supply reservoir, and thus insure a gradual descent of the supply coal upon the central part of the bed of incandescent coal, and at the same time leave a large and open space outside of the conic frustum *m*, for the free burning and expanding of the gases or flame. This result is also furthered by the dishing form of the flange h, the same forming a large circulating flame-channel J, all round the upper edge of the fire-pot, as illustrated.

"The reservoir G is continued up to a horizontal division plate I of the stove, by means of an extension G^1, as shown. The division-plate I has a large coal-induction hole *n* in its centre and several hot-air passages *o o* near its circumference or outside of the circle of the coal-supply reservoir, as shown. Around the central hole n there is constructed a small, combined cylindric and conic hopper J, which is furnished with an adjustable valve *s*, and a removable cover-plate J^2, as hereinafter described. Through and from the rear of this hopper there extends a branch draft-flue *r*, the same leading into the main draft-flue F^5, as shown. In order to open and close this flue (*r*) and also to open and close the induction-hole to the coal-supply reservoir, the taper-valve *s* is fitted to the lower part of the hopper J, and up from the centre of the back of this valve a vertical rod s^1 extends and passes through the removable cover-plate J^2 of the hopper, and also through a weight s^2, as shown. The weight s^2 is not level on its bottom with the top surface of the cover-plate J^2, nor is the quantity of metal on one side of the rod as great as that on the other side. The cover-plate, the valve, the rod, and the weight, are all connected together, so that by taking hold of the rod the whole can be lifted together, that is, when the valve is raised, first, to its full stroke; but the connection is also such that, when the valve is required to be raised a less distance than its full stroke, the movement of the valve is independent of the cover-plate J^2; therefore the branch-flue *r* can be opened and closed or the damper-valve adjusted without disturbing the cover-plate, and whenever such an adjustment of the valve is made, the weight, by reason of its being unbalanced, will automatically bind upon the rod and hold it and the valve in suspension.

"It is desirable to open the branch of the direct draft-flue when the fire is first started, and also before the cover-plate J^2

is removed, first, in order to obtain a powerful draft, and second, to pass off the pent-up gases in the coal reservoir through the branch-flue, instead of allowing them to puff out into the room at the time when fresh coal is being introduced.

"The organization thus far described has but one shell, and in order to make it a double shell or wall-stove a casing, K, L, M, is placed around it from base to top. The part K of this casing incloses a portion of the fire-pot, and of the vertical pipes and draft-flue. This part is finely perforated all around so as to admit air to the first wall, to be heated as indicated at *w*. The part L of the casing incloses the remainder of the vertical pipes and fire-pot, and also a small portion of the coal-supply reservoir, but not the main draft or smoke flue. It is also finely perforated so as to admit cold air, as indicated at w^1. The part M of the casing incloses the remainder of the coal-supply reservoir, and extends up to and unites with a stationary top or finishing plate W^2. This part of the casing is not perforated, but the plate W^2 has perforations through it for the escape of the confined heated air W^3 into the room or into pipes leading to rooms above, as indicated by arrows W^4.

"It will be seen that the air circulates all about the radiating surface, and thus protects the same from rapid destruction by the fire, and while this is the case the air is very thoroughly heated, and discharged in that state into the room where the stove is situated, or into other conductors."

There were in this reissue twelve claims, the first five of which, the complainants alleged, had been infringed by the defendants, namely:

"(1.) A base-burning, coal-supply reservoir stove or furnace, so constructed that the products of combustion do not pass up, around, and above the supply-reservoir, nor up through the grate, but down outside of the fire-pot toward the base of the stove, and out through a main draught flue, which leads directly from a space or chamber about the lower part of the stove, all for the purpose set forth and substantially as described.

"(2.) The contracting of the discharge end of the coal-supply reservoir, the expanding of the fire-pot, and the extending of the flame-passage downward, for united operation, in a base-burning, coal-supply reservoir stove or furnace, essentially as set forth.

Statement of the case.

"(3.) A fire-pot resting on a base, and imperforated on its inner or outer circumference, or from its inner to its outer circumference, and so constructed and applied, with respect to a coal-supply reservoir, that an inclosed horizontal chamber for the free expansion and circulation of the flame and gases, is formed all around and outside of the contracted discharge, and above the upper edge of the fire-pot, substantially as and for the purpose set forth.

"(4.) The descending passage or passages, in combination with the continuous flame-expansion and circulation passage, and a main draft-flue, leading out of the base or lower part of the stove or furnace, substantially as set forth and for the purpose described.

"(5.) Constructing the fire-pot of a base-burning, coal-supply reservoir stove or furnace, with an imperforated circumference and in the form of a trumpet-mouth at its upper portion, in combination with descending flame-passages, substantially as described and for the purpose set forth."

The specification of the patent of August 11th, 1863, stated that the invention covered by it was an improvement on the stove patented by the reissue of February 3d, 1863, and consisted,

"1st. In the construction of an illumination-window or windows, at one or more points in the continuous flame-expansion chamber or channel, which is about the base of the coal-supply reservoir and the top of the coal-burning fire-pot, in combination with a descending flue which leads to a chamber about the base of the stove, and from such chamber into a chimney-flue.

"2d. In the construction of a damper draft-flue in the continuous flame-expansion chamber or channel, located as just stated, in combination with a descending flue, which first leads down into a chamber about the base of the stove, and then into the chimney-flue, with which the damper draft-flue connects directly at the top of the fire-pot."

The patent (see figures on page 364) proceeded:

"Fig. 1 is a vertical longitudinal section of a stove patented by us at previous dates, with our improvements of the present date applied to it.

"Fig. 2 is a vertical transverse section of the whole stove.

Statement of the case.

"Our first improvement is carried into practice by casting the fire-pot A with a rectangular, elliptical, or circular extension *a* (Fig. 1) (6) at one or more points of its upper edge. This enlargement we extend through an opening in the outer casing or jacket B of the stove, and close it with mica or other transparent material C, as shown. We may find it more practical to form a short ledge on the upper edge of the fire-pot, as at b, and cast the

FIG. 6.

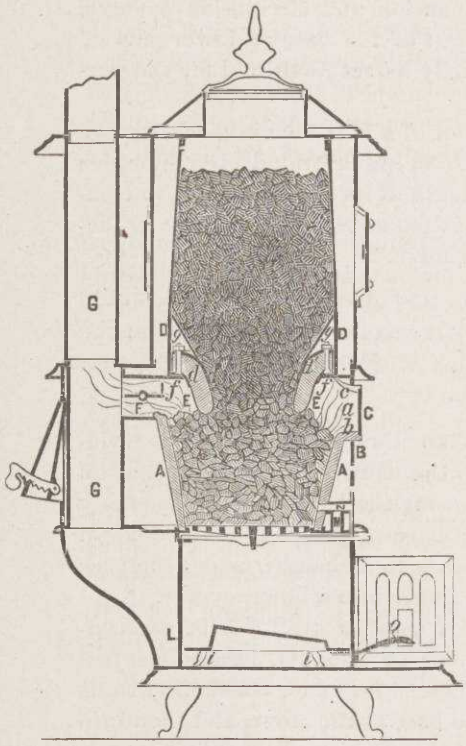
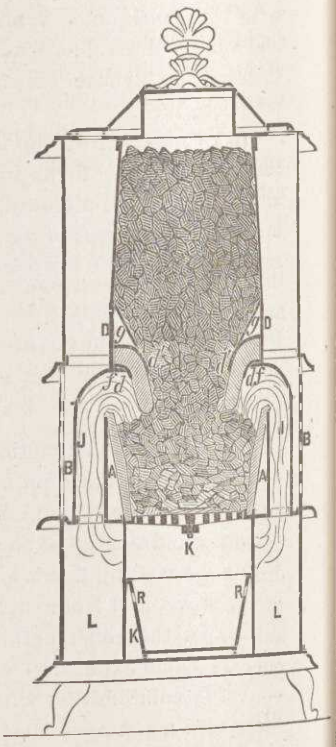


FIG. 7.



enlargement c on the part D, which forms the expansion-flame passage E, as shown. In any case, the illumination-window must be constructed so as to confine the flame and gases at this point within the flame-chamber E.

"Our second improvement is carried into practice by casting in like manner an enlargement of proper form to make a branch-flue F on the upper edge of the fire-pot, or on the lower edge of

the part D, as represented. This branch-flue we run into the smoke-pipe or draft-flue G, and in order to open and close it at will, we have arranged within it a damper or valve I, which has its rod, by which it is turned, extended to the outside of the casing of the stove. By opening the damper a direct draft is obtained, and the fire can be kindled very speedily, and the draft does not have to pass up through the body of coal in the reservoir, as in our other patented stove. When the damper is closed, the highly ignited gases pass down the descending flues J J, as in our former patent. We will here state that we have slightly modified the base of our stove by increasing the depth of the ash-pit K, and dispensing with a chamber or space underneath the ash-pit. This space or chamber L, in which the heated products of combustion circulate to heat the base of the stove, and pass to the draft- or smoke-flue, being only around the ash-pit."

There were in this patent six claims, the first two of which, the complainants alleged, had been infringed by the defendants, namely:

"(1.) The combination of the illuminating openings, flame-expansion chamber, coal-supply reservoir, fire-pot, descending flue and draft-flue, substantially in the manner and for the purpose described.

"(2.) The combination with the flame-expansion chamber, formed at the base of the coal-supply reservoir, and around the upper edge of the fire-pot of a base-burning stove, of the branch draft-flue with damper, when the same are located with respect to the flame-expansion chamber, fire-pot, coal-supply reservoir, and descending combustion-flues, substantially as and for the purpose described."

Certain parts of the things above described were shown by the evidence, or were admitted, not to be new in A.D. 1861, when the complainants professed to have invented their base-burning stove. Among them these:

The introduction of a magazine or reservoir into a stove for the purpose of supplying coal to the fire-pot below.

The contraction of the lower end of the said reservoir, so that it should be smaller than the upper portion thereof,

which, the complainants asserted, aided in sustaining the mass of coal therein, and prevented too great pressure upon the burning coal in the fire-pot.

The construction of a fire-pot of larger diameter at the top than at the bottom.

So also stoves so constructed that the smoke, gas, and other products of combustion passed from the fire-chamber through downward flues to or near the level of the bottom of the stove were common; the revertible flues so-called had long been in use.

In one of the exhibits these products of combustion were passed down and through a chamber in the base of the stove and thence out into the smoke pipe.

The addition of a direct draft to such stoves as were constructed with revertible flues by means of a flue above the fire-pot provided with a damper to be closed after the fuel had been ignited was no novelty.

The use of openings in the exterior or shell of the stove and the insertion of mica therein in order to permit the light emitted in the process of combustion to be seen, had been employed for very many years.

The stove of the defendant, which the complainants alleged infringed their patents, contained in combination several of the devices claimed by the complainants, as—

1. The flaring fire-pot supported by a base, the diameter of the pot narrower at the bottom than at the top.

2. A vessel over the fire-pot to receive the coal, and let it down by way of supply on the fire below; the lower end of the vessel being narrower than the upper.

3. Revertible flues outside of the pot to conduct the products of combustion downwards to the base of the stove and thence to a main draft-flue leading thereout.

4. A direct draft for such stoves as are constructed with revertible flues, the direct draft being obtained by a flue passing out above the fire-pot, and provided with a damper to be closed after the fuel has been ignited.

5. Holes or openings in the iron case of the stove in which to put plates of mica so as to let the fire in the stove be seen

through it, and to give light to the room in which the stove is.

In the defendant's stove, however, there was no such peculiar structure of the lower extremity of the supply reservoir, nor such a closed expansion-chamber as in the complainant's stove; the reservoir did not rest on the fire-pot; nor had it a connection either with it or with the sides of the stove; nor was there anything interposed to the passage of the products of combustion up and around the reservoir when the flue for direct draft was open; and when that flue was closed the flame was not detained over the burning coal, but the products of combustion passed directly across the edge of the fire-pot and descended along its sides to the interior draft-passage.

So, in the defendant's stove, the entire space around the magazine and the fire-pot was completely inclosed. There was but a single chamber around the reservoir over the surface of the burning coal and around the fire-pot. Through this chamber the products of combustion passed, either through the direct draft-flue, when that was in use, or to the base of the stove and thence outward.

The court below dismissed the bill and the complainant brought the case here.

Mr. E. H. Bennett, for the appellant; Mr. C. M. Keller, for the appellee.

Mr. Justice STRONG delivered the opinion of the court.

The sort of stoves known as "base-burners," or self-feeding stoves, had been made and they were well known years before either of the complainants' patents were granted, and it is not asserted that merely as base-burning stoves they are within the monopoly of the patents. The inventions claimed are alleged improvements in the structure and arrangement of such stoves. They consist in what is described as a new combination of old and known devices producing a new manufacture, namely, a stove uniting in itself all the advantages of a reservoir stove, and those of a revertible-draft

stove which prevents the products of the combustion in the fire-pot from passing up, around, and over the reservoir, thereby heating the fuel therein so as to expel its gases, and cause their explosion as well as their escape into the apartments where the stove may be placed. All the devices of which the alleged combination is made are confessedly old. No claim is made for any one of them singly, as an independent invention.

It must be conceded that a new combination, if it produces new and useful results, is patentable, though all the constituents of the combination were well known and in common use before the combination was made. But the results must be a product of the combination, and not a mere aggregate of several results each the complete product of one of the combined elements. Combined results are not necessarily a novel result, nor are they an old result obtained in a new and improved manner. Merely bringing old devices into juxtaposition, and there allowing each to work out its own effect without the production of something novel, is not invention. No one by bringing together several old devices without producing a new and useful result the joint product of the elements of the combination and something more than an aggregate of old results, can acquire a right to prevent others from using the same devices, either singly or in other combinations, or, even if a new and useful result is obtained, can prevent others from using some of the devices, omitting others, in combination.

If now we examine the patents held by the complainants, looking first at the objects sought to be obtained by the combinations for which the patents were granted, they are, as described in the specification, first, to prevent the passage of the products of combustion up, around, and over the top of the coal-supply reservoir, so as to heat a surrounding jacket thereof; and, secondly, to heat a circulating or ascending body of air by means of radiated heat from the fire-pot, and at the same time to heat the base of the stove by means of direct heat circulating through descending flues which lead into the ash-pit, or around it, and to the smoke

and draft flue. A third avowed object is to secure economy by retarding the fall of the coal into the fire-pot from the supply reservoir, and by causing the flame to circulate outside of the contracted discharge of the reservoir, and around the upper edge of the fire-pot, and thence to descend around or under the base of the stove in its passage to the smoke and draft flue. Such are the avowed objects of the combinations claimed to have been devised by the patentees, and their effects they assert to be husbanding the radiated heat, and using it for the purpose of warming the upper part of the stove and the room in which it is situated, as well as for heating air for warming rooms above, if desirable, and at the same time so confining the direct fire heat, and keeping it in contact with the base portion of the stove as to insure warming it to a comfortable degree. A second effect claimed is relief of the incandescent coal from the weight of the body of superincumbent coal, thus preventing the compression of the burning coal in the fire-pot, and securing for the flame free expansion, thus enabling it to act with greater heating effect upon the lower portion of the stove in its passage to the smoke and draft flue.

The combination employed to produce these effects consists of the following devices, among others:

1st. A flaring fire-pot supported by a base, the diameter of the pot being larger at the top than at the bottom.

2d. A magazine or reservoir for supplying coal, located over the fire-pot, and having its lower end contracted.

3d. Revertible passages or flues outside of the pot for the conduct of the products of combustion downwards to the base of the stove and thence to a main draft flue leading thereout.

4th. A direct draft for such stoves as are constructed with revertible flues, the direct draft being obtained by a flue passing out above the fire-pot and provided with a damper to be closed after the fuel has been ignited.

5th. Openings in the case or exterior of the stove and the insertion of mica therein for the purpose of illuminating the

room in which the stove may be with the light of the burning fuel.

These devices *with others* are brought together and claimed as a new combination, and several combinations of some of them are also claimed as inventions, producing novel and useful results. What those other devices are we need not specify, for it is not shown that they are employed by the defendants.

The stove of the defendants does, however, contain all those mentioned and contain them in combination. That each of them was an old device, well known, and in public use before the patents of the complainants were granted is abundantly proved by the evidence submitted. A flaring fire-pot, a supply reservoir with its lower extremity of smaller diameter than its upper, revertible flues, a place for flame expansion above the fire-pot, the addition of a direct draft for use in igniting the fuel, provided with a damper, and the insertion of mica for illumination openings, were all found in stoves before Hailes and Treadwell claimed to have made their invention. It is true there is a peculiarity in the construction of the lower extremity of the complainants' supply reservoir. It is provided with a circular flange, extending outward and bending downward, so as to fit upon the upper rim of the fire-pot, and thus form a closed combustion-chamber. This, of course, cuts off communication with the space around the upper part of the reservoir, and confines the flame and other products of combustion within a circular combustion-chamber thus formed, leaving no outlet for them except through ear passages into revertible flues. For this device, the peculiar structure of the reservoir, and the formation of the closed expansion chamber, there is no equivalent in the defendants' stove. There is no such closed chamber. The reservoir does not rest on the fire-pot. It has no connection with it, or with the sides of the stove. Nor is there any obstacle interposed to the passage of the products of combustion up and around the reservoir when the flue for direct draft is open. And when that flue is closed, the flame is not detained over the burning coal, but the products of

combustion pass directly across the edge of the fire-pot and descend along the sides thereof to the inferior draft-passage. Such an arrangement is not fitted to produce the effects sought and claimed for the complainants' stoves. On the contrary, it plainly excludes them.

There are other differences in the devices used both in the complainants' and the defendants' stoves, which we think are substantial, and not merely formal. The combination claimed by the complainants passes the products of combustion out of the chamber through perforations in the flange or through ears into flues leading downwards but wholly exterior to the fire-pot, and not in contact with it. This arrangement makes it possible to introduce external air through perforations in the outer casing of the stove, and allow it when heated by contact with the fire-pot and the descending flues to escape from the top. Accordingly the outer casing is perforated, and there is no closed magazine around the fire-pot. But in the defendants' stove there is no such device and no such effects are produced. There are no external downward flues separated from the fire-pot. The whole space around the magazine and the fire-pot is completely inclosed. There is but a single chamber around the reservoir, over the surface of the burning coal, and around the fire-pot. Through this chamber the products of combustion pass, either through the direct draft-flue, when that is in use, or to the base of the stove and thence outwards. This arrangement also excludes the possibility of an effect claimed for the Hailes and Treadwell invention. It admits of no space around the fire-pot to which the external air can have access.

It is not, then, the combination of old devices which the defendants use that Hailes and Treadwell invented. It is not those old devices that produce the new results claimed. The complainants' combination is a different thing. It has a greater number of constituent elements. It consists in the employment of the devices used by the defendants, together with others they do not use, and the result of the entire combination is the production of a stove differing very ma-

terially from that of the defendants. And the defendants' combination cannot produce the results claimed for that of the complainants. We have said that the new results claimed, whatever they may be, are not the production of the combined devices common to both stoves. The devices used by the defendants produce no new effects, because used in combination. The space around the fire-pot leading to the base doubtless secures the beneficial results long known to follow the use of revertible flues. It may be conceded to be an equivalent for such flues. But the results of its construction are not changed by the fact that a flaring fire-pot, and a supply reservoir with a contracted discharge end, and openings for illumination are used in the same stove. It still operates to conduct the products of combustion to the base, and into the exit flue. No new operation is given to it by the combination. The same may be said of every other device employed by the defendants which is also in the complainants' combination. Each produces its appropriate effect unchanged by the others. That effect has no relation to the combination; in no sense can it be called its product. Thus far nothing novel is produced. This, then, is mere aggregation of devices, not invention, and consequently the use of those devices, either singly or together, cannot be held to be any infringement of rights belonging to the complainants.

We pass now to consider more in detail the claims in the complainants' patents which it is alleged the defendants have infringed. The first in the reissued patent, dated February 3d, 1863, is unquestionably too broad to be sustained, unless limited to the means described in the specification. So it was doubtless intended by the patentees to be limited, for the claim speaks of the combination claimed "as substantially described," that is, described in the specification. Thus limited, one of its essential elements is a closed combustion-chamber over the fire-pot, formed by a flange of the reservoir resting on the upper edge of the pot, and provided with perforations or ears connecting with two flues passing downwards. This element is indispensable for the purposes

asserted in the claim, as well as in the specification. And the peculiar structure of the chamber is more than formal. It is functional. It prevents the passage of the flame and other products of combustion up, around, and over the supply reservoir, which is a leading avowed object of the invention, precisely the improvement patented. But this constituent of the combination the defendants have never used, nor have they used any corresponding device, or device producing the same results.

The second claim is for contracting the discharge end of the coal-supply reservoir, expanding the fire-pot, and extending the flame passage downward for united operation in a base-burning coal-supply reservoir stove or furnace, essentially as set forth. The means set forth for extending the flame passage downwards are perforations through the flange forming the lateral boundary of the closed combustion-chamber, or ears leading thereout and close flues extending from the ears or perforations downward at some distance from the fire-pot through a space bounded on one side by the fire-pot and on the other by an outer casing of the stove perforated for the admission of external air. It might, perhaps, be questioned whether there is any device in the defendants' stove corresponding to this, but waiving the consideration of that question, it is very evident that the combination of the three devices named is not the work of invention. They have no relation to each other. Neither the form of the feeder, nor the shape of the fire-pot bears at all upon the direction of the draft passages. There is no novel result flowing from the joint operation of the three devices. The revertible flues have no more to do with a stove supplied by a feeder than they would have with a stove supplied by hand. There is, therefore, nothing in this claim that interferes with what the defendants have done.

An essential element of the combinations mentioned in both the third and fourth claims is the closed combustion-chamber formed, in part by a circular flange extending outward and closing on the top of the fire-pot, with perforations in it, or ears for connection with the downward flues, or it is

those perforations or ears leading out of such a chamber to the descending passages. These devices the defendants do not employ, and they cannot be used in the defendants' stove. There has been, therefore, no infringement of these claims.

The fifth claim is the only remaining one contained in the reissue which the defendants are alleged to have invaded. It is constructing the fire-pot of a base-burning stove with an imperforated circumference and in the form of a trumpet mouth at its upper extremity, in combination with descending flame passages, substantially as described, and for the purposes set forth. How in combination? As described in the specification, united by means of perforated flanges or ears of the pot, involving, of course, the presence of a closed combustion-chamber constructed substantially as already described. Construing the claim thus, as we think it must be construed, the defendants have been guilty of no infringement.

Passing now to the second patent, issued August 11th, 1863, we observe that its first claim was for a combination of the illumination openings, flame-expansion chamber, coal-supply reservoir, fire-pot, descending-flue and draft-flue, substantially in the manner and for the purpose described. In the main this is the same combination as that claimed in the reissued patent we have had under consideration. The only change is the addition of illumination openings. These were a well-known device applied to stoves long before either of the patents were granted. They perform no peculiar office in the new combination. They have no possible relation to it. They do not affect, in the slightest degree, the results of that combination, whatever they may be. It is impossible to regard the mere addition of such openings to a stove containing the improvements described in the reissued patent, as the formation of a new patentable combination. It is not invention. If, however, it were, the defendants have not trespassed upon it, for of the combination the peculiarly formed close expansion chamber is an essential constituent, and that is not found in the defendants' stove.

Statement of the case.

Similar remarks might be made respecting the second claim of the patent of August, the only remaining one alleged to have been infringed. All the elements of the combination have not been used by the defendants.

DECREE AFFIRMED.

This case was argued before the CHIEF JUSTICE took his seat, and he did not participate in the judgment.

FERRIS v. HIGLEY.

1. The act of Congress under which Utah was organized as a Territory provided for a Supreme Court, District Courts, Probate Courts, and justices of the peace, and distributed the judicial power among them.
2. It gave to the Supreme and District Courts a general jurisdiction at common law and in chancery, and limited and defined the powers of the justices of the peace.
3. It declared that the legislative power should extend to all rightful subjects of legislation not inconsistent with the Constitution of the United States or with the organic act.
4. The act of the Territorial legislature conferring on the Probate Courts a general jurisdiction in civil and criminal cases, and both in chancery and at common law, is inconsistent with the organic act, and is, therefore, void.

ERROR to the Supreme Court of the Territory of Utah. The case, which involved a question as to the jurisdiction of the Probate Courts of Utah, was thus:

In 1850 Congress passed an act "to establish a Territorial government for Utah;" the organic act governing the Territory.* The act is a long act, of seventeen sections. It defines the boundaries of Utah; establishes an executive power and defines its duties; provides for a secretary of the Territory and defines his duties. It establishes also a legislative power; declares of whom it shall be composed, and

* Act of September 9th, 1850; 9 Stat. at Large, 453.

how the persons composing it shall be elected, and the qualification of the voters electing them.

In defining the legislative power it says among numerous other things:

"SECTION 6. The legislative power of said Territory shall extend to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of this act.

"All the laws passed by the legislative assembly and governor shall be submitted to the Congress of the United States, and *if disapproved shall be null and of no effect.*"

It then thus establishes the judicial power:

"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 same section then declares of how many justices the Supreme Court shall consist; that the President of the United States shall appoint them (as the act also does that he shall the governor, secretary, attorney, and marshal, enacting that the United States shall pay the salaries of all), and how many judges of the Supreme Court shall make a quorum, and for what term their commissions shall run. It divides the Territory into judicial districts, makes District Courts, enacts that the judges of the Supreme Court shall hold them; and adds:

"The jurisdiction of the several courts herein provided for, both appellate and original, and THAT OF THE PROBATE COURTS and of justices of the peace SHALL BE AS LIMITED BY LAW. *Provided*, that justices of the peace shall not have jurisdiction of any matter in controversy, where the title or boundaries of land may be in dispute, or where the debt or sum claimed shall exceed one hundred dollars, and the said Supreme and District Courts respectively shall possess chancery as well as common law jurisdiction."

The act gives power to the *Supreme* and *District* Courts to appoint their clerks, and enacts additionally:

"Writs of error, bills of exception, and appeals shall be allowed in all cases from the final decisions of said *District* Courts

to the Supreme Court, under such regulations as may be prescribed by law. . . .

"Writs of error and appeals from the final decisions of said *Supreme* Court shall be allowed, and may be taken to the Supreme Court of the United States in the same manner and under the same regulations as from the Circuit Courts of the United States."

But though the act goes into full details about the Supreme and District Courts, and, in fact, about everything else relating to the government of the Territory, it says nothing more in any part of it about Probate Courts than the eleven words above quoted, on page 376, in small capitals.

With this act of Congress in force as the fundamental law of the Territory, the Territorial legislature in 1855* passed an act, entitled "An act in relation to the judiciary." That act says:

"The several *Probate Courts* in their respective counties *have* power to exercise *original jurisdiction, both civil and criminal, and as well in chancery as at common law*, when not prohibited by legislative enactment; and they shall be governed in all respects by the same general rules and regulations as regards practice as the District Courts."

Congress had not enacted any act "*dis*approving" of this Territorial act, and thus rendering it, by Federal legislation, null and of no effect.

In this state of enactment, Congressional and Territorial, Higley sued Ferris in the *Probate* Court of Salt Lake County, on a promissory note for $1000, and obtained a judgment there. The case coming into the District Court of the third judicial district, was reversed, on the ground that the Probate Court had no jurisdiction of such a suit; and this judgment being affirmed on appeal to the Supreme Court, it was now brought here by writ of error to that court.

The question, of course, was whether under the organic act of the Territory vesting the judicial power of that Ter-

* January 19.

ritory "in a Supreme Court, District Courts, Probate Courts, and in justices of the peace," and declaring that the jurisdiction of those courts—mentioning specially "that of the Probate Courts"—should be as *limited by law*—the said organic act—in its grant of power to the Territorial legislature to legislate on all "rightful subjects of legislation consistent with the provisions of the act"—meant that the jurisdiction of the courts should be limited—that is to say, should be defined by *its* law—the law of the Territory—alone; or whether it also referred to and included the ancient law, well known in nearly all the United States of America, which fixes the constitution of those courts which under various names, including that of Probate Courts, have the care of the estates and concerns of persons deceased.

Messrs. C. J. Hillyer and T. Fitch, for the plaintiff in error:

It cannot be argued that the establishment and definition of jurisdiction of courts of record is not "a rightful subject of legislation," or that Territorial legislation to that end with respect to local courts, is inconsistent with the Constitution of the United States.

The only inquiry is then whether the Territorial statute conferring common-law and chancery jurisdiction upon Probate Courts is inconsistent with the provisions of the act of Congress.

It is submitted that Congress, in declaring that the jurisdiction of the Probate Courts shall be "as limited by law," intended a law to be hereafter enacted either by itself or by the Territorial legislature, and that the Territorial legislature, in conferring upon the Probate Courts common-law jurisdiction to an unlimited extent, did no more than it was empowered by the act of Congress to do. It is further submitted that the failure of Congress to subsequently annul this act of the Territorial legislature by a disapproving statute validates the exercise of power by the Territorial legislature, even if it had been originally of doubtful validity.

The idea that Congress, in using the words "as limited by law," intended, not statutory enactments alone, but "the

law" in its broader sense, wherein the history of Probate Courts, the constructions of eminent writers and the interpretation of courts as to the powers and jurisdiction of Probate Courts in general are considered as part of "the law," can hardly be sustained. A grant of power from the law-making body, accompanied by a reservation that such power so granted may afterwards be "limited by law," means a law to be thereafter enacted, and not a judicial construction of existing enactments.

Neither can it be argued that, as the section of the act of Congress heretofore quoted confers original chancery and common-law jurisdiction upon the District Courts, it therefore, by necessary implication, excludes such jurisdiction from all other courts under the application of the maxim. The act of Congress referred to is not a penal statute, and the maxim, "*Expressio unius*," &c., does not apply.

The words "*have* power" in the Territorial act, are unusual in a statute meant to grant power. The usual words are, "*shall* have power." One of the judges of the court below was of the opinion that the words used were meant as a simple declaration of the Territorial legislature that the jurisdiction already existed, though he did not rest the case on that ground. His opinion is submitted.

No opposing counsel.

Mr. Justice MILLER, delivered the opinion of the court.

The single question in this case is whether the Probate Court had jurisdiction to hear and determine such an action as it heard and determined in the present case; and this must be decided by a construction of the statute of the Territory and the provisions of the act of Congress organizing the Territory.

A statute of the Territorial legislature enacts that "the several Probate Courts, in their respective counties, have power to exercise original jurisdiction, both civil and criminal, and as well in chancery as at common law, when not prohibited by legislative enactment, and they shall be gov-

erned in all respects by the same general rules and regulations as regards practice as the District Courts."

In a very learned opinion of one of the judges of the Supreme Court of the Territory, we find an ingenious argument in support of the idea—though the case is not rested on this ground—that this provision was not intended to confer jurisdiction, but was a mere declaration of the opinion of the Territorial legislature that the jurisdiction already existed. This is founded on the use of the words "have power" in the present tense, instead of "shall have power," in the future. We have no doubt that the legislature intended to *confer* the power by that sentence. No statute or other law existed previously by which any one ever supposed that such power existed. The form of expression here used is not at all uncommon for that purpose, especially in enactments which, like this, are parts of a general code of laws. The legislature was not in any manner called upon to give its opinion of the powers of the Probate Court, but it was in fact making a general system of laws for the Territory. It is inconceivable that it meant anything else but to establish the court and prescribe its jurisdiction.

But the power of the legislature to confer this jurisdiction on the Probate Courts is a much more serious question.

The organic act, in defining the power of the Territorial legislature, declares that "it shall extend to all rightful subjects of legislation consistent with the Constitution of the United States, and with that act."

We may, I think, assume, without much hazard, that defining the jurisdiction of a Probate Court, or, indeed, of any court, may be fairly included within the general meaning of the phrase rightful subject of legislation. Nor do we think there is anything in such legislation inconsistent with the Constitution of the United States. There remains then only the further inquiry whether it is inconsistent with any part of the organic act itself.

That act established a complete system of local government. It stands as the constitution or fundamental law of the Territory. It provides for the executive, legislative, and

judicial departments of government. It prescribes their functions, their manner of appointment and election, their compensation and tenure of office. In regard to the judiciary, it creates the courts, distributes the judicial power among them, and provides all the general machinery of courts, such as clerk, marshal, prosecuting attorney, &c.

It is here then, if anywhere, that we should look for anything inconsistent with the power conferred on the Probate Courts by the Territorial legislature. The ninth section of the act declares that "the judicial power of the Territory shall be vested in a Supreme Court, District Courts, Probate Courts, and justices of the peace," and it prescribes the organization and number of the District Courts. The judges of these are appointed by the President, by and with the advice and consent of the Senate of the United States. And then it declares that "the jurisdiction of the several courts herein provided for, both appellate and original, and that of the Probate Courts, and of the justices of the peace, shall be as limited by law: Provided, That justices of the peace shall not have jurisdiction of any matter in controversy where the title or boundary of lands may be in dispute, or where the debt or sum claimed shall exceed one hundred dollars, and the said Supreme and District Courts, respectively, shall possess chancery as well as common-law jurisdiction."

Provision is made in the same section for appeals and writs of error from the District Courts to the Supreme Court of the Territory, and from that court to the Supreme Court of the United States, but no provision is made for any such review of the decisions of the Probate Courts or of the justices of the peace.

The common-law and chancery jurisdiction here conferred on the District and Supreme Courts, is a jurisdiction very ample and very well understood. It includes almost every matter, whether of civil or criminal cognizance, which can be litigated in a court of justice. The jurisdiction of the justices of the peace is specifically limited as regards the moneyed value on which it may decide, and by the exclu-

sion of matters concerning real estate. Of the Probate Courts it is only said that a part of the judicial power of the Territory shall be vested in them. What part? The answer to this must be sought in the general nature and jurisdiction of such courts as they are known in the history of the English law and in the jurisprudence of this country. It is a tempting subject to trace the history of the probate of wills and the administration of the personal estates of decedents, from the time that it was held to be a matter of exclusive ecclesiastical prerogative, down to the present. It is sufficient to say that through it all, to the present hour, it has been the almost uniform rule among the people, who make the common-law of England the basis of their judicial system, to have a distinct tribunal for the establishment of wills and the administration of the estates of men dying either with or without wills. These tribunals have been variously called Prerogative Courts, Probate Courts, Surrogates, Orphans' Courts, &c. To the functions more directly appertaining to wills and the administration of estates, have occasionally been added the guardianship of infants and control of their property, the allotment of dower, and perhaps other powers related more or less to the same general subject. Such courts are not in their mode of proceeding governed by the rules of the common law. They are without juries and have no special system of pleading. They may or may not have clerks, sheriffs, or other analogous officers. They were not in England considered originally as courts of record; and have never, in either that country or this, been made courts of general jurisdiction, unless the attempt to do so in this case be successful.

Looking then to the purpose of the organic act to establish a general system of government, and its obvious purpose to say what courts shall exist in the Territory, and how the judicial power shall be distributed among them, and especially to the fact that all ordinary and necessary jurisdiction is provided for in the Supreme and District Courts, and that of the justices of the peace, and that the jurisdiction of the Probate Court is left to rest on the general nature

and character of such courts as they are recognized in our system of jurisprudence, is it not a fair inference that it was not intended that that court should be made one of general jurisdiction? that it should not be converted into a court in which all rights, whether civil or criminal, whether of common-law or chancery cognizance, whether involving life, or liberty, or property, should be lawfully tried and determined?

For all such cases, when tried in the District Courts, provision is made for correction of errors and mistakes by appeal to a higher court. But no such provision is made in regard to the Probate Courts, a thing which certainly would have been done if it had been supposed that all judicial power would have been vested in them.

It is supposed that a sufficient answer to this course of reasoning is found in the declaration of the ninth section of the organic act already cited, that the jurisdiction of the several courts therein provided for, "shall be as limited by law." The argument is that this refers to laws to be thereafter made by the Territorial legislature, and that as the power of that body extended to all rightful subjects of legislation, it extended to this of totally changing the jurisdiction of these courts. We are not prepared to say that, in deciding what law is meant in this phrase, "as limited by law," we are wholly to exclude laws made by the legislature of the Territory. There may be cases when that legislature conferring new rights, or new remedies, or establishing anomalous rules of proceedings within their legislative power, may direct in what court they shall be had. Nor are we called on to deny that the functions and powers of the Probate Courts may be more specifically defined by Territorial statutes within the limit of the general idea of the nature of Probate Courts, or that certain duties not strictly of that character may be imposed on them by that legislation.

But we hold that the acts of the legislature are not the only law to which we must look for the powers of any of these Territorial courts. The general history of our jurisprudence and the organic act itself are also to be considered,

and any act of the Territorial legislature inconsistent with the latter must be held void. We are of opinion that the one which we have been considering is inconsistent with the general scope and spirit of that act in defining the courts of the Territory, and in the distribution of judicial power amongst them, inconsistent with the nature and purpose of a Probate Court as authorized by that act, and inconsistent with the clause which confers upon the Supreme Court and District Courts general jurisdiction in chancery as well as at common law. The fact that the judges of these latter courts are appointed by the Federal power, paid by that power—that other officers of these courts are appointed and paid in like manner—strongly repels the idea that Congress, in conferring on these courts all the powers of courts of general jurisdiction, both civil and criminal, intended to leave to the Territorial legislature the power to practically evade or obstruct the exercise of those powers by conferring precisely the same jurisdiction on courts created and appointed by the Territory.

The act of the Territorial legislature conferring general jurisdiction in chancery and at law on the Probate Courts is, therefore, void.

This view is supported by the decisions of courts of Kansas,* on a similar statute; by decisions in Idaho,† and by the decisions of the Supreme Court whose judgment we are here called on to reverse.

JUDGMENT AFFIRMED.

The CHIEF JUSTICE, not having heard the argument, took no part in the decision of this case.

* Locknane *v.* Martin, McCahon, 60; Dewey *v.* Dyer, Ib. 77; Mayberry, Graham et al. *v.* Kelly, 1 Kansas, 116.

† The People *v.* Du Rell, 1 Idaho, 30; Moore *v.* Konbly, Ib. 55.

THE S. B. WHEELER.

1. The doctrine, over and over again ruled by this court, that when in admiralty cases involving questions of fact alone, the District and Circuit Courts have both found in one way, every presumption is in favor of the decrees, and that there will be no reversal here unless for manifest error, again declared.
2. Whether the absence of a lookout at the bow of a sailing vessel, though at night, was or was not a contributing fault to a collision, is a question of fact, and where on a libel for a collision both the District and the Circuit Courts have held that it was not, the general rule of practice just above stated, as to the effect of decisions by the two courts in one way, applies.

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

About one o'clock at night, on the 18th of July, 1871, a collision occurred in the Vineyard Sound, between the schooners C. F. Beebe and S. B. Wheeler, by which the Beebe was sunk and totally lost. Hereupon her owners libelled the Wheeler in the District Court for the District of Massachusetts.

The libel alleged that the crew of the Beebe saw the green light of the other schooner something more than a mile off, and over their starboard bow; that the Beebe kept her course until it became apparent that the Wheeler had changed and was still changing her course to starboard, so as to make a collision inevitable, and until she was within a hundred feet of the Wheeler, when the helm of the latter was put to starboard, as the only thing that could be done with any hope of escaping the collision or relieving the force of the blow; that under this change of helm she had fallen off about two points, when the Wheeler struck her amidships on the starboard side and cut her in two.

The answer set up that a red light was seen from the Wheeler about a mile distant and on the port bow; that the master, who was in charge of the deck, kept his vessel off until the light was two points on his port bow, and then

ordered the helm to be steadied, and that afterwards, when said light was about seventy yards distant, the vessel bearing the light, and which proved to be the Beebe, suddenly fell away from the wind in the direction of the Wheeler; that the helm of the latter was immediately put hard aport, and that she fell away; but that the Beebe came down across her bows rendering a collision unavoidable.

After hearing numerous witnesses on both sides (the testimony being conflicting, and that of the claimants disclosing the fact that their vessel had no lookout at its bow, and no question of law being raised in the case), the District Court having found various facts as established by the evidence, dismissed the libel with costs, and on appeal the Circuit Court affirmed the decree. Thereupon the libellants appealed to this court, where the matter was again elaborately argued on the evidence.

Mr. J. C. Dodge, for the appellants; Messrs. G. A. Somerby and L. S. Dabney, contra.

The CHIEF JUSTICE delivered the opinion of the court.

Questions of fact only are presented by this appeal. There is no dispute as to the law. Two courts have already found against the appellants. It has been over and over again ruled by this court that under such circumstances the burden is on the appellant to show the error. Every presumption is in favor of the decrees below. We ought not to reverse unless the error is clear. Such is not the case here.

It is, indeed, urged that the claimants, by their own proof, established the fact that there was no lookout at the bow of the Wheeler when the collision occurred. This is so, but whether that was a contributing fault was a question of fact, and that has been twice found against the appellants.

We are entirely satisfied with all the findings.

JUDGMENT AFFIRMED.

NEW ORLEANS *v.* THE STEAMSHIP COMPANY.

1. This court has no power to reverse, on appeal, the imposition of a fine decreed by the Circuit Court for contempt of it.
2. A lease made July 8th, 1865, during the military occupation of New Orleans, in the late rebellion, by the army of the United States, by the mayor of New Orleans (appointed by the general commanding the department), pursuant to a resolution of the boards of finance and of street landings (both boards appointed in the same manner), by which a lease of certain water-front property in the said city, *for ten years*—which lease called for large outlays by the lessee, and was deemed by this court otherwise a fair one—sustained for its whole term, although in less than one year afterwards (that is to say, on the 18th of March, 1866), the government of the city was handed back to the proper city authorities.
3. The fact, that on the 9th of February, 1866,—seven months after the lease was made—a "general order" from the military department of Louisiana, forbidding the several bureaus of the municipal government of the city, created by military authority, from disposing of any of the city property for a term extending beyond a period when the civil government of the city might be reorganized and re-established, in conformity to the constitution and laws of the State, held not to have altered the case.

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

On the 1st of May, 1862, the army of the United States captured the city of New Orleans. It was held by military occupation until the 18th of March, 1866, when its government was handed over to the proper city authorities. The condition of things which subsisted before the rebellion, was then restored. During the military occupation it was governed by a mayor, a board of finance, and a board of street landings, appointed by the commanding general of the department. On the 8th of June, 1865, Hugh Kennedy was thus appointed mayor. On the 8th of July, 1865, as such mayor, pursuant to a resolution signed by the chairman of the board of finance and by the chairman of the board of street landings, both boards having been appointed in the same manner as himself, Kennedy executed to the appellees

a lease of certain water-front property therein described. The lease made the following provisions:

The city granted to the company the right to inclose and occupy for their exclusive use the demised premises for the term of ten years.

The company was at its own expense to build a new wharf in front of the landing, as designated, with new bulkheads to retain the levee earthworks throughout the whole extent of the front assigned to them, they furnishing the requisite labor and materials; to keep the structure in complete order and repair until the termination of the lease, and then to deliver it to the city authorities in that condition, natural wear and tear only excepted. The company was to have the right, at its own cost, to construct buildings and sheds within the inclosed space as should be required for the transaction of their shipping and freighting business. The wharves were to be completed within a year from the date of the lease, of new materials, in a workmanlike manner, and to be protected by a line of heavy fender-piles in front, of sufficient size and strength to enable the largest of the company's ships to land and load at the wharf without damage. All the improvements, consisting of wharves, bulkheads, fender-piles, sheds, buildings, and inclosures, were to be kept in good repair by the company until the expiration of the lease.

The lease was not to be transferred without the city's consent, and, in case of default by the company to fulfil its engagements, the city had the right to annul it. At the expiration of the lease all the improvements made by the company were to become the property of the city. The company agreed to pay an annual rent of $8000, in monthly instalments, for which it gave its promissory notes, one hundred and twenty in number.

The company expended more than $65,000 in making the improvements specified in the lease, and duly paid its notes as they matured down to the 11th of April, 1866, including the one then due.

On the 18th of that month the city surveyor, aided by a

number of laborers, acting under an order of the city council, approved by the mayor, destroyed the fence or inclosure erected by the company. It had cost them $7000. The company filed a bill and supplemental bill whereby they prayed for an injunction and damages. The notes for rent given by the company and then unpaid were delivered by the military authorities to the proper city authorities when the government of the city was transferred to the mayor and council. Those unpaid when this litigation was begun were held by the city then and for several months afterwards. They were tendered to the company by a supplemental answer in this case and deposited in court, where they still remained. The note last paid matured and was paid before the inclosure was destroyed. The city had not tendered back the money so paid, nor had it disclaimed the validity of the payment, nor had it tendered back the amount or any part of it, expended by the company in making the improvements, nor made any offer touching the subject.

In the process of the litigation the then mayor, Clark, applied to the Third District Court of the city for an injunction to restrain the company from rebuilding the inclosure which had been destroyed, and an injunction was granted accordingly.

The company thereupon served a rule upon Clark to show cause why he should not be punished for contempt in taking such action in another tribunal. At the final hearing of the case the city offered in evidence order No. 11 of Major-General Canby, commanding the military department of Louisiana. The order was dated at New Orleans, *February 9th*, 1866, and was thus:

"The several bureaus of the municipal government of the city of New Orleans, created by and acting under military authority, are enjoined and prohibited from alienating, or in any manner disposing of, the real estate or other property belonging to the city, or granting any franchise or right to corporations or individuals for a term extending *beyond such period as the civil government of the city may be reorganized and re-established under and in conformity to the constitution and laws of the State;* and

any alienation, disposition, or grant will be subject to any rights and interest of the General Government which may be involved, and shall not extend beyond the time when the questions relative to those rights and interest may be determined by competent authority."

The court refused to receive the order in evidence, and the city excepted.

The following facts were agreed on by the parties: "From the execution of the lease to the 18th of April, 1866, the company had been in peaceable possession of the demised premises, and had performed all its obligations under the lease. No notice was given by the city of the intended demolition of the inclosure, and it was done early in the morning. Under its charter of 1856 the city had, before the war, leased portions of its wharves to individuals and companies, and had, in one instance, farmed out the collection of levee dues upon all the wharves by sections. The damages resulting from the destruction of the company's buildings, &c., and the necessary employment, in consequence of this destruction, of additional watchmen, amounted to $8000."

At the hearing the court decreed that Clark, the mayor, should pay a fine of $300 for the contempt of the court wherewith he was charged; that the city should be enjoined from interfering with the possession and enjoyment of the demised premises by the company during the life of the lease, and that the company should recover from the city $8000 for damages, and that the city should pay the costs of the suit.

It was from this decree that the present appeal was taken.

Mr. W. H. Peckham for the appellant:

I. *The imposition of a fine of* $300 *imposed on the mayor was error.* His action was the assertion of a right, and in no sense violated the injunction issued in this cause. Possibly he mistook the court to which he should have applied. But if he had applied to the court below, the application would have been, not to dissolve or modify the injunction already issued, but for another injunction *against* the company, and

in favor of the city, whether such application were made by motion or petition in this suit, or by filing a cross-bill, as might be appropriate under the practice adopted in Louisiana.

If the application to the court below would not have been a contempt, nor an application to dissolve or modify the existing injunction, neither can it be a contempt when made to a State court.

Perhaps a suit for that purpose would be regarded as ancillary to the first suit, within the doctrine of *Freeman* v. *Howe*,* or, perhaps, as a distinct proceeding within the doctrine of *Buck* v. *Colbath*,† but in neither case can it be called a contempt.

II. *The refusal of the court below to admit the order of General Canby, No.* 11, was error. Mayor Kennedy's authority depended on martial law, and was restricted by the terms of General Butler's proclamation. He was always subject to the directions of the military officers. These disapproved of, and virtually reversed his action. The fact that the date is after that of the lease, is immaterial. Martial law is not guided or controlled by constitutions. The apparent injustice to individuals of its decrees is a matter of no weight.

III. The lease cannot stand.

1. *It was void of truth.* Neither the military nor the civil government had power to make it. It was of property held by the city in trust for the public, for public use; and *ultra vires.* No power other than that of the State itself could alien the rights of the public, and transfer them to an individual or company, to the exclusion of the public. In *Municipality No.* 2 v. *New Orleans Cotton Press*,‡ the court says:

"The city is not proprietor of a *locus publicus*, but only administrator. It belongs as much to the citizen of Ohio as to a citizen of New Orleans. It is a plan left open for the convenience of commerce, and for the use of the whole world—a thing *hors du commerce.*"

* 24 Howard, 450. † 3 Wallace, 334.

‡ 18 Louisiana, 127, and see People v. Kerr, 27 New York, 188.

2. *The military mayor and boards had no authority to make such a lease.* Whatever rights or powers they possessed terminated with the termination of hostilities, and they could no more create an interest to last beyond that time than could a tenant for years create one to last beyond his term.*

Mr. James Emott, contra.

Mr. Justice SWAYNE (having stated the case) delivered the opinion of the court.

The questions presented for our consideration are questions of law. The facts are undisputed. Our remarks will be confined to the several objections to the decree taken by the counsel for the appellant.

The fine of three hundred dollars imposed upon the mayor is beyond our jurisdiction. Contempt of court is a specific criminal offence. The imposition of the fine was a judgment in a criminal case. That part of the decree is as distinct from the residue as if it were a judgment upon an indictment for perjury committed in a deposition read at the hearing.† This court can take cognizance of a criminal case only upon a certificate of division in opinion. In *Crosby's Case*, Mr. Justice Blackstone said: "The sole adjudication for contempt, and the punishment thereof, belongs exclusively and without interfering to each respective court." The Circuit Court having first acquired possession of the original case was entitled to hold it exclusively until the case was finally disposed of.‡ Any relief to which the city was entitled should have been sought there, and that

* Halleck on International Laws and Laws of War, pp. 446, 447, and 448, chap. 19, §§ 2, 3, 4, and 5; chap. 35, §§ 8 and 9, chap. 32, §§ 1 and 2, pp. 776–777, § 4, p. 781; Twiss on the Laws of Nations, and Rights and Duties in time of War, chap. 4, § 66, p. 126; Phillimore, vol. 3, p. 863, §§ 583 and 584, Digest, title "Rights," "Private Rights," "Restitution Rights of Captors."

† Crosby's Case, 3 Wilson, 188; Williamson's Case, 26 Pennsylvania State, 24; Ex parte Kearney, 7 Wheaton, 41.

‡ Taylor *v.* Taintor, 16 Wallace, 370; Hagan *v.* Lucas, 10 Peters, 400; Taylor *v.* Carryl, 20 Howard, 584.

court was competent to give it, either in the original or in an auxiliary case. As to any other court the matter was *ultra vires*.* It was unnecessary, unwarranted in law, and grossly disrespectful to the Circuit Court to invoke the interposition of the State court as to anything within the scope of the litigation already pending in the Federal court.

The order of General Canby, No. 11, was issued seven months after the lease was made. The rights it conferred upon the lessees, whatever they were, had then become fully vested. The order did not purport to annul the lease. It prescribed a rule of conduct as to giving such leases in the future, and concluded as follows: "And any alienation, disposition, or grant will be subject to any rights and interest of the General government which may be involved, and shall not extend beyond the time when the questions relative to those rights and interest may be determined by competent authority." It does not appear that the government ever took any action touching this lease. The order could not, therefore, in any view, affect the rights of the parties. The court did not err in refusing to receive it in evidence.

It has been strenuously insisted that the lease was made by Kennedy without authority, was, therefore, void *ab initio*, and, if this was not so, that its efficacy, upon the principle of the *jus post liminium*, wholly ceased when the government of the city was surrendered by the military authorities of the United States to the mayor and council elected under the city charter.

Although the city of New Orleans was conquered and taken possession of in a civil war waged on the part of the United States to put down an insurrection and restore the supremacy of the National government in the Confederate States, that government had the same power and rights in territory held by conquest as if the territory had belonged to a foreign country and had been subjugated in a foreign

* Freeman *v.* Howe, 24 Howard, 450; Buck *v.* Colbath, 3 Wallace, 334.

war.* In such cases the conquering power has a right to displace the pre-existing authority, and to assume to such extent as it may deem proper the exercise by itself of all the powers and functions of government. It may appoint all the necessary officers and clothe them with designated powers, larger or smaller, according to its pleasure. It may prescribe the revenues to be paid, and apply them to its own use or otherwise. It may do anything necessary to strengthen itself and weaken the enemy. There is no limit to the powers that may be exerted in such cases, save those which are found in the laws and usages of war. These principles have the sanction of all publicists who have considered the subject.

They have been repeatedly recognized and applied by this court.† In the case last cited the President had, by proclamation, established in New Orleans a Provisional Court for the State of Louisiana, and defined its jurisdiction. This court held the proclamation a rightful exercise of the power of the executive, the court valid, and its decrees binding upon the parties brought before it. In such cases the laws of war take the place of the Constitution and laws of the United States as applied in time of peace. It follows as a corollary from these propositions that the appointment of Kennedy as mayor and of the Boards of Finance and of Street Landings was valid, and that they were clothed with the powers and duties which pertained to their respective positions.

It can hardly be doubted that to contract for the use of a portion of the water-front of the city during the continuance of the military possession of the United States was within the scope of their authority. But, conceding this to be so, it is insisted that when the military jurisdiction terminated the lease fell with it. We cannot take this view of the subject. The question arises whether the instrument was a

* The Prize Cases, 2 Black, 636; Mrs. Alexander's Cotton, 2 Wallace, 417; Mauran *v.* The Insurance Company, 6 Id. 1.

† Cross *v.* Harrison, 16 Howard, 164; Leitensdorfer *v.* Webb, 20 Id. 176; The Grapeshot, 9 Wallace, 129.

fair and reasonable exercise of the authority under which it was made. A large amount of money was to be expended and was expended by the lessees. The lease was liable to be annulled if the expenditures were not made and the work done within the limited time specified. The war might last many years, or it might at any time cease and the State and city be restored to their normal condition. The improvements to be made were important to the welfare and prosperity of the city. The company had a right to use them only for a limited time. The company was to keep them in repair during the life of the lease, and at its termination they were all to become the property of the city. In the meantime the rental of eight thousand dollars a year was to be paid.

When the military authorities retired the rent notes unpaid were all handed over to the city. The city took the place of the United States and succeeded to all their rights under the contract.* The company became bound to the city in all respects as it had before been bound to the covenantees in the lease. The city thereafter collected one of the notes subsequently due, and it holds the fund, without an offer to return it, while conducting this litigation. It is also to be borne in mind that there has been no offer of adjustment touching the lasting and valuable improvements made by the company, nor is there any complaint that the company has failed in any particular to fulfil their contract.

We think the lease was a fair and reasonable exercise of the power vested in the military mayor and the two boards, and that the injunction awarded by the court below was properly decreed. The *jus post liminium* and the law of nuisance have no application to the case.

We do not intend to impugn the general principle that the contracts of the conqueror touching things in conquered territory lose their efficacy when his dominion ceases.

We decide the case upon its own peculiar circumstances, which we think are sufficient to take it out of the rule.

* The United States *v.* McRae, 8 Law Reports, Equity Cases, 75.

We might, perhaps, well hold that the city is estopped from denying the validity of the lease by receiving payment of one of the notes, but we prefer to place our judgment upon the ground before stated.

JUDGMENT AFFIRMED.

Justices CLIFFORD, DAVIS, and BRADLEY did not hear the argument of this case, and did not participate in the judgment.

Mr. Justice HUNT, concurring.

I cannot assent to the proposition that the agents of the city appointed by the conquering power which captured it had authority to execute a lease of its levees and wharves continuing more than nine years after the conquering power had abdicated its conquest. If an extension of nine years may be justified, it would be difficult to repudiate an extension for ninety years, if that case should be presented. The lease under consideration was executed on the 8th day of July, 1865, to continue for the term of ten years. On the 18th of March, 1866, eight months and ten days afterwards, the military authority of the United States was withdrawn and the civil authority resumed its sway. The lease continued for that length of time during the military occupation of the city, and by its terms was to continue nine years, three months, and twenty days after the military dominion did in fact cease to exist. That the execution of this lease was an unwarranted assumption of power by the agents who made it, I quote Halleck on International Law and the Laws of War.* He uses this language:

"§ 4. Political laws, as a general rule, are suspended during the military occupation of a conquered territory. The political connection between the people of such territory and the state to which they belong is not entirely severed, but is interrupted or suspended so long as the occupation continues. Their lands and immovable property are, there-

* Page 780, § 4.

fore, not subject to the taxes, rents, &c., usually paid to the former sovereign. These, as we have said elsewhere, belong of right to the conqueror, and he may demand and receive their payment to himself. They are a part of the spoils of war, and the people of the captured province or town can no more pay them to the former government than they can contribute funds or military munitions to assist that government to prosecute the war. To do so would be a breach of the implied conditions under which the people of a conquered territory are allowed to enjoy their private property and to pursue their ordinary occupations, and would render the offender liable to punishment. They are subject to the laws of the conqueror, and not to the orders of the displaced government. Of lands and immovable property belonging to the conquered state, the conqueror has, by the rights of war, acquired the use so long as he holds them. The fruits, rents, and profits are, therefore, his; and he may lawfully claim and receive them. Any contracts or agreements, however, which he may make with individuals farming out such property, will continue only so long as he retains control of them, and will cease on their restoration to, or recovery by, their former owner." To which he cites Hefftter;* Vattel;† *American Insurance Co.* v. *Canter*,‡ and other authorities. See also, *Thirty Hogsheads of Sugar* v. *Boyle*.§

The wharves and levees now in question were land and immovable property belonging to the conquered state. The fruits and rents of them were spoils of war which belonged to the conqueror so long as he held the conquered state. When the possession of the conqueror was at an end, the rights belonging to a conqueror ceased also. The spoils of war do not belong to a state of peace.

It is said that although this doctrine may be sound generally, it is not applicable to our recent civil war. But why not? The State of Louisiana was in rebellion against the United States government. It had formally disavowed its

* Droit International, §§ 131–133, 186.

† Droit des Gens, liv. 3, ch. 13, § 197, et seq.

‡ 1 Peters, 542. § 9 Cranch, 191.

association with the United States, and had formally become a member of another and hostile confederated government. The United States invaded its territory and captured its commercial metropolis, not figuratively or metaphorically, but literally and physically; with its ships, its cannon, and its men it battered down the forts built for its protection and drove out the armies by which it was defended. What it thus acquired by military power, it retained by the same power.

The armies of the revolting States were overthrown, and peace ensued. It was not, as the ancient historian said, "*solitudinem faciunt, pacem appellant,*" but rest, repose, and rights restored. The State of Louisiana was again the sovereign authority in which all the administrative power of the State was vested. The city of New Orleans as a representative of the State, and under its authority, possessed the absolute control of its municipal powers, in the same manner and to the same extent as it possessed and exercised them before the existence of the war. The displaced government resumed its sway. The conqueror's possession ceased.

The State of Louisiana and the Confederate government were public enemies, not unsuccessful revolutionists merely. The forts of the Confederate States were blockaded as those of a foreign enemy, and vessels taken in attempting to enter them were adjudged prizes of war. A prize court is in its very nature an international tribunal. Their captured soldiers were not shot as rebels, but were exchanged as prisoners of war. All intercourse between the citizens of the contending States was illegal, contracts were dissolved or suspended, their property within our States was confiscated to the public use. In short, we were at war with them. It is difficult to understand why the postliminy doctrine is not applicable under such circumstances.

In *Fleming* v. *Page*,* Chief Justice Taney says: "The port of Tampico, at which the goods were shipped, and the Mexican State of Tamaulipas, in which it is situated, were un-

* 9 Howard, 614, &c.

doubtedly, at the time of the shipment, subject to the sovereignty and dominion of the United States. The Mexican authorities had been driven out or had submitted to our army and navy; and the country was in the exclusive and firm possession of the United States, and governed by its military authorities, acting under the order of the President. But it does not follow that it was a part of the United States, or that it ceased to be a foreign country in the sense in which these words are used in the acts of Congress. . . . While it was occupied by our troops, they were in an enemy's country and not in their own; the inhabitants were still foreigners and enemies, and owed to the United States nothing more than the submission and obedience, sometimes called temporary allegiance, which is due from a conquered enemy when he surrenders to a force which he is unable to resist. Tampico, therefore (he says), was a foreign port when this shipment was made."

This case is authority to the proposition that conquest and temporary military possession do not alter the national character of a city or port. As Tampico remained Mexican, notwithstanding its conquest by our armies, so New Orleans, so far as the *jus post liminii* is concerned, remained a part of the Southern Confederacy.

There is, however, another view of the case that may be taken.

The care, custody, and control of wharves and levees is legitimately within the power of the city. Like streets and highways, they may be opened or closed in the discretion of the city. The mode in which they shall be used, how managed and regulated, whether open to the use of all indifferently, whether portions shall be set apart for particular uses, whether certain classes of business shall be confined to particular localities, whether controlled by the immediate agents of the city or managed by those to whom the city may lease them, are matters of police regulation to be settled by the authorities of the city.* In none of the cases is it to

* Slaughter-House Cases, 16 Wallace, 36.

be assumed that the power will be wilfully exercised to the injury of the city.

In my view, the agents of the city who made the lease of July 18th, 1865, which we are now considering, exceeded the authority they possessed. Their authority was limited to the time of the possession and control of the lots by the military authority which appointed them. The making of the lease, however, was not an illegal act in any other sense than that the agents had exceeded their powers. The excessive acts of those agents were capable of ratification, and if ratified, were as binding upon the principal as if originally authorized.

It appears that the lessees gave their notes (one hundred and twenty notes in number) for $666.66 each, payable monthly, for the whole amount of the rent to become due. The first nine of the notes were paid to the mayor and bureau acting under the military authority. The government of the city now in power was elected by the citizens according to law, in the ordinary manner, upon the resumption by the State and city of their civil powers, and was vested with the entire authority of the city in respect to wharves, levees, their management and control. Upon the principles already stated, it had power to lease the levee and wharf in question to the steamship company for the period named in the lease. Prior to the war, it had leased portions of its wharves to individuals, and had farmed out the collection of the levee dues upon the entire wharves by sections.*

It came into possession of the city government upon the election of its citizens on the 18th of March, 1866. Twenty-four days thereafter, to wit, on the 11th of April, 1866, the note for $666.66 due three days previously, was paid to the city government. At the same time all the other notes, one hundred and eleven in number, were transferred by the military government to the new city administration. These notes were retained by the city until several months after the present action was begun, when they were tendered to

* 1 Dillon on Municipal Corporations, §§ 43, 64, 67, 74, 181.

the plaintiff by supplemental answer. No tender was ever made of the money, $666.66, received by the city upon the note paid to it by the plaintiff for the rent due April 8th, 1866. It now holds and enjoys, to that amount, the rent received by it under a lease which it seeks to repudiate.

The reception and holding of this rent is a clear and unqualified act of ratification, which bars the defence of a want of authority to execute the lease from which it issued. It is in violation of every principle of honesty and of sound morality, that one should retain the benefit of the act of his agent, and at the same time repudiate such act.*

A ratification once made, with a knowledge of all the material circumstances, cannot be recalled.† A ratification of a part of a contract ratifies the whole.‡ One act of ratification is as complete and perfect in its effect as any number of acts of the same character.

For these reasons I am able to

CONCUR IN THE AFFIRMANCE OF THE JUDGMENT.

Mr. Justice FIELD, dissenting.

I am unable to agree with the majority of the court in the judgment rendered. The power of the mayor and board of New Orleans, appointed by the commanding general upon the military occupation of that city, terminated with the cessation of hostilities; and I am of opinion that no valid alienation of any portion of the levee front and landing of the city could be made by them for any period extending beyond such occupation.

Assuming, as asserted, that the capture of New Orleans gave to the military authorities of the Union the same rights with respect to property there situated which would attend the conquest of a foreign country, the result is not different. A temporary conquest and occupation of a country do not

* Story on Agency, §§ 239, 240, 252-3-4-9; Bissell *v.* Michigan Southern and Northern Indiana Railroad Company, 22 New York, 258; Parrish *v.* Wheeler, Ib. 504; Perkins *v.* Washington Insurance Co., 4 Cowen, 645; Peterson *v.* Mayor, 17 New York, 449.

† Story on Agency, § 242.

‡ Ib. and § 250.

change the title to immovable property, or authorize its alienation. They confer only the rights of possession and use. When the military occupation ceases, the property reverts to the original owner with the title unimpaired.

"Of lands and immovable property belonging to the state," says Halleck, "the conqueror has by the rights of war acquired the use so long as he holds them. The fruits, rents, and profits are, therefore, his; and he may lawfully claim and receive them, but contracts or agreements, however, which he may make with individuals farming out such property, will continue only so long as he retains control of them, and will cease on their restoration to or recovery by their former owner."* Such is the language of all publicists and jurists, and there is nothing in the circumstances attending the military occupation of New Orleans by our forces which calls for any modification of the well-established rule of public law on this subject. The fact that New Orleans is a part of one of the States of the Union certainly ought not to be deemed a reason for enlarging the power of the military commander, but on the contrary would seem to be good ground for restricting it.

It appears to me to be perfectly clear that, according to settled doctrines of public law, questioned by no publicists, but everywhere recognized, the authorities of New Orleans were restored to as complete control over the levee front and landing of the city upon the cessation of the military occupation as they possessed previously, and had, in consequence, a perfect right to remove all obstacles to the public use of such levees and landings.

I do not see any ground for the application of the doctrine of ratification in the case. The civil authorities of the city were restored to power in March, 1866, and in April following they asserted their right to remove the obstructions to the levees created by the steamship company, and took steps to enforce it. In this proceeding they repudiated instead of ratifying the action of their military predecessors. The one

* On International Law, chap. 32, § 4.

hundred and eleven unpaid notes of the company received by their predecessors have been deposited in court subject to the company's order, and the failure to restore or tender the proceeds of one note, amounting to six hundred and sixty-six dollars, previously paid, may be justified or explained on grounds consistent with the repudiation of the lease. Ratification of unauthorized acts of public agents, or persons assuming to be public agents, can only be inferred from conduct indicating an intention to adopt the acts and inconsistent with any other purpose. The alienation by sale or lease of any portion of the public levees and landings of the city after the restoration of its civil authorities could only be made, if at all, by ordinance or resolution of its common council, and it may be doubted whether there could be a ratification of an unauthorized alienation, attempted by their predecessors, by any proceeding less direct and formal.

I am of opinion, therefore, that the decree of the court below should be reversed, and the bill be dismissed.

LYON *v.* POLLARD.

1. Where a person agreed to serve in superintending a large hotel for another, at a compensation specified, either party being at liberty to terminate the contract on thirty days' notice to the other, and the person agreeing to superintend was ejected by the other on less than thirty days' notice, *held*, in a suit for damages by the party thus ejected—the general issue being pleaded and notice of special matter given—that the defendant might prove that the party ejected was unfit to perform his duty by reason of the use of opiates, and by reason of unsound mental condition.
2. Where by the terms of a contract a party is bound to give thirty days' notice of an intention to terminate it, and having given the notice afterwards waives it, he may in fact renew the notice, though the form of his communication purport to insist on the notice which he has waived; and at the expiration of the required time the second document will operate as a notice.

Statement of the case.

3. Though where, under a contract of hiring services, a party is bound to give a certain number of days' notice to terminate it, it is not terminated until the full term of days has elapsed, yet where an action has been brought for damages for a dismissal without the proper notice, a notice of termination may be given, though the full number of days has not expired when an actual dismissal took place; this to show that the plaintiff had a right now to serve but a portion of the thirty days.

ERROR to the Supreme Court of the District of Columbia.

Mrs. E. A. Pollard sued J. E. Lyon in the court below, and declared on a written contract, by which Lyon agreed to furnish the means of carrying on the St. Cloud Hotel, a hotel of considerable size in the city of Washington, and Mrs. Pollard agreed to superintend and conduct it. For this service she was to receive one-fifth of the net profits, in ascertaining which the rent paid by Lyon for the house was to be excluded. Either party was at liberty to terminate the contract by giving thirty days' notice in writing. The breach alleged was that the defendant ejected the plaintiff from the premises without having given the stipulated notice. Under pleas which amounted to the general issue, the defendant undertook to show that he had given the notice required, and under a special notice of what he would offer in evidence, offered to prove that the plaintiff was unfit to perform her part of the contract by reason of the use of opiates, and by reason of her unsound mental condition. The court refused to receive the evidence; and the defendant excepted.

The defendant then offered evidence of a service of notice on the 11th July on the plaintiff, under the contract to terminate it. Also evidence of service of a notice on the 19th September, in this form:

"September 19th, 1870.

"MRS. E. A. POLLARD.

"MADAM: On the 11th of July last I caused notice in writing to be served upon you, which notice terminated the agreement between us. I now notify you that the time specified in that notice *has fully expired*, and that *you are no longer superintendent* of this hotel, and no longer entitled to the appellation of proprietress.

"Respectfully,

"J. E. LYON."

Argument in support of the judgment.

Testimony was also given tending to show that the first notice had been waived or withdrawn.

The plaintiff was dismissed on the 4th of October.

On this testimony the defendant asked the court to charge that, even if the notice of July 11th had been wholly withdrawn, the subsequent notice of September 19th was in legal effect a renewal of it, and of itself operated to terminate the contract at the expiration of thirty days from its date.

This prayer the court refused to grant; and verdict and judgment having been given for the plaintiff, the defendant brought the case here on exceptions to the evidence, and to the refusal to charge as requested.

Mr. J. H. Bradley, in support of the rulings and charge:

The court rightly refused the offers as to the use of opiates, and as to the plaintiff's unsound mental condition. The suit was for damages on a contract which if the plaintiff failed to perform it, it was in the power of the defendant to rescind on thirty days' notice. If a contract provides a special mode of putting an end to it, that mode must be followed. However imperfectly the plaintiff may have performed her duties, so long as the defendant chose to accept her performance, he was bound to pay her in the manner stipulated between them.

The next exception is directed to the charge of the court on the subject of the notices. The charge was right. Whether there was a waiver by the defendant of the notice of July 11th, 1870, was purely a question of fact for the jurors to determine, and was properly left to them. If they found that it was waived by the defendant, it became extinct; and could not be revived by the defendant.

The notice of the 19th September, 1870, could not then have been made a renewal of its predecessor.

Nor is it a good notice operating of itself to terminate the contract at the expiration of thirty days from its date. It does not propose or pretend to be a notice to take effect at a future day, but sets up a former notice that the plaintiff

was holding over against that notice after the term expired, and is, if anything, a demand of immediate possession.

Messrs. Davidge and Cox, contra.

Mr. Justice MILLER delivered the opinion of the court.

The offers, as to the use of opiates and the unsound mental condition, are the subjects of the first bills of exception.

We do not agree with counsel that, for the insanity of plaintiff, or her mental incapacity to perform her part of the contract, whether from natural infirmities or from the use of opium, the only remedy of the defendant is an action against her on the contract. The plaintiff was employed to perform important and specific duties. Her compensation for this was to be one-fifth of the net proceeds of the business which she had agreed to superintend. If she rendered herself, or otherwise became, incapable of performing these duties, that of itself authorized defendant to rescind or terminate the contract. He was not bound to continue as the superintendent of a large hotel a person who was a lunatic, or who was so stupid under the influence of narcotics that her presence was a danger and an injury, and who could render no reasonable service. The contract on her part implied some capability of performing the duties she had assumed, of rendering some service. If she could render none defendant was not bound to continue it even for the thirty days which the termination of it by notice required. The court below erred in refusing to admit this evidence.

The defendant offered evidence of a service of notice on the 11th July on plaintiff, under the contract, to terminate it. Also evidence of service of a notice on the 19th September of his intention to act on the first notice, and that the time had expired. Testimony was also given tending to show a waiver or withdrawal of the first notice. The plaintiff was dismissed about the 4th of October. On this testimony the court was asked by defendant to instruct the jury that, even if the notice of July 11th had been wholly withdrawn, the subsequent notice of September 19th was in legal

effect a renewal of the former notice, and of itself operated to terminate the said contract at the expiration of thirty days from its date.

Assuming as the bill of exceptions seems to show, that the date of the notice of September 19th was the date of its service on plaintiff, we think the court erred in refusing this prayer.

The only object or purpose of any notice in the case was to apprise the party on whom it was served that the other party intended to terminate the contract. The contract itself fixed the time when this should take place, namely, thirty days after the service. The fact that the notice refers to a past notice and speaks of the termination of the contract as being already accomplished, does not destroy its effect as a notice of present intent to put an end to the arrangement. This notice of intent the contract makes effectual at the end of thirty days, and so the court was asked to instruct the jury. In declining to do this the court left the jury to infer that it had no effect whatever.

It is probable that if the first notice was wholly waived or abandoned the defendant had no right to dismiss the plaintiff until the 19th day of October. But even in reference to damages defendant had a right to show that under the contract and the notice she had only fifteen days to remain, and was injured only to that extent.

JUDGMENT REVERSED.

AVERY *v.* HACKLEY.

A valid lien is not divested by the mere fact of the holder of it subsequently taking a transfer of the equity of redemption made to him with a view of giving to him a preference, and in violation of the Bankrupt Act. The transfer of the equity of redemption of course is void.

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

Avery, assignee of Blake, a bankrupt, brought trover in

the court below against Hackley & Co. to recover the value of certain saw-logs, alleging that they had been transferred by the bankrupt to the said Hackley & Co. in fraud of the Bankrupt Act.

The case, as found by the court on a waiver of a jury, was thus:

Hackley & Co. were owners of saw-mills and engaged in sawing logs, and so making boards from them. Blake was a lumberman without capital, and engaged in buying logs and bringing them to saw-mills to be thus sawed into boards.

On the 25th of January, 1868, a contract was made between the two parties, by which Blake, on the one hand, agreed to deliver at the saw-mill of the defendants 18,000,000 feet of saw-logs to be sawed into boards, and by which Hackley & Co., on the other, agreed to advance to him $4 per 1000 feet, to be paid from time to time as the sawing advanced, and to be applied exclusively to the purchase of logs to be brought to them to be sawed.

To secure the advances, the property in the logs was conveyed to the defendants and the right of property vested in them; and they covenanted that when the lumber was manufactured they would send it to market and sell it to the best advantage; the proceeds to be equally divided between the parties.

Blake accordingly sent to the defendants large quantities of logs, and the defendants advanced large sums ($77,000) of money upon them; the case, as found, showing that but for the advances Blake could not have got this lumber from the forests, and thence to the defendants' mills.

During the spring of 1868 the price of lumber fell largely, so much so that it seemed likely that all the logs which Blake had sent to the defendants would be inadequate to repay to them their advances on account of it. Hereupon Blake, on the 25th of May, in the year just named, informed the defendants that he was unable to pay his debts, and proposed to make an assignment. They objected to his doing this and requested him to make a bill of sale of his property to them. This he made; the bill of sale embracing not only

the logs then at their mills, but certain land from which it was cut, and various property, saws, horses, oxen, wagons, &c., which had been used in getting it from the place where it grew to the mills. *The defendants, however, did not deliver up nor cancel, nor agree to deliver up or cancel, the contract of January 25th, but contrariwise, kept it in their possession.*

The bill of sale of May 25th was made afterwards, with a view to give the defendants a preference, and therefore in violation of the Bankrupt Act.

On the 2d of June, 1868, Blake was decreed a bankrupt, and Avery, the plaintiff below, appointed his assignee. Soon afterwards, the creditors objecting to the bill of sale, the defendants transferred to the assignee all the property conveyed by the bill except the logs. These they had sold, the proceeds paying them nothing above their advances previous to May 25th, and on their refusing to pay to the assignee these proceeds he brought the action below.

The question, of course, was whether this contract of the 25th of January was abandoned by the defendants doing what they had done subsequent to it (that is to say, by their taking, in the circumstances which they did, the bill of sale of May 25th), and merged in that bill. If so, the defendants had lost their lien, since it was obvious that they could not stand on the new contract of May 25th, it having been plainly void as to creditors. On the contrary, if the old security was not abandoned, then, although the defendants had attempted to strengthen their hold on the logs by an additional security, voidable at the election of creditors, and which the creditors did avoid, the right of lien justly acquired was not lost to the defendants, and they were at liberty to assert it in this action.

The court below decided that the lien was not affected by what was done on the 25th of May, and from that decision this writ of error was taken.

Mr. J. W. Champlin, for the plaintiff in error; Mr. E. A. Storrs, contra.

Mr. Justice DAVIS delivered the opinion of the court.

If the contract of January 25th, 1868, was never surrendered or abandoned it is manifest that the defendants acquired an interest in and lien upon the logs furnished by Blake to the extent of the advances made by them. There could be, therefore, on the theory that the contract of the 25th of January was subsisting, no ground for the maintenance of this action. It is said, however, that the defendants lost their rights under this contract by what occurred and was done subsequently to its execution.

It is undeniable that before the execution of the contract of May 25th the logs in controversy were in the possession of the defendants, who had advanced on them to Blake a very large sum of money. Without these advances the logs could not have been cut, banked, and put in the river; and, unless the defendants have plainly lost their right to retain the logs, common justice requires that they should be repaid. The honesty of the transaction is undisputed. Nor is there anything to show that the defendants were aware of the insolvent condition of Blake until after the logs had been delivered and the money advanced. They were proceeding in good faith to carry out their part of the contract when they were met by information of Blake's inability to go on with his business. The bill of sale, as it is called, which they took embraced not only the logs in controversy, but other personal property and real estate.

It is fair to infer from the facts found in the case that the bill of sale was not intended to clothe the defendants with any greater rights in the logs than they possessed without it, for it is very clear that the parties acted on the idea that the lumber, when manufactured and sold, would fall short of reimbursing the defendants for their advances, interest, and expenses. To save them from anticipated loss was, doubtless, the motive for including the remaining property of Blake, and not any expectation that previously acquired legal rights would be enlarged. The giving this preference has not operated to lessen the estate of Blake, as the creditors

got everything but the logs, and these, as it turns out, Blake had no interest in.

If there were any reasonable doubt about the intention of the defendants not to abandon the contract of January 25th, it is set at rest by the consideration that when the bill of sale was executed and delivered there was no agreement to cancel it, nor was it, in fact, cancelled, but was held and retained by the defendants. Naturally, if they had intended to rest their right to the logs exclusively on the bill of sale, they would have surrendered the former security. It is, therefore, not a case where an old security is abandoned and given up, and a new one taken as a substitute for that which previously existed. If, then, the contract of 25th January was not merged in the contract of 25th May, the latter one cannot operate an extinguishment of the former, the fairness of which has not been denied. This would not be the case if both contracts were valid, unless by express agreement, and it would be singular if such an effect could be produced, where one of them could be avoided by creditors as against the policy of the law. The creditors having elected to avoid the fraudulent conveyance, take the property as though it had never been made, and subject to all lawful liens upon it. The assignee, standing in the place of the bankrupt, acquired no greater rights than he possessed, and the defendants neither gained nor lost any rights because of the bill of sale.

These general views are sustained by authorities which seem decisive of the point at issue.*

One of these authorities, *White* v. *Gainer*,† was trover by the assignee of a bankrupt. The defendant, a maker of

* In re Kahley, 4 Bankrupt Register, 124; Ladd *v.* Wiggin, 35 New Hampshire, 428; Towle *v.* Hoit, 14 Id. 63; Stedman *v.* Vickery et al., 42 Maine, 136; Hoyt *v.* Dimon, 5 Day, 483; Britt *v.* Aylett, 6 English, 475; Mead *v.* Combs, 4 C. E. Green (New Jersey), 112; Ripley *v.* Severance, 6 Pickering, 474; Sawyer *v.* Turpin, 5 Bankrupt Register, 339; Eastman *v.* Porter, 14 Wisconsin, 39; Stokoe *v.* Cowan, 29 Beavan, 637; Meshke *v.* Van Doren, 16 Wisconsin, 319; White *v.* Gainer, 2 Bingham, 23.

† 2 Bingham, 23.

cloth, who had a lien on some cloth in his possession, purchased it of the bailor, together with several other pieces, after he became bankrupt, and when the cloth was demanded of him by the assignees of the bankrupt, refused to give it up, saying, "I may as well give up every transaction of my life."

It was contended at the trial that the lien was merged in the purchase, and that, at all events, it was waived, because not set up when the cloth was demanded. The judge directed the jury that the demand should have been accompanied with a tender of the amount due for the workmanship on the cloths, but reserved the point as to the merger of the lien.

On deciding the motion for a rule *nisi* to set aside the verdict, Best, C. J., said: "It has been urged that he (the defendant) bought the cloths after the bankruptcy. If that were so, he stands in the same situation as every other purchaser, under the same circumstances; the purchaser is liable to restore them to the assignees, but the assignees must take them subject to such rights as had accrued previously to their claim, and the bankruptcy of the bailor will not deprive the defendant of the right to which he is entitled,—the right of lien. It might have been otherwise, if the defendant, when called on to surrender the goods, had relied on the purchase; but this was not the case, and the verdict must stand."

The rule laid down by Chief Justice Best is applicable here.

The assignee of Blake had no right to the property until he had tendered the advances upon it, and there is no evidence that the defendants placed their refusal to deliver the property upon any particular ground. In the absence of this evidence it is a reasonable presumption that the lien, if not asserted in terms, at least, was not when demand was made, waived. It is true the defendants claimed, after the execution of the bill of sale to the creditors of Blake and other persons, to be the absolute owners of the property conveyed to them, but so far as the logs were concerned,

this claim was doubtless founded on the belief that the price of lumber would not advance, and if it did not, according to the estimates which were made, Blake had no interest in them. If so, although the claim of absolute ownership might not be legally correct, it had a basis of fact to rest upon, and does not prove that the defendants intended to abandon their lien. Indeed, it would be a harsh rule to infer the abandonment of a lien to the extent of this one, contracted in good faith in the prosecution of a legitimate business, unless the evidence on the subject left no other alternative.

It is said that after the execution of the bill of sale the lumber was not sold on joint account, and, therefore, the lien was waived. The answer to this is that the contract by which the lien was secured did not require the lumber to be sold on joint account. If the defendants sent the lumber to market, sold it to best advantage, and divided the proceeds, the contract on their part was complied with. They had entire control over it, and the manner of sale is immaterial and cannot affect the rights of the parties.

The leading purpose of the Bankrupt law is to secure an equal distribution of the bankrupt's property among his creditors. This purpose was accomplished in this case when the bill of sale was set aside, but the assignee seeks to go further and increase the estate more than seventy thousand dollars by relieving the bankrupt from the performance of a pre-existing valid contract. This he cannot do, unless on the clearest proofs that the defendants intended to abandon this contract and rely wholly on the bill of sale. As these proofs are wanting, the judgment is

AFFIRMED.

MAYS *v.* FRITTON.

1. Where the consideration of a question is *prima facie* within the jurisdiction and control of a State court—such as determining to whom the surplus of a fund raised by the foreclosure of a mortgage belongs—if the person who gave the mortgage becomes bankrupt and his assignee goes into the State court, submits to its jurisdiction, and nowhere asserts, in any way, the rights of the Federal courts in the matter—he cannot, after taking his chance for a decision in his favor, and getting one against him, raise in this court the point of want of jurisdiction in the State court.
2. To authorize the assignee to recover the money or property under the thirty-ninth section of the Bankrupt Act, it is necessary that he should establish the act of the bankrupt, not only of which he complains, but also that it was done with a view to give a preference over other creditors, and that the other party to the transaction had reasonable cause to believe that such person was insolvent. *Wilson* v. *City Bank* (17 Wallace, 473), affirmed. The statute assumes that there may be cases where the various acts of conveyance and disposition may be made, which would not amount to giving a preference.
3. Where, on a feigned issue directed to a jury, both of the necessary facts abovementioned have been found against the assignee, and this court has not the evidence before it, it must assume that the verdict of the jury is right.

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

In the year 1862, one Born executed a mortgage to Doll and others, on real estate which he then owned. Some years afterwards, that is to say, on the 16th of January, 1868, he gave to a Mrs. Fritton a bond for $4000, payable in one year, with warrant to confess judgment. On this warrant Mrs. Fritton caused a judgment to be entered on the day on which it was given.

On the 31st day of the same month, a petition was presented by a creditor of Born alleging that various acts of bankruptcy had been committed by him on the 1st, 3d, and 4th of the same month, and praying that he might be declared a bankrupt. On the 28th day of February, 1868, he was accordingly adjudged a bankrupt, and on the 18th of March one Mays was appointed assignee.

Statement of the case.

On the 6th of July, 1868, Doll, the mortgagee, already mentioned, foreclosed his mortgage in one of the county courts of Pennsylvania, and he having received from the sheriff the amount of it (no question as to the validity of his lien having existed), there remained a sum of $5192 above that amount, which the court referred to an auditor to distribute. Going before the auditor, Mrs. Fritton insisted that her judgment was a lien upon the proceeds of the property sold, and that she was entitled to the proceeds.

The assignees appeared by their counsel and claimed the entire fund, on the grounds:

"*First.* That it was the property of a bankrupt, and that, by reason of the bankruptcy, all his estate passed to the assignees.

"*Second.* That Mrs. Fritton's judgment was given in fraud of the Bankrupt law," and was void for various other reasons set forth.

The Bankrupt Act enacts:

"SECTION 35. If any person, being insolvent or in contemplation of insolvency, and within four months before the filing a petition by or against him, with a view to give a preference, procures his property to be attached or seized on execution, or makes any payment, pledge, transfer, or who shall within six months make any sale, transfer, conveyance, or other disposition of his property to any person having reasonable cause to believe that such person is insolvent and such payment, &c., is made in fraud of the provisions of this act, the same shall be void, and the assignee may recover the property, &c., from the person so to be benefited."

Mrs. Fritton denied the abovementioned allegations of fact made by the assignees, and on her affidavit that they were untrue, a jury was demanded and granted, in pursuance of the practice in such cases in Pennsylvania. The jury found that at the time of giving the bond and warrant Born was insolvent, but that Mrs. Fritton had not reasonable cause to believe that he was, and that the judgment was given to secure a prior debt, but was not given to enable Mrs. Fritton to obtain a preference over other creditors.

After the jury had thus passed upon the questions of fact, the counsel for the assignees again appeared before the auditor, claiming the fund and insisting that under the findings of the jury Born was insolvent when he executed the warrant of attorney to Mrs. Fritton; that it was given to secure a prior debt, and was a fraud upon the provisions of the Bankrupt Act.

The auditor awarded the fund to Mrs. Fritton, and the assignees took an appeal to the Supreme Court.

Upon the appeal to that court it was contended that there was error, among other things, "in disregarding the various provisions of the United States Bankrupt law in regard to preferences given by bankrupts, and in giving Mrs. Fritton a preference over other creditors, contrary to the twenty-ninth section of the United States Bankrupt Act."

In stating their position before the Supreme Court the assignees, in their argument, which was contained in the record, said:

"The inquiry is reduced to this: Who is entitled to the fund in court, Mrs. Fritton or Born's assignees?"

The Supreme Court affirmed the award below, which gave the fund to Mrs. Fritton, and the case was now brought here on error by the assignees.

Messrs. Durant and Horner, for the assignees, plaintiff in error:

1. The State court was without jurisdiction over Mrs. Fritton's claim. It erred in granting a feigned issue upon her affidavit, and in giving judgment in her favor. The whole subject belonged to the Federal courts to decide, and when it appeared that proceedings in bankruptcy had been taken and were still pending, the jurisdiction of the State court was at an end, and the matter should have been certified into the District Court of the United States for its determination. Whether the judgment creditor had a lien or not is a question which can only be solved in the Bankrupt court of the United States.

2. The judgment below was erroneous, because Mrs.

Fritton's judgment was given to secure a prior debt. The case of *Buchanan* v. *Smith*, recently decided by this court,* declares in effect that whatever enables a debtor to proceed more rapidly than if he was retarded by the necessary delay of an action, is a fraud upon the Bankrupt Act.

Messrs. A. V. Parsons and J. S. Parsons, contra:

1. Whether *if* the point now made by the opposing counsel as to jurisdiction had been made below, it would have been a good one, need not be in the least considered, since the record shows in the fullest manner that it was nowhere there made, and shows that everywhere, in fact, it was waived. A party cannot take, in this court, points not taken anywhere below. This is settled practice.

2. No doubt in *Buchanan* v. *Smith* many *dicta* are found which might militate against the present case. But it is manifest from what is said in the subsequent case of *Wilson* v. *The City Bank*, that *Buchanan* v. *Smith* did not express the views of this court, though it recorded its judgment upon the particular case. Indeed, since the case of *Wilson* v. *The City Bank*, it has not been regarded as of any authority.

Mr. Justice HUNT delivered the opinion of the court.

In looking into the record we do not find that the question of the jurisdiction of the State courts over Mrs. Fritton's claim, now made in the argument of the learned counsel of the assignees, was anywhere made in the courts below. It does not appear to have been made before the auditor, or before the Supreme Court on appeal. On the contrary, it affirmatively appears that the assignees submitted the question of the title to the fund to both of these courts, and asked its decision in their favor. In the proceeding before the auditor, before the jury passed on the questions of fact, this was the case. After the jury had passed upon them the counsel for the assignees again appeared before the auditor, claiming the fund and insisting that under the findings of

* 16 Wallace, 277.

the jury Born was an insolvent when he executed the warrant of attorney to Mrs. Fritton; that it was given to secure a prior debt, and was a fraud upon the provisions of the Bankrupt Act.

So, upon the appeal to the Supreme Court, the same ground was taken.

In all these instances the assignees submitted the decision of their claims to the State courts, and, in asking those courts to decide in their favor, necessarily asked them to decide the case.

While the assignees have made sufficient objection to the judgment rendered against them, we nowhere find an objection to the power of the court to render a judgment. An objection that the court has not decided correctly is a very different thing from an objection that the court has no power to decide.

The present was the case of the foreclosure of a mortgage under the State laws. The disposition of any surplus that might arise from a sale on such mortgage, under a proceeding in the State courts, *primâ facie* belonged to the State courts. The subject-matter was within their jurisdiction, and under their control. If special circumstances existed which altered that result, it was the duty of the party making such claim to state them and ask a ruling accordingly. Nothing of the kind was done in the present instance.

To be available here an objection must have been taken in the court below. Unless so taken it will not be heard here. It is not competent to a party to assent to a proceeding in the court below, take his chance of success, and, upon failure, come here and object that the court below had no authority to take the proceeding. This point comes before us at every term and is always decided the same way.*

We are not called upon, therefore, to decide whether, in

* Brown *v.* Clarke, 4 Howard, 4; Phelps *v.* Mayer, 15 Id. 160; Turner *v.* Yates, 16 Id. 14; Camden *v.* Doremus, 3 Id. 515; Bank *v.* Kennedy, 17 Wallace, 19; Read *v.* Gardner, Ib. 409; Ray *v.* Smith, Ib. 412; Insurance Co. *v.* Folsom, 18 Id. 237; Town of Ohio *v.* Marcy, Ib. 552; Lucas *v.* Brooks, Ib. 436; Shutte *v.* Thompson, 15 Id. 151; Prout *v.* Roby, Ib. 472.

a case like the present, the State court having the fund in its possession, was competent to proceed to its distribution, or whether if demand had been made, there having been previous to that time a decree of bankruptcy and the appointment of assignees, the whole subject should have been remitted to the United States court.*

The assignees contend further, that the judgment below was erroneous for the reason that the judgment of Mrs. Fritton was void under the Bankrupt Act, and that she was not entitled to the fund awarded to her. This is the question and the only question which was litigated by the assignees in the State courts.

The thirty-ninth section of the Bankrupt Act defines what acts of the debtor afford grounds for declaring him to be a bankrupt upon the petition of his creditor, among which are the following: "Or who being bankrupt or insolvent, . . . shall make any payment, gift, grant, sale, . . . or give any warrant to confess judgment, or procure or suffer his property to be taken on legal process with intent to give a preference to one or more of his creditors." The Bankrupt court, on the 31st of January, 1868, adjudged that Born had committed some of the acts in this section specified, by reason of which his creditor was entitled to have him declared a bankrupt.

Whether Mrs. Fritton shall retain this fund or shall lose it, depends upon the thirty-fifth section of the same act. That section enacts that if any person being insolvent or in contemplation of insolvency, and within four months before the filing a petition by or against him, with a view to give a preference, procures his property to be attached or seized on execution, or makes any payment, pledge, transfer, or who shall within six months make any sale, transfer, conveyance, or other disposition of his property to any person having reasonable cause to believe that such person is insolvent, and such payment, &c., is made in fraud of the pro-

* See Marshall *v.* Knox, 16 Wallace, 551.

visions of this act, the same shall be void and the assignees may recover the property, &c., from the person so to be benefited.

To authorize the assignees to recover the money or property under this section, it is necessary that he should establish the act of the bankrupt, not only of which he complains, but also that it was done with a view to give a preference over other creditors, and that the other party to the transaction had reasonable cause to believe that such person was insolvent. For a full discussion of the law on this general subject, see the recent case of *Wilson* v. *City Bank*.*

In the case before us, both of these necessary facts have been found against the assignees. In answer to the second inquiry submitted to them, the jury said that Mrs. Fritton had not reasonable cause to believe that Born was insolvent at the time he executed the warrant of attorney. In answer to the further inquiry, they said that this warrant of attorney was not given with a view to a preference over other creditors. The warrant of attorney cannot, therefore, be held void under the thirty-fifth section of the Bankrupt law. That section does not reach it, and as the act of the parties was valid under the statutes of Pennsylvania, there is nothing to impeach its validity.

We have not the evidence before us, and we must assume that the verdict of the jury is right. The statute assumes that there may be cases where the various acts of conveyance and disposition may be made, which would not amount to giving a preference.

We are of the opinion that the judgment of the Supreme Court of Pennsylvania was right, and that it should be

AFFIRMED.

* 17 Wallace, 473; see also Bump on Bankruptcy, 532–542, 547.

Statement of the case.

BELLE OF THE SEA.

1. Where adjusters of average, under directions from a mortgagee of a vessel in possession, and with the consent of her owners, undertake to adjust the business of the vessel on her coming in from a voyage in which she has suffered disasters and been obliged to take up money on bottomry, proceed in their office, collect the freights, general average, and insurance, pay the bottomry bond, having it assigned to themselves, and make the necessary disbursements of the vessel, it will not be inferred, except upon clear proof, that they meant to extinguish as against themselves the bottomry lien.
2. Nor will a representation in the nature of a mere opinion by them as to what will be the result of the whole adjustment, prevent them from enforcing their bottomry lien, if the freight, insurances, &c., do not discharge it, against a purchaser of the vessel who has relied on the representation.

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

The American ship "Belle of the Sea," owned by one Kimball, being in the port of New York, a certain Hammond, of that city, lent to her said owner, Kimball, $25,000 on a mortgage of the vessel; and the vessel sailed to Calcutta. On her return voyage from Calcutta to New York, she sprung a leak, was obliged to put into Mauritius for repairs, and to take up $46,000 on bottomry, the bottomry bond (now held by the Messrs. Ward in New York), covering ship, cargo, and freight. There were policies of insurance on both the ship and freight.

Shortly before the arrival of the ship at New York, the mortgage on her being long overdue, and the owner of the vessel, Kimball, being supposed to be unable to pay either bottomry bond or mortgage, Hammond, the holder of the mortgage, addressed himself to Higgins & Co., average adjusters, telling them that on the arrival of the vessel he meant to take possession of her, and that he wanted them to protect his interest in the mortgage generally. According to the account given of the matter by Higgins & Co., they agreed with him "to transact the business, *take up the bond*,

and divide one-half the commissions that could be earned in the case." They subsequently saw the Wards, holders of the bond, and offered to take it up in behalf of Hammond, the mortgagee. The Wards agreed that if before twelve o'clock of a day named and then near at hand, Kimball, the owner of the vessel, did not take it up, they, the adjusters, might do so. At about eleven o'clock of the day thus fixed Kimball came with his two sons to the office of the adjusters. Higgins's account of the interview was to this effect:

"Mr. Kimball stated generally that he thought of putting the business of the vessel in our hands. I then told him that we had made all arrangements with Mr. Hammond to take up the bond, and that at twelve o'clock we expected to get it; that I did not think he could raise the requisite amount of money, or find anybody ready at a moment's notice to go into the affair, and that I therefore considered we were pretty certain of getting it.

"I further stated to him that as Hammond was then acting as mortgagee in possession, I didn't see that there need be any conflict, for if he could find any one to supply him with money to pay off Hammond, he would be bound to account for all moneys received by him flowing from the business of the vessel, and told him that I had made an arrangement with Hammond to divide one-half of the commissions with him. Mr. Kimball stated that he hoped to raise money and pay off Hammond, and that in that event he would expect Hammond to account to him for these commissions. I told him that my fee would be made in accordance with the trouble in the case. He then expressed his satisfaction, and volunteered to go and tell Mr. Ward that it was agreeable to him that we should take up the bond. I think I told him that we would endeavor to do justice to all parties interested; and he went away. At twelve o'clock we took up the bond; took an assignment of it from the Wards; and then we went on to manage the business of the vessel; everything being managed by Mr. Hammond, personally, in his capacity as mortgagee in possession. We put a man in possession. Mr. Kimball subsequently transferred the policies of insurance on the ship to us.

"I should state also that the same day, *before* we took up the bond, we were called on by the charterer, Samuel Stevens, who

stated that he expected to have taken up the bond if he could have got it, in order to protect himself for advances made to the ship on account of freight-moneys, which he said amounted to $27,500, or thereabouts, and that he had given notice to all the consignees not to pay the freight to anybody else but himself. I told him that that process would lock the whole freight-money up in court, and involve the whole thing in litigation, and that I didn't see why his rights couldn't be preserved by letting us collect the freight, and hold it subject to all the legal rights of all concerned. He said he thought it could be so done, provided we didn't allow ourselves to prejudice anybody's interest at the expense of another. I told him that it was very desirable that we should all move together, and that if he would lend his aid in having the whole matter amicably settled without litigation, we would pledge ourselves to act with the strictest impartiality to all parties. He expressed himself as entirely satisfied with such a pledge, and so promised, and thereupon went and informed the consignees that they might pay the freight to us."

The two sons of Kimball, who, as already mentioned, were present at the interview between Kimball and the adjusters, gave an account of it somewhat different from that given by the adjuster. Their statement was as follows:

"Mr. Higgins *proposed to pay the bond for Mr. Kimball if Mr. Kimball would give him adjustments of claims against companies.* He said that he would not charge any commission for payment of bottomry bond, as he would not be out of that money more than a day or two, as he intended to require payment immediately, and before delivery of cargo, of all charges on cargo, naming the freight and general average thereon; that there were not many owners of cargo, and that they were very earnest to get their goods; several had called, and they would pay any moment the entire freight and estimate of general average on cargo. Mr. Higgins estimated the freight at about $34,000, and the general average on cargo at $20,000, which would more than pay bottomry bond and disbursements on crew inwards, &c. This was all verbally agreed to by both parties. They said that *they would apply collections to bond immediately.*"

Nothing was said at this interview about Mr. Kimball's policies of insurance, but at a subsequent meeting they were handed to Mr. Higgins to be collected, the amount to be applied to payment of the bond, if necessary.

During these operations, one Nickerson was desirous of buying the ship, and finally did buy it. He gave this account of his purchase:

"Before I purchased I had an interview with Higgins & Co., the agents of the former owner, Mr. Kimball, who had placed the affairs of the ship, arising out of her last voyage, in their hands for settlement. In this interview they *assured* me that if certain claims of the freighters were paid there would be a balance of some $3000 in their hands belonging to the ship. On this assurance I bought the ship, and paid the freighters' claims."

Higgins in giving an account of this same matter stated that he had put all the accounts before Nickerson, who examined them, and had his own adjusters examine them; and he denied, in effect, that he had made such representations as those alleged.

As things turned out Higgins & Co. could not get all the insurance-money claimed, and asserted by them to be due from the insurers; and there was a deficit which was to fall on some one. On whom it was to fall was the question. The adjusters, Higgins & Co., asserted that it was to fall on the ship under the bottomry bond; they having been subrogated to the rights of the Wards. Nickerson, the purchaser, asserted on the contrary that it was to fall on Higgins & Co., the adjusters, who had undertaken to pay the bond, and to look to freight, insurance, &c., for reimbursement.

The two parties being thus unable to agree, and the vessel being in the port of Philadelphia, Higgins & Co. libelled her there for the deficit. The District Court decreed in their favor, and the Circuit Court on appeal affirmed the decree. Nickerson now brought the case here.

Mr. Henry Flanders, for the appellant:

1. The testimony shows that the adjusters expected confidently that the freight, insurance, &c., would reimburse

them, and, therefore, that they agreed to *pay* and did *pay* the bottomry bond. The testimony of the two sons of Kimball shows this. Higgins's own testimony shows it no less; for he says that his firm was employed "to *take up* the bond." The bottomry lien being thus once extinguished is not revived—especially is not revived against an innocent purchaser for value—because the adjusters expected to get money which they failed to get. The present case is one of every-day occurrence. The adjusters anticipated uncertain profits, and did not get them. For this, *their* own error of judgment, they must themselves suffer.

2. In addition to this, we have as a defence the assurance of Higgins to Nickerson, before the purchase of this last, that if certain claims of freighters were paid there would be a balance in favor of the ship; and the fact that *on that assurance alone*, Nickerson purchased.

The testimony on both parts of the case is, on the appellant's side, positive, specific, and to the point. The other side opposes to it but general denials.

Mr. S. C. Perkins, contra:

1. The purchaser of the vessel alleges, that the lien of bottomry was extinguished by an agreement by the adjusters with the owner of the ship that they would take up the bond and look only to the freight, general average, and insurance for their reimbursement. This he is bound plainly to prove. Has he proved it?

It is evident that the adjusters had proposed to the Wards to pay the bond and take an assignment of it, before they had any interview with Kimball, the owner of the ship. Their occupation being that of adjusters of averages, they were doubtless desirous to be employed in that capacity in reference to this ship. Whatever estimate they may have made of the comparative resources and liabilities of the ship, whatever assurances they may have given as to their ability to marshal and adjust them for the best interests of the owner, these are to be considered as reasons suggested for their employment, rather than as importing a stipulation

that they would accept such resources as their sole security for reimbursement. Proposing to pay the amount of the bond and to take an assignment of it, it is improbable that they intended to forego the certain security thus afforded them, and depend upon the problematical sufficiency of the ship's credits to return their large advances. Admitting that they were the agents of the ship-owner, the payment of his debt with their own money would not work a satisfaction of the debt or an extinguishment of the security for it. By the assignment of the bond they took the place of the bottomry creditors, and there is no incompatibility in the rights to which they thus succeeded and their duties and obligations as agents of the debtors. Certainly there is no implication, in equity, at least, that by becoming agents of the debtor they thereby surrendered or lost any of their securities as creditors. Admitting further, that they paid the bond in pursuance of an arrangement with the owner to that effect, still the debt with its incidents subsisted and would only be discharged by payment in money or some other conventional mode. The defence really concedes this much. For it does not allege that the bond itself was satisfied, but only that it is not a lien upon the ship, because the adjusters paid it on the faith and credit of the freights, general average, and insurance exclusively. But such conclusion can only result from an express or implied agreement to that effect. That the adjusters expressly agreed to take up the bond and forego its lien does not appear in all the proofs, nor is it to be inferred from the fact of their agency, or from an agreement to take it up with their money and to adjust the liabilities and marshal the resources of the ship for the best interests of her owner.

2. If the adjusters represented to Nickerson, the purchaser of the vessel, that if certain claims of the freighters were paid, there would be a balance in their hands in favor of the ship, or her owner, and he thereupon paid these claims and purchased the ship, they could not maintain this suit. But this is a fact which it devolves upon the respondent to prove. The proof of it rests upon his unsupported

testimony. It is denied by the libellant, Higgins, who is alleged to have made the representation. Thus affirmed by one party, and denied by the other, it cannot be considered as established, and the estoppel, which rests upon it, necessarily fails.

Mr. Justice STRONG delivered the opinion of the court.

Very clearly the ship was not discharged from the bottomry lien, unless the bond was actually paid, or unless the libellants agreed to pay it and look to the freights, the general average, and the insurances exclusively for their reimbursement. Of actual payment there is no evidence whatever. On the arrival of the ship at New York, Mr. E. A. Hammond, who had a mortgage upon her, which, with interest, amounted to more than $30,000, took her into his possession, in virtue of authority conferred by the mortgage, and employed the libellants to take up the bottomry bond, to collect the freight, the general average and insurance, and generally to transact the business of the vessel. Subsequently this arrangement was assented to by the owner and the charterer. Accordingly the libellants took up the bond by taking an assignment of it from the Messrs. Ward who held it, and proceeded to adjust the business of the ship, collecting the freights, general average, and insurance, and making the necessary disbursements, but as they were unable to realize from the insurances what was expected, the sums collected proved insufficient to pay the expenses of discharging the ship, the commissions, and the necessary disbursements, together with the bottomry bond. They now claim the right to apply what they have been able to collect, first, to reimburse themselves, the commissions, necessary expenses, and disbursements made by them on account of the ship; and, secondly, to the discharge of the bottomry lien, looking to the ship for that portion of the bond which, by such marshalling of the fund, remains unpaid. And such, we think, are their rights, if they have not been surrendered. By the assignment of the bottomry bond to them, they became bottomry creditors, and even if there had been no such

assignment, and had they in fact paid the bond at the instance of the owner and mortgagee, they would have been entitled in equity to the rights of the bottomry creditor. Being thus creditors by bottomry and also by payments on behalf of the ship for expenses, they have a clear right to apply whatever funds of the ship come to their hands, first, to the satisfaction of their unsecured claims, and secondly, to the bond, and to look to the ship for any unpaid balance of the bottomry. If, however, when they undertook their agency they agreed to pay the bond, and thus discharge its lien, looking to the freight, the general average, and the insurance alone for reimbursement, or to the personal liability of the owner, as the appellants insist they did, they cannot now set up a lien on the ship. But we do not think the evidence establishes any such agreement, and its existence is quite improbable. They were adjusters of averages, and they desired to be employed as such to attend to the business of the ship. To secure such employment, they made the most favorable representation of what they were able and willing to do. But they proposed to the Messrs. Ward, who held the bond, to take it up, taking an assignment of it, before they had any interview with Mr. Kimball, the owner. They could then have had no accurate knowledge of the amount of the freight, the general average, and the insurance. They could not have known that the ship's resources would suffice to pay the bottomry, and the other expenses necessary to make the freight and the general average available. And they had then no control over the insurances. It is, therefore, quite unlikely that they undertook to pay the bond and discharge the lien. Their arrangement was with the mortgagee, and there is no evidence that they agreed with him to do anything more than take the bond from the holder and act as general agents of the ship in adjusting its affairs. The proofs do not establish that in that arrangement they undertook to satisfy the bottomry and extinguish its lien without regard to the amount of freight, general average, and insurances which could be collected, and without regard to the necessary disbursements and commissions.

Such is not the testimony of Mr. Higgins, nor has the mortgagee so testified, and the owner was not present at the arrangement.

The appellants, however, rely upon the statement of two sons of the owner, who do not speak at all of the arrangement with the mortgagee. They speak only of a subsequent interview of Mr. Higgins with the owner, from whom the possession had been taken, and who had then no control over the settlement of the ship's affairs. Their statement is that Higgins proposed to pay the bottomry bond for the owner if he would give his firm adjustments of claims against insurance companies, and expressed his convictions of what his firm could do, making some promises respecting the rate of commissions, and promising to apply collections to the bond immediately. The sons state further that this was verbally agreed to, but the policies were not delivered in pursuance of any such agreement, nor was there any agreement to deliver them, and what is very remarkable, the sons state that nothing was said at that interview about the policies. They were subsequently handed to Mr. Higgins to be collected, and the amount to be applied to the payment of the bottomry bond, if necessary. These witnesses are contradicted in some particulars by Mr. Higgins, but assuming that their statement is correct, it falls far short of proof that Higgins agreed to discharge the ship from the bottomry lien, or agreed to pay the bond and look only to the freight, insurances, and general average. And, even if the firm could be considered as agents of the owner, the payment of his debt, or the debt of the ship, could not work a satisfaction of the debt, or extinguish its lien. It would only change the creditor. We are of opinion, then, that no arrangement with the owner has been proved by which the libellants have been disabled from enforcing the bottomry lien.

Another defence has been set up. The appellants contend that the libellants are estopped from resorting to the ship for any balance of the bond unpaid, by their represen-

tations. They insist that they purchased the ship relying upon a representation of Mr. Higgins, that if they purchased and would settle certain claims of the charterers, there would be at least three thousand dollars beyond what was needed to pay the bottomry bond, and other claims of his firm. There is, however, no sufficient proof of such representations. They are denied by Mr. Higgins, and the only person who affirms they were made is Mr. Nickerson, the purchaser himself. And even the testimony of Nickerson appears to assert only that Higgins expressed an opinion respecting what would be the result, rather than a positive assertion of the fact. This is quite an insufficient basis for an estoppel, and manifestly the opinion was not relied upon. Nickerson had examined for himself some of the accounts at least.

This disposes of the case. Admitting the libellants have no lien in admiralty for their fees and commissions, or even for their disbursements on account of the ship, they had, as we have said, a right to apply the funds they had in hand, first to the satisfaction of the debt due them for such fees, commissions, and disbursements, applying only the remainder to the bond. For the balance unpaid they have the security of the bottomry lien.

DECREE AFFIRMED, with interest at the rate allowed in Pennsylvania, and with costs.

THE MONTELLO.

1. The navigability of a stream, for the purpose of bringing it within the terms "navigable waters of the United States," does not depend upon the mode by which commerce is conducted upon it, as whether by steamers, or sailing vessels, or Durham boats, nor upon the difficulties attending navigation; such as those made by falls, rapids, and sandbars, even though these be so great as that while they last they prevent the use of the best means, such as steamboats, for carrying on commerce.

Statement of the case.

It depends upon the fact whether the river in its natural state is such as that it affords a channel for useful commerce.

2. These doctrines applied to the Fox River, in Wisconsin, a river whose navigability was originally so much embarrassed by rocks, rapids, &c., as that only Durham boats could use the stream, but which afterwards, by canals, locks, and other artificial means was so much improved as that steamboats could use it freely; the river having, however, never, in its natural state, been a channel for useful commerce.

APPEAL from the Circuit Court for the Eastern District of Wisconsin.

In the southern part of the State of Wisconsin, about a mile and a half east of Portage City, and at a point about equidistant from the eastern and western boundaries of the State, rises the Fox River. The stream flows in a northeasterly direction, through Lake Winnebago into Green Bay, thence into Lake Michigan, so connecting through that lake and lakes Huron, Erie, and Ontario with the river St. Lawrence, and other great waters having their hydrographic basin on the Atlantic coast, and discharging themselves into the Atlantic Ocean.

In a bend before Portage City sweeps the Wisconsin River, which, rising in the regions far northwest of the place just named, before arriving at Portage City runs eastwardly, and then turning to the west and flowing a certain distance falls into the Mississippi River. In this way a natural watercourse has been always open from the head-waters of the Mississippi through the Wisconsin River to the spot now known as Portage City.

Of course when a "portage," or carriage by land, was made of merchandise from the Wisconsin River at Portage City to the sources of Fox River, less than two miles east, the merchandise coming from the head-waters of the Mississippi was on waters whose course was towards the Atlantic Ocean.

In its natural state, there were, however, in parts of the Fox River rapids and falls. At Grand Chute there was a rock making a fall two feet perpendicular; and below certain rapids known as the De Pere, the navigation was

especially difficult. There were many other similar though less difficult places. All these embarrassed the navigation of early days, but they did not destroy nor even much arrest it. The stream was always used for purposes of trade; including especially the great fur trade, a trade carried on before our Revolution, and when French and British were pursuing their adventurous commerce far into the savage regions of the Northwest. Smith, the historian of Wisconsin, states* that even so far back as 1718, one of "the great avenues from the St. Lawrence to the Mississippi was by way of Fox and Wisconsin Rivers." In 1763, Marquette and Joliet, French explorers of the source of the Mississippi, followed the line of the two streams mentioned. The stream was then navigated by long, narrow boats, called Durham boats—vessels from seventy to one hundred feet long and twelve broad, drawing, when loaded, from two to two and a half feet of water—which men would push with poles or propel by oars, or have dragged by horses and mules; sometimes, in very shallow water, wading alongside and pushing the boats onward themselves. At places where progress on the stream was impracticable the vessel would be unloaded and a "portage" made, till the navigator had got beyond the difficult place, and then a reshipment would be made of the merchandise into some other boat beyond, or into the same boat, which unloaded, and drawing less water than before, could be got across the place that in a loaded state had stopped it. Arriving at the very source of the Fox River, a "portage" of less than two miles would be made, and the merchandise was on the Wisconsin, and thence it floated to the Mississippi. In May, 1838, a regular line of Durham boats was advertised to run from Green Bay, near Lake Michigan, to the portage at the head of the Fox River.

By the Ordinance of 1787,† for the government of the Northwest Territory, it was enacted that—

"The navigable waters leading into the Mississippi and St.

* History of Wisconsin, vol. 1, p. 81.

† Article 4.

Lawrence, and *the carrying places between the same*, shall be common highways, and forever free as well to the inhabitants of the said Territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor."

This clause was substantially enacted in the constitution of Wisconsin, which provides* that—

"The river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the State as to the citizens of the United States, without any tax, impost, or duty therefor."

By the act of Congress of 1846,† passed on the admission of Wisconsin as a State into the Union, a quantity of land was granted to the State—

"For the purpose of improving the navigation of the Fox and Wisconsin Rivers, in the Territory of Wisconsin, and of constructing the canal to unite the said rivers at or near the portage."

And it was provided that the—

"Said rivers, when improved, and the said canal, when finished, shall be and forever remain a public highway for the use of the government of the United States, free from any toll or other charge whatever, for the transportation of the mails, or for any property of the United States, or persons in their service passing upon or along the same."

The State of Wisconsin accepted the grant, and, pursuant to the authority and power vested in the State, a company was incorporated by an act approved July 6th, 1853, for the improvement of the Fox and Wisconsin Rivers. That act vested in the corporation all the rights and privileges granted to the State by the act of Congress. And the improvement company in carrying out the object of its creation, built dams, locks, and canals in Fox River, from Portage City to

* Article 9, section 1, Revised Statutes of Wisconsin, 1858, pp. 40, 1070.
† 9 Stat. at Large, p. 83.

below De Pere Rapids. The works of this company were on a grand scale, and by them Fox River was changed from its natural condition to an improved thoroughfare, for the use of which all boats were required to pay toll. It became the property of and was exclusively managed by a corporate body, with power to demand and receive tolls from all crafts passing through the locks, not excepting boats enrolled and licensed for coasting trade.

In consequence of the acts of Congress, and of the State, and of the increase of trade from the Northwest, over the Wisconsin River, across the portage, and upon the Fox River and the lakes, the Fox River was cleared of the obstructions caused by its rapids, or falls, and the difficult or impracticable passes were removed by locks, canals, dams, and other artificial navigation, so that there was now, and had been for several years, uninterrupted water communication for steam vessels of considerable capacity from the Mississippi to Lake Michigan, and thence to the St. Lawrence, through the Wisconsin and Fox Rivers; and steamboats had passed, and were constantly passing, over these rivers with passengers and freight destined to points and places outside of the State of Wisconsin.

In this state of things the government libelled the steamer Montello in admiralty, for non-compliance with certain acts of Congress making enrolment and license, and certain provisions as to steam valves necessary for all vessels of the tonnage of which the Montello was, navigating the navigable waters of the United States. The owners of the steamer denied that the Fox River was "navigable water" of the United States, within the act of Congress; and whether it was so was the question in the case.

The case had been here before,* but the libel was defective and the evidence insufficient to determine the question, and it was remanded for further proceedings, to enable the parties by new allegations and evidence to present the exact character of Fox River as a navigable stream. This was

* 11 Wallace, 414.

now done, and there was, therefore, nothing now in the way of a correct solution of the inquiry.

The court below—resting its decision on the ground that before the navigation of the river was artificially improved there had been numerous obstructions to a continuous navigation, especially below the De Pere Rapids—decided that the river was not a part of the public navigable waters of the United States, within the doctrine laid down in *The Daniel Ball*,* and *The Montello*,† and dismissed the libel. The United States appealed, and now assigned as error—

1. That by the Ordinance of 1787 and subsequent acts of Congress, as well as by the constitution of Wisconsin, the Fox River was declared and made part of the public navigable waters of the United States, and consequently fell within the doctrine in respect of that class of waters laid down by this court; and

2. That the Fox River was a part of the navigable waters of the United States, notwithstanding the fact that its navigation was defective by reason of the falls and rapids, which had been remedied of late times by artificial navigation.

Mr. G. H. Williams, Attorney-General, and Mr. C. H. Hill, Assistant Attorney-General, for the plaintiff in error:

1. Whether a stream constitutes part of the navigable waters of the United States, does not depend upon the question whether artificial improvements are required in order to render it navigable. Some of the greatest rivers on the continent, like the St. Lawrence and the Ottawa, are so interrupted by rapids as to require artificial means to enable them to be navigated continuously, and the great lakes themselves, by the employment of artificial means only, form an uninterrupted line of navigation with the ocean. Where the natural navigation is the principal one, and the artificial merely dependent and ancillary thereto, and the natural stream is in fact navigable within the ordinary acceptation of the word, then the river forms a part of the navigable

* 10 Wallace, 557. † 11 Id. 411.

waters of the United States, if, by means of the artificial navigation, it is practically made so, and interstate commerce is actually carried on. All the State courts, and they are numerous, which have had occasion to discuss the question of what is a navigable stream have given a very broad and liberal construction to these words. In Wisconsin this very river is treated as a navigable river.*

2. If this were not so, the Ordinance of 1787 and the subsequent act of Congress, and the constitution of Wisconsin, make the Fox River "navigable water of the United States."

Mr. J. H. Hauser, contra:

1. *What is meant by "navigable waters of the United States?"*

The first definition of them given by this court was given in *The Daniel Ball*, where the court says:

"Those rivers must be regarded as public navigable rivers in law which are navigable in fact when they are used, or are susceptible of being used, in their ORDINARY CONDITION, as highways for commerce over which trade and travel are or may be conducted in the customary modes of travel on water."

And in the present case, on the former appeal, speaking of the Fox River, it says:

"It can only be deemed a navigable water of the United States when it forms by itself, or by its connections with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries, in the *customary* modes in which such commerce is conducted by water."

The State courts have discussed the question of navigable waters only as a fact in their own State, and not as relating to commerce with other States or foreign countries. Their decisions do not apply.

2. *Is the Fox River a navigable water of the United States?*

The Fox was, in parts, not a navigable stream prior to 1846. It had numerous rapids and abrupt falls. At Grand Chute there was a solid rock, making a fall of two and a half feet

* Harrington *v.* Edwards, 17 Wisconsin, 586.

perpendicular. No commerce could be carried up the river in the ordinary and customary manner, and under no circumstances could it be pretended to be a public navigable stream prior to the act of Congress of August 6th, 1846. Exclusive control was granted by that act to the State of Wisconsin, only reserving that it should be a public highway for the use of the United States. The State of Wisconsin, by an act of its legislature, approved July 6th, 1853, ceded all the rights and privileges which the State had obtained from the United States, to this company.

From 1840 to 1853 the control of the Fox River belonged to the State of Wisconsin, and since that it has belonged to the Fox and Wisconsin Rivers Improvement Company, and was not a public navigable water of the United States. And after this grant passed into the hands of the improvement company it became a canal or slack-water navigation, and comes within the case of *Veazie* v. *Moor*,* which decides that the Penobscot River is not a public navigable river of the United States, for the reason that it has no navigable connection with the seas, unless made so by artificial or private means.

If the Fox River is a navigable stream of the United States, it would be impossible to conceive of any body of water that is not or might not become such navigable water.

3. *Did Congress by the Ordinance of* 1787 *intend to include Fox River?*

Certainly not on the ground of its being navigable; for prior to the building of the canal and slack-water navigation the case shows that only Durham boats could at certain stages of the water pass up and down the river, and then only by unloading at certain places and lifting the boats over the rapids. This court says in *The Daniel Ball*, that the water must be navigable in its "*ordinary condition*," and in this case on the former appeal, "It must be water over which commerce can be carried on in the *customary modes* in which such commerce is conducted by water."

* 14 Howard, 568.

In its *ordinary condition* it was impossible to get steamboats up or down the river. Even Durham boats could pass up or down only by being unloaded and lifted over the falls. This was not the "*customary modes*" by which commerce is conducted by water. The true definition of "navigable water" of the United States must be water which, in its ordinary condition, by itself or by its connections with other waters, forms with them a continual highway over which commerce is or may be carried on with other States or foreign countries in vessels which Congress has deemed of suitable size to be recognized in its commercial and revenue laws.

The literal construction of the Ordinance of 1787 would include all the navigable waters in the State, for all the lakes and rivers of the State empty either in the Mississippi or St. Lawrence. The Indians in their commerce carried their boats from lake to lake.

4. *Does the subsequent legislation of Congress show that the waters of the Fox River were included in the Ordinance of* 1787?

If the Ordinance of 1787 applied to Fox River, then all subsequent legislation of Congress and of the State of Wisconsin in regard to said river is in violation of said ordinance.

Again, "common highway," as used in the Ordinance of 1787, is used in a broader sense than admiralty jurisdiction, for while it includes navigable waters it also includes *carrying-places* between the same, and admiralty jurisdiction has not yet extended to land as well as navigable water.

While the United States did grant land to aid in improvement of the river, yet the improvement was largely made by private energy and sacrifice, and the government reserved no rights except as above stated.

If private enterprise makes waters navigable which were not before navigable, and capable of carrying vessels which are of sufficient capacity to come within the jurisdiction of the Federal courts, which before were not navigable by any of the ordinary modes of commerce, will the United States then come in and take jurisdiction and control, especially where this improvement is wholly within a State, and sub-

ject to State law and State taxation? Such a policy would not be for the best interest of the General and State governments, and would be such a centralization of power in the Federal government, and such an encroachment on the powers reserved to the States by the Constitution, that this court will be slow to make such a radical change and to extend the jurisdiction of the Federal courts, that by the same reasoning the General government would take control of every trade, manufacture, and enterprise throughout the country.

Mr. Justice DAVIS delivered the opinion of the court.

This court held in the case of *The Daniel Ball*,* that those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And a river is a navigable water of the United States when it forms by itself, or by its connection with other waters, a continued highway over which commerce is, or may be, carried with other States or foreign countries in the customary modes in which such commerce is conducted by water.† Apply these tests to the case in hand, and we think the question must be answered in the affirmative.

The Fox River has its source near Portage City, Wisconsin, and flows, in a northeasterly direction, through Lake Winnebago into Green Bay, and thence into Lake Michigan, and by means of a short canal of a mile and a half it is connected at Portage City with the Wisconsin River, which empties into the Mississippi. From its source to Oshkosh the river is frequently spoken of as the "Upper Fox." From Lake Winnebago to Green Bay it is called the "Lower Fox." There are several rapids and falls in the river, but the obstructions caused by them have been removed by arti-

* 10 Wallace, 557.

† The Montello, 11 Id. 411.

ficial navigation, so that there is now, and has been for several years, uninterrupted water communication for steam vessels of considerable capacity from the Mississippi to Lake Michigan, and thence to the St. Lawrence, through the Wisconsin and Fox Rivers; and steamboats have passed, and are constantly passing, over these rivers with passengers and freight destined to points and places outside of the State of Wisconsin.

It is said, however, that although the Fox River may now be considered a highway for commerce, over which trade and travel are, or may be, conducted in the ordinary modes of trade and travel on water, it was not so in its natural state, and, therefore, is not a navigable water of the United States within the purview of the decisions referred to.

It is true, without the improvements by locks, canals, and dams, Fox River, through its entire length, could not be navigated by steamboats or sail vessels, but it is equally true that it formed, in connection with the Wisconsin, one of the earliest and most important channels of communication between the Upper Mississippi and the lakes. It was this route which Marquette and Joliet took in 1673 on their voyage to discover the Mississippi; and the immense fur trade of the Northwest was carried over it for more than a century.* Smith, in his History of Wisconsin,† says: "At this time (1718) the three great avenues from the St. Lawrence to the Mississippi were, one by the way of the Fox and Wisconsin Rivers, one by way of Chicago, and one by the way of the Miami of the Lakes, when, after crossing the portage of three leagues over the summit level, a shallow stream led into the Wabash and Ohio." It is, therefore, apparent that it was one of the highways referred to in the Ordinance of 1787, and, indeed, among the most favored on account of the short portage between the two rivers. In more modern times, and since the settlement of the country, and before the improvements resulting in an unbroken navi-

* Parkman's Discovery of the Great West, 52 *et seq.*; 3 Bancroft's History of the United States, 156, 157.

† Volume 1, page 81.

gation were undertaken, a large interstate commerce has been successfully carried on through this channel. This was done by means of Durham boats, which were vessels from seventy to one hundred feet in length, with twelve feet beam, and drew when loaded two to two and one-half feet of water. These boats, propelled by animal power, were able to navigate the entire length of Fox River, with the aid of a few portages, and would readily carry a very considerable tonnage.

In process of time, as Wisconsin advanced in wealth and population, and had a variety of products to exchange for the commodities of sister States and foreign nations, Durham boats were found to be inadequate to the wants of the country, and Congress was appealed to for aid to improve the navigation of the river, so that steam power could be used. This aid was granted, and since the river was improved commerce is carried over it in one of the usual ways in which commerce is conducted on the water at the present day. But commerce is conducted on the water, even at the present day, through other instrumentalities than boats propelled by steam or wind. And, independently of the Ordinance of 1787, declaring the "navigable waters" leading into the Mississippi and St. Lawrence to be "common highways," the true test of the navigability of a stream does not depend on the mode by which commerce is, or may be, conducted, nor the difficulties attending navigation. If this were so, the public would be deprived of the use of many of the large rivers of the country over which rafts of lumber of great value are constantly taken to market.

It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway. The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and be-

comes in law a public river or highway. Vessels of any kind that can float upon the water, whether propelled by animal power, by the wind, or by the agency of steam, are, or may become, the mode by which a vast commerce can be conducted, and it would be a mischievous rule that would exclude either in determining the navigability of a river. It is not, however, as Chief Justice Shaw said,* "every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable, but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture."

The learned judge of the court below rested his decision against the navigability of the Fox River below the De Pere Rapids chiefly on the ground that there were, before the river was improved, obstructions to an unbroken navigation. This is true, and these obstructions rendered the navigation difficult, and prevented the adoption of the modern agencies by which commerce is conducted. But with these difficulties in the way commerce was successfully carried on, for it is in proof that the products of other States and countries were taken up the river in its natural state from Green Bay to Fort Winnebago, and return cargoes of lead and furs obtained. And the customary mode by which this was done was Durham boats. As early as May, 1838, a regular line of these boats was advertised to run from Green Bay to the Wisconsin portage.† But there were difficulties in the way of rapid navigation even with Durham boats, and these difficulties are recognized in the Ordinance of 1787, for not only were the "navigable waters" declared free, but also the "carrying-places" between them, that is, places where boats must be partially or wholly unloaded and their cargoes carried on land to a greater or less distance. Apart from this, however, the rule laid down by the district judge as a test of navigability cannot be adopted, for it would exclude many of the great rivers of the country which were so interrupted by rapids as to require artificial means to enable

* 21 Pickering, 344.

† Doty *v.* Strong, 1 Pinney, 316.

them to be navigated without break. Indeed, there are but few of our fresh-water rivers which did not originally present serious obstructions to an uninterrupted navigation. In some cases, like the Fox River, they may be so great while they last as to prevent the use of the best instrumentalities for carrying on commerce, but the vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce. If this be so the river is navigable in fact, although its navigation may be encompassed with difficulties by reason of natural barriers, such as rapids and sand-bars.

The views that we have presented on this subject receive support from the courts of this country that have had occasion to discuss the question of what is a navigable stream.*

From what has been said, it follows that Fox River is within the rule prescribed by this court in order to determine whether a river is a navigable water of the United States. It has always been navigable in fact, and not only capable of use, but actually used as a highway for commerce, in the only mode in which commerce could be conducted, before the navigation of the river was improved. Since this was done, the valuable trade prosecuted on the river, by the agency of steam, has become of national importance. And emptying, as it does, into Green Bay, it forms a continued highway for interstate commerce. The products of other States and foreign countries, which arrived at Green Bay for points in the interior, were formerly sent forward in Durham boats, and since the completion of the improvements on the river these products are reshipped in a small class of steamboats. It would be strange, indeed, if this difference in the modes of conducting commerce, both of

* Moore *v.* Sanborn, 2 Michigan, 519; Brown *v.* Chadbourne, 31 Maine, 1; People *v.* Canal Appraisers, 33 New York, 461; Morgan *v.* King, 35 Id. 459; Flanagan *v.* Philadelphia, 42 Pennsylvania State, 219; Monongahela Bridge Co. *v.* Kirk, 46 Id. 112; Cox *v.* The State, 3 Blackford, 193; Hogg *v.* Zanesville Canal Co., 5 Ohio, 410; Hickok *v.* Hine, 23 Ohio State, 527; Jolly *v.* Terre Haute Bridge Co., 6 McLean, 237; Rowe *v.* The Granite Bridge Co., 21 Pickering, 346; Illinois River Packet Co. *v.* Peoria Bridge Co., 38 Illinois, 467; Harrington *v.* Edwards, 17 Wisconsin, 586.

which, at the times they were employed, were adapted to the necessities of navigation, should operate a change upon the national character of the stream.

Before the Union was formed, and while the French were in possession of the territory, the Wisconsin and Fox Rivers constituted about the only route of trade and travel between the Upper Mississippi and the great lakes. And since the territory belonged to us this route has been regarded of national importance. To preserve the national character of all the rivers leading into the Mississippi and St. Lawrence, and to prevent a monopoly of their waters, was the purpose of the Ordinance of 1787, declaring them to be free to the public; and so important was the provision of this ordinance deemed by Congress that it was imposed on Wisconsin as a condition of admission into the Union.

Congress, also, when the State was admitted, made to it a grant of lands, in order that the Fox and Wisconsin might be united by a canal, their navigation improved, and the rivers made in fact, what nature meant they should be, a great avenue for trade between the Mississippi and Lake Michigan. The grant was accepted, the navigation improved, and the canal constructed. These objects were, however, accomplished by a private corporation chartered for the purpose, which was allowed to charge tolls as a source of profit. The exaction of these tolls created dissatisfaction outside of the State, and Congress, in 1870, in response to memorials on the subject of the importance of these rivers as a channel of commerce between the States, passed an act authorizing the General government to purchase the property, and after it was reimbursed for advances, to reduce the tolls to the lowest point which should be ascertained to be sufficient to operate the works and keep them in repair.* Although this legislation was not needed to establish the navigability of these rivers, it shows the estimate put by Congress upon them as a medium of communication between the lakes and the Upper Mississippi.

* 16 Stat. at Large, 189.

Statement of the case.

It results from these views that steamboats navigating the waters of the Fox River are subject to governmental regulation.

DECREE REVERSED, and cause remanded for further proceedings,

IN CONFORMITY WITH THIS OPINION.

INSURANCE COMPANY *v.* MORSE.

1. The Constitution of the United States secures to citizens of another State than that in which suit is brought an absolute right to remove their cases into the Federal court, upon compliance with the terms of the twelfth section of the Judiciary Act.
2. The obstruction to this right imposed by a statute of a State, which enacts—

> "That any fire insurance company, association, or partnership, incorporated by or organized under the laws of any other State of the United States, desiring to transact any such business as aforesaid by any agent or agents, in this State, shall first appoint an attorney in this State on whom process of law can be served, containing *an agreement that such company will not remove the suit for trial into the United States Circuit Court or Federal courts, and file in the office of the secretary of state a written instrument, duly signed and sealed, certifying such appointment, which shall continue until another attorney be substituted,*"

is repugnant to the Constitution of the United States and the laws in pursuance thereof, and is illegal and void.
3. The agreement of the insurance company, filed in pursuance of the act, derives no support from a statute thus unconstitutional and is as void as it would be had no such statute been passed.

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

A statute of Wisconsin, passed in 1870,* enacts as follows:

"It shall not be lawful for any fire insurance company, association, or partnership, incorporated by or organized under the laws of any other State of the United States, or any foreign government, for any of the purposes specified in this act, directly or indirectly to take risks or transact any business of in-

* 1 Taylor's Statutes, page 958, section 22.

surance in this State, unless possessed of the amount of actual capital required of similar companies formed under the provisions of this act; and any such company desiring to transact any such business as aforesaid by any agent or agents, in this State, shall first appoint an attorney in this State on whom process of law can be served, containing *an agreement that such company will not remove the suit for trial into the United States Circuit Court or Federal courts, and file in the office of the secretary of state a written instrument, duly signed and sealed, certifying such appointment, which shall continue until another attorney be substituted.*"

This statute being in force, the Home Insurance Company of New York, a corporation organized under the laws of the State of New York, and having its office and principal place of business in the city of New York, being desirous of doing business in the State of Wisconsin, established an agency there, and in compliance with the provisions of the above-quoted statute, filed in the office of the secretary of state of Wisconsin an appointment of H. S. Durand as their agent in it, on whom process might be served. The power of attorney thus filed contained this clause:

"And said company agrees that suits commenced in the State courts of Wisconsin shall not be removed by the acts of said company into the United States Circuit or Federal courts."

Being thus established in the State, the company issued a policy of insurance to one Morse, and a loss having occurred, as was alleged, under it, Morse sued the company in the County Court of Winnebago, one of the State courts of Wisconsin, to recover the amount alleged to be due on the policy. The company entered its appearance in the suit and filed its petition to remove the case, under the twelfth section of the Judiciary Act of 1789, into the Circuit Court for the district. The section under which the company filed its petition for removal is in these words:

"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 at the time of enter-

ing 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 accept the surety and proceed no further in the cause."

The petition was in proper form and was accompanied by the required bond and bail.

The State court of Wisconsin in which the suit was brought held that the statute above quoted, of the State, and the agreement under it justified a denial of the petition to remove the case into the Circuit Court of the United States; and a trial having been had, gave judgment for the plaintiff on a verdict found in his favor. A similar view as to the effect of the statute of the State and the agreement under it, was taken by the Supreme Court of Wisconsin, and the judgment was there affirmed.* Thereupon the insurance company brought the case here; and whether the statute and the agreement were sufficient to justify the refusal to remove the case was the point now presented for consideration.

The Constitution of the United States ordains as follows:

"This Constitution and *the laws of the United States* which shall be made in pursuance thereof . . . shall be the *supreme law* of the land; and the judges in every State shall be bound thereby; *anything* in the constitution or laws of any State to the contrary notwithstanding.

"The judicial power of the United States . . . shall extend to . . . controversies between citizens of different States."

The case was twice argued.

Mr. J. W. Cary, in support of the judgment below:

That corporations created by the laws of one State have

* 30 Wisconsin, 496.

not the absolute right to recognition, and to do business in another State, is not a subject for argument; the question has been adjudicated by this court.

In the recent case of *Paul* v. *Virginia*,* this court, speaking through Field, J., says:

"Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be *granted upon such terms and conditions as those States may think proper to impose.* They may exclude the foreign corporation entirely, they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest."

This case did but recognize what Taney, C. J., had expressed in behalf of the court in *Bank of Augusta* v. *Earle*,† and what Curtis, J., said equally for it in *The Lafayette Insurance Company* v. *French*.‡

If, therefore, a State corporation has no rights in States other than in the one in which created, except "by the permission, express or implied, of those States," and if a State has an absolute right to prohibit a foreign corporation from doing business within its limits, it follows of necessity that when a State grants permission to do business, to a foreign corporation, it has a right to impose such terms and conditions as it may see fit. The only point, therefore, upon the question of removal is whether the contract or stipulation required by the statute of Wisconsin of 1870 inures to the State alone, or inures to both the State and to each policyholder.

The provision is for the benefit of the assured, and inserted for a beneficent purpose, to wit: to give to the assured a certain remedy without delay. It meant to prevent him from being compelled to go a great distance from his home to assert his claims, and that if he wishes a writ of error or an appeal to what is decided against him he shall not be sub-

* 8 Wallace, 168. † 13 Peters, 519. ‡ 18 Howard, 407.

jected to the expense of coming to this high court in Washington; a court often at a very great distance from the suitor, and where of necessity he is often subjected to great delay and to great cost. These foreign companies say to the State, "We wish to do business in your State." The State replies: "If we permit you to do business here and any of our people suffer a loss, you can, under existing laws, subject them, if you refuse to pay, to the great inconvenience of going a long distance from their homes to enforce their rights. However, we will give our consent to your doing business here provided you will agree to waive your rights under a certain act of Congress, which, in controversies between citizens of different States gives to the defendant a right to be heard in the Federal courts, and will consent that all litigation shall be in our courts, the courts of our State." The companies answer, "We consent." And with such understanding they are permitted to do business, and now they assert that they are not bound by the agreement!

It is well settled that a party cannot be allowed to take benefits and at the same time repudiate obligations. The legislature was granting a favor. It could impose its own conditions, it matters not how much those conditions might conflict with the legal or constitutional rights of these companies.*

This contract of insurance in the present case was made under the law in question. A contract made under a law is presumed to be made in reference to it; for the law of every State where a contract is made enters into and makes part of the contract.† Under the provisions of this law the status of the assured and insurer is the same as if the company had put an express condition in the policy that the insurer should not remove an action upon it from the State to the Federal courts.

* People *v.* Murray, 5 Hill, 468; Burrows *v.* Bashford et al., 22 Wisconsin, 108; Van Slyke *v.* State, 23 Id. 655; Van Allen *v.* The Assessors, 3 Wallace, 573.

† Blanchard *v.* Russell, 13 Massachusetts, 1; Mather *v.* Bush, 16 Johnson, 238.

The only question, as we have before stated, is whether the contract is with both assured and the State, or with the State alone. That is a question which it belongs to the Supreme Court of Wisconsin to decide, and not to the courts of the United States.

Messrs. W. M. Evarts and H. M. Finch, contra.

Mr. Justice HUNT delivered the opinion of the court.

The refusal of the State court of Wisconsin to allow the removal of the case into the United States Circuit Court of Wisconsin, and its justification under the agreement of the company and the statute of Wisconsin form the subject of consideration in the present suit.

The State courts of Wisconsin held that this statute and their agreement under it justified a denial of the petition to remove the case into the United States court. The insurance company deny this proposition, and this is the point presented for consideration.

Is the agreement thus made by the insurance company one that, without reference to the statute, would bind the party making it?

Should a citizen of the State of New York enter into an agreement with the State of Wisconsin, that in no event would he resort to the courts of that State or to the Federal tribunals within it to protect his rights of property, it could not be successfully contended that such an agreement would be valid.

Should a citizen of New York enter into an agreement with the State of Wisconsin, upon whatever consideration, that he would in no case, when called into the courts of that State or the Federal tribunals within it, demand a jury to determine any rights of property that might be called in question, but that such rights should in all such cases be submitted to arbitration or to the decision of a single judge, the authorities are clear that he would not thereby be debarred from resorting to the ordinary legal tribunals of the State. There is no sound principle upon which such agreements can be specifically enforced.

We see no difference in principle between the cases supposed and the case before us. Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him. A man may not barter away his life or his freedom, or his substantial rights. In a criminal case, he cannot, as was held in *Cancemi's Case*,* be tried in any other manner than by a jury of twelve men, although he consent in open court to be tried by a jury of eleven men. In a civil case he may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge. So he may omit to exercise his right to remove his suit to a Federal tribunal, as often as he thinks fit, in each recurring case. In these aspects any citizen may no doubt waive the rights to which he may be entitled. He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented.

That the agreement of the insurance company is invalid upon the principles mentioned, numerous cases may be cited to prove.† They show that agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void.

In *Scott* v. *Avery* (one of the cases), the Lord Chancellor says: "There is no doubt of the general principle that parties cannot by contract oust the ordinary courts of their jurisdiction. That has been decided in many cases. Perhaps the first case I need refer to was a case decided about a century ago.‡ That case was an action on a policy of insurance in which there was a clause that in case of any loss or dispute it should be referred to arbitration. It was decided there that an action would lie, although there had

* 18 New York, 128.

† Nute *v.* Hamilton Insurance Co., 6 Gray, 174; Cobb *v.* New England Marine Insurance Co., Ib. 192; Hobbs *v.* Manhattan Insurance Co., 56 Maine, 421; Stephenson *v.* P. F. and M. Insurance Co., 54 Id. 70; Scott *v.* Avery, 5 House of Lords Cases, 811.

‡ Kill *v.* Hollester, 1 Wilson, 129.

been no reference to arbitration. Then, after the lapse of half a century, occurred a case before Lord Kenyon, and from the language that fell from that learned judge, many other cases had probably been decided which are not reported. But in the time of Lord Kenyon occurred the case which is considered the leading case on the subject, of *Thompson* v. *Charnock.** That was an action upon a charter-party, in which it was stipulated that if any difference should arise it should be referred to arbitration. That clause was pleaded in bar to the action brought upon breach of the contract, with an averment that the defendant was, and always had been, ready to refer the same to arbitration. This was held to be a bad plea, upon the ground that a right of action had accrued, and that the fact that the parties had agreed that the matter should be settled by arbitration did not oust the jurisdiction of the courts." Upon this doctrine all the judges who delivered opinions in the House of Lords were agreed.

And the principle, Mr. Justice Story, in his Commentaries on Equity Jurisprudence,† says is applicable in courts of equity as well as in courts of law. "And where the stipulation, though not against the policy of the law, yet is an effort to divest the ordinary jurisdiction of the common tribunals of justice, such as an agreement in case of dispute to refer the same to arbitration, a court of equity will not any more than a court of law interfere to enforce the agreement, but it will leave the parties to their own good pleasure in regard to such agreements. The regular administration of justice might be greatly impeded or interfered with by such stipulations if they were specifically enforced."

In *Stephenson* v. *P. F. and M. C. Ins. Co.*,‡ the court say: "While parties may impose as condition precedent to applications to the courts that they shall first have settled the amount to be recovered by an agreed mode, they cannot entirely close the access to the courts of law. The law and not the contract prescribes the remedy, and parties have no more right to enter into stipulations against a resort to the

* 8 Term, 139. † Section 670. ‡ 54 Maine, 70.

courts for their remedy in a given case, than they have to provide a remedy prohibited by law; such stipulations are repugnant to the rest of the contract, and assume to divest courts of their established jurisdictions; as conditions precedent to an appeal to the courts, they are void." Many cases are cited in support of the rule thus laid down. Upon its own merits, this agreement cannot be sustained.

Does the agreement in question gain validity from the statute of Wisconsin, which has been quoted? Is the statute of the State of Wisconsin, which enacts that a corporation organized in another State shall not transact business within its limits, unless it stipulates in advance that it will not remove into the Federal courts any suit that may be commenced against it by a citizen of Wisconsin, a valid statute in respect to such requisition, under the Constitution of the United States?

The Constitution of the United States declares that the judicial power of the United States shall extend to all cases in law and equity arising under that Constitution, the laws of the United States, and to the treaties made or which shall be made under their authority, . . . to controversies between a State and citizens of another State, and between citizens of different States.*

The jurisdiction of the Federal courts, under this clause of the Constitution, depends upon and is regulated by the laws of the United States. State legislation cannot confer jurisdiction upon the Federal courts, nor can it limit or restrict the authority given by Congress in pursuance of the Constitution. This has been held many times.†

It has also been held many times, that a corporation is a citizen of the State by which it is created, and in which its principal place of business is situated, so far as that it can sue and be sued in the Federal courts. This court has repeatedly held that a corporation was a citizen of the State

* Art. 3, § 2.

† Railway Co. *v.* Whitton, 13 Wallace, 286; Payne *v.* Hook, 7 Id. 427; The Moses Taylor, 4 Id. 411, and cases cited.

creating it, within the clause of the Constitution extending the jurisdiction of the Federal courts to citizens of different States.*

The twelfth section of the Judiciary Act of 1789 provides that if a suit be commenced in any State court by a citizen of the State in which the suit is commenced, against a citizen of another State, where the matter in dispute exceeds $500, and the defendant at the time of entering his appearance shall file a petition for the removal of the cause for trial into the next Circuit Court of the United States, and shall offer good bail for his proceedings therein, "it shall be the duty of the State court to accept such security and proceed no farther in the cause."

This applies to all the citizens of another State, whether corporations, partnerships, or individuals. It confers an unqualified and unrestrained right to have the case transferred to the Federal courts upon giving the security required. In the case recently decided in this court, of *Insurance Company* v. *Dunn*,† it was held that no power of action thereafter remained to the State court, and that every question, necessarily including that of its own jurisdiction, must be decided in the Federal court.

The statute of Wisconsin, however, provides as to a certain class of citizens of other States, to wit, foreign corporations, that they shall not exercise that right, and prohibits them from transacting their business within that State, unless they first enter into an agreement in writing that they will not claim or exercise that right.

The Home Insurance Company is a citizen of New York, within this provision of the Constitution. As such citizen of another State, it sought to exercise this right to remove to a Federal tribunal a suit commenced against itself in the State court of Wisconsin, where the amount involved exceeded the sum of $500. This right was denied to it by the

* Express Co. *v.* Kountze, 8 Wallace, 342; Cowles *v.* Mercer Co., 7 Id. 118; Railway *v.* Whitton, 13 Id. 275; Ohio and Mississippi Railroad Co., *v.* Wheeler, 1 Black, 286.

† 19 Wallace, 214.

State court on the ground that it had made the agreement referred to, and that the statute of the State authorized and required the making of the agreement.

We are not able to distinguish this agreement and this requisition, in principle, from a similar one made in the case of an individual citizen of New York. A corporation has the same right to the protection of the laws as a natural citizen, and the same right to appeal to all the courts of the country. The rights of an individual are not superior in this respect to that of a corporation.

The State of Wisconsin can regulate its own corporations and the affairs of its own citizens, in subordination, however, to the Constitution of the United States. The requirement of an agreement like this from their own corporations would be *brutum fulmen*, because they possess no such right under the Constitution of the United States. A foreign citizen, whether natural or corporate, in this respect possesses a right not pertaining to one of her own citizens. There must necessarily be a difference between the status of the two in this respect.

We do not consider the question whether the State of Wisconsin can entirely exclude such corporations from its limits, nor what reasonable terms they may impose as a condition of their transacting business within the State. These questions have been before the court in other cases, but they do not arise here. In *Paul* v. *Virginia*,* Mr. Justice Field used language, in speaking of corporations, which has been supposed to sustain the statute in question. "Having (he says), no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely, they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest."

* 8 Wallace, 168.

So in the *Bank of Augusta* v. *Earle*,* the language of Chief Justice Taney has been invoked for the same purpose.

In each of these cases, the general language of the learned justice is to be expounded with reference to the subject before him. They lay down principles in general terms which are to be understood only with reference to the facts in hand. Thus, the case in which the opinion was delivered by Mr. Justice Field was one involving the construction of that clause of the United States Constitution which declares that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States," and of that clause regulating commerce among the States, not of the one now before us. It involved the question whether the State might require a foreign insurance company to take a license for the transaction of its business, giving security for the payment of its debts, and decided that taking insurance risks was not a transaction of commerce, within the meaning of the two clauses of the Constitution cited. It had no reference to the clause giving to citizens of other States the right of litigation in the United States courts, and certainly had no bearing upon the right of corporations to resort to those courts, or the power of the State to limit and restrict such resort.

It was not intended to impair the force of the language used by Mr. Justice Curtis in the *La Fayette Insurance Company* v. *French*,† where he says: "A corporation created by Indiana, can transact business in Ohio, only with the consent, express or implied, of the latter State. This consent may be accompanied by such conditions as Ohio may think fit to impose, and these conditions must be deemed valid and effectual by other States, and by this court; *provided*, they are not repugnant to the Constitution and laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for

* 13 Peters, 519.

† 18 Howard, 407.

defence." Nearly the same language is used by Mr. Justice Nelson in *Ducat* v. *The City of Chicago*.*

None of the cases so much as intimate that conditions may be imposed which are repugnant to the Constitution and laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by others.

The case of the *Bank of Columbia* v. *Okely*,† is relied upon by the court below to sustain the statute and the agreement in question. In that case it was provided in the fourteenth section of the charter of the bank that whenever a borrower of the bank should make his note by an agreement in writing negotiable at the bank and neglect its payment when due, the president of the bank should cause a demand in writing to be served upon the delinquent, and if the money was not paid within ten days after such demand it was made lawful for the bank to present to the county clerk the note so unpaid, with proof of the demand, and to require him to issue an execution or attachment against the debtor. Before such execution could issue the bank was required to file an affidavit of the amount due on the note. "If the defendant shall dispute the whole or any part of the debt (the statute adds) on the return of the execution, the court shall order an issue to be joined and a trial to be had, and shall make such other proceedings that justice may be done in the speediest manner." This statute was sustained in the case cited. Mr. Key, for the plaintiff, argued in its support on the theory that the whole effect of the provision was to authorize the commencement of a suit by attachment instead of the usual common-law process. Mr. Jones, *contra*, contended that it was in violation of the provision of the constitution of Maryland and of the United States securing to parties the right of trial by jury when the value in controversy exceeded twenty dollars. In rendering the decision the court say: "This court would ponder long before it would sustain this action if we could be persuaded that the act in question produced a total prostration of the trial by

* 10 Wallace, 410.

† 4 Wheaton, 235.

jury, or even involved the defendant in circumstances which rendered that right unavailing for his protection. . . . If the defendant does not avail himself of the right given to him of having an issue made up and the trial by jury, which is tendered to him by the act, it is presumable that he cannot dispute the justice of the claim."

We are not able to discover in this case any countenance for the statute of Wisconsin which we are considering.

On this branch of the case the conclusion is this:

1st. The Constitution of the United States secures to citizens of another State than that in which suit is brought an absolute right to remove their cases into the Federal court, upon compliance with the terms of the act of 1789.

2d. The statute of Wisconsin is an obstruction to this right, is repugnant to the Constitution of the United States and the laws in pursuance thereof, and is illegal and void.

3d. The agreement of the insurance company derives no support from an unconstitutional statute and is void, as it would be had no such statute been passed.

We are of opinion, for the reasons given, that the Winnebago County Court erred in proceeding in the case after the filing the petition and the giving the security required by the act of 1789, and that all subsequent proceedings in the State court are illegal and should be vacated. The judgment in that court, and the judgment in the Supreme Court of Wisconsin, should be REVERSED, and the prayer of the petition for removal should be GRANTED.

ORDERED ACCORDINGLY.

The CHIEF JUSTICE, with whom concurred Mr. Justice DAVIS, dissenting.

I cannot concur in the judgment which has just been announced. A State has the right to exclude foreign insurance companies from the transaction of business within its jurisdiction. Such is the settled law in this court.* The right to impose conditions upon admission follows, as a nec-

* Paul *v.* Virginia, 8 Wallace, 181; Ducat *v.* Chicago, 10 Id. 410; Bank of Augusta *v.* Earle, 13 Peters, 586.

essary consequence, from the right to exclude altogether. The State of Wisconsin has made it a condition of admission that the company shall submit to be sued in the courts she has provided for the settlement of the rights of her own citizens. That is no more than saying that the foreign company must, for the purposes of all litigation growing out of the business transacted there, renounce its foreign citizenship and become *pro tanto* a citizen of that State. There is no hardship in this, for it imposes no greater burden than rests upon home companies and home insurers.

This insurance company accepted this condition, and was thus enabled to make the contract sued upon. Having received the benefits of its renunciation the revocation comes too late.

The State court had jurisdiction to try the question of citizenship upon the petition to transfer. Upon the facts I think it was authorized to find that the company was, for all the purposes of that action, a citizen of Wisconsin, and refuse the order of removal.

SPROTT *v.* UNITED STATES.

1. A purchaser of cotton from the Confederate States, who knew that the money he paid for it went to sustain the rebellion, cannot in the Court of Claims recover the proceeds, when it has been captured and sold, under the Captured and Abandoned Property Act.
2. The moral turpitude of the transaction forbids that in a court of law he should be permitted to establish his title by proof of such a transaction.
3. The acts of the States in rebellion, in the ordinary course of administration of law, must be upheld in the interest of civil society, to which such a government was a necessity.
4. But the government of the Confederacy had no existence except as organized treason. Its purpose while it lasted was to overthrow the lawful government, and its statutes, its decrees, its authority can give no validity to any act done in its service or in aid of its purpose.

APPEAL from the Court of Claims.

The act known as the Captured and Abandoned Property Act, passed March 12th, 1863,* providing for "the collection

* 12 Stat. at Large, 820.

of abandoned property, &c., in the insurrectionary districts within the United States," enacts that any person claiming to have been the owner of any such abandoned or captured property may, within a time specified in the act, prefer his claim to the proceeds thereof in the Court of Claims, and on proof to the satisfaction of the court: (1) of his ownership; (2) of his right to the proceeds thereof; and (3) that he has never given any aid or comfort to the rebellion, receive the residue of such proceeds, after deducting any purchase-money which may have been paid, &c.

Under this act one Sprott, a resident of Claiborne County, Mississippi, filed a claim in the Court of Claims to the proceeds of certain cotton. That court made the following finding of facts:

At different times during the years 1864 and 1865, large quantities of cotton were purchased by the agents of the Confederate States for the treasonable purpose of maintaining the war of the rebellion against the government of the United States. Of cotton thus purchased by various agents in Claiborne County, Mississippi, three hundred bales were sold to the claimant by one agent, in March, 1865, for ten cents a pound, in the currency of the United States. The sale was made by the agent as of cotton belonging to the Confederate States, and it was understood by the claimant at the time of the purchase to be the property of the rebel government, and was purchased as such. The agent had been specially instructed by the Confederate government "to sell any and all cotton he could for the purpose of raising money to purchase munitions of war and supplies for the Confederate army;" but the purpose of the sale was not disclosed to the claimant, whose purpose was not to aid the Confederate States, buying the cotton at its market value and regarding it as a mere business transaction of "cotton for cash." The cotton was delivered to him at the time when the money was paid, he then being a resident of Claiborne County, within the Confederate lines.

The cotton was captured in May, 1865, and the proceeds or some portion thereof are in the treasury.

And upon these facts the Court of Claims found, as conclusions of law—

1. That the government of the Confederate States was an unlawful assemblage, without corporate power to take, hold, or convey a valid title to property, real or personal.

2. That the claimant was chargeable with notice of the treasonable intent of the sale by the Confederate government, and that the transaction was forbidden by the laws of the United States, and wholly void, so that the claimant acquired no title to the property which was the subject of suit.

The court therefore decreed against the claimant, and from its decree he brought the case here.

Messrs. George Taylor and R. M. Corwine, for the appellant; Mr. C. H. Hill, Assistant Attorney-General, contra.

Mr. Justice MILLER delivered the opinion of the court.

The Court of Claims, upon the facts which it found, decided as conclusions of law—

1. That the government of the Confederate States was an unlawful assemblage without corporate power to take, hold, or convey a valid title to property, real or personal.

2. That the claimant was chargeable with notice of the treasonable intent of the sale by the Confederate government, and that the transaction was forbidden by the laws of the United States, and wholly void, so that the claimant acquired no title to the property which is the subject of suit.

We do not think it necessary to say anything in regard to the first proposition of law laid down by that court. Whether the temporary government of the Confederate States had the capacity to take and hold title to real or personal property, and how far it is to be recognized as having been a *de facto* government, and if so, what consequences follow in regard to its transactions as they are to be viewed in a court of the United States, it will be time enough for us to decide when such decision becomes necessary. There is no such necessity in the present case.

We rest our affirmance of the judgment of the Court of Claims upon its second proposition.

It is a fact so well known as to need no finding of the court to establish it, a fact which, like many other historical events, all courts take notice of, that cotton was the principal support of the rebellion, so far as pecuniary aid was necessary to its support. The Confederate government early adopted the policy of collecting large quantities of cotton under its control, either by exchanging its bonds for the cotton, or when that failed, by forced contributions. So long as the imperfect blockade of the Southern ports and the unguarded condition of the Mexican frontier enabled them to export this cotton, they were well supplied in return with arms, ammunition, medicine, and the necessaries of life not grown within their lines, as well as with that other great sinew of war, gold. If the rebel government could freely have exchanged the cotton of which it was enabled to possess itself, for the munitions of war or for gold, it seems very doubtful if it could have been suppressed. So when the rigor of the blockade prevented successful export of this cotton, their next resource was to sell it among their own people, or to such persons claiming outwardly to be loyal to the United States, as would buy of them, for the money necessary to support the tottering fabric of rebellion which they called a government.

The cotton which is the subject of this controversy was of this class. It had been in the possession and under the control of the Confederate government, with claim of title. It was captured during the last days of the existence of that government by our forces, and sold by the officers appointed for that purpose, and the money deposited in the treasury.

The claimant now asserts a right to this money on the ground that he was the owner of the cotton when it was so captured. This claim of right or ownership he must prove in the Court of Claims. He attempts to do so by showing that he purchased it of the Confederate government and paid them for it in money. In doing this he gave aid and assistance to the rebellion in the most efficient manner he

possibly could. He could not have aided that cause more acceptably if he had entered its service and become a blockade-runner, or under the guise of a privateer had preyed upon the unoffending commerce of his country. It is asking too much of a court of law sitting under the authority of the government then struggling for existence against a treason respectable only for the numbers and the force by which it was supported, to hold that one of its own citizens, owing and acknowledging to it allegiance, can by the proof of such a transaction establish a title to the property so obtained. The proposition that there is in many cases a public policy which forbids courts of justice to allow any validity to contracts because of their tendency to affect injuriously the highest public interests, and to undermine or destroy the safeguards of the social fabric, is too well settled to admit of dispute. That any person owing allegiance to an organized government, can make a contract by which, for the sake of gain, he contributes most substantially and knowingly to the vital necessities of a treasonable conspiracy against its existence, and then in a court of that government base successfully his rights on such a transaction, is opposed to all that we have learned of the invalidity of immoral contracts. A clearer case of turpitude in the consideration of a contract can hardly be imagined unless treason be taken out of the catalogue of crimes.

The case is not relieved of its harsh features by the finding of the court that the claimant did not *intend* to aid the rebellion, but only to make money. It might as well be said that the man who would sell for a sum far beyond its value to a lunatic, a weapon with which he knew the latter would kill himself, only intended to make money and did not intend to aid the lunatic in his fatal purpose. This court, in *Hanauer* v. *Doane*,* speaking of one who set up the same defence, says: "He voluntarily aids treason. He cannot be permitted to stand on the nice metaphysical distinction that, although he knows that the purchaser buys the

* 12 Wallace, 342.

goods for the purpose of aiding the rebellion, he does not sell them for that purpose. The consequences of his acts are too serious to admit of such a plea. He must be taken to intend the consequences of his own voluntary act." This case, and the succeeding one of *Hanauer* v. *Woodruff*,* are directly in point in support of our view of the case before us.

The recognition of the existence and the validity of the acts of the so called Confederate government, and that of the States which yielded a temporary support to that government, stand on very different grounds, and are governed by very different considerations.

The latter, in most, if not in all, instances, merely transferred the existing State organizations to the support of a new and different national head. The same constitutions, the same laws for the protection of property and personal rights remained, and were administered by the same officers. These laws, necessary in their recognition and administration to the existence of organized society, were the same, with slight exceptions, whether the authorities of the State acknowledged allegiance to the true or the false Federal power. They were the fundamental principles for which civil society is organized into government in all countries, and must be respected in their administration under whatever temporary dominant authority they may be exercised. It is only when in the use of these powers substantial aid and comfort was given or intended to be given to the rebellion, when the functions necessarily reposed in the State for the maintenance of civil society were perverted to the manifest and intentional aid of treason against the government of the Union, that their acts are void.†

The government of the Confederate States can receive no aid from this course of reasoning. It had no existence, except as a conspiracy to overthrow lawful authority. Its foundation was treason against the existing Federal government. Its single purpose, so long as it lasted, was to make that treason successful. So far from being necessary to the

* 15 Wallace, 439.

† Texas v. White, 7 Id. 700

organization of civil government, or to its maintenance and support, it was inimical to social order, destructive to the best interests of society, and its primary object was to overthrow the government on which these so largely depended. Its existence and temporary power were an enormous evil, which the whole force of the government and the people of the United States was engaged for years in destroying.

When it was overthrown it perished totally. It left no laws, no statutes, no decrees, no authority which can give support to any contract, or any act done in its service, or in aid of its purpose, or which contributed to protract its existence. So far as the actual exercise of its physical power was brought to bear upon individuals, that may, under some circumstances, constitute a justification or excuse for acts otherwise indefensible, but no validity can be given in the courts of this country to acts voluntarily performed in direct aid and support of its unlawful purpose. What of good or evil has flowed from it remains for the consideration and discussion of the philosophical statesman and historian.

JUDGMENT AFFIRMED.

Mr. Justice CLIFFORD and Mr. Justice DAVIS expressed their concurrence in the judgment of the court above announced, solely upon the ground that the purchase of the cotton and the payment of the consideration necessarily tended to give aid to the rebellion, and that all such contracts were void, as contrary to public policy. They stated that all such portions of the opinion as enforced that view had their concurrence, but that they dissented from the residue of the opinion as unnecessary to the conclusion.

Mr. Justice FIELD, dissenting.

I am compelled to dissent from the judgment of the court in this case, and from the reasons stated in the opinion upon which that judgment is founded. The opinion appears to me to proceed upon the assumption that this is an action to enforce a contract which was illegal in its inception, and, therefore, without standing in a court of justice. And the

cases of *Hanauer* v. *Doane*, in the 12th of Wallace, and *Hanauer* v. *Woodruff*, in the 15th of Wallace, are cited in support of the position that contracts of this character will not be upheld. Those authorities do establish the position that contracts entered into for the purpose of aiding the late insurrectionary government are illegal and void, and will not be enforced by the Federal tribunals. In the first case the action was upon two promissory notes, the consideration of which consisted in part of stores and supplies furnished the defendant, an army contractor of the Confederate government, with knowledge that they were to be used in aid of the rebellion, and in part of due-bills issued by the contractor to other parties for similar supplies, and taken up at his request; and the court held that the sale of the goods, being made with the vendor's knowledge of the uses to which they were to be applied, was an illegal transaction and did not constitute a valid consideration for the note of the purchaser, and that the due-bills given by him for similar goods, being taken up by third parties with knowledge of the purpose for which they were issued, were equally invalid as a consideration for his note in their hands. In the second case the action was upon a promissory note, the only consideration of which consisted of certain bonds, issued by the convention of Arkansas which attempted to carry that State out of the Union, and issued for the purpose of supporting the war against the Federal government, and styled "war bonds" on their face, and one of the questions presented for our determination was whether the consideration was illegal under the Constitution and laws of the United States. And the court answered that it did not admit of a doubt that the consideration was thus illegal and void; that "if the Constitution be, as it declares on its face it is, the supreme law of the land, a contract or undertaking of any kind to destroy or impair its supremacy, or to aid or encourage any attempt to that end must necessarily be unlawful and can never be treated, in a court sitting under that Constitution and exercising authority by virtue of its provisions, as a meritorious consideration for the promise of any one."

In both of these cases the aid of the courts was sought to enforce unexecuted contracts which were illegal and void in their inception, because made in aid of the rebellion, and all that they decide is that contracts of that character can never be enforced in the courts of that government against which the rebellion was raised. In those courts such contracts stand on the same footing as other illegal transactions; they will not be upheld nor enforced. In both of those decisions I concurred, and in the second case I wrote the opinion of the court. I still adhere to the views expressed in both cases.

But, with great respect for my associates, I am compelled to say that, in my judgment, neither of those cases has any just application to the case at bar, or to any question properly involved in its decision. This action is not brought to enforce an unexecuted contract, legal or illegal; there is no question of enforcing a contract in the case. The question, and the only question, is whether the cotton seized by the forces of the United States in May, 1865, was at the time the property of the claimant. If it was his property, then he is entitled to its proceeds, and the judgment of the Court of Claims should be reversed; and in determining this question we are not concerned with the consideration of his loyalty or disloyalty. He was a citizen of Mississippi and resided within the lines of the Confederacy, and the act forbidding intercourse with the enemy does not apply to his case. He was subject to be treated, in common with other citizens of the Confederacy, as a public enemy during the continuance of the war. And if he were disloyal in fact, and if by his purchase of the cotton he gave aid and comfort to the rebellion, as this court adjudges, the impediment which such conduct previously interposed to the prosecution of his claim was removed by the proclamation of pardon and amnesty made by the President on the 25th day of December, 1868. He was included within the terms of that beneficent public act of the Chief Magistrate of the United States, as fully as if he had been specifically named therein. That pardon and amnesty did not, of course, and could not

change the actual fact of previous disloyalty, if it existed, but, as was said in *Carlisle* v. *The United States*,* "they forever close the eyes of the court to the perception of that fact as an element in its judgment, no rights of third parties having intervened." In legal contemplation the executive pardon not merely releases an offender from the punishment prescribed for his offence, but it obliterates the offence itself.

In the present case, therefore, the question of the loyalty or disloyalty of the claimant is withdrawn from our consideration; and as the non-intercourse act does not apply to his case, it does not concern the United States whether he acquired the property from another public enemy or from one of the States of the Confederacy, or from an agent of the Confederate government. He was in possession of the property at the time of the seizure, asserting ownership to it; and no one then disputed, and no one since has disputed his title. Who then owned the property if he did not? The United States did not own it. They did not acquire by its seizure any title to the property. They have never asserted any greater rights arising from capture of property on land in the hands of citizens engaged in the rebellion than those which one belligerent nation asserts with reference to such property captured by it belonging to the citizens or subjects of the other belligerent. All public property which is movable in its nature, possessed by one belligerent, and employed on land in actual hostilities, passes by capture. But private property on land, except such as becomes booty when taken from enemies in the field or besieged towns, or is levied as a military contribution upon the inhabitants of the hostile territory, is exempt from confiscation by the general law of nations. Such is the language of Mr. Wheaton, who is recognized as authority on all questions of public law. And "this exemption," he adds, "extends even to the case of an absolute and unqualified conquest of the enemies' country."†

In *Brown* v. *The United States*,‡ the question arose whether

* 16 Wallace, 151. † Law of Nations, Lawrence's edition, 596.

‡ 8 Cranch, 152.

enemy's property found on land at the commencement of hostilities with Great Britain, in 1812, could be seized and condemned as a necessary consequence of the declaration of war; and the court held that it could not be thus condemned without an act of Congress authorizing its confiscation. The court, speaking through Chief Justice Marshall, said that it was conceded that war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, and observed that the mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, might more or less affect the exercise of this right, but could not impair the right itself. "That," said the court, "remains undiminished, and when the sovereign authority shall choose to bring it into operation, the judicial department must give effect to its will." "*But*," added the court, "*until that will shall be expressed, no power of condemnation can exist in the court.*"

It may be doubted whether the right to confiscate property of the enemy wherever found, which is here stated to have been conceded, would at this day be admitted without some qualification excepting private property on land not engaged in actual hostilities or taken as booty, or levied as a military contribution, as stated by Mr. Wheaton. Be that as it may, the decision is emphatic that until Congress by some legislative act directs the confiscation of private property on land, none can be ordered by the courts.*

Now, Congress has only provided for the confiscation of private property of persons engaged in the rebellion, by the act of August 6th, 1861,† and that of July 17th, 1862.‡ Both of these acts require legal proceedings resulting in a judicial decree of condemnation before the title of the owner can be divested. The present case is not brought under either of these acts. No proceedings for the condemnation

* See also instructions of Mr. Adams, when Secretary of State, to our Minister at St. Petersburg, July 5th, 1820, and Halleck, 457; Hefter, § 133; and United States *v.* Percheman, 7 Peters, 51.

† 12 Stat. at Large, 319. ‡ Ib. 589.

and forfeiture of the cotton seized, or of its proceeds, have ever been instituted by the government. The title of the claimant remains, therefore, at this day, as perfect as it did on the day the cotton was seized.

In the case of *The United States* v. *Klein*,* this court had occasion to consider the rights of property, as affected by the war, in the hands of citizens engaged in hostilities against the United States, and it held, after mature consideration, that the effect of the act of Congress of March 12th, 1863, to provide for the collection of captured and abandoned property in insurrectionary districts, under which the present action is brought, is not to confiscate, or in any case absolutely divest, the property of the original owner, even though disloyal, and that by the seizure the government constituted itself a trustee for those who were by that act declared entitled, or might thereafter be recognized as entitled to the proceeds.

But it is contended that the Confederate government, being unlawful in its origin and continuance, was incapable of acquiring, holding, or transferring a valid title to the property. The court below so held in terms, and this court so far sustains that ruling as to declare that the claimant could not acquire any title to the cotton seized by purchase from that government.

Assuming that the Confederate government was thus incapable of acquiring or transferring title to property, the result claimed by the attorney-general, and held by the majority of this court, would not, in my judgment, follow. That organization, whatever its character, acted through agents. Those agents purchased and sold property. The title of the vendors passed to somebody; if it did not vest in the Confederate government, because that organization was incapable of taking the property, it remained with the agents. The sale of the vendors was a release and quit-claim of their interest, and when that took place the property was not derelict and abandoned. Whatever title existed to the

* 13 Wallace, 136.

property was, therefore, in the agents if their assumed principal had no existence, and by their sale passed to purchasers from them. Undoubtedly larceny could be alleged against one who feloniously took the property from such purchaser. The taker would not be allowed in any court which administers justice to escape punishment by showing that no title passed to the purchaser because his vendor was the agent, or assumed to be the agent, of a government which had no legal existence. And it is equally clear that the purchaser could have maintained an action for injuries to the property thus purchased, or for its recovery if forcibly removed from his possession by a third party. The plea that the property was not his because obtained from the agent, or a person assuming to be the agent, of an unlawful political organization, would not be held a justification for the injuries or the detention.

But I do not desire to place my objection to the decision of the court upon this view of the case. I place it on higher ground, one which is recognized by all writers on international law, from Grotius, its father, to Wheaton and Phillimore, its latest expounders, and that is, that a government *de facto* has, during its continuance, the same right within its territorial limits to acquire and to dispose of movable personal property which a government *de jure* possesses. And that the Confederate government, whatever its character in other respects, possessed supreme power over a large extent of territory, embracing several States and a population of many millions, and exercised that power for nearly four years, we are all compelled to admit. As stated by this court, speaking through Mr. Justice Nelson,* it cannot be denied that, by the use of unlawful and unconstitutional means, "a government in fact was erected greater in territory than many of the old governments in Europe, complete in the organization of all its parts, containing within its limits more than eleven millions of people, and of sufficient resources in men and money to carry on a civil war of un-

* Mauran *v.* Insurance Company, 6 Wallace, 14.

exampled dimensions; and during all which time the exercise of many belligerent rights were either conceded to it, or were acquiesced in by the supreme government, such as the treatment of captives both on land and sea as prisoners of war; the exchange of prisoners; their vessels captured recognized as prizes of war and dealt with accordingly; their property seized on land referred to the judicial tribunals for adjudication; their ports blockaded, and the blockade maintained by a suitable force, and duly notified to neutral powers, the same as in open and public war."

In *Thorington* v. *Smith*,* this court placed the Confederate government among that class of governments *de facto* of which the temporary governments at Castine and Tampico were examples, and said, speaking through Chief Justice Chase, that "to the extent of actual supremacy, however unlawfully gained, in all matters of government within its military lines the power of the insurgent government cannot be questioned. That supremacy did not justify acts of hostility to the United States. How far it should excuse them must be left to the lawful government upon the re-establishment of its authority. But it made obedience to its authority in civil and local matters not only a necessity, but a duty. Without such obedience civil order was impossible."

With these authorities before me I should unhesitatingly have said—but for the fact that a majority of my associates differ from me, and the presumption is that they are right and I am wrong,—that it was impossible for any court to come to the conclusion that a government thus organized, having such immense resources and exercising actual supremacy over such vast territory and millions of people, did not possess the power to acquire and to transfer the title to personal property within its territorial limits.

Our government in its efforts to reach the property of the extinct Confederacy has asserted a very different doctrine from that announced in the court below, and, so far as the cotton seized in this case is concerned, approved here. It

* 8 Wallace, 10.

has alleged in the courts of England that that Confederacy did acquire property to a vast amount and attempted to reach it in the hands of its agents. In *United States* v. *McRae** it filed a bill in the court of chancery in England to obtain an account of all moneys and goods which came to the hands of the defendant, as agent or otherwise, on behalf of the Confederate government during the insurrection, and the payment of the moneys which, on taking such account, might be in his hands, and a delivery over of the goods in his possession. The bill alleged that the Confederate government possessed itself of divers moneys, goods, and treasure, part of the public property of the United States, and that other moneys and goods were from time to time paid and contributed to it by divers persons, inhabitants of the United States, or were seized and acquired by that government in the exercise of its usurped authority; that it had sent to agents and other persons in England large amounts of money to be laid out in purchasing goods for its use, and had sent there large quantities of goods to be sold; that it had thus sent large sums of money and large quantities of goods to the defendant, and that on the dissolution of that government he had them in his possession. And the bill claimed that all the joint or public property of the persons constituting the Confederate government, including the said moneys and goods, had vested in the United States and constituted their absolute property, and ought to be paid and delivered to them. The court held that the moneys, goods, and treasure which were at the outbreak of the rebellion the public property of the United States, and which were seized by the rebels, still continued the moneys, goods, and treasure of the United States, their rights of property and rights of possession being in no wise divested or defeated by the wrongful seizure. But that with respect to property which had been voluntarily contributed to or acquired by the insurrectionary government, and impressed in its hands with the character of public property, the right of the United

* 8 Law Reports, Equity, 69.

States was that of a successor of the Confederate government; and that they could recover such property from an agent of that government, but subject, however, to the same rights and obligations, to which that government would have been subjected, had it not been overthrown.

In the case of *The United States* v. *Prioleau*,* the same court again held that the government of the United States could recover the property of the Confederate government, as its successor or representative in the hands of its agents, but that they must take it subject to all the liens and conditions arising from the contract upon which the property was received by the agents. Neither the United States, in the prosecution of these suits, nor the courts of England in deciding them, expressed the slightest doubt that the title to the property, not originally owned by the United States, had been acquired by the Confederate government, which was in the hands of its agents. And I submit that a response by those courts to the claim of the United States, that the insurgent government, being illegal in its origin and continuance, could neither take, hold, nor transfer title to personal property, would not have been acquiesced in, nor deemed respectful by our government. And I submit respectfully that the earnest denunciation of the wickedness of the rebellion, contained in the opinion of the majority, is no legal answer to the demand of the claimant for the proceeds of his property seized and sold by our government, when that government long since pardoned the only offence of which that claimant was guilty, and thus gave him the assurance that he should stand in the courts of his country in as good plight and condition as any citizen, who had never sinned against its authority.

I am, therefore, of opinion that the judgment of the Court of Claims should be reversed.

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* 2 Hemming & Miller's Chancery Cases, 559.

TITUS *v.* UNITED STATES.

1. An informer does not acquire a right to a moiety under the Confiscation Act of August 6th, 1861, in regard to land informed against, *after* a complete title to the property has been acquired by conquest. [In the present case the information was filed July 17th, 1866, the rebellion being at the time suppressed, and the property in the possession of the military forces of the government.]
2. The government is not estopped from denying an informer's claim to a moiety in such a case,

   (*a*) by the fact that its district attorney has allowed proceedings in confiscation to be carried on under the act and the land to be sold, and the purchase-money to be received;

   (*b*) or by the fact that the Commissioner of the Freedmen's Bureau, to whom, as agent of the United States, Congress gives the control and management of all captured and abandoned land, never claimed the land itself, but after it had been sold and the price paid into court, and a moiety adjudged to the informer, has taken the other moiety without question.
3. The case of an informer in such a case stands on a very different footing, and is to be judged of by very different principles of estoppel, from that of a purchaser of the land, who has paid his money to the United States in consequence of their offer to sell under the act.

ERROR to the Circuit Court for the Southern District of Georgia. The case was thus:

On the 2d December, 1862, the executors of the will of C. J. McDonald, being fully authorized, sold and conveyed to the Confederate government certain land in Bibb County, Georgia, to be used (through the agency of certain laboratories built upon it for the preparation of ammunition) in promoting the rebellion against the government of the United States. This land remained the property of the Confederate government, and was used in aid of the rebellion, until the final surrender of the Confederate armies, when it was taken possession of and held by the military forces of the United States. On the 17th July, 1866, while it remained so in the possession of the military forces, one Titus filed with the district attorney an information against it under the act of

August 6th, 1861, known as the Confiscation Act.* This act provides, in substance, that if, during the (then) present or any future insurrection against the government of the United States, any *person* should, after the prescribed proclamation, purchase or acquire, sell or give, any property, of *whatsoever kind or description*, with intent to use or employ the same, or suffer the same to be used or employed, in aiding or abetting or promoting such insurrection; or if any *person*, being the owner of such property, should knowingly use or employ, or consent to the use or employment of, the same for such purpose, all *such* property should be lawful subject of prize and capture wherever found, and the President was required to cause it to be seized, confiscated, and condemned. The proceedings for condemnation were to be had in the courts of the United States having jurisdiction of the amount, or in admiralty in any district in which such "prizes and capture" might be seized, or into which they might be taken and proceedings first instituted. The Attorney-General, or the district attorney of the United States for the district in which the property might at the time be, was authorized to institute the proceedings of condemnation, and, in such case, they were to be wholly for the benefit of the United States; or any person might file an information with such attorney, and then the proceedings were to be for the use of an informer and the United States in equal parts.

The district attorney, in pursuance of the information filed by Titus, as already mentioned, and prosecuting "for the United States and *informant*," on the 15th January, 1867, commenced proceedings in the District Court of the Southern District of Georgia for the condemnation and sale of the property, alleging the conveyance to and use by the Confederate government, and averring that, *by the surrender of the Confederate armies, it had become the property of the United States.* No person appeared in the action to defend, or offered to claim the property, and, on the 26th February, the formal judgment of forfeiture and sale under the act was entered.

* 12 Stat. at Large, 319.

A warrant of sale was issued on the 25th March, 1867, to which the marshal, on the 21st November, returned that, on the 8th May, he had postponed the sale upon the order of the district attorney. On the 17th June Titus filed a petition in the cause, asking to be made a party, and for a judgment, asserting his right to one-half the proceeds of the sale and directing its payment to him. The prayer of this petition was granted on the 8th April, 1868, and, on the 20th January, 1870, the marshal made a second return to the warrant of sale, to the effect that he had sold the property for $19,542.75, and had paid the purchase-money into the registry of the court. On the 19th April following, the *Commissioner of the Freedmen's Bureau* asked for and obtained an order for the payment to him of *one-half* the net proceeds of the sale.

The reader will perhaps recall that the act establishing the Freedmen's Bureau, passed March 3d, 1865,* provides—

"That the commissioner, under the direction of the President, shall have authority to set apart for the use of loyal refugees and freedmen such tracts of land within the insurrectionary States as shall have been *abandoned or to which the United States shall have acquired title by confiscation, or sale, or otherwise*, and to every male citizen, whether refugee or freedman as aforesaid, there shall be assigned not more than forty acres of such land," &c.

After providing that he shall be protected in the occupancy thereof, at an annual rental for the period of three years, the act concludes thus:

"At the end of said term, or at any time during said term, *the occupants* of any parcels so assigned may purchase the land *and receive such title thereto as the United States can convey*, upon paying therefor the value of the land, as ascertained and fixed for determining the annual rent aforesaid."

The twelfth section of the act of July 16th, 1866,† *continuing* the said bureau, also provides—

"That the commissioner shall have power *to seize, hold, use,*

* 13 Stat. at Large, 507.

† 14 Id. 173, &c.

lease, or sell, all buildings and tenements, and any lands appertaining to the same or otherwise, formerly held under color of title by the late so-called Confederate States, and not heretofore disposed of by the United States, and any buildings or lands held in trust for the same by any person or persons, and to use the same, *or appropriate the proceeds derived therefrom, to the education of the freed people,*" &c.

The district attorney, on the 2d May, filed a motion to set aside the judgment in favor of Titus, and, that motion being refused, took a writ of error to the Circuit Court, where the judgment was reversed. The case was here for a review of this action of the Circuit Court.

Mr. J. A. Wills, for the plaintiff in error:

I. The United States had certainly, as one ground of title to the property in question, that arising under the Confiscation Act of August 6th, 1861. Even conceding that they had a title arising by conquest, or by the surrender of the Confederate States on the field of battle, represented by the Commissioner of the Freedmen's Bureau, under the twelfth section of the act of July 16th, 1866, still they had a right to elect, and by the concurrent action of their several officers did elect to rely upon and assert their title and to enforce and dispose of it by the proceedings in confiscation. They are accordingly bound by all the legal consequences and incidents of that election.

The proceeding in confiscation, in which the judgment in favor of the informer was rendered by the District Court, was *a valid legal unit;* and, therefore, the judgment in favor of the informer was an integral, necessary, and logical sequence, or part of the confiscation proceedings, which, considered as such, cannot be maintained in part and set aside in part; in short, the whole must stand or fall together.

The land was *confiscable* under the Confiscation Act of August 6th, 1861.

The fact that it had been conveyed by its former owners, *directly*, "to the Confederate States," and had been used and employed by them in aid of the rebellion, did not render it

any the less nor any the more confiscable, under those laws, than it would have been if the title had remained in its former owners. In either case it would have been equally "used and employed in aiding, abetting, and promoting" the rebellion. The *title* of those who now hold the land under the decree and order of sale in the proceedings in confiscation against it, rests upon the truth of this proposition; and, indeed, this seems to be admitted on all sides, since no writ of error has been sued out by any one to call in question the validity of those proceedings, so far as they relate to the judgment of condemnation, and to the sale of the land confiscated.

By the act of August 6th, 1861, it was made "the *duty* of the Attorney-General, or of the district attorney of the United States for the district in which said land was situated, to institute the proceedings of condemnation, and *in such case* it is declared they shall be *wholly* for the benefit of the United States, or *any person may file an information with such attorney, in which case* the proceedings shall be for *the use of such informer and the United States in equal parts.*"

The information filed by the informer with the district attorney which led to the seizure of the property in this case, was filed July 17th, 1866. He also furnished *the evidence* used in the trial of this case for the condemnation thereof.* Now, if the district attorney had had all the information and evidence necessary to secure a condemnation of the said property, before or at the time the information of the informer was filed with him, it was his duty by law to proceed on his own information and evidence. But he did not so proceed. Presumptively, indeed evidently, because he could not.

When the two general facts are established in this case—first, that the land informed against was *confiscable*, and was actually *confiscated and sold* under a judgment of the District Court, and second, that the proceedings in confiscation were

* This fact was admitted in a certificate of the district attorney, filed below by consent, to supply lost parts of the record.—REP.

instituted in the beginning and carried on to enforce the law, at the instance of the plaintiff in error, an informer, whose relation as such has been admitted and proved—the courts of the United States in such confiscation proceedings have no right to disregard the third section of the act of August 6th, 1861, which declares expressly that "*in such case the proceedings shall be for the use of such informer* and *the United States in equal parts.*"

The statute of March 3d, 1865, giving the rights acquired by conquest to the Freedmen's Bureau, shows that the only title proposed to be given to the freedmen for any *such* property was a "quit-claim." Hence in the insurrectionary States but little value was attached, in point of fact, to property held by the title of conquest, while the fullest confidence was given to a title acquired by judicial proceeding under the confiscation laws; and that, therefore, the Commissioner of the Freedmen's Bureau acted wisely in this case by electing to assert the title of the United States in and by the proceedings in confiscation. The half that he did get was better than the whole which he might have had.

What, then, was the legal effect of his election?

This question was submitted to Mr. Stanbery, when attorney-general, in regard to the Macon armory property. He was asked—

"If, in your opinion, a complete title to that property is *not* already vested in the United States, to direct such proceedings to be instituted as may be necessary for the purpose of having the title perfected."

Under date of October 5th, 1866 (after the information in this case had been filed), that distinguished lawyer says:*

"*The United States is in possession of the property, I understand,* and in so far as the operation of *the law of war* may be concerned, the title is as perfect now as it can become.

"The property, however, may be liable to confiscation under the act of August 6th, 1861, &c. In respect to the institution of proceedings under that statute, the first objection that occurs to

* 12 Opinions of Attorney-General, pp. 76–78.

me is, *that it waives the claim of title by conquest.* Furthermore, on the filing of the information, *the property would pass at once into judicial custody*, and continue in such custody until the determination of the cause, &c. *I do not think that I can safely direct judicial proceedings against the property*, &c. I mention that law [of August 6th, 1861] as it is the only one known to me under which an allegation of forfeiture could probably be framed."

II. At any time before the information was filed, and at all times afterwards and before the sale of this property, it was in the power of the Commissioner of the Freedmen's Bureau, under the act of March 3d, 1866, to have elected to claim title by conquest alone, and through the law officers of the United States to have discontinued the confiscation proceedings, and to have relied on the title by conquest alone. But that was not done. In addition to his passive acquiescence, he came forward, and by his application to the court for *his half* of the proceeds of the sale of the property, he directly and positively ratified and approved the confiscation proceedings, and the claim of the informer to the other half of the proceeds under them.

Mr. S. F. Phillips, Solicitor-General, contra.

The CHIEF JUSTICE delivered the opinion of the court.

In war the public property of an enemy captured on land becomes, for the time being at least, the property of the conqueror. No judicial proceeding is necessary to pass the title. Usually the ultimate ownership of real property is settled by the treaty of peace, but so long as it is held and not surrendered by a treaty or otherwise it remains the property of the conqueror.

This well-settled principle in the law of war was recognized by this court in *United States* v. *Huckabee*,* as applicable to the late civil war. At the close of that war there was no treaty. When the insurrection was put down the government of the insurgents was broken up, and there was no

* 16 Wallace, 434.

power to treat with. Hence the title to all captured property of the Confederate government then became absolute in the United States.

Titus, however, claims as an informer under the act of 1861. This act provided, in substance, that if, during the (then) present or any future insurrection against the government of the United States, any *person* should, after the prescribed proclamation, purchase or acquire, sell or give, any property of whatsoever kind or description, with intent to use or employ the same, or suffer the same to be used or employed, in aiding or abetting or promoting such insurrection; or if any *person*, being the owner of such property, should knowingly use or employ, or consent to the use or employment, of the same for such purpose, all *such* property should be lawful subject of prize and capture wherever found, and the President was required to cause it to be seized, confiscated, and condemned. The proceedings for condemnation were to be had in the courts of the United States having jurisdiction of the amount, or in admiralty in any district in which such "prizes and capture" might be seized, or into which they might be taken and proceedings first instituted. The Attorney-General, or the district attorney of the United States for the district in which the property might at the time be, was authorized to institute the proceedings of condemnation, and, in such case, they were to be wholly for the benefit of the United States; or any person might file an information with such attorney, and then the proceedings were to be for the use of an informer and the United States in equal parts.

Clearly this act was intended for private, not public property—for such property of persons as required, under the laws of war, a judicial sentence of condemnation to divest the title of its owner,—not such property of a hostile government as had already been captured by an army and subjected to the complete and undisputed dominion and ownership of the conquering power. It applies, as will be seen, to all property, personal as well as real. Not only to a laboratory in which ammunition is prepared, but to the am-

munition itself; not to armories simply, but to their product. If the laboratory, owned by the hostile government, when captured in the progress of the war and held by the army, can be informed against and condemned for the benefit of the informer and the United States, so also can the ammunition prepared therein and captured in battle. If the armory, then the gun. Once incorporate this statute, with such a construction, into the law of war, and the attention of the soldier in battle will be divided between the capture of arms, ammunition, and stores on the field, and the search for a district attorney with whom to lodge a statutory information, and demand, as a matter of right, a proceeding in the court for its condemnation on the joint account of himself and the government in whose service he is. We doubt if the counsel for the informer in this case, who has so earnestly and so ably advocated the cause of his client here, would be willing to enlist himself in behalf of such a claim, and yet it is difficult to see how, if he succeeds in this, he might not in that.

An informer, to entitle himself to the statutory reward for his service, must inform against property which is the subject of judicial condemnation. There can be nothing to divide if there is nothing to condemn. In this case the land, when informed against, was already the property of the United States. The title had passed by the completed conquest. There was nothing to reach by judicial process. Information, in the statutory sense, could do no good. The property had been devoted to the war and followed its fortunes. The capture was the result of many battles, but it was none the less, on that account, captured property, needing no judicial sentence of forfeiture to make it absolutely the property of the United States.

But it is claimed that the United States are estopped by the proceedings of condemnation instituted, as they were, in behalf of itself and an informant, from denying, as against the informer, that the property in question was the subject of forfeiture on joint account under the act. There is no pretence that there was any claim, adverse to the title of the

United States as conqueror, that was, or could be, cut off by the judgment of the court. It will hardly be contended, we think, that if, after the close of the war, an information had been filed with the district attorney against the Charleston custom-house, and he had proceeded to have it condemned under the act, the United States would be estopped from objecting to the claim of an informer, for one-half its value, and yet the custom-house, although owned by the United States before the war, was no more its property at the close than was the laboratory informed against in this case, if the statements in the record are true. The very libel of information, filed by the district attorney, shows upon its face that the title of the United States was then complete, and the fair inference from the petition of Titus to be made a party to the cause is, that the case made by the libel is the same as that he presented to the attorney for proceedings. Certainly the United States are not prohibited from asserting, as against the informer, that the case he brought to its consideration, and upon which it acted, was not one in which he could be interested.

But it is further claimed that there is an estoppel in favor of this informer because the Commissioner of the Freedmen's Bureau omitted to appear and resist the judgment of condemnation, and, after the sale was made, applied for and received from the court one-half the proceeds.

The act of July 16th, 1866, gave the commissioner of that bureau the control and management of property of the character proceeded against, for certain purposes specified, but in this he was only the agent of the United States. His bureau was the department of the government authorized to manage the trust to which the property had been devoted. He is not estopped if the United States are not, and his neglect to appear and defend against the proceedings can certainly have no more effect against the United States than the institution of the original proceedings.

Neither was an estoppel created by the receipt of the purchase-money. The order in favor of the informer was made on the 8th April, 1868, and the property remained unsold

until December 7th, 1869. On the 19th April, 1870, the commissioner made his application to the court for the money. One-half the proceeds was all he could ask for, so long as the judgment in favor of the informer remained in force. This he applied for and received, and on the 2d May the proceedings now under consideration were commenced to set aside that judgment. Certainly, under these circumstances, it cannot be said that, even if he had the power to do so, the commissioner has yielded the claim of the government to the money which had been adjudged to the informer.

Very different questions, and very different principles of estoppel, will have to be considered if the United States or the commissioner shall ever attempt to assert title against the purchasers at the sale. They claim under the sale, and have paid their money in consequence of the offer of the United States to sell in that way. The informer stands in no such position. He has parted with nothing he ever had. He stands upon the original title. If, when he informed, the United States had no title, and through his information one was acquired, he is entitled to the statutory reward for his service. But if the United States had then a perfect title and nothing could be added to it by reason of his information, he has done nothing for which the statute has provided a reward. Whether he should be paid for furnishing the government with information by which it has been able to make its conquest available, is a question we are not called upon to consider. We deal with him only as an informer under the statute, and as such he has no standing in court.

In the view we have taken of the case it is not necessary to consider whether the District Court erred in permitting Titus to become a party to the proceedings after the judgment of condemnation had been entered, and all chances of liability for costs had been resolved in his favor.

JUDGMENT AFFIRMED.

BOLEY *v.* GRISWOLD.

In an action in the courts of the Territory of Montana for the recovery of the possession of personal property—the code of civil procedure in which Territory provides that the judgment in such an action may be for the possession of the property, or the value thereof in case a delivery cannot be had, and damages for the detention—while it is true that there can be no judgment for the value if there can be a delivery of the property, yet it is not true that a judgment is necessarily erroneous if the alternative is not expressed upon its face. The court must be satisfied that the delivery cannot be made before it can adjudge absolutely the payment of money. But, if so satisfied, it may so adjudge. A special finding that a delivery cannot be made is not necessary. An absolute judgment for the money is equivalent to such a finding.

ERROR to the Supreme Court of the Territory of Montana.

The Civil Practice Act of the Territory of Montana thus enacts:

"In an action to recover possession of personal property, judgment for the plaintiff may be for the possession or the value thereof, in case a delivery cannot be had, and damages for the detention of them."

This act being in force, Griswold sued Boley in one of the District Courts of Montana for the recovery of the possession of certain cattle. The jury found as follows:

"For the return of the cattle to the plaintiff, and in case a return of the same could not be had, $3000, the value thereof; and $800 damages for the detention."

On this verdict the court entered a judgment that plaintiff recover from defendant the sum of $3800, with interest, &c.

No alternative judgment, as provided by the Practice Act, for the possession or return of the property, was rendered upon the verdict by the District Court.

The defendant took the case to the Supreme Court, which affirmed the judgment of the District Court. Thereupon he brought the case here.

Opinion of the court.

Messrs. J. Hubley Ashton and N. Wilson, for the plaintiff in error:

The section of the Civil Practice Act of Montana, on which this case depends, appears to be identical with section 277, of the New York Code, which prescribes the form of judgment to be taken in actions to recover the possession of personal property. Upon that code the Court of Appeals of New York has decided* that neither a plaintiff nor a defendant, in an action to recover the possession of such property, can take judgment for the *value* of property, except as an *alternative;* and that if a judgment is taken for the value alone, and no alternative judgment is entered for the *return* of the property, it will be erroneous, and that for such error the judgment for the value will be reversed by an appellate court.

This seems a rational view of the case, and comes before this court with the support of a tribunal particularly conversant with the general principles of the Civil Practice Act under consideration.

Mr. Robert Leech, contra.

The CHIEF JUSTICE delivered the opinion of the court.

It is true that under the Civil Practice Act of Montana there can be no judgment for the value if there can be a delivery of the property, but it is not true that a judgment is necessarily erroneous if the alternative is not expressed upon its face. The court must be satisfied that the delivery cannot be made before it can adjudge absolutely the payment of money. But, if so satisfied, it may so adjudge. A special finding to that effect is not necessary. An absolute judgment for the money is equivalent to such a finding.

In one part of this record it appears that the verdict was for the return of the property, or, in case that could not be made, for $3000, the value, and $800 damages for the detention. The judgment was for the money, and the pre-

* Dwight *v.* Enos, 5 Selden, 472, 476; Fitzhugh *v.* Wiman, Ib. 563.

sumption is, in the absence of anything in the record to the contrary, that before it was rendered the court had become judicially satisfied that the property could not be returned. In a court of error every presumption is in favor of the validity of the judgment brought under consideration. Error must appear affirmatively before there can be a reversal.

JUDGMENT AFFIRMED.

HEARNE v. MARINE INSURANCE COMPANY.

1. Where, by the terms of a policy, a vessel is insured "to *a port in Cuba*, and at and thence to port of advice and discharge in Europe," and the vessel is lost in going from the port of discharge in Cuba, to another port in the same island for reloading, held on a suit on the policy for a loss that evidence by the assured was inadmissible to show a usage that vessels going to Cuba might visit at two ports, one for discharge and another for loading. [In the present case the court held that the evidence offered did not show such a usage.]
2. Where there has been a deviation in a voyage insured, no decree will be made for a return of any part of the premium. The deviation annuls the contract as to subsequent parts of the voyage and causes a forfeiture of the premium.

APPEAL in equity from the decree of the Circuit Court for the District of Massachusetts. Hearne filed a bill in the court below against the New England Mutual Marine Insurance Company to reform a contract of insurance, he alleging that the policy as made out did not conform to the agreement of the parties, taking that agreement with the usage or custom which he insisted entered into and formed a part of it.

The case was thus:

On the 7th of May, 1866, Hearne made his application by letter to the company for insurance. He said:

"The bark Maria Henry is chartered to go from Liverpool to Cuba and load for Europe, *via* Falmouth for orders where to discharge. Please insure $5000 on this charter valued at $16,000, provided you will not charge over 4 per cent. premium."

Statement of the case.

On the 9th of that month the company through its president replied:

"Your favor of the 7th is at hand. As requested we have entered $5000 on charter of bark Maria Henry, Liverpool to port in Cuba and thence to port of advice and discharge in Europe, at 4 per cent."

The policy was made out on the same day and described the voyage as follows:

"At and from Liverpool *to port in Cuba and at and thence to port of advice and discharge in Europe.*"

Thereafter the policy was delivered to the assured and received without objection. The vessel was loaded with coal at Liverpool and proceeded thence to St. Iago de Cuba. There she discharged her outward cargo. She went thence to Manzanillo, another port in Cuba, where she took on board a cargo of native woods. On the 13th of September, 1866, she sailed thence for Europe, intending to go by Falmouth for orders. Upon the 18th of that month, on her homeward voyage, she was lost by perils of the sea. Due notice was given of the loss, and it was admitted to have occurred as alleged in the bill. The company refused to pay, upon the ground that the voyage from St. Iago de Cuba to Manzanillo was a deviation from the voyage described in the policy, and, therefore, put an end to the liability of the insurers.

On the 7th of December, 1868, two years after the loss occurred, Hearne brought an action at law against the company. The court held that he was not entitled to recover by reason of the deviation before stated. He failed in the suit. On the 16th of January, 1871, he filed the bill in this case, and prayed therein to have the contract reformed so as to cover the elongated voyage from St. Iago to Manzanillo.

The bill averred that at the time of chartering the bark, and at the time of the issuing of the policy, there existed at Liverpool a general and uniform usage of trade, that all vessels chartered at said port for a round voyage from said port to the island of Cuba, and thence to return to

Europe, carrying coal as their outward cargo to Cuba, and bringing a return cargo thence to Europe, should visit one port in the said island for the purpose of discharging the outward cargo, and that they should then proceed to another port for the purpose of shipping a return cargo, and further that this usage was well known to all merchants, and others engaged in the trade between Liverpool and Cuba.

Evidence was introduced to establish the usage. It showed that about four-fifths of the vessels which go laden with coal to Cuba, take their return cargo elsewhere on the island than at the port of discharge, and that a few used the same port for both purposes. But it appeared also that the contract in both cases was expressed according to what the parties purposed.

The court below dismissed the bill, and from its action Hearne took this appeal.

Mr. Walter Curtis, for the appellant; Mr. H. C. Hutchins, contra.

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

The reformation of written contracts for fraud or mistake is an ordinary head of equity jurisdiction. The rules which govern the exercise of this power are founded in good sense and are well settled. Where the agreement as reduced to writing omits or contains terms or stipulations contrary to the common intention of the parties, the instrument will be corrected so as to make it conform to their real intent. The parties will be placed as they would have stood if the mistake had not occurred.*

The party alleging the mistake must show exactly in what it consists, and the correction that should be made. The evidence must be such as to leave no reasonable doubt upon the mind of the court as to either of these points.† The

* Kerr on Fraud and Mistake, 419, 420.

† Beaumont *v.* Bramley, 1 Turner & Russell, 41–50; Marquis of Breadalbane *v.* Marquis of Chandos, 2 Mylne & Craig, 711; Fowler *v.* Fowler, 4 De

mistake must be mutual and common to both parties to the instrument. It must appear that both have done what neither intended.* A mistake on one side may be a ground for rescinding, but not for reforming, a contract.† Where the minds of the parties have not met there is no contract, and hence none to be rectified.‡

This jurisdiction is applied, where necessary and proper, to the reformation of contracts of insurance.§

Here the application was to insure on a charter "from Liverpool to Cuba, and load for Europe, *via* Falmouth," &c. This was indefinite as to Cuba, and may have been regarded by the company as ambiguous. The answer was, as "requested, we have entered $5000 on charter *to port in Cuba, and thence to* port of advice and discharge in Europe." This answer shows clearly two things: (1.) How the company understood the proposition. (2.) That they agreed to insure according to that understanding, and not otherwise.

There was no mistake nor misapprehension on their part. The circumstances show there could be none.

The correspondence between the parties constituted a preliminary agreement. The answer to Hearne's proposal was plain and explicit. It admitted but of one construction. He was bound carefully to read it, and it is to be presumed he did so. In that event there was as little room for misapprehension on his part as on the part of the company. Such a result was hardly possible. There is nothing in the evidence which tends to show that any occurred. The inference of full and correct knowledge is inevitable. It is

Gex & Jones, 255; Sells *v.* Sells, 1 Drewry & Smales, 42; Loyd *v.* Cocker, 19 Beavan, 144.

* Rooke *v.* Lord Kensington, 2 Kay & Johnson, 753; Eaton *v.* Bennett, 34 Beavan, 196.

† Mortimer *v.* Shortall, 2 Drury & Warren, 372; Sells *v.* Sells, *supra.*

‡ Bentley *v.* McKay, 31 L. J. Chancery, 709; Baldwin et al. *v.* Milderberger, 2 Hall, 176; Coles *v.* Bowne, 10 Paige, 534; Calverley *v.* Williams, 1 Vesey, Jr., 211.

§ Harris *v.* Col. Co. Ins. Co., 18 Ohio, 116; Fireman's Insurance Co. *v.* Powell, 13 B. Monroe, 311; National Fire Insurance Co. *v.* Crane, 16 Maryland, 260.

as satisfactory to the judicial mind as direct evidence to the same effect would be.

So far, the complainant's case is as weak in equity as it was at law.

But it is said there was a usage that vessels going to Cuba might visit at least two ports—one for discharge and the other for reloading. It is insisted that this usage authorized the voyage to Manzanillo; that the voyage was not a deviation; that it in no wise affected the liability of the company in equity; and that hence, the contract of the parties in this particular should be reformed accordingly.

It is not necessary that the usage relied upon in cases like this should have been communicated or known to the assurers. Lord Mansfield said: "Every underwriter is presumed to be acquainted with the practice of the trade he insures, and if he does not know it, he ought to inform himself."*

Usage is admissible to explain an ambiguity, but it is never received to contradict what is plain in a written contract.† If the words employed have an established legal meaning, parol evidence that the parties intended to use them in a different sense will be rejected, unless if interpreted according to their legal acceptation, they would be insensible with reference to the context or the extrinsic facts.‡ If no such consequence is involved, proof of usage is wholly inadmissible to contradict or in any wise to vary their effect.§ In no case can it be received where it is inconsistent with, or repugnant to, the contract. Otherwise it would not explain, but contradict and change the contract which the parties have made—substituting for it another

* Noble *v.* Kennoway, 2 Douglas, 513; see also 1 Duer on Insurance, 266, and the cases there cited.

† Blackett *v.* Royal Exchange Assurance Co., 2 Crompton & Jervis, 250; Crofts *v.* Marshall, 7 Carrington & Payne, 607; Phillipps *v.* Briard, 1 Hurlstone & Norman, 21.

‡ Wigram on Wills, 11, 12.

§ Yates *v.* Pym, 6 Taunton, 446; Blackett *v.* Royal Exchange Assurance Co., *supra.*

and different one, which they did not make.* To establish such inconsistency it is not necessary that it should be excluded in express terms. It is sufficient if it appear that the parties intended to be governed by what is written and not by anything else.†

The principle of the admission of such testimony is that the court may be placed, in regard to the surrounding circumstances, as nearly as possible in the situation of the parties—the question being, what did they mean by the language they employed?‡ What is implied is as effectual as what is expressed.§ The expression and the implication in this case are equally clear. It is expressed that the vessel should proceed to a port in Cuba, and thence to Europe. It is implied that she should visit no other port in Cuba. *Expressum facit tacitum cessare.* Under these circumstances, usage can have no application, and proof of its existence is inadmissible. But the usage relied upon is not sustained by the evidence.

It appears that a large proportion of the vessels, perhaps four-fifths, which go laden with coal to Cuba, take on their return cargo elsewhere on the island than at the port of discharge. A few use the same port for both purposes. But the proof is also that the contract in all such cases is expressed according to the intent. There is no proof that where the policy is upon a voyage to one port and back, the vessel may proceed to another port before her return, and that by usage or otherwise, the latter voyage as well as the former shall be deemed to be within the policy.

Viewing the case in this aspect, we find nothing that would warrant the interposition of a court of equity.

We are asked, if we decline to reform the contract, to decree the return of the premium. This we cannot do.

* Holding *v.* Pigott, 7 Bingham, 465; Clarke *v.* Roystone, 13 Meeson & Welsby, 752; Trueman *v.* Loder, 11 Adolphus & Ellis, 589; Muncey *v.* Dennis, 1 Hurlstone & Norman, 216.

† Hutton *v.* Warren, 1 Meeson & Welsby, 477; Clarke *v.* Roystone, *supra.*

‡ 1 Greenleaf on Evidence, § 295*a*.

§ United States *v.* Babbit, 1 Black, 61.

We regard the case as one of mere deviation. It is essentially of that character. In that class of cases, the law annuls the contract as to the future, and forfeits the premium to the underwriter. Here equity must follow the law. We cannot apply a different rule.

DECREE AFFIRMED.

EQUITABLE INSURANCE COMPANY *v.* HEARNE.

Where a party proposed to insurers to insure his vessel on a "voyage from Liverpool *to Cuba* and to Europe *via* Falmouth," at a rate named, and the company offered to insure at a somewhat higher rate, saying, "It is worth something, you know, to cover the risk *at the port of loading* in Cuba," *held* that it was implied that "the port of loading" might be different from the port of discharge, and where the assured accepted this offer, and told the insurer to insure "at and from Liverpool *to Cuba* and to Europe *via* a market port," &c., *held* further, that a policy which insured "to port *of discharge* in Cuba, and to Europe *via* a market port," &c., did not conform to the contract, and was to be reformed so as to do so.

APPEAL from the Circuit Court for the District of Massachusetts.

The controversy in this case grew out of a contract of insurance upon the same charter-party as in the preceding case, though here the insurance was by a different company from the insurance there. The present case was thus:

On the 2d of May, 1866, Hearne addressed a letter to the Equitable Insurance Company as follows:

"Insure $4000 on the charter-party of the bark Maria Henry, valued at $16,000, if you will not charge me more than 3 per cent.; voyage from Liverpool to Cuba, and to Europe *via* Falmouth, for orders where to discharge. She will take her registered tonnage of coal."

On the 4th of the same month the company replied:

"We cannot write the charter of the bark Maria Henry at your rate, viz., 3 per cent., including coals, from Liverpool to

Cuba. Our rate will be 4 per cent. for the voyage, to include coals."

On the 7th of the month Hearne answered, arguing against the rate proposed, and offered "3 per cent., or 4 per cent., 1½ per cent. to be returned if no loss."

On the day following the company responded:

"We will write upon the charter of the bark Maria Henry as proposed by you—Europe to Cuba and back to Europe—at 3½ per cent. net. *It is worth something, you know, to cover the risk at the port of loading in Cuba.*"

On the next day Hearne wrote:

"I accept your proposition in reference to the insurance of the bark Maria Henry. Please insure $4000, at 3½ per cent., on the charter valued at $16,000, at and from Liverpool to Cuba, and to Europe *via* a market port, for orders where to discharge."

The contract, as expressed in the policy, was for—

"Four thousand dollars on charter of bark Maria Henry, at and from Liverpool to port of discharge in Cuba, and at and thence to port of advice and discharge in Europe."

The facts of the case were the same in all respects, down to the close of the litigation at law between the parties, inclusive, as those in the case immediately preceding, where the controversy was with the other company. That case is referred to for the particulars. Hearne having been defeated in his action at law, filed this bill for the reformation of the contract, as stated in the policy. The Circuit Court decreed in his favor. The company brought the case here for review.

Mr. J. C. Dodge, for the appellant; Mr. Walter Curtis, contra.

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

It is not denied that the correspondence between the parties constituted a preliminary agreement. Such clearly was

its effect. The policy was intended to put the contract in a more full and formal shape. The assured was bound to read the letters of the company in reply to his own with care. It is to be presumed he did so. He had a right to assume that the policy would accurately conform to the agreement thus made, and to rest confidently in that belief. It is not probable that he scanned the policy with the same vigilance as the letters of the company. They tended to prevent such scrutiny, and, if it were necessary, threw him off his guard.

The principles upon which a court of equity will exercise the jurisdiction invoked by the appellee were considered in the case which precedes this. What was there said need not be repeated. In this case Hearne's proposition to the company was to insure upon the charter, "voyage from Liverpool to Cuba, and to Europe *viâ* Falmouth." The company's response, as before stated, was: We will insure "as proposed by you—Europe to Cuba—at 3½ per cent. It is worth something, you know, to cover the risk at port of loading in Cuba." This is the language of the parties, and it is the essence of the correspondence. Suppose the language of these sentences had been incorporated in the policy in this form: This company hereby insures $4000 *upon the charter of the bark Maria Henry, as proposed* by the assured, from "*Europe to Cuba and back to Europe, at 3½ per cent. net,*" —the premium is enhanced "*to cover the risk at port of loading in Cuba,*"—what would have been the legal result? Can it be doubted that the policy would be held to cover alike the voyage to a port of discharge in Cuba, a voyage thence, if necessary, to a port of loading in Cuba, and a voyage from the latter to Europe? The "port of loading" is the only one mentioned in the letter. It seems to have been uppermost in the mind of the writer. The risk is referred to as a distinct and separate one. The implication is that the port might be one other than the port of unloading. The right to go to both rests upon the same foundation, and it is not more clear as to one than the other. What is implied is as effectual as what is expressed. The intent of the parties, as

manifested, is the contract. Upon any other construction the important language as to "the port of loading" would be insensible and without effect. No other interpretation, we think, can reasonably be given to it.

In *Dickey* v. *The Baltimore Insurance Co.*,* the policy insured the vessel upon a voyage "from New York to Barbadoes, and at and from thence to the Island of Trinidad, *and at and from Trinidad* back to New York." This court held that the words "at and from" protected the vessel in sailing from one port to another in Trinidad to take in a part of her cargo. Marshall, Chief Justice, said: "It is the settled doctrine of the courts of England that insurance *at and from an island*, such as those in the West Indies, generally insures the vessel while coasting from port to port for the purpose of the voyage insured." He refers to *Bond* v. *Nutt*,† and to *Thellusson* v. *Fergusson*.‡ The case of *Cruikshank* v. *Jansen*§ is to the same effect. These authorities fully sustain the proposition laid down. We are not aware that their authority has been questioned. They show the just liberality of construction which obtains where contracts of insurance are involved.

In this controversy the clear terms of the preliminary agreement warranted the court below in overruling the departure from it found in the policy.

We have examined the case only in the light of its own inherent facts. We have not found it necessary to consider the usage alleged to exist at Liverpool touching voyages in the trade from that port to Cuba. It seems clear to us that the judgment below does not need further support. We, therefore, forbear to remark upon that subject.

DECREE AFFIRMED.

* 7 Cranch, 327.
‡ 1 Douglas, 361.
† 2 Cowper, 601.
§ 2 Taunton, 301.

RUBBER-TIP PENCIL COMPANY *v.* HOWARD.

Though an idea of a person who afterwards obtains a patent for a device to give his idea effect, may be a good idea, yet if the device is not new his patent is void, even though it be useful. The principle applied to the patent of J. B. Blair, of July 23d, 1867, for a new manufacture, being rubber heads for lead-pencils, and the patent held void as being for nothing more than making a hole smaller than the pencil in a piece of india-rubber and putting the pencil in the hole, the elastic and erasive qualities of india-rubber being known to every one, and every one possessing capacity to make a hole in a piece of rubber, and to put a pencil in the hole, so as to be held there for an eraser by the elasticity of the rubber.

ERROR to the Circuit Court for the Southern District of New York; the case being thus:

On the 23d of July, 1867, J. B. Blair, an artist, alleging himself to be the original and first inventor of "a new and useful rubber head for lead-pencils," received a patent for his invention. His specification and claim were as follows:

"Be it known that I, J. B. Blair, of the city of Philadelphia, &c., have invented a new and useful cap or rubber head to be applied to lead-pencils, &c., for the purpose of rubbing out pencil-marks; and I do hereby declare the same to be fully described in the following specifications and represented in the accompanying drawings, of which—

"Figure 1 is an external view of a pencil as provided with a rubber or elastic erasive head, constructed in accordance with my invention.

"Figure 2 is a longitudinal section of the same.

"Figure 3 shows the head, as made, in a somewhat modified form, or with its upper end terminating in a cone.

"The nature of my invention is to be found in a new and useful or improved rubber or erasive head for lead-pencils, &c., and consists in making the said head of any convenient external form, and forming a socket longitudinally in the same to receive one end of a lead-pencil or a tenon extending from it.

"In the said drawings, A denotes a lead-pencil, and B one of my erasive heads applied thereto. The said head may have a flat top surface, or its top may be of a semicircular or conical

Drawings, attached to the specification.

FIG. 1.

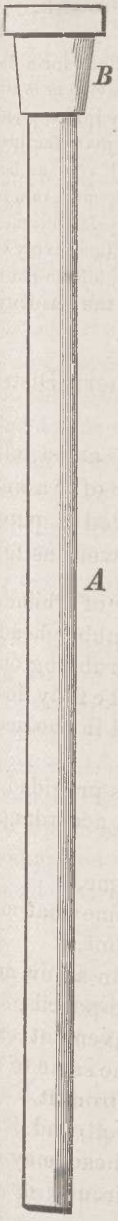


FIG. 2.

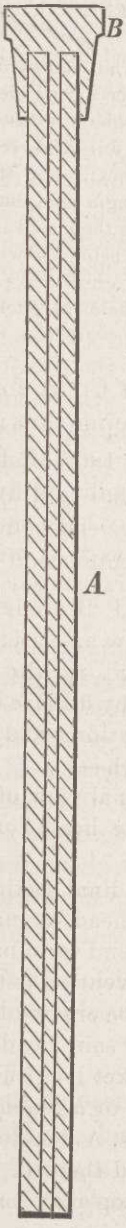
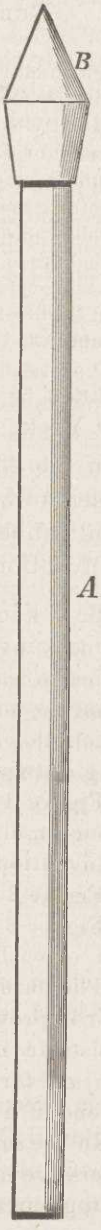


FIG. 3.



shape, or any other that may be desirable. Within one end of the said head I form a cylindrical or other proper-shaped cavity. This socket I usually make about two-thirds through the head, and axially thereof; but, if desirable, the socket or bore may extend entirely through the said head. The diameter of the socket should be a very little smaller than that of the pencil to be inserted in it. The elastic erasive head so made is to fit upon a lead-pencil at or near one end thereof, and to be so made as to surround the part on which it is to be placed, and be held thereon by the inherent elasticity of the material of which the head may be composed. The said head is to be composed of india-rubber, or india-rubber and some other material which will increase the erasive properties of the head.

"The drawings exhibit the elastic head so made as to cover the end as well as to extend around the cylindric sides of the pencil, but it is evident that the contour of the said head may be varied to suit the fancy or the taste of an artist or other person; and I do not limit my invention to the precise forms shown in the drawings, as it may have such or any other convenient for the purpose, so long as it is made so as to encompass the pencil and present an erasive surface about the sides of the same.

"A head made in my improved manner and applied to a pencil as above set forth is of great practical utility and advantage to bookkeepers, accountants, and various other persons. The pointed form of the head, as shown in Figure 3, will be found very useful for draughtsmen in erasing lines from their drawings when it may be desirable not to erase other lines in close proximity to that which it is desirable to erase. The elastic or rubber pencil-head, made as above set forth, may be applied not only to lead-pencils, but to ink-erasers and other articles of like character.

"I claim as a new article of manufacture an elastic erasive pencil-head, made substantially in manner as described.

"J. B. BLAIR."

This patent having become the property of the Rubber-Tip Pencil Company, and one Howard having made, as the company alleged, rubber-tipped pencils like those covered by the patent, the company filed a bill to enjoin him, &c.

Argument in support of the patent.

He set up, among other defences, that the article of manufacture claimed as an invention was not patentable as such.

And of this view was the court below. It construed the invention claimed to be "broadly any form which would enable the rubber to encompass a pencil, ink-eraser, or other articles of like character." It said that the additional words, "and present an erasive surface about the sides of the same," added nothing to the description, because "it was impossible to have a piece of rubber encompass a pencil, ink-eraser, or other article of similar character, without presenting an erasive surface about the sides of the same."

It said further, that the article was not the subject of a patent, because the elastic and erasive properties of india-rubber were known to all; "and that no person knowing the elastic quality of rubber could be wanting in the knowledge that a piece of rubber could be made to encompass and adhere to a pencil by making a hole in it; nor could any one be deficient in the skill requisite to make such a hole."

From a decree accordingly the company took this appeal.

Mr. J. S. Washburn, for the appellant:

1. The construction by the court below of the specification and claim is *illiberal* and contrary to the just rule laid down in many cases in this court, including especially a recent one, that patents for invention are to receive a liberal interpretation, and are, if practicable, to be so construed as to uphold and not destroy the right of the inventor.*

There exists in the present case no necessity which compels an illiberal construction. Indeed, such construction can be sustained only by rejecting the substantial effect of the language of the specification, as explained by the drawings.

The claim is for "an elastic, erasive pencil-head, made *substantially in manner described.*" The claim immediately following the description of the invention must be construed

* Klein *v.* Russell, 19 Wallace, 433.

in connection with the explanations contained in the specifications.*

Now, the specification describes the invention as an "improved" rubber, or erasive head for lead-pencils, and shown in the specification and *drawings* to be a *solid*, *elastic*, *socketed*, *erasive head*, "so made as to fit upon a lead-pencil at or near the end thereof, and to be so made as to surround the part on which it is to be placed, and to be held thereon by the inherent elasticity of the material of which the head may be composed," and having the *projecting*, *working erasive* surfaces shown in the drawings, which it is stated are "constructed in accordance with my invention," and by which drawings the invention is stated to be "represented."

It is true that the specification says—

"The drawings exhibit the elastic head, so made as to *cover the end* as well as to extend around the cylindric sides of the pencil, but it is evident that the *contour* of said head may be varied to suit the fancy or the taste of an artist or other person; and I do not limit my invention to the *precise* forms shown in the drawings, as it may have such, or any other *convenient for the purpose*, so long as it is made so as to encompass the pencil, and present an erasive surface about the sides of the same."

And from this language the court below assumed that the head might be of *any* external form whatever, so long as it encompasses the pencil, and that the words "and present an erasive surface about the sides of the same" were without any meaning.

But this is a misconception. The language relied on by the court below, and above quoted, should be taken in connection with the language preceding:

"The said head may have a flat *top* surface, or its *top* may be of a semicircular or conical shape, or any other that may be desirable. Within one end of the said head I form a cylindrical or other proper-shaped cavity. This socket I usually make about two-thirds through the head, and axially thereof; but, if desirable, the socket or bore may extend entirely through the said head."

* Seymour *v.* Osborne, 11 Wallace, 547.

Argument in support of the patent.

The statement in the first above-quoted paragraph, that the *contour* may be varied, and that the inventor does not limit himself to the "*precise*" forms shown in the drawings, is made with reference to the "end" of the pencil being covered or uncovered, and is subject to the express condition that the forms shall be "convenient for the purpose," and the implied condition to be fairly derived from the use of the word "precise," that they *must* correspond *substantially* with the *drawings*. There is certainly nothing from which it can be fairly derived that he intended to *disclaim* the features which are clearly portrayed in the drawings, upon which its practical value as an eraser depends; and the use of the words "to suit the fancy or the taste of an artist or other person," confines the meaning of the inventor to a matter of *simple style*, and indicates that he does not limit himself to a precise contour as a matter of ornamental configuration. This is further indicated by the fact that, in the drawings, while the *top* of the head is varied and the *contour* of the projecting erasive working surfaces about the sides may be varied from hexagon to square or circular, the projecting, working surfaces themselves are always retained.

It is also evident from the context that the words "and present an erasive surface about the sides of the same" mean *such* erasive surface as is portrayed in the drawings, and as is "*convenient for the purpose.*"

The court below therefore disregarded the drawings. But it is well settled that the drawings constitute a part of the specification, and are to be resorted to to aid a specification, which would otherwise be imperfect; to help out the description; to furnish clearer information respecting the invention described in the specification; to show the nature, character, and extent of the claim, as well as make a *part* of the description; and to *add* anything to the specification which is not specifically contained or mentioned therein.*

The fact that the construction placed upon the language

* Earl *v.* Sawyer, 4 Massachusetts, 9; Burrall *v.* Jewett, 2 Paige, 143; Washburn *v.* Gould, 3 Story, 133, 138, 139; Emerson *v.* Hogg, 2 Blatchford, 9; Hogg *v.* Emerson, 6 Howard, 485; 11 Id. 606.

in the present case is inconsistent with what the drawings establish, is enough to show it to be a misconstruction.

2. There are certain leading facts, known to everybody, which answer the concluding remarks of the court below, and are of themselves enough to decide this case.

Lead-pencils have very long—longer than any living man remembers—been used to make marks. India-rubber has very long—longer than any living man remembers—been used to rub them out. But never until lately was india-rubber used for this purpose except in a form *dis*connected from the pencil. But on a summer's morning of 1867, one Blair, a poor artist of Philadelphia, seeing that it will be more convenient to use it *on* his pencil than off, puts in a certain way, a piece of a certain shape, *on* the pencil, and finding a great advantage in thus using such a piece, shows what he has done. Behold! thousands, hundreds of thousands and millions of rubber-tipped pencils at once appear. Very rich companies, like the Rubber-Tip Pencil Company, are incorporated. Great capital is invested in the matter, and rubber-tipped pencils become a manufacture of the nation. How can it be said that there is no invention here? So far as the patent laws are concerned, *utility*, as ascertained by the consequences of what is done, is the test of invention, and when utility is proved to exist in any great degree, a sufficiency of invention to support the patent must be presumed.* In such a case it is vain to talk about the small amount of ingenuity shown or to say that the arrangement and application are so simple and obvious that anybody could see them.

Messrs. F. W. Betts and S. W. Kellogg, contra.

The CHIEF JUSTICE delivered the opinion of the court.

The question which naturally presents itself for considera-

* Roberts *v.* Dickey, Circuit Court of the United States, Western District of Pennsylvania, per Strong, J., and McKennan, circuit judge, 1 Official Gazette, 4, 5, 6; and see McCormick *v.* Seymour, 2 Blatchford, 243; and Curtis on Patents, § 41.

tion at the outset of this inquiry is, whether the new article of manufacture, claimed as an invention, was patentable as such. If not, there is an end of the case and we need not go further.

A patent may be obtained for a new or useful art, machine, manufacture, or composition of matter, or any new and useful improvement thereof. In this case, as has been seen, Blair's patent was for "a new manufacture," being a new and useful rubber head for lead-pencils. It was not for the combination of the head with the pencil, but for a head to be attached to a pencil or something else of like character. It becomes necessary, therefore, to examine the description which the patentee has given of his new article of manufacture, and determine what it is, and whether it was properly the subject of a patent.

It is to be made of rubber or rubber and some other material which will increase its erasive properties. This part of the invention alone could not have been patented. Rubber had long been known, and so had rubber combined with other substances to increase its naturally erasive qualities.

It is to be of any convenient external form. It may have a flat-top surface, or its top may be of a semicircular or conical shape, or any other that may be desirable. This would seem to indicate clearly that the external form was not a part of the invention. It was, however, urged upon the argument, that the invention did consist in the projecting surfaces extending out from the head, and which appear, as is claimed, in the drawings attached to the specifications. It is true, that in two out of the three drawings projecting surfaces are indicated, but such is not beyond question the case with the third. The shape there shown is conical, extending to a point, and evidently intended to represent the form mentioned as specially adapted to the use of draughtsmen in erasing lines from their drawings. It was the end of such a pencil, not the sides, that was to furnish the particular advantage of form. But although drawings do accompany the specification and are referred to, it is evident

that this reference is for the purpose of illustration only, because the patentee is careful to say that "he does not limit his invention to the precise forms shown, as it may have such or any other convenient for the purpose, so long as it is made so as to encompass the pencil and present an erasive surface upon the sides of the same." Certainly words could hardly have been chosen to indicate more clearly that a patent was not asked for the external form, and it is very evident that the essential element of the invention as understood by the patentee was the facility provided for attaching the head to the pencil. The prominent idea in the mind of the inventor clearly was the form of the attachment, not of the head. If additional proof of this is required, it may be found in the further statement in the specifications, which locates the head for use at *or near* the end of the pencil, and so made as to surround the part on which it is to be placed and be held thereon by the inherent elasticity of the material of which it is to be composed. If intended for use at any other place than on the end of the pencil, the projections could not be essential, as any form that would surround the part would present the requisite erasive surface.

Again, the head is to have in it longitudinally, a socket to receive one end of a lead-pencil or a tenon extending from it. This socket is to be cylindrical or of any other proper shape. Usually, the inventor says, he made it so as to extend part way through the head, but if desirable, it might be extended entirely through. It must be within one end, but any particular location at the end is not made essential. This clearly is no more than providing that the piece of rubber to be used must have an opening leading from one end into or through it. This opening may be of any form and of any extent longitudinally. The form, therefore, of the inside cavity is no more the subject of the patent than the external shape. Any piece of rubber with a hole in it is all that is required thus far to meet the calls of the specifications, and thus far there is nothing new, therefore, in the invention. Both the outside and inside may be made of any form which will accommodate the parties desiring the use.

Syllabus.

But the cavity must be made smaller than the pencil and so constructed as to encompass its sides and be held thereon by the inherent elasticity of the rubber. This adds nothing to the patentable character of the invention. Everybody knew, when the patent was applied for, that if a solid substance was inserted into a cavity in a piece of rubber smaller than itself, the rubber would cling to it. The small opening in the piece of rubber not limited in form or shape, was not patentable, neither was the elasticity of the rubber. What, therefore, is left for this patentee but the idea that if a pencil is inserted into a cavity in a piece of rubber smaller than itself the rubber will attach itself to the pencil, and when so attached become convenient for use as an eraser?

An idea of itself is not patentable, but a new device by which it may be made practically useful is. The idea of this patentee was a good one, but his device to give it effect, though useful, was not new. Consequently he took nothing by his patent.

The decree of the Circuit Court is

AFFIRMED.

ATCHISON *v.* PETERSON.

1. On the mineral lands of the public domain in the Pacific States and Territories, the doctrines of the common law, declaratory of the rights of riparian proprietors respecting the use of running waters, are inapplicable or applicable only in a very limited extent to the necessities of miners, and inadequate to their protection; there prior appropriation gives the better right to running waters to the extent, in quantity and quality, necessary for the uses to which the water is applied.
2. What diminution of quantity, or deterioration in quality, will constitute an invasion of the rights of the first appropriator will depend upon the special circumstances of each case; and in controversies between him and parties subsequently claiming the water, the question for determination is whether his use and enjoyment of the water to the extent of the original appropriation have been impaired by the acts of the other parties.

Statement of the case.

3. Whether, upon a petition or bill asserting that the prior rights of the first appropriator have been invaded, a court of equity will interfere to restrain the acts of the party complained of, will depend upon the character and extent of the injury alleged, whether it be irremediable in its nature, whether an action at law would afford adequate remedy, whether the parties are able to respond for the damages resulting from the injury, and other considerations which ordinarily govern a court of equity in the exercise of its preventive process of injunction.

APPEAL from the Supreme Court of the Territory of Montana.

Atchison and others filed a bill in the District Court of the Territory just named, for an injunction to restrain Peterson and others from carrying on certain mining operations on a creek in the county of Clark and Lewis, in the said Territory, known as the Ten-Mile Creek. The bill alleged that the water, diverted by the complainants from the stream for mining purposes, was deteriorated in quality and value. It appeared from the evidence that the complainants were the owners of two ditches or canals, known respectively as the Helena water-ditch and the Yaw-Yaw ditch, by which the creek mentioned was tapped and the water diverted and conveyed a distance of about eighteen miles to certain mining districts, known as the Last Chance and Dry Gulches, and there sold to miners. The parties through whom the complainants derived their interests, asserted a claim to the waters of the creek in November, 1864, and during that year commenced the construction of the ditches and continued work thereon until August, 1866. The work was then suspended, for want of means by the parties to continue it, until the following year, when it was resumed, and in 1867 the ditches were completed and put into operation. Their cost was $117,000.

Whilst this work was progressing, and in the summer of 1865, there was some mining on the Ten-Mile Creek about fifteen miles above the point where the ditches of the plaintiffs tap the stream, but there was no continued mining at that place until 1867. From that period until the present time the defendants had been working and were still working mining ground situated at that point on the creek. In

that work they in some places washed down the earth from the side of the hills bordering on the stream; in other places they excavated the earth and threw such portions as were supposed to contain gold into sluices upon which the water was turned. The earth from the washing on the hillsides and from the sluices, designated in the vocabulary of miners as "tailings," and the water mixed with it was carried into the creek and affected its whole current, which at that point has a volume of only about two hundred inches, according to the measurement of miners, filling the water with mud, sand, and sediment, and impairing its value at that point for further mining.

The bill alleged that the "tailings" thus thrown into the current were carried down the stream into the ditches of the complainants, thereby obstructing the flow of the water through the ditches, and injuring it in quality and value; and they insisted that as prior appropriators of the waters of the stream, they were entitled to its use without such deterioration; and for the protection of their rights, they asked an injunction to restrain the defendants from the further commission of the alleged grievances.

The evidence showed that the volume of water in the creek, which at the point where the defendants worked their mining claims was, as above said, only about two hundred inches, according to the measurement of miners, was increased at the point where the ditches of the complainants tapped the creek, by intervening tributary streams of clear water, to about fifteen hundred inches. Of this water the Helena ditch diverted about five hundred inches, and took it about eighteen miles, to the places where it was sold to miners. The water as it entered the ditch was in some degree muddied and affected with sand, and the evidence was conflicting as to the influence of the mud and sand upon the value of the water. The great preponderance of the evidence, however, was to the effect that the injury in quality from this cause was so slight as not, in any material extent, to impair the value of the water for mining, nor render it less salable to the miners at the places where it was carried. A

majority of the witnesses testified that it was first-class water for mining purposes, and some of them that it was good water even for domestic uses.

Persons who had cleaned out the Helena ditch and examined it, testified that there were no tailings or sediment of consequence in it, and that the most that there was ran into the ditch from the hillsides along the ditch and stream. A preponderance of the evidence also showed that no extra labor was required on the ditch on account of the muddy character of the water, or at most only the additional labor of one person for a few minutes each day, and that a sand-gate was necessary at the head of the ditch whether or not there was mining above on the stream.

With respect to the water diverted by the Yaw-Yaw ditch, it was shown that its deterioration, so far as the deterioration exceeded that of the water in the Helena ditch, was caused by sand and sediment brought by a tributary which entered the creek below the head of the Helena ditch.

The mining claims of the defendants were shown to be worth from $15,000 to $20,000 each, and it appeared that the defendants were responsible and capable of answering for any damages the complainants might sustain.

The District Court denied the injunction, and the Supreme Court of the Territory affirmed its decree. From the latter court an appeal was taken to this court.

Mr. Robert Leech, for the appellants; Mr. G. G. Symes, contra.

Mr. Justice FIELD delivered the opinion of the court.

By the custom which has obtained among miners in the Pacific States and Territories, where mining for the precious metals is had on the public lands of the United States, the first appropriator of mines, whether in placers, veins, or lodes, or of waters in the streams on such lands for mining purposes, is held to have a better right than others to work the mines or use the waters. The first appropriator who subjects the property to use, or takes the necessary steps for

that purpose, is regarded, except as against the government, as the source of title in all controversies relating to the property. As respects the use of water for mining purposes, the doctrines of the common law declaratory of the rights of riparian owners were, at an early day, after the discovery of gold, found to be inapplicable or applicable only in a very limited extent to the necessities of miners, and inadequate to their protection. By the common law the riparian owner on a stream not navigable, takes the land to the centre of the stream, and such owner has the right to the use of the water flowing over the land as an incident to his estate. And as all such owners on the same stream have an equality of right to the use of the water, as it naturally flows, in quality, and without diminution in quantity, except so far as such diminution may be created by a reasonable use of the water for certain domestic, agricultural, or manufacturing purposes, there could not be, according to that law, any such diversion or use of the water by one owner as would work material detriment to any other owner below him. Nor could the water by one owner be so retarded in its flow as to be thrown back to the injury of another owner above him. "It is wholly immaterial," says Mr. Justice Story, in *Tyler* v. *Wilkinson*,* "whether the party be a proprietor above or below in the course of the river; the right being common to all the proprietors on the river, no one has a right to diminish the quantity which will, according to the natural current, flow to the proprietor below, or to throw it back upon a proprietor above. This is the necessary result of the perfect equality of right among all the proprietors of that which is common to all." "Every proprietor of lands on the banks of a river," says Kent, "has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (*currere solebat*) without diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors above or below him, unless he has a prior right

* 4 Mason, 379.

to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit et debet currere ut currere solebat.* Though he may use the water while it runs over his land as an incident to the land, he cannot unreasonably detain it or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors he cannot divert or diminish the quantity of the water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above without a grant or an uninterrupted enjoyment of twenty years, which is evidence of it. This is the clear and settled doctrine on the subject, and all the difficulty which arises consists in the application."*

This equality of right among all the proprietors on the same stream would have been incompatible with any extended diversion of the water by one proprietor, and its conveyance for mining purposes to points from which it could not be restored to the stream. But the government being the sole proprietor of all the public lands, whether bordering on streams or otherwise, there was no occasion for the application of the common-law doctrine of riparian proprietorship with respect to the waters of those streams. The government, by its silent acquiescence, assented to the general occupation of the public lands for mining, and, to encourage their free and unlimited use for that purpose, reserved such lands as were mineral from sale and the acquisition of title by settlement. And he who first connects his own labor with property thus situated and open to general exploration, does, in natural justice, acquire a better right to its use and enjoyment than others who have not given such labor. So the miners on the public lands throughout the Pacific States and Territories by their customs, usages, and regulations everywhere recognized the inherent justice of this principle; and the principle itself was at an early period recognized by legislation and enforced by the courts

* 3 Kent's Commentaries, 439, side paging.

in those States and Territories. In *Irwin* v. *Phillips*,* a case decided by the Supreme Court of California in January, 1855, this subject was considered. After stating that a system of rules had been permitted to grow up with respect to mining on the public lands by the voluntary action and assent of the population, whose free and unrestrained occupation of the mineral region had been tacitly assented to by the Federal government, and heartily encouraged by the expressed legislative policy of the State, the court said: "If there are, as must be admitted, many things connected with this system which are crude and undigested, and subject to fluctuation and dispute, there are still some which a universal sense of necessity and propriety have so firmly fixed as that they have come to be looked upon as having the force and effect of *res adjudicata*. Among these the most important are the rights of miners to be protected in their selected localities, and the rights of those who, by prior appropriation, have taken the waters from their natural beds, and by costly artificial works have conducted them for miles over mountains and ravines to supply the necessities of gold diggers, and without which the most important interests of the mineral region would remain without development. So fully recognized have become these rights, that without any specific legislation conferring or confirming them, they are alluded to and spoken of in various acts of the legislature in the same manner as if they were rights which had been vested by the most distinct expression of the will of the law-makers."

This doctrine of right by prior appropriation, was recognized by the legislation of Congress in 1866. The act granting the right of way to ditch and canal owners over the public lands, and for other purposes, passed on the 26th of July of that year, in its ninth section declares "that whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and

* 5 California, 140.

acknowledged by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same."*

The right to water by prior appropriation, thus recognized and established as the law of miners on the mineral lands of the public domain, is limited in every case, in quantity and quality, by the uses for which the appropriation is made. A different use of the water subsequently does not affect the right; that is subject to the same limitations, whatever the use. The appropriation does not confer such an absolute right to the body of the water diverted that the owner can allow it, after its diversion, to run to waste and prevent others from using it for mining or other legitimate purposes; nor does it confer such a right that he can insist upon the flow of the water without deterioration in quality, where such deterioration does not defeat nor impair the uses to which the water is applied.

Such was the purport of the ruling of the Supreme Court of California in *Butte Canal and Ditch Company* v. *Vaughn*,† where it was held that the first appropriator had only the right to insist that the water should be subject to his use and enjoyment to the extent of his original appropriation, and that its quality should not be impaired so as to defeat the purpose of that appropriation. To this extent, said the court, his rights go and no farther; and that in subordination to them subsequent appropriators may use the channel and waters of the stream, and mingle with its waters other waters, and divert them as often as they choose; that whilst enjoying his original rights the first appropriator had no cause of complaint. In the subsequent case of *Ortman* v. *Dixon*,‡ the same court held to the same purport, that the measure of the right of the first appropriator of the water as to extent follows the nature of the appropriation or the uses for which it is taken.

What diminution of quantity, or deterioration in quality,

* 14 Stat at Large, 253. † 11 California, 143.

‡ 13 California, 33; see also Lobdell *v.* Simpson, 2 Nevada, 274.

will constitute an invasion of the rights of the first appropriator will depend upon the special circumstances of each case, considered with reference to the uses to which the water is applied. A slight deterioration in quality might render the water unfit for drink or domestic purposes, whilst it would not sensibly impair its value for mining or irrigation. In all controversies, therefore, between him and parties subsequently claiming the water, the question for determination is necessarily whether his use and enjoyment of the water to the extent of his original appropriation have been impaired by the acts of the defendant.* But whether, upon a petition or bill asserting that his prior rights have been thus invaded, a court of equity will interfere to restrain the acts of the party complained of, will depend upon the character and extent of the injury alleged, whether it be irremediable in its nature, whether an action at law would afford adequate remedy, whether the parties are able to respond for the damages resulting from the injury, and other considerations which ordinarily govern a court of equity in the exercise of its preventive process of injunction.

If, now, we apply the principles thus stated to the present case, the question involved will be of easy solution. It appears from the evidence that there is at the point where the defendants work their mining claims only about two hundred inches of water in the creek, according to miners' measurement; that between that point and the point where the Helena ditch taps the creek the distance is about fifteen miles; and that between those points the creek is supplied by several tributary streams of clear water, so that at the point where the water is diverted its volume amounts to about fifteen hundred inches. Of this water the Helena ditch diverts five hundred inches, and conveys it nearly eighteen miles to the localities where it is sold. Running water has a tendency to clear itself, and that result is often produced by a flow of a few miles. But in this case the

* This is substantially the rule laid down in Hill v. Smith, 27 California, 483; Yale on Mining Claims and Water Rights, 194.

evidence shows that the water as it enters the Helena ditch is muddied and to some extent is affected by sand. At the same time there is a great preponderance in the evidence to the effect that the deterioration in quality from this circumstance is very slight and does not render the water to any appreciable extent less useful or salable for mining purposes at the localities to which it is conveyed; and that no additional labor is required on the ditch on account of the muddied condition of the water. There is also much doubt left by the evidence whether the sand carried into the ditch does not to a very great extent come from the hillsides lying between it and the mining of the defendants, or lying along the course of the ditch. A sand-gate at the head of the ditch is necessary, whether there is or is not mining on the stream above; and the accumulation of sand from all sources, from the hillsides as well as from the mining of the defendants, only requires the additional labor of one person for a few minutes each day. The injury thus sustained, and which is only to a limited extent attributable to the mining of the defendants, if at all, is hardly appreciable in comparison with the damage which would result to the defendants from the indefinite suspension of work on their valuable mining claims. The defendants are also responsible parties, capable, according to the evidence, of answering for any damages which their mining produces, if any, to the plaintiffs. Under these circumstances we think there was no error in the refusal of the court below to interfere by injunction to restrain their operations, and in leaving the plaintiffs to their remedy, if any, by an action at law.

With respect to the water diverted by the Yaw-Yaw ditch, it is shown that its deterioration, so far as the deterioration exceeds that of the water in the Helena ditch, is caused by sand and sediment brought by a tributary which enters the creek below the head of the Helena ditch.

DECREE AFFIRMED.

Statement of the case.

UNITED STATES *v.* GILL.

1. When, without any express contract founded on advertisement or on military exigency, subsistence stores have been received into custody by army officers in frontier parts of the country, and subsequently, the use of them becoming necessary or convenient, have been in part used, in part destroyed through carelessness of the army subalterns, and in part become useless from natural causes,—the original owner having left (but not with a purpose of abandoning) that part of the country, where, had he remained, its disturbed state would have prevented him taking care of the stores except in the government posts,—the government is properly charged with the value of all the stores except of the part which had spoiled through natural causes; that is to say, is chargeable with that which it got benefit from or suffered to be carelessly destroyed.
2. But it is chargeable only at the value of the stores when they were received by it, and not with the value at the time when they were used, the value having risen between the two dates.

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

I. In November, 1864, A. J. Gill was owner of five hundred and thirty-six tons of hay, at Point of Rocks, near Fort Fillmore, in the Territory of Colorado. On the 27th November, 1864, he applied to Lieutenant Dunn, the commanding officer at the fort, to purchase the same for the use of the United States. Dunn declined to make any such purchase, stating that he was not authorized to do so, but he gave to Gill his receipt in writing, wherein it was stated that he had "received of A. J. Gill five hundred and thirty-six tons of hay, in good order and well ricked, for the use of the government," and he at the same time referred Gill to the commander of the district and to the quartermaster at Denver, who could purchase the hay if they saw fit. The commander of the district was applied to, but declined to purchase at that time. During the same month the military inspector of the district of Colorado, anticipating a short supply of hay for the winter, ordered the quartermaster of Fort Lyon "to take the hay belonging to A. J. Gill and use it for government stock." After this Gill exercised no con-

trol over the hay. He left Colorado on the 4th February, 1865, on business of his own, and did not return until the summer of 1866. In consequence of Indian troubles then existing it was unsafe for small parties to remain outside of government posts, and he was compelled to leave the hay without any one in charge of it; but in July, 1865, his agent visited the place and found the entire five hundred and thirty-six tons gone. The claimant did not abandon or intend abandonment of the hay, and at the time he left the Territory it had gone into government use, as set forth in what is now next stated.

In December, 1864, and during the winter 1864–65 the quartermaster and foragemaster at Fort Lyon directed government trains to go to the hay and quarter there. A military expedition having about two thousand horses was also quartered there, and used the hay. In the spring, about one-half of the hay had been given to government animals, about one-quarter had been thrown out of the ricks, trampled down, wasted, and destroyed, and about one-quarter remained in the ricks, though in a worthless condition.

After Lieutenant Dunn was relieved at Camp Fillmore, his successor, Lieutenant Dennison, assumed the responsibility of the custody of the hay, and in June, 1865, the post commander at Fort Lyon ordered the quartermaster there to receive the rest of the hay remaining, so as to relieve Lieutenant Dennison from responsibility. A board of survey being demanded, it was found that the rest was spoiled and worthless, and no receipt was given or responsibility assumed by the post quartermaster.

II. The value of the hay in November, 1864, was $38.50 per ton, and during the winter, at the time it was used, $45 a ton.

Upon the foregoing case the Court of Claims decided, as a conclusion of law—

That there being no valid express contract founded upon advertisement or military exigency for the sale and purchase of the hay, the government was not liable for the entire quantity sold in November, 1864, at $38.50 per ton; but was

liable for the hay taken and used, at its fair and reasonable value at the time of taking; and responsible for the wasteful and destructive manner in which it was taken and used; and that Gill should recover for three-fourths of the entire quantity ricked, at the rate of $45 a ton. It accordingly gave judgment in his favor for $18,090. The government brought the case here.

Mr. G. H. Williams, Attorney-General, and Mr. John Goforth, Assistant Attorney-General, for the appellant:

1. There having been no valid express contract founded upon advertisement,* nor any military emergency,† the defendants were not liable for the hay alleged to have been sold, if the taking was not a trespass by government troops. The refusal of the district commander to receive the hay was a notice to him as well as to all officers and agents of the defendants that the hay would not be purchased for the use of the government animals. The direction of the district inspector to the post quartermaster at Fort Fillmore to use the hay was illegal and of no effect, as it was not within the line of his duty or within his power to declare an emergency.

2. If the hay was taken and used by order of an officer without authority to act, or by government troops and parties without the claimant's knowledge and consent, and when he had left the Territory, much more if they scattered and trampled it under foot, it was a trespass, and the Court of Claims had no jurisdiction of the case.‡

3. The taking and using of the hay by the government troops and parties was an "appropriation within the act of July 4th, 1864,"§ and the Court of Claims has no jurisdiction of the action.‖

4. The memorandum receipt given to claimant by Lieu-

* Act 2d March, 1861, 12 Stat. at Large, 220.

† Act 4th July, 1864, 13 Id. 394.

‡ Gibbons *v.* United States, 8 Wallace, 269.

§ 13 Stat. at Large, 381.

‖ Filor *v.* United States, 9 Wallace, 45.

tenant Dunn was not binding upon the United States, there being no delivery or acceptance of the hay; but, on the other hand, the receipt of it having been accompanied by a statement by Dunn that he was not authorized to make the purchase, and the receipt being given as an accommodation to the owner in order that the district commander might know that he, Dunn, was cognizant of the fact that the owner had five hundred and thirty-six tons of hay cut and ricked in the vicinity of Fort Fillmore.

If judgment was to be given for the owner at all it should have been at the rate of $38.50 per ton, and no more. It was improper for the court to rate it as worth $45 per ton.

Messrs. T. J. Durant and C. W. Hornor, contra.

The CHIEF JUSTICE:

Upon the facts found, we think the judgment should have been for the value of the hay in November, 1864, to wit: $38.50 per ton, instead of $45, its value during the winter. To this extent the Court of Claims erred. The judgment is therefore REVERSED, and the cause remanded, with instructions to enter a new judgment

IN ACCORDANCE WITH THIS OPINION.

POLLARD *v.* BAILEY.

Where by the charter of a bank, stockholders are "bound respectively for all the debts of the bank *in proportion* to their stock holden therein," one creditor cannot sue a stockholder at law (there being numerous other creditors) to recover the full amount of his debt, without regard to those other creditors or to the ability of the other stockholders to respond to their obligations under the charter; and so appropriate to himself the entire benefit of that stockholder's security and exclude all other creditors from it. He should proceed in equity, where the "proportion can be ascertained upon an account taken of debts and stock, and a *pro rata* distribution of the debts among the several stockholders."

Especially is this so when other parts of the charter indicate plainly that the exercise of the powers of a court of chancery which could bring before it all the necessary parties, and adjust all their rights, was, in a case of insolvency, contemplated.

ERROR to the District Court for the Middle District of Alabama.

By an act passed in 1854, the legislature of Alabama chartered a bank to be called the Central Bank of Alabama. The capital was $900,000, divided into shares of $100 each.

The charter made certain provisions in case of the insolvency of the bank, or of its suspension of payments in specie. They were thus:

"SECTION 16 (ARTICLE 2). Individual stockholders, having shares in said bank, shall be bound respectively for all the debts of the bank in proportion to their stock holden therein.

"SECTION 20. If any debt due from said bank for an amount exceeding $100, shall remain unpaid for more than ten days after proper demand, the holder of such debt may file a bill in the chancery court, of the county . . . in which said bank may be located, for the settlement of all the debt of the bank, if he elect so to do, and may, on proof, &c., pray an injunction to restrain the said bank and its officers from paying out, or in any way transferring or delivering to any person any money or assets of said bank, or incurring any obligation or debt until such order be vacated or modified; and if such chancellor shall be of opinion that the debt is justly due, and that the bank has no just defence against the demand, and if it shall appear expedient and necessary, upon the proof presented, in order to prevent fraud and injustice, he shall grant an order for such injunction, and the said chancellor shall then proceed to inquire whether the said bank be solvent or not; and if it shall appear that the said bank is not clearly solvent, then he may make an order declaring the same to be insolvent, and requiring its affairs to be wound up and settled; and, further, if, in his opinion, the safety of the creditors shall require it, such chancellor may appoint a receiver to take charge of all the assets of the bank, and to close and settle its affairs.

"SECTION 21. In case the said bank be found insolvent, and settlement of its affairs be ordered, the same shall be done upon

bill filed in said chancery court, under the orders of the court and rules of chancery, and full distribution shall be made of the assets according to the rights of all parties; but the holders of bank-notes and obligations issued by the bank for circulation as money shall be first called in and paid, and shall have priority over debts due from the bank; and after the assets of the bank are exhausted, if they be not sufficient to pay all debts and liabilities, a further call shall be made on the shareholders in the bank for further payment of capital, over and above the sum of $100, of an amount equal to the deficiency, which shall be apportioned among all the shares of stock; and an order shall be made by the court for the payment *of* each shareholder of the sum or proportion due on his shares of stock; and each shareholder shall pay the sum so assessed to him severally in proportion to his stock, which shall be collected by the receiver and applied.

"SECTION 22. The summary remedy in this act, specially given for settling up and closing the affairs of said bank, shall apply to the case of insolvency, but shall not be allowed in case of a suspension only by the bank of specie payment, so long as suspension shall be sanctioned by the General Assembly; but nothing in this act shall be *construed so as to deprive a creditor of said bank from his right to suit in any other appropriate mode of proceeding*, or to prevent the General Assembly from hereafter regulating, by a general law in relation to banking institutions, the mode of enforcing and satisfying the rights of creditors of said bank: *Provided*, Any billholder shall also have the right to move in any court having jurisdiction, or before any justice of the peace in the city or county in which said bank is located, as the case may require, for the collection of any bill the payment of which may be refused."

Of the capital authorized by the charter a certain Pollard took $20,000, or two hundred shares. In 1865 the bank became insolvent, and in 1869 had ceased to do any business, having about $700,000 of bills outstanding and unpaid. In 1872, one Bailey, who had $17,000 of these bills, sued Pollard, *at law*, as the owner of two hundred shares of stock, assuming that he could thus sue him under the above-quoted section sixteen (article two) of the charter of the bank, which prescribes, as the reader will remember, "that the stock-

holders shall be respectively bound for all of the debts of the bank in proportion to their stock holden therein." The declaration contained averments that the bank had ceased to do business since 1868, and that no demand had been made of the bank for the payment of the bills, and that a demand had been made of the defendant, who was a stockholder of the bank during the period the plaintiff had been the owner. But there was no reference to the other creditors or the ability of the other stockholders to pay any proportion of the claim.

The defendant demurred to the declaration, but the court overruled the demurrer and gave judgment for the plaintiff. From that judgment the defendant brought the case here.

Mr. J. A. Elmore, in support of the ruling below:

1. The declaration was properly held to be sufficient. The bank having ceased to act and being without funds and indebted, was in law deemed to be dissolved, so far as to give the remedy afforded against the shareholders to the creditors of the corporation.

This dissolution, or insolvency, being proved, the liability of the stockholders, as declared by its charter, became *absolute*, and there was no valid objection to its enforcement at law. Various cases in New York* settle this.

The election to go into equity must be at the election of the creditors, and the difficulty of the stockholder in protecting himself beyond the statute liability has never been suggested as a ground for proceeding in equity.†

The liability is made by the charter several and direct, and not collateral. The measure of damages is different in each case, depending on the number of shares held; each stockholder is responsible to the amount of stock held by him.‡

* Bank of Poughkeepsie *v.* Ibbotson, 24 Wendell, 473; Simonson *v.* Spencer, 15 Id. 548; Van Hook *v.* Whitlock, 3 Paige, 409; Garrison *v.* Howe, 17 New York, 458.

† Bank of Poughkeepsie *v.* Ibbotson, 24 Wendell, 473.

‡ Bullard *v.* Bell, 1 Mason, 243.

Whenever a statute imposes a legal obligation upon one party to pay money to another, the person to whom the payment is to be made may maintain an action of debt, or assumpsit, for the money.*

2. Though the charter of the bank in this case gives the creditor a particular remedy, it at the same time, by its twenty-second section, expressly provides that nothing therein contained shall be construed so as to deprive a creditor of the right to sue in any other appropriate mode of proceeding. And the concluding part of the section gives a billholder a right to move in *any* court for the collection of any bill. We direct attention particularly to these clauses.

Mr. J. A. Campbell (*a brief of Mr. G. W. Goldthwaite being filed*), *contra.*

The CHIEF JUSTICE delivered the opinion of the court.

The right of Bailey to maintain his action against Pollard depends upon the construction to be given to the charter of the bank. Pollard does not deny his liability to the creditors, but insists that it cannot be enforced in this manner.

He is one of the stockholders of the bank and Bailey one of its creditors. Stockholders are, by article two, section sixteen of the charter, "bound respectively for all the debts of the bank in proportion to their stock holden therein." The action below was at law, by one creditor against one stockholder, to recover the full amount of his debt without regard to the other creditors or the ability of the other stockholders to respond to their obligations under the charter. The stock of Pollard, at its par value, exceeds in amount the debt owing to Bailey, but it is admitted that the other indebtedness of the bank is very large, and nearly, if not quite, equal to the entire capital.

Each stockholder is bound for the debts in proportion to his stock. His liability is not limited to the par value of his stock, neither is he bound absolutely for the payment of

* Bullard *v.* Bell, 1 Mason, 243.

the full amount of that. He must pay a sum which shall bear the same proportion to the whole indebtedness that his stock bears to the whole capital, and is not required to pay more. For the purposes of this case it is not necessary to decide what effect the insolvency of any of the stockholders would have upon the liability of such as are solvent. It is certain that no stockholder is liable for more than *his proportion* of the debts. This proportion can only be ascertained upon an account of the debts and stock and a *pro rata* distribution of the indebtedness among the several stockholders. The proper action, therefore, to enforce the liability is one in which such an account can be stated and distribution made. Such an action calls specially for the exercise of the powers of a court of equity, which can bring before it all the necessary parties and adjust all their rights. Every stockholder, when called upon to perform his obligations, has the right to require that the extent thereof shall then be determined once for all, as well that which he is under to his associate stockholders as that to the creditors. Otherwise he might be made to respond to the creditors under one rule and obtain his relief from the other stockholders under another. The provision, therefore, for a proportionate liability is equivalent to a provision for an appropriate form of equitable action to enforce it. The case is different from what it would be if the charter had provided generally that all stockholders should be individually liable for the payment of the debts. The cases from New York cited upon the argument, and which are supposed to be in opposition to the view we have taken, involved the consideration of such a liability.

But when section sixteen is taken in connection with sections twenty and twenty-one, it is very apparent that it was the intention of the legislature only to charge the stockholders upon a proper account, and in the manner therein provided for. The intention of the legislature, when properly ascertained, must govern in the construction of every statute. For such purpose the whole statute must be examined. Single sentences and single provisions are not to be

selected and construed by themselves, but the whole must be taken together.

As has been seen, section sixteen created the liability, but provided no remedy for its enforcement except by implication. Section twenty, however, provides in substance that if any debt due from the bank, exceeding $100 in amount, shall remain unpaid for more than ten days after proper demand, the holder may file a bill in the proper chancery court for the settlement of all the debts of the bank, if he elects so to do, and may, on certain specified proof, pray an injunction to restrain the bank and its officers from paying out, or in any manner transferring or delivering to any person, any money or assets of the bank, or incurring any obligations until the order is vacated or modified. It further provides that, upon certain findings, the chancellor shall proceed to inquire whether the bank is solvent or not; and if, upon such inquiry, he shall find that it is not clearly solvent, he may make an order declaring the same to be insolvent and require its affairs to be wound up and settled, and, under certain circumstances, appoint a receiver for that purpose. Section twenty-one provides that if the bank be found insolvent, and settlement of its affairs ordered, the same shall be done upon bill filed in said chancery court under the orders of the court and the rules in chancery, and that full distribution shall be made of the assets according to the rights of all parties, billholders having priority over other debts due from the bank. After the assets were exhausted, if they were not sufficient to pay all debts and liabilities, a further call was directed upon the shareholders for further payment of capital to an amount equal to the deficiency, which was to be apportioned among all the shares of stock, and an order made for the payment by each shareholder of the sum or proportion of his shares. This apportioned call the receiver was required to collect and apply.

The individual liability of stockholders in a corporation for the payment of its debts is always a creature of statute. At common law it does not exist. The statute which cre-

ates it may also declare the purposes of its creation, and provide for the manner of its enforcement.

After an examination of the several sections of this charter, it cannot for a moment be doubted that it was not only the intention to provide for a proportionate liability, but for a *pro rata* distribution of the fund arising therefrom among the different creditors, according to their several priorities. Every provision is entirely inconsistent with the idea that one creditor could, by an individual suit, appropriate to himself the entire benefit of the security, and exclude all others. A common fund was created for the common benefit, to be collected and distributed by the receiver, who was made the common agent of all. There was no liability except for the deficiency. That was to be apportioned and collected for the common benefit.

It was not only to be apportioned and collected, but the mode of apportionment and the manner of collection were specially provided for. The liability and the remedy were created by the same statute. This being so the remedy provided is exclusive of all others. A general liability created by statute without a remedy may be enforced by an appropriate common-law action. But where the provision for the liability is coupled with a provision for a special remedy, that remedy, and that alone, must be employed.

It follows as a necessary consequence from these premises that the action of Bailey cannot be maintained, and that the demurrer to his declaration should have been sustained.

But it is claimed that by section twenty-two Bailey, as a billholder, had the right to move in the proper court for the collection of any bill the payment of which had been refused. This clearly refers to an enforcement of the liability of the bank itself and not to that of the stockholders.

JUDGMENT REVERSED, and the cause remanded with instructions to sustain the demurrer to the declaration, and give

JUDGMENT ACCORDINGLY.

Syllabus.

PACKET COMPANY *v.* CLOUGH.

1. Under the act of Congress of July 6th, 1862, enacting that "the laws of the State in which the court shall be held, shall be the rule of decision as to the competency of witnesses in the courts of the United States," and under the acts of the legislature of Wisconsin, passed in 1863 and 1868, one of which says that "a party to a civil action . . . may be examined as a witness in his or her behalf on the trial; . . . *and in case of an action for damages for personal injury to a married woman, this section shall be so construed as to allow such married woman to be a witness on her own behalf, in the same manner as if she was single;*" and another of which says that "a party to any civil action . . . may be examined as a witness in his own behalf or *in behalf of any other party,*" a married woman may in the Circuit Court for Wisconsin, in an action on the case by her husband and herself, for injuries done to her person, be examined as a witness for the plaintiffs. It is unimportant whose will be the damages—whether the husband's or wife's—if recovered. The competency of the witness must be determined by the statutes.
2. In an action on the case by a husband and wife, with the regular common-law declaration, for injuries done to the wife's person, and a plea of the general issue, after direct proof has been given of the marriage, the defendants cannot prove either by way of disproving the fact of marriage alleged in the declaration or in mitigation of damages, that the plaintiffs had not lived together and cohabited as husband and wife since a time named (many years before); that it was commonly reputed that they had not lived together, and that there was a common reputation that the alleged husband was living and cohabiting with another woman.
3. When a woman has been severely injured in getting aboard a steamer, by the alleged carelessness of the servants of the boat, in putting out an improper sort of gang-plank, the fact that she is unwilling to pay fare for her passage, and that the captain makes no demand of fare from her, is no release of her right of action against the owners of the boat for the injuries done to her, unless she at the time understands it to be so and consents that it shall be so. This is true even though the passage be one two days and a half long.
4. The conversations of a captain of a steamer with a party injured in getting on his boat, made two days and a half after the accident occurred, in which he attributed the accident to the carelessness of the servants of the boat in putting out the plank, is not evidence to charge the owners of the boat with fault, and this though made while the boat was still on its voyage and before the voyage upon which the injured party had entered was completed.
5. A party who complains of the rejection of evidence must make it appear by his bill of exceptions that if the evidence had been admitted it might

have led the jury to a different result, and that accordingly he has been injured by the rejection. He must therefore have properly before this court the evidence rejected, or some statement of what it tended to prove.

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

In January, 1870, Carlos Clough and Sarah, his wife, in right of the wife, sued the Union Packet Company, in an action on the case to recover damages for personal injuries sustained by the wife in consequence of alleged negligence of the company's servants. The declaration was in the regular common-law form: *Plea:* The general issue.

The company, at the time of the injury, was owner of a steamboat employed by it in carrying passengers and freight on the Mississippi River, between St. Paul, in the State of Minnesota, and St. Louis, in the State of Missouri. During the passage downward, the boat arrived at Read's Landing, in Minnesota, at about two o'clock on the afternoon of September 30th, 1869, where she stopped to receive passengers. At that place Mrs. Clough (who was about to go to Davenport, in Iowa, at which place the boat was in the habit of touching), in attempting to go on board, fell from the gangway provided for entrance to the boat, and received the injury for which the suit was brought. Whether the company was guilty of negligence in having failed to provide a proper gangway, or in having failed to keep it in position, was, of course, an important question in the case, and on the trial the deposition of Mrs. Clough was admitted in support of her claim. Exception was taken to its admission.

Whether this exception could be sustained depended upon certain statutes of the United States and of Wisconsin.

Thus, an act of Congress of July 6th, 1862,* enacts 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, in trials at common law, in equity, and admiralty."

* 12 Stat. at Large, 588.

And a statute of Wisconsin, passed in 1863,* enacts that—

"A party to a civil action or proceeding may be examined as a witness in his or her behalf, on the trial, except in actions in which the opposite party sues, or defends as administrator, or legal representative of any deceased person. *And in case of an action for damages for personal injury to a married woman this section shall be so construed as to allow such married woman to be a witness on her own behalf, in the same manner as if she were not married.*"

Another statute, also passed in 1868,† enacts that—

"A party to any civil action or special proceeding in any and all courts, and before any and all tribunals, and before any and all officers acting judicially, may be examined as a witness in his own behalf, *or in behalf of any other party,* in the same manner and subject to the same rules of examination as any other witness."

After direct testimony had been given by Mrs. Clough that the plaintiffs were married on the 24th day of December, 1845, the defendants proposed to prove by other witnesses that the plaintiffs had not lived together and cohabited as husband and wife since December, 1869;‡ that it was commonly reputed that they had not so lived together, and that there was a common reputation that Carlos Clough was living and cohabiting with another woman. This proof was offered, as alleged, for two purposes,—one, to disprove the fact alleged in the declaration, that the plaintiffs were husband and wife, and the other in mitigation of damages. The court refused to receive it for either purpose, asserting, in regard to the first alleged purpose, that the question of the plaintiffs' relation to each other was not in issue by the pleadings; and, in regard to the second, that the evidence was not admissible in mitigation of damages: that the marriage of the plaintiffs had been proved without objection, and was not controverted by the defendant.

It appeared by the statements of Mrs. Clough that she

* Taylor's Statutes, 1599, § 73.

† Id. 1600, § 74.

‡ The trial was had in April, 1872.

went to Davenport, arriving there in the evening; that she was on the boat two days and a half; that on account of the injury received by her she had been unwilling to pay fare, that the captain demanded none of her, and that she thanked him for the free passage.

In the course of the trial the plaintiffs' counsel asked Mrs. Clough this question:

"What conversation, if any, did you have with the captain *after* the accident, on her trip down to Davenport?"

The question was objected to by the defendant's counsel, but the court overruled the objection, and the answer to the objection was read as follows:

"He said it was through the carelessness of the hands in putting out the plank that I fell; that they did not put out the regular plank, but loose planks. *It was in the evening, before we got into Davenport, that I had the conversation with the captain.*"

The defendant then offered in evidence the *ex parte* deposition of one Turner, taken in Memphis, Tennessee, under the thirtieth section of the Judiciary Act.

The court rejected the deposition because it conceived it not to be properly certified by the magistrate taking it. This rejection made another exception. Neither the bill of exceptions nor anything else contained the deposition, nor any statement of what it tended to prove.

The twenty-first rule of this court, in that part of it relating to "briefs" and "specifications of error," says:

"When error alleged is to the admission or rejection of evidence, the specification shall quote the full substance of the evidence offered, *or copy the offer as stated in the bill of exceptions;* any alleged error not in accordance with these rules will be disregarded."

The judge charged—

"That the consent of the captain not to charge any fare, as testified to by Mrs. Clough, was not a settlement or release of Mrs. Clough's right of action in this case, and would not prevent a recovery unless she so understood it and so agreed at the time."

To which charge the defendant excepted.

Verdict and judgment having been given for the plaintiffs in $6000, the company brought the case here, assigning for error—

1st. The admission of the deposition of Mrs. Clough.

2d. The rejection of the evidence to prove that plaintiffs did not live and cohabit together.

3d. The holding that the marriage of the plaintiff was not in issue under the pleadings.

4th. The holding, because Mrs. Clough had testified that the plaintiffs were married, that the defendant could not disprove the fact by such testimony as was offered.

5th. The charging that the demand of Mrs. Clough, that she should not pay fare in consequence of the injury received in going on to the boat, and the assent thereto of the captain, did not amount to a settlement of her claim for the injury done to her unless she so understood it.

6th. The allowing Mrs. Clough to state, as she did, what the captain had said to her *after* the accident, and on the trip down to Davenport and just before arriving at that place, in regard to the cause of the injury.

7th. The rejection of the deposition of Turner.

Mr. J. W. Cary, for the plaintiff in error:

1. *The court erred in admitting the deposition of Mrs. Clough, if she was the wife of Carlos Clough.*

The judgment in this action, when recovered, would belong to Carlos Clough. The wife, in such cases, is joined as a formal party, but the husband would be entitled to the judgment.* The case, therefore, presents the question, can a wife be a witness for her husband? The question is not whether she is interested in the event, the suit, but as to the policy of the law. If she can be a witness for her husband, she must be competent as a witness against him, and in that case a wife may be called in a suit against the husband and compelled to disclose all the domestic and marital secrets of

* Shaddock and Wife *v.* Clifton, 22 Wisconsin, 114.

the household. We acknowledge the force of the statutes relied on, but these results are so alarming as perhaps to control their interpretation.

2. *The court erred in rejecting the evidence to prove that the plaintiffs did not live and cohabit together as husband and wife.*

(*a*) It was competent evidence, tending to show that such relation did not at the time of the injury or trial exist between the parties. The fact that two persons live and cohabit together as husband and wife is some proof that such relation exists between them. On the other hand, the fact that two persons do not live and cohabit together as husband and wife is some evidence that the relation does not exist. The only evidence in this case that this relation did or ever had existed between the plaintiffs was by one of the plaintiffs. She produced no certificate or record evidence of marriage, but simply her verbal statement that they had been married many years previously. The defendants offered proof by persons who had known them, that they did not and had not lived or cohabited together as husband and wife since they had known them. This tended to prove the absence of a marriage.

(*b*) It was competent evidence to mitigate the damages. As already said this prosecution was for the sole benefit of Carlos Clough. He alone was entitled to the judgment and to the money sought to be collected. The loss and damage which he sustained by the injury was what the jury were to find in that case. Would not this loss be much greater to him if she was a wife with whom he was living and cohabiting, one whom he loved and cherished, than it would be if she was one with whom he had no intercourse or society?

3 and 4. *The court erred in holding that the marriage of plaintiffs was not in issue by the pleadings; and that the defendant could not disprove the fact by such testimony as was offered.*

Their right to join in this action depended wholly upon the question as to whether they were husband and wife. It was necessary for them to allege that fact, otherwise their declaration would have been demurrable. The defendant

pleaded the general issue, which was a denial of every material fact in the declaration; therefore this question was in issue by the pleadings, and was necessary to be proved. If necessary to be proved it was competent for the defendant to adduce evidence to disprove it. It was, therefore, error to hold that it was a fact not in issue.

5. *The court erred in charging the jury that the demand of Mrs. Clough, that she should not pay fare in consequence of the injury, and the assent thereto of the captain, did not amount to a settlement of the claim now set up unless she so understood it.*

Mrs. Clough paid no fare. When called upon for fare she was unwilling to pay, because she met with an accident in coming on board the boat; and her view was assented to. On what principle? Simply as a settlement of her claim for the injury against the company. She used that claim against the company to excuse herself from paying the fare which the captain of the boat had a right to collect. He yielded to her claim and received the consideration claimed. Is she not estopped further to assert it?

6. *The conversation testified to by Mrs. Clough with the captain should have been excluded.*

On this exception we rely confidently.

The accident occurred on the 30th of September, 1869, at about two o'clock P.M. Two and a half days afterwards, just as the boat was nearing Davenport, the alleged conversation with the captain in regard to the accident took place. In the *Milwaukee and Mississippi Railroad Company* v. *Finney*,* a suit against a railroad company, the court below allowed the plaintiff to give in evidence the declarations of the defendant's ticket agent, made after the transaction of selling the ticket was closed. The court held it clearly erroneous, and reversed the judgment, and Dixon, C. J., in disposing of it, quotes Story, J., as follows:

"Where the acts of the agent will bind the principal, then his representations, declarations, and admissions respecting the

* 10 Wisconsin, 388.

subject-matter, will also bind him, *if made at the time*, and *constituting* a part of the *res gestæ*."

7. *The court erred in rejecting the deposition of Turner.*

Messrs. W. P. Bartlett and M. H. Carpenter, contra:

1. *The act of Congress and the statutes of Wisconsin* (*stated, supra, p.* 530) *settle the first assignment of error.*

The court cannot look at those statutes and have doubt as to their potential operation. The courts of Wisconsin apply them to just such cases as this case.* Indeed, this first exception is hardly pressed. The whole force of the opposite argument lies in an assumption, not true, that the husband alone was the party suing. Now, Mrs. Clough was a *necessary* and proper party plaintiff. The injury was to her person. With, in, and by her, the cause of action existed. Without her there was no right of action. She and the meritorious cause coexisted. She was *the* party seeking to enforce her legal remedy for the actual injury practiced upon *her* body. The joining of the husband as a coplaintiff was a nominal thing, to answer a technical requirement of the law. The death of the husband, at any time, could not have defeated the right of action. If it is argued, that in case of a judgment for the plaintiff, Carlos Clough could control the judgment, the answer to that is, that the court, on a proper application, in behalf of Mrs. Clough, would control him, and would see that the proceeds of the judgment were properly applied for the use of the injured person.

2, 3, and 4. *The second, third, and fourth assignments may be treated together and are equally unfounded.*

The action was a common-law "action on the case," for consequential damages—tortious, in form, *ex delicto*. The cause of action is set forth in and by a common-law declaration. The plea is not guilty. That plea puts in issue the *gravamen* of the complaint, the fault or guilty negligence and carelessness of the defendant, and not the relationship

* Barns *v.* Martin, 15 Wisconsin, 246; Shaddock *v.* Town of Clifton, 22 Id. 114.

of the plaintiffs, or the corporate existence of the defendant, or citizenship of the parties. All of these matters however essential are impliedly admitted by the plea of *not guilty*. The existence of the defendant as a corporation might have been put in issue, but it was not; so might the citizenship of the respective parties, but was not; so might the relationship of the plaintiffs, but was not. Had issues on these several subjects been formed, they would have been issues in abatement of the action and not to the *merits*. The defendants elected to plead to the merits, *not guilty*, thereby waiving all formal objections or dilatory pleas. The court well said, that the plaintiffs' relation to each other was not in issue by the pleadings, though to avoid controversy or argument the marriage of the plaintiffs was proved, and that too without any objection.

5. *The attempt to set up the non-payment of fare as a release for the injury.*

The verdict and judgment was for $6000. The injury was of course great. The attempt to release a claim for such injury by non-payment of a few dollars passage-money is hard to support. No captain in common decency could have extorted fare in such a case. The clearest proof of intention to release should have been given if such a pretension was to be supported. The charge was right.

6. *The statement made by the captain in conversation with Mrs. Clough was evidence.*

It was made while Mrs. Clough was still a passenger upon the boat, not having reached her destination. It was competent as a part of the *res gestæ*, and independent of the question whether the admission was a part of the *res gestæ* or not, it was made during the time that the plaintiff was on her journey, and before its termination, and is competent evidence in that view alone. In *The Enterprise*,* Curtis, J., says:

"I am quite sure the practice has been to admit declarations made by the master while in command concerning any matters

* 2 Curtis, 321.

which came under his authority as master, though not part of any *res gestæ* strictly speaking."

In *Burnside* v. *Grand Trunk Railway Company*,* it was held by the court that the statements of the general freight agent of the railway company as to the condition of goods delivered to him for transportation, made while the goods were *in transit*, were admissible in evidence against the company, *although made eight months after the goods were delivered*, and the court says that the only question is,

"Whether at the time these statements were made the contract with the railroad was still in the course of execution, and we think it must be so considered."†

7. *Whether the ex parte deposition of Turner was rightly ruled out this court will not inquire.*

The record nowhere shows to this court what the testimony was which was excluded, nor what it proved or if it tended to prove anything. This omission in the record is of itself fatal under the twenty-first rule, and independently of it. The counsel should show that the deposition contained testimony competent in itself, and which *had it not been ruled out by the court*, would or might have prevented a verdict against the packet company.‡

Mr. Justice STRONG delivered the opinion of the court.

In considering the first assignment of error—that is to say, the question whether on the trial the deposition of Mrs. Clough was rightly admitted in support of her claim, it is unnecessary to inquire whose will be the damages, if any, which may be recovered—whether they will belong to the husband or to the wife. The competency of the witness, or her incompetency, must be determined by the statutes of Wisconsin, where the case was tried. The act of Congress

* 47 New Hampshire, 554.

† To the same effect see Demeritt *v.* Meserite, 39 New Hampshire, 521; Morse *v.* Connecticut Railroad Co., 6 Gray, 450; Burgess *v.* Wareham, 7 Id. 345.

‡ Sewell *v.* Eaton, 6 Wisconsin, 494.

of July 6th, 1862, has enacted 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, in trials at common law, in equity, and admiralty." And the statutes of Wisconsin* very plainly declare that the wife is a competent witness for herself in such a case as this. The first assignment of error cannot, therefore, be sustained.

The second, third, and fourth assignments present substantially the same question, and they may be considered together. After direct testimony had been given by Mrs. Clough that the plaintiffs were married on the 24th day of December, 1845, the defendants proposed to prove by other witnesses that the plaintiffs had not lived and cohabited together as husband and wife since December, 1869; that it was commonly reputed that they had not so lived together, and that there was a common reputation that Carlos Clough was living and cohabiting with another woman. This proof the court refused to receive. It was offered for two avowed purposes—one in mitigation of damages, and the other to disprove the fact alleged in the declaration that the plaintiffs were husband and wife. But how, if received, it could have tended to mitigate damages has not been made plain to us. The suit, as the case shows, was for an injury inflicted upon the wife. Surely the injury was the same whether the husband lived with her or not. And the evidence was inadmissible for the other purpose for which it was offered. It is true, ordinarily, the general issue in an action of trespass on the case imposes upon the plaintiff the necessity of proving all the material facts averred in the declaration, but the ability of the plaintiffs to sue is not a fact directly averred, and, therefore, it cannot be disproved under a plea of not guilty. In fact it is not put in issue by such a plea. The defence that the plaintiffs suing as husband and wife are not married goes to the form of the writ, rather than to the

* See statutes of 1863 and 1868, quoted *supra*.—REP.

cause of action, and it should, therefore, be pleaded in abatement, and not in bar. Thus, in Chitty's Pleadings* it is laid down as a proper plea in abatement to the form of the writ that the plaintiffs or defendants suing, or being sued, as husband and wife, are not married. And in Stephens on Pleading,† it is said "the plea of not guilty in trespass on the case operates as a denial of the breach of duty, or wrongful act alleged to have been committed by the defendant. . . . But not guilty will apply to no other defence than a denial of the wrongful act." The general issue at length is that the defendant is not guilty of the grievances laid to his charge, in manner and form as the said plaintiff hath above thereof complained against him, and of this he puts himself upon the country, &c.‡ While, since the time of Lord Mansfield, the scope of this issue has been much enlarged, it has not been supposed to extend to a denial of the ability of the plaintiff to sue. In *Combs* v. *Williams*,§ it was ruled that in the trial of an action upon a promise to a feme sole, brought by her husband and herself after marriage, it is not competent for the defendant under the general issue to prove the illegality of the marriage, such matter being wholly in abatement. True, this was in an action of assumpsit, but the general issue is as broad, in such a case, as it is in case for a tort. And if this were not so, even if in the state of the pleadings the defendants were at liberty to prove that the plaintiffs were not husband and wife, they could not prove it by such evidence as that which they offered. Cohabitation as husband and wife may tend to prove marriage, but non-cohabitation has not been accepted as disproving the existence of the marital relation in face of uncontradicted evidence that a marriage in fact had taken place.

The fifth assignment of error is without any foundation. It would be very extraordinary were we to hold that the plaintiff had settled and discharged her claim upon the de-

* Vol. i, page 392.
† Page 160.
‡ 1 Chitty's Pleading, 432.
§ 15 Massachusetts, 243.

fendants without any intention or understanding on her part to give it up.

The next assignment is more important. The accident by which the plaintiff was injured occurred at Read's Landing, in Minnesota, on the 30th day of September, 1869, about two o'clock in the afternoon. Two days afterwards, as the boat approached Davenport, in the State of Iowa, Mrs. Clough, the witness, had a conversation with the captain, in which he made some statements respecting the accident, and these statements the court allowed to be given in evidence against the defendants. In this we think there was error. Declarations of an agent are, doubtless, in some cases, admissible against his principal, but only so far as he had authority to make them, and authority to make them is not necessarily to be inferred from power given to do certain acts. A captain of a passenger steamer is empowered to receive passengers on board, but it is not necessary to this power that he be authorized to admit that either his principal, or any servant of his principal, has been guilty of negligence in receiving passengers. There is no necessary connection between the admission and the act. It is not needful the captain should have such power to enable him to conduct the business intrusted to him, to wit, the reception of passengers, and, hence, his possession of the power to make such admissions affecting his principals is not to be inferred from his employment.* It is true that whatever the agent does in the lawful prosecution of the business intrusted to him, is the act of the principal, and the rule is well stated by Mr. Justice Story,† that "where the acts of the agent will bind the principal, there his representations, declarations, and admissions respecting the subject-matter will also bind him, *if made at the same time, and constituting part of the res gestæ.*" A close attention to this rule, which is of universal acceptance, will solve almost every difficulty. But an act done by an agent cannot be varied, qualified, or

* 1 Taylor on Evidence, § 541.

† Story on Agency, § 134.

explained, either by his declarations, which amount to no more than a mere narrative of a past occurrence, or by an isolated conversation held, or an isolated act done at a later period.* The reason is that the agent to do the act is not authorized to narrate what he had done or how he had done it, and his declaration is no part of the "*res gestæ.*"

Applying this rule to the present case, how does it stand? The thing of which the plaintiffs complain was negligence, on the 30th of September—a fault in providing for Mrs. Clough's embarkation on the steamer. That, and that alone, caused the injury she sustained. That and nothing else was the "*res gestæ.*" What the captain of the boat said of the transaction two days afterwards was, therefore, but a narrative of a past occurrence, and for that reason it could not affect his principals. It had no tendency to determine the nature, quality, or character of the act done, or left undone, and it is not, therefore, within the rule stated by Judge Story. That rule has been recognized "*in totidem verbis*" in Wisconsin by Chief Justice Dixon, in delivering the opinion of the court in *The Milwaukee and Mississippi Railroad Company* v. *Finney*.† And there is nothing in any of the decisions cited by the defendants in error inconsistent with such a rule. The case of *The Enterprise*, cited from 2d Curtis, was a suit in admiralty for subtraction of wages, and the declarations of the master respecting the contract with the seamen were admitted, though not a part of the *res gestæ*. But the decision was rested upon the ground that the admiralty rule is different from the rule at common law. The case of *Burnside* v. *The Grand Trunk Railroad Company*, cited from 47 New Hampshire, simply decides that the statements of the general freight agent as to the condition of goods delivered to him for transportation made while the goods are still in transit, or while the duty of the carrier continues, are admissible in evidence against the company. This was a case of contract not executed, and, while it remained unexecuted, the agent had power to vary it; had, in fact, com-

* 1 Taylor on Evidence, § 526.

† 10 Wisconsin, 388.

plete control over it. The transaction was still depending, and the agent was still in the execution of an act which was within the scope of his authority. But in the present case the declarations admitted were not made in the transaction of which the plaintiffs complain, or while it was pending. They refer to nothing present. They are only a history of the past.

It is argued they were made before the voyage upon which Mrs. Clough entered was completed. True, they were, but they were not the less mere narration. The accident was past. The injury to Mrs. Clough was complete. The only wrong she sustained, if any, had been consummated two days before. We cannot think the fact that she had not arrived at her port of destination is at all material. If she had left the steamer before the declarations were made it is not claimed, as certainly it could not be, that they were admissible. Now, suppose two persons were injured by the negligence which the plaintiffs assert, and one of them had left the boat before the captain's declarations were made, clearly they would have been inadmissible in favor of the person whose voyage had been completed. This is not denied. Yet the connection between them and the accident would be as close in that case as in this. Can they be admissible in the one case and not in the other? Assuredly not. We must hold, therefore, that there was error in admitting in evidence the statement of the captain of the steamboat made two days after the wrong was done of which the plaintiffs complain.

The last assignment of error is the rejection of the deposition of Turner. Of this it is sufficient to say that we have not before us either the deposition or any statement of what it tended to prove. We cannot know, therefore, that it was of any importance, or that, if it had been admitted, it could have had any influence upon the verdict. A party who complains of the rejection of evidence must show that he was injured by the rejection. His bill of exceptions must make it appear that if it had been admitted it might have led the

jury to a different verdict. This must be understood as the practice in this court, and such is the requirement of our twenty-first rule. By that rule it is ordered that when the error assigned is to the admission or rejection of evidence, the specification shall quote the full substance of the evidence offered, or copy the offer as stated in the bill of exceptions. This is to enable the court to see whether the evidence offered was material, for it would be idle to reverse a judgment for the admission or rejection of evidence, that could have had no effect upon the verdict.

But for the reception of the statement made by the captain, shortly before the arrival of the boat at Davenport, the judgment must be reversed.

JUDGMENT REVERSED, and a

VENIRE DE NOVO AWARDED.

EXPRESS COMPANY *v.* WARE.

1. This court will not examine evidence to ascertain whether a jury was justified in finding, as it has done, on an issue of fact.
2. Where a statute of limitation enacts that a defendant's absence from the State will prevent its running, but that "in the case of a foreign corporation, if it has a managing agent in the State, service of the writ may be made on *him*," on a question of fact arising in a suit brought more than five years after the cause of action had accrued, whether the defendant did or did not have a managing agent for the State prior to the time when the suit was brought, it is proper to charge that the time during which the plaintiff was disabled from suing by reason of defendant having no managing agent in this State is not to be counted as part of the five years' limitation period.

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

The Code of Nebraska bars actions upon contract in five years. The defendant's absence from the State is not, how-

ever, to be computed. But in the case of a foreign corporation, if it has a managing agent in the State, service of the writ may be made upon such managing agent.*

These provisions of the code being in force, Ware delivered, on the 29th of September, 1864, and during the late rebellion, to the United States Express Company a quantity of gold, to be carried by it from Nebraska City to New York. The company by its receipt undertook to carry the gold, but exempted itself from any loss by "the acts of the enemies of the government, or insurrections, or any of the dangers incident to a time of war."

The company carried the gold on the Hanibal and St. Joseph Railroad, which crosses the north part of Missouri.

At the time when this gold was delivered, that part of Missouri was in a high state of commotion with the rebellion, rebels being nearly as numerous as loyal persons, and of equal or greater activity. In the course of the transit upon the railroad just mentioned, a body of eighty armed rebels, on the 3d of October, 1864, fired into the train of cars, and stopped and robbed it, carrying off this gold.

Hereupon, on the 27th of February, 1870—more than five years after the loss—Ware sued the express company, serving the writ upon a managing agent of it, and alleging that the route at the time of the transportation was unsafe; that the express company was guilty of negligence in carrying gold on it; and that there was, at the time, a safe and suitable route across the State of Iowa, which the company could have and ought to have used. The company set up its special contract and an exemption under it.

Evidence was given by both sides as to the safety or danger of travel on the Hannibal and St. Joseph Railroad on and about the 3d of October, 1870. Trains, it appeared, up to that date had been running regularly, but it appeared equally that tracks had been torn up in places, that a train had been fired into as it passed and a brakeman killed, and that from the generally disturbed condition of the region, there was

* Revised Statutes of Nebraska, 395, 396, 404.

with many persons a greater or less degree of fear that trains would be captured.

Evidence was also given on both sides—on the company's to show, that at the time of the loss and for some time afterwards, the company did have a "managing agent," and that, therefore, as suit could have *then* been brought by a service on *him*, the present action not having been brought till the 27th of February, 1870, was barred by the statute of limitations—and on the part of the plaintiff to show that there was no "managing agent" on whom service could be made prior to the said 27th of February, when the suit was actually brought.

The court below charged the jury:

"If you find that the defendant had a managing agent within the State at the time of the loss, then the statute began to run from that time, and if it had such agent in the State for the next five years after the loss, then this action is barred, but otherwise it is not. In other words, to bar this action the plaintiff must have been able for five years before suit brought to have sued the defendant in this State, and compelled it to answer the suit by a service upon a managing agent therein."

Verdict and judgment having been given for the plaintiff the express company brought the case here, assigning for error—

1. That the evidence of negligence did not support the verdict.

2. That the action was barred by the statute of limitations, and that the court erred in its instruction on that point.

Mr. J. M. Woolworth, for the plaintiff in error; Mr. Clinton Briggs, contra.

The CHIEF JUSTICE delivered the opinion of the court.

We see no error in the charge, and cannot examine the evidence to ascertain whether the jury was justified in finding as it did upon the issues of fact.

JUDGMENT AFFIRMED.

AMBLER *v.* WHIPPLE.

1. Where an instrument prepared by one partner for signature by his copartner, with whom he has fallen out and quarrelled, contains mutual releases and assignments—each being the consideration of the other—it should, in order to be binding, be signed by both parties. The fact that the partner who did not prepare it has taken without objection from the other an unsigned counterpart after this other partner had signed the first counterpart, and left it in the hands of a third person to be delivered only when the unsigned counterpart was signed and delivered, does not give effect to the release.
2. Though bad character, drunkenness, and dishonesty on the part of one partner may be good grounds for dissolving a partnership, on the application of the other—this other not having known at the time of forming the partnership, these characteristics of his copartner—yet when *before* the partnership was formed they were known by the partner not guilty of them to have existed, they do not authorize such partner himself to treat the partnership as ended, and to take to himself all the benefits of the joint labor and joint property.
3. A partner who furnished capital, charged in a case strongly indicating injustice, with half profits in favor of another of inventive genius, and whom after valuable discoveries he sought to get rid of, alleging, even with truth, intemperate habits and bad character.

APPEAL from the Supreme Court of the District of Columbia.

Ambler filed a bill in the court just named against one Whipple and a certain Dickerson. A cross-bill and a supplemental bill, made additional pleadings.

The suit grew out of a copartnership between Ambler and Whipple, formed May 24th, 1869, for the purpose of experimenting with and bringing to perfection an invention by which gas, for lighting and heating and other useful purposes, was to be generated from petroleum; for obtaining a patent or patents for the result of their labor, and for the management of the business after such patent had been obtained.

The terms of the partnership were clearly stated in a memorandum of agreement signed by the parties, consisting of nine articles.

It sufficiently appeared from these articles that Ambler

Statement of the case.

was looked upon as the man of inventive genius, and Whipple as the man of business, and the source of the funds necessary to conduct the experiments and place the affair on a successful footing.

By these articles it was agreed that if success attended their efforts the profits were to be equally divided, after deducting the expenditures which Whipple might find necessary to be advanced. That Whipple might have full control of his branch of the joint venture, it was stipulated that Ambler should assign to him his interest in the patents which might issue, and in pursuance of this stipulation Ambler did execute an assignment of all his interest in the invention and in the patents which might be granted thereon. The articles of partnership were dated on the day when the partnership was formed, May 24th, 1869, and the assignment the day after.

In view of the present controversy the most important of these articles of agreement was the SIXTH, which was in the words following:

"That any and all letters-patent that may be obtained in this country and all other countries by virtue of said invention, or by reason of any improvement, or of any modification of the same by either party, shall be owned by and between the parties to this agreement in equal shares, to wit, one undivided half to each, and all proceeds of sale or sales of any and every kind and character shall be shared by and between the parties share and share alike."

The bill alleged that after experimenting three or four months a result was obtained and a patent issued in the name of Whipple and Ambler, No. 92,687, dated July 18th, 1869, and that while the patentees were experimenting under this patent and seeking remedies for apparent defects and for improvements in their invention, the true principle of success was developed about the 20th or 21st day of August; that immediately thereafter the defendant, Whipple, conceived the design of excluding the complainant from any benefit of the invention, and began a course of proceedings for the purpose of defrauding him of his rights; that in

pursuance of this scheme he ignored his rights and character as a joint owner and patentee in the invention; forcibly debarred him from the workshops where his invention was used, and denied him all interest in the result of his labors, and introduced the other defendant, Dickerson, in the absence of the complainant, to the place where the experiments had been made and to the machinery which had been used, and that in a few days Dickerson applied for a patent, afterwards issued (No. 95,665), which embodied the invention of Ambler, with only a colorable variation; that thereafter Whipple and Dickerson entered into a copartnership and successfully introduced the invention of the complainant into use, and by sales of particular States and districts had received in a short time over $100,000.

This was the substance of the bill of complaint, and the relief prayed was that Whipple and Dickerson might make discovery of the sales and profits; that they should be enjoined from the use of the complainant's invention, and that a decree be made in favor of the complainant for compensation and damages.

The answer of Whipple admitted the original agreement and assignment, and the issue of the patent to Whipple and Ambler. It admitted also the partnership with Dickerson and the issue of the patent to Dickerson. It denied all intent to defraud the complainant, but admitted the sales or contracts for sale of the Dickerson patent. It denied the identity of the two patents or the inventions set forth in them. It averred that after a full experiment with the first patent it proved a total failure, and that the complainant abandoned all further effort with it and left the city of Washington, where the experiments had been conducted; that Dickerson, having been previously engaged in inquiries in the same direction, perfected an invention of great value which effected what he and Ambler had failed to do, and that he thereupon entered into a partnership with Dickerson in regard to that invention, as he had a right to do, and that in the sales, contracts, or profits growing out of this patent, the complainant had no interest whatever.

Statement of the case.

The answer set up as a further defence that the complainant by his drunkenness, dishonesty, and general bad repute had rendered a continuance of the partnership impossible; and that through one Martin the defendant Whipple had purchased of Ambler all his interest in the patent of Whipple and Ambler, and in the partnership business in which they had been engaged. It also contained allegations of the fact that before the partnership began, the complainant had been convicted of a felony and was otherwise infamous, but neither in the answer nor in the cross-bill, where this matter was repeated, *was it stated that this fact came to the knowledge of Whipple, the defendant, after he had entered into the partnership.* It did not deny the allegation of the bill, that after the date specified in it the complainant had been excluded from the workshops.

The cross-bill filed by the defendant Whipple set up a release of Ambler, his improper conduct, the failure of the experiments with the original invention, and prayed that Ambler be enjoined from setting up any right or claim against him on account of said invention, or on account of the articles of agreement between them. To this Ambler answered, very fully denying the release and denying the failure of the invention and his abandonment of it.

Dickerson filed a separate answer, but it contained nothing of moment not included in Whipple's.

The supplemental bill averred that since the filing of the original bill an additional patent (No. 102,662) had issued to the defendants; that it was for the same invention, essentially as that made by Whipple and Ambler, and patented to them by patent No. 92,687.

The answer to this bill denied this, and asserted that the invention patented was one of Whipple and Dickerson.

The testimony occupied a large part of a record of four hundred and eighteen pages, and was contradictory. Notwithstanding its amount, however, some matters necessary to the best comprehension of the case in all its parts were not presented. Thus, though the pleadings referred largely to the patent to Whipple and Ambler (No. 92,687), and to

that one (No. 102,662) to Whipple and Dickerson, mentioned in the supplemental bill as having been granted, during the suit, and though the complainant alleged that the latter was for the same invention, with colorable differences, as the former, yet neither was set out in the evidence. Certain leading facts, however, were made sufficiently clear.

Thus the evidence tended plainly to show that after the grant of the patent of July 18th, 1869 (No. 92,687), a series of experiments were conducted through a term of three months, by Whipple and Ambler, in the same place and under their joint supervision, which finally resulted in the discovery of the important and before unknown principle, that the mingled vapors of water and petroleum, when held together at the temperature and under the pressure due to steam, would result in the production of a combustible gas, if such combination was continued long enough to enable the chemical reunion to take place. This discovery would seem to have been developed empirically, and apparently was not demonstrated in confirmation of an antecedent theory. In the first experiment of the partners, upon a practical scale, the endeavor was made to make a gas from the vapor of petroleum, evaporated by heat applied on the outside of a cylinder containing petroleum and fitted with a piston-head to force the gas, when evolved, through strainers of various porous materials placed above the cylinder. This piston-head was very loosely fitted, and steam entered the petroleum and became mingled with its vapor. After the machine for this purpose was made, it was soon observed, in experimenting with it, that while it made gas with a loose-fitting piston, it made little or none when the piston was fitted tightly, *i. e.*, packed, so as to be steam-tight. This led to the conclusion that the introduction of steam into the oil itself was essential to the proper development of gas in quantities practically sufficient, and a hole was then bored in the cylinder, allowing a free flow of steam through the petroleum, when of a sudden the invention appeared to be complete. Whipple said to a workman, "I am satisfied with it. There is a million of dollars in it."

Statement of the case.

There was some conflict of testimony as to the precise time at which, and the persons by whose orders, this boring of the piston was done. Four witnesses, including Ambler and his son, stated that it was by direction of Ambler. Three (Whipple and two persons still in his employ) stated that it was by direction of Whipple.

The decisive experiment just abovementioned was made about the 21st of August, 1869.

There were now certain *undisputed* facts in the case; facts referred to by this court, in its opinion, as such.* They were these:

"The book of accounts of expenditures made by Whipple and kept under his direction showed that up to that date Whipple and Ambler's names had been used in charging up the items. On the 23d Ambler's name was dropped and it was all charged to Whipple. Many declarations of his were proved about this time, that he would make a great fortune; and it was proved by one Holden, with whom Ambler had been boarding, that up to this time Whipple had paid for Ambler's board without objection, but shortly after gave him, Holden, notice that he would do so no longer. It appeared from Dickerson's supplemental and amended answer that in the months of June and July Whipple was in Chicago and tried to interest him in the matter in which he and Ambler were engaged. It was also shown that on the 3d of September, within less than two weeks after the purpose of Whipple to get rid of Ambler was alleged to have been fully conceived, Dickerson, who was not a man of science, but a person having money, made his appearance in Washington, coming from Chicago, and was taken by Whipple to the shop where the recent experiment had been made. This was in the absence of Ambler from the city. Precisely what took place between Whipple and Dickerson was not shown by the testimony. *That* was to be judged of by the results which followed.

"The first of these was that, on the 16th day of September,

* *Infra*, pp. 558, 559.

only thirteen days after his first sight of the machinery in the workshops, and his first interview in Washington with Whipple, Mr. Dickerson filed in the Patent Office an application for a patent, the specification and claims of which were so nearly like those of Ambler and Whipple, and so nearly embodied the results of their experiments as to leave little doubt that it originated in the Whipple-Ambler experiments, however much it might differ in some particulars from their patent. This application was pressed so successfully that a patent was issued on it to Dickerson and Whipple on the 12th of October. In the meantime Dickerson and Whipple had entered into a partnership in the matter, and Ambler was excluded from all control."

These facts, as already said, were undisputed, and there was much other testimony of a direct character tending to prove the purpose of Whipple to put Ambler wholly aside and out of the way, and that with this purpose he went after Dickerson, an old acquaintance of his own, and that with this purpose Dickerson came to Washington.

The testimony was voluminous. The whole case involving chiefly questions of intent and of fact, and thus ministering no great deal anywhere to juridical science, the *results* of it, as they appeared to the reporter and as they were assumed by the court, are alone given.

It appeared sufficiently plain that Ambler was a man of intemperate habits, not at all constantly affected by liquor, but getting into drunken debauches from time to time, and, when in that state especially, given to lying and to various degraded habits. The evidence showed, however, that Whipple had known him since 1864, five years before the partnership between him and Ambler was formed, and that the habits were generally known; known in fact by almost everybody who knew Ambler at all. They knew him to be a man of genius, with both the weaknesses and the vices in a full measure by which genius is sometimes disfigured. During a part of the month of August it seemed that he left Washington for eight or ten days. When he came home Whipple would not allow him to enter the workshops.

Statement of the case.

A principal defence of the defendants was the alleged release by Ambler.

The original of the alleged release was in the possession of a person named Martin, already referred to. It was dated September 24th, 1869.

It recited the issuing of the patent No. 92,687, the assignment of it to Whipple, the articles of partnership, and that a disagreement existed between Ambler and Whipple in regard to the construction of the invention; that Ambler was anxious to be released from his obligations to Whipple, and was willing to convey all his interest in the invention to Whipple, and then declared that in consideration of the full discharge of $1000 due by Ambler to Whipple, Ambler sold and conveyed all his interest in the invention, and in all improvements made, or which might be made by Whipple; and that Whipple released Ambler from all obligation on account of the contract, and from the payment of the $1000.

Martin stated that he had got the paper from Whipple at the request of Ambler; that the paper was drawn by him, Martin, at Whipple's request, and signed by Whipple on the 24th of September, 1869, the day of its date; that after getting the paper he could not find Ambler for some time, though he had called at his lodgings and written a letter, &c. However, on the 24th of October he saw Ambler. The witness proceeded:

"Ambler introduced the subject of the release from Whipple to him, and stated that his wife objected to his signing it, and said he ought to hold on; 'But,' said he, 'I differ in opinion with her, and I will sign the agreement.' . . . I handed Mr. Ambler the original of the contract, in my own writing, which was signed by Mr. Whipple and witnessed by Mr. Lombard and myself, and he read the same. I then handed him the duplicate copy, which was to be signed by himself. He made no objection to the contract, put the duplicate in his pocket, said he would take it with him to Washington, would there execute it and hand it to Mr. Whipple, and that I might deliver the original to him after he delivered the copy. I still hold the original of said contract for Mr. Ambler; will deliver it to him as soon as the

duplicate is signed and delivered *to myself* or *Mr. Whipple.* I would not give Mr. Ambler the original because signed by Mr. Whipple; and I was instructed not to give it to him until the other was signed. I tendered it to him on Sunday, October 24th, at his rooms at his hotel."

The testimony of Martin showed that he had undertaken, in his conversations with Ambler and while negotiations were going on about the arrangement set out in the paper dated 24th of September, 1869, and signed by Whipple but not by Ambler, to engage that Whipple should release the $1000 recited in the paper as having been due by Ambler to Whipple, and that Whipple did afterwards release the said $1000.

The witness gave a very disparaging account of Ambler's early and long-continued habits of intemperance, and of the great efforts which he had made to reform him. He testified also to his conviction for crime, though it appeared that after his discharge from prison the witness took an interest with him in a patent, offered by Ambler to him by way of gratitude.

The following, with similar testimony, much too long to be set out in a case involving chiefly questions of fact, was relied on to show that Martin was really the agent of Whipple:

"QUESTION. What time did you first make Mr. Whipple's acquaintance?

"ANSWER. In the spring of 1864.

"QUESTION. Had you a great deal to do with Whipple?

"ANSWER. Yes, sir.

"QUESTION. As much mixed with him as with Ambler?

"ANSWER. No, sir; not quite. It was a different kind of mixing.

"QUESTION. You said that in the course of conversation with Ambler, you agreed that Whipple should discharge him?

"ANSWER. Yes, sir."

Ambler was indebted, it seemed, to the witness.

Ambler's own account of the matter was:

"On the 24th of October, 1869, I met Mr. Martin, and he told

me that he had prepared an assignment of my interest to Mr. Whipple for, he said, a part consideration of $1000. I took the assignment and looked at it. Said I, 'Shall I take this with me?' He replied, 'Yes, if you choose.' 'I do not wish,' said he, 'to press this case upon you at all; exercise your own judgment.' Said I, 'Mr. Martin, I will take it to Washington and show it to my wife.' I did not say, nor intimate, that I would sign it."

The court below dismissed the bill and the complainant took this appeal.

Messrs. G. W. Paschall and R. Mason, for the appellant; Mr. J. A. Ballestier, contra.

Mr. Justice MILLER delivered the opinion of the court.

It is to be observed that neither party prays for a dissolution of the partnership. Indeed, the bill and cross-bill, and the answers to both, proceed upon principles which do not recognize the partnership as existing. The complainant seems to imply that by reason of Whipple's course of conduct he is remitted to all his rights as the inventor, and claims that being the sole inventor of the successful machine he is entitled to all the benefit of it. Whipple assumes that by his purchase from Ambler, and Ambler's misconduct, that the partnership has been dissolved, and he has succeeded to all its rights, if they are of any value.

The testimony is voluminous and contradictory. In the view we shall take of the case, while the decision will mainly turn on these questions of fact, we shall only state the effect which the testimony has had upon our minds without referring to it in detail.

1. If the complainant really released or sold his interest in the partnership business, or in the patent of Whipple and Ambler, his case is at an end, and we will, therefore, consider that question first.

The instrument of writing dated September 24th, 1869, is supposed to have that effect. There is no doubt that the language of the instrument* is sufficient for the purpose

* Quoted, *supra*, p. 553.—REP.

for which it was intended, but it wants the signature of Ambler. Nor is it pretended that he ever signed it or any copy of it. It is clearly on its face a paper which requires the signature of both parties to make it binding on either. The releases and assignments are mutual, and each is the consideration of the other, and it requires no great penetration to see that it was drawn in the interest of Whipple, who signed it, and not in the interest of Ambler, who did not sign it.

But it is argued that the paper was procured from Whipple by Martin, the agent of Ambler, at Ambler's request, and was signed by Whipple and delivered to Martin; that Martin delivered it to Ambler, who received a copy of it without objection, and promised to sign it. Admitting all this to be true, it is very clear that both parties intended to have a written instrument signed by each as the evidence of any contract they might make on that subject, and neither considered any contract concluded until it was fully executed. Under these circumstances Ambler had a right to decline to sign the paper, and until he signed he was not bound by it. It was not drawn by him, nor at his dictation. It was first signed by Whipple, and drawn up by him or in his presence, and made to suit his purposes. It is idle to say that because Ambler took a copy of it from Martin to examine he became a party to it, though he never signed it.

Further, we are of opinion, notwithstanding Martin's declaration that he acted on Ambler's suggestion, that he was throughout the whole affair acting for Whipple, and governed solely by his interest. This transaction does not, in our opinion, establish any release or transfer of Ambler's interest in the partnership concern.

2. Nor is there any such evidence of abandonment of the enterprise on the part of Ambler as to justify the court in holding that he had lost or forfeited his rights in the venture. It is true that about the middle of August he left Washington City for a week or two, but when he returned he found himself excluded from the workshops and from all participation in Whipple's plans, and it seems probable he was by

Whipple's authority forbidden to go there before he left the city. It is unreasonable to call this a voluntary abandonment of the enterprise.

3. What weight would be given to the charges of bad character, drunkenness, and dishonesty in a suit by Whipple to dissolve the partnership we need not here state. If all that is charged were proved in such a suit it would make a strong case for relief, on such terms as equity might impose for the protection of both parties. But they did not authorize Whipple, of his own motion, to treat the partnership as ended and take to himself all the benefits of their joint labors and joint property. It seems also to be a fair inference from the pleadings and other circumstances that Whipple must have known of Ambler's conviction for felony *before* he entered into the agreement with him.

We are, therefore, of opinion that the case shows nothing which deprives Ambler of his rights under the original contract with Whipple.

4. We are also of opinion that Whipple is chargeable as trustee for Ambler with one-half of all that has been realized or may be realized from the use of the patent to Whipple and Ambler and the patent to Whipple and Dickerson.

This conclusion we rest upon the sixth article of the agreement between Whipple and Ambler.* This article provides that any improvement or modification of the invention which may be made by either party, in this country or any other, for which a patent may be obtained, shall enure to the joint benefit of both. In the peculiarly close and confidential relation which the parties assumed toward each other in regard to an invention which both understood to be imperfect, undeveloped, and the subject of future trial and experiment, this provision was eminently wise and necessary. And since Whipple was, by the assignment of Ambler, invested with the legal title of the patent and chief conduct of the affairs of the partnership, he was under a peculiar obligation of good faith as both partner and trustee of Ambler.

* Quoted, *supra*, p. 547.—REP.

Notwithstanding the bills, cross-bills, and supplemental bills set up both by the patent to Whipple and Ambler and the patent to Whipple and Dickerson, No. 95,665, and another issued to them pending the suit, No. 102,662, which are charged by Ambler to be all covered by his invention, and by the others to be totally distinct, none of these patents are found in the record. It is impossible, therefore, for this court to give any *conclusive* opinion or judgment as to how far they are identical, or how far there may be distinctive features, under which the whole or some part of the two latter patents might be sustained. We base our decree on other principles.

We are satisfied, from the testimony in the case, that the results of the experiments conducted by Ambler and Whipple in their joint enterprise developed the practicability of success in obtaining the object of their pursuit; that these experiments disclosed the fact that while they had mainly relied on the effect of heat by steam, applied to petroleum indirectly by encompassing the vessel in which the petroleum was, by the steam let into an outer chamber, it was found that it was necessary to introduce the steam into the vessel, thus bringing it into direct contact with the petroleum.

Whether Ambler had seen this as clearly as Whipple is not very well or satisfactorily shown. But it is proved to our entire satisfaction that when Whipple saw this point, and that through it success was within his reach, he immediately recognized its great value. This experiment was made at the same shops, with the same machines, and in the same pursuit, which for three months had engaged the active energies of both Ambler and Whipple. The weight of evidence is that Ambler was present and assisting, but this is denied by other witnesses.

What is clear to us is that as soon as Whipple recognized the value of this discovery he made up his mind to be rid of Ambler.

The undisputed facts of the case,* taken in connection

* See them set out, *supra*, pp. 551, 552.—REP.

with much other testimony of a direct character, convince us that Whipple, in violation of his trust to Ambler, and in fraud of his rights, deliberately entered upon a scheme by which Ambler was to be deprived of the benefits resulting from success in their joint experiments. That in pursuit of this scheme he called in Dickerson, who, without having invented anything, and in a remarkably short space of time, procured letters-patent to issue to himself and Whipple which embraced the results of Ambler's discoveries and experiments, whether they embraced anything else or not.

For all that has come to Whipple's hands, for all that is included in the patents to him and Dickerson, he is, under the terms of the sixth article of the agreement, a trustee for Ambler to the extent of one-half, and must be so charged and held to account in this proceeding.

As to Dickerson, while he is not a trustee under that article, we are of opinion that he has so far knowingly connected himself with and aided in the fraud on Ambler that he cannot resist Ambler's right to an undivided half of both the patents to Dickerson and Whipple, and of the profits made or to be made out of them. What rights or remedies he may have against Whipple we do not decide.

The result of these views is that the decree of the Supreme Court of the District must be reversed; that a decree must be entered in that court declaring Whipple and Dickerson to hold in trust for the benefit of Ambler to the extent of one-half the two patents issued to them, mentioned in the pleadings as 95,665 and 102,662; that an accounting be had as to the profits realized by them, or either of them, from the use or sale, or otherwise, arising from said patents, and for such other and further proceedings as may be

IN CONFORMITY TO THIS OPINION.

INSURANCE COMPANY *v.* COLT.

1. When the charter of an insurance company in the same clause which authorized its president and directors to make insurance against fire, and for that purpose to execute such "contracts, bargains, agreements, policies, and other instruments" as might be necessary, declared that every such contract, bargain, agreement, and policy should be in writing, or in print, and be under the seal of the corporation and be signed by the president and attested by the secretary or other officer appointed for that purpose; *Held*, that this requirement of the charter had reference only to executed contracts or policies of insurance, and not to the initial or preliminary arrangements for insurance which precede the execution of the formal instrument by the officers of the company.
2. An agent for an insurance company authorized to take and approve risks, and to insure, is by general usage also authorized to allow credit for the premium. Its allowance does not impair the validity of the preliminary contract to insure.
3. When a preliminary contract for insurance is valid it may be enforced in a court of equity against the company; and being enforced by the procurement of a policy, an action can be maintained upon the instrument; or the court in enforcing the execution of the contract may enter a decree for the amount of the insurance.
4. When an agent is authorized, after a preliminary contract for an insurance is made by him, to fill up a blank policy duly signed and attested by the officers of the company, sent to him for the purpose, he is authorized to fill up such policy after a loss has occurred. When thus filled up, the policy becomes the property of the assured, and upon a refusal of the company to surrender it two courses are open to him: either to proceed by action to recover the possession of the policy, or to sue upon the policy to recover for the loss, and in the latter case to prove its contents upon failure of the company to produce the instrument on the trial.
5. Where, at the time the preliminary contract for an insurance is made, it is expressly stipulated that the policy when filled up shall be held by the agent, in his safe, for the assured, no actual manual transfer of the policy to the assured, after its execution, is essential to perfect his title.

ERROR to the Circuit Court for the District of Connecticut; in which court Colt sued the Franklin Insurance Company, of Philadelphia, on a policy of insurance which he alleged had been executed by the company; an allegation on its part denied.

The uncontradicted case was thus:

The insurance company aforesaid was one incorporated

by Pennsylvania and having its principal office in Philadelphia. One section of its charter gave to its president and directors power to appoint such "agents" as should be necessary for conducting and executing its business elsewhere than in Philadelphia as well as in that city, and the company accordingly was doing business in Hartford, Connecticut, and had as its general agents there, for the transaction of its business of fire insurance, with power to take and approve risks and insure and countersign policies, a firm known as Nevers & Havens.

Another section of the charter, the eighth, was in these words:

"§ 8. The said president and directors shall have full powers on behalf of the said corporation, to make insurance against losses by fire, on any house, tenement, manufactory, or other building, . . . and to *make, execute*, and *perfect* such and so many *contracts, bargains, agreements, policies, and other instruments, as shall or may be necessary, and as the nature of the case shall or may require; and every such contract, bargain, agreement, and policy to be made by said corporation shall be in writing or in print, and shall be under the seal of the said corporation, signed by the president, and attested and signed by the secretary, or other officer who may be appointed by the president and directors for that purpose.*"

With this charter in force, the said Nevers & Havens, as agents of the company, on the 26th of August, 1870, made proposals to Colt to insure certain premises belonging to him. He thereupon made an application for insurance for the sum of $10,375, from August 26th, 1870, for a term of five years, to be placed in the company. And a parol contract of insurance was then completed with the said Nevers & Havens, agents as aforesaid, to insure this said property with the company for five years from the said date, the insurance to be binding on and from that date, at a premium then fixed and agreed to. Credit was given for the payment of the premium till the 1st of October then next, and it was agreed that a policy should be made, and that Nevers & Havens should keep it in their possession for Colt till the

1st of October, for his convenience, he saying that he had then no safe and convenient place in which to keep papers of that character.

The property was destroyed by fire without fault of Colt, on the 20th day of September, 1870, and proofs of loss were duly made and presented.

No policy was made until after the fire, when Nevers & Havens, upon the request of Colt, filled out a blank policy of the company, properly signed and countersigned. They declined, however, to surrender the possession of the same to Colt till they should have consulted the company.

The company had no knowledge of the said negotiations or of the contract to insure (except as the knowledge of the said agents might be the knowledge of the company) till after the fire, and no communication respecting the negotiations or contract had been made by Nevers & Havens to it till after the fire.

The policy was subsequently, after such consultation, returned by the agents to the company.

Colt tendered to the agents the premium on the 22d of September, 1870, and demanded the policy, and it not having been produced he demanded the insurance-money (again tendering the premium), and the insurance-money being refused he brought suit against the company *at law*, and on the trial, proved the contents of the policy.

The counsel for the defendant requested the court to charge the jury—

1st. That the eighth section of the company's charter prescribed the manner in which every contract, bargain, and agreement of insurance should be made, and that no contract having been made in writing or print, and executed as therein required during the existence of the property claimed to have been insured, the company was not liable in the action.

2d. That under and by virtue of the charter of the company, it was not authorized to make a parol contract of insurance, and that any such contract was void at law.

3d. That under the said charter an action at law could not

be sustained against the company upon a parol agreement to insure, or a parol contract of insurance.

4th. That it being a fact, in this case admitted by the plaintiff, that the parol contract of insurance was not executed or evidenced by a written policy until after the destruction of the property by fire, the company's agent had no authority subsequent to the fire to make and execute a written policy which should be binding upon it.

The court refused thus to charge the jury, and charged contrariwise, that upon the uncontradicted case the plaintiff was entitled to their verdict. To this charge the company excepted, and verdict and judgment having gone against it, it brought the case here.

Messrs. F. Chamberlin and E. Hall, for the plaintiff in error:

When the charter of a corporation prescribes to it in terms plainly mandatory a particular mode and manner in which all its contracts shall be executed and delivered, such prescription operates as a limit upon the mode in which such contracts shall be executed and delivered, and all persons dealing with a corporation (even a foreign one) are bound to take notice of every limitation upon its powers contained in its charter.*

Now, the eighth section of this company's charter declares not only that every "policy to be made by said corporation shall be in writing or in print," but that *every* "contract, bargain, *agreement*," shall be just as much so. The only question therefore is, Was what was done by Nevers & Havens any kind of a contract, bargain, or agreement made by the corporation? The whole case of the plaintiff rests upon an assumption that it was completely a contract, bargain, and agreement made by it. He has no case whatever but on that assumption. The language of this section has an emphasis of comprehension. It is that "*every*" contract, bargain, or agreement—contracts, bargains, and agreements howsoever made—whether made by the company, at its

* See Hoyt *v.* Thompson, 19 New York, 222.

office in Philadelphia, or in other places, and by its agents—whether preliminary or final—all must be "in writing," &c. The legislature and the insurance company doubtless knew that these requirements would cause a certain amount of delay to the company in transacting the business of insurance. But they considered this to be far less injurious and far less embarrassing than continual lawsuits arising on disputes of what it was that agents had done, and whether, in what they had done, they had transcended their authority or not.

The reason of this requirement in the case of this particular company is specially obvious. The Franklin Insurance Company was chartered to do business in every State of the Union as much as in Pennsylvania; in States far from its home as well as in its home. "Agents" are part of its machinery as chartered. Now, it is notorious that the business of agents is not to "execute and perfect policies," but to "make contracts, bargains, agreements," preliminary to the "execution and perfecting of policies," and it is equally notorious that the actions of agents of insurance companies in making such preliminary "contracts, bargains, and agreements" are among the most fertile sources of litigation in insurance cases. A wise policy of the legislature of Pennsylvania therefore required *these*, as well as that which was but the executing and perfecting of them, to be in a formal shape, and signed in the way prescribed, before they should become binding.

Can it be supposed that the same legislature which requires policies to have form and to be in writing, meant to leave all the preliminary contracts, bargains, and agreements on which policies were to issue, loose and open to parol? these preliminary contracts, bargains, and agreements especially being made by mere agents, persons in distant places, and of necessity unknown to the company. The preliminary contracts, bargains, and agreements are the foundation of the policies. They are the essential and only essential portions of what is done. When *they* are clear and undisputed, the policy is but a form. Equity will regard it as executed and perfected, though not one word of it has

been written. Nay, though it be all written and printed, and sealed and attested, yet if it differ from the preliminary agreement it is nought, and will be made to conform to it. Now, did the legislature mean to sweep away all protection to the company by leaving every important thing to rest in parol, and requiring that which was but form, to be in writing and solemnly executed?

Some reliance will perhaps be placed by opposing counsel on what was said by the late Mr. Justice Grier of this court, in the case of *Constant* v. *Alleghany Insurance Company*, ruled in the Pennsylvania circuit.* There a statute of Pennsylvania empowered an insurance company

"To make, execute, and perfect such contracts, bargains, agreements, policies, and other instruments as shall or may be necessary, and as the nature of the case may require, and every such contract, bargain, policy, and other agreement shall be in writing or print, under the corporate seal, and signed by the president, or, in his inability, by the vice-president."

A parol preliminary contract was made through an agent, and a loss having occurred, and the company having refused to pay, the assured *filed a bill in equity* to compel the company to execute the policy and for relief. Mr. Justice Grier, indeed, said that—

"Before such instruments are attested in due form, the president or secretary, or whoever else may act as a general agent of the company, may make agreements, and even parol promises, as to the terms on which a policy shall be issued, so that *a court of equity* will compel the company to execute the contract specifically; and that where the loss had happened—to avoid circuity of action—the chancellor will enter a decree directly for the amount of the insurance for which the company ought to have delivered their policy, properly attested."

Whether this position is correct we need not inquire further than we have done. Conceding it to be correct, the case does not touch ours. The case before Grier, J., was a

* 3 Wallace, Jr. 316.

proceeding in equity. Our case is at law, and though the reverend justice, of whom we speak, abhorred every sort of technicality that sought to entangle justice in its meshes, he yet noted how different the case would have been had the suit been like this, one at law. He says:

"By its act of incorporation, this company could make insurance which would be *legally* valid, only by a policy attested by the president, secretary, and the seal of the corporation."

The case, therefore, is in our favor, not against us.

Messrs. H. C. Robinson and R. D. Hubbard, contra.

Mr. Justice FIELD delivered the opinion of the court.

The charter of the company defendant in the same clause which authorizes its president and directors to make insurance against fire, and for that purpose to execute such "contracts, bargains, agreements, policies, and other instruments" as may be necessary, declares that every such contract, bargain, agreement, and policy shall be in writing, or in print, and be under the seal of the corporation, and be signed by the president and attested by the secretary or other officer appointed for that purpose.

Where similar language as to the form of the contract or policy was used in connection with a like grant of power to insure, in a general statute of Pennsylvania respecting insurance companies, it was held by the late Mr. Justice Grier, in a case before the Circuit Court of the United States, that a company to which the law applied, could make an insurance, which would be legally valid, only by a policy attested by the officers and seal of the corporation.* The learned justice undoubtedly considered that the mode in which the contract or policy could be made was so associated with the grant of power as to be essential to a valid exercise of the power. And such appears to be the natural import of the language of the clause of the charter of the defendant under

* Constant *v.* The Insurance Company, 3 Wallace C. C. 316.

consideration in this case, when the whole clause, that which confers the power and that which prescribes the mode of its exercise, is read.

But the learned justice at the same time very justly observed, that before the policy was attested in due form the president or secretary, or whoever else might act as general agent of the company, might make agreements and parol promises as to the terms on which a policy should be issued, so that a court of equity would compel the company to execute the contract specifically; and that where a loss had happened, to avoid circuity of action, the chancellor would enter a decree directly for the amount of the insurance for which the company ought to have delivered its policy properly attested.

The requirement of the charter in this case has reference, in our judgment, only to executed contracts or policies of insurance, by which the company is legally bound to indemnify against loss, and not to those initial or preliminary arrangements which necessarily precede the execution of the formal instrument by the officers of the company. The preliminary arrangements for the amount and conditions of insurance are in a great majority of instances made by agents. It is always so where the insurance is effected out of the State where the company is incorporated and has its principal place of business. The charter of the company in this case authorized the president and directors to appoint officers and agents for conducting its business in other places than the city of Philadelphia. And it would be impracticable to carry on its business in other cities and States, or at least the business would be attended with great embarrassment and inconvenience, if such preliminary arrangements required for their validity and efficacy the formalities essential to the executed contract. The law distinguishes between the preliminary contract to make insurance or issue a policy and the executed contract or policy. And we are not aware that in any case, either by usage or the by-law of any company, or by any judicial decision, it has ever been held essential to the validity of these initial contracts that they should

be attested by the officers and seal of the company. Any usage or decision to that effect would break up or greatly impair the business of insurance as transacted by agents of insurance companies.

In a recent case in the Court of Appeals of Kentucky this precise question was considered, and its determination was in accordance with the views we have expressed.* There the suit was to enforce a parol contract of insurance made by the agent of the company, whose charter provided that all policies or contracts of insurance made by the corporation should be "subscribed by the president, or president *pro tem.*, and signed and attested by the secretary, and being so signed and attested," should be binding and obligatory upon the corporation without its seal, according to the tenor, extent, and meaning of the policies or contracts. And the court held that this clause did not require an executory contract for an insurance to be in writing, and said that it knew of no American charter which did so require, observing that whilst a policy as an executed contract of insurance was defined to be documentary and authenticated by the underwriter's signature, yet a contract to issue a policy as an executory agreement to insure might be binding without a written memorial of it; that no statute of frauds applied, and that the common law did not require writing.

There is no suggestion that the preliminary contract in this case was not made in perfect good faith on both sides, with full knowledge by the agents of the condition, character, and value of the property insured. The credit allowed for the payment of the premium was an indulgence which the agents were authorized by general usage to give. Its allowance did not impair the preliminary contract; that, being valid, could have been enforced in a court of equity against the company; and having been enforced by the procurement of a policy, an action could have been maintained upon the instrument; or the court in enforcing the execution of the contract might have entered a decree for the

* The Security Fire Insurance Co. of New York *v.* The Kentucky Marine and Fire Insurance Co., 7 Bush, 81.

amount of the insurance. But no resort to a court of equity for specific performance was necessary in this case by reason of the action of the agents in filling up the blank policy, which was duly attested, as they should have done immediately after the preliminary arrangement with the assured. The agents were authorized to do after the fire that which they had previously stipulated to do on behalf of the company. The original neglect to fill up the blank policy at once constituted no valid reason for further delay. If the policy filled up at once would have bound the company, so must the policy subsequently filled up. The relations of the parties and the obligations of the company were not changed by the neglect of the agents. The filling up of the policy was a voluntary specific performance of the preliminary agreement. And, when filled up, the policy was by express stipulation to be held by the agents in their safe for the assured, and no actual manual transfer was, under these circumstances, essential to perfect the latter's title. It then became his property, and upon a refusal of the defendant to surrender it two courses were open to him: either to proceed by action to recover the possession of the policy, or to sue upon the policy to recover for the loss, and in the latter case to prove its contents upon failure of the company to produce the instrument on the trial.

In *Kohne* v. *The Insurance Company*,* the terms of insurance upon a vessel were agreed upon between the agent of the plaintiff and the company. For the premium a note was to be received with approved security. A policy was accordingly filled up by the president in conformity with the agreement, and notice thereof given to the agent. Three days afterwards the agent called at the office of the company to deliver the note and receive the policy. The company had in the meantime heard of the loss of the property insured, a fact which was unknown to either party when the agreement was made, and refused to deliver the policy, asserting that the agreement for the insurance was inchoate,

* 1 Washington's Circuit Court, 93.

which it had a right to retract. The assured then brought trover for the policy, and Mr. Justice Washington, presiding in the Circuit Court, sustained the action, holding that the contract was perfected when the policy was executed, and, of course, that the possession of the instrument by the company, after giving notice of its execution, did not impair the title of the assured.*

In *Lightbody* v. *The North American Insurance Company*,† the agent of the plaintiff made a contract of insurance of certain buildings with the agent of the defendant on the 30th of March, and paid the required premium. On the following morning the buildings were destroyed by fire. The policy was made out and delivered by the agent on the 21st of April following, after the company had refused to pay the loss; and the court held that the policy took effect by relation from the day of its date, which was the day the premium was paid and the contract concluded; that it was the manifest intent of the parties that the contract should operate from its date, so as to give the plaintiff the same legal remedy which he would have had if the policy had been then delivered; that the agent pursued his authority in delivering the policy after the loss, and that the delivery bound the defendants.

In the case of *The City of Davenport* v. *The Peoria Marine and Fire Insurance Company*,‡ the power of an agent to issue a policy after a loss, pursuant to his agreement, was very fully and ably considered with reference to the principal decisions on the subject. There the agreement for insurance was made between the parties by their agents on the 20th of March; on the night of the same day the property was destroyed by fire; on the following morning the policy was executed and delivered in accordance with the agreement, both parties at the time being ignorant of the loss. The court held that the policy was valid and binding; that the doctrine that an act done at one time may take effect as of a

* See also Sheldon *v.* Connecticut Mutual Insurance Co., 25 Connecticut, 207.

† 23 Wendell, 18.

‡ 17 Iowa, 277.

prior time, by relation back, was applicable to contracts of insurance; that the agreement to insure was the principal act, and that the formal execution of the policy might be concurrent therewith, or subsequent thereto, and when subsequent, and made as of the date of the principal act, took effect by relation as of that date.

Numerous other authorities to the same purport were cited on the argument, but we do not deem it necessary to pursue the subject further. We see no error in the ruling of the court below, and its judgment must, therefore, be affirmed; and it is so ordered.

JUDGMENT AFFIRMED.

GILLETTE *v.* BULLARD.

In an action on the bond given on appeal from the District Court to the Supreme Court of the Territory of Montana, the plea was that the defendant had prosecuted a writ of error from the judgment of the Territorial court to the Supreme Court of the United States, and had had executed his bond which operated as a supersedeas of that judgment, and that no remittitur or mandate had issued from the latter court, and that the judgment of the Supreme Court of the Territory still remained in the court so stayed by the supersedeas bond and the order thereon.

This plea is insufficient in that it does not aver that at the commencement of this action the appeal was then pending in this court or had ever been perfected. Nor is the case altered by the Practice Act of Montana, which enacts, in its seventy-eighth section, that "in the construction of a pleading, for the purpose of determining its effect, its allegations shall be liberally construed with a view to substantial justice."

ERROR to the Supreme Court of the Territory of Montana.

Bullard, assignee of Marden, sued Gillette upon an appeal bond. The action was commenced on the 30th of January, 1872. The complaint alleged that on the 15th June, 1868, Marden recovered a judgment in the District Court of the Territory against Plaisted & Wheelock, which yet remained in full force, unreversed and unsatisfied except as thereinafter

stated; that on the 16th day of July, 1868, Plaisted & Wheelock appealed from that judgment to the Supreme Court of the Territory, and that on such appeal Gillette executed a bond, whereby he became bound for the payment of the judgment and all damages and costs that might be awarded against the appellants if it should be affirmed; that on the 31st December, 1868, said judgment was affirmed by the Supreme Court of the Territory, and costs adjudged against the appellants; that on the 2d of July, 1870, Marden assigned the judgment and his interest therein to the plaintiff; that by virtue of executions issued, certain sums were made on the 22d of August, and the 26th of September, 1870, but that a large balance still remained unpaid, for the recovery of which the action was brought.

The answer, filed on the 21st of February, A.D. 1872, did not deny any of the averments in the complaint, but alleged by way of defence, that on the —— day of January, 1869, Plaisted & Wheelock appealed from the judgment of the Supreme Court of the Territory to this court; that they thereupon executed and filed with the clerk of the Supreme Court of the Territory a good and sufficient bond on appeal, and that court stayed all proceedings upon the judgment and granted a supersedeas in the action; that no remittitur or mandate had ever been issued from this court to the Supreme Court of the Territory, or from the Supreme Court of the Territory to the District Court, and that the judgment of the Supreme Court of the Territory still remained in that court "so stayed by the order thereof by the giving of the bond on appeal and by the supersedeas."

After the filing of the answer, judgment was given against Gillette upon the pleadings, and he brought the case here.

The question was whether the answer stated facts sufficient to constitute a defence to the action.

By the seventy-eighth section of the Practice Act of Montana it is provided, that "in the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed, with a view to substantial justice between the parties."

Opinion of the court.

Mr. Robert Leech (*a brief of Mr. W. F. Sanders being filed*), *for the plaintiff in error:*

The undertaking sued on was simply security for the judgment, and the plaintiff had no right to maintain an action thereon until the final affirmance of the judgment in the court of last resort. To enable him to maintain this action against the surety, it was necessary that he have a right to enter and collect a *judgment of affirmance* in the case.* This right, as the pleadings show, the plaintiff has never acquired.

It is true that the defendant, in his answer or plea, does not allege in express terms that the cause is still pending in this court. But he avers that which, by reasonable intendment and independent of any enactment, is equivalent thereto, namely, that "no remittitur or mandate has ever been issued from this court to the Supreme Court of the Territory, or from the Supreme Court of the Territory to the District Court; and that the judgment so rendered in the Supreme Court of the said Territory still remains in that court so stayed by the order thereof, by the giving of the said bond on appeal, and by the said supersedeas."

But the answer is made more effective by statute. The seventy-eighth section of the Practice Act of Montana enacts that in the construction of a pleading *for the purpose of determining its effect* its allegations shall be *liberally* construed. Construing this answer or plea *liberally*, it must be taken to intend not only that the appeal had been taken, but that it had been perfected and was pending when the action was begun.

No opposing counsel.

The CHIEF JUSTICE delivered the opinion of the court.

The seventy-eighth section of the Practice Act of Montana—which provides that "in the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed, with a view to substantial justice

* Poppenhusen *v.* Seeley, 41 Barbour, 450; Robinson *v.* Plimpton, 25 New York, 484.

between the parties"—is a modification of the common-law rule which construes all pleadings most strongly against the pleader, but even with the statute as our guide, we think the judgment below was correct. An answer to be good must overcome the case made by the complaint. If the facts well pleaded in the complaint are admitted, as in this case, it must state other facts, sufficient, if true, to defeat the action in whole or in part, or it will not avail as a defence.

That is not the case here. It is nowhere averred that at the time of the commencement of this action the appeal to this court was pending or that it had ever been perfected. In fact, such averments seem to have been studiously avoided. The appeal was allowed in January, 1869. Unless a transcript was filed in this court before the end of the following term that appeal would be vacated. In the language of very many decisions it would become *functus officio.** The supersedeas is but an appurtenance of the appeal. The stay insisted upon in the answer, although there seems to have been an attempt to make it more, is only that which resulted from the supersedeas. That was at an end when the appeal became inoperative. The failure, therefore, to aver that the appeal was in force was a failure to aver that the stay as granted continued to have effect.

The complaint alleges that money was made upon executions in 1870. The date of the issue of the executions is not given, but if the collection was regular the judgment could not have been stayed when the money was made, and that was after the time within which the appeal, if it was to remain in force, must be perfected. Clearly, therefore, to make the defence perfect, it was incumbent upon the defendant to aver distinctly in his answer not only that the appeal had been taken, but that it had been perfected and was still pending when the action was commenced.

It is, however, stated that no mandate or remittitur had been issued from this court to the Supreme Court of the

* Edmonson *v.* Bloomshire, 7 Wallace, 310.

Territory, or from the Supreme Court of the Territory to the District Court when the action was commenced. None could issue from this court, for there was nothing here, so far as the pleadings show, to remand. None was necessary from the Supreme Court of the Territory to the District Court, because the condition of the bond is to pay if the judgment should be affirmed. The affirmance, therefore, is the material fact which is to fix the liability. That is averred in the complaint and not denied in the answer.

JUDGMENT AFFIRMED.

LONGSTRETH *v.* PENNOCK.

The Pennsylvania statute of June 16th, 1836, which provides that where property upon demised premises, and liable to distraint, is seized on execution and sold, the officer making the sale shall pay the rent (provided it does not exceed one year's rent) in preference to the judgment on which the execution issued, extends, by an equitable intendment, to a seizure of goods similarly situated, by an assignee in bankruptcy. A landlord's claim is accordingly, in Pennsylvania, first paid out of the bankrupt's goods liable to distress on demised premises, and before making a dividend of their proceeds among the creditors generally.

ERROR to the Circuit Court of Pennsylvania; the case being thus:

A Pennsylvania statute of June 16th, 1836,* enacts as follows:

"The goods and chattels being in or upon any messuage, lands, or tenements, which are or shall be demised for life or years or otherwise, taken by virtue of an execution, and liable to the distress of the landlord, shall be liable for the payment of any sums of money due for rent at the time of taking such goods in execution: *Provided*, That such rent shall not exceed one year's rent.

"After the sale by the officer, of any goods or chattels as

* Purdon's Digest, edition of 1873, p. 879.

aforesaid, he shall first pay out of the proceeds of such sale, the rent so due, and the surplus thereof, if any, he shall apply towards satisfying the judgment mentioned in such execution."

This statute being in force, Pennock rented a warehouse in Philadelphia to Wattson & De Young, at the yearly rent of $4500, payable in equal quarterly instalments. Wattson & De Young, the lessees, being in possession of the premises, and having therein a stock of goods more than sufficient to pay the rent if a distress had been made, were adjudicated bankrupts, and Longstreth, their assignee, took possession of the premises, and of the stock upon them. The landlord claimed of him the rent due and accrued up to the date of the issuing of the warrant in bankruptcy, and it having been paid to him under a stipulation to restore the same if the assignee were not allowed credit therefor on the settlement of his account, and he not having been allowed such credit, this action was brought by him to test his right to get back what had been so paid for rent accruing prior to the warrant, which was for much less than a year's rent. The Circuit Court adjudged that the payment was rightfully made, and that the assignee could not recover it back. The assignee now brought the case here.

Mr. J. C. Longstreth, for the assignee, plaintiff in error; Mr. J. B. Townsend, contra.

Mr. Justice SWAYNE delivered the opinion of the court.

The assignee acquired his title to the movable property found on the demised premises, subject to the rights of all other persons.* The rent in question was for a period which terminated when the assignee took possession, and the entire period was within a year of that time. Before the commencement of the proceedings in bankruptcy, the defendants in error might have distrained; and it is agreed that the property upon the premises was more than sufficient to satisfy the demand. The statute of Pennsylvania, of June

* Gibson *v.* Warden, 14 Wallace, 244.

16th, 1836, provides that where property under such circumstances is seized and sold under execution, the rent due for a period not exceeding one year shall be paid first out of the proceeds of the sale. This case is within the equity of that statute.* The question presented is one belonging to the local law of Pennsylvania. We think it was correctly decided by the Circuit Court.

JUDGMENT AFFIRMED.

CANNON *v.* NEW ORLEANS.

1. An ordinance of the city of New Orleans, which demands of all steamboats which shall moor or land in any part of the port of New Orleans a sum measured by the tonnage of the vessel, is a tonnage tax within the meaning of the Federal Constitution, and, therefore, void.
2. It is a tax for the privilege of stopping in the port of New Orleans, and cannot be justified under the plea that it is intended as a compensation for the use of wharves built by the city.
3. For the use of wharves, piers, and similar structures, whether owned by individuals or by the city or other corporation, a reasonable compensation may be charged to the vessel, to be regulated in the interest of the public by the State legislature or city council.
4. But in the exercise of this right care must be taken that it is not made to cover a violation of the Federal Constitution, which prohibits the States to lay any duty of tonnage.
5. Any duty, or tax, or burden imposed under the authority of the States which is in its essence a contribution claimed for the privilege of arriving and departing from a port of the United States, and which is assessed on a vessel according to its carrying capacity, is a violation of that provision unless the consent of Congress be obtained.

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

The Constitution of the United States ordains as follows:†

"Congress shall have power to regulate commerce with foreign nations and *among the several States*, and with the Indian tribes. No State shall, without the consent of Congress, lay any duty of tonnage."

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* Sedgwick's Statutory and Constitutional Law, 296.

† Article 1, §§ 8, 10.

With these provisions in force as fundamental law, the city of New Orleans made an ordinance as follows:

"From and after the 1st day of January, 1853, the levee dues on all steamboats *which shall moor or land in any part of the port of New Orleans* shall be fixed as follows: ten cents per ton if in port not exceeding five days, and five dollars per day after said five days shall have expired; provided, that boats arriving and departing more than once in each week shall pay only seven cents per ton each trip."

This ordinance was subsequently amended by the substitution of the words "levee and wharfage dues" for the words "levee dues," and by providing further that "boats making three trips per week shall pay five cents per ton each trip."

The length of both shores of the Mississippi embraced by the port of New Orleans is at least twenty-two miles. The entire portion of the shore on which wharves had been built, was at most two miles; less than one-tenth of the wharved space.

In this state of things and under the ordinance above-mentioned, the city had claimed and collected of one Cannon for several years a tax on his steamboat, the R. E. Lee; and claiming it again Cannon filed a petition to enjoin such further collection, and also to recover back the money already paid. The ground of his petition was, that under each of the above-quoted clauses of the Constitution the ordinances were void. The Supreme Court of the State held the ordinance valid, and dismissed the petition. Its view was thus expressed:

"The same points that are made in this case, supported by the same line of argument as here, were presented in the case of *The First Municipality* v. *Pease et al.*,* and were decided adversely to the position taken by the plaintiff in this case.

"We think the views there expressed correct.

"The 'levee dues,' under consideration, are not a 'duty on tonnage,' nor a regulation of or burden on commerce, nor a duty upon vessels plying between the States, within the contemplation of the Constitution of the United States, but charges

* 2 Annual, 540.

as compensation for commercial facilities furnished by the city, and for which, by the common consent of mankind, compensation is paid.* The question of the right to impose such charges, whether under the name of wharfage or levee dues, being judicially determined, the manner and extent of its exercise are left to those to whom the management of the municipal affairs are intrusted, under their responsibility to those whom they represent. The aggregate of charges may possibly be largely in excess of the actual necessary expenses during one year, and the very next be insufficient to meet. This will result from the nature of the river banks, the action of the river current, the quality and nature of materials used, the fluctuations of commerce, and many other causes unforeseen and irregular in their operation, and all which show the impossibility of judicial control and regulation of the subject."

From the decree of dismissal Cannon brought the case here.

Messrs. R. H. Marr, P. Phillips, and W. W. King, for the plaintiff in error. [The brief of these gentlemen mentioned, in the course of its argument, that in the year 1843, and in consequence of a very onerous wharfage tax imposed by the city in 1842, the legislature of Louisiana passed an act as follows:

"From and after the passage of the present act, it shall be incompetent for the mayor and city council of New Orleans, or for either of the municipalities of said city to enact, or enforce, or execute any law, ordinance, or regulation now enacted, whereby any tax, duty, impost, or charge of any nature whatsoever, shall be or is imposed upon goods, produce, wares, and merchandise of whatsoever kind or nature, landed in or shipped from the corporate limits of the said city."

They further stated that the Supreme Court of the State decided that after this act this wharfage tax could not be collected.†]

Mr. W. H. Peckham, contra.

* Worsley *v.* The Second Municipality, 9 Robinson, 332; Gibbons *v.* Ogden, 9 Wheaton, 235.

† Worsley *v.* The Second Municipality, 9 Robinson, 326, note.

Mr. Justice MILLER delivered the opinion of the court.

This writ of error is based upon the proposition that the city ordinance is in conflict with two clauses of the Constitution of the United States, namely, that which grants to Congress the right to regulate commerce with foreign nations, among the States, and with the Indian tribes; and that which forbids the States to levy any duty of tonnage without the consent of Congress.

We shall only consider the question raised by the latter clause.

It is argued in support of the validity of the ordinance that the money collected under it is only a compensation for the use of the wharves which are owned by the city, and which have been built and are kept in repair by the city corporation.

Under the evidence in this case of the condition of the levee and banks of the Mississippi River within the limits of the city, to which the language of the ordinance must be applied, this contention cannot be sustained. It is in proof that of the twenty miles and more of the levee and banks of the Mississippi within the city, not more than one-tenth has any wharf, and that vessels land at various places where no such accommodations exist. The language of the ordinance covers landing anywhere within the city limits. The tax is, therefore, collectible for vessels which land at any point on the banks of the river, without regard to the existence of the wharves. The tax is also the same for a vessel which is moored in any part of the port of New Orleans, whether she ties up to a wharf or not, or is located at the shore or in the middle of the river. A tax which is, by its terms, due from all vessels arriving and stopping in a port, without regard to the place where they may stop, whether it be in the channel of the stream, or out in a bay, or landed at a natural river-bank, cannot be treated as a compensation for the use of a wharf. This view is additionally enforced if, as stated by counsel for the plaintiff, in their argument, the Supreme Court of the State has decided that, under the act of 1843

of the Louisiana legislature, no wharfage tax or duty can be levied or collected by the city.

We are of opinion that upon the face of the ordinance itself, as applied to the recognized condition of the river and its banks within the city, the dues here claimed cannot be supported as a compensation for the use of the city's wharves, but that it is a tax upon every vessel which stops, either by landing or mooring, in the waters of the Mississippi River within the city of New Orleans, for the privilege of so landing or mooring.

In this view of the subject, as the assessment of the tax is measured by the tonnage of the vessel, it falls directly within the prohibition of the Constitution, namely, "that no State shall, without the consent of Congress, lay any duty of tonnage." Whatever more general or more limited view may be entertained of the true meaning of this clause, it is perfectly clear that a duty or tax or burden imposed under the authority of the State, which is, by the law imposing it, to be measured by the capacity of the vessel, and is in its essence a contribution claimed for the privilege of arriving and departing from a port of the United States, is within the prohibition.

There have been several cases before this court involving the construction of this provision. The more recent and well considered of these are *The Steamship Company* v. *The Portwardens*,* *The State Tonnage Tax Cases*,† and *Peete* v. *Morgan*.‡

In the first of these cases the late Chief Justice, who delivered the opinion, seemed inclined to guard against too narrow a construction of the clause, lest its spirit and purpose might be evaded. He says, "that in the most obvious and general sense, it is true, the words describe a duty proportioned to the tonnage of the vessel; a certain rate on each ton. But it seems plain that in this restricted sense, the constitutional provision would not fully accomplish its intent. The general prohibition against laying duties on

* 6 Wallace, 31. † 12 Id. 212. ‡ 19 Id. 581.

imports or exports would have been ineffectual if it had not been extended to duties on the ships which serve as the vehicles of conveyance. This extension was doubtless intended by the prohibition of any duty on tonnage. It was not only a pro rata tax which was prohibited, but any duty on the ship, whether a fixed sum upon its whole tonnage, or a sum to be ascertained by comparing the amount of tonnage with the rate of duty." The other two cases fully sustain the proposition as we have stated it.

In saying this we do not understand that this principle interposes any hindrance to the recovery from any vessel landing at a wharf or pier owned by an individual or by a municipal or other corporation, a just compensation for the use of such property. It is a doctrine too well settled, and a practice too common and too essential to the interests of commerce and navigation to admit of a doubt, that for the use of such structures, erected by *individual* enterprise, and recognized everywhere as private property, a reasonable compensation can be exacted. And it may be safely admitted also that it is within the power of the State to regulate this compensation, so as to prevent extortion, a power which is often very properly delegated to the local municipal authority.

Nor do we see any reason why, when a city or other municipality is the owner of such structures, built by its own money, to assist vessels landing within its limits in the pursuit of their business, the city should not be allowed to exact and receive this reasonable compensation as well as individuals. But in the exercise of this right care must be had that it is not made to cover a violation of the Federal Constitution in the point under consideration.

We are better satisfied with this construction of the Constitution from the fact that this is one of the few limitations of that instrument on the power of the States which is not absolute, but which may be removed wholly or modified by the consent of Congress.

The cases which have recently come before this court in which the State by itself or by one of its municipalities has

attempted to levy taxes of this character, clearly within the letter and the spirit of the constitutional prohibition, show the necessity of a rigid adherence to the demands of that instrument. If hardships arise in the enforcement of this principle, and the just necessities of a local commerce require a tax which is otherwise forbidden, it is presumed that Congress would not withhold its assent if properly informed and its consent requested.

This is a much wiser course, and Congress is a much safer depositary of the final exercise of this important power than the ill-regulated and overtaxed towns and cities, which are not likely to look much beyond their own needs and their own interests.

We are of opinion that the ordinance under which the levee dues were assessed upon the plaintiff's vessel is unconstitutional and void.

JUDGMENT REVERSED, and the case remanded to the Supreme Court of Louisiana for further proceedings,

IN CONFORMITY TO THIS OPINION.

CLARK *v.* IOWA CITY.

1. The statute of limitations of Iowa, which bars actions upon all written contracts within ten years after the cause of action thereon has accrued, commences to run against actions upon coupons for interest annexed to municipal bonds in that State, when they have been detached from the bonds and transferred to parties other than the holders of the bonds, from the maturity of the coupons respectively.
2. The cases of *The City of Kenosha* v. *Lamson* (9 Wallace, 477) and of *The City of Lexington* v. *Butler* (14 Wallace, 282) commented upon and explained.
3. Coupons for interest when severed from the bonds to which they were annexed originally are negotiable and pass by delivery. They then cease to be incidents of the bonds, and become independent claims; and do not lose their validity, if for any cause the bonds are cancelled or paid before maturity.

Statement of the case.

ERROR to the Circuit Court for the District of Iowa. The case was thus:

On the 1st of March, 1856, Iowa City issued a number of bonds, dated on the day just named, promising in each to pay to the bearer, on the 1st of January, 1876, the sum of $500, with interest at 10 per cent., payable on the 1st of January in each year. For this interest ten coupons, or interest warrants in negotiable form, for $50 each, were annexed to the bonds. From ten of these bonds the coupons were subsequently cut off, and long before the commencement of this suit—which was on the 31st of January, 1874—were negotiated and by purchase and delivery became the property of a certain Clark. The ten bonds themselves, from which the coupons were thus severed, were paid off and satisfied by the company prior to the said date; Clark not being at the time owner or holder of any of them.

In this state of things Clark, on the said 31st of January, 1874, sued the city on ten coupons representing the instalments *due on the 1st of January*, 1860. More than fourteen years had thus elapsed since the coupons had become due, and since suit might have been brought on them.

The statute of limitations in Iowa, making no distinction between simple contracts and specialties, enacts that all actions "founded on *written contracts*" must be brought within ten years after the cause of action accrued.

In bringing his suit so long after the coupons became due, the plaintiff's idea, founded on his interpretation of the decisions in *The City of Kenosha* v. *Lamson** and *The City of Lexington* v. *Butler*,† in this court, was that the statute began to run against the coupons only from the maturity of the bond, and as the bond would not be barred until January 1st, 1886, that his suit on the coupons, though brought more than fourteen years after they became due, was still in time.

The defendant's position was that the cases just mentioned and relied on by the plaintiff were *mis*interpreted by him; that suits on the coupons were barred in ten years after *their*

* 9 Wallace, 477.

† 14 Id. 282.

own maturity, or barred January 1st, 1870, more than four years before this suit was brought.

The defendant accordingly pleaded the statute of limitations, alleging that more than ten years had elapsed since the cause of action arose and before the bringing of the suit.

He pleaded further the facts abovementioned about the coupons and bonds; to wit, that the plaintiff got them by purchase in the market after they had been severed from the bonds; that long before the suit brought the bonds had been satisfied, and that the plaintiff was not owner of them when they were so paid.

To this plea the defendant demurred, assigning for cause "that the statute had not run for ten years against the covenant in the bonds to pay the interest, and that the payment of the bonds to another person than the holder of the coupons did not bar his remedy on the coupon, his right of action running on the coupons until the remedy thereon was barred by running of the statute against the bond itself."

A point thus made was—

"Does the statute of limitation commence to run upon the coupons in suit from their own maturity respectively, or does it commence to run upon the coupons only from the maturity of the bonds to which said coupons belonged?"

The judges being opposed in opinion on the question, they certified it to this court for answer.

Mr. James Grant, for the plaintiff:

As we interpret the decisions of this court, the point raised has been decided here in our favor.

In *The City of Kenosha* v. *Lamson*, in 9th Wallace, a suit on coupons which, not having been under seal, were barred as a simple contract by the statute, though the bond which was under seal was, as a specialty, not barred, Nelson, J., giving the judgment, says:

"The coupon is not an independent instrument, . . . but is given for interest thereafter to become due upon the bond, *which interest is part of the bond and partakes of its nature*, and the bond . . . is not barred by lapse of time short of twenty years."

This language may perhaps be capable of two interpretations, but the most reasonable seems to be that which would make it say that all rights belonging to the creditor on the bonds belong to him also on the coupons. If that is its meaning, then as suit on the bond in this case would not be barred till January 1st, 1886, neither will suit on the coupons be. That the meaning which we assume to be the true meaning of this case was subsequently understood in this court to be so, appears by the case of *The City of Lexington* v. *Butler*, in 14th Wallace. There Clifford, J., says expressly, and in a way which leaves no doubt as to the conception by that learned justice of the former case, and of his meaning in the one then before the court:

"It is well-settled law that a suit upon a coupon is not barred by the statute of limitations *unless the lapse of time is sufficient to bar also a suit upon the bond*, as the coupon, if in the usual form, is but a repetition of the contract in respect to the interest, for the period of time therein mentioned which the bond makes upon the subject, being given for the interest thereafter to become due upon the bond, which interest is parcel of the bond, and partakes of its nature, and is not barred by lapse of time except for the same period as would bar a suit, unless it is barred on the bond to which it was attached."

Mr. L. B. Patterson, contra.

Mr. Justice FIELD delivered the opinion of the court.

The bonds of Iowa City were taken up and cancelled before the commencement of this action, but previous to such cancellation the coupons for interest due on the 1st of January, 1860, upon which the action is brought, were detached and negotiated to other parties until by purchase they came to the possession of the plaintiff. The statute of Iowa prescribes the limitation of ten years to actions on all written contracts, whether under seal or otherwise.

The simple question, therefore, presented for our determination is whether the statute is a bar to an action upon the coupons detached from the bonds and transferred to parties other than the holders of the bonds, when it would

not be a bar to an action on the bonds themselves had they not been cancelled.

The counsel for the plaintiff cites the case of *The City of Kenosha* v. *Lamson*, reported in the 9th of Wallace, and the case of *The City of Lexington* v. *Butler*, reported in the 14th of Wallace, as conclusive against the bar of the statute. There are expressions in the opinions of the court in those cases which, detached from the context, would seem to justify this conclusion. But the whole purport of the decisions in those cases was to the effect that the coupons being given for interest on the bonds, partook of their nature and were equally high as security, and therefore the statute could only run against them when it would run against instruments of the dignity of the bonds. In other words, the decisions only established the doctrine that the coupons so far partook of the nature of the bonds that as the latter were specialties so were they specialties also, and not mere simple contracts.*

The first case, that of *The City of Kenosha* v. *Lamson*, arose in Wisconsin, where actions upon sealed instruments are not barred until the lapse of twenty years, whilst actions upon simple contracts are barred in six years. The action was brought upon the coupons when more than six years but less than twenty years had elapsed after their maturity. And the court held that the coupons were substantially copies of the bond in respect to the interest, and were given to the holder of the bond for the purpose of enabling him to collect the interest at the time and place mentioned, without the trouble of presenting the bond every time the interest became due, and to enable him to realize the interest by negotiating the coupons in business transactions; and that the coupons partaking of the nature of the bonds, which were of higher security than the coupons, were not barred by lapse of time short of twenty years. The court concluded its opinion by observing that it would be a departure from the purpose for which the coupons were issued, and from

* See also Commissioners of Knox County *v.* Aspinwall, 21 Howard, 539, 546.

the intent of the parties, to hold that when they are cut off from the bonds the nature and character of the security changes and becomes a simple contract debt and adds: "Our conclusion is that the cause of action is not barred by lapse of time short of twenty years."

The case of *The City of Lexington* v. *Butler* arose in Kentucky, where the statute prescribes fifteen years as the limitation for actions on bonds and only five years for actions on simple contracts. The action was upon coupons of certain bonds issued by the city, and the city pleaded the statute of limitations of five years, but the court answered that bonds were specialties not falling within the period prescribed; that suits on bonds might be maintained if commenced within fifteen years after the cause of action accrued, and that a suit upon a coupon was not barred by the statute unless the lapse of time was sufficient to bar also a suit upon the bond, as the coupon, if in the usual form, was but a repetition of the bond in respect to the interest for the period of time therein mentioned, and partook of its nature.

It is evident from this examination of the cases cited that it was not the intention of the court to decide that an action upon a coupon detached from the bond, and negotiated to other parties, was not subject to the same limitations as an action upon the bond itself; much less to hold that the coupons remained a valid and existing cause of action not only for the period prescribed for actions on the bond after its maturity, but for the additional period intervening between the maturity of the coupon and the maturity of the bond, however great that might be. The question before the court in those cases was only whether the time the statute ran against the coupons was the longest or shortest period;—was it six or twenty years in the Wisconsin case, or was it five or fifteen years in the Kentucky case;—and the court held that the statute ran for the longest period, because the coupons partook of the nature of the bonds and the statute ran for that period as to them.

Most of the bonds of municipal bodies and private corporations in this country are issued in order to raise funds for

works of large extent and cost, and their payment is, therefore, made at distant periods, not unfrequently beyond a quarter of a century. Coupons for the different instalments of interest are usually attached to these bonds, in the expectation that they will be paid as they mature, however distant the period fixed for the payment of the principal. These coupons, when severed from the bonds, are negotiable and pass by delivery. They then cease to be incidents of the bonds, and become in fact independent claims; they do not lose their validity, if for any cause the bonds are cancelled or paid before maturity; nor their negotiable character; nor their ability to support separate actions; and the amount for which they are issued draws interest from its maturity. They, then, possess the essential attributes of commercial paper, as has been held by this court in repeated instances.* Every consideration, therefore, which gives efficacy to the statute of limitations when applied to actions on the bonds after their maturity, equally requires that similar limitations should be applied to actions upon the coupons after their maturity.

Coupons, when severed from the bonds to which they were originally attached, are in legal effect equivalent to separate bonds for the different instalments of interest. The like action may be brought upon each of them, when they respectively become due, as upon the bond itself when the principal matures; and to each action—to that upon the bond and to each of those upon the coupons—the same limitation must upon principle apply. All statutes of limitation begin to run when the right of action is complete, and it would be exceptional and illogical to hold that the statute sleeps with respect to claims upon detached coupons, whilst a complete right of action upon such claims exists in the holder.

We answer, therefore, the question certified to us, that the statute of Iowa which extends the same limitation to

* Thompson *v.* Lee County, 3 Wallace, 327; Aurora City *v.* West, 7 Id. 105. See also County of Beaver *v.* Armstrong, 44 Pennsylvania State, 63, and National Exchange Bank *v.* Hartford, Providence, and Fishkill Railroad Co., 8 Rhode Island, 375.

actions on all written contracts, sealed or unsealed, began to run against the coupons in suit from their respective maturities; and accordingly

AFFIRM THE JUDGMENT.

CLIFFORD, J.: I dissent from the opinion of the court, upon the ground that the case is governed by our prior decisions.

MURDOCK *v.* CITY OF MEMPHIS.

1. The second section of the act of Feb. 5th, 1867 (14 Stat. at Large, 385), "to amend" the Judiciary Act of 1789, operates as a repeal of the twenty-fifth section of that act; and the act of 1867, as it is now found in the Revised Statutes of the United States, § 709, is the sole law governing the removal of causes from State courts to this court for review, and has been since its enactment in 1867.
2. Congress did not intend, by omitting in this statute the restrictive clause at the close of the twenty-fifth section of the act of 1789 (limiting the Supreme Court to the consideration of Federal questions in cases so removed) to enact affirmatively that the court *should* consider all other questions involved in the case that might be necessary to a final judgment or decree.
3. Nor does the language of the statute, that "the judgment may be re-examined and reversed or affirmed on a writ of error . . . in the same manner and under the same regulations, and the writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States," require the examination of any other than questions of Federal law.
4. The phrase above quoted has reference to the manner of issuing the writ, its return with the record of the case, its effect in removing the case to this court, and the general rules of practice which govern the progress of such cases to final judgment, and is not intended to prescribe the considerations which should govern this court in forming that judgment.
5. But the language of the statute in making the jurisdiction of this court dependent on the decision of certain questions by the State court against the right set up under Federal law or authority, conveys the strongest implication that these questions alone are to be considered when the case is brought here for revision.
6. This view is confirmed by the course of decisions in this court for eighty years, by the policy of Congress, as shown in numerous statutes, conferring the jurisdiction of this class of cases in courts of original jurisdiction, viz , the District and Circuit Courts, whether originally or by removal from State courts, when it intends the whole case to be tried, and by the manifest purpose which caused the passage of the law.

7. In construing the act of 1867 as compared with the act of 1789, the court declares itself to be of opinion that it is not so closely restricted to the face of the record in determining whether one of the questions mentioned in it has been decided in the State court, and that it may, under *this* statute, look to the properly certified opinion of the State courts when any has been delivered in the case.
8. And it holds the following propositions as governing its examination and its judgments and decrees in this class of cases, under the statute as now found in the recent revision of the acts of Congress:
   1. That it is essential to the jurisdiction of this court over the judgment or decree of a State court that it shall appear that one of the questions mentioned in the statute must have been raised and presented to the State court; that it must have been decided by the State court against the right claimed or asserted by the plaintiff in error, under the Constitution, treaties, laws, or authority of the United States, or that such a decision was necessary to the judgment or decree rendered in the case.
   2. These things appearing, this court has jurisdiction, and must examine the judgment so far as to enable it to decide whether this claim of right was correctly adjudicated by the State court.
   3. If it finds that it was rightly decided, the judgment must be affirmed.
   4. If it was erroneously decided, then the court must further inquire whether there is any other matter or issue adjudged by the State court sufficiently broad to maintain the judgment, notwithstanding the error in the decision of the Federal question. If this be found to be the case, the judgment must be affirmed without examination into the soundness of the decision of such other matter or issue.
   5. But if it be found that the issue raised by the question of Federal law must control the whole case, or that there has been no decision by the State court of any other matter which is sufficient of itself to maintain the judgment, then this court will reverse that judgment, and will either render such judgment here as the State court should have rendered, or will remand the case to that court for further proceedings, as the circumstances of the case may require.

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

The Constitution of the United States after vesting the judicial power of the United States "in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish," ordains as follows:

"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 under their authority," &c.

Statement of the case.

On the 24th of September, 1789, at the first Congress of the United States, after the adoption of the Constitution, Congress passed the "act to establish the judicial courts of the United States;"* the great act commonly called the Judiciary Act. The twenty-fifth section of it gave to this court whatever power was given in the act at all to re-examine, reverse, or affirm the final judgments or decrees in suits in the highest courts of law or equity of the States.

On the 5th of Feb., 1867, after the late rebellion had been suppressed,—and just before the adoption of the fourteenth amendment to the Constitution, which declares that "no State shall make or enforce any law which shall abridge the privileges or *immunities* of citizens of the United States"—but while more or less disorganization of things remained in the Southern States, Congress passed an act entitled "An act to *amend* an act to establish the judicial courts of the United States."† This act was in two sections. The first section gives to the courts of the United States, and the several judges thereof, within their respective jurisdictions, in addition to the authority already conferred by law, power to grant writs of habeas corpus in all cases where any person may be restrained of liberty in violation of the Constitution, or of any treaty or law of the United States.

The second—the one alone much concerning this case,—was on the same subject as the twenty-fifth section of the old act.

The twenty-fifth section of the old act and the second section of the new one are here juxtaposited verbatim in columns.

THE TWENTY-FIFTH SECTION OF THE ACT OF 1789.	THE SECOND SECTION OF THE ACT OF 1867.
That a final judgment or decree in any suit, in the highest court *of law or equity* of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States,	That a final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision is

* 1 Stat. at Large, 25.

† 14 Id. 485.

and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of such their validity, *or where is drawn in question the construction of any clause* of the Constitution, or of a treaty or statute of, or commission held under the United States, and the decision is against the title, right, privilege, or *exemption* specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute, or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error, the citation being signed by the chief justice, or judge, or chancellor of the court rendering or passing the judgment or decree complained of, or by a justice of the Supreme Court of the United States, in the same manner and under the same regulations, and the writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a *Circuit Court*, and the proceeding upon the reversal shall also be the same, except that the Supreme Court, *instead of remanding the cause for a final decision, as before provided, may at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same and award execution. But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid than such as appears on the face of the record and immediately respects the before-mentioned questions of validity or construction of the said Constitution, treaties, statutes, commissions, or authorities in dispute.*

against their validity, or where is drawn in question the validity of a statute of or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of such their validity, or where any title, right, privilege, or *immunity is claimed* under the Constitution, or any treaty or statute of, or commission held, or *authority exercised*, under the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission, or *authority*, may be re-examined and reversed or affirmed in the Supreme Court of the United States, upon a writ of error, the citation being signed by the chief justice, or judge, or chancellor of the court rendering or passing the judgment or decree complained of, or by a justice of the Supreme Court of the United States, in the same manner, and under the same regulations, and the writ shall have the same effect as if the judgment or decree complained of had been rendered or passed *in a court of the United States;* and the proceeding upon the reversal shall also be the same, *except that the Supreme Court may, at their discretion, proceed to a final decision of the same, and award execution or remand the same to an inferior court.*

Statement of the case.

The published proceedings of the two houses of Congress show that the bill, which subsequently became a law, was reported by a committee which had been instructed "to inquire and report what legislation was necessary to enable the courts of the United States to enforce the freedom of the wives and children of soldiers of the United States, under the joint resolution of Congress of March 3d, 1865, and the liberty of all persons under the operation of the constitutional amendment abolishing slavery." The bill, so far as the point now under consideration is concerned, was not the subject of special comment. The effect of it was declared by the member of the House of Representatives who reported it from the committee, to be "to enlarge the privilege of the writ of habeas corpus."* In the Senate an inquiry was made "whether the second section was drawn *on the same principle* as the twenty-fifth section of the Judiciary Act of 1789." The reply was, "It is a little broader than the Judiciary Act. It is of a similar character."†

Thus, apparently it happened that the fact that Congress had passed the act of 1867, was hardly noted for some time within the precincts of this bar—where the venerable Judiciary Act of 1789 was in some sort regarded as only less sacred than the Constitution, and most unlikely to be wished to be altered—and that the less studious observers considered that the new section was but a careless transcript of the old one. However, the more careful readers were early awakened by possibilities of meanings in the second section of the new act which would have far-reaching effects. Mr. Phillips in his work on Practice,‡ in this court, early observed that the new act "in some of its provisions and omissions seems to have been intended to work a change in the exercise of the jurisdiction of the court." So in the case of *Stewart* v. *Kahn*,§ the difference between the two acts was enforced by *Mr. S. M. Johnson*, counsel, on one side of the case who claimed for it vast effects.

* Congressional Globe, first session 39th Congress, part 5, page 4151.

† Ib. page 4229.

‡ Page 128.

§ A.D. 1870, 11 Wallace, 500.

A careful reading of the act shows, indeed, to every one certain verbal changes. Thus:

1st. By the old act, this court could not proceed to final judgment and award execution, except in cases where the cause "had been once remanded before."

By the new act, this limitation is omitted, and the court is authorized in all cases at their discretion, to render judgment and award execution.

2d. By the old law the jurisdiction is vested in cases where is drawn in question the *construction* of any clause of the Constitution, or treaty, or statute, or commission.

In the new, we have the use of these other words, "or where any right, title, privilege, or immunity is claimed," under the Constitution, &c.

3d. By the old law it was required that what is called "the Federal question" must "appear on the face of the record."

In the new, the words making this requisition are omitted.

4th. By the old law, "no other error could be assigned or regarded as ground of reversal, than such as immediately related to the validity or construction of the Constitution, treaties, statutes, commissions, or authorities in dispute."

In the new, the words putting this limitation on the jurisdiction disappear, and makes an argument plausible that Congress or the draughtsman of the act had meant to say that if a Federal question once existed in the case, and this court so got jurisdiction of the case, then it was bound to go on and decide every question in it, though these questions were questions of local law, and such as, in numberless cases, the court had decided that, under the old section and in consequence of the now omitted language at the close of it, could not be passed on here.

Referring to this last change, its operation seemed so important and its bearing on the twenty-fifth section so direct,

in a matter oftener discussed and decided by this court than any question ever submitted to it; that it was difficult for some persons to conclude that the legislator who drew the bill, and the legislature that adopted it, did not comprehend that the bill was effecting a radical change in the exercise of the jurisdiction of the court.

However, it was obvious that as long as in the cases brought up here, either,

1st. No Federal question at all existed in the case, OR,

2d. The Federal question, where one did exist, had been *wrongly* decided in the court below,—and there was no local question on which the case might have been disposed of—

There was no necessity to pass upon the effect of the concluding sentences of the new section. The case would come within both the old and new. The necessity to consider the effect of the new act would, however, arise on the first occasion when some case should come before the court, in which (1st), there was a Federal question, (2d), where that question had been rightly decided, and (3d), where there were, besides, local questions which would dispose of the case, and which the plaintiff in error alleged had been wrongly adjudged below. Such a case now seemed to be here.

The case was thus:

Murdock filed a bill in one of the courts of chancery of Tennessee, against the city of Memphis, in that State. The bill and its exhibits made this case:

In July, 1844,—Congress having just previously authorized the establishment of a naval depot in that city, and appropriated a considerable sum of money for the purpose—the ancestors of Murdock—by ordinary deed of bargain and sale, without any covenants or declaration of trust on which the land was to be held by the city, but referring to the fact of "the location of the naval depot lately established by the United States at said town"—conveyed to the city certain land described in and near its limits "for the location of the naval depot aforesaid."

Statement of the case.

By the same instrument (a quadrupartite one) both the grantors and the city conveyed the same land to one Wheatley, in fee, in trust for the grantors and their heirs, "in case the same shall not be appropriated by the United States for that purpose."

On the 14th of September, 1844, the city of Memphis, in consideration of the sum of $20,000 paid by the United States, conveyed the said land to the United States with covenant of general warranty; there being, however, in this deed to the United States no designation of any purpose to which the land was to be applied, nor any conditions precedent or subsequent, or of any kind whatsoever.

The United States took possession of the land for the purpose of the erection of a naval depot upon it, erected buildings, and made various expenditures and improvements for the said purpose; but in about ten years after, by an act of August 5th, 1854,* transferred the land back to the city. The act was in these words:

"All the grounds and appurtenances thereunto belonging, known as the Memphis Navy Yard, in Shelby County, Tennessee, be, and the same is hereby, ceded to the mayor and aldermen of the city of Memphis, *for the use and benefit of said city.*"

There was no allegation in the bill that the city was in any way instrumental in procuring this transfer or the abandonment of the site as a naval depot; on the contrary, it is averred that the city authorities endeavored to prevent both.

The bill charged that by the failure of the United States to appropriate the land for a naval depot, and the final abandonment by the United States of any intention to do so, the land came within the clause of the deed of July, 1844, conveying it to Wheatley in trust; or if not, that it was held by the city in trust for the original grantors, and the prayer sought to subject it to said trusts.

The answer, denying the construction put upon the deed of 1844, which established a trust, asserted that the land had been appropriated by the United States as a naval depot

* 10 Stat. at Large, 586.

within the meaning and intent of the deed of July, 1844, and that the subsequent perpetual occupation of it was not a condition subsequent; and consequently that the abandonment of it as a naval depot was not a breach of a condition such as divested the title so conveyed by the deed.

It pleaded the statute of limitations. It also demurred to the bill as seeking to enforce a forfeiture for breach of condition subsequent.

The court sustained the demurrer, and also decreed that the city had a perfect title to the property against the complainants both under the act of Congress and the statute of limitations, and dismissed the bill. The Supreme Court of Tennessee affirmed this decree.

That court was also of opinion, and so declared itself to be, that the act of Congress "cedes the property in controversy in this cause to the mayor and aldermen of the city of Memphis, for the use of the city only, and not in trust for the complainant; and that the complainant takes no benefit under the said act."

The complainant thereupon sued out a writ of error to this court.

The case was first argued January 21st, 1873.

Messrs. W. I. Scott and J. B. Hieskell, for the plaintiff in error:

1. *Is there a Federal question, so that the court can take jurisdiction?* There is such a question. The ancestor of Murdock conveyed to the city and Wheatley on condition, or more properly speaking perhaps, in trust. Neither party could discharge himself of the trust. When the city conveyed to the United States, the United States took the land fettered with a trust. When the United States reconveyed to the city, they, of necessity, conveyed in trust. The fact that the deed said that it conveyed to the city "for its own use" does not alter the case. If a trustee, in fraud of a declared trust, conveys to another for the use of that other, that other holds not for his own use but for the *cestui que trust.* Therefore, we set up and claim a right under the

act of Congress. No right arose to us but for that act. When the act reconveyed the property to the city there was an abandonment, a breach of the trust or condition on which the property had been conveyed. The grantors or their heir, the present complainant, took it. There is, therefore, a Federal question, and that question has been decided against us.

2. *That question was decided wrongly*, as our remarks just made show.

Whether the new act changes the old twenty-fifth section or not the judgment below must be reversed, and the case remanded.

3. But, however our second point may be — that is to say, whether the Federal question was decided wrongly or rightly, and conceding that it was decided rightly—then although in consequence of the closing sentence of the old twenty-fifth section,* no question of law merely local could formerly be considered here, yet that closing part being now left off, the restriction on this court to consider this class of questions is removed; and it being once shown that there is a Federal question in the case to give this court jurisdiction, the court must re-examine, affirm, or reverse the decision of the State court on these local questions as well as on the Federal question. This, doubtless, was what was meant by Mr. Justice Swayne in *Stewart* v. *Kahn*, where, distinguishing between changes merely verbal throughout the section and the great omission at its close, that learned justice says:†

"The section is to a great extent a transcript of the twenty-fifth section of the prior act. There are several alterations which are not material, but at the close of the second section there is a *substantial* omission."

[The learned counsel on an assumption of the correctness of this position, then went on to argue that the decision of the court below on the pleas of the statute of limitations, &c., was erroneous.]

* *Supra*, p. 593.

† 11 Wallace, 502.

Argument for the defendant in error.

Messrs. W. T. Otto, B. M. Estes, J. M. Carlisle, and J. D. McPherson, contra:

1. *There is no Federal question, and consequently no jurisdiction in this court to pass on anything.* If there was a trust in the case, it was made not by the act of Congress, but by the deed of the grantors. No title, right, or privilege was specially set up or claimed by the complainant under the act, and the act is mentioned in his bill only as an item in the history of things, indicating the time when his right, if he had one, arose. The decree that the complainant took no benefit under the act does not bring the case within the twenty-fifth section, because it is not stated that the complainant ever claimed any title under it, and the language does not necessarily imply that he did. The language of the court means simply that the city took title under the act of Congress for its own use, and not in trust for any one else.

2. *If there was a Federal question, the question was rightly decided.* It was rightly decided for many reasons. One is enough, and that is that there was no breach of condition or trust, but on the contrary performance or execution. If there was any condition or trust, it was that the property should be conveyed to the United States for the purpose of a naval depot. It was so conveyed. The condition—if there was a condition—was performed; the trust—if there was a trust—was executed when the United States established the navy yard upon the land in question. *Mead* v. *Ballard*,* is in point. There a grant was made "upon the express understanding and condition" that an institution should be permanently located upon the granted premises, and that on failure of such location within a year from the date of the deed, and on repayment of the purchase-money without interest, the premises should revert to, and become the property of, the owners. The building was erected within the time named. It was afterwards burned, and the trustees then erected other buildings upon some contiguous property. This court held that the condition was performed

* 7 Wallace, 290.

Argument for the defendant in error.

when the trustees passed a resolution locating the building on the premises, with the intent that they should be the permanent place of business of the corporation, and that it did not operate as a covenant to build and rebuild, or keep the building on the land for an indefinite time.

3. *If it was not rightly decided the matter is unimportant.* The record shows that there were other questions, exclusively of State cognizance, sufficient to dispose of the case. The demurrer having been to the whole bill, and being sustained, disposed of the case. The defendants pleaded the statute of limitations, and the case being heard on the merits, the court decided that the defendants had a good title under it. This disposed of the whole case. The writ of error should, therefore, be dismissed.*

The position taken by opposing counsel as to the effect of the re-enactment of Feb. 5th, 1867, is radical in the extreme. It would subvert every principle which has ever governed this court in reference to the adjudications by State courts on State law. What is quoted from *Stewart* v. *Kahn* was said extra-judicially. Besides, there may be "a substantial omission" in the new act, and many such omissions, and yet no such far-reaching effect as is here claimed for them follow; an effect, so far as concerns State jurisprudence, which is revolutionary. CURIA ADVISARI VULT.

As appeared by the final judgment given in the case, the court, upon advisement, was of the opinion,

1st. That there was a Federal question involved.

2d. That it was decided rightly.

Accordingly the case, when thus under advisement, presented the exact conditions referred to, *supra*, p. 596, and under which it would become necessary carefully to consider the effect of the act of Feb. 5th, 1867. It became necessary, therefore, to pass upon the third point above discussed by counsel; discussed, however, not so fully as the primary points of their case, nor otherwise than as points

* Gibson *v.* Chouteau, 8 Wallace, 314.

which *might* arise. The court accordingly now, March 10th, 1873, ordered the case to be reargued on the following propositions:

"1. Does the second section of the act of February 5th, 1867, repeal all or any part of the twenty-fifth section of the act of 1789, commonly called the Judiciary Act?

"2. Is it the true intent and meaning of the act of 1867, above referred to, that when this court has jurisdiction of a case, by reason of any of the questions therein mentioned, it shall proceed to decide all the questions presented by the record which are necessary to a final judgment or decree?

"If this question be answered affirmatively, does the Constitution of the United States authorize Congress to confer such a jurisdiction on this court?"

And it invited argument, oral or by brief, from any counsel interested in cases where these questions were important.

The case was now, April 2d and 3d, 1873, *reargued by the same counsel for the plaintiff in error as before; Mr. P. Phillips, in addition*, as amicus curiæ, *expressing his views orally, and the late Mr. B. R. Curtis, in the same character, having submitted some observations in print.**

I. *The old twenty-fifth section is repealed.*

The two laws differ in the following particulars:

1. In defining the cases over which the appellate power shall extend.

2. In the regulations each prescribes for the exercise of this appellate power.

The later statute was manifestly intended to cover and provide for the subject-matter of the earlier law, and to qualify the provisions of the earlier law not only by omission, but by addition and alteration. In such a case the later repeals the earlier act by necessary implication.

* There were also at the time before the court briefs in other cases, where the questions about the effect of the new act were discussed. In the report now made of what was said at the bar the points made by the counsel separately are, of course, presented only as a whole; no attempt being made to assign to each what he chiefly or alone may have pressed.

Argument in favor of the extended jurisdiction.

II. *If the act of* 1789 *be repealed, does the act of* 1867 *authorize the Supreme Court of the United States to review all questions in the record, or is the jurisdiction confined to the Federal questions?*

1. The language of the act declares that the "judgment or decree may be re-examined, and reversed or affirmed, in the Supreme Court of the United States, upon a writ of error (and in proper cases upon an appeal), *in the same manner and under the same regulations* as if it had been passed in a court of the United States." And the "*writ* shall have the same effect as if the judgment or decree" had so passed.

2. In order rightly to ascertain the force of this provision, we must not lose sight of the matter omitted. The restriction expressly interposed in the former act was placed there because it was considered that without such express language no restriction could be implied from the previous clause of the enactment. Hence, in the former act the prohibition was inserted in positive terms. Now, in the revising act, it is omitted, and the conclusion is that the restriction no longer exists.

As early as the case of *Durousseau* v. *The United States*,* Marshall, C. J., used this language:

"Had the judicial act created the Supreme Court, without defining or limiting its jurisdiction, it must have been considered as possessing all the jurisdiction which the Constitution assigned to it. . . . And in omitting to exercise the right of excepting from its constitutional powers, would have necessarily left those powers undiminished. The appellate powers of this court are not given by the judicial act; they are given by the Constitution. But they are limited and regulated by the judicial act."

It is evident that Marshall, C. J., had reference to the express limitation contained in the last clause of the twenty-fifth section of the act of 1789. For in *Osborn* v. *The Bank*,† he gives the opinion of the court, that under the Constitution extending the "judicial power to all CASES in law and

* 6 Cranch, 314; and see Gelston *v.* Hoyt, 3 Wheaton, 326.
† 9 Id. 820.

equity arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority, that the judicial department receives jurisdiction to the full extent of the Constitution, laws, &c."

3. When a party asserts his right before a court in the forms prescribed by law, it then becomes a "case" to which this judicial power extends.

This includes the right of both parties to the litigation; and the case may be said to "arise," whenever its correct decision depends upon the construction of said Constitution, laws or treaties.

If the Constitution had intended to limit the jurisdiction, as is done by the twenty-fifth section, the appropriate language for this purpose has not been used. The power is not extended merely to "questions," but to "cases."

The limitation of the twenty-fifth section being virtually repealed by its omission in the act of 1867, denotes clearly the intention of Congress that when a Federal question exists, the full constitutional power should be exercised, and that the court should decide the "case," and this necessarily includes all questions presented by it.

4. The phraseology of the acts supports our views. It is not that the judgment or decree may be examined, but *re*-examined. There can be no re-examination of a matter that has not been theretofore examined; and this right to *re*-examine, that is to examine over again the judgment or decree, would have involved as full and complete an examination as had before been given, if it were not that this *re*-examination was confined and made partial by the limitation imposed.

The conclusion is, that Congress, by allowing to this court this power, had in contemplation that it should dispose of the whole case.

5. Again. The *writ* cannot have the same effect as if the judgment or decree had been rendered or passed in a court of the United States, unless all the errors were passed upon; and as there is no longer any prohibition of errors that may be assigned or regarded, but the express prohibition here-

tofore existing is annulled, it follows that this statute must have effect according to its language, and it must be considered that the legislature, in removing the express qualification, leaving the antecedent unqualified, intended to commit it to its literal interpretation.

6. In addition. The act of 1867 authorizes this court in its discretion "to proceed to final decision and award execution, or remand the same (*i. e.*, the cause) to an *inferior* court." The highest court of the State is thus treated as an "inferior court;" and power is given to pass it by entirely, as if the judgment had been rendered in a Circuit Court of the United States. This tends to show that full and adequate capacity was meant to be given to this court to re-examine the whole case.

7. Finally. The new statute was passed just after the overt acts of opposition had been suppressed by the force of Federal arms, but while it was uncertain how far the *spirit* of opposition, though covert, yet remained both alive and active. The use, in the new act, of the new word "immunities," comes plainly from the fourteenth amendment then first before the nation, and it clearly points to the purpose of that amendment; an amendment meant to extirpate all power of mischief in even that spirit of opposition. The new act shows an apprehension that Federal justice would be obstructed by local and State animosities and revenges, and that Federal questions might really be passed on in State courts, but the proof of adjudication artfully suppressed *on the record*. For this reason it was that the new act omits the provision in the old twenty-fifth section, "that no other error shall be assigned or regarded as ground of reversal than such as appears *on the face of the record*." And for a kindred reason—that is to say, to place the whole jurisprudence of the country under the protection of this great Federal tribunal of the nation, and to let all citizens feel everywhere and always, as a fixed reality, the fact that the Constitution of the United States and the laws of Congress passed in pursuance thereof, ARE the "supreme law of the land"—for these reasons we say, and that every ques-

tion passed on by the State courts might be open to reconsideration here, was the other part of the clause omitted from the new act, that no other error shall be assigned or regarded as ground of reversal than such as . . . *immediately respects the beforementioned questions of validity or construction of said Constitution, treaties, statutes, commissions, or authorities in dispute.*

Contemporaneous acts of Congress enforce this view. During and just after the rebellion, Congress, for the political causes to which we have referred as supporting our view, gave to the Circuit and District Courts of the United States jurisdiction over many questions which it had previously left to the exclusive control of the State courts.*

[III. The learned counsel then argued that the second section of the new act was constitutional.]

Messrs. W. T. Otto, B. M. Estes, J. M. Carlisle, and J. D. McPherson, contra:

Conceding, for the argument, that the act of 1867 covers the whole subject-matter of the old twenty-fifth section upon every other point, we insist that the "subject-matter" of the last clause of the old section is not covered or affected thereby, and that this clause is yet in force. There is nothing in the act of 1867 repugnant to this last clause of the old section, and the subject-matter thereof is in no wise covered by the new section. It is not only possible, but it is easy to reconcile the two and give effect to both.

The title of the act is, "An act to *amend* an act to establish the judicial courts of the United States." The intention of Congress was then to "*amend*," not to "*repeal*," and at most, the effect of the new act is to strike out all of the old section, except the last clause, and to insert the new enactment in the stead of the part stricken out.† This construction accords with well-settled rules, and is favored by the argument that it is not to be supposed that Congress

* See these acts referred to, *infra*, p. 631.—REP.

† United States *v.* Palmer, 3 Wheaton, 610; Hadden *v.* Collector, 5 Wallace, 107.

intended, without express language to that effect, to abrogate a salutary provision which had been in force and well understood for three-quarters of a century, and which at least was supposed to be a part of a judicial *system* which had the Constitution for its chief corner-stone.

In *Wood* v. *United States*,* the law of repeals by implication is thus rightly stated:

"It is not sufficient to establish that subsequent laws cover some or even all of the cases provided for by it, for they may be merely affirmative, or cumulative, or auxiliary. But there must be a positive repugnancy between the provisions of the new law and those of the old, and even then the old law is repealed by implication only, pro tanto, to the extent of the repugnancy."

The intention of the act of 1867 was to enlarge somewhat the provisions of the old twenty-fifth section, but not to repeal it. If this construction is not adopted, the conclusion is inevitable, that the main object of Congress in passing the second section of the new act was to annul the last clause of the old twenty-fifth section, and *that it sought to do so by a most singular means.*

The repugnancy between the two sections, which opposing counsel assert, is not real. If the clause with the exception and the clause without the exception cannot stand together, then the clause with the exception, as it stood in the twenty-fifth section of the Judiciary Act, was repugnant in itself, and that section was composed of inconsistent and irreconcilable provisions. This construction cannot be entertained.

II. *Is the intent and meaning of the act of* 1867 *that the court shall proceed to decide all the questions presented by the record which are necessary to a final judgment or decree, when it has once got jurisdiction of a case by reason of any Federal question in it?*

The way in which the act of 1867 was introduced into

* 16 Peters, 362; and see White *v.* Johnson, 23 Mississippi, 68; Ellis *v.* Paige, 1 Pickering, 45; Nichols *v.* Squire, 5 Id. 168; Bartlet *v.* King, 12 Massachusetts, 545.

Congress and passed through it,* confirms the idea that the answer to this question must be a negative one. No purpose was avowed to empower or require this court, on a writ of error to a State court, to pass upon any question in the record which turns upon the common law of a State or the interpretation of its constitution or statutes, when neither is in conflict with the National authority. It is to be presumed that no such purpose existed. The intent to vest a general revisory power, which, since the adoption of the Constitution, has never been exerted over the State tribunals, should be expressed in clear and unmistakable terms.

It is not expressly given by the second section. The provision in each section touching the "effect" of the writ of error and the omission of the last clause of the old section, coupled with the assumed fact that it either limited some power conferred by that provision, or prescribed the mode of exercising it, are the only grounds upon which the enlarged jurisdiction has been asserted. That provision obviously relates only to the mode of removing the record to this court, and to the regulations by which that object is accomplished. The clause, if divisible, declares: First, that no other error shall be assigned, or regarded as a ground of reversal, than such as appears on the face of the record. Second, that the error, when assigned, shall immediately respect the questions mentioned in the section.

The word "suit" occurs both in the old and in the new section. The word means the prosecution of some demand in a court of justice, and applies to a judicial proceeding, either at law or in equity, in which a party pursues a remedy which the law affords him.† The omission in the act of 1867, of the words "of law or equity," is entirely unimportant. An appeal is the only mode by which a cause of an equitable nature or in admiralty can be brought from an inferior court of the United States for revision, and it extends to matters of fact as well as of law; while a "final judgment or decree in any suit" in a State court can only be

* See this matter stated, *supra*, p. 594.—REP.

† Weston *v.* The City Council of Charleston, 2 Peters, 449.

"re-examined" here on a writ of error. That writ is of common-law origin, and "lies only for matters of law arising upon the face of the proceeding."* The re-examination on the return of the writ would, therefore, necessarily, and without any limiting words, be confined to such matters.

Congress, by the twenty-fifth section, gave a legislative interpretation to the only clauses of the Constitution which can be construed to give this court control over the action of the State courts. The concluding words were inserted to define that control, not to restrain it within narrower limits than the Constitution had imposed; and this was done to relieve the subject from all controversy, and to allay apprehensions which then widely prevailed as to the judicial branch of the government.

The judiciary clause was adopted by the Convention at Philadelphia with apparent unanimity and without prolonged discussion. It, with other leading features of the Constitution, was vehemently assailed before the public, and in the State conventions, by many of the conspicuous statesmen of that day.

George Mason wrote that "the judiciary of the United States is so constructed and extended as to absorb and destroy the judiciaries of the several States."† In the Virginia convention he said that he was "greatly mistaken if there be any limitation whatever with respect to the nature or jurisdiction of these (Federal) courts."‡ Indeed, the historical fact is familiar that the enemies of the Constitution maintained that it established a consolidated government, and that the judiciary of the States would be overruled and absorbed. Jay, the Pinckneys, Hamilton, Marshall, Madison, and other friends of the Constitution answered the objections and insisted that, by no just rule of construction could such extraordinary and dangerous powers be justly ascribed to it. None of these great men intimated that the action of the State courts could be revised by the judiciary department, except on questions purely Federal.

* 3 Blackstone's Commentaries, 407.
† Elliott Debates, 475.
‡ 3 Id. 521.

Argument against the extended jurisdiction.

That masterpiece of legislation which we call the "Judiciary Act" originated in the Senate. It was reported by a committee, one of whom became Chief Justice of the United States,* and another a justice of this court.† Five of them had been deputies to the Convention which framed the Constitution.‡ As the Senate then sat with closed doors we have no record of its debates; but, in the House of Representatives, no member maintained that the judicial power of the United States, when exerted over the consummated proceedings of a State court, extended beyond the determination of the Federal questions involved.

The authors of the Judiciary Act and the Congress which passed it belonged to that party which held that the Federal authority, exerted to the fullest limits consistent with the Constitution, was indispensable to the peace and unity of the country, and doubtless they all meant to extend it as far as, constitutionally, they could. The twenty-fifth section was at one time denounced as unconstitutional by one class of statesmen and by courts, and attempts have been made by State laws to defeat its operation. The jurisdiction under it, however, has been so wisely and beneficently exercised, and has done so much to perpetuate, in its vigor and purity, the Constitution of the country, that it has finally commanded general acquiescence. No serious effort has been made in Congress to alter its essential provisions or impair their efficacy, nor, unless such be the effect of the act of 1867, to give them a broader scope. It may be justly regarded as an extemporaneous and authoritative exposition of the limits of the Federal power in its bearing on the legislative and judicial action of the States. Marshall, C. J., in *Cohens* v. *Virginia*,§ remarks:

* Oliver Ellsworth. † William Paterson.

‡ Oliver Ellsworth, William Paterson, Caleb Strong, Richard Bassett, William Few, who with William Maclay, Richard Henry Lee, and Paine Wingate, were the Senate committee, appointed, April 8th, 1789, to bring in a bill to organize the judiciary of the United States, were members of the Convention which framed the Constitution, although the names of neither Strong nor Ellsworth appear among those of the signers of it.

§ 6 Wheaton, 264.

Argument against the extended jurisdiction.

"Congress seems to have intended to give its own construction of this part of the Constitution in the twenty-fifth section of the Judiciary Act, and we perceive no reason to depart from that construction."

The clause should then be held as declaratory of a rule of the common law as well as of a constitutional provision. From its absence from the second section no intention of Congress to extend the jurisdiction beyond its ancient limits can be inferred.

If the decision of the Federal question by the highest State court is correct, the judgment is affirmed. It is difficult to perceive why action should be taken here on any other matter in controversy which has no direct necessary bearing upon this material and controlling question. It will never be required in disposing of a suit, unless the court should assume to act upon the questions which turn exclusively upon the common law of a State or the interpretation of its constitution and laws.

This court has habitually accepted "as a rule of decision" the adjudications of the State courts on such questions in all cases arising within the respective States. It has held that "a fixed and received construction" of the statutes of a State in its own courts makes a part of the statutes. It adopts the local law of real property as ascertained by the decisions of the State courts, whether those decisions are grounded on the construction of the statutes or on the unwritten law of the State. When those courts revoke their former decisions, it follows the latest settled adjudications. This doctrine has been maintained in an unbroken series of decisions, commencing with *McKeen* v. *De Lancey's Lessee.** It is not to be presumed that Congress, with a full knowledge of the history and traditions of the court, intended to confer jurisdiction over the State tribunals upon any question where their decisions had been theretofore regarded as conclusive—a jurisdiction demanded by no public necessity, and productive of no good results.

* 5 Cranch, 22.

Argument against the extended jurisdiction.

1. As to the necessity for such extended jurisdiction. It is true that an inferior court of the United States, having exclusive original cognizance of suits by reason of their subject-matter, is fully authorized to pass upon any question arising in their progress, or involved in their adjudication; although such question may not depend upon a principle of Federal jurisprudence. Otherwise, the rights asserted could not be judicially enforced, as the injured party can resort to no other power. *Osborn* v. *The Bank of the United States*, cited on the other side, maintains substantially this doctrine. It does not refer to the limits of the revisory power of this court or to the effect of the last clause of the twenty-fifth section. That power extends, with such exceptions and under such regulations as Congress may provide, to judgments and decrees rendered by any Federal tribunal in suits which are brought therein, or which, pursuant to the legislation of Congress, are removed thereto, and may correct all errors in matter of law, and sometimes of fact. But the relations which the State courts sustain to this court are not those of an inferior court of the United States. Congress cannot impose duties upon them, nor invest them with judicial power. They were created by the several States to interpret and give effect to their respective constitutions and laws, and to administer justice according to law. Nothing in their history, in the character of their jurisprudence, or in the condition of the country—and these may be considered in construing the act of 1867—shows the least necessity for empowering this court to supervise the exercise of their jurisdiction over so much of the matter in controversy, as must be determined by the State law, simply on the ground that the record presents a question decided adversely to the party, who claims a right derived from, or protected by, the Constitution and laws, or a treaty of the United States. Human ingenuity may be challenged to offer a reason why "the judgment or decree" of the State court should be reversed here upon a point having no relation to, or connection with, the question, in the absence of which

this court would confessedly have no jurisdiction whatever of the suit.

2. As to the results. The effects and consequences of the interpretation of the act for which the plaintiff in error asks, present a legitimate subject of inquiry. However wisely and justly the jurisdiction which he claims for this court might be exercised, its inevitable tendency would be to impair that control over their domestic concerns, which the States and their tribunals have hitherto possessed. The other results are too obvious to require to be presented.

The second section of the act of 1867 presents with the utmost clearness and precision every question which in the progress of a cause in the State courts can be decided adversely to the National authority. It was to vindicate that authority, which is, by universal acknowledgment, supreme within the limits of the Constitution, and to secure uniformity in the interpretation of that instrument, and of the laws and treaties of the United States, that Congress provided a resort to this, from a State court. Any broader interpretation of the section would do violence to its reason, spirit, and intention.

The answer to the second proposition should, therefore, be in the negative.

[III. The learned counsel then argued that the Constitution did not authorize Congress to confer on this court such a jurisdiction as was claimed for it by the opposing side.]

On the 22d of June, 1874 (some time after all this argument was concluded), Congress passed its great act of that date, embracing "the statutes of the United States, general and permanent in their nature, in force on the 1st of December, 1873, as revised and consolidated by commissioners appointed under an act of Congress;" the act commonly known as that making the "Revised Statutes of the United States." In these Revised Statutes, the act of Feb. 5th, 1867, makes section 709, but the concluding clause of the act of September 24th, 1789, "but no other errors," &c., makes no part of the Revised Statutes.

Opinion of the court.—Preliminary remarks.

Mr. Justice MILLER (now, January 11th, 1875) delivered the opinion of the court.

In the year 1867 Congress passed an act, approved February 5th, entitled an act to amend "An act to establish the judicial courts of the United States, approved September the 24th, 1789."* This act consisted of two sections, the first of which conferred upon the Federal courts and upon the judges of those courts additional power in regard to writs of habeas corpus, and regulated appeals and other proceedings in that class of cases. The second section was a reproduction, with some changes, of the twenty-fifth section of the act of 1789, to which, by its title, the act of 1867 was an amendment, and it related to the appellate jurisdiction of this court over judgments and decrees of State courts.

The difference between the twenty-fifth section of the act of 1789 and the second section of the act of 1867 did not attract much attention, if any, for some time after the passage of the latter. Occasional allusions to its effect upon the principles long established by this court under the former began at length to make their appearance in the briefs and oral arguments of counsel, but were not found to be so important as to require any decision of this court on the subject.

But in several cases argued within the last two or three years the proposition has been urged upon the court that the latter act worked a total repeal of the twenty-fifth section of the former, and introduced a rule for the action of this court in the class of cases to which they both referred, of such extended operation and so variant from that which had governed it heretofore that the subject received the serious consideration of the court. It will at once be perceived that the question raised was entitled to the most careful examination and to all the wisdom and learning, and the exercise of the best judgment which the court could bring to bear upon its solution, when it is fairly stated.

The proposition is that by a fair construction of the act of

* 14 Stat. at Large, 385.

1867 this court must, when it obtains jurisdiction of a case decided in a State court, by reason of one of the questions stated in the act, proceed to decide every other question which the case presents which may be found necessary to a final judgment on the whole merits. To this has been added the further suggestion that in determining whether the question on which the jurisdiction of this court depends, has been raised in any given case, we are not limited to the record which comes to us from the State court—the record proper of the case as understood at common law—but we may resort to any such method of ascertaining what was really done in the State court as this court may think proper, even to *ex parte* affidavits.

When the case standing at the head of this opinion came on to be argued, it was insisted by counsel for defendants in error that none of the questions were involved in the case necessary to give jurisdiction to this court, either under the act of 1789 or of 1867, and that if they were, there were other questions exclusively of State court cognizance which were sufficient to dispose of the case, and that, therefore, the writ of error should be dismissed.

Counsel for plaintiffs in error, on the other hand, argued that not only was there a question in the case decided against them which authorized the writ of error from this court under either act, but that this court having for this reason obtained jurisdiction of the case, should re-examine all the questions found in the record, though some of them might be questions of general common law or equity, or raised by State statutes, unaffected by any principle of Federal law, constitutional or otherwise.

When, after argument, the court came to consider the case in consultation, it was found that it could not be disposed of without ignoring or deciding some of these propositions, and it became apparent that the time had arrived when the court must decide upon the effect of the act of 1867 on the jurisdiction of this court as it had been supposed to be established by the twenty-fifth section of the act of 1789.

Opinion of the court.—First question: The 25th section is repealed.

That we might have all the aid which could be had from discussion of counsel, the court ordered a reargument of the case on three distinct questions which it propounded, and invited argument, both oral and written, from any counsel interested in them. This reargument was had, and the court was fortunate in obtaining the assistance of very eminent and very able jurists. The importance of the proposition under discussion justified us in delaying a decision until the present term, giving the judges the benefit of ample time for its most mature examination.

With all the aid we have had from counsel, and with the fullest consideration we have been able to give the subject, we are free to confess that its difficulties are many and embarrassing, and in the results we are about to announce we have not been able to arrive at entire harmony of opinion.

The questions propounded by the court for discussion by counsel were these:

1. Does the second section of the act of February 5th, 1867, repeal all or any part of the twenty-fifth section of the act of 1789, commonly called the Judiciary Act?

2. Is it the true intent and meaning of the act of 1867, above referred to, that when this court has jurisdiction of a case, by reason of any of the questions therein mentioned, it shall proceed to decide all the questions presented by the record which are necessary to a final judgment or decree?

3. If this question be answered affirmatively, does the Constitution of the United States authorize Congress to confer such a jurisdiction on this court?

1. The act of 1867 has no repealing clause nor any express words of repeal. If there is any repeal, therefore, it is one of implication. The differences between the two sections are of two classes, namely, the change or substitution of a few words or phrases in the latter for those used in the former, with very slight, if any, change of meaning, and the omission in the latter of two important provisions found in the former. It will be perceived by this statement that there is no repeal by positive new enactments inconsistent

Opinion of the court.—First question: The 25th section is repealed.

in terms with the old law. It is the words that are wholly omitted in the new statute which constitute the important feature in the questions thus propounded for discussion.

A careful comparison of these two sections (set forth in parallel columns, *supra*, pp. 592, 593.—REP.) can leave no doubt that it was the intention of Congress, by the latter statute, to revise the entire matter to which they both had reference, to make such changes in the law as it stood as they thought best, and to substitute their will in that regard entirely for the old law upon the subject. We are of opinion that it was their intention to make a new law so far as the present law differed from the former, and that the new law embracing all that was intended to be preserved of the old, omitting what was not so intended, became complete in itself and repealed all other law on the subject embraced within it. The authorities on this subject are clear and uniform.*

The result of this reasoning is that the twenty-fifth section of the act of 1789 is technically repealed, and that the second section of the act of 1867 has taken its place. What of the statute of 1789 is embraced in that of 1867 is of course the law now and has been ever since it was first made so. What is changed or modified is the law as thus changed or modified. That which is omitted ceased to have any effect from the day that the substituted statute was approved.

This view is strongly supported by the consideration that the revision of the laws of Congress passed at the last session, based upon the idea that no change in the existing law should be made, has incorporated with the Revised Statutes nothing but the second section of the act of 1867. Whatever might have been our abstract views of the effect of the act of 1867, we are, as to all the future cases, bound by the law as found in the Revised Statutes by the express language of Congress on that subject; and it would be labor lost to consider any other view of the question.

* United States *v.* Tynen, 11 Wallace, 88; Henderson Tobacco, Ib. 652; Bartlet *v.* King, 12 Massachusetts, 537; Cincinnati *v.* Cody, 10 Pickering, 36; Sedgwick on Statutes, 126.

2. The affirmative of the second question propounded above is founded upon the effect of the omission or repeal of the last sentence of the twenty-fifth section of the act of 1789. That clause in express terms limited the power of the Supreme Court in reversing the judgment of a State court, to errors apparent on the face of the record and which respected questions, that for the sake of brevity, though not with strict verbal accuracy, we shall call Federal questions, namely, those in regard to the validity or construction of the Constitution, treaties, statutes, commissions, or authority of the Federal government.

The argument may be thus stated: 1. That the Constitution declares that the judicial power of the United States shall extend to *cases* of a character which includes the questions described in the section, and that by the word *case*, is to be understood all of the case in which such a question arises. 2. That by the fair construction of the act of 1789 in regard to removing those cases to this court, the power and the duty of re-examining the whole case would have been devolved on the court, but for the restriction of the clause omitted in the act of 1867; and that the same language is used in the latter act regulating the removal, but omitting the restrictive clause. And, 3. That by re-enacting the statute in the same terms as to the removal of cases from the State courts, without the restrictive clause, Congress is to be understood as conferring the power which that clause prohibited.

We will consider the last proposition first.

What were the precise motives which induced the omission of this clause it is impossible to ascertain with any degree of satisfaction. In a legislative body like Congress, it is reasonable to suppose that among those who considered this matter at all, there were varying reasons for consenting to the change. No doubt there were those who, believing that the Constitution gave no right to the Federal judiciary to go beyond the line marked by the omitted clause, thought its presence or absence immaterial; and in a revision of the statute it was wise to leave it out, because its presence im-

plied that such a power was within the competency of Congress to bestow. There were also, no doubt, those who believed that the section standing without that clause did not confer the power which it prohibited, and that it was, therefore, better omitted. It may also have been within the thought of a few that all that is now claimed would follow the repeal of the clause. But if Congress, or the framers of the bill, had a clear purpose to enact affirmatively that the court *should consider* the class of errors which that clause forbid, nothing hindered that they should say so in positive terms; and in reversing the policy of the government from its foundation in one of the most important subjects on which that body could act, it is reasonably to be expected that Congress would use plain, unmistakable language in giving expression to such intention.

There is, therefore, no sufficient reason for holding that Congress, by repealing or omitting this restrictive clause, intended to enact affirmatively the thing which that clause had prohibited.

We are thus brought to the examination of the section as it was passed by the Congress of 1867, and as it now stands, as part of the revised statutes of the United States.

Before we proceed to any criticism of the language of the section, it may be as well to revert for a moment to the constitutional provisions which are supposed to, and which do, bear upon the subject. The second section of the third article, already adverted to, declares 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."

Waiving for the present the question whether the power thus conferred extends to all questions, in all cases, where only one of the questions involved arises under the Constitution or laws of the United States, we find that this judicial power is by the Constitution vested in one Supreme Court and in such inferior courts as Congress may establish. Of these courts the Constitution defines the jurisdiction of none but the Supreme Court. Of that court it is said, after giving

it a very limited original jurisdiction, that "in all other cases before mentioned, the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress may prescribe."

This latter clause has been the subject of construction in this court many times, and the uniform and established doctrine is, that Congress having by the act of 1789 defined and regulated this jurisdiction in certain classes of cases, this affirmative expression of the will of that body is to be taken as excepting all other cases to which the judicial power of the United States extends, than those enumerated.*

It is also to be remembered that the exercise of judicial power over cases arising under the Constitution, laws, and treaties of the United States, may be original as well as appellate, and may be conferred by Congress on other courts than the Supreme Court, as it has done in several classes of cases which will be hereafter referred to. We are under no necessity, then, of supposing that Congress, in the section we are considering, intended to confer on the Supreme Court the whole power which, by the Constitution, it was competent for Congress to confer in the class of cases embraced in that section.

Omitting for the moment that part of the section which characterizes the questions necessary to the jurisdiction conferred, the enactment is, that a final judgment or decree in any suit in the highest court of a State in which a decision in the suit can be had (when one of these questions is decided), may be re-examined, and reversed or affirmed, in the Supreme Court of the United States, upon a writ of error . . . in the same manner, and under the same regulations, and the writ shall have the same effect as if the judgment or decree complained of had been passed or rendered in a court of the United States.

It is strenuously maintained that as the office of a writ of error at the common law, and as it is used in relation to the

* Wiscart *v.* Dauchy, 3 Dallas, 321; Durousseau *v.* United States, 6 Cranch, 307; The Lucy, 8 Wallace, 307; Ex parte McCardle, 6 Id. 318; S. C. 7 Id. 506.

inferior courts of the United States when issued from this court, is to remove the whole case to this court for revision upon its merits, or at least upon all the errors found in the record of the case so removed, and as this statute enacts that these cases shall be re-examined in the same manner, and under the same regulations, and the writ shall have the same effect as in those cases, therefore *all* the errors found in a record so removed from a *State* court must be reviewed so far as they are essential to a correct final judgment on the whole case.

The proposition as thus stated has great force, and is entitled to our most careful consideration. If the invariable effect of a writ of error to a Circuit Court of the United States is to require of this court to examine and pass upon all the errors of the inferior court, and if re-examination of the judgment of the court in the same manner and under the same regulations, means that in the re-examination everything is to be considered which could be considered in ence to the Circuit Court, and nothing else, then the infera writ which is drawn from these premises would seem to be correct.

But let us consider this.

There are two principal methods known to English jurisprudence, and to the jurisprudence of the Federal courts, by which cases may be removed from an inferior to an appellate court for review. These are the writ of error and the appeal. There may be, and there are, other exceptional modes, such as the writ of certiorari at common law, and a certificate of division of opinion under the acts of Congress. The appeal, which is the only mode by which a decree in chancery or in admiralty can be brought from an inferior Federal court to this court, *does* bring up the whole case for re-examination on all the merits, whether of law or fact, and for consideration on these, as though no decree had ever been rendered. The writ of error is used to bring up for review all other cases, and when thus brought here the cases are *not* open for re-examination on their whole merits, but every controverted question of fact is excluded from consideration, and only

such errors as this court can see that the inferior court committed, and not all of these, can be the subject of this court's corrective power.

Now, one of the first things apparent on the face of this statute is that decrees in chancery, and in admiralty also, if a State court shall entertain jurisdiction of a case essentially of admiralty cognizance, are to be removed into this court from the State courts by this writ of error as well as judgments at law. And such has been the unquestioned practice under the act of 1789 from its passage until now. But this writ cannot bring a decree in chancery or admiralty from the Circuit Court to this court for review. It has no such effect, and we dismiss every day cases brought here by writ of error to a Circuit Court, because they can only be brought here by appeal, and the writ of error does not extend to them.*

Unless, therefore, we have been wholly wrong for eighty years, under the act of 1789, and unless we are prepared to exclude chancery cases decided in the State courts from the effect of this writ, it cannot, literally, have the same effect as in cases from a court of the United States; and if we could hold that the writ would have the same effect in removing the case, which is probably all that is meant, still the case when removed cannot literally be examined in the same manner, if by manner is meant the principle on which the judgment of the court must rest. For chancery cases, when brought here from the Circuit Courts, are brought for a trial *de novo* on all the evidence and pleadings in the case.

It is, therefore, too obvious to need comment, that this statute was designed to bring equity suits to this court from the State courts by writ of error, as well as law cases, and that it was not intended that they should be re-examined in the same manner as if brought here from a court of the United States, in the sense of the proposition we are considering.

But passing from this consideration, what has been the manner in which this court re-examines the judgments of

* The San Pedro, 2 Wheaton, 132; McCollum *v.* Eager, 2 Howard, 61; Minor *v.* Tillotson, Ib. 392; Benton *v.* Lapier, 22 Id. 118.

the Circuit Courts on writs of error, as touching the errors into which it will look for reversal? For it is this *manner* which is supposed to require an examination of all errors, whether of Federal law or otherwise under this statute. It requires but slight examination of the reports of the decisions or familiarity with the practice of this court, to know that it does not examine into or decide all the errors, or matter assigned for error, of the most of the cases before them. Many of these are found to be immaterial, the case being reversed or affirmed on some important point which requires of itself a judgment without regard to other matters. There are errors also which may be sufficiently manifest of which the appellate court has no jurisdiction, as in regard to a motion for a new trial, or to quash an indictment, or for a continuance, or amendment of pleadings, or some other matter which, however important to the merits of the case, is within the exclusive discretion of the inferior court.

Nor does it seem to us that the phrase "in the same manner and under the same regulations, and the writ shall have the same effect" is intended to furnish the rule by which the court shall be guided in the considerations which should enter into the judgment that it shall render. That the writ of error shall have the same effect as if directed to a Circuit Court can mean no more than that it shall transfer the case to the Supreme Court, and with it the record of the proceedings in the court below. This is the effect of the writ and its function and purpose. When the court comes to consider the case it may be limited by the nature of the writ, but what it shall review, and what it shall not, must depend upon the jurisdiction of the court in that class of cases as fixed by the law governing that jurisdiction.

So the regulations here spoken of are manifestly the rules under which the writ is issued, served, and returned; the notice to be given to the adverse party, and time fixed for appearance, argument, &c. Another important effect of the writ and of the regulations governing it is that when accompanied by a proper bond, given and approved within the prescribed time, it operates as a supersedeas to further pro-

ceedings in the inferior court. The word manner also much more appropriately expresses the general mode of proceeding with the case, after the writ has been allowed, the means by which the exigency of the writ is enforced, as by rule on the clerk, or mandamus to the court, and the progress of the case in the appellate court; as filing the record, docketing the case, time of hearing, order of the argument, and such other matters as are merely incident to final decision by the court. In short, the whole phrase is one eminently appropriate to the expression of the idea that these cases, though coming from State instead of Federal tribunals, shall be conducted in their progress through the court, in the matter of the general course of procedure, by the same rules of practice that prevail in cases brought under writs of error to the courts of the United States.

This is a different thing, however, from laying down rules of decision, or enacting the fundamental principles on which the court must decide this class of cases. It differs widely from an attempt to say that the court in coming to a judgment must consider this matter and disregard that. It is by no means the language in which a legislative body would undertake to establish the principles on which a court of last resort must form its judgment.

There is an instance of the use of very similar language by Congress in reference to the removal of causes into this court for review which has uniformly received the construction which we now place upon this.

By the Judiciary Act of 1789, there was no *appeal*, in the judicial sense of that word, to this court in any case. Decrees in suits in equity and admiralty were brought up by writ of error only, until the act of 1803; and as this writ could not bring up a case to be tried on its controverted questions of fact, the nineteenth section of the act of 1789 required the inferior courts to make a finding of facts which should be accepted as true by the appellate court. But by the act of March 3d, 1803,* these cases were to be brought

* 2 Stat. at Large, 244.

to this court by appeal, and to give this appeal full effect the nineteenth section of the act of 1789 was repealed, and upon such appeal the court below was directed to send to this court all the pleadings, depositions, testimony, and proceedings. In this manner the court obtained that full possession and control of the case which the nature of an appeal implies. And it is worthy of observation that Congress did not rely upon the mere legal operation of the word appeal to effect this, but provided in express terms the means necessary to insure this object.

But to avoid the necessity of many words as to the mode in which the case should be brought to this court and conducted when here, it was enacted "that such appeals shall be subject to the same rules, regulations, and restrictions as are prescribed in law in case of writs of error." Here is language quite as strong as that we have had under consideration, and strikingly similar both in its purport and in the purpose to be served by it. Yet no one ever supposed that when the court came to consider the judgment which it should render on such an appeal it was to be governed by the principles applicable to writs of error at common law. It was never thought for a moment, notwithstanding the use of the word "restrictions," that the court was limited to questions of law apparent on the record; but the uniform course has been to consider it as a case to be tried *de novo* on all the considerations of law and of fact applicable to it. There are many decisions of this court showing that these words have been held to apply alone to the course of procedure, to matters of mere practice, and not at all affording a rule for decision of the case on its merits in the conference-room.*

There is, therefore, nothing in the language of the act, as far as we have criticized it, which in express terms defines the extent of the re-examination which this court shall give to such cases.

But we have not yet considered the most important part

* Villabolos *v.* United States, 6 Howard, 81; Castro *v.* United States, 3 Wallace, 46; Mussina *v.* Cavazos, 6 Id. 355.

of the statute, namely, that which declares that it is only upon the existence of certain questions in the case that this court can entertain jurisdiction at all. Nor is the mere existence of such a question in the case sufficient to give jurisdiction—the question must have been *decided* in the State court. Nor is it sufficient that such a question was raised and was decided. It must have been decided in a certain way, that is, against the right set up under the Constitution, laws, treaties, or authority of the United States. The Federal question may have been erroneously decided. It may be quite apparent to this court that a wrong construction has been given to the Federal law, but if the right claimed under it by plaintiff in error has been conceded to him, this court cannot entertain jurisdiction of the case, so very careful is the statute, both of 1789 and of 1867, to narrow, to limit, and define the jurisdiction which this court exercises over the judgments of the State courts. Is it consistent with this extreme caution to suppose that Congress intended, when those cases came here, that this court should not only examine those questions, but all others found in the record? —questions of common law, of State statutes, of controverted facts, and conflicting evidence. Or is it the more reasonable inference that Congress intended that the case should be brought here that *those questions* might be decided and *finally* decided by the court established by the Constitution of the Union, and the court which has always been supposed to be not only the most appropriate but the only proper tribunal for their final decision? No such reason nor any necessity exists for the decision by this court of other questions in those cases. The jurisdiction has been exercised for nearly a century without serious inconvenience to the due administration of justice. The State courts are the appropriate tribunals, as this court has repeatedly held, for the decision of questions arising under their local law, whether statutory or otherwise. And it is not lightly to be presumed that Congress acted upon a principle which implies a distrust of their integrity or of their ability to construe those laws correctly.

Let us look for a moment into the effect of the proposition contended for upon the cases as they come up for consideration in the conference-room. If it is found that no such question is raised or decided in the court below, then all will concede that it must be dismissed for want of jurisdiction. But if it is found that the Federal question was raised and was decided against the plaintiff in error, then the first duty of the court obviously is to determine whether it was correctly decided by the State court. Let us suppose that we find that the court below was right in its decision on that question. What, then, are we to do? Was it the intention of Congress to say that while you can only bring the case here on account of this question, yet when it is here, though it may turn out that the plaintiff in error was wrong on that question, and the judgment of the court below was right, though he has wrongfully dragged the defendant into this court by the allegation of an error which did not exist, and without which the case could not rightfully be here, he can still insist on an inquiry into all the other matters which were litigated in the case? This is neither reasonable nor just.

In such case both the nature of the jurisdiction conferred and the nature and fitness of things demand that, no error being found in the matter which authorized the re-examination, the judgment of the State court should be affirmed, and the case remitted to that court for its further enforcement.

The whole argument we are combating, however, goes upon the assumption that when it is found that the record shows that one of the questions mentioned has been decided against the claim of the plaintiff in error, this court has jurisdiction, and that jurisdiction extends to the whole case. If it extends to the whole case then the court must re-examine the whole case, and if it re-examines it must decide the whole case. It is difficult to escape the logic of the argument if the first premise be conceded. But it is here the error lies. We are of opinion that upon a fair construction of the whole language of the section the jurisdiction con-

ferred is limited to the decision of the questions mentioned in the statute, and, as a necessary consequence of this, to the exercise of such powers as may be necessary to cause the judgment in that decision to be respected.

We will now advert to one or two considerations apart from the mere language of the statute, which seem to us to give additional force to this conclusion.

It has been many times decided by this court, on motions to dismiss this class of cases for want of jurisdiction, that if it appears from the record that the plaintiff in error raised and presented to the court by pleadings, prayer for instruction, or other appropriate method, one of the questions specified in the statute, and the court ruled against him, the jurisdiction of this court attached, and we must hear the case on its merits.* Heretofore these merits have been held to be to determine whether the propositions of law involved in the specific Federal question were rightly decided, and if not, did the *case* of plaintiff in error, on the pleadings and evidence, come within the principle ruled by this court. This has always been held to be the exercise of the jurisdiction and re-examination of the case provided by the statute. But if when we once get jurisdiction, everything in the case is open to re-examination, it follows that every case tried in any State court, from that of a justice of the peace to the highest court of the State, may be brought to this court for final decision on all the points involved in it.

That this is no exaggeration let us look a moment.

Suppose a party is sued before a justice of the peace for assault and battery. He pleads that he was a deputy marshal of the United States, and in serving a warrant of arrest on plaintiff he gently laid his hands on him and used no more force than was necessary. He also pleads the general issue. We will suppose that to the special plea some response is made which finally leads to a decision against the defendant on that plea. And judgment is rendered against

* Rector *v.* Ashley, 6 Wallace, 142; Bridge Proprietors *v.* Hoboken Co., 1 Id. 116; Furman *v.* Nichol, 8 Id. 44; Armstrong *v.* Treasurer, 16 Peters, 281; Crowell *v.* Randell, 10 Id. 368.

him on the general issue also. He never was a deputy marshal. He never had a writ from a United States court; but he insists on that plea through all the courts up to this, and when he gets here the record shows a Federal question decided against him, and this court must re-examine the whole case, though there was not a particle of truth in his plea, and it was a mere device to get the case into this court. Very many cases are brought here now of that character. Also, cases where the moment the Federal question is stated by counsel we all know that there is nothing in it. This has become such a burden and abuse that we either refuse to hear, or hear only one side of many such, and stop the argument, and have been compelled to adopt a rule that when a motion is made to dismiss it shall only be heard on printed argument. If the temptation to do this is so strong under the rule of this court for over eighty years to hear only the Federal question, what are we to expect when, by merely *raising* one of those questions in any case, the party who does it can bring it here for decision on all the matters of law and fact involved in it. It is to be remembered that there is not even a limitation as to the value in controversy in writs to the State courts as there is to the Circuit Courts; and it follows that there is no conceivable case so insignificant in amount or unimportant in principle that a perverse and obstinate man may not bring it to this court by the aid of a sagacious lawyer raising a Federal question in the record—a point which he may be wholly unable to support by the facts, or which he may well know will be decided against him the moment it is stated. But he obtains his object, if this court, when the case is once open to re-examination on account of that question, must decide all the others that are to be found in the record.

It is impossible to believe that Congress intended this result, and equally impossible that they did not see that it would follow if they intended to open the cases that are brought here under this section to re-examination on all the points involved in them and necessary to a final judgment on the merits.

The twenty-fifth section of the act of 1789 has been the subject of innumerable decisions, some of which are to be found in almost every volume of the reports from that year down to the present. These form a system of appellate jurisprudence relating to the exercise of the appellate power of this court over the courts of the States. That system has been based upon the fundamental principle that this jurisdiction was limited to the correction of errors relating solely to Federal law. And though it may be argued with some plausibility that the reason of this is to be found in the restrictive clause of the act of 1789, which is omitted in the act of 1867, yet an examination of the cases will show that it rested quite as much on the conviction of this court that without that clause and on general principles the jurisdiction extended no further. It requires a very bold reach of thought, and a readiness to impute to Congress a radical and hazardous change of a policy vital in its essential nature to the independence of the State courts, to believe that that body contemplated, or intended, what is claimed, by the mere omission of a clause in the substituted statute, which may well be held to have been superfluous, or nearly so, in the old one.

Another consideration, not without weight in seeking after the intention of Congress, is found in the fact that where that body has clearly shown an intention to bring the whole of a case which arises under the constitutional provision as to its subject-matter under the jurisdiction of a Federal court, it has conferred its cognizance on Federal courts of original jurisdiction and not on the Supreme Court.

It is the same clause and the same language which declares in the Constitution that the judicial power shall extend to cases arising under the Constitution, laws, and treaties of the United States and to cases of admiralty and maritime jurisdiction. In this same act of 1789 the jurisdiction in admiralty and maritime cases is conferred on the District Courts of the United States, and is made exclusive. Congress has in like manner conferred upon the same court exclusive original jurisdiction in all cases of bankruptcy.

Opinion of the court.—Second question: The extent of jurisdiction.

Upon the Circuit Court it has conferred jurisdiction with exclusive reference to matters of Federal law, without regard to citizenship, either originally or by removal from the State courts in cases of conflicting titles to land under grants from different States.* In cases arising under the patent laws.† In suits against banking associations organized under the laws of the United States.‡ In suits against individuals on account of acts done under the revenue laws of the United States.§ In suits for damages for depriving, under color of State laws, any person of rights, privileges, or immunities secured to him by the Constitution or laws of the United States.‖

The acts referred to, and perhaps others not enumerated, show very clearly that when Congress desired a case to be tried on all the issues involved in it because one of those issues was to be controlled by the Constitution, laws, or treaties of the United States, it was their policy to vest its cognizance in a court of original jurisdiction, and not in an appellate tribunal.

And we think it equally clear that it has been the counterpart of the same policy to vest in the Supreme Court, as a court of *appeal* from the State courts, a jurisdiction limited to the questions of a Federal character which might be involved in such cases.

It is not difficult to discover what the purpose of Congress in the passage of this law was. In a vast number of cases the rights of the people of the Union, as they are administered in the courts of the States, must depend upon the construction which those courts gave to the Constitution, treaties, and laws of the United States. The highest courts of the States were sufficiently numerous, even in 1789, to cause it to be feared that, with the purest motives, this construc-

* 1 Stat. at Large, 89. † 16 Id. 206, 215. ‡ 13 Id. 116.
§ Act of March 2d, 1833, 4 Id 632, and act of July 13th, 1866, 14 Id. 176.
‖ Act of May 31st, 1870, 16 Id. 114; and act of April 20th, 1871, 17 Id. 13. See also for removal of cases of similar character from State courts, act of March 3d, 1863, 12 Id. 756; act of April 9th, 1866, 14 Id. 46; and act of May 31st, 1870, 16 Id. 144.

tion given in different courts would be various and conflicting. It was desirable, however, that whatever conflict of opinion might exist in those courts on other subjects, the rights which depended on the Federal laws should be the same everywhere, and that their construction should be uniform. This could only be done by conferring upon the Supreme Court of the United States—the appellate tribunal established by the Constitution—the right to decide these questions finally and in a manner which would be conclusive on all other courts, State or National. This was the first purpose of the statute, and it does not require that, in a case involving a variety of questions, any other should be decided than those described in the act.

Secondly. It was no doubt the purpose of Congress to secure to every litigant whose rights depended on any question of Federal law that that question should be decided for him by the highest Federal tribunal if he desired it, when the decisions of the State courts were against him on that question. That rights of this character, guaranteed to him by the Constitution and laws of the Union, should not be left to the exclusive and final control of the State courts.

There may be some plausibility in the argument that these rights cannot be protected in all cases unless the Supreme Court has final control of the whole case. But the experience of eighty-five years of the administration of the law under the opposite theory would seem to be a satisfactory answer to the argument. It is not to be presumed that the State courts, where the rule is clearly laid down to them on the Federal question, and its influence on the case fully seen, will disregard or overlook it, and this is all that the rights of the party claiming under it require. Besides, by the very terms of this statute, when the Supreme Court is of opinion that the question of Federal law is of such relative importance to the whole case that it should control the final judgment, that court is authorized to render such judgment and enforce it by its own process. It cannot, therefore, be maintained that it is in any case necessary for the security of the rights claimed under the Constitution, laws, or treaties of

the United States that the Supreme Court should examine and decide other questions not of a Federal character.

And we are of opinion that the act of 1867 does not confer such a jurisdiction.

This renders unnecessary a decision of the question whether, if Congress had conferred such authority, the act would have been constitutional. It will be time enough for this court to inquire into the existence of such a power when that body has attempted to exercise it in language which makes such an intention so clear as to require it.

The omitted clause of the act of 1789 declared that no other error should be regarded as a ground of reversal than such as appears on the face of the record and immediately respects the beforementioned questions.

It is probable that in determining whether one of those questions was actually raised and decided in the State court, this court has been inclined to restrict its inquiries too much by this express limitation of the inquiry "to the face of the record."* What was the record of a case was pretty well understood as a common-law phrase at the time that statute was enacted. But the statutes of the States and new modes of proceedings in those courts have changed and confused the matter very much since that time.

It is in reference to one of the necessities thus brought about that this court long since determined to consider as part of the record the opinions delivered in such cases by the Supreme Court of Louisiana.† And though we have repeatedly decided that the opinions of other State courts cannot be looked into to ascertain what was decided, we see no reason why, since this restriction is removed, we should not so far examine those opinions, when properly authenticated, as may be useful in determining that question. We have been in the habit of receiving the certificate of the court signed by its chief justice or presiding officer on that point, though not as conclusive, and these opinions are quite

* Williams *v.* Norris, 12 Wheaton, 117; Rector *v.* Ashley, 6 Wallace, 142

† Grand Gulf Railroad Co. *v.* Marshall, 12 Howard, 165; Consin *v.* Blanc's Executor, 19 Id. 202.

as satisfactory and may more properly be treated as part of the record than such certificates.

But after all, the record of the case, its pleadings, bills of exceptions, judgment, evidence, in short, its record, whether it be a case in law or equity, must be the chief foundation of the inquiry; and while we are not prepared to fix any absolute limit to the sources of the inquiry under the new act, we feel quite sure it was not intended to open the scope of it to any loose range of investigation.

It is proper, in this first attempt to construe this important statute as amended, to say a few words on another point. What shall be done by this court when the question has been found to exist in the record, and to have been decided against the plaintiff in error, and *rightfully* decided, we have already seen, and it presents no difficulties.

But when it appears that the Federal question was decided erroneously against the plaintiff in error, we must then reverse the case undoubtedly, if there are no other issues decided in it than that. It often has occurred, however, and will occur again, that there are other points in the case than those of Federal cognizance, on which the judgment of the court below may stand; those points being of themselves sufficient to control the case.

Or it may be, that there are other issues in the case, but they are not of such controlling influence on the whole case that they are alone sufficient to support the judgment.

It may also be found that notwithstanding there are many other questions in the record of the case, the issue raised by the Federal question is such that its decision must dispose of the whole case.

In the two latter instances there can be no doubt that the judgment of the State court must be reversed, and under the new act this court can either render the final judgment or decree here, or remand the case to the State court for that purpose.

But in the other cases supposed, why should a judgment be reversed for an error in deciding the Federal question, if the same judgment must be rendered on the other points

in the case? And why should this court reverse a judgment which is right on the whole record presented to us; or where the same judgment will be rendered by the court below, after they have corrected the error in the Federal question?

We have already laid down the rule that we are not authorized to examine these other questions for the purpose of deciding whether the State court ruled correctly on them or not. We are of opinion that on these subjects not embraced in the class of questions stated in the statute, we must receive the decision of the State courts as conclusive.

But when we find that the State court has decided the Federal question erroneously, then to prevent a useless and profitless reversal, which can do the plaintiff in error no good, and can only embarrass and delay the defendant, we must so far look into the remainder of the record as to see whether the decision of the Federal question alone is sufficient to dispose of the case, or to require its reversal; or on the other hand, whether there exist other matters in the record actually decided by the State court which are sufficient to maintain the judgment of that court, notwithstanding the error in deciding the Federal question. In the latter case the court would not be justified in reversing the judgment of the State court.

But this examination into the points in the record other than the Federal question is not for the purpose of determining whether they were correctly or erroneously decided, but to ascertain if any such have been decided, and their sufficiency to maintain the final judgment, as decided by the State court.

Beyond this we are not at liberty to go, and we can only go this far to prevent the injustice of reversing a judgment which must in the end be reaffirmed, even in this court, if brought here again from the State court after it has corrected its error in the matter of Federal law.

Finally, we hold the following propositions on this subject as flowing from the statute as it now stands:

1. That it is essential to the jurisdiction of this court over

the judgment of a State court, that it shall appear that one of the questions mentioned in the act must have been raised, and presented to the State court.

2. That it must have been decided by the State court, or that its decision was necessary to the judgment or decree, rendered in the case.

3. That the decision must have been against the right claimed or asserted by plaintiff in error under the Constitution, treaties, laws, or authority of the United States.

4. These things appearing, this court has jurisdiction and must examine the judgment so far as to enable it to decide whether this claim of right was correctly adjudicated by the State court.

5. If it finds that it was rightly decided, the judgment must be affirmed.

6. If it was erroneously decided against plaintiff in error, then this court must further inquire, whether there is any other matter or issue adjudged by the State court, which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue raised by the Federal question. If this is found to be the case, the judgment must be affirmed without inquiring into the soundness of the decision on such other matter or issue.

7. But if it be found that the issue raised by the question of Federal law is of such controlling character that its correct decision is necessary to any final judgment in the case, or that there has been no decision by the State court of any other matter or issue which is sufficient to maintain the judgment of that court without regard to the Federal question, then this court will reverse the judgment of the State court, and will either render such judgment here as the State court should have rendered, or remand the case to that court, as the circumstances of the case may require.

Applying the principles here laid down to the case now before the court, we are of opinion that this court has jurisdiction, and that the judgment of the Supreme Court of Tennessee must be affirmed.

The suit was a bill in chancery brought by Murdock and

Opinion of the court.—The immediate case disposed of.

others against the city of Memphis to have a decree establishing their right in certain real estate near that city. The United States having determined to build a navy yard at Memphis, about the year 1844, or previous thereto, the city of Memphis, on the 14th day of September of that year, conveyed to the United States the land in controversy by an ordinary deed of general warranty, expressing on its face the consideration of $20,000 paid, and designating no purpose for which the land was conveyed. After retaining possession of the land for about ten years without building a navy yard, the United States abandoned that purpose, and by an act approved August 5th, 1854, ceded the property to the city of Memphis by its corporate name for the use and benefit of said city.

The plaintiffs in error, by their bill, allege that the title was originally conveyed to the city of Memphis, in trust, for certain purposes, including that of having a navy yard built on it by the United States; that when the title reverted to the city by reason of the abandonment of the place as a navy yard by the United States, and the act of Congress aforesaid, the city received the title in trust for the original grantors, who are the plaintiffs, or who are represented by plaintiffs. A demurrer to the bill was filed. Also an answer denying the trust and pleading the statute of limitations. On the hearing the bill was dismissed, and this decree was affirmed by the Supreme Court of the State. The complainants, in their bill, and throughout the case, insisted that the effect of the act of 1854 was to vest the title in the mayor or aldermen of the city in trust for them.

It may be very true that it is not easy to see anything in the deed by which the United States received the title from the city, or the act by which they ceded it back, which raises such a trust, but the complainants claimed a right under this act of the United States, which was decided against them by the Supreme Court of Tennessee, and this claim gives jurisdiction of that question to this court.

But we need not consume many words to prove that neither by the deed of the city to the United States, which

is an ordinary deed of bargain and sale for a valuable consideration, nor from anything found in the act of 1854,* is there any such trust to be inferred. The act, so far from recognizing or implying any such trust, cedes the property to the mayor and aldermen *for the use of the city.* We are, therefore, of opinion that this, the only Federal question in the case, was rightly decided by the Supreme Court of Tennessee.

But conceding this to be true, the plaintiffs in error have argued that the court having jurisdiction of the case must now examine it upon all the questions which affect its merits; and they insist that the conveyance by which the city of Memphis received the title previous to the deed from the city to the government, and the circumstances attending the making of the former deed are such, that when the title reverted to the city, a trust was raised for the benefit of plaintiffs.

After what has been said in the previous part of this opinion, we need discuss this matter no further. The claim of right here set up is one to be determined by the general principles of equity jurisprudence, and is unaffected by anything found in the Constitution, laws, or treaties of the United States. Whether decided well or otherwise by the State court, we have no authority to inquire. According to the principles we have laid down as applicable to this class of cases, the judgment of the Supreme Court of Tennessee must be

AFFIRMED.

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

I dissent from so much of the opinion of the court as denies the jurisdiction of this court to determine the whole case, where it appears that the record presents a Federal question and that the Federal question was erroneously decided to the prejudice of the plaintiff in error; as in that

* 10 Stat. at Large, 586.

state of the record it is, in my judgment, the duty of this court, under the recent act of Congress, to decide the whole merits of the controversy, and to affirm or reverse the judgment of the State court. Tested by the new law it would seem that it must be so, as this court cannot in that state of the record dismiss the writ of error, nor can the court reverse the judgment without deciding every question which the record presents.

Where the Federal question is rightly decided the judgment of the State court may be affirmed, upon the ground that the jurisdiction does not attach to the other questions involved in the merits of the controversy; but where the Federal question is erroneously decided the whole merits must be decided by this court, else the new law, which it is admitted repeals the twenty-fifth section of the Judiciary Act, is without meaning, operation, or effect, except to repeal the prior law.

Sufficient proof of the fact that the new law was not intended to be without meaning and effective operation is found in the fact that the provision in the old law which restricts the right of the plaintiff in error or appellant to assign for error any matter except such as respects one of the Federal questions enumerated in the twenty-fifth section of the Judiciary Act, is wholly omitted in the new law.

Mr. Justice BRADLEY, dissenting:

I feel obliged to dissent from the conclusion to which a majority of the court has come on the public question in this cause, but shall content myself with stating briefly the grounds of that dissent, without entering into any prolonged argument on the subject.

Meantime, however, it is proper to say that I deem it very doubtful whether the court has any jurisdiction at all over this particular case. The complainants claim the property in question under the terms, and what they regard as the true construction, of the trust-deed of July, 1844, whereby the property was conveyed to the city of Memphis "for the location of the naval depot;" and to Wheatley, trustee for

the grantors, "in case the same shall not be appropriated by the United States for that purpose." This deed was acknowledged on the 19th of September, 1844, and (probably at the same time) a deed dated 14th of September, 1844, was executed by the city to the United States, conveying the land in fee without any conditions or uses expressed. Operations for erecting and establishing a navy yard on the premises were commenced and were continued for several years, but were finally abandoned, and on the 5th of August, 1854, Congress, by an act, ceded the property to the city of Memphis for the use and benefit of the city. The defendants, the city of Memphis, claim both legal and beneficial title to the property under this act of Congress, and the Supreme Court of Tennessee sustained the claim—or, at least, did not sustain the adverse claim of the complainants. The claim of the complainants was not based on this act of Congress, but on the original deed of 1844, which limited the estate in the lands to their trustee "in case the same shall not be appropriated by the United States for that purpose," *i. e.*, the purpose of a navy yard. They claim that by the true construction of this clause a right to the land accrued to them, as well by an abandonment of the project of a navy yard as by its never being adopted. The conduct of the government in relation to the land, it is true, is claimed by them to be such as calls into operative effect the clause of the deed on which they rely. They construe that conduct as an abandonment of the enterprise. The act of cession by Congress to the city of Memphis is only one fact in a long chain of circumstances which they educe to show such abandonment.

It seems to me, therefore, that their claim is based entirely on the deed of 1844; and that the subsequent action of the government, so far as it has any effect in the case, is merely matter of evidence on the question of fact of abandonment; and that the failure of the government, from the beginning, to take any steps for establishing a navy yard on the land would have been no more a mere fact *in pais* to be proved in order to support the claim of the complainants, than were all the acts of the government which did, in fact,

take place. Proving that the government did not appropriate the land for a navy yard is a very different thing from setting up a claim to the land under an act of Congress.

I think, therefore, that in this case there was no title or right claimed by the appellants under any statute of, or authority exercised under, the United States; and consequently that there was no decision against any such title; and, therefore, that this court has no jurisdiction.

But supposing, as the majority of the court holds, that it has jurisdiction, I cannot concur in the conclusion that we can only decide the Federal question raised by the record. If we have jurisdiction at all, in my judgment we have jurisdiction of the *case*, and not merely of a *question* in it. The act of 1867, and the twenty-fifth section of the Judiciary Act both provide that a final judgment or decree in any suit in the highest court of a State, where is drawn in question certain things relating to the Constitution or laws of the United States, or to rights or immunities claimed under the United States, and the decision is adverse to such Constitution, laws, or rights, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error. Had the original act stopped here there could have been no difficulty. This act derives its authority and is intended to carry into effect, at least in part, that clause of the Constitution which declares 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 under their authority—not to all *questions*, but to all *cases*. This word "cases," in the residue of the section, has frequently been held to mean suits, actions, embracing the whole cases, not mere questions in them; and that is undoubtedly the true construction. The Constitution, therefore, would have authorized a revision by the judiciary of the United States of all *cases* decided in State courts in which questions of United States law or Federal rights are necessarily involved. Congress in carrying out that clause could have so ordained. And the law referred to, had it

stopped at the point to which I have quoted it above, would clearly have been understood as so ordaining. But the twenty-fifth section of the Judiciary Act went on to declare that in such cases no other error should be assigned or regarded as a ground of reversal than such as immediately respected the question referred to as the ground of jurisdiction. It having been early decided that Congress had power to regulate the exercise of the appellate jurisdiction of the Supreme Court, the court has always considered itself bound by this restriction, and as authorized to reverse judgments of State courts only for errors in deciding the Federal questions involved therein.

Now, Congress, in the act of 1867, when revising the twenty-fifth section of the Judiciary Act, whilst following the general frame and modes of expression of that section, omitted the clause above referred to, which restricted the court to a consideration of the Federal questions. This omission cannot be regarded as having no meaning. The clause by its presence in the original act meant something, and effected something. It had the effect of restricting the consideration of the court to a certain class of questions as a ground of reversal, which restriction would not have existed without it. The omission of the clause, according to a well-settled rule of construction, must necessarily have the effect of removing the restriction which it effected in the old law.

In my judgment, therefore, if the court had jurisdiction of the case, it was bound to consider not only the Federal question raised by the record, but the whole case. As the court, however, has decided otherwise, it is not proper that I should express any opinion on the merits.

The case having been reargued, as well as argued originally, before the appointment of the CHIEF JUSTICE, he took no part in the judgment.

THE RAILROAD COMPANY *v.* MARYLAND.

[ON MOTION.]

Where, on error to the supreme court of a State, the record shows a decision of the State court on a Federal question properly presented, and of which this court could take jurisdiction, and shows also the decision of a local question, the writ of error will not be dismissed on motion in advance of the hearing. The parties are entitled to be heard on the soundness of the decision below on the Federal question, on the sufficiency of that question to control the judgment in the whole case, and on the sufficiency of any other point decided to affirm the judgment even if the Federal question was erroneously decided.

ON motion to dismiss a writ of error to the Court of Appeals of Maryland. The case was thus:

The State of Maryland sued the Baltimore and Ohio Railroad Company in the Supreme Court of Baltimore, in assumpsit, to recover one-fifth of the gross receipts of the company, from January, 1860, to January, 1870, for the transportation of passengers upon what is known as "the Washington Branch Road," a road running from Baltimore in Maryland under a charter from Maryland, to the boundary between that State and the District of Columbia; the line of way being continued by a charter from Congress to the City of Washington.

By the act of the State of Maryland of 1832, under which the branch road was built, one-fifth of the entire receipts from passengers was to go to the State. The defendant set up, as a defence to the action, that this was a tax on passengers for the privilege of passing through the State of Maryland, and was, therefore, void under the Constitution of the United States, within the principle of the case of *Crandall* v. *Nevada*.*

The Superior Court sustained this view of the subject and gave judgment for the defendant. On appeal to the Court

* 6 Wallace, 35.

of Appeals, that court reversed the judgment and ordered a new trial, at which the judgment was rendered for the plaintiff, and on a second appeal this was affirmed.

The defendant now brought the case here as within the second section of the act of February 5th, 1867, quoted *supra*, pp. 592, 593, right-hand column.

There was no question that the defendant asserted throughout the entire case a right and an immunity under the Constitution of the United States; that the law of the Maryland legislature was in conflict with that Constitution, and that this claim of right was decided against the defendant. The opinion of the Court of Appeals, which was in the record, showed that all the members of that court were of opinion that the act of the Maryland legislature was not in conflict with the Federal Constitution, and so decided in this case. The case was, therefore, clearly within the second section of the act of 1867.

But that court in its opinion placed its judgment also, by a majority (two judges dissenting), on the ground that the railroad company having acted as the agent of the State to collect the money from the passengers, could not in this action avail itself of the illegality of their act in demanding and receiving it. And this also was a proposition which was made in the case at its first trial and insisted on throughout.

Mr. A. K. Seyester, Attorney-General of Maryland, now moved to dismiss the writ of error, urging that this, the second ground, just abovementioned as one on which the Court of Appeals placed its judgment, was of itself sufficient to control the case, and citing *Rector* v. *Ashley*,* *Gibson* v. *Chouteau*,† and *Klinger* v. *Missouri*,‡ and other cases, decided while the twenty-fifth section of the Judiciary Act was in force, to show that where there were other questions in the record on which the judgment of the State court might have rested, independently of the Federal question, this court could not reverse.

* 6 Wallace, 147. † 8 Id. 314. ‡ 13 Id. 263.

Messrs. A. K. Seyester, I. N. Steele, P. F. Thomas, and S. T. Wallis, in support of the motion, again urged upon this court that the second ground taken by the Court of Appeals as above said, was of itself sufficient to control the case.

Messrs. Reverdy Johnson, J. H. B. Latrobe, and C. J. M. Gwin, contra.

Mr. Justice MILLER delivered the opinion of the court.

Some of the decisions of this court under the act of 1789 would undoubtedly justify the view taken by the counsel of the defendant in error, in support of the motion to dismiss, if it were very clear that the second proposition on which the Court of Appeals placed its judgment was sufficient to control the case, and that it involved no consideration of Federal law.

But the act of 1789 contained restrictive language not in the act of 1867; and in construing the statute as it now stands, we have ruled in the case of *Murdock* v. *Memphis*, just decided, that where the Federal question has been raised, and has been decided against the plaintiff in error, the jurisdiction has attached, and it must be heard on the merits. To what this examination on the merits shall extend we have in that opinion considered. But until we have determined that the State court decided erroneously the Federal question which it did decide, we can go no further into the re-examination.

The counsel of both parties in this court are entitled to be heard when the record shows the existence of a decision which gives us jurisdiction, on the soundness of that decision, on its sufficiency to control the judgment in the whole case, and on the sufficiency of any other point decided, to affirm the judgment even if the Federal question was erroneously decided.

For these reasons the motion to dismiss the case is

OVERRULED.

MATHEWS *v.* MCSTEA.

The decision of a State court passing upon the effect produced by the act of the executive on a given contract in inaugurating the late civil war in the United States, is reviewable here by writ of error under the second section of the act of 5th February, 1867, to amend the Judiciary Act; § 709 of the Revised Statutes of the United States.

ERROR to the Court of Common Pleas of New York.

On motion to dismiss the writ for want of jurisdiction. The case was thus:

On the 15th of April and 19th of April, 1861, the President, by his proclamation, declared that insurrection existed in Louisiana and certain other Southern States, and that the ports of Louisiana, with those of the said States, were under blockade.

On the 23d of the same April, a firm composed of three persons, Mathews, Brander, and Chambliss—*of whom Mathews resided in New York and the other two in New Orleans*—accepted *at New Orleans*, a draft drawn on them for $8050, payable twelve months after date.

On the 13th of July, 1861, an act of Congress was passed* authorizing the President to issue a proclamation declaring the inhabitants of any State where insurrection existed in a state of insurrection against the United States, and the act declared that thereupon "all commercial intercourse by and between the same, and the citizens thereof, and the citizens of the rest of the United States, shall cease and be unlawful, so long as such condition of hostilities shall continue." And on the 16th of August, 1861, the President did issue his proclamation,† declaring Louisiana, with other States, in a state of insurrection against the United States, and forbidding all commercial intercourse with the inhabitants of such States.

On the 26th of February, 1862 (after this act and procla-

* 12 Stat. at Large, 257, § 5.

† Ib. Appendix.

mation), other drafts were drawn and accepted in the same way.

All the drafts came before maturity into the hands of one McStea, and he brought suit in the court below on the whole of them. Mathews alone appeared. He set up the defence that at the time of the acceptances war had been declared and existed between that part of the United States in which he resided and that in which his other partners resided, by virtue of which the partnership had been dissolved before these acceptances were made, and that the contracts as to him were, therefore, void. The court decided against him as to the acceptance made on the 23d of April, and in his favor as to the others. He then took the case into the Court of Appeals; and there, upon the acceptance of the 23d of April, for $8050, raised the same question as before, and no other; contending that the proclamations of blockade of the 15th and 19th of April, by the President, had the effect to dissolve the partnership, and that by reason of them the act of acceptance was void as to him.

The Court of Appeals in its opinion discussed the question at what stage of the civil war the rule against commercial intercourse with the enemy took effect so as to dissolve the contract of partnership. Conceding that under the decision in *The Prize Cases*,* the war existed for some purposes prior to that act, the court still held that it did not become, until recognized by the act of Congress of July 13th, 1861, of such a character as to suspend commercial intercourse, and, therefore, that it had no effect upon the acceptance of the 23d of April, 1861. As to the other acceptances it admitted that they had been rightly disposed of in the court below. Accordingly the question abovementioned as raised by Mathews—the only question in the case, as heard and decided in the Court of Appeals,—was decided against him.

The record having been remitted according to the practice of New York from the Court of Appeals to the court where the suit was brought, in order that the judgment might be

* 2 Black, 635.

carried into effect, Mathews now brought the case here, as within the second section of the act of February 5th, 1867, set forth *supra*, p. 592, 593, right-hand column.

Mr. A. F. Smith, in support of the motion to dismiss:

It cannot be pretended that the case is within the first provision of the act, for the final judgment was not against the validity of any treaty or statute of, or authority exercised under the United States.

Nor is it within the second, for the final judgment was not in favor of the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States.

Nor is it within that part of the third which speaks of "a commission held or authority exercised under the United States:" for Mathews held no such commission and exercised no such authority. There accordingly only remains for consideration the point whether he claimed in the State court "*any title, right, privilege, or immunity under the Constitution, or any treaty or statute of the United States,*" against which the decision was. And it is clear that he did not. His position was that the war of the rebellion dissolved the partnership, on or before April 23d, 1861, and that he was not, therefore, bound by the acceptance of his firm on that day. He asserted this as a general principle. He did not assert that any statute of the United States made it so; nor that his liability was affected either way by the non-intercourse act of July 13th, 1861, passed nearly three months after the acceptance, and under which the non-intercourse proclamation was issued on August 16th of that year.

Messrs. J. Sherwood and W. M. Evarts, contra:

I. Mathews, it is plain, insisted, in the State court, that under the act of July 13th, 1861, the proclamations of the President of April 15th, 1861, and April 19th, 1861, were *approved, legalized, and made valid.*

Under these proclamations he claimed immunity from

liability as a copartner in a firm, which he insisted was dissolved on the day of the date of the proclamation of blockade, four days before the date of the acceptance made by the firm.

He did then claim an immunity under that statute, and the decision in the Court of Appeals was against that immunity.

II. In the decision of the case there was drawn in question the construction of clauses of the Constitution.

The clauses giving to Congress the power to declare war, and defining the authority and powers of the executive, were necessarily considered in order to determine whether the President, in the absence of Congress, could initiate war or repel war brought on by foreign powers or enemies at home.

The questions actually and necessarily determined were:

1. Whether the war of the rebellion in the beginning was a war carrying with it the consequences of international war.

2. Whether by the war, beginning as it did, commercial intercourse was, in the month of April, 1861, suspended.

These were certainly Federal questions requiring the most enlarged and thoughtful examination of the Constitution of the United States.*

Mr. Justice MILLER delivered the opinion of the court.

We are of opinion that the only question made and decided in this case against plaintiff in error was the sufficiency of the acts of the President to inaugurate a war which would render invalid this contract, and that this is one of the questions embraced by the act of February 5th, 1867.

The motion to dismiss is, therefore,

OVERRULED.

* The Prize Case, 2 Black; The Protector, 12 Wallace, 700; The United States v. Lane, 8 Id. 195.

CADLE *v.* BAKER.

The debtors of a National bank, when sued by a person whom the comptroller, professing to act in pursuance of the fiftieth section of the National Currency Act, has appointed to be its receiver, cannot inquire into the lawfulness of such receiver's appointment.

ERROR to the District Court for the Middle District of Alabama; the case being thus:

The forty-sixth and forty-seventh sections of the National Currency Act* provide that if any of the banks which it authorizes fail to redeem their notes, the holder may have the notes protested; and that notice of the protest shall be forwarded to the Comptroller of the Currency; that upon receiving notice of such failure to redeem, the comptroller shall send a special agent to ascertain the facts; and if, on the report of such agent, he shall be satisfied of the failure, he shall declare the securities of the bank pledged for redemption of the notes forfeited, and give notice to the noteholders to present them to him for payment.

The fiftieth section enacts that on becoming satisfied of the failure "as specified in this act," he may also appoint a receiver, who, under his direction, shall take possession of the assets of the bank and collect all debts due to it, &c.

The same section provides, however, that if the bank denies that it has failed to redeem its notes, it may apply to the nearest District Court or Territorial court to enjoin further proceedings in the premises, when, if such court, on hearing the case, shall be satisfied that there has been no failure, it may enjoin both comptroller and receiver from all further proceedings on account of such alleged refusal.

This statute being in force, the Comptroller of the Currency appointed one Cadle receiver of the First National Bank of Selma, and the said Cadle, as such receiver, brought suit in the court below against a certain Baker, to recover

* Of June 3d, 1864, 13 Stat. at Large, 113.

the amount due upon a bill of exchange, drawn by Cadle and indorsed to the bank, and held as part of its assets at the time when Cadle was appointed receiver. The declaration contained an averment in substance that the Comptroller of the Currency having become satisfied, "as specified in the Banking Act," that the bank had refused to pay its notes, did appoint the plaintiff "a receiver as provided by the fiftieth section of the act," and that he had qualified under his appointment and entered upon the performance of his duties. The defendants demurred to the declaration, and, in effect, assigned for cause that it was not specifically averred that each and all of the several things had been done which were provided for in sections forty-six and forty-seven, in order to furnish the evidence to satisfy the comptroller that the bank had refused to pay its notes and was in default. The court below sustained the demurrer and gave judgment for the defendant. The receiver now brought the case here.

Mr. P. Phillips, for the plaintiff in error; no opposing counsel.

The CHIEF JUSTICE delivered the opinion of the court.

We think such averments as the defendant alleges to be necessary and the want of which he has assigned for cause of demurrer, were not necessary. The debtors of a bank, when sued by a receiver, cannot inquire into the legality of his appointment. It is sufficient for the purposes of such a suit that he has been appointed and is receiver in fact. As to debtors, the action of the comptroller in making the appointment is conclusive until set aside on the application of the bank. The bank may move in that behalf, but the debtor cannot. Section fifty makes express provision for a contest by the bank.

The court below erred in sustaining the demurrer, and for that reason the judgment is reversed and the cause remanded with instructions to OVERRULE the DEMURRER to the declaration and

PROCEED ACCORDINGLY.

TREAT *v.* JEMISON.

A judgment affirmed for want of such an assignment of errors as is required by the twenty-first rule; there being in the record no plain error not assigned and such as the court thought fit to be noticed by it without a proper assignment.

ERROR to the Circuit Court for the District of California.

Rule twenty-one of this court provides that the brief of the counsel for the plaintiff in error shall contain, "*in the order here stated*,"—

1. A statement of the case, &c.

"2. An assignment of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and specifically each error asserted and intended to be urged."

And the rule further declares that "without such an assignment of errors counsel will not be heard, except at the request of the court, and errors not assigned according to this rule will be disregarded, though the court at its option may notice a plain error not assigned."

With these rules, officially published in form* when first made, and long in force and generally acted on at the bar, the present case was brought up here and submitted. The briefs were elaborate, but contained *no such assignment of errors* as by the rule is prescribed.

Mr. N. Bennett, for the plaintiff in error; Messrs. Foote, Houghton, and Reynolds, contra.

The CHIEF JUSTICE:

The judgment of the Circuit Court is affirmed. There is no such assignment of errors in this case as is required by the rule, and we do not see in the record any error that ought to be noticed without an assignment.

* 14 Wallace, xi.

Statement of the case.

PARCELS *v.* JOHNSON.

A writ of error from this court will not lie to remove the judgment of an inferior appellate court, where the judgment of that court remands a case to another below it for new trial and hearing, and where it is evident that the parties have not exhausted the power of these inferior courts.

ERROR to the Supreme Court of Missouri.

Mrs. Johnson brought suit against one Parcels, in one of the Circuit Courts of Adair County, Missouri, to have an assignment of dower in a certain one hundred and twenty acres of land, of which she alleged that her husband had been seized in fee simple and in such way as that she was dowable of the land.

The facts appeared to be, that her husband, before his marriage with her, had been a soldier in the infantry service of the United States in the war of 1812, and as such was entitled under acts of Congress to one hundred and twenty acres of land; that a warrant for this quantity of land was issued to him; that the plaintiff was afterwards married to him; that they had one child; that the husband died, his wife and child surviving; that afterwards, under an act of Congress, the warrant was located on the land in which the dower was claimed; that a patent soon afterwards, and before this suit was brought, issued in the name of the husband, for it; and that the curator of the child, under certain judicial proceedings, sold the land to Parcels, the defendant. The defence was—

1st. That the husband in his lifetime had no such seizin or estate as authorized his wife to be endowed.

2d. That the curator had reserved one-third of the proceeds of the sale of the land for the wife's use and benefit, and as her supposed dower in the money.

The second defence, however, was not proved, the defendant relying chiefly on the first.

The Circuit Court of Adair County adjudged that the

husband had not been seized of any such estate as Mrs. Johnson could be endowed of.

From this judgment Mrs. Johnson took the case to the Supreme Court of Missouri. That court was of a different view, and having delivered and filed a learned opinion, found in the record, ordered the judgment of the Adair County Court to be reversed; and that—

"The said cause be remanded to the aforesaid Adair Circuit Court for *further proceedings to be had therein in conformity with the opinion of this court herein delivered and filed.*"

From this judgment Parcels now brought the case here, where it was elaborately argued upon the merits.

Mr. B. G. Barrow (with whom was Mr. M. H. Carpenter), for the plaintiff in error; Mr. J. F. Benjamin, contra.

The CHIEF JUSTICE delivered the opinion of the court.

This writ of error is dismissed, upon the authority of *Moore* v. *Robbins*,* *St. Clair County* v. *Lovingston*,† *Tracy* v. *Holcombe*,‡ *Pepper* v. *Dunlap*,§ *Brown* v. *Union Bank*.‖

A writ of error can only issue from this court to the highest court of a State for a review of the final judgment or decree of that court in a suit. In other words, it is only the last judgment or the last decree which the State courts can give in a suit, until that judgment or decree is set aside or reversed, that this court can, even in the prescribed cases, bring here for re-examination.

The judgment of the Supreme Court of Missouri, brought up in this case, is one of reversal only and remanding the suit to the inferior court for further proceedings in accordance with the opinion delivered and filed. The cause was sent back, therefore, for a new trial or a new hearing. Upon such trial or hearing the inferior court can proceed to render a new judgment, not inconsistent with the opinion, and

* 18 Wallace, 588. † Ib. 628. ‡ 24 Howard, 426.
§ 5 Id. 51. ‖ 4 Id. 465.

that judgment may in its turn be taken to the Supreme Court for examination.

From the record it appears that one of the defences set up in the answer, to wit, that which was based upon the implied acceptance of one-third of the proceeds of the guardian's sale in lieu of dower in the land, was not proven. On a new trial that proof may be supplied and a judgment rendered thereon satisfactory to the now complaining party. In that manner the present supposed Federal question may be put out of the case. So, too, the present pleadings may be amended and a new case made, which will render unnecessary the consideration of any question that can give this court jurisdiction.

Thus it is apparent that the parties have not as yet exhausted the power of the State courts in the premises, and until that is done our power cannot be called into action. This court must be the last resort of litigants in State courts.

WRIT DISMISSED.

LOAN ASSOCIATION v. TOPEKA.

1. A statute which authorizes towns to contract debts or other obligations payable in money implies the duty to levy taxes to pay them, unless some other fund or source of payment is provided.
2. If there is no power in the legislature which passed such a statute to authorize the levy of taxes in aid of the purpose for which the obligation is to be contracted, the statute is void, and so are the bonds or other forms of contract based on the statute.
3. There is no such thing in the theory of our governments, State and National, as unlimited power in any of their branches. The executive, the legislative, and the judicial departments are all of limited and defined powers.
4. There are limitations of such powers which arise out of the essential nature of all free governments; implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name.
5. Among these is the limitation of the right of taxation, that it can only be used in aid of a public object, an object which is within the purpose for which governments are established.

6. It cannot, therefore, be exercised in aid of enterprises strictly private, for the benefit of individuals, though in a remote or collateral way the local public may be benefited thereby.
7. Though the line which distinguishes the public use for which taxes may be assessed from the private use for which they may not, is not always easy to discern, yet it is the duty of the courts, where the case falls clearly within the latter class, to interpose when properly called on for the protection of the rights of the citizen, and aid to prevent his private property from being unlawfully appropriated to the use of others.
8. A statute which authorizes a town to issue its bonds in aid of the manufacturing enterprise of individuals is void, because the taxes necessary to pay the bonds would, if collected, be a transfer of the property of individuals to aid in the projects of gain and profit of others, and not for a public use, in the proper sense of that term.
9. And in a suit brought on such bonds or the interest coupons attached thereon, they are properly declared void.
10. The fact that the town authorities paid one instalment of interest on the bonds, by means of a levy of taxes, does not alter the case. It works no estoppel.

ERROR to the Circuit Court for the District of Kansas.

The Citizens' Savings and Loan Association of Cleveland brought their action in the court below, against the city of Topeka, on coupons for interest attached to bonds of the city of Topeka.

The bonds on their face purported to be payable to the King Wrought-Iron Bridge Manufacturing and Iron-Works Company, of Topeka, to aid and encourage that company in establishing and operating bridge shops in said city of Topeka, under and in pursuance of section twenty-six of an act of the legislature of the State of Kansas, entitled "An act to incorporate cities of the second class," approved February 29th, 1872; and also of another "Act to authorize cities and counties to issue bonds for the purpose of building bridges, aiding railroads, water-power, or other works of internal improvement," approved March 2d, 1872.

The city issued one hundred of these bonds for $1000 each, as a *donation* (and so it was stated in the declaration), to encourage that company in its design of establishing a manufactory of iron bridges in that city.

The declaration also alleged that the interest coupons first due were paid out of a fund raised by taxation for that pur-

pose, and that after this payment the plaintiff became the purchaser of the bonds and the coupons on which suit was brought, for value.

A demurrer was interposed by the city of Topeka to this declaration.

The section of the act of February 29th, on which the main reliance was placed for the authority to issue these bonds, reads as follows:

"SECTION 76. The council shall have power to encourage the establishment of manufactories and such other enterprises as may tend to develop and improve such city, either by direct appropriation from the general fund or by the issuance of bonds of such city in such amounts as the council may determine; *Provided*, That no greater amount than one thousand dollars shall be granted for any one purpose, unless a majority of the votes cast at an election called for that purpose shall authorize the same. The bonds thus issued shall be made payable at any time within twenty years, and bear interest not exceeding ten per cent. per annum."

It was conceded that the steps required by this act prerequisite as to issuing the bonds were regular, as were also the other details, and that the language of the statute was sufficient to justify the action of the city authorities, if the statute was within the constitutional competency of the legislature.

The single question, therefore, for consideration raised by the demurrer was the authority of the legislature of the State of Kansas to enact this part of the statute.

The court below denied the authority, placing the denial on two grounds:

1st. That this part of the statute violated the fifth section of Article XII of the constitution of the State of Kansas; a section in these words:

"SECTION 5. Provision shall be made by general law for the organization of cities, towns, and villages; and their power of taxation, assessment, borrowing money, contracting debts, and

loaning their credit, shall be so restricted as to prevent the abuse of such power."

[The argument here was that the section of the act of February 29th, 1872, conferring the power to issue bonds contained no restriction as to the amount which the city might issue to aid manufacturing enterprises, and that the failure of the legislature to limit and restrict the power so as to prevent abuse, violated the fifth section of Article XII of the constitution above referred to.]

2d. That the act authorized the towns and other municipalities to which it applied, by issuing bonds or lending its credit, to take the property of the citizen under the guise of taxation to pay these bonds, and use it in aid of the enterprises of others which were not of a public character; that this was a perversion of the right of taxation, which could only be exercised for a public use, to the aid of individual interests and personal purposes of profit and gain.

The court below accordingly, sustaining the demurrer, gave judgment in favor of the defendant, the city of Topeka; and to its judgment this writ of error was taken.

Mr. Alfred Ennis, for the plaintiff in error; Messrs. Ross, Burns, and A. L. Williams, contra.

Mr. Justice MILLER delivered the opinion of the court.

Two grounds are taken in the opinion of the circuit judge and in the argument of counsel for defendant, on which it is insisted that the section of the statute of February 29th, 1872, on which the main reliance is placed to issue the bonds, is unconstitutional.

The first of these is, that by section five of article twelve of the constitution of that State it is declared that provision shall be made by general law for the organization of cities, towns, and villages; and their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, shall be so restricted as to prevent the abuse of such power.

The argument is that the statute in question is void be-

cause it authorizes cities and towns to contract debts, and does not contain any restriction on the power so conferred. But whether the statute which confers power to contract debts should always contain some limitation or restriction, or whether a general restriction applicable to all cases should be passed, and whether in the absence of both the grant of power to contract is wholly void, are questions whose solution we prefer to remit to the State courts, as in this case we find ample reason to sustain the demurrer on the second ground on which it is argued by counsel and sustained by the Circuit Court.

That proposition is that the act authorizes the towns and other municipalities to which it applies, by issuing bonds or loaning their credit, to take the property of the citizen under the guise of taxation to pay these bonds, and use it in aid of the enterprises of others which are not of a public character, thus perverting the right of taxation, which can only be exercised for a public use, to the aid of individual interests and personal purposes of profit and gain.

The proposition as thus broadly stated is not new, nor is the question which it raises difficult of solution.

If these municipal corporations, which are in fact subdivisions of the State, and which for many reasons are vested with quasi legislative powers, have a fund or other property out of which they can pay the debts which they contract, without resort to taxation, it may be within the power of the legislature of the State to authorize them to use it in aid of projects strictly private or personal, but which would in a secondary manner contribute to the public good; or where there is property or money vested in a corporation of the kind for a particular use, as public worship or charity, the legislature may pass laws authorizing them to make contracts in reference to this property, and incur debts payable from that source.

But such instances are few and exceptional, and the proposition is a very broad one, that debts contracted by municipal corporations must be paid, if paid at all, out of taxes which they may lawfully levy, and that all contracts creating

debts to be paid in future, not limited to payment from some other source, imply an obligation to pay by taxation.

It follows that in this class of cases the right to contract must be limited by the right to tax, and if in the given case no tax can lawfully be levied to pay the debt, the contract itself is void for want of authority to make it.

If this were not so, these corporations could make valid promises, which they have no means of fulfilling, and on which even the legislature that created them can confer no such power. The validity of a contract which can only be fulfilled by a resort to taxation, depends on the power to levy the tax for that purpose.*

It is, therefore, to be inferred that when the legislature of the State authorizes a county or city to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the act itself, or in some general statute, a limitation upon the power of taxation which repels such an inference.

With these remarks and with the reference to the authorities which support them, we assume that unless the legislature of Kansas had the right to authorize the counties and towns in that State to levy taxes to be used in aid of manufacturing enterprises, conducted by individuals, or private corporations, for purposes of gain, the law is void, and the bonds issued under it are also void. We proceed to the inquiry whether such a power exists in the legislature of the State of Kansas.

We have already said the question is not new. The subject of the aid voted to railroads by counties and towns has been brought to the attention of the courts of almost every State in the Union. It has been thoroughly discussed and is still the subject of discussion in those courts. It is quite true that a decided preponderance of authority is to be found in favor of the proposition that the legislatures of the States,

* Sharpless *v.* Mayor of Philadelphia, 21 Pennsylvania State, 147, 167; Hanson *v.* Vernon, 27 Iowa, 28; Allen *v.* Inhabitants of Jay, 60 Maine, 127; Lowell *v.* Boston, Massachusetts (MS.); Whiting *v.* Fond du Lac, 25 Wisconsin, 188.

unless restricted by some special provisions of their constitutions, may confer upon these municipal bodies the right to take stock in corporations created to build railroads, and to lend their credit to such corporations. Also to levy the necessary taxes on the inhabitants, and on property within their limits subject to general taxation, to enable them to pay the debts thus incurred. But very few of these courts have decided this without a division among the judges of which they were composed, while others have decided against the existence of the power altogether.*

In all these cases, however, the decision has turned upon the question whether the taxation by which this aid was afforded to the building of railroads was for a public purpose. Those who came to the conclusion that it was, held the laws for that purpose valid. Those who could not reach that conclusion held them void. In all the controversy this has been the turning-point of the judgments of the courts. And it is safe to say that no court has held debts created in aid of railroad companies, by counties or towns, valid on any other ground than that the purpose for which the taxes were levied was a public use, a purpose or object which it was the right and the duty of State governments to assist by money raised from the people by taxation. The argument in opposition to this power has been, that railroads built by corporations organized mainly for purposes of gain —the roads which they built being under their control, and not that of the State—were private and not public roads, and the tax assessed on the people went to swell the profits of individuals and not to the good of the State, or the benefit of the public, except in a remote and collateral way. On the other hand it was said that roads, canals, bridges, navigable streams, and all other highways had in all times been matter of public concern. That such channels of travel and of the carrying business had always been established, improved, regulated by the State, and that the railroad had

* The State *v.* Wapello Co., 9 Iowa, 308; Hanson *v.* Vernon, 27 Id. 28; Sharpless *v.* Mayor, &c., 21 Pennsylvania State, 147; Whiting *v.* Fond du Lac, 25 Wisconsin, 188.

not lost this character because constructed by individual enterprise, aggregated into a corporation.

We are not prepared to say that the latter view of it is not the true one, especially as there are other characteristics of a public nature conferred on these corporations, such as the power to obtain right of way, their subjection to the laws which govern common carriers, and the like, which seem to justify the proposition. Of the disastrous consequences which have followed its recognition by the courts and which were predicted when it was first established there can be no doubt.

We have referred to this history of the contest over aid to railroads by taxation, to show that the strongest advocates for the validity of these laws never placed it on the ground of the unlimited power in the State legislature to tax the people, but conceded that where the purpose for which the tax was to be issued could no longer be justly claimed to have this public character, but was purely in aid of private or personal objects, the law authorizing it was beyond the legislative power, and was an unauthorized invasion of private right.*

It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many.

* Olcott *v.* Supervisors, 16 Wallace, 689; People *v.* Salem, 20 Michigan, 452; Jenkins *v.* Andover, 103 Massachusetts, 94; Dillon on Municipal Corporations, § 587; 2 Redfield's Laws of Railways, 398, rule 2.

The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers.

There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A. and B. who were husband and wife to each other should be so no longer, but that A. should thereafter be the husband of C., and B. the wife of D. Or which should enact that the homestead now owned by A. should no longer be his, but should henceforth be the property of B.*

Of all the powers conferred upon government that of taxation is most liable to abuse. Given a purpose or object for which taxation may be lawfully used and the extent of its exercise is in its very nature unlimited. It is true that express limitation on the amount of tax to be levied or the things to be taxed may be imposed by constitution or statute, but in most instances for which taxes are levied, as the support of government, the prosecution of war, the National defence, any limitation is unsafe. The entire resources of the people should in some instances be at the disposal of the government.

The power to tax is, therefore, the strongest, the most pervading of all the powers of government, reaching directly or indirectly to all classes of the people. It was said by Chief Justice Marshall, in the case of *McCulloch* v. *The State of Maryland*,† that the power to tax is the power to destroy. A striking instance of the truth of the proposition is seen in the fact that the existing tax of ten per cent. imposed by the United States on the circulation of all other banks than the National banks, drove out of existence every

* Whiting *v.* Fond du Lac, 25 Wisconsin, 188; Cooley on Constitutional Limitations, 129, 175, 487; Dillon on Municipal Corporations, § 587.

† 4 Wheaton 431.

State bank of circulation within a year or two after its passage. This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised.

"To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms."

Nor is it taxation. A "tax," says Webster's Dictionary, "is a rate or sum of money assessed on the person or property of a citizen by government for the use of the nation or state." "Taxes are burdens or charges imposed by the legislature upon persons or property to raise money for public purposes."*

Coulter, J., in *Northern Liberties* v. *St. John's Church*,† says, very forcibly, "I think the common mind has everywhere taken in the understanding that taxes are a public imposition, levied by authority of the government for the purpose of carrying on the government in all its machinery and operations—that they are imposed for a public purpose."

We have established, we think, beyond cavil that there can be no lawful tax which is not laid for *a public purpose.* It may not be easy to draw the line in all cases so as to decide what is a public purpose in this sense and what is not.

It is undoubtedly the duty of the legislature which imposes or authorizes municipalities to impose a tax to see that it is not to be used for purposes of private interest instead of a public use, and the courts can only be justified in interposing when a violation of this principle is clear and the

* Cooley on Constitutional Limitations, 479.

† 13 Pennsylvania State, 104; see also Pray *v.* Northern Liberties, 31 Id. 69; Matter of Mayor of New York, 11 Johnson, 77; Camden *v.* Allen, 2 Dutcher, 398; Sharpless *v.* Mayor of Philadelphia, *supra;* Hanson *v.* Vernon, 27 Iowa, 47; Whiting *v.* Fond du Lac, 25 Wisconsin, 188.

reason for interference cogent." And in deciding whether, in the given case, the object for which the taxes are assessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether State or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation."

But in the case before us, in which the towns are authorized to contribute aid by way of taxation to any class of manufacturers, there is no difficulty in holding that this is not such a public purpose as we have been considering. If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town.

A reference to one or two cases adjudicated by courts of the highest character will be sufficient, if any authority were needed, to sustain us in this proposition.

In the case of *Allen* v. *The Inhabitants of Jay*,* the town meeting had voted to loan their credit to the amount of $10,000, to Hutchins and Lane, if they would invest $12,000 in a steam saw-mill, grist-mill, and box-factory machinery, to be built in that town by them. There was a provision to secure the town by mortgage on the mill, and the select-

* 60 Maine, 124.

men were authorized to issue town bonds for the amount of the aid so voted. Ten of the taxable inhabitants of the town filed a bill to enjoin the selectmen from issuing the bonds.

The Supreme Judicial Court of Maine, in an able opinion by Chief Justice Appleton, held that this was not a public purpose, and that the town could levy no taxes on the inhabitants in aid of the enterprise, and could, therefore, issue no bonds, though a special act of the legislature had ratified the vote of the town, and they granted the injunction as prayed for.

Shortly after the disastrous fire in Boston, in 1872, which laid an important part of that city in ashes, the governor of the State convened the legislative body of Massachusetts, called the General Court, for the express purpose of affording some relief to the city and its people from the sufferings consequent on this great calamity. A statute was passed, among others, which authorized the city to issue its bonds to an amount not exceeding twenty millions of dollars, which bonds were to be loaned, under proper guards for securing the city from loss, to the owners of the ground whose buildings had been destroyed by fire, to aid them in rebuilding.

In the case of *Lowell* v. *The City of Boston*, in the Supreme Judicial Court of Massachusetts, the validity of this act was considered. We have been furnished a copy of the opinion, though it is not yet reported in the regular series of that court. The American Law Review for July, 1873, says that the question was elaborately and ably argued. The court, in an able and exhaustive opinion, decided that the law was unconstitutional, as giving a right to tax for other than a public purpose.

The same court had previously decided, in the case of *Jenkins* v. *Anderson*,* that a statute authorizing the town authorities to aid by taxation a school established by the will of a citizen, and governed by trustees selected by the will,

* 103 Massachusetts, 74.

was void because the school was not under the control of the town officers, and was not, therefore, a public purpose for which taxes could be levied on the inhabitants.

The same principle precisely was decided by the State court of Wisconsin in the case of *Curtis* v. *Whipple*.* In that case a special statute which authorized the town to aid the Jefferson Liberal Institute was declared void because, though a school of learning, it was a private enterprise not under the control of the town authorities. In the subsequent case of *Whiting* v. *Fond du Lac*, already cited, the principle is fully considered and reaffirmed.

These cases are clearly in point, and they assert a principle which meets our cordial approval.

We do not attach any importance to the fact that the town authorities paid one instalment of interest on these bonds. Such a payment works no estoppel. If the legislature was without power to authorize the issue of these bonds, and its statute attempting to confer such authority is void, the mere payment of interest, which was equally unauthorized, cannot create of itself a power to levy taxes, resting on no other foundation than the fact that they have once been illegally levied for that purpose.

The act of March 2d, 1872, concerning internal improvements, can give no assistance to these bonds. If we could hold that the corporation for manufacturing wrought-iron bridges was within the meaning of the statute, which seems very difficult to do, it would still be liable to the objection that money raised to assist the company was not for a public purpose, as we have already demonstrated.

JUDGMENT AFFIRMED.

Mr. Justice CLIFFORD, dissenting:

Unable to concur either in the opinion or judgment in this case, I will proceed to state, in very brief terms, the reasons which compel me to withhold my concurrence.

* 24 Wisconsin, 350.

Corporations of a municipal character are created by the legislature, and the legislature, as the trustee or guardian of the public interest, has the exclusive and unrestrained control over such a franchise, and may enlarge, diminish, alter, change, or abolish the same at pleasure. Where the grantees of a franchise, as well as the grantors, are public bodies and the franchise is created solely for municipal objects, the grant is at all times within the control of the legislature, and consequently the charter is subject to amendment or repeal at the will of the granting power.*

Errors of indiscretion which the legislature may commit in the exercise of the power it possesses cannot be corrected by the courts, for the reason that the courts cannot adjudge an act of the legislature void unless it is in violation of the Federal or State constitution.†

State constitutions may undoubtedly restrict the power of the legislature to pass laws, and it is plain that any law passed in violation of such a prohibition is void, but the better opinion is that where the constitution of the State contains no prohibition upon the subject, express or implied, neither the State nor Federal courts can declare a statute of the State void as unwise, unjust, or inexpedient, nor for any other cause, unless it be repugnant to the Federal Constitution. Except where the Constitution has imposed limits upon the legislative power the rule of law appears to be that the power of legislation must be considered as practically absolute, whether the law operates according to natural justice or not in any particular case, for the reason that courts are not the guardians of the rights of the people of the State, save where those rights are secured by some constitutional provision which comes within judicial cognizance; or, in the language of Marshall, C. J., "The interest, wisdom, and justice of the representative body furnish the only security

* Hartford *v.* Bridge Co., 10 Howard, 534; Bissell *v.* Jeffersonville, 24 Id. 294; Darlington *v.* Mayor, 31 New York, 187; Granby *v.* Thurston, 23 Connecticut, 416; 2 Kent (12th ed.), 275.

† Benson *v.* Mayor, 24 Barbour, 248; Clarke *v.* Rochester, Ib. 446; Bank *v.* Rome, 18 New York, 38.

in a large class of cases not regulated by any constitutional provision."*

Courts cannot nullify an act of the State legislature on the vague ground that they think it opposed to a general latent spirit supposed to pervade or underlie the constitution, where neither the terms nor the implications of the instrument disclose any such restriction.† Such a power is denied to the courts, because to concede it would be to make the courts sovereign over both the constitution and the people, and convert the government into a judicial despotism.‡

Subject to the Federal Constitution the legislature of the State possesses the whole legislative power of the people, except so far as the power is limited by the State constitution.§

Our own decisions are to the same effect, as appears by one of very recent date, in which the court say that "the legislative power of a State extends to everything within the sphere of such power, except as it is restricted by the Federal Constitution or that of the State."‖

Apply those principles to the cases before the court and it follows, as it seems to me, that the judgment in each case should be reversed for the following reasons: (1.) Because the demurrer to the declaration in each case should have been overruled. (2.) Because the bonds to which the coupons sued on were attached were issued in pursuance of the express authority of the legislature vesting that power in the corporation defendants. (3.) Because the constitution of the State does not in any manner prohibit the passage of such a law as that under which the bonds were issued. (4.) Because it is not competent for a Federal court to adjudge a State statute void which does not conflict in any respect with the Constitution of the United States or that of the State whose legislature enacted the statute.

* Bank *v.* Billings, 4 Peters, 563; Cooley on Constitutional Limitations (2d ed.), 168; Calder *v.* Bull, 3 Dallas, 398.

† Walker *v.* Cincinnati, 21 Ohio State, 41.

‡ Golden *v.* Prince, 3 Washington's Circuit Court, 313.

§ Bank *v.* Brown, 26 New York, 467; People *v.* Draper, 15 Id. 532.

‖ Pine Grove *v.* Talcott, 19 Wallace, 676.

Syllabus.

Unwise laws and such as are highly inexpedient and unjust are frequently passed by legislative bodies, but there is no power vested in a Circuit Court nor in this court, to determine that any law passed by a State legislature is void if it is not repugnant to their own constitution nor the Constitution of the United States.

Vague apprehensions seem to be entertained that unless such a power is claimed and exercised inequitable consequences may result from unnecessary taxation, but in my judgment there is much more to be dreaded from judicial decisions which may have the effect to sanction the fraudulent repudiation of honest debts, than from any statutes passed by the State to enable municipal corporations to meet and discharge their just pecuniary obligations.

BASEY ET AL. *v.* GALLAGHER.

1. Where in an equity case a demurrer is filed to the complaint and the record does not disclose what disposition was made of it, and an answer is subsequently filed, upon which the parties proceed to a hearing, it will be presumed on appeal that the demurrer was abandoned.
2. Although by the organic act of the Territory of Montana common-law and chancery jurisdiction is exercised by the same court, and by legislation of the Territory the distinctions between the pleadings and modes of procedure in common-law actions and those in equity suits are abolished, the essential distinction between law and equity is not changed. The relief which the law affords must be administered through the intervention of a jury, unless a jury be waived; the relief which equity affords must be applied by the court itself, and all information presented to guide its action, whether obtained through masters' reports or findings of a jury, is merely advisory.
3. The provision in the statute of Montana of 1867 regulating proceedings in civil cases declaring "that an issue of fact shall be tried by a jury, unless a jury trial is waived," does not require the court in an equity case to regard the findings of a jury called in the case as conclusive, though no application to vacate the findings be made by the parties, if in its judgment they are not supported by the evidence.
4. In the Pacific States and Territories a right to running waters on the public lands of the United States for purposes of irrigation may be

acquired by prior appropriation, as against parties not having the title of the government. The right, exercised within reasonable limits, having reference to the condition of the country, and the necessities of the community, is entitled to protection. This rule obtains in the Territory of Montana, and is sanctioned by its legislation.

5. By the act of Congress of July 26th, 1866, which provides "that whenever by priority of possession rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same," the customary law with respect to the use of water, which had grown up among occupants of the public land under the peculiar necessities of their condition, is recognized as valid. That law may be shown by evidence of the local customs, or by the legislation of the State or Territory, or the decisions of the courts. The union of the three conditions in any particular case is not essential to the perfection of the right by priority; and in case of conflict between a local custom and a statutory regulation, the latter, as of superior authority, will control.

APPEAL from the Supreme Court of the Territory of Montana. The case was thus:

The organic act of the Territory just named recognizes the distinction between the jurisdictions of law and equity, but requires that proceedings in both be in the same court.

By a statute of the Territory regulating proceedings in such cases in courts of the Territory, only one *form* of civil action is allowed; and it is there enacted that "issues of fact shall be tried by a jury, unless a jury is waived or a reference ordered," in a way which the statute provides.

In this state of the law Gallagher and others filed a bill in one of the District Courts of the Territory, against Basey, Stafford, and others, *praying for an injunction* to restrain them from diverting the water of a stream known as Avalanche Creek, in the said Territory, to which they, the plaintiffs, asserted a right by prior appropriation for the purposes of irrigation. They alleged that in the year 1866 they and their predecessors in interest took up for settlement and cultivation certain farms, designated by them as "ranches," on the public lands of the United States near the creek, in the county of Meagher, in that Territory; and that they or their predecessors in interest had ever since occupied and

cultivated the same; that it was necessary to irrigate the land for its successful cultivation, and to raise grain, hay, and vegetables; that they accordingly, during that year and the following spring, constructed, at great labor and expense, a ditch by which they intersected the creek a short distance from its junction with the Missouri River, and conveyed its water to their farms and used it for irrigation; that at this time the water was not appropriated by any person, and was subject to appropriation by them; that by their ditch they appropriated the water to the extent of five hundred inches, according to the measurement of miners; that this amount was necessary to the successful cultivation of the land, and by means of it they and their predecessors in interest were enabled to cultivate the farms and raise large and valuable crops of grain, hay, and vegetables.

They further alleged that subsequent to this appropriation by them, and during the years 1867 and 1870, and the intervening period, the defendants erected dams across the creek above the head of their ditch and diverted the water of the stream, and thereby wholly deprived them of its use and enjoyment, preventing their cultivation of the farms and rendering them useless; that had the water been permitted to flow, unobstructed by the dams of the defendants, there would have been a sufficient supply for irrigating and cultivating the farms. They therefore sought the aid of the court to restrain the defendants from diverting the water, except so much as might be in excess of the five hundred inches appropriated by them.

To this complaint the defendants demurred, on the ground, 1st, that the cause of action alleged was barred by the statute of limitations; and, 2d, that the complaint did not state a cause of action. The record did not disclose what disposition was made of the demurrer.

An answer was subsequently filed which denied the several allegations of the complaint, except the one which averred the possession by the plaintiffs of their farms.

The record was a very defective one, and presented the case obscurely. Gathering, however, what could be gath-

ered from its imperfect statements, it would seem that at the May Term of the District Court of the Territory in 1871, previous to the final hearing, which was had at the subsequent July Term, a jury was called in the case, to which certain questions were submitted and its answers taken. The jury found substantially that parties by the name of White and Torvais, prior to September or October, 1866, had appropriated the water of the creek to the extent of thirty-five inches; that these parties, during one of those months, gave the plaintiffs and their predecessors the right to connect with their ditch, and to extend and enlarge the same; that the plaintiffs and their predecessors commenced such enlargement during those months, and increased the capacity of the ditch to two hundred and fifty inches; that White and Torvais afterwards, in 1867, sold their water-right and ditch to the defendant, Stafford; that the defendant, Basey, had no interest in privity with the other defendants, and diverted the water for his own use by agreement with the plaintiffs, and that neither of the other defendants had diverted water to the injury of the plaintiffs previous to the commencement of the action.

Upon these special findings both parties moved the court for judgment; the defendants, that the complaint be dismissed; the plaintiffs, that a decree pass in their favor. On these motions the court heard the whole case "on the pleadings, evidence, and proceedings therein, and the findings of the jury," and rendered a decree adjudging that the defendant, Stafford, was entitled to thirty-five inches of the water, and that as against the defendants, saving this amount, the plaintiffs were entitled to two hundred and fifteen inches of the water, and decreed an injunction against any diversion of the water by the defendants which would prevent its flow to this extent in the stream to the ditch of the plaintiffs. From this decree an appeal was taken to the Supreme Court of the Territory, and there the decree was affirmed. From that affirmance this appeal was taken.

In rendering the decree, the District Court disregarded a portion of the findings of the jury and adopted others, and

this action was approved by the Supreme Court of the Territory, and constituted one of the errors assigned here for the reversal of its decree.

The correctness or incorrectness of the decree appealed from, depended perhaps, in part, upon certain statutes.

They were thus: One was an act of Congress of July 26th, 1866,* which enacted as follows:

"SECTION 9. Whenever *by priority of possession* rights to the use of water for mining, agricultural, manufacturing or other purposes, have *vested* and accrued, *and the same are recognized and acknowledged by the local customs, laws, and decisions of courts*, the possessors and owners of such vested rights shall be maintained and protected in the same. And the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed."

The other statutes were Territorial acts. The first was an act passed on the 12th of January, 1865, entitled "*An act to protect and regulate the irrigation of land in Montana Territory.*" The first section of this act thus enacted:

"All persons who claim, own, or hold a possessory right or title to any land, or parcel of land, within the boundary of Montana Territory, as defined in the organic act of this Territory, when those claims are on the bank, margin, or neighborhood of any stream of water, creek, or river, shall be entitled to the use of the water of said stream for the purpose of irrigation, and making said claim available to the full extent of the soil for agricultural purposes."

The fourth section was thus:

"In case the volume of water in said stream or river shall not be sufficient to supply the continual wants of the entire country through which it passes, *then the nearest justice of the peace shall appoint three commissioners, as hereinafter provided, whose duty it shall be to apportion, in a just and equitable proportion, a certain amount of said water, upon certain alternate weekly days, to different localities, as they may in their judgment think best*

* 14 Stat. at Large, 253.

for the interest of all parties concerned, and with a due regard to the legal rights of all."

In 1870 this act of 1865 was repealed and another act was passed, making provision for the construction of ditches and the irrigation of agricultural lands. This enacted in its second, fifth, and sixth sections as follows:

"SECTION 2. Any person or persons, corporation or company, who may have or hold a title or possessory right or title to any agricultural lands within the limits of this Territory, as defined by the organic act thereof, shall be entitled to the use and enjoyment of the waters of the streams or creeks in said Territory for the purposes of irrigation and making said land available for agricultural purposes to the full extent of the soil thereof.

"SECTION 5. In all controversies respecting the rights to water under the provisions of this act *the same shall be determined by the date of the appropriation as respectively made by the parties.*

"SECTION 6. The waters of the streams or creeks of the Territory may be made available to the full extent of the capacity thereof for irrigating purposes, without regard to deterioration in quality or diminution in quantity, so that the same do not materially affect or impair the rights of the prior appropriator, but in no case shall the same be diverted or turned from the ditches or canals of such appropriator, so as to render the same unavailable."

In 1871 and 1872, when the statutes of Montana were revised, and a code of laws and practice was established for the Territory, this last act was incorporated into the system and re-enacted as part of it.*

Mr. Montgomery Blair, for the appellants:

The Supreme Court of the Territory erred in affirming the decree of the District Court:

1. Because in rendering that decree the District Court disregarded the findings of the jury, and by the laws of the Territory those findings were conclusive upon the court.

* Laws of Montana; Codified Statutes, 1871 and 1872, p. 498.

In the Territory of Montana only one form of action is allowed, and all distinctions in actions are abolished. And issues of fact are required to be tried by a jury in all cases, unless a jury is waived, or a reference is ordered, as provided for in the act. And the jury are made the *exclusive* judges of all questions of fact. Now in *Taylor* v. *Person*,* a case from North Carolina, in which the distinction between law and equity is fully recognized, but where a statute requires just what the Montana statute requires, it has been adjudged that if the record does not show that the facts had been found by a jury, it is error for which the decree will be reversed.

2. Because the decree proceeds upon the assumption that the appellees acquired a vested right in the water in question by being the first appropriators of it.

The law governing this subject is found in the act of Congress of July 26th, 1866. By the terms of that act the right in question is made to depend upon the existence of three several conditions: *First*, "it must be recognized and acknowledged by the local customs of the Territory;" *second*, by "the (local) laws;" and, *third*, "by the decisions of the courts."

The fourth section of the act of the Territory of 1865 is inconsistent with the doctrine of right by prior appropriation, and so Chief Justice Wade held in his separate opinion in the case of *Thorp* v. *Freed*.† It is true that his associate, Knowles, J., differed from him, and that the case was decided on other grounds. In commenting upon the statute mentioned the Chief Justice says:

"The whole purpose of the statute was to utterly abolish and annihilate the doctrine of prior appropriation." . . . "If the section does not mean that there shall be an equal distribution among all the parties concerned in such water, without any regard whatever to the date of appropriation, then I am utterly unable to comprehend the language used."

* 2 Hawks, 298.

† 1 Montana, 653.

Argument for the appellees.

Mr. R. T. Merrick, contra:

I. The case was a chancery case, and was tried as such, and the decree is in the usual form of decrees in chancery.

The issues submitted to the jury were so submitted only to *aid* the chancellor in ascertaining, from the evidence before him, the ultimate facts upon which to rest his decree. The two jurisdictions of law and equity in Montana are recognized as separate and distinct, and even though one *form* of action prevail, must be exercised as separate and distinct from each other in all cases, and equitable or legal relief administered according to the rules appertaining to the jurisdictions respectively.

II. The first appropriation of the water of a stream passing through the public lands of the United States for some beneficial purpose confers the right to the use and enjoyment of the water to the extent of the original appropriation.*

In this case there is no riparian owner except the United States, and the record does not show that either of the parties even occupy along the margin of the stream. The lands being open to appropriation the rule of time is the rule of right, and the first taker is to be protected in his entry and possession. Blackstone says:†

"If a stream be *unoccupied* I may erect a mill thereon, and detain the water; yet not so as to injure my neighbor's *prior* mill, or his meadow, for he hath by his first occupancy acquired à property in the current."

In *Williams* v. *Morland*,‡ and in *Liggins* v. *Inge*,§ and in the earlier cases in Massachusetts and Connecticut a similar principle was announced. Later adjudications in England establishing a different doctrine rest upon the fact that the

* Irwin *v.* Phillips, 5 California, 140; Bear River Co. *v.* The York Mining Co., 8 Id. 332; Butte Canal Co. *v.* Vaughn, 11 Id. 152; McDonald *v.* Bear River Co., 13 Id. 220; Phœnix Water Co. *v.* Fletcher, 23 Id. 482; Hill *v.* Smith, 27 Id. 476; Smith *v.* O'Hara, 43 Id. 371; Lobdell *v.* Simpson et al., 2 Nevada, 274; Ophir Mining Co. *v.* Carpenter, 4 Id. 534; Hobart *v.* Ford, 6 Id. 80; Dalton *v.* Bowker, 8 Id. 201.

† 3 Commentaries, 403.

‡ 2 Barnewall & Cresswell, 913.

§ 7 Bingham, 692.

right to the use of the water of the stream had never been detached as *property* from the ownership of the adjacent soil, and that such use was claimed and held only as a riparian right.

The act of Congress of July 26th, 1866, clearly recognizes a right to the use of water as independent of any right or title to land, and assures protection to this right whenever it has "*vested*" by "*priority of possession*," provided the "local customs, laws, and decisions of courts," recognize such a right and such a mode of acquiring it.

Congress is here dealing with the public domain.

The question then arises, is the case of the complainant within the provisions of the act of Congress of July 26th, 1866?

Do the *local customs, laws, and decisions of the courts* of Montana recognize the acquisition of a right to the use of the water of a stream by appropriation, as separate and distinct from the ownership of land adjacent to the stream, and is such right to be determined by the priority of possession among respective claimants?

What is the fact as to the local customs, laws, and decisions of Montana, as they affect this question?

[The counsel here cited and commented upon the laws of the Territory which are given in the statement of the case; and contended that they established that "rights to the use of water for agricultural purposes" may be acquired and become vested by priority of possession.]

The "local customs and decisions of the courts" of the Territory also recognize and establish a similar rule of property.

In *Thorp* v. *Freed*, Knowles, J., says:

"Ever since the settlement of this Territory it has been the custom of those who settled themselves upon the public domain and devoted any part thereof to the purposes of agriculture, to dig ditches and turn out the water of some stream to irrigate the same. This right has been generally recognized by our people. *It has been universally conceded that it was a necessity of agricultural pursuits.* So universal has been this usage that I

do not suppose there has been a parcel of land, to the extent of one acre, cultivated within the bounds of this Territory that has not been irrigated by water diverted from some running stream."

Wade, C. J., in a separate opinion in the same case, denies that any custom exists recognizing the right to appropriate water for the purposes of agriculture and irrigation, whilst apparently admitting the existence of the custom as applied to mining and the mineral lands of the public domain.

But if a usage exists recognizing the right to divert and appropriate water, the *purpose* for which the appropriation may be made is immaterial, provided it be useful or beneficial and not for speculation.*

This right has been recognized, too, by the courts. The cases referred to show that it has been uniformly recognized and established in California and Nevada, and the courts of Montana have, on this subject, followed the decisions of the courts of those States.†

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

The record does not disclose what disposition was made of the demurrer to the complaint, but as an answer was subsequently filed upon which the parties proceeded to a hearing, the presumption is that it was abandoned.

By the organic act of the Territory, the District Courts are invested with chancery and common-law jurisdiction. The two jurisdictions are exercised by the same court, and, under the legislation of the Territory, the modes of procedure up to the trial or hearing are the same whether a legal or equitable remedy is sought. The suitor, whatever relief he may ask, is required to state "in ordinary and concise lan-

* Ortman et al. *v.* Dixon, 13 California, 33; Davis *v.* Gale, 32 Id. 26; Woolman *v.* Garringer, 1 Montana, 535.

† Caruthers *v.* Pemberton, 1 Montana, 111, 113; Thorp *v.* Woolman, Ib. 171, 172; Woolman *v.* Garringer, Ib. 535, 543; Atchison *v.* Peterson, Ib. 564.

guage" the facts of his case upon which he invokes the judgment of the court. But the consideration which the court will give to the questions raised by the pleadings, when the case is called for trial or hearing, whether it will submit them to a jury, or pass upon them without any such intervention, must depend upon the jurisdiction which is to be exercised. If the remedy sought be a legal one, a jury is essential unless waived by the stipulation of the parties; but if the remedy sought be equitable, the court is not bound to call a jury, and if it does call one, it is only for the purpose of enlightening its conscience, and not to control its judgment. The decree which it must render upon the law and the facts must proceed from its own judgment respecting them, and not from the judgment of others. Sometimes in the same action both legal and equitable relief may be sought, as for example, where damages are claimed for a past diversion of water, and an injunction prayed against its diversion in the future. Upon the question of damages, a jury would be required; but upon the propriety of an injunction, the action of the court alone could be invoked. The formal distinctions in the pleadings and modes of procedure are abolished; but the essential distinction between law and equity is not changed. The relief which the law affords must still be administered through the intervention of a jury, unless a jury be waived; the relief which equity affords must still be applied by the court itself, and all information presented to guide its action, whether obtained through masters' reports or findings of a jury, is merely advisory. Ordinarily, where there has been an examination before a jury of a disputed fact, and a special finding made, the court will follow it. But whether it does so or not must depend upon the question whether it is satisfied with the verdict. This discretion to disregard the findings of the jury may undoubtedly be qualified by statute; but we do not find anything in the statute of Montana, regulating proceedings in civil cases, which affects this discretion. That statute is substantially a copy of the statute of California as it existed in 1851, and it was frequently held by the Supreme

Court of that State, that the provision in that act requiring issues of fact to be tried by a jury, unless a jury was waived by the parties, did not require the court below to regard as conclusive the findings of a jury in an equity case, even though no application to vacate the findings was made by the parties, if in its judgment they were not supported by the evidence. That court only held that the findings, when not objected to in the court below and the judge was satisfied with them, could not be questioned for the first time on appeal.*

The question on the merits in this case is whether a right to running waters on the public lands of the United States for purposes of irrigation can be acquired by prior appropriation, as against parties not having the title of the government. Neither party has any title from the United States; no question as to the rights of riparian proprietors can therefore arise. It will be time enough to consider those rights when either of the parties has obtained the patent of the government. At present, both parties stand upon the same footing; neither can allege that the other is a trespasser against the government without at the same time invalidating his own claim.

In the late case of *Atchison* v. *Peterson*,† we had occasion to consider the respective rights of miners to running waters on the mineral lands of the public domain; and we there held that by the custom which had obtained among miners in the Pacific States and Territories, the party who first subjected the water to use, or took the necessary steps for that purpose, was regarded, except as against the government, as the source of title in all controversies respecting it; that the doctrines of the common law declaratory of the rights of riparian proprietors were inapplicable, or applicable only to a limited extent, to the necessities of miners, and were inadequate to their protection; that the equality of right

* Still *v.* Saunders, 8 California, 287; Goode *v.* Smith, 13 Id. 81; Duff *v.* Fisher, 15 Id. 376. See, also, Koppikus *v.* State Capitol Commissioners, 16 Id. 248; and Weber *v.* Marshall, 19 Id. 447.

† *Supra*, p. 507.

recognized by that law among all the proprietors upon the same stream, would have been incompatible with any extended diversion of the water by one proprietor, and its conveyance for mining purposes to points from which it could not be restored to the stream; that the government by its silent acquiescence had assented to and encouraged the occupation of the public lands for mining; and that he who first connected his labor with property thus situated and open to general exploration, did in natural justice acquire a better right to its use and enjoyment than others who had not given such labor; that the miners on the public lands throughout the Pacific States and Territories, by their customs, usages, and regulations, had recognized the inherent justice of this principle, and the principle itself was at an early period recognized by legislation and enforced by the courts in those States and Territories, and was finally approved by the legislation of Congress in 1866. The views there expressed and the rulings made are equally applicable to the use of water on the public lands for purposes of irrigation. No distinction is made in those States and Territories by the custom of miners or settlers, or by the courts, in the rights of the first appropriator from the use made of the water, if the use be a beneficial one.

In the case of *Tartar* v. *The Spring Creek Water and Mining Company*, decided in 1855, the Supreme Court of California said: "The current of decisions of this court go to establish that the policy of this State, as derived from her legislation, is to permit settlers in all capacities to occupy the public lands, and by such occupation to acquire the right of undisturbed enjoyment against all the world but the true owner. In evidence of this, acts have been passed to protect the possession of agricultural lands acquired by mere occupancy; to license miners; to provide for the recovery of mining claims; recognizing canals and ditches which were known to divert the water of streams from their natural channels for mining purposes; and others of like character. This policy has been extended equally to all pursuits, and no partiality for one over another has been evinced, ex-

cept in the single case where the rights of the agriculturist are made to yield to those of the miner where gold is discovered in his land. . . . The policy of the exception is obvious. Without it the entire gold region might have been inclosed in large tracts, under the pretence of agriculture and grazing, and eventually what would have sufficed as a rich bounty to many thousands would be reduced to the proprietorship of a few. Aside from this the legislation and decisions have been uniform in awarding the right of peaceable enjoyment to the first occupant, either of the land or of anything incident to the land."*

Ever since that decision it has been held generally throughout the Pacific States and Territories that the right to water by prior appropriation for any beneficial purpose is entitled to protection. Water is diverted to propel machinery in flour-mills and saw-mills, and to irrigate land for cultivation, as well as to enable miners to work their mining claims; and in all such cases the right of the first appropriator, exercised within reasonable limits, is respected and enforced. We say within reasonable limits, for this right to water, like the right by prior occupancy to mining ground or agricultural land, is not unrestricted. It must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual. The act of Congress of 1866 recognizes the right to water by prior appropriation for agricultural and manufacturing purposes, as well as for mining. Its language is: "That whenever by priority of possession rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same."

It is very evident that Congress intended, although the lan-

* Per Heydenfeldt, J., 5 California, 397.

guage used is not happy, to recognize as valid the customary law with respect to the use of water which had grown up among the occupants of the public land under the peculiar necessities of their condition; and that law may be shown by evidence of the local customs, or by the legislation of the State or Territory, or the decisions of the courts. The union of the three conditions in any particular case is not essential to the perfection of the right by priority; and in case of conflict between a local custom and a statutory regulation, the latter, as of superior authority, must necessarily control.

This law was in force when the plaintiffs in this case acquired their right to the waters of Avalanche Creek. There was also in force an act of the Territory, passed on the 12th of January, 1865, to protect and regulate the irrigation of land, which declared in its first section that all persons who claimed or held a possessory right or title to any land within the Territory on the bank, margin, or neighborhood of any stream of water, should be "entitled to the use of the water of said stream for the purpose of irrigation and making said claim available to the full extent of the soil for agricultural purposes." Another section provided that in case the volume of water in the stream was not sufficient to supply the continual wants of the entire country, through which it passed, an apportionment of the water should be made between different localities by commissioners appointed for that purpose. This last section has no application to the present case, for it is not pretended that there was not water enough in the district, where Avalanche Creek flows, to supply the wants of the country; and, the section itself was repealed in 1870.*

In January of that year another act was passed by the legislature of Montana upon the same subject, which recognizes the right by prior appropriation of water for the purposes of irrigation, and declares that all controversies respecting the rights to water under its provisions shall be

* Session Laws of 1865, 367.

determined by the date of the appropriation as respectively made by the parties, and that the water of the streams shall be made available to their full extent for irrigating purposes, without regard to deterioration in quality or diminution in quantity, "so that the same do not materially affect or impair the rights of the prior appropriator; but in no case shall the same be diverted or turned from the ditches or canals of such appropriator so as to render the same unavailable."*

Several decisions of the Supreme Court of Montana have been cited to us recognizing the right by prior appropriation to water for purposes of mining on the public lands of the United States, and there is no solid reason for upholding the right when the water is thus used, which does not apply with the same force when the water is sought on those lands for any other equally beneficial purpose. In *Thorp* v. *Freed* the subject was very ably discussed by two of the justices of that court, who differed in opinion upon the question in that case, where both parties had acquired the title of the government. The disagreement would seem to have arisen in the application of the doctrine to a case where title had passed from the government, and not in its application to a case where neither party had acquired that title. In the course of his opinion Mr. Justice Knowles stated that ever since the settlement of the Territory it had been the custom of those who had settled themselves upon the public domain and devoted any part thereof to the purposes of agriculture, to dig ditches and turn out the water of some stream to irrigate the same; that this right had been generally recognized by the people of the Territory, and *had been universally conceded as a necessity of agricultural pursuits.* "So universal," added the justice, "has been this usage that I do not suppose there has been a parcel of land, to the extent of one acre, cultivated within the bounds of this Territory, that has not been irrigated by water diverted from some running stream."†

* Session Laws of 1870, 57.

† 1 Montana, 652, 665.

We are satisfied that the right claimed by the plaintiffs is one which, under the customs, laws, and decisions of the courts of the Territory, and the act of Congress, should be recognized and protected.

DECREE AFFIRMED.

ERRATUM.

The reader will please to consider what is below as inserted on page 591, after the last clause of the syllabus of *Murdock* v. *City of Memphis*, and as paragraph 9 thereof; and also to consider the same thing as inserted in the Index, on page 698, as a paragraph between the paragraphs 2 and 3 of the title "Jurisdiction," now there.

Where an act of Congress calls into operative effect a provision in a deed, in virtue of which provision thus called into effect, a party claims title and right in such a way that, confessedly, but for the act, no suit would lie, the party so claiming claims a "title" and "right" "under" a statute of the United States within the meaning of the act of February 5th, 1867; and if the decision is against the title and right thus set up and claimed, jurisdiction exists here to re-examine.

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