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CASES

ARGUED AND ADJUDGED

IN

The Supreme Court

OF

THE UNITED STATES,

OCTOBER TERM, 1874.

REPORTED BY

JOHN WILLIAM WALLACE.

VOL. XXII.

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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.

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DECISIONS

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1874.

GILL *v.* WELLS.

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1. An original patent of one Wells, for a hat-body machine, among other things, minutely described a specific device called a "*chamber or tunnel*," composed of two side pieces, a bottom piece, and a top piece, permanently united together, so as to form in fact a single tubular device, and described minutely the functions which this device performed. A reissued patent separated this "chamber or tunnel" into its several component parts, called by distinct names, viz., a "bottom guide," and a "top guide," and "side guides;" and ascribed independent functions to each of these parts, and claimed in succession each of these parts in combination with other parts of the hat-body machine. At the same time the description of this composite device, "*the chamber or tunnel*," and its functions as such, which were contained in the original patent, were omitted entirely from the reissued specification. *Held*, that the reissued patent was invalid, as not being for the same invention as the original patent.
2. A complete description was given in the *original* patent of the combination of the four parts which constituted the "*chamber or tunnel*," and that patent did not contain the slightest evidence that the patentee ever made any other combination than that of all the four parts which together form this "*tunnel or chamber*." *Held*, that in such case, even if the patentee had subsequently discovered that he could accomplish a new and useful result by a combination of *some of the several parts* included in this "tunnel or chamber," he could not surrender and reissue his patent for this combination of a smaller number of the ingredients, because the reissued patent in that event would not be for the same invention as the surrendered original.
3. Such a description of a combination of other parts, besides the first-mentioned, would constitute new matter, the introduction of which into the

specification of a reissued patent is forbidden by section fifty-three of the Patent Act of 1870.

4. A patentee cannot legally surrender a patent for an invention consisting of a combination of old ingredients, and amend the descriptive parts of the specification by striking out *the entire description of one of the ingredients of the combination* and inserting in lieu thereof *a full description of several other devices*, without any allegation that *they are the equivalents of the one whose description is stricken out.*
5. The case of *Gould* v. *Reese*, 15 Wallace, 194, commented on.
6. An equivalent for the ingredient of a combination consisting wholly of parts that are old must be one which was known at the date of the original patent as a *proper substitute* for the ingredient left out.

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

Mrs. Eliza Wells, administratrix of Henry A. Wells, sued Gill at law for infringement of letters-patent for an improvement in machinery for making hat-bodies. Original letters-patent had been granted to the said Henry, April 25th, 1846. The patent was reissued in 1856, in two parts, No. 396 and No. 400, to an assignee of Wells, and was extended by the Commissioner of Patents, April 17th, 1860; and again reissued in December, 1860, to the assignee of Wells, in No. 1086 and No. 1087. No. 1086 was again reissued to Burr, June 17th, 1862, in No. 1318. On the 2d of March, 1867, Nos. 1087 and 1318 were extended to Eliza Wells, as administratrix of Wells, by act of Congress; and on the 19th of May, 1868, No. 1087 was again reissued in No. 2942. On this the present suit was founded.

The cause was tried upon the general issue, with notice of certain special matters in defence, and a verdict for the plaintiff below for nominal damages was rendered.

The defendant excepted to certain rulings, instructions, and directions given below, and exceptions being taken the case was now before this court.

The subject of hat-forming machines and the art relating to the making of hats is set out by the present reporter in the case of *Burr* v. *Duryee*,* which was a suit under a prior

* 1 Wallace, 531.

reissue of the already mentioned patent of Wells; and it is indispensable that the reader of the present case, unless he has already a knowledge of the subject in some other way, master the general history presented by that case, before he proceed with the present one.*

As stated in that case, Wells had been preceded by a machine of one Williams, in which there was a feed-apron for carrying the fur, a disintegrater, a fur conductor, a rotating cone, and an exhaust.

The Wells machine, as shown in his original patent and in the model filed by him in the Patent Office, consisted of certain parts organized together into a hat-forming machine, which consisted of—

1st. Feed-aprons.

2d. A revolving brush.

3d. A tunnel or chamber.

4th. An upper hood and lower flap as adjuncts to the trunk.

5th. An exhaust, rotating, perforated cone.

These several parts are shown combined in Fig. 1, which is a copy of Wells's original patent drawing.

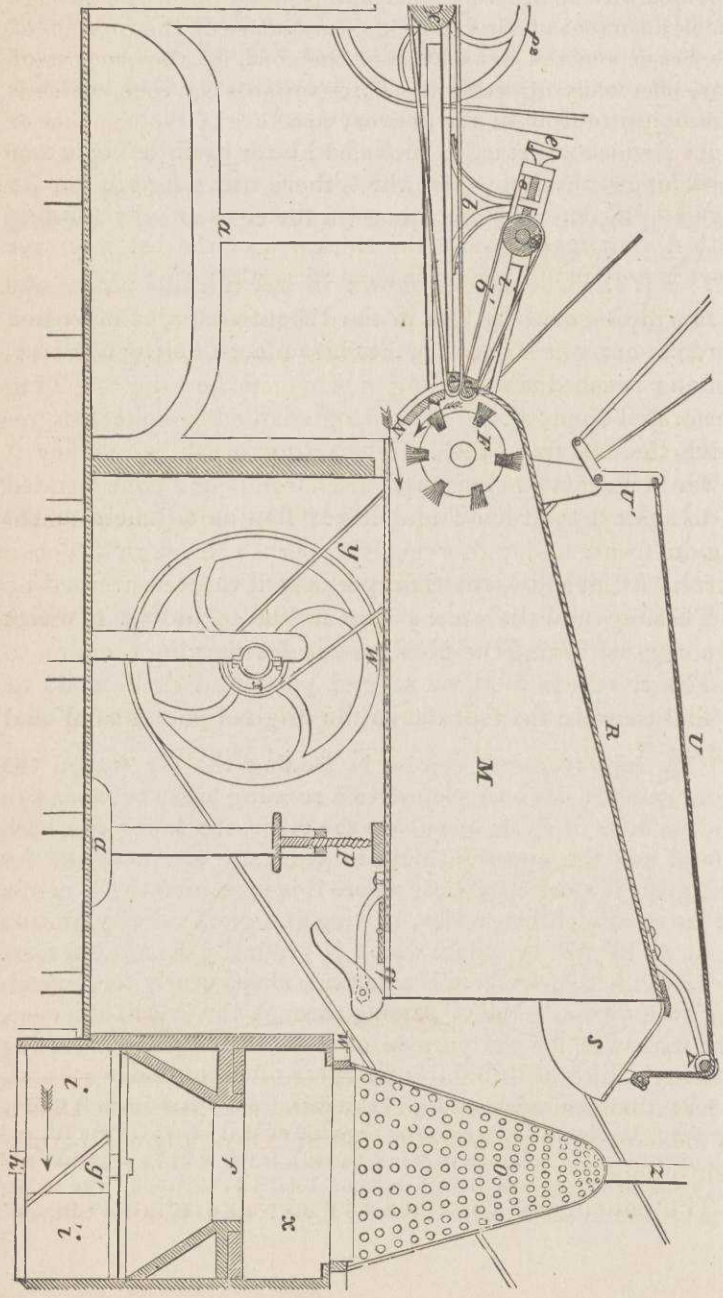
The functions of these several parts and their mode of operation were thus set out in the original patent of Wells:

"My improvements consist in feeding the fur (called the stock) after it has been picked, to a rotating brush between two endless belts of cloth, one above the other, the lower one horizontal and the upper inclined, to gradually compress the fur and gripe it more effectually where it is presented to the action of the rotating brush, which, moving at a great velocity, throws it in a chamber or tunnel which is gradually changed in form towards the outlet, where it assumes a shape nearly corresponding to a vertical section passing through the axis of the cone, but narrower, for the purpose of concentrating and directing

* For the better understanding of that case, the reporter deems it well to say that "the figure" referred to on page 550 of that report (in the 7th and 8th lines from the top of the page just named), is figure 21 on page 560, and not figure 10 on page 549, as might not unnaturally be supposed. The matter is put rightly in late editions of Volume I, but is not so in earlier editions.

Wells's original patent drawing.

FIG. 1.

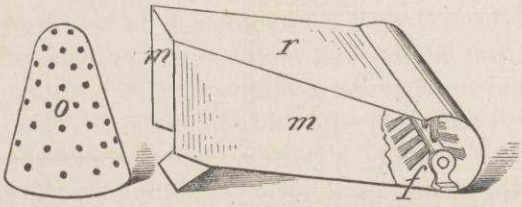


the fur thrown by the brush on to the cone; this casing being provided with an aperture immediately under the brush, through which a current of air enters in consequence of the rotation of the brush and the exhaustion of the cone, for the purpose of more effectually directing the fibres towards the cone, which is placed just in front of the delivery aperture of the chamber or tunnel, which aperture is provided at top with a bonnet or hood hinged thereto, and at the bottom with a hinged flap, to regulate the deposit of the fibres on the cone or other former, with a view to distribute the thickness of the bat wherever more is required to give additional strength."

It will be seen that the marked feature of this invention here set out was a *tunnel* or *chamber* placed between the revolving brush disintegrating mechanism and the revolving perforated cone, this tunnel being adapted to collect or receive the fur from the disintegrating brush, to convey it towards the cone, and then to discharge it in a concentrated form against the revolving cone. The tunnel had an opening in front, under the revolving brush, through which a current of air entered. This current of air, constrained by the casing or walls of the tunnel, was plainly the direct agent in conveying the fibres to and discharging them on to the cone.

This *tunnel* was represented in the original model and patent as an integral structure, as shown in Fig. 2; and

FIG. 2.



although, like all tubular structures of rectangular section, it had a bottom and top and two sides, yet these were shown as made of uniform material and united rigidly and permanently together.

The patent also described two movable adjuncts to the

discharging end of the tunnel, one called the "*hinged hood*," placed above, and the other called the "*hinged flap*," placed below. The hinged hood is shown in Fig. 1 at *s*, and the hinged flap at *q*.

Nothing was said in the original specification to lead one to suppose that any result whatever could be accomplished without the union of the bottom, the sides, and the top into this integral structure called the "*chamber*" or "*tunnel*;" and the interposition of that "tunnel" between the disintegrating brush, *F*, and the pervious vacuum cone, *O*. Moreover it was not suggested in the original patent, nor was there anything to lead any one to suppose that if the tunnel or chamber was entirely removed the feeding mechanism and the disintegrating apparatus could in any useful way whatever *co-operate* with the pervious cone.

There were four claims of this patent relating to the mechanism.

The first claim of the original patent of 1846 pointed clearly to a *combination* of the peculiar feeding mechanism, bb^1, the disintegrating brush, *F*, and the tunnel or chamber, *M*, in front of the brush.

The second claim pointed at the combination of the chamber or tunnel, *M*, and the perforated cone, *O*, in front of it.

The third claim pointed at the combination of the tunnel or chamber, *M*, and the upper hinged hood, *S*.

The fourth claim pointed at the combination of the tunnel or chamber, *M*, with the lower hinged flap, *q*.

It will be observed that into each of the four combinations set out in the four claims above respectively, the entire tunnel or chamber (composed of a bottom, sides, and top, united together) entered as an *integral* device.

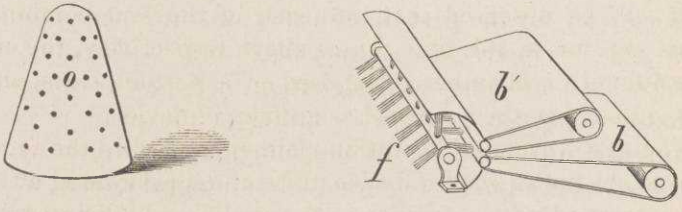
The first feature of invention claimed looked to the function which, as an *integral* device, this tunnel performed at its receiving end with reference to the feeding and disintegrating brush.

The second feature claimed looked to the function which this same tunnel as an *integral* device performed, at the discharging end, in reference to the perforated vacuum cone.

The third and fourth features claimed respectively concerned this same tunnel as an *integral* device, viewed in connection with the movable adjuncts at the upper and lower part of its discharging end.

In the several successive reissues of this patent, granted in 1856, April 17th, 1860, and December, 1860, this device was called a "*tunnel* or *chamber*;" was uniformly described as an *integral* device, and no hint was given that it could be entirely removed or that it could be separated into its elementary parts, and that either of its several elementary parts could alone perform any useful purpose in connection with the disintegrating brush and cone. After the patent had been extended by Congress, the extended patent was reissued May 19th, 1868 (that is to say, twenty-two years after the date of the original patent), with specification No. 2942, presenting two distinct features of invention not exhibited in the original patent or in any prior reissue, viz.: 1st, that there existed in the Wells invention a direct combination between the feeding machinery, the disintegrating brush, and the pervious cone, independent of any intermediate device between the disintegrating brush and the cone. Such a combination would be represented to the mind by dropping out the chamber or tunnel from the Wells patent, drawing Fig. 1, at page 4, *supra*, and thus producing

FIG. 3.



A special claim, No. 4, was inserted in this reissue to point out and secure this combination to the representatives of Wells. It was in the following language:

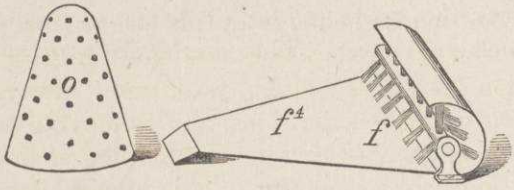
FOURTH CLAIM.

"The combination of the feeding apron, on which the fur can be placed in separate batches as described, the rotating brush or picker substantially as described, the rotating cone, or 'former,' provided with an exhausting mechanism substantially as described; the said combination having a mode of operation substantially such as described."

The second marked change in this last reissue, No. 2942, from either of its predecessors was the omitting from the specification the words "*tunnel or chamber*" always theretofore present in the specifications, and employing no distinctive term as applicable thereto as an integral device. At the same time that all mention of this integral device theretofore called the "*tunnel or chamber*" disappeared from the specification, that device in the new description was split up into four parts, *each* of which parts was treated as if it was in itself an *integral* device; and a specific designation was given to each part. Thus, instead of it being stated as it had been done in the previous issues that there was a "tunnel or chamber" extending from the brush toward the cone, it was stated in the last reissue that "*from the under part of the rotating brush x x, there is a plate f, which extends towards the pervious cone.*" Again, it was stated that "there is an upper guide or deflector *r*, which extends over the rotating brush forward of it toward the cone." Again, it was stated that "on each side there is a guide *m*, extending from the picker brush toward the cone." These devices, called respectively for the first time in this reissue "*plate f or bottom plate*," "*upper guide or top guide*," and "*guide m or side guides*," had no names or designation by letters or otherwise whatsoever given to them in either of the prior reissues. Moreover, all statement of the function performed by the "tunnel or chamber" regarded as an integral device, which function had been theretofore regarded as the *mode of operation* of the Wells machine, disappeared in this reissue, and special functions were assigned to each of these *parts*, thus treated as integral devices in this reissue. Finally, in the claiming part of the specification, combinations between

each of these several newly recognized integers and the other parts of the machine were carved out. Thus, Claim 1 covered the combination of the disintegrating brush, the "*bottom plate or guide f f*," and the rotating pervious vacuum cone. This combination would be shown by

FIG. 4.

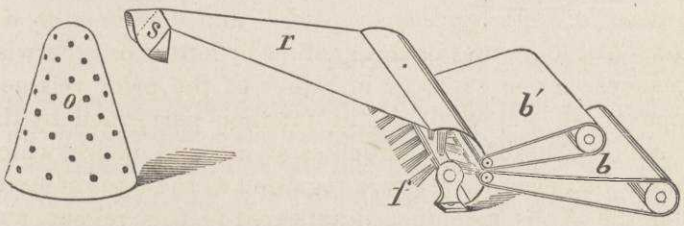


Claim 1 was in the following language:

"The combination of the rotating brush or picker, substantially such as described, the rotating pervious cone, provided with an exhausting mechanism substantially as described, *and the bottom plate or guide* substantially as described for directing the fur fibres towards the lower part of the cone, and preventing the fibres going to waste, the said combination having the mode of operation specified, and for the purpose set forth."

Claim 2 covered the combination of the feeding mechanism, the disintegrating brush or mechanism, the "*top guide or deflector*," and the pervious vacuum cone. This combination would be shown in Fig. 5.

FIG. 5.



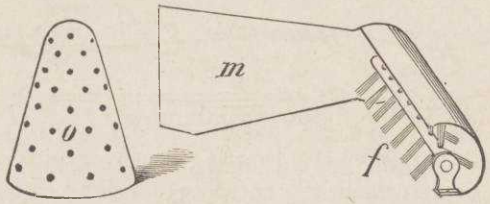
This Claim 2 was in these words:

"The combination of the feed-apron, the rotating brush or

picker, substantially as described, the rotating pervious cone, provided with an exhausting mechanism, substantially as described, and *the guide or deflector, for directing fur fibre on to the tip and upper part of the cone*, substantially as described; the said combination having the mode of operation specified, and for the purpose set forth."

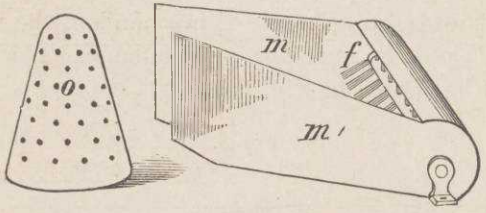
Claim 3 embraced the combination of the disintegrating mechanism, the "side guides or either of them," and the pervious vacuum cone. This combination in an alternate

FIG. 6.



form would be illustrated by Fig. 6, where only one side guide is involved, and by Fig. 7, where both side guides are shown.

FIG. 7.



Claim 3 was in these words:

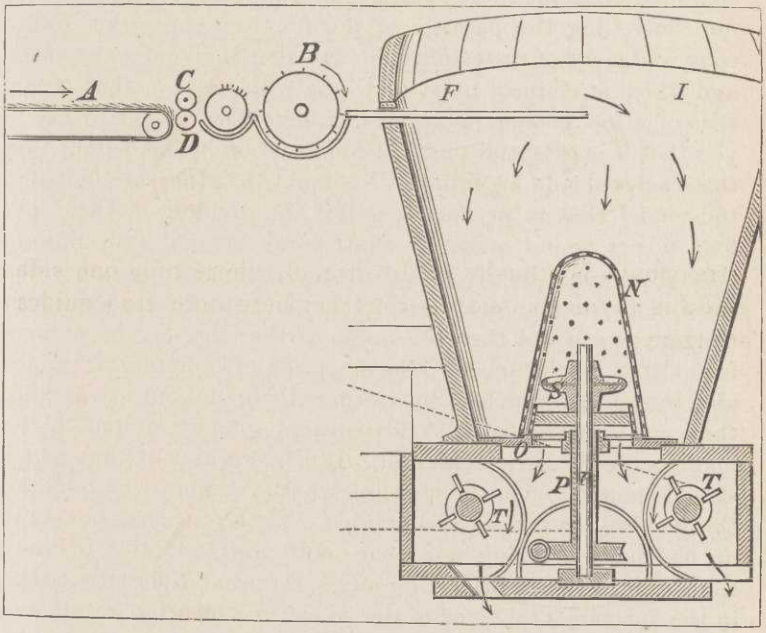
"The combination of the rotating brush or picker, substantially as described, the rotating pervious cone provided with an exhausting mechanism, substantially as described, and the *side guides, or either of them*, substantially as described, to prevent fur fibres from getting out of the proper influence of the current travelling to the cone, and to protect the travelling fibres from disturbing currents; the said combination having the mode of operation specified, and for the purpose set forth."

Statement of the case.

Such being the claims of this reissue, No. 2942, on which the present suit was brought, it becomes necessary to describe the defendant's machine; the machine, namely, alleged to have infringed. It consisted of a machine shown in Fig. 8.

This machine had a single feed-apron *A*, a rotating picker *B*, which revolved in the direction shown by the arrow, throwing the fur against a "cut-off board" *F*.

FIG. 8.



The fur is carried to the machine on the feeding apron *A*, and passes between rollers *C* and *D*, and by the action of the picker cylinder *B*, it is thrown against a cut-off board *F*, whence it passes into the top of box *I*. The fan *T* creates a blast in the direction of the respective arrows, drawing the air and fur in the box *I* downwards, and as this current of air passes through the apertures in the cone the fur is deposited on said cone *N*.

The current of air can be regulated by means of the reg-

isters *S*, which are within the cone *N*, the lower one of which can be turned on shaft *R*, and serves to open or close the apertures of the upper disk so as to produce a current of air of the desired strength.

The court below, after describing to the jury the Wells "trunk," consisting of a bottom, top, and sides, and its mode of operation as a "trunk," proceeded to charge them as follows:

"Now, gentlemen, having said what I have in relation to the combination of the three parts to the trunk, this instrumentality for controlling the passage of the fur from the picker to the cone, and mode of restraining this fur, so it shall not go to waste, and which is claimed to be new, you will perceive that it consists of a top, bottom, and sides; I have been asked to say to you that it is essential to a just construction of this patent that those sides should be united. No doubt that they are united in the model that is produced; and if the dividing of them into four pieces would make no substantial change, if the instrumentality would be the same substantially, and operate in the same mode, no man could sever them and say he was not an infringer; and if not then the union of the edges at the corners is not of the substance of the invention. Therefore, I am not able to say that one has not infringed who did not use a trunk that was constructed with its corners solid or united in the manner that is here exhibited. If I had a case of that sort I should submit to you the question whether a man who took the thing as we see it here and divided it at the corners, and set it up, had made anything more than an attempt, colorable, to evade the patent, without producing any substantial difference, either in the instrumentality or in the mode in which the result was effected.

"Such being the model which is produced here—for if you perceive that, in any respect, I have erroneously conceived it or misstated it, you will correct me—I have only recurred to it for the purpose of giving application to the views, mainly of law, bearing upon the question. I say this being substantially an account of the machine which Mrs. Wells, the plaintiff, patented in the reissue, which is the foundation of this suit, has, for reasons doubtless sufficient to her, divided the claim of the specification into several parts, and she has done so apparently

under the idea that if she dealt with the machine as a unit, as an aggregate, the invention might be appropriated with impunity by a party who used a portion of its effective, original, and useful parts, leaving out some others. An inventor is at liberty when he has made an invention, if it consists of several distinct, effective, new devices, which as an aggregate, may constitute, in his judgment, the best machine in the world, but of which certain of the parts may be omitted, and it still be an effective, new, and useful machine—I say that the inventor is at liberty, in taking out his patent, to protect himself against that species of innovation by claiming the separate, new, and useful parts of the machine by themselves.

"For illustration. A party patenting a machine may introduce ingenious and new devices which may be better than any other for the purpose, but some of which could be supplied by old devices, if he patents the machine and the combination containing his new devices, patents only a combination. A party who might think he could make a machine substantially useful for his purpose by omitting these devices, and supplying their places by old devices, having different operation and character, would be at liberty to do so, and thus, practically, a large benefit, or perhaps the whole benefit that is due the inventor might be lost. I say the patent law, therefore, permits the inventor not only to patent the machine as an aggregate, but to patent the new devices which enter into it, so that another may not avail himself of his ingenuity in that respect. That is the reason why reissues often become necessary, because in the original patent, the party did not claim distinctly the separate items of the property which he had a right to claim. And, in that view, I suppose the plaintiff here has claimed the combination of the rotating brush or picker, substantially as described, the rotating pervious cone, provided with an exhausting mechanism, substantially as described; and the bottom-plate or guide, substantially as described, of which is called the trunk for directing the fur fibres toward the lower part of the cone, and preventing the fibres going to waste, which combination has the mode of operation specified and for the purpose set forth."

Upon this instruction of the court below, and upon the refusal of the court below to instruct the jury that the reissued patent, No. 2942, was invalid because it was not for

the same invention as the original patent—matters to which the defendant excepted—the first principal decision of this court is based.

The only other matters assigned for error and noticed by the court were—

That the court erred in refusing to instruct the jury that the defendant's machines did not infringe the fourth claim of the plaintiff's patent, unless it had the feeding device of the original patent in combination with the rotating brush or picker and the pervious cone, and the chamber or tunnel described in the original specification.

That the court erred in instructing the jury that the reissued patent is valid, as respects the fourth claim, if the combination of the three ingredients therein mentioned was new, and could be usefully employed for the purpose of facilitating the making of *hat-bodies, supplemented by any known means of guiding the fur in such a way as to bring, by the operation of these three devices*, the fur to the cone so as to make a hat-body, or if those three devices would make a hat-body without the aid of other means of protecting the fur against escape that would be serviceable for any purpose, then it was patentable, even without the trunk, which is also called the chamber or tunnel.

Messrs. H. F. French and A. L. Soule, for the plaintiff in error; Messrs. E. N. Dickerson and M. K. Brewer, contra.

Mr. Justice CLIFFORD delivered the opinion of the court.

Valid letters-patent may be granted for an invention which consists entirely in a new combination of old ingredients, provided it appears that the new combination of the ingredients produces a new and useful result; but the rule is equally well settled, in such a case, that the invention consists merely in the new combination of the ingredients, and that a suit for an infringement cannot be maintained against a party who constructs or uses a substantially different combination, even though it includes the exact same ingredients. Alterations, however, in a combination, which are merely

formal, do not constitute a defence to the charge of infringement, as the inventor of a new and useful combination of old ingredients is as much entitled to claim equivalents as any other class of inventors, but they cannot suppress subsequent improvements which are substantially different from their inventions, whether the new improvement consists in a new combination of the same ingredients or of some newly discovered ingredient, or even of some old ingredient performing some new function not known at the date of the letters-patent as a proper substitute for the ingredient withdrawn.

Old ingredients known at the date of letters-patent granted for an invention, consisting of a new combination of old ingredients, if also known at that date as a proper substitute for one or more of the ingredients of the invention secured by the letters-patent, are the equivalents of the corresponding ingredients of the patented combination. Such old ingredients, *so known* at the date of the letters-patent granted, are the equivalents of the ingredients of the patented combination, and no others, and it may be added that *that*, and that only, is what is meant by the rule that inventors of a new combination of old ingredients are as much entitled to claim equivalents as any other class of inventors.

Reissued patents, in order that they may be valid, must be for the same invention as the surrendered originals. Inoperative or invalid patents, which are so by reason of a defective or insufficient specification, or by reason that the patentee claimed as his own invention or discovery more than he had a right to claim as new, may be surrendered if the error arose by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, and the provision is that the Commissioner, in that event, shall, upon the payment of the sum required by law, cause a new patent for the same invention, and in accordance with the corrected specification, to be issued to the proper party, as prescribed in the fifty-third section of the Patent Act.*

Unquestionably the specifications in such a case may be

* 16 Stat. at Large, 206.

amended to correct an error which has arisen by inadvertence, accident, or mistake, if without any fraudulent or deceptive intention, but the express provision in the new Patent Act is that no new matter shall be introduced into the specification, and that in the case of a patent for a machine neither the model nor drawings shall be amended, except each by the other, which is a very important provision to secure the fulfilment of the condition that the reissued patent shall be for the same invention as that secured by the original patent.

Matters of law only are in dispute here between the parties, as the judgment of the Circuit Court was rendered in a suit at law for the infringement of a patent, and the cause was removed into this court by a writ of error to revise the rulings and instructions of the circuit judge, but it will be necessary to refer somewhat fully to the specification of the original patent, and to compare the same with the specification of the reissued patent, which is the patent in suit, in order to understand the exact nature and scope of the controlling questions presented for decision.

Exact description of the invention was given in the specification of the original patent, which affords the most ample means to define the nature and scope of the improvement actually made by the patentee as secured by that patent.

My improvements, he says, consist in feeding the fur after it has been picked to a rotating brush, between two endless belts of cloth, one above the other, the lower one horizontal and the upper one inclined to gradually compress the fur and gripe it more effectually where it is presented to the rotating brush, which moves at great velocity and throws it into a chamber or tunnel which is gradually changed in form towards the outlet, where it assumes a shape nearly corresponding to a vertical section passing through the axis of the cone, but growing narrower, for the purpose of concentrating and directing the fur thrown by the brush to the cone.

Currents of air enter at the same time through an aperture immediately under the brush, in consequence of the rotation of the brush and the exhaustion of the cone, for the

purpose of more effectually directing the fibres towards the cone, which is placed just in front of the delivery aperture of the chamber or tunnel, which aperture is provided at the top with a bonnet or hood, hinged thereto, and at the bottom with the hinged flap to regulate the deposit of the fibres on the cone or other former with the view to distribute the thickness of the bat wherever more is required to give additional strength to the manufacture.

Means are also described for holding the fibres composing the bat on to the cone, so that the bat may be removed from the cone or former before the hardening process is applied, and for that purpose the representation is that the patentee first covers it with felted or fulled cloth, and then he employs one or two metallic cones, one to put over the bat after it has been surrounded with the moist cloth, for the purpose of making pressure on the fibres and to allow hot water to circulate when the whole is immersed therein to harden the bat preparatory to felting, and the other metallic cone is to be placed within the perforated one on which the hat has been formed, and which is necessarily thin and weak, for the purpose of resisting the pressure of the surrounding water, consequent upon a partial vacuum produced within, when the whole is withdrawn from the water.

Special reference is then made to the drawings and a detailed description is given of every device included in the apparatus and of the functions which the respective devices of the apparatus perform. Superadded to those details is a general description of the mode in which the described apparatus operates and of the result which it accomplishes, in substance as follows: As the fibres are first presented they are acted upon by the brush, which moves with great velocity, and they are properly laid by its downward action, but when liberated they are carried down the curved surface of the chamber or tunnel, and at the lower edge of that device they meet a current of air that enters a narrow aperture near the bottom of the chamber or tunnel, which extends the whole length of the brush, and prevents the fibres from

falling and resting on the bottom of the chamber or tunnel and carries them on to the perforated cone.

Minute description is also given of the chamber or tunnel and of its appendages and of the functions which it performs, as follows: That it extends over and under the brush and is so arranged as to have a slight motion the axis of which is the same as that of the brush, and that its bottom rests on set-screws to regulate the delivery end of the same relatively to the cone; that its forward end is provided with a hinged flap regulated by a cam lever as the means of regulating the delivery of the fibres; that its top is gradually elevated and that the sides are contracted to make the delivery aperture nearly of the form of the cone but narrower and higher; that its upper part is provided with a hood so curved as to correspond generally with the curve of the top of the cone.

Particular description is also given of the mode in which the hood is arranged and of the functions which it performs, as follows: That it is hinged to the upper part of the delivery aperture of the chamber and that it is connected with an eccentric by means of a cord and bell-crank passing over a pulley, so that each revolution of the eccentric carries the hood up and down to direct the discharge of the fibres and to distribute the same on to the cone, giving a greater thickness in the parts of the hat which form the brim and edge than on the top and crown, and he suggests the means to be employed by the manufacturer when it is desired still further to diversify the distribution of the fibres.

Intelligent description is also given of the cone and of the functions which it performs, and of the whole mode of operation from the time the fibres are placed upon the feed-apron until the hat is formed, but there is no trace of any suggestion or intimation that the operation can be performed or the patented result be produced without the chamber or tunnel. Instead of that it is unquestionably true that the chamber or tunnel is a material ingredient of the combination and an essential feature of the described invention. Unmistakable support to that view, if any be needed beyond what is disclosed in the description given of the same, is

also derived from the claims of the patent, three of which in express terms describe the invention as a combination, and include the chamber or tunnel as one of the ingredients of the combination. Besides the evidence in that direction, derived from the first three claims, the fourth claim is for the employment of the hinged hood to regulate the proper distribution of the fibres, which device is obviously but a mere appendage of the chamber or tunnel in terms included in the described combination.

Such a combination, if new and useful, and if it produces a new and useful result, is the proper subject of a patent to secure to the owner or proprietor the exclusive right to make, use, and vend the thing patented for the period allowed by the Patent Act. Beyond doubt such a patent is valid and operative, but the rights of the patentee under it differ in one respect from those of a patentee for an invention which consists of an entire machine, or of a new and useful device, as the rights of a patentee for a mere combination of old ingredients are not infringed unless it appears that the alleged infringer made or used the entire patented combination.*

Invalid and inoperative patents may be surrendered and reissued for the same invention, but Congress never intended that a patent which was valid and operative should be reissued merely to afford the patentee an opportunity to expand the exclusive privileges which it secures, to enable him to suppress subsequent improvements which do not conflict with the invention described in the surrendered patent. Evidence of a decisive character to negative the theory that such a practice finds any support in the act of Congress, besides what existed before, is found in the new Patent Act, which expressly provides that no new matter shall be introduced into the specification; and in case of a machine patent, that neither the model nor the drawings shall be amended except each by the other.

Two or three only of the errors assigned will be much

* Gould *v.* Rees, 15 Wallace, 194.

considered. They are in substance and effect as follows: (1.) That the court erred in refusing to instruct the jury that the reissued patent is invalid because it is not for the same invention as the original. (2.) That the court erred in refusing to instruct the jury that the defendant's machine did not infringe the fourth claim of the plaintiff's patent unless it had the feeding device of the original patent in combination with the rotating brush or picker and the pervious cone and the chamber or tunnel described in the original specification. (3.) That the court erred in instructing the jury that the reissued patent is valid as respects the fourth claim if the combination of the three ingredients therein mentioned was new and could be usefully employed for the purpose of facilitating the making of hat-bodies, supplemented by any known means of guiding the fur in such a way as to bring, by the operation of these three devices, the fur to the cone so as to make a hat-body, or if those three devices would make a hat-body without the aid of other means of protecting the fur against escape that would be serviceable for any purpose, then it was patentable, even without the trunk, which is also called the chamber or tunnel.

Three or more important propositions of patent law are involved in the exceptions covered by the assignment of errors, which it becomes important to restate with some care, because neither the prayers for instructions, nor the rulings of the court in refusing the same, nor the instructions given, nor the assignment of errors are in every respect free from ambiguity.

Perhaps no one of the prayers for instruction corresponds in precise terms with either of the first two propositions, but it is nevertheless true that many of them, as applied to the separate claims of the patent, did raise the questions involved in those propositions, and it is equally certain that the court in several instances ruled to the effect that the reissued patent was not invalid for the reason assigned, and that the machine of the defendant did infringe that of the plaintiff, even though it did not contain the chamber or tunnel described in the plaintiff's original specification.

Filled as the record is with proofs to establish the truth of the preceding statements, further argument upon the subject is unnecessary. Throughout the trial it was the constant aim of the defendant to defeat the plaintiff's action upon the three grounds mentioned: (1.) That the reissued patent was invalid because it was not for the same invention as the original. (2.) That the defendant did not infringe the plaintiff's invention because his machine did not contain the chamber or tunnel of the plaintiff's invention, nor its appendages. (3.) That the reissued patent was invalid as it respects the fourth claim of the same, because the combination contains only three of the four ingredients described in the original specification, and does not include either the chamber or tunnel or its appendages.

Unquestionably these several defences were pressed in many forms, and all must agree that the court refused to sustain any one or all of them as often as they were presented by the defendant.

Attention will next be called to the specification of the reissued patent as the best means by which to determine whether the invention secured by it is or is not the same as that of the original. Wide differences between the two specifications are manifest in two important particulars.

1. That the whole description of the chamber or tunnel and its appendages is left out of the specification of the reissued patent, and that it contains a full description of other devices different from the chamber, in form at least, to perform the functions of the chamber and its appendages as described in the original specification.

Material matters are left out of the specification when compared with the original, and it is beyond dispute that new features are introduced in the description of the devices to be employed in guiding the fibres of the fur when taken from the feeding mechanism by the rotating brush or picker. They are picked and thrown towards the cone as in the other specification, in which it has already appeared that the representation is that they are guided and directed in the manner and for the purpose specified by the chamber and

its appendages. Instead of that the description in the reissued specification is that the function of guiding and directing the fur is effected by the following means. Nothing is said about the chamber, but the description is that a plate is provided and placed under the brush, and that it extends towards the pervious cone, an open space being left between that end of the plate which is nearest the picker and the concave part below the feeding mechanism that a current of air may enter freely to assist in carrying the fibres towards the cone as they are thrown by the brush or picker, and the further representation is that the plate guides the fibres as they are travelling and prevents too great an accumulation of them immediately around the lower edge of the cone, the greatest thickness of the bat being required to be deposited some distance above, that the bat when made may be thickest at and about the junction of the rim and crown, technically termed the band, and that it also prevents waste, as otherwise many of the fibres would be carried by the force of gravity below the influence of the currents travelling towards the cone, particularly towards the close of the operation, when the currents induced by the exhausting fan become very faint.

Description is then given of the mode in which the plate is adjusted and of the functions which it performs, as follows: That it rests on an adjusting screw, so that that end of it which is nearest the cone can be readily elevated or depressed relatively to the base of the cone, as it may be desired to vary the distribution of the fibres with a view to make hats with a broad or narrow rim and with the rim thicker or thinner relatively to the other parts, the plate being made in two parts with a view to facilitate the distribution, the part beyond the supporting screw and nearest the cone being hinged to the other part and being provided with a cam or lever or other equivalent device.

Provision is also made for a device called an upper guide or deflector, which, as the representation is, extends from the feeding mechanism over the rotating brush or picker and forward of it towards the cone to direct the fibres and effect a

proper distribution of them on the top of the cone and down the sides thereof towards the base; and the further representation is that the under surface of that guide or deflector nearest the picker-brush is flat or parallel with the axis of the picker-brush, and thence, towards the other end, concave and of a gradually increasing concavity towards the cone, and that the apparatus may be supplied with an additional deflector further to diversify the distribution of the fibres, somewhat in the form of a hood, which is hinged to the end of the deflector nearest the cone, so that it can be moved by a cord passing over a pulley or a lever actuated by an eccentric or a cam on a shaft. Guides are also provided on each side of the deflector, extending from the picker-brush towards the cone, to prevent the fur fibres from escaping laterally out of the proper influence of the currents which are travelling towards the cone, and which otherwise would go to waste, and also to prevent the fibres which are travelling towards the cone from being disturbed by lateral or foreign currents, not induced by the rotating brush or picker or by the exhausting of the cone.

No allusion even is made to the chamber or tunnel in describing the apparatus for guiding and directing the fibres thrown by the rotating brush or picker except at the conclusion of the description, where the patentee states that in the machine illustrated by the accompanying drawings the bottom plate, top guides or deflector, and side guides are all united along their edges, which is an express admission that it is the chamber or tunnel and its appendages in the original specification that performs all these functions, and that the description given in the reissued patent is a new feature, describing devices different in form and with different names from the description given of the means to accomplish the same end in the original patent.

Differences so wide between an original and a reissued patent show that it was a bold measure to grant, as well as to ask for, such a reissue. Examples of the kind, if any, it is believed are very few in which such a reissued patent has been granted where there is not a word in the original speci-

fication to support the theory that the patentee ever invented anything except his described combination, which it is admitted consisted of four ingredients, all of which were old. Complete description is given in the original specification of that combination, but the specification does not contain the slightest evidence that the patentee ever made any other combination than that which embodies the four described ingredients.

Cases arise where a patentee, having invented a new and useful combination consisting of several ingredients which in combination compose an organized machine, also claims to have invented new and useful combinations of fewer numbers of the ingredients, and in such cases the law is well settled that if the several combinations are new and useful, and will severally produce new and useful results, the inventor is entitled to a patent for the several combinations, provided that he complies with the requirement of the Patent Act and files in the Patent Office a written description of each of the alleged new and useful combinations, and of the manner of making, constructing, and using the same.

He may give the description of the several combinations in one specification, and in that event he can secure the full benefit of the exclusive right to each of the several inventions by separate claims referring back to the description in the specification; and if by inadvertence, accident, or mistake, he should fail to claim any one of the described combinations, he may surrender the original patent and have a reissue not only for the combination or combinations claimed in the original, but for any which were so omitted in the claims of the original patent.

Very different rules, however, apply in a case where the only invention described in the original patent is the one which includes all the ingredients of the machine, provided there is no suggestion, indication, or intimation that any other invention of any kind has been made. Such a patentee as the one last mentioned may subsequently discover that he can accomplish a new and useful result by a combination embracing less than the whole number of the ingredients

included in the prior patented combination, but he cannot secure the right and privilege of a patentee in the combination of the smaller number of the ingredients by a surrender of his first patent and a reissue of the same which shall include the second combination as well as the first, because the reissued patent in that event would not be for the same invention as the surrendered original.*

Nor could that change be allowed under the present Patent Act for another reason equally decisive, which is that the description of the other combinations, beside the first, would constitute a new matter, the introduction of which into the specification of a reissued patent is expressly forbidden by the fifty-third section of that act. Such a prohibitory provision, it should be remembered, is new and was not in force when the reissued patent in suit was granted.†

None of the prior patent acts contained any such prohibition, but they all provided in terms that the reissued patent must be for *the same invention* as the original, and that the inventor before he shall receive a patent for his invention, shall file in the Patent Office a written description of the same and of the manner of making, constructing, and using the same, in such full, clear, concise, and exact terms as to enable any person skilled in the art to make, construct, and use the invention.

Where the ingredients are all old the invention in such a case consists entirely in the combination, and the requirement of the Patent Act that the invention shall be fully and exactly described applies with as much force to such an invention as to any other class, because if not fulfilled all three of the great ends intended to be accomplished by that requirement would be defeated. They are as follows: (1.) That the government may know what they have granted and what will become public property when the term of the monopoly expires. (2.) That licensed persons desiring to practice the invention may know, during the term, how to make, construct, and use the invention. (3.) That other in-

* Vance *v* Campbell, 1 Black, 428. † 16 Stat. at Large, 206.

ventors may know what part of the field of invention is unoccupied.

Purposes such as these are of great importance in every case, but the fulfilment of them is never more necessary than when such inquiries arise in respect to a patent for a machine which consists of a combination of old ingredients. Patents of that kind are much more numerous than any other, and consequently it is of the greatest importance that the description of the combination, which is the invention, should be full, clear, concise, and exact.

Patient search has been made *in vain* for any trace of the description of any other invention in the original patent than that of the combination of all the ingredients of the apparatus described by the patentee as the one used by him to effect the described patented result. Unable to discover in that specification any description of any other invention than that, the court is of the opinion that none other was secured by the original patent.

Argument to show that an invention consisting of a combination of three ingredients which are old is not the same as that of a combination of four old ingredients is quite unnecessary, as the negative of the proposition is as well settled in the patent law as it is in mathematics. In *Vance* v. *Campbell** four propositions were decided which have an important application to the case before the court: (1.) That a patentee in a suit for an infringement of an invention consisting of a combination of old ingredients cannot in his proofs abandon a part of such combination and maintain his claim to the rest, for the reason that unless the patented combination is maintained the whole of the invention fails. (2.) That the patentee in such a suit cannot be allowed to prove that any part of the combination is immaterial or useless. (3.) That the combination is an entirety, and that if one of the ingredients be given up the thing claimed disappears, which is an obvious truth, as the invention in such a case consists simply in the combination. (4.) That the clause which provides that the suit shall not be defeated where the

* 1 Black, 428.

patentee claims more than he has invented, in case he shall disclaim such part, applies only where the part invented can be clearly distinguished from that improperly claimed, which shows that the clause cannot apply to a patent granted for an invention consisting of a combination of old ingredients.*

Enough has already been remarked to show that all the principal claims of the original patent recognize the chamber or tunnel and its appendages as one of the primary ingredients of the patented invention, and it is absolulely certain that the specification of that patent contains neither suggestion, indication, nor intimation that the original patentee made any other invention to accomplish the described functions than the one which includes the whole four described ingredients.

Suppose that it is so, still it is insisted by the plaintiff that the plate, deflector, and side guides which are described in the specification of the reissued patent are substantially the same thing as the chamber or tunnel of the original patent, and that those devices taken together are legally to be regarded as the equivalent of the chamber or tunnel and its appendages as described in the specification of the original patent.

Even a glance at the original specification is sufficient to show that it does not contain any description whatever of the plate, deflector, or side guides mentioned in the specification of the reissued patent, nor is it pretended that if the several devices named had been described in the original specification the description of these several devices would have been a good description of the chamber or tunnel and its appendages which are embraced in the invention secured by that patent within the meaning of the act of Congress, which requires that the description shall be full, clear, concise, and exact. Clearly it could not be, as it would not accomplish any one of the three great purposes before named as the purposes for which the description is required.

Equivalents are doubtless allowed to a patentee or owner

* Case *v.* Brown, 2 Wallace, 320; Burr *v.* Duryee, 1 Id. 566.

of the patent to shut out infringements, but the Patent Act furnishes no support to the theory that the patentee may surrender a patent for an invention consisting of a combination of old ingredients, and amend the descriptive parts of the specification by striking out the entire description of one of the ingredients of the combination and inserting in lieu thereof a full description of several other devices without any allegation that they are the equivalents of the one whose description is stricken out, or any explanation whatever showing the reason why the change was made.

Whether one device is or is not an equivalent for another is usually a question of fact, and often becomes a difficult issue to decide. Grave doubts were at one time entertained whether the patentee of an invention consisting of a combination of old ingredients was entitled to equivalents, but it is now well settled that he is just as much as the patentee of any other class of inventions; but it is very important to understand what is meant by an equivalent of an ingredient in such a combination. Questions of the kind usually arise in comparing the machine of the defendant in a suit for infringement with that of the plaintiff, and the rule is that if the defendant omits entirely one of the ingredients of the plaintiff's combination, without substituting any other, he does not infringe, and if he substitutes another in the place of the one omitted, which is new or which performs a substantially different function, or even if it is old but was not known at the date of the plaintiff's patent as a proper substitute for the omitted ingredient, he does not infringe.* By an equivalent in such a case it is meant that the ingredient substituted for the one withdrawn performs the same function as the other, and that it was well known at the date of the patent securing the invention as a proper substitute for the one omitted in the patented combination.† Hence it follows that a party who merely substitutes another old ingredient for one of the ingredients of a patented com-

* Carver *v.* Hyde, 16 Peters, 514; Brooks *v.* Fiske, 15 Howard, 212; Stimpson *v.* Railroad, 10 Id. 329; Prouty *v.* Ruggles, 16 Peters, 341.

† Gould *v.* Rees, 15 Wallace, 194

bination is an infringer if the substitute performs the same function as the ingredient for which it was substituted, and was well known at the date of the patent as a proper substitute for the omitted ingredient; but the rule is otherwise if the ingredient substituted was a new one or performed substantially a different function, or was not known at the date of the plaintiff's patent as a proper substitute for the one omitted, as in that event he does not infringe.*

Inconveniences past estimation would result if those rules should be applied in defining the rights of a patentee to make amendments to the specification of an original patent when applying for a reissue, as it would open the door in every case to issues of fact whether the substituted device is or is not an equivalent for the one withdrawn, within the rules defining what is meant by that term, which issues of fact might be determined one way in one case and another and a different way in another case. Nor can those rules be applied in such a case consistently with the language of the section allowing a surrender and reissue, which is limited to the correction of errors which have arisen by inadvertence, accident, or mistake, nor without an utter disregard either of the condition that the reissue shall be for the same invention as the original, or of the clause of the twenty-sixth section, which provides that before any inventor shall receive a patent for his invention he shall file in the Patent Office a written description of the same in such full, clear, concise, and exact terms as to enable any one skilled in the art to make, construct, and use the same.

Substitution of one ingredient for another may perhaps be made in cases where it would be competent for the court to decide, as matter of law, that the ingredient substituted is an equivalent for the one withdrawn, as where a spring is substituted for a lever to produce power, or where a weight is substituted for a spring to produce pressure, but the court could seldom or never, in a suit at law, undertake to determine without a jury whether a particular ingredient

* Roberts *v.* Harnden, 2 Clifford, 504.

substituted in a reissued patent was or was not known at the date of the original patent as a proper substitute for the one withdrawn from the combination described in the original specification.

Viewed in the light of these several suggestions the court is of the opinion that it is not competent for a patentee, when he surrenders an original patent, to amend the specification for the new patent by striking out from the original the correct description of one of the ingredients of the patented combination, and to substitute in its place the description of other devices not well known at the date of the original patent as a proper substitute for the ingredient whose description is stricken out.

2. Just the same considerations are involved in the second proposition, which, therefore, requires no further discussion, as it is fully maintained by the reasons given in support of the first proposition.

3. Even grant that neither of the rules laid down in the two preceding propositions are correct, still the court is unhesitatingly of the opinion that the judgment in this case must be reversed for the reason that the instructions given to the jury are erroneous, inasmuch as they do not correctly define the meaning of an equivalent as applied to the ingredients of an invention consisting entirely of a combination of ingredients all of which are old.

Assume the theory that the patentee of such a patent, in effecting a reissue, may strike out from the original specification the description of one of the ingredients of the patented combination and insert as a substitute therefor in the new specification the description of an equivalent for the same, which is denied, still it is clear law that the substituted ingredient cannot be regarded as a legal equivalent, within the meaning of the Patent law, unless it performs substantially the same function as the ingredient withdrawn, and was well known as such an ingredient at the date of the original patent and as a proper substitute for the ingredient which was included in the patented combination.

Questions of the kind usually arise where it becomes nec-

essary to determine whether the defendant is guilty of an infringement in case it appears that he has not used all of the ingredients of the patented combination of the plaintiff. Repeated decisions of this court have settled the rule in such cases that if the ingredient substituted by the defendant for the one left out in the defendant's machine was a newly discovered one, or even an old one performing some new function, and was not known at the date of the plaintiff's patent as a proper substitute for the ingredient left out, the charge of infringement cannot be maintained.*

Tested by these considerations the court here is of the opinion that the judgment of the Circuit Court must be reversed for three reasons, as follows: (1.) That the prayer for instruction presented by the defendant, that the reissued patent is not for the same invention as the original, was improperly refused. (2.) That the Circuit Court improperly refused to instruct the jury that the defendant did not infringe the plaintiff's patent unless the apparatus had the feeding device of the original patent in combination with the rotating brush or picker and the pervious cone and the chamber or tunnel described in the original specification. (3.) That the Circuit Court erred in instructing the jury that the reissued patent is valid as respects the fourth claim if the combination of the three ingredients therein mentioned is new and could be usefully employed for the purpose of facilitating the making of hat-bodies, supplemented by any known means of guiding the fur in such a way as to bring the same, by the operation of these three devices, to the cone so as to make a hat-body, or if those three devices would make a hat-body without the aid of other means of protecting the fur against escape.

Two errors are contained in that instruction, as follows: (1.) It gives an erroneous definition of an equivalent for the ingredient of a combination consisting wholly of such as are old, as the substituted ingredient in such a case must be

* Gould *v.* Rees, 15 Wallace, 193; Seymour *v.* Osborne, 11 Id. 555; Vance *v.* Campbell, 1 Black, 428; Prouty *v.* Ruggles, 16 Peters, 341.

one which was known at the date of the original patent as *a proper substitute* for the ingredient left out, which latter qualification is entirely omitted in the instruction given to the jury. (2.) But the instruction is also erroneous because it would allow a patentee to secure in a reissued patent inventions for combinations fewer in number than the whole described in the original patent, though the original patent contained no description whatever of any such invention, in violation of the express provision of the Patent Act and of the decisions of this court.

JUDGMENT REVERSED with costs, and the cause remanded with directions to issue a

NEW VENIRE.

Mr. Justice STRONG concurred in the judgment, but not in all the positions taken in the preceding opinion.

Mr. Justice BRADLEY did not sit, and took no part in the judgment.

INSURANCE COMPANY *v.* NEWTON.

1. Every admission upon which a party relies, is to be taken as an entirety of the fact which makes for his side, with the qualifications which limit, modify, or destroy its effect. When, therefore, the agent and officers of an insurance company stated to the agent of a party claiming upon a policy of insurance that the preliminary proofs presented were sufficient as to the death of the insured, but that they showed that the insured had committed suicide, the whole admission must be taken together. If sufficient to establish the fact of the death of the insured, it was also sufficient to show the manner of his death.
2. The preliminary proofs presented to an insurance company, in compliance with the condition of its policy of insurance, are admissible as *primâ facie* evidence of the facts stated therein, against the insured and on behalf of the company.

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

Mrs. Newton, widow of J. H. Newton, brought suit in the court below, against the Mutual Life Insurance Com-

pany, of Newark, New Jersey, upon two policies of insurance on the life of her husband, issued by the company's agent at St. Louis.

The policies stipulated for the payment of the insurance-money within ninety days after due notice and proof of the death of the party insured, but they provided also that the policies should be void if the insured should die by his own hand.

In answer to the action, the company averred that the insured did thus die, and that the policies thereupon ceased to be binding.

The insured died at Los Angeles, in California, in June, 1870, and proofs of his death were delivered by the father of the plaintiff to the agent of the company in August following. These proofs consisted of several affidavits, giving the time, place, and circumstances of his death, and the record of the finding of the jury upon the coroner's inquest. The finding was that the deceased came to his death "by a pistol-shot fired by a pistol in his own hand through the heart."

On the trial, the father of the plaintiff testified that he was the agent, in the matter of these policies, of his daughter, and that, acting in that capacity, he had delivered the written proofs mentioned to the agent of the company at St. Louis, and had demanded payment of him, and afterwards also of the officers of the company at the home office in Newark; that at neither place was any objection made either by the agent or the officers of the company to the form or fulness of the proofs of the death of the insured; that the agent had said that they were sufficient as to form, but that at both places objection was made, at the same time, that the proofs disclosed a case of suicide, and on that account payment of the insurance was refused.

The plaintiff having closed her case, the company offered as evidence the preliminary proofs of the death of the party insured, and presented to the company by the father, as above said. The court excluded them, and the company excepted. In its charge, the court having referred to the affidavits presented by the plaintiff, said:

"It appears that the company, upon receiving the affidavits, claimed that they showed that Newton had taken his own life, and refused to pay; and the agent has so testified on the stand as a witness, and says the company never denied or doubted the fact of Newton's death, and that the affidavits showed it; but placed their refusal to pay upon the distinct and specific ground that he took his own life, and that this fact appeared (as the company claimed) from the proofs of loss furnished by the plaintiff.

"Under these circumstances, the court instructs you that the defence based upon want of notice and proof of death, is not sustained.

"On the merits the company sets up the defence that the deceased 'died by his own hand;' that is, that he purposely took his own life. This defence is met by a denial.

"This is an affirmative defence, and hence the burden of showing, by a fair preponderance of testimony, that Newton purposely took his own life, rests upon the defendant."

To this charge the defendant excepted, and verdict and judgment having been rendered for the plaintiff the company brought the case here, on exceptions to the evidence and to the charge.

Messrs. F. T. Frelinghuysen and E. L. Stanton, for the plaintiff in error, cited 1 Greenleaf on Evidence,* *Campbell* v. *Charter Oak Insurance Company*,† *Irving* v. *Excelsior Insurance Company*,‡ and other cases,§ to show that the whole of the admission must go to the jury, or none of it, and that the preliminary proofs of death were properly admitted, if not by way of estoppel at least as evidence to be considered by the jury.

Mr. T. Z. Blakeman, *contra*, and in support of the judgment, relied on *Cluff* v. *Mutual Benefit Life Insurance Company*‖ as in point.

* Sections 201, 202. † 10 Allen, 213. ‡ 1 Bosworth, 507.

§ Ætna Insurance Co. *v.* Stevens, 48 Illinois, 31; Hoffman *v.* Ætna Insurance Co., 1 Robertson, 501; affirmed, 32 New York, 405; New York Central Insurance Co. *v.* Watson, 23 Michigan, 486.

‖ 99 Massachusetts, 317

Opinion of the court.

Mr. Justice FIELD delivered the opinion of the court.

The court below allowed the statement of the company and its agent to the witness as to the sufficiency of the proofs of death of the insured to be received as conclusive of that fact, but by its charge to the jury in effect separated the admission of that fact from its accompanying language, that the proofs disclosed a case of suicide, and held that this latter statement was of an independent fact to be established by the company. In this particular we think the court erred. Every admission is to be taken as an entirety of the fact which makes for the one side, with the qualifications which limit, modify, or destroy its effect on the other side. This is a settled principle which has passed by its universality into an axiom of the law. Here the admission related to the two particulars which the proofs established, the death of the insured and the manner of his death, both of which facts appear by the same documents. They showed the death of the insured only as they showed that he had committed suicide, and all that the officers of the company evidently intended by their declaration was that they were satisfied with the proofs of the one fact because they established the other. The whole admission should, therefore, have been taken together. If it was sufficient to establish the death of the insured, it was also sufficient to show that the death was occasioned in such a manner as to relieve the company from responsibility.

But the court also erred in excluding from the jury the proofs presented of the death of the insured when offered by the company. When the plaintiff was permitted to show what the agent and officers of the company admitted the proofs established, it was competent for the company to produce the proofs thus referred to and use them as better evidence of what they did establish.

But independently of this position the proofs presented were admissible as representations on the part of the party for whose benefit the policies were taken, as to the death and the manner of the death of the insured. They were presented to the company in compliance with the condition

of the policy requiring notice and proof of the death of the insured as preliminary to the payment of the insurance-money. They were intended for the action of the company, and upon their truth the company had a right to rely. Unless corrected for mistake, the insured was bound by them. Good faith and fair dealing required that she should be held to representations deliberately made until it was shown that they were made under a misapprehension of the facts, or in ignorance of material matters subsequently ascertained.

There are many cases which hold that where a mistake has occurred in the preliminary proofs presented, and no corrected statement is furnished the insurers before trial, the insured will not be allowed on the trial to show that the facts were different from those stated. The case of *Campbell* v. *The Charter Oak Insurance Company*, decided by the Supreme Court of Massachusetts,* and the case of *Irving* v. *The Excelsior Insurance Company*, decided by the Superior Court of the City of New York,† are both to this effect. It is not necessary, however, to maintain any doctrine as strict as this in the present case; and possibly the rule there laid down is properly applicable only where the insurers have been prejudiced in their defence by relying upon the statements contained in the proofs. Be that as it may, all that we now hold is that the preliminary proofs are admissible as *primâ facie* evidence of the facts stated therein against the insured and on behalf of the company. No case has come under our observation, other than the present, where the preliminary proofs presented by the insured have been entirely excluded as evidence when offered by the insurers, the question being in all the cases whether these proofs estopped the insured from impeaching the correctness of their statements, or from qualifying them, or whether they were subject to be explained and varied or contradicted on the trial.

The case of *Cluff* v. *The Mutual Benefit Insurance Company*, in the Supreme Court of Massachusetts,‡ cited by the plaintiff, is far from sustaining his position. There the bene-

* 10 Allen, 213. † 1 Bosworth, 50. ‡ 99 Massachusetts, 317.

ficiary had submitted in connection with the preliminary proof certain slips cut from newspapers showing reports that the insured had died in known violation of law. On the trial upon the issue whether the plaintiff had, ninety days previous to the commencement of the suit, furnished the company sufficient proof of the death of the insured, the plaintiff put in evidence certain affidavits by which that proof had been made, but did not offer the slips; the latter were then offered by the company and were excluded, and the Supreme Court, in reviewing the case, held that the exclusion was not a valid ground of exception unless it plainly appeared that the insurers were prejudiced thereby, and that they were not so prejudiced because the fact of death was otherwise sufficiently shown. "When an apparent ground of defence," said the court, "is disclosed by a separate and unnecessary narration of circumstances, and the proofs required by the policy are complete without that narration and disclosure, it cannot be said that the party has failed to comply with the conditions imposed upon his right to litigate his claim; and the effect of such disclosure to defeat the action must depend upon the degree to which the plaintiff is bound by the statement. If not sworn to by the plaintiff, nor treated by him in such manner that he is concluded by his conduct, the whole question will be open to explanation and proof upon the main issue subject to the usual rules of evidence."

In the present case the proofs presented were sworn to; they consisted, as already stated, of affidavits and the record of the finding of a jury under oath. Here the narration of the manner of the death of the deceased was so interwoven with the statement of his death that the two things were inseparable. The fact that the proofs were presented by the father of the plaintiff and not by the plaintiff herself cannot change their character. They were the only proofs presented, and without them there was no attempted compliance with the condition of the policies. He was the agent of the plaintiff with respect to the policies, intrusted by her with the presentation of the preliminary proofs.

Statement of the case.

Presented in her name and by her agent in the matter, and constituting the essential preliminary to her action, they must stand as her acts, and the representations made therein must be taken as true until at least some mistake is shown to have occurred in them. As already said, no suggestion is made that these proofs do not truly state the manner of the death of the insured. It is sought, however, to avoid their effect in favor of the company by taking a part of the statement of its officers as to what the proofs showed, and rejecting the residue, and then excluding the proofs themselves. This position cannot be sustained without manifest injustice to the company.

The judgment must, therefore, be

REVERSED, AND A NEW TRIAL ORDERED.

CARY, COLLECTOR, *v.* THE SAVINGS UNION.

Where depositors in a savings bank do not receive a fixed rate of interest independently of what the bank itself may make or lose in lending their money, but receive a share of such profits as the bank, by lending their money, may, after deducting expenses, &c., find that it has made, such share of profits is a "dividend" within the meaning of the Internal Revenue Act of 1864, as amended by the act of 1866, and not "interest."

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

An act of Congress passed in 1864, as amended in 1866,* enacted that there should be levied and collected a tax of five per centum on all dividends thereafter declared due, wherever and whenever the same should be payable to depositors as part of the earnings, income, or gains of any savings institution:

"*Provided*, That the annual or semi-annual *interest* allowed or

* 13 Stat. at Large, 283; 14 Id. 138.

paid to the depositors in savings banks or savings institutions shall not be considered *as dividends.*"

This statute being in force, Cary, collector of internal revenue at San Francisco, demanded of the Savings Union, one of the savings banks of that city, a certain sum of money which had been assessed against the company as a tax for *dividends* paid by it to its depositors. The company refused to pay, alleging that they had paid no "dividends" to their depositors, and had only paid to them semi-annual *interest* on their deposits. The collector, however, being about to distrain for the amount, the company paid it under protest, and now brought suit as for money thus paid under duress.

The Savings Union was this sort of institution:

It had a capital stock. Its business was to receive deposits, and in the contract under which they were received, provision was made for the accumulation of a reserve fund out of the profits earned, which was to be the property of the company. The capital stock, reserve fund, and deposits were also made, by the same contract, a common fund to be lent out by the company as opportunity offered. The stock and the reserve fund formed a guarantee capital for the security of the return of the deposits to the depositors.

At the expiration of every six months the directors were required to ascertain the amount of the profits of the business, and after deducting certain salaries and expenses, and setting apart a certain proportion, not exceeding one-tenth, to the stockholders as a compensation for furnishing the capital, apportion the remainder for a dividend upon the capital stock, reserve fund, and deposits, at such monthly or yearly rates as the total amount of net profits would permit. The dividend apportioned to each account was to be in proportion to the time the several amounts represented in the account formed part of the funds of the corporation, and the rate of dividends or ordinary deposits was to be increased by twenty per cent. to form the rate upon funds remaining permanently in the hands of the corporation, including what were denominated "term deposits." The

directors were also required to determine and make known from time to time a rate of interest to be paid to depositors who might wish to take such rate in lieu of dividends, on drawing out the balance of their accounts between one dividend day and another.

Each depositor at the time of opening his account, signed a contract printed on the first three leaves of the little pass-book, which he then received. The contract was headed,

"*Conditions of agreement on which deposits may be made with, and will be repaid by the San Francisco Savings Union.*"

And it contained a large number of provisions in regard to the returns which the depositor expected to get for his deposit. In these "conditions" these returns were always styled "dividends," as *ex. gr.*, in the following, which was one of the conditions:

"*Dividends* will be payable during the six months following the half year for which they may have been declared, in preference to deposits; . . . and all *dividends*, not drawn within the first thirty days, will share in the next *dividend*."

The question was whether the payments made to depositors, upon which the taxes now sought to be recovered, were assessed and collected, were made as interest or as dividends of profits. The court below held them to be dividends, but held also that under an act of Congress, to which it referred, and passed since the two acts above quoted, the dividends were not taxable. It accordingly gave judgment for the company, and the collector brought the case here.

The ruling of the court below as to the validity of the tax had, lately, and *since the judgment*, been declared by this court a wrong one; and the law declared to be that dividends were then still taxable. So that the only question now was whether the tax was laid on dividends or on interest. If on the former, the judgment was, of course, to be reversed, and a judgment entered below for the collector.

Mr. C. H. Hill, Assistant Attorney-General, for the plaintiff in error, distinguished the case of such a savings bank as this

one was, from that of savings banks—such as he said there are many of—which simply take money from depositors, agreeing to pay to them a fixed rate of interest per annum; a rate for which the corporation is bound, no matter how little gain it may itself make; and for no more than which it is bound, however great its own gains may be; any surplus above the interest agreed to be paid to depositor, not belonging to him but to the corporation.

Mr. H. J. Tilden, *contra*, argued that what the depositor got here was really the interest which was paid by borrowers on money put by him into the bank, and that *calling* that interest a "dividend" did not less make it "interest."

The CHIEF JUSTICE delivered the opinion of the court.

A distinction is expressly recognized in the act of Congress between interest and dividends, and the Circuit Court decided that the payments to the depositors were for dividends. The question is whether this decision was correct.

We think it was. The depositors contracted not for a rate of interest to be paid upon their deposits, but for a share of the profits of the business in which their money was, by agreement, to be employed. It is true that the profits of the company were principally to be derived from interest upon loans made, but they were none the less on that account profits. The interest received for the loan of each deposit was not kept by itself, and paid to the depositors after deducting a charge to cover expenses, but all was placed in a common fund, and when the net result of the business was ascertained, that was divided among the several contributors according to the value of their contributions. Such a division clearly produces a dividend according to the common understanding of that term. The parties themselves so understood it, for they gave it that name in the contracts, executed when the depositors made their deposits. They stipulated for the payment of dividends and not interest.

JUDGMENT ACCORDINGLY.

HOUSE ET AL. *v.* MULLEN.

1. A bill was filed by two parties, one of whom showed good cause for equitable relief, but the other of whom did not show what interest he had in the subject-matter of litigation, or that he had any. The bill was demurred to on several grounds, one being the want of such showing (which by settled equity rule is a good ground of demurrer), and another ground being that the bill showed that the claim was barred by the statute of limitations, was stale, &c.; an allegation about the bill not true in fact, it showing the reverse, and *this* ground of demurrer therefore failing. The court below "dismissed" the bill generally; and in this state the record was of course capable of being pleaded in bar to a new suit on the merits. This court being of opinion that the only defect in the bill was that it did not show interest in both the parties while it did show cause for equitable relief in one, refused to affirm the decree below, as it would have done had the dismissal been *without prejudice*, or because a party who showed no interest was a complainant. On the contrary, to prevent what might be great injustice in case of another suit on the merits, by the record being used in the way above mentioned, the court reversed the decree and remanded the case with directions to allow the complainant to amend his bill within a reasonable time, or failing to do this to dismiss it without prejudice.
2. When a bill by a widow, claiming real estate, alleges that certain persons named, being several in number, *all* claim through a deed made by her during coverture, which deed the bill alleges was void for want of her free consent in making it, no demurrer lies to the bill on the ground that the defendants were improperly joined, inasmuch as they had separate and distinct interests which could not be joined in one suit.

APPEAL from the District Court for the Middle District of Alabama.

On the 27th of November, 1871, Eliza House filed a bill in chancery, in the court below, against Andrew Mullen and twenty-one others.

The bill set forth that on the 16th of March, 1838, the said Eliza being then a married woman, a conveyance was made by one Lawrence to a certain Gibson, for the consideration of $2700, of the half *or* undivided moiety of lot No. 22, in the town of Selma, Alabama; that by mistake this was recorded as a conveyance of the half *of* the undivided moiety of said lot; that by the terms of the conveyance the

trustee was to hold the property in trust for the benefit of her the said Eliza during her natural life, after which he was to convey in fee simple to such child or children as she might have living at her death. The bill further alleged that Gibson died in 1841, and Reuben House, the husband of the complainant, in 1868; that from the date of the deed from Lawrence to Gibson, the complainant lived on the premises, or received the rents and profits, until 1846; that during this time her husband and herself removed from Alabama to Florida; that the defendants were now in possession of the lot or parts of the same, claiming the whole of it as owners, and asserting title under a deed which they alleged to have been made by the complainant and her husband in 1846 to one Walker, which deed the complainant alleged that she did *not* sign and seal as her voluntary act and deed, freely and without compulsion of her said husband.

The bill prayed for the appointment of a trustee in place of Gibson, who was dead. It also prayed for a partition with the defendants, for an account of rents and profits, and for such other and further relief as to equity belonged.

Before anything further was done, the complainant obtained leave to file an amended bill, and an entire new bill was accordingly filed by her and *Mary Hunter*, and *Charles Hunter*, husband of the said Mary. What interest Mr. and Mrs. Hunter had in the matter, or how either was related to anybody concerned in it, was nowhere stated. As for the rest, the same matters were alleged in the new bill as in the old. To this new bill the defendants demurred.

The grounds of demurrer set forth were—

1. That if the complainants had any rights as shown by the bill, they were separate and distinct, and could not be joined in this suit.

2. That the bill did not show any interest of Mary and Charles Hunter in the subject-matter of the litigation.

3. That the defendants were improperly joined, inasmuch as they had separate and distinct interests which could not be joined in one suit.

4. And that the claim was stale, and barred by the statute of limitations and by the long acquiescence of the complainants in the possession of the defendants as shown by the bill.

The decree ran thus:

"This cause coming on, &c., . . . it is considered by the court that the said demurrer of the defendants . . . be sustained. It is, therefore, adjudged and decreed that the said bill of complaint of Eliza House, Mary Hunter, and Charles Hunter, be and the same is hereby *dismissed* out of this court."

The reader will observe that the dismissal was general and absolute; not one for error or defect of parties or without prejudice.

From this decree the complainants appealed.

Mr. W. W. Boyce, for the appellants:

The second ground of demurrer, and to which we will first advert, was that no interest was specifically stated to exist in Mr. and Mrs. Hunter. But Mrs. Hunter was plainly the daughter of Mrs. House. The fact was inferable from the allegations of both bills, that the trust was for Mrs. House for life and for her *child* afterwards; from the patent fact that the child was a party in interest and necessary; and from the amended bill in which she was brought in. The omission to state in terms the relationship was evidently one merely accidental, which should not have been visited with the heavy penalty of such a dismissal as was made—an absolute one—but if with any dismissal at all with but one giving leave to amend.

But there was no ground for any sort of dismissal. The fact of heirship being shown as above it is, as a matter inferable, the first ground of demurrer falls away. Mrs. House and Mrs. Hunter had the same title; the former being equitable tenant for life and the latter tenant in remainder. The husband was rightly added for form.

The third ground of demurrer is bad, because *all* the defendants are alleged to be in possession under a deed made

by the complainant, Mrs. House, which was executed under duress.

As for the fourth ground, the statute of limitations, &c., the bill was filed in November, 1871. Mr. House, the husband, it is alleged in the bill and admitted by the demurrer, died only in 1868. Till 1868 the complainant, Mrs. House, was under disabilities. Every ground of demurrer, therefore, was bad.

No opposing counsel.

Mr. Justice MILLER delivered the opinion of the court.

The fourth ground of demurrer—that the bill shows that the claim was stale, barred by the statute, &c.—is sufficiently answered by the averment of the bill that the plaintiff, Eliza House, was a *feme covert* from the time she parted with the possession until the year 1868, the bill being filed in 1871.

The third ground—that the defendants are improperly joined—is equally indefensible, as the bill shows that defendants all claim through a deed from her, which deed she alleged to be void for want of her free consent in making it.

If the case should come to a hearing the contest must turn upon the validity of this deed, in which all the defendants have a common interest. Besides, she asks to have her half divided or partitioned off to her. To obtain that she is not obliged to file a separate bill against each of the twenty-two defendants, if she is entitled to a half of the whole lot on partition.

The two first causes of demurrer may be treated together.

The bill is fatally defective in joining Mary Hunter and her husband, Charles Hunter, as plaintiffs, and making no allegation or averment of any interest whatever which they have in the matter.

It is suggested by counsel for appellants that Mary Hunter is the child of Eliza House, and that the statement of this fact is omitted by a mere accident. But we have no evidence that Mary Hunter is the child of Eliza House, except

the statement of appellants' brief; nor could any evidence of that fact be admitted under this bill.

The authorities are very clear that such a misjoinder, or the bringing a suit by a plaintiff who shows no interest of any kind in the suit, is fatal to the bill if taken on demurrer or answer. We must in this suit hold that they have no interest, as none is alleged, though it seems almost incredible that when this was distinctly pointed out as a ground of demurrer the counsel did not ask leave to amend, either by stating their interest or striking out their names.

The demurrer was, therefore, properly sustained and the bill dismissed, as the presumption must be that no leave to amend was asked.*

But when a bill is dismissed for misjoinder of parties it settles nothing but that the suit cannot progress in that condition; and if parties will not or cannot amend so as to remove that difficulty, the court will go no further, but will dismiss the bill. It does not and cannot, in the nature of things, conclude either party upon the merits of the matter in controversy, and the plaintiffs, or any one of them, should be at liberty to bring another bill, with proper parties, in regard to the subject-matter of the first one. And the right to do this cannot be doubted when it appears plainly that the first bill was dismissed either for want of necessary parties or for a misjoinder of parties, or when by the terms of the decree the bill is dismissed without prejudice.†

But neither of these things appear in the present case. There are grounds stated in the demurrer which would, if sustained, be a bar to any other suit, to wit, staleness of the claim, statute of limitations, and long acquiescence in the possession and claim of title by defendants. It does not appear by the decree, or by the order sustaining the demurrer, on which of the grounds set out in the latter it was

* Story's Equity Pleadings, §§ 509, 544; Mitford's Equity Pleadings, 6th American edition, 177, side paging, 154; Page *v.* Townsend, 5 Simons, 395; King of Spain *v.* Machado, 4 Russell, 225; Cuff *v.* Platell, Ib. 242; Bill *v.* Cureton, 2 Mylne & Keen, 503, 512.

† Story's Equity Pleading, § 541.

sustained, or on what ground the bill was dismissed. As the record stands this decree might be pleaded successfully as a bar to any other bill brought by Eliza House, or by Mary Hunter, her child, in assertion of her right to this lot, though we are of opinion that the only defect in the bill is that it shows no interest in Mary Hunter, while it does show a good cause for equitable relief on the part of Eliza House. If the decree had dismissed the bill without prejudice,* or had stated as the ground of dismissal the misjoinder of parties, or want of interest in two of them, we would have affirmed it, but, to prevent what may be a great injustice, we must reverse the present decree and remand the case, with directions to allow plaintiffs to amend their bill as they may be advised, and if they fail to do this within a reasonable time, to dismiss it without prejudice.

REVERSAL AND REMAND ACCORDINGLY.

JEFFRIES *v.* LIFE INSURANCE COMPANY.

Where a policy of life insurance contains the following conditions, to wit:

> "This policy is issued by the company, and accepted by the assured, on the following *express conditions and agreements, which are a part of the contract of insurance:*
>
> "*First.* That the statements and declaration made in the application for said policy, and on the faith of which it is issued, *are in all respects true*, and without the suppression of any fact relating to the health or circumstances of the insured *affecting the interest of the company*—"

And the further condition:

> "That in case of the violation of the foregoing condition, . . . this policy shall become *null and void*—"

Any answer untrue in fact, and known by the applicant for insurance to be so, avoids the policy, irrespective of the question of the materiality of the answer given, to the risk.

Accordingly, where, on a suit against an insurance company, the plea alleged that the party insured, by his application for a policy, in answer

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* Story's Equity Pleading, § 541.

Statement of the case.

to a question asked of him by the insurance company, whether he was "*married or single*," made the false statement that he was "*single*," knowing it to be untrue; that in reply to a further question whether "*any application had been made to any other company? If so, when?*" answered "*No;*" *whereas, in fact, at the time of making such false statement, he knew that he had previously made application for such insurance, and been insured in the sum of* $10,000 *by another company*, a demurrer to the plea was held bad; though the plea did not aver that true information on the questions to which the false answers were made "affected the interest of the company," or in other words, was material to the risk.

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

Jeffries, administrator of Kennedy, sued the Economical Life Insurance Company, of Providence, Rhode Island, in the court below, alleging that on the 19th of October, 1870, the said company issued a policy of insurance upon the life of the deceased for $5000; that Kennedy died in August, 1871, and that notice had been given to the company of his death, payment of the amount of insurance demanded and refused.

The policy, which the declaration set out at length, contained the clauses following, viz.:

"This policy is issued by the company, and accepted by the insured and the holder thereof, on the following *express conditions and agreements, which are part of this contract of insurance:*

"1st. That the statements and declarations made in the application for this policy, and on the faith of which it is issued, are in all respects true, and without the suppression of any fact relating to the health or circumstances of the insured, *affecting the interests of said company.*

"6th. That in case of the violation of the foregoing conditions, or any of them, . . . this policy shall become null and void."

The plea averred—

"That the policy was issued and accepted, on the following *express conditions and agreements contained in it and made part of the contract of insurance*, to wit, that the statements and declaration made in the application for the policy, and on the faith of

which it was issued, were in all respects true, and without the suppression of any fact relating to the health or circumstances of the assured *affecting the interests of the defendants*, and upon the further condition, that in case of the violation of the aforesaid condition, among others the policy should become *null and void*.

"That the said Kennedy did violate the first condition in this, that the statements and declarations made by him in his application for the said policy, were not in all respects true, but were false in the following respects, to wit:

"1st. That in the application for the policy, and on the faith of which the same was issued, in answer to the question therein asked of him as to whether he was married or single, he stated that he was single, whereas, in fact, he was married, having a wife then living, as he well knew.

"2d. That in the application for the policy, and on the faith of which it was issued, in reply to the question therein asked of him, '*Has any application been made to any other company; if so, when?*' he answered '*No;*' whereas, in fact, he had, prior thereto, to wit, in April, 1870, applied for insurance upon his life, to the Mutual Life Insurance Company of New York, and had been insured therein in the sum of $10,000, as at the time of making the said answer, he well knew."

To this plea the plaintiff demurred, but the court overruled the demurrer, and entered judgment for the company. From the judgment so entered, the present writ of error was brought.

The demurrer admitting that the statements made in the application were false, the question in the case, of course, was this: "Was the plea bad because it did not aver also, that the false statements were material to the risk?"

Messrs. T. W. B. Crews and J. S. Laurie, for the administrator, plaintiff in error:

1. The statements contained in the decedent's application were not *warranties*. They are not pleaded as warranties. The plea does not allege that the statements were in writing, and if they were not, but were oral only, then, as no particular form of words is essential to make a warranty,

but the question is one of intent, it should have been left to a jury to say whether there was a warranty.

The use by a pleader, of the terms "express conditions and agreements," does not of itself import a condition precedent or a warranty.* If a warranty is relied on, it should be averred. The distinction between a warranty and a representation, is one well known, and, in insurance, vital. A misrepresentation will not vitiate a policy unless material to the risk. The materiality must be averred. It is a fact for the jury.†

2. Independently of any question of defective pleadings, the plea shows on its face that no misstatement in the application could have been meant to vitiate the policy, unless the same "*affected the interest* of the said company;" affected the interests of the company injuriously, of course, thereby meaning. The plea while iterating the language of the contract, yet seeks to defeat a recovery, on the ground of the misstatements, without venturing to allege that they did affect the interests of the company in any way.

Now, it appears that of the two misstatements made in this case, neither affected the interests of the company injuriously; and, indeed, that if they affected those interests at all, they affected them beneficially.

In the first one, the company being told that the applicant was an unmarried man, asked of course, and got a higher premium than if they had been told that he was married; it being matter of notoriety, that a married man is regarded, in the parlance of insurers, as a "better life," than an unmarried one.

So, too, being told that no application had been made elsewhere, they necessarily made a more searching examination into the character of the applicant's health than they would otherwise have made. By his untrue answer the applicant invited medical inquiry. The question put to him

* Bliss on Life Insurance, 2d edition, § 63.

† Daniels *v.* Hudson River Insurance Co., 12 Cushing, 416; Farmers' Insurance Co. *v.* Snyder, 16 Wendell, 481; Phillips on Insurance, 5th edition, p. 580, § 540.

on his application, was not as to *what* other company he had applied to; or for what amount or for what *rate*, but was simply, "*Has any application been made to any other company? If so, when?*" Had he answered truly, he would have said "*Application has been made to another company. It was made about six months ago.*"

The company to which he was now applying would have inquired and would have learned that he had been taken recently, and taken for a large amount, $10,000. This would have tended to show that he was a fit subject for a risk. Such prior insurance by another company would have been regarded as complimentary to the applicant; or in mercantile phrase, as an "indorsement" of his life.

The case then, as to both misstatements, falls within the rule laid down by Mr. Parsons:*

"Nor is a policy avoided by such a misstatement or a fact, which, if truly stated, would *diminish the risk;* for then if the insurers are deceived, *it is to their own advantage.*"

At all events, the second misstatement did no harm. Life insurance companies do not like over-insurances, from their tendency to produce suicide. But there is no allegation or pretence here either of suicide or of an insurance in contemplation of it.

The art with which insurers now word and hedge about contracts of insurance in favor of themselves—their adroit modes of getting answers, and their numerous "conditions" hidden in long columns of finely printed matter—has been the subject of just reproof from this court;† and the results of their contrived questions are so frequently and so grossly unjust, that the legislatures of several States, including Maine, New Hampshire, Ohio, and Missouri, have interfered, and provided by direct enactment that misrepresentations not relating to the risk, shall not vitiate a policy, and that in all cases the materiality shall be a question for

* On Contracts, 6th edition, 471, note *a*.

† See as to the devices of insurers, Insurance Company *v.* Slaughter, 12 Wallace, 407, and Insurance Company *v.* Wilkinson, 13 Id. 222.

the jury. The Missouri statute of March 23d, 1874, to that purport, was the immediate result of the case at bar.

Messrs. A. M. Thayer and J. La Due, contra:

Mr. Justice HUNT delivered the opinion of the court.

The contention in opposition to the judgment is this: that the plea does not aver that the false statements made by the assured were material to the risk assumed. Is that averment necessary to make the plea a good one?

It is contended, also, that the false answers in the present case were not to the injury of the company, that they presented the applicant's case in a less favorable light to himself than if he had answered truly. Thus, to the inquiry are you married or single, when he falsely answered that he was single, he made himself a less eligible candidate for insurances than if he had truly stated that he was a married man; that although he deceived the company, and caused it to enter into a contract that it did not intend to make, it was deceived to its advantage, and made a more favorable bargain than was supposed.

This is bad morality and bad law. No one may do evil that good may come. No man is justified in the utterance of a falsehood. It is an equal offence in morals, whether committed for his own benefit or that of another. The fallacy of this position as a legal proposition, will appear in what we shall presently say of the contract made between the parties.

We are to observe, first, the averment of the plea: That Kennedy, in and by his application for the policy of insurance, in answer to a question asked of him by the company, whether he was "*married or single?*" made the false statement that he was "*single*," knowing it to be untrue; that in reply to a further question therein asked of him by the company, whether "*any application had been made to any other company? If so, when?*" answered "*No;*" *whereas, in fact, at the time of making such false statement, he well knew that he had previously made application for such insurance, and been insured in the sum of* $10,000 *by another company.*

We are to observe, secondly, the averment that the statements and declarations made in the application for said policy, and on the faith of which it is issued, *are in all respects true*, and without the suppression of any fact relating to the health or circumstances of the insured affecting the interests of the company.

We are to observe, also, that other clause of the policy, in which it is declared that this policy is made by the company and accepted by the insured, upon the express condition and agreement that such statements and declarations are in all respects true. This applies to all and to each one of such statements. In other words, if the statements are not true, it is agreed that no policy is made by the company, and no policy is accepted by the insured.

The proposition at the foundation of this point is this, that the statements and declarations made in the policy shall be true.

This stipulation is not expressed to be made as to important or material statements only, or to those supposed to be material, but as to all statements. The statements need not come up to the degree of warranties. They need not be representations even, if this term conveys an idea of an affirmation having any technical character. Statements and declarations is the expression; what the applicant states and what the applicant declares. Nothing can be more simple. If he makes any statement in the application it must be true. If he makes any declaration in the application it must be true. A faithful performance of this agreement is made an express condition to the existence of a liability on the part of the company.

There is no place for the argument either that the false statement was not material to the risk, or that it was a positive advantage to the company to be deceived by it.

It is the distinct agreement of the parties, that the company shall not be deceived to its injury or to its benefit. The right of an individual or a corporation to make an unwise bargain is as complete as that to make a wise bargain. The right to make contracts carries with it the right to de-

termine what is prudent and wise, what is unwise and imprudent, and upon that point the judgment of the individual is subject to that of no other tribunal.

The case in hand affords a good illustration of this principle. The company deems it wise and prudent that the applicant should inform them truly whether he has made any other application to have his life insured. So material does it deem this information, that it stipulates that its liability shall depend upon the truth of the answer. The same is true of its inquiry whether the party is married or single. The company fixes this estimate of its importance. The applicant agrees that it is thus important by accepting this test. It would be a violation of the legal rights of the company to take from it its acknowledged power, thus to make its opinion the standard of what is material, and to leave that point to the determination of a jury. The jury may say, as the counsel here argues, that it is immaterial whether the applicant answers truly if he answers one way, viz., that he is single, or that he has not made an application for insurance. Whether a question is material depends upon the question itself. The information received may be immaterial. But if under any circumstances it can produce a reply which will influence the action of the company, the question cannot be deemed immaterial. Insurance companies sometimes insist that individuals largely insured upon their lives, who are embarrassed in their affairs, resort to self-destruction, being willing to end a wretched existence if they can thereby bestow comfort upon their families. The juror would be likely to repudiate such a theory, on the ground that nothing can compensate a man for the loss of his life. The juror may be right and the company may be wrong. But the company has expressly provided that their judgment, and not the judgment of the juror shall govern. Their right thus to contract, and the duty of the court to give effect to such contracts, cannot be denied.

Of the authorities in support of these views, a few only will be mentioned. In *Anderson* v. *Fitzgerald*,* Fitzgerald

* 4 House of Lords Cases, 483, 487.

applied to an insurance office to effect a policy on his life. He received a form of proposal containing questions required to be answered. Among them were the following: "Did any of the party's near relatives die of consumption or any other pulmonary complaint?" and "Has the party's life been accepted or refused at any office?" To each of these questions the applicant answered "No." The answers were false. F. signed the proposal and a declaration accompanying, by which he agreed "that the particulars above mentioned should form the basis of the contract." The policy mentioned several things, which were warranted by F., among which these two answers were not included. The policy also contained this proviso: that "if anything so warranted shall not be true, or if any circumstance material to this insurance shall not have been truly stated, or shall have been misrepresented or concealed, or any false statement made to the company in or about the obtaining or effecting of this insurance," the policy should be void. On the trial before Mr. Justice Ball, he charged the jury "that they must not only be satisfied that the various false statements were false in fact, and were made in and about effecting the policy, but also that such false statements were material to the insurance." A bill of exceptions was tendered, on the ground that the jury should have been directed "that if the statements were made in and about effecting the insurance and such statements were false in fact, the defendants were entitled to a verdict, whether such statements were or were not material." The exceptions were argued in the Court of Exchequer, where judgment was ordered for the plaintiff on the verdict. A writ of error was brought in the Court of Exchequer Chamber, where the judgment was affirmed by a majority of seven to three. The writ of error to the House of Lords was then brought. Mr. Baron Parke, Mr. Baron Alderson, Mr. Justice Coleridge, Mr. Justice Wightman, Mr. Justice Erle, Mr. Justice Creswell, Mr. Baron Platt, Mr. Justice Talfourd, Mr. Justice Williams, Mr. Baron Martin, and Mr. Justice Crompton attended.

Opinions were delivered by Mr. Baron Parke, the Lord

Chancellor, Lord Brougham, and Lord St. Leonards, all concurring in reversing the judgment, on the ground that the question of the materiality of the statements should not have been submitted to the jury. This case was decided upon facts almost identical with the one before us, and presented the precise question we are considering. The counsel for the defendants asked for a ruling, that if the statements were untrue, the defendants were entitled to a verdict, whether they were or were not material. This was refused, and the judge charged that to entitle the defendants to a verdict, the statements must not only be false, but material to the insurance. This was held to be error, and the judgment was reversed.

Cazenove v. *British Equitable Assurance Company*,* is a familiar case, and was decided in the same way. This case was affirmed in the Exchequer Chamber, in 1860.†

Many cases may be found which hold, that where false answers are made to inquiries which do not relate to the risk, the policy is not necessarily avoided unless they influenced the mind of the company, and that whether they are material is for the determination of the jury. But we know of no respectable authority which so holds, where it is expressly covenanted as a condition of liability that the statements and declarations made in the application are true, and when the truth of such statements forms the basis of the contract.

The counsel for the insured insists that policies of insurance are hedged about with so many qualifications and conditions, that questions are propounded with so much ingenuity and in such detail, that they operate as a snare, and that justice is sacrificed to forms. We are not called upon to deny this statement. The present, however, is not such a case. The want of honesty was on the part of the applicant. The attempt was to deceive the company. It is a

* 6 Common Bench, N. S. 437; and see Duckett *v.* Williams, 2 Crompton & Meeson, 348.

† 6 Jurist, new series, 826, 1860; see also Price *v.* Phœnix Insurance Co., 17 Minnesota, 497.

case, so far as we can discover, in which law and justice point to the same result, to wit, the exemption of the company.

JUDGMENT AFFIRMED.

Justices CLIFFORD and MILLER dissenting.

SCOTT, ASSIGNEE, *v.* KELLY.

1. When an assignee in bankruptcy voluntarily submits himself to the jurisdiction of a State court, and that court renders judgment against him, it is too late for him to allege that the Federal courts alone have jurisdiction in bankruptcy.
2. When the question in a State court is not whether if the bankrupt had title, it would pass to his assignee under the Bankrupt Act, but whether he had title at all, and the State court decides that he had not, no question of which this court can take jurisdiction under section 709 of the Revised Statutes is presented.

ERROR to the Supreme Court of New York; the case being thus:

In July, 1867, three persons, Shawhan, Mendall, and Palmer, of St. Louis, advertised themselves as copartners, under the firm name of Shawhan & Co., and in the September following purchased in that city, under the name of Shawhan & Co., a quantity of flour of one Stanard, and got possession of it without paying for it. "Shawhan & Co." immediately failed; having shipped the flour to agents of theirs in New York, to be sold under the fictitious name and for the account of E. C. Packard & Co. Stanard thereupon, on the 2d of October, 1867, commenced an action in the Supreme Court of New York against Shawhan & Co., and attached, in the hand of the agents of Shawhan & Co., a portion of the proceeds of the flour.

Shawhan, individually, soon after his failure, and on the 28th of October, 1867, was adjudged a bankrupt in Missouri, and one Scott was appointed his assignee. The attachment was levied on the funds mentioned, on the 28th of March,

1868. The agents applied to the court for leave to pay the money into court and substitute the assignee of Shawhan, the opposing claimants of the fund, as defendant in their stead; and the assignee being summoned came in and defended the case.

On the trial, he showed that there was in reality a secret agreement between the persons composing the firm of "Shawhan & Co.," made when that firm was organized, that they were not to be partners in fact, but that Mendall and Palmer were really to be clerks for Shawhan, and that they received a salary as such.

This secret agreement, it was admitted, was not known to or communicated to Stanard before he sold the flour to Shawhan & Co.

The question presented was this: When Shawhan was declared bankrupt, whose was the property, as between Shawhan and the creditors of Shawhan & Co., and as between Shawhan and the creditors of Shawhan? Did it belong to Shawhan individually, or to Shawhan, Palmer, and Mendall, as copartners?

The position of the defendants was that as between Shawhan and the creditors of Shawhan & Co., the property in question belonged to Shawhan individually, and that therefore it passed to Scott, his assignee in bankruptcy, the same as would have done any other individual property of his, for the reason, as they alleged, that the advertisement by the parties of themselves as copartners was a fraud.

The Supreme Court of New York decided that the attaching creditors, who had attached the proceeds as partnership property, and who were now represented by one Kelly, should prevail.

Its view was that, had the suit been brought before Shawhan was decreed a bankrupt, Shawhan would have been estopped from denying the rights of the attaching creditor, and that this being so, his assignee was also estopped; that he had no other rights than Shawhan himself, and no rights superior to his, and was vested with the property subject to all equities against it in his hands.

Opinion of the court.

From this judgment Scott, the assignee, brought the case here as within section 709 of the Revised Statutes,* his counsel contending that the State courts of New York had no jurisdiction in cases of bankruptcy; that under the Bankrupt Act†—which enacted in terms that "the District Courts of the United States be and *they* hereby are constituted courts of bankruptcy," and which declares that "*they* shall have original jurisdiction in all matters and proceedings in bankruptcy"—the matter belonged to one of those courts, and contending *further* that, as plaintiff in error, he set up a title to the subject of the controversy under an assignment in bankruptcy, under an act of Congress, to wit, the Bankrupt Act, which is a "title" . . . "claimed under" a "statute of" . . . "the United States;" that such title was necessarily "drawn in question" in the decision of the Supreme Court, and that the decision of that court was and is "against the title" so claimed and "set up" by the plaintiff in error.

Mr. G. W. Lubké, for the plaintiff in error; Messrs. J. C. Perry and Lyman Tremain, contra.

The CHIEF JUSTICE delivered the opinion of the court.

The writ of error in this case is dismissed for want of jurisdiction.

The assignee in bankruptcy voluntarily submitted himself and his rights to the jurisdiction of the State court. Being summoned he appeared, without objection, and presented his claim for adjudication by that court. No effort was made to remove the litigation to the courts of the United States. It is now too late to object to the power of the State court to act in the premises and render judgment.‡

The question presented for the decision of the State court was not whether, if the bankrupt had title, it would pass to his assignee by the operation of the Bankrupt Act, but whether he had title at all. The court decided that he had

* See the section in the Appendix.

† 14 Stat. at Large, 517.

‡ Mays *v.* Fritton, 20 Wallace, 414.

not. Such a decision by a State court does not present a question of which this court can take jurisdiction upon a writ of error.

WRIT DISMISSED.

PUTNAM *v.* DAY.

1. On a bill of review in equity nothing can be examined but the pleadings, proceedings and decree, which, in this country, constitute what is called the record in the cause. The proofs cannot be looked into as they can on an appeal.
2. On such a bill filed by a defendant to set aside the decree, he is bound by the answer filed on his behalf by his solicitor, though he did not himself read it, unless he can show mistake or fraud in filing it. The answers of other defendants cannot be read in his favor.
3. Where the defendant, by his answer, admits the claim to be due, and prays contribution from other defendants, without setting up any defence to the demand, he cannot, after a decree, and on a bill of review, ask to have the decree set aside on the ground of laches on the part of the complainant in bringing suit.

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

In January, 1868, Putnam and others, having obtained, in the Floyd County Circuit Court of the State of Indiana, a judgment against the New Albany and Sandusky City Junction Railroad Company, filed in the court below, *the Circuit Court of the United States for the District of Indiana*, a creditor's bill against the city of New Albany, Indiana, one Day, and several other defendants, for the purpose of compelling them as stockholders of the said railroad company, to pay certain amounts alleged in the bill to be due and unpaid by them on their stock subscriptions to the said company, so that the amount of the judgment due to the complainants might be paid and satisfied; it being alleged in the bill that the said company was insolvent, and that all its property had been exhausted in satisfying other claims.

The city of New Albany, in its answer, set up a defence peculiar to itself, to wit, a complete settlement and com-

promise with the railroad company in 1857, by which the bonds issued by the city in payment of its stock subscription were surrendered, upon its assuming and paying a large amount of debts due by the company; and the city insisted that this settlement was made in good faith, and was for the benefit of the railroad company and its creditors; and that the complainants had lain by and slept on their rights too long to be permitted to disturb what was alleged to be a most proper and just arrangement.

The other defendants, with the exception of Day, set up that they were not indebted on their subscriptions, for that their stock had been taken off their hands by the city of New Albany, under a provision in the original subscription, which, if the city did take their stock, relieved them.

Day did not join these other defendants in the defence set up by them, but filed a separate answer, and a cross-bill, in which he admitted that he had subscribed stock in the railroad company to the amount of $36,100, *and that* $3500 *thereof remained unpaid.* He then stated that the other defendants, including the city of New Albany, were subscribers to a large amount, which he set forth in a list; and he asserted that they had not paid as much in proportion on their subscriptions as he had paid on his; and prayed that they might be compelled to contribute until they had paid in equal proportion to himself; in which case, he alleged, there would be money due to him instead of money due from him. His cross-bill being demurred to, was dismissed.

A decree in the case was rendered in July, 1869, adjudging that there was due to the complainants on their judgment against the railroad company upwards of $70,000; and that there was due on the stock subscriptions of said company, from the city of New Albany, upwards of $100,000;* from Day, $3500; from another defendant, $3026; which sums were directed to be paid and applied *pro rata* in satisfaction of the judgment. The decree against Day was made

* On appeal to this court, by the city of New Albany, this part of the decree was reversed and the cause remanded, with directions to dismiss the bill as to the city. New Albany *v.* Burke, 11 Wallace, 96.

on the admissions of his answer, charging him with the $3500 admitted to be unpaid, with interest thereon. The bill was dismissed as to the rest of the defendants, it being found that the defence set up by them was true, and that they were not indebted on their subscriptions, as most of their stock had been taken off of their hands by the city of New Albany under provision for that purpose contained in the original subscription.*

In January, 1870, Day filed in the court below a bill of review (the present bill) to have this decree set aside as to him. In this bill, which was a bill partly original and partly in review, he stated briefly the proceedings in the former suit; admitted the filing of the answer and cross-bill before referred to, but alleged that it was filed by his attorney, and was never seen or read or sworn to by himself; and that it did not set up truly the facts or the true grounds of his defence. He further stated that the truth was, that his stock was taken by the city of New Albany in the same manner as that of the other defendants as to whom the bill had been dismissed, except certain shares which he subscribed, payable in lands; and that he was not indebted to the railroad company for any unpaid portion of stock subscribed by him. He also insisted as a ground of review that the decree in the former suit was erroneous, and should be set aside for three reasons specified in the bill of review:

First. That the Floyd County Circuit Court, in which the judgment had been rendered, had exclusive jurisdiction of the matter.

Secondly. That the original bill did not set out sufficient facts to show a debt on his part.

Thirdly. That the complainants were guilty of gross laches and negligence in seeking equitable relief, having lain by and slept on their right to equitable relief (if they had any) for more than nine years.

Putnam and the others (complainants in the original bill) answered this bill of review, insisting upon the regularity

* See Burke *v.* Smith, 16 Wallace, 390.

and conclusiveness of the proceedings, and denying that Day had any defence to the original suit, or that he ever assigned his stock to the city of New Albany.

To this answer a general replication was put in.

Day was himself examined as a witness, and testified to the transfer of his stock to the city, except as stated in his bill, and to the payment of all dues thereon. He also testified as to his employment of an attorney to represent him in the original suit, and to the manner in which his answer and cross-bill were filed. His testimony on this point was to the effect that when the suit was instituted, he employed James Collins and his own nephew, Addison Day (who were partners in the practice of the law), to represent him as his counsel; and that they advised him "to file under the bill" and ask for equitable relief, and claim a *pro rata* contribution among the stockholders; that he did not see the answer and cross-bill which they prepared, and had no knowledge of the allegations contained in them; that he was informed that the court had acted on his answer and cross-bill, and that he was out of court; that he relied principally on Collins, as Day was young and inexperienced; but that he never consulted Collins but once, though he saw him a second time; that he had no business in the case that needed any further explanation at the time; that Collins was sick much of the time and died in May, 1869, during the pendency of the suit; that he saw his attorney, Day, occasionally after the suit was brought, and consulted with him, and paid his expenses to Indianapolis when he went there to file the answer and cross-bill. This was all the material evidence in the case.

The Circuit Court set aside the decree against Day. It said, in its opinion—

"When this court can see by the answer of the association subscribers, and the *evidence* in the original case, that there was no just claim on the part of the railroad company against the Days; that they had been released from such claim, if any existed, years before the creditor's bill was filed, and even before the judgment was recovered on which it was founded, and that

the court dismissed the bill as to persons equally liable with them, does the rule which has been pressed on the court by counsel,—that the proofs cannot be examined on a bill of review,—apply? We think not."

The case was now before this court on an appeal from this decision.

Messrs. S. Burke and J. A. Garfield, for the appellants, Putnam et al.; Mr. M. C. Kerr, contra.

Mr. Justice BRADLEY delivered the opinion of the court.

The complainant in the bill filed below failed utterly, we think, to make out a case of fraud, mistake, or want of authority on the part of his solicitors and counsel in filing the pleadings in the original suit, and taking the ground they did on his behalf. Of course fraud is not charged; but the complainant relied on the fact that he never saw the answer or cross-bill, and did not know their contents. This is no ground for allowing him to repudiate them now. It is not alleged that he would have placed his defence on any different ground had the answer and cross-bill been read by him. Indeed, they were drawn in pursuance of the advice received from his counsel and acquiesced in by him. His not having sworn to his answer, or even read it, is no excuse. It was his duty to have known its contents, if not to have verified it. If his counsel failed to make as good a defence for him as they might have done, it was his misfortune and cannot be rectified after the passing of the decree. Litigation would never come to an end if parties were permitted thus to shift their entire ground of attack or defence, after finding where the pinch of the cause lay. They must be estopped by the record, unless they can show that they were the victims of fraud or mistake.

Taking the cause, then, as it stood when the original decree was rendered, does the bill of review show any error for which it can be reversed?

It is to be remembered, that on a bill of review the proofs

cannot be considered.* If the decree is contrary to these, remedy must be sought by appeal.† We are confined, then, to an examination of the pleadings, proceedings, and decree, and the pleading of Day himself is to have controlling effect so far as it contains admissions against his own interest. It is apparent that the decree of the Circuit Court on the bill of review was based on the answers and evidence adduced by the other defendants, which tended to show that the appellee's case was similar to theirs. Day's own answer in the case was entirely disregarded. But is it possible to ignore it? Day was not necessarily in the same category with the other defendants. All had an equal opportunity to surrender their subscriptions to the city, and it was claimed by the other defendants in their answers, and admitted and shown, by a stipulation filed in the cause, that they did surrender their subscriptions to the city, and that the city assumed them. But they do not state, and it would not be evidence for Day, if they did, that Day surrendered his subscription. On the contrary, in his own answer, which is evidence against him, he clearly admits that he was a large subscriber to the stock, and that there was due on his subscription the amount for which the decree was rendered against him. There is nothing in the bill, nor in the report of the master, nor in any other part of the record, unless it be the answers of the other defendants, inconsistent with this admission of Day himself. On the contrary, the charges of the bill and the report of the master are in entire conformity with it. As the record stands, no other decree could have been made than that which was made, unless the other errors assigned have some ground to stand on.

Those errors are not relied on by the court below. As to the first, namely, that the Floyd County Circuit Court had exclusive jurisdiction of the case, it is hardly necessary to remark upon it. Surely, a creditor's bill may be filed in a different court from that in which the creditor obtains his judgment; for, otherwise, none could have been filed when

* 2 Daniel's Chancery Practice, 1631, 3d ed.

† Story's Equity Pleading, § 407.

courts of law and equity were separate courts, as they still are in some of the States.

The second was clearly groundless. The bill stated the ground of the claim against Day, and the answer admitted it, and supplied the particulars if they were not sufficiently specified in the bill.

The third error assigned was that the complainants had been guilty of gross laches and negligence in preferring their claim, having waited nine years after the return of their execution unsatisfied before filing their bill. This might have been a proper defence to make to the original bill; but it was not the defence which the appellee made. He did not put himself on that ground. He admitted his liability and prayed that the other defendants might contribute their just share, which he insisted would relieve him. How could the court under such a defence as this have dismissed the bill for laches and delay? A decree has to be founded on the *allegata* as well as *probata* of the case. There is nothing in the *allegata*, which alone are before us, to justify a different decree from that which was made.

The court below evidently relied on its knowledge and estimation of the proofs in the cause. The learned judge in his opinion, in summing up his views of the case, says so, in so many words.*

In the views there expressed, we think the court erred. We think the rule to be well established, and a wholesome one, that (as before stated) the proofs cannot be looked into on a bill of review. This was so expressly held in *Whiting* v. *Bank of the United States*.† It is true that in our practice the final decree does not contain a summary of the facts as it did in the English practice—which summary was examinable on a bill of review; but to countervail this absence of statement in the decree, we have adopted the practice of looking back of the decree into the whole record of the pleadings and proceedings, including orders, master's report, &c., together constituting what is generally regarded

* See *supra*, pp. 62–63 —REP.

† 13 Peters, 6.

as the record in the cause, and necessary to be examined in order to a proper understanding of the decree itself. This makes a record similar to that of a common-law action, the decree being the judgment of the law upon the allegations of the parties, and the conclusion which the court deduces from the proofs. But the conclusions of fact deduced from the proofs are not spread upon the record *in extenso*, unless through the medium of a report made by a master or commissioner.

The eighty-sixth rule in equity, adopted by this court, has abolished the recital of the pleadings and proceedings in the decree, and has prescribed the form in which it shall be couched, as follows: "This cause came on to be heard at this term, and was argued by counsel; and thereupon, in consideration thereof, it was ordered, adjudged, and decreed, as follows, viz.:" here inserting the decree or order. The decree, it is true, may proceed to state conclusions of fact as well as of law, and often does so for the purpose of rendering the judgment of the court more clear and specific.

The record thus made up constitutes the basis of examination on a bill of review, but it never contains the proofs adduced in the cause.

An examination of the record in this case does not, in our judgment, afford any ground for setting aside the decree made against Day in the original cause.

DECREE REVERSED, with directions to

DISMISS THE BILL.

The CHIEF JUSTICE did not sit. Mr. Justice DAVIS dissented.

RITCHIE *v.* FRANKLIN COUNTY.

1. Where a constitution of a State forbids special legislation, an act, demanded by considerations of high justice and by the fact that carelessness in the language of previous statutes has worked the necessity for the act, may be presumed to have been meant as a curative act, and as

applicable to a particular case as well as to all others similar, and this is true though the new act be couched in general words only.

2. In a State where, though a *statute* may require that no bonds be issued by counties to make roads unless the voters have approved the expenditure, there is nothing in the State *constitution* which forbids the legislature from conferring on counties the authority to borrow money for the purpose named without such approval, the legislature can confer on counties the power to borrow money to pay debts already contracted for this purpose without such consent.

3. The act of the legislature of Missouri of March 21st, 1868, to authorize County Courts to issue bonds for the purpose of paying for the building of bridges and macadamized roads *theretofore* contracted to be built, is valid under the constitution of the State, whether the act be considered as an original act or as one merely curative.

APPEAL from the Circuit Court for the Eastern District of Missouri; in which court one Ritchie filed a bill against Franklin County, in the said State, and various persons, holders of its bonds, such as are hereinafter described, to enjoin the county from collecting a special tax levied to pay the interest on the said bonds, and to compel the holders of them to surrender them for cancellation; he, Ritchie, the complainant, alleging that by the constitution of Missouri the same were unconstitutional and void.

The case was thus: The constitution of Missouri ordains,

"*Article* 1. No law *retrospective in its operation* can be passed.

"*Article* 4. The General Assembly shall not pass special laws, . . . establishing, locating, altering the course *or affecting the construction of roads, or the repairing or building of bridges;* or legalizing, except as against the State, the unauthorized or invalid acts of any officer.

"The General Assembly shall pass no special law for any case for which provision can be made by a general law; but shall pass general laws providing, so far as it may deem necessary, for the cases enumerated in this section, and for all other cases where a general law can be made applicable.

"Inferior tribunals, to be known as County Courts, shall be established in every county for the transaction of all county business."

These provisions of the State constitution being in force as fundamental law, the General Assembly, *February* 16th,

Statement of the case.

1865, passed an act empowering and authorizing the County Courts, for the purpose of opening and keeping in repair roads, and in order to raise the necessary funds to pay the expenses of any or all of said improvements, to borrow money on the credit of the county, and to issue bonds of the same, "but," said the act, "the said bonds shall not bear interest at a higher rate than six per cent., *unless by agreement between the parties*, nor shall said bonds, or any of them, be sold or disposed of at less than par value, that is to say, the amount called for on their face."

The act proceeded:

"SECTION 3. The said bonds may be made transferable in such a manner as the County Court by its order may direct, and the courts shall be authorized to levy a sufficient amount of revenue annually to pay the accruing interest on said bonds, and for that purpose may, if it should be necessary, levy a special tax.

"SECTION 4. Before any expenditure shall be made by the County Courts for the purposes contemplated by this act, the County Courts *may, for the purpose of information*, submit the amount of the proposed expenditure to the voters of the respective counties, and if a majority of the voters shall approve of such proposed appropriation, then the court may proceed and improve the roads as herein contemplated. If a majority shall vote against such an appropriation, then nothing further shall be done therein within twelve months," &c.*

Another act, having provisions in words of the same effect, was passed in 1866. In consequence of the act of 1865 declaring that the submission to the people of the amount of the proposed expenditure was "for the purpose of information," the County Court of Franklin construed the provision as leaving it to their discretion whether they would submit any such question to the people. And being now engaged in a general scheme for macadamizing the roads of the county and bridging the streams in it, the County Court issued a quantity of bonds without submitting the matter to

* Laws of Missouri, A.D. 1865, p. 171.

the people in any way. The validity of the bonds being denied, the question whether they were valid or not, came before the Supreme Court of Missouri, in the case of *The Leavenworth and Des Moines Railroad Company* v. *The County Court of Platte*,* where it was decided that the bonds were void.

Thereupon, the road having been now built, the Assembly, on the 21st of March, 1868, passed a new act to authorize County Courts to issue bonds for the purpose of paying for the building of bridges and macadamized roads *heretofore* contracted for and built.

This act thus enacted:

"SECTION 1. In all cases where County Courts have *heretofore* laid out, surveyed, and commenced the building, and have built macadamized or other roads, or have . . . built bridges, or other necessary work in their respective counties, the County Courts are hereby authorized to borrow money on the credit of the county, and to issue bonds of the county with coupons attached, &c.; but said bonds shall not . . . bear interest at a higher rate than ten per cent., for the purpose of paying for the work done and contracted for in their respective counties.

"SECTION 2. Said bonds may be made transferable in such manner as the County Court may direct, and the courts shall be authorized to levy a sufficient amount of revenue annually to pay the accruing interest on bonds authorized by this act; and for that purpose may, if it be necessary, levy a special tax.

"SECTION 3. All acts or parts of acts inconsistent with this act are hereby repealed."

And on the 23d of March, of the same year, it passed a new road law, in the main like the old one, but with some modifications, and making it plainly peremptory on the County Courts to take a vote of the people before issuing bonds.

After the passage of the act of March 21st, 1868, the County Court of Franklin County entered an order on its records to issue bonds to the contractors to pay for the work

* 42 Missouri, 171.

done on the road in question, and thereupon the former bonds were surrendered and cancelled, and a like number issued and purchased by the defendants in due course of business. These new bonds were made payable to the bearer, and purported on their face to have been issued by the County Court of Franklin County, in pursuance of the act last above mentioned. Roads similar to the one for which these bonds were issued were building by the contractors who were building it, at the same time for the same county; and the defendants had no means of knowing whether the bonds they held were issued to pay for the particular road in controversy. They bought them in good faith for value without notice of any infirmity of title. The court below, holding the act of 21st of March constitutional, dismissed the bill.

The question of the constitutionality of the act, it may be here added, had been before the Supreme Court of Missouri in a case *between other parties;* and that court held that the act conferred "original power" to issue the bonds without reference to previous or contemporary laws, and also that it was "curative" and legalized the unauthorized action of the County Court and validated the new bonds issued.

The case came here on exceptions to the answer, and the question to be passed on was whether there was authority to issue the bonds in controversy.*

Mr. T. W. B. Crews, for the appellants:

I. *The bonds in controversy purport to have been issued under authority of the act of March* 21*st*, 1868.

They cannot exist under that act.

1. The act gave no original power. This is evident from its terms. Of itself, it was incomplete. It made no provision for the payment of the principal of the bonds, and it expressly recognized the binding force of all acts and parts

* A question was also raised at the bar as to whether the judgment of the Supreme Court of Missouri in the case referred to in the text, was a bar to this action, but the view taken by this court of the authority to issue the bonds rendered it unnecessary to consider this other question.

of acts, under which roads may have been contracted for and built, except so far as they conflicted with its own provisions. Nothing in the act has the effect to authorize the issue of bonds without the vote of the people.

The act of 1865, requiring a vote before expenditures should be incurred, was in force when the act of March 21st, 1868, was passed, and the whole law was re-enacted at the same session, with some modifications, and among others a provision, making it plainly peremptory on the County Courts, in terms, to take a vote of the people before issuing any bonds for the purposes expressed in the act. So far from relaxing, the legislature evidently intended to adhere more rigidly to the policy previously declared on that subject, and meant to restrain within narrower limits the power of County Courts.

The several enactments of the acts of 1865 and 1868 should be construed to be in *pari materiâ*. Their several provisions can stand together and can be consistently reconciled. There is nothing express or implied that would lead to the conclusion that the one abrogated or was designed to abrogate the other.

The purpose of the act of March 21st, 1868, was to authorize the issue of bonds *bearing ten per cent. interest*, and the sale or negotiation of the same below the par value thereof; neither of which was allowable under the previous law; and in these particulars only was the law changed by this act. Moreover, the act can properly apply only to work *legally* done, and *legally* contracted for. No other sort of contract is known to the law. And such contract could not have been made but by virtue of and in pursuance of some previous existing legal authority. The general law of 1865 and 1866 conferred such authority, and it was the only law that did confer it.

Had it been intended to authorize the expenditures without a vote, this purpose would have been indicated in either the title or the body of the act. If the omission to take a vote of the people was a defect, and such a one as needed further legislation, certainly the legislature would have

pointed to this defect in some appropriate and intelligible language or terms.

2. Nor can the act of March, 1868, be construed to be "curative" or "confirmatory."

It is conceded that up to the time of the approval of the act, the bonds then issued were absolutely void. The County Court had broken down the barriers which the law had raised, had disregarded the authority which had called them into being, and had usurped a power which belonged only to the people. Can we conclude that the legislature, in this general way, proposed to cure or confirm their proceedings, and to authorize the issue of bonds to pay for work done or to be done without the sanction of the people? The act does not purport to be curative. The aim of a curative act is always special and particular. Although it may be general in its application to a class of things or objects, it is pointed and distinctive as to the cause or the supposed necessity of it.

The theory of the act of March 21st, 1868, as maintained by the respondents is that the County Court had acted without authority in incurring such expenditures and issuing bonds as a means of paying them. If they had not, then there was no necessity for this act, beyond the purpose of regulating the rate of interest and the authority to sell the bonds for what they would bring in the market, in the class of cases specified in the act. If it were necessary or expedient in this class of cases to authorize the issue of bonds with a higher rate of interest, and without the restrictions imposed by previous laws—matters merely incidental and subordinate—then it was surely of greater importance in the estimation of the lawgiver, that there should have been *adequate authority to issue the bonds;* that the bonds themselves should have the required sanction to give them validity.

II. *The act in question as construed by the other side is void under the State constitution.*

1. It was plainly retrospective.

2. It affected the construction of roads and was designed to legalize the invalid and unauthorized acts of county offi-

cers. Though expressed in general terms it must have been framed with a view to meet this case. Its generality was an attempt on the part of the legislature to evade the provisions of the constitution, which ordains that "the General Assembly shall *not* pass special laws . . . affecting the construction of roads," and to accomplish by indirect means that which it was forbidden to do directly.

Mr. J. O. Broadhead, contra.

Mr. Justice DAVIS delivered the opinion of the court.

The acts of the General Assembly of Missouri of 1865 and 1866 gave authority to the County Courts to borrow money and issue bonds for road purposes where "the amount of proposed expenditure had been submitted to a vote of the people." The County Court of Franklin County construed the provision on the subject of this submission as discretionary and not mandatory. Although this construction was wrong, the language used by the legislature gave color to it.

To declare that a court "may, for the purpose of information," submit its proposed action to the people, is not the best nor the usual way of instructing the court not to do the thing proposed unless the taxpayers approved it. Such language is well calculated to mislead any one unaccustomed to the construction of statutes, and it cannot be a matter of surprise that this County Court treated the provision requiring a vote for information as discretionary. In doing this it doubtless acted as other County Courts in the State had done under like circumstances. That this election clause should cause litigation was natural enough, and we therefore find it presented for adjudication in the case of *The Leavenworth and Des Moines Railroad Company* v. *The County Court of Platte County.*

In that case it was held that the power conferred upon the County Courts could not be exercised unless the proposed expenditure was approved by the voters. This decision of necessity alarmed contractors, who had in good faith con-

structed roads, and equally so the holders of bonds issued for the purpose of paying the contractors for their work.

To relieve these persons from the predicament in which they were placed the legislature passed a curative act. This act, on account of special legislation being forbidden by the constitution of the State, had to be general in its language, and without reference to any particular county. It was eminently just that it should be passed. The value of good roads for the common use of every one can hardly be overestimated. As a general thing, in this country, they are within the control and supervision of the township, county, or other local authorities. Ordinarily they are improved and kept in repair by means of local taxation, but this mode will not suffice when the wants of the community require that they should be macadamized. Especially is this true of a new State like Missouri. It seems that the County Court of Franklin engaged in a general scheme for macadamizing the roads of the county and bridging the streams in it. It is fair to presume that this enterprise was undertaken in obedience to a public sentiment on the subject, although the sense of the voters was not actually taken in conformity with the directions of the statute. This is the more probable on account of the well-known mania of the people to run in debt for public improvements. The taxpayers saw the large expenditures that were being made, and yet they took no steps to arrest them. Not until the works were completed and the securities had passed into the hands of *bonâ fide* purchasers did they move in the matter. If they had been incited to action as soon as the contract was made, they would have been saved a heavy debt, and innocent persons would not have suffered. In this state of the case the legislature interposed and passed an act to authorize County Courts to issue bonds for the purpose of paying for the building of bridges and macadamized roads which had been contracted for and built. This act refers to past transactions, and two days after its passage a new road-law was passed couched in such language that no one could mistake the character of the powers conferred.

Thus it will be seen the legislature intended to cure past errors, but left no room for future ones. In this way it was enabled to relieve the hardship caused by the construction placed on the imperfect language of a former legislature, and at the same time to put an end to expenditures like those made by Franklin County, unless a majority of the voters should approve of them. In many cases retroactive laws, although intended to effect a good purpose, have features of injustice about them. This is not that case. The bonds here were issued under a supposed authority, and no one interposed an objection. The taxpayers rested until the mischief was done and then tried to get relief. It is certainly not unjust to them that the legislature should say, "you must pay for an expenditure which you saw incurred and could have prevented, but did not." If the County Court had acted wholly outside of its duties the aspect of the case might have been different. But the most that can be said is that the court mistook the nature of the powers conferred upon it, and that this mistake would never have occurred if the legislature had used language appropriate to the purpose.

There is no provision in the constitution of Missouri restraining the General Assembly from conferring on counties the authority to borrow money to improve their roads without asking the consent of the voters. If so, why cannot the legislature confer on counties the power to borrow money to pay for debts already contracted for this purpose?

We agree with the Supreme Court of Missouri, that the act in question, being an authority to do a particular thing, may be construed as an original power. But whether it be treated as an original power or as curative and confirmatory legislation, it is equally valid, and this is the view taken of the subject by that court.*

If the act was valid, the court had the power to take up the bonds and issue others in lieu thereof.

These bonds purport on their face to have been issued

* Steines *v.* Franklin Co., 48 Missouri, 175.

under the order of the County Court of Franklin County, made in pursuance of the authority conferred on the court by the act of Assembly in question, and as the defendants claim to be innocent holders, and this is true for the purpose of the exception, the complainant has no standing in a court of equity.

DECREE AFFIRMED.

MAXWELL *v.* STEWART.

1. To make a record of a judgment valid upon its face, it is only necessary for it to appear that the court had jurisdiction of the subject-matter of the action and of the parties, and that a judgment had in fact been rendered.
2. A trial by the court without the waiver of a jury is at most only error. A judgment after such a trial is not necessarily void. Mere errors cannot be set up as a defence to an action brought upon it.
3. When the record of a case, a judgment in which is sued upon, shows that an attachment was issued in it and laid on property appraised at a less sum than the judgment was given for, a demurrer which makes, in virtue of the attachment, a defence of payment and satisfaction, is not good.
4. A seizure of personal property even to the full value of the sum claimed, under an order of attachment issued during the pendency of an action, is not necessarily a satisfaction of the judgment when afterwards obtained. The defendant must show affirmatively that it was applied to and satisfied the judgment.
5. A court will acquire jurisdiction of the person in a suit originally commenced by an attachment *in rem*, if the party against whom the claim is set up voluntarily appears and submits himself to the jurisdiction, demurs, pleads, and goes to trial on issues made.
6. Fraud cannot be pleaded to an action in one State upon a judgment in another.
7. *Nil debet* is not a good plea to an action upon a judgment in another State.

ERROR to the Supreme Court of New Mexico; the case being thus:

Stewart sued Maxwell in one of the courts of the State of Kansas, claiming $7000; and publication having been prop-

erly made, laid an attachment on certain personal property of the defendant of which the sheriff took possession, and which was appraised at $6825. What was finally done with the property did not exactly and by direct evidence appear. No redelivery bond, it seemed, was now existent. After the attachment had been made Maxwell voluntarily appeared and submitted himself to the jurisdiction of the Kansas court, in the case wherein the attachment issued. He filed, first, a demurrer, afterwards an answer, and finally went to trial on issues which the pleadings raised. Judgment was given against him for $7050 by the court, no jury, apparently, having been had in the case. He moved for a new trial, but did not get one. After the entry of judgment he got a rule on the sureties "in the redelivery bond," for the redelivery of the property attached; but as already observed, apparently no redelivery bond itself was now existent as part of the record of the suit.

In this state of facts, Stewart now sued Maxwell in a court of New Mexico on the judgment thus obtained in Kansas, setting forth in his declaration the record of the court there which disclosed the facts above mentioned, but not a great many more.

Judgment having been given for the plaintiff in the court of New Mexico, in which the suit was brought, and this being affirmed in the Supreme Court of the Territory, the defendant brought the case here, assigning these errors:

1. That the record sued upon was not full and complete, because it did not contain copies of certain papers—a summons which it appeared had issued, or affidavits of publication which had been made, &c.—which papers had been filed in the progress of the cause.

2. That it also showed that the judgment was rendered upon a trial of the cause by the court without the waiver of a jury.

3. That the judgment was satisfied in law because, as shown by the record, certain personal property of the defendant, worth $6825, was seized and taken into the possession of the sheriff under an order of attachment issued at the

time of the commencement of the action, and because this property had not been legally accounted for.

[This objection was first made by a demurrer to the petition which set forth the record in full, and afterwards by plea.]

4. That the court in Kansas did not have such jurisdiction of the defendant as was necessary in order to bind him by its judgment.

5. That the judgment sued upon was obtained by a false and fraudulent assertion of a contract, and by means of false and interested testimony; and—

6. That a demurrer had been sustained to the plea of *nil debet*, filed in the court below (the court of New Mexico), in the present suit.

Mr. J. S. Watts, for the plaintiff in error; Mr. P. Phillips, contra.

The CHIEF JUSTICE delivered the opinion of the court.

We will consider the errors assigned in the order in which they come before us:

1. The form of the record of a judgment is regulated by the practice of the court in which the action is prosecuted. To make such a record valid upon its face, it is only necessary for it to appear that the court had jurisdiction of the subject-matter of the action and of the parties, and that a judgment had in fact been rendered. All else is form only. The record sued upon in this case did show the existence of these essential facts.

2. A trial by the court without the waiver of a jury is at most only error. A judgment after such a trial is not necessarily void. Mere errors cannot be set up as a defence to an action brought upon it.

3. So far as the defence of payment and satisfaction was made by demurrer to the petition, it is enough to say that it did not anywhere appear in the pleadings, by averment or otherwise, that the value of the property taken under the attachment was sufficient to discharge the entire judgment.

On the contrary its appraised value was less than the amount of the judgment. If upon the case made by the pleadings the plaintiff could recover anything, the demurrer was not well taken. Issue was joined upon the plea presenting the same defence, and upon the trial of that issue it may have been shown that the property had been legally accounted for. In fact, it can be fairly inferred from the record itself, that the property had been restored before judgment to the possession of the defendant, upon the execution of a redelivery bond. It appears affirmatively that after judgment a rule was granted and served upon the sureties on such a bond.

But even if this were not so, it does not follow that the defence insisted upon was good. A seizure of personal property under an order of attachment issued during the pendency of an action is not necessarily a satisfaction of the judgment when afterwards obtained. Such a seizure is made for the purposes of security and, if the property is retained in the possession of the sheriff, he will be held responsible for the exercise of ordinary care for its preservation. If wasted, lost, or destroyed by his negligence he must account, and the amount for which he is liable on such account will, when ascertained, be applied toward the satisfaction of any judgment that may have been obtained. To that extent the plaintiff is made responsible for the sheriff, but such an application can only be made upon a proper showing by the defendant. There is no presumption which throws the burden of proof upon the plaintiff. No such showing was made or attempted in this case.

4. The record shows that the action was commenced by attachment and service had by publication. So far the action was in the nature of a proceeding *in rem*, and would bind only the property attached. But afterwards, as the record also shows, the defendant voluntarily appeared and submitted himself to the jurisdiction of the court. He at first filed a demurrer, then an answer, and finally went to trial upon the issues made by the pleadings. After judgment he moved for a new trial which was overruled. If these

statements appearing in the record are true, the court did have jurisdiction of the person of the defendant, and could bind him by a judgment. No evidence was introduced to contradict the record. Its truth is, therefore, presumed.

5. In *Christmas* v. *Russell*,* this court held that fraud could not be pleaded to an action in one State upon a judgment in another. With this we are satisfied.

Since the case of *Mills* v. *Duryea*,† it has been settled in this court that *nil debet* is not a good plea to an action upon a judgment in another State.

JUDGMENT AFFIRMED.

HAYCRAFT *v.* UNITED STATES.

Under the act of March 12th, 1863, relating to captured and abandoned property, and which enacted that any person claiming to be the owner of such property may, "at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof in the Court of Claims, and, on proof . . . that he has never given any aid or comfort to the present rebellion," receive the proceeds of the sale of such property, a person who did give aid and comfort to the rebellion, and who has not been pardoned until after two years from the suppression of the rebellion cannot, on then preferring his petition, obtain the benefit of the act, even though in cases generally the limitation of actions in the said court is one of six years. The question is not one of limitation but of jurisdiction. And the inability of an unpardoned rebel to sue in the Court of Claims does not control the operation of the statute.

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

By an act of March 3d, 1863,‡ relating to the Court of Claims, it was enacted that—

"The said court shall have and determine *all* claims founded upon . . . *any* contract, express or *implied*, with the government of the United States."

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* 5 Wallace, 304.

† 7 Cranch, 481.

‡ Act reorganizing the Court of Claims, 12 Stat. at Large, 767; and see the act of February 24th, 1855, 10th id. 612, organizing the said court.

It was further enacted:

"SECTION 10. That every claim against the United States, cognizable by the said court, shall be forever barred unless the petition setting forth a statement of the claim be filed in the court . . . *within six years after the claim accrued.*"

This statute relating to the Court of Claims being in existence, the act of March 12th, 1863, relative to captured and abandoned property was passed. That act enacts:

"SECTION 1. That it shall be lawful for the Secretary of the Treasury . . . to appoint a special agent or agents to receive and collect all abandoned or captured property in any State or Territory designated as in insurrection, &c.; *Provided*, That such property shall not include any kind or description which has been used or which was intended to be used for waging or carrying on war against the United States, such as arms, ordnance, ships, steamboats, or other water craft, and the furniture, forage, military supplies, or munitions of war.

"SECTION 2. That any part of the goods or property received or collected . . . may be appropriated to public use on due appraisement and certificate thereof, or forwarded to any place of sale within the loyal States, as the public interests may require; and all sales of such property shall be at auction to the highest bidder, and the proceeds thereof shall be paid into the Treasury of the United States.

"SECTION 3. That the Secretary of the Treasury . . . shall also cause a book or books of account to be kept showing from whom such property was received, the cost of transportation, and proceeds of transportation.

"And any person claiming to have been the owner of any such abandoned or captured property may *at any time within two years after the suppression of the rebellion* prefer his claim to the proceeds thereof in the Court of Claims; and on proof to the satisfaction of the said court of his ownership of said property, of his right to the proceeds thereof, and *that he has never given any aid or comfort to the present rebellion*, receive the residue of such proceeds," &c.

All these provisions of the two statutes being in existence, one Haycraft, of Mississippi, *a person who had given aid and comfort to the late rebellion*, was the owner of a quantity of

cotton in the State just named, which in April, 1863, during the rebellion, the United States had seized as abandoned property, and sold; the proceeds ($27,000) being now in the treasury.

Haycraft having been, as just above said, disloyal to the United States, and unable to give all the proofs which the Captured and Abandoned Property Act required, was precluded by the terms of the act, as things stood at the time of its passage, from suing under it.

However, on the 8th December, 1863 (that is to say within less than nine months from the passage of the act), the President issued a proclamation offering full pardon and restoration of property to all insurgents (certain classes excepted), provided they would take an oath to support, protect, and defend the Constitution and Union, abide by and support all acts of Congress, and all proclamations of the President made during the rebellion, with reference to slaves.

Lee surrendered April 9th, 1865; Joseph Johnston on the 26th. On the 10th of May Jefferson Davis was captured, and on the 26th Kirby Smith gave up the remnant of the rebel army.

On the 29th of May pardon and restoration was offered to all (certain classes excepted) who would simply *take an oath of allegiance*, and keep it.

The war in Mississippi was, by proclamation, *legally* ended April 2d, 1866.*

On the 7th of September, 1867, another proclamation was made offering pardon and restoration of property to all (except certain classes more limited than before), who would take an oath of allegiance.

The latest of all these proclamations of pardon, it will be observed, was within two years after the war was legally ended.

On the 25th of December, 1868,—this being, however, more than two years after the war was ended, even legally viewed,—a final proclamation was issued by President John-

* The Protector, 12 Wallace, 700.

son, by which "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," was proclaimed and declared "unconditionally and without reservation to all, and to every person who directly or indirectly participated in the late insurrection or rebellion."

In the *United States* v. *Klein*,* this court (December Term, 1874) decided that the restoration of captured and abandoned property became the absolute right of persons pardoned, as much as of loyal people; suit being brought for it in the Court of Claims within two years from the close of the war.

In this state of enactments and pardons, Haycraft, already mentioned, *on the 30th of July*, 1872, six years and more after the close of the war, filed his petition in the Court of Claims, and without so much as alleging that he had been within one of the classes excepted from the benefit of those different proclamations which preceded the last, sought to recover the proceeds of his cotton.

The petition was in the nature of an implied assumpsit for the value of the cotton. It alleged that during the rebellion the voluntary residence of the petitioner was in Mississippi, where, for some time during his said residence, the rebel force held sway; that he did give aid and comfort to persons engaged in the rebellion, and was, *therefore, precluded from redress by suit in the Federal courts, and especially from the remedy afforded to claimants under the provisions of the act of Congress approved March 12th, 1863; the Captured and Abandoned Property Act.*

It further averred that he was entitled to and had received the benefit of the "full pardon and amnesty, duly granted by the authority of the United States, on the 25th day of December, A.D. 1868, whereby his civil disabilities were removed, and his right of redress by suit in the United States courts was restored," together "with restoration of

* 13 Wallace, 136.

all his rights, privileges, and immunities under the Constitution and laws of the United States."

The petition went on:

"Your petitioner further states that his property aforesaid having been taken possession of by the United States government, and appropriated by it, and the money arising from the sale of said property being now held by the government, an implied contract has arisen on its behalf to make petitioner just compensation therefor, according to what it was reasonably and fairly worth at the time and place at which it was so taken from him as aforesaid, and accordingly to pay over to him the net proceeds of the sale of said cotton."

Finally, it alleged the cotton to have been at the time and place of its seizure as aforesaid, reasonably worth $27,000, being the amount of the net proceeds of the sale thereof, which amount under the implied contract aforesaid, the claimant alleged himself entitled to receive from the United States.

The United States demurred, and the Court of Claims dismissed the petition; placing the dismissal upon the grounds—

1st. That no action for proceeds of captured and abandoned property would lie except under the provisions of the act of March 12th, 1863.

2d. That such action to be maintainable must be brought within two years after the suppression of the rebellion.

From this ruling the claimant appealed, alleging that the Court of Claims erred,

1st. In holding that the only right of action for such proceeds was exclusively under the act of March 12th, 1863.

2d. In holding that it had not jurisdiction, because the suit had not been brought within two years after the suppression of the rebellion.

3d. In holding further that this limitation was available to defeat the claimant's action, though he was debarred by an act of Congress from bringing or maintaining such an action.

Argument for the claimant.

Messrs. J. Casey and J. W. Bartley, for the appellant:

I. *The right of suit for these proceeds was not exclusively under the act of March 12th*, 1863.

The radical error of the Court of Claims consists in supposing that the jurisdiction to hear and decide these cases is a special one. But what is the truth? The act provides that where a loyal man's property has been taken and sold by the United States, he may, within two years after the war, bring suit to recover the proceeds; that is to say, the United States have taken his property, which they had no right to take at all, and have converted it into money, and they hold it as a trustee for him, as the Supreme Court has declared in *United States* v. *Padelford*,* *United States* v. *Klein*,† and in other cases. Then he brings an action for money had and received to his use, on the implied promise; and that is the whole of this action. This is the essence of the act.

Of all such actions, the Court of Claims has had jurisdiction ever since it has existed. Under the acts constituting it,

> "The said court shall have and determine *all* claims founded upon any law of Congress, or upon any regulation of an executive department, or upon *any* contract, express or *implied*, with the government of the United States."

Now the Captured and Abandoned Property Act remitted claimants to that court, *under the general powers and faculties of the court*, as theretofore defined by law. Such has been the construction uniformly given to this act by this court.

In *United States* v. *Anderson*,‡ the counsel for the United States contended that the powers of the Court of Claims in these cases were defined and limited exclusively by the act of March 12th, 1863; and that the court could not render a judgment for a specific sum, because the act did not provide for that. But this court rejected this narrow view, and held that the authority conferred by this special act of March

* 9 Wallace, 531. † 13 Id. 139. ‡ 9 Wallace, 56.

12th, 1863, was to be exercised by the court, under the general powers of the court.

So in the case of *United States* v. *Padelford.* The same strict and narrow construction was again urged upon the court by the counsel for the United States; and *that actual, personal, and continual loyalty* was a jurisdictional prerequisite to enable the Court of Claims to entertain the suit at all. But this court rejected the position of counsel.

So in *United States* v. *Zellner*,* where the Court of Claims had decided that the act of March 12th, 1863, did not give the right of appeal; and where Congress, recognizing the same view, passed the act of June 25th, 1868,† to confer that right on the United States. But this court held that the claimant could appeal under the general provisions contained in the act of March 3d, 1863.‡

This court, by Nelson, J., says:

"The Court of Claims was organized as a special judicial tribunal to hear and render judgment in cases between the citizen and the government; *the subjects of its jurisdiction were defined in the act*, and generally the mode of conducting its proceedings, subject, of course, to such alterations and changes as Congress, from time to time, might see fit to make. The subject of its jurisdiction might be enlarged or diminished, *but this would not disturb or in any way affect the general plan or system of its organization.*"

II. *The difference in legal* status *of loyal and disloyal persons, affected differently, too, the property of such persons respectively, seized under the Captured and Abandoned Property Act, and of course affected differently its proceeds.*

There was no legislation of Congress that authorized any officer of the United States, civil or military, to seize and sell the property of a loyal man. But knowing that mistakes as to the true *status* of persons had been and would be made, Congress provided for loyal men in this act. As to the proceeds of the disloyal person's property, it remained in the

* 9 Wallace, 244.

† 15 Stat. at Large, 75.

‡ 12 Id. 767, § 5, the act governing the court generally.

treasury subject to the policy which the legislative or executive branches of the government should adopt.

In *United States* v. *Klein*, Chase, C. J., for the court, says:

"The act of March 12th, 1863, provided for the sale of enemies' property collected under the act, and payment of the proceeds into the treasury, and left them there subject to such action as the *President* might take under the Confiscation Act of the 17th July, 1862."

Under this act the President could grant the owners pardon and amnesty, with full restoration of the rights lost or forfeited by rebellion, and thus entitle them to the return of their property or its proceeds. This policy he adopted, and this finally settled the question, that these proceeds were to be restored to the owners of the property, out of which they had accrued.

This restoration, so determined on, could only be made through the Court of Claims, whose jurisdiction was exclusive;* and from that court, every person, in any way implicated in the rebellion was excluded by Congressional prohibition until pardoned.

The *status* of this claimant was therefore this:

1st. Having aided the rebellion, his property was rightfully seized and sold, to be held by the United States, until they should determine, as a matter of public policy, whether it should be restored to the owner by pardon of his crime, or condemned and confiscated by judicial proceedings. Till then, his right to it was suspended.

2d. The jurisdiction of the Court of Claims was exclusive on the question whether he should recover these proceeds, and the legislation of Congress prohibited him from suing there at all. So that, not only his right to these proceeds, but the capacity to sue for them, was taken away by the capture and sale, and by the accompanying legislation of Congress.

* Mrs. Alexander's Cotton, 2 Wallace, 404; Act of March 12th, 1863, § 3, 12 Stat. at Large, 820; Act of July 2d, 1864, 13 Id. 375; Act of July 27th, 1868, 15 Id. 243.

Argument for the claimant.

3d. While this condition of things continued he could not sue, and consequently could not be barred by neglecting to do that which the law prohibited him from doing.

4th. No judicial condemnation having been decreed, and his offence having been pardoned, both his right to the property and his capacity to sue for it, were restored by that act of pardon, and from its date.

Haycraft's disabilities continued until the 25th December, 1868, when the President issued an unconditional proclamation of pardon and amnesty.

This pardon, confessedly, under many decisions of this court,* put the person pardoned, in all legal aspects and relations, in the same condition as if he had never transgressed.

The condition or predicament of these proceeds, the owner being disloyal, is similar to property seized under our customs, or revenue, or neutrality laws. In either case the property, under certain conditions and limitations, may be sold. In such case, where the litigation for forfeiture or non-forfeiture is undetermined, and the offence unpardoned, or the forfeiture not remitted, the owner has no right to the proceeds and could not maintain a suit for them. His right to them accrues, and his ability to maintain a suit for them commences at the moment of remission of the offence for which they are held or final judgment of non-forfeiture in his favor. No statute of limitations would run against him before this time.

Now, this court has decided† that the war, irrespective of a statute, suspended the running of the statute of limitations between private persons living in the loyal and insurrectionary States. But here, by the statutes of the United States, there was neither right to the money nor capacity in Haycraft to sue for it until December 25th, 1868. The same act that released the right of the United States re-

* Ex parte Garland, 4 Wallace, 333; Cummings *v.* Missouri, Ib. 277; United States *v.* Padelford, 9 Id. 531; United States *v.* Klein, 13 Id. 139.

† Hanger *v.* Abbott, 5 Wallace, 532; The Protector, 12 Id. 700; Insurance Company *v.* Kauffman, 18 Id. 151, and other cases.

stored his and also gave him ability to sue. From that time, therefore, the limitation commences to run against him. What limitation? Not that of the two years in the act of March 12th, 1863, because that had already passed; but if any, the only other one in existence, that of the tenth section of the act of March 3d, 1863, which provides—

"*That every claim against the United States, cognizable by the Court of Claims,* shall be forever barred unless the petition, setting forth a statement of the claim, be filed in the court or transmitted to it under the provisions of this act *within six years after the claim first accrues.*"

Mr. G. H. Williams, Attorney-General, Mr. Samuel Field Phillips, Assistant Attorney-General, Mr. John Goforth, Assistant Attorney-General, contra:

1. The claimant, who it is not pretended came within any excepted class, could at any time after the 8th of December, 1863, have taken an oath to abstain from rebellion and to support the government, and been pardoned. But he was stiff-necked, and would not comply even with these terms, or, as the result showed, with the easier terms of later proclamations. He would never have been pardoned had not pardon been "thrust" upon him by the proclamation of President Johnson, pardoning rebels in spite of themselves.

2. The argument of the other side puts all rebels including such a one as Haycraft, above described, whose property was captured, and deserved to be captured and confiscated, in a better position than loyal men where the capture was by mistake, and where a great injury was done to the owner. *These* last must sue in two years after the war is closed. The others, according to the argument of the claimant's counsel, might sue at any time within six after being pardoned in spite of a determination that they would not be pardoned. This *reductio ad absurdum* of the opposite argument proves the *quod est demonstrandum*, as well as any direct argument.

Reply: The first point in the argument of the govern-

ment is, of course, that the legal effect and operation of a free and full pardon, is destroyed by proof of the extrinsic fact, that the offender could have been pardoned before, if he had asked for it, and complied with the conditions. If there be any principle or authority in the law, which gives support to such a position it is unknown to us.

The second point made in that argument—to wit, that our positions put rebels in better condition than loyal men—is not true, and would not prove what it is meant to prove if it were. The loyal man's right accrued so soon as his property was sold and the money paid to the United States officers, from the year 1861 till 1865, and that right continued till two years after the close of the war; continued, we may say, till 20th August, 1868. All this time the rebel was debarred: 1st. For lack of right to the possession of the proceeds; 2d. For want of capacity to sue; 3d. Because of actual legislative prohibition of the court to entertain his suit or render a judgment in his favor. In the next place, whatever benefit accrues to the former disloyalist is an incident rather than the object of the policy of reconciliation and reconstruction, adopted for their own benefit by the United States.

To recapitulate. The case is this: The United States took Mr. Haycraft's property and sold it, charged him with all the expenses, and paid the balance into the treasury. They might have libelled, condemned, and confiscated it, and have made it the property of the United States. But they said, "We will not do so; the future interests and dignity of this great nation require that we pardon his offence and restore his property." But now, when he applies to the designated tribunal to take his proofs, and give him the proceeds of his property that the United States hold as mere trustees for him, they interpose the plea of the statute of limitations. Can this promise of restoration—these fiduciary obligations of trustee—be thus fulfilled and discharged? Can the United States fully and freely pardon our client's offence and still punish it, by this confiscation of his property?

Opinion of the court.

The CHIEF JUSTICE delivered the opinion of the court.

The main question presented for our consideration in this case is whether one who gave aid and comfort to the late rebellion can, after the expiration of two years from its suppression, commence and successfully maintain an action in the Court of Claims for the recovery of money in the treasury arising from the sale of his cotton taken possession of by the United States, and sold under the provisions of the Captured and Abandoned Property Act.

The case has been argued to some extent as though it involved the consideration of a statute of limitations. To our minds the question is one of jurisdiction. A sovereign cannot be sued in his own courts except with his consent. This is an action against the United States in its own Court of Claims. The appellant must, therefore, show that consent has been given to its prosecution. That being done, the jurisdiction of the court is established and he may proceed. Otherwise, not.

It is conceded that the required consent is not contained in the Captured and Abandoned Property Act itself, for the only action there consented to is one to be commenced within two years after the suppression of the rebellion. But inasmuch as the United States has consented to be sued in the Court of Claims upon contracts, express or implied, it is contended that this action may be prosecuted on account of an implied promise by the United States to pay to every owner of captured and abandoned property, whether loyal or disloyal, the proceeds of his property taken and sold.

As the taking was under the authority of an act of Congress, we must look to the act to see if this promise has been made. It is not claimed that any exists if it is not to be found there. If it has been made at all, it was when the property was taken, and is equivalent to an undertaking by the United States *at that time* to receive and hold the property, or its proceeds if sold, in trust for the use and benefit of the owner, whoever he might be. The claim is, that the trust in favor of the owner having *then* been created, the remedy for its enforcement in the Court of Claims *as a con-*

tract was restored to the disloyal owner by the operation of the President's proclamation of December 25th, 1868, granting unconditional pardon to all who participated in the rebellion.

The act authorizes the Secretary of the Treasury, from time to time as he shall see fit, to appoint special agents to receive and collect all abandoned or captured property in the insurrectionary States, not including, however, any which had been used, or was intended to be used, for waging or carrying on the war, such as arms, ordnance, ships, munitions of war, &c. Any part of the property collected might be appropriated to public use, on due appraisement or certificate thereof, or forwarded to any place of sale in the loyal States, as the public interests might require. All sales were to be at public auction to the highest bidder, and the proceeds paid into the National treasury. The Secretary of the Treasury was required to cause books of account to be kept, showing from whom the property was received, the cost of transportation, and the proceeds of the sale. And any person claiming to have been the owner of such property was authorized, at any time within two years after the suppression of the rebellion, to prefer his claim to the proceeds in the Court of Claims, and, on proof of his ownership, his right thereto, and that he had not given aid and comfort to the rebellion, receive the balance of the proceeds remaining in the treasury, after deducting certain expenses.

Such was the power to take given by the act, and such the obligation assumed by the United States upon the taking, with the remedy provided for its enforcement. It was evidently a war measure, and the statute is to be construed in the light of that fact. It was confined to private property of the enemy. Public property was expressly excluded. It embraced no private property except such as was abandoned by its owners or liable to capture. The property in this case was cotton, and, according to the uniform decisions of this court, the subject of capture.* As was said in Mrs.

* Mrs. Alexander's Cotton, 2 Wallace, 419; Padelford's Case, 9 Id. 540.

Alexander's case, cotton was regarded by the insurgent government as one of its "main sinews of war." It was in fact the foundation upon which the financial system of the rebellion was built. It was a security the insurgents offered for the payment of their debts. Upon it they relied for their influence abroad. To obtain it, forced contributions were exacted from its owners. From time to time in the progress of the war it was found upon the enemy's territory occupied by the military forces of the United States. While, when so found, it might have been owned by non-combatant enemies and, in that sense, private property, it was in fact, under the circumstances, at least semi-public. If left undisturbed, and the insurgents should repossess themselves of the territory, it would again be placed where it might strengthen the rebellion. Its capture was, therefore, legitimate; not for booty, but to cripple the enemy. In that way it was kept out of the insurgent treasury. It might have been destroyed, but the unnecessary destruction of property ought always to be discouraged. The act of Congress looked to its preservation, but authorized its capture. In so doing Congress acted within its constitutional power to "make regulations concerning captures on land and water."*

In the indiscriminate seizure which was likely to follow such an authority, it was anticipated that friends as well as foes might suffer. Therefore, to save friends, it was provided that any person claiming to have been the owner might, at any time within two years after the suppression of the rebellion, prefer his claim, and, upon proof of his ownership and loyalty, receive the money realized by the United States from the sale of his property. That expresses all there is of the trust or the remedy provided.

In Klein's case,† the property collected under this act was said to be of "a peculiar description, known only in the recent war, called captured and abandoned property," and that "the government recognized to the fullest extent the humane maxims of the modern law of nations which exempts private property of non-combatant enemies from cap-

* Art. I, section 8, paragraph 11.

† 13 Wallace, 36.

ture as booty of war." "No similar legislation," it was also said, "is mentioned in history," and "the government constituted itself the trustee for those who were *by that act* declared entitled to the proceeds of captured and abandoned property, and for those whom it would thereafter recognize as entitled." And again (p. 139), that "the proceeds of the property have passed into the possession of the government, and the restoration of the property is pledged to none except those who have continually adhered to the government. Whether restoration will be made to others, or confiscation will be enforced, is left to be determined by considerations of public policy subsequently to be developed."

In the same case it was also held* that "the restoration of the property became the absolute right of the persons pardoned on application *within two years from the close of the war.*" Under this construction the effect of the act was to provide a reward for submission to the government and the acceptance of amnesty, as well as authority for the seizure of property, and it is thus made to operate in two ways to weaken the insurgents: first, by depriving them of their property; and second, by inducing their adherents to submit to the authority of the United States as a means of regaining that which they had lost personally. In that view time is material. The length of a war depends largely upon the relative strength of the contending parties. As a rule, that belligerent is the first to surrender, other things being equal, who first loses the elements of warlike power. Especially is this true in a civil war. Strategy sometimes gives unnatural strength, and thus obtains success, but more commonly war resolves itself into a question of men and money, of strength and endurance.

According to the doctrine of Klein's case, if a suit was commenced within two years a pardoned enemy could recover as well as a loyal friend. But the commencement of the suit within the prescribed time was a condition precedent to the ultimate relief. The right of recovery was made to depend upon the employment of the remedy provided by

* Page 142.

the act. There was no promise even under the rulings in that case, except to such as should commence the suit in time, and upon the trial be in a condition to bring themselves within the requirements of the act. The promise, such as it is, was express. There is no room left for implication. Pardon and amnesty have no effect, except as to such as sue in time. In this, Klein's case but adopts the ruling in previous cases. Thus, in Mrs. Anderson's case,* the doctrine is stated in these words: "But by the act in question the government yielded its right to seize and condemn the property which it took in the enemy's country, if it belonged to a faithful citizen, and substantially said to him: 'We are obliged to take the property of friend and foe alike, which we will sell and deposit the proceeds of in the treasury; and if at any time within two years after the suppression of the rebellion you prove satisfactorily that of the property thus taken you owned a part, we will pay you the net amount received from its sale.'" And in Zellner's case,† "Any person claiming to be the owner of abandoned and captured property, within the meaning of the act, may, at any time within two years after the suppression of the rebellion, present his claim to the Court of Claims," &c. And again, in Armstrong's case, decided at the same time with Klein's, this is the language of the court, speaking through the late Chief Justice: "And that the person so pardoned is entitled to the restoration of the proceeds of captured and abandoned property if a suit be brought within 'two years after the suppression of the rebellion,'" the special provision as to the time being brought to the attention of the reader by the marks of quotation.

Provision might have been made for the institution of suits by loyal owners at any time, but it was not, and the reason may perhaps be found in Klein's case. According to that, an insurgent who accepted the offers of pardon which were from time to time extended to him, and became loyal in fact, received as one of the privileges and immunities to which he was restored, the right to recover the proceeds of

* 9 Wallace, 67.

† 9 Wallace, 248.

the sale of his property taken under the act, if he made his claim in time. To obtain a pardon before the war closed an insurgent must withdraw himself from the enemy and become loyal. There could be no recovery even in a suit commenced until the pardon was obtained, and there could be as soon as it was. Hence the sooner the pardon the sooner the money could be had. So, too, after the contest was over, an early submission by all to the authority of the government was important. To this the act, as construed, furnished an additional inducement by its promise of restoration if application therefor was made in time.

Additional strength is given to this interpretation of the act by what followed its enactment. On the 17th of July, 1862, the President was authorized by Congress to extend pardon and amnesty by proclamation to persons engaged in the rebellion, with such exceptions and upon such conditions as he should deem expedient.* On the 8th December, 1863, nine months after the passage of the Captured and Abandoned Property Act, he issued his first proclamation under this authority.† By this he offered full pardon and restoration of property to all insurgents, except a few designated classes, who would take a prescribed oath to the effect generally that they would thereafter abstain from the rebellion, and support the government of the United States. On the 26th March, 1864, by a further proclamation, he excluded from the operation of the writ, prisoners of war and those confined for crime. Thus during the war actual withdrawal from the enemy and an oath of allegiance were made conditions precedent to amnesty; but on the 29th of May, 1865, and within three days after the surrender of the last organized army of the rebellion, another proclamation was issued,‡ offering pardon and restoration of property to all, with certain exceptions, who would take an oath of allegiance alone. On the 7th September, 1867, but still within two years after the suppression of the rebellion, as it has been determined, another was issued extending the operation of the last to all save three of the excepted classes of persons.§ Thus, after

* 12 Stat. at Large, 592. † 13 Id. 737. ‡ 13 Id. 758. § 15 Id. 700.

the war, simple submission by an insurgent to the authority of the government was the only price to be paid for pardon and restoration to the right, according to Klein's case, of using the means provided by Congress for the recovery of the proceeds of the sale of his captured or abandoned property. Pardon was, therefore, easy to be had, and the promise of a restoration of this class of property was tendered as a reward for its acceptance to such as would qualify themselves within the prescribed time to receive it.

This appellant, though one of those who might, did not accept these easy terms. He would not render even this small equivalent for the restoration of his property, and consequently he has not availed himself of the only promise the United States has as yet offered to make looking to that end. The Court of Claims may act upon promises made, but cannot make them.

There is here no question of confiscation. The title of the United States, whatever may be the rights it carries with it, is by authorized capture or appropriation of enemy's property on land. But the same statute which authorized the capture gave a right to certain persons to demand and receive a restoration of their property taken. Coupled with the right to demand was a provision for the remedy by which it was to be enforced. Both the right and the remedy are, therefore, created by the same statute, and in such cases the remedy provided is exclusive of all others. The demandant in this case neglected to avail himself of the remedy provided, and consequently he is now without any. That remedy was the only one of which the Court of Claims or any other court has been authorized to take jurisdiction. It is for Congress, not the courts, to determine whether this jurisdiction shall be extended and other remedies provided.

JUDGMENT AFFIRMED.

UNITED STATES *v.* INSURANCE COMPANIES.

1. Corporations created by the legislature of a rebel State while the State was in armed rebellion against the government of the United States, have power since the suppression of the rebellion, to sue in the Federal courts, if the acts of incorporation had no relation to anything else than the domestic concerns of the State, and they were neither in their apparent purpose nor in their operation hostile to the Union or in conflict with the Constitution; but were mere ordinary legislation, such as might have been had there been no war or no attempted secession, and such as is of yearly occurrence in all the States.
2. Such corporations may in proper cases sue under the Captured and Abandoned Property Act.

APPEALS from the Court of Claims.

The Home Insurance Company and the Southern Insurance and Trust Company, both being corporations created by the legislature of Georgia in 1861 and 1863, while the State was in armed rebellion against the government of the United States, brought suit in the court below against the United States, under the Captured and Abandoned Property Act (an act which, by its terms, gives a right to sue only to persons who have borne true faith and allegiance to the government and have never voluntarily aided, abetted, or given encouragement to rebellion), to recover the proceeds of the sale of cotton captured at Savannah, in 1864, and now in the treasury of the United States. The United States pleaded the general issue, and statute of limitations, but no other plea.

On the argument, however, of the case, the counsel of the government set up that the courts of the United States would not recognize the competency of those bodies known as the legislatures of the insurgent States, to create corporations, such as insurance, banking, and trust companies; and as the plaintiffs in the court below were incorporated under acts passed after the attempted secession of Georgia from the Union, and before the close of the war, it was argued that they could have now no legal existence. The question thus raised, in the argument—the grounds made

by the pleas not having been at all supported by the evidence, and, in fact, not pressed—was accordingly whether such corporations as were now suing could be recognized as having a legal existence with capacity to own cotton and to sue in the Court of Claims.

That court thought that they had, and gave judgment against the government. The case, therefore, was now here on its appeal; the same question being now presented here in the argument, along with the further point, that if these plaintiffs were competent to sue in the Federal courts, they could not sue under the Captured and Abandoned Property Act, because as corporations they could not bear true faith and allegiance; that capability, as well as the contrary one of voluntarily aiding, abetting, or giving encouragement to rebellion being predicable of natural persons only; for whom and not for corporations the act must be meant. This point, however, was not made in the court below, nor its decision thereon assigned for error. The errors assigned were that the court erred—

"1st. In holding that the claimants had a legal existence; and

"2d. In holding that the rebel legislature of Georgia could create a corporation capable of suing the United States after the suppression of the rebellion."

Mr. G. H. Williams, Attorney-General, and Mr. John Goforth, Assistant Attorney-General, for the United States; Messrs. C. F. Peck and W. W. McFarland, contra.

Mr. Justice STRONG delivered the opinion of the court.

It may well be doubted whether under the pleadings in the court below the appellants have any right to raise the objection here that the companies plaintiff have now no legal existence, because incorporated after the attempted secession of Georgia from the Union, and before the close of the war. There was no plea that traversed directly the corporate existence of the plaintiffs. A general denial of the averments of the petition was hardly sufficient. Notwithstanding the old rule that a corporation suing must

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prove its corporate existence, it has been many times decided that a plea of the general issue admits its capacity to sue, as does going to trial upon the merits.* And such is the established practice in the Court of Claims.†

We do not, however, rest our decision upon this ground. We prefer answering the question which the appellants attempt to raise. No doubt the legislature of Georgia in 1861 and 1863, when the enactments were made for the incorporation of these plaintiffs, was not the legitimate legislature of the State. The State had thrown off its connection with the United States, and the members of the legislature had repudiated, or had not taken, the oath by which the third section of the sixth article of the Constitution requires the members of the several State legislatures to be bound. But it does not follow from this that it was not a legislature, the acts of which were of force when they were made, and are in force now. If not a legislature of the State *de jure*, it was at least a legislature *de facto*. It was the only law-making body which had any existence. Its members acted under color of office, by an election, though not qualified according to the requirements of the Constitution of the United States. Now, while it must be held that all their acts in hostility to that Constitution, or to the Union of which the State was an inseparable member, have no validity, no good reason can be assigned why all their other enactments, not forbidden by the Constitution, should not have the force which the law generally accords to the action of *de facto* public officers. What that is was well stated by Kent in the second volume of his Commentaries.‡ "In the case of public officers," he says, "who are such '*de facto*,' acting under the color of office by an election or appointment not strictly legal, or without having qualified them-

* Lehigh Bridge Company *v.* The Lehigh Coal and Navigation Company, 4 Rawle, 9; Sutton *v.* Cole, 3 Pickering, 245; Conard *v.* The Atlantic Insurance Co., 1 Peters, 450; The Society for the Propagation of the Gospel *v.* The Town of Pawlet, 4 Id. 501.

† Hebrew Congregation *v.* The United States, 6 Court of Claim Reports, 244.

‡ Page 295.

selves by the requisite tests, or by holding over after the time prescribed for a new appointment, as in the case of sheriffs, constables, &c., their acts are held valid as it respects the right of third persons who have an interest in them, and as concerns the public, in order to prevent the failure of justice." And thus this court has ruled in regard to the legislatures of the insurgent States in several cases which have come up for our decision. In *Texas* v. *White and Chiles*,* Chief Justice Chase in delivering the opinion of the court (while declining to attempt any exact definition within which the acts of an insurgent State government must be treated as valid or invalid), remarked: "It may be said, perhaps with sufficient accuracy, that acts necessary to peace and good order among citizens, such, for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfers of property, real and personal, providing remedies for injuries to person and estate, and other similar acts which would be valid, if emanating from a lawful government, must be regarded, in general, as valid when proceeding from an actual, though unlawful government; and that acts in furtherance, or in support of the rebellion against the United States, or intended to defeat the just rights of citizens, and other acts of like nature, must in general be regarded as invalid and void." This language was intended only as an outline, but it sufficiently indicates where is the line between valid and invalid acts of the legislatures of the insurgent States. Similar opinions were expressed in *Sprott* v. *The United States*, a case decided at this term.† There, when speaking of the powers of the insurgent States, our language was, "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

* 7 Wallace, 700.

† 20 Id. 459.

void." And with equal distinctness was it said in *Horn* v. *Lockhart*,* "We admit that the acts of the several States" (in insurrection) "in their individual capacities, and of their different departments of government, executive, judicial, and legislative, during the war, so far as they did not impair, or tend to impair the supremacy of the National authority, or the just rights of citizens under the Constitution, are, in general, to be treated as valid and binding. The existence of a state of insurrection and war did not loosen the bonds of society, or do away with civil government, or the regular administration of the laws. . . . No one that we are aware of seriously questions the validity of judicial or legislative acts in the insurrectionary States, touching these and kindred subjects, when they were not hostile in their purpose or mode of enforcement to the authority of the National government, and did not impair the rights of citizens under the Constitution." After these emphatic utterances controversy upon this subject should cease. All the enactments of the *de facto* legislatures in the insurrectionary States during the war, which were not hostile to the Union, or to the authority of the General government, and which were not in conflict with the Constitution of the United States, or of the States, have the same validity as if they had been enactments of legitimate legislatures. Any other doctrine than this would work great and unnecessary hardship upon the people of those States, without any corresponding benefit to the citizens of other States, and without any advantage to the National government.

Tried by the rule thus stated, the enactments by which the plaintiffs in these cases were incorporated must be treated as valid. They had no relation to anything else than the domestic concerns of the State. Neither in their apparent purpose, nor in their operation were they hostile to the Union, or in conflict with the Constitution. They were mere ordinary legislation, such as might have been had there been no war, or no attempted secession; such as is of

* 17 Wallace, 580.

yearly occurrence in all the States of the Union. We hold, therefore, that the Court of Claims correctly decided that the plaintiffs were lawfully incorporated, and that they had a legal capacity to sue in that court.

It remains only to notice one other position taken by the appellants during the argument. It is that even if the plaintiffs below are corporations which this court can recognize as such, they cannot sue in the Court of Claims for the proceeds of the sale of captured and abandoned property because, as it is argued, the Captured and Abandoned Property Act provides only for suits by persons who could have given aid and comfort to the rebellion. It is said, corporations were incapable of giving such aid, and that they cannot make proof that they have never given it. Nothing in the assignments of error justifies the presentation of such an argument. But were it otherwise, the argument would be plainly unsound. The act of Congress confers the right to sue upon any person claiming to have been the owner of the captured or abandoned property. It makes no distinction between natural and artificial persons, and it has not been doubted that corporations created before the war commenced might sue. Many such actions have been sustained. It is no objection to them that plaintiffs in all suits are required to make proof that they have never given aid and comfort to the rebellion. Such proof may be made as well by artificial as natural persons. Corporations may have rendered very substantial aid to the armed resistance to the laws of the United States. They may have made loans or contributions to the Confederate government. They may even have fitted out companies or regiments of soldiers. If they have rendered no aid, the fact is quite capable of proof.

JUDGMENTS AFFIRMED.

Mr. Justice BRADLEY did not sit in this case.

Statement of the case.

MARYLAND *v.* RAILROAD COMPANY.

1. Although since the legal tender acts, an undertaking to pay in gold may be *implied*, and be as obligatory as if made in express words, yet the implication must be found in the language of the contract, and cannot be gathered from the mere *expectations* of the parties.
2. A reference to what are called "surrounding circumstances," is allowed for the purpose of ascertaining the subject-matter of a contract, or for an explanation of the terms used, not for the purpose of adding a new and distinct undertaking.
3. An implication that a railroad company having an unfinished road in which the State was largely interested should pay gold instead of currency to the State which has lent to the company sterling bonds of the State, of which the interest was payable abroad, and, of course, in coin, is not inferable from the fact that unless the contract between the company and the State be so interpreted, the State has not exacted from the company all that was necessary to its own complete indemnification; this being especially true in the case of a contract, where, in other parts, a complete indemnification was specifically and carefully provided for, and in one where at the time it was made there was no difference, existing or anticipated, in the value of currency and coin, and the difference having been brought about by events supervening long afterwards.

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

In the year 1826 the State of Maryland incorporated the company now well known as the Baltimore and Ohio Railroad Company, for the purpose of making a railroad from Baltimore to the Ohio River. The capital was $3,000,000; and the State took one-sixth of it, or $500,000. The company was, however, not able to make the road with the $3,000,000 capital thus originally subscribed; and in 1836 the legislature of the State passed an act "for the promotion of internal improvements, &c.," meant to assist the completion of the road.

By the first section the State authorized its treasurer to subscribe $3,000,000, in instalments, to the capital of the road, on certain conditions.

Its ninth section was as follows:

"Before any subscriptions shall be made by virtue of this act,

the stockholders of the said company shall stipulate, agree, and bind the company . . . to guarantee to the State of Maryland, *after* the expiration of three years from the payment by the State of each of the instalments on the stock hereby authorized, the payment from that time, *out of the profits* of the work, of six per centum per annum, payable *semi-annually*, on the amount of money which shall be paid to the said company by virtue of this act, *until* the clear annual profits of the said railroad shall be more than sufficient to discharge the *interest* which it shall be liable so to pay to the State of Maryland, and shall be adequate to a dividend of six per centum per annum among its stockholders, and *thereafter* the State shall, in reference to the stock so subscribed for, and on so much thereof as the State may hold, be entitled to have and receive a *perpetual dividend of six per centum per annum, out of the profits of the work* as declared from time to time, and no more, and all and so much of such annual profits as shall exceed six per centum, shall be distributed to the other stockholders according to their several interest in said company."

The guarantee required by this section was given by the company, and accepted by the State.

The act further provided for the appointment of commissioners to proceed to Europe to negotiate loans, and for the issue of the bonds to raise money on behalf of the State to satisfy the purposes of the act. The bonds were to be issued, redeemable, at the pleasure of the State, after the expiration of *fifty years from their date*, and to bear interest at the rate of six per centum per annum, payable *quarterly, either at the loan office in the city of Baltimore, or at some place in Europe*, as might be arranged by contract. They were not, however, to be sold at any rate which would yield to the State less than twenty per cent. net, above par. Of this premium, whatever part of it was not required to pay the interest on the loan for three years after its negotiation, was, with its increment, directed to be invested, in order to constitute a sinking fund for the ultimate redemption of the debt incurred.

The bonds were issued by the State, but the commissioner sent to Europe was unable to negotiate them on the terms

prescribed by the act. The State then sold the bonds to the company itself; but rated, as they had been by the State, at $120, they proved to be unsalable by the company.

In this state of things the State passed, in 1838, an act providing that upon the surrender of the bonds, the commissioner of loans should deliver to the company "*an amount of sterling bonds or certificates of stock to be redeemable in London*, at the pleasure of the State, at any time *after fifty years from the date thereof*, and to bear an interest of *five* per cent. per annum, payable *semi-annually* in London, on the 1st day of January and July in each and every year, equivalent to the amount of bonds delivered up by the company." The act continued:

"And in thus changing the bonds already issued under the act aforesaid for the bonds hereby created, the said commissioner of loans shall give to the said company in the proportion of $3200 of the bonds or certificates of stock hereby created for every $3000 of the bonds so to be delivered up.

"*Provided*, however, that the said company shall secure by mortgage on all the property and revenues of said company to the satisfaction of the treasurer, the payment of the interest at the rate of five per centum per annum on the stock created by this act, semi-annually, at least ninety days before the first day of January and July, in every year, FOR THE TERM OF THREE YEARS from the date of the bonds, *together with the cost of transmitting said interest to London to be there paid, and also the difference in the exchange of currency between London and the city of Baltimore.*"

The bonds that were issued to the company by the State, under this act of 1838, owing to difficulties in disposing of them to advantage, were not appropriated by the company until about the year 1849, when they were placed on the market in Europe, and sold. As they were disposed of, the railroad company paid the interest on them as it accrued, and all costs and difference in exchange, for the term of three years; and after the expiration of that term it continued to pay such interest, cost, and exchange, by applying directly the State's guaranteed dividend of six per cent. on

the stock subscribed under the act of 1836, instead of paying it over to the treasury. The company rendered no account, but treated the six per cent. dividend as equivalent to the five per cent. sterling interest, with the costs and exchange; and this continued to be its course of conduct to the 1st of July, 1865, from which time it ceased to apply the six per cent. dividend as formerly, but paid it directly into the State treasury in currency notes. The State had been, therefore, required, from the 1st of July, 1865, to the present time to provide for the payment of the sterling interest in London, together with all costs and difference in exchange; which, of course, had to be adjusted to a gold standard, while it had been in the receipt of the six per cent. dividend in currency.

At the time that the company accepted the provisions of the act, June 4th, 1836, and indeed up to the year 1861, the matter was not one of practical importance. Coin (or paper convertible on demand into it) was the currency of the country. The law recognized no tender as valid but one in coin; and in the case of this contract, as in all others made at the time that it was (A.D. 1836), the expectation of the parties, it was not denied, was that the contract would be discharged in coin.

But in the year 1861, already named, a general suspension of payments in coin took place throughout the country, and in 1862 and 1863, Congress authorized the issue of many millions of notes of the United States, which by the acts authorizing them were declared to be a tender in payment of debts. This act, this court held to be constitutional;* but the court also decided that a debtor could pay his debt with legal tender notes only when his contract did not specify that payment should be made with coin;† in other words that a debtor might have defined the medium of payment as well as have promised to pay. So that after the passage of these acts there were two kinds of money or rep-

* Legal Tender Cases, 12 Wallace, 457.

† Trebilcock *v.* Wilson, 12 Wallace, 687; Bronson *v.* Rodes, 7 Id. 229.

resentatives of values with which debts might be paid, coin and legal tender notes; an ordinary debtor being at liberty to pay in currency, though a debtor who had undertaken to discharge his obligation by payment in gold or silver would be held to his contract as specifically made.

Immediately on the issue of the sort of notes above mentioned they fell in value as compared with gold, and at many times since had been greatly below it. At one time during the summer of 1864 it required $285 in them to buy $100 in gold. The difference thus became vast, and it so happened that the payment, in gold, of five per cent., was the payment of a much greater sum than would have been the payment of six per cent. in the "legal tender notes" of the United States; otherwise called "currency." And as the State had paid the five per cent. interest on its sterling bonds in gold—the only way in which it could pay interest abroad—it now, in the suit below, asserted that it was entitled to be fully indemnified by the company, and to be repaid in gold and not in currency. This the company denied, and the question therefore was whether by the contract between the parties, the State was entitled to demand in gold what was payable to her, or whether it might be satisfied in legal tender notes. The court below was of the opinion that it might be satisfied in legal tender notes, and gave judgment against the State. To that judgment the present writ was taken.

Messrs. S. T. Wallis, I. N. Steele, and P. F. Thomas, for the plaintiff in error:

A contract to pay in gold is here implied, and the case falls within *Trebilcock* v. *Wilson*,* which obliges the debtor in such case to pay in gold.

The State had subscribed $500,000 to the road, which was yet unfinished, and desired to have the road finished; but it desired also not to really increase its own debt, and not to have to raise interest by taxation. If the road could only be finished, *it* could pay the interest, and, when it came

* 12 Wallace, 687.

due, the principal of what the State might bind itself in form to pay. The proper interpretation of the acts of the legislature *construed together and in the light of surrounding circumstances*, an interpretation which must have been given at the time by both parties, therefore is:

1st. That in practical effect the State only lent its *credit* to the company to enable the latter to borrow money in Europe; the cost of the transaction to be altogether borne by the railroad company, and the State being the mere conduit through which that cost was to be conveyed from the company to the European lender.

2d. That the transaction, though in the form of stock, paying a fixed and preferred dividend, was, in effect, a loan bearing the legal rate of interest of the State, six per cent.; the form of stock being adopted to make the loan irredeemable by the company at any fixed period, but at the same time placing in the hands of the State a source from which it could at any time after the success of the work became assured, realize the means of paying its own bonds in Europe, and terminate the transaction.

3d. That this interest was payable in gold, not only because at the date of the transaction all legal demands were solvable in gold only, but because, from the nature of the transaction, gold only must have been in the contemplation of the parties to it, as gold was the only medium within the fixed rate of the contract which would keep the State harmless.

That this was all so, stands to reason. The State was bound to protect her own interest and that of her people, and it must be inferred that she did not contract in a way so loose as to expose herself and them to pay $2.85, and more, when she got but $1 in return. Undoubtedly both parties thought that what the company agreed to pay would be enough to pay the interest on the State bonds; which on the construction given to the contract in the court below it never could do.

The case of *Lane County* v. *Oregon*,* involved the proper

* 7 Wallace, 71.

construction of the statutes of the State of Oregon, and this court decided that when the statutes of the State required the collecting officer to pay over the taxes to the State treasurer in gold, it was required by legitimate, if not necessary consequence, that the taxes should be collected in gold, though the statute imposing the taxes made no mention of the medium in which they should be payable. We refer to that case as an authority in point upon the implication of an obligation from the nature of the transaction. Now, in the case we are considering, it was well known and understood between the contracting parties that the State was to oblige itself by the tenor of its bonds, negotiable in Europe, to pay the principal and interest of the debt thus contracted in gold, and the only source provided by the same contract for such payment was a stipulated amount to be paid by the company to the State, and intended to be the equivalent of the interest payable by the State. In order to make it equivalent it is necessary to make it payable by the company in gold; and is not the implication as logically necessary in this case as it was in the Oregon case?

Messrs. J. H. B. Latrobe, Reverdy Johnson, and C. J. M. Gwinn, contra.

Mr. Justice STRONG delivered the opinion of the court.

It is not contended in this case that the contract between the parties contains any express undertaking to pay what the company assumed to pay, either in coin or in any specified kind of money, or with anything other than that which might be a legal tender for the payment of debts, when the time for payment should arrive. But the argument on behalf of the State is, that the language used implies an undertaking to pay in coin, and that the case is therefore within the principle laid down in *Trebilcock* v. *Wilson*. Conceding that such an undertaking may be implied, when there is no express promise to pay in gold, still the implication must be found in the language of the contract. It is not to be gathered from the presumed or the real expectations of the par-

ties. As was said in *Knox* v. *Lee*,* "the expectation of the creditor and the anticipation of the debtor may have been that the contract would be discharged by the payment of coined money, but neither the expectation of one party nor the anticipation of the other constitutes the obligation of the contract. There is a well-recognized distinction between the expectation of the parties to a contract and the duty imposed by it. Were it not so, the expectation of results would always be equivalent to a binding engagement that they should follow." There is sound reason in what was said by Lord Denman in the Queen's Bench, in *Aspdin* v. *Austin*,† which was an action upon a covenant. "Where parties," said his lordship, "have entered into written engagements with express stipulations, it is manifestly not desirable to extend them by any implications. The presumption is that, having expressed some, they expressed all the conditions by which they intend to be bound under that instrument. It is possible that each party to the present instrument," said he, "may have contracted on the supposition that the business would in fact be carried on and the service in fact be continued during three years, and yet neither party be willing to bind themselves to that effect; and it is one thing for the court to effectuate the intention of the parties to the extent to which they may have even imperfectly expressed themselves, and another to add to the instruments all such covenants as upon a full consideration the court may deem fitting for completing the intention of the parties, but which they, either purposely or unintentionally, have omitted. The former is but the application of a rule of construction to that which is written; the latter adds to the obligation by which the parties have bound themselves, and is of course quite unauthorized, as well as liable to great practical injustice in the application." Applying these principles, and looking to the contract, we discover no basis for such an implication as the plaintiff in error asserts.

We are asked to consider the circumstances which at-

* One of the Legal Tender Cases, 12 Wallace, 457.

† 5 Adolphus & Ellis (new series), 671.

tended the legislative enactments, and induced them. The State was then in part the owner of an unfinished railroad. It was important to the interests of the people of the State, as well as to the State as a stockholder, that the road should be finished, and to accomplish its completion pecuniary assistance by the State was needed. For this purpose the State lent her credit. This was the object she had primarily in view. It is said she had also in view her own protection and that of her citizens against loss in so doing, and that it must be presumed the legislature discharged its duty, and made effectual provision for such protection. This is assuming what cannot be conceded. It assumes that it was the duty of the legislature to exact from the company all that could be exacted, and this though the company was in great need of assistance, and though it was the interest of the State that such assistance should be furnished. But if the assumption might be made, it would still be inadmissible to deduce an implication of a promise, not from the contract itself, but from the extraneous fact that such a promise ought to have been exacted. Ordinarily a reference to what are called "surrounding circumstances" is allowed for the purpose of ascertaining the subject-matter of a contract, or for an explanation of the terms used, not for the purpose of adding a new and distinct undertaking.

The plaintiff in error further insists that the contract, as exhibited in the acts of the legislature, amounts to an engagement on the part of the company to indemnify the State for the payments she was under obligation to make in discharge of the interest upon her bonds, by means of which the money was raised to pay her subscription to the company's stock; and as that interest could only be discharged by gold, it is argued the company must be held to have undertaken to pay in gold, since payment by legal tender notes would not amount to indemnity. But we see nothing in the contract which justifies its being construed as a contract of indemnity. It may be conceded, and it probably was the fact, that both parties thought what the company undertook to pay would suffice to pay the interest upon the State bonds

from time to time as it should fall due. But nothing in the statutes, read as a whole or read with reference to the required guarantee, or read in the light of the circumstances then existing, exhibits any undertaking that the company's stipulated payments should suffice to discharge the liabilities of the State. On the contrary there is much in the statutes to repel any possible implication of an engagement to indemnify, and to make it apparent that such an obligation was not intended to be imposed or assumed. As has been noticed, the company was required by the act of 1836 to pay, after the first three years, six per cent. interest out of the profits of the work, and pay it *semi-annually*, until the net profits should be adequate to pay a six per cent. dividend, and thereafter pay a perpetual dividend of six per cent *annually*. But the bonds first authorized to be issued by the State to pay her subscription were bonds bearing six per cent. interest payable *quarterly*, and running not less than fifty years. The commissioners for their sale were also authorized to make the interest on the bonds payable at the loan office of the State, in the city of Baltimore, or at some place or places in Europe, should they find it advantageous so to contract. It is manifest, therefore, that if the bonds had been made payable in Baltimore, principal and interest, the semi-annual payment required of the company would not have met the obligations of the State, which were to pay quarterly her interest. And if the bonds had been made payable in Europe, still less would the six per cent. due from the company, though paid in gold, have enabled the State to pay her interest abroad. In addition she must have paid exchange and the cost of transmission. This seems to indicate clearly that the act of 1836 not only was not, but that it was not intended to create an obligation to indemnify the State. And this is not all. The bonds first issued were exchanged under the act of 1839, and sterling bonds bearing five per cent. interest payable semi-annually in London were given to the company in their place. This act required the company to secure the payment of the interest at the rate of five per centum per annum on the stock (the sterling

bonds) created by the act, semi-annually, at least ninety days before the first day of January and July in every year for the term of three years from the date of the bonds or certificates of stock, together with the cost of transmitting the interest to London to be there paid, and also the difference in exchange of currency between London and Baltimore. This was a stipulation for indemnity. It covered all that the State was required to pay as interest on her sterling bonds. But it was expressly limited to the interest for the first three years, and hence it excluded any implication of an obligation to indemnify against all liability of the State to pay the subsequently accruing interest. Unless this is true the limitation to three years is unmeaning. After the expiration of that period, nothing more was required than the semi-annual payment of six per cent. as stipulated by the act of 1836.

It is, we think, also a matter of some significance that by the contract the payments to the State were required to be made at first out of the profits, the gross receipts of the company. No distinction was made between the kind of money the company might be compelled to receive and that required to be paid to the State. Nor was any distinction attempted to be made between the kind of money with which the dividends to the State and other stockholders could be paid.

For these reasons, we think, the contract between the parties exhibits no just ground for an implication that the company assumed an obligation to pay its dues to the State in gold, or in any other manner than in money generally, and the fact that the company did pay the State's interest in sterling funds in London down to 1865, cannot change the construction of the contract.

We do not perceive that the case of *Lane County* v. *Oregon* has any bearing upon the present controversy.

JUDGMENT AFFIRMED.

Dissenting, Justices CLIFFORD and FIELD.

PLEASANTS *v.* FANT.

1. Where the question before the jury is whether F. (the defendant) was a partner with K., so as to make him liable for the debts of the firm, K.'s declarations to third persons are not admissible in favor of the plaintiffs until they have established a *primâ facie* case of partnership by other evidence.
2. The admission of the defendant and the deposition of K. to the effect that the defendant had procured for K. a loan of money to be used in a purchase of cotton, and that K. had voluntarily promised to give the defendant a part of the profits, if any were made, for his assistance in procuring the loan, when no sum or proportion of profits was named, does not raise such a presumption of partnership.
3. Nor is such evidence sufficient to require the court to submit the question of partnership to a jury; and its instruction to find for the defendant was right.
4. Such instruction is right where the court would decide for the defendant on a demurrer to all the evidence, and the true rule in the case is that if, to the judicial mind, the evidence, tested by the law of the issue and the rules of evidence, is not sufficient to justify a jury fairly and reasonably in finding a verdict for the plaintiff, the court should so tell the jury.
5. If the court can see that if a verdict for the plaintiff should be rendered, it ought to be set aside as being unwarranted by the testimony, such instruction should be given in advance of the verdict.

ERROR to the Circuit Court for the District of Maryland.

R. & H. Pleasants sued Fant in the court below, and the single question in dispute was whether the defendant was a partner in the firm of Keene & Co., so as to charge him with a debt conceded to be due by that firm to the plaintiffs, arising out of some transactions in cotton. The case was tried before a jury, and when the testimony was through, both plaintiffs and defendant prayed instructions of the court, which were all refused, and the court said to the jury,

"There is no evidence in this cause from which the jury can find that the defendant had such an interest in the purchase and sale of the cotton by Keene & Co. as will make him, the defendant, a partner as to third persons, and the jury will, therefore, find their verdict for defendant."

The bills of exception disclosed the testimony on which this instruction was founded, and the question now before

Statement of the case.

this court was whether the verdict founded on that instruction should be set aside and the judgment reversed.

The direct testimony offered to prove the partnership was confined to the statements of Fant in a conversation with one of the plaintiffs and a clerk in their office, and the deposition of Keene, a partner of Keene & Co. The substance of the former was that Fant denied that he was a partner, said he knew from some experience what was necessary to make him a partner, and admitted that he had procured for Keene a loan of $10,000 in gold from a bank of which he was president, and that he was to receive part of the profits of Keene's venture in purchasing cotton with that money, as compensation for procuring the loan. What portion of the profits he was to receive was not stated.

Keene in his deposition denied that Fant was a partner in the transaction, but said that Fant had negotiated for him the loan from the bank, and he had made Fant a promise, *which was entirely voluntary*, to give him a part of the profits he might realize, and that he had mentioned *no particular part or proportion of the profits to be so given.*

After the admission of this testimony, the plaintiffs, on the ground that they had sufficiently shown a relation between Fant and Keene to admit of Keene's declaration to third persons as to Fant's interest, offered to prove by one of the plaintiffs, that Keene had told him Fant was a partner, and asked that the plaintiffs would advance money enough on the cotton then in their possession as brokers to enable him to pay Fant his money and let him out of the firm. This offer was objected to and the objection sustained by the court.

A large amount of testimony, however, was admitted, the object of which was to show that Fant, as president of the bank, was in the habit of using the money of the bank in private speculations, without the knowledge of the directors, but which was very feeble and far from establishing that fact.

Verdict and judgment having been given for the defendant, the plaintiffs brought the case here.

Argument for the plaintiff in error.

Messrs. I. N. Steele and S. T. Wallis, for the plaintiffs in error:

1. The English rule laid down in *Waugh* v. *Carver*,* makes a participation in profits conclusive proof of partnership under all circumstances.

In *Berthold* v. *Goldsmith*,† and in *Seymour* v. *Freer*,‡ this court holds that the rule does not apply to "a case of service or special agency, where the employé has no power, as a partner, in the firm, and *no interest in the profits, as property, but is simply employed as a servant or special agent, and is to receive a given sum out of the profits, or a proportion of the same, as a compensation for his services.*" Beyond that exception the court does not go in its adjudication or its reasoning. There is nothing in either to countenance the idea that a party, not an employé, but contributing, or lending, or procuring the capital of a concern, can stipulate, *ab initio*, for a share of its profits, as a compensation for doing so, and yet escape liability for its debts. And such an idea is contrary to the whole current of authority.§ This court has not followed some of the later English cases.‖

2. The instruction given to the jury improperly took the case away from it. The evidence undoubtedly did at least *tend* to prove a participation in the profits; and while the rule of evidence does not allow one partner to bind or speak for the other, until proof has been given of his authority, it nevertheless requires nothing more than proof tending to

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* 2 Henry Blackstone, 235; S. C. reported with notes in 1 Smith's Leading Cases, 7th ed., p. 1289.

† 24 Howard, 542, 543. ‡ 8 Wallace, 215.

§ Hesketh *v.* Blanchard, 4 East, 144 (8 Wallace, 222); Gouthwaite *v.* Duckworth, 12 East, 422; Cheap *v.* Cramond, 4 Barnewall & Alderson, 667; Parker *v.* Canfield, 37 Connecticut, 250; Taylor *v.* Terme, 3 Harris & Johnson, 505; Benson *v.* Ketchum, 14 Maryland, 355; Sheridan *v.* Medara, 2 Stockton, 475; Bearce *v.* Washburn, 43 Maine, 564; Brownlee *v.* Allen, 21 Missouri, 123; Wood *v.* Vallette, 7 Ohio, 178; Catskill Bank *v.* Gray, 14 Barbour, 477; Pierson *v.* Steinmyer, 4 Richardson's South Carolina (Law), 310.

‖ Cox *v.* Hickman, 8 House of Lords Cases, 268; Bullen *v.* Sharp, 1 Law Reports (C. P.), 86.

establish the authority; proof legally sufficient to go to the jury on the point.*

It is settled law that a Circuit Court has no authority to order a peremptory nonsuit against the plaintiff's will.† But very nearly the same result is reached if after a plaintiff has given what he deems sufficient evidence of his case, and which does confessedly *tend* to prove it, the court may tell the jury what this court told the jury below.

Mr. R. T. Merrick, contra.

Mr. Justice MILLER delivered the opinion of the court.

If the admission of Fant to plaintiffs, and the evidence of Keene, are insufficient to raise a *primâ facie* presumption of partnership, then Keene's declarations on that subject were inadmissible, and the court was right in its instruction to the jury. If it was sufficient for that purpose then it was erroneous, and the evidence here offered of Keene's statements to plaintiffs was improperly excluded.

The case rests after all on the question whether in Fant's declaration to the plaintiffs and Keene's deposition there was evidence of a partnership on which a verdict for plaintiff could have been sustained.

We have been favored by counsel with a reference, very learned and very exhaustive, to the authorities on the question of how far or when a participation in the profits subjects a party to the liability of a partner to third persons. And it must be confessed that some of the discriminations, where profits are used as compensation for definite services, are very nice.

We do not think that a close examination into these is necessary in this case. According to Keene's testimony there was clearly no contract binding him to divide the profits with Fant. He says the promise was entirely vol-

* Rosenstock *v.* Tormey, 32 Maryland, 182, 183; Irvine *v.* Buckaloe, 12 Sergeant & Rawle, 35; Roberts *v.* Gresley, 3 Carrington & Paine, 380; National Bank *v.* Mechanics' Bank, 36 Maryland, 5.

† Elmore *v.* Grymes, 1 Peters, 469.

untary, and that no portion of the profits was mentioned. By voluntary he undoubtedly means that it was not a part of the agreement by which he obtained the money, but a gratuitous promise to reward his friendship if he succeeded in his venture.

Fant's statement to the plaintiff, as detailed by the latter, differs but very little from this. As a compensation for obtaining the loan, he says that Keene agreed to allow him a part of the profits, but how much or what proportion, or whether it was a definite sum to be paid out of the profits, or a proportionate part of the profits, is not shown.

If one of the most approved criteria of the existence of the partnership in such cases be applied to this, namely, the right to compel an account of profits in equity, the evidence totally fails. In a suit for that purpose, founded on this precise statement, no chancellor would hesitate to dismiss the bill.

But we are pressed with the proposition that it was for the jury to decide this question, because the testimony received and offered had some tendency to establish a participation in the profits, and the question of liability under such circumstances should have been submitted to them, with such declarations of what constitutes a partnership as would enable them to decide correctly.

No doubt there are decisions to be found which go a long way to hold that if there is the slightest tendency in any part of the evidence to support plaintiff's case it must be submitted to the jury, and in the present case, if the court had so submitted it, with proper instructions, it would be difficult to say that it would have been an error of which the defendant could have complained here.

But, as was said by this court in the case of the *Improvement Company* v. *Munson*,* recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no

* 14 Wallace, 448.

evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed.

The English cases there cited fully sustain the proposition,* and the decisions of this court have generally been to the same effect.

In the case of *Parks* v. *Ross*,† this court held that the practice of granting an instruction like the present had superseded the ancient practice of demurrer to evidence, and that it answered the same purpose and should be tested by the same rules; and in that case it said the question for the consideration of the court was whether the evidence submitted was sufficient to authorize the jury in finding the contract set up by plaintiff. And in *Schuchardt* v. *Allens*,‡ this case is referred to as establishing the doctrine that if the evidence be not sufficient to warrant a recovery, it is the duty of the court to instruct the jury accordingly.

In the case of *Pawling* v. *The United States*,§ the court, by Marshall, C. J., said: "The general doctrine on a demurrer to evidence has been correctly stated at the bar. The party demurring admits the truth of the testimony to which he demurs, and also those conclusions of fact which a jury may fairly draw from that testimony. Forced and violent inferences he does not admit, but the testimony is to be taken most strongly against him, and such conclusions as a jury might justifiably draw the court ought to draw."

It is the duty of a court in its relation to the jury to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of his lawful rights in the conduct of a trial. This is done by making plain to them the issues they are to try, by admitting only such evidence as is proper in these issues, and rejecting all else; by

* See Jewell *v.* Parr, 13 C B. 916; Toomey *v.* L. & B. Railway Co., 3 C. B. (N. S.), 146; Ryder *v.* Wombwell, 4 Law Reports, Exch. 33.

† 11 Howard, 362.

‡ 1 Wallace, 359.

§ 4 Cranch, 219; see also Bank of the United States *v.* Smith, 11 Wheaton, 171.

instructing them in the rules of law by which that evidence is to be examined and applied, and finally, when necessary, by setting aside a verdict which is unsupported by evidence or contrary to law.

In the discharge of this duty it is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor. Not whether on all the evidence the preponderating weight is in his favor, that is the business of the jury, but conceding to all the evidence offered the greatest probative force which according to the law of evidence it is fairly entitled to, is it sufficient to justify a verdict? If it does not, then it is the duty of the court after a verdict to set it aside and grant a new trial. Must the court go through the idle ceremony in such a case of submitting to the jury the testimony on which plaintiff relies, when it is clear to the judicial mind that if the jury should find a verdict in favor of plaintiff that verdict would be set aside and a new trial had? Such a proposition is absurd, and accordingly we hold the true principle to be, that if the court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the court should say so to the jury. In such case the party can submit to a nonsuit and try his case again if he can strengthen it, except where the local law forbids a nonsuit at that stage of the trial, or if he has done his best he must abide the judgment of the court, subject to a right of review, whether he has made such a case as ought to be submitted to the jury; such a case as a jury might justifiably find for him a verdict.

Tested by these principles we are of opinion the Circuit Court ruled well. If plaintiffs had secured a verdict on the testimony before us we think that court ought to have set it aside as not being warranted by the evidence. It is not possible with any just regard to the principles of law as to partnership, and the rules of evidence as applied to this tes-

timony, to come fairly and reasonably to the conclusion that Fant was Keene's partner in this transaction.

JUDGMENT AFFIRMED.

RAILROAD COMPANY *v.* PRATT.

1. Though where goods received at one place are to be transported over several distinct lines of road to another and distant one, the liability of the common carrier first receiving them (where no special contract is made) is limited to his own line, yet he may subject himself by special contract to liability for them over the whole course of transit. And this is true of a railroad corporation possessed of the powers given to railroad corporations generally and subject to corresponding liabilities; such railroad corporations, *ex. gr.*, as those incorporated under the general railroad law of New York.
2. If there is competent evidence of such a contract thus to carry, put before the jury, the weight, force, or degree of such evidence is not open for consideration by this court.
3. What amounts to competent evidence. This matter stated in a recapitulation of the evidence given in this particular case. A way-bill in which the heading spoke of the goods as goods to be transported *by* the first road, *from* the place of departure *to* the place at the end of the whole line, and at which the owner wished to have them delivered, *held* to be such evidence, whether looked upon as a contract, or as a declaration or admission.
4. Where in such a line of roads as that described in the first paragraph above, the common carrier owning the first road undertakes to carry goods over the entire line—part of the goods being put aboard the cars on his line, and a part *to be* put on at its termination and where the next road begins—the fare asked and agreed to be paid being, however, the fare usually asked and paid for the carriage over the whole line, and the contract being for transportation over the whole road and not for carriage to the end of the first line and then for delivering to the carrier owning the next road and for carriage by him—the fact that a part of the goods were put on the cars only where the second road begins, will not exonerate the owner of the first road from liability for their loss.
5. Where on such a line of road as that in the said first paragraph described, the second road posts *its* rules in the station-house of the first, a person furnishing goods for transportation "through" is not to be held as of necessity to have notice of them from the fact of such posting, and because he was often in the station-house of the first company where they were posted. Independently of which, his contract being with the first company only, and *it* agreeing to carry for the whole distance, *its* rules are the rules that are to govern the case.

Statement of the case.

6. If a common carrier by rail is negligent and careless in furnishing cars, and so furnish cars unsuitable for the case—even though they be cars for cattle, which cars the owner himself sees, and which cattle the owner himself attends—the carrier is not relieved from responsibility, even though there have been an agreement that he shall not be responsible.

ERROR to the Circuit Court for the District of Massachusetts, in which court J. Pratt and H. Brigham, of Boston, sued, by process of attachment, the Ogdensburg and Lake Champlain Railroad Company, a corporation of New York, to recover from *that* company damages for the loss of certain horses which Pratt, for the two parties, had put into the company's cars on its road in the said State, and which had been burned to death, not on the said company's road, but on the Vermont Central Railroad; a road in the State of Vermont, connecting with the former, but not belonging to the same corporation, but on the contrary belonging to a different corporation; to wit, a corporation of Vermont.

The case was thus:

In the northeastern part of New York there exists what is known as the Ogdensburg and Lake Champlain Railroad. The road begins at Ogdensburg, about ninety miles west of Lake Champlain, and runs eastwardly through a place called Potsdam to Rouse's Point on the said lake, at which point it strikes the boundary line between the States of New York and Vermont.

This Ogdensburg and Lake Champlain Railroad Company was incorporated under the general railroad law of New York, and possessed the powers possessed by railroad corporations generally, and was subject to the same liabilities as they generally are.

At Rouse's Point begins a new railroad, to wit, the Vermont Central Road; a different road, as already stated, and owned by a different corporation, one created by Vermont. The rails of the two roads, however, connect. This Vermont Central Road runs across the State of Vermont in a southeasterly direction till it comes towards the edge of Massachusetts, where it strikes a third road, which, passing through Concord in that State, enters the city of Boston.

Statement of the case.

At the town of Potsdam, above spoken of as near the west end of the Ogdensburg and Lake Champlain road, Pratt, already mentioned, a transporter of horses, went, in March, 1868, to one Graves, who was the station agent at Pottsdam of the Ogdensburg and Lake Champlain road, and informed him that he wished two good "stock cars" to carry certain horses for himself and Brigham to Boston. Pratt thus testified:

"I have been for twenty years in the habit of buying horses (one or two hundred a year), and of transporting them over the Ogdensburg and Lake Champlain and the Vermont Central roads to Boston. I have known Graves five or six years as station agent at Potsdam. His office was in the freight-house. He always furnished me stock cars. This occurred from five to ten times a year. The cars thus furnished by him went without any change right through over these roads, and the arrangements made by him were always recognized by the roads through to Boston. A week before the horses for whose loss this suit is brought, were brought to Potsdam, Mr. Graves engaged to give me two good stock cars to carry them to Boston. He did at the time appointed give me two cars, and I took my horses to them. I objected to one of the cars. Graves said that I must take it or wait for a week, as no others than these were there. I took the car rather than wait, and repaired it as well as I could. I put in some hay—wet and rotten hay—to keep the horses from slipping. I always did that. One of the railroad hands and I put it in on this occasion; and in full view of the office. This railroad hand had been in the service of the company for three or four years. I then told Mr. Graves that I wished to put in other horses at Rouse's Point. He agreed to this. We agreed upon the price, $85 per car, through to Boston; being the same price as if all the horses had been put in at Potsdam; the horses to be transported from Potsdam; some taken on there and some at Rouse's Point. We had passes to go on the train which took our horses. I always put my horses in and go on the cars myself to take care of the horses, or else send a man. On this occasion Mr. Brigham was in charge all the way. I had no other man. You can't go in the same car with the horses. A place called a box car was furnished for us. The way-bill was thus made out:

Way-bill of merchandise transported by Ogdensburg and Lake Champlain Railroad Company, from Potsdam Junction to Boston, via Concord, March 20th, 1868.

Name and residence. Designation.	Description of articles.	Weight.	Rate.	Freight.	Back charges.	Total charges.	Remarks.
J. Pratt, Boston,	1 car horses..... 1 man in charge, free, O'g.	20,000	.....	$85.00	.....	$85.00	Coll.
H. Brigham, . . .	1 car horses..... 1 man in charge, free.	20,000	.....	85.00	.....	85.00	.....
		40,000		$170.00		$170.00	

"I saw the bill at Potsdam after it was made out."

The plaintiffs here put this question to the witness:

"In these acts of Graves in furnishing cars and making arrangements for transportation through to Boston as testified by you, for whom did he assume to act?"

The defendant objected to the question, asserting that the witness could be asked only as to what was said and done, and that the question was incompetent on this account, and as calling from the witness an expression of his own opinion or inference. The court admitted the question, and defendant excepting, the witness answered:

"He assumed to act for the Ogdensburg and Lake Champlain Railroad Company."

In consequence of the cars being broken and very much exposed, and sparks from the locomotive getting into them the hay took fire, and the horses were burnt to death. This took place on the road of the Vermont Central Company. Some of the horses were put in at Rouse's Point.

No freight was paid on this particular occasion at Potsdam; and indeed it was generally paid, in transactions between these parties, in the depot in Boston.

The defendants produced Graves, the station master already mentioned. He testified that there were several cars at Potsdam when Pratt brought the horses to the station, and that he could have had his choice, and as he, the

witness, supposed did have it; that all cars were examined before being sent off, and if unfit were reported; that the cars were "billed" as per the way-bill above shown; that the freight might have been paid in advance, but was not; that the witness knew of no hay put into the cars; that it was against the rules of the Vermont Central road to put any litter in them. Two men were allowed to go free, one in each car.

The defendants also put in evidence certain rules printed on a single sheet, entitled "Vermont Central Railroad Special Live-stock Tariff," which after reciting certain rates of freight per ton, contained, under the head of "DIRECTIONS," the following provisions:

"In consideration of drovers being permitted to ride free on the same train with their stock for the purpose of taking charge of it, it will, in all cases, be their duty, or that of shippers of live stock, to examine cars before loading, and if they accept them the stock will be at their risk of loss or damage occasioned by doors being displaced or otherwise. Hay, straw, and like combustibles will, under no circumstances, be allowed in a car with live stock. Persons violating this rule will not only suffer all loss which the same may cause to his or their own stock, but will be held responsible for all damage caused by such violation, whether it be to individuals or to the railroad."

They then introduced evidence tending to show that these rules were posted up in the Potsdam station, and that the plaintiffs were often there, and so must have seen them. The plaintiffs denied being often in the station-house, and testified that they had never seen or heard of the said rules until after this loss occurred.

On the trial, the court having charged that the defendants would not be liable for a loss occurring on any other railway in the line unless, at least, they specifically and expressly contracted to transport the horses through or beyond their own road to where the accident happened; that otherwise they would be forwarders, and their liability would be discharged by safely delivering to the next road in the line, was asked by the defendants to charge further thus:

"If the jury are satisfied that the plaintiffs at Potsdam Junction, when they took the car in question, knew of its defects, and that it was unsafe, and liable to catch fire and burn, having full opportunity to see and examine it, and that they did see and examine it, and had full knowledge of its condition, and either selected or accepted this when they might have had another car; or if they consented to take this, and were allowed to take it at their request and wish, they electing and proposing to do so, and insisting upon it rather than wait a reasonable time for another car, they by so selecting or accepting the car took their risk of these defects, and cannot recover for losses occurring because of them."

In lieu of the charge requested, the court charged as follows:

"The common carrier is bound to furnish suitable vehicles and means of transportation for the carriage of such articles as he undertakes to carry and transport. If he furnishes unsafe or unfit cars he is not exempted from liability by the mere fact that the shipper knew them to be defective and used them. Nothing less than an agreement by the shipper to assume that risk would have that effect. In this case, if the plaintiffs expressly agree to assume the risks of defective cars rather than to wait a reasonable time for other cars, they cannot recover."

The jury found for the plaintiff, and the Ogdensburg and Lake Champlain Railroad Company brought the case here on different causes of error, which were resolvable into these four questions:

1. Had the Ogdensburg and Lake Champlain Railroad Company power or right to contract as a common carrier to transport the horses to Boston over another railroad, and beyond its own terminus?

2. Was there competent evidence given on the trial that the company did so contract in relation to the horses in question?

3. Did the plaintiffs, by putting their horses into a car which they knew was defective and unsuitable, thereby assume the risk of such defects, and relieve the company from responsibility for the same?

4. Was there error in admitting in evidence the way-bill made and forwarded with the property by the defendants, or in allowing the witness to state for whom the station agent assumed to act?

Mr. C. H. Hill, for the plaintiff in error; Messrs. E. L. Pierce and A. Churchill, contra.

Mr. Justice HUNT delivered the opinion of the court.

The several causes of error assigned present four separate principles, and we will consider the questions which they raise in their order. The questions may be thus stated:

First. As to the power of the railroad company to contract as a common carrier for the transportation of property beyond the terminus of its own road.

The distinction between the liability of a carrier, in carrying goods upon his own line, and in forwarding them when the duty to carry is at an end, is well defined. In the language of Mr. Justice Davis, in *Railroad Company* v. *Manufacturing Company*,* "It is the duty of the carrier, in the absence of any special contract, to carry safely to the end of his line, and to deliver to the next carrier in the route beyond." What constitutes a sufficient delivery to the succeeding carrier is often a difficult question, but we have no occasion to embarrass ourselves with it here.

The fair result of the American cases limits the carrier's liability as such, when no special contract is made, to his own line, although there are cases which hold the liability as continuing the same throughout the whole route, and such is the English doctrine. A discussion on this point is unnecessary, as the judge on the trial held the rule as we have stated it, and as was most favorable to the defendants. He charged the jury that the defendants were only liable upon a contract to be proved that they had assumed a liability beyond that imposed by law.

The defendants were an incorporation organized under

* 16 Wallace, 324.

the general railroad law of the State of New York. They possessed the powers given to corporations generally and were subject to the corresponding liabilities.*

Assuming the case to stand upon the general principles applicable to the question, the doctrine that a railroad company may subject itself to the obligations of a carrier beyond its own line, has been distinctly held in the State of New York, where this contract was made; in the State of Massachusetts, where its performance was to be completed, and in the State of Vermont, where the alleged injury occurred.†

In the case of *Burtis* v. *Buffalo and St. Lawrence Railroad*, *supra*, it was held that this principle applied to connecting roads extending beyond the limits of the State. The single exception to this holding, so far as we are aware, is in the State of Connecticut, where the contrary has been held by its Supreme Court.‡

This case, however, does not stand upon the general principle only. By the statutes of New York§ it is enacted as follows: "Any railroad company receiving freight for transportation shall be entitled to the same rights and subject to the same responsibilities as common carriers. Whenever two or more railroad companies are connected together, any company owning either of said roads receiving freight to be transported to any place on the line of either of said roads so connected shall be liable as common carriers for the delivery of such freight at such place. In case any such company shall become liable to pay any sum by reason of the

* New York, Laws of, 1848, p. 221; Same, Laws of, 1850, p. 211.

† Bissell *v.* Michigan Railroad, 22 New York, 258; Buffett *v.* Troy and Boston Railroad, 40 Id. 168; Root *v.* Great Western Railroad, 45 Id. 524; Burtis *v.* Buffalo and St. Lawrence Railroad, 24 Id. 269; Hill Manufacturing Co *v.* Boston and Lowell Railroad Co., 104 Massachusetts, 122; Feital *v.* Middlesex Railroad, 109 Id. 398; Noyes *v.* Rutland and Bennington Railroad Co., 27 Vermont, 110; Morse *v.* Brainerd, 41 Id. 550; Railroad Co. *v.* Manufacturing Co., 16 Wallace, 324; Evansville and Crawfordsville Railroad Co. *v.* Androscoggin Mills.

‡ Converse *v.* N. and N. Y. Transportation Co., 33 Connecticut, 166; 22 Id. 502.

§ Statutes of 1847, 299, § 9; 2 Revised Statutes, 5th edition, 693, § 67.

neglect of any other company or companies, the company paying such sum may collect the same of the company by whose neglect it became so liable." This statute is declared by Rappallo, J., in *Root* v. *Great Western Railroad*,* to be declaratory merely.

We do not see that there is room to doubt the power of the company to make the contract in question.

Second. Was there evidence in this case that the Ogdensburg and Lake Champlain Railroad Company did contract as a common carrier to transport this property beyond its own terminus over other roads to Boston?

The weight, the force, or the degree of the evidence is not before us, if there was competent evidence, on which the jury might lawfully find the existence of the contract alleged.†

Both the authority of Graves, the station agent, to make the contract, and the evidence of Pratt and others of the making of the contract, were questions of fact for the consideration of the jury. If the jury have found in the plaintiffs' favor on these points, upon evidence legally sufficient to justify it, this court cannot interfere with their findings.

The evidence on both these points may properly be considered at the same time. Pratt testified that he had for many years been in the habit of transporting horses over the defendants' road to Boston, to the number of two hundred a year, and that Graves had been the station agent at Potsdam for five or six years; that nearly a week before the present shipment Graves engaged to give him on that day two good stock-cars to carry his horses to Boston, and that the cars furnished by Graves had always come over these roads and delivered the horses in Boston, and that the arrangements made by him were recognized by the other roads; that Graves's office was in the Potsdam freight-house, and that he paid the freight through, sometimes at Potsdam

* 45 New York, 524.

† Dirst *v.* Morris, 14 Wallace, 484; Mills *v.* Smith, 8 Id. 27.

and sometimes at Boston; that on this occasion he agreed with Graves upon the price through to Boston, viz., $85 a car, and that a way-bill was made out for the horses and cars to Boston at the price mentioned. Other witnesses give testimony in corroboration, which it is not necessary to refer to. Graves testified that he was the station-master at Potsdam, and that the cars were billed from Potsdam to Boston, via Concord, as per bill; that the price agreed upon was not paid in advance, but it might have been.

The way-bill was headed thus: "Way-bill of merchandise transported by Ogdensburg and Lake Champlain Railroad Company from Potsdam Junction to Boston via Concord, March 28th, 1868." It describes the two cars with horses, and as consigned to Pratt & Brigham, at Boston.

We see no sound objection to the admission of this way-bill as evidence. If a written contract, it was not only evidence, but the best evidence of what the contract was. It was exhibited to Pratt before the cars were started, as a part of the transaction.

If not a contract, it was an act done and a declaration made by the agent in the very act of transacting the business, and as a part of it, which brought it within the principle of the *res gestæ*.

This evidence shows that the oral engagement was "to carry his horses to Boston," not to carry to Rouse's Point and thence to forward to Boston, but "to carry" as well and as fully over the Vermont and Massachusetts roads as over the Ogdensburg road.

Again, a specific price was agreed upon for transportation over the whole route. This was in accordance with the practice, and whether paid at Potsdam or at Boston was unimportant. This practice had been continued for years, and the jury had the right to hold the contract to be the same, without reference to prepayment or postpayment. The jury were justified in inferring that where a carrier fixes a price for transportation over the whole route, that he makes the entire contract his own. One who carries simply over his own line, and thence forwards by other lines, would ordi-

narily, the jury may say, make or collect his own charges and leave the remaining charges to be collected by those performing the remaining service. Receipt of the entire pay affords a fair presumption of an entire contract.

The language of the way-bill is quite expressive. It describes "merchandise transported . . . from Potsdam to Boston." Transported or carried are equivalent terms, and quite distinct from the idea of forwarding. Whether looked upon as a contract, or as a declaration, or an admission simply, the way-bill furnishes evidence that the Ogdensburg company undertook to carry the horses to Boston.

In *Root* v. *Great Western*,* in speaking of the contract to transport as a common carrier over other lines, the court say: "Such an undertaking may be established by express contract, or by showing that the company held itself out as a carrier for the entire distance, or received freight for the entire distance, or other circumstances indicating an understanding that it was to carry through."

We think there was competent evidence before the jury that the company undertook to carry this property to Boston, and the jury having found such to be the fact, the other companies are to be deemed the agents of the defendants, for whose faults they are responsible.

Third. The loss, it is contended, arose from the defective condition of the car in which the horses were placed, whereby it was exposed to danger from fire. It is said that Pratt was aware of the defective condition of the car; that he voluntarily made use of it, and that the risk of loss by its use thus became his and ceased to be that of the company. The judge charged the jury that it was the duty of the carrier to furnish suitable vehicles for transportation; that if he furnished unfit or unsafe vehicles he is not exempted from responsibility by the fact that the shipper knew them to be defective and used them; that nothing less than a direct agreement by the shipper to assume the risk would have that effect.

* *Supra*, p. 131.

There was a conflict in the testimony upon the point whether other cars were to be had. Pratt testified that he was compelled to take these cars or wait with his horses for a week. The station-agent testified that there were other cars which Pratt might have had if he preferred them.

The authorities sustain the position taken by the judge at the trial.

In *New Jersey Steam Navigation Company* v. *Merchants' Bank*,* Mr. Justice Nelson says: "If it is competent at all for the carrier to stipulate for the gross negligence of himself and servants or agents in the transportation of goods, it should be required to be done at least in terms that would leave no doubt as to the meaning of the parties."

To this effect are the New York and Massachusetts cases before cited.

In *Railroad Company* v. *Manufacturing Company*† it was declared that the court did not intend to relax the rule by which the liability of carriers was established. In *Railroad Company* v. *Lockwood*‡ the following, among other propositions, were reiterated and established by the unanimous judgment of the court:

1st. That a common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law.

2d. That it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants.

The judge at the trial in this case might have gone much further than he did, and have charged that if the jury found the company to have been negligent and careless in furnishing cars, they would not be relieved from responsibility, although there had been an agreement that they should not be liable therefor.

Fourth. It is contended that there was error in the admission of evidence on the trial. The admission of the way-

* 6 Howard, 344, 383. † 16 Wallace, 318. ‡ 17 Wallace, 357.

bill we have considered, and we think it was properly admitted.

When the plaintiff, Pratt, was on the stand as a witness the following question was put to him: "In these acts of Graves in furnishing cars and making agreements for transportation through to Boston, as testified by you, for whom did he assume to act?" This question was objected to by the defendants, and the objection was overruled. We think this question was erroneous in its form, and that, as insisted by the defendants, he should have been asked to state only what was said and done. The error was, however, harmless. That Graves was acting for the Ogdensburg company was disputed by no one. All that had been testified to, showed it. Graves himself testified that he was so acting, and there was no evidence or pretence to the contrary, either on the trial or the argument. The question is as to the effect of his acts, and not as to whether he acted for the company. His authority has not been repudiated by the company at any time or in any form. We have often held that we will not reverse a judgment on account of an error which clearly appears to have produced no injury.

Two suggestions are made by the counsel for the plaintiffs in error which require consideration.

The first is that the rules of the Vermont Central road forbade the use of combustible material in the cars on their road, and that if known to the plaintiffs, and the contract were made in reference to them, the presence of this material in the car while on their road was a bar to the action. The answer to this suggestion is, first, that there is no competent evidence of such contract and agreement; and second, that the contract was made with the Ogdensburg road alone. The shippers were strangers to the rules as well as to the owners of the Vermont road. Their dealings were with the Ogdensburg road only, one of whose agents aided in putting the litter into the car, and the rules of which company were not violated by that act.

The second suggestion is that some of the horses injured were not placed in the cars till they were at Rouse's Point,

beyond the terminus of the defendants' road. The contract was in substance for transportation over the Ogdensburg road of all the horses. For the convenience of the shipper he was allowed to put them on board at different points. This was an incidental circumstance merely, and does not affect the contract. If it receives the full price for the transportation of all the property from Potsdam to Boston it is evidently to the advantage of the company if it escapes the danger incident thereto for a portion of the distance. The power to contract for the whole distance of all the horses, and the making of such contract, and the receipt of the compensation specified, fix the rights of the parties. The precise details of its performance are not essential.

JUDGMENT AFFIRMED.

ST. JOHN *v.* ERIE RAILWAY COMPANY.

A railroad company, built originally with money contributed as stock, subsequently borrowed money, issuing its bonds at five several dates and giving five several mortgages to secure them. It also borrowed money, issuing bonds for which it gave no mortgage; unsecured bonds. It finally proved insolvent, and proceedings to foreclose the last two mortgages were had. The stockholders and creditors now entered into an agreement for the adjustment of its liabilities, and pursuant to the agreement the road was sold under the proceedings of foreclosure to trustees, who transferred all its property subject to all the existing mortgage liens to a new corporation authorized by the legislature, with an agreement confirmed by legislative act, by which it was agreed that the stockholders of the old company should be stockholders—*common* stockholders—in the new; and the *un*secured creditors of the old one be stockholders *preferred*. This agreement was carried out, and the parties further agreed—

> "Such preferred stock shall be entitled to preferred dividends out of the net earnings of said road (if earned in the current year, but not otherwise), not to exceed seven per cent. in any one year, payable semi-annually, *after payment of mortgage interest and delayed coupons in full.*"

The new company now worked the road, and for a considerable time paid to the preferred stockholders seven per cent. out of its net earnings, and of course after payment of mortgage interest and delayed coupons.

Statement of the case.

However, in the course of managing its affairs it afterwards—that is to say *after* the making of the above-mentioned agreements—leased new roads, some of which were not profitable; and borrowed large amounts of money which it spent in the repair and equipment of the road; all in a mode quite regular. And paying its interest on the old debts, rent for the new roads, and interest on the additionally borrowed money, it could not pay anything more.

A "preferred stockholder" now filed a bill to have full payment of his dividends from the net earnings, prior to any payment on account of the new leases or additionally borrowed money; his view being that his rights were to be determined by the state of things which existed when his stock was issued, and were not affected by the leases taken and the money borrowed afterwards.

Held, That this was not a true view of the case; and that the last and italicized clause above, "*after payment of mortgage interest and delayed coupons in full*," was controlled by the previous word "*net*," which meant "that which remained as net profit after the deduction of *all* charges or outlay." The bill was accordingly dismissed.

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

By an act of the legislature of New York of the 24th of April, 1832, a corporation known as the New York and Erie Railroad Company was created. The road which the company built extended from Piermont, a town on the west side of the Hudson, some sixty miles north of New York, and just above the line which divides the State there from New Jersey, to Dunkirk on Lake Erie. To reach Piermont from the city of New York by rail, the company ferried its passengers and freight across the Hudson to Jersey City, opposite to New York, and carried them from its depot there northward alongside of the Hudson, upon roads in New Jersey which it rented.

The company had also other rented roads.

The money put into the road as capital stock being insufficient to complete it and carry it on, it issued five successive sets of bonds, amounting in the aggregate to $20,000,000. The first set was secured by a lien upon the road given by statute. The other sets were secured by mortgages, according to the order of their issue. It also issued bonds, not thus secured, to the amount of $7,000,000. In 1859 the

company became bankrupt. Proceedings in foreclosure were instituted to enforce the last two mortgages, and a receiver was appointed.

In this state of things, on the 22d of October, 1859, the shareholders and creditors of the company entered into an amicable agreement providing for the adjustment of its liabilities. In pursuance of this agreement all the property and effects of the company, *including the then existing leases of the roads rented*, were sold under a decree in the foreclosure suits, and bought in by trustees for the benefit of the parties in interest, pursuant to a clause in the agreement. A new corporation, under the name of the Erie Railway Company, was organized, pursuant to acts of the legislature of New York of the 4th of April, 1860, April 2d, 1861, and March 28th, 1862, and all the property of the old company bought by the trustees was transferred to it, subject however to all the liens and incumbrances upon it which subsisted before the foreclosure and sale. The agreement above mentioned of the 22d of October, 1859, was incorporated into the decree of sale, and was recognized and sanctioned by the several acts of the legislature under which the new corporation was organized. It was also made a part of the articles of association or charter of that company. Its obligatory effect in this case was not questioned. The third article declared:

"The capital stock of said company is divided into common capital stock and preferred capital stock. The whole amount of said common stock of said company is 115,500 shares, each of the par value of $100, being in amount equal to the outstanding capital stock of the New York and Erie Railroad Company. The whole amount of the preferred capital stock of said company is to be equal to the amount of the total unsecured and judgment debt of the New York and Erie Railroad Company, with interest thereon as provided by the contract referred to in said acts, and by the provision of the said act, passed April 2d, 1861, when ascertained pursuant to the provisions of said act."

The fifth article of the agreement was as follows:

"Such of us as are holders of the convertible sinking fund

and other unsecured bonds of said company hereby agree to exchange our respective bonds for preferred stock of like amount with the principal of our bonds, with coupons now overdue, and for two years in advance added, and to deposit our bonds with said trustees to be so exchanged, receiving therefor receipts. Such preferred stock is to be entitled to preferred dividends out of the net earnings (if earned in the current year, *but not otherwise*), *not to exceed 7 per cent. in any one year, payable semi-annually, after payment of mortgage interest and delayed coupons in full.*"

The act of April 2d, 1861, in its fourth section, thus enacted:

"Section 4. Said preferred stock shall be entitled to preferred dividends out of the net earnings of said road if earned in the current year, but not otherwise, not to exceed seven per cent. in any one year, payable semi-annually, after payment of mortgage interest and delayed coupons in full. And the holders thereof may vote personally or by proxy at all meetings of the corporation, in the same manner as the holders of common stock, but not otherwise."

In virtue of these arrangements, one St. John became the holder of three hundred shares of the preferred stock.

After the issuing of the preferred stock the new company took leases of several additional roads, some of which proved profitable and others not so; and borrowed £1,000,000, for which it gave sterling bonds bearing interest at the rate of six per cent. per annum, payable in gold. The money was borrowed for the repair and equipment of the roads of the company, and was expended accordingly.

The company paid the "delayed coupons," and a dividend of five per cent. on all the preferred stock for the year 1863, and seven per cent. annually thereafter until the year 1868; but after that time paid nothing upon that stock. On the contrary, it paid, in preference, the rents on the leases, the new as well as the old, and the interest on £1,000,000 sterling loan, as well as on the old secured $20,000,000.

The net earnings of the company during the year 1868, after deducting the interest paid on the mortgage debts ex-

isting when the preferred stock was issued, were so inconsiderable that payment of *all* the rents and of interest on the sterling bonds absorbed more than all of them. If no rents and no interest upon the sterling bonds had been paid during that year, there would have been more than enough of the net earnings left to pay the dividends claimed by the complainant. If no interest had been paid on the sterling bonds, and no rents under the leases made since the preferred stock was issued, there would have been enough remaining to have paid a small part of the dividends; but no part of such dividends could have been paid without leaving unpaid some part of the interest upon the sterling bonds, and of the rents under the leases made since the preferred stock was issued.

To explain the matter by figures—

The rents payable for the old leases, assumed in 1862,	$372,000	
" " " new leases made after 1862,	376,000	
Interest, &c., payable on the £1,000,000 sterling gold bonds, ...	388,500	
		$1,136,500
The net earnings for 1868, of the main road and of all the rented roads, after deducting interest ($1,286,000) on the old, that is to say the secured bonds, was		$680,000

The preferred stock, both in 1862 and 1869, was about $8,536,000.

In the keeping of the accounts of the company, the leased roads were treated as part of the whole road. No separate accounts of each were kept. Coal traffic, however, passing over one of them, taken after 1862, was stated to be very profitable.

In this state of things St. John filed in 1869 a bill in the court below against the company, asserting that he was entitled to have full dividends paid to him before any part of the net earnings were applied in payment of the interest on the sterling bonds and the rents under the leases of roads after 1862 to the new corporation. His position was that his rights were to be determined by the state of things which existed when his stock was issued, and that they were not affected by the leases taken and the bonds issued by the company afterwards.

The company on the other hand insisted that this interest and the rents of all the leases were necessarily to be first fully paid.

The court below was of the company's view, and dismissed the bill. St. John took this appeal.

Mr. D. B. Eaton, for the appellant:

I. Both the circumstances surrounding the parties when the contract was made and the language of the contract itself support the view which we take.

1. *As to surrounding circumstances.* The now preferred stockholders were, prior to the contract, creditors; and, to say nothing of their right to attack mortgagees, they could get judgments on their bonds, which would secure to them payment immediately after payment of what was due on the mortgages, and take precedence of all future obligations to pay rent on new roads or interest on new loans. With the right to get judgments on their bonds, and so to come in immediately after the mortgagees, it is unreasonable to suppose that they meant to open a measureless space between themselves and the mortgagees by giving the company power not only to create an unlimited number of leases, but power also to create enormous amounts of debt; to let in, prior to themselves, *other* unsecured bond creditors and the lessors of new roads leased—both to an indefinite amount—and to put in those persons—strangers—instead of themselves, next to the mortgagees; to expose themselves, in short, not only to enterprises untried, but to obligations unlimited. It is to suppose more according to what these bond creditors would have naturally done, if we suppose that in giving up the valuable right which they did give up, they meant to secure for themselves a certain and abiding position next to the then existing mortgagees upon the net earnings of the company well defined: to get a right to a dividend from specific net earnings from specific property next after the payment of specific mortgage interests, and that while they deprived themselves of the power of seizing the road and everything belonging to it on execution, and gave up

the chance of getting the principal of their debt, they did not, as creditors, waive their then existing right of priority to interest. The state of the road, its income and outgoes, were before them; and on the prospects thus presented they could act intelligently. But on the view taken by the opposite side, they were out at sea, and dashing ahead without chart or compass, in waters where there were no soundings, and in a fog where they could discern nothing before them.

2. *The language of the contract conforms with the probabilities indicated by surrounding circumstances.* Had the company's now views been those of the parties to the contract, it would have been sufficient to have said that the holders of the unsecured bonds should have a preferred stock. That, of itself, would, in law and common understanding, mean a stock entitled to a preferred dividend. Or if the parties desired to be pleonastically certain, they might have added that the holders of "such preferred stock should be entitled to preferred dividends, each year, if earned." But the language is very different. "Preferred stockholders" are to have "preferred dividends" out of "net earnings," *after* payment of "mortgage-interest," not "*before* dividends on common stock."

The reading of the other side assumes that the makers of the agreement thought that, except for language to the contrary, a preferred dividend would be payable before mortgage-interest; an assumption impossible to make, conceding to the persons who drew the contract any knowledge of the law at all.

The fact that the existing security may be called "stock," and that its holders may vote with the common stockholders is unimportant. The security, however, is not called stock, but is called *preferred* stock, and its holders are *preferred* stockholders. The only question is, to whom and to what are they preferred? Suppose that the contract declared *in terms* that what the preferred stockholders were to receive should be paid in preference to rent on new leases, or interest on new debts? How then? Would the calling that on which they are to receive a payment preferred *stock* impair their rights? Plainly not. Indeed, are

not debt and stock often used as convertible terms? Do we not speak continually of stocks of the States, and of the United States, meaning debts due by them respectively? Certainly we do. Indeed this very court does so. In the *Bank Tax Case*,* Nelson, J., delivering its unanimous opinion, speaking of the New York Banking laws says:

"The association is required to deposit . . . *stocks* of the State of New York."

And again:†

"Now when the capital of the bank is required to be invested in stocks, and among others *in United States stock*."

The court is here speaking of State *debts* and United States *debts*.

The statutes of the United States equally use the terms debt and stock as convertible. One of them,‡ *ex. gr.*, relating to a 3 per cent. loan, says:

"Any part of the principal of the said *debt or stock*, bearing an interest of 3 per cent., as shall be unredeemed, shall," &c.

Then the use of the word "stock" is nothing, and the only question is, does the contract, as expressed, mean what we assert that it does mean?

In settling that meaning it is to be noted that these *preferred* stockholders never sustained the ordinary relations of stockholders, general or preferred. They began as creditors. They never subscribed for stock, nor paid instalments, nor took part in creating a corporation, nor had an opportunity to share in unlimited profits, nor agreed to assume any of the ordinary risk of stockholders, nor bargained for so large a vote as to be able to protect themselves, but from the beginning relied on a peculiar contract relation, due notice of which they caused to be conspicuously published to all the world. They are in part creditors and in part stockholders, and not technically either. They have the rights which their contract gives them, and a name will

* 2 Wallace, 207. † Page 208.

‡ Act of March 3d, 1795, ch. 286 [cx], § 12; and in many other places.

not make those rights greater or less. Modern business and legislation have created relations which, according to the narrow views of the old laws and decisions, would be anomalous, and in them a person may be in some sense and at the same time a creditor and a stockholder. Such is the case of every preferred stockholder.

There is no use of considering what would be our condition in case of insolvency, and who would be then preferred. What has that condition to do with our rights during solvency? We will consider the case of insolvency when it arises.

It is matter of common knowledge that the Erie Railway has been largely built by English capital. The agreement whose meaning is now under consideration was doubtless made in all its parts by representatives of English capitalists. The expressions of English statutes, the views of English writers, and the decisions of the English courts may be looked to with more than common deference in interpreting it. Now, in the English law, preferred stock is commonly called *debenture* stock, the word debenture coming obviously from *debere*, to owe. So the dividends on preferred or debenture stock are commonly called interest; and the English law declares them to "rank next to interest payable on the mortgages or bonds for the time being,"* though it admits of course that the holders of it cannot require repayment of what they have paid for it.

Nor is there anything in the use of the word "dividend" which of itself impairs our argument. If it was said, in terms, that the "dividend" on preferred stock was to be paid out of net earnings from existing roads, and next after mortgage-interest, and prior to rent on any new leases, and prior to interest on any new loans, the meaning and the case would be clear. The word "dividend" then is unimportant. And the only question is whether, *in any way*, the meaning and the case are clear? This so-called dividend, it

* 26 and 27 Victoria, chapter 118; Shelford's Law of Railways, 4th edition, p. 206, §§ 22, 23, 24, and 31.

will be noted, is to be declared from "net earnings," and is payable *absolutely*, each year, if earned, immediately after the mortgage-interest is paid. The payment may be called a dividend, but it is more analogous to interest.

If every common stockholder should be present and vote to have any such surplus of net profits used for some other designated purpose, this would confessedly not impair the claims of preferred stockholders to receive it.

In the case of *Maryland* v. *Railroad Company*, very lately decided by this court,* the State of Maryland was, by a contract with the Baltimore and Ohio Railroad Company, entitled to have and receive a *perpetual dividend* of six per cent. per annum (upon $3,000,000 which the State lent to the company), out of the profits of the road. Does any one doubt that this made a *debt* from the company to the State in case any profits were made? And that calling the money to be paid a dividend was nothing?

Nor is there anything in the expression "net earnings" which impairs our argument. Of course "*net* earnings" are gross earnings after the deduction of every sort of cost, charge, and expense of administering and working "the road." But *what* road? That is the question to be settled. The language is "the net earnings of the *said* road." Does "the *said* road" mean the road then known as the road of the Erie Railway Company—the road, and the only road, which had been before the contracting parties—with its then leased roads,—or does it mean that road—that "said road"—with a score of different, distant, and most unprofitable roads, worked into its *corpus* as a part of it, and with $5,000,000 of debt created to equip and use them? That, we say, is the question.

The case made by the pleadings is a little obscure as to what road or roads absorbed the $5,000,000 borrowed. But that vast sum is not shown to have been expended *on the line as it existed when the preferred stock was created.* That line must have been completed and equipped, and it could never

* *Supra*, p. 105.

have been expected that such sums would be borrowed to use on such a road. Without doubt the money was expended in great measure on the newly leased lines.

II. Now, the defendant should have kept separate accounts of its newly leased roads, and been prepared to sustain their losses or demonstrate their profits. The plaintiff is entitled to have counted as gross earnings on the line as it existed when his stock was created, all the money thereon received and earned, and from this can be deducted only the expenses of operating such line, including, of course, rents payable for any portion of it. Such accounts are easily kept. On that basis the plaintiff will take his chances of a dividend, as the contract provides, and will regard his prospects as greatly improved. The company denies that right, and refuses such account and payment. This rule of separate accounts is the English rule. In *Corry* v. *Londonderry*,* where there were five classes of stockholders, the court held that the company must keep separate accounts, and that the discretion of the directors over expenditures was limited by the rights conferred on preferred shareholders. Where net profits were pledged, as here, it was held they could not be diminished by subtracting from them "money raised under the borrowing powers," and that "money procured for the purpose of *completing* the line cannot be paid out of profits."

A material part of the reasoning of this case has been sustained by *Taft* v. *The Hartford Railroad*,† in this country.

III. It will be said, doubtless, by opposing counsel, that our view of the law would obstruct all expansion of the company's business, by preventing the company borrowing money or leasing roads. If such was the effect, the fact would be no reason for the court refusing us our right. Such a contract made by the company, and sanctioned by the courts and the legislature, as this has been, would be valid, however inconvenient it might be. But such is not the effect. The company may lease, and borrow, and ex-

* 29 Beavan, 263, 272, 273.

† 8 Rhode Island, 310, 334, and 335.

pand, and the preferred stock no more obstructs them than does a mortgage. They must first give us a dividend, if there be net earnings to pay it, just as they must pay mortgage-interest.

Mr. W. W. McFarland, contra, for the company.

Mr. Justice SWAYNE delivered the opinion of the court.

The question presented in the present case depends for its solution wholly upon the construction given to the fifth clause of the agreement of 1859, and the fourth section of the act of 1861. They are identical in effect as regards the point to be considered.

The original takers of the preferred stock were creditors. They abandoned that position and became stockholders. They thereupon ceased to be the former, and can only be regarded as the latter. They surrendered their debts and received in return stock of the same amount, which gave them a chance for annual dividends of seven per cent., and a voice by voting in the choice of those by whom the affairs of the company were to be administered. What they were to receive was not interest, but dividends; and they were to receive them in priority to the holders of the common stock. The latter could receive nothing until the former were satisfied. The maximum payable on the preferred stock was specified. It might be less, or nothing. It could not be more. The amount subject to the limit prescribed depended wholly upon the residue of the net earnings applicable in that way. The language employed is apt to express the relation of stockholders. None to express the relation of creditors is found in the instrument; and there is nothing from which the intent to continue that relation any longer can be inferred. If the mortgages were foreclosed and there were a surplus left insufficient to satisfy the general creditors, it is quite clear that the holders of the preferred stock could have no right to share in the fund.

The dividends were to be paid after the mortgage-interest and delayed coupons were paid in full.

This clause was inserted doubtless out of abundant caution, to prevent the possibility of a claim being set up to the prejudice of the holders of the mortgage securities. Whether the restriction was necessary, for that purpose, we need not consider. The preferred dividends were to be paid out of "the *net earnings* of the road." The lexical definition of *net* is "clear of all charges and deductions."—Webster. "That which remains after the deduction of all charges or outlay, as net profit."—Worcester. The popular acceptation of the term is the same. There is no controversy between the parties on this subject. Such net earnings must have been earned in "the current year." There are these four specific limitations. There are no others. It is not said that the preferred dividends shall be paid *next* after the mortgage interest and delayed coupons, nor after, nor *pro rata* with anything else, nor before anything else except dividends upon the common stock. Beyond the four restrictions named, the matter is left to be regulated wholly by the principles of law and the discretion of the company. Suppose in this case the holders of coupons of the sterling bonds and the holders of preferred stock claimed payment at the same time and the fund was insufficient to meet both demands, can it be doubted that the rights of the creditor would be held paramount to those of the shareholder, and that the interest must be fully satisfied before a dividend could be paid? The plainest principles of reason and justice as well as the law would require this result. A question is raised as to the source to which the phrase "net earnings of the road" refers. The term *road* is used as an appellative, and was clearly intended to include the principal road and all its adjuncts. The complainant insists that the "*net earnings*" must be the *net earnings* of things as they were when the preferred stock was issued. We find nothing in the case, express or implied, to warrant this view. At the time referred to, the company held certain leases. If it was deemed best, and was found practicable, could not the company have rid itself of them? If the complainant's view be correct, this could not be done, at any rate not without the

consent of the preferred stockholders. So if the company deemed it proper to take leases of other roads, in addition to those previously held, or in place of them, what was there to prevent it? Upon what ground can it be claimed that the category "net earnings of the road" was not intended to embrace the net earnings of all the business of the company for the time being, whether done upon one or many roads?

There is nothing in the agreement or the statute, and we are aware of no legal principle which would authorize the stockholders in question to analyze the business, select out a part of it, and to say that the *net earnings* specified must be a predicate of that part, and of none other. The company had the right to conduct its operations, in good faith, as it might see fit; and it was from them and all of them that the materials for the computations of earnings were to be derived.

The only qualification prescribed in this connection is not as to the scope, means, or elements of the business, but is one in point of time. The net earnings from which the preferred dividends were to be paid must have been earned "in the current year." Whether the business of such year were large or small, or of what it consisted, is immaterial. The corporation never agreed to be limited in the exercise of its faculties and franchises, and the complainant must abide the result. If errors were committed, and a loss ensued, a court of equity cannot relieve him. It is one of the chances of the enterprise in which he embarked.

The business of the road was a unit. If it had been disintegrated as proposed by the complainant, we apprehend it would have been found that the correlations of the main stem and the branches were such, and that the expenses and charges incident to the entire business and those of the several parts were so interwoven and blended, that an accurate ascertainment of the net profit of the main line and any of the auxiliaries, taken separately from the rest, would have been impracticable. An ancillary road may be short and yield but little income, yet by reason of its reaching to coal-

fields, or from other local causes, its contributions to other roads of the series may be very large and profitable. Whether in this case the partial computation insisted upon could or could not have been made, the process was one upon which the company was neither bound nor had the right to enter.

We hold that the computation by the company for the year 1868 was made upon the proper basis, and that the complainant is concluded by it. We are of the opinion that the rents for that year, accruing under leases taken by the company after the issuing of the preferred stock, and the interest upon the sterling bonds for that year were properly paid, and that there were no net earnings earned in that year which could be properly applied in payment of preferred dividends. These views are fatal to the complainant's case. We have carefully examined all the authorities referred to by his learned counsel. None of them are in hostility to the conclusions at which we have arrived.

DECREE AFFIRMED.

SLOAN *v.* LEWIS.

1. Under the thirty-ninth section of the Bankrupt Act, enacting that a person may, in certain events, be decreed a bankrupt, against his will, "on the petition of one or more of his creditors the aggregate of whose debts provable under this act amounts to at least $250," it is not necessary that the *principal* of the debt should amount to $250. If with interest plainly due on it, according to what appears on the face of the petition, it amounts to at least $250, that authorizes the decree.
2. In a case where the decree is thus authorized, in other words, where jurisdiction exists in the District Court of the United States to decree a person a bankrupt, and the person has been decreed a bankrupt accordingly, a party against whom the assignee in bankruptcy brings suit in another court, not appellate, to recover assets of the bankrupt's estate, cannot show that payments made on account had reduced the petitioning creditor's debt so low as that the bankrupt did not owe as much as the petitioning creditor in his petition alleged. The finding of the Dis-

trict Court of the existence of a debt to the amount of $250, due from the party proceeded against to the petitioning creditor, is conclusive, in a collateral action, of the fact that a debt of that amount was due.

ERROR to the Supreme Court of North Carolina; the case being thus:

The Bankrupt Act* enacts that any person owing debts and committing certain acts,

"Shall be adjudged a bankrupt on the petition of one or more of his creditors, the aggregate of whose debts provable under this act *amounts to at least* $250."

This enactment being in force, Bell filed a petition in the District Court of the United States of North Carolina, praying that a certain Rhyne might be decreed a bankrupt. The petition alleged,

"That your petitioner's demands against the said Rhyne exceed the sum of $250, and that the nature of them is as follows."

It then set forth three sealed notes amounting in the aggregate to $249.35; and on comparing the dates of the three notes with the date when the petition in bankruptcy was filed, it appeared that several years' interest was due on them.

The "debt" therefore, using the word "debt" in its strict common-law parlance, was less than $250; though, with the interest added, it much exceeded that sum.

The debtor was, on this petition, decreed, against his will, a bankrupt, and one Lewis was appointed his assignee.

Lewis now sued one Sloan in a State court of North Carolina to set aside certain conveyances made by the bankrupt, in fraud, as was alleged, of the Bankrupt law; and one of the defences in the action was that the adjudication of bankruptcy was void, because the record showed that the debt owing to the petitioning creditor was less than $250, and consequently that the court had no jurisdiction in the premises.

* Section 39.

Argument against the assignee's right to sue.

The State court in which the suit was brought, considered that the District Court of the United States which made the adjudication in bankruptcy had, in fixing the amount of the debt, properly added the interest to the principal of the debt. In addition it refused to allow the defendant to show that the debt of $249.35 had been reduced by a credit of $64 which the creditor petitioning in bankruptcy had not allowed; a reduction, it may be noted, which was not alleged in the pleadings. Its view was that "the petition of Bell in the bankrupt court had been passed on by that court and the matter presented by it there adjudicated; and that other courts, not appellate, could not go behind the record." And fraud on the Bankrupt Act being found in the conveyances made by the bankrupt, it set them aside. This decree being affirmed by the Supreme Court of the State, the case was now brought here by Sloan, claiming under the conveyances.

Mr. H. W. Guion, for the plaintiff in error:

I. Bankrupt acts are in the nature of penal acts. By a short, sharp process they take a man's property right out of his own hands. Such statutes are to be construed strictly.

1. Now the terms "debt" and "interest" are both technical terms in the common law, each having a specific sense of its own. Those senses have never been confounded. Even in the process of the courts, mesne or final, the distinction between debt and interest is persistently preserved. In the *fi. fa.* the sheriff is commanded to make a certain debt, and also a certain other sum, as damages for the detention of said debt, and also for the costs; these damages being interest.

The rule as to interest in England, previous to 3 and 4 William IV, ch. 42, is stated by Mr. Chitty,* as follows:

"The general common-law rule is, that the law does not imply a contract on the part of the debtor to pay interest on the sum he owes, although the debt may be a fixed amount, and may

* On Contracts, 563.

Argument against the assignee's right to sue.

have been frequently demanded. Nor is interest due as a matter of right in the absence of an express stipulation, even in the case of written instruments, unless they be commercial instruments of a negotiable nature, such as bills of exchange and promissory notes."

Interest is thus but an incident to the debt, and not a part of the debt itself. But it is not the only incident, and if *it* is to be computed, why not the *other* incidents also, that at different times and in varied forms present themselves. *Ex. gr.* In the District Court of North Carolina, a petitioning creditor in bankruptcy some time since, when gold coin was forty per cent. in value above legal tender notes of the United States, set forth as his debt, a note for $200, payable in gold coin, and asserted that the amount was sufficient to confer jurisdiction, as with the then premium on gold coin his debt amounted to $280, in lawful money; and this was undeniably true. The court refused to compute this incident as a part of the petitioning creditor's debt. But if the argument of opposing counsel is right it committed, plainly, an error. Indeed, where—when you depart from a rule—are you to stop? In some States compound interest is allowed; in others but simple interest. Some notes and bills are payable in foreign currency, and might demand that the par of exchange be added. Some bills payable at different places may be protested, and the holder become entitled to damages by reason of the non-payment. All the incidents are *damages*, like interest, strictly due, and they are related to the debt, as intimately as the "interest" itself.

2. Further than all this, and as respects this particular case. The petitioning creditor in his petition fails to claim *interest* as any part of his debt, and does not pretend or aver that the proceedings are founded on such interest. In *Udall* v. *Steamship Ohio*,* this court held "that no computation of interest will be made to give jurisdiction, unless it be specially claimed in the libel." "This," it said, "would cer-

* 17 Howard, 17.

tainly be the case at law," and added that "no reason is perceived why the rule should be relaxed in case of libel."

3. Our whole Bankrupt Act is derived from the bankrupt acts of Great Britain; and when our act uses the same words which that act does, and the meaning of those words has been long settled by the judgments of the highest British courts, there is great reason why we should adhere to the interpretation so given. Those courts well deserve our respect; for the judges in them are, generally, consummate lawyers; able intellectually, and thoroughly trained in their profession. In addition to this, it is desirable, in the vast and constant commerce between the countries, that similar enactments on a subject intimately affecting both, should be similarly construed. The English act of 6 George IV, ch. 16, § 15, after presenting the form of commission reads thus:

"No such commission shall be issued unless the single *debt* of such creditor, or of two or more persons, being partners petitioning for the same, shall amount to £100 or upwards, or unless *the debt* of two creditors so petitioning shall amount to £150 or upwards, or unless *the debt* of three or more creditors so petitioning shall amount to £200 or upwards."

The older English bankrupt acts used the same expressions.

Now, so far back as 1746, Lord Hardwicke upon this word "debt" decided that interest could not be added to the principal;* and that decision has been followed steadily to this day, alike in the bankrupt court,† in the Common Pleas,‡ and in the King's Bench.§

If a question in law can become settled, this should be.

II. The point was made in the court below, that the adjudication making Rhyne a bankrupt, was not only erro-

* Ex parte Marlar and others, 1 Atkyns, 151.

† Ex parte Greenway, Buck, 412.

‡ In re Burgess, 8 Taunton, 660, S. C., 2 B. Moore, 745.

§ Cameron *v.* Smith, 2 Barnewall & Alderson, 305.

neous but void for want of jurisdiction apparent on the record, and that the question whether he was properly adjudged a bankrupt was examinable in every court where the record was produced and relied upon by the party claiming the benefit thereof. The court summarily disposed of this question by saying: "That the petition of Bell in the bankrupt court had been adjudicated by that court, and that this court could not go behind the record."

But assuredly if a court acts without authority, its judgments and orders are nullities. Now here a "debt" of a certain amount was indispensable to give jurisdiction. No such "debt" was shown. It was alleged; but the evidence of the debt, as set out on the face of the record, disproved the allegation; for the evidence consisted of three sealed notes which on their face were less than $250.

Mr. Samuel Field Phillips, contra.

The CHIEF JUSTICE delivered the opinion of the court.

The Bankrupt Act* provides for an adjudication of involuntary bankruptcy upon the petition of one or more creditors, the aggregate of whose debts provable under the act amounts to at least $250. It becomes necessary, therefore, to ascertain what constitutes a debt that may be proved. The plaintiff in error contends that it is limited to the principal of a sum of money owing, while the assignee claims that it includes the principal and all accrued interest.

To determine this question we must look in the first place to the act itself. If the intention of Congress is manifest from what there appears we need not go further. Section nineteen provides "that all debts due and payable from the bankrupt at the time of the adjudication of bankruptcy, 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." And again, "all demands against

* Section 39.

the bankrupt, for or on account of any goods or chattels wrongfully taken or withheld by him, may be proved and allowed as debts to the amount of the value of the property so taken or withheld, with interest."

There is certainly nothing here which in express terms excludes interest from the provable debt. On the contrary there is the strongest implication in favor of including it.

The object is to ascertain the total amount of the indebtedness of the bankrupt at the time of the commencement of the proceedings, and also the amount of this indebtedness owing to each one of the separate creditors. Accrued interest is as much a part of this indebtedness as the principal. It participates in dividends, when declared, precisely the same as the principal. One has no preference over the other, and for all the purposes of the settlement of the estate the bankrupt owes one as much as he does the other. Creditors prove their debts in order that they may participate in the management and distribution of the estate. Their influence in the management and their share on the distribution depend upon the amount of their several debts which have been proven. Hence, in order to fix the equitable representative value of a debt not due, provision is made for a rebate of interest. But if interest is to be rebated on debts not due, why not upon the same principle add it to such as are past due?

The provision for adding interest to the value of goods wrongfully taken and converted is equally significant. Certainly no good reason can be given for withholding interest in cases arising upon contract and allowing it in cases of tort, and because it is expressly given in the last and no provision is made for it in the first, the conclusion is irresistible that it was expected to follow the contract as a part of the obligation.

We are all, therefore, clearly of the opinion that accrued interest constitutes part of a debt provable against the estate of the bankrupt, and if it does it is necessarily part of a debt which may be used to uphold involuntary proceedings. It is only necessary, upon this point of jurisdiction, that the

petitioning creditors should have owing to them from the debtor they wish to pursue, debts provable under the act to the required amount. The English cases referred to in the argument, in our opinion, have no application here. They are founded upon the English statutes and the established practice under them. Our statute is different in its provisions and requires, as we think, a different practice.

This is conclusive of the case. The petition filed in the bankrupt proceedings distinctly averred that the debts due the petitioner exceeded the sum of $250; and, if interest is added, the particular indebtedness specified amounts to more than that sum. The court found this allegation true. That finding is conclusive in a collateral action. We have so decided in *Michaels* v. *Post*,* at the present term. Where the record shows jurisdiction, an adjudication of bankruptcy can only be assailed by a direct proceeding in a competent court. Evidence, therefore, to show that payments had been made which reduced the indebtedness below the required amount was inadmissible under any form of pleading in an action like this, but it was especially so in this case, because there is no averment in the pleadings contradicting the record. The sole objection is that upon the face of the record the error is apparent. A record cannot be impeached without previous notice by proper form of pleading.

JUDGMENT AFFIRMED.

IN RE CHILES.

1. In the original decree in the case of *Texas* v. *White & Chiles* (7 Wallace, 700), the defendants were perpetually enjoined from setting up any claim or title to any of the bonds, or coupons attached to them, which were the subject-matter of the suit. The bill, answers, and proceedings in the case show that the purpose of the suit was to establish the title of the State to these bonds, and to free it from the embarrassment of the claim of defendants.

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* 21 Wallace, 398.

Statement of the case.

2. All parties to the suit were, therefore, bound by the decree as to that title, and because Chiles was the owner, or now asserts himself to be the owner, through a transaction not set up in his answer, he is not the less concluded and bound to obey the above injunction.
3. Notwithstanding he now asserts a different title, or source of title, held by him when the suit was brought, from the one imputed to him in the suit and defended by him, he is in contempt of court in setting up and seeking to enforce his claim.
4. Punishments for contempt of court have two aspects, namely: 1. To vindicate the dignity of the court from disrespect shown to it or its orders. 2. To compel the performance of some order or decree of the court which it is in the power of the party to perform and which he refuses to obey.
5. In the present case there is no part of the original decree which Chiles can perform which remains unexecuted, and no additional order or decree can be made for him to perform in this proceeding for contempt.
6. The court, therefore, sentences him to a fine of $250 and costs for his contempt in setting up a claim of title to seventy-six of the bonds mentioned in the decree.

ON motion by the State of Texas for a rule on John Chiles to show cause why he should not be dealt with as guilty of a contempt of this court in disobeying one of its decrees, and why he should not by proper instrument convey to the said State all his right, title, and interest to seventy-six certain bonds of the United States now in the possession of Droege & Co., of London.

The case was thus:

On the 12th of January, 1863—the State of Texas being then in rebellion against the United States—certain persons calling themselves its Military Board, and who were possessed, under a statute of the then so-called State, of actual power within its confines—entered into a contract with a certain G. W. White and J. Chiles, by which, in consideration of military stores to be furnished to the State, the State was to sell and transfer to them certain bonds of the United States which, long before the rebellion, the United States had given to the State of Texas as an indemnity for the surrender of certain territory claimed by it; and which bonds were thus known as the Texas Indemnity Bonds.

Statement of the case.

Two lots of bonds were mentioned in this contract. One of them was thus:

"2d. Seventy-six bonds with coupons attached, principal and interest amounting to $87,400, said seventy-six bonds and coupons supposed to be upon deposit with Droege & Co., England."

The rebellion being suppressed, and the government of the State of Texas having passed again into the hands of persons loyal to the United States, the State filed a bill in this court against *White & Chiles*, one J. A. Hardenberg and several other persons, to establish its title to and to get control and possession of these bonds, or of their proceeds. The case is reported in 7th Wallace, page 700.

The bill recited the circumstances under which the United States issued and the State of Texas received the bonds known as the Texas indemnity bonds, and then alleged that these bonds fell into the hands of a combination of conspirators, who, assuming to be the lawful government of the State of Texas, sold them to White & Chiles, delivering one hundred and thirty-five of them, and selling the seventy-six above mentioned, which were then deposited with Droege & Co., in England. It alleged that the contract of sale by the military board of Texas, and the statute under which that board acted were void, because the object and purpose of both were to aid the rebellion in its efforts to overthrow the government of the United States; and it alleged that the bonds were not legally transferred for want of the indorsement of the governor of Texas, which, by a statute of that State, was made necessary to any legal transfer of them.

There was thus an assertion of title and ownership of these bonds both in law and in equity in the plaintiff, the State of Texas, with a recital of the origin and state of that title.

There was then an allegation of three distinct grounds on which the claim of the defendants was charged to be invalid: 1. That their possession was obtained through an unlawful band of conspirators who, taking possession of these bonds and of the political power of the State, had delivered the

bonds to White & Chiles, without any authority to do so. 2. That such bonds could not be lawfully delivered or transferred so as to carry the title of the State to them to any person without the indorsement of the governor, which none of these bonds had. 3. That the contract under which White & Chiles received the bonds delivered to them, and claimed title to those not delivered, was void, because made with the intent to aid the rebellion.

A copy of this contract was set out as Exhibit "A" of the bill, and mentioned, as already stated, specifically the seventy-six bonds.

White & Chiles filed separate answers to this bill, and took issue either as matter of law or of fact on all these grounds of complaint. They asserted the justice and legality of their title to the bonds and to all of them; and of course denied the right of the State to recover of them or of their vendees either these bonds or their proceeds in the treasury or their value.

On the 12th of April, 1869, a decree was entered in the case. It ordered—

"That the contract bearing date the 12th January, 1865, purporting to have been executed between the military board of the State of Texas and White & Chiles—which said contract is set forth as Exhibit A to the complainant's bill of complaint—is null and void and of no effect, and that the said White & Chiles, their agents and attorneys, and all others claiming to act in their behalf, be perpetually enjoined from asserting any right or claim under the same, and that the complainant is entitled to recover and receive the bonds and coupons mentioned in said contract as having been transferred or sold to the said White & Chiles, which at the several times of service of process in this suit were in possession or under the control of the defendants, respectively, and any proceeds thereof which have come into such possession or control with notice of the equity of the complainant.

"That the said G. W. White, John Chiles, J. A. Hardenberg, &c., and each of them, be hereby perpetually enjoined from setting up any claim or title to any of the bonds and coupons attached which are described in the first article of said contract

filed as Exhibit A to the bill of complaint, and that the above complainant is entitled to restitution of such of the bonds and coupons and proceeds as have come into the possession or control of the said defendants, respectively, and as aforesaid."

By the terms of the decree each party had leave to move for further orders.

In this state of things, Chiles, on or about the date of it, addressed and served on Droege & Co. this notice:

"July 17th, 1874.

"MESSRS. DROEGE & Co.,

"Manchester, England.

"You are again hereby notified that I am the owner, by contract with the State of Texas, of seventy-six Texan indemnity bonds of one thousand dollars each, and coupons attached, amounting in all to $87,400; and also of the balance of one hundred and fifty-one of said bonds, with coupons attached, placed in your custody by John Milton Swisher, of Texas. And you are hereby notified not to part with the possession of said bonds and coupons or any portion of them without due authority from me.

"My solicitors will wait upon you with the necessary process to bring the matter before a judicial tribunal as soon as the proper preparations can be perfected.

"JOHN CHILES."

The State of Texas now, accordingly, made the motion on which the present rule to show cause was granted.

The petition on which it was granted charged that Chiles had continually and repeatedly asserted a claim to seventy-six of the bonds mentioned in the said decree, thereby seriously impeding a settlement and compromise by the State of Texas with persons who have possession of such bonds in England, and especially charging him with writing and serving the preceding notice to Droege & Co., as also a certain other notice to other persons in England, having some sort of relation to the proceeds of some of these Texas indemnity bonds; this last notice, however, not being much pressed by the counsel of Texas as a feature in the case, and the reliance being on the notice to Droege & Co. as to the seventy-

six bonds, which were distinctly referred to in the bill in the original suit.

In answer to the rule to show cause, and in answer to interrogatories propounded to him by the complainant's counsel, Chiles admitted that he signed the abovementioned notices in the city of New York and caused them to be served on the parties, and that he had claimed, ever since the decree in the original case, and did now claim, as owner, the seventy-six abovementioned bonds. But he denied that he was guilty of any contempt or violation of the injunction of this court, on two grounds:

1st. That the decree of the court only enjoined him from asserting a claim under the contract between White & Chiles and the military board of Texas, which was the Exhibit "A" mentioned in the decree, whereas the title which he now asserted to all the bonds, including the seventy-six, was, as he alleged, under a wholly different contract made by himself alone, on the 4th of March, 1865, with the said military board (which he deemed was the proper authority of the State of Texas), *after* the one which was declared void by the decree of this court, but before the suit was brought. And that in that last contract White had no interest whatever. He added that being in no wise forbidden, or not at full liberty to assert a claim as owner to the said bonds *there*under, he proposed to have the question of his right to the said bonds thereunder adjudicated by the proper court in England.

2d. That there could be no violation of the injunction until he asserted his claim by some kind of judicial proceeding, which he had not yet attempted to do.

The question therefore was whether, on this petition and answer, he could be properly punished for a contempt.

Mr. Albert Pike, against the rule:

I. The object of the original suit was to annul the contract made with *White & Chiles*. It had no other object. The injunction was but a mode of giving effect to the decree annulling it. And no other contract being mentioned in

the suit or decree, the injunction cannot lawfully have the effect to forbid the assertion of right under any other. It can annul no contract that was not asked to be annulled, and properly impeached; certainly not by implication, one of the existence of which it was not even informed.

Although the second contract was *made* long before the decree, it had taken no effect at all as a *transfer* of the seventy-six bonds, until *by* the decree the first contract was annulled. Until then Chiles had no title under it, to these bonds, which he could set up. He could not plead a title before it existed.

Injunctions are granted to suppress vexatious *suits;* to remove improper *impediments* and *defences at law;* to restrain alienations of property; to prevent transfers; to prevent irreparable mischiefs and trespasses; to suppress publications; to compel delivery up of possession and to quiet possession; to *restrain from carrying on a suit*, or entering judgment in a foreign country, and for a number of other things; but we find none to prevent a man from saying, orally or in writing, by way of notice or otherwise, that he has a claim or right to property or to evidences of debt of any kind. A written notice to such effect is no more than an oral one. If one "sets up" a claim, or "asserts" a claim, so does the other. Chiles has had the right, ever since the decree was rendered, to stand at the street-corners and proclaim, if he saw fit, or to publish and advertise in the newspapers here and in London, and to tell, inform, advise, and notify to Droege & Co. that he believed and knew that he had a perfect right to and was the proprietor of the bonds in England or those which he and White had received under the first contract, notwithstanding the decree of this court. It is no contempt of the court to think and to say that its decision in any case is wrong. The court itself has declared that of its own decisions, and reversed them; and dissenting opinions are continual. In the very case of *Texas* v. *White & Chiles*—in which the decree which it is now said has been contemned, was given—there were dissenting opinions by Grier, Swayne, and Miller, JJ.; the opinion of each of them going to the

foundation of the case,—the right, to wit, of the State of Texas to sue at all.

Besides, these bonds are in England, under a sovereignty distinct from any which this court has anything to do with. This court had no power to compel Droege & Co., or any other man in England, to come into these precincts, or to pass upon money held by them.

In the inquiry whether Chiles has violated the law, the decree is to be construed in his favor, and against the plaintiff: 1st, because it is penal in its nature; and 2d, because it is the decree of the plaintiff made in response to his prayer, and upon the case made by him in his bill.

The decree in this case, indeed, enjoined all the defendants from *setting up any claim* to any of the bonds described in the first article of the contract. But a court will always construe a decree with reference to the issues it was meant to decide. However broad and emphatic the enjoining words may be, the object of the bill in this case was to avoid and set aside the particular contract attacked by the bill; and the general words must be restricted within these limits.*

II. Chiles has not, according to the legal meaning of the phrase, or according to its meaning as used in the decree, *set up* or *asserted* a claim to the seventy-six bonds in question, he not having instituted or commenced any suit, action, or proceeding whatever, for the enforcement of any right in himself to them, or of any interest in them.

Messrs. R. T. Merrick and T. J. Durant, contra:

The manifest conclusions to be drawn from a perusal of the letter of Chiles to Droege & Co. are, so far as John Chiles is concerned:

First. To ignore absolutely all the proceedings in the suit of *Texas* v. *White & Chiles*, reported in 7th Wallace, and to treat the elements of the thing adjudged therein, so far as the seventy-six bonds are concerned, as absolutely void.

* Graham *v.* Railroad Company, 3 Wallace, 710.

Second. In violation of the decree and its accompanying injunction, to again claim the bonds as owner.

Third. To prevent, by the active interposition of Chiles, the State of Texas from reaping the fruits of the decree in the said case of *Texas* v. *White & Chiles.*

Any statement which can be made of the case now before the court shows that this is so, and that Mr. Chiles is in contempt. We do not insist upon the grounds for this assertion. The court will enforce them if it deems it necessary.

We now go further; and in view of what Chiles has done by his notices, in view of the embarrassments which by them he has caused and is causing, we ask that he be compelled to execute, under direction of a master to be appointed in the case, a proper instrument transferring to the State of Texas *in form*, the title to the seventy-six bonds in the hands of Droege & Co. And in view of his plain contempt of the court already committed, we ask that he be imprisoned until he execute such a transfer.

Mr. Justice MILLER delivered the opinion of the court.

The object of the bill filed by the State of Texas in the case of *Texas* v. *White & Chiles*, and reported in 7th Wallace, was to establish the *title of the State of Texas* to the bonds there claimed, and her bill of complaint made parties, so far as she knew and could bring them before the court, all persons who denied or contested that title. The bill was framed as carefully and as fully as it well could be for the purpose of establishing that title finally and conclusively. If out of abundant caution the bill sets out all the false and pretended claims of the defendants, and the grounds on which they were supposed to be false, that were known to complainant, is the final decree in her favor to be of no avail because one or more of the defendants had another and a different ground of defence which he did not set up in his answer, nor in any manner make known to the court?

Mr. White was called on by this bill to defend his *title*, his *whole title*, to these bonds, or to any part of them, or any in-

terest in them. The prayer and object of the bill was to decide and determine the title, and to give all such relief as equity could give if the title was found in the complainant.

It would be to trifle with the court to make a proceeding in equity, designed to give full and final relief, and to administer complete justice, to depend upon the skill and jugglery by which a defendant might conceal some part of his defence to that suit until it was decided against him, and then set it up as an excuse for disobeying the final decree of the court, or hold it out as the basis of another suit for the title or possession of the same bonds. And whatever difference of opinion may be found in the authorities, on the nice distinctions involved in the question of what is concluded in suits at law, and without even the necessity of going as far as this court has gone in actions at law in holding that all that *might* have been set up as a defence in the action must be concluded by the judgment, we are of opinion that in such a case as this, in a suit in equity, when the obvious purpose of the bill is to establish and adjudicate the entire rights and title of the parties before the court to the bonds and their proceeds in all the forms in which they can be identified, the decree must be final and conclusive on all the rights of all the parties actually before the court.

As to the meaning of the decree on this subject it is too plain for argument.

The first paragraph or order declares the contract with White & Chiles void, and enjoins them and the other defendant from asserting any right or claim under the same; and it establishes plaintiff's right to said bonds and to their proceeds.

The second paragraph or order perpetually enjoins the defendants, including White & Chiles, from setting up *any claim* or title to any of the bonds and attached coupons which are described in that contract, but does not limit the prohibition to a title under said contract. There can be no use for these several orders of injunction except to make it certain that defendants are to assert no claim to these bonds, either under that contract or under any other claim or title.

Opinion of the court.

In regard to the second ground of defence no authorities are cited by either side. The language of the enjoining order certainly is not limited to a prohibition of a suit in court. Nor are we satisfied that the purpose and object of the injunction would be obtained by such a limitation. The purpose of the suit was, as we have said, to establish the rights of plaintiff as owners of these bonds and to prevent further interference or obstruction in the assertion of that right. As to all the bonds in the possession of the parties, or when they or their proceeds were within the control of the court, this purpose was attained by other orders and decrees.

But as to these bonds which were in England, all that the court could do was to prevent by injunction any interference of the defendants with the efforts of complainant to recover them, and that was the meaning of the enjoining order of the court. Is it obeyed or its purpose attained while one of the defendants asserts openly and continually, "I am the owner of these bonds notwithstanding the decree of the court; I shall in another jurisdiction maintain my right to them by all legal means?" That such a course would seriously embarrass the complainant in securing her right as established by this decree there can be no doubt. Would it be permitted when in a suit to quiet title to real estate defendant was enjoined from any further disturbance of that title or assertion of his own, that he could still continue to slander plaintiff's title, impair its validity, and prevent its sale, because he stopped short of instituting a suit for the land? The very ground of bringing a suit to quiet title is that the disturber, while asserting a claim which is a cloud on plaintiff's title, refuses to carry it to the test of a trial in court, and because he refuses to do this a court of equity stops his mouth. This also is a bill to quiet title, and the defendant is forbid to set up or assert a title in conflict with complainant's. This prohibition is not obeyed where the defendant continues the annoyance and the injury in any form short of bringing a suit for the bonds.

Without determining how far a mere loose verbal asser-

tion of a right to these bonds could violate the injunction, we are of opinion that the deliberate service upon those who had them in possession, of a written notice of his claim of ownership, with a reference to further judicial proceeding in support of it, is a violation of the injunction of the court in this case, and that the defendant, Chiles, is guilty of a contempt in that regard.

Section 725 of the Revised Statutes declares that the courts of the United States shall have power to punish by fine and imprisonment for contempts of their authority. And among the cases specially enumerated are "disobedience or resistance by any officer of the court, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts." Such has always been the power of the courts both of common law and equity. The exercise of this power has a twofold aspect, namely: first, the proper punishment of the guilty party for his disrespect to the court or its order, and the second, to compel his performance of some act or duty required of him by the court, which he refuses to perform.*

In the former case, the court must judge for itself the nature and extent of the punishment, with reference to the gravity of the offence. In the latter case, the party refusing to obey should be fined and imprisoned until he performs the act required of him, or shows that it is not in his power to do it.

We are asked by counsel for the State of Texas to act upon this latter principle in the present case. But it is not pointed out to us very clearly what act it is in the power of defendant to perform commanded by the decree and which he refuses to do. The bonds are not in his possession or under his control. He cannot, therefore, deliver them up as the decree orders. There is no decree that he shall pay their value. The only order which he is shown to have violated is the one we have considered, enjoining him from setting up a claim to them.

* Stimpson *v.* Putnam, 41 Vermont, 238.

Opinion of the court.

The petition for the present rule on Chiles asks that he may be ordered by a proper instrument in writing to convey and transfer to the State of Texas all rights, titles, and interest which he appears or pretends to have in said bonds, and counsel in oral argument says he should be imprisoned for contempt until he complies with this order.

But the obvious answer to this is that no such order or decree has been made, and defendant can be guilty of no contempt in not doing this until he has been ordered to do it, and he is aware of it. To make an order now, and then punish for contempt or disregard of it before it was made, is *ex post facto* legislation and judicial enforcement at the same moment.

It is true that the original decree contains a provision for further directions in the enforcement of it, and it may be that such an order as is asked for now would be made on proper application and proper notice to the parties concerned, but such a proceeding can constitute no part of process for contempt in disregarding an existing order of the court. The granting or refusal of such an order is governed by very different considerations, and is to be brought to the attention of the court by very different proceedings than such as belong to the one now before us.

We are left, then, to the consideration of what punishment we shall impose upon Mr. Chiles for the violation of this court's injunction in a suit to which he was a party, where he was fully heard and his rights conclusively decided.

Without further comments, we think it our duty to order that he pay to the United States a fine of two hundred and fifty dollars and the costs of this proceeding, and that he stand committed to the custody of the marshal of this court until said fine and costs are paid.

Justices FIELD and HUNT dissented.

BURNHISEL *v.* FIRMAN, ASSIGNEE.

1. Where a party agrees, by note, to pay a certain sum at the expiration of a year, with interest on it at a rate named, the rate being higher than the customary one of the State or Territory where he lives, and does not pay the note at the expiration of the year, it bears interest not at the old rate but at the customary or statute rate.
2. If, however, the parties calculate interest and make a settlement upon the basis of the old rate, and the debtor gives new notes and a mortgage for the whole on that basis, the notes and mortgage are, independently of the Bankrupt Act, and of any statute making such securities void *in toto* as usurious, valid securities for the amount which would be due on a calculation properly made. They are bad only for the excess above proper interest.
3. Where a person owing money, principal and interest, for some time overdue, but secured by mortgage, accounts with his creditor and on computation a sum is found as due for the principal and interest added together, any new mortgage given for the whole and on the same property on which the former mortgage was given, is not, upon satisfaction being entered on the old mortgage, to be considered as a new security and so open to attack under the Bankrupt law if made within four months before a decree in bankruptcy against the debtor. If the old security was not a preference, neither will the new one be so. They are to be considered as being for the same debt.

APPEAL from the Supreme Court of the Territory of Utah.

Firman, assignee of Wright, a bankrupt, filed a bill in the court below against Burnhisel, to set aside a mortgage given by the said Wright, before his bankruptcy, to the said Burnhisel, the bill alleging that the mortgage was void under the Bankrupt Act.

The case was thus:

Wright executed three promissory notes, each payable "in one year from date with interest at 25 per cent."

The first, dated March 26th, 1866, was to Burnhisel, and for $2450.

The second, dated May 9th, 1866, was to Pond, and for $951.

The third, dated May 26th, 1867, was to Burnhisel, and for $950.

Statement of the case.

All three notes were secured by mortgages on the same property. It did not appear from anything in the case what rate of interest prevailed in Utah Territory when the notes were given; but on the 14th of February, 1868 (by which time all three of the notes had become due), a statute of the Territory enacted that it should be lawful to take 10 per cent. interest per annum when the rate had not been agreed upon by the parties; and by an act passed in 1869 it was enacted directly that parties might agree on any rate of interest, but that when none had been agreed on, the rate should be 10 per cent.

In this state of things, nothing having been paid on either of the notes to Burnhisel, he and Wright, on the 1st of August, 1871—that is to say, three years and more after statute had fixed the rate of interest in Utah at 10 per cent., where the parties had not agreed upon a different rate—made a settlement of the interest due on the two notes to Burnhisel. They computed it at 25 per cent., per annum, during the whole time, from the date of the notes down to the time of the settlement, and so made it amount to $4440. And for this sum, as arrears of interest, Wright gave to Burnhisel another note payable in one year with interest at 10 per cent.

On the 26th of April, 1872, Burnhisel having bought for what appeared due as principal ($951), the note to Pond, he (Burnhisel) and Wright made another settlement; making the sum due by Wright to be $9622, and Wright gave to Burnhisel two new notes secured by mortgage upon the same estate on which the three former notes had been secured. One note was for $4220, payable June 1st following (1872), with interest from 1st May at the rate of 25 per cent. payable monthly till the principal was paid. The other note was for $5402, payable at the same time as the other, with interest at the rate of 10 per cent.; this, too, payable monthly till the principal was paid. Satisfaction was entered on all the old mortgages, and the notes were surrendered to Wright, the words "*Settled by new arrangement and notes, April 26th*, 1872," being written upon them.

Burnhisel was himself examined as witness, when this question was asked and this answer given:

"*Question.* At what rate of interest was the computation made to meet the amount of the two notes of April 26th, 1872?

"*Answer.* The principal at 25 per cent. per annum and the interest which had accrued up to the 1st of August, 1871, at the rate of 10 per cent. per annum, up to the date of the said two notes. There was no interest computed on the Pond note in the settlement of 1872, the same being put in at $951, just what I actually paid."

Wright having been decreed a bankrupt within less than four months after the last two notes, and the mortgage to secure them was given, Firman, the assignee, filed a bill alleging that the mortgage was void under the thirty-fifth section of the Bankrupt Act. The bill set out fully all the notes and mortgages.

That section enacts that,

"If any person, being insolvent, within four months before the filing of the petition against him, with a *view* to give *preference* to *any creditor* or person having a claim against him, makes any *pledge or conveyance of any part of his property,* the person receiving such pledge or conveyance, or to be benefited thereby, having reasonable cause to believe such person insolvent, *and such pledge or conveyance is made in fraud of the provisions of this act,* the same shall be void, and the assignee may recover the property or the value of it from the person receiving it, or so to be benefited."

By consent of parties the mortgaged property was sold and the proceeds ($7300) being in court, the question was to whom they should be awarded. The counsel of the assignee alleged that there had been a preference made by the last mortgage:

1st. In that interest, in being calculated for more than one year at 25 per cent., had been calculated on a basis that created a debt voluntarily, and that this debt—the interest, namely, for several years at 25 per cent.—had now, in April, 1872, and in contemplation of bankruptcy, been first secured by the mortgage then made.

Argument for the mortgage-creditor.

2d. That the old debt, both principal and interest, at 25 per cent. for one year, and all other lawful interest, had been satisfied, and that the mortgage of April, 1872, was a new security.

The court below held the case fraudulent within the above-quoted section of the Bankrupt Act, and awarded the money to the assignee in bankruptcy. From that decree Burnhisel appealed.

Messrs. Snow and Hoge, for the appellant:

I. Where a person contracts to pay money, and nothing is said about the rate of interest, the presumption, of course, must be that the interest is to be at the ordinary rate. But that is not this case. Here the party contracted to pay *within one year* with interest at 25 per cent., and he does not pay within the year. Against the will of the other party he violates his promise and keeps in his own hands the money of that party. What is the presumption in that case? The lender, for all the time that he did lend, insisted on 25 per cent., and for all the time that the borrower professed to borrow he agreed to pay that rate. If the borrower, in breach of his contract, in violation of his own duty, and against the lender's will and rights, extend the time, shall he not be held to the rate at which he took the money? The authorities declare that he shall. In *Kohler* v. *Smith*,* in the Supreme Court of California, a person had given a note for $1000, "payable in two months after date, with interest at the rate of 5 per cent. per month;" that is to say, at the enormous rate of 60 per cent. a year. The statute of California gives but 10 per cent. a year for all moneys after they become due, "where there is no express contract giving a different rate of interest." The case, therefore, was just like the one now before the court. The court held that the debtor being in default in not paying the principal, must pay for the use of it at the rate of 5 per cent. a month till he did pay it. That case decides, therefore, that where moneys are

* 2 California, 597.

lent at a *higher* rate of interest than the statutory rate, and are payable at a day fixed, and are not paid at the day, the higher rate, in the absence of agreement otherwise, is to continue.

Ludwig v. *Huntzinger*,* in Pennsylvania, is decided on the same principle of regard to the creditor, when made to suffer for a non-return of his principal by his debtor's breach of contract. There the contract was to pay $1144 in eighteen months from the date of the contract, with 3 per cent. interest per annum. The statutory rate in Pennsylvania is 6 per cent. The debtor, violating his contract by not paying the principal when due, was punished with the higher rate. The California and the Pennsylvania case do not conflict; though in the former the statutory rate was not taken and in the latter it was. In both, the creditor's interest was preferred; and in California the statutory rate was put aside because it would have given him less; while in Pennsylvania it was followed because it would give him more. The American Leading Cases,† speaking about the cases where an obligation to pay interest generally arises, and those where it does not, says:

"In all cases, the question seems to be whether the debtor *is in default.*"

And this seems a reasonable view. Any other invites to and protects breach of contract and fraud. If, for example, a man borrow for one year only at 25 per cent., promising positively to return the principal at the end of that one year, but do not so return it, but on the contrary, in the face of his contract and duty, keep it for two more, and you charge him for those two years but at the rate of ten, has he not managed to borrow during the first year at the rate of 15? Certainly he has. He pays but 45 per cent. for the whole three years, which is at the rate of 15 for each year. By a trick and breach of contract he circumvents his creditor;

* 5 Watts & Sergeant, 60.

† Fifth edition, vol. 1, p. 681 or 506*, note to Selkirk *v.* French.

Argument for the assignee.

and the creditor has no means of punishing him. Certainly he should be held in such a case to the highest rate possible.

In addition, the parties, by computing, on their settlement in August, 1871, the rate at 25 per cent. to that date, interpreted their original contract, and showed they meant that 25 per cent. should be paid continually if the debt was not paid within the year.

If this were not all so, and if statute in any event would govern such a case as this one, the statutes here which fix 10 per cent. interest, were both passed after these contracts were made. To make the statutes operate on *these* contracts, the statutes must be made to operate retrospectively; a mode of operation always disfavored.

II. The whole debt and interest for which the new mortgage was given, was secured by the old mortgages. What the parties did in April, 1872, when the new notes and mortgage were given was to have a settlement for the amount due, reduce all things to writing, and, by taking a new mortgage, which, of course, they recorded, give notice to third parties of what was done. The whole debt for which the new mortgage was given was secured by the previous mortgages, though part of it was for unpaid interest, a matter which third persons would not know except by some such thing as was here done. Of course, therefore, there was no purpose to give a preference. At worst the new mortgage could be bad only for any interest added, upon a wrong basis of calculation, to what was really due.

Messrs. C. M. Hawley and T. Marshall, contra, for the assignee:

I. The interest at 25 per cent. was due for one year only. It was an enormous rate. Suppose the debtor did break his contract, how does he become bound to pay in the second year an illegal rate because he agreed to pay it in the first? If he pays it as he contracted to pay, it is enough. For the rest he pays the usual rate. Twenty-five per cent. cannot have been a usual rate in Utah on the expiration of any of the first three notes, or a statute would not have been passed

so near to that date fixing it at ten. The interest fixed in August, 1871, as the true amount of interest due was, therefore, more than the debtor was bound to pay. And he gave the last mortgage to secure a debt which the first one did not secure. That was a preference.

II. The three old notes and the old mortgages given to secure them were extinguished and satisfied when the new notes and mortgages were given. These last are to be looked upon as a new security, and as such as having no virtue of a date earlier than the day when they were given.* This was April 26th, 1872, within four months of the bankruptcy.

Mr. Justice SWAYNE delivered the opinion of the court; considering the two questions raised in the argument, in the order in which they were raised:

I. The bases of the calculation of interest made by Burnhisel and Wright were wrong, and the result was the aggregate amount of the two notes of April 26th, 1872, which was a sum much too large. Burnhisel was then entitled,

1st. To the face of the two original notes to him, with 25 per cent. interest upon each for one year, and the lawful rate of interest of the Territory where no rate is specified down to the date of the settlement; and,

2d. To the face of the note to Pond with the like lawful rate of interest after its maturity down to the same period.† The implication of the "act relative to interest," of February 14th, 1868, is exactly the same as the affirmation of the act upon the same subject of 1869. The latter act was, therefore, unnecessary.‡ Both these acts fix the rate at 10 per cent. where no rate has been agreed upon. What it was in such cases, prior to the taking effect of the first act, we are not advised.

* Wallas *v.* Long, 16 Alabama, 738; Banks *v.* Boyd, 38 Id. 625; Headley *v.* Gounndry, 41 Barbour, 279; Hadlock *v.* Bulfinch, 31 Maine, 246; Fowler *v.* Bush, 21 Pickering, 230; Marritt *v.* Handy, 8 Gill, 41.

† Brewster *v.* Wakefield, 22 Howard, 127; Young *v.* Godbe, 15 Wallace, 562.

‡ United States *v.* Babbitt, 1 Black, 61.

For the amount due upon the two original notes to Burnhisel and upon the one to Pond, transferred to Burnhisel, the two later notes, with the rate of interest stipulated in them, and the mortgages securing them, were, aside from the objection arising under the Bankrupt law, unquestionably valid securities.* In Pennsylvania, where there is a statute making usury penal, but not declaring the contract void, a usurious bond and mortgage may be enforced for the amount actually due.†

II. In order to bring a security for a debt within the provision of the Bankrupt law, relied upon by the appellee, it is necessary that all the prescribed conditions should concur. If either element of the combination be wanting, there is no infringement of the law. Among them, and the cardinal one, is that the security should be given by the bankrupt within the time specified, "with the view of giving a preference to a creditor or person having a claim against him." Are the securities here in question liable to this objection? The facts must give the answer, and they are undisputed. The several securities upon which the notes and mortgage attacked were founded, and for which the later ones were substituted, were given not only more than four months, but more than five years, before the filing of the petition in bankruptcy. The later ones were for the same liabilities consolidated, and for nothing else. The mortgage was upon the same property as the prior mortgage, and none other. They were intended to be for the amount due upon the former securities. They were for too much, as we now adjudge the law of Utah to be. In the view of equity they are as if they had been taken for the proper amount. The excess is a nullity. It has no efficacy or validity for any purpose. The bankrupt's estate, to be administered by his assignee, is just what it would have been if the new notes

* Wearse *v.* Pierce, 24 Pickering, 141; Abbe *v.* Newton and wife, 19 Connecticut, 20; Rood *v.* Winslow, 2 Douglass, Michigan, 68; Mackey *v.* Brownfield, 13 Sergeant & Rawle, 239; United States *v.* Bradley, 10 Peters, 343.

† Wycoff *v.* Longhead, 2 Dallas, 92; Turner *v.* Calvert, 12 Sergeant & Rawle, 46.

and mortgage had never existed. The rights of other creditors were in no wise affected by the substitution. The mortgaged premises, when sold, yielded a sum less than sufficient to pay the amount due on the original securities. It cannot be justly said that any property was withdrawn or any preference given within the four months. The withdrawal and the preference were years before. The new securities were only the recognition and continuity of those which preceded them. The change was one of form rather than of substance. It is as much the purpose of the law to sustain all valid claims arising beyond the time specified as it is to strike down the frauds within that time which it denounces. The assignee took the estate subject to the rights, legal and equitable, of all other parties.* Our views in this case are in harmony with those expressed in several recent cases in which we had occasion to consider this section of the Bankrupt law.† We hold that the section does not affect securities within the category of those before us.

There is another ground upon which a judgment for the appellant may well be placed. As before remarked, the new securities were intended to take the place of the prior ones. If the new ones are adjudged invalid, the cancellation and surrender of the prior ones will have been without the shadow of a consideration. If the cancellation and surrender are permitted also to stand, Burnhisel will have lost his debt without fault on his part, and contrary to the intent of both debtor and creditor in making the change of securities. Burnhisel will be in no better situation than if he had given up the old securities upon being paid in coin or currency which he believed to be good, but which turned out to be counterfeit. Where there is a failure of consideration and fraud or mistake in such cases, a court of equity will annul the cancellation and revive the securities. Upon being so revived they resume their former efficacy. This is an ordinary exercise of the jurisdiction of such tribunals.

* Gibson *v.* Warden, 14 Wallace, 244.

† Wilson *v.* The City Bank, 17 Id. 473; Tiffany *v.* The Boatman's Savings Institution, 18 Id. 375; Cook *v.* Tullis, Ib. 332.

"It is a rule in equity that an incumbrance shall be kept alive or considered extinguished as shall most advance the justice of the case."*

The application of this principle occurs most frequently in cases of usury. It is well settled that if a security founded upon a prior one be fatally tainted with that vice, and the prior one were free from it but given up and cancelled, and the latter one thereafter be adjudged void, the prior one will be revived, and may be enforced as if the latter one had not been given. The cases to this effect are very numerous.† A vendor's lien may be revived under the same circumstances.‡ In the same suit, wherein there is a failure to recover upon the void security, the valid one, on account of which it was given, may be enforced. In the case before us all the notes and mortgages are fully set out in the bill. There is, therefore, no obstacle arising from the state of the pleadings.

Embarrassment sometimes occurs in such cases from the attaching of intervening rights. Here there are none, and as regards the assignee there can be none. If the later securities were void, as insisted by the appellee, then the appellant would be entitled to relief in this view of the case.

DECREE REVERSED, and the case REMANDED, with directions to enter a decree

IN CONFORMITY WITH THIS OPINION.

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* Starr *v.* Ellis, 6 Johnson's Chancery, 395; Neville *v.* Demeritt et al., 1 Green's Chancery, 336; Barnes *v.* Camack, 1 Barbour, Supreme Court, 396; Loomis *v.* Hudson, 18 Iowa, 416; East In. Co. *v.* Donald, 9 Vesey, 284; Hore *v.* Becher, 12 Simons, 465.

† Parker *v.* Cousins, 2 Grattan, 389; Farmers' and Mechanics' Bank *v.* Joslyn, 37 New York, 353; Cook *v.* Barnes, 36 Id. 521; Rice *v.* Welling & Fake, 5 Wendell, 595.

‡ Crippen *v.* Heermance, 9 Paige, 211.

Statement of the case.

THE ELGEE COTTON CASES.

1. On the 31st of July, 1863, during the late rebellion, E. and C., owning certain crops of cotton in Wilkinson County, Mississippi, executed a paper thus:

> "We *have*, this 31st of July, 1863, *sold* unto Mr. L. our crops of cotton, now lying in the county aforesaid, numbering about 2100 bales, at the price of ten cents per pound, currency, the said cotton to be delivered at the landing of Fort Adams, and to be paid for when weighed. Mr. L. agreeing to furnish at his cost the bagging, rope, and twine necessary to bale the cotton unginned, *and we do acknowledge to have received, in order to confirm this contract, the sum of thirty dollars.* This cotton will be received and shipped by the house of D. & Co., New Orleans, and *from this date is at the risk of Mr. L.* This cotton is said to have weighed an average of 500 lbs. when baled."

At the time of making the contract, the cotton baled was stored under a covering of boards, and a small part of the cotton (about twenty bales) not baled, was in the gin-house on the Buffalo Bayou, about ten miles from the Mississippi River, at a place known as "The Rocks," or "Felter's Plantation," then without the Federal military lines; and G. and L. were together there. Immediately after the sale, L. employed a person, living near where the cotton was stored, to watch and take care of the same, and paid him therefor, and this person continued his care of it till it was taken possession of in the name of the United States. *Held*, that, notwithstanding the words above italicized, the paper of the 31st of July, 1863, was executory only and had not divested E. and C. of their property in the cotton; no money but the thirty dollars having been paid, and nothing else done in execution of the contract; and that in a suit for the proceeds of it under the Captured and Abandoned Property Act, which gives to the "owner" a right to recover, under certain circumstances, property captured or abandoned during the late civil war, they alone could sue.

2. The same E. and C. (or rather E. alone, who had now become sole owner of the cotton) subsequently to the above quoted contract with L., made another contract with N. (he not having notice of the first contract), by which E. contracted for the sale to N. "for so much of the 2100 bales as N. should get out in safety to a market, for the price of £15 per bale, to be paid at Liverpool. The risk of the cotton to be on the vendors." *Held*, equally, but as a matter even more plain than in the former case, that no property passed by the contract; no cotton ever having been got out. *Held*, further, that this was not altered by a letter in these words from the owners of the cotton:

> "It having been agreed on between you and myself that I sell to you all the cotton of E. and C. now baled and under shed, for the price of £15 sterling per bale, payable in Liverpool, you will cause the same to be placed to my credit with J. A. J. & Co., of Liverpool."

Statement of the case.

APPEALS from the Court of Claims, in which court the representatives of one Elgee claimed the net proceeds in the Treasury of the United States of the sale of certain cotton under what is known as the Captured and Abandoned Property Act; the right of the said Elgee being disputed by a firm of Woodruff & Co., and also by a certain Mrs. Nutt, executrix of one Haller Nutt, M.D., both of which parties claimed adversely to Elgee and to one another; the United States at the same time denying the rights of all of them, or, at least, denying them in the way in which the parties asserted them. The case was thus:

The act "to provide for the collection of abandoned property," &c., passed March 12th, 1863, after providing for the sale of such property by the government, thus enacts:

"Any person claiming to have been the *owner* of any such abandoned or captured property, may, at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof in the Court of Claims, and on proof to the satisfaction of said court of his ownership of said property, of his right to the proceeds thereof, and that he has never given any aid or support to the present rebellion, receive the residue of such proceeds, after the deduction of any purchase-money which may have been paid, together with the expense of transportation and sale of said property, and other lawful expenses attending the disposition thereof."

On the 31st day of July, 1863, J. K. Elgee and R. Chambers (the right of which last was immediately afterwards vested in Elgee alone) being the owners of a quantity of cotton in Wilkinson County, Mississippi, W. C. Gordon, their agent, entered, as appeared by the findings of the Court of Claims, into an agreement with C. S. Lobdell, thus:

"MISSISSIPPI, WILKINSON COUNTY.

"We *have*, this 31st of July, 1863, *sold* unto Mr. C. S. Lobdell our crops of cotton, now lying in the county aforesaid, numbering about 2100 bales, at the price of ten cents per pound, currency, the said cotton *to be delivered at the landing at Fort Adams, and to be paid for when weighed, Mr. Lobdell agreeing to furnish at*

his cost the bagging, rope, and twine to bale the cotton unginned; and we do acknowledge to have received, in order *to confirm this contract,* the sum of thirty dollars. This cotton *will be received and shipped by the house of Da Silva & Co.*, New Orleans, and from this date is *at the risk of Mr. Lobdell.* This cotton is said to have weighed an average of five hundred pounds when baled.

"W. C. GORDON,
"Agent for Messrs. Elgee & Chambers.
"C. S. LOBDELL."

At the time when the contract was made the baled cotton was stored under a covering of boards, at some place not certainly designated. A portion, equal to about twenty bales unbaled, was in a gin-house on Buffalo Bayou, at a place known as "The Rocks," or "Felter's Plantation," about ten miles from the Mississippi River. At this latter place Lobdell and Gordon, the agent of Elgee & Chambers, met. Whether it was the same place where the bulk of the cotton was lying did not distinctly appear. Immediately after the contract Lobdell employed a certain J. Morris, living near where the cotton was stored, "to watch and take care" of it, and paid him therefor, and Morris continued his care until the 2d of April, 1864, on which day the cotton was seized by the agent of the United States.

Lobdell sold his rights under the contract to Woodruff & Co.

So far as respects Elgee, on the one side, and Woodruff & Co. on the other.

The claim of Mrs. Nutt rested on certain facts found as follows, by the Court of Claims:

In the month of October, 1863, Haller Nutt, M.D., a citizen of Mississippi, employed as his agent Truman Holmes, to go from Natchez, then in possession of the military forces of the Union, into the territory of the Confederacy to purchase cotton.

At this time Dr. Nutt resided in the immediate vicinity of Natchez, and within the military lines and control of the Union forces; and he procured from the military authorities

their permits for Holmes to pass out of and into said lines, on said agency.

In October, 1863, Holmes, as the agent of Dr. Nutt, contracted with Elgee for the sale from him of so much of the 2100 bales of cotton stored at Felter's plantation as he (Holmes) should get out in safety to a market, for the price of £15 per bale, to be paid at Liverpool. The risk of the cotton till got out to be on Mr. Elgee.

On the 8th of October, 1863, Mr. Elgee made and delivered to Holmes a writing in these words:

"ALEXANDRIA, October 8th, 1863.

"DEAR SIR: It having been agreed on between you and myself that I sell to you all the cotton of Elgee & Chambers, now baled and under shed, for the price of £15 sterling per bale, payable in Liverpool, you will cause the same to be placed to my credit with J. A. Jackson & Co., of Liverpool.

"Yours,

"J. K. ELGEE."

"Captain TRUMAN HOLMES, present."

The position, of course, of Elgee now was that no ownership of the property had passed out of him to anybody—

1st. That, as respected Lobdell or his assignees, Woodruff & Co., the sale was one for cash, and that no cash had been paid; that the amount to be paid was to be ascertained by weighing, and that no weighing had been had; that the contract was entire, and that the property was yet to *be* delivered; but that part of it was incapable of being delivered until it should be ginned and baled, a matter which had never been done; Lobdell, who was bound to furnish them having never furnished the prerequisite bagging, rope, and twine.

2d. That as respected Mrs. Nutt, executrix of Dr. Nutt, she had plainly no case on the contract found by the Court of Claims, a contract of which Elgee's above-quoted letter of October 8th, 1863, made no part; and which was but "for the sale from him of so much of the 2100 bales stored at Felter's plantation as Holmes should get out in safety to

a market;" that this was plainly executory and had never been reduced into certainty by any cotton at all being got out, it having all been seized by the Federal government previously.

On the other hand, and as respected the opposing claimants.

Mrs. Nutt, agreeing that no property had ever passed from Elgee to Lobdell or through him to Woodruff & Co., but on the contrary so far as regarded those parties, remained in Elgee, contended, as respected her husband, Dr. Nutt, that to *him* it had passed; and she relied strongly on the letter of Elgee of October 8th, 1863, to Holmes, the agent of her husband, as showing this, and as putting an interpretation by Elgee himself which could not now be controverted on the matter, while—

Lobdell and Woodruff & Co. (the latter-named of whom claimed under the former), treating the contract with Holmes for Nutt, and the letter of October 8th, 1863, as of no importance, contended that prior to either, the cotton had passed to Lobdell, of which conclusive evidence appeared in the expressions in the contract—

"We have sold to Mr. C. S. Lobdell our crops of cotton, and we do acknowledge to have received in order to *confirm* the contract the sum of $30. The cotton from this date is at the risk of Mr. Lobdell."

As to the United States. Their presence in the matter was apparently that the government might assist the court in doing justice between the individuals interpleading; so that in finally paying money out of the treasury the government might do to each that which, upon the showing by all, seemed to be right.

The Court of Claims in deciding the case, made what it deemed an equitable division of the funds; appropriating a part to Elgee as payment for the cotton, at the price named in the contract with Lobdell, and appropriating parts to Lobdell and to Woodruff & Co. From its decree all the parties

appealed; Elgee himself having died during the suit, and his representatives now taking his place.

A question was made, and in this court learnedly argued, as to whether both the contracts which were the subjects of consideration, were not forbidden by the non-intercourse acts of Congress, and whether, on *that* ground, the claims of all the parties claiming under them did not fall. Any report of that part of the case or of argument on it is, however, unnecessary in view of the fact that the property in the cotton was admitted by all parties to have been originally in Elgee; and that the judgment of this court was that, even conceding the contracts to have been lawful, no property passed under either out of Elgee.

Messrs. J. M. Carlisle, J. D. McPherson, and W. W. McFarland, for the representatives of Elgee; Messrs. B. F. Butler and R. M. Corwine, for Woodruff & Co.; Mr. Montgomery Blair, for Lobdell; Mr. Joseph Casey, for Mrs. Nutt, and Mr. S. F. Phillips, Solicitor-General, for the United States.

Mr. Justice STRONG delivered the opinion of the court.

These cases have been elaborately and very ably argued, touching both the legality and the construction of the contracts under which the different parties claim. But in the view which we take of the merits of the controversy it is unnecessary to do more than to examine the contracts themselves, and to determine what is their true meaning.

The fundamental question, in all the cases, is whether Elgee parted with the ownership by either of the contracts found by the Court of Claims to have been made by him, or for him by his agent, Gordon. It is the owner alone who has any standing in the Court of Claims under the Captured and Abandoned Property Act. In regard to such property, only such suits can be brought as are authorized by the statute. That statute furnishes a complete system for the prosecution of claims under it, and defines the extent of the rights which those who claim an interest in the proceeds of property captured or abandoned during the civil war, may assert against the government. According to the well-

Opinion of the court.—The captured and abandoned act explained.

known rules of statutory construction, the system is exclusive of all others, and the rights defined are the only ones which can be enforced in any judicial proceeding. The language of the act makes it plain that no one is allowed to sue in the Court of Claims for the proceeds of captured or abandoned property unless he can prove to the satisfaction of the court three things: *first*, his ownership of the property seized; *secondly*, his right to the proceeds thereof; and, *thirdly*, that he never gave aid or comfort to the rebellion. The third, it is true, has been ruled by this court to be no longer necessary since the amnesty proclamations, but the ownership of the property at the time of the seizure, and the right to the proceeds thereof, are still indispensable to any standing in court as a claimant for the proceeds of property captured, which have been paid into the treasury of the United States.

We are, then, to inquire whether either Woodruff & Co., or Haller Nutt had acquired the ownership of the cotton prior to its seizure by the agent of the United States, on the 2d of April, 1864; for if either of these parties had become the owner and entitled to the proceeds of its sale before that date, that party is entitled to a judgment for the sum remaining in the treasury, after the deductions are made provided by the statute. If, on the other hand, neither of those parties has shown that Elgee parted with his title; if the ownership remained in Elgee until after the seizure, and until his death, his representatives are the only persons that are authorized to sue for the proceeds of the cotton in the Court of Claims, for they only are the owners, whatever equities may exist in favor of the parties who contracted to buy.

We come, then, at once to the question whether Woodruff & Co. acquired the ownership of Elgee. If they did, it was mediately through C. S. Lobdell. They made no contract with Elgee, but Lobdell did, and they purchased Lobdell's contract. The contract between Lobdell and Elgee appears in the findings of the Court of Claims.*

* See it set out, *supra*, foot of p. 181 and top of p. 182.—REP.

Opinion of the court.—Rules for distinguishing executory contracts.

At the time when the contract was made the baled cotton was stored under a covering of boards at some place not certainly designated. A portion equal to about twenty bales unbaled was in a gin-house on Buffalo Bayou, at a place known as "The Rocks," or "Felter's Plantation," about ten miles from the Mississippi River. At this latter place Lobdell and the agent of Elgee met. Whether it was the same place where the bulk of the cotton was lying does not distinctly appear. Immediately after the contract Lobdell employed Morris, living near where the cotton was stored, "to watch and take care" of it, and paid him therefor, and Morris continued his care until the cotton was seized by the agent of the United States. But it does not appear that the possession was surrendered to Morris, or that there was any change of possession. At this time, the region where the parties were was greatly disturbed by the war, and the cotton was in danger of being burnt by the Confederate forces, and of being captured by the United States. Under these circumstances, what ought it to be concluded was intended by the contract between Gordon and Lobdell? Was it intended to pass the property in the cotton to the purchaser, or was it in legal effect only an agreement to sell?

It must be admitted there is often great difficulty in determining whether a contract is itself a sale of personal property so as to pass the ownership to the vendee, or whether it is a sale on condition, to take effect or be consummated only when the condition shall be performed, or whether it is a mere agreement to sell. It is, doubtless, true that whether the property passes or not is dependent upon the intention of the parties to the contract, and that intention must be gathered from the language of the instrument. There are, however, certain rules for the construction of such contracts, which are well settled in England, and, we think, also in this country. Mr. Justice Blackburn, in his work on sales,* states two of them, and Mr. Benjamin, in his treatise,† adds a third. They are as follows:

* Pages 151, 152.

† Second edition, p. 236.

First. "When, by the agreement, the vendor is to do anything to the goods for the purpose of putting them into that state in which the purchaser is bound to accept them, or, as it is sometimes worded, into a deliverable state, the performance of those things shall, in the absence of circumstances indicating a contrary intention, be taken to be a condition precedent to the vesting of the property."

Second. "Where anything remains to be done to the goods for the purpose of ascertaining the price, as by weighing, measuring, or testing the goods, where the price is to depend on the quantity or quality of the goods, the performance of these things shall also be a condition precedent to the transfer of the property, although the individual goods be ascertained and they are in the state in which they ought to be accepted."

Third. "Where the buyer is by the contract bound to do anything as a consideration, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer."

These may be regarded as rules for ascertaining the intention of the parties. They are in most cases held to be conclusive tests. Though not supported by all the decisions, they certainly are generally accepted in England, and by most of the courts in this country. And they are the rules which are applicable to contracts for the sale of specific chattels, contracts which define the articles which are the subjects of agreement, either single articles or aggregates separated from others, as the grain in a bin, the hides in a specified vat, &c., &c., or such a case as the present, all the cotton at a designated place. A considerable number of the numerous authorities which justify these rules are collected by Mr. Benjamin in his Treatise on Sales.* Applying them to the contract now under consideration, we think it cannot be maintained that the parties intended the con-

* Same edition, p. 234, et seq.

tract should pass the ownership of the cotton at once to the buyer, without any ascertainment of the whole price by weighing, without its complete preparation for delivery, without any delivery, and without payment. This is not the case of an unconditional sale of a specific chattel for an ascertained price. Its subject was the crops of cotton then lying in Wilkinson County. The contract was a cash contract. No credit was intended. An ascertainment of the price by weighing was contemplated, though it is not stated where the weighing should be done. The vendor undertook to deliver at Fort Adams. He was to deliver it in bales. Yet all the property was not in a deliverable state. Part was unginned, unbaled, and unbagged. The vendor was to prepare it for delivery by ginning, baling, and bagging it, and Lobdell was to furnish the necessary bagging, rope, and twine. This was to put the cotton into the condition in which he was bound to receive it, for he was not bound to receive any unless the whole was ginned, baled, and bagged. The contract was entire. And the vendor was not bound to put the cotton into a deliverable state unless Lobdell furnished the necessary materials. Besides, it was stipulated that the cotton should be received by Da Silva & Co.

Our conclusion does not rest merely on the ground that the cotton was not weighed or delivered. It is unnecessary to decide that weighing the cotton was in this case a prerequisite to the transmission of the property, though that appears to be the law in England, when by the contract the goods are to be weighed by the vendor, or by him concurrently with the vendee. In the leading case of *Hanson* v. *Meyer*,* where it appeared that under a contract of sale a vendee agreed to purchase all the starch of the vendor, then lying at the warehouse of a third person, at so much per hundred weight, by bill at two months, and the starch was in papers, but the exact weight was not then ascertained, and was to be ascertained afterwards, and fourteen days

* 6 East, 614.

were to be allowed for the delivery, and where the vendor gave a note to the vendee, addressed to the warehouse-keeper, directing him to weigh and deliver to the vendee all his starch, it was decided that the absolute property in the starch did not pass to the vendee before the weighing, which was to precede the delivery and to ascertain the price. And this, though a part had been weighed and delivered, and though a credit was given. Nothing was wanting to specify the subject of the contract. It was all the vendor's starch in the warehouse. So in *Simmons* v. *Swift*,* where the contract was, "I have this day, October 23d, sold the bark stacked at Redbrook, at £9 5*s.* per ton of twenty-one hundred weight, to Hezekiah Swift, which he agrees to take and pay for on the 30th of November," and some of the bark was weighed and delivered, it was held that the property in the residue did not vest in the purchaser until it had been weighed. In *Logan* v. *Le Mesurier*,† the sale was by the following contract: "Hart, Logan & Co., of Montreal, sell, and Le Mesurier, Routh & Co., of the same place, buy a quantity of red-pine timber, the property of Thomas Durell, of Hull, L. C., but under the control of the sellers, now lying above the rapids, near the Chaudiere Falls, Ottowa River, and stated by the said Thomas Durell to consist of 1391 pieces, measuring 50,000 feet, more or less, deliverable at Quebec on or before the 15th of June next, and payable by the purchasers' promissory notes, at ninety days from this date, at the rate of 9½*d.* per foot, measured off. Should the quantity turn out more than above stated, the surplus to be paid for by the purchaser at 9½*d.* per foot on delivery, and should it fall short, the difference to be refunded by the sellers." It was held that by the terms of the contract the sale was not complete until the measurement and delivery of the timber was made, and that the transfer of the property was postponed until the measurement at the delivery. Here the timber was fully specified by the description, and by the place where it lay. A statement of the estimated

* 5 Barnewall & Cresswell, 857. † 6 Moore's Privy Council, 116.

Opinion of the court.—Contract with Lobdell considered.

quantity was given; the time and place of delivery was designated, as was the price per foot, measured off. Credit was also stipulated for. It was the case of selling ascertained chattels for an ascertainable sum. If this stood alone the contract would have passed the property, but it was controlled by the provisions for the possession, carriage, and delivery, as well as the measurement and readjustment of the price. Many other English cases to the same effect might be cited.* We do not understand that there is any disposition to depart from the doctrine of these cases, or that of Mr. Blackburn's first and second rules. Of course, when nothing remains for the seller to do, when the weighing or measurement stipulated for is incumbent upon the buyer, or when the parties have provisionally agreed that a certain sum shall be taken for the price, subject to future correction, the contract is not within the rules. *Turley* v. *Bates*† has sometimes been thought a departure from the earlier cases, but we think without reason. It was the case of the sale of an entire heap of fire-clay at two shillings per ton. The buyer was to cart it away and weigh it. He weighed, removed, and paid for a part, and refused the rest. It was held the property of the whole heap had passed to him. But here the seller had nothing to do with the weighing or delivery. He had performed all he was required to do, either for ascertaining the quantity or the price. Besides, the jury had found as a fact that the sale was of the whole heap. The case of *Kershaw* v. *Ogden*‡ is in substance the same. In each of these cases the contract was in parol, and what it was, necessarily for a jury.

It is true there are some American decisions, especially in New York, that are not in entire harmony with those we have cited. There are at least some dicta in *Crofoot* v. *Bennett*,§ tending to show that specification of the subject in a contract for sale is sufficient to pass the property, though the vendor has the duty still of ascertaining the entire price

* See Zagury *v.* Furnell, 2 Campbell, 240; Rugg *v.* Minett, 11 East, 210; Gilmour *v.* Supple, 11 Moore's Privy Council, 551.

† 2 Hurlstone & Coltman, 200. ‡ 3 Id. 717. § 2 Comstock, 258.

by weighing or measuring before delivery. And in *Kimberly* v. *Patchin*,* and *Russell* v. *Carrington*,† it seems to have been ruled that the sale of a specified quantity of grain, part of a larger bulk, with a receipted bill of sale and an order for the grain, passed the title without any actual separation or delivery of the property. These decisions, we think, are not in accordance with the authorities generally in this country. They are in conflict with later decisions in New York. In *Kein* v. *Tupper*,‡ the English rule was strictly accepted. There, it was said by Chief Justice Church, that when anything remains to be done by the vendor to ascertain the identity, quantity, or quality of the property, no title passes. That was the case of a sale of a certain number of bales of cotton, described by marks, at so much per pound, and the court said, as the cotton was to be weighed by the vendors to ascertain the quantity, and sampled by both parties to ascertain the quality, no title passed until these acts were done. We do not care, however, to review the decisions on this subject farther, for the stipulation in the contract now under consideration, that the cotton should be paid for when weighed, was only one of several provisions tending to the conclusion that the intention of the parties was not to effect an immediate passing of the property.

We have already noticed that no sale upon credit was intended. There was, therefore, no reason why the vendor should part with anything before the purchase-money was paid or tendered. The possession was certainly retained. The vendors undertook to deliver at Fort Adams. To enable them to carry, and thus deliver, possession was indispensable. The contract also provided that the cotton should be received by Da Silva & Co. This agreement to carry and deliver at Fort Adams on the Mississippi, where it was obviously intended the contract should be consummated by the receipt of the cotton and the payment of its price, concurs with other circumstances in indicating a purpose of the

* 19 New York, 330. † 42 Id. 118. ‡ 52 Id. 553.

parties that the property was not intended to be changed until the weighing, delivery, receipt, and payment took place. So it was regarded in *Logan* v. *Le Mesurier*.* Indeed, assuming, as the contract warrants, that the sellers were to carry the cotton to a designated place, and to ascertain its quantity and aggregate price by weight before delivery, and assuming that it was then to be received, and that payment for the whole was to be concurrent with the delivery, it is hard to find any intention that the owners intended to part with their ownership while the cotton lay at Felter's plantation.

Added to this is, we think, a very significant circumstance. The contract shows that a portion of the cotton was not in a condition for delivery. True, it was relatively but a small portion, sufficient, as found by the court, to make about twenty bales. But, as we have noticed, the contract was entire. It was for all the crops. The purchaser was under no obligation to take less than the whole. The subject of the contract was baled cotton, and Lobdell bargained for that. Nothing in the contract, indeed, shows clearly how much of the cotton was unginned, and how much was unbaled, but it reveals that a portion was, and certain it is it was considered essential that all which had not been ginned and baled and bagged, should be put into that condition before the vendee was required to accept it. And this the sellers were required to do. So much is clearly implied in the contract. If, then, it be, as asserted in Mr. Blackburn's first rule, that when anything remains to be done by the seller for the purpose of putting the goods into that state in which the purchaser is bound to accept them, or, in other words, into a deliverable condition, the property does not pass, it cannot be held that there was any intention of Gordon, or his principals, to transmit to Lobdell the ownership of the cotton before its delivery and before the payment of its stipulated price. We do not deny that a person may buy chattels in an unfinished condition and acquire the right of

* *Supra.*

property in them, though possession be retained by the vendor, in order that he may fit them for delivery. But in such a case the intention to pass the ownership by the contract cannot be left in doubt. The presumption is against such an intention.

It should also be noticed that Lobdell undertook by the contract to furnish the necessary bagging, rope, and twine to put the unginned and unbaled cotton in a deliverable state. Obviously this was to be done before the sellers were bound to deliver. It was, therefore, a condition precedent upon which the vendee's right depended. With this condition there was no compliance, and thus neither the vendors nor the vendee did all that it was contemplated and agreed they should do preparatory to the acceptance of the goods, or to bring the cotton to the condition in which it was understood it should be to entitle the sellers to the price stipulated.

On the other side it has been argued with much earnestness, that the provision in the contract, the cotton from the date thereof should be at the risk of Lobdell, exhibits an intention of the parties that the property should pass. It must be admitted that when a contract of sale has transmitted the property in its subject to the buyer, the law determines, in the absence of agreement to the contrary, that the risk of loss belongs to him. This is a consequence of his ownership, though undoubtedly the property may be in one and the risk in another. But it needs no agreement that the buyer shall take the risk, if it is intended the ownership shall pass to him. Hence the stipulation that the cotton should be at the risk of Lobdell after the date of the contract, instead of showing an intention of the parties that the right of property should pass to him, seems rather to indicate a purpose that the ownership should remain unchanged. Else why introduce a provision totally unnecessary? Such was the inference drawn from the introduction of a similar clause in a contract considered in *Martineau* v. *Kitching*.* There it was stipulated that the goods should

* Law Reports, 7 Q. B. 436.

remain at the risk of the sellers, and Lord Cockburn asked "if the property in the goods had not passed to the buyers why it was said the goods should remain at the risk of the sellers?" adding further, "what would be the necessity, what would be the object and purpose of such a stipulation if the property still remained in them? Of course it would be at their risk." It may be asked what then was the object of stipulating that the cotton should be at Lobdell's risk if it was not intended to evidence a transmission of the title? No doubt some purpose existed, and we think it may be found in the circumstances in which the parties stood when they contracted. The cotton was in a disturbed region of the country. It was in danger of destruction by the Confederate forces, and of capture by the United States forces. The sellers undertook to carry and deliver it at the landing at Fort Adams. Such a delivery might be rendered impossible by the vicissitudes of the war, and hence it was a reasonable provision that Lobdell should bear the risk, that the sellers should not be answerable in damages in case of Confederate burning or Federal capture. To us this is a sufficient explanation of the assumption of the risk by Lobdell, without regarding it as a mutual recognition of a change of ownership.

It is hardly necessary to add that the receipt of $30 "in order to confirm the contract," can have no bearing upon the question whether the property passed. The confirmation of the contract and its effect are distinct matters. Whatever may have been thought by some old writers respecting the effect in the transmission of property, of giving and receiving earnest-money, it is now considered of no importance, or of the smallest importance. The subject is discussed in Benjamin on Sales,* and the conclusion is reached that the true legal effect of earnest is simply to afford conclusive evidence that a bargain has been actually completed, with mutual intention that it should be binding on both; and that the inquiry whether the property has passed in

* Second edition, pages 260–2.

such cases is to be tested not by the fact that earnest is given, but by the true nature of the contract concluded by giving the earnest. The author says further, "No case has been found in the books in which the giving of earnest has been held to pass the property in the subject-matter of the sale, where the completed bargain, if proved in writing, or in any other sufficient manner, would not equally have altered the property."

In our judgment, therefore, the contract of July 31st, 1863, must be regarded as only an agreement to sell, and not as effecting a transfer of the ownership. It left the property in Elgee, where it was before.

We are the better satisfied with this conclusion because it works substantial justice, and because it accords with what appears to have been the subsequent understanding of the parties. The bargain was for cash, yet no steps were taken to consummate it until after the cotton was seized in April, 1864. Never indeed. No tender of the price was made, the cotton was neither weighed, delivered, nor received, and, throughout, both parties appear to have treated the agreement as merely executory.

The result of what we have said is that neither Lobdell, nor Woodruff & Co., who claim under him, had any such ownership of the cotton as to entitle them or either of them to sue in the Court of Claims for its proceeds.

We come next to the claim of Mrs. Nutt, executrix of Haller Nutt, deceased. A very vigorous argument has been made to us in support of this claim, but we think it cannot be sustained. Assuming that Nutt's contract with Elgee, made in October, 1863, was not illegal, that it was not in violation of the non-intercourse laws, it still was not such a contract as passed the property in the cotton. The finding of the court is, that in October, 1863, Truman Holmes, as the agent of Dr. Nutt, contracted with Elgee for the sale from him of so much of the 2100 bales of cotton stowed at Felter's plantation as he (Holmes) should get out in safety to a market, for the price of £15 per bale, to be paid in Liver-

pool. The risk of the cotton till got out to be on Mr. Elgee. That this was but an executory contract is very plain. Its subject was indefinite. It was not necessarily the 2100 bales; not certainly any of them. It was simply so much of them as Holmes should get out in safety to a market. The agreement contemplated that he might never get out any. If so nothing was agreed to be sold. In fact he never did get out a bale. Whatever else may be dispensed with, it is certain that there can be no sale of personal chattels without a specific identification of the thing sold. Which of the whole number of bales could the purchaser say was his? For which of them could he have been compelled to pay? And there is no evidence that Holmes ever received the cotton or any part of it, or asserted any possession, though the sale was on credit, and if the property was his principal's he was entitled to remove it at once to a market.

Our attention has been called to the letter dated October 8th, 1863, and addressed by Elgee to Holmes afterwards, which it is argued was itself a sale.* This letter was not found by the court to have been the contract between the parties. It refers to the former agreement, and evidently it was intended as a direction where to pay the price of the cotton, if any should be got out, and if any purchase-money should become due. It had no other purpose. It was not even a delivery order. Much less can it be regarded as a bill of sale. And there is no finding that it was accepted. The only contract, therefore, respecting the sale of the cotton to Holmes upon which the executrix of Dr. Nutt can rely, is that found by the court to have been made; a contract for the sale of so much of the 2100 bales as Holmes should get out in safety to a market, and that contract passed no property in the cotton.

This disposes of the whole case. The property in the cotton was in Elgee, and neither of the contracts proved divested him of his ownership. The result is that his per-

* See the letter, *supra*, p. 183.—REP.

sonal representatives are entitled to a judgment for the entire proceeds of the cotton held in trust for the owner.

JUDGMENT REVERSED, and the record is remitted with instructions to dismiss the petitions of Woodruff & Co., and Mrs. Nutt, executrix, and to enter a judgment in favor of the personal representatives of Elgee, for the sum found in the treasury, the net proceeds of the sale of cotton.

Dissenting, Justices BRADLEY and HUNT.

FRETZ *v.* STOVER.

1. The point cannot be first made in this court that no replication has been made to an answer in chancery, and, therefore, that the answer is to be taken as conclusively true in all points. If such a point is meant to be insisted on here, it should have been made in the court below.
2. New defences, *i. e.*, defences not made in an answer to the original bill, cannot be first set up in an answer to a bill of revivor. Such bill puts in issue nothing but the character of the new party brought in.
3. After the late rebellion broke out, debtors in the rebellious States had no right to pay to the agents or trustees of their creditors in the loyal States, debts due to these last in any currency other than legal currency of the United States. Payment in Confederate notes or in Virginia bank notes (security for whose payment was Confederate bonds, and which notes like the bonds themselves never, after the rebellion broke out, were safe, and before it closed had become worthless), *held* to have been no payment, and the debtor charged *de novo*.

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

For several years prior to February 25th, 1861, a litigation had been waged by Fretz and wife, residents of Pennsylvania, against Stover, a resident of Fauquier County, Virginia; a certain Chilton, a lawyer in embarrassed circumstances, and resident in the same county, being the counsel of the former. The suit was for property claimed by the wife. On the said 25th of February, 1861, a com-

promise was effected between the parties, and it was agreed that Stover should give his bond to Fretz and wife, secured by a deed of trust to Chilton, as trustee, of a valuable farm, specified, for $2366, payable on or before the 1st of March, 1863. Fretz and his wife now returned to their home in Pennsylvania, leaving their attorney, Chilton, to see that the compromise was properly carried out, and that all details necessary for its completion were attended to. Chilton did thus accomplish matters; and Stover having, on the 8th of April, 1861, executed his bond, payable on or before March 1st, 1863, to Fretz and his wife, and transferred to Chilton by deed of trust for Fretz and his wife the farm to secure it, both instruments were delivered in form to Chilton. Of all this Fretz was informed. At the time when the compromise was made the country was in a disturbed condition with the Southern issues; but intercourse between all parts of it was still common, and as yet no war existed. On the 12th of April, 1861, Sumter was fired on by rebels, and civil war became flagrant. All communication ceased between Pennsylvania and that part of Virginia in which Chilton and Stover lived.

In 1864, intercourse being restored between Fauquier County, Virginia, and Pennsylvania, Chilton wrote Fretz saying "that the papers were all safe, and that he would keep them safe, as he could collect nothing but Confederate money." In the autumn of 1865 Fretz went to Fauquier County, where he saw Chilton, and Chilton then told him that he had received nothing on account of the bond; showed him a letter from Stover offering to pay it in Confederate money, which money Chilton said that he had not taken because it would have been of little use to him, Fretz. In 1866, that is to say, after the war was ended, Fretz learned accidentally that the bond had been paid in December, 1862, not wholly in notes of the Confederate States, but partly in them and partly in notes of Virginia banks; the security for the payment of which latter was bonds of the Confederacy; and the bonds and all the notes, of course, becoming worthless alike with the fall of the Confederacy itself.

Chilton was alive at this time, but soon after (1867) died in solvent, and Fretz now (August 9th, 1869) filed a bill in the court below (his wife not being a party) against Stover to set up and have enforced the deed of trust; the ground of the bill being that Chilton had no authority to receive payment in paper such as he did receive it in, nor Stover the right to make it. The bill set forth the general history of the transaction, alleged "that the said bond and the deed of trust securing the sum of money specified in the bond were left with the said Chilton as the attorney at law of the complainant, the deed of trust for record and *the bond for collection at its maturity.*" It charged actual fraud between Chilton and Stover in this, that Stover, taking advantage of Chilton's great pecuniary necessities, induced him to receive the Confederate and Virginia paper money at par in payment and discharge of the bond.

After the filing of the bill, Mrs. Fretz, the wife, was by consent of counsel made a party to it.

Stover filed his answer, admitting the settlement and execution of the bond and deed of trust, and the payment in Virginia bank notes and Confederate treasury notes as charged, but denied that these payments were the result of an unlawful and fraudulent combination between the respondent and Chilton. He insisted, however, that they were in law a full discharge and satisfaction of the debt and trust deed, but if this were not so, that to the extent of the compensation due by Fretz to Chilton for professional services, he should not be compelled to pay a second time.

After this answer was filed, the deposition of Fretz, the husband, was taken by the complainants, which was the only evidence in the cause. Fretz swore that Chilton had no authority over the bond and deed of trust, except to take charge of them and keep them safely, and to have the deed recorded, all which he promised to do; and that he, Fretz, had never given any authority to Chilton to receive payment in any kind of currency; that the subject of payment of the instruments had never been spoken of between the parties.

Argument for the Pennsylvania creditor.

Fretz further testified that at the time of Chilton's death, Chilton was indebted to him on another account, over and above any fees due for professional services; and that these had been paid.

Subsequently Stover died, and a bill of revivor was filed to make his brother, who was his sole devisee and legatee, as also the executor of his will, a party defendant. The brother appeared and answered, admitting the character imputed to him by this bill, but setting up new defences founded on alleged ratification of Chilton's acts by silence and acquiescence after they came to the complainant's knowledge; defences not made in the answer of Stover to the original bill. The record did not show any replication made either to the original answer or to the answer of the executor.

On the hearing the bill was dismissed, and this appeal was brought to revise that decree.

Mr. John Sergeant Wise, *for the appellants*, contended that the decree was erroneous; because,

1st. Chilton never was, by express appointment or implication, the attorney at law or in fact of Fretz to collect said bond at all.

2d. If he was authorized at the time he received the bond to collect it when due, his appointment was made in ignorance of and without reference to the contingency of war, and in its very nature revoked by its breaking out.

3d. If he was agent or attorney with power to collect, and the breaking out of war did not revoke and terminate his agency, he had no right or power to take, and Stover had no power to pay anything but gold and silver.

4th. Granting to Chilton every power which Stover contends he had, the power he did exercise, in view of the mode in which and time it was exercised, was in collusion with Stover, to the destruction of his principal's debt, without possibility of benefit to any one but Stover and himself.

Mr. W. Willoughby, contra:

I. *We raise a preliminary point.*

There being no replication either to the original answer of Stover or to that of his executor answering the bill of revivor, both are by settled chancery practice to be taken as conclusively true "in all points," whether responsive to the bill or not;* the reason of this being that the plaintiff, by not replying, has excluded the defendant from the opportunity of proving his averments.

II. *Passing to the main case.*

1. The bill was filed August 9th, 1869, for the purpose of setting up a deed of trust that had been paid and satisfied in December, 1862, nearly seven years before, on the ground that payment had been made in Virginia bank notes and Confederate money, to an agent, without authority. It admits that the deed of trust was left with Chilton, as the attorney at law of the complainant, for record, and the bond, which it was given to secure, "*for collection at its maturity.*" Chilton died in 1867. The complainant did not disavow, or object to such payment, before the death of Chilton; nor did he do so at all before the commencement of the suit, at least two years after he had full knowledge of the fact and manner of payment.

2. Chilton, who received the payments and satisfied the deed of trust, had authority to receive payment. The whole case shows this. The bill itself states so. He was the trustee in the deed of trust.

3. It is contended that if there was an agency, it was put an end to by the fact of Chilton's being in an enemy's country during the war. But this is not true. "A person may have an agent in the enemy's country to collect debts due to him, and to preserve his property there." The fact that it may have been illegal to remit, did not make it so to receive. In addition, Chilton was trustee as well as agent. He was not only the proper person to satisfy the deed of trust, but he was the only one who could do so.

* Brinkerhoff *v.* Brown, 7 Johnson's Chancery, 222; Dale *v.* McEvers, 2 Cowen, 118.

4. But, it is denied that Chilton had authority to receive in payment Virginia bank notes or Confederate currency.

In *Hale* v. *Wall*,* payment of bonds in Confederate currency and Virginia State bank notes, to an agent, under circumstances similar to those of this case, was held to be a good payment, "*in the absence of instructions from the principal, not to receive such money.*"

The peculiar circumstances of this case have an important bearing upon the rule of law as to such payments. In Fauquier County, Virginia, such currency was, at that time, the only currency in circulation. It was in constant use; and by that standard contracts were made, and all the business of society carried on. Payments were constantly made in such currency; and, in this respect, it was like the notes of banks, with which all business had been carried on, and which were always regarded as good payments, unless objected to *at the time.*

The bill of complaint is framed upon the theory that the payment, made as it was, was the result of conspiracy between Stover and Chilton to defraud Fretz. This is denied by the answer, and there is no proof in support of the charge. The circumstances under which such payment was made show entire good faith. Mr. Chilton was an upright lawyer, as is shown, primarily by the fact that implicit confidence had been placed in him by Fretz himself.

The only testimony in the case is that of Fretz, the husband, a party to the case, and a party embittered by long-waged litigation. Such testimony is really of little value. If Chilton were alive, and we could have the benefit of *his* testimony, a very different state of facts might appear from that attempted to be made by Fretz, and on his making of which his only hope of recovery depends.

Mr. Justice DAVIS delivered the opinion of the court.

At the outset of this case we are met with the objection that there is no replication in the record; but this objection,

* 22 Grattan, 424.

on the authority of *Clements* v. *Moore*,* should have been made in the court below. Not having been made there, it will be considered as having been waived. It would work great injustice in this case to allow it to be taken here for the first time, for manifestly the submission was not on bill and answer, for proofs were taken, and it is to be presumed, in the absence of anything in the record to the contrary, that they were considered by the court in the disposition of the cause.

So far as the answer to the bill of revivor was concerned, no formal replication was required to avoid its effect as evidence in the cause. Nothing could be brought into the litigation by the bill of revivor besides the mere question whether the brother, brought in on the bill of revivor, was the executor of the will of Stover, and his legatee and devisee, for Catharine Fretz had been made a party to the original suit before answer was made to it.† The new defences, therefore, set up in the answer to the bill of revivor, were not pertinent to it, and cannot be considered in the case.‡

We are brought, therefore, directly to the question whether the payments by Stover to Chilton were, under the circumstances surrounding the parties, of any validity.

It is argued by the appellants that the bond was not left with Chilton for collection at all, but only for safe keeping until it matured; but the bill avers the fact to be otherwise, and, naturally, it must have been so. Chilton had been the attorney of Fretz and wife through a protracted and angry litigation, and, as the evidence shows, assisted at the compromise of it. This compromise was effected in February, 1861, and contemplated several transactions which could not be completed until after Fretz's return to Pennsylvania. Among these was the execution of the bond and deed of trust in question. As Fretz could not in person see that the papers were properly drawn, he intrusted that duty to Chil-

* 6 Wallace, 310. † Story's Equity Pleadings, § 377.

‡ Gunnell *v.* Bird, 10 Wallace, 308.

ton, and the additional duty of having the deed recorded. It was undoubtedly expected at the time that before the bond matured Fretz would hold frequent communications with Chilton, and this may account for nothing being said on the subject of collecting the bond. There was no necessity for it, as the bond had a long time to run, and, besides, no trouble was anticipated about the collection of it. It is, however, fairly to be inferred from the relation between the parties that Chilton had authority to collect and transmit, in the absence of any specific directions on the subject. And if war had not intervened, and he had not been told to collect the bond in legal currency alone, he would have been authorized to receive payment in current bank bills which passed at their par value in business transactions at the place where the contract was to be performed. But if this rule holds good when the country is at peace and undisturbed by civil commotion, it has no application in a state of war like that of the late rebellion. That rebellion effected a change in the status of the parties to this contract, and in the relations between the appellants and Chilton. Although the country was unquiet when these parties, in February, 1861, settled their differences, yet it would be a violent presumption to suppose that they anticipated the changed condition of things which soon after occurred. They doubtless acted on the belief that the difficulties which threatened the peace of society would be adjusted, and the monetary affairs of the country remain as they were. On this theory they concluded their agreement, and Fretz repaired to his home in Pennsylvania, leaving Chilton to see that Stover performed his part of it. It may be that it was not expected that the bond which Chilton obtained from Stover would be paid in specie, but at least it was expected that it would be paid in current bank notes, redeemable on presentation at the counter of the banks issuing them. At any rate, it was executed with reference to the standard of value then existing in the United States.

The war occurred, and Fretz was prohibited by the law of the government under which he lived from holding com-

munication with Virginia. If some persons did take the risk and cross the line in order to save their property, certainly Fretz, who did not choose to break the law and encounter the danger, cannot be held responsible for not going to Virginia and withdrawing the bond and deed of trust from the hands of Chilton. When, in 1864, he first heard from Chilton, he was told his papers were safe and would be kept so, as nothing but Confederate money could be collected, which was valueless. And not until 1866 did he learn the truth, although after the war closed he had frequent personal interviews with Chilton. This conduct of Chilton's shows his consciousness that he had attempted to wrong his principals and his unwillingness to disclose his culpability. But it is of no importance what he attempted to do, for his principals are not bound by his wrongful acts. If he was authorized when he received the bond to collect it when due, in bank bills which were current in Virginia at the time, this authority was conferred in ignorance of, and without reference to, the contingency of war, and in the nature of things was revoked when war broke out. The authority to collect was based on the power to remit, and this it was impracticable, as well as unlawful, to do. Besides this, the authority to receive bank bills at all, in the collection of debts, only rests on the theory that they pass as money at their par value by the common consent of the community, and can be used by the principal where he lives in the common transactions of life. But when this is not the case, and war has disturbed the country to that extent that the paper used in Virginia to pay debts is of no value in Pennsylvania, there is no longer any authority to take it by an agent living in Virginia in discharge of a debt due a citizen of Pennsylvania. If it were otherwise, then, as long as the war lasted, every Northern creditor of Southern men was at the mercy of the agent he had employed before the war commenced. And his condition was a hard one. Directed by his government to hold no intercourse with his agent, and therefore unable to change instructions which were not applicable to a state of war, yet he was bound by

the acts of his agent in the collection of his debts the same as if peace prevailed. It would be a reproach to the law if creditors, without fault of their own, could be subjected to such ruinous consequences.

If Chilton could not receive payment of the bond in Confederate paper and Virginia bank notes, neither had Stover the right to pay them. It was a void act on his part to attempt to discharge his debt in this way, as well as a fraud in Chilton to suffer him to do so. His obligation when the bond fell due was to pay it in the legal currency of the United States, and yet he tries to discharge it in paper worthless to Fretz, and with knowledge that, worthless as it was, it could not be sent to him. If it be true that he did not represent Fretz, still he had no right to do an act of gain to himself, but of no benefit to Fretz. Besides, what ground had he for supposing that Fretz gave authority to Chilton to make such a sacrifice? As a sensible man he must have known that this could not be so, especially as the debt was secured by a deed of trust on a valuable farm. It is impossible to escape the conviction that there was collusion between Chilton and Stover in the transaction, but whether this be so or not, the transaction itself was invalid.

In recognition that this might be the judgment of the court, Stover asks that his payments may be applied towards the debt for professional services due Chilton from the appellants. Without stopping to inquire whether this could be done, if the appellants owed Chilton anything, it is enough to say that the evidence shows that the indebtedness is the other way.

It is claimed that the Virginia bank notes at least should be treated as payment pro tanto, but, as we are advised, the difference between their market value and that of Confederate bonds and notes was merely nominal during the war, and when it ended the bank notes were worthless, being only secured by Confederate bonds.* Apart from this, the

* See the ordinances adopted by the Convention of Virginia in June and July, 1861, after the State had seceded.

evidence shows they were, when paid, equally with Confederate paper valueless in Pennsylvania.

The views taken of this case accord with *Ward* v. *Smith*,* and are supported by the Court of Appeals of Virginia in *Alley et al.* v. *Rogers*.† It follows, from what has been said, that the bond given by Charles Stover to Isaac Fretz and Catharine his wife has not been paid, or any part of it, and that the deed of trust to secure it is still a subsisting security in full force and effect.

DECREE REVERSED AND THE CAUSE REMANDED, with instructions to enter a decree for Catharine Fretz, survivor of her husband, in conformity with this opinion.

REVERSAL AND REMAND ACCORDINGLY.

SWEENEY ET AL. *v.* LOMME.

1. In a suit on a replevin bond given to the sheriff, where the question whether the proper party to sue is the sheriff or the party for whose benefit the bond was given, depends upon the code of practice of Montana Territory, this court will not reverse the decision of the Supreme Court of that Territory on the question; that being a question on the construction of their own code.
2. In a suit on a replevin bond the defendants cannot avail themselves of the failure of the court to render in the replevin suit the alternative judgment for the return of the property or for its value; even if that were an error for which that judgment might be reversed.
3. If a return be awarded in the replevin suit, the surety is liable on the condition of the bond to return, and this without execution or other demand for its return. The judgment establishes the liability.
4. Nor is this liability to be measured in this action by the value of the interest in the property of the attachment debtor, for whose debt it was seized by the sheriff. The value of the property at the time it was replevied, limited by the debt still due on the attaching creditor's judgment and the penalty of the replevin bond, are the elements of ascertaining the damages in the suit on that bond.
5. When it appears for the first time in the argument of a cause that the

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* 7 Wallace, 451. † 19 Grattan, 381.

existence of the judgment appealed from is not stated in the record, the court of its own motion may allow the plaintiff in error a certiorari and time to produce a certified copy of it.

ERROR to the Supreme Court of the Territory of Montana.

The case was thus:

The Civil Practice Act of the Territory of Montana thus enacts:

"Every action shall be prosecuted in the name of the real party in interest."

"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 it."

This enactment being in force, Lomme sued B. & C. Kintzing, in one of the District Courts of the said Territory, as partners, to recover a debt, and in that suit issued an attachment, under which the sheriff seized certain personal property, alleged to belong to the Kintzings, as security for the satisfaction of any judgment that might be recovered against them.

In this state of things one Watson brought replevin against the sheriff, to recover possession of this property; and—two persons, Sweeney and Holter, entering as sureties into a written undertaking to the sheriff, in $5000, conditioned "for the return of the property to *him*, if return thereof should be adjudged, AND for the payment to him of such sum as might be recovered against Watson"—the property was delivered to Watson.

In this action of Watson against the sheriff the jury found a verdict "for the defendant," on which the court entered a judgment to the effect that the sheriff "recover from the plaintiff, Watson, the possession of the property replevied in this action," and his costs.

The jury did not find the *value* of the property replevied, nor was any alternative judgment entered against Watson, as required by the already quoted section of the Civil Prac-

tice Act, for the *value* of the property in case a return could not be had.

No execution was ever issued on this judgment for the return of the property; nor was it ever returned or offered to be returned to the sheriff, by either Watson or his sureties.

Going back now to the original suit. In that suit Lomme obtained, October 27th, 1870, judgment against the Kintzings for $4954, with interest at 10 per cent. and costs, about $1300 of which was got on execution.

Thereupon he sued Sweeney and Holter, as sureties in the undertaking given to the sheriff in the replevin suit brought against him by Watson for the property attached by the sheriff at the instance of Lomme, as the property of the Kintzings; the object of this suit being to recover from the sureties the value of the property replevied, or so much thereof as might be necessary to satisfy the balance of the amount due upon the judgment obtained by Lomme against the Kintzings.

On the trial the plaintiff, Lomme, gave no evidence of the assignment, or of the *delivery*, of the replevin bond to him by the defendant in the action of *Watson* v. *The Sheriff;* and was permitted to prove the value of the property attached, at the time it was replevied by Watson, this value being fixed by witnesses at from $7000 to $10,000.

At the conclusion of the plaintiff's case, the defendant moved for a non-suit, on the ground that Lomme could not sue in his own name on the bond given to the sheriff. The court refused the non-suit, holding that the bond having been for the use of Lomme, and he being the real party in interest, he could so sue.

The evidence being all in, the defendants requested the court to charge:

That the only interest which the plaintiff could claim in the goods was just the interest which the Kintzings had at the time of the levy of the attachment on them, and that he could recover no greater amount from the defendants than the value of the interest of the Kintzings in them, at the said time, if he recovered at all.

Statement of the case.

That unless a writ *de retorno habendo* (that is to say, for the return of the property claimed in the complaint) had been issued to the proper officer previous to the commencement of this action, then that the verdict should be for the defendants.

That the undertaking sued on fixed the value of the property replevied at $2500 at the time the same was replevied, and the jury could not fix the value thereof to be any greater sum.

The court refused to give any one of these charges, though it did charge that the $1300 which Lomme had recovered on his suit from the Kintzings was to be deducted from what the jury might find.

The court charged that the plaintiff's damages should be assessed at such amount as the jury might find remained unsatisfied upon his judgment against the Kintzings, with interest, and his costs expended in Watson's suit against the sheriff, if they found that the value of the property replevied by and delivered to Watson at the time it was so delivered, and not returned to the sheriff or placed in subjection to the plaintiff's judgment against the Kintzings, was equal to the balance of the judgment and the amount of the costs; and if the property was not equal to the said balance and costs, that the jury should assess the plaintiff's damages at the amount they should find the said property was worth at the time of its delivery to Watson, and the amount of plaintiff's costs in *Watson's* suit against the sheriff, with interest on such amounts at ten per cent. per annum.

That the only question for the jury to determine was, whether possession of the property delivered to Watson was ever returned to Roberts, and to determine the value of the property so delivered to Watson and not so returned.

The jury found, November 10th, 1871, in favor of the plaintiff for $5000. The record as it came up to the court omitted to show, by the usual sort of entry, that judgment had been entered accordingly. However, there was in the record a notice by the defendant's counsel to the counsel of the plaintiffs, "that the defendants appealed to the Supreme

Court of the Territory from the judgment made and entered in the District Court of the Territory, in favor of the plaintiff and against the defendants." And also an order by the Supreme Court of the Territory that the cause of *Lomme* v. *Sweeney et al.*, "coming on for judgment on the appeal herein," it was ordered "that the judgment entered herein by order of the court below be affirmed with costs."

This the counsel of the plaintiffs in error had regarded as a sufficient evidence of the entry of a judgment for $5000 in the District Court, and an affirmance of it in the Supreme Court, and so brought the case here. The errors assigned were:

1. That Lomme was allowed to sue in his own name.
2. That the verdict in the replevin suit was in violation of the provision in the Civil Practice Act, since it did not find the value of the property, and there was no alternative judgment for that value, OR the return of the property.
3. That proper instruction had been refused.
4. That wrong ones had been given.

Mr. J. Hubley Ashton, for the plaintiffs in error, and Mr. Robert Leech, contra; the latter gentleman in his brief calling attention to the peculiar form of the evidence of the judgments in the District Court, which he suggested was no evidence of *what* judgment, if any, had been given; and Mr. Ashton informing the court that the peculiarity was due to a mere clerical error, that would be remedied by certiorari, if the court saw fit now to order one, and would suspend its judgment till one could issue and be returned. The court directed the argument to proceed, and a certiorari to issue.

[A certiorari having thus issued and been returned, showed the error to have been a mere clerical one, as alleged by Mr. Ashton.]

Mr. Justice MILLER delivered the opinion of the court.

1. The first error assigned and mainly relied on is that the bond on which the suit is brought having been given to the

sheriff, this action cannot be maintained by Lomme, the party for whose benefit it was really given.

This question has been decided differently by different State courts under precisely the same code of practice.

In several of these it has been held that the real party in interest is always the proper plaintiff, while in others it is held that the suit must be brought by the obligor in the bond for the use of the party in interest.

Without expressing any opinion of our own on the question, we hold that as it is one which arises under their own code of practice, we should, in this conflict of authority, adopt the ruling of the Supreme Court of Montana in the consideration of it. This assignment of error is, therefore, not well taken.

2. The next objection is that the verdict in the replevin suit did not find the value of the property, and that there was no alternative judgment for that value or the return of the property.

On this question also conflicting authorities are produced as to what judgment should have been rendered under codes precisely similar to the Montana code in regard to actions of replevin. And in the case of *Boley* v. *Griswold*,* in a direct appeal, we have held that a judgment in replevin may be good though the alternatives are not expressed. But we are not now considering whether that judgment was erroneous or not. No writ of error to that judgment is pending in this court. As the jury found for the defendant, the sheriff, and the court rendered judgment for a return of the property to him in a suit in which it had jurisdiction to render that judgment, it is not void because it did not add something else which it might have added.

The undertaking of the plaintiffs in error was "for the prosecution of said action (of replevin), for the return of said property, if return thereof be adjudged, *and* for the payment to the said defendant of such sum as may from any cause be recovered against said plaintiffs." The judgment, there-

* 20 Wallace, 486.

fore, which is valid until reversed, established one of the conditions on which the plaintiffs in error agreed to be liable, and as the property was not returned, either by them or by Watson, they are liable to an action on their contract.

3. Nor do we think the court erred in refusing to instruct the jury that Lomme could only recover the value of the interest of the Kintzings in the property. This would have been to try the action of replevin over again. If Watson had no right to the property he had no business to interfere, and if he thought some person not yet before the court had a paramount interest in it he should have returned the property and left such person to assert his own rights. Having replevied the property and failed to establish his own right to it in the suit thus provoked by him, he is but a trespasser in holding possession afterwards.

4. Nor do we think that it was necessary that an execution should have been issued to retake the property under the judgment in the action of replevin before the liability of the plaintiffs in error in the replevin bond accrued. They undertook, themselves, in express terms, that they would be liable if a judgment for return of the property was had, and not on condition that it could not be had on execution. This question was before us in the recent case of *Douglas* v. *Douglas*,* in which it was held that the judgment of *de retorno habendo* rendered the party liable on a replevin bond.

5. The bill of exceptions shows that the goods, at the time they were replevied, were worth from $7000 to $10,000. The verdict of the jury was for $5000, the penalty of the bond. As there is nothing in the record to show that there was not due to Lomme on his judgment against the Kintzings, including interest and costs, and for the costs and expenses of defending the replevin suit, the sum of $5000, all these elements of damages being before the jury, we cannot say that the verdict was for too much or that the judgment rendered on it was erroneous.

6. A point was made in the defendant's brief that there

* 21 Wallace, 98.

was no judgment found in the record, and an inspection of it showed that while the judgment of the Supreme Court of the Territory merely in terms affirmed the judgment of the District Court, the judgment of the District Court was not in the record, and, in fact, no judgment was to be found in the record which we could either reverse or affirm.

Under these circumstances, as the defendants in error had made no objection, by motion to dismiss the writ, or otherwise, before the hearing, the court heard the argument, and of its own motion gave the plaintiffs time to perfect the record by certiorari, if it could be done. The proper judgment has since been certified to this court, and it is now

AFFIRMED.

BAILEY *v.* MAGWIRE, COLLECTOR.

1. A claim of exemption from county and municipal taxation cannot be supported, any more than a claim from State taxation, except upon language so strong as that, fairly interpreted, no room is left for controversy. No presumption can be made in favor of the exemption; and if there be reasonable doubt, the doubt is to be solved in favor of the State.
2. The fact that in an act amending the charter of a railroad corporation special provision is made for ascertaining the taxes to become due by the corporation to the State (nothing being said about the manner of ascertaining other taxes), is not of itself enough to work an exemption of the property of the corporation from all taxation not levied for State purposes. Silence, in regard to such other taxes, cannot be construed as a waiver of the right of the State to levy them. There must be something said affirmatively, and which is explicit enough to show clearly that the legislature intended to relieve the corporation from this part of the burdens borne by other real and personal property, before such an act shall amount to a contract not to levy them.
3. A provision in such an act, prescribing a mode for ascertaining the tax due the State, by which provision the president of the company is required to furnish to the auditor of the State a statement, under oath, of the actual cash value of the property to be taxed, on which the company is directed to pay the tax due the State, within a certain time, to the treasurer, under penalties, does not amount to a contract, that the State will not pass any law to assess the property of the company for taxation for State purposes in a different manner.

Statement of the case.

4. But if a particular mode has been prescribed for assessing the property of a particular company that mode should be followed, until, in some way, a different mode is prescribed.
5. Whether or not an act prescribing such particular mode has been impliedly repealed by a general revenue act, not in terms repealing it, is a matter peculiarly within the province of the highest courts of the State, whose acts are the subjects of the question, to decide. And when such courts have decided the question, their decision is controlling.

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

Bailey and others, foreign stockholders, in the Pacific Railroad Company, a corporation existing and organized under different special acts of the State of Missouri, filed a bill in the court below against a certain Magwire, collector of State, county, school, and city taxes for the county and city of St. Louis, Missouri, to enjoin his collection of such taxes assessed for the year 1869, on the said railroad company under the general tax law of the State; the ground of the application being that by acts of the Missouri legislature governing the said railroad company, and which acts, as the company asserted, made a contract with it, the company—

1st. Was not liable for any county, school, or city taxes at all.

2d. Was not liable for State taxes under the act in virtue of which they had been assessed, but was liable for them only under another act; a special act relating to itself, and prescribing a manner for assessment, &c., different from the manner which had here been followed.

The case was thus:

The charter of the Pacific Railroad Company was granted in 1849, and counties, cities, and towns along its line were authorized to subscribe to it; but it contained no provision exempting its property from taxation.*

By an act of 1851, amendatory of the charter,† it was enacted that the capital stock, together with all their works

* Session Acts of 1849, p. 219.

† Id. 1851, p. 271.

and other property, and all profits which should arise from the same should be vested in the respective shareholders of the company forever, in proportion to their respective shares, and that the same should be deemed personal estate and be exempt from *all public charge or tax whatsoever*, for the term of five years from the passage of the act. This exemption, of course, would have expired in 1856.

At the time of the passage of this act, as before and since, there existed in Missouri, under its public statutes, a general scheme of taxation of all property in the State; this scheme embracing all property of corporations over and above their capital stock, as well as the property of citizens in the counties where it was situated.

In this state of things, the exemption given by the act of 1851 not having yet expired, the legislature of Missouri, on the 25th of December, 1852, passed another act amendatory of the charter. This act lent its credit to the company by issuing to it State bonds to the amount of $1,000,000, to be used after the expenditure of a like sum raised from other sources; and it gave to the company a large body of lands which Congress had given to the State.

By a twelfth section it made the following enactment as to taxation:

"SECTION 12. The said 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, at the actual cash value thereof, shall be *subject to taxation at the rate assessed by the State on other real and personal property of like value.*

"And for the purpose of ascertaining the value of the same, it shall be the duty of the president of said company, on the first day of February in each year, after such road is completed, opened, and put in operation, and declares a dividend, to furnish to the auditor of the State a statement under his oath, of the actual value of the road-bed, buildings, machinery, engines, cars, and other property appertaining to such completed road; and from said statement, the auditor shall charge said company with

the amount appearing to be due to the State, according to the statement furnished by the president of the company.

"And in case said company shall fail to pay into the State treasury, within thirty days after the first day of December in each year, the amount charged against said company as aforesaid, said company shall forfeit and pay to the State of Missouri, in addition to the sum with which said company may stand charged by the auditor, ten per cent. per month, after the expiration of said thirty days, on the amount charged to said company; which sum charged against said company, together with the ten per cent. per month hereinbefore specified, may be recovered in the name of the State of Missouri, by civil action, in any court of competent jurisdiction; and should the president of said company fail to make out and furnish to the auditor of the State a statement as herein required, said company shall forfeit and pay to the State $10,000 for such failure, which may be recovered in the name of the State of Missouri, in any court of competent jurisdiction.

"*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 the *said tax*, nor from the forfeitures and penalties in this section imposed."

This act of 1852 was accepted by the company, and the rights given by the act of 1851 were thus surrendered.

The road was completed in April, 1866; and after April, 1868, and in each year since that time—the company not having yet made any dividend—the president of the company made returns of its taxable property in the manner required by the twelfth section of the act of 1852; but not in any other manner.

At the time when the road was completed $3,614,500 of stock had been subscribed; of which $2,500,000 had been subscribed by the counties and towns along the line of it.

In 1866 the legislature of Missouri passed an act relating to the collection of revenue generally throughout the State. The mode prescribed for ascertaining the value of property of corporations generally, was different from that prescribed by the twelfth section of the act of 1852, for ascertaining

Statement of the case.

the value of the property of the Pacific Railroad. But the act of 1866 did not in terms nor by any *plain* implication repeal the twelfth section of the act of 1852. Whether it did so by any kind of implication was a question that came before the Supreme Court of Missouri, A.D. 1873, in *The Pacific Railroad Company* v. *Cass County*,* in which case the court decided that the act of 1866 did not repeal the said twelfth section in any way.

In August, 1871, this decision not then having been made by the said Supreme Court, the assessors for St. Louis County, *acting under the provisions of the act of* 1866, assessed a tax for *State*, county, school, and city purposes on the property of the Pacific Railroad Company, and seized upon its property, advertising it for sale. Thereupon the present bill was filed; by which various foreign stockholders in the company—the company itself declining to act, and remaining passive—sought to enjoin the collection of the tax.

Its positions, of course, were:

1st. That the twelfth section of the act of 1852, respecting the taxation of the road, was and remained a contract between the State of Missouri and the railroad company; that it specifically provided for the *whole subject* of the taxation of the road, and that in virtue of it the general revenue laws of the State were not intended to and did not apply to this particular company.

2d. That the said section accordingly exempted the company from taxation for county, school, and all other purposes except those mentioned in it.

3d. That if this were not all so, thus broadly stated, and if the section were not a contract as to all taxes, and did not, as such contract, furnish the only authority and rule by which this particular company was to be taxed, yet that until repealed it was the law governing the subject of taxation for State purposes; that, as was shown by the decision in the *Pacific Railroad Company* v. *Cass County*, it had never yet been repealed, and therefore that certainly, as

* 53 Missouri, 26.

to the taxes for State purposes, the collector was to be enjoined.

The positions of the collector, on the other hand, were—

1st. That after the time limited in the twelfth section—that is to say, as things turned out, after April, 1868—the property of the railroad company became subject to taxation, as any other property in the State, to State, county, municipal, and school taxation, and through any mode which the legislature of the State might see fit to prescribe.

2d. That the provisions of the said twelfth section constituted no contract in favor of the company as against the right of the State (after the time had elapsed during which the company was to be exempt from taxation) to provide by law for the taxation of the property of the company in any manner it should see fit, and for the general purposes for which any other property in the State was subjected to taxation; and finally,

3d. That in point of fact the said twelfth section had been repealed, impliedly, by the general purpose of the act of 1866, so that even as to taxation for State purposes, it no longer applied.

The court below sustained the defendant in everything excepting as to *city* taxes (which, for reasons not necessary here to be stated, it deemed illegally laid); decreeing, of course, that the defendant might lawfully collect not only the county and school taxes, as he proposed to do, but also, in the same way, the *State* taxes. The bill to enjoin him from so doing was accordingly dismissed, and from the decree dismissing it this appeal was taken.

It may be well enough to mention that in a case which was in effect one between these same parties, and lately before this court, it had been decided that the twelfth section of the act of 1852 created a *contract* between the parties, exempting the railroad from taxation until it was completed, and for two years afterwards, if it did not pay a dividend before the expiration of these two years.*

* Pacific Railroad *v.* Magwire, 20 Wallace, 36.

Argument against the right to tax generally.

Messrs. James Baker and G. F. Edmunds, for the stockholders, appellants:

I. It has been already decided by this court that the twelfth section, under consideration, makes a "contract" between the State of Missouri and the railroad company, that the company should be exempt by it from all taxation, until the road was completed and a dividend paid, or until two years after its completion. The two years having passed, the only question now to be considered, under the first of the points raised by the case, is as to the extent to which the road may be taxed, and the manner of taxation. What is the extent of that contract?

The language of the act, leaving out such words as do not affect the meaning, so far as this question is concerned, is:

"The Pacific Railroad shall be exempt from taxation until the same shall be completed and in operation, and shall declare a dividend, *when it shall be subject to taxation at the* RATE *assessed by the State on other property of like value.*"

The taxation to which the road is to be subject, after the happening of the events mentioned, is to be at a certain *rate*, that is, at the rate assessed by the State on other real and personal property of like value. No other or greater rate is authorized, nor is any other taxation than that provided by the act, contemplated. It is not a mere declaration, that after the payment of a dividend the property shall be subject to taxation in the manner and at the rate specified. The language employed is different. The property is first declared to be exempt from all taxation. This is to continue until the road is completed and declares a dividend, after which it is to be subject to a specified kind and amount of taxation. Does not this sentence, taken together, preclude the idea of any other or greater taxation? Is it not plain that the exemption is to continue as to all taxations except that particularly specified? It is not said that after these things take place it shall be no longer exempt. There are no negative words used. Were it not for the language which restores it, the total exemption would

still continue. The limitation of the time of the total exemption and of the amount of the subsequent taxation are obviously one sentence, and must be taken together. The clause should not be divided into separate and distinct subjects, so that it may be argued that the exemption granted is to cease when a dividend is declared, and by the process of division and argument, a new subject of the remainder of the sentence made, which shall provide what shall take place afterwards. The whole must be taken together, the latter part as limiting or qualifying the former. The extent and manner of subsequent taxation provided for is as much a limitation of the exempting words as is the completion of the road and the payment of a dividend.

That the whole subject of the future taxation of this road was intended to be provided for, appears by an examination of the whole section. The mode of assessing and collecting the tax mentioned is specifically provided with great particularity. A return of the property is to be made. The character of the return, the kinds of property to be returned, the person by whom, and the officer to whom, and the duties of the officer in charging the taxes, and of the officer who is to collect the same, and many other particulars are specifically set out. The tax is to be paid to the State treasurer. No mention is made anywhere in the act of any other taxation for county or other purposes. In the proviso, at the close of the section, it is declared "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*," &c. What tax? Clearly the tax specifically provided for after the total exemption ceased. It is not *taxes* but *tax*. The total exemption is from taxes for all purposes, while that authorized is a *tax* only, and is to be paid to the treasurer of the State, and that is plainly *the tax* from which the company is no longer to be exempt. Both the obvious meaning and the well-known rule, that the last antecedent should be referred to when the meaning is obscure, indicate that it is the tax pro-

Argument against the right to tax generally.

vided for. If it was the purpose of the act to leave the property subject to other taxation than that provided for, its authors would have employed language in this proviso that would embrace all taxation. The word "*said*," preceding and limiting the word "*tax*," points to the fact that the tax provided for is the one from which the company is no longer to be exempt.

The case of the *Raleigh and Gaston Railroad Company* v. *Reid*,* in this court—a case from North Carolina—is much in point. There an act had been passed by the legislature of North Carolina in these words:

"The said railroad, and all engines, cars, and machinery, and all the works of said company, together with all profits which shall accrue from the same, and all the property thereof, of every description, shall be exempt from any public charge or tax whatsoever, for the term of fifteen years, and thereafter the legislature may impose a tax not exceeding twenty-five cents per annum, on each share of the capital stock held by individuals, *whenever* the annual profits shall exceed eight per cent."

Subsequently to this act being passed—within the fifteen years, and the annual profits not yet exceeding eight per cent—the legislature of the State passed an act taxing the franchise of the road.

This court, in construing the first act, says:

"The only way in which the property of this company could be reached for taxation at all, was after the limitation of the fifteen years had expired. The legislature was then at liberty to tax the individual shares of the stockholders, whenever their annual profits exceeded eight per cent. When a statute limits a thing to be done in a particular mode, it includes a negative of any other mode. It was the manifest object of the legislature which incorporated this company to invite the investment of capital in the enterprise of building this road, and no means better adapted for the purpose could have been devised short of total immunity from taxation. As long as the capital was unproductive it contributed nothing to the support of the govern-

* 13 Wallace, 269.

ment, and even after it became remunerative its contribution was fixed by the terms of the charter, and could not, in any event, exceed twenty-five cents on the share of stock. The impolicy of this legislation is apparent, but there is no relief to the State, for the rights secured by the contract are protected from invasion by the Constitution of the United States."

The North Carolina act and the one we are considering are similar in principle. Neither in direct words negatives the right to impose a greater or different rate of taxation.

A similar doctrine is laid down in the *New York and Erie Railroad* v. *Sabine*,* in the Supreme Court of Pennsylvania.

These cases do but afford modern application of old law; law perfectly settled in the days of Hobart and Plowden. The former declares that affirmatives in statutes that introduce a new rule imply a negative of all else;† as the latter had declared before him,‡ that when a statute limits a thing to be done in a particular mode it includes a negative of any other mode.

II. The objection to which acts giving exemption from taxation by States are ordinarily and justly subject—the objection, namely, that by such exemptions the legislature of a State might render the State government powerless to carry on the affairs of the State, by taking away all power to raise funds for that purpose—does not apply here. The State is at liberty to tax the property in question at the same rate, and, consequently, to as great an extent as it does other property. The exemption contended for is from county and other local taxation. The State may appropriate all the tax it is at liberty to impose to its own uses. Counties, cities, and other municipalities, possess no power of taxation, except what is granted to them by the legislature of the State, and it may, if it sees fit, withhold such power to any extent. They are frequently not permitted to tax all the property the State does.

III. In the history of the Pacific Railroad, we find a sup-

* 26 Pennsylvania State, 244.

† Slade *v.* Drake, Hobart, 298.

‡ Stradling *v.* Morgan, Plowden, 206 *b*.

port to our interpretation of the twelfth section under consideration.

By the charter of the road counties, cities, and towns along the line of the road were authorized to subscribe to the capital stock of the company. The legislature was anxious to secure the construction of the road; a matter of plain importance to the State and to the public. By loans of its bonds, conditioned on subscription, by gifts of lands and otherwise, the State stimulated and encouraged subscriptions by counties and towns along the road. In view of this earnest desire to secure the construction of the road thus manifested by the State and by the municipalities, and the people along the line of the road; and of the fact that the counties and incorporated towns were themselves the principal stockholders, and consequently the proprietors of the road, and hence would have to pay the taxes themselves, who can question that an exemption from local taxation was proper, and was intended? The State might well claim and reserve to itself the right to tax the road after its completion, after it was able to pay dividends on its stock, and at the same time grant an immunity from municipal taxation.

IV. Finally. If the act in question is not a contract, and is subject to repeal, it has in fact not been repealed. This is adjudged in the case of *The Pacific Railroad Company* v. *Cass County*,* by the tribunal most to be respected in a decision on the meaning of the statute. The assessment, therefore, as to State taxes, at least, is made in a wrong way.

Messrs. B. A. Hill and H. A. Clover, contra.

Mr. Justice DAVIS delivered the opinion of the court.

It is contended on behalf of the appellants that the twelfth section of the act of 1852, provides for the whole subject of the taxation of the road, that it exempts the road from all taxes except State taxes, and furnishes the only rule and authority by which these taxes can be ascertained and collected.

* *Supra*, p. 219.

It was held by this court, in the case of *The Pacific Railroad* v. *Magwire*,* that this section created a contract between the State and the railroad company, exempting the road from taxation until it was completed, and for two years thereafter if it did not pay a dividend before the expiration of these two years.

The inquiry is whether this contract goes further and exempts the road, after it has been completed for two years, from all other than State taxation, and whether the State is precluded from providing another mode of valuation for State taxes.

It is manifest that legislation, which it is claimed relieves any species of property from its due proportion of the general burdens of government, should be so clear that there can be neither reasonable doubt nor controversy about its terms. The power to tax rests upon necessity, and is inherent in every sovereignty, and there can be no presumption in favor of its relinquishment. While it were better for the interest of the community that this power should on no occasion be surrendered, this court has always held that the legislature of a State, unrestrained by constitutional limitation, has full control over the subject, and can make a contract with a corporation to exempt its property from taxation, either in perpetuity or for a limited period of time. If, however, on any fair construction of the legislation, there is a reasonable doubt whether the contract is made out, this doubt must be solved in favor of the State. In other words, the language used must be of such a character as, fairly interpreted, leaves no room for controversy.

The present claim is of perpetual exemption from county and municipal taxation, quite as essential to the wants of the people as taxation for State purposes.

It is conceded that this exemption is not granted in express terms, but it is argued that, taking the whole section together, it arises by necessary implication. We do not think so. Immunity from all taxation was given until the

* 20 Wallace, 36.

road was built and in operation two years, but after this it is declared "that the road-bed, buildings, machinery, engines, cars, and other property of such completed road, at the actual cash value thereof, shall be subject to taxation at the rate assessed by the State on other real and personal property of like value." This is a declaration that the taxation imposed upon the property of this company shall not be different from the taxation imposed upon other similar property, which conforms to the constitutional requirement, "that all property subject to taxation shall be taxed in proportion to its value." If other property is charged with the payment of county, school, and municipal taxes, why not the property of this company? In no other way can the principle of equality in taxation, so essential to good government, be secured. If the legislature intended to apply a different rule in this case, it were easy to have said that the property of this company shall be subject to taxation "for State purposes." Instead of this it is declared to be "subject to taxation." This obviously means general taxation—such taxation as other property of like value is subjected to. No words of limitation are used, and none can be implied against the interests of the State. It is never for the interest of the State to surrender the power of taxation, and an intention to do so will not be imputed to it unless the language employed leaves no other alternative.

The motive for temporary exemption is apparent enough, because until the road was able to earn something taxation might bear heavily upon it. But with the completion of the road the reason for the exemption ceased, and it is difficult to see what inducement there was for the State to grant perpetual immunity from local taxation. In the original charter of the company, granted in 1849, there was no exemption from taxation. It is true the amendment of 1851 altered this so that the road was relieved of any public charge or tax for the period of five years, but this privilege expired in 1856, and the provisions of the act of 1852 on this subject were more favorable to the company. Besides receiving under this act a large body of lands, donated by

Congress to the State to aid in the construction of railroads, it was enabled to complete its entire road and run it for two years without paying any tax whatever. By this means it secured immunity from taxation until 1868, and any further immunity in this direction, if conceded by the State, would have been a mere gratuity. In view of all the legislation on this subject, it would seem quite clear that the General Assembly of Missouri, while recognizing in behalf of this road the propriety of temporary exemption from taxation, had no purpose to continue these exemptions indefinitely.

But it is said the section covers the whole subject of taxation, and as it provides for State taxes only it excludes any other. If in the declaratory part of it the road had been subject to "State taxation," there would have been plausibility in the argument, to say the least, that the legislature intended to waive other taxation. But the provision is that after the temporary exemption from all taxation ceases, by its own limitation, the property of the road shall be subject "to taxation" at the same rate as other property in the State. There is no restriction in this language, nor is there any rule of law by which a word can be imported to limit its meaning. It is true special provision is only made for the ascertainment and payment of a State tax, and nothing is said about the manner of ascertaining and paying other taxes. But this does not prove an intentional abandonment of all but State taxes. It proves nothing more than that the legislature thought proper, in the particular of State taxes, to modify the general revenue law so far as this corporation is concerned, leaving the provisions of this general law operative upon local taxation.

It would be a hard rule to apply to the legislation of a State to hold that the circumstance of making in the amendment to a charter of a railroad corporation special provision for ascertaining the tax due the State (nothing being said about the manner of ascertaining other taxes), works an exemption of the property of the corporation from all taxation not levied for State purposes. Silence on such a subject

cannot be construed as a waiver of the right of the State in this regard. There must be something said which is broad enough to show clearly that the legislature intended to relieve the corporation from a part of the burdens borne by other real and personal property. This was not done in this case, and the claim of exemption from local taxation cannot be sustained.

It is claimed, however, that even if this be so the State is inhibited from altering the special provision on the subject of State taxation. This provision prescribes a mode for ascertaining the tax due the State. The president of the company is required to furnish to the auditor a statement, under oath, of the actual cash value of the property to be taxed, on which the company is directed to pay the tax due the State, within a certain time, to the treasurer, under penalties. And the claim is that the State legislature is prohibited from passing any law to assess the property of the company for taxation for State purposes in a different manner. It is not so written in the statute, nor, indeed, can any proper inference be drawn from what is written that the legislature intended to contract with the corporation in this particular. It would be strange indeed if it were so, for the mode of assessment might not work well, and yet, if it formed the subject of a contract, it could not be changed. The principal thing in which the State and company were interested was the actual cash value of the property to be charged. This value was the basis of taxation, and it could not be a matter of moment how it was fixed, provided it were done correctly. In this result both the State and corporation had an equal interest. Both were interested in the means adopted only so far as they were efficient to secure the contemplated object. The exigency of the State required the revenue on the basis of actual value, and this, it is to be presumed, the corporation was willing to accord. At any rate it was the duty of the State, in justice to other property-owners, to use the appropriate means to ascertain this value. The ordinary method of doing this is by the instrumentality of officers appointed for

the purpose, but the State asked the railroad, through its president, to make the valuation, to which the corporation assented. This way of reaching the result was less expensive to the State, but more expensive to the corporation than the usual mode in which taxes are assessed. The president of the company could not make a true valuation without the expenditure of time and labor, and this repeated, year by year, as values of property constantly fluctuate. There is no presumption that he would not do it, conscientiously, according to his best judgment, but still it was a favor to the State for him to do it at all, and certainly no one can contend that a State cannot waive at any time a provision for its own benefit. Apart from this view of the subject, the provision in question was simply a mode for ascertaining the true value of the property to be taxed, and if, on trial, it should turn out not to be the best mode for the purpose, surely the legislature has a right to change it and adopt another. This no one will question, unless the legislature has surrendered its power over the subject by contract, which, in our opinion, has not been done in this case.

But, until the legislature appoints another mode for assessing and collecting the revenue due the State from this corporation, it must proceed in conformity with the provisions contained in the act of 1852.

The whole subject we have discussed recently came before the Supreme Court of Missouri in the case of *The Pacific Railroad Company* v. *Cass County*. The assessor of Cass County had levied taxes for both State and county purposes on the property of the company in the county, and the question was whether these levies were authorized. The court held that the taxes for county purposes were rightfully assessed, under the general revenue laws, but that the taxes for State purposes were unauthorized, because section twelve of the act of 1852 had not been repealed either by an express provision of a subsequent law or by necessary implication, and being in force, State taxes could only be collected in the way pointed out in that section.

Syllabus.

As it is the peculiar province of the highest court of a State to decide whether or not the method pursued in the assessment and collection of taxes is in conformity with the law of the State, this decision is controlling.

It was not made until after this suit was instituted, and, doubtless, not promulgated until the rendition of the decree. The assessors of St. Louis County, in this case, imposed taxes for State, county, school, and city purposes. The bill charged that the whole proceeding was illegal, and sought to restrain the entire levy. On demurrer the Circuit Court held that the city taxes were wrongfully levied, and issued the proper order restraining them, and dismissed the bill so far as it related to State, county, and school taxes. The court should have included State taxes in the restraining order. On this account the decree must be reversed and cause remanded, with directions to enter an order enjoining the collection of the State tax in the bill mentioned. In all other respects the decree is right.

DECREE REVERSED AND REMANDED.

FRENCH v. HAY.

In 1859 A. lent to B., who was largely interested in an embarrassed railroad, $5000 to buy certain judgments against the road, and B. having bought, in 1859 and the early part of 1860, judgments to the amount of $31,000, assigned the whole of them to A., absolutely. Subsequently, that is to say in August, 1860, A. made a transfer (so called) of them to B., "upon B.'s payment of $5000, with interest from this date;" and gave to B. a power of attorney of the same date, authorizing him "for me and in my name" to dispose of them as he might see proper. *Held*,

1st. That the so-called transfer was executory, amounting only to an offer that if B. would pay the $5000, B should become owner of the judgments; and that B. having, in May, 1861, gone South and joined the rebels there, and not come back till 1865, could not in 1868 file a bill, and on an allegation that A. had collected the judgments, claim the proceeds, less the $5000 and interest.

2d. That a bill making such an allegation and such a claim was demur-

rable; the bill not being one of discovery, and the complainant having complete remedy at law.

3d. That the road having been sold under a mortgage existing prior to the judgments and bought by A., who, under the laws of the State where it was, organized a new company, issued new stock, and having got, as an allotment to him, a quantity of such stock which he sold for more than enough to pay the judgments—on which satisfaction was then entered—such satisfaction was not in any sense a collection of the judgments.

4th. That if it could be so considered, yet that the sale to A. having been judicially declared void, and set aside, and the old company thus brought again into existence, and B. so reinstated in his old ownership of his stock in it, unimpaired by the sale, he could claim no proceeds of the judgments from A., because, if they were ever his (B.'s) by virtue of the transfer and power of attorney, they remained his still, since no one but the owner could enter satisfaction on them.

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

In 1855, James French and Walter Lenox, of Alexandria, Virginia, obtained from the legislature of Virginia a charter for a railroad between Alexandria and Washington, to be called the Alexandria and Washington Railroad Company. The two persons just named, with a third (a relative of French), owned all the stock; French owning three-fourths of the whole. The capital paid in being inadequate to make and equip the road, the company borrowed $60,000 and gave a deed of trust on the road to secure payment of the debt. The company soon afterwards and before 1859 incurred other debts, which were not secured by mortgage.

In this condition of things Alexander Hay, of Philadelphia, in 1859 advanced to French $5000, and French in the year just named and in the winter and spring of 1860 bought in $31,000 of these unsecured debts. Having reduced them to judgment he assigned the judgments to Hay. And Hay, on the 24th of August, 1860, executed to French these two papers; the first, a transfer, whose character (whether executory or executed) was the chief matter of contest in this case; and a power of attorney whose meaning was not disputed:

Statement of the case.

THE AGREEMENT TO TRANSFER.

"For and in consideration of the sum of $5000, with interest from this date, I hereby assign and transfer to James French, of Alexandria, Virginia, all the judgments, notes, or claims which I hold against the Alexandria and Washington Railroad Company, or against said railroad company, indorsed by the said French and Walter Lenox, or by either of them, to be held by the said French, his heirs and assigns, as his individual property, *upon his payment to me of the above-named sum of* $5000, with interest from this date.

"Given under my hand and seal this 24th of August, 1860.

"A. HAY.

"Witness,

"THOMAS HAY."

THE POWER OF ATTORNEY.

"To all whom it may concern: Be it known, that I, Alexander Hay, of the city of Philadelphia, do hereby constitute and appoint James French, Esq., of Alexandria, Virginia, my true and lawful attorney, *for me and in my name*, to make such disposition as he may deem proper of all the judgments, notes, or claims which I hold against the Alexandria and Washington Railroad Company, or against said company, indorsed by said French and Walter Lenox, or by either of them, to take all necessary steps for collecting the same, or pledge or hypothecate the same, or compromise or sell the same, on such terms as he shall deem proper, and do with them whatever he shall choose, as fully as if they were his individual property; and I do hereby, by these presents, ratify and confirm the same as fully as if I were present acting in person.

"Given under my hand and seal this 24th of August, 1860.

"A. HAY. [SEAL.]

"Witness,

"THOMAS HAY."

No part of the $5000 was ever paid by French to Hay.

In May, 1861, French went south and joined the rebels, Lenox going with him.

In April, 1862, the trustees in the deed of trust sold the road with the franchises, to pay the mortgage on it, and

Hay bought it, paying for it $12,500. Immediately afterward Hay, under the code of Virginia, formed a new company, called the Washington, Alexandria, and Georgetown Railroad Company, and issued new stock. A part of this new stock was allotted to Hay. He subsequently sold it; selling it for more than enough to satisfy the judgments which he held, by French's assignment of them to him, against the old road. He did accordingly satisfy those judgments.

In May, 1865, the rebellion being now suppressed, French and Lenox returned to their homes, in Alexandria, and caused a suit to be brought in the name of the old corporation, for which *they* had procured a charter, against the new company organized by Hay, to recover back the road and old franchises, on the ground that the sale to Hay was void. This suit was decided in favor of the old corporation. The sale was set aside and the old corporation reinstated in its possessions as of ancient and former right.

French now (July, 1868) filed a bill—the bill in this case—against Hay. It recapitulated several of the facts above mentioned, charging that in 1859 Hay agreed to advance to the complainant the necessary money to purchase the outstanding debts of the Alexandria and Washington Railroad Company, and that he did advance the $5000 for that purpose; that in pursuance of the arrangement the complainant, in 1859, and in the winter and spring of 1860, bought up the debts of the company to the amount of $31,000; that the debts thus bought were reduced to judgment and assigned to Hay; that in the purchase the complainant employed and paid out of the money advanced by the defendant something less than $5000, and *that all the money over and above the said sum of* $5000 *paid out in purchase of said debts* (a list of which was attached to the bill) *was furnished and paid out of his own proper money and resources, in the expectation that the same would be repaid or otherwise satisfactorily accounted for by the defendant on a settlement.* The bill then averred that on the 24th of August, 1860, the defendant, by the written assignment and power of attorney already quoted, transferred and assigned

to the complainant all the said claims so purchased, reserving the repayment of $5000 to cover the advances made, and charged that notwithstanding the said assignment the defendant afterwards collected all the said judgments and claims, and appropriated the proceeds thereof to his own use.

Upon these averments an account was prayed for of all the judgments and claims, and a decree that the defendant pay to the complainant all sums of money arising therefrom, with interest, after deducting the said sum of $5000, with any interest due thereon, so as aforesaid advanced to the complainant.

The answer admitted the execution of the transfer and power, but asserted that they were to take effect only on payment of the $5000; that French on the outbreak of the rebellion had joined it and abandoned Alexandria; that the defendant was not bound to wait the issue of the rebellion and to see if French would ever return.

The answer alleged also that independently of all this, French had a complete remedy at law; and that the bill was demurrable.

The court below dismissed the bill and French appealed.

Mr. F. P. Stanton, for the appellant; Messrs. J. B. Stewart and A. G. Riddle, contra.

Mr. Justice STRONG delivered the opinion of the court.

It is plain that no other equity is asserted in the bill of the complainant than such as grew out of the alleged assignment and power of attorney of August 24th, 1860. There is none arising out of payments made by the complainant in the purchase of the debts and judgments. So far as it is charged by the bill, every dollar that was paid for the judgments was paid with the defendant's money, advanced by him to the complainant for the purchase. It is true the allegation is made that all the money over and above the $5000 advanced, that was paid in the purchase of the debts, was furnished by the complainant out of his own resources, but it is

not averred that any more than $5000 in all were paid. It is, therefore, the alleged assignment of August 24th, 1860, alone which is the basis of the complainant's equity.

That instrument, however, called an assignment, was, at most, but an executory agreement to assign. Construed with the power of attorney made at the same time, it admits of no other construction. The instrument was signed by Hay alone. French, the complainant, did not sign it, and it is not averred that he promised to pay the $5000. Hay undertook only that French should hold the judgments and claims "upon his payment" of the stipulated consideration, with interest from the date. And the power of attorney given by Hay to French at the same time was an authority to deal with the securities in the name of Hay, and for Hay. The power was worse than useless, if the intention of the parties was that a present ownership of the judgment should be vested in French, without the payment of the agreed price. The utmost effect, therefore, that can be given to these two instruments of August 24th, 1860, upon which alone the complainant must rely, is that they amounted to an offer that if French would pay the $5000 he should be the owner of the judgments. The transmission of the title and the payment of the price were intended to be contemporaneous. If this is so, how long was the defendant under obligation to hold the offer extended? No time for its acceptance was mentioned. The offer was made in August, 1860. The complainant never accepted it. No acceptance is averred in his bill. He never paid or tendered the $5000; he never assumed to pay it. He asserted no claim to the judgments until 1868, when he filed this bill. Now, while it is true that in equity time is generally not considered as of the essence of a contract, it is only true when compensation can be made for its lapse, and the rule is inapplicable in case of an offer that requires acceptance to make a contract. In May, 1861, the complainant having given no indication of acceptance, and having, so far as it appears, asserted no claim to the judgments, abandoned his home, and did not return until 1865. Not until three years after his return

did he commence this action. Was the defendant under obligation to remain inactive and make no efforts to obtain the debts due him, uncertain whether French would ever elect to pay the $5000 and take the judgments? We think not. Nothing in the instruments of August, 1860, imposed such an obligation. To say the least, therefore, it may well be doubted whether the complainant has any right under those instruments that a court of equity will enforce.

And were it conceded that, by the instrument through which he claims, French became the owner of the judgment, as between himself and Hay, we do not perceive how the concession could aid him in this case. If, as the bill avers, Hay collected the judgments and now holds the money for the use of the complainant, there is a complete remedy at law. This is not a bill for discovery, and the aid of a court of equity is not needed.

But the judgments never were collected. It is not pretended that the judgment debtors ever paid anything, or that French or Lenox, who were sureties for the payment of the debts, ever paid anything. In 1862 the railroad and property of the railroad company was sold under a deed of trust which the company had given prior to any of the judgments, and Hay became the purchaser. He paid none of the purchase-money with the judgments he held. He could not have paid with those judgments, for his bid was less than the sum due under the deed of trust, and that sum was prior in right to any of the judgments. Nor is there any attempt to prove that any part of the purchase-money was paid by the judgments. The evidence shows that after Hay purchased, a new company was formed; that a portion of its stock was allotted to him; that he subsequently sold the stock so allotted for a sum greater in amount than the aggregate of the judgments he held against the old company, and that after the formation of the new company, he caused satisfaction of the judgments to be entered of record. In no other manner than this is it now pretended that the judgments have been collected. The presumption of collection that might arise from the entries of satisfaction, if unex-

plained, is rebutted by the proof that all the defendant received was the proceeds of sale of his stock in the new company, by no possibility the fruit of the judgments. And the complainant cannot claim an interest in that stock or its proceeds, without affirming the trustees' sale of the railroad, and the subsequent formation of the new company, followed by the issue of the stock. Such a sale, if valid, would have destroyed the old company, three-quarters of the stock of which the complainant owned. But the sale has been judicially determined to have been invalid, the old company has recovered the property, and the new has been consequently adjudged never to have had a legal existence. The consequence of this is that the complainant now holds his full interest in the old company, unimpaired by any sale. After this it is impossible to see how he can assert that any part of the new stock or its proceeds belonged to him; and if it did not, nothing has been collected for him, even if he can be considered the owner of the judgments. Nor has he been injured by the entries of satisfaction, for if he became the owner of the judgments by force of the instruments of August 24th, 1860, as he avers, he is the owner still, notwithstanding the entries of satisfaction, for no one but the owner could cause valid acknowledgments of satisfaction to be made. For these reasons the decree must be

AFFIRMED.

FRENCH, TRUSTEE, *v.* HAY ET AL.

1. A. filed a bill against B., a purchaser of property at a sale made by C., a trustee to sell, charging both B. and C. with collusion and fraud in the sale, and praying discovery from both parties, that the sale might be set aside, &c., and that B., who had taken possession of the property, might be charged with its rents, but not making such a prayer as to C. Both B. and C. appeared and answered. The court charged B. with rents, but did not charge C. B. appealed, and the decree charging him being affirmed, and a master having reported to the inferior court the amount of rents, a final decree was there made against B. for them. At the same time that this decree was made (B. being insolvent), the

complainant asked and got leave to file an *amended* bill against the two parties; Mr. D., an attorney of the court, appearing in court—but without any authority from C.—and consenting that such a bill should be filed. The amended bill was accordingly filed, alleging that B. was insolvent; that *C.* was chargeable for the rents as well as B., and that both were chargeable for use of certain furniture on the premises when B entered them. Neither B. nor C., apparently, had actual knowledge of the filing of this bill. And a decree was entered, *pro confesso*, against C. for both the value of the rents and the injury to the furniture. On C. getting knowledge of this decree it was vacated, and notwithstanding opposition by him a decree for rents was entered, leaving the case open as to both parties in respect to the furniture. B. and C. then answered *as to the whole case*.

Subsequently (being entitled as respected citizenship to do so) they removed the case into the Circuit Court of the United States under the act of March 2d, 1867, which court set aside *all* the decrees in the State court and, ordering that the case should stand for hearing on bill, answer, and pleadings, opened the entire suit as if nothing had been done anywhere else in any part of it. C. answered denying all the material allegations of all the bills; and testimony being taken no proof of their truth appeared as to him. The Circuit Court annulled the decrees, *in toto*, in the State court against *both* B. and C., and dismissed the whole bill. A. appealed to this court. *Held*,

First. That the decree against B. was wrongly vacated; that as to *him* the decree in the State court on the original bill for rents was *res judicata;* and that *that* decree stood as though no amended bill had been filed, and unimpeachable as to everything covered by it; while as to the other matter (the damage to the furniture), the Circuit Court of the United States should by issue directed to a jury, or by reference to a master, have ascertained it and have decreed accordingly.

Second. That the State court committed a gross error in entering a decree against C. for rents, on the amended bill, where the original bill had not prayed that he should be charged with them, and that his answer denying, as it did, all the material allegations of both bills against him, and those allegations being otherwise unsupported, the decree of the State court was, as to *him*, rightly vacated, and the bill, as to *him*, rightly dismissed.

2. When a case has been removed from a State court, into the Circuit Court of the United States, under one of the acts of Congress relating to such removal of cases (in this case the act was that of March 2d, 1867), an objection that the act has not been complied with in respect of time and other important particulars, will not be listened to in this court, the point not having been made in the court below until three years after the removal made, and when the testimony was all taken and the case ready for hearing. Nor ought it under such circumstances to have been listened to in the Circuit Court. It came too late, and must be held to have been conclusively waived.

Statement of the case.

APPEAL from the Circuit Court for the Eastern District of Virginia; the case, though between the same parties as the preceding one (that is to say, between French and Hay), not relating to the same transactions, and being thus:

In October, 1858, McCullough owning a house and lot in Alexandria, Virginia, and being indebted to Harper in the sum of $3000, evidenced by six negotiable notes of $500 each, conveyed the premises in the month named, to Brent, in trust to secure the payment of the six notes. He then leased the premises, together with certain furniture then in the house, to James French, for five years at a rent of $600 a year; and in March, 1859, conveyed the premises to Robert French in trust for the wife of the said James; assigning at the same time to Robert French the lease previously made to James; the money to be paid upon which would in the course of the five years amount to exactly $3000, and which it was agreed should be paid to Harper in extinguishment of his debt of that amount.

On the execution of the lease James French went into possession.

The rents were applied as agreed on, so that when the rebellion became flagrant, as it did in the spring of 1861, all the notes had been paid, excepting one. Five hundred dollars were, therefore, thus due by McCullough to Harper, and were still secured by the deed of trust to Brent.

In this state of things McCullough, the debtor, died; Harper, his creditor, went south into the rebel lines, indorsing the note for the $500 and leaving it with his wife in Alexandria. James French and wife followed Harper, leaving a Mrs. Brandy, a sister of French's, in occupation of the house and furniture; and things in Alexandria got into such confusion as in a civil war might occur in a place situated as it was.

With the death of McCullough and the withdrawal south of the other original actors, two new persons appeared. One Alexander Hay, a citizen of Pennsylvania, a creditor of McCullough, who upon his death applied for and got letters of administration from the proper court at Alexandria on

McCullough's estate; and the other, J. B. Stewart, a citizen of New York, who alleging himself to have become owner of the remaining note of $500 due by the estate of McCullough, applied for and got in the usual court at Alexandria, an order by which Hay was substituted as trustee in the place of Brent, now alleged to be in the Confederate army.

Hay, in order, as he alleged, properly to administer on McCullough's estate as the legal administrator of it, and also to execute as substituted trustee, his newly received trust, now, December, 1865, advertised and sold as trustee, under the deed of trust executed to Brent in 1858, the premises conveyed by it; Dr. Ripley, a surgeon in the army, bidding them off as purchaser at $2600; *the deed of McCullough to Robert French in trust for the wife of James French, executed in March*, 1859, *having never been put on record until about a month before this sale, and neither Hay nor Dr. Ripley apparently having ever heard of it until after the sale was made.*

Dr. Ripley, now hearing of the deed to French, and fearing that there might be trouble about title, and about getting possession, refused to pay for or to take the property; and Stewart being willing to take his bid, Ripley assigned the bid to him. But Hay too was alarmed, and some allegations reaching his ears that Stewart when he made the motion for the substitution of a trustee in the place of Brent, did *not* own the remaining note of $500 as he had alleged he did, would take no money from nor execute any deed to Stewart. In short, after the sale he did nothing whatever, and his connection with the property ended. Stewart, however, got possession of the house under an arrangement between himself and its then occupant, and being once in, held on to the occupancy.

In February, 1866, the rebellion being now ended, and Harper and the other parties who had gone south having come back to Alexandria, their old home, Robert French, as trustee of Mrs. James French, filed a bill in the County Court of Alexandria, against Stewart, Hay, Brent et al., alleging that Stewart was not owner of the remaining $500 note, when the order of court putting Hay as trustee in the

place of Brent was made, and that the note was at that time still owned by Harper, and that the sale by Hay was collusive and void; that the note had since been paid, and that so the whole $3000, which the property was conveyed to Brent to secure, was now discharged; and the complainant entitled to hold the property upon the trusts created for Mrs. Robert French by the deed of March, 1859, there being now no prior trust. The prayer of the bill was:

"That the defendants, Stewart and Hay, may make full and true discovery of all their transactions connected with the sale, by the said Hay, of the property described, to the said Stewart, that the sale may be set aside, and the deed made in pursuance thereof delivered up and cancelled; that the said *Stewart* may render an account of the rents and profits of the said property while in the use and occupation thereof."

No prayer, as the reader will observe, was made that *Hay* might be charged with rents and profits.

On the 2d of June, 1866, Stewart filed his answer; the same being sworn to and signed in the ordinary way, and signed also by his attorney, C. F. Doddridge, Esquire.

On the 8th of December following, the court decreed that the sale was void; that the property should be restored to the complainant; that *Stewart* was chargeable with the rents and profits, and that the case should be referred to a master to ascertain the amount. An appeal was thereupon taken by *Stewart* to the proper court of the State—the State District Court—which affirmed the decree of the County Court. Upon the return of the case to the County Court it was referred to a master to take an account of the rents and profits, pursuant to the decree.

The master reported that Stewart was chargeable with $3276, from which sum was to be deducted the payments made by him, amounting in all to $887, and leaving a balance against Stewart of $2389, and on the 2d of June, 1869, the court decreed that he should pay that sum with interest from the 26th of October, 1868. This the reader will understand was for rents and profits of the real estate only, and not for use of furniture.

Statement of the case.

At the same time when this decree was made leave was given to the complainant to file an amended bill; "William Dulany" (said the record), "an attorney of the court, appearing in court and consenting thereto."

He thereupon, June 7th, 1869, did file such bill, charging that *Hay* had participated in the frauds of Stewart, and should be held equally liable with him for *rents*, and that *both* were chargeable in addition for loss and damage touching the *furniture* in the house when Stewart took possession. The bill was taken as confessed by Hay, and on the 21st of August, 1869, it was decreed that he should pay to the complainant on account of rents and for the detention and damage to the furniture, $3389, with interest from the 26th of October, 1868, the date already named in the former decree. Thereafter Hay and Stewart applied to the court to vacate the decrees against them, and for leave to appear and answer; the grounds of their application being that no process upon the amended bill had been served upon them, and that they had no notice or knowledge of its pendency against them until after the decree *pro confesso* had been entered, nor until a short time before the application now made; and Hay averred and showed by his own oath and by other proofs that Mr. Dulany, the attorney, who had acted for him in that behalf had done so by a misunderstanding, wholly without his consent or knowledge; and he set forth a variety of facts which, if true, made a complete defence to the bill.

On the 23d of December, 1869, the court vacated the decree of the 21st of August, 1869, against Hay, but at the same time and in the same order decreed against him for the sum of $2389, with interest from the 26th of October, 1868, on account of the *rents*, and ordered that an issue should be tried on the law side of the court touching the *furniture;* and that Hay and Stewart should both have leave to answer. They thereupon answered as to the whole case; denying each and all of the allegations both of the original and the amended bill. On the 8th of February, 1870, they moved the court for an order for the removal of the case

to the Circuit Court of the United States for that district, pursuant to the act of Congress of the 2d of March, 1867. An order was made and the cause was removed accordingly. The whole proceedings in the State court, including, of course, all the bills and the answers, among the latter, the answer of Hay denying each and all of the allegations of the bills, were thus transferred as the record for the circuit of the United States.

In the Circuit Court of the United States Hay and Stewart severally moved the court to vacate the several decrees against them made by the Circuit Court of the county. These motions were heard, and the several decrees were annulled, and it was "ordered that the case do now stand for hearing on the bill, answer, and pleadings." Testimony was thereafter taken, by agreement, upon both sides. On the 13th of October, 1873,—near three years after the case had been removed, and when it was ready for hearing—the complainant moved the court to remand it to the court whence it came, he insisting that the act of Congress under which the case had been removed, had not been complied with in respect to time and several other important particulars. The motion was overruled. The case was then heard upon the merits and the bill dismissed.

The complainant appealed to this court, and the case was thus brought here for review.

In the argument here the objection touching the removal of the case from the State court was renewed, and the case otherwise discussed both on technical points and on merits.

Mr. W. Willoughby, for the appellant; Messrs. H. H. Wells and G. W. Paschall, contra.

Mr. Justice SWAYNE delivered the opinion of the court.

The objection made in the court below touching the removal of the case from the State court, and which objection has been renewed here, was not made in the court below until the testimony was all taken, the case was ready for hearing, and nearly three years had elapsed since the trans-

fer was made. The objection came too late. Under the circumstances it must be held to have been conclusively waived.*

We shall consider the record as regards Stewart and Hay as if they were not joint defendants. The case as to each presents a distinct aspect, and requires a separate examination.

I. AS TO STEWART.

On the 2d of June, 1866, he filed his answer to the original bill. It was subscribed and sworn to by himself, and signed by Mr. Doddridge as his counsel. He thus entered his appearance and placed himself within the jurisdiction of the court. The proceedings thereafter, including his appeal to the State District Court, appear to have been in all things regular down to the removal of the case to the Circuit Court of the United States. The decree of the 8th of December, 1866, from which the appeal was taken, was a final one.† When affirmed by the appellate court it was conclusive of the rights of the parties as to everything covered by it, and could not be affected by any action of the Circuit Court of the county or of the United States in the subsequent progress of the case. That decree was *res judicata* of the most solemn character.‡

The decree of the 2d of June, 1869, ascertained the amount due from Stewart for the rents, and ordered that he should pay it. This terminated the litigation under the original bill. After the close of that term—except for reasons not claimed nor shown to exist—the court had no power to revoke or modify this decree.§ Nothing of the kind was attempted. At the same time that this decree was entered leave was given to the complainant to file the amended bill,

* Taylor *v.* Longworth, 14 Peters, 174; Executors of Brasher *v.* Van Cortlandt, 2 Johnson's Chancery, 242; Skinner *v* Dayton, 5 Id. 191.

† Forgay *v.* Conrad, 6 Howard, 204; Thomson *v.* Dean, 7 Wallace, 342.

‡ Campbell *v.* Campbell, 22 Grattan, 649; Thomson *v.* Albert, 15 Maryland, 282; Hammond *v.* Inloes, 4 Id. 139.

§ Cameron *v.* McRoberts, 3 Wheaton, 591; Bank of the United States *v.* Moss et al., 6 Howard, 31; United States *v.* Glamorgan, 2 Curtis, 236.

William Dulany, Esq., an attorney of the court, "appearing in court and consenting thereto." The amended bill was filed on the 17th of that month. It sought to make Hay liable also for the rents, and Hay and Stewart liable for the loss and damage as to the furniture. This did not in any wise affect the previous litigation and decrees as to Stewart under the original bill. Those decrees continued to stand as if the amended bill had not been filed.* The general rule is that an amendment of the bill gives a defendant the right to answer as if he had not answered before.† In the state of the case which existed when the amendment here in question was made, no amendment could be allowed. It was then too late. A final decree covering the entire original case subsisted. The court had no power over that decree and never attempted to exercise any. The further relief sought could be reached, if at all, only by a supplemental bill.‡ It was a gross error to allow the amended bill to be filed. But the point was not made in the State court nor in the court below, nor in the argument here. The case, according to our views, can be properly disposed of without reference to it. We have, therefore, laid it out of view. An amended bill is esteemed a part of the original bill and a continuation of the suit. But one record is made. But the amendment is sometimes of such a character that it is regarded as an independent graft upon the original case and the beginning of a new *lis pendens*.§ Stewart complained that Dulany appeared and acted for him as to the amended bill without authority. Whether Dulany did so or not is immaterial. New process is neces-

* Young *v.* Frost, 1 Maryland, 394; Washington Bridge Co. *v.* Stewart et al., 3 Howard, 413; Walsh *v.* Smyth, 3 Bland, 20; Keene *v.* Wheatley and Clarke, 9 American Law Register, 60.

† 1 Daniell's Chancery Practice, 411 (Perkins's edition of 1865).

‡ Thorn *v.* Germand, 4 Johnson's Chancery, 363; Shephard *v.* Merrill, 3 Id. 423; Chandler *v.* Pettit, 1 Paige, 168; Stafford *v.* Howlett, 1b. 200; Bowen *v* Idley, 6 Id. 46; Ross *v.* Carpenter, 6 McLean, 382; Walsh *v.* Smyth, 3 Bland, 20; Sanborn *v.* Sanborn, 7 Gray, 142; Verplanck *v.* Mercantile Insurance Co., 1 Edwards, 46.

§ Miller *v.* McIntire, 6 Peters, 61; Walsh *v.* Smyth, 3 Bland, 20.

sary unless waived upon a supplemental bill and a bill of revivor, but not upon an amended bill as to defendants who are already before the court.* Being in court they are bound to take notice of the filing of such bills as of any other proceeding in the case. In the English practice the complainant is required to serve a copy of the amendment upon the solicitor of the defendant,† but this, it is believed, is rarely if ever done in the courts of the States, unless required by an established rule of practice or a special order in the case. In the courts of the United States the subject is regulated by the twenty-eighth rule of equity practice. The State court, by an order of the 23d of December, 1869, directed an issue to be tried as to the furniture, and gave Stewart leave to answer the amended bill.

This was all he had a right to claim, and left him nothing to complain of. In this condition of things the case went to the Circuit Court of the United States. That court possessed the same power in the case as the State court while the case was before it, no more and no less. It certainly did not sit as a court of errors or appeal with jurisdiction to reverse the final decree of the State court made under the original bill. That would be contrary to the intent and meaning of the act of Congress under which the removal was made. Its authority as to Stewart was limited to the allegations of the amended bill in regard to the furniture. So far as he was concerned it presented no other subject of litigation, and nothing else was open to examination under it. If that bill had not been filed there could have been no transfer as to him. On the 22d of October, 1872, the court below, as before stated, set aside all the decrees of the State court and ordered that "this case do now stand for hearing on the bill, answer, and pleadings." The entire case was thus opened anew, as if nothing had been done under the original bill by the State court. This was clearly an error. We think the liability of Stewart as to the furniture was well made out by the complainant.

* Cunningham *v.* Pell, 6 Paige, 657; Longworth *v.* Taylor, 1 McLean, 516.
† Woodhouse *v.* Meredith, 1 Jacob & Walter, 207.

The court below, by an issue at law, as directed by the interlocutory order of the State court, or by a reference to a master, should have ascertained the amount and decreed accordingly.*

The order vacating the decrees of the State court as to Stewart, made under the original bill, is VACATED. The final decree dismissing the bill as to him is REVERSED, and the case will be REMANDED to the court below with directions to proceed

IN CONFORMITY WITH THIS OPINION.

II. AS TO HAY.

He also filed an answer to the original bill. Like Stewart's, it was subscribed and sworn to by himself, and was subscribed by counsel. He, too, was bound to take notice of the filing of the amended bill. But the original bill claimed no decree against him. The amended bill, as to him, made an entirely new case. It set up the first claim against him as to the rent and the furniture. His own affidavit and the other proofs showed clearly that Dulany had no authority to appear as his counsel; that he had no actual knowledge of the filing of the bill until after the decree *pro confesso* was taken against him, and that he had a complete defence. It is within the discretion of a court of equity, upon a proper showing, to set aside a decree *pro confesso* upon such terms as it may see fit to prescribe.†

The State court well exercised its authority in setting aside the decree against Hay, but it committed a gross error in decreeing against him *eo instanti* the payment of $2387 on account of the rent, leaving the case open only as to the furniture. To revoke the first decree because he had been ignorant of the filing of the amended bill, and, hence, had made no defence, and then to renew it without giving him an opportunity to be heard, was, to say the least, a singular

* Kelsey *v.* Hobby, 16 Peters, 269.

† Wooster *v.* Woodhull, 1 Johnson's Chancery, 539; Beekman *v.* Peck, 3 Id. 415.

anomaly. So far as he was concerned the claim as to the rent and the furniture rested upon exactly the same foundation. If it was proper that he should be heard as to one it was equally so that he should be heard as to the other. There was no difference. The same considerations applied with respect to both. In the renewed decree damages as to the furniture might as well have been included as the charge for the rent. It was no less wrong as to the latter than it would have been as to the former. Time and opportunity to defend being refused, the decree was in effect another decree *pro confesso*. It certainly was not a decree upon the merits after a hearing upon the charge as to the rents.

After the transfer of the case he applied to the Circuit Court of the United States to vacate this decree upon the same showing as in the State court, and it was done. A bill for fraud could not have been maintained, because there was no foundation for the charge. A bill of review would not have availed him, because there was no error apparent upon the face of the decree nor upon the record. The circumstances under which the decree was rendered were very peculiar. They have been stated. The proper mode of seeking redress was by motion upon the showing which was made.* The Circuit Court had the power to do what it did and properly did it. This was less expensive, less dilatory, and much to be preferred to a bill, even if the same relief could have been had in that way. It was also more in accordance with the spirit of sound equity practice.

The entire case made by the bill as to Hay was thus opened. His answer denied all the material allegations against him, and we find in the record no evidence whatever to sustain them. No effort seems to have been made to procure any.

* Kemp *v.* Squire, 1 Vesey, Sr., 112; Robinson *v.* Cranwell, 1 Dickins, 1; Erwin *v.* Vint, 6 Mumford, 267; Pickett's Heirs *v.* Legerwood et al., 7 Peters, 144; see also Tilden *v.* Johnson, 6 Cushing, 354; Balch and wife *v.* Shaw, 7 Id. 284; Hall *v.* Williams, 1 Fairfield, 278.

The bill as to him was rightly dismissed, and in this respect the decree of the Circuit Court is

AFFIRMED.

NOTE.

AT the same time with the preceding case was argued, and just after its adjudication was adjudged, another which here follows, an offshoot from the first case, issuing from it as a branch from a main stock. It is requisite, of course, that before reading the smaller case now given, the reader should be possessed of the larger one already reported.

FRENCH, TRUSTEE, *v.* HAY.

When, in a case which is properly removed from a State court, under one of the acts of Congress relating to removals, into the Circuit Court of the United States, a complainant getting a decree in the State court and sending a transcript of it into another State, sues the defendant on it there, the Circuit Court into which the case is removed may enjoin the complainant from proceedings in any such or other distant court until *it* hears the case; and if, after hearing, it annuls the decree in the State court, and dismisses, as wanting equity, the bill on which the decree was made, may make the injunction perpetual.

THE present case was thus:

On the 3d of February, 1870, that is to say, six weeks after the decree for $2389 (leaving the matter of furniture open), for rents mentioned in the former case* as having been given, 23d of December, 1869, in the County Court of Alexandria, in favor of James French, the trustee, against Alexander Hay, the said French sent a transcript of the decree to Philadelphia, the place of Hay's residence, and sued Hay on it, in one of the local courts there. Hay had, two days before the transcript was sued on, that is to say on the 1st of February, 1870, made the affidavits requisite to remove the case into the Circuit Court of the United States under the act of Congress; though the case was not yet actually removed, nor indeed removed until the 12th following.

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* *Supra*, p. 243, towards the bottom of the page.

Argument for the appellant.

On the transcript just mentioned, from the State court, French got a judgment against Hay, in the local court at Philadelphia, March 21st, 1871; and Hay at once* took the case on error to the Supreme Court of Pennsylvania, where he had it now pending.

Before the other side could get that court to proceed in the case, Hay† filed a bill—the present bill—in the court below—the Circuit Court for the Eastern District of Virginia—into which he had, *before* this time and with a view of vacating all that had been done there, removed the case from the County Court of Alexandria, in which French as trustee had got the decree against him for rents, and was about proceeding for the furniture. And in his said now bill prayed for and at once obtained, a preliminary injunction to restrain French from proceeding further in Pennsylvania or elsewhere to collect his decree in the County Court of Alexandria on the transcript. And the said Circuit Court having at a later date‡ annulled that decree and dismissed the bill on which it was founded (a course of action which this court in the last preceding case approved and affirmed) proceeded now,§ after answer put in and testimony taken, to make *perpetual* the preliminary injunction which it had previously granted restraining French from suing in Pennsylvania or elsewhere on the transcript of the decree so ultimately, with the affirmance of this court, annulled as aforesaid.

From this its action French took this appeal.

Mr. W. W. Willoughby, for the appellant:

1. When the case of *French, Trustee,* v. *Hay et al.* was removed from the Alexandria County Court into the Circuit Court of the United States, Hay, if he meant to restrain the use of the transcript, could have filed a cross-bill; and that would have been the proper way. What we now have is an original bill, asking the Circuit Court of the United States for Virginia to take jurisdiction of things in the State of Pennsylvania. This sort of bill was unallowable.

2. But there was a graver objection to the decree from which we appeal. *Its effect is to restrain the proceedings of a State court.*

* April 5th, 1871.
† June 1st, 1871.
‡ October 22d, 1872.
§ January 11th, 1873.

The Circuit Court of the United States for Virginia is asked to and does restrain the party from prosecuting a suit or enforcing a judgment which he has in the court of the State of Pennsylvania. Now, the Judiciary Act enacts:*

"Nor shall a writ of injunction be granted to stay proceedings in any court of a State."

It is of no pertinence to argue that though the court itself could not be enjoined, yet that a party suing in it may be. This would do indirectly what the statute says shall not be done at all. In *Peck* v. *Jenness*† the court say:

"The fact that injunction issues only to the parties before the court, and not to the court, is no evasion of the difficulties that are a necessary result of an attempt to exercise that power over a party who is a litigant in another independent forum."

Even though a State court might enjoin a party from using or enforcing a judgment in another State, the Federal court cannot enjoin proceedings in any State court. The act of Congress has no effect upon the State court, but it has upon a Federal court, and says such court shall not enjoin proceedings in a State court.

Messrs. H. H. Wells and G. W. Paschall, contra.

Mr. Justice SWAYNE delivered the opinion of the court.

A stronger equity can hardly exist than that which is developed in favor of the appellee in the case before us.

The order of the court below, annulling the decree upon which the suit at law in Pennsylvania was founded, was fatal to that action, and entitled Hay to a perpetual injunction, without reference to the final result of the prior case.

This bill is not an original one. It is auxiliary and dependent in its character, as much so as if it were a bill of review.‡ The court having jurisdiction *in personam* had power to require the defendant to do or to refrain from doing anything beyond the limits of its territorial jurisdiction which it might have required

* 1 Stat. at Large, 334.

† 7 Howard, 625.

‡ Logan *v.* Patrick, 5 Cranch, 288; Dunn *v.* Clark, 8 Peters, 1; Dunlap *v.* Stetson, 4 Mason, 349, 360; Clark *v.* Mathewson, 12 Peters, 164.

to be done or omitted within the limits of such territory.* Having the possession and jurisdiction of the case, that jurisdiction embraced everything in the case, and every question arising which could be determined in it until it reached its termination and the jurisdiction was exhausted. While the jurisdiction lasted it was exclusive, and could not be trenched upon by any other tribunal.† The court below might, upon a cross-bill, and, perhaps, upon motion, have given the relief which was given by the interlocutory and the final decree in the case before us.

If it could not be given in this case the result would have shown the existence of a great defect in our Federal jurisprudence, and have been a reproach upon the administration of justice. In that event the payment of the annulled decree may be enforced in Pennsylvania, and Hay, notwithstanding the final decree in that case, and in this case, would find himself in exactly the same situation he would have been if those decrees had been against him instead of being in his favor. They would be nullities as regards any protection they could have given him. Instead of terminating the strife between him and his adversary, they would leave him under the necessity of engaging in a new conflict elsewhere. This would be contrary to the plainest principles of reason and justice.

The prohibition in the Judiciary Act against the granting of injunctions by the courts of the United States touching proceedings in State courts has no application here. The prior jurisdiction of the court below took the case out of the operation of that provision.

If the State courts should persist in proceeding—a thing not to be expected—the wrong will be on the part of those tribunals and not of the court below.

DECREE AFFIRMED.

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* Watts *v.* Waddle, 6 Peters, 391; Lewis *v.* Darling, 1 Howard, 1.

† Hagan *v.* Lucas, 10 Peters, 400; Taylor *v.* Carryl, 20 Howard, 484; Freeman *v.* How, 24 Id. 450; Taylor *v.* Tainter, 16 Wallace, 370.

Statement of the case.

CONNOYER ET AL. v. SCHAEFFER.

1. Under proceedings before the boards of commissioners appointed under the act of March 2d, 1805, for ascertaining and adjusting the claims to land embraced in the Louisiana purchase, and the several subsequent acts on the same subject, where a claimant presents not only the evidence of original concession, but that also which purports to be the evidences of title to himself, the confirmation, though made to the original grantee (or "concessionee," as he is sometimes styled), "and *his* legal representatives," operates as a grant to the claimant, although the name of the claimant be omitted in the form of confirmation. *Bissell* v. *Penrose* (8 Howard, 317) decides this, and that case is here affirmed.
2. In a suit for recovery of land, under the act of Congress of July 4th, 1836, the plaintiff offered in evidence a written request to the recorder of lands in and for the Territory of Missouri, to record all registered concessions found in certain books named, then in his office. But it did not appear that those under whom the plaintiff claimed, had any agency in giving the notice, nor that any signer of the paper was interested in the lands in question, nor that any of them represented those who were or professed to be so interested. The notice named no claimant, and described no land, and did not intimate that any one was in fact claiming under the concessions referred to. *Held*, that the paper was not such notice of the claim as the act contemplated.

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

An act of the 2d March, 1805,* for enabling claimants of land in the territory acquired by us from France in the year 1803 (within which territory the present State of Missouri is included), to have their incomplete titles to lands confirmed and perfected, enacts that the claimant of such land shall file within a certain time, with the register or recorder of land titles of the district, his notice in writing, together with every grant, "order of survey, deed, conveyance, or other written evidence of his claim," and that unless he shall so file "such written evidence," all his right shall be void. "Nor shall any grant, . . . *deed of conveyance, or other written evidence*," says the act, "which shall not be so recorded, as above directed, ever be considered or admitted in evidence

* 2 Stat. at Large, 326.

in any court of the United States, against any grant derived from the United States."

The act then provides for the appointment of commissioners, who were to hear and decide in a summary manner "all matters respecting such claims."

By a subsequent act, one of 21st April, 1806,* the time for filing the "notices in writing and written evidences of claims" was extended, but with a similar provision, as to all claims not so presented being barred, and the evidence of them not admitted in evidence if not so filed. The act enacts that oral testimony may be heard in support of or opposition to such claims.

Under these acts many old French and Spanish titles in Missouri were examined and confirmed. But the acts expired before all that were filed could be disposed of. Accordingly new acts were passed; one July 9th, 1832, and one March 2d, 1833,† providing "for the final adjustment of land claims in Missouri." These acts provided for a board of commissioners to "examine all unconfirmed claims to lands in that State heretofore filed in the office of said recorder according to law;" and enacted that in examining these claims heretofore filed, they "shall proceed in the examination in a summary manner, with or without any new application of claimants." Under these acts, therefore, no new claim could be filed before the board; the commissioners were only to pass upon the claims already filed.

These statutes being on the statute-book, Louis Labeaume, on the 27th of June, 1808, gave notice to the old board of commissioners—that is to say, the board proceeding under the acts of 1805 and 1807—of his claim to a lot of land—a common field lot—in the city of St. Louis. The tract had been conceded in 1772 by the acting lieutenant-governor of the Spanish government to a certain Françoise, widow Dodier; Labeaume, of course, claiming by conveyances under her.

The conveyance to Labeaume, as filed before the boards

* 2 Stat. at Large, 391.

† 4 Stat. at Large, pp. 565–661.

as evidence of his title, showed two different conveyances on the same paper. One conveyance was from eight persons named, who *purported* to be the right heirs of the widow Dodier, and was dated 18th August, 1806; one of the eight persons being a certain Joseph Hortez, who signed the conveyance in behalf of Margaret Bequette, his wife, as one of the heirs of the said widow. The other conveyance was from the same Hortez, and in this conveyance he conveys the tract as having been acquired by him, at a judicial sale, as the property of the said widow, made and ordered by the lieutenant-governor; but the *proces verbal* (or record, to use the English term) of which sale and adjudication, the deed recites had been lost in the secretary's office. This deed was dated the 23d August, 1806, was acknowledged, and with the acknowledgments appended thereto was recorded in the recorder's office of St. Louis County.

The board before which Labeaume appeared and presented the concession and his derivative title-papers—that is to say, the board acting under the acts of 1805 and 1807—did not confirm his title.

Labeaume himself died in 1821, having made a will by which he devised all his estate to his widow.

After the passage of the acts authorizing the appointment of a board to examine claims previously filed according to law, but not confirmed, a son of Labeaume appeared before the new board and presented in behalf of his mother as now representing the original claimant, the claim originally filed by Labeaume. And in June, 1835, this board reported "that this claim ought to be confirmed *to the said widow Dodier or her legal representatives*," and it was so confirmed accordingly, by act of Congress of July 4th, 1836.

In this state of things, a certain Schaeffer (A.D. 1860) being in possession and now confessedly vested with whatever title was vested by these proceedings in Labeaume, Connoyer, and others (who it was equally admitted was, as to a part of the premises in controversy, vested with whatever title passed to the *heirs of the widow Dodier* by virtue of the confirmation) sued him in ejectment.

Statement of the case.

On the trial, the plaintiffs, already mentioned as heirs of the widow Dodier, relied on the confirmation as being to *her*, and to *her* legal representatives, contending that from defective execution the deeds upon which Labeaume founded his derivative title could pass no title, and therefore that there could have been no confirmation to *him* made upon them.

The defendant, who had put in evidence the original deeds set out in the proceedings of the first board, relied much more on the confirmation; he contending that the history of these confirmations of land claims under the already-mentioned acts of Congress showed that there were two classes of cases which came before the boards:

1st. Where the claimant exhibited only the original concession and did not attempt to show any title out of the person to whom the concession had been made originally.

2d. Where, with the original concession, there were exhibited mesne conveyances, which the claimant relied on as bringing the title down to himself.

And that while in the former class of cases nothing was established on a confirmation to the original grantee and his representatives but the title of that grantee, in the second, under the decision of this court in *Bissell* v. *Penrose** both the title of the original grantee and the derivative title to the claimant were established.

The defendant therefore insisted that the regularity of the papers accompanying Labeaume's claim could not be inquired into, as the confirmation when made inured to Labeaume, if living, and if dead, to his legal representatives.

The court in which the ejectment was brought held that the confirmation of the lot sued for inured to Labeaume, and those claiming under him, and not to the widow Dodier and her heirs. As the plaintiffs claimed as such heirs, that ruling of the court decided the whole case. The holding being affirmed in the Supreme Court of the State of Missouri, the plaintiffs brought the case here.

* 8 Howard, 317.

Argument for the plaintiff in error.

The question, of course, was to whom did the confirmation inure? If to Labeaume, then it was an unimportant inquiry whether the title-papers produced by him were imperfectly executed or not. If to the legal representatives of the widow Dodier, the inquiry was important.

It may be here added, though the thing is scarce worth reporting, that for the purpose of showing that those from whom he sought to deduce title were claimants before the land commissioners, the plaintiff sought to introduce, in connection with the Dodier claim, a certified copy of a request in writing, as found of record in the office of the recorder of land titles in and for the Territory of Missouri, signed by one T. B. Reddick and twelve others, in which these thirteen requested the recorder, "for the benefit of all parties interested, to record the registered concessions in Livre Terrein, Nos. 1, 2, 3, 4, 5, and 6, on file" in his office. It did not appear that those under whom the plaintiffs claimed had any agency in giving this notice. No evidence was offered connecting them with the transaction, nor did it appear that any signer was interested in the lands or represented any one who was.

The court in which the ejectment was brought rejected this evidence; and the Supreme Court, adverting to the characteristics of it just mentioned, confirmed its action; adding "that the paper pointed to a mass of books, and asked that certain records should be made, but named no claimant, described no lands, and did not intimate that any one was in fact claiming under any of the concessions referred to."

Mr. C. C. Whittelsey, with whom was Mr. H. A. Cunningham, for the plaintiffs in error, asserted the true rule of law to be, that where the board of commissioners omitted all mention of the person presenting the claim as assignee of the original grantee of the former government, and confirmed the claim to the legal representatives of the person who held the claim by grant from the French or Spanish governments, then that the confirmation inured to the benefit of the per-

Argument for the plaintiff in error.

sons showing themselves to be the legal representatives of such grantee by inheritance as heirs, or by will as devisees, or by conveyance as purchasers, and did not inure to the benefit of the party filing the claim, *except so far as he showed himself by plainly good muniments to be the legal representative by descent, devise, or purchase.*

It was impossible, the counsel argued, to read over the list of claims filed before the board of commissioners, or with the recorder of land titles, prior to 1814, and then to examine the list of confirmations, without observing in how many cases the commissioners confirmed the claims as against the United States, but refused to decide that the claimant was the person entitled to the land by derivative title. By examining these reports it would be seen that the commissioners issued certificates sometimes by name to the person filing the claim, sometimes to the claimant as assignee, and sometimes to the representatives of the person under whom the claim was claimed.*

The form "to the original concessionee or his legal representatives" by descent, devise, or purchase, left the question open to inquiry in a court of justice, to whom the certificate, confirmation, or patent should inure, and thus saved the officers of the government the necessity of deciding upon many and difficult questions of derivative title. When, therefore, the board of commissioners in their action, June, 1835, declared that this claim ought to be confirmed to the said "widow Dodier or her legal representatives," they plainly showed that they did not intend to confirm the land to Labeaume or his representatives by name, for he was not named in the judgment of confirmation.

* See 2 Land Claims, pp. 563–603; 3 Id. pp. 275–317; Report of Board of 1832–3, 5 Land Claims; see list of certificates, Nos. 6, 89, 90, 92, 110, 157, 169, 185, 199, 207, 215, 225, 256, 267, 270, 275, 280, 284, 285, 298, 321, 358, 394, 402, 439, 440, 448, 514, 523, 543, 576, 606, 625, 628, 648, 649, 650, 651, 661, 672, 694, 717, 721, 731, 742, 764, 770, 793, 827, 897, 918—legal representatives of Gab. Dodier, Sr.—942, 943, 953, 968, 979, 1015, 1023, 1123, 1127, 1158, 1159, 1194, 1217, 1218, 1230, 1270, 1272, 1288, 1290, 1291, 1299, 1301, 1303, 1304. Nos. 942 and 943 were the lots in controversy in the suit of Strother *v.* Lucas, 12 Peters, 410.

The assumption that the judgment of confirmation inured to the benefit of the person who filed the claim in all cases, when the party presenting the claim presented *any evidence whatever*, to show a derivative title from the original concessionee of the former governments, took from the board of commissioners all authority to pass upon the validity of the derivative title, and rendered their decision nugatory. Must they decide in express words that the derivative title was invalid, and so enter it of record and reject the claim for that reason, although as against the government the original claim was equitably entitled to confirmation, or were they at liberty to put this question by and leave it to be settled by the courts as advised by the attorney-general?

Of course, if the confirmation inured to Labeaume simply because he in person appeared to present the claim, that closed the case; but such a position could not be maintained.

The learned counsel, referring to *Bissell* v. *Penrose*,* much relied on by the plaintiff, contended that if it applied to this case at all, it was in reality inconsistent with the well-established rule in regard to the confirmation of land claims previously laid down in *Strother* v. *Lucas*,† and moreover could not be reconciled with what of quite late time had been implied in *Hogan* v. *Page*;‡ that, in addition, the case could not be maintained on principle.

The rejection of the copy of the paper signed by Reddick and the twelve others, was not strongly insisted on.

Messrs. Glover and Shepley, *contra*, contending that the confirmation inured to Labeaume, relied on *Bissell* v. *Penrose*, in support of that position, arguing that the cases of *Strother* v. *Lucas* and *Hogan* v. *Page* were misconceived and misapplied by the learned counsel opposing.

Mr. Justice DAVIS delivered the opinion of the court.

The substantial point of inquiry presented in this case is, to whom did the confirmation inure?

* 8 Howard, 317. † 12 Peters, 410. ‡ 2 Wallace, 605.

Opinion of the court.

The question which we are thus called on to answer, is not a new one. If it were, it would certainly not be free from difficulty. It has, however, been settled so long that it has become a rule of property, and it would produce infinite mischief to disturb it.

Two classes of claims were presented to the commissioners—one where the claimant exhibited with his claim evidence of a derivative title from the concedee, the other where he only produced the original concession without attempting to show his connection with it.

In the latter class of cases the claim, if confirmed, has been held to have the effect of a confirmation to the legal representatives of the person to whom the original concession was made. This ruling proceeds upon the theory that the commissioners passed upon nothing but the merits of the original concession, having no opportunity to pass upon the validity of anything else. Of this class, where no evidences of derivative title at all were filed with the concession is the case of *Hogan* v. *Page*.*

But where the claimant presented before the board, besides the original title, evidences of derivative title, it has been held that the commissioners decided upon both, and that the confirmation operated as a grant to the claimant, although his name was omitted in the form of confirmation. This was expressly ruled in *Bissell* v. *Penrose*.† The claim there was confirmed to Benito, Antoine, Hypolite, Joseph, and Pierre Vasquez, or their legal representatives, according to the concession. Rudolph Tillier presented the claim for confirmation and produced the concession, with written evidence of his title, which would appear to have been imperfect. It was argued there, as here, that the act of 1836 confirms only the Spanish concession in the abstract, but the court held otherwise, and decided that the title was confirmed to Tillier, the assignee, as claimant. Besides the general reasoning on which this opinion is based, the de-

* 22 Missouri, 55; Same Case, 32 Id. 68, and on error, 2 Wallace, 605.
† 8 Howard, 317.

cision in *Strother* v. *Lucas*,* and the usages of the land office are cited in support of it.

Shortly after the decision in *Bissell* v. *Penrose*, the case of *Boone* v. *Moore*† arose in Missouri. The confirmation in that case was to David Cole, or his legal representatives. The claim was filed by Jesse Richardson, who produced before the old board his derivative title-papers. The Supreme Court of Missouri held that the confirmation was to Richardson, and not to the legal representatives of Cole, on the authority of *Bissell* v. *Penrose*, and this, too, while evidently doubting the propriety of that decision. The same point was again presented to the Supreme Court of Missouri in *Carpenter* v. *Rannells*,‡ with the same result. The record in that case shows that James Bankson, as assignee of John Butler, under an executory contract, claimed the land, and produced to the board the evidence upon which a confirmation was granted. The judgment of confirmation, however, was to John Butler or his legal representatives, but the court held, on the authority of *Bissell* v. *Penrose* and *Boone* v. *Moore*, that the legal effect of this confirmation was to vest the title in Bankson. The principles in this case are examined and adhered to in the case of the present plaintiffs against Labeaume's heirs, reported in 45 Missouri, 139.

The case of *Carpenter* v. *Rannells*§ was brought to this court, and it was held, substantially, that Bankson, having presented the claim and filed his paper title with it, the confirmation inured to him, and that no other representative of Butler, whether hereditary or by contract, had any right, legal or equitable, to the premises in controversy.

It would seem that these cases should be decisive of the question at issue. Instead of this the plaintiffs seek to overturn the authority of *Bissell* v. *Penrose*, on which all the cases rest. It is too late to question the soundness of that decision. To permit it to be done now would not only unsettle titles to which this decision is applicable, but weaken confidence in all titles in Missouri growing out of Spanish

* 6 Peters, 772; 12 Id. 458.
† 14 Missouri, 420.
‡ 45 Id. 584.
§ 19 Wallace, 138.

concessions. There can be no hardship in applying the doctrine of *Bissell* v. *Penrose* to the facts of this case. After the lapse of more than sixty years Labeaume's title is disputed in behalf of persons who never appeared before the commissioners with any claim of their own. In that early day there must have been great ignorance among the people of the forms of legal papers. And this fact was, doubtless, considered by the commissioners in reaching the conclusion which they did. They treated the papers of Labeaume as a transfer to him of all the interest that the heirs of Dodier had in the premises, and having the power to adjudicate the title to the claimant on such papers as he presented, their decision, having been confirmed by Congress, whether right or wrong, is final.

An attempt was made in this case to show that the persons from whom the plaintiffs seek to deduce their title were claimants before the board of commissioners, but this attempt wholly failed.* It is unnecessary to discuss the piece of evidence introduced for this purpose, for the Supreme Court of Missouri in their opinion have said all that can be said on the subject.†

JUDGMENT AFFIRMED.

HAMPTON *v.* ROUSE.

1. Under a statute which enacts that the "owner," may within a time named, redeem land sold for taxes, a redemption may properly be made by a person who has been decreed a bankrupt, the lands having been his. In the case here before the court there had as yet been no appointment of an assignee, nor assignment and conveyance to such person, as provided for in the fourteenth section of the Bankrupt Act of 1867; and the redemption was made between the date of the decree and of such appointment.
2. A charge that a person who had been decreed a bankrupt on his own ap-

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* See Statement, *supra*, p. 264.

† Connoyer *v.* Schaeffer, 48 Missouri, 166.

plication had by *such decree* ceased to be owner and had lost the right to redeem, *held* to be erroneous; there having been evidence tending to show a redemption by such a person.

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

A valuable plantation in Mississippi belonging to Wade Hampton, and at the time in his possession, though mortgaged by him, was sold on the 11th of April, 1867, to John Rouse, under a statute of the State just named, entitled "An act to incorporate the Board of Levee Commissioners, &c."* This act gives to this board power to assess taxes on lands such as the plantation of Hampton was, and if the taxes are not paid to have the sheriff sell the lands.

It contains, however, this provision on the subject of redemption:

"The sheriff's deed, however, for all lands sold for taxes, shall be and remain with the probate clerk; and should the *owner or owners* of said land, their agents or attorneys, apply, they, or either of them, *shall be entitled to the redemption* of said land *at any time within two years of the day of sale*, upon the payment of the purchase-money, &c., &c. This redemption may be made from the levee treasurer or from the probate clerk where the sheriff's deed is kept."

In this state of things Hampton, on the 29th of December, 1868, applied for the benefit of the Bankrupt Act, and on the 17th of April, 1869, was decreed a bankrupt under it. On the 19th, an assignee in bankruptcy was appointed.

The Bankrupt Act of March 2d, 1867, the now existing act and the one under which Hampton was decreed bankrupt, enacts:†

"SECTION 11. If any person owing debts provable under this act exceeding the amount of $300, shall apply by petition to the judge of the judicial district in which such debtor has resided, . . setting forth his inability to pay all his debts in full, his willingness to surrender all his estate and effects for the benefit

* Laws of Missouri for 1865, p. 60.

† 15 Stat. at Large, 522.

of his creditors, and shall annex to his petition a schedule containing a full and true statement of all his debts, . . . also an accurate inventory, . . . of all his estate, such petitioner shall be adjudged a bankrupt."

The same section of the act, at its close, further directs that the district judge in that state of the case, shall issue a warrant directed to the marshal of the district, authorizing him to publish notices in such newspapers as the warrant specifies; to serve written or printed notices on all creditors named in the schedule filed with the petition of the applicant, and to give such notice to all concerned as the warrant directs, which notice shall state as follows:

(1.) That such a warrant has been issued.

(2.) That the payment of debts or the delivery or transfer of property to the debtor is forbidden by law.

(3.) That the creditors will meet, on a day therein named, to prove their debts and choose an assignee.

The twelfth section enacts that at the meeting of the creditors, such as the preceding section contemplates, one of the registers of the District Court shall preside, and that the creditors in his presence shall choose one or more assignees of the estate of the debtor.

The act then goes on in its fourteenth section thus:

"As soon as said assignee is appointed and qualified, the judge, or, where there is no opposing interest, the register, . . . shall by an instrument under his hand assign and convey to the assignee all the estate real and personal of the bankrupt, with all his deeds, books, and papers relating thereto; *and such assignment shall relate back to the commencement of said proceedings in bankruptcy, and thereupon, by operation of law, the title to all such property and estate, both real and personal, shall vest in said assignee.*"

The Bankrupt Act of 1841* differed, as to the mode and time of appointing the assignee in bankruptcy, from the now existing and above-quoted act of 1867. *It* ran thus:

"SECTION 3. That all the property and rights of property, . . .

* 5 Stat. at Large, 443.

of every bankrupt . . . shall, by mere operation of law, *ipso facto, from the time of such decree* be deemed to be divested out of such bankrupt without any other act or conveyance whatsoever; and the same shall be vested by force of the same decree in such assignee, as, from time to time, shall *be appointed by the proper court* for the purpose."

Hampton being still in possession of his land, Rouse now brought ejectment against him for it; and on the trial Hampton offered to prove that on the 10th day of April, 1869—that is to say, "within two years of the day of sale," the same having been made as above stated on the 11th of April, 1867—his son, as his agent, offered to redeem the land, under circumstances which made the offer equivalent to a redemption.

The son testified in substance thus:

"On the 10th of April, 1869, I went as agent of Wade Hampton to the office of Mr. Haycroft, the levee treasurer, and offered to redeem the lands in controversy. I had the means to redeem the lands. There were so many applicants waiting to redeem lands before me that I could not then be attended to. The press of business in the treasurer's office prevented my redeeming the lands when I went on the 10th of April, and that pressure continued until the time of redemption had passed.

"The means which I had were levee bonds. They were my means and not my father's. They were in the hands of Mr. Haycroft, in his office. Some of them had been converted into currency. I do not know how much. The proceeds of some of these bonds had been applied to the redemption of another estate, which was redeemed entirely out of them.

"When I applied to redeem these lands, in controversy, Mr. Haycroft exhibited a map of the county to me, and it was perfectly understood between him and myself what lands I wished to redeem, and also the taxes of what year. He knew at the time what means were to be used in redeeming said lands, and he made no objection, and the only reason why the lands were not then redeemed was because of the press of business in his office."

Mr. Haycroft, the levee treasurer, referred to above, testified that he occasionally sold the levee bonds, such as just

above spoken of, as an accommodation to taxpayers, and with the proceeds paid the redemption-money; that he had done so in the case of other lands for Hampton; but that it was no part of his official duty so to sell bonds and apply the proceeds; that in this case he had told Hampton's son that he would have to pay in currency. He added, however, that the applications for redemption on the 10th of April, 1869, were so numerous that he could not on that day have attended to the redemption of these lands under any circumstances; and that on the 11th the time expired.

The court charged the jury,

"That Wade Hampton, having been adjudged a bankrupt on his own application, after the land was sold for the taxes, had thereby ceased to be the owner of the land, and had lost the right to redeem."

And this charge was assigned for error.

Messrs. James Lowndes and W. W. Boyce, for the plaintiff in error:

It is clear that under the eleventh and twelfth sections of the Bankrupt Act, the decree in bankruptcy does not, under the present Bankrupt Act, divest the debtor of his estate, though under the act of 1841 it did do so in terms. Under the present act the decree only settles the fact that the debtor is a bankrupt; that is to say that he cannot now pay his debts as they come due.

It is by what is prescribed in the fourteenth section as to be done—that is to say, by the appointment of the assignee and the assignment and conveyance to be executed, "as soon as said assignee is appointed," that the debtor's property is divested. Now, as no assignee was appointed in this case, nor any assignment or conveyance made until several days after the offer to redeem was made, it can only be through the words at the close of the paragraph which declares that "such assignment shall relate back, &c.," that it can be pretended that the redemption was of no effect. But while the assignment and conveyance vest the assignee with

"the title to all such property and estate" as the bankrupt had when the proceedings were begun, it does not follow that they vest him with that title wholly unaffected by what has been *lawfully* done as to the estate in the meantime; what has been done by way of benefit to the estate. If, for example, a debtor at the time when the proceedings in bankruptcy were begun, had land heavily charged by mortgage, and by the voluntary act of the mortgagee the mortgage were satisfied, would the assignee take the land still subject to the mortgage or discharged from it? or if the debtor or any one else put on the land valuable improvements, would the assignee get those improvements or not get them? We suppose that the assignee in one case would take the land clear of the mortgage, and in the other would take it improved by the new erections. In the case now before the court, a defeasible estate is made by the act of the debtor, between the time of the decree and that of the assignment and conveyance, an indefeasible one. In this case as in the former ones, we suppose that the assignee—in other words the creditors or the assets—get the benefit of what is done. They still get "all the title to all such property and estate."

But even if the estate were vested in the assignee the old owner could redeem.

I. In *Dubois* v. *Hepburn*,* this court said:

"Any right which in law or *equity* amounts to an ownership in the land; *any* right of entry upon it, to its possession or *enjoyment*, or *any part of it* which can be deemed an *estate*, makes the person the *owner*, *so far as it is necessary to give him the right to redeem*."

Now, though a man may be a bankrupt—that is to say, though he may be unable to pay all his debts as they fall due, and though his estate may be passed accordingly to his assignee in bankruptcy—it does not follow that the debtor may not himself afterwards, from other property, coming to him by descent or gift or other good fortune, pay all his debts; nor follow that without this good fortune of any kind the as-

* 10 Peters, 1.

signee may not, with the proceeds of the assigned estate, pay all the debts and return a surplus to the former debtor. The debtor has, therefore, "a right which in equity amounts to an ownership." He has a right to pay the debts, and if he do pay them, all the estate is his; or if the assignee pay them from a *part* of the estate assigned, all the residue of the estate is equally his. *Such* an interest, says the above-cited case, "makes the person owner so far as it is necessary to give him the right to redeem;" for that case makes "any (possible) right of enjoyment of *any* part of it enough," if that part can be called an estate. Indeed it is only by a liberal construction of the word "owner" that an assignee in bankruptcy can redeem. Strictly speaking he is but a trustee to pay debts, and return any balance to the debtor.

It may be here observed that long since the case of *Dubois* v. *Hepburn*, this court has twice construed statutes authorizing redemption from taxes, with the utmost benignity. The cases of *Bennet* v. *Hunter*, in 9th Wallace,* and *Tracy* v. *Irwin*, in the 18th of the same reports,† show this; the former case deciding that any person may act as the owner's agent to redeem, and that the action of such person if ratified by the proper party operates as a redemption. If it were necessary to enlarge the scope of *Dubois* v. *Hepburn* these cases minister the means. But it is not necessary.

We assert, therefore, that notwithstanding the retroactive words of the fourteenth section of the Bankrupt Act of 1867, Hampton had still the right to redeem. No doubt the assignee also had. So indeed had any creditor; or, if the proper person ratified the act of redemption, any person whatever. It would certainly be monstrous if an estate worth $100,000, which had been sold for $500 tax, should be wholly lost to creditors because the bankrupt owner had *no right* to redeem and the assignee as yet *no money* to do so; or because the time for redemption expired *between* the time of filing the petition and the appointment of the assignee.

II. If our views are at all correct, then the charge was

* Page 338. † Page 550; and see Patterson *v.* Brindle, 9 Watts, 29.

wrong. We assert that under the two last cases above cited from Wallace, that which was in law a tender was made. But whether or not, evidence was certainly given *tending* to show that a tender was made; and if such evidence was given, the charge was equivalent to having rejected the evidence on the trial. To have done this would have been error.

Mr. P. Phillips, contra:

The fourteenth section of the Bankrupt Act enacts that "the assignment shall '*relate back*' to the commencement of the proceedings in bankruptcy;" and thereupon, "*by operation of law*," *the title to all the property of the bankrupt shall vest in the assignee.* The present act herein goes further than did the act of 1841. Under the third section of that act the bankrupt's estate was divested out of him *ipso facto* by the decree. But so, too, under that act, the assignee in bankruptcy was appointed by the court, at the moment of the decree made. In fact, in some courts, the assignee was always the same person in all cases; so that he was really a permanent officer of the court existing previously to the decree. There was thus a person in whom the estate could, on the divestiture from the bankrupt, immediately vest. The present act, we say, goes further, and means to vest the bankrupt's property in his assignee from the time that proceedings are begun—from the time, namely, that the debtor himself has proclaimed that he was bankrupt, or is shown by his creditors to have been so. And, why should it not so vest it? The bankrupt's estate *ought* to pass from him from *that* time if bankrupt acts are to prevail at all. But this difficulty occurred here. Under the present act the assignee is not an officer of the court, but is appointed in each case by the creditors, *pro re natâ*. He cannot be appointed, therefore, until after the petition is filed, in other words, until after "the commencement of the proceedings." The creditors must have notice of them, and meet before they can appoint the assignee. If, therefore, the act had said that the estate of the debtor "shall be divested from him on

the commencement of proceedings in bankruptcy," there would be no one in whom it could vest. It would be *in nubibus*. It accordingly leaves it to the assignment to divest the estate, but declares that "such assignment shall relate back to the commencement of the proceedings."

But whatever may have been the reason for the special character of the enactments, the language of the fourteenth section is positive; and under the enactment made by it all the property of Hampton, as he owned it, on the day when he filed his petition, vested in the assignee. Thus vesting, Hampton was not "owner" of it when the alleged offer to redeem was made. The assignee was owner, and *he* alone had power to redeem.

The statute of Mississippi doubtless uses the word "owner" in the sense in which people ordinarily use it. Now, people do not ordinarily call a man owner of an estate after a bankrupt act has, even by relation back, divested him of the estate which he once had. A person may be interested in an estate—a lien-creditor is directly interested, and every creditor is interested indirectly—but he is not owner in either a legal or a popular sense.

The case, therefore, does not come within any expressions in *Dubois* v. *Hepburn*, nor is it helped by *Bennet* v. *Hunter*. The first case decided that "the *owner*, either acting in person or through some friend or agent, compensated or uncompensated," might redeem—in other words, that anybody might redeem, if professing to act in behalf of the "owner" —and that a ratification by the owner would be presumed in furtherance of justice. But the case does not decide that a "*no* owner," acting either in person or through some friend or agent, may redeem. In the present case, had an assignee been appointed, and had Hampton's son, without being authorized so to act, professed to act for *him*, the case would be in point. But the son did not so profess to act; but professed to act, and was authorized to act, for quite another person, to wit, his father, who was *not* owner.

Nor does *Tracy* v. *Irwin* help the difficulty of *this* part of the case; though it may help the difficulty of another part;

the part, namely, involving the question whether Hampton's son made any tender for anybody. *Tracy* v. *Irwin* decides that if tax collectors, being bound, as they are in law, to receive redemption-money from the *agents* of owners, announce by general announcements that they will receive it from nobody but *owners* themselves, an agent who goes to the proper office to pay, need not show an *actual* offer of the money. And this we admit to be good law. If he had the money *ready* to tender, it was enough; for an actual tender would have been nugatory. But, as we have said, this case does not show at all who *is* owner, or that the agent of a person *not* owner need or need not do anything.

Everything here, it is to be observed, is statutory. Considerations of common law do not come in; still less any equitable ones. It is a case where the oft-quoted sentence of the great English Chief Justice, Sir Henry Hobart, is applicable:* "The *statute* makes sure work. The *statute* is like a tyrant. Where *he* comes, he makes all void; but the common law is like a nursing father."

But there was no tender by anybody, or at any time. Hampton's son offered to redeem the premises, not by the payment of any *money* in his hands, but out of the proceeds of certain bonds which had been deposited in the hands of Haycroft, the treasurer, and which were then unsold and which the levee treasurer was under no official obligation to sell. The evidence shows that the levee treasurer told Hampton's son that he must pay the redemption-money in currency. But if he had not so told him, and if the treasurer had specially undertaken to redeem the lands, yet—as it was no part of his official duty thus to undertake or to redeem—his failure to redeem, from whatever cause the failure arose, and even if it arose from fraud, could not avoid the deed made to Rouse by the treasurer in the discharge of his official duty. Under the case of *Tracy* v. *Irwin* it cannot be doubted that the party going to see about the redemption must be *able* to redeem; that is to say, must have, somewhere at command, *money* to redeem with.

* 1 Modern, 36; 21-22 Car. 11.

Of course, if there was no tender in law, the court properly charged as it did. Indeed, it would have acted properly enough had it excluded the evidence in the first place; the old doctrine about submitting a case, if there is a *scintilla* of evidence, having been long an exploded one.

Mr. Justice CLIFFORD delivered the opinion of the court.

It appears by the record that the offer to redeem was made by the agent of the owner on the 10th of April, 1869, less than two years from the sale. This was within proper time, as allowed by law.

It is clear that a decree in bankruptcy, without more, will not, under the Bankrupt Act, which in the first part of its eleventh section provides for the decree, have the effect to discharge the debts of the petitioner nor to divest him of the title to either his real or personal estate. And argument is hardly necessary to show that none of the proceedings contemplated in any part of the eleventh section, or those directed in the twelfth, have that effect, as neither of the sections contains any language whatever to import or indicate that anything of the kind was intended by the framers of the act.

Conclusive support to this view, if any be needed, is derived from the fourteenth section of the act. Prior to the assignment and conveyance authorized and directed by that section, the title, whatever it be, of the estate belonging to the debtor, both real and personal, remains unchanged, except that the court, in certain cases, may in the meantime restrain the debtor or any other person, by injunction, from making any transfer or disposition of any part of the same, not excepted from the operation of the act.

Sufficient appears in the sections of the act referred to, when considered in connection with the admissions and other evidence exhibited in the record, to show beyond doubt that the instruction of the court under discussion is erroneous, and that the error was of a character to supersede every question of fact submitted to the jury.

Plenary evidence was given that the offer to redeem, as

exhibited in the transcript, was made on the 10th of April, 1869, and the assignee of the estate of the bankrupt was not appointed and qualified as such until the 19th of April in the same year, and the testimony reported shows that the bankrupt was in the possession of the premises and that he ever after continued in the possession of the same to the present time.

Whether or not the evidence introduced to prove that an offer to redeem the premises was made at the time was sufficient to avail the defendant as equivalent to a tender, it is not necessary at the present time to decide, but the court is of the opinion that it was of such a character, in view of a recent decision of this court, that it ought to have been submitted to the jury, untrammelled by a prior instruction, which in substance and effect amounted to a direction to the jury that their verdict must be for the plaintiff.

Such an offer to redeem it was held, in the case of *Bennet* v. *Hunter*,* might be made by the owner or by an agent or by any person willing to act for the party interested, upon the ground that an act done by a third person for the benefit of another is valid if ratified either expressly or by implication, and that such ratification will be presumed in furtherance of justice. Since that time it has also been decided, in the case of *Tracy* v. *Irwin*,† that if the tax commissioners announce that they will not receive the payment of the taxes in such cases unless tendered by the owner, that a formal offer by another to pay is unnecessary, that it is enough if a relative of the owner went to the office of the commissioners to see after the payment of the tax, even though he made no formal offer to pay, because such an announcement is in effect a waiver of a tender by the commissioners, they having declined to receive payment unless the tender is made by the owner in person.

Apply that rule to the case and it is clear that the evidence introduced by the defendants tending to show an offer to redeem the premises should have been submitted to the

* 9 Wallace, 338. † 18 Wallace, 550.

jury under proper instructions. Instructions of the kind, however, would have been useless after the jury had been told that the defendant ceased to be the owner of the land, and that he lost his right to redeem the same when he was adjudged a bankrupt, it appearing that the decree was entered before the offer to redeem was made, as assumed by both parties.

Enough appears in the language of the fourteenth section of the Bankrupt Act to demonstrate the proposition that the instruction of the Circuit Court in that regard was incorrect, nor is the question affected in the least by the fact that the same section provides that such assignment or conveyance shall relate back to the commencement of the proceedings, as the instrument of assignment cannot operate either retrospectively or prospectively before it is executed. Until an assignee is appointed and qualified and the conveyance or assignment is made to him, the title to the property, whatever it be, remains in the bankrupt, which is the plain meaning of the fourteenth section of the Bankrupt Act.* Different regulations in that respect were enacted in the former Bankrupt Act, as the third section of that act provided that "all the property and rights of property, of every name and nature, of the bankrupt, not excepted from the operation of the act, . . . shall, by mere operation of law *ipso facto*, *from the time of such decree*, be deemed to be divested out of such bankrupt, without any other act, assignment, or other conveyance whatsoever."† Unlike the old act, the existing act makes it the duty of the court, or, where there is no opposing interest, of the register, by an instrument under his hand, to assign and convey to the assignee all the estate, real and personal, of the bankrupt, and the rule is that such a conveyance or assignment divests the bankrupt of the whole of his property, except what is exempted from the operation of the Bankrupt Act, and vests the title to the same in the assignee, but the record in this case shows that

* Sutherland *v.* Davis, 42 Indiana, 28.

† 5 Stat. at Large, 443; Ex parte Newhall, 2 Story, 362; Oakey *v.* Bennett, 11 Howard, 44.

no assignee had been appointed when the alleged offer to redeem was made, which affords a demonstration that the charge of the court that he had ceased to be the owner of the land and thereby lost his right to redeem was improper, being equivalent to a direction to the jury to find a verdict for the plaintiff.*

JUDGMENT REVERSED, and the cause remanded with directions to issue

A NEW VENIRE.

MECHANICS' AND TRADERS' BANK *v.* UNION BANK.

1. The Constitution did not prohibit the creation by military authority of courts for the trial of civil causes during the civil war in conquered portions of the insurgent States. The establishment of such courts was the exercise of the ordinary rights of conquest.
2. A court established by proclamation of the commanding General in New Orleans, on the 1st of May, 1862, on the occupation of the city by the government forces, will, in the absence of proof to the contrary, be presumed to have been authorized by the President.
3. Though *called*, in the order establishing it, a Provost Court, a larger jurisdiction than one over minor criminal offences might, in fact, have validly been given to it by the power which constituted it.
4. Whether such court acted within its jurisdiction in a case where one bank of the State of Louisiana was claiming from another bank of the same State a large sum of money, is not a question for this court to determine, but a question exclusively for the State tribunals.

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

The State of Louisiana, as is known, during the late rebellion joined the rebel forces. On or about the 29th of April, 1862, however, the government forces under General Butler—then in command of the conquering and occupying army, and commissioned to carry on the war in the Depart-

* Wright *v.* Johnson, 4 National Bankrupt Register, 627; Same Case, 8 Blatchford, 150; Bump on Bankruptcy (7th ed.), 22.

ment of the Gulf, a department which included Louisiana—took possession of New Orleans. At the time of his thus occupying the city, the only money then circulating there was notes issued by the rebel confederacy; "Confederate notes." In the confusion of things for a few days after the capture, it did not appear plainly to the people generally what would be done about these notes, and there being no other sort of money whatever in general circulation, General Butler, on the 1st of May, 1862, in the necessities of the case, issued a proclamation allowing the circulation of them "until further orders."

On the day following, by general order, he established a court. The powers of the court were not defined otherwise than by the order establishing it. The order said:

"Major J. M. Bell, volunteer aid-de-camp, of the division staff, is hereby appointed provost judge of the city of New Orleans, and will be obeyed and respected accordingly.

"Captain J. H. French, aid-de-camp and acting inspector-general, is hereby appointed provost marshal of the city of New Orleans, and Captain Stafford, volunteer aid-de-camp, deputy provost marshal. They will be obeyed and respected accordingly."

No direct authorization or approval of this court by the President was shown; nor any direct evidence that it was not authorized by him, or that he disapproved it.

At different dates between the 5th and 13th of May, 1862, the Union Bank of New Orleans lent to the Mechanics' and Traders' Bank there $130,000 in Confederate notes, which still had a circulation of a certain kind. Whether any specific agreement was made between the two banks as to the sort of notes in which the money borrowed should be returned, that is to say, whether it was agreed that it should be returned in Confederate notes, or whether there was no understanding or agreement in relation to the payment except that tacitly understood, that it should be returned in notes as current at the time of payment as were the Confederate notes when borrowed—this was a matter not clear; the great weight of evidence, however, as the reporter read

it, being that there was no understanding in the case other than that last mentioned.

On the 16th of May, 1862, General Butler, by general order, directed that on the 27th following, that is to say, within eleven days, all circulation of or trade in Confederate notes should cease within his department. The depreciation of them, of course, was rapid and great; though the Confederation not yet having fallen to pieces, the notes had some circulation, though a circulation at a great discount compared with good money, in other places in the South.

In this depreciated state of them, the Mechanics' and Traders' Bank, on the 26th of May, that is to say, the day before the notes were to cease circulating in New Orleans, and thereabouts, not then owning any such amount of the notes, tendered to the Union Bank in Confederate notes the $130,000 borrowed, with interest. The Union Bank declined to receive them; and soon after brought suit in the Provost Court to recover in good money the $130,000 lent. That court dismissed the suit, holding that the loan was payable as the borrowing bank had offered to pay it, that is to say, in Confederate money. However, the parties were summoned afterwards before General Butler, who heard an argument from the counsel of the borrowing bank. On a still later day they appeared again before the Provost Court, when the counsel of the borrowing bank being about to make an argument to show the rectitude of the former decision, the provost judge, according to the testimony of the president of that bank, said that he had been ordered to reopen the case and grant a new trial; that counsel "need read no law to him, for the case would be decided under orders." The borrowing bank accordingly paid the $130,000 and interest, in lawful money of the United States; paying it, however, under protest.

It may be here stated, as part of the general history of things—though no part of this appeared in the record—that, on the 20th of October, 1862—a little less than six months after General Butler established his court already mentioned—the Federal occupation in Louisiana having now

Statement of the case.

become secure and more extended, President Lincoln himself established at New Orleans, in a formal way, by commission, under the seal of the United States, what was called the "Provisional Court;" declaring that it should be a court of record *for the State of Louisiana*, and appointing Mr. Charles A. Peabody judge thereof. This court was in form authorized to hear and determine all causes, civil and criminal.*

* The following is the order of President Lincoln, from which the Provisional Court in New Orleans derived its existence. The reporter inserts it, the whole subject of that court being much referred to in the argument for the plaintiff in error, and in the dissenting opinion:

"EXECUTIVE MANSION, WASHINGTON, October 20th, 1862.

"The insurrection which has for some time prevailed in several of the States of this Union, including Louisiana, having temporarily subverted and swept away the civil institutions of that State, including the judiciary and judicial authorities of the Union, so that it has become necessary to hold the State in military occupation, and it being indispensably necessary that there should be some judicial tribunal existing there capable of administering justice, I have, therefore, thought it proper to appoint, and I do hereby constitute a Provisional Court, which shall be a court of record for the State of Louisiana, and I do hereby appoint CHARLES A. PEABODY, of New York, to be a provisional judge, to hold said court, with authority to hear, try, and determine all causes, civil and criminal, including causes in law, equity, revenue, and admiralty, and particularly all such powers and jurisdiction as belong to the District and Circuit courts of the United States, conforming his proceedings, so far as possible, to the course of proceedings and practice which has been customary in the courts of the United States in Louisiana; his judgments to be final and conclusive. And I do hereby authorize and empower the said judge to make and establish such rules and regulations as may be necessary for the exercise of his jurisdiction, and to appoint a prosecuting attorney, marshal, and clerk of the said court, who shall perform the functions of attorney, marshal, and clerk, according to such proceedings and practice as before mentioned and such rules and regulations as may be made and established by said judge. These appointments are to continue during the pleasure of the President, not extending beyond the military occupation of the city of New Orleans, or the restoration of the civil authority in that city and the State of Louisiana. These officers shall be paid out of the contingent fund of the War Department, compensations as follows: The judge at the rate of $3500 per annum; the prosecuting attorney, including the fees, at the rate of $3000 per annum; and the clerk, including the fees, at the rate of $2500 per annum; such compensation to be certified by the Secretary of War. A copy of this order, certified by the Secretary of War, and delivered to such judge, shall be deemed and held to be a sufficient commission.

"Let the seal of the United States be hereunto affixed.

[L. S.] "ABRAHAM LINCOLN.

"By the President:

"WILLIAM H. SEWARD,
"Secretary of State."

The lending bank now sued the other bank in one of the inferior courts of Louisiana to recover the money.

Its petition adverted to certain clauses of the Constitution, among them to those clauses which ordain that,

"The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the *Congress* may from time to time ordain."

And also that,

"The *President* . . . shall nominate, and by and with the advice of the senate . . . shall appoint judges of the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for."

And, assuming, apparently, that the court established by General Butler—if not meant to be a mere provost's court, that is to say, a court confined to the trial of criminal matters, and, therefore, without jurisdiction in a civil one, such as this suit—was, of necessity, meant by the said Butler to be an establishment by him as a commanding officer of the United States in an occupied city, of a court of the United States, with a judge of the same appointed by him, it went on to submit that—

"The ordaining and establishing by General Butler of the said court, the appointment of Major Bell as the judge thereof by the said general, and the action and proceedings of the latter in the premises, were acts in violation of the Constitution, and consequently null and void, conferring no right on the Union Bank to invoke the authority of the said Bell to obtain from him judgment in behalf of the said bank against the defendant, compelling it to pay to the said bank the sum adjudged by Bell to be due to it."

It submitted further—

"That if the court had been one endowed with perfect jurisdiction, the interference of General Butler in the administration by its judge of its justice, and causing him to make decisions 'under orders,' rendered void all that he did."

It then alleged that it did not owe to the Union Bank the money which it had been made to pay under an order at

once unjust and in violation of the Constitution, and which had been made effective only through military force; and that all this being so it was entitled *ex æquo et bono*, to have back the money thus taken away.

The petition admitted, as respected the Union Bank, that in all that it had done, it had acted as it thought that it ought to act, and had been seeking to recover what it deemed to be a just debt by a proceeding which it deemed a fair one. Accordingly all claim for damages was waived.

Previously to the case coming on to be heard before the inferior State court of Louisiana, that State adopted a constitution, of which the 149th article was thus:

"All rights, actions, prosecutions, claims, contracts, and all laws in force at the time of the adoption of this constitution, and not inconsistent therewith, shall continue as if it had not been adopted; all *judgments* and judicial sales, marriages, and executed contracts *made in good faith and in accordance with existing laws in this State* rendered, made, or entered into, between the 26th day of January, 1861, and the date when this constitution shall be adopted, are hereby declared to be valid," &c.

Having heard the case, the State court in which the suit was brought said:

"Conceding, for the sake of argument, the incompetence of the Provost Court to render the judgment it did against the borrowing bank, the practical effect of its judgment, viz., the payment of the money, cannot now be inquired into with a view to its restitution, for two reasons:

"1st. There was a valid obligation on the part of the borrowing bank to pay the amount borrowed; and, after the money has been paid, it is immaterial, in a civil point of view, by what means the payment was enforced. Had the officers of the Union Bank forcibly taken the money from the vaults of the other bank, the latter could not recover it if the taker was a legal creditor to the amount taken.

"2dly. Whether the Provost Court was or not a competent court in law, it was a court in fact, and the admission of the plaintiff in his petition of the good faith of the Union Bank brings the case within the terms of article 149 of the constitu-

tion of Louisiana,* and secures for the judgment obtained under such circumstances the validity which probably it did not previously possess."

The case being then taken to the Supreme Court of the State on appeal, that court said:

"The important question is, was the judgment which the plaintiff was compelled to pay an absolute nullity, and can he recover from the defendant the amount paid by reason of said judgment?

"This raises the question whether General Butler had the right after the capture of the city, in May, 1862, to appoint a judge to try civil cases. If he had this right the judgment was not an absolute nullity, and the amount paid by the plaintiff cannot be recovered. If the judge had the right to hear and determine the case, the plaintiff cannot recover the money paid in satisfaction thereof, even though it be conceded that there was not sufficient proof to authorize the judgment or that the debt was for Confederate money.

"Under the Constitution the United States has the right to make war, to raise and to support armies and navies, to suppress insurrections, and to repel invasions. The measures to be taken in carrying on war and suppress insurrections are not defined; and the decision of all such questions is in the discretion of the government to whom these powers are confided by the Constitution.

"When the United States captured the city of New Orleans, in 1862, the civil government, existing under the Confederacy, ceased to have authority. As an incident of war powers, the President had the right to establish civil governments, to create courts, to protect the lives and the property of the people.

"The question is, had the general commanding the military forces of the United States which captured the city, the right to establish the provisional court called the Provost Court which rendered the judgment against the plaintiff? We are of the opinion that he had. This was an exercise of the war powers of the United States, presumably with the consent and authorization of the President, the commander in chief.

"The plaintiff paid a judgment rendered by a competent

* See it, *supra*, p. 281.

court, established by the United States in the exercise of its war powers (the only authority competent to organize a court in this city at the time), and has no cause of action against the Union Bank for the money paid in pursuance of the decree of that court. The United States had authority to establish this court, and the judgment is validated by article 149 of the constitution of Louisiana."

The judgment in favor of the Union Bank was accordingly affirmed.

From that judgment the case was brought here as within section 709 of the Revised Statutes.*

The errors assigned were that the Supreme Court of Louisiana erred:

"1st. In holding that the President had a right to authorize General Butler to establish a court of civil jurisdiction in New Orleans in May, 1862.

"2d. In holding that it was to be *presumed* that the President *did* authorize General Butler to establish the court of Judge Bell, with the civil jurisdiction attributed to it by the opinion of the court.

"3d. In holding that the court of Judge Bell had jurisdiction to render its judgment against the Mechanics' and Traders' Bank, and that the said judgment was not a nullity.

"4th. In holding that, supposing the judgment of the Provost Court to have been originally void, it was validated, and so made a bar to the claim of the plaintiff in error, by force of the 149th article of the constitution of Louisiana."

Messrs. E. and A. C. Janin, for the plaintiff in error:

The order establishing the court in question is for a Provost Court simply. The jurisdiction of such a court is of the criminal sort, and is confined to the minor sort of offences.†

Now, conceding that General Butler had power to establish, and that he did establish, and rightly, a Provost Court, yet a case of the kind that this was—a suit by one bank cor-

* See the section in the Appendix.

† Webster's Dictionary, *in verbo*, "Provost Marshal."

poration against another bank corporation, for $130,000—was no proper subject for the cognizance of such a tribunal.

Can the jurisdiction be maintained on the ground that the court was a civil tribunal? It cannot be, for two reasons:

1st. Because the character of the court is established as that of a criminal court by the very use of the words "*provost* judge." What a provost judge is, is well known. We have already stated the character of his jurisdiction. He is almost invariably a military officer. Here he was a "major" in the army, and "volunteer aid-de-camp of the division staff." His military character shows that it cannot be meant that his jurisdiction should include civil things.

2d. Because it is indispensable for such a court that it should be established, or at least approved, by the President. There is no record of any civil court during the war being otherwise established. In the case of the "Provisional Court" established at New Orleans in October, 1862—a civil court—after the occupation of that city, during the war, there was a formal establishment of it by President Lincoln, and by a commission, longer and more full than any ever issued to any judge of this court, sent, under the seal of the United States, to Mr. Peabody, the person appointed by the President to be judge. A court thus formally constituted by the President may be sustained on the authority of certain recent cases here,* though perhaps it cannot be sustained without difficulty, in view of the plain language of the Constitution, which makes no provision for the establishment of any sort of civil courts in time of war different from those to be established in times of peace.

The inferior State court of Louisiana, in which the suit for the recovery of the money paid under protest was brought, perceived the pressure of this part of the case and put its decision denying a recovery, on two grounds, which were consistent with want of jurisdiction in the Provost Court. The Supreme Court was less wise. Admitting, in effect, that a mere provost's court could have no jurisdiction

* The Grapeshot, 9 Wallace, 132; Handlen *v.* Wickleff; Pennewet *v.* Eaton, 15 Id. 382.

of such a case as this was, it assumes that this court was a civil court. But still the difficulty remained that there was nothing to show that the President ever authorized its establishment, and that if he did not, the court had no jurisdiction. The court then "jumps" this difficulty, and says that General Butler's act "was an exercise of the war powers, *presumably* with the consent and authorization of the President;" thus assuming the matter to be proved.

Now, we say, contrariwise, that an act done, in irregular times, and in opposition to what the law requires—an act which on its face is one of usurpation and despotism, as this act was—is not to be presumed to have been rightly done, but until proven to have been so done is to be presumed to have been done wrongly. This is true when there is no evidence in the case and all rests on presumption.

But here we have evidence, and the evidence is that the establishment of this court was General Butler's own act, and was not authorized by the President in advance of it, nor approved by him after it was done.

1. What were General Butler's own ideas of the necessity of an approval by the President? In *Ex parte Milligan*,* a brigadier-general had appointed a military court in the State of Indiana (a State at the time, as always before and since, loyal to the Union) to try a man named Milligan for various offences against the laws of war. The civil courts were all in session, and a grand jury was exercising its functions. No hostile army was within the borders of the State, nor expected there. Notwithstanding this, Milligan was convicted and was sentenced to death. A motion was made to this court for a habeas corpus, and the case presented the point whether the man had been sentenced by a competent court. General Butler—the same eminent person who had established the Provost Court now under consideration—having reaped the victories of war, and having by this time returned to the bar to reap those, not less renowned, of peace, appeared before this court as special counsel of the

* 4 Wallace, 2.

United States, to justify the action of the military commission in Indiana, and to insure, if possible, such action from it as would secure the execution of Milligan. In his argument in the case, as reported,* he announces his idea of martial law and of the rights of the officer executing it. He asserts that such officer is "supreme legislator, supreme judge, and supreme executive." That, therefore, was his idea of what he himself was when, a conquering hero in New Orleans, he established the Provost Court. A gentleman who was at once a general, a conqueror, and a lawyer, "supreme legislator, supreme judge, and supreme executive," had no occasion to communicate about anything with the President of the United States, a person who is never a legislator, never a judge, and though for a short time an executive, is yet never a supreme executive, but an executive limited, coarcted, and restrained by numerous and clear ordinances of a written constitution.

Every presumption, therefore, from what we know of General Butler's views of the action of times of war upon constitutional law, as those views were declared by himself to this court in *Ex parte Milligan* make it improbable that he consulted anybody before he established his provost's court, or informed anybody, even the President of the United States, afterwards. If his own views of his powers were right, he had perhaps little occasion to do so.

2. The action of that President, as we have it in written records, tends to the same conclusion. On the 20th of October, 1862, the President did establish a civil court in New Orleans, in very great form, as we have already said. Among other formalities, he issued a commission to Mr. Peabody, constituting him judge. This commission recites that the insurrection had temporarily "swept away the civil institutions of the State, including the judiciary and judicial authorities of the Union," and that it was "indispensably necessary that there should be *some* judicial tribunal existing there capable of administering justice." The President

* 4 Wallace, 14.

plainly considered that no such tribunal was there, or since the rebellion had been there. He accordingly established such a one; a Provisional Court; one confessedly not such as the Constitution and laws authorized in time of peace, and established only in an exercise of the rights of war; that is to say, such a one as General Butler pretended to establish. Is it not plain, from the establishment of this court, and especially from the recitals just quoted, that the President never did authorize General Butler's Provost Court at all as a civil court, and that if he ever heard of it acting as such a court, that he disapproved of its doing so? Mr. Lincoln, it is quite plain, felt that to establish a civil court, even in an occupied city, a commission was necessary from *him*, and when he wished to establish such a court he gave one in form.

In the face of such evidence, both of General Butler's views and of President Lincoln's views, you can presume nothing in this matter.

The authorities in this court show too that the case is not one for favorable presumptions of approval by the President. In the *Sea Lion*,* an act of Congress, after restricting commercial intercourse in the insurrectionary districts, authorized the President to license it in certain cases, with a proviso that the licensed intercourse should be carried on only in pursuance of regulations prescribed by the Treasury Department. The construction was that the *President alone* had the power to license such intercourse. The court said:

"The license finds no warrant in the statute. The statute prescribed that the PRESIDENT shall license trade."

It is to be observed too, that in this case General Banks licensed the trade, and that Rear-Admiral Farragut indorsed the license "Approved." Yet it was held that "the President only could license it;" and no presumptions that he had licensed it were indulged in, even though such officers

* 5 Wallace, 613; and see the Ouachita Cotton, 6 Id. 531; Cappell *v.* Hall, 6 Id. 557, and McKee *v.* United States, 8 Id. 166.

as General Banks and Admiral Farragut with their combined power had sanctioned it.

But the extraordinary part of the case is that Major Bell, the Provost Court, *decided the case in favor of the Mechanics' and Traders' Bank;* that his judgment was not appealed from to General Butler; but *suâ sponte—motu mero suo*—in exercise of his power as "supreme legislator, supreme judge, and supreme executive"—the General ordered him to open the case and reverse his decision; and that the provost judge did do this, and, as he says, "under orders." Who was the judge? Surely not Major Bell, for his will, his mind, his judgment, were at variance with his decree. General Butler was the judge, and Bell did but record *his* decree.

Mr. P. Phillips, contra:

1. The case has been argued on the other side as if the jurisdiction of this court under section 709 of the Revised Statutes was clear. But it is not clear; on the contrary, it does not exist.

The grounds on which it is assumed that the jurisdiction exists under the section just referred to, are:

1st. That no court could be established in Louisiana by the government of the United States, nor any judge appointed by it—not even in time of civil war—but in the way provided in certain clauses of the Constitution.

2d. That there was an implied contract by the borrowing bank to restore money received by it from the Union Bank in virtue of a void decree, enforced by military power; and that this implied contract was violated by section 149 of the State constitution.

But no constitutional question is *necessarily* involved. The judge of the inferior State court seems to have avoided much discussion about any. He found that the debt claimed by the Union Bank was a just debt, and that this being so, and that bank having got, even by a void decree, its money, there was an end to the case.

There thus being ground, not involving a Federal question, upon which the case can be rested, no Federal question

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should be entertained.* The Supreme Court of Louisiana in resting the case on the ground which it did, did not mean to abandon the ground taken by the court below it; ground taken in the pleadings, and of course covered by the final judgment in the Supreme Court as well as in the inferior court.

Whether or not this point not Federal was rightly decided is not a matter open for judgment here. But plainly it was decided rightly. It is impossible to believe that when the Union Bank lent this money—General Butler being then in occupation of the city—and allowing the circulation of Confederate money, only "till further orders"—it is impossible to believe that the directors or officers of the Union Bank lent Confederate notes to be returned at the borrower's pleasure in kind. The tender made in repayment, on the 26th, was an offer to pay a debt in a thing utterly worthless. In one day afterwards no one would be permitted to circulate or to deal in it. The borrowing bank did not own the notes which it tendered; and the tender was made knowing that it would not be accepted.

2. But assuming that jurisdiction exists in this court, under section 709, or that the decision on the point not Federal was wrong.

The position of the other side is that the court established by General Butler was not established, nor its judge appointed, in accordance with certain articles of the Constitution; the same being the articles which prescribe in what way the courts of the United States shall be established, and judges in them appointed, in cases generally.

That the court was not so established, and that its judge was not so appointed is conceded. But we assert at the same time that the provisions of the Constitution relied on by the other side are not applicable to a state of war.

If they are so applicable then every other provision of the same Constitution, applicable to times and cases generally, may be applied.

* Murdock *v.* City of Memphis, 20 Wallace, 591.

For example, "No one," says the Constitution, "shall be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without due compensation."

But it would be bordering on the absurd to say that such provisions were in force while the State was occupied by an invading army to compel its citizens to lay down their arms.

The occupation of New Orleans by the Federal forces did not restore to its citizens the rights which they had renounced under the Constitution of the United States. If the acts of reconstruction are valid, these rights were not restored until Congress provided for their representation in its body. To some extent, indeed, the people of New Orleans ceased to be enemies. For when the city was taken possession of, a proclamation was issued by the commanding general, which, while it declared martial law, promised protection to rights of property. But this was all; all, at least, at the dates which are under our consideration.

Then the question is—admitting that the court established by General Butler was not a court established nor its judge appointed in the way customary in times of peace—was its organization or the appointment of its judge, and its action void, in view of the special circumstances existing when it was established?

The condition of New Orleans when the Federal forces took possession of it has been frequently described by this court. On the 20th October, 1862—months after the establishment of the Provost Court—the President issued his executive order, by which a provisional court was instituted. In this he describes the "insurrection" as having subverted and swept away the civil institutions of the State, including the judiciary, so that "it has become necessary to hold the State in military occupation."

The President accordingly established a provisional court with wide powers and complete ability to enforce them. That in this he acted in accordance with the Constitution

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has been decided in *The Grapeshot*,* and affirmed in *Pennywit* v. *Eaton*† and in *Handlen* v. *Wickliffe*.‡

Indeed, it seems to be conceded on the other side that if the Provost Court had been established by the executive under an order issuing directly from him, no question could now exist as to its validity. But surely a general in the command of a department, in the exercise of war powers, must in the absence of evidence to the contrary, be presumed to act in accordance with the views and under the sanction and authority of the commander in chief.§ When insurrection has swept away the judicial tribunals of a State as well as of the United States, the commanding general in the exercise of the war power had authority to organize a provisional court for the trial of civil as well as of criminal cases. And what if he does *call* it a Provost Court, provided he show, as he here is alleged by the other side to have done, that the court was meant to be one for the trial of civil causes also? The community must be saved from chaos, and courts are the means by which this end is attained. It is better for the true sovereign that when he is restored to his rights he should find order instead of chaos. On this ground the judgments of the Confederate courts, though presided over by judges in sworn hostility to the United States, have been held valid by this court. The necessity which gave validity to such judgments was certainly no greater than that which called for the organization of courts in New Orleans in May, 1862. It was in this spirit that article 149 of the constitution of the State was passed, affirming all judgments rendered between January, 1861, and its adoption.

That the President was informed of what General Butler had done, and that he approved it so far as even by the views of the other side would be enough to give to it his official sanction, is not to be doubted. His omitting to establish any provisional court *in form* for nearly six months after the city was occupied proves this. He established this

* 9 Wallace, 132. † 15 Id. 382. ‡ 12 Id. 175.
§ Leitensdorfer *v.* Webb, 20 Howard, 176.

provisional court not by way of showing his ignorance or disapproval of what in the first moment of occupation had been done, but because it was desirable now, though only *something* like former times prevailed in New Orleans, and till such times prevailed entirely, to have a tribunal established in more form, with better evidences of its powers and jurisdiction, and of the limits upon them which might now safely be made.

But the other side should show affirmatively a disapproval; approval being to be presumed in a case like this.

Besides, the Provisional Court was a court for the State of Louisiana, and not, like the Provost Court, for the city of New Orleans alone.

Yet, further, *The Grapeshot* did not decide that the President's knowledge or authorization was necessary to make a valid court. In that case, a court established by him during war, and in a place where courts could not be established as in times of peace, was held to have been validly established. But it was not decided that a military commander occupying a place might not have validly established one also. Suppose that after occupying New Orleans General Butler's communications with the President had been cut off, and remained for months cut off entirely, as in fact they were cut off, in every way but by sea, when the Provost Court was established. What then? Could no civil court at all be established? The argument of the other side is reduced to the *absurdum*.

As to the evidence of General Butler's compelling Major Bell to reverse his decision, the thing rests on the evidence of the officer of the borrowing bank of what the provost judge *told* him. There is really no legal evidence that General Butler ever did more than hear what the counsel of the borrowing bank had to say. If Major Bell, in such a place and in such a situation as he was in, did no more than consult with General Butler, and after being enlightened by his views reconsider his former decision, what does the "acting under orders" come to?

Reply:

As to the jurisdiction.

1. In suing in the inferior State court to recover the money which the bank borrowing Confederate notes had been obliged by the Provost's Court to pay in good money, that bank set up specially that the establishment of Major Bell's court, his appointment as judge, and his actions and proceedings as such, in the suit before him between the banks, were null and void as being in violation of the Constitution of the United States, which vests the judicial power of the Union in one Supreme Court and such inferior courts as Congress may, from time to time, ordain and establish. And on this ground the plaintiff claimed immunity from any effect resulting from the judgment of Judge Bell's court.

The Supreme Court of Louisiana, however, held that the Provost Court was a lawful one, and the judgment valid and a bar to plaintiff's claim. This presents a Federal question, and assimilates the present case to that of *Pennywit* v. *Eaton*.*

2. A Federal question is also presented since the Supreme Court of Louisiana held, that supposing the judgment of the Provost Court to have been void, it was made valid by article 149 of the State constitution. For, if that judgment was void when the money was paid under it, to the Union Bank, under protest, an implied contract attached to the Union Bank to refund it, and if article 149 bars or assumes to bar the enforcement of that contract, it impairs the obligation of the contract, and is, consequently, unconstitutional so far as it applies to the present case.†

Mr. Justice STRONG delivered the opinion of the court.

The facts of this case, so far as they are necessary to a proper understanding of the question raised, are the following:

In May, 1862, after the capture of New Orleans by the United States army, General Butler, then in command of

* 15 Wallace, 380. † Railroad Company *v.* McClure, 10 Wallace, 511.

the army at that place, issued a general order appointing Major J. M. Bell, volunteer aid-de-camp, of the division staff, provost judge of the city, and directed that he should be obeyed and respected accordingly. The same order appointed Captain J. H. French provost marshal of the city, and Captain Stafford deputy provost marshal. A few days after this order the Union Bank lent to the plaintiffs the sum of $130,000, and subsequently, the loan not having been repaid, brought suit before the provost judge to recover the debt. The defence was taken that the judge had no jurisdiction over civil cases, but judgment was given against the borrowers, and they paid the money under protest. To recover it back is the object of the present suit, and the contention of the plaintiffs is that the judgment was illegal and void, because the Provost Court had no jurisdiction of the case. The judgment of the District Court was against the plaintiffs, and this judgment was affirmed by the Supreme Court of the State. To this affirmance error is now assigned.

The argument of the plaintiffs in error is that the establishment of the Provost Court, the appointment of the judge, and his action as such in the case brought by the Union Bank against them were invalid, because in violation of the Constitution of the United States, which vests the judicial power of the General government in one Supreme Court and in such inferior courts as Congress may from time to time ordain and establish, and that under this constitutional provision they were entitled to immunity from any liability imposed by the judgment of the Provost Court. Thus, it is claimed, a Federal question is presented, and the highest court of the State having decided against the immunity claimed, our jurisdiction is invoked.

Assuming that the case is thus brought within our right to review it, the controlling question is whether the commanding general of the army which captured New Orleans and held it in May, 1862, had authority after the capture of the city to establish a court and appoint a judge with power to try and adjudicate civil causes. Did the Constitution of

the United States prevent the creation of civil courts in captured districts during the war of the rebellion, and their creation by military authority?

This cannot be said to be an open question. The subject came under consideration by this court in *The Grapeshot*,* where it was decided that when, during the late civil war, portions of the insurgent territory were occupied by the National forces, it was within the constitutional authority of the President, as commander in chief, to establish therein provisional courts for the hearing and determination of all causes arising under the laws of the State or of the United States, and it was ruled that a court instituted by President Lincoln for the State of Louisiana, with authority to hear, try, and determine civil causes, was lawfully authorized to exercise such jurisdiction. Its establishment by military authority was held to be no violation of the constitutional provision that "the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish." That clause of the Constitution has no application to the abnormal condition of conquered territory in the occupancy of the conquering army. It refers only to courts of the United States, which military courts are not. As was said in the opinion of the court, delivered by Chief Justice Chase, in *The Grapeshot*, "It became the duty of the National government, wherever the insurgent power was overthrown, and the territory which had been dominated by it was occupied by the National forces, to provide, as far as possible, so long as the war continued, for the security of persons and property and for the administration of justice. The duty of the National government in this respect was no other than that which devolves upon a regular belligerent, occupying during war the territory of another belligerent. It was a military duty, to be performed by the President, as commander in chief, and intrusted as such with the direction of the military force by which the occupation was held."

* 9 Wallace, 129.

Thus it has been determined that the power to establish by military authority courts for the administration of civil as well as criminal justice in portions of the insurgent States occupied by the National forces, is precisely the same as that which exists when foreign territory has been conquered and is occupied by the conquerors. What that power is has several times been considered. In *Leitensdorfer & Houghton* v. *Webb*,* may be found a notable illustration. Upon the conquest of New Mexico, in 1846, the commanding officer of the conquering army, in virtue of the power of conquest and occupancy, and with the sanction and authority of the President, ordained a provisional government for the country.† The ordinance created courts, with both civil and criminal jurisdiction. It did not undertake to change the municipal laws of the territory, but it established a judicial system with a superior or appellate court, and with circuit courts, the jurisdiction of which was declared to embrace, first, all criminal causes that should not otherwise be provided for by law; and secondly, original and exclusive cognizance of all civil cases not cognizable before the prefects and alcaldes. But though these courts and this judicial system were established by the military authority of the United States, without any legislation of Congress, this court ruled that they were lawfully established. And there was no express order for their establishment emanating from the President or the commander in chief. The ordinance was the act of General Kearney, the commanding officer of the army occupying the conquered territory.

In view of these decisions it is not to be questioned that the constitution did not prohibit the creation by military authority of courts for the trial of civil causes during the civil war in conquered portions of the insurgent States. The establishment of such courts is but the exercise of the ordinary rights of conquest. The plaintiffs in error, therefore, had no constitutional immunity against subjection to

* 20 Howard, 176.

† Executive Documents, 2d session 29th Congress, vol. 3, Document 19.

the judgments of such courts. They argue, however, that if this be conceded, still General Butler had no authority to establish such a court; that the President alone, as commander in chief, had such authority. We do not concur in this view. General Butler was in command of the conquering and occupying army. He was commissioned to carry on the war in Louisiana. He was, therefore, invested with all the powers of making war, except so far as they were denied to him by the commander in chief, and among these powers, as we have seen, was that of establishing courts in conquered territory. It must be presumed that he acted under the orders of his superior officer, the President, and that his acts, in the prosecution of the war, were the acts of his commander in chief.

Again, it is argued that even if the Provost Court was rightly established, it had no jurisdiction over civil causes. It must be conceded that the order by which the court was created did not define expressly the nature and extent of its jurisdiction. And it is also true that a Provost Court ordinarily has cognizance only of minor criminal offences; but that a larger jurisdiction may be given to it, by the power which brings it into being, is undeniable. Whether a larger jurisdiction was conferred in the case now under consideration we are not called upon to determine. It is not a Federal question. The Supreme Court of Louisiana decided that General Butler had a right, after the capture of New Orleans, in May, 1862, to appoint a judge to try civil cases, notwithstanding the provisions of the Constitution. Having determined that he had such a right, we have disposed of the question which entitles the case to be heard here, and it is not for us to inquire whether the Provost Court acted within its jurisdiction or not. That is a question exclusively for the State tribunals. In determining, as the State Supreme Court did, that the plaintiffs had no such constitutional immunity as they claim, there was no error. If in other respects errors were committed, they are not reviewable by this court, unless they present some other Federal question.

Such a question the plaintiffs allege is presented. Assuming that the judgment given by the Provost Court in favor of the Union Bank was void for want of jurisdiction in the court, they argue that when they paid the sum adjudged against them the law raised an implication of a promise by the Union Bank to refund it, and that the obligation of this contract was impaired by the 149th article of the State constitution of 1868. That article ordained that all judgments and judicial sales, marriages, and executed contracts made in good faith and in accordance with existing laws in the State, rendered, made, or entered into between the 26th day of January, 1861, and the adoption of the constitution, should be valid. But if the court was lawfully established, as the Supreme Court of the State decided, the law raised no such promise as is asserted, and the validating clause of the constitution, therefore, impaired no contract obligation. Besides, we cannot admit that the legislation of a State may not validate the judgments of a court in fact, though in giving the judgments the court may have transcended its jurisdiction.

Nothing more need be added. Sufficient has been said to show that, in our opinion, the plaintiffs have been denied no right or immunity secured to them by the Constitution and laws of the United States. If there is any error in the record, it is one of which this court can take no cognizance.

JUDGMENT AFFIRMED.

Mr. Justice FIELD, dissenting.

I am unable to agree with a majority of the court in this case. I do not differ from them so much in the judgment rendered as in the reasons assigned for it. Had they placed their decision on the ground that the plaintiff bank owed the money it was compelled by the decree of the Provost Court to pay, and, therefore, could not recover it back, however illegal the action of that tribunal, I should have made no objection to their judgment. But as they pass by this ground and not only affirm the legality of the establish-

ment of the Provost Court by the commanding general at New Orleans, which is not seriously controverted, but the validity of the jurisdiction in civil cases exercised by that tribunal, I must dissent from their opinion. I can find no sufficient warrant for any such doctrine as there expressed in the action of the government during the late war, or in the previous decisions of this court.

The case, as disclosed by the record, is briefly this: On the 2d of May, 1862, General Butler, commanding the forces of the United States then occupying the city of New Orleans, by general order appointed Major Bell, aid-de-camp of the division staff, provost judge of the city. Soon after this, and previous to the 13th of May, the Union Bank of Louisiana loaned the Mechanics' and Traders' Bank of New Orleans $130,000 in Confederate notes. On the 26th of the month the borrowing bank tendered payment of this amount in notes of the same kind, but the tender was refused, the lending bank claiming payment in either the notes of the borrowing bank or in United States currency. It appears that the commanding general had, by proclamation issued on the 16th, prohibited the circulation of Confederate notes after the 27th of the month. This prohibition necessarily affected the value of the notes. A dispute thereupon arose between the two banks as to the character of the currency in which the loan was to be paid, it being contended on the one side that Confederate notes were to be received in payment, and on the other that the money should be refunded in notes as current at the time as the Confederate notes were when they were loaned. The lending bank thereupon brought suit for the $130,000 before the Provost Court.

That court dismissed the suit, holding that the claim was payable in Confederate notes. This was early in July, 1862. Some days afterwards the commanding general directed the provost judge to set this judgment aside, and to try the case again. Accordingly, when counsel for the Mechanics' and Traders' Bank appeared in the action after this order and attempted to make a defence, he was informed by the judge that he need not read any law to the court, that the judge

had been ordered to grant a new trial, and that "the case would be decided under orders." A judgment for the amount claimed payable in currency was accordingly rendered in favor of the Union Bank, and the same was paid under protest. This was on the 24th of July, 1862.

It was to recover this sum that the present action was brought in a State District Court of Louisiana. That court declined to pass upon the competency of the Provost Court to render the judgment in question, but held that the Mechanics' and Traders' Bank was indebted to the Union Bank in the amount for which that judgment was rendered, and that the same could not be recovered back in the present action; and further, that the 149th article of the constitution of the State of 1868, which declared that all judgments, with certain exceptions, not material in the present case, rendered in good faith and *in accordance with existing laws in the State*, between the 26th of January, 1861, and the adoption of the constitution, should be valid, secured for the judgment in question, to use the language of the court, "the validity which probably it did not previously possess."

On appeal the Supreme Court of the State went further, and held that the commanding general had the right to establish the Provost Court and invest it with jurisdiction to decide all civil cases, including the one complained of; that its establishment was the exercise of the war power of the United States, presumably with the consent and authorization of the President, and that the judgment was validated by the 149th article of the State constitution.

The plaintiff combats these positions, and contends that the commanding general had no authority to invest that military tribunal with jurisdiction in civil cases; and that it was exempted under the Constitution from any liability imposed by a judgment rendered in the exercise of any such jurisdiction.

The Constitution secures to every one immunity from liability and consequent deprivation of property from the unwarrantable exercise of jurisdiction by tribunals established under the authority of the United States, whether by Con-

gress acting under the judiciary article of that instrument, or by the executive, or military officers appointed by him, acting under the war powers of the government. And the right to inquire in this court whether any such unwarranted jurisdiction has been exercised is not, in my judgment, dependent upon the determination of a State court as to the validity of the asserted jurisdiction.*

Had this court, as already stated, confined itself to an affirmation of the judgment of the State court on the ground that the plaintiff bank owed the money borrowed, and that it could not recover it back in this action, although paid under the coercion of the decree of the Provost Court, I should have acquiesced. But to uphold the civil jurisdiction of that military tribunal upon the presumed assent to its investment with such jurisdiction by the President of the United States, when, as I think, the President refused to permit the exercise of any such jurisdiction during the war, appears to me to be uncalled for and erroneous.

Provost courts are military courts having a well-known jurisdiction, which is limited exclusively to minor offences, tending to disorder and breaches of the peace, by soldiers and citizens within the lines of an army, and occupy with reference to such offences a similar position with that of police courts in our cities.

The power and jurisdiction of these courts were the subject of frequent consideration during the late war by the Judge-Advocate-General of the army, and by him were brought to the attention of the Secretary of War and the President. His opinions upon these subjects, when approved by the Department of War, were adopted as directions of the executive head of the government for the guidance of the officers of the army. And it is impossible to read the opinions without perceiving in almost every line that the jurisdiction of the tribunals was limited to offences of a petty character, and that the government intended that such jurisdiction should not in any case be enlarged. By

* Trebilcock *v.* Wilson, 12 Wallace, 692–4.

them it was declared that a general commanding a department, in which the ordinary criminal courts were suspended, was authorized, *under circumstances requiring the prompt administration of justice*, to appoint a provost judge for the trial of minor offences, but that the graver violations of the law should be referred to military commissions; that the provost court was a tribunal whose jurisdiction was derived from the customs of war, and was unknown to our legislation; that it had no jurisdiction of offences of soldiers triable before a court-martial or military commission; and that the judgment of the Provost Court at New Orleans, directing the imprisonment of men at Ship Island and the Dry Tortugas for desertion, marauding, mutiny, robbery, and larceny, was without sanction of law and wholly void. "The jurisdiction of a provost court," said one of these opinions, "should be confined to cases of police merely, to wit: such cases as are summarily disposed of daily by the police courts in our large cities, as, for instance, cases of drunkenness, disorderly conduct, assault and battery, and of violation of such civil ordinances or military regulations as may be in force for the government of the locality. The provost judge supplies the place of the local police magistrate in promptly acting upon the class of cases described, without, at the same time, being necessitated (as a formal military commission would be) to preserve a detailed record of the testimony and proceedings in each case."

In another case, where an order of a commander of a department authorized a provost court to settle questions of title to personal property, it was declared that that was a subject of which no military court could properly take cognizance, and the department commander was advised that the jurisdiction of such tribunals as provost courts, in time of war, could only be extended to matters of police.*

* See record of opinions in the office of the Judge-Advocate-General, vol. ii, 14; vol. vi, 635, 639; vol. viii, 638; vol. xii, 386; vol. xiii, 392; vol. xv, 519. An excellent digest of these opinions was prepared by Major W. Winthrop, of the United States Army, in 1868, and published by authority of the Secretary of War.

In the face of these promulgations from the department of military justice, approved by the Secretary of War, and through him by the President, how can it be said that the Provost Court in New Orleans was presumably authorized by the President to exercise civil jurisdiction? From inquiries which I have made since this case has been pending, I think I am justified in stating that no case has arisen in which the exercise of civil jurisdiction by one of these tribunals has ever been, even impliedly, sanctioned by the government. Whenever any attempt by them to exercise such jurisdiction has been brought to the attention of the executive department, it has been uniformly and promptly condemned.

Besides, the assent of the executive can only be presumed in support of such acts of a subordinate officer as legitimately fall within the sphere of that officer's duties, and with the execution of which he is usually charged. Acts relating to the movement of troops and the furnishing of supplies to them, directed by the Secretary of War, may well be presumed to have been authorized by the President, because the execution of such measures falls within the sphere of the War Department. But no presumption would arise that they were thus authorized if the directions proceeded from the Postmaster-General or the New York collector of customs, because to neither of those officers are such duties usually intrusted.

Now, it is no part of the duty of a military commander, whether putting down an insurrection against the government or engaged in making foreign conquest, to settle the pecuniary obligations of citizens to each other, or to provide a court for their determination. His whole duty is to subdue, by force, the insurrection in the one case and opposition to the extension of the dominion of his government in the other; and when this is accomplished, to preserve order in the community until his superior authorities direct what further proceedings shall be taken. Until such directions are given the military commander cannot lawfully go beyond his simple military duties.

So, when a civil government was established in New Mexico, by order of General Kearney, after that officer had conquered that province by the forces under his command, he acted pursuant to special instructions from the President, through the head of the War Department. He carried the instructions with him, prepared in advance, so confident was the President that certain conquest would attend the march of our troops.

"Should you conquer and take possession of New Mexico and Upper California, or considerable places in either," said these instructions, issued on the 3d of June, 1846, "*you will establish temporary civil governments therein*, abolishing all arbitrary restrictions that may exist, so far as it may be done with safety. In performing this duty it would be wise and prudent to continue in their employment all such executive officers as are known to be friendly to the United States, and will take the oath of allegiance to them."*

I think, therefore, that the majority of the court are mistaken in their statement that there was no express order for the establishment of courts and a judicial system by General Kearney in New Mexico, emanating from the President or commander-in-chief. The authority for the establishment of civil government included the establishment of different departments of such government, judicial as well as others.†

The case of *Leitensdorfer* v. *Webb*,‡ cited by the majority in support of their views, does not, therefore, appear to me to touch the real question at issue. There, General Kearney, having his specific instructions from the President, and, as this court stated in that case, "holding possession for the United States, in virtue of the power of conquest and occupancy, and in obedience to the duty of maintaining the security of the inhabitants, ordained, *under the sanction and*

* Executive Documents, 2d session of 29th Congress, vol. iii, 1846 and 47, No. 19.

† The ordinance of General Kearney establishing civil government in New Mexico, with courts of civil and criminal jurisdiction, provided that the judges of those courts should be appointed by the President of the United States. Same documents, No. 19, page 30.

‡ 20 Howard, 176.

authority of the United States, a provisional or temporary government for the acquired territory."

As to the appointment of Judge Peabody as provisional judge of New Orleans, which was held valid in the case of *The Grapeshot*,* a case cited as conclusive of the question under consideration here, the appointment came directly from the President. On the 20th of October, 1862, he issued his order, reciting that the insurrection had temporarily subverted and swept away the civil institutions of Louisiana, including the judiciary and judicial authorities of the Union, so that it had become necessary to hold the State in military occupation, and that it was indispensable that there should be some judicial tribunal existing there, capable of administering justice; and that, therefore, he had thought proper to establish and did establish a Provisional Court, and appoint a judge thereof, with authority to hear, try, and determine all causes, civil and criminal, including causes in law, equity, revenue, and admiralty, conforming his proceedings, as far as possible, to the course of proceedings and practice of the courts of the United States in Louisiana, but that the appointment of the judge should not extend beyond the period of military occupation of the city of New Orleans or the restoration of the civil authority in that city and State.†

Upon the restoration of the civil authority the Provisional Court thus established ceased to exist. In July, 1866, Congress enacted that all suits, causes, prosecutions, and proceedings of that court, proper for the jurisdiction of the District or Circuit Court of the United States for Louisiana, should be transferred to those courts respectively, and be heard and determined therein, and that all judgments, orders, and decrees of the Provisional Court, in cases thus transferred, should at once become the orders, judgments, and decrees of the District or Circuit Court, as the case

* 9 Wallace, 129.

† See the commission of President Lincoln to Mr. C. A. Peabody, *supra*, p. 279.

might be, and be enforced, pleaded, and proved accordingly.*

We thus have the establishment of the court by the President, and the recognition of the legality of its establishment by Congress. Surely there is no analogy between that case and the one at bar.

No other case is cited in support of the extraordinary judgment of the Provost Court we are now considering, and I feel confident that there is no authority in the previous decisions of this court for the doctrine announced by the majority in their opinion.

I do not question that it was competent for the President to authorize the establishment by military officers, or civilians appointed military governors, of temporary courts, to continue during the war, with civil as well as criminal jurisdiction to the extent essential for the security of persons and property, in territory dominated by our forces, after the overthrow of the insurgent power of the Confederates. Such was the case with the military governor of Louisiana, who was specially authorized in his commission from the President to establish all necessary tribunals within the State, and whose appointment of judges of the third and fourth District Courts in New Orleans was recognized as valid by this court in the cases of *Handlin* v. *Wickliffe*, reported in the 12th of Wallace, and *Pennywit* v. *Eaton*, reported in the 15th of Wallace.† All that I insist upon is, that where

* 15 Stat. at Large, 360.

† The following is a copy of the commission issued by the President to General Shepley as military governor of Louisiana:

"COMMISSION AS MILITARY GOVERNOR.

"WAR DEPARTMENT, WASHINGTON CITY, June 3d, 1862.

"Hon. GEORGE F. SHEPLEY, &c., &c.

"SIR: You are hereby appointed military governor of the State of Louisiana, with authority to exercise and perform, within the limits of that State, all and singular the powers, duties, and functions pertaining to the office of military governor (*including the power to establish all necessary offices and tribunals and suspend the writ of habeas corpus*), during the pleasure of the President, or until the loyal inhabitants of that State shall organize a civil government in conformity with the Constitution of the United States.

"By the President.

[SEAL OF THE UNITED STATES] "E. M. STANTON,
"Secretary of War."

such courts were established the authority from the President must be shown, and that it cannot be presumed from the mere existence of the courts, and the exercise of jurisdiction by them. Sometimes, indeed, the general power conferred upon a subordinate officer carried with it authority to establish such tribunals; as, for example, the power conferred upon a military commander to establish a civil government, carried authority to establish tribunals with civil as well as criminal jurisdiction in the territory governed, for the administration of justice. But the mere possession of military power in a particular district within the United States by an officer of the army of the United States carried with it, by itself, no authority to establish tribunals to dispose of civil controversies between the inhabitants of such district, and where any such authority is asserted to have existed it must be shown to have been granted by the President; it cannot be presumed, certainly not where the ordinary jurisdiction of the court excluded any power over civil controversies, as was the case with provost courts.

But supposing that the provost court in the present case was rightly invested with civil jurisdiction, there was nothing to justify its judgment in the case mentioned. It had already given its judgment that the suit before it of the Union Bank should be dismissed. There its powers ended. What subsequently it did was done under the dictation of its military superior; and so, as if in derision of the proceeding, the provost judge afterwards said to the counsel of the defendant, that no law need be read to him; that the commanding general had ordered a new trial, and that "the case would be decided under orders."

A judgment thus rendered wants all the elements of a judicial determination, and is entitled to no respect in any tribunal where justice is administered. The commanding general, we all know, was a man of eminent ability, and competent to sit in judgment upon any question of law, however difficult; but he was not judge there; he was only a military chieftain, and his order had nothing in it which

took from its character as an arbitrary edict of despotic power.

The position that the judgment of the Provost Court was validated by article 149 of the constitution of Louisiana of 1868, does not seem to me to merit any consideration.* The article requires for the validation of the judgment that it must have been rendered *in accordance with existing laws in the State*, and the assertion that any laws of the State at the time authorized the establishment of a provost court, or that such court should rehear a case upon the mandate of a commanding general of the United States, is a proposition which needs only to be mentioned to be answered.

Besides, it is a novel doctrine in this country, that a judgment affecting private rights of property, not merely defective for want of compliance with some matter of form, but absolutely void for want of jurisdiction in the court to render it, can be validated by subsequent enactment, legislative or constitutional. I know of no judicial determination recognizing any such doctrine or even looking that way.

Mr. Justice BRADLEY was not present at the argument of this case, and took no part in its decision.

GAVINZEL *v.* CRUMP.

In November, 1863, during the rebellion, Confederate notes being then so much depressed in market value that in Richmond, Virginia, $3260 of them were worth but $204 in gold coin, G., a Swiss, at the time resident in Richmond, but desirous to go to Europe—to escape to which through the rebel lines was then extremely difficult—agreed to lend C., an American, resident in Richmond, the said sum of $3260 in the Confederate notes above mentioned, and C. borrowed the said sum in such notes. C. executed his bond to G., by which it was agreed that the money was not to become due and payable until the civil war should be ended (during which no interest should be chargeable), nor become

* See the 149th article in the statement of the case, *supra*, 281.

Statement of the case.

payable then unless demand was made for it; and, moreover, that if C. was not at that time prepared to pay the said sum, he should have a right to retain it for two years longer, when it should become absolutely payable. The bond continued:

"And upon this further condition, that at any time after the 1st day of April, 1864, and during the continuance of said war, if the said G., or any attorney in fact duly authorized by him to receive payment of said sum, shall be present *in person* in the city of Richmond, I shall have the right (if I elect to do so) to tender said sum, without interest thereon, to said G. *in person*, or to his said attorney in fact *in person*, in said city, in current bankable funds; and upon such tender being made the said G. or his said attorney in fact shall be bound to receive the same in full payment and satisfaction of this obligation, and thereupon the said obligation shall be surrendered and cancelled. But said tender is not to be made except to said G. or his said attorney in fact in person, in the city aforesaid."

G. went to Europe after the execution of the bond, and did not return till after the war was ended, that is to say, not until June, 1865. He then demanded payment of the $3260 in lawful money of the United States. C. set up and proved that at all times after the 1st of April, 1864, he had $3260 "current bankable funds" on hand, to pay to G. or to any attorney in fact authorized by G. to receive them, but that neither G. nor any such attorney in fact was ever present in Richmond until after the war was ended, at which time the said funds were worthless. His position thus was that the bond was discharged by his readiness to tender; and that this readiness of his had been rendered of no effect by the fault of G. in not being in Richmond, or having an attorney in fact there to receive the money. *Held*,

1st. That there was nothing in this above-quoted paragraph of the bond which impliedly obliged G. either to be himself in Richmond at any time after the 1st day of April, 1864, and during the continuance of the war, or to have an attorney in fact there to receive the money due on the bond.

2d. That there was no ambiguity in the written contract, and, therefore, no occasion to introduce parol evidence to show that it was part of the contract that after the 1st of April, 1864, the war then continuing, G. should be in Richmond or have an attorney in fact there to receive payment for him of the money due on the bond.

APPEAL from the Circuit Court of the United States for the Eastern District of Virginia.

George Gavinzel, M.D., a Swiss, resident in Richmond, Virginia, on the 20th of November, 1863, the rebellion being then flagrant, and "Confederate notes," as they were called—that is to say, notes issued by the rebel confederacy—being the only currency common in Richmond, agreed to lend to

Robert Crump, a resident, like himself, of Richmond, and whose family physician he was, the sum of $3260 in the said notes; the notes, at the time, having become so far depreciated that the $3260 lent in them were worth in gold but $204. Gavinzel was at this time contemplating leaving the country for Europe, it being, however, a matter of extreme difficulty to pass through the rebel lines.

In adjusting the terms of the loan, the only difference between the two parties was as to the time when the money should be returned. Gavinzel, though he *expected* that the war would be ended by the spring of 1864, was desirous of postponing the time of payment till the close of the war, whenever that close might take place. Crump wished to have the privilege, in case the war lasted after April, 1864, of making payment at any time after that day and during its continuance. However, after having discussed the matter for a certain time, one Cannon, an attorney, employed by Gavinzel, drew up a bond in these words, the part in brackets at the close of the instrument being the part on which the question in this suit chiefly arose:

"Know all men by these presents, that I, Robert Crump, of the county of Henrico, and State of Virginia, am held and firmly bound unto George Gavinzel, M.D., of the city of Richmond, in the said State, in the sum of $3260, for the payment of which sum, well and truly to be made to the said Gavinzel, his heirs, assigns, and personal representatives, I bind myself, my heirs, executors, and administrators firmly by these presents, as witness my hand and seal, this 20th day of November, 1863.

"The foregoing obligation is made subject to the following terms and conditions, to wit:

"That the said sum of $3260 is to be retained by me, and is not to become due and payable until the close of the present war between the Confederate and the United States of America, during which time the said sum shall not bear any interest whatever, nor shall the same become due and payable after the close of the said war until demand for the same shall be made by the said Gavinzel or his legal representatives upon me or my legal representative; and as soon as the war shall have

closed, and said demand shall thereafter have been made, the principal sum of $3260, without interest thereon, shall be paid. But if at that time I shall not be prepared to pay the said sum, I shall have the right to retain the same in my hands for the space of two years from and after the time when such demand is made, I paying legal interest thereon from such time until the said principal sum is paid; and after the expiration of said two years the said principal sum, with such interest as may have accrued thereon after such demand as aforesaid, shall be absolutely due and payable; and the said Gavinzel, his heirs, assigns, and personal representatives, shall have the right to enforce the payment of the same.

"[And upon this further condition, that at any time after the 1st day of April, 1864, and during the continuance of the war, IF the said Gavinzel, or any attorney in fact duly authorized by him to receive payment of said sum, shall be present *in person* in the city of Richmond, and State of Virginia, I shall have the right (if I elect so to do) to tender said sum, without interest thereon, to said Gavinzel *in person*, or to his said attorney in fact *in person*, in said city and State, in current bankable funds; and upon such tender being made the said Gavinzel or his said attorney in fact shall be bound to receive the same in full payment and satisfaction of this obligation; and thereupon the said obligation shall be surrendered and cancelled. *But said tender is not to be made except to said Gavinzel or his said attorney in fact in person, in the city and State aforesaid.*]

"Witness my hand and seal this November 20th, 1863."

The instrument having been read over to both parties in the presence of each other, and no objection being made by either party to its terms, nor any alteration being asked for by either, it was executed by Crump on the day on which it was dated.

At the same time with the execution of this obligation, and according to previous agreement, Crump executed a deed of trust to Cannon of valuable real estate near Richmond, to become void provided "that he, the said Crump, should well and truly pay and satisfy to the said Gavinzel the said sum of $3260, according to the terms and conditions in the said obligation set forth."

Soon after this—that is to say, on December 20th, 1863—Gavinzel got out of Richmond and went to Europe; his escape through the rebel lines having been, according to his own account, almost impossible; attended with greater difficulties than anything which he had ever in his life done.

He left behind him no attorney in fact to collect this debt, but during his absence was wholly unrepresented.

On the 1st of April, 1864, *the war then continuing*, Crump provided himself with $3260 current funds, bankable at Richmond, to pay the loan; but found neither Gavinzel nor any attorney in fact of his to receive them. He had these funds in his possession from the date mentioned until the close of the war, by which time they had lost all value.

On the 2d of June, 1865, the war being now ended—and not till then—Gavinzel returned from Europe, went to Richmond, and demanded payment in lawful money of the United States of the sum named in his bond, $3260; which payment Crump refused to make.

Gavinzel thereupon filed a bill in the court below, praying a sale of the property conveyed in trust, and a payment to him out of the proceeds of the amount which he claimed.

Crump set up in his answer two defences—

1st. That the said $3260 had no reference to lawful money of the United States; that the loan was made in "treasury notes of the Confederate States;" that those notes were issued to sustain a rebellion against the United States, and illegal.

2d. That it was part and parcel of the contract between the parties at the time of the loan and the execution of the bond, that the obligor should be at liberty at any time during the continuance of the said war, after the 1st day of April, 1864, to discharge said debt and said bond for $3260, by repayment of that sum, without interest, *in current bankable funds* to the said Gavinzel, or to his agent; and that without such understanding the obligor would not have received the said $3260, or any part of it in the said Confederate currency, from the said Gavinzel.

The answer further alleged that the respondent had such

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money on the 1st of April, 1864, and at all times afterwards till the close of the war, ready to pay; but that neither Gavinzel nor any agent of his was at Richmond to receive them.

Both Gavinzel and Crump were examined, but while both agreed in swearing that at the time when the loan was made, Gavinzel was getting ready to go to Europe if possible, they flatly contradicted each other as to what Gavinzel prior to or at the execution of the bond and deed of trust, said about the fact or the time of his coming back.

Gavinzel was thus examined and thus answered:

"Q. When you left Richmond on the 20th of December, 1863, did you not then expect to return in the spring or summer of 1864?

"A. I did not expect to live that long, much less to return. I had a severe hæmorrhage.

"Q. At the time of the loan to Crump what was your estimate of the duration of the war?

"A. I expected that the war would last till the commencement of the next spring, and then be ended.

"Q. Did you intend to be here if the war lasted at that time?

"A. I did not.

"Q. Did you agree to be present in the city of Richmond or to have an agent to act for you in the city of Richmond after the 1st of April, 1864?

"A. I did not.

"Q. Was there at the time of the execution of Crump's bond or since, any different agreement in any respect from that contained in the bond?

"A. Never."

Crump was thus examined and thus testified:

"Q. At the time of your *negotiation* with Dr. Gavinzel was anything said by him, and if so what, in regard to his departure from Richmond to Europe?

"A. He said he was getting ready to go. He said that he would *certainly* be back in April, 1864; and, if not, he would have some one here to act for him."

The court below decreed that the trust-deed should stand

as a security for Crump's paying to Gavinzel $204, lawful money of the United States, with interest, &c. (which said sum of $204 was the value in gold of the $3260 Confederate notes when lent), and that if the said $204 were not paid in two months, with interest, as aforesaid, the property conveyed should be sold. From that decree Gavinzel took this appeal.

Mr. H. H. Wells, for the appellant:

The substantial question presented in this cause is, whether the principal sum of $3260, mentioned in the bond and deed of trust, can be discharged by the payment of the sum of $204, the value in gold on the 20th of November, 1863, of $3260 in Confederate notes.

If the large sum may be satisfied by the smaller amount, it is only because by the agreement of the parties the appellee had an absolute right to tender payment to the appellant after the 1st of April, 1864, and during the war, in Confederate money, or in what was equivalent thereto, money then bankable in the city of Richmond, independent of the fact of whether or not Gavinzel was in Richmond, or had an agent there duly authorized to receive payment of the bond.

The bond itself neither shows any such agreement nor gives color to the idea that any such did in fact exist.

And the testimony, taken together, fails to establish any agreement or understanding different from that contained in the bond itself. Even if it were competent to contradict the bond or waive its terms by an antecedent parol agreement or understanding between the parties, this evidence would be ineffectual for that purpose, because—

1st. There is no concord or agreement between the witnesses as to what the conversation in this particular was.

2d. Because the testimony of Crump, taken to be true precisely as he states it, does not amount to either a contract, agreement, or understanding of the parties. It was a statement made at the time of the "negotiation" for the loan, at a time antecedent to the making of the writing, and it was therefore presumed to be embodied in the writ-

ing. It was not an undertaking to be in Richmond nor to have an agent there, but only an expression of an opinion as to what was likely to occur.

The transaction is not void because based on Confederate money. Such transactions have been sustained in this court in more cases than one, their purposes not having in any way been to promote the rebellion.*

It is obvious, from the very great difficulty which existed when the bond was given, of a person's getting through the rebel lines, and out of Richmond, that the bond was in fact a wager upon two things:

1st. The issue of the rebellion.

2d. Whether Gavinzel could get out of Richmond and through the rebel lines.

The last matter was one in contemplation of the parties just as much as the first. Gavinzel, plainly, was convinced,—

1st. That the Confederacy would go to pieces, and probably by April, 1864, and that its notes would be, as they soon did prove to be, absolutely worthless.

2d. That he could execute his purpose of getting through the rebel lines, out of Richmond, and of keeping away until the war was ended (if he should so long live); when, of course, a tender in any money but lawful money of the United States would be no tender at all.

Crump, on the other hand, appears to have been uncertain as to the issue of the rebellion, but to have rather thought,

1st. That if the Southern Confederacy did not achieve a triumph by the 1st of April, 1864, its resources would be exhausted, and that it would have to succumb.

2d. That Gavinzel would not be able to get through the rebel lines out of Richmond before that time.

And on the basis of these, their respective beliefs or speculations, they made these contracts. Which belief was right was a matter which nothing but actual result could decide.

* Delmas *v.* Insurance Co., 14 Wallace, 661; Planters' Bank *v.* Union Bank, 16 Id. 483.

But if the case, as we above suppose, was the true one, there is no difficulty of seeing how naturally the contract, as expressed in the clause of the bond within brackets, might be made, without any circumvention by Gavinzel of Crump, the obligor.

The only difficulty with the case of Crump is, that like many other people in the Southern Confederacy, he did not judge the signs of the times, and the state of things around him, aright; while his opponent, Gavinzel, a cool, observing, and sagacious Swiss, who saw things as a looker on, and without prepossessions or political aspirations, did.

Mr. S. F. Beach, contra:

1. Although there was not in the bond any *express* undertaking by Gavinzel to be present in Richmond after the 1st of April, 1864, in case the war lasted, or if he should not be personally present then to have an attorney in fact there to receive the money for him, yet such an undertaking is implied by the bond. Unless we so admit, the last clause of the bond* would be without any effect whatever on the contract.

It is not to be believed that Gavinzel supposed Crump understood the privilege of the tender as depending upon whether or not Gavinzel *chose* to be represented in Richmond when the 1st of April arrived; that was to suppose that Crump understood his right of tender as depending on whether Gavinzel should, when the time arrived, be willing to accept it.

It must have been known to Gavinzel that Crump understood this provision of the bond as securing something more to him than would have been secure to him without it.

Stipulations are not needed and are not inserted in contracts for securing a future privilege to one party, provided the other, when the time comes, shall then be willing to

* The clause on page 311, *supra*, containing fourteen lines within brackets. The brackets are the reporter's, and, of course, not on the original instrument.—REP.

allow it. Such privileges are, of course, secure without any contract.

The testimony of Crump is thus supported by circumstances, and so outweighs the testimony of Gavinzel, which is unsupported by any.

If, then, the only fact on which depended the right to discharge the bond of the tender, was *the duration of the war after April 1st*, 1864, that fact having occurred and the defendant having been always ready at the place designated to make the tender, and the actual tender having been prevented by an omission which it was in the power of Gavinzel alone to supply (so known and understood at the making of the contract), to wit, the omission of the plaintiff to appoint an attorney to represent him, the effect of all this was to discharge the bond, as completely as if the tender had been actually made and accepted.

2. This contract was plainly a contract of hazard, and, just as plainly, the only matter of hazard in the contemplation of the parties was, *the duration of the war*. The parties did not contract with reference to the hazard of Gavinzel's being represented or unrepresented in Richmond by an attorney in fact after the 1st of April, 1864. That was a matter of no hazard; hazard could not be predicated of it, because it was a matter entirely under the control of Gavinzel.

The essence of the agreement was, that Crump might pay back the loan in the currency in which he received it, if the war lasted, and so long as it lasted, after April 1st, 1864. If the war terminated sooner, he was to repay it in the currency which that termination should bring with it. Each party took a risk, and each received a consideration for the risk.

Crump took the risk of being compelled to pay back good money for bad, and the consideration to him was exemption from interest.

Gavinzel took the risk of losing interest, and of being compelled to take worse money for bad, the consideration to him being the chance of converting his Confederate notes

into gold; and that he considered this chance valuable may be gathered from the opinion which he entertained, that the war would last till the commencement of the spring of 1864, and then be ended.

Mr. Justice DAVIS delivered the opinion of the court.

The main question in the case arises on the construction of the bond.

The bond is peculiar in its character and unusual in its terms. It is not due until the close of the war of the rebellion, and not even then until specific demand is made for the money. Two things must concur to give the obligee or his representative a right of action: the termination of the war and demand for the money. On demand, if the war has closed, the bond can be discharged by the payment of the principal sum, without interest, but the borrower, if he chooses, can retain the money two years longer by paying legal interest. On the expiration of these two years the principal sum and accruing interest is absolutely due and payable. So far the terms of the bond, it is admitted, are plain enough, but there is still another condition on which the chief controversy in the case depends. It is in the concluding words of the instrument.*

It is proved in the case that the money lent was Confederate notes, although the fact is not so stated in the bond, and that after the 1st of April, 1864, the war then continuing, Crump provided himself with the funds for the return of the loan, but found no one in Richmond who was authorized to receive them, and he kept them ready to pay till they lost all value by the termination of the war.

And it is contended by him, as the tender was prevented by the omission of Gavinzel to appoint an attorney in fact to represent him in his absence, the bond is discharged as completely as if the tender had been actually made and accepted.

*. The concluding words here referred to are the clause on page 311, *supra*, containing fourteen lines within brackets.—REP.

Opinion of the court.

This would be so if Gavinzel was in default for not appointing an attorney. But the bond does not require him to make the appointment, nor to remain in Richmond. It gives Crump the right to make the tender, if the war continued after the 1st of April, 1864, but the tender could only be made in Richmond, and only to Gavinzel or to an attorney in fact in person who was authorized to receive payment. In other words, the money was payable, if Gavinzel was in Richmond, or had an agent there to receive it, but was not payable if he was not there, or had no agent in the city. Crump may have understood that his right to discharge the bond by the tender was to become absolute if the war lasted (and so long as it lasted) after April 1st, 1864, but the contract does not admit of a construction consistent with that understanding. And the court cannot, without evidence authorizing it to be done, import words into the contract which would make it materially different in a vital particular from what it now is. There is no occasion to introduce parol evidence to explain anything in the contract, because there is no ambiguity about it, and it is not competent by this sort of evidence to alter the terms of a contract, by showing that there was an antecedent parol agreement or understanding between the parties different in a material particular from that which the contract contained. But if it were competent, the evidence fails to establish any such antecedent agreement. Gavinzel and Crump are the only witnesses, and their statements are inconsistent one with the other. In view of this difference in the recollection of the parties—to use no harsher term—how can the court say that Gavinzel agreed either to be in Richmond or to have an agent there to represent him? Both parties were present when the bond prepared by Cannon on the direction of Gavinzel was read to them, and there does not seem to have been any objection to it, or any alteration proposed in the draft of it. Nor is there anything in the record to show that the parties did not, in this transaction, stand on equal ground, with equal intelligence and equal opportunities of judging of the hazard incurred. If so, hard as the bargain is, there is

no good reason in the state of the pleadings why it should not be enforced. The answer sets up only two defences, the illegality of a contract based on Confederate notes, and the inability of Crump to discharge the debt, according to the last condition of the bond, by the neglect of Gavinzel on his departure to Europe, to appoint an attorney in fact to receive the money. But the last defence, as we have seen, is not sustained, and in regard to the first, this court has held substantially that contracts, based on Confederate currency, will be enforced when made in the usual course of business between persons resident in the insurgent States, and not made in furtherance of the rebellion.

Whether or not this was a wagering contract, and therefore void, is not a question in the case, as no objection to it on that ground was taken in the answer or on the argument.

The contract was plainly a contract of hazard, mutual hazard. Each party took risks, and each received a consideration for the risk thus taken. Manifestly, the leading object Gavinzel had in the transaction was to lend his money, so that it would not be repaid until the war closed, whether this event occurred before or after the 1st of April, 1864; and this object, on the contingency of his being able to go to Europe, the terms of his contract enabled him to accomplish. If the war ended by April, 1864, as he swears he thought it would, his purpose was attained, whether he went to Europe or not. But if the war continued longer, and he was able to get out of the Confederacy, he was in as good condition as if the war had terminated when he expected it would. There were, however, difficulties to be encountered in getting through the lines, represented by Gavinzel in his testimony "as the greatest he ever met with in his life." If unable to overcome these difficulties he would be obliged to stay in Richmond, and Crump would have the opportunity, if he chose to avail himself of it, of paying back the loan in the currency in which he received it.

The inducements to Crump to enter into the contract were the present use of the money and exemption from interest, with favorable terms of repayment. Besides this, there was

the chance that he might be able to repay the loan in Confederate money. Both parties not only ran the risk of the war closing before or after the 1st of April, 1864, but also of the value of money whenever the war did close, be that sooner or later, and of the ability of Gavinzel to leave the Confederacy. Certainly the wisdom of Crump in entering into a contract which contemplated such hazards cannot be commended, but if parties make contracts where there is no fraud, upon contingencies uncertain to both, with equal means of information, the courts cannot undertake to set them aside.

Confederate currency was a commodity in trade, and the parties risked their judgment upon the future value of it, as they might have done upon any other commodity for sale in the community. But if it be treated in this case as a loan of money, Crump agreed to repay it by a certain time after the termination of the war, in the currency which that termination should bring with it, and onerous as the condition is, he must abide by it.

The views we have taken of this case are sustained by the decision in *Brachan* v. *Griffin*.* In that case Griffin agreed, in consideration of £25,000 paper money, to be paid him by Willis in the years 1780 and 1781, to pay the latter £2500 in specie in 1790. Griffin brought his bill in chancery for relief against Brachan, the assignee. Fleming, J., denying the relief, said: "The contract in this case was founded upon speculation on both sides. Griffin thought the present use of the money would be advantageous to him; and Willis, that it would be more beneficial to him to receive the specie at a distant day. The contract seems to have been fully understood by the parties, and to have been fairly entered into upon both sides." The language used by this judge is applicable to this contract, which, after all, was a mere speculation upon the paper currency of the Confederacy. Besides this case from Virginia, decided in 1803, there are recent decisions in that State and Maryland which

* 3 Call, 375.

uphold contracts of hazard similar in many respects to the one in this case.*

DECREE REVERSED, and the cause REMANDED to that court, with instructions to enter a decree for the complainant,

IN CONFORMITY TO THIS OPINION.

RAILWAY COMPANY *v.* RAMSEY.

Although consent of the parties to a suit cannot give jurisdiction to the courts of the United States, the parties may admit the existence of facts which show jurisdiction, and the courts may act judicially upon such an admission.

Where the statutes of the United States authorizing a removal into the Circuit Court of the United States, of a cause brought originally in the courts of a State, require that the parties to the suit shall be citizens of different States, and where a cause has been removed from a State court to a Circuit Court, and all the papers in it have been afterwards destroyed by fire, and the parties then, by writing filed in the Circuit Court, admit that the cause was brought to the Circuit Court by transfer from the State court, *in accordance with the statutes in such case provided*, and—being now anxious apparently only to get to trial—simply ask and get leave to file a declaration and plea as substitutes for the ones originally filed and now destroyed,—in such case this court will, in the absence of all proof to the contrary, presume that the citizenship requisite to give the Circuit Court jurisdiction was shown in some proper manner; though it be not apparent on the mere pleadings.

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

Several statutes authorize, as is known, the transfer or removal of causes, commenced in the State courts, to those of the United States.

First. Where the amount in dispute, exclusive of costs, exceeds $500, and when the suit is *against an alien*, or is *by a citizen of the State where it is brought, and against a citizen of*

* Boulware *v.* Newton, 18 Grattan, p. 708; Taylor *v.* Turley, 33 Maryland, p. 500.

another State, it may be removed on the petition of the defendant filed in the case, in the State court, at the time of entering his appearance in said court.*

Second. When the suit is *against an alien, and a citizen of the State wherein it is brought*, or is *by a citizen of such State* against a citizen of the same, *and a citizen of another State*, upon petition of the defendant, filed at any time before trial or final hearing, if (so far as relates to him) it is brought for the purpose of restraining or enjoining him, or is a suit in which there can be a final termination of the controversy, so far as concerns him, without the presence of the other defendants, as parties in said cause.

Third. When a suit is between *a citizen of the State in which it is brought and a citizen of another State*, it may be so removed on the petition of the latter, whether he be plaintiff or defendant, filed at any time before the trial or final hearing of the suit, if before or at the time of filing said petition he makes and files in said 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.

To effect a removal in any of the cases the petitioner must, at the time of filing his petition in the State court, offer to the State court "good and sufficient security for his entering in said Circuit Court on the first day of its session copies of said process against him, and of all pleadings, *depositions, and testimony, and other proceedings in the case*, or in said cases, where a citizen of the State where the suit is brought is a defendant, copies of all process, pleadings, *depositions, testimony, and other proceedings* in the cause *concerning or affecting the petitioner*," &c.

These different statutes being in force, and the only ones on the subject, the record in the present case came here.

It showed that Ramsey originally commenced an action against the Pittsburg, Cincinnati, and St. Louis Railway

* See the statutes embodied in section 630 of the Revised Statutes of the United States, 873, 874, title 13, chapter 7.

Company in the Superior Court of the City of Chicago; that the suit was afterwards transferred, *according to the statutes in such case provided*, to the Circuit Court of the United States for the Northern District of Illinois; that while it was pending in that court undetermined the files and pleadings were all destroyed by fire; that after the fire the plaintiff asked leave to file a declaration as a substitute for the one destroyed; that the defendant assented to this request, and on the same day the court made an order, as follows:

"By agreement of the parties, by their attorneys, as per stipulation filed, leave is given them to file a copy of the declaration and plea heretofore filed herein and destroyed by fire on the 9th of October last, and it is ordered that they be substituted for and stand in the place of the original declaration and plea so destroyed."

That thereupon copies of such pleadings were filed, but that *there was nothing in the declaration or plea to show the jurisdiction of the Circuit Court;* that on the 11th June, 1872, the parties went to trial upon the issues joined, and that a verdict was rendered for the plaintiff on the 14th of the same month; that on the same day the defendant filed a motion for a new trial, and on the 29th a further motion in arrest of judgment, for the reason that there was nothing upon the record to show that the court had jurisdiction, and that on the 29th of December following the court overruled both motions and gave judgment upon the verdict.

It nowhere appeared that either of the parties attempted to supply any of the lost files except the pleadings, or that any objection was made to the jurisdiction until after the trial was had and a verdict rendered.

The action of the court in overruling the motion in arrest of judgment was the only matter now assigned for error.

Messrs. E. Walker and R. B. Roberts, for the plaintiff in error:

There nowhere appears on this record any averment of the citizenship of the plaintiff, nor is any allusion made even to his residence.

Argument in support of the jurisdiction.

As early as *Bingham* v. *Cabot*,* and the short cases of *Abercrombie* v. *Dupuis*,† and *Wood* v. *Wagnon*,‡ the necessity of averment of citizenship, as an indispensable prerequisite to the maintenance of jurisdiction, was announced, and Marshall, C. J., in *Brown* v. *Keene*,§ said:

"The decisions of this court require that the averment of jurisdiction shall be positive; *that the declaration shall state expressly* the fact on which jurisdiction depends. It is not sufficient that the jurisdiction may be *inferred* argumentatively from the averments."

In *Jackson* v. *Ashton*,‖ and in *Piquignot* v. *The Pennsylvania Railroad Company*,¶ the court declined to examine any questions till the jurisdiction was shown in the pleadings.

In the later case of *The Lucy*,** the court uses this language:

"No consent of counsel can give jurisdiction. Appellate jurisdiction depends on the Constitution and the acts of Congress. When these do not confer it courts of the United States cannot exercise it."

In the case now before the court, the consent to file a declaration could not, under the authorities which we have cited, either confer citizenship on the plaintiff or jurisdiction on the court.

Messrs. Ross and Phillips (*a brief of Mr. John Van Arman being filed*) *contra:*

No doubt when a suit is brought originally in the Circuit Court, the *declaration* should state, and state positively, just as Marshall, C. J., in the case cited, says, the fact of different citizenships between the parties, upon which difference of citizenship the jurisdiction of the Circuit Court, as all know, depends. But the same thing is not true in a case removed from a State court. The declaration there never, or at least

* 3 Dallas, 382. † 1 Cranch, 343. ‡ 2 Id. 9.
§ 8 Peters, 112. ‖ Id. 148. ¶ 16 Howard, 105.
** 8 Wallace, 307; and see The Nonesuch, 9 Id. 504; and Pennsylvania *v.* Quicksilver Co., 10 Id. 553.

very rarely, states the citizenship of either party. Any statement of it would, in most cases, be surplusage, and irrelative to both the jurisdiction and the controversy. Citizenship, therefore, in a case originally brought in a State court can be shown, on a removal, by affidavit. Indeed if it could not be thus shown, the statutes, so far as they authorize removal on the application of a defendant would be a dead letter. *He* has nothing to do with the declaration in the case, and can put no averments of any sort into it.

The only question, therefore, now before the court is whether, when the case shows that the statutes authorizing removal require a difference of citizenship, and when it further shows that the case was removed according to the statutes in cases of removal provided, and when it further appears that all the original papers in the case have been burned,—the question, we say, is whether the court will, in such a case, presume that there was proper evidence before the court to justify a removal. That it will we can hardly doubt.

The CHIEF JUSTICE delivered the opinion of the court.

In cases where the jurisdiction of the courts of the United States depends upon the character of the parties, as it no doubt does in this, the facts upon which it rests must, of course, somewhere appear in the record. They need not necessarily, however, be averred in the pleadings. It is sufficient if they are in some form affirmatively shown by the record.

Here the parties have, by stipulation and agreement placed on file and made part of the record, admitted that the cause was brought to the Circuit Court by transfer from a State court in accordance with the statutes in such case provided. By the same stipulation it is made to appear that all the original files in the cause had been destroyed by fire. True the stipulation refers specially to pleadings alone, but in this court, after what has occurred below, it may with great propriety be assumed that it was intended to include all papers and entries in the cause.

The parties, after this destruction, asked to supply the pleadings. Neither party seems to have considered that anything else was necessary. Each, apparently admitting jurisdiction, seemed anxious to get ready for trial. They were permitted to file copies of the lost declaration and plea and thus make up their issues. The record now before us contains none of the lost files, but is made up of the stipulation above stated, the substituted pleadings, and the proceedings thereafter.

We have then a case before us upon error in which the record presented shows upon its face that part of the files in the cause were destroyed before the record was made, and that neither one of the parties has considered it necessary to have them supplied. The question arises, therefore, whether under such circumstances we are confined to what is in terms expressed upon the record sent to us, or whether we may resort to presumptions to give effect to what is expressed.

We are reviewing the action of another court and are to determine whether or not there is error in what it has done. The restoration of the lost files was not absolutely necessary to support the jurisdiction of that court. Having been once there the court is presumed to know their contents and is permitted to act upon that knowledge. Parol proof, too, is admissible to aid the memory of the court.

Consent of parties cannot give the courts of the United States jurisdiction, but the parties may admit the existence of facts which show jurisdiction, and the courts may act judicially upon such an admission.

Here the parties have put into the record their joint admission that the cause was transferred to the Circuit Court from a State court, and that the evidence of the transfer which was once among the files has been destroyed. They have asked the court to act upon this admission and proceed with the cause. The court did proceed. The fair presumption from all this is that it was then within the knowledge of the parties and the court that there had been on the files in the cause everything which the statute required to be

there to complete the transfer, and that the appearance and admission of the parties was expected and intended to have all the force and effect which a restoration of the papers could have. If, therefore, with these papers in the record the jurisdiction would appear, the judgment ought not to have been arrested, and there is, consequently, no error.

We are then permitted to inquire what the lost papers would have shown if they had been incorporated into the record, and for that purpose may presume they contained all that the law required they should.

To obtain the transfer of a suit, the party desiring it must file in the State court a petition therefor and tender the required security. Such a petition must state facts sufficient to entitle him to have the transfer made. This cannot be done without showing that the Circuit Court would have jurisdiction of the suit when transferred. The one necessarily includes the other. If upon the hearing of the petition it is sustained by the proof the State court can proceed no further. It has no discretion and is compelled to permit the transfer to be made. The petitioning party is then required to file in the Circuit Court copies of the process, and of all pleadings, depositions, testimony, and other proceedings in the State court. This includes the proceedings by which the transfer was effected, and these, as has been seen, must show the facts necessary to give the Circuit Court jurisdiction.

Such are the papers which we are to presume were filed in this cause, and from what has occurred the conclusion is irresistible that they must have contained all that was necessary to justify the court in accepting the transfer. This it need not have done unless the jurisdiction was apparent. Either party upon the filing of the papers could have moved to remand, or the court itself, without a motion, could have sent the case back if the jurisdiction did not appear. As both the court and the parties accepted the transfer, it cannot for a moment be doubted that the files did then contain conclusive evidence of the existence of the jurisdictional facts.

Syllabus.

This ends the case. With the lost files in the record, we should see that the court had the right to permit the parties to litigate before it as they did.

There is here no question of a restoration of lost records. This record has never been lost. It was not made until after the fire. The litigation was pending when that calamity occurred. What has been lost is part of the files which, when the time arrived to make up a record, would have been incorporated into it. What we have to consider is whether in the record as made their loss has been supplied. We think it has by the recorded acts of the parties and their stipulation.

JUDGMENT AFFIRMED.

STEPHEN *v.* BEALL ET UX.

1. Where one of four joint tenants makes a deed of trust (a mortgage) of land conveyed to the four—the deed of trust purporting to convey the *whole* estate—it is not necessary, on a bill filed to have the land sold under the deed of trust (in other words, to foreclose the mortgage), to make the three who do not convey parties defendant to the bill.
2. It is settled doctrine that a married woman may charge her separate property for the payment of her husband's debt, by any instrument in writing in which she in terms plainly shows her purpose so to charge it; she describing the property specifically and executing the instrument of charge in the manner required by law.
3. Though equity will enforce in the most rigid manner good faith on the part of a trustee, and vigilantly watch any acquisition by him in his individual character, of property which has ever been the subject of his trust, yet where he has sold the trust property to another, that sale having been judicially confirmed after opposition by the *cestui que trust*, the fact that thirteen years afterwards he bought the property from the person to whom he once sold it does not, of necessity, vitiate his purchase. The question in such a case becomes one of actual fraud. And where on a bill charging fraud, the answer denies it in the fullest manner, alleging a purchase *bonâ fide* and for full value paid, and that when he, the trustee, made the sale to the person from whom he has since bought it, the purchase by himself, now called in question, was not thought of either by himself or his vendee—the court will not decree the purchase fraudulent, the case being heard on the pleadings, and without any proofs taken.

Statement of the case.

4. The complainants in this case, who alleged fraud and relied on the trustee's possession of the trust property after an alleged sale of it, as evidence of it, not stating *when* the trustee came into possession—that is to say, how soon after his former sale—the court assumed the time to be thirteen years; this term having elapsed between the date of the sale by the trustee and the filing of the bill (or cross-bill, rather) to set it aside; the court acting on the presumption that the complainant stated the case as favorably as he could for himself, and would have mentioned the fact that the trustee had been in possession long before the bill was filed, if he had really been so.

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

In the year 1849, by deed of bargain and sale, all in technical form, one Colburn conveyed to Mrs. Mary Bell and to her three children, John, Sarah, and Maria, by name, a piece of ground described, in the District of Columbia, with the appurtenances; the grant being "unto the said Mary, John, Sarah, and Maria, their heirs and assigns forever; to have and to hold the said described land and premises with the appurtenances unto them the said Mary (the mother), John, Sarah, and Maria, their heirs and assigns forever, to them and their sole use, benefit and behoof forever."

The mother subsequently married a man named Beall, and so became Mrs. Mary Beall.

In this state of things, the estate of one Magruder, in Maryland, being about to be sold by a certain Stephen, as trustee, under a decree of court there, Beall bought it, for $10,100, and in pursuance of the terms of sale as prescribed by the decree, paid to Stephen, the trustee, $1000 in cash, and gave to him his three notes, each for $3033.33⅓, secured by a deed executed by himself and wife, all with recitals of its history and purpose and with everything in or about it, in form, purporting to convey the *whole* of the tract of land which Colburn in 1849 had conveyed to her the said Mrs. Beall (while bearing the name of Bell), and to her three children. The children were not parties to the deed of trust.

The order of court for the sale of Magruder's property

directed that a deed should be given by Stephen, the trustee, only on the payment by the purchaser of all the purchase-money.

Beall, the husband, did not pay his three notes, and a resale by Stephen of the original property was directed by the court having jurisdiction of the matter. The proceeds were directed to be applied to discharge the three notes, and any surplus was to be paid to Beall. A resale by public auction was accordingly made on the 5th of May, 1859; the purchaser being one Crowley. The price, however, thus obtained was but $6478, thus leaving a debt due by Beall of $2622, exclusive of interest. The resale was reported to the court and was confirmed by it, after an opposition to it by Beall. To get satisfaction for the deficit of $2622 and interest Stephen, the trustee, now, June, 1871, filed a bill in the court below against Mr. and Mrs. Beall, praying an account of what was due to him on the notes and a sale of the property which had been conveyed to him by Mr. and Mrs. Beall in the deed of trust, or of so much of it as would satisfy what should be found due.

Mr. and Mrs. Beall answered. They set up that at the time of the execution of the deed of trust, the title to the lot was in Mrs. Beall (then Mrs. Bell), "jointly with her children," naming them; and "submitted that the lot could not now be sold without affecting their rights."

They submitted further, that Mrs. Beall could neither at law nor in equity pledge her separate estate for the payment of her husband's debt.

On a cross-bill filed by them, they averred that when the sale was made by Stephen as trustee, to Beall, Stephen misrepresented the value of the property, much exaggerating it, and promised to execute a valid deed to Beall for it, on receiving the $1000 and the notes.

They averred further, that Stephen was now in possession of the land of Magruder said to have been resold to Crowley; that the said resale was really made for Stephen, the trustee; and fraudulent, as being a purchase made by a trustee at his own sale. They did not in this cross-bill state

when Stephen came into possession of the property once held by him in trust, nor state any other thing to show how long after the "resale" it was. The cross-bill itself was sworn to February 28th, 1872.

Stephen, in answer to this cross-bill, denying his promise to execute any deed before the full purchase-money was actually paid, admitted that he was in possession of the land resold, but averred that the resale to Crowley was a *bonâ fide* sale; and that he Stephen was in possession by a *bonâ fide* purchase from Crowley, and for full consideration which had been paid by him. He denied all fraud in the said purchase by Crowley on the resale, and in his own purchase, and averred that his own purchase from Crowley was not thought of by either himself or Crowley, until after Crowley's purchase had been made; and, of course, that it was made without any fraudulent combination with Crowley. But he did not state the date when he came into possession of the property on his alleged purchase from Crowley.

No proofs being made, the case was heard on the pleadings.

The court below dismissed the bill, and Stephen appealed.

Mr. R. T. Merrick, for Mr. and Mrs. Beall, and in support of the decree below:

The bill was rightly dismissed, and this for several reasons:

1. It wanted necessary parties. The lot conveyed by Mr. and Mrs. Beall, had been conveyed to the latter (before her marriage with Beall) and to her children. The law of the District of Columbia, as it stood prior to 1857, was the old law of Maryland, which after the creation of the District still remained. By that law a joint tenancy was created. Every party was seized *per my* and *per tout*, as the old terms are; that is to say of the whole and of part. A conveyance by the mother though it may not have made a good title for the whole, did affect the whole. A sale under the deed of trust would have cast a cloud on the title of the children, and they should have been brought in, and if any decree

of sale was made it should have been with reference to their rights.

If the interest of the defendant requires the presence of new parties, he takes the objection of non-joinder, and the complainant is forced to amend, or his bill will be dismissed.*

2. The debt sought to be secured was the individual debt of the husband, Beall, and it was not competent for the wife, under the policy of the law made for her protection and under the provisions of the deed or deeds by which she held the property in connection with her children, to incumber that property for the security of her husband's debts. *Steffey* v. *Steffey*, in the Court of Appeals of Maryland,† and *Central Bank of Frederick* v. *Copeland*,‡ in the same court seem to show this.

3. That the price which Beall agreed to pay for the property was wholly excessive, is proved by what it brought on the resale; and that Stephen did promise to make a conveyance in fee simple to Beall, as soon as he got the money and secured notes, can hardly be doubted in view of the payment which the latter made of $1000 in money, and of the deed of trust given on his wife's estate. Why take cash and a security on a new estate, while the complete title in the old one is retained? If a deed in fee simple was not promised and intended, then this taking of cumulated securities shows that Stephen knew that the property had been sold to Beall at a grossly exaggerated value, and renders the allegation of fraud in this particular, as alleged in the cross-bill, the more probable.

But the great objection to the complainant's case, the *vulnus immedicabile*, remains. No doctrine is better settled in equity—none more wisely settled, or upon foundation more deeply laid in morality and in the admitted frailty of human nature—than that a trustee shall not purchase at his own sale. No contrivances, no indirections, will save

* Shields *v.* Barrow, 17 Howard, 145; Daniell's Chancery Practice, p. 240; note citing numerous cases.

† 19 Maryland, 5. ‡ 18 Id. 305.

him when he has done so. The intervention of third parties so far from assisting him does but make his case worse, since the intervention of others shows his consciousness of guilt.

It is here admitted that the trustee is in possession of the property which he professed to sell, or rather to resell. At what date he sold it we know. At what date he came into possession of it is a matter not at all disclosed. He may have come into possession at once. In such a case undoubtedly his possession would be convincing proof of a bad purpose when he made the sale. And his omission to state, in any way, in his answer to the cross-bill, *when* he did come into possession, so that a chancellor may see how soon, or how long after the sale, it was, infers as a necessity the conclusion that his possession followed hard upon his sale.

The court should perhaps put what Chancellor Kent calls the "sting of disability" into any such doings by a trustee, as ever getting into possession of property once sold by him in a fiduciary character. Such a rule is a safe rule, and the only safe rule.

But if a long lapse of time will repel all presumption of fraud, then certainly it lies upon a trustee to state clearly and to show that a long lapse of time has intervened. In this case the admitted possession by Stephen, as an individual, of the property sold by him as a trustee, puts upon him the burden of proof, even if the proof be nothing but his own answer. *That* proof he can surely give. The time when he came into possession is matter peculiarly within his own knowledge; and when, on that subject, he keeps silence, he is entitled to no favorable presumption. Those calling him to an account are entitled to every such; for it may well be that they don't know when he made his purchase.

It is not enough that he state that there was no fraud. Whether there was fraud or not may be a question of law. He swears therefore to matter of law. Let him state and swear to dates, and the court will decide whether there was or was not fraud.

Mr. T. T. Crittenden, contra, for Stephen, the appellant.

Opinion of the court.—Parties.

Mr. Justice HUNT delivered the opinion of the court.

The counsel for the appellee sustains the decree below dismissing the bill upon three grounds: 1st. Because the complainant failed to join the necessary parties defendant. 2d. Because a wife could not, at the date of the deed in question from Mrs. Beall, incumber her estate for the benefit of her husband. 3d. Because the complainant acted in bad faith.

We will consider the different grounds in their order.

1. As to the necessity of further parties defendant.

Mrs. Beall was the owner of one-fourth of the property referred to, and no more. This one-fourth she could convey, and no more. Whether the terms of her deed purported to convey this portion only, or the whole, is not important. She could not convey the remaining three-fourths, nor could the general language of her deed create a cloud upon the title of her children. The record showed exactly what title she had, and exactly what title the children had. No relief was asked against the children, and no claim made by the trustees that their rights were affected by the deed of their mother. The bill was filed against Mrs. Beall and her husband only, and judgment only asked against them. No judgment could be taken against the children or that would affect their estate, nor would a sale of their interest have any legal effect.*

If the grantees were tenants in common, it is not denied that Mrs. Beall could convey her portion or interest without affecting the rights of her cotenants, and that her deed in this case would effect that purpose. It is said, however, that as the law of Maryland stood in 1801, and was thence carried into the District of Columbia, the conveyance to Mrs. Beall and her children created a joint tenancy, and that being a joint tenant, her conveyance in 1857 did not bind her interest only, but affected, also, that of her cotenants.

* Ward *v.* Dewey, 16 New York, 519; Heywood *v.* City of Buffalo, 14 Id. 534; Cox *v.* Clift, 2 Comstock, 118; Story's Equity, § 700.

We cannot recognize this conclusion. We find the law on this point thus laid down, in Coke Littleton and in Bacon's Abridgment:

"If there be three joint tenants and one aliens his part, the other two are joint tenants of their parts that remain, and hold them in common with the alienee."*

"If one joint tenant bargains and sells his moiety, and dies before the deed is enrolled, yet the deed, being afterwards enrolled, shall work a severance *ab initio*, and support, by relation, the interest of the bargainee. But if one joint tenant bargains and sells all the lands, and before enrollment the other dies, his part shall survive, for the freehold not being out of him the jointure remains, and though afterwards the deed is enrolled, yet only a moiety shall pass, for the enrollment by relation cannot make the grant of any better effect than it would have been if it had taken effect immediately."†

It is laid down in the same authorities that if one joint tenant agree to alien, but do not, and die, this will not sever the joint tenancy, nor bind the survivor. But it is held in *Hinton* v. *Hinton*,‡ that in equity it may be enforced if the articles amount to an equitable severance of the jointure.

We think it clear upon these authorities that the attempted conveyance by Mrs. Beall of the entire premises had no effect upon the interest of her cotenants, conceding them to have been joint tenants. The law is well settled that no cloud is cast upon a title by a proceeding or claim, where the record through which title is to be made shows a defence to the claim.§ It would not be proper under such circumstances that the children should be parties defendants.‖

* Coke Littleton, 189; Bacon's Abridgment, title "Joint Tenants," E.

† Coke Littleton, 186, 186a; Bacon's Abridgment, title "Joint Tenant," I, 3.

‡ 2 Vesey, 634.

§ Ward *v.* Dewey, 16 New York, 519; Heywood *v.* City of Buffalo, 14 Id. 534; Cox *v.* Clift, 2 Comstock, 118; Story's Equity, § 700.

‖ See Reed *v.* Vanderheyden, 5 Cowen, 719; Bailey *v.* Inglee, 2 Paige, 278.

Opinion of the court.—Wife's power to charge her property.

We dismiss, then, as unfounded the argument of a want of parties defendant.

2. The dismissal of the bill is defended upon the further ground that the debt sought to be secured is the debt of the husband, and that it was not competent for the wife to incumber her individual property to secure her husband's debts.

In support of this argument *Steffy* v. *Steffy*,* in the Court of Appeals of Maryland, is cited; but that case does not bear upon the question. That was not the case of an attempt to incumber the separate property of the wife for the debt of the husband. It was a case in which both husband and wife had joined in an agreement to sell the lands of the wife. Upon a bill for specific performance the interest of the husband was adjudged to be bound, but the execution of a contract simply was held to be inoperative to convey the estate of or to bind the married woman under the statutes of Maryland.

Nor is *The Central Bank of Frederick* v. *Copeland*,† in the same court, and also cited, an authority to the point insisted upon. It was there held that a mortgage by a wife for her husband's debts, obtained from her by threats, and the exercise by the husband of an authority so excessive as to subjugate her will, was not binding upon her.

There is nothing in these authorities to indicate that the law of Maryland or of the District of Columbia on this subject is in any respect peculiar. The case rests upon and must be governed by the general principles applicable to the subject.

As to a wife's individual property generally, it is well settled that she may, by joining in a deed with her husband, convey any interest she has in real estate. Such a deed conveys the interest of both.‡

The doctrine that a married woman has the power to charge her separate estate with the payment of her husband's

* 19 Maryland, 5.

† 18 Id. 305.

‡ 1 Washburn on Real Property, *280.

debts, or any other debt contracted by her as principal or as surety, has been uniformly sustained for a long period of time.*

The question has been in respect to the manner in which the conceded power should be exercised, and in respect to the requisite evidence of its due execution. Whether the simple execution of an obligation by a married woman operates to charge her estate, or whether she must declare such to be her intention; whether an oral statement of such intention is sufficient, or whether it must be in writing; whether such intention must be manifested in the contract itself or may be separately manifested; whether a declaration of an intention to bind her separate property is sufficient, or whether the property intended to be charged must be specifically described, have been the subject of discussion at different times. But that a married woman, by an instrument in writing by which she expressly charges her separate property for the payment of a debt, which charge is contained in the instrument creating the debt, and where the property is specifically described, and which instrument is executed in the manner required by law, may create a valid charge upon such property, is agreed in all the books.

The instrument before us contains all these requisites, and we cannot doubt its validity. Whether the property is her separate estate or her individual property merely, the result is the same.

3. It was farther contended that the bad faith of the complainant should bar his recovery.

The defendants in a cross-bill allege fraud in the original sale to Mr. Beall, in that the complainant deceived and defrauded them by promising to execute a deed of the Magruder property, as soon as they made the purchase, and

* Hulme *v.* Tenant, 1 Brown's Chancery Cases, 16; Standford *v.* Marshall, 2 Atkyns, 69; Bullpin *v.* Clarke, 17 Vesey, 365; Jaques *v.* Methodist Episcopal Church, 17 Johnson, 548; Yale *v.* Dederer, 22 New York, 450; Same Case, 18 Id. 276; Corn Exchange Insurance Co. *v.* Babcock, 42 Id. 615; Story's Equity, § 1396, 1401a.

by misrepresentations of the value of the land. This is denied by the complainant in his answer to the cross-bill. It will be remembered also that the order of sale expressly prohibited the giving a deed until the whole purchase-money should be paid. Fraud is alleged again in that the purchase by Crowley at the resale was for the benefit of Stephen, the complainant, upon an agreement that the property should be transferred to him, and that the same had been conveyed to him. All fraud is denied in the answer. The alleged agreement or understanding between Crowley and the complainant Stephen is denied in all its parts. It is admitted by Stephen that subsequently, without any previous understanding, and in good faith, and for a fair price paid, the complainant purchased of Crowley the property bought by him at the resale. The interval between the purchase by Crowley at the resale and the purchase from him by the complainant does not appear. Crowley's purchase was made in May, 1859. In February, 1872, thirteen years having elapsed, it is alleged and admitted that a conveyance had been made by Crowley to the complainant. On the principle that every pleader states his case as favorably to him as he is able to do, we may assume that this time had mostly elapsed before the purchase was made by the complainant. No proofs were taken. The case was heard on bill and answer. It narrows itself down to this: there being no understanding or agreement between the purchaser at a public sale, and the trustee making the sale, there being no collusion between them, there being no fraud in fact, the duties of the trustee in respect to the sale being ended, and his doings confirmed by the court having the subject in charge, does the circumstance that years afterwards the trustee bought the property from the purchaser in good faith, and for a fair price paid to him, vitiate and annul the public sale to the purchaser?

If there was a fraud on the part of the complainant in making the sale, at which Crowley was the purchaser, it arose from an act, an intention, or an omission then done or existing. A subsequent purchase may afford evidence

that the original sale was made to permit that purchase, and that the end illustrates what the parties all the while intended. But to make a fraudulent sale it is necessary to go back to the acts, the intents, or the neglects existing at the time of the sale. It would seem to be a self-evident proposition that when it is conceded that a sale was in fact fair, honest, and just when made, that no unlawful act or intent then existed, that a fraudulent intent or an unjust dealing as to that time could not be imputed to the party from subsequent occurrences. It stands upon pleadings here that at the time of the sale the complainant had no understanding that he should ever have any interest in the property; in other words, Crowley bought it for himself and for his own exclusive benefit. There was no collusion, that is, the property was fairly sold and for all that could be obtained for it. The sale was reported to and confirmed by the court. This constituted a discharge of the duty of the trustee in making the sale. It is quite difficult to conceive that any subsequent facts (leaving these in full force) can establish that such a sale is fraudulent.

It is a general rule that a trustee cannot deal with the subject of his trust. If one acting as trustee for others becomes himself interested in the purchase, the *cestuis que trust* are entitled, of course, to have the sale set aside, unless the trustee had fairly divested himself of the character of trustee, and the fact that the purchase was made through the intervention of a third person makes no difference.*

We should be unwilling to weaken the obligation of good faith and fidelity required by the law of a trustee. We have frequently enforced such obligations in the most rigid manner. It would, however, be a great straining of a good principle to hold that a purchase by a trustee from the purchaser at a public sale, under the circumstances before us, is necessarily fraudulent.

There is a class of cases undoubtedly in which transfers

* Jewett *v.* Miller, 10 New York, 402; Slade *v.* Van Vechten, 11 Paige, 21; Van Epps *v.* Van Epps, 9 Id. 237; Bank of Orleans *v.* Torrey, 7 Hill, 260; Hawley *v.* Cramer, 4 Cowen, 717; Hill on Trustees, *536, *h.*

of property are adjudged to be fraudulent, although there be no actual fraud meditated by the parties. Such are the cases of an assignment by an insolvent debtor reserving portions of the assigned property for his own benefit, requiring releases from creditors as a condition of participating in the fund, and the like.

The case we are considering bears no resemblance to these cases. There is in a purchase by a trustee, nothing that of itself and necessarily vitiates the original sale. Whether culpable or commendable depends upon the circumstances of each case. It may be wrong, and it may be right. It may be approved by the parties interested and affirmed. It may be condemned by them and avoided. When it is found that the transaction is itself perfectly fair and honest, that the purchase was not contemplated at the original sale, but was first thought of years afterwards, and was then made for a full and fair consideration actually paid by the trustee, and after the fiduciary duty was at an end, we find no authority to justify us in pronouncing the original sale to have been fraudulent.

Upon the whole case the decree must be REVERSED, and the record remanded, with directions to enter a decree in conformity with this opinion, with leave to the parties to amend their pleadings if they shall be so advised.

REVERSAL AND REMAND ACCORDINGLY.

RAILROAD COMPANY *v.* POLLARD.

1. *Stokes* v. *Saltonstall* (13 Peters, 181) affirmed; and on a suit for injury to person, against a railway company carrying passengers, the doctrine again declared to be that if the passenger is in the exercise of that degree of care which may reasonably be expected from a person in his situation, and injury occur to him, this is *primâ facie* evidence of the carrier's liability.
2. Whether a passenger in a rail car, standing up in it, when getting into the station-house, at the close of the journey, but before an actual stoppage of the car, is guilty of negligence in the circumstances of the case, is a question of fact for the jury to decide under proper instructions.

Statement of the case.

3. In courts of the United States under section 858 of the Revised Statutes, which enact (with a proviso excepting to a certain extent, suits by or against executors, administrators or guardians) that in those courts, no witness shall be excluded in any civil action because he is a party to or interested in the issue tried, parties to a civil suit (the suit not being one of the sort excepted by or against executors or guardians), may testify by deposition as well as orally, there being, under the act of Congress, no difference between them and other persons having no interest in the suit.

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

By the practice in the courts of New Jersey, after a plaintiff rests his case, the defendant may move for a nonsuit; and if the court refuses to grant one, a bill of exceptions may be asked for, and on writ of error brought, the plaintiff in error may assign for error the refusal to grant the nonsuit.

By an act of Congress, approved June 1st, 1872,* it is enacted,

"That the practice . . . and forms, and modes of proceeding, &c., in the Circuit . . . Courts of the United States shall conform as near as may be to the practice . . . and forms and modes of proceeding existing at the time in like cases, in the courts of record of the State within which such Circuit . . . Courts are held."

In this state of the law, in June, 1871, Mrs. Pollard, a resident of Chicago, had taken passage by railroad, on a connecting line of roads, one of which was owned by the New Jersey Railroad Company (the defendant in this case), for herself, her two sisters, and her own daughter, a child of about thirteen years old, from Chicago *viâ* Philadelphia to New York; the purpose of the journey being refreshment in the summer and general improvement to health. The travelling party were in a Pullman palace car, and occupied what is known as a "section" of it. This section was near the middle of the last car of the train

* Revised Statutes of the United States, § 914.

where it was used for travelling and not for sleeping. It had two double seats, one at each end of the section, facing each other, so that persons who occupied the seat nearest the forward part of the car had to ride with their backs to the engine.

On the arrival of the party at Philadelphia, the train was composed of five passenger cars and a baggage car. But it being now the season of fruit, five fruit cars were added to the train before setting off for New York; these being put on to it between the locomotive and the passenger train. The train thus made up had in it eleven cars. Some freight cars were added afterwards.

Continuing their journey towards New York by night, when the train came within about thirty miles of the last-named city, or rather of Jersey City just opposite to it—it being now half-past five o'clock in the morning—the servant in charge of the Pullman cars aroused the passengers in them, informing them that they were reaching the end of their journey. Mrs. Pollard got up, and having with no unreasonable delay as it seemed dressed herself and her child, began to arrange the child's hair, brushing and plaiting it. She was standing in the section which her travelling party had occupied, with her back to the seat in which she had been sitting, and so looking towards the rear of the cars, the child standing before her. During this operation of arranging the child's hair, and when within about one hundred yards of the depot at Jersey City, the whole train was switched off upon a siding. The four passenger cars and the baggage car were detached or uncoupled from the fruit and freight cars, were attached by the drill-master to his engine, taken back over the same road beyond the switch, which was then adjusted to allow the cars to enter the passenger depot, and were then backed into the usual landing-place for the passengers. In this operation and just as the train was about to stop—the cars moving very slowly, so much so that some passengers at the moment were getting out of them on to the platform—one car bumped against another with a certain degree of force, and Mrs. Pollard was

in some way thrown against the arm of the seat in which she had been sitting, striking, as testimony tended to prove *must* have been the case, the lower part of her spinal cord; a part of it which, as is known to medical men and surgeons, is very susceptible to anything like a blow, and which,—especially in case of women,—it is dangerous to fall upon. Mrs. Pollard was rendered quite unconscious by the blow, and the train being now completely stopped, she was carried by four men into a hotel near the station, where medical aid was soon obtained. Having been finally conveyed to her home in Chicago, it was soon found that the whole region about the lower part of the lumbar vertebræ and the sacrum was much injured, and that partial paralysis of the lower limbs was supervening. This went on, and power of locomotion, of course, was ultimately much impaired. Mrs. Pollard accordingly brought suit—the suit below—against the New Jersey Railroad Company, on whose road the accident occurred.

On the trial the conductor of the car testified that Mrs. Pollard "told the doctor at Jersey City that she had a weak back;" and the porter of the car testified, that at the same place he "heard her tell one of her sisters who had been travelling with her that she was sorry for the accident, because she was on her way for health; that her back had never been strong." These statements, however, were denied by Mrs. Pollard and the sister.

There was testimony offered by the railroad company which tended to show that on all their cars they used the best sort of "buffers" to deaden the concussions which are unavoidably incident to stopping a train of cars; that the bumping in this case was not greater than what is usual in coming to a stand in the station-house; and that by some persons it had not been even observed.

On the other hand, testimony was given to show that the company did not use the buffers known as Miller's, which the plaintiff alleged was the best sort to deaden the concussion, and testimony tending to show also that in the present case the jar had been unusual and violent.

Statement of the case.

One of the witnesses by whom the plaintiff's case was sought to be made out was herself. She had been examined *de bene esse* in Chicago and her evidence, thus given, was read on the trial of the case at Trenton, New Jersey, she being at the time in Chicago, Illinois, and unable to travel.

This deposition was offered and received in pursuance of section 858 of the Revised Statutes of the United States, which enact as follows:

"In the courts of the United States, no witness shall be excluded in . . . any civil action because he is a party to or interested in the issue tried."

The same section, after excepting the cases of actions by or against executors, administrators, or guardians, continues:

"In all other respects, the laws of the State in which the court is 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, and in equity and admiralty."

The reading of the deposition was opposed by the defendants, on the ground that it was not lawful, either by the acts of Congress or by the acts of the legislature of New Jersey, to use in evidence the *deposition* of a party, and because, as the defendants insisted, the testimony of the plaintiff, she being a party to the cause, could only be taken in the presence of the court and jury.

On its admission by the court, an exception was accordingly sealed.

The plaintiff having rested her case the defendant moved for a nonsuit, on the ground that there was such contributory negligence on the part of Mrs. Pollard, as shown by her standing in the car, her position and occupation at the time of the accident, as would prevent a recovery; and that there was no such negligence shown on the part of the defendant as would warrant the case to be submitted to a jury. The court refused a nonsuit.

This refusal was the subject of another exception.

The evidence being concluded, the *plaintiff's* counsel requested the court to charge—

Statement of the case.

"That while the plaintiff was bound to satisfy the jury that the injury was caused by the negligence of the defendants, if from the evidence the jury were satisfied that the injury was occasioned while Mrs. Pollard was a passenger on defendants' road, and that she was in the exercise of ordinary care, namely, that degree of care which may be reasonably expected from a person in her situation, this would be *primâ facie* or presumptive evidence of the defendants' liability; and that the plaintiff would not be required to show by what particular acts of misconduct or negligence on the part of the defendants the injury was occasioned."

The court charged that the law, as decided by this court in *Stokes* v. *Saltonstall*, reported in 13th Peters,* was in accordance with what the request thus made assumed it to be. But told the jury also, to be careful not to consider any presumption against the defendant, until they were satisfied by affirmative proof on the part of the plaintiff that Mrs. Pollard was in the exercise of reasonable care and caution when the injury was sustained.

The *defendants*' counsel asked the court to charge—

"1st. That the facts of the case were not of that character which would warrant on the part of the jury an inference that the defendants were guilty of a want of care and skill; and that the jury must look to affirmative proof of want of care and skill in coming to a verdict.

"2d. That the facts were not such as to warrant the conclusion that there was a want of care on the part of the defendants."

The court declined to give either one of these instructions; assigning as the ground of refusal that in the present case the facts were not *clear and uncontradicted*, and that it was only when they were that the court could direct the jury as to the inferences which the law drew from them.

The same counsel further asked the court to charge:

"3d. If, under all the facts of this case, the jury are unable to find how or in what manner the injury was caused, then that

* Page 181.

there would not be sufficient proof of negligence or want of skill on the part of the defendants as to enable the plaintiff to recover."

The court, in reply to this request, charged as follows:

"If this prayer means that the jury has no right, from the facts and circumstances proved, to infer negligence or want of skill and care on the part of the defendants, unless they are able to find how and in what manner the injury was caused, it is not a proper request in the present case, and I decline to charge the jury in accordance with it. There is no controversy but that the injury was the result of the fall of the plaintiff against the arm of the seat in the car, and the charge already given covers the extent of the responsibility of the defendants, and under what circumstances the law holds them liable in damages."

The same counsel further asked the court to charge:

"If the jury find from the facts of the case that both parties were negligent, there can be no recovery."

The court, in reply to this request, charged as follows:

"This prayer is correct, with this qualification, provided that the jury are of the opinion that the negligence of the plaintiff was of such a character as to contribute to the injury, and that such injury would not have resulted if she had not been guilty of negligence."

The jury having given a verdict in the sum of $8000 for the plaintiff, and judgment being entered accordingly, the case was brought here on the refusal to nonsuit, on the admission of Mrs. Pollard's deposition, on the charge as given, and on the refusals to charge as requested.

Mr. J. W. Scudder, for the railroad company, plaintiff in error:

1. *The plaintiff should have been nonsuited.* The accident was an ordinary incident of railroad travel. There was nothing unusual in the motion of the cars. Mrs. Pollard should not have been standing up at the moment of bringing the train to, plaiting her child's hair. If she chose to be then so engaged she should have been seated. A jar in the

moment of coming to almost always happens. Persons should not be in a position in which, when it occurs, they will probably be injured. We assume that in any court of New Jersey the plaintiff would have been nonsuited. The act of Congress of June 1st, 1872, made it obligatory on the Circuit Court to follow the same practice and mode of proceeding.

2. The charge given, with a slight addition by way of qualification, in conformity with the plaintiff's request, while it conformed to what was said many years ago by this court, in *Stokes* v. *Saltonstall*, does not entirely conform with what has received the sanction of later cases in this court, and in cases elsewhere in courts of first authority.* The later cases go to say more distinctly than does that case, that in suits against common carriers the negligence of the defendant cannot be presumed by reason of the proper care on the part of the plaintiff. There must be positive proof on the part of the plaintiff of the negligence of the defendant.

3. *As to the prayers of the defendants.* The first and second were sound propositions as applicable to the case. They were not designed, as the court erroneously supposed, to withdraw the case from the determination of the jury; but to have the court state to the jury that they must not be controlled by inference, but must rely only on facts affirmatively proved.

The third prayer was certainly reasonable. The whole journey was one for the improvement of health. Two witnesses swore that Mrs. Pollard had said she had a weak back; a spinal disease, probably. It was really doubtful whether this fall in the car *produced* the ultimate paralysis. In view of these facts the request was proper to be made.

So as to what the court said in reply to the defendants' request to charge as to contributory negligence; a matter

* Parrott *v.* Wells, 15 Wallace, 524; Transportation Co. *v.* Downer, 11 Id. 134; Tourtelott *v.* Rosebrook, 11 Metcalf, 460; Robinson *v.* Fitchburg and Worcester Railroad, 7 Gray, 97; Hammack *v.* White, 11 Common Bench, New Series, 588 (103 English Common Law); Curtis *v.* Rochester and Syracuse Railroad Co., 18 New York, 543 (4 Smith).

which, in truth, was involved in the motion to nonsuit. Mrs. Pollard was aware of the approach to the depot; she had been told to get ready to leave the car; she knew, or ought to have known, that, at the terminus of a road, trains are stopped and started again, frequently before the passengers can get out at the place of departure; and if, under such circumstances, she placed her child before her and used both of her hands in combing the child's hair, so that she could not readily obtain support when a change in the motion of the train took place, the position in which she placed herself was the cause of the injury. If such position materially contributed to the injury it would be contributory negligence, and she could not recover.*

As to the admission of Mrs. Pollard's deposition. [The counsel here conceding that a party to a case might testify orally, went into a critical examination of various statutes of the United States, and of New Jersey, to show that he could not testify by deposition taken *de bene esse*.]

Mr. A. A. Abbott, *contra*, argued that no one of the matters assigned for error presented fair ground, even for question.

It is settled in the Federal courts that a plaintiff cannot be nonsuited against his will if he has given any evidence to sustain his case;† and such evidence was given here.

Stokes v. *Saltonstall* was a solemn decision, never seriously brought into question.

The requests made by the defendants for charges would have wrested questions of fact from the jury.

Texas v. *Chiles*‡ has opened the door to parties testifying in a case as wide as it previously was to disinterested witnesses.

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* Moore *v.* The Central Railroad Co., 4 Zabriskie, 268; Runyon *v.* The Central Railroad, 1 Dutcher, 558; Telfer *v.* The Northern Railroad Co., 1 Vroom, 191; Willett's Administrator *v.* The Buffalo and Rochester Railroad Co., 14 Barbour, 585, 589; Winship *v.* Enfield, 42 New Hampshire, 197.

† Elmore *v.* Grymes et al., 1 Peters, 469; D'Wolf *v* Rabaud, Ib. 476; Crane *v.* Morris's Lessee, 6 Id. 598.

‡ 21 Wallace, 488.

We ask that the judgment should be affirmed, with damages at the rate of *ten per cent.* in addition to interest, in accordance with Rule 23 of the court.

The CHIEF JUSTICE delivered the opinion of the court.

It is unnecessary to decide in this case, whether the act of June 1st, 1872, by which the practice, pleadings, forms, and modes of proceedings, &c., in the Circuit and District Courts of the United States are made to conform as near as may be to the practice, pleadings, forms, and modes of proceedings in the courts of the States, gives to the Circuit Courts the power to order a nonsuit against the will of the plaintiff in States where that power exists in the State courts, because, upon an examination of the record, we are all of the opinion that the evidence submitted by the plaintiff was sufficient to justify the court in leaving the case to the jury.

It is conceded that the part of the charge to the jury excepted to, is fully sustained by the decision of this court in *Stokes* v. *Saltonstall.* We see no necessity for reconsidering that case.

There was no error in the refusal of the court to charge the jury as requested by the defendants. Each request involved the determination of a question of fact by the court, where there was, to say the least, a conflict of evidence.

We have decided at the present term, in *Texas* v. *Chiles*,* that in the courts of the United States parties to a suit are by acts of Congress put upon a footing of equality with other witnesses and are "admissible to testify for themselves and compellable to testify for the others."

This disposes of all the errors assigned in this case.

JUDGMENT AFFIRMED.

N. B. No punitive damages were given.

* 21 Wallace, 488.

Statement of the case.

WOODSON *v.* MURDOCK ET AL.

1. The provision of the constitution of Missouri, which ordains—

> "The General Assembly shall have no power, for any purpose whatever, to release the lien held by the State upon any railroad—"

a provision having reference to the statutory liens held by the State on different railroads for the credit of the State, lent to them by the issue of State bonds, the principal and interest of which the railroad companies were to pay—was not meant, in case of a failure by the railroad companies, to prevent the State from making a compromise with any railroad company of any debt due to it or to become due; and on the compromise being effected to release the lien.

2. This view of the meaning of the clause is not altered by reading it in the light of the constitutional ordinance, "for the payment of State and railroad indebtedness," adopted at the same time as the State constitution, and as part of it, which ordinance, after providing for a sale by the State of any railroad indebted to it, and for the possible case of a purchase by the State of the road, provides further for a sale of the road after the State has so become owner, ordaining in such case—

> "That no sale . . . shall be made without reserving a lien upon the property and franchises thus sold . . . *for all sums remaining due.*"

This expression is to be regarded—not as having reference to what the railroad company originally owed the State, that is to say, reference to the debt for which the road was first sold,—but to any portion of the purchase-money which may remain unpaid upon a second sale; a sale by the State, after *she* has become owner.

3. The provision in the same constitution—

> "That no law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in its title—"

is not violated by any act having various details, provided they all relate to one general subject.

Hence where an act was entitled "An act for the sale of the Pacific Railroad, and to foreclose the State's lien thereon, and to amend its charter," *held*, that after certain sections providing for the sale, a section providing that in certain contingencies no sale should be made, was not a violation of the constitutional provision.

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

Murdock and others filed a bill in the court below for an injunction to restrain Woodson, governor of Missouri, from advertising for sale, or selling, the Pacific Railroad,

Statement of the case.

under an alleged existing statutory lien in favor of the State of Missouri. The complainants were trustees for the bondholders upon a mortgage upon the road for $7,000,000, subsequent to the said lien, and dated July 15th, 1868.

The case was thus:

In 1851, and at various times between that year and 1855, the legislature of Missouri passed acts lending its credit to the Pacific Railroad, a railroad whose line extends from St. Louis to Kansas City. By the same act it lent its credit also to two other roads. The object of the legislation was to secure the completion of the roads. The form in which the aid was extended was this: The State made its bonds, some at twenty years and others at thirty years, promising to pay the amount thereof to the company or its order. Coupons were attached; and by act of the legislature, the faith and credit of the State were pledged for the payment of the interest and the redemption of the principal of the bonds.

The company was, by the act, to make provision for the punctual payment of the interest and principal of the bonds so issued by the State, so as to exonerate the State from advances for that purpose. To secure this undertaking on the part of the company, the act provided that the net tolls and income of the road should be pledged for the payment of interest, and that the acceptance of the bonds, by the company, "should become and be, to all intents and purposes, a mortgage of the road of the company, and every part and section thereof and its appurtenances, to the people of the State, 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 as aforesaid."

This was to be the first lien or mortgage upon the road; and it was further provided by the act that if the company should make default in the payment of either principal or interest, no more bonds should be issued to it, and it should be lawful for the governor to sell the road and its appurtenances, at auction, to the highest bidder, on six months' notice; or to buy in the same at such sale for the State,

subject to such disposition of the road or its proceeds as the legislature might thereafter direct.

Under these provisions as to security the State issued its bonds for the benefit of the Pacific Railroad, to the extent of $7,000,000 or upwards.

The company paid the interest on the bonds up to 1st July, 1859, but since that date had failed to do so.

In 1864, the road not being completed, the legislature of Missouri authorized the company to borrow $1,500,000, payable in four, five, and six years, and to secure it by a first lien on the road west of a place called Dresden, the State waiving, for this purpose and to this extent, its priority of lien. The bonds given as evidence of this debt were called "Dresden bonds."

In 1865—the rebellion being now just closed, and the State, which had been the theatre of contending parties among its own citizens, being left in an exhausted and impoverished way, with its railroads in many cases more or less torn up or greatly injured, and the companies to which they belonged in default for what they owed the State—the State adopted a new constitution and a constitutional ordinance; the latter being entitled "For the payment of State and railroad indebtedness."

This constitutional ordinance was adopted in pursuance of a vote taken under a statute, which enacted:

"The election shall be by ballot. Those ballots in favor of this ordinance shall have written or printed thereon the words, '*Shall the railroads pay their bonds? Yes.*' Those opposed to this ordinance shall have written or printed thereon the words, '*Shall the railroads pay their bonds? No.*'"

The new constitution thus ordained:

"No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title; but if any subject embraced in an act be not expressed in the title, such act shall be void only as to so *much thereof as is not so expressed.*

"The General Assembly shall have no power, for any purpose *whatever*, to release the *lien* held by the State upon any railroad."

The constitutional ordinance provided for the levy of a heavy annual tax—10 per cent. on gross receipts from October, 1864, to October, 1868, and 15 per cent. thereafter—upon the Pacific Railroad and other roads, to be "appropriated to the payment of principal and interest now due, or hereafter to become due upon the bonds of the State, or the bonds guaranteed by the State issued to the aforesaid railroad companies."

By the fourth section of the ordinance it was provided that,

"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."

And the fifth section of this ordinance provided that,

"*Whenever the State shall become the purchaser of any railroad*, or other property, *sold as hereinbefore provided for*, the General Assembly shall provide by law in what manner the same shall be sold for the payment of the indebtedness of the railroad company in default; but no railroad or other property or franchises purchased by the State shall be restored to any such company until it shall first have paid in money or Missouri State bonds, or in bonds guaranteed by the State, *all interest due from said company*. And all interest thereafter accruing shall be paid semi-annually in advance, and no sale or other disposition of any such railroad or other property, or their franchises, shall be made *without reserving a lien upon all the property and franchises thus sold or disposed of, for all sums remaining unpaid;* and all payments therefor shall be made in money or in bonds or other obligations of the State."

In 1866 the road was finished and put in running order

to the west line of the State; but in order to effect this the company had in 1865 received aid from St. Louis County, to the amount of $700,000. On the 31st day of March, 1868, the road was in a bad condition as to repairs and equipments, and the company owed a floating debt of $1,092,848, an unadjusted debt of about $200,000, and the first instalment of the Dresden bonds, amounting to $500,000. Of its stock $3,614,500 was held by citizens and municipalities of Missouri—over $2,000,000 by St. Louis City and County, or taxpayers therein.

In this condition of the company as respects its road and its debt to the State and to others, and with the above-quoted provisions of the constitution and constitutional ordinance in force, the legislature, on the 31st of March, 1868, passed an act, entitled "An act for the sale of the Pacific Railroad, and to foreclose the State's lien thereon, and to amend the charter thereof."

By section one the governor was directed to sell the road and its appurtenances and all the property belonging thereto, in accordance with the provisions of section five of an act entitled "An act to expedite the construction of the Pacific Railroad," &c., approved February 22d, 1851.

The act then proceeded:

"SECTION 2. Upon a sale of the road, as provided in the foregoing section, the price and sum for which the same shall be sold shall not be less than $8,350,000, payable to the State treasurer, in the bonds of this State, or in money, within ninety days from the date of sale. No bid, except the bid of the governor on behalf of the State, shall be accepted, unless there is paid to the State treasurer, who shall attend the sale, an amount of not less than $300,000, in such bonds or money, as a part of the purchase-money, to be paid when the road is stricken off; and such bonds or money shall be forfeited to the State in case the purchaser or purchasers shall fail to the amount of the purchase-money bid within the time above provided for.

"If said sum of $8,350,000 is not realized at such sale, the governor shall, by himself or agent, buy in the same for and in the name of the State of Missouri.

"SECTION 4. Upon the payment of all the purchase-money, as specified in section two of this act, and upon the delivery of an obligation in conformity with section three of this act, the governor shall execute a deed to the purchaser or purchasers, conveying all such right, title, and interest, in and to said Pacific Railroad, its franchises, appurtenances, and the property belonging thereto, as are subject to the lien of this State."

Then followed section five, upon which the principal question made in this case turned.

"SECTION 5. If the Pacific Railroad shall, at any time within ninety days after the first day of April, 1868, pay into the treasury of the State the sum of $350,000, in bonds of this State, or in money, then, and in that event, the governor shall not advertise said road for sale; and if the company shall, within ninety days thereafter, pay into the State treasury an additional sum equal to $5,000,000 in all (the same being either in cash or Missouri State bonds), the governor shall, upon the production of the receipts of the State treasurer for said amounts, execute and deliver to the Pacific Railroad Company a deed of release for all claims, title, and interest which the State of Missouri has in and to the said Pacific Railroad, its property and appurtenances; and the said Pacific Railroad Company shall, from and after the delivery of said deed, be fully discharged from all claims or debts due the State, and all liability growing out of the issue of the bonds of the State to aid in the construction of said road, and no sale shall, in any event, take place under this act.

"If, however, for any cause, the said company shall be unable to pay the additional sum as herein provided, the governor shall proceed to advertise said road; but if the said company shall, during the pendency of said advertisement, pay into the State treasury the additional sum, with interest thereon from the first day of October, 1868, at the rate of six per cent. per annum, then, and in that case, no sale of said road shall take place, and the governor shall execute and deliver to the said Pacific Railroad Company the deed of conveyance and release provided for in this act, and the said Pacific Railroad Company shall be exempt from all the liabilities and obligations herein specified; but in case the said company shall, after the payment of $350,000 above stated, fail to pay the additional sum specified (being the

remainder of the $5,000,000), then, and in that case, the sum first paid shall be forfeited to the State."

The company within the ninety days paid into the State treasury the $350,000, and within ninety days thereafter the balance of $5,000,000, and received a deed from the governor in pursuance of the act releasing and discharging it and its property from all liens and claims on the part of the State, and from all liabilities growing out of the issue of the bonds of the State to aid in the construction of its road. The governor's deed was made July 1st, 1868.

In order to take up the "Dresden bonds," and to raise the $5,000,000 to be paid to the State, and to put its road in repair, the company, on July 15th, 1868, made a mortgage to Murdock and others (the complainants in the case), as trustees, to secure $7,000,000 of bonds. This mortgage recited the act of March 31st, 1868; and it was the professed intention to make it, after the payment of the $5,000,000 to the State, and upon the payment of the Dresden bonds, a first lien on the entire Pacific road, its property and franchises. Subsequently, on July 1st, 1871, a second mortgage was made by the company for $3,000,000, the proceeds of which it is alleged were exclusively used in improving the road, and in purchasing rolling-stock. Both of these mortgages were outstanding and unpaid, as also another mortgage for $800,000, secured upon certain lands in St. Louis, purchased for a station.

In March, 1873, the General Assembly of Missouri adopted a concurrent resolution reciting that grave doubts had arisen as to the constitutionality of the act of March 31st, 1868, just quoted, and directing proceedings to protect and enforce all the rights and claims of the State against the road.

Upon this authority the governor advertised the road and its appurtenances for sale under the original statutory lien in favor of the State. This proceeding on the part of the State authorities assumed that the fifth section of the act of March 31st, 1868, was unconstitutional; that the statutory lien of the State was yet in full force, and that it was the first lien on the Pacific road, its property and appurtenances.

If this assumption was well founded in point of law, then, of course, the proposed sale, if made, would cut off the mortgage to Murdock and the others (the complainants), and the rights of the holders of the $7,000,000 of bonds secured thereby. On the other hand, if the said fifth section was not unconstitutional, then the State had no lien to be enforced, and the proposed sale, if made, would be wholly nugatory.

The controlling question in the case, therefore, was whether the said fifth section violated either provision of the constitution or violated the constitutional ordinance of the State, as all are above quoted.

It was insisted—

1st, and in regard to the merits, that the transaction authorized by the said section, and carried out under it, evaded that provision of the constitution which ordained that "the General Assembly shall have no power *whatever* to release the lien held by the State upon any railroad." And that the transaction did evade the said provision of the constitution, it was argued, was made more obvious by the provisions in the fifth section of the constitutional ordinance, that when the State sold any railroad for debt due the State and bought it in, and afterwards sold it, it should not be sold "without reserving a lien upon all the *property, &c., thus sold, for all sums remaining unpaid;*" a provision which the counsel insisting on it, interpreted as meaning all those sums "remaining unpaid," at the time when the sale was made by the State, *in the first instance;* and not as meaning those sums which might remain unpaid after making any cash payment on the occasion of the second sale, *i. e.*, the sale made by the State after she had by the first sale herself become the owner.

2d, and on grounds more technical, that the said section was unconstitutional, because it made the act in which it was, relate to more than one subject; the subject presented by the said section not being the one embraced in the title.

This title, as the reader will remember, was "An act for

the sale of the Pacific Railroad, and to foreclose the State's lien thereon, and to amend the charter thereof."

The court below decided that the said section was not unconstitutional by reason of either objection urged against it.

1st. That the transaction under consideration was in effect a sale of the State's interest to the company for $5,000,000; that the legislature had the power to order a sale, and, not being restrained by the constitution, it necessarily had the power to fix the price and terms of the sale.

2d. That only the general purpose (which was to be a single one) of the act needed to be expressed in it was its title, and that this had been sufficiently done in the present case.

An injunction against a sale by the governor was accordingly decreed. From that decree he took this appeal.

Mr. Britton A. Hill, for the plaintiff in error:

I. The fifth section of the act of 1868 is unconstitutional, because it declares that the governor shall execute to the Pacific Railroad Company a deed of *release* for all claims, title, or interest, which the State of Missouri has in or to the said railroad, its property and appurtenances, on the payment of $5,000,000, when a much larger sum was then due to the State, and for payment of which sum the State held a *lien* on the road.*

This *release* is in conflict with the article of the constitution of Missouri, which ordains that "the General Assembly shall have no power, *for any purpose whatever*, to release the *lien* held by the State upon any railroad."

Under the constitution, this lien could not be *released* without payment of the debt due in full. The $5,000,000 paid to the State treasurer in 1868 extinguished the lien of the State

* At the time of the execution of the deed of release in July, 1868, the State lien on the bonds lent to the Pacific Railroad Company was $7,000,000, on which interest had been paid up to the 1st of July, 1859. The amount of interest on these seven millions of bonds from the 1st of July, 1859, to the 1st of July, 1868, at six per cent. per annum, is $420,000 a year, or $3,780,000 for nine years, making $10,780,000 then due the State.

to that extent, but the remaining sum due the State continues to be a *lien* on the road.

The words used in the clause of the constitution under consideration are clear and definite, admitting of no judicial construction to alter, vary, or affect the plain *intent* of the people in adopting it.*

That the fifth section of the act of 1868 is unconstitutional, is made more plain by the railroad ordinance which is entitled, "An ordinance for the payment of the State and railroad indebtedness," and which was adopted as a part of the constitution.

The ordinance expressly declares that the railroads shall pay their bonds lent to them by the State, principal and interest, *in full*, without any *abatement*, in money or bonds of the State; that such payment of said bonds, principal and interest, shall be *enforced;* 1st. By levying and collecting a tax of ten per cent. on the gross earnings of the railroads for two years, up to the 1st of October, 1868, and a tax of fifteen per cent. from and after said date, until all of said bonds, principal and interest, are *paid in full, in money or bonds of the State;* 2d. If the said railroads fail to pay the said tax and the principal and interest of all bonds loaned said railroads by the State, then the railroads shall be sold under the lien (of 1851) reserved to the State, and the proceeds of such sales shall be appropriated to the payment of the amount remaining due and unpaid from said railroad companies; and, 3d. If the State buys any railroad at such sale on statutory foreclosure, the General Assembly shall provide by law how the same may be sold for the payment of the debt of the railroad company in default; but no railroad property or franchises so bought by the State can be *restored* to any company so in default, until it shall *first* have *paid* all interest due from said company. And all interest to accrue shall be paid semi-annually, in advance, and *all sums* remaining unpaid shall be secured by a *lien* on all the property and

* Cooley on Constitutional Limitation, 2d ed., 1871, p. 55 and notes; Opinion of Mr. Justice Bronson in People *v.* Purdy, 2 Hill, 35; Spencer *v.* State, 5 Indiana, 76; State *v.* King, 44 Missouri, 285.

franchises so sold or disposed of, and all *payments* of such liens shall be made *in money or in State bonds.*

The constitution and the railroad ordinance are to be construed together, as one instrument.

II. The fifth section of the act of 31st March, 1868, is unconstitutional for the further reason that the subject of the section is not expressed in the title of the act, as required by the constitution.

This act of 1868, excluding the fifth section, provides for all the purposes stated in the title, in strict accordance with the constitution and constitutional ordinance, to sell the railroad and appurtenances at public auction, on six months' notice, to foreclose the lien of the State thereon, and to amend the charter of the company.

But the fifth section is inserted into the act providing for a repeal of all the preceding clauses therein, and to prevent the sale of the road and the foreclosure of the State lien thereon. So far from the subject of said fifth section being embraced in the title of the act, it is directly in conflict with it. The fifth section declares that on the payment of $350,000 into the State treasury within ninety days after the 1st of April, 1868, "the governor shall not *advertise* said road *for sale*, and if the company within ninety days thereafter pay into the State treasury an additional sum equal to $5,000,000 in all, the governor shall . . . execute and deliver to the said Pacific Railroad Company a deed of *release* for all claims, title, and interest which the State of Missouri has in and to the said Pacific Railroad, its property and appurtenances . . . and no *sale* shall, in that event, *take place* under this act."

In every respect this fifth section is in conflict with the title of the act, and embraces different and opposite subjects, to wit: To prevent the advertisement and "sale of the road," and to prevent "the foreclosure of the State lien thereon;" by releasing that lien for less than one-third the amount secured to the State by the existing statutory liens on the railroad.

The title of the act is, therefore, plainly contradicted by

the subjects embraced in the fifth section. Totally different subjects are stated in the title, and no reader of the title could imagine the subjects embraced in the fifth section.

The title required to embrace the subjects contained in the fifth section would be: "An act to prevent the sale of the Pacific Railroad, and to prevent the foreclosure of the State's lien thereon, by a release of the lien of the State for $10,780,000 on the payment of $5,000,000."

In the *Indiana Central Railway Company* v. *Potts*,* the court says:

"Every statute must have a title, that title must designate a single subject for the sections following it, and that subject must be reasonably particular and not too general, for otherwise the object of the constitutional provision would be wholly thwarted; and a part of the object of that provision was that the title should indicate the character of the sections of the act."†

No case can be found of an enactment held valid where the subject of a section of an act is in direct conflict with the act and with the title also; there being in the constitution of the State such a provision as here. In fact the fifth section would repeal the title and all the other sections of the act.

Messrs. W. M. Evarts, J. B. Henderson, and J. Baker, contra:

I. The clause of the constitution first relied on by opposing counsel is:

"The General Assembly shall have no power for any purpose whatever to release the lien held by the State upon any railroad."

This cannot mean that the State, upon *payment* of the debt of the railroad company, cannot execute a *release* of the property from the lien of the State.

* 7 Indiana, 681.

† State *v.* Miller, 45 Missouri, 495; The State ex rel. Hickson *v.* Lafayette County Court, 41 Id. 39; The People ex rel. McConnel et al. *v.* Hills, 35 New York, 44; The People ex rel. Failing *v.* The Commissioners of Highways, 53 Barbour, 70; Chiles et al. *v.* Monroe, 4 Metcalf, 72; Walker *v.* Caldwell, 4 Louisiana Annual, 298.

It cannot mean that the State cannot *enforce* the lien by such methods as seem to promise the best result in value therefrom to the State as creditor, and upon such enforcement to *release* the property from the lien of the State.

It does not purport to restrict the State in the choice of means or modes of making the most in value out of the lien, and thereupon of releasing the lien.

It does mean that these liens of the State are not at its disposal for favor or gift or grace. They are to be treated as public property, and dealt with by the General Assembly under the public obligation of preserving and realizing their value to the State.

This clause *severs* this subject from the general discretion of the supreme law-making power, and confines the discretion to dealing as creditor with debtor, in respect of the property and value involved.

But this lesser discretion is left unhampered, and its exercise can never be the subject of judicial control while it maintains the character of the choice of means to *realize* the lien, not to release it without realizing.

The State having full discretion in computing the money value of its lien, had the full power to discharge it upon receiving that computed value.

The elements of this computation are, in the rough, the value of the property, either for forced sale in the market or to be nursed by the State, and the considerations which should encourage one course for realizing the lien or another. If the State observes this purpose in its legislation, no court can revise its discretion, either in amounts or modes.

The act of the State of Missouri contains plenary evidence that its whole purpose was to measure and secure the best value from the lien in one or the other of three ways.

By a sale of the railroad in the market at a *minimum* price limited.

By a purchase by the State at a *maximum* price of purchase, to wit, the *minimum* fixed for the sale in the market.

By a realization of the value of the lien as thus com-

puted, as the result of sale or purchase of the property, by receiving from the company a substantial equivalent for what the State would realize by one or the other of the alternative methods.

It is manifest, upon the pecuniary elements of the computation upon which the act proceeds, that it preserves and enforces the lien, and releases it for the computed value—not for grace.

The constitution being thus self-luminous—intelligible, we mean, of itself—and not requiring to be read by reflected light from any source, we need not refer, at all, to the constitutional ordinance, within no part of which the facts of the present case come; and which is invoked by the other side only because it is supposed to cast a light upon the constitution, without which the constitution cannot be rightly understood; an assumption which would give a singular and unfortunate peculiarity to the constitution of the State.

II. Nothing appears in the act of 1868 beyond what is indicated in the title.

The company alleges that the State sold its interest in the road, and that the State's lien was foreclosed by the act of sale. So far the purposes of the act are indicated by the title, and so far the act cannot be void. Different and incongruous subjects are not brought together in the act, but the provisions as to the sale of the road, and the foreclosure of the State's lien thereon, relate to but one subject within the meaning of the constitutional provision, and this subject is expressed in the title.

The Supreme Court of Missouri has decided that this provision of the constitution of its State does not prevent the uniting in one enactment all those subjects germane to, or connected or congruous with, the general subject-matter of the bill.* Thus the reorganization of the State Bank as a National bank, the selling of stock therein belonging to the State, and the investment of the funds derived from such

* St. Louis *v.* Tiefel, 42 Missouri, 578; State *v.* Miller, 45 Id. 495.

sale, were matters intimately connected and blended, and might be embraced in one bill.*

Mr. Justice STRONG delivered the opinion of the court.

It has not been contended here that the complainants are not entitled to the injunction decreed by the Circuit Court, if the act of the Missouri legislature, approved March 31st, 1868, was a legitimate exercise of the legislative power. But it is insisted that the fifth section of that act is in conflict with the constitution of the State, and, therefore, that the arrangement made under it with the Pacific Railroad Company cannot be held to operate as a discharge of the company from the debt due by it to the State, or as a release of the railroad from the lien of the State's mortgage. The question presented, then, is this: Was the fifth section of the act mentioned prohibited by the constitution of the State? By the first section the governor was directed to sell the Pacific Railroad and its appurtenances, in accordance with the provisions of section five of the act, and of an act approved February 22d, 1851, entitled "An act to expedite the construction of the Pacific Railroad and the Hannibal and St. Joseph Railroad." By the second section the price for which the railroad was directed to be sold was required to be not less than $8,350,000 payable to the State treasurer, in bonds of the State or in money, within ninety days from the day of sale. If that sum was not obtained the governor was required to buy in the railroad for the State. By the third section it was made a condition of the sale that the purchaser or purchasers should bind himself or themselves to change the gauge of the road within ten years from the date of sale, so as to conform to the gauge of the Union Pacific Railroad. The fourth section enacted that upon the payment of all the purchase-money, and upon

* State v. Bank of Missouri, 45 Missouri, 528; and see to the same effect Murphy v. Menard, 11 Texas, 673; People v. Makamey, 13 Michigan, 495; State v. County Judge, 2 Iowa, 280; Morford v. Unger, 8 Id. 82; Whiting v. Mt. Pleasant, 11 Id. 482; Supervisors v. People, 25 Illinois, 181; Clinton v. Draper, 14 Indiana, 295; Mosier v. Hilton, 15 Barbour, 657.

the delivery of an obligation, in conformity to the requirement of the third section, the governor should execute a deed to the purchaser or purchasers conveying all such right, title, and interest in and to the said Pacific Railroad, its franchises, appurtenances, and the property belonging thereto as were subject to the lien of the State. Then followed the fifth section, which is the one mainly in contest. It enacted that if the Pacific Railroad Company should, at any time within ninety days after the 1st day of April, 1868, pay into the treasury of the State the sum of $350,000, in the bonds of the State or in money, then, and in that event, the governor should not advertise the road for sale; and if the company should, within ninety days thereafter, pay into the State treasury an additional sum equal to $5,000,000 in all (either in cash or in Missouri State bonds), the governor should, upon the production of the receipts of the State treasurer for the said amounts, execute and deliver to the said Pacific Railroad Company a deed of release for all claims, title, and interest which the State of Missouri had in and to the railroad, its property and appurtenances, and that the Pacific Railroad Company should, from and after the delivery of the deed, be fully discharged from all claims or debts due the State, and all liability growing out of the issue of the bonds of the State to aid in the construction of their railroad.

Within ninety days after the passage of this act the company paid into the State treasury $350,000, and within ninety days after such payment $4,650,000 more, in all $5,000,000, the sum specified in the fifth section, and received from the governor a deed conveying all the right, title, and interest of the State, and discharging it from all liens and claims of the State, and from all liability growing out of the issue of State bonds to aid in the construction of its road.

That this was a compromise of the claims of the State against the company; practically, a sale to the company of the State's interest growing out of its advance of State

bonds under the statutes of 1851, and the following years, is very plain, and such was its obvious intention. The principal of the debt was not then payable. The bonds issued by the State had not then fallen due. All of them were either twenty or thirty-year bonds, and the company was under no obligation to pay the principal until the bonds became payable. The extent of her obligation was measured by the provisions of the act of 1851. That act required the company to make provision for the payment of the principal and interest of the bonds in such manner as to exonerate the State from any advances of money for that purpose, and, had the interest been paid up to 1868, the State could then have exacted no more. The interest, it is true, was in arrears from July 1st, 1859. To that extent the State had an immediate claim upon the company, but as the whole debt, according to the agreed statement of facts, was $7,000,000, the aggregate of unpaid interest in 1868 was less than $4,000,000. The arrangement then made, by which $5,000,000 was received in full satisfaction, and the deed given, included, therefore, not only interest due, but principal which had not fallen due, and, hence, it may properly be regarded as a commutation or a sale of the rights of the State to the company.

We come then to the question whether anything in the constitution of the State prohibits such a transaction. A new constitution was adopted in 1865, the fifteenth section of the fourth article of which is as follows: "The General Assembly shall have no power, for any purpose, to release the lien held by the State upon any railroad." This provision, it is insisted by the appellants, denied to the legislature the power to make such a disposition of the interests of the State as was made in 1868 in virtue of the fifth section of the act of March 31st of that year.

The language of the prohibition is remarkable. It is not that the General Assembly shall not release the *debt* due to the State by any railroad company. Legislative control over the debt is left untouched. The provision has reference only to a security for the debt. Had it been intended

to put the debt beyond the disposition of the legislature, it would be difficult to find a reason for confining the prohibition to a release merely of the lien. But it is easy to see why it should be ordained that while the debt remained, the security for it should not be given up. And that such was the intention appears quite plainly in view of the state of things which existed when the constitution was framed and adopted. Prior to its adoption it may be said to have become almost a legislative habit to release the liens held by the State upon railroads without discharging the debts. In numerous cases statutes had been enacted by which railroad companies were authorized to borrow money, and to mortgage their roads as security for the loans, the State releasing its lien, to give the mortgagees a priority. The purposes for which these releases were made were various, and they were generally avowed in the statutes. Thus, in 1864 the legislature released the State's lien upon a part of the Pacific road, avowedly for the purpose of enabling the company to complete its main road to Kansas City. At the same time the lien of the State on the North Missouri Railroad was released for several avowed purposes,—to enable the company to complete their main road to the Iowa State line; to enable the company to construct its west branch; and to enable it to build a bridge across the Missouri River. And again, in 1865, February 16th, the legislature released the first lien of the State upon the road of the same company for the same purposes, retaining, however, a second lien. All this took place very shortly before the constitution was adopted. That such releases were contemplated when the convention framed the constitutional inhibition, and when the people ratified it, can hardly be doubted. The constitution was plainly intended to prohibit them, and, therefore, language was employed denying the power to release the lien, and saying nothing of the debt. Certainly there is no expressed restriction of legislative power over the debt itself. If any exists it must be supplied by implication. Keeping in mind, then, that the constitutional prohibition is directed only against a release of liens, what

should be regarded as its meaning? We agree it is not to be frittered away by doubtful construction, but like every clause in every constitution it must have a reasonable interpretation, and be held to express the intention of its framers. It must be held to have been intended for the public protection, for the preservation of the public property, and to make available claims the State held against railroads. But if it is to be construed reasonably, and in accordance with what must have been the intentions of those who adopted it, it cannot be construed literally. It cannot mean that the lien of the State upon a railroad shall not be released upon full payment of the debt, to secure which the lien was created. If it does, it is equivalent to a prohibition against the State's receiving payment. Surely it will not be contended to deprive the legislature of power to make use of the lien to enforce satisfaction of the debt, though thereby the lien be discharged. That would be to destroy the value of the lien. Nor can it mean that the lien may not be employed to obtain from the property bound by it all that the property is worth and all that the indebted company can pay, though that be less than the entire amount of the debt. It is not a restriction upon the power of the legislature to make the most which in its judgment is possible from the security. In terms the legislature is left unrestricted as to the mode of receiving payment, or settling with its debtors. Composition, accord and satisfaction, and full payment in cash are left within the legislative discretion, at least so far as the liquidation of the debt is concerned. So there is nothing in the clause of the constitution quoted which can be regarded as a restriction upon the power of the legislature to sell any claims held by the State against a railroad company. It is not an ordinance that the legislature shall not deal with debts due to the State from railroad companies as it may deal with debts due from other debtors. It is that the *lien* shall not be released *for any purpose whatever*, that is, for the accomplishment of any object the legislature might have in view, and unless we can hold this means it shall not be released even by full payment of the debt, it

can mean no more than this, that, while the debt remains, the legislature may not let go the security for it. Such a construction accounts for the peculiarity of the language employed. There is a very palpable distinction between the lien which the State holds upon a railroad and the debt, obligation, or duty which the lien was created to secure. The two could not have been confounded by the framers of the constitution. If it was intended that, under all circumstances, every dollar due from a railroad company should be exacted, and that no settlement should be made, or sale authorized, without payment of the uttermost farthing, it is incredible that the constitution would not have so declared. That such was not the intention is plainly shown by the railroad ordinance adopted with the constitution, and a part of the organic law of the State. By that ordinance the legislature was authorized and directed to sell the railroads on their failure to pay a tax levied, and when the sale should be made to others than the indebted companies, no limitation was directed to be affixed to the price, and such a sale, we have no doubt, would have discharged the road from the State's lien. The State itself was empowered to become a purchaser at the sale at any price at which it could buy, and whenever it purchased, the lien, of course, was merged in the title, and the General Assembly was required to provide by law in what manner the railroad, or franchises, or other property, should be sold for the payment of the indebtedness of the company in default. But the ordinance does not require that at such sale the purchaser from the State shall pay the full amount of that indebtedness. A lien is required to be reserved for all sums remaining unpaid; that is, very clearly, for all that part of the purchase-money from the State at her sale which remains unpaid. If this is not the meaning, the State may never be able to sell at all, and the plain purpose of the ordinance may be entirely frustrated. And that such is its meaning has been determined by the Supreme Court of Missouri.* The fifth

* See 37 Missouri, 129.

section of the ordinance does, indeed, require that no railroad or other property, or franchise purchased by the State shall be restored to the company in default until it shall have first paid in money, or in Missouri State bonds, or in bonds guaranteed by the State, all interest due from said company, and requires that all interest coming due thereafter shall be paid semi-annually in advance; but even this is no assertion that such a restoration shall not be made for a sum less than the original indebtedness. Whether it may or not it is unnecessary to decide, for the provision applies only to a case where the road has been sold, and where the State has become the purchaser, which is not this case.

Neither the clause in the body of the constitution, therefore, nor any provisions of the railroad ordinance forbid the legislature to sell the railroad, or compromise the debt claimed by the State, for less than the entire indebtedness. It follows, then, that though the legislature had no power to release the lien while the debt remained, it was not prohibited from selling the claim or commuting the debt. And there is no inconsistency in this. The legislature may well have been trusted with the management of the obligation, responsible only to its constituents, while the security for the fulfilment of the obligation may have been withdrawn from its control. A trustee may have no right to give up a security for a claim, and yet be at full liberty to settle and adjust the claim itself or to sell it. It need hardly be added that if the legislature had power to accept a commutation of the claim of the State, or to sell the debt for what in its judgment it deemed best for the public interests, it had also power to make a formal relinquishment of the lien after the debt had been liquidated. The constitutional provision was not designed to continue in existence liens that the law had extinguished.

For these reasons we hold that the fifth section of the act of the legislature of March 31st, 1868, was not in conflict with that provision of the constitution which forbids, for any purpose whatever, a release of the lien held by the State upon any railroad.

Nor do we perceive that there is any conflict between it and the railroad ordinance. The appellants insist that the ordinance forbids any sale of a defaulting railroad except at public auction, for a price equal to the full amount of the debt of the defaulting company, and without a reservation of a lien upon the property sold, not merely for the unpaid part of the purchase-money, but for all that remains unpaid of the debt for which the property is sold. Such is not our reading of the ordinance, nor is it that of the Supreme Court of the State. We have already said that the lien required to be reserved is only to secure the unpaid balance of the purchase-money. This is too clear for argument. It is equally clear to us the ordinance does not require that the sale shall be for a price equal to the whole debt, or that it shall be at public auction. The first, second, and third sections impose upon each of three railroad companies, of which the Pacific Railroad Company is one, an annual tax of ten per centum of the gross receipts, for two years, and fifteen per centum thereafter, until the principal and interest of the bonds for which the companies were liable should be fully paid. Then followed the fourth section, as follows: "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 franchise 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." There is nothing in this which takes away from the legislature the power to determine the time, the manner, or the price of the sale which it was directed to cause to be made. It is true the sale is ordered to be made under the lien reserved to the State, referring, doubtless, to the mortgage taken under the act of 1851, and it is also true that by that act it was enacted that if either of the companies to which bonds might be issued should make default in the payment of either principal or interest of the said bonds, the

Opinion of the court.—The subjects of the act not incongruous.

governor might sell their road by auction, giving six months' notice, or buy it in for the use of the State, but these provisions were no part of the lien. They were means specified for enforcing it. The legislature was at liberty to provide other means of collecting the debt and enforcing the lien. The sale directed by the ordinance was for non-payment of the tax imposed, and the direction to sell under the lien reserved was simply an order to proceed to collect the mortgage. The lien is not to be confounded with proceedings for its foreclosure.

Finally, it is insisted by the appellants that the fifth section of the act of 1868 is unconstitutional because its subject is not embraced in the title of the act, and because the constitution ordains that "no law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title; but if any subject be not embraced in the title, such act shall be void only as to so much thereof as is not so expressed." The title of the act of 1868 is "An act for the sale of the Pacific Railroad, and to foreclose the State's lien thereon, and to amend the charter thereof." That the subject of the fifth section is embraced in this title is very apparent. If the subject is not the foreclosure of the State's lien, it is impossible to say what it is. And we think it cannot be justly said the act embraces more than one subject. It has many details, but they all relate to one general subject, which is the sale of the railroad and the foreclosure of the State's lien thereon.*

We cannot sustain this objection.

Nothing, then, in our judgment, warrants the conclusion that the fifth section of the act of March 31st, 1868, was not a legitimate exercise of the legislative power of the General Assembly of the State. It follows that the arrangement made in pursuance of it with the Pacific Railroad Company, and the deed of the governor to the company, extinguished the debt due to the State, and, consequently, put an end to the lien.

* Cooley's Constitutional Limitations, 141 et seq.

The $5,000,000 paid to the State were raised upon bonds of the company and a mortgage, of which the complainants in the court below are trustees. The money was advanced on the faith of the legislation of 1868, and so were $3,000,000 more, for which a subsequent mortgage was given. If that legislation was not unconstitutional, as we have endeavored to show it was not, it would be a gross wrong to the bondholders who thus advanced their money, were the defendants permitted to sell the railroad, its property, and franchises, for the satisfaction of a claim or lien which has no longer any existence.

DECREE AFFIRMED.

Mr. Justice MILLER, with whom concurred Mr. Justice DAVIS, dissenting.

I cannot agree to the judgment of the court, and think the principle involved of sufficient importance to justify an expression of my views.

For many years previous to the late civil war the principal railroads in the State of Missouri had been the objects of the special care of the people, and had received large pecuniary aid from the State. This aid had been given at various times and in divers sums, in the shape of the bonds of the State, to the extent, in the aggregate, of twenty-five millions of dollars or more. For these sums, which were treated as loans, the railroad companies had consented to statutory liens in the nature of mortgages, with conditions to pay the bonds of the State, interest and principal, as they fell due. If the terms of the loan were not precisely as I have stated in all cases, they were substantially so, and any variations in special instances do not affect the question under consideration.

The State of Missouri was, almost as much as any State in the Union, the seat of the worst calamities of that war. Its people were divided among themselves; regular armies marched and countermarched over its soil, and each side used or abused the railroads to their utmost capacity when within their control. But, above all, the local guerrilla

warfare, to which the disputed control of her territory and the divided allegiance of her people subjected them, was the cause of immense destruction and damage of her railroads. These companies, therefore, emerged from the war with their roads in a state of repair which hardly admitted of use, and the rolling stock so deteriorated that new supplies were indispensable. Their credit was low, their means exhausted, and their property apparently worth but little. They were unable to meet their obligations to the State, and were largely in arrears for the interest on the State bonds.

The State itself was in little better condition. To the heavy burdens of increased taxation, imposed by the Federal government to support the war and pay its debt, was now added the necessity of paying the interest on the large debt of the State incurred in aid of the railroad companies.

The question forced itself upon the people of the State and the railroad companies, what is to be done in this emergency? The people of the State felt the injustice, in their overburdened condition, of being called on to pay, without aid from the corporations, the debt incurred for their benefit, and this hardship was not diminished by the consideration that the roads were owned and controlled by stockholders, very few of whom were citizens of Missouri. The railroad companies felt that if their roads were to be made capable of accomplishing the purpose of their creation, all their means and all their credit must be devoted to repairing and rebuilding the roads and refurnishing the rolling stock.

The railroad companies and that part of the people of the State who felt a stronger interest in the roads appealed to the generosity of the legislature to relieve the roads from the burden of the debt to the State. Those who believed that the credit of the State and the relief of the people from the burden of excessive taxation were of paramount importance thought the State should relieve herself as far as possible by enforcing her lien at the expense of the stockholders, and by sale of the roads, realize all they would bring, and, appropriating this to the payment of the bonds of the

State, diminish to that extent the taxation necessary to pay the interest on her large public debt.

The appeal for leniency to the railroad companies had many and able advocates, and was warmly urged by them, and assisted by all the appliances which that class of corporations use with so much effect. The legislature had in several instances released liens altogether on some roads, and had postponed liens to let in subsequent ones, thus showing what might be expected of that body.

It was in the midst of the discussion of this question that the members of the constitutional convention of 1865 were elected, and in the face of the difficulties which it presented that the convention assembled.

They took cognizance of the matter. They understood that they were expected to adopt some plan of relief, and whatever plan was adopted must be based mainly, if not exclusively, on one or the other of the two propositions we have named. We are now called upon to give judicial construction to what they did, and, by all the rules of sound interpretation, it must be done in view of the condition of affairs which their action was intended to relieve and of the public sentiment which they intended to represent.

It was very clear then, it is equally clear *now*, looking alone to what was incorporated into the constitution by that convention, that it wholly rejected the idea of leniency to the railroad companies, and that its sole care was to conserve the pecuniary interest of the State.

As the constitution stood when the convention assembled it was in the power of the legislature—of any legislature—at any time, under the pressure of any influence, to release the lien of the State on the roads, or to make any other compromise of the claim of the State. If the convention was fully determined against this policy, it was their first duty to take this power from the legislative body altogether. The first thing to be done was to forbid the legislature from granting this relief. In the effort to carry out this purpose the convention placed in the body of the constitution, article IV, section 15, the declaration that "the General Assembly

shall have no power *whatever* to release the lien held by the State upon any railroad."

It seems to me strange that this provision should be the subject of a divided opinion as to its meaning. The release here meant could not have been the execution of a technical instrument called a release. No such absurdity can be imputed to the convention, because if the debt was paid, or otherwise discharged, so that the lien no longer existed, the making of such an instrument was of no value to any one. The thing prohibited was the discharge or remission in any shape of the specific lien which the State had on the roads for the repayment of the bonds she had advanced or loaned to the companies. To make this more emphatic all power *whatever* on this subject was taken away. No pressing exigency, no motive, however pure or generous, and no consideration even of pecuniary wisdom in which the legislature might indulge, or believe, was to justify this discharge of the lien which the State held as security for her advances. How can it be maintained in the face of this that while the legislature could not release from motives of grace, and for the purpose of a gratuity, it could release on a purpose of compromise by accepting one-third or one-half of the debt secured by the lien? If one-third could be accepted, then one-tenth. If five millions could be accepted when ten were due, then five dollars could be accepted. It is to be borne in mind that we are considering the constitutional power of the legislature to release the lien, and on this question we are not at liberty to consider whether it acted wisely or reasonably. If they could release at all, or for any consideration, the court cannot say they have exceeded their power. But the constitution seems to place all this beyond question by saying it shall not have any power *whatever* to do this thing.

The work of the convention was, however, to be submitted to a vote of the people. If it received a majority of the votes cast, it became the fundamental law of the land. Otherwise it passed for nothing. Other propositions were submitted separately, and might be adopted or rejected

without hazarding the whole instrument. But so important did the convention deem this provision that they put it into the body of the new constitution, so that the latter could not be adopted without including the former.

If, however, the question of releasing the road from its debt to the State was thus settled in the negative, there still remained the question of the present enforcement of the lien by sale or otherwise. This question was left by the convention to a vote of the people in a separate ordinance, which might be adopted or rejected without defeating the constitution itself, but which, if adopted, became part of the constitution.

Both the constitution and this ordinance were submitted at the same time, and both were adopted and became part of the fundamental law of the land at the same time. This ordinance throws a flood of light on the intention of the men who framed the constitution in adopting the section we have just discussed. It imposed a tax of ten per cent. on the gross receipts of the three principal roads from October, 1864, to October, 1868, and fifteen per cent. thereafter; to be devoted to the payment of the principal and interest of the bonds loaned by the State; and it required that if either of said companies neglected or refused to pay said tax, the General Assembly should provide by law for the sale of that road. The fifth section of this ordinance is as follows:

"Whenever the State shall become the purchaser of any railroad or other property, or the franchises sold as hereinbefore provided for, the General Assembly shall provide by law in what manner the same shall be sold for the payment of the indebtedness of the railroad company in default; but no railroad or other property or franchises purchased by the State shall be restored to any such company until it shall have first paid, in money or in Missouri State bonds, or in bonds guaranteed by this State, all interest due from said company, and all interest thereafter accruing shall be paid semi-annually in advance; and no sale or other disposition of any such railroad or other property or their franchises,

shall be made without reserving a lien upon all the property and franchises thus sold or disposed of, for all sums remaining unpaid; and all payments therefor shall be made in money or in the bonds or other obligations of this State."

The manner in which this ordinance was put to the people is significant. The ballot was to be, "Shall the railroads pay their bonds? Yes." "Shall the railroads pay their bonds? No." The former was a vote for adopting the ordinance; the latter was a vote against it. It is thus seen that if this ordinance was adopted, both the convention and the people were in earnest in their determination not to release any claim the State had in those companies. The peculiar provision of the above section makes this very clear. If the State became the purchaser the legislature should provide for the manner of its resale; but in no event was it to be restored by resale or otherwise to the company who had owned it until that company had first paid in money, or bonds of the State of Missouri, all the accrued interest due from said company; and all interest thereafter to accrue was to be paid in advance semi-annually. It was also provided that *no* sale or other disposition of such railroad should be made without reserving a lien upon all the property and franchises thus sold or disposed of *for all sums remaining unpaid.*

The sale or disposition here spoken of had reference to a sale to other parties than to the defaulting company. And even in that case the ordinance provided that none should be made which did not secure the State for all her liabilities on account of the road. The clause can have no other meaning but this, though it is ably argued that it means such part of the consideration of the new sale as may be on credit. But, taking the constitutional provision, the prohibition in the ordinance against a restoration of the roads without payment of what is due, and security for what is to become due, it seems to me hardly to admit of a doubt that *in no event* was the road to pass from the control of the State without security against any loss by reason of these bonds. But however this may be, the constitutional prohibition

against releasing the lien, the provisions of the ordinance for the levy of a severe tax on the gross receipts, the direction for a sale if it was not paid, and the two provisions against restoration to the same company until full payment, indicate to my mind the unmistakable determination of the convention and the people that the companies should, in the language of the prescribed ballot, "*pay their bonds*,"—pay them in full,—or lose their roads, their property and franchises.

The answer made to all this is, that while the legislature could not release the *lien* they could remit the *debt*. That while they could not restore the road to the same company after the State had bought it in, they could sell to the company the debt which that company owed the State at any price it chose. That while the State could not release the lien by any legislative act, it could compromise or sell the debt, and thus defeat, destroy, or part with that lien.

It is said if the convention intended to prohibit the legislature from dealing as it chose with the *debt*, it could easily have said so, instead of using the word *lien*. If the convention had said that the legislature shall have no power to discharge the *debt* without full payment, it could then be argued with much more force that the *lien* might be released though the debt could not be touched. On the other hand, so long as the lien remained the debt must remain, for there could be no lien without the debt. It seems to me, therefore, that the convention used the stronger and better term, the one which included both, and which expressed precisely what they meant, namely, that both the debt and the lien of the debt should remain inviolate except by payment. If there could be any doubt of this, the form of submission of the ordinance on which the people voted, that the "roads should pay their bonds," makes it too clear for dispute.

But of what avail are constitutional restrictions of legislative power, or legislative restrictions of municipal power, if they are disregarded by the legislatures and municipalities?

It may be said that there remains to the people the pro-

tection of the courts. But language is at best a very imperfect instrument in the expression of thought, and the fundamental principles of government found in constitutions must necessarily be declared in terms very general, because they must be very comprehensive.

The ingenuity of casuists and linguists, the nice criticism of able counsel, the zeal which springs from a large pecuniary interest, and the appeal of injured parties against the bad faith of the legislatures who violate the constitution are easily invoked, and their influence persuasive with the courts, as they always must be.

And if language as plain as that we have been considering, a purpose so firmly held and clearly expressed is to be frittered away by construction, then courts themselves become but feeble barriers to legislative will and legislative corruption, and the interest of the people, which alone is to suffer, has but little to hope from the safeguards of written constitutions.

These instruments themselves, supposed to be the peculiar pride of the American people, and the great bulwark to personal and public rights, must fall rapidly into disrepute if they are found to be efficient only for the benefit of the rich and powerful, and the absolute majority on any subject will seek to enforce their views without regard to those restrictions on legislative power which are used only to their prejudice.

MORGAN *v.* CAMPBELL, ASSIGNEE.

1. Under the Landlord and Tenant Act of Illinois, which enacts in its seventh section that—

> "In all cases of distress for rent it shall be lawful for the landlord, by himself, his agent, or attorney, to *seize for rent any personal property of his tenant* that may be found in the county where such tenant shall reside, and in no case shall the property of any other person, although the same may be found on the premises, be liable to seizure for rent due from such tenant:"

And enacts in its eighth section that—

> "Every landlord shall have a *lien* upon the crops growing or grown upon the demised premises in any year for rent that shall accrue for such year;"

Statement of the case.

A landlord has no lien upon the personal property of his tenant prior to an actual levy of distress.

2. If proceedings of bankruptcy are begun by other persons against his tenant before such warrant of distress be actually levied, the subsequent assignment in bankruptcy—which assignment the fourteenth section of the Bankrupt Act declares "shall relate back to the commencement of said proceedings," and "by operation of law" vest in the assignee, the title to all the bankrupt's property and estate, "although the same is then attached on mesne process as the property of the debtor"—will vest the personal property of the tenant in the assignee, to the exclusion of the landlord's right to levy on it.

3. It was the object of this fourteenth section to prevent any particular creditor asserting any lien but such as existed when the petition in bankruptcy was filed.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

This was a contest between a landlord of demised premises claiming rent, and the assignee in bankruptcy of his tenants, claiming certain personal property on the premises, out of which the landlord by distress expected to get his rent.

The case, which depended more or less upon statute law of Illinois, in force at the time of the landlord's levy, was thus:

A statute of Illinois known as its Landlord and Tenant Act,* enacts as follows, in certain sections its enactments bearing on the subject of rent, distress, &c.:

"SECTION 6. In all cases of distress for rent, the person making the same shall immediately file with some justice of the peace, in case the amount claimed does not exceed $100, or with the clerk of the Circuit Court in case it exceeds that sum, a copy of the distress warrant, together with an inventory of the property levied upon; and thereupon the party against whom the distress warrant shall have been issued shall be duly summoned, and the amount due from him assessed and entered upon the records of the court finding the same. The said court shall certify to the person or officer making the same the amount so found due, together with the costs of court, and said officer

* Chapter 60, 1 Gross's Statutes, 412.

shall thereupon proceed to sell the property so distrained and make the amount thus certified to him, and return the certificate so issued to him with an indorsement thereon of his proceedings, which return and certificate shall be filed in the proper court.

"SECTION 7. In all cases of distress for rent it shall be lawful for the landlord, by himself, his agent, or attorney, to seize for rent any personal property of his tenant that may be found in the county where such tenant shall reside, and in no case shall the property of any other person, although the same may be found on the premises, be liable to seizure for rent due from such tenant.

"SECTION 8. Every landlord shall have *a lien* upon the crops, growing or grown upon the demised premises in any year, for rent that shall accrue for such year.

"SECTION 9. In case of the removal or abandonment of the premises by such tenant, all grain or vegetables grown or growing upon any part of the demised premises so abandoned may be seized by the landlord, before the rent is due, and the landlord so distraining shall cause the grain or vegetables so growing to be properly cultivated and perfected, and in all cases husband such grain or vegetables, grown or growing, until the rent agreed upon shall become due, when it shall be lawful for such landlord to sell and dispose of the same as in other cases of seizure, after the rent shall have become due," &c.

These enactments being in force, one Morgan, on the 18th of June, 1872, leased to Liebenstein & Spiegel certain premises in Chicago, Cook County, Illinois, at a rent of $750 per month, payable September 30th, 1872, and on the last day of every month thereafter. The lease provided that if default should be made in the payment of the rent, when due, Morgan might distrain upon any property belonging to lessees, whether exempt from execution and distress by law or not, and the lessees waived all right to hold or retain any such property under any exemption laws then in force in the State of Illinois, or in any other way; "*meaning and intending hereby*," said the lease, "*to give the said party of the first part, his heirs, executors, administrators, or assigns a valid and first lien, upon any and all goods and chattels,*

and other property belonging to the said party of the second part, as security for the payment of said rent in manner aforesaid, anything hereinbefore contained to the contrary notwithstanding."

Liebenstein & Spiegel entered into possession of the premises, but paid only one month's rent.

On the 14th of May, 1873, a petition was filed in the District Court for the Northern District of Illinois, by one Harrington, charging Liebenstein & Spiegel with having committed acts of bankruptcy, and praying that they might be declared bankrupts.

Three days afterwards, that is to say on the 17th of May, —between seven and eight months' rent ($5250) being now due—Morgan, the landlord, issued his warrant to the sheriff of Cook County for distraining the goods and chattels of his tenants, then on the premises, to pay the rent due; and on the same day the sheriff did levy the warrant upon them, and held them under the warrant, on the premises. On the 16th of June, 1873, he filed in the proper court an inventory of them, and caused a summons in the matter to be issued against the tenants in the way prescribed by the sixth section of the above-quoted Landlord and Tenant Act, and served upon them.

Liebenstein & Spiegel, the tenants, were afterwards declared bankrupts, and one Campbell was appointed their assignee. After his appointment he demanded of Morgan, the landlord, and his bailiff, possession of the chattels taken by them in distress, and held under Morgan's warrant of distress; and against the protest of both Morgan and his bailiff, took the same and was about to sell them.

Thereupon Morgan filed a bill in the court below to enjoin him.

The assignee in bankruptcy demurred to the bill.

The question of course was: Did the law of Illinois, in force on the 14th of May, 1873, when the petition in bankruptcy was filed, confer on a landlord a lien on the personal property of his tenant independently of and prior to the levy of a warrant of distress?

If it did, then, under the settled rule of bankruptcy law,

the lien would not be divested; proceedings in bankruptcy never divesting existing liens.*

But if it did not so exist, then the assignee in bankruptcy would take the property for distribution among the creditors generally; it being equally settled that no lien can be acquired after the filing of a petition in bankruptcy;† this, in virtue of the provision of the fourteenth section of the Bankrupt Act, which enacts that on the appointment of an assignee, and on the assignment to him of the bankrupt's property and estates, the—

"Assignment shall relate back to the commencement of the proceedings in bankruptcy, and thereupon, by operation of law, the title to all such property and estate, both real and personal, shall vest in said assignee, although the same is then attached on *mesne* process as the property of the debtor."

The court below sustained the demurrer, thus deciding that prior to and independently of an actual levy of the warrant of distress, a landlord had not in Illinois any *lien* on his tenant's personal property.

Morgan, the landlord in this case, appealed to this court.

Mr. J. A. Sleeper, for Morgan, the appellant:

1. We submit that by the common law, and the statute of the State of Illinois and the law of the State, as expounded and interpreted by its Supreme Court, the lien of the landlord on the property of the tenant for rent due is paramount and superior to the right of an execution or attaching creditor, a general assignee for the benefit of creditors, or an assignee in bankruptcy.

In *Penny* v. *Little*,‡ A.D. 1841, the Supreme Court of Illinois had under consideration the question of the right of the landlord to distrain for rent, and held that the right ex-

* Ex parte Dalby, *re* Griffiths, 1 Lowell, 431; Winsor, Assignee of McLellan, 2 Story, 492.

† Stuart *v.* Hines & Eames, 33 Iowa, 60; Peck *v.* Jenness, 7 Howard, 612; In re Wynne, 4 Bankruptcy Register, 5; In re Patterson, Id. Supplement, 27.

‡ 3 Scammon, 301.

isted independently of the statute and in virtue of the common law.

The same court had the question of the right of a landlord in, and lien upon, the property of his tenant, under consideration in *O'Hara* v. *Jones*,* and referring to *Penny* v. *Little*, say:

"Under our law the landlord has the lien and the right to distrain in all cases where the rent is certain, whether the right to distrain is reserved in the lease or not. And this statutory lien in favor of the landlord is superior to other junior liens, and may be enforced against all but prior liens and *bonâ fide* purchasers without notice; and if the goods of a tenant are seized under execution or attachment, the landlord's lien for his rent is superior and will hold the property."

And upon these principles, thus laid down, the court decided that an assignee for the benefit of creditors, takes the property as a mere volunteer, and subject to all liens to which it is then liable; and that if liens exist upon the property when the assignment is made, they must be first discharged, in the order of their priority, and the remainder applied in execution of the trusts.

This decision, we submit, controls the subject.

We do not seek to maintain that, before the rent becomes due, the landlord has either a superior lien over execution or attaching creditors, or the right to distrain the property for the rent; but that he, all along, has an inchoate right, which may not be asserted, and cannot be, until all the conditions upon which his right to distrain are fulfilled; and that when the conditions are fulfilled, by rent becoming due and being unpaid, then *eo instanti* he may issue his distress warrant and seize the property.

As the court in *O'Hara* v. *Jones*,† says:

"The landlord's lien is like the lien of an execution on personal property of the tenant. . . . He has the power, *when the rent falls due, to issue his execution* to his bailiff for collection of his rent by levy and sale of the tenant's property. The land-

* 46 Illinois, 288.

† Id. 291, 292.

lord's lien is of common-law growth, and does not depend upon statutory enactments for its creation. . . . But the landlord's right to distrain is coeval with the entire history of the common law, and has maintained its energy to the present time."

If anything previously said in *Rogers* v. *Dickey** is different from this—which we do not think is the case—it is overruled by the later decision.

In *O'Hara* v. *Jones* the court supply the reasoning which follows from the facts in *Rogers* v. *Dickey*, and hold that *inasmuch as the rent was due* March 1st, 1867, and the assignment was made March 9th, 1867, the landlord's lien was superior to the claim of the assignee. The court put the decision upon the ground that the rent was due. If the rent had been due in *Rogers* v. *Dickey* we have no doubt that the landlord's lien would have preceded the execution lien, whether the distress warrant had been then issued and levied or not, provided the distress had been levied before actual sale, to a *bonâ fide* purchaser without notice, by the sheriff under his execution.

2. No language could be clearer or more comprehensive than the language of the lease under consideration in this case. It is undeniable that, by it, the tenants intended to give the landlord, and that the landlord intended to take and receive a valid and specific first lien on the property of the tenants, as his security for the payment of this rent, in addition to the lien thereon created by the common law and the statute.

It may be argued that the distress warrant is mesne process, or in the nature of an attachment. Judge Drummond so held *In re Joslyn*.† The Supreme Court of Illinois, in *O'Hara* v. *Jones*, say it is an execution issued by the landlord. They also have said substantially that it is not the commencement of a suit; that the statute which requires proceedings in court to ascertain the amount of rent due, is only in restraint of the execution of the distress warrant, but that the sale, when made, is made under and by virtue

* 1 Gilman, 636.

† 2 Bissell, 235.

of the landlord's writ of seizure, which the Supreme Court calls his execution.

Mr. Adolphe Moses, contra, for the assignee:

We think it plain that by the Landlord and Tenant Act of Illinois, no *lien* is created as to the personal property of a tenant; and that the act simply recognizes the common-law right of distress, and attempts to regulate it. We concede that as to crops and agricultural products, the statute, acting upon consideration of public policy, grants a lien.

Our case concerns personal property alone.

In *Volney Stamps* v. *Gilman & Co.*,* it is said:

"The distress at common law was a dormant right to take the thing into possession as a pledge. *If this right was not made active by actual seizure, it was utterly impotent.* The landlord's right (however it may be described) is not a *jus in rem;* it does not amount to a legal or equitable title."

This, we submit, is the rule of the common law.

O'Hara v. *Jones* is much relied on by opposite counsel as changing in Illinois this rule.

The priority of liens under the eighth section of the Landlord and Tenant Law of Illinois had been, previously to that case, passed upon in *Miles* v. *James*, as affecting crops. The question as to the lien *on personal property* came up for the first time before the court in *O'Hara* v. *Jones*, and it was evidently misled by the case of *Miles* v. *James*, which represents the difference between *a statutory lien on crops and the right to distrain* on personal property at common law, recognized by the statute. The court inaccurately and loosely speaks of the "landlord's lien," "statutory lien."

A careful reading of the case of *Penny* v. *Little* will show that the court in that opinion carefully treats simply of *the right to distrain* for rent, and the phrase "landlord's lien" is not used in the opinion.

In re Joslyn,† Drummond, J., then district judge, and since made circuit judge, reviewed this whole subject-matter

* 43 Mississippi, 466.

† 2 Bissell, 138

in 1870, for the guidance of the practice in the Northern District of Illinois. His conclusions, which have always been regarded as satisfactory to the bar, were, on appeal, affirmed in the Circuit Court.

He says:

"It is to be remembered that in equity the landlord may have no just preference over the many general creditors of the bankrupt, and, in view of the general scope and spirit of the Bankrupt Law itself, and of the effect which it was to have on the rights of creditors, I have thought that unless the intention of the statute was clear to allow the common law or statutory lien of the landlord to have a priority over the general creditor, it ought not to be so regarded, and, looking at the statutes in our State, bearing upon the right of the landlord to distrain for rent, it seems to me that fairly construing the two laws together, and the effect which one has upon the other it must be said that under the Bankrupt Law, as operating upon the State law, the landlord, except in the particular case referred to, must be treated as being upon the same footing as the general creditors of the bankrupt, and can only have a right to come in like them, and prove his debt in the usual way."

Equality is the equity of the Bankrupt Law. The decree of the Circuit Court dismissing the bill should, therefore, be affirmed.

Mr. Justice DAVIS delivered the opinion of the court.

The bill in this case cannot be sustained unless the laws of Illinois conferred upon the landlord a statutory lien upon the personal property of the tenant in the county prior to the levy of the warrant. If the lien existed independently of the warrant, and the warrant was used merely as a means of enforcing it, then the theory of the bill is correct. On the contrary, if no lien could be acquired until at least the warrant was actually levied, the court below did not err in dismissing the bill.

The sixth and seventh sections of the Illinois Landlord and Tenant Statute speak of distress for rent. The sixth section prescribes the manner of proceeding, but the seventh

recognizes the existence of the right itself, and is in these words: "In all cases of distress for rent it shall be lawful for the landlord, by himself, his agent, or attorney, to seize for rent any personal property of his tenant that may be found in the county where such tenant shall reside, and in no case shall the property of any other person, although the same may be found on the premises, be liable to seizure for rent due from such tenant." The eighth section declares that "every landlord shall have a lien upon the crops growing or grown upon the demised premises in any year for rent that shall accrue for such year."

These are the only provisions of the statute material to the present inquiry, and they indicate clearly enough the intention of the legislature on the subject. Manifestly it was the purpose to make a distinction in this regard between agricultural products raised on the farm and the general personal property of the tenant in the country. If this were not so, why introduce the eighth section into the law at all, for the right of distress was conferred without it. The distinction was doubtless owing to the fact that agriculture is *now*, and was at the passage of the law, the chief industry of the State. It could work no serious injury to trade if one kind of property alone were subject to a statutory lien, but to extend this lien to all the personal property owned by a tenant in the county would interfere with it very materially. Be this as it may, the statute does in express terms confer a lien upon the crops growing or grown upon the demised premises in any year for the rent of that year, and recognizes for other personal property in the county the right of distress as it existed at common law. At common law the landlord could distrain any goods found upon the premises at the time of the taking, but he had no lien until he had made his right active by actual seizure. A statutory lien implies security upon the thing before the warrant to seize it is levied. It ties itself to the property from the time it attaches to it, and the levy and sale of the property are only means of enforcing it. In other words, if the lien is given by statute, proceedings are not necessary

to fix the status of the property. But in the absence of this statutory lien it is necessary to take proceedings to acquire a lien on the property of the tenant for the benefit of the landlord. This the landlord is enabled to do in a summary way to satisfy the rent which is due him, and in this he has an advantage as creditor over creditors at large of the tenant. It is difficult to see why the tenant, subject to this dormant right of the landlord, is not as much the owner of his effects as any other person would be who owned property and owed debts.

The statute we are considering has been the subject of consideration at the hands of the Supreme Court of Illinois. And it is contended that *O'Hara* v. *Jones** is authority for the position assumed by the appellant. The point decided in that case was that the landlord had a right to distrain for rent upon the property of the tenant even after he had made a general assignment for the benefit of creditors of all his property, real and personal, on the ground that the assignee of the tenant could not hold the goods free from the lien of the landlord; that the assignee took the goods of the assignor as a volunteer, and subject to all the liens to which they were then liable.

This decision evidently proceeds on the idea that the statute created a greater and different lien in favor of the landlord than is given by the common-law right of distress. But the court, in the recent case of *Hadden* v. *Knickerbocker*,† while adhering to the point actually decided in *O'Hara* v. *Jones*, repudiate this idea and say that the lien is given the landlord upon growing crops, "but no specific lien is given upon other property of the tenant." This case protects *bonâ fide* purchasers who have paid value for the property, with notice that rent was due the lessor and that he was about to distrain, although in *O'Hara* v. *Jones* it would seem that purchasers are not to be treated as *bonâ fide* unless they bought without notice.

It is argued that the basis of the decision in *O'Hara* v.

* 46 Illinois, 291. † — Id. —; not reported when this case was argued.

Jones is that the landlord's lien for rent is superior to that of a creditor holding under execution or attachment, and there are expressions in the opinion which tend in that direction, but the court to reach that conclusion would be obliged to overrule *Rogers* v. *Dickey*,* and this case is not even noticed in the opinion of the court.

The question in *Rogers* v. *Dickey*, as stated by the court, was "whether an execution delivered to the sheriff and in his hands at the time a distress warrant was levied took precedence of the levy by the constable, where there had been no sale of the property levied upon." The property levied on was on the demised premises, and the court, on full consideration, held that the sheriff, who had in the meantime taken the property from the constable, was justified in the proceeding, and this, too, on the general principles of law, for no point is made of superior right in the levy of the constable by virtue of the Landlord and Tenant Act. This decision could not have been reached if, in the opinion of the court, the landlord had a lien on the property prior to the seizure under the warrant, for the court, in *Miles* v. *James*,† held that the statutory lien of the eighth section on growing crops was a prior lien to an execution.

But it is unnecessary to consider the cases further, for whatever may be the scope of some of the decisions in the State, the exact point we are considering was decided, as we understand it, in the recent case of *Hadden* v. *Knickerbocker*,‡ and, indeed, the question does not seem to have been passed upon in any other case. If, as is said in that case, the statute creates no lien in favor of the landlord on the general property of the tenant in the county, until the levy of the distress warrant, then the question arises, whether the appellant acquired any right to the property in question by reason of his levy as against the assignee of the bankrupts and against the rights of the other creditors. It may become important in other cases to determine whether the lien acquired by the levy, to become operative, must not be

* 1 Gilman, 636. † 36 Illinois, 401. ‡ *Supra.*

perfected in conformity with the provisions of the statute on the subject, but in the view we take of the rights of the parties to this suit, it is not necessary to consider the question. The question might arise where the levy was before the filing of the petition in bankruptcy, and the subsequent proceedings, taken after this was done, were not in conformity with the provisions of the statute. The levy in this case was, however, made after the institution of bankruptcy proceedings, but before the decree in bankruptcy was rendered.

The fourteenth section of the Bankrupt Act declares that the assignment in bankruptcy shall relate back to the commencement of proceedings, and by operation of law vest the title of the estate of the bankrupt in the assignee, notwithstanding the same is then attached on mesne process as the property of the debtor. It is argued that a distress warrant, being the act of the landlord himself, is not an attachment upon mesne process. This is true according to the technical signification of the term, but the meaning of the term in this connection embraces any proceeding by which a lien is first acquired. The object of the law was evidently to prevent any one procuring a lien after the filing of the petition who had not got it before. If the lien existed before the filing of the petition, it could be enforced in the bankrupt court; but if it did not exist the purpose of the law was to prevent its being brought into existence by any proceeding whatever. If this were not so, as soon as it was known that the petition was filed the provisions of the law might be easily evaded. The main purpose which the Bankrupt Act seeks to accomplish is to distribute the property of the bankrupt equally among his creditors, and in order to do this the creditor who has not, when proceedings are begun, such a security as binds the property is prevented from obtaining it, and thus securing a preference over another creditor. There is no good reason why the law should protect a landlord in the issuing of a distress warrant, and repudiate an equally meritorious creditor in the levy of an attachment. If a distress warrant, where no further proceedings are nec-

essary to perfect the lien, is not, strictly speaking, an attachment upon mesne process, yet, under the Illinois statute, as has been remarked by an eminent judge,* it is in the nature of mesne process. The statute requires that a copy of the distress warrant be immediately filed in court; the party against whom it issues summoned; the amount due from him ascertained and entered upon the records of the court. It is then made the duty of the court to certify to the officer making the levy, the amount of the debt, and this certificate is his authority to make the sale, which certificate, with the proceedings indorsed upon it, must be returned into court.

It will thus be seen that the landlord, after he levies his warrant, can progress no further until the court has sanctioned the proceeding. The certificate that is issued, if not final process in the ordinary sense of the term, resembles it, and the distress warrant, if not mesne process issuing out of a court, is similar to it. The effect of the distress warrant is to seize the property and hold it for the purpose of enforcing the claim of the landlord upon it, and an ordinary attachment upon mesne process does nothing more for the general creditor. Both have to be returned into court and action taken on them before the property can be sold. Each is process through which a lien is obtained, but by neither can the lien be made available, unless through some final proceeding. There is, therefore, sufficient similarity between these processes for the distress warrant to be treated as a writ in the nature of an attachment upon mesne process.

But we do not want to rest our decision on this point alone, for the fourteenth section of the Bankrupt Law is not levelled at the mode of doing a thing, but at the thing itself. It was the object of this section to prevent the acquisition of any other liens than such as existed when the petition in bankruptcy was filed, and any proceeding by which this is attempted is within the condemnation of the law.

JUDGMENT AFFIRMED.

* Drummond, J., In re Joslyn, 2 Bissell, 241.—REP.

Statement of the case.

AMSINCK *v.* BEAN, ASSIGNEE.

1. The assignee in bankruptcy of the estate of an individual partner of a debtor copartnership, cannot maintain a suit to recover back money previously paid to a creditor of the copartnership, upon the ground that the money was paid to such creditor in fraud of the other creditors of the firm, and in fraud of the provisions of the Bankrupt Act. The suit should be by the assignee of the partnership.
2. The mere fact that one partner of a firm composed of two partners, after a stoppage of payment, suffered the other, who had put in two-thirds of the capital, and who was in addition a large creditor of the partnership for money lent, to manage the partnership assets apparently as if they had been his own, proposing to creditors a compromise at seventy cents on the dollar, taking the partnership stock, transacting business in his own name, buying some new stock, selling old and new, and mingling the funds—though keeping separate accounts—does not, of itself, dissolve the partnership, and vest such acting partner with the partnership property in such way as that on a decree of bankruptcy against him *individually* the partnership assets pass to his assignee in bankruptcy.

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

The Bankrupt Act enacts in its thirty-sixth section, that persons trading as partners may be decreed bankrupt, as well as persons trading as individuals; and that when a partnership is decreed bankrupt, all the joint stock and property of the partnership and also all the separate estate of each of the partners shall pass to the assignee, who by the said section is to keep separate accounts of the two estates. Creditors of the firm, and the separate creditors of each partner, may prove their respective debts; and the net proceeds of the joint stock is to be appropriated to pay the former, and the net proceeds of the separate estate to pay the latter. If there be any balance of the separate estate of any partner, after payment of his separate debts, it is to be added to the joint stock to pay the joint creditors; and if there be any balance of the joint stock after payment of the joint debts, it is to be divided and appropriated to and among the separate estates of the several partners, according to their respective right and interest therein, and as it

would have been if the partnership had been dissolved without any bankruptcy.*

But the act does not contain any provisions by which, when one member alone of a partnership is decreed bankrupt, and there is no decree against the partnership itself, the property of the partnership passes as does the partner's individual property.

In this state of the law, on the 15th of February, 1869, a partnership composed of two persons, named respectively Kintzing and Lindsey, and trading at St. Louis, Missouri, as Kintzing & Co.—Kintzing being the senior partner, a contributor of two-thirds of the capital, and a large creditor of the firm for money lent—becoming embarrassed in their affairs, and having numerous creditors, including one named Amsinck (a large one, resident in New York) stopped payment.

From the date of this stoppage, Kintzing seemed to have proceeded as if the partnership had been dissolved. The assets of the firm with the tacit assent of Lindsey, the other partner, passed into the exclusive possession of Kintzing. *He* then submitted a written proposition to the partnership creditors, to pay them in discharge of existing debts, seventy per cent.—in *the firm notes*, however—at six, twelve, and eighteen months; the arrangement not to bind any creditor until agreed to by all.

Amsinck directed his agent in St. Louis to sign the agreement in behalf of him, Amsinck, on condition, to be privately made with Kintzing & Co., that they should "discount" the notes thus to be given; paying for them on such so-called operation of discount, one-third cash and the residue in thirty and sixty days; an arrangement which if Kintzing & Co. could not get on ultimately would prove more favorable, of course, to Amsinck than that proposed to the other creditors and accepted by about two-thirds of them. Kintzing & Co. agreed to this, and the fifty per cent. was paid to Amsinck; making a payment in cash of $16,275. The six, twelve, and eighteen months' compromise notes were sent

* 14 Stat. at Large, 534.

to those creditors who had agreed to accept them, though conditionally; the six months' notes maturing August 18th, 1869.

In the meantime Kintzing went on trying to get the other creditors to accept the terms of compromise proposed; he alone, as it seemed, administering the partnership assets for the benefit of the creditors as contemplated by the agreement of compromise. *He* took the partnership stock, made new purchases on his own account, transacted the business in his own name, and sold the old and new stock, mingling the funds as if all were his own, except that he kept separate books for each business. The $16,275 (the amount paid to Amsinck) was derived from such mingled funds.

As already observed, about two-thirds of the creditors had signed the compromise agreement when the agent of Amsinck signed it for *him*. Kintzing continuing to make exertions to get the remaining creditors to sign, transacted business with the old assets and some new ones, in the way mentioned, for a certain time. However, finding that all the creditors would not sign, and so that the plan of compromise would be defeated, he made to the State assignee of Missouri, on the 21st of August, 1869—the six months' notes, which had matured three days before, being still unpaid—a general assignment under the laws of Missouri of *his* property, for the benefit of *his* creditors.

Certain of the creditors of the partnership now getting wind of the secret arrangement between Amsinck and Kintzing & Co., and that the $16,275 had been actually received by Amsinck, filed a petition in the District Court at St. Louis, representing that they were creditors of Kintzing, "*a member* of the late firm of Kintzing & Co.;" that the said Kintzing had committed various acts of bankruptcy specified (one of the acts specified being the payment to Amsinck), and praying that he, Kintzing (not Kintzing & Co., nor Lindsey, but Kintzing), might be decreed a bankrupt, and he was so decreed accordingly; one Bean being appointed his assignee in bankruptcy.

Statement of the case.

Thereupon Bean filed a bill in chancery—the bill in this case—against Amsinck, in the court below, praying that the payments made to Amsinck might be decreed to have been made in fraud of other creditors and of the Bankrupt Act, and that Amsinck might be decreed to account for and pay them over to him, Bean, the assignee. The answer denied fraud, &c., and set up in addition the point that the bankruptcy proceedings were against Kintzing alone, and not against Lindsey also, and not against the firm; that the complainant, Bean, was the assignee only of Kintzing individually, and not the assignee of the firm; that the copartnership had never been dissolved; that the complainant did not represent the interest of Lindsey in the claim sought to be recovered in the suit; and that Lindsey had an interest in it which did not pass to the complainant.

The court below did not, however, regard the objection as of force. It said:

"It is apparent, from the evidence, that the firm was regarded as dissolved by all parties concerned, by Kintzing, by Lindsey, and by the creditors, including the defendants, and that the assets and effects of the firm were regarded as being put into Kintzing's hands, in trust, to settle up the business as the appointee of the creditors, and pay the compromise notes. Kintzing passed into the hands of the State assignee all that was left of such assets, as being part of the estate of Kintzing. From the State assignee they passed to the plaintiff, as the assignee of Kintzing, as part of the estate of Kintzing."

It said in addition:

"The composition deed does not appear to have been assented to in any manner by Lindsey. He is not named in it, nor was he, so far as appears, a party to it potentially. . . . There does not seem to have been any authority, so far as Lindsey was concerned, to sign the firm name to the compromise notes, so as to bind him by them. The compromise notes, therefore, signed by Kintzing with the firm name, were the individual notes of Kintzing. Having given them, he was to have the assets to administer with which to pay them."

This objection arising from the fact of the decree in bank-

ruptcy being against Kintzing alone, being thus disposed of, and the transaction between Amsinck and Kintzing & Co. having been, as the court considered, a clear fraud on the other creditors of that firm, the court decreed a recovery. It said:

"Whether the money could or could not be recovered back by the *debtor*, the fourteenth section of the Bankruptcy Act especially vests in the assignee all property conveyed by the bankrupt in fraud of his creditors, and authorizes him to sue for and recover the same. This applies to conveyances fraudulent at common law, and to transfers of property such as that in the present case."*

From that decree Amsinck brought the case here, where three assignments of error—two of them not material to be stated—were made; the third one, and the one on which the decision in this court was rested, being this:

"That the decree was erroneous in deciding that the assignee of Kintzing individually could maintain this action; the appellants alleging that if they were liable at all they were liable to Kintzing & Co. or to *their* assignee."

Mr. A. F. Smith, for the appellant:

The bankrupt proceedings against Kintzing alone were ineffectual to vest in the assignee title to the partnership property.†

It is not pretended by the bill that Kintzing had any right or title to the partnership property to the exclusion of Lindsey. The most that is set up is that he had possession, by the consent of Lindsey, of the assets of the firm for the benefit of the creditors. It is not pretended that Lindsey had been released, or that he had assigned or otherwise parted with his legal interest in the partnership assets. On such a case it is plain that the action must fail.

* Knowlton *v.* Moseley, 105 Massachusetts, 136; Bean *v.* Brookmire, 1 Dillon, 151, 154.

† Bankrupt Act, § 36; General Order in Bankruptcy, 18; Re Shepard, 3 Bankrupt Register, 42; Re Crockett, 2 Id. 75; Re Lewis, 1 Id. 19; Re Prankard, Ib. 51; Re Little, Ib. 74.

Nor is the point technical; for if it is well taken, it would be no answer for Amsinck, in the event of his being sued hereafter by the assignee of Kintzing & Co., to plead that they had paid the money to the assignee of an individual member of the firm.

Nor can it be argued that the money paid to the appellants belonged to Kintzing individually. The case shows that it belonged to the partnership.

Messrs. E. T. Allen and E. B. Merrill, contra, for the assignee:

It is not necessary for the dissolution of a partnership as between partners, that a deed of dissolution under the hand and seal of the partners be executed, recorded, and published. A partnership may be dissolved in fact—dissolved by matter *in pais*—as well as by document technically written and executed in form.

Now, the case here shows a dissolution in fact, immediately on the stoppage. Kintzing was the chief capitalist, a creditor, and the person most interested. Lindsey did not, apparently, think his interest worth looking after. He abandoned the wreck; and from that time forth Kintzing took possession of everything; he proposed the compromise; he gave the notes; all, in short, belonged to *him;* this "all," however, being the *damnosa hereditas* of paying all debts, and the "forlorn hope" of getting any surplus, necessarily small, if after paying debts anything remained.

In such a case the assignee of Kintzing was assignee of all the assets of the firm, including this claim on Amsinck, to refund what he had got in virtue of a fraud on the other creditors.

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

Waiving the first two errors assigned, the single question presented for decision is whether the complainant, as the assignee of the estate of an individual partner of a debtor copartnership, can maintain a suit to recover back money

previously paid to a creditor of the copartnership, upon the ground that the money was paid to such creditor in fraud of the other creditors of the firm and in fraud of the provisions of the Bankrupt Act.

Assignees in bankruptcy of the estate of an insolvent copartnership may, perhaps, maintain such a suit for such a claim, even though the money was paid by an individual partner under such an agreement to compromise his separate debts, as the assignees in such a case are required to keep separate accounts of the joint stock or property of the copartnership and of the separate estate of each member of which the copartnership is composed; and the provision is that the net proceeds of the joint stock and property shall be appropriated to pay the creditors of the copartnership, and that the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors.

None of the proceeds of the separate estate of the individual partners can be appropriated to pay the partnership debts, unless the proceeds from that source exceed what is necessary to pay the separate debts of the partner, nor can any part of the proceeds of the joint stock or property of the copartnership be appropriated to pay the separate debts of the individual partner, unless there is an excess from that source beyond what is required to pay the partnership debts.*

These regulations show that, in cases where they apply, the assignees in bankruptcy of the joint stock and property of a copartnership are required to administer the separate estate of the individual members of the firm or company as well as the described estate of the copartnership, but the Bankrupt Act contains no regulations of a corresponding character applicable in a case where an individual member of a copartnership is adjudged a bankrupt without any such decree against the copartnership or the other partner or partners of which the copartnership is composed.

Instead of that the Bankrupt Act provides that in all

* 14 Stat. at Large, 535.

other respects the proceedings against partners shall be conducted in the like manner as if they had been commenced and prosecuted against one person alone. Partners are not entitled in any case to come in competition with the joint creditors upon the partnership funds, whatever may be the rights and equities which would otherwise attach between them and the bankrupt partner or partners.

Where all the partners become bankrupt the general rule is that the separate estate of one partner shall not claim against the joint estate of the partnership in competition with the joint creditors, nor shall the joint estate claim against the separate estate in competition with the separate creditors.*

Doubt upon that subject cannot be entertained, and it is equally clear that a solvent partner cannot prove his own separate debt against the separate estate of the bankrupt partner, so as to come in competition with the joint creditors of the partnership, for the plain reason that he is himself liable to all the joint creditors, which is sufficient to show that in equity he cannot be permitted to claim any part of the funds of the bankrupt before all the creditors to whom he is liable are fully paid.†

Neither can a solvent partner prove against the separate estate of the bankrupt partner in competition with the separate creditors of the bankrupt until all the joint creditors of the partnership are paid or fully indemnified, for if a dividend were reserved to such a party on such proof the joint creditors might be injured by such solvent partner stopping the surplus of the separate estate, which would otherwise be carried over to the joint estate, or the separate creditors might be injured by the funds being stopped and the transmission of the same be delayed.‡

Two exceptions are admitted to that rule: (1.) Where

* McLean *v.* Johnson, 3 McLean, 202.

† Emery *v.* Bank, 7 National Bankrupt Register, 217.

‡ Story on Partnership, 406; Robson on Bankrupt (2d ed.), 621; Ex parte Lodge & Fendal, 1 Vesey, Jr., 166; Ex parte Maude, Law Reports, 2 Chancery Appeals, 555.

the property of a partner has been fraudulently applied for the purposes of the partnership. (2.) Where a distinct trade is prosecuted by one or more of the members of the firm.*

Subject to the preceding rules, as explained, the solvent partners retain their full right, power, and authority over the partnership property after bankruptcy, in the same manner and to the same extent as if no bankruptcy of a particular partner had occurred. Their lien also remains in full force, not only to have the partnership funds applied to the discharge of the partnership debts and liabilities, but also to the discharge of all the debts due by the partnership to them or any one of them, as well as for their own distributive shares, if any, in the surplus.†

Debts due by the bankrupt partner to the partnership are entitled to priority in preference to the debts due by him to his separate creditors, and if the joint funds prove insufficient to discharge his debt to the partnership the solvent partners have a right to prove the deficiency against the separate estate of the bankrupt *pari passu* with the separate creditors.‡

Bankruptcy, it is said, when decreed by a competent tribunal, dissolves the copartnership, but the joint property remains in the hands of the solvent partner or partners, clothed with a trust to be applied by him or them to the discharge of the partnership obligations and to account to the bankrupt partner or his assignee for his share of the surplus.§

Exceptions undoubtedly exist to that rule where it appears that the partnership or all the partners are insolvent, even though some of them may not be in bankruptcy.‖

Assets are to be marshalled between the creditors of the

* 1 Deacon (3d ed.), 852.

† Bump on Bankruptcy (7th ed.), 660; Collier on Partnership (3d Am. ed.), § 860.

‡ Bump on Bankruptcy (7th ed.), 220.

§ Ex parte Norcross, 5 Law Reporter, 124; Harvey *v.* Crickett, 5 Maule & Selwyn, 339.

‖ Ayer *v.* Brastow, 5 Law Reporter, 501; Murray *v.* Murray, 5 Johnson's Chancery, 60; Barker *v.* Goodair, 11 Vesey, 86; Smith *v.* Stokes, 1 East, 367; Parker *v.* Muggridge, 2 Story, 348.

copartnership and the separate creditors of the partners only when there are partnership assets and separate assets of individual partners, and proceedings have been instituted against the partnership and the individual members, as provided in the thirty-sixth section of the Bankrupt Act.*

Certain exceptions also exist to that rule where both the joint and separate estates are administered by the assignees of the copartnership.†

Many decided cases support the proposition that the bankruptcy of one partner operates as a dissolution of the copartnership, but such an adjudication obtained by one partner against another will not be sustained if the real object of the petitioner is to dissolve the firm and the adjudication is not required for any other purpose.‡

Involuntary proceedings in bankruptcy were instituted in this case against the senior partner of the copartnership, and it is conceded that no such proceedings have ever been commenced against the copartners or the other partner. Proofs were introduced to show that the other partner was largely indebted to the firm, and it may be conceded that the proofs are sufficient to show that the firm is insolvent, but there is nothing in the record to show that the complainant possesses any other authority to maintain the suit than what he derives by virtue of his appointment as assignee of the estate, real and personal, of the bankrupt senior partner of the copartnership.

Repeated decisions have settled the rule that an assignee of the estate of an individual partner has no such title as will enable him to call third parties to an account for partnership property, and it is difficult to see why that rule does not dispose of the case before the court.§

All of the debts embraced in the compromise agreement

* Ex parte Leland, 5 National Bankrupt Register, 222; Ex parte Downing, 1 Dillon, 36.

† Ex parte Warren Leland, 5 National Bankrupt Register, 229.

‡ Shelford on Bankruptcy (3d ed.), 186; Ex parte Christie, Montague & Bligh, 314; Ex parte Browne, 1 Rose, 151; Ex parte Johnson, 2 Montague, Deacon & De Gex, 678.

§ Bump on Bankruptcy, 660.

were partnership debts and the payments made to procure the signature of the appellants were made to discharge those debts; nor is the question affected in the least by the fact that some small part of the fund used to make those payments was earned by the senior partner in transacting the business of the copartnership subsequent to the time when the firm suspended payment. Most of the amount, it is conceded, was taken from the partnership assets, and the whole was paid as being the money of the copartnership.

Money paid under such circumstances, if it can be recovered back at all, must be claimed by the partnership in whose behalf it was paid, or by an assignee duly appointed to administer the joint estate, as it is quite clear that neither an individual partner nor his assignee can call the party to whom such a payment has been made to an account for such a payment any more than he could for any other debt due to the copartnership. If liable in fact, a voluntary payment to the appellee would not discharge the obligation, as the liability, if it exists, is to another party; nor would a judgment in this case, even if satisfied, be a bar to a subsequent suit in the name of the partnership or their duly appointed assignees.

Two principal suggestions are made in support of the theory set up by the appellees: (1.) That all the parties concerned in the attempt to effect a compromise between the debtors and their creditors proceeded as if the copartnership had previously been dissolved and as if the assets and effects of the debtor firm had been placed in the hands of the senior partner in trust to settle up the affairs of the debtors with their creditors and to pay the compromise notes. (2.) That the other partner never assented to the compromise agreement nor was he in fact a party to the final arrangement, and that the copartnership name was signed to the compromise agreement and to the notes without his authority.

Issuable matters are certainly involved in those propositions, but suppose they are fully proved, they are not sufficient to show that the other partner ever conveyed his

interest in the assets and effects of the copartnership to the bankrupt partner, or that he ceased to be a joint owner of the same when the estate of the bankrupt partner was assigned and conveyed to the complainant below as his assignee.*

Nothing is exhibited in the record to warrant the conclusion that the copartnership was ever in fact dissolved before the decree in bankruptcy against the senior partner, and as the compromise notes were given in the name of the copartnership, the other partner remained liable for their payment.

DECREE REVERSED and the cause remanded, with directions to

DISMISS THE BILL OF COMPLAINT.

UNITED STATES *v.* FARRAGUT.

Captors (Admiral Farragut and others) having filed a libel in the admiralty for prizes taken below New Orleans in April, 1862, they and the government agreed to refer the cause to the "final determination and award" of A., B., and C., "the award of whom," said the agreement of reference, "shall be *final* upon all questions of *law* and fact involved, said award to be entered as a rule and decree of court in said case, with the right also of either party to appeal to the Supreme Court of the United States, *as from other decrees or judgments in prize cases*"

The arbitrators made an award, finding certain matters wholly or chiefly of fact and also certain conclusions of law, and their award was, after exceptions to it, made a decree of the court where the libel was filed.

An appeal was taken to this court.

Held as principles of law applicable to the case:

1. That there was nothing in the nature of the admiralty jurisdiction, or of an appeal in admiralty, which prevented parties in the court of admiralty, whether sitting in prize or as an instance court, from submitting their case by rule of the court to arbitration.
2. That the award in the present case was to be construed here and its effect determined by the same general principles which would govern it in a court of common law or of equity.
3. That notwithstanding the expression in the agreement of submission, that all questions of *law* in the case were to be concluded by the award,

* Harrison *v.* Sterry, 5 Cranch, 302.

Syllabus.

the agreement was in this respect no more than a submission of all matters involved in the suit.

4. That accordingly where the award found facts, it was conclusive; where it found or announced concrete propositions of law, unmixed with facts, its mistake, if one was made, could have been corrected in the court below, and could be corrected here; that where a proposition was one of mixed law and fact, in which the error of law, if there was any, could not be distinctly shown, the parties must abide by the award.

5. That the award was also liable, like any other award, to be set aside in the court below, for such reasons as would be sufficient in other courts; as for exceeding the power conferred by the submission, for manifest mistake of law, for fraud, and for all other reasons on which awards are set aside in other courts of law or chancery.

6. *Held* accordingly further, in application of these principles:

(*a*) That on a question whether the capture was by the navy alone, or by the navy conjointly with the army, the finding that it was by the navy alone, was a finding on a point mainly of fact, and conclusive; there being no evidence of any misapprehension of law governing the arbitrators in their decision of it.

(*b*) That the names of the vessels participating in the capture, and the value of the property captured were questions of pure fact, and that the finding was final.

(*c*) That whether the property was lawful prize of war and subject to condemnation was the very matter submitted to the arbitrators to be decided by them; and that their award that it was such lawful prize and so subject to condemnation, was to be upheld unless it was shown that in making such award they had acted upon a manifest mistake of law.

(*d*) That where the award found that certain vessels named were, after capture, given up to their lawful owners, from whom they had been taken by the enemy, the award was to be taken as stating that these vessels had been the property of loyal citizens of the United States, had been seized by the enemy for their own use, and when captured from the enemy by the libellants had been restored by the military power in New Orleans to their original owners, and that on this state of facts the arbitrators held that when captured they were lawful prize and liable to condemnation as such in a prize court. But that there being nothing in the finding of the court nor in the record, nor anything suggested by counsel in argument, to show that these owners were not domiciled in the rebel States, and it being reasonably to be supposed from all that *was* known that such was the case, it wou'd, in favor of the award and decree below, be presumed that the arbitrators had evidence of that fact. *Held*, therefore, that in holding these vessels liable to capture and condemnation, and lawful prize of war, it did not appear under the decision in the *Prize Cases* (2 Black, 671), which in their second proposition adjudged that property of persons domiciled or residing within the enemy's lines was enemy property,

and liable to capture as prize of war, without regard to their sentiments of loyalty or disloyalty to the United States government, that the arbitrators violated any principle of law.

Held, however, that in awarding, as they did, the value of these vessels to the captors as prize, and in addition forty per cent. of that value for salvage, the arbitrators violated law and practice.

(*e*) That where the *award* found nothing about the return to their owners of certain other vessels, though there was some evidence (if it had been proper to go behind the award) to show that they were so delivered, but none at all as to the character of these owners for loyalty, this court could not, in the face of the award that they were lawful prize and subject to condemnation, infer that their owners were loyal men, even if it could look to the evidence to find that the vessels were delivered to them. *Held*, therefore, to be clear that there was no sufficient evidence to show that the award as to these vessels was based on any mistake of law.

APPEAL from the Supreme Court of the District of Columbia.

On the 22d of January, 1862, the city of New Orleans being then in the possession of the rebel confederacy, and access to it from the ocean by the troops of the United States being cut off by the rebel forces in Forts Jackson and St. Philip, below it; a large armament of mortars was sent to the mouth of the Mississippi, which the Western Gulf Squadron of the United States was blockading; and Flag-officer Farragut, afterwards admiral of that name, ordered to its command. These were his instructions:

"When these formidable mortars arrive, and you are completely ready, you will collect such vessels as can be spared from the blockade and proceed up the Mississippi River and reduce the defences which guard the approaches to New Orleans, when you will appear off that city and take possession of it under the guns of your squadron, and hoist the American flag therein, keeping possession until troops can be sent to you. . . . As you have expressed yourself perfectly satisfied with the force given to you, and as many more powerful vessels will be added before you can commence operations, the department and the country will require of you success."

On the 3d of February, 1862, Flag-officer Farragut sailed from Hampton Roads to assume his command. By letter

of February 10th, 1862, from the Secretary of the Navy, he was instructed that—

"The most important operation of the war is intrusted to yourself and your brave associates. . . . Eighteen thousand men are being sent to the gulf to co-operate in the movements, which will give to the armies of the United States full possession of the ports within the limits of your command. You will, however, carry out your instructions with regard to the Mississippi and Mobile without any delay, beyond that imposed upon you by your own careful preparation. *A division from Ship Island will probably be ready to occupy the forts that will fall into your hands.*"

A land force of 18,000 men, under Major-General Butler, destined to co-operate with the navy in the attack on New Orleans, was dispatched from Fortress Monroe, and entered the Mississippi about the middle of April, landing on Ship Island there, and putting itself into relations with Admiral Farragut.

General Butler, when leaving Fortress Monroe, received orders by which the army under him was to await the reduction of the enemy's works by the navy, and then, after their capture, in case a reduction and capture was made, the army was to put and leave in them a sufficient garrison to render them secure; but in case the navy failed to reduce the works, then a co-operative movement by the united forces—land and naval—was to commence; the army, covered by the navy, to make its approaches and carry them by assault.

All preparations being made, the fleet commenced the bombardment of Fort Jackson on the 16th of March, which bombardment lasted until April 24th, 1862. At half-past three o'clock on the morning of that day, the fleet, in two divisions, moved up the river, and, aided by the mortar fleet, ran past and between Forts St. Philip and Jackson, placed on the east and west sides of it, under a fire described by Farragut "such as the world had rarely seen."

After passing the forts the fleet, on the morning of the

25th, proceeded to New Orleans, attacked the forts immediately around the city for its defence, reduced them, and demanded the surrender of the city on that day in the name of the United States.

General Butler in the meantime, in accordance with an agreement which he had previously made with Flag-officer Farragut before the bombardment began, rowing seven miles to get a good footing, landed 3000 men at the quarantine station (Sable Island). He then threw a body of them across the Mississippi and hemmed in the forts. That night the garrison of Fort Jackson mutinied against their officers, and a majority of them surrendered to the government pickets; and on the next day the officers also surrendered, and the government troops were put and left in the forts. He then followed Flag-officer Farragut up the river, and with 2000 men took possession of New Orleans.

Such at least was one part—the historical *proscenium* as it may be called—of the case; though the evidence adduced in the record of this particular suit, while establishing *it*, in the main, may or may not have considerably modified it as to the degrees in which the army and the navy shared in the conquest. Whether it did or did not was one of the questions raised and disputed about by counsel, and the reporter states what he has stated chiefly to lead in and make more intelligible what follows.

The result of the reduction of the forts was the capture of a large number of vessels, coal, and other property.

All this property was appraised at the time by a board of officers duly appointed for that purpose. But there being no District Court for the Eastern District of Louisiana open at that time, and much of the property being river steamers unfit to be sent to sea, and much of it necessarily used by the army and navy of the United States in their further operations in the gulf and the river Mississippi, none of it was sent in to be condemed as prize at the time of the capture.

Congress, accordingly, on the 3d of March, 1869, passed an act with the following title and enactment:

Statement of the case.

"*An Act relating to captures made by Admiral Farragut's fleet in the Mississippi River in May*, 1862.*

"*Be it enacted, &c.*, That the vessels attached to or connected with Admiral Farragut's fleet in the river Mississippi, which participated in the opening of that river, and which resulted in the capture of New Orleans in the month of May, 1862, and which by law would have been entitled to prize-money in the captures made by said vessels, shall be now entitled to the benefits of the prize laws in the same manner as they would have been had the District Court for the Eastern District of Louisiana been then open, and the captures made by said vessels had been libelled therein; and any court of the United States having admiralty jurisdiction may take and have cognizance of all cases arising out of said captures, and the same proceedings shall be had therein as in other cases of prize.

"SECTION 2. *And be it further enacted*, That the shares in such captures awarded to the officers and men entitled to prize shall be paid out of the Treasury of the United States."

In pursuance of this statute Admiral Farragut, on behalf of himself and the officers and crews of his fleet, filed his libel in the Supreme Court of the District of Columbia, on the 26th April, 1869, against thirty-six sailing vessels of different kinds, or steamers, including the ships Metropolis, Farwell, Milan, the barkantine Ocean Eagle, the bark George Alban, and the steamer Sallie Robinson, of the aggregate value, as alleged, of $116,500.

Five steamers, to wit, the Diana, the Ceres, the Tennessee, the McRae, and the Iberville, valued, as alleged, at $613,520.

[The steamer McRae (of the value as alleged of $96,000), the libel averred had been "sent up with paroled prisoners to New Orleans, but not being properly cared for by the Confederate officers having her in charge, was sunk."]

Five Confederate vessels, then in process of construction.

The following steamers, St. Charles, Time and Tide, Louisiana Belle, Empire Parish, St. Maurice, and Morning

* 15 Stat. at Large, 336.

Light, appraised in the aggregate at $64,000, and which steamers, among others, the libel alleged belonged to the Confederate authorities or citizens of the Confederate States, and after being captured were delivered over to the United States, and used by them in transporting their forces, munitions of war, &c.

Sixteen thousand tons of coal worth $20 a ton.

The libel alleged the capture by Farragut's fleet, *jure belli*, of all these thirty-six vessels, as also of the coal; and setting forth their value, prayed a monition, and that all might be held to be prize of war, and that a decree might be passed directing their value to be distributed among the officers and crews of the Western Gulf Squadron, as to law and justice might appertain.

The Treasury Department having informed the District Attorney of the United States at Washington, that it was very questionable whether the captures mentioned in the libel were prize of war, and that it was desired to have this question, besides questions of fact arising in the cases, fully and fairly tried, directed him to take such steps as upon consultation with a gentleman named (Mr. Corwine), who had been retained as special counsel of the government, it might be deemed necessary to take to protect the interests of the government. So far as the reporter could gather things from a confused record, one ground of the question suggested by the Treasury Department, whether the vessels libelled were prize of war, *jure belli*, was an idea that the captures had been made in a greater or less degree by the aid of the army; it was also of the impression that in asking for so large a sum of prize-money as it did, the libellants were disregarding the statutory rule which gave them so large a sum only when the capturing force was inferior to that opposing it.

However, whatever was the ground of its action, the United States, both by the attorney for the District of Columbia and by special counsel employed in the case, appeared and defended the suit, and such proceedings were had that by a written agreement between the United States

on one side, and the libellant on the other, the whole controversy was submitted to three arbitrators, whose award, or that of a major part of them, should by rule of the court be entered as its decree. It was signed by the counsel for Farragut, by the special counsel of the United States, the Attorney-General, the Secretary of the Treasury, and the Secretary of the Navy.

This agreement, after reciting the pendency of the suit which we have just mentioned, and another by the same libellant against the United States, which was not found in the record, but is supposed to have related to the same subject-matter, proceeds as follows:

"Now, for the more speedy and economical adjustment of said controversies, it is agreed between the libellants and the United States that these causes shall be referred to the final determination and award of Henry W. Paine, Esq., of Boston, and Thomas J. Durant, Esq., of Washington, and Gustavus V. Fox, Esq., late Assistant Secretary of the Navy, mutually chosen on the part of the libellants and the United States, *the award of whom, or the greater part of whom, shall be final upon all questions of law and fact involved in these causes;* said award to be entered as a rule and decree of court in said cases in said Supreme Court, with due right of either party to take evidence, as in other like cases, within thirty days from this date; and *with the right also of either party to appeal to the Supreme Court of the United States as from other decrees or judgments in prize cases.*"

In due time the arbitrators made their unanimous award, the substance of which is as follows:

1. That the capture was not a conjoint operation of the army and navy of the United States.

2. That forty-two vessels, whose names were given, participated in the capture.

3. That twenty-nine vessels, whose names were also given, and which included the vessels already mentioned by name, were captured, and also five vessels of war in process of construction on the docks in the Mississippi River, and sixteen thousand tons of coal.

4. That the value of each of these vessels separately, and

of the coal and unfinished vessels was such and such a sum, which the award specified, the aggregate being $966,120.

5. That all this property was lawful prize of war, and lawfully subject to condemnation as such.

6. That in the engagement which resulted in the capture of those ships, the entire force of the enemy was superior to the force of the United States ships and vessels so engaged.

9. That of the above-mentioned captured vessels, the McRae was wholly lost and destroyed, having been used as a cartel by the United States, and sunk in the river opposite New Orleans, within four days after her capture.

10. That the ships Metropolis, Farwell, and Milan, the barkantine Ocean Eagle, the bark George Alban, and the steamer Sallie Robinson, whose aggregate value was $116,500, were, after capture, given up to the legal owners, from whom they had been taken by the enemy.

The award allowed the captors the value of these vessels, and $46,600 for military salvage due thereon, and closed by giving to the libellants the whole value of all these vessels, $966,120, and the $46,600 salvage just mentioned.

The award, it will be noted, said nothing about any other vessels than those mentioned in the tenth paragraph having been given up to the owners of them, though there was some evidence in the record which tended to prove the bare fact that the steamers St. Charles, Time and Tide, Louisiana Belle, Empire Parish, St. Maurice, and Morning Light had been given up to their owners; but who the owners were, where they resided, or anything else about them did not appear in the said evidence.

This award having come into the court below, it was excepted to by the United States, and a motion soon made to set it aside; the following being the grounds of the exception and motion:

"1st. That the finding that the capture was not a conjoint operation of the army and navy of the United States, is not warranted by the law and the facts, but is expressly contrary to the law and the facts.

"2d. That the finding of the value of the vessels alleged to

have been captured, is without warrant of law, and wholly unsupported by evidence.

"3d. That the finding that the property alleged to have been captured was 'lawful prize of war, and lawful subject of condemnation as such,' is erroneous and wholly unsupported by the law and facts.

"4th. That the finding that the force of the enemy was superior to the forces of the United States ships and vessels engaged in the alleged capture, is erroneous and wholly at variance with and unsupported by the law and the facts.

"5th. That the finding that the steamer McRae was lost after that she was alleged to have been captured, and while she was being used as cartel by the United States, is erroneous and not supported by the law and the facts. The evidence shows that the McRae belonged to the United States prior to her use and when she was used by the rebels, and that she was recaptured from them by the naval forces of the United States on the occasion referred to in the award, and that she was not prize of war. At most it was but a recapture.

"6th. That it is erroneous, and not warranted by law, to allow military salvage, as against the United States, for the alleged recapture of the vessels set out in paragraph ten of the award. Such property was not recaptured by the libellant and those he represents."

The court refused to set the award aside, and on the contrary made it the decree of the court. From that decree the United States took this appeal.

After the case came into this court the Attorney-General dismissed the appeal as to the sixteen thousand tons of coal, the five vessels of war in process of construction, and five other vessels, namely, the Diana, the Ceres, the Tennessee, the McRae, and the Iberville, covering $613,520 of the decree, and this sum has been distributed among the captors.

The record, as it came to this court, was a very confused one. It was composed, a considerable part of it, of evidence in the cause; some of it received by stipulation, some of it documentary, and more—the most of it, indeed—by depositions. Whether any part of this was before the arbitrators, or what part of it, or what other testimony, if any,

was before them, the confused state of the document rendered it impossible for any one to know.

Mr. G. H. Williams, Attorney-General, and Mr. R. M. Corwine, special counsel, for the United States.

The first question is, What is brought up by the appeal?

The "appeal," reserved by the agreement to refer, is from the judgment or decree of the Supreme Court of the District of Columbia.

The award was of no avail until it was entered as a rule or decree of that court, and from that rule (*i. e.*, judgment) or decree the appeal might be taken.

Such appeal is to be as from other decrees or judgments *in prize cases.*

Now, in decrees in prize cases all pleadings, together with the report of the arbitrators, go up with the appeal,* and the proceedings in all respects are governed by the Rules of Practice in Admiralty.

By Rule 44, in admiralty, power is given the court to refer any matter in dispute to one or more commissioners; and such commissioners shall have and possess all the powers of masters in chancery. So that, if the parties had not agreed, the court might have referred the cause to arbitrators. But here the parties did agree, and the court adopted the selection of arbitrators, and their form of submission, and referred the cause.

The 44th Rule, as we have said, confers upon commissioners the powers of masters in chancery, and the rule, as laid down in 2d Daniell's Chancery Practice,† is that the master must report *all the evidence* for the inspection of the court. Evidence improperly rejected by the master may be examined in court.‡

Such an appeal as was here made from the decree below, brings then the case here to be tried *de novo*, without reference to the proceedings of the arbitrators, and, in fact, as if

* See Rule 52 of the Supreme Court of the United States in Admiralty.

† Page 1498. ‡ Fuller *v.* Wheelock, 10 Pickering, 135.

no reference had been made. The decree was vacated by the appeal.

[The learned counsel then, on an assumption that all questions of fact were open to examination at this bar, went into an examination of the evidence; inferring, on such examination, that in several particulars of fact—including the degree in which the army shared in the conquest—the conclusions of the arbitrators were not well made, and that really, on a perfectly true view of the case, nothing was due to the libellants at all.]

Reverting, however, in a larger degree to matters of law, and admitting, for argument's sake, that the evidence cannot be gone into:

The decree of the court below finds that the ships Metropolis, Milan, Farwell, the barkantine Ocean Eagle, the bark George Alban, and the steamer Sallie Robinson, were, after capture, "given up to the loyal owners from whom they had been taken by the enemy."

Upon these facts, the existence of the *right of postliminy* in the said owners at the time of the recapture of their property by our forces may fairly be assumed.

That right entitled the owners to a restoration of their property by the captors; while, on the other hand, the captors became entitled to military salvage, for which they had a lien upon the property, but that was the only interest they had in it.

The claim of the captors for military salvage might have been enforced by proceedings *in personam* as well as *in rem;* and this shows that the liability therefor, so far as it constituted a personal charge, rested upon the owners. The captors could certainly have no ground for asserting a claim against the government on account of salvage, unless, perhaps, the property or its proceeds had been appropriated by the government after the capture, which was not the case. And the proceeding in the court below being *virtually* but the prosecution of a claim against the government, the allowance of military salvage to the promoters of that proceeding, in respect of the property referred to, was improper.

It appears also, from the record, that the steamers St. Charles, Time and Tide, Louisiana Belle, Empire Parish, St. Maurice, and Morning Light, were restored to their owners. The *presumption* is, though there may be no specific evidence to that effect, that the restoration of this property was due to the fact that the owners thereof were loyal to and under the protection of the government. If so, then the right of postliminy existed in their favor, and the only interest the captors really had in the property was a salvage right, which, for reasons already stated, cannot be made the subject of claim against the government in this proceeding. The allowance made by the court below, in respect of this property, should therefore be wholly excluded.

It is accordingly submitted that at the very least the decree of the court below ought to be modified in the following particulars:

1. The amount allowed by the court as the value of the ships Metropolis, Farwell, Milan, the barkantine Ocean Eagle, the bark George Alban, and the steamer Sallie Robinson, should be stricken out, ...	$116,500
2. The amount allowed by the court as military salvage on the same vessels should also be stricken out, ...	46,600
3. The amount allowed by the court as the value of the steamers St. Charles, Time and Tide, Louisiana Belle, Empire Parish, St. Maurice, and Morning Light, should also be stricken out,	64,600
Amounting in the aggregate to	$227,700

Mr. B. F. Butler, for Admiral Farragut and his officers and men; Mr. Hubley Ashton, for Admiral Porter; Mr. Nathaniel Wilson, for Rear-Admiral Bailey, contended that under the terms of the submission which made the award of the arbitrators final, not only on questions of fact but on "questions of law" also, it was doubtful if anything at all could be considered in this court; that certainly the ordinary rule which made such an award conclusive as to matter of fact, prevented a consideration of the case *de novo* as on appeals in admiralty.

The learned counsel, however, examined the evidence fully, seeking to show that on it, as in matter of law, the award was perfectly just.

Opinion of the court.

Mr. Justice MILLER delivered the opinion of the court.

The first and most important question arising in the argument of the case before us, respects the validity of the award and its effect in limiting the field of investigation of this court on appeal.

On the one hand it is maintained that the provision which gives to either party the right to appeal to this court, as from other decrees or judgments in prize cases, in effect nullifies the award here and opens the entire case upon all the pleadings and evidence in the record as though no award had been made. On the other, it is argued that the clause which declares the award final upon all questions of law and fact involved in the cause, forbids any inquiry here into any question of law or fact passed on by the arbitrators.

As regards the first proposition, it is unreasonable to suppose that parties to a suit in court, referring the whole subject to arbitrators with an agreement that the award shall be final and become the decree of the court, intended to leave the whole case open after the award as though none had been made.

The provision for an appeal to this court was undoubtedly to negative the possible inference that such appeal was forbidden by the clause making the award final in all questions of law and of fact arising in this case.

It is to be observed that the appeal is not and could not be from the award, but from the decree of the court below. That court would deal with the award in the same manner that awards in other courts could be dealt with.

There is nothing in the nature of the admiralty jurisdiction, or of an appeal in admiralty, as counsel seem to suppose, which would prevent parties in that court, whether sitting in prize or as an instance court, from submitting their case by rule of the court to arbitration, or which varies the effect to be given to such award from that to be given to it in any other court, either in the court below or on appeal. This award is to be construed here and its effect determined by the same general principles which would govern it in a court of common law or of equity.

Nor do we conceive, notwithstanding the expression in the agreement of submission, that all questions of law in the case are concluded by the award. In this respect it is no more than a submission of all matters involved in the suit.

Where the award finds facts it is conclusive, where it finds or announces concrete propositions of law, unmixed with facts, its mistake, if one is made, could have been corrected in the court below, and can be corrected here. Where a proposition is one of mixed law and fact, in which the error of law, if there be one, cannot be distinctly shown, the parties must abide by the award.

The award was also liable, like any other award, to be set aside in the court below, for such reasons as are sufficient in other courts. For exceeding the power conferred by the submission, for manifest mistake of law, for fraud, and for all the reasons on which awards are set aside in courts of law or chancery. A motion was made in that court to set aside the award on the following grounds:

1st. The finding that the capture was not a conjoint operation of the army and navy of the United States is not warranted by the law and the facts, but is expressly contrary to the law and the facts.

2d. The finding of the value of the vessels alleged to have been captured is without warrant of law and wholly unsupported by evidence.

3d. The finding that the property alleged to have been captured was "lawful prize of war, and lawful subject of condemnation as such," is erroneous and wholly unsupported by the law and facts.

4th. The finding that the force of the enemy was superior to the forces of the United States ships and vessels engaged in the alleged capture, is erroneous and wholly at variance with and unsupported by the law and the facts.

5th. The finding that the steamer McRea was lost after that she was alleged to have been captured, and while she was being used as cartel by the United States, is erroneous and not supported by the law and the facts. The evidence shows that the McRea belonged to the United States prior

to her use and when she was used by the rebels, and that she was recaptured from them by the naval forces of the United States on the occasion referred to in the award, and that she was not prize of war. At most it was but a recapture.

6th. It is erroneous, and not warranted by law, to allow military salvage, as against the United States, for the alleged recapture of the vessels set out in paragraph No. 10 of the award. Such property was not recaptured by the libellant and those he represents.

A glance at these grounds will show that all of them, except the last, is an attempt to reopen the questions submitted to the arbitrators, because they had decided erroneously questions of pure fact, or of law and fact, in which the former was so mingled with the latter as to be inseparable.

Applying these principles to the case before us, we think we are bound by the first statement of the award, that the capture was not a conjoint operation of the army and navy. There is no evidence here of any misapprehension of the law governing that question, and it must obviously have been one mainly of fact, and the award is, therefore, conclusive.

So also the names of the vessels participating in the capture, of the vessels and other property captured, and the value of that property, are all questions exclusively of fact which the arbitrators had a right to find, were bound to find, and the finding is a finality. The finding that all this property was lawful prize of war and subject to condemnation as such, was the very thing submitted to them for their decision, and unless it can be shown that in making this award they have acted upon a manifest mistake of law, the award must be upheld. Does this appear? Having found the capture, the property captured, the names and character of the vessels engaged in it, and the nature of the capture, the only other question open was the character of the captured property.

Was it liable to capture as prize for any of the reasons which make property liable to the law of prize? Was it

contraband of war? Had it been engaged in violating or attempting to violate a blockade? Was it enemy property? If it was captured with any or all of these characteristics it was lawful prize, and subject to condemnation, and whether it was or not was clearly matter to be decided by the arbitrators, and unless they violated some principle of law in deciding it, which this court can see, the award must be confirmed.

The Attorney-General insists that it sufficiently appears from the record that the ships Metropolis, Farwell, Milan, the barkantine Ocean Eagle, the bark George Alban, and the steamer Sallie Robinson, of the value of $116,500; and the steamers St. Charles, Time and Tide, Louisiana Belle, Empire Parish, St. Maurice, and Morning Light, of the value of $64,000, were not lawful prize or subjects of condemnation. The foundation of the argument is that these vessels were owned by loyal citizens, and were on that account delivered up to their owners by the military authorities after their capture. As regards the six vessels last named, the award is totally silent as to their being delivered to the owners, or as to the loyalty of those owners.

There is some evidence in the record, if we could go behind the award, to show that they were delivered to their owners, but none whatever as to the character of these owners for loyalty. We cannot, in the face of the award that they were lawful prize and subject to condemnation, infer that their owners were loyal men, if we could look to the evidence to find that the vessels were delivered to them.

It is, therefore, clear that there is no sufficient evidence to show that the award as to these vessels was based on any mistake of law.

The six vessels first named stand on a different ground. As to them, the tenth finding of the award is, that they "were after capture given up to their lawful loyal owners, from whom they had been taken by the enemy."

On this point we understand the award as stating that these vessels had been the property of loyal citizens of the United States, had been seized by the enemy for their own

use, and when captured from the enemy by the libellants had been restored by the military power in New Orleans to their original owners, and that on this state of facts the arbitrators hold that when captured they were lawful prize and liable to condemnation as such in a prize court. Unless the fact that the original owners were loyal to the government of the United States is of itself sufficient to exempt these vessels from the law of prize, the award of the court must be sustained. If the owners resided on that side of the line of bayonets spoken of in the *Prize Cases** which adhered to the Union, then they were not liable to condemnation as prize, for their owners could have interposed a claim in the prize court, and on payment of salvage their property would have been restored to them. But if their owners resided on the other side of that line, were themselves citizens of and domiciled in States declared by the President's proclamation to be in insurrection, then their property captured in naval warfare was lawful prize, and subject to condemnation. The loyalty of the owners made no difference in this regard. This whole subject was exhaustively examined in the *Prize Cases*, and the second proposition established by the opinion, commencing at page 671, 2 Black, is that property of persons domiciled or residing within the enemy's lines was enemy property, and liable to capture as prize of war, without regard to their sentiments of loyalty or disloyalty to the United States government. This was sustained on the ground that all such property, being capable of use in aid of the enemy, was liable to capture for the purpose of crippling his resources. And one vessel and some personal property was condemned as prize in that case, because owned by citizens of Richmond, though no disloyal acts were charged or proved against them.

This rule was acted on by this court in all cases which came within it (and there were several) growing out of the same civil war. The rule is vindicated by the fact that these very vessels were seized and were in use by the public forces

* 2 Black, 674.

of the enemy at the time they were captured, and their capture was a deadly blow at their power to carry on the war.

There is nothing in the finding of the court, nor in the record, nor is it suggested by counsel in argument, to show that these owners were not domiciled in the rebel States. It would be reasonably supposed from all that *is* known, that such was the case; and in favor of the award and decree below it will be presumed that the arbitrators had evidence of that fact.

It does not appear, therefore, that in holding these vessels liable to capture and condemnation, and lawful prize of war, the arbitrators violated any principle of law.

But it is quite clear that in awarding the value of these vessels to the captors as prize, and in addition forty per cent. of that value for salvage, they did violate law and justice.

This is too apparent to need argument, and is seen on the face of the award; and the decree of the Supreme Court of the District as to the $46,600 awarded as salvage is REVERSED, and in all other particulars it is affirmed, and the case is REMANDED to the Supreme Court of the District of Columbia, with directions to reform its decree in this particular, and for such further proceeding as may be necessary, in conformity with this opinion.

REVERSED AND REMANDED ACCORDINGLY.

FOX *v.* SEAL.

1. Under the joint resolution of the legislature of Pennsylvania, passed January 21st, 1843, and which declares that "it shall not be lawful for any company incorporated by the laws of the Commonwealth and empowered to construct any railroad, canal, or other public internal improvement, while the debts thereof, incurred by the said company to contractors, laborers, and workmen employed in the construction or repair of said improvements remain unpaid, to execute a general or partial mortgage, or other transfer of the real or personal estate of the said company, so as to defeat, postpone, endanger, or

Statement of the case.

delay their said creditors, without the written assent of said creditors first had and obtained, and that any such mortgage or transfer shall be deemed fraudulent, null, and void, as against any such contractors, &c., as aforesaid;" an unpaid contractor, laborer, or workman, employed in the construction of a railroad in Pennsylvania, has a lien of indefinite duration on such road, which lien has precedence over every right that can be acquired by or under any mortgage made after the debt to the contractor was incurred.

2. Such lien is not merged in any judgment got by the contractor against the company for his debt, nor by any proceedings in or judgments in scire facias, primary or subsequent, upon such judgments. In whatever shape the debt may be, it has the benefit of the privilege given it by the legislative resolution.

3. If the company mortgage their road after the contractor has got a judgment against it for his debt, such contractor is not bound, on a scire facias brought by him to revive his original judgment, to give notice to a mortgagee as a terre-tenant. A mortgagee is not a terre-tenant.

4. Under the act of the Assembly of Pennsylvania of April 4th, 1862, which, reciting the above-quoted joint resolution of January 21st, 1843, enacts "that whenever any incorporated company, subject to the provisions of the above resolution, shall divest themselves of their real or personal estate, contrary to the provisions of said resolution, it shall and may be lawful for any contractor, laborer, or workman employed in the construction or repair of said company, *having obtained judgment* against the said company, to issue a scire facias upon said judgment, with notice to any person, or to any incorporated company, claiming to hold or own said real or personal estate," all that is required to enable the contractor, &c., to proceed by scire facias, as contemplated by the act, is that such contractor, &c., have a judgment against the indebted company which gave the mortgage. It is not necessary that the judgment be a lien.

5. Where, on the intervention of a contractor having a lien such as is given by the above-mentioned joint resolution of 1843, a court, on proceedings in foreclosure of a mortgage of the road made subsequently to the date of the lien, orders a sale "subject to any lawful claims or rights which may exist prior or paramount to said mortgage," and the sale is made accordingly, the lien is not divested; whatever might be the case were the lien that of a judgment.

6. Nor will such a lien be divested by a statute authorizing a railroad company to borrow money and to pledge its income and property to secure the payment. A repeal of the joint resolution will not be inferred, by the grant of such a power simply.

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

On the 21st of January, 1843, the legislature of Pennsylvania passed the following

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JOINT RESOLUTION TO PROTECT LABORERS AND CONTRACTORS.

"*Resolved*, That it shall not be lawful for any company incorporated by the laws of this Commonwealth, and empowered to construct, make, and manage any railroad, canal, or other public internal improvement, while the *debts* and *liabilities*, or any part thereof, incurred by the said company to *contractors*, laborers, and workmen employed in the construction or repair of said improvement remain unpaid, to execute a general or partial assignment, conveyance, *mortgage*, or other transfer of the real or personal estate of the said company, so as to defeat, postpone, endanger, or delay their said creditors, without the *written assent* of the said creditors first had and obtained; and any such assignment, conveyance, *mortgage*, or transfer, shall be deemed *fraudulent*, *null*, and *void*, as against any such *contractors*, laborers, and workmen, creditors as aforesaid."*

This joint resolution being in force, the legislature of the same State, in the year 1850, incorporated the Hemphill Railroad Company; a company authorized to make a railroad from a town called Greensburgh, in the interior of Pennsylvania, to the western boundary of the State.

The act of incorporation gave the company no power to borrow money or mortgage the road. But a subsequent act—one of April 12th, 1851—empowered the company to borrow money and "to pledge the property and income of the company in order to secure the payment thereof."

With these acts in force, the company, in 1853 (May 27th), entered into a contract with a contractor named Fox to do the work on the projected road; and he did it. In the following year, 1854, the company became embarrassed and requested Fox to stop working; which he also did.

Not getting paid, he brought suit February 16th, 1855, in the Circuit Court of the United States, at Pittsburg, against the company, and on the 23d of November, 1860, got judgment against it for $33,500; this *judgment* constituting, by the law of Pennsylvania, a lien against the company's real estate for five years from its date, and no longer;

* Pamphlet Laws of 1843, p. 367.

and the law of the State requiring notice to be given to terre-tenants, when there are terre-tenants, and the plaintiff in the judgment desires to revive the judgment as against them.

On the 27th of June, 1855—that is to say, between the day when Fox brought his suit and that when he got judgment—the debt to Fox being still unpaid, and he having given no assent, written or other, thereto,—the company executed a mortgage on the whole of their road, franchises and property, real and personal, to one Seal, as trustee, to secure the payment of bonds to the amount of $1,000,000, to be issued by the company, and which were immediately afterwards issued; the bonds having twenty years, that is to say until 1875, to run. The mortgage was duly recorded in all the counties through which the road ran, and Seal, the trustee, took possession of the road and worked it until the time of the sale, hereafter mentioned. Interest on the bonds becoming due, and not being paid, suit was instituted in the Supreme Court of Pennsylvania, to foreclose the mortgage and to sell the road, its franchises, and other property, real and personal. Fox hereupon applied by petition to be allowed to intervene *pro interesse suo* in the suit for foreclosure; or if this should not be granted, that he might be paid out of the proceeds of the sale. His petition contained a full history of the origin, character, and amount of his claim against the Hemphill Railroad Company. The court rejected his petition on both its parts; and a sale was made under the proceedings in foreclosure; the sale, however, being made (in consequence of Fox's petition) "*subject to any lawful claims or rights which might exist prior or paramount to the said mortgage.*" The purchaser was another corporation, named the Pittsburg, Wheeling, and Baltimore Railroad Company. This sale was made March 30th, 1871.

Between the date of the above-mentioned mortgage and the sale under it, that is to say on the 4th of April, 1862, the legislature of Pennsylvania passed an act to enable contractors, laborers, workmen, &c., better to get the enjoyment of the lien which the joint resolution of January 21st, 1843,

already quoted, had given them. This act was in these words:

"*Whereas*, it frequently happens that incorporated companies, by assignment, conveyance, mortgage, or other transfer, divest themselves of their real and personal estate, in contravention of the provisions of the resolution of January 21st, 1843; therefore,

"*Be it enacted*, That whenever any incorporated company, subject to provisions of the above resolution, shall divest themselves of their real or personal estate, contrary to the provisions of the said resolution, it shall and may be lawful for any contractor, laborer, or workman employed in the construction or repair of the improvements of said company, having obtained judgment against the said company, to issue a scire facias upon said judgment, with notice to any person, or to any *incorporated company, claiming to hold or own said real or personal estate*, to be served in the same manner as a summons, upon the defendant, if it can be found in the county, and upon the person or persons, or incorporated company claiming to hold or own such real estate; and if the defendant cannot be found, then upon the return of one *nihil* and service as aforesaid, on the person or persons, or company claiming to hold or own as aforesaid, the case to proceed as in *other* cases of scire facias against terretenants."*

We should here mention that while some of these things were going on, that is to say in 1867 (January 29th), and while Seal was in possession of the road as trustee, Fox had issued a scire facias against the Hemphill Railroad Company to revive the judgment which he had got against it in 1860; the lien of which *judgment* had of course, under the law of Pennsylvania as already stated, expired in 1865. To *this* scire facias no one was made a defendant but the original defendant, the Hemphill Railroad Company. Judgment was entered on this scire facias March 14th, 1867.

He now, February 23d, 1871—thirty-seven days before the sale of the road, and while Seal was yet in possession of it—issued a scire facias *to revive judgment* and *quare executio*

* Pamphlet Laws of 1862, p. 235, § 1.

non on the judgment just now mentioned as obtained in 1867, and in this second scire facias he made Seal a codefendant with the original defendant, the Hemphill Railroad Company, and, as soon as the sale of the old road to the Wheeling, Pittsburg, and Baltimore Railroad Company had been made, brought in *that* company as another codefendant; this being effected August 12th, 1871, and he meaning in all which he did to act in conformity with what was directed by the act of the Pennsylvania Assembly of 1862, quoted on the preceding page.

These two last-named parties, that is to say Seal and the Wheeling, Pittsburg, and Baltimore Railroad Company pleaded to this last scire facias.

The pleas were:

Payment;

That the mortgage was not made in contravention of the joint resolution of 1843;

That the plaintiff was not a creditor within the scope of that joint resolution;

That any lien or claim which the plaintiff ever had, had expired prior to his bringing the present suit.

And, on issue taken, &c., the question, divested of the technicalities of pleading and evidence, was whether the real and personal estate of the old Hemphill Railroad Company, which under the proceedings in foreclosure instituted by Seal had passed to the Wheeling, Pittsburg, and Baltimore Railroad Company, was liable to the debt to Fox as ascertained by the judgment of the Circuit Court on which the scire facias to revive, &c., had issued.

The plaintiff, to establish his case was about to offer certain pieces of documentary and record evidence separately, when the court directed that he should offer the whole in a body, and in connection. He now did this; offering the record of the mortgage (the same being without any written assent by him to it); the record of the proceedings in foreclosure and sale, with the order preceding it that it should be made subject to any lawful claims or rights prior or paramount to the mortgage; the joint resolution of the Penn-

sylvania legislature of January 21st, and the act of Assembly of April 4th, 1862; the records of his own suit of 1855, ending in judgment in 1860; the record of the scire facias of 1867, to revive it; this to be followed up with evidence of the nature and date of origin of the claim on which the original judgment was got; to wit, that it was that of a contractor in the construction of the railroad prior to the date of the mortgage; that the mortgage, if not postponed to his claim, defeated it; that he was not a stockholder in the Hemphill Railroad Company, &c., &c.

The defendants objected to the evidence as irrelevant and incompetent, and the court rejected it; the plaintiff excepting to such action. Judgment having been given for the defendants, the plaintiff brought the case here.

For the reader's convenience, the dates of some of the important facts occurring in the history of the case are here set forth chronologically:

1843, January 21st, joint resolution of the legislature.

1850, May 15th, Hemphill Railroad Company incorporated.

1851, April 12th, act of legislature authorizing a mortgage by it.

1853, May 27th, Fox's contract made.

1855, February 16th, Fox's suit brought.

1855, June 27th, mortgage made to trustees, and trustees take possession.

1860, November 23d, Fox obtains judgment.

1862, April 4th, act of the legislature.

1867, January 29th, scire facias to revive, against the Hemphill Railroad Company only.

1867, March 14th, judgment on this scire facias.

1871, February 23d, scire facias to revive judgment, *et qu. ex. non* against the Hemphill Railroad Company and the trustees also; the present suit.

1871, March 30th, sale of the railroad.

1871, August 12th, the Pittsburg, Wheeling and Baltimore Railroad Company brought in on motion as codefendants.

Argument for the bondholders of the railroad company, &c.

Mr. J. W. Kirker, for Fox, the contractor, the plaintiff in error:

The record and documentary evidence offered by the plaintiff, and rejected by the court, was the only competent evidence to prove the facts which were the obvious purpose of the offer. They were relevant and competent evidence, and were put in issue by the defendant's pleas. They tended to prove facts which were material and necessary for plaintiff to establish to entitle him to a verdict.

Divesting the matter of the technicalities of pleading, and evidence under pleadings, it is obvious that the questions were—

1. What was the effect of the joint resolution of 1843? We assert that it gave to Fox, the contractor, a lien, indefinite in point of time, on the railroad's estate, and prior to that of the mortgage to Seal. The purpose of the resolution is plain; its language explicit and incapable of any meaning but one. So far as the Hemphill Railroad Company was concerned, this lien was independent of any sci. fas. or other proceedings. It was a lien created by the sovereign will of the legislature; a body which could make liens of perpetual duration though no line of record should indicate their existence. And this sort of lien it meant to make, and made.

2. It was only after the company originally owning the road had divested itself of its estate, in contravention of the joint resolution, and when the lien creditor, after such divestiture, desired to have fruition of his lien, that he was bound to bring in anybody as a new party. In the present case, after the road passed to the Pittsburg, Wheeling, and Baltimore Railroad Company, then that company had to be brought in under the act of April 4th, 1862, and it was brought in.

Mr. Hill Burgwin, for the trustees of the bondholders and both railroad companies, contra:

1. *The joint resolution of* 1843 *does not protect the plaintiff's claim as against the mortgage now in controversy.*

At the time when the joint resolution of 1843 was passed, a railroad company had no power to execute such a mort-

gage as this, covering its franchises and all the property essential to their exercise. Therefore this mortgage was not within the provision of the resolution. But if it were, the supplement of 1851 to the charter of the Hemphill Railroad Company expressly authorized this mortgage, and so operated as a repeal *pro tanto* of the resolution of 1843.

The supplementary act of 1851 provides that the said company shall have power to borrow money on the credit of the corporation, and may execute bonds or promissory notes therefor, and to secure payments thereof may pledge the property and income of said company. The railroad itself was certainly a part of the property of the company, and so was their franchise of using and enjoying it. The income of the company was derived from such franchise, and an authority to mortgage the income was an authority to mortgage the subject from which it is derived. A grant of the profit of land passes the land itself, for what is the land but the profits thereof?* The manifest object of the act was to enable the company, by a pledge of their road and its income, to secure the principal and interest of the bonds, which they were by the same section authorized to issue. To hold otherwise would render the power conferred entirely nugatory. The words are few, but pregnant, and were evidently meant to confer the fullest power to pledge the entire property and income of the corporation to accomplish the purpose in view.

The contract of Fox was made in 1853, two years after the execution of this mortgage had been authorized by special law.

The joint resolution of 1843 could never, we submit, have been intended to avoid transfers made in good faith, and for a valuable consideration. If we assume that it was intended to avoid them, its effect would be that no one could make any purchase from a railroad company of real or personal property, without taking it subject to a secret lien which by no reasonable diligence could be ascertained or defined.

* Coke Littleton, 46.

Nor only so, but such lien is unlimited as to time. Such far-reaching and inequitable results will not be allowed to obtain if any other reasonable one presents itself. It would be against both the letter and the whole spirit of adjudged law that they should obtain.

In *Cincinnati City* v. *Morgan*,* it is said by this court:

"To acquire as against all mortgages and incumbrances, a lien by statute upon the *corpus* of a railroad, in virtue of credit advanced, it is necessary that the statute express in terms not doubtful the intention to give a lien."

In *Commonwealth's Appeal*† it is said by the Supreme Court of Pennsylvania, from a district in which State this case comes:

"Our legislature discountenances all liens and incumbrances from transactions that do not appear of record."

And again:

"The law abhors all secret liens."

And in *Kauffelt* v. *Bower*,‡ in the same State, a well-considered case, Gibson, J., says:

"We cannot intend that latent incumbrances were designed to be tolerated, when we find even those which appear of record considered in some measure as clogs on the freedom of alienation so congenial to our habits."

We rather suppose that the joint resolution of 1843 was really meant by the legislature of Pennsylvania to be no more than a re-enactment *pro tanto* of the statute of 13 Elizabeth and to invalidate a subsequent transfer only when there was an actual or constructive intent to hinder, delay, or defraud a creditor.

Perhaps it was to meet the just objection to parol liens, now asserted on the other side as legitimately coming from the resolution of 1843, that the legislature, by its act of April, 1872, provided in effect that in order to a contractor's

* 3 Wallace, 275.

† 4 Pennsylvania State, 165.

‡ 7 Sergeant & Rawle, 64–74.

availing himself of the benefit of that resolution, as against a terre-tenant, he must obtain a judgment against the company, and then revive by scire facias against the terre-tenant. And this brings us to our next ground of the defence.

2. *Any rights which the plaintiff may have had originally, have been lost by failure to pursue them in the proper mode and within the proper time.*

It is evident that it was intended by the act of 1862, to assimilate the proceedings to enforce a claim under the resolution of 1843, to those under the laws limiting the lien of judgments and providing for their revival against terre-tenants. The resolution of 1843, seeming to give a secret parol lien with no means to enforce it, the act of 1862 provided first, that the claim be made of record by judgment against the company, and thereby (and as we assert, then first) become a lien; and second, that such judgment having the properties of other judgments, expire as to its lien against terre-tenants, unless revived by scire facias against them within five years.

Testing the claim of the plaintiff by these principles, it is to be observed, that his original judgment against the Hemphill Railroad Company was entered November 23d, 1860, more than five years after suit brought; that the scire facias was not issued till 29th January, 1867; that no one was made party defendant but the Hemphill Railroad Company, although the trustees had been in actual possession of the road under the mortgage for ten years, and not until February 23d, 1871, more than eleven years after the original judgment obtained, fifteen years after the trustees had taken actual possession of the road for the mortgage bondholders, was any notice given to them, or attempt made to revive the judgment or enforce this claim as against them.

Now, it is settled in Pennsylvania,* that "a scire facias, to revive a judgment against a terre-tenant cannot be maintained on a judgment on a scire facias against the original

* Zerns *v.* Watson, 11 Pennsylvania State, 260.

lien debtor alone, obtained after the title of the terre-tenant had accrued." This proposition in itself presents a complete bar to the plaintiff's present action.

If, then, the plaintiff had intended to avail himself of the act of 1862, against *bonâ fide* terre-tenants in actual possession, with their mortgage for $1,000,000 on record in every county through which the road extended, it was his duty within the period limited by law to revive as against them the judgment he had obtained. Having failed to do so, they and every person proposing to purchase one of these bonds had a right to presume that his claim as against the property described in the mortgage had been abandoned. For instance, the bonds—twenty-year bonds, issued in 1865—being, of course, in the market, say in 1870, the purchaser ascertains that the trustees have been in possession of the road fourteen years, working and maintaining it for the bondholders, that no proceedings have been had under the act of 1862, to charge the property of the company in their hands, with the claims of contractors, and yet if the plaintiff's claim can be enforced, he is to find that the bonds which he purchases in good faith, on the foregoing facts of the case, are to be postponed to a claim which originated about eighteen years before. Such liens are infinitely removed from every sort of lien which the law of Pennsylvania, and indeed of any State in this Union, tolerates.

The real parties in interest here are the bondholders under the mortgage. Bonds such as these form a large part of the commercial securities in the stock exchange. They pass from hand to hand by delivery, upon the faith of the mortgage which secures them. They have been protected and guarded in the hands of *bonâ fide* holders for value by many decisions of this court, and those of the different States. It is of the greatest importance that their circulation be not checked by the fear of secret liens not to be discovered by any reasonable diligence.

In conclusion:

The petition of Fox to intervene in the proceedings in the Supreme Court of Pennsylvania, and have the order of sale

modified so as to protect his alleged claim was dismissed. The court, however, *suo motu*, modified the order. But this order thus made provided nothing more nor less than the law of itself would have provided, viz., that if there were any paramount liens which such a sale would not divest, then the purchaser would hold subject to such. If it meant more than this, then the court had no right to make it. The claim of plaintiff either was or was not a prior and paramount lien to that of the bondholders. If it was, and not liable to be divested by sale under the mortgage, then the order of court was unnecessary, except as a notice or precaution to bidders. If it was not, then the court could not make it so by this order to the prejudice of the bondholders. Their rights as against the plaintiff's claim were fixed and defined in law, and if the latter was either invalid or lapsed, the court could not validate or revive it as against them. And also, if the legal effect of the proposed judicial sale under decree of foreclosure would be to divest the plaintiff's supposed lien, the court could not, by such order, interfere with and prevent such legal effect. The duty of Fox was to look to the proceeds of the sale, and he had no right to look to anything else.

Reply:

The resolution of 1843 has not been repealed by the charter of incorporation of the Hemphill Railroad Company and the supplemental act of 1851. Because the intention to repeal—

1st. Is not expressed.

2d. Cannot be inferred by necessary implication.

An ancient statute will be impliedly repealed by a more modern one, *only* when the latter is couched in negative terms, or when the matter is so clearly repugnant that it necessarily implies a negative.

The exercise of the power to mortgage, conferred upon the Hemphill Railroad Company, is limited and regulated by the general laws of the State of Pennsylvania relating to mortgages made by railroad companies and other corpora-

tions. Both of these acts are *affirmative*, and the substance is such that *both* may stand together. The charter and supplement of 1851 confer on the company the mere power to mortgage. The resolution of January 21st, 1843, regulates and limits the exercise of that power.

The whole argument about *secret liens* and *ab inconvenienti* generally, comes to nothing in the face of a *plain* expression of legislative will, such as we have described the joint resolution of 1843 as being, and as it truly is.

Mr. Justice STRONG delivered the opinion of the court.

We think there was error in the rejection of the evidence offered by the plaintiff. Some of it may have been immaterial to the issues pending, but the court directed that all the record and documentary evidence be embraced in one offer, and then rejected it all. In effect the objections urged by the defendants were treated as a demurrer, and the offer was overruled because the evidence was regarded as insufficient in law to sustain the action.

If the rights of the plaintiff have not been lost by failure to prosecute them in the proper mode, and in due time, the joint resolution of 1843, in our opinion, protects him against the mortgage, and all persons claiming thereunder.*

That the plaintiff's testator was a contractor with the Hemphill Railroad Company, and that the debt due to him was incurred by the company for the construction of their railroad, it was the direct tendency of the evidence offered to prove, and these facts are uncontroverted now. That debt, therefore, was within the protection, whatever that may be, of the resolution. What, then, was the nature and extent of that protection? It is unnecessary to assert that the company was rendered incapable of making a mortgage, or any transfer of its property, so long as the debt due to its contractor remained unpaid. But the language of the resolution is too clear to admit of question that the legislature intended to give to an unpaid contractor a priority of claim

* See the joint resolution set out, *supra*, p. 426.—REP.

to the company's property, over every right that could be acquired by a mortgagee, or acquired under a mortgage, if the mortgage was made after the debt to the contractor was incurred. It was at least intended that the property, into whosesoever hands it might come, should remain subject to a paramount claim of the contractor so long as the debt due to him remained unpaid. That this was substantially giving to him a lien of indefinite duration seems quite plain. It was not a "*jus in re*," nor a "*jus ad rem*," but it was a charge upon the property, a right to prevent any disposition of it, by which it could be withdrawn from the creditor's reach, and therefore in a very legitimate sense an equitable lien. The resolution in effect declared that while his claim against the company exists, a subsequent mortgage or transfer cannot be set up to defeat the contractor's resort to the property and his superior right to have it applied to the payment of the debt due him. It is true the mode of that resort is not prescribed. It can only be by suit, judgment, and execution, but whenever judgment and execution are obtained, the lien is made to precede the lien of any mortgage or the effect of any conveyance; more accurately, it has the effect it would have were there no mortgage or conveyance in existence. The property may be levied upon and sold, and the proceeds of the sale may be applied to the satisfaction of the debt due the contractor, without possible interference by the mortgagee, though the mortgage preceded the judgment in time. We cannot regard the resolution as no more than a partial re-enactment of the statute of 13th Elizabeth invalidating mortgages and transfers only when there is an actual or constructive intent to hinder, delay, or defraud creditors. If that was all the resolution intended it was unnecessary and unmeaning. But it declares null and void every mortgage *the effect* of which is to defeat, *postpone*, endanger, or delay contractors, laborers, and workmen. The mortgage may be good as against other creditors, but it is a nullity as to them.

It has been argued that it is against the policy of Pennsylvania to allow secret liens, or liens not of record, or liens

on land created by parol, and undoubtedly there are evils attendant upon the allowance of such incumbrances. But that is a matter for legislative consideration. The supposed policy of the State cannot, in a judicial tribunal, prevail over a plain statute. And notwithstanding the disinclination judges have manifested to sustain liens not of record, there are many such liens known to the statute laws of that State and upheld by the courts. A mechanic, or materialman, is given a lien, and he is not required to put his claim on record until within six months after his work has been done, or his materials have been furnished. Yet his lien has priority over every lien (other than a mechanic's) which attached to the building or curtilage subsequent to the commencement of such building. So liens are given by statutes to laborers, miners, and clerks, and they are valid against subsequent mortgages, though the liens do not appear upon any record.* It is not, then, against the policy of the State to create a statutory lien in favor of laborers or workmen.

And if we have correctly interpreted the legislative resolution of 1843, if the debt due from the Hemphill Railroad Company to the plaintiff's testator was a lien upon the property of the company from the time it was created, so far, at least, as to have priority over any subsequent mortgage or conveyance, it is plain the lien would have continued a prior incumbrance, so long as the debt it was given to secure remained, had there been no such subsequent mortgage. But the express declaration of the resolution is that the mortgage shall have no effect as against such a debt or claim. And this must mean that neither the mortgage itself nor any sale made under it shall have the effect of defeating, postponing, endangering, or delaying the contractor; for if a sale made under the mortgage discharges the contractor's lien and removes the property from his reach, effect is given to the mortgage itself, and precisely the effect which the statute denied to it.

We are thus brought to the question whether the lien or

* Act of March 30th, 1859, Pamphlet Laws, 318.

claim which the plaintiff's testator had upon the property, real and personal, of the Hemphill Railroad Company, as a security for the debt due him, and which was paramount to the mortgage made to the company, has been lost or extinguished. And we think it has not. The debt remains due and unpaid. In 1855, Fox, the contractor, commenced a suit for its recovery, and he obtained a judgment in 1860. That judgment did not extinguish the right which he had from the time the debt was incurred to have the property of his debtors first applied to the satisfaction of the debt. It did not cause to be merged in itself the original lien, any more than a judgment obtained upon a bond secured by a mortgage absorbs the lien of the mortgage. In whatever shape the debt was it had the benefit of the statutory privilege. It matters not then that more than five years elapsed after the judgment was recovered before it was revived, for if it be conceded that the lien of the judgment expired, that of the debt remained.

And if the lien of the judgment recovered in 1860 ceased at the end of five years from the time of its rendition, still it is undeniable that the revived judgment of 1867 gave a new lien which followed the property into whosesoever hands it came, until the present scire facias was sued out in February, 1871. The only possible answer to this is that before the revived judgment of 1867 was obtained, the property of the Hemphill Railroad Company had passed from its ownership, had become vested in its mortgagees, and that the trustees of the mortgage were not notified of the scire facias, or made parties to it. To this there are two replications, each of which, in our opinion, is quite sufficient. The first is that the company was, by the resolution of 1843, deprived of the power to make a mortgage or any conveyance by which its property could be withdrawn from the reach of the plaintiff, and the mortgagees or trustees could acquire no rights which the mortgagors were unable to confer. The second replication is that the mortgage to Seal and others was not a grant of the ownership of the property described in it. It was but the creation of a lien for the security of

the bonds issued under it. True, the trustees of the bondholders, pursuant to its provisions, took possession of the mortgaged property in 1857, and carried on the business of the company until 1871, but even as against them the company remained the owners of the road, subject only to a lien to secure the payment of the mortgage debt. The trustees were not terre-tenants. They were mere occupants. Terre-tenants, against whom, by the laws of Pennsylvania, it is necessary that a scire facias to revive a judgment be sued out, in order to preserve its lien, are those who have seizin of the land, those who are owners, or claim to be owners by title derived from the defendant in the judgment. There can be no terre-tenant, such as intended by the act of 1798,* who is not a purchaser, mediately or immediately, from the debtor while the land was bound by the judgment.† Such has always been held to be the law in Pennsylvania, and such are terre-tenants in England.‡ A mortgagee has never been regarded as a terre-tenant entitled to notice of the revival of a judgment. There has therefore been no failure or neglect in this case to make the necessary parties to all the judicial proceedings commenced by the plaintiff or his testator. The law did not require notice of the scire facias sued out to revive the judgment of 1860, to be given to the trustees of the mortgage, and if the lien of that judgment had expired, the revived judgment fastened a new lien upon the property. That lien was a security for the debt which, by the resolution of 1843, was made paramount to the mortgage, and against which, while it remains unpaid, the mortgage cannot be set up.

This, however, relates to the ordinary judgment lien, but it is not essential to the plaintiff's case, as exhibited by the evidence he offered, that the judgment which he now seeks to enforce is a lien upon the property claimed and held by the trustees of the mortgage and by the Wheeling, Pitts-

* 3 Smith's Laws, 331.

† Dengler *v* Kiehner, 13 Pennsylvania State, 41; Chahoon *v.* Hollenback, 16 Sergeant & Rawle, 432; In re Dohner's Assignees, 1 Pennsylvania State, 104.

‡ 2 Saunders, 9, Note 8.

burg, and Baltimore Railroad Company. It would be were it not for the legislative resolution of 1843, and for the enactment of April 4th, 1862. But the first of these, as we have seen, made the debt due to the contractor, itself a lien without a judgment, and prescribed no limits to its duration. The second (the act of April 4th, 1862), manifestly recognized the existence of such a lien, and pointed out a mode for making it available to the creditor. This will be seen by reference to the act itself.*

This act makes special provision for such cases as the present. Under it all that is necessary to enable a contractor, laborer, or workman to proceed by scire facias against a person or company claiming to hold or own the real or personal estate of the debtor to such contractor, laborer, or workman, by virtue of a mortgage made in contravention of the resolution of 1843, is that he has obtained a judgment against the indebted company which gave the mortgage. It is not required that his judgment shall be a lien on the property. And plainly it was not intended that such a lien must exist. The resolution of 1843 prohibited transfers, assignments, and mortgages of personalty as well as of realty, and a judgment creates no lien upon personalty. But the resolution recognizes the right of a contractor to follow both into the hands of a claimant or owner holding under such an assignment, transfer, or mortgage, without regard to the question whether the property is real or personal. It, therefore, recognizes the existence of a lien in favor of those protected by it, independent of the lien of any judgment they may recover. This must be so, for if it is essential to a right to proceed by scire facias against the property in the hands of a grantee of the indebted company that the judgment of the creditor shall be a lien upon that property, what is to be said of the case where the indebted company has conveyed before the recovery of any judgment? In such a case the judgment can be no lien. Yet it will not be claimed the property could not be followed by scire facias against

* See it set out, *supra*, p. 428.—REP.

the grantee. And if it could, it must be, not because of the lien of the judgment, but because of the lien of the debt, a lien which, as there is no statutory limitation to it, remains so long as the debt remains unsatisfied.

Such being, in our opinion, the true meaning of the joint resolution of 1843, and of the act of the legislature of 1862, the evidence offered by the plaintiff and rejected by the court should have been received. It tended to prove, *inter alia*, that the plaintiff's claim was within the protection of the joint resolution; that the mortgage under which the defendants hold was invalid as against him; that his case was embraced in the remedial act of 1862, and that the defendants had bought under a decree of foreclosure of the mortgage, which expressly directed that the property should, notwithstanding the sale, remain subject to the claim of the plaintiff.

It has been contended, however, in support of the ruling of the court below, that the sale which was made of the property in March, 1871, under a decree of the Supreme Court of Pennsylvania in the suit to foreclose the mortgage, divested the plaintiff's lien, and that thereafter his only remedy was a resort to the proceeds of that sale. This might be so if the only lien he had was that of his judgment. But, as we have endeavored to show, he had a lien independent of his judgment and prior to the mortgage. The decree of the Supreme Court ordered the property to be sold subject to that. The plaintiff petitioned to be allowed to intervene "*pro interesse suo*" in the suit for foreclosure, or, if that was not allowed, that he might be paid out of the proceeds of sale, but his petition was refused, and the court ordered that the purchaser at the sale should hold the whole of the estate and property, real, personal, and mixed, of the Hemphill Railroad Company, "subject to any lawful claims or rights which may exist prior or paramount to said mortgage." The plaintiff's lien, therefore, was undisturbed by the sale, and, hence, he had no right to look to the proceeds of the sale for payment.

This disposes of the case.

Statement of the case.

It is hardly necessary to add that the act of the legislature of April 12th, 1851, empowering the Hemphill Railroad Company to borrow money and pledge its property and income to secure the payment thereof, cannot be regarded as exempting that company from the operation of the resolution of 1843.

JUDGMENT REVERSED, and a

VENIRE DE NOVO AWARDED.

RAILWAY COMPANY *v.* MCSHANE ET AL.

1. The *Railway Company* v. *Prescott* (16 Wallace, 603) modified and overruled so far as it asserts the contingent right of pre-emption in lands granted to the Pacific Railroad Company, to constitute an exemption of those lands from State taxation.
2. But affirmed so far as it holds that lands, on which the costs of survey have not been paid, and for which the United States have not issued a patent to the company, are exempt from State taxation.
3. Where, however, the government has issued the patent, the lands are taxable, whether payment of those costs have been made to the United States or not.

APPEALS from the Circuit Court of the United States for the District of Nebraska; in which court the Union Pacific Railroad Company filed a bill to enjoin one McShane and other persons, severally treasurers of different counties in the said State, through which the road ran, and in which it had lands, from the collection of taxes assessed upon them. There were also cross-bills.

The case was thus:

An act of July 1st, 1862, creating the Union Pacific Railroad, enacted*—

"SECTION 3. That there is hereby granted to the said company for the purpose of aiding in the construction of said railroad . . . and to secure the safe and speedy transportation of

* 12 Stat. at Large, 489.

the mails, troops, munitions of war, and public stores thereon, every alternate section of public land . . . designated by odd numbers, to the amount of *five* alternate sections per mile on each side of said railroad, on the line thereof and within the limit of *ten* miles on said road, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed. . . .

"*And all such lands so granted . . . which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and pre-emption, like other lands, at a price not exceeding* $1.25 *per acre, to be paid to said company.*"

The statute went on to enact that whenever tne company should have completed forty consecutive miles of any portion of its road, ready for the service contemplated by the act, and supplied with all the appurtenances of a first-class road, the President of the United States should appoint three commissioners to examine it and report to him in relation thereto; and if it should appear that forty consecutive miles had been properly completed, then, patents were to issue "conveying *the right and title*" to the lands to the company on each side of the road as far as the same should be completed to the amount aforesaid; and patents in like manner were to issue as each forty miles of road were completed.

An act of July 2d, 1864, amendatory of this act, after authorizing the company, on the completion of each section of its road, to issue first mortgage bonds on the same to an amount designated, and extending the grant for *twenty* miles on each side of said road, enacted:*

"SECTION 21. That *before* any land granted by this act shall be *conveyed* to the said company or party entitled thereto . . . there shall *first be paid* into the Treasury of the United States, the *cost of surveying, selecting, and conveying the same*, by the said company or party in interest, *as the titles shall be required by said company.*"

* 13 Id. 356.

Statement of the case.

In the case of *Railway Company* v. *Prescott*,* this act was interpreted by this court, upon some clauses not necessary to be here quoted, as making the costs of surveying attach to *all* the lands granted to the road, whether by the original act of 1862, or by the amendatory act, just quoted, of 1864.

The work of constructing the road was begun in 1865. In 1867 the company, "for the purpose of raising money to aid in the construction," mortgaged its lands to secure the payment of $10,000,000. The terms of the mortgage required the trustees, upon payment of the bonds, to reconvey the residue of the unsold lands to the company. It reserved to the company the exclusive control and management of the lands, with power to sell the same; the purchase-money, however, to be paid to the trustees before a conveyance was made. The holder of bonds under the mortgage might purchase lands and pay for them in bonds. Both company and trustees were to join in any conveyance in order to make a title.

By the 1st of April, 1869, a road capable of being safely and speedily travelled on, though susceptible still of many obviously desirable improvements, was practically completed.

On the 10th of that same month, some allegations having been made, that certain subsidies granted by the United States to the company in government bonds, to aid in building the road, had not been applied in the exact way designed by Congress, in the acts granting them, and so as to make the road one absolutely of the "first class," a joint resolution was passed, by which it was resolved that to ascertain the condition of the road, the President should appoint a commission of five eminent citizens to examine into the matter and report upon the condition of the road, and to report also what sum, if any, would be required to complete it as a first-class road, such as was contemplated by the acts of Congress. A commission of five eminent citizens was accordingly appointed.

* 16 Wallace, 603.

However, the commissioners whom the act of 1862 had directed to decide whether the road was properly built and in pursuance of the acts authorizing it, having certified that it was so built, the President accepted it May 10th, 1869.

The commission of eminent citizens afterwards reported that while the road was in its then state a good and reliable means of communication, well equipped and prepared to carry passengers and freight with safety and dispatch, yet to make it a first-class road within their construction of the act of Congress, would in their judgment require an expenditure of $1,500,000 more than had as yet been laid out on it.

The joint resolution, just above mentioned, by its third section had

"*Resolved*, That the President is hereby authorized to withhold from said company an amount of subsidy bonds, sufficient to secure the *full* completion *as a first-class road*, of all sections of such road, 'or in lieu of such bonds he may receive as such security an equal amount of the first mortgage bonds of such company.'"

The section enacted further, that in case it appeared to the President that the amount of subsidy bonds yet to be issued was insufficient to secure the full completion of the road, requisition should be made on the company for enough subsidy bonds, or enough of its own first mortgage bonds, to secure full completion, and in default of obtaining such security, that measures should be taken "to compel the giving of it, and thereby, or in any manner otherwise, to protect the interest of the United States in said road, and to insure the completion thereof as a first-class road, as required by law and the statutes in that case made."

As to the status of the lands now assessed, it appeared that at the date of the levy and assessment of the tax in question, the company had dealt with the lands, and was now dealing with them as if they were in all respects their absolute property. They had mortgaged them, as we have already stated; were now advertising and selling them.

They did not recognize the right of the public to settle upon or pre-empt, and to buy them at $1.25 per acre. On the other hand, neither Congress nor the Interior Department had taken any steps to subject the lands to settlement and pre-emption.

Upon the report of the committee of "eminent citizens," under the joint resolution, already mentioned, of April 10th, 1869, that $1,500,000 would be required for supplying deficiencies in the road, the Secretary of the Interior, November 3d, 1869, to indemnify the government, ordered that only one-half the lands to which the company would otherwise be entitled should be patented, and that patents for the rest be suspended until further direction from the Department. Accordingly, in February, 1871, a patent issued to the company under this order for about 640,000 acres of land, half the quantity of the land; the Department refusing to issue a patent for the other half. And so the matter now stood; that is to say, patents for one-half of the company's land were still withheld as security for the completion of its road in matters reported as not up to the required standard.

It also appeared that of the lands situated within the ten-mile limit, every alternate odd section which the company claimed had been patented previous to the assessment and levy of the tax, that the residue of the grants within like limits was unpatented, and that the costs of surveying had not been paid on any lands situated within the ten-mile limit, whether patented or unpatented, because (as was stated by the land agent of the company) not required by the Interior Department.

In respect to the lands situated between the ten and twenty-mile limits, it appeared that they had all been selected, listed, certified, and that the land-office fees and costs of surveying had been paid, and every alternate odd section of those claimed by the company patented, the residue being unpatented.

In this state of things, the company, in July, 1873, filed the present bill. It alleged that in 1872 the assessors of the several counties where the lands were situated (which lands

were described in lists filed as exhibits with the bill), assessed them, and that the boards of commissioners of the same counties levied taxes for State, school, and local municipal purposes upon them, and that the defendants, the treasurers of these counties, were about to proceed to the collection of those taxes by seizing and selling the locomotives, cars, and rolling stock generally of the company, with other personal property. The bill alleged further, that the lands were not liable to any State taxation at the time of the assessment or levy, and it prayed that these treasurers might be enjoined from further proceedings for the collection of them.

The grounds on which this exemption was claimed may be divided into three distinct propositions, some of which were applicable to all the lands and others to only part of them.

1. That by the third section of the act of 1862, under which the company was organized, and by which the lands within the ten-mile limit were granted in aid of the construction of the road, it was provided that all such lands as should not be sold within three years after the entire road shall have been completed, shall be subject to settlement and pre-emption like other lands, at a price not to exceed $1.25 per acre, to be paid to the company. And it was alleged that these lands were liable to this pre-emption, which would be defeated by a sale of them for the taxes.

2. That by the amendatory act of 1864, which extended the grant to twenty miles on each side of the road, it was provided that before any of the land granted should be conveyed to the company, there should first be paid into the Treasury of the United States the cost of surveying, selecting, and conveying the same by the said company, and that these costs not having been paid, a sale for taxes would defeat the right of the United States to enforce this claim and recover their expenses out of the lands.

3. That under the joint resolution of April 10th, 1869, authorizing the President to appoint a commission to inquire into the manner in which the road had been constructed, and, if the report was unfavorable, to take steps to secure

its proper construction, the secretary had refused to issue patents for these lands, withholding the title as security for the performance of what was required in that respect.

The first two of the above grounds on which an injunction against the taxing was sought, were based upon what the complainants conceived was adjudged in *Railway Company* v. *Prescott*,* it having been there adjudged as they argued:

1st. That, whether patented or not patented, the lands were not subject to taxation of the contingent right in the United States of offering them to actual settlers at $1.25 per acre, in case the company did not sell the same within three years from the completion of the road; this objection being based upon the closing part (italicized) of section three of the act of 1862, *supra*, p. 445.

2d. That the right of the State did not, according to the language of the syllabus in that case, attach "until the right to the patent was complete and the requisite title was fully vested in the party without anything more to be paid, or any act to be done going to the foundation of the right," and accordingly that prepayment by the company of the cost of surveying, selecting, and conveying the lands granted, being required by statute making the grant, before any of the lands "shall be conveyed," no title vested, even to the patented tracts, unless the required prepayment had been made.

It was contended on the other side, and in behalf of the right to tax, that *Railway Company* v. *Prescott* was unlike this case, since here—

1. The company had mortgaged the lands in anticipation of a completion of the road; and applied the money received to building the road; that this was a "disposition" of the lands within the act of 1862, though it might not be a "sale" within the meaning of the same act.

2. The company had received patents for half of the land.

3. The company had paid surveying fees on all unpatented

* 16 Wallace, 603.

lands in the grant of 1864, and were ready to pay them on the grant of 1862, and had not paid them on it only because they were not asked for.

The court below, while it confessed to some difficulty in distinguishing the case of *Railway Company* v. *Prescott*, on either of the two points just stated, from the one now before the court, was still of opinion that the authority of that case might, as to the first point above mentioned, be escaped from, so far at least as regarded the lands which the company held by patent. After observing that it would not say whether a mortgage of the land was such a "disposition" as would prevent the right of settlement or pre-emption, it remarked that in *Railway Company* v. *Prescott* the taxes were assessed before any patent was issued, and, in addition, that the cost of surveying had not been paid. The learned judge, in this connection said:

"I am inclined to consider the true meaning and effect of the provision in question to be this: While the road is being constructed and for a period of three years after the completion of the entire line, the company may sell or dispose of the lands at their own price, and they are subject during this period to no right of settlement or pre-emption; after the three years have elapsed, the company may still sell or dispose of their lands in good faith, but as to any lands not thus sold or disposed of, there is a right on the part of the public to settle upon and pre-empt them in the same manner as if they were part of the public domain; the price, not exceeding $1.25 per acre, being payable to the company instead of the government.

"If this be a correct view of section three of the act of 1862, it results that the lands of the company, so far as they are patented, are subject to taxation by the authority of the State, and this privilege reserved in favor of the actual settler, and of which he may never wish to avail himself, which is contingent in its nature and subject to be defeated by a sale of the lands by the company, is not inconsistent with, and will not defeat, the rightful authority of the State to tax the lands."

On the second ground of exemption set up, he said:

"This ground of exemption, in view of the decision in the

Prescott case, may be disposed of briefly. Upon the proofs in this case, I am of opinion that lands which have not been patented, either because the costs of surveying required by section twenty-one of the act of 1864 have not been paid, or because patents have been withheld by the Interior Department as indemnity to make good the deficiencies in the construction of the road, are not taxable, and to this extent the injunction will be continued in force. But as to all lands which have actullay been patented to the company, the injunction will be dissolved. It is true that, as respects the patented lands within the ten-mile limits, the land agent of the company states that the surveying fees have not been paid, but he also states that the reason why they were not paid was that the Interior Department did not require it.

"It does not appear that there are any lands not patented which have been fully earned and set apart to the company upon which all fees have been paid, and for which the patents are not retained by the government for its own security, and therefore, for all practical purposes, I hold that the lands in this case may, upon the proofs before the court, be divided into two classes: 1st, those which are patented and which are taxable; 2d, those which have not been patented and which are not shown to be taxable."

The court below accordingly decreed a dismissal of the bill as to all lands embraced in the company's patent of February 23d, 1871, and an injunction as to the lands which had not been patented to the company.

From that decree both parties appealed; the company, because any of its lands were allowed to be taxed; the county treasurer, McShane, because they were not all taxed.

Mr. A. J. Poppleton, for the railroad company:

The lands which have been taxed in this case are situated in the same way as were those in *Railway Company* v. *Prescott*. Both bodies of lands were granted under the same acts of Congress, to be used in the same way, to be held by the same tenure, and upon similar conditions. The rule laid down in the case just mentioned must, therefore, govern this case.

Argument against the right to tax.

That *all* lands in this case which are unpatented, and upon which *the costs of surveying have not been paid*, or patents to which are withheld by the government as security for a completion of the road, according to the standard fixed by its charter, are within the rule laid down in the case just quoted, and, therefore, are not subject to State taxation, seems to us too plain for argument. They are clearly within the *first* ground assigned in that case for non-taxability.

In respect to all the patented lands in this case, the exemption rests solely, we admit, upon the second ground laid down in the same case, to wit, upon "*the contingent right* (in the government) *of offering the land to actual settlers at the minimum price asked by the government for its lands.*" But we insist that this ground, in the present case, is sufficient and conclusive. It also operates upon both classes of lands.

Does this ground of exemption operate upon the patented lands? The court below, though laboring hard to come to such a conclusion, held that in respect to patented lands, the case of *Railway Company* v. *Prescott* did not, of necessity, control this.

The real question is, therefore, what is the principle of exemption thus laid down by this court in the case of *Railway Company* v. *Prescott*, and from which the court below sought to extricate the present case? Does it apply less to patented than unpatented lands? As to one part, failure of the *company* to perform all conditions precedent to a perfect right to a patent, exempts from taxation; in the other, an interest or a right of the *United States* in the lands, operates as an exemption. The first is referable to the conduct and interests of the company; the second to the rights of the government.

Is this right of the United States any less worthy of preservation after patent issued than before? Is it cut off by the issue of a patent? If worthy of preservation at any stage, what limit can be assigned except the limit of its existence in the United States. Unless the interest of the United States was erroneously protected in the *Railway Company* v. *Prescott* (a matter not to be supposed), these lands

must be held exempt, on the ground of the contingent right in the government of offering the lands at a minimum price. This contingent right of the United States cannot be cut off by the issue of a patent, for the following reasons:

1. No patent issued under the act could convey a greater or better title than is authorized by it. The patent being merely the evidence of the title granted by the acts of Congress, nothing inserted in it by the officers charged with the administration of the grant could enlarge it.

2. To hold that this "contingent right of offering the land to actual settlers at the minimum price asked by the government for its lands," is extinguished by the issue of the patent, is to nullify the right which this provision was framed to create and protect.

Nothing can defeat the operation of the second ground of exemption upon both classes of lands, except proof that the lands have been "sold or disposed of," by the company, as provided in section third, act July 1st, 1862. It does not relieve the question to show that the road was completed in 1869. For, in that case, the right of the United States to require the sale of the lands at $1.25 per acre, has ceased to be contingent, and become absolute.

Messrs. Clinton Briggs and J. C. Cowin, for the treasurer, McShane:

I. The company insists that the three years pre-emption clause, contained in the third section of the act of 1862, defeats the right to tax, and relies on *Railway Company* v. *Prescott*. But, assuming—and this is but for the sake of argument—that the court below did not put the right construction on that rather unintelligible section, still the case relied on by the other side does not control this one.

By the terms of the act of 1862, the right to settlement and pre-emption is to exist only in case that the lands are not "sold or disposed of" within three years after the entire road shall have been completed. The lands need not be "*sold*" within the three years. It is enough that they be

"disposed of." When they were mortgaged they were "disposed of," even if they were not "sold." The road was completed, really, in May, 1869. These lands were mortgaged in 1867. They were, in fact, already disposed of when the road was completed. They were disposed of in 1867, two years before a title to them existed in the company. When, however, a title was obtained by the company in virtue of the completion of their road, that title inured to the mortgagees, on the well-known principle of "estoppel." The mortgagees, therefore, immediately on the completion of the road—and, of course, within the required three years—held a valid mortgage.

This mortgage was for an immense amount, $10,000,000. The bill does not allege that the lands had any value above the mortgage. This $10,000,000 accomplished the same purpose that a like sum would have done if paid by purchases of the fee, and the purposes of the grant were just as well accomplished in one mode of disposition of the lands as the other. Congress gave the lands—such is the language of the law—"for the purpose of aiding in the construction" of the road. The mortgagees have furnished the aid—$10,000,000. Their money has enabled the company to build the road and *earn* the lands. The mortgagees knew that the money paid was for the precise purposes for which the grant was made; they taking only the risk of the ability of the company to earn the lands with the aid of this money.

The mortgage provides that the bondholder may purchase lands and pay for them in bonds. He has the option to sustain the relation of a mortgagee or that of a purchaser. He has the right to refuse money and demand land in payment at the appraised value. Thus the instrument is more than a mortgage.

Then, in addition, the company in this case has received patents for half its lands, and has paid surveying fees, &c., on those unpatented. It has advertised its lands for sale and sold them; assuming thus and otherwise by its acts an absolute ownership. In these particulars, as in the one just mentioned, the case is distinguished from *Railway Company*

v. *Prescott*, so far as that case rests on the obligation to give pre-emption.

II. It is distinguishable also as respects the fees for surveying, &c.:

1. As respects the grant of 1864, the fees for surveying, &c., *have* been paid in all cases, and whether patent has issued or has not issued.

2. As respects the grant of 1862, these fees are not asked until after patent issues. The land department apparently does not construe as does this court the twenty-first section of the act of 1864, as applying to lands granted by the act of 1862. At all events it does not require prepayment of the fees for surveying as to lands granted by the act of 1862; lands within the ten-mile limit. The non-payment of these costs, therefore, is no impediment to the company's getting a patent. It is now the equitable owner of these unpatented lands, and so has a taxable interest in them. It is unimportant whether the patent was actually issued or not. The company had *earned* the lands.

The land department of the United States, indeed, refuses to give a patent for some of the lands, not because the surveying fees are not paid, as is required in regard to the lands granted by the act of 1864, undoubtedly (and as this court has decided as to those granted in 1862 also), but because the joint resolution of 1869 required that security should be got for the making of a certain sort of perfect road. But the joint resolution is not aimed at the lands. It requires that *subsidy* or *other bonds* shall be held as security for the expenditure, and, if they are not voluntarily given by the company, the Attorney-General is required to institute suits "to compel the giving *such* security." There is no intimation in the act that lands or patents are to be withheld as such security. The act of the land department in withholding patents is without authority. The commissioners had certified the road. The President had accepted it. Anything further between the company and the United States was matter for the courts.

The contingent rights in the United States, which in *Rail-*

way Company v. *Prescott* was held sufficient to exempt lands must—whether coming from the "pre-emption" cause, or from the right to retain for payment of costs of surveying, &c.—to the eye of a practical man, appear as applied to the present case but rights of a dim and shadowy sort.

How does the case stand?

1. As respects the United States.

It "granted" the lands to the company in 1862. It accepted the road as completed in 1869, thus declaring that the company had paid for—earned the lands. It issued patent for 640,000 acres in 1871; and received from the company the surveying, &c., on the lands not patented.

2. As respects the acts and declarations of the company.

It accepts the grants made by the United States. It declared, in 1869, that it had completed its entire road; thereby asserting it had earned and was entitled to the lands. It receives patents for a part of them, and pays the surveying fees, &c., on the residue. It mortgaged its grant for $10,000,000, and received the money and applied it to building the road. It exercised exclusive acts of ownership, by selecting, classifying, advertising them for sale and selling portions of its grant. It now asks the court to interfere by injunction to prevent, of course, a cloud being cast upon its titles.

Thus, both the United States and the company say that the lands belong to the company. Is not Nebraska then justified in so regarding them and in seeking to make them, as private property, bear a just proportion of the public burdens.

We submit that every consideration of equity and justice is in favor of the tax. How long, indeed, shall these immense bodies of land remain in the situation in which this company would place them? not under the control of the United States, so as to be open to settlement and cultivation, not owned by the company, so as to be subject to State taxation; but owned by it when it wants lenders on mortgage, or when it wants purchasers; owned by it for every *beneficial* purpose, but not owned for the purpose of bearing any share of the public burdens.

Even if the United States has some claim against the lands for surveying fees or anything else, it is difficult to see how it could be prejudiced by a sale of them for taxes. This court said in the case of *Carroll* v. *Safford*,*

"The sale for taxes is made on the presumption that the purchase from the government has been *bonâ fide*, and if not so made the purchaser at the tax sale acquires no title, and consequently no embarrassment can arise in the future disposition of the same land by the government."

A different view seems to have been taken in *Railway Company* v. *Prescott*. But this question is not involved here.

Reply:

The position of the other side is that the contingent preemption right in favor of settlers of the United States, protected by *Railway Company* v. *Prescott*, has been destroyed because the company has mortgaged the lands, and so "disposed of" them. But both the legal and the ordinary signification of these words import an absolute parting with all control over or reversionary interest in the lands. Neither a mortgage nor a *contract* of sale accomplishes such an alienation of interest and control. In both cases the company retain an interest in the thing mortgaged or contracted to be sold which may, upon the happening of certain events, revest a complete title in a part or of all the property. Suppose, after the execution of the mortgage, the company had got money, from subsidy bonds or from some other source, and had discharged the mortgage, not an acre of the land having been yet sold. Could it be contended that the simple making of the instrument of mortgage was such "disposition of" the land as would defeat the operation of the third section of the act of 1862?

If such an interpretation be accepted, then a mortgage, however inconsiderable, a contract to convey, with however irresponsible a party—and each with an absolute certainty

* 13 Howard, 462.

of reversion to the company of a title in fee—would operate to defeat the intent of Congress.

If, therefore, the purpose and object of Congress in framing the section under consideration, was that authoritatively declared by this court in the case of *Railway Company* v. *Prescott*, it is submitted with confidence that no form of conveyance, and no species of alienation of granted lands, which falls short of an unconditional parting with the control of and title to the same, either present or reversionary, legal or equitable, can operate to defeat the condition imposed by the section in question.

Therefore, certainly all the lands in controversy, patented or unpatented, not having been either "sold or disposed of" by the company, whether the three years from the date of the completion of the road have elapsed or not, are subject to the contingent right reserved by Congress in the section under consideration; and are, therefore, not subject to taxation.

And the same thing is true of all lands, whether patented or unpatented, upon which the costs of surveying, &c., have not yet been paid. The language of the statute of 1864 is absolute, and has been held by this court, in one part of the same case of *Railway Company* v. *Prescott*, to apply to the ten-mile grant of 1862 as well as to the twenty-mile grant of 1864. Otherwise, by a colorable conveyance, or by a contract of sale, the onerous terms of which would provide for and make sure a forfeiture, or by a mortgage for a sum so inconsiderable as to render redemption morally certain, the whole object of the provision would be easily defeated. Nor is the question modified by the circumstance that the mortgage is for a large sum; especially when it appears that the proceeds of the sales of the lands which are being made are pledged, and are being applied to the payment of the mortgage debt.

The mode adopted by the company for rendering the grant available for the purpose for which it was made must have been anticipated by Congress when passing the act. Sales of the lands before the road is built, and in quantities

such as to realize sums of much use in carrying forward the work, are known to be impossible. By means of a mortgage upon them, with a pledge to its redemption of the proceeds of the sales of the lands after their value has been greatly increased by the building of the road, the funds for the purpose can be raised, and they have never been raised by other means. With this knowledge, it is impossible to think that Congress, in the terms of the third section, intended to include a mortgage of the lands, and defeat the very important object of the clause, almost at the very moment of enacting it.

The construction contended for on the other side involves the matter in infinite confusion. This company is selling the lands and applying the proceeds to pay off the mortgage. If, by the sale of one-fourth thereof, the whole mortgage debt is paid, is there a disposition of the remaining three-quarters?

Mr. Justice MILLER delivered the opinion of the court.

We will take up, without restating them, the three several propositions which present the grounds on which the exemption from State taxation is claimed,* and in examining their legal bearing on the case will at the same time, where it is necessary, inquire how far they are supported by the facts of the case, and will then look into the other matters set up by way of defence.

The first and second of the propositions relied on by the railroad company are supposed to find sufficient support in the case of *Railway Company* v. *Prescott*.†

That was a suit by the Kansas Branch of the Union Pacific Railroad Company to have declared void a sale of some of its land for taxes, made under State authority, and this court granted the relief on the ground that the land was not liable to taxation at the time it was assessed for the taxes under which it had been sold. No patent had been issued to the company when the taxes were assessed, and

* Stated, *supra*, pp. 449, 450.—REP.

† 16 Wallace, 603.

the costs of surveying the land had not been paid to the government by any one. This court reaffirmed the doctrine that lands which had constituted a part of the public domain might be taxed by the States before the government had parted with the legal title by issuing a patent, but that this could only be done when the right to the patent was complete, and the equitable title fully vested in the party, without anything more to be paid, or any act to be done going to the foundation of his right. And it said that in that case the United States had a right to retain the patent until the costs of surveying the land had been paid, which had not been done, and that the right of pre-emption in lands unsold by the company within three years after completion of the road, would be defeated if a sale for State taxes could be made which would be valid.

This latter ground was not necessary to the judgment of the court, as it rested as well on the failure to pay the costs of surveying the land. And we are now of opinion, on a fuller argument and more mature consideration, that the proposition is not tenable.

The road was completed and accepted by the President in May, 1869, and these lands have been subject to such pre-emption since three years from that date, if this right can be exercised by the settler without further legislation by Congress, or action by the Interior Department. We do not now propose to decide whether any such legislation or other action is necessary, or whether any one, having the proper qualification, has the right to settle on these lands and, tendering to the company the dollar and a quarter per acre, enforce his demand for a title. It is not known that any such attempt has been made, or ever will be, or that Congress or the department has taken, or intends to take, any steps to invite or aid the exercise of this right. It would seem that if it exists, it would not be defeated by the issue of the patent to the company, and it may, therefore, remain the undefined and uncertain right, vested in no particular person or persons, which it now is, for an indefinite period of time. The company, meantime, obtains the title, sells

the lands when a good offer is made, and exercises all the other acts of full ownership over them, without the liability to pay taxes.

We are of opinion, therefore, that this right confers no exemption from taxation, whether the land be patented or not; and so far as the opinion in the case of *Railway Company* v. *Prescott* asserts a different doctrine, it is overruled.

But the proposition that the State cannot tax these lands while the cost of surveying them is unpaid, and the United States retains the legal title, stands upon a different ground.

The act of 1864, section twenty-one, declares that before any of the lands granted by this act shall be conveyed to the company, there shall first be paid into the treasury of the United States the cost of surveying, selecting, and conveying the same.

That the payment of these costs of surveying the land is a condition precedent to the right to receive the title from the government, can admit of no doubt. Until this is done, the equitable title of the company is incomplete. There remains a payment to be made to perfect it. There is something to be done without which the company is not entitled to a patent. The case, clearly, is not within the rule which authorizes State taxation of lands the title of which is in the United States.

The reason of this rule is also fully applicable to this case. The United States retains the legal title by withholding the patent, for the purpose of securing the payment of these expenses, and it cannot be permitted to the States to defeat or embarrass this right by a sale of the lands for taxes. If such a sale could be made, it must be valid if the land is subject to taxation, and the title would pass to the purchaser. If no such title could pass, then it is because the land is not liable to the tax; and the treasurers of the counties have no right to assess it for that purpose.

But when the United States parts with her title, she has parted with the only means which that section of the statute gives for securing the payment of these costs.

It is by retaining the title that the payment of costs of survey is to be enforced. And so far as the right of the State to tax the land is concerned, we are of opinion that when the original grant has been perfected by the issue of the patent, the right of the State to tax, like the right of the company to sell the lands, has become perfect.

It is admitted that part of the lands in dispute have been patented, and part of them have not. And the circuit judge in his opinion and decree divides them into the patented and the unpatented lands, and we concur in his opinion that there is no reason why the patented lands should not be taxed.

As to those which are not patented, it may be assumed from the evidence in the case that on none of them have the costs of survey been paid or tendered to the United States, and if they are all subject to that provision of the act of 1864 they are not liable, on the principle we have stated, to be taxed. It is said, however, by counsel for the State, that the Interior Department has never demanded the costs of surveying the lands within the original ten-mile limit, in cases in which they *have* issued patents, and do not claim them in those for which no patent has been issued; that as the non-payment of these costs, therefore, is no impediment to demanding and receiving the patents, the equitable title is complete, and they should be held subject to taxation.

We held, however, in the case of *Railway Company* v. *Prescott*, that these costs of survey attached to all the lands granted to the road, whether by the original act or by the amendatory act of 1864, and we have no sufficient evidence before us that the Department of the Interior has acted on a different principle. If, however, they have done so heretofore, it is not for us to say that they *will* grant patents *hereafter* without payment of these costs; and in a case where we are called on to decide whether such costs are lawfully demandable before the legal title of the company is perfect, we must abide by our own construction of the statute.

It is said, however, that these lands have been mortgaged

by the company under sanction of the act of Congress on that subject, and that the mortgage conveys the legal title out of the United States, so that her rights can no longer be interposed to protect them from taxation.

It is not necessary to go into the merely technical question whether the legal title passed from the United States by virtue of that mortgage and the act of Congress which authorized it, nor whether, if it ever becomes necessary to foreclose that mortgage, the rights of the United States in the land would be divested by the proceeding, because we are satisfied that the United States, until she conveys them by patent or otherwise, has an interest, whether it be legal or equitable, which the State of Nebraska is not at liberty to divest by the exercise of the right of taxation.

Under these views we are of opinion that the State had no right to tax the lands for which the cost of surveying had not been paid, and for which no patent had been issued; and as the decree of the Circuit Court was made in conformity with these principles, it is

AFFIRMED.

HUNNEWELL *v.* CASS COUNTY.

1. Under the act of July 2d, 1864 (13 Stat. at Large, 364), which gave to the Burlington and Missouri River Railroad Company every alternate section of the public lands, to the amount of ten alternate sections per mile on each side of the road on the line thereof, but enacted in its twenty-first section that "before any land granted by this act shall be conveyed to the said company there shall first be paid into the *Treasury of the United States* the *cost of surveying, selecting, and conveying* the same by the said company," it is not clear what the "cost of conveying" is, no statute known to the court authorizing a charge or fee for issuing a patent. Nor is it clear whether, under the terms the "cost of selecting and conveying," the fees of $1 for each final *location* of one hundred and sixty acres, given to *registers and receivers* by the act of Congress of July 1st, 1864 (13 Stat. at Large, 365), is meant or not.
2. Nor under the General Statute 907, of the State of Nebraska, is it plain what is the latest day at which by the laws of that State the right to assess lands for taxation can be exercised for any given year.

Statement of the case.

3. In this state of uncertainty as to the exact meaning of the statutes, Federal and State, and in the absence of any decision by the State court as to the meaning of the State statute, and of any long and well-settled practice under it, this court refused to enjoin county officers in Nebraska from levying a tax laid under State authority, on lands granted by Congress to a railroad company, in a case where the ground on which the prayer for injunction was based was that the registers' and receivers' fees, which the complainant assumed to be the "costs of selecting and conveying," mentioned in the act of Congress, had not been paid until a few days after the time when the complainant, on his construction of the act of the State above mentioned, assumed was the last day on which taxes could be laid, and when all those claims of the Federal government were satisfied before half the current year for which the taxes were levied had expired, and patents for the lands had issued, before the bill praying the injunction was filed.

APPEAL from the Circuit Court for the District of Nebraska.

Hunnewell, for himself and others, citizens, all, of States other than Nebraska, filed a bill in the court below against Cass and other counties of the State of Nebraska, their treasurers, and the Burlington and Missouri River Railroad Company, to obtain an injunction on the said treasurers, to prevent their collecting State and county taxes which had been levied on certain lands granted to the said company by an act of Congress. He alleged himself and the others to be stockholders in the company; that the lands on which the taxes had been assessed were not liable to taxation under State authority; that the company was about to pay these taxes notwithstanding that he had made a protest and remonstrance against their so doing. The bill prayed relief as above said by injunction.

The case, divested of parts of it disposed of in principle by the case of *Railroad Company* v. *McShane*, just reported, and therefore not necessary to be presented, was thus:*

* In this case, as in *Railroad Co.* v. *McShane*, referred to in the text, the objection was taken that the lands were or might become, within three years from the completion of the road (A. D. 1872), subject to the pre-emption clause of the 3d section of the original act of 1862, *supra*, p. 445; the railroad company assuming that the grant to it, because it was found in the act of 1864 (which act was confessedly "amendatory" of the act of 1862), was

Statement of the case.

An act of Congress, approved July 2d, 1864,* by which the Burlington and Missouri River Railroad Company, a corporation created by the laws of Iowa, was authorized to extend its road through Nebraska, from a point on the Missouri River to another point on the Pacific railroad, so as to connect with it, thus enacted:

"SECTION 19. That for the purpose of aiding in the construction of said road, there be and hereby is granted to the Burlington and Missouri River Railroad Company, every alternate section of public land, . . . designated by odd numbers, to the amount of ten alternate sections per mile on each side of the said road, on the line thereof, and not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed."

By a subsequent section, whenever the company had completed twenty consecutive miles of its road, in a manner prescribed, the President of the United States was to appoint commissioners to examine and report to him relative thereto; and if it should appear to him that twenty miles of the road had been properly completed, then, upon certificate of said commissioners to that effect, patents were to issue conveying the right and title to the lands to the company on each side of said road as far as the same was completed. And such examination, report, and conveyance by patents, was to continue from time to time, in like manner, until the road should be completed.

The act went on in its twenty-first section thus:

"SECTION 21. Before any land granted by this act shall be conveyed to the said company . . . there shall first be paid *into the Treasury of the United States* the cost of *surveying, selecting, and conveying* the same by the said company, . . . which

governed by that clause. The court below, however, held that proposition to be one not sound. After the decision in *Railroad Co.* v. *McShane*, the question whether it was or not became, of course, of no importance, since if it were so governed, the fact would, under the decision there made, be no ground of exemption.

* 13 Stat. at Large, 364.

amount shall, without further appropriation, stand to the credit of the *proper account*, to be used by the Commissioner of the General Land Office, *for the prosecution of the survey of public lands along the line of said road.*"

The road of the Burlington and Missouri company was completed for the purpose of this case, we may consider, in the spring of 1872. In that year, the *first* day of April fell on Monday.

The costs of *surveying* the lands which the county treasurers had sought to tax, were paid on the *seventh* day of March; and the fees of the register and receiver of the land office—which *fees the complainants alleged to be the "cost" of "selecting and conveying,"* which, with the cost of surveying, *the above-quoted twenty-first section enacted should be paid into the treasury, "before any land granted by the act should be conveyed to the company,"*—were not paid until the 19th and 20th of April, which days, as happened in 1872, were respectively the *third* Friday and Saturday of the month; the third Monday (as the month came in on Monday) having been the 15th.

The complainants now, citing a statute of Nebraska, which they stated governed the subject, alleged that the time to which all assessment, for taxation of lands in the State related, was fixed by the statute on the first day of March, in each year; and that if the lands were not taxable on that day, they were not taxable at all for that year; that if this were not true, yet that no land could be taxed for any year which was not liable to taxation when the power of certain "precinct assessors," mentioned in the statute, expired after their meeting on the *first Monday of April* (prescribed by the statute), for the purpose of equalizing the assessment, or, at the latest, after the session of the county commissioners which the statute fixed for the *third Monday of April*, and which third Monday in April, 1872, was, as already stated, Monday the *fifteenth* of the month.

The facts of the case and the positions just stated involved, therefore, two questions:

1. Whether under the statutes of Nebraska the assessment, &c., had been in time?

2. Whether the fees of the register and receiver, which had been paid on the third Friday and Saturday (the 19th and 20th) of April, were the "costs" of "selecting and conveying the lands" which the twenty-first section of the act of Congress enacted should, with the cost of surveying, be paid before the lands should be conveyed to the company?

As to the first point, the only statute of Nebraska referred to by counsel on either side, or which was suggested from any quarter as bearing on the question, was one, as follows:

"GENERAL STATUTE 709.

"SECTION 26. The precinct assessors of each county shall meet at the office of the county clerk, on the first Monday of April of each year, for the purpose of equalizing the assessments, and shall return their lists to the county clerk on or before the second Monday of the same month.

"SECTION 27. The county commissioners of each county shall constitute a board of equalization for the county, and said board, or any two of them, shall hold a session of at least three days, at the county seat, commencing on the third Monday of April in each year, for the purpose of equalizing and correcting the assessment roll in their county."

By section twenty-eight the county clerk is directed to make out and transmit to the State auditor an abstract of these matters, as settled by the board of county commissioners, on or before the first Monday of May. On the fourth Monday in May the governor, State auditor, and treasurer are to meet as a State board of equalization, and to decide upon the rate of the State tax, State school tax, and sinking fund tax for the current year.

The auditor is then to transmit this result to the county clerks on or before the second Monday in June, and on the first Monday in July the county commissioners are required to meet and levy the necessary taxes for the current year.

By section fifty-two it is declared that taxes upon real property shall be a perpetual lien thereupon, commencing from the 1st day of March of the current year, against all persons and bodies corporate, except the United States and the State of Nebraska.

Statement of the case.

By section fifteen all personal property is to be listed, assessed, and taxed in the county where the owner resides on the 1st day of March, but if the owner resides out of the State it is to be listed and taxed where it may be *at the time of listing*.

As to the second matter, whether the fees of the registers and receivers were or were not "costs of selecting and conveying the lands," within the meaning of the twenty-first section, the act of Congress, the only statute cited on either side, was one of July 1st, 1864, as follows:*

"*An Act to regulate the compensation of registers and receivers of the land offices in the several States and Territories, in the location of lands by States and corporations under grants from Congress.*

"In the location of lands by States and corporations, under grants from Congress for railroads and other purposes, . . . the *registers and receivers* of the land offices of the several States and Territories in the districts where such lands may be located, for their services therein shall be entitled to receive a fee of $1 for each final *location* of one hundred and sixty acres, to be paid by the State or corporation making such *location*, the same to be accounted for in the same manner as fees and commissions on warrants and pre-emption *locations, with limitations as to maximum of salary prescribed by existing laws*, in accordance with such instructions as shall be given by the Commissioner of the General Land Office."

The court below dismissed the bill. It said in its opinion:

"The fees to the registers and receivers of the local land offices, under the act of July 1st, 1864, are not embraced within those required to be paid by the twenty-first section of the act of 1864. These are fees for 'location,' not for 'selecting' and 'conveying' the land.

"But again, it may be remarked that the cost of surveying was paid in time to make the lands taxable; the work of selecting the lands was done by the company without, so far as shown, any expense to the government, and for the cost of con-

* 13 Stat. at Large, 335.

veying it does not appear that the government makes or has any claim."

From the decree of dismissal the complainants took this appeal.

Mr. J. M. Woolworth, for the appellants:

I. In *Railway Company* v. *Prescott*,* this court held, that until the payment by the company of costs of "surveying, selecting, and conveying" the lands, they were not liable to taxation. Though another point in that case has been questioned as not perhaps perfectly well considered,† this point has been received by all as well founded.

Now, we say that, in this case, those costs have not been paid.

1. Our position is that the fees of the register and receiver were the "costs of selecting and conveying" the lands mentioned in the twenty-first section of the act of Congress, because:

a. The statutes nowhere provide for the payment of any other expenses connected with the selection and conveyance of lands granted to railroads.

b. The surplus, after paying those officers the maximum allowed them, is turned into the General Land Office, to defray the expenses of further surveys.

c. While the term used in one act is "location," and in another "selection," each when applied to railroad grants means the same thing. The act making a grant to a railroad company, as in that to this company, always locates the grant and selects or designates the lands; but by reason of conflict with pre-emption and homestead rights, and other grants, a process, more or less complicated, is gone through with, which is properly described by either term.

2. The costs of patenting the lands were certainly "costs of conveying" them, none of which, of course, were paid until after the other costs.

* 16 Wallace, 603.

† On that point it had now been just overruled. See preceding case.—REP.

Argument in favor of the exemption from taxation.

3. The revenue law of Nebraska fixes no day at which the fiscal year begins, nor does it, in terms, fix a day at which the owner of real estate becomes taxable in respect thereof. But section fifty-two of the General Statute 709, designating the 1st of March at which taxes become a lien, does impliedly fix that as the day at which the owner is liable for taxes thereon. If on that day lands are not taxable, they are not so at all for that year. Now, on the 1st of March, 1872, this company was not taxable in respect of these lands.

4. But if this be not so, certainly the process of assessment having been concluded on the first Monday in April (which in 1872 was the first of the month), after which day the lands were selected, and all the costs of selection and conveyance paid, these lands were not taxable to this company for that year.

a. The assessment of property is the essential prerequisite to a valid levy of taxes thereon.*

b. The rule is general and imperative, that assessments can be made only when and as the statute prescribes.†

c. And the assessment must be made within the time limited therefor.‡

d. Property not taxable at the day the assessment closes, is not taxable at all.§

II. In *Railway Company* v. *Prescott*, this court says:

"While we recognize the doctrine heretofore laid down, that lands sold by the United States may be taxed before they have parted with the legal title, by issuing a patent, it is to be understood as applicable to cases where the *right* to the patent is com-

* Parker *v.* Overman, 18 Howard, 137; Ferris *v.* Coover, 10 California, 589, 137.

† Whitney *v.* Thomas, 23 New York, 281, 285; Cruger *v.* Dougherty, 43 Id. 107, 118; The People *v.* Goff, 52 Id. 434, 436; Torrey *v.* Millbury, 21 Pickering, 64, 67.

‡ Thames, &c., Co. *v.* Lathrop, 7 Connecticut, 555; Williamsport *v.* Kent, 14 Indiana, 306; The People *v.* Goff, 52 New York, 434; Marsh *v.* Chesnut, 14 Illinois, 223; Ludlow *v.* Willich, 1 Cincinnati, 315.

§ Mygatt *v.* Washburn, 15 New York, 316; Clark *v.* Norton, 3 Lansing, 484; Same Case on appeal, 49 New York, 248.

plete, and the equitable title is fully vested in the party without anything more to be paid, or any act to be done, going to the foundation of his right."

Even if we are wrong in insisting that the register's and receiver's fees were to cover the costs of selecting the lands, yet until the 19th day of April, 1872, this company had not a complete right to a patent, nor was the equitable title fully vested in it, because:

1. The twenty-first section of the act of Congress required the payment of these fees before the lands could be located, and the first step in that behalf was the certificate from the local to the General Land Office; so that more did remain to be paid until that day.

2. At that day, too, "an act remained to be done, going to the foundation of the right" to the patent, namely, the location of the lands, which act was begun when the local land officers certified the lists made by the company's agent, and was concluded either when the lists were made by the commissioner or approved by the secretary.

The process of locating railroad grants is traceable in the recitals in the lists and patents, and is as follows:

(1.) The company makes its selections, which appear on its original lists filed in the local office.

(2.) These lists being corrected, are certified by the local to the General Land Office.

(3.) These lists are approved successively by the commissioner and secretary, after proper examinations and corrections made by them.

And it is not until all this process is concluded that the right becomes fixed, for not until then is any one quarter section definitively ascertained to be the company's. Here, while no list was certified by the local officers before April 19th, several, we may state as a matter of fact, were not certified until long afterwards; some, indeed, not until after the levy of the taxes in July.

Mr. Clinton Briggs, contra:

It is argued on the other side, that because the costs of

Argument in favor of the right of taxation.

surveying (paid March 7th, 1872), and the register's and receiver's fees (paid April 19th and 20th following) were not paid a few *days* earlier, the lands were not taxable.

The State law does not in terms fix the time in which property shall be assessed. The assessment roll is to be returned to the county clerk "on or before the second Monday of April."

The board of equalization "shall hold a session of at least three days, commencing on the third Monday of April." After the assessment is equalized and corrected, and before the first Monday of May, the clerk shall make an abstract thereof.

Taxes are to be levied on the first Monday of July.

The position of the other side is that the power of the assessor was exhausted on the 8th of April, and of the board on the 17th of April. According to that theory, the register's and receiver's fees were paid two days or twelve days too late for taxation purposes. If the county officers had control of this matter of assessment as late as April 21st, then these lands were taxable even upon the theory set up.

It is not necessary, however, to base the right to tax these lands upon any calculations in or out of the three, or the eleven days. The case may well rest upon grounds less technical.

1. We assert that the lands were taxable, say on the 1st April, notwithstanding these fees were not yet paid.

The twenty-first section of the act of Congress provides that before the lands shall be conveyed, "the costs of surveying, selecting, and conveying" them shall be paid, "which amount shall . . . stand to the credit of the *proper account*, to be used by the Commissioner of the General Land Office *for the prosecution of the surveys of the public lands along the line of the road.*"

Thus *all* the money paid stands appropriated at the moment of payment to the single purpose of prosecuting surveys along the line of the road.

If there were no unsurveyed lands along the line of the road, what becomes of the money? All these lands were

surveyed prior to 1871. The money, therefore, could not be used for the purpose of prosecuting surveys along the line of the road. The intention of Congress was to make the companies pay for surveying the lands they were to receive; not to reimburse the government for money already expended on surveys.

It would seem that the section could have no application to this grant. In *Railway Company* v. *Prescott* it did not appear that the lands along the line of the road had been surveyed, but the fact was otherwise as respects the Kansas Pacific, as well as the Union Pacific; at least as to the more westerly portions of the lines.

So, we may assert, that the section took effect as to the lands of these two companies, but not as to this grant.

But do the words "selecting and conveying" mean acts of the register and receiver for which they are to receive fees? As to the selecting, it appears that this was done by the company; and, as said by the circuit judge, "without, so far as shown, any expense to the government."

In *Railway Company* v. *Prescott* the stress was laid upon the non-payment of the costs of surveying. Nothing is said about the fees of the register and receiver.

In the case of grants, to which the section applies, the reasons for requiring the payment of the costs of *surveying* are cogent. It may be said that the lands are not fully earned until this is done, though the road be completed and accepted. The lands must, indeed, be surveyed before the grant can attach to them. No one knows which the odd-numbered sections are until they are surveyed. This may be said to be one of the things mentioned in *Railway Company* v. *Prescott* as to be done, because going to the "foundation" of the right to the lands.

But after this payment it would seem that the equitable title was complete, and that what follows relates only to the evidences of the legal title; such as payment of register's and receiver's fees, issuing and recording the patent, &c.

If these views are correct, it follows that the case does not fall within the principles laid down in the case just cited,

and that the twenty-first section of the act of Congress does not contain anything to defeat the right of the State to tax these lands. Indeed, the provisions of these sections were intended to be a burden upon the grants; but if the construction contended for on the other side be correct, they give the companies the most valuable franchise they can possess, immunity from taxation.

This immunity, it is to be observed, does not exist by reason of any statutory law, but if it exists at all it is by virtue of judicial construction. But the rule is firmly established that a statute granting exemptions from taxation shall receive the narrowest construction, when the statute is in the least degree ambiguous. Here, in the absence of any statute, the court is asked to declare the exemption as a matter of inference. In *Christ Church Hospital* v. *The County of Philadelphia*,* in speaking of a tax-exemption statute this court says:

"It belongs to a class of statutes in which the narrowest meaning is to be taken which will fairly carry out the intent of the legislature."

There is no implication in government grants.†

Mr. Justice MILLER delivered the opinion of the court.

The ground of exemption claimed by the bill in this case, so far as not disposed of by the case of *Railroad Company* v. *McShane*, just decided, rests upon the allegation that the costs of selecting, surveying, and conveying the lands had not been paid at the time of their assessment for taxes of the year 1872, these being the taxes in dispute. In regard to this ground, we find ourselves embarrassed by two very troublesome questions, if their solution is essential to a decision of the case, as was assumed in the argument.

1. What is the latest period at which, by the laws of Nebraska, the right to assess lands for taxation can be exercised for any given year?

2. What are the costs of selecting and conveying the

* 24 Howard, 302. † Charles River Bridge *v.* Warren, 11 Peters, 545.

lands of these railroad companies, mentioned in the third section of the act of 1864?

As the latter question is one to be solved by the acts of Congress or by the rules and regulations of the land department, it would seem an appropriate one for a Federal court to answer.

But the lands granted to railroads generally by acts of Congress are the alternate sections on each side of the road within a certain limit, and, therefore, when the surveys are made and the line of the road laid down by protraction through these surveys, the sections and parts of sections are at once determined; and there is no choice or selection to be made.

It is true that by some statutes, and especially by the one granting the lands in question, where it is found that any odd section which would otherwise go to the company has been disposed of or pre-empted, the company may take other lands in place of it, and this it may select within certain distances from the road. But the selection, in such case is made by the company, and it is difficult to imagine what costs the government incurs in the selection which is to be paid by the company "into the Treasury of the United States." These lands thus selected in lieu of others also are such small part of the whole grant that the costs of selection could not amount to much, and the record in the case does not enable us to determine what particular parcels are of this character.

The act of July 1st, 1864, enacts that the register and receiver of the land office in which the lands granted to States and corporations for railroad and other purposes are located, are entitled to receive from such corporations a fee of one dollar for each final location of one hundred and sixty acres, to be accounted for as other fees are, with limitations of maximum salary prescribed by law.

Counsel for the appellant insists that these are the costs of selection referred to in the twenty-first section of the act of Congress of 1864. But those costs were to be paid into the treasury, and these are to be paid to the registers and

receivers. Unless these officers receive fees beyond the maximum salary allowed to them, these fees would not go into the treasury, and certainly are not paid into it by the company, as that act requires the costs to be paid to which it refers.

Again, these fees are to be paid on all the lands located, which may fairly be construed to be all the lands ascertained to belong to the company under a grant, while the costs spoken of in the twenty-first section are the costs of *selection*, which can properly apply only to lands where a choice or option employing exercise of judgment has been used. Still, as these are the only costs or expenses which counsel on either side has been able to suggest as the costs of selecting the lands within the meaning of the statute, it is unsafe to say they are not the costs referred to.

There is equal uncertainty about what is meant by the costs of conveying the lands by the government. The conveyance is by patent, and we have been shown no statute which authorizes a charge or fee for issuing the patent, nor was counsel on either side able to refer us to any such, though both were familiar with the operations of the land department in the West.

Turning from this difficulty to the question of the time to which the taxability of property, real or personal, relates under the laws of Nebraska, we find an equal embarrassment. No decision of any court of that State has been made on the subject. No language of the revenue laws of the State fixes such a time expressly.

The provisions contained in General Act 907* are all the provisions we have been able to find bearing on the question, and they are far from conclusive. In regard to personal property, the first of March seems to be adopted as a criterion to determine who shall pay the tax, and what county shall receive it when it has changed locality or ownership during the year and before the tax is levied. This may also-

* Set out *supra*, pp. 468, 469.—REP.

be the reason of fixing the lien of the tax on land on the same day, that vendor and vendee may have a rule to determine upon whom the burden shall fall. But from this time until the State board of equalization on the fourth Monday in May acts finally upon it, the assessment of property both real and personal is in progress and is incomplete, and the final levy of the tax does not take place until July. In the absence of any day or time fixed decisively by the statute or clearly deducible from it, and of any decision of any court of the State on the subject, or of any long and well-settled practice by the State authorities, we hesitate to say that when land is only exempt from taxation by reason of the claims upon it of the Federal government, and those claims are satisfied before the final proceedings are concluded, it would not be included in that assessment. In such case not half the current year for which the taxes are levied has expired. The general matter of assessment or valuation for taxation is still within the control of the proper officers, and if it is brought to their knowledge that the full ownership of the lands has passed from the United States to individuals or corporations it would seem equitable that they should bear their share of the burden of taxation.

We are the more inclined not to interfere in this case by the extraordinary remedy of injunction, because it is shown that as to all these lands, not only had all dues to the United States been paid before the final action of the State board of equalization, but patents had issued for all of them before this suit was brought. At the time, therefore, of filing this bill to prevent the collection of taxes on account of the interest of the United States in the lands on which they were levied, the United States had no interest in the land which would forbid their being taxed; nor is it clear that they had any when the lands were assessed. The costs of surveying were paid before even the precinct assessors assessed these lands, as they then thought they had a right to do, and it is extremely uncertain whether any costs of selecting or conveying the lands within the meaning of the act of Congress existed or were unpaid.

Under all the circumstances, without deciding that there is any particular day to which by the laws of Nebraska the liability for taxation of real estate must always be referred, or if there be, what that day is, we affirm the decree of the Circuit Court dismissing the bill in this case.

DECREE AFFIRMED.

TAYLOR *v.* THOMAS.

After the late rebellion in the Southern States had broken out into war, and the government had blockaded all the Southern ports so as to prevent the shipment of the staples of the South, including especially cotton, from them, the rebel legislature of Mississippi passed (December 19th, 1861) an act authorizing the issue of $5,000,000 in what were called cotton notes; negotiable notes in a form suitable for currency, to be issued by the State in sums of $1, $2, $3, $5, $10, $20, and $100. Owners of cotton were to, in effect, hold it pledged to the government, which thereupon gave them an advance on it in these notes; it being agreed on both sides that after the removal of the blockade, and on a proclamation made to that effect, the cotton should be delivered by the owners, at some seaport or city to be named, and sold; the proceeds of sale to be paid into the treasury of the State, and if sufficient, to be applied to redeeming the notes; and if insufficient the owner of the cotton was to make the *deficit* good to the State.

The notes were made, by the act, receivable in payment of all taxes due or to become due to the State, or to any county, or school fund, or municipal corporation, except a military tax then laid and confessedly in aid of the rebellion; and when received for taxes might be again paid out by the State treasurer upon any warrant of the auditor drawn upon the general treasury.

Held, that notwithstanding the exception as to the "military tax," the notes were to be regarded as issued in aid of the rebellion and were therefore void. And that on the rebellion being suppressed the notes—notwithstanding the provision in the original act about their receivability for taxes—were not receivable in payment of taxes which the reorganized State government directed to be paid in currency of the United States.

IN error to the Supreme Court of Mississippi.

This case involved the question of the validity of certain notes, commonly known as "cotton money," issued and put

in circulation by the State of Mississippi as currency during the late rebellion, and also the obligation of the State to receive the same in payment of taxes after the rebellion, and after the reorganization of the State government.

The case was thus:

Mississippi, through a convention convened by the action of the legislature, passed, on the 9th of January, 1861, an ordinance of secession, by which it was ordained "that all the laws and ordinances by which the State became a member of the Federal Union were repealed, and that all obligations on the part of the said State, or the people thereof, were withdrawn, and that the State now resumed all the rights, functions, and powers which by any of the said laws and ordinances were conveyed to the government of the said United States, and was absolved from all the obligations, restraints, and duties incurred to the said Union, and should be henceforth a free, sovereign, and independent State."

And in March of the same year, persons from different rebel States having met at Montgomery, Alabama, and made what they called a constitution for the permanent Federal government of the Confederate States of America, an additional ordinance was passed by the convention in Mississippi, ordaining that said constitution was adopted and ratified by the State of Mississippi, acting in its sovereign and its independent character; and that the State acceded to and became a member of the Confederacy provided for by the same.

Immediately after this the constitution of the State was so amended as to abrogate all provisions adapting it to the Constitution of the United States, and so changing it as to conform it to the connection between the State and the Southern Confederacy.

This was followed by measures taxing all the resources of the States in various forms to provide the means to sustain the Confederacy in its separation from the United States.

In the spring of 1861, the insurrection having broken out into war throughout the Southern States, military and naval

measures became necessary to suppress it, and the government of the United States instituted a blockade of all the Southern ports, so that no staple of the States in rebellion could find a market.

On the 19th December, 1861, under such circumstances and in the condition of affairs just described, the insurrectionary government of the State passed an act entitled "*An act authorizing the issue of treasury notes as advances upon cotton.*"

The act provided for the issue of $5,000,000, in notes of the denomination of $1, $2, $3, $5, $10, $20, and $100, to be paid out of the State treasury as advances to the people of the State on the crop of cotton grown in the State in the year 1861, at the rate of 5 cents per pound. The notes were to be in the following form:

Receivable in payment of all dues to the State and counties, except the military tax.

On demand, after proclamation to present, the State of Mississippi will pay to the bearer the sum of dollar(s) out of proceeds of cotton pledged for the redemption of this note, at the Treasurer's office, in Jackson, Mississippi.

Issued day of , 186 .

_____, _____,
Auditor of Public Accounts.

_____, _____,
Treasurer.

On the petition of parties owning cotton and having it in their actual possession or control, and on their executing a bond with approved securities in double the amount of the advance conditioned for the delivery of the cotton, &c., the auditor was required to advance these notes to the amount and at the rate per pound above stated. The owner of the cotton was to keep it safely until after the removal of the then existing blockade of the Confederate ports, when, on the proclamation of the governor demanding it, the cotton was to be delivered at some city or seaport in the Confederate States within ninety days, and sold either for gold and silver or for these cotton notes, and the funds so received

for the cotton were pledged for the redemption of the notes, and were not to be appropriated to any other purpose whatever; and such of the cotton notes as might be received in payment for the cotton were to be cancelled and destroyed. If the proceeds of the sale were not sufficient to discharge the advance in gold or silver, or in treasury notes, then the owner was to pay the amount requisite to make up the deficit. All funds received by the governor, whether in payment of the advances or for the proceeds of sales of the cotton, or for deficits, or recovered in suits on the bonds, were to be deposited with the State treasurer and placed in the State treasury. And the treasury notes issued under the act were to be receivable in payment of all taxes due or to become due to the State, or to any county or school fund, or municipal corporation, except a military tax previously levied under "An ordinance (of January 26th, 1861) to raise means for the defence of the State;" and when so received for taxes might be "again paid out upon any warrant of the auditor drawn upon the general treasury," until redeemed and cancelled as above stated. The cotton, until sold, was to be at the risk of the owner receiving the advance; but when sold the proceeds were to be subject to the order of the governor.

The legislature of Mississippi, which passed the law of 1861, had been elected prior to the so-called secession of the State.

In the year 1865—the rebellion being now suppressed and the supremacy of the government re-established—the legislature of Mississippi passed a law laying a tax of $2 per bale on cotton, and enacting that the collectors of taxes should collect it "in the currency of the United States."

A certain Taylor having fifty bales, the tax on which was of course $100, the collector of the taxes, one Thomas, demanded of him payment in currency of the United States. Taylor tendered to him the amount in $100 of the cotton notes, and refused to pay in currency of the United States. Hereupon the collector was about to distrain, when Taylor filed a bill—the present bill—to enjoin him, and to make

Argument in support of the tender of the "cotton note."

him receive the $100 "cotton-note" in payment of the tax; he, Taylor, contending that the agreement of the State made in the act authorizing their issue, to receive the cotton bills in payment of taxes, was a "contract" which the State had no power by its subsequent act of 1865 to impair.

The Supreme Court of the State, where the case finally came, adjudged the notes to be void. It said, in substance,

"We regard the act, in its operation and effects, to have been in aid of the late rebellion; a part of the financial system of the State, at a time of great pecuniary want, to supply not only a circulating medium for the people in the transactions of their ordinary business, but also to furnish the means by which an empty treasury of the State might be replenished.

"One section of the act provides that the notes shall be receivable in payment of all taxes now due or that may hereafter become due to the State, or to any county, or school fund, or municipal corporation, except the military tax; and that the said notes, when so received for taxes, may again be paid out by the treasurer upon any warrant of the auditor, drawn upon the general treasury. It will be thus seen that the notes were intended to supply an important part of the revenue by which the State government was to be sustained and enabled more effectually to aid the Confederate government in the prosecution of a sanguinary war, waged expressly for the purpose of subverting the government of the United States. The notes are therefore illegal and void."

Taylor now brought the case here on error.

Messrs. F. P. Stanton and H. S. Foote, for the plaintiff in error:

I. *The character of the act of* 1861, *authorizing the issue of the treasury notes, does not warrant the conclusion reached by the Supreme Court of Mississippi, that it was passed in aid of the rebellion.*

The act was one of ordinary legislation. The shipment and sale of cotton had been effectually prevented by the blockade. The crop of 1861 was on hand, wholly unavailable, although in ordinary times the cotton raised in the

Argument in support of the tender of the "cotton note."

State was the chief, if not the only resource of the people, to supply a currency and to enable them to make the exchanges necessary to the very existence and support of society. This measure was a local one simply, avoiding all connection with any military operations, and providing only for the internal commerce of the State. The substance of it was to base a currency to the extent of $5,000,000 on the crop of cotton made in the year 1861, then fully matured and in hand, and to preserve this crop for shipment and sale until the raising of the blockade, which had suddenly arrested the whole trade of the region.

The act distinguishes these cotton-notes from the notes issued under the ordinance of the convention, entitled "An ordinance to raise means for the defence of the State," passed January 26th, 1861. This ordinance of the convention was confessedly passed in furtherance of the rebellion. But the act in question had no connection with it, but was in absolute contrast to it. The cotton notes were no more issued to aid in the war than if the government of Mississippi had procured so much gold and silver coin and advanced it to the people of the State on the pledge of their cotton crop of that year.

II. *The decision made by the Supreme Court of Mississippi has been overruled by subsequent decisions in the same court.*

The ruling in this case was a departure from the law as it had previously been settled in that State in the case of *Hill* v. *Boyland*,* and other cases decided about the same time. The Supreme Court subsequently re-established the doctrine established in *Hill* v. *Boyland*, and thus overruled its own decision in the case now brought before this court. This, we think, will appear on reference to the cases of *Mister* v. *McLean*,† *Buchanan* v. *Smith et al.*,‡ and *Lawson* v. *Jeffries*.§

III. *Decisions of this court, also, are inconsistent with the conclusion that the act of* 1861 *was in aid of the rebellion.*

In the cases of *White* v. *Hart*,‖ *Huntington* v. *Texas*,¶ and *Horn* v. *Lockhart*,** this court has settled the principle that

* 40 Mississippi, 619. † 43 Id. 270. ‡ Ib. 97. § 47 Id. 686.
‖ 13 Wallace, 165. ¶ 16 Id. 413. ** 17 Id. 580.

"at no time were the rebellious States out of the pale of the Union;" that "if the government was in actual control of the State, the validity of its *act* must depend on the object and purpose of it;" and "that the acts of the several States, executive, judicial, and legislative, during the war, so far as they did not impair or intend to impair the supremacy of the National authority, or the just rights of citizens under the Constitution, are, in general, to be treated as valid and binding." The decision of the court below in this case was the opposite of these principles.

IV. In view of these decisions, which recognize the validity of acts passed by the insurrectionary States, so far as the acts were acts of ordinary legislation, it is unnecessary to advert to the circumstance, that the Mississippi legislature of 1861 had been elected prior to the secession of the State, and was the legislative power of the State not only *de facto*, but *de jure*, as well.

Messrs. G. F. Edmunds and T. W. Bartley, contra:

I. The legislation, and the acts done in pursuance of it, were in aid of the rebellion.

1. They were meant, palpably meant, to circumvent a state of things produced by the war. The shipment and sale of cotton, the chief staple of the South, and the one by which the rebellion was meant to be carried on, was cut off by the blockade, and this act was passed to enable it to hold out.

2. The notes were receivable in payment of *all* taxes except "the military tax" (whatever that was), and were the general fund for paying the legislators, governors, and State troops.

To say that such a proceeding was a pure one and legal, is to offend common sense.

II. The impression of opposing counsel that the decision of the Supreme Court of Mississippi, in this case, has been overruled by subsequent cases in that court, is inaccurate. The cases cited were not strictly analogous, and turned upon questions essentially different.

III. The same may be said of the cases cited from this court as having overruled the position taken by the Supreme Court of Mississippi in this case. Those cases do not touch the questions in the present case; a reference to the cases cited will show this.

IV. If the lawfully elected legislature of Mississippi betrayed its trust by passing a law to assist in overthrowing the Constitution and government which it had taken an oath to support and maintain, this cannot help the case of the opposite side. It does but add turpitude and perfidy to illegal legislation.

[In addition to the argument of these points, the counsel on both sides argued the question as to whether the notes under consideration were "bills of credit" within the Constitution, and such as that instrument ordains that "no State shall emit."]

Mr. Justice CLIFFORD delivered the opinion of the court.

Beyond all doubt the finding of the appellate court of the State of Mississippi is correct, and the court here also unanimously concur in the conclusion reached by that court, that the treasury notes authorized to be issued by the act under consideration, inasmuch as they were issued "against the public policy and in violation of the Constitution of the United States, are, therefore, illegal and void."

Three principal propositions are submitted by the appellant to controvert that conclusion, which will be separately considered:

(1.) That the terms of the act authorizing the issue of the treasury notes do not warrant the conclusion reached by the State appellate court, that it was passed in aid of the rebellion.

(2.) That the subsequent decisions of the same court have overruled the decisions of that court in that case.

(3.) That certain decisions of this court are inconsistent with the conclusion that the act in question, when properly

construed, affords any evidence that it was designed to accomplish any such purpose.

I. Subsequent to the passage of the secession ordinance every branch of the State government—executive, legislative, and judicial—claimed that the State ceased by that act to be one of the States of the Federal Union, and denied in the most solemn forms of proceeding that the people of the State owed any further allegiance to the Federal Constitution or obedience to the laws of the United States. Instead of that the whole people of the State joined with one accord in adopting a new constitution differing widely from the Federal Constitution, and by which, as they claimed, they severed and dissolved all connection with the Federal Union and established a new confederation between the people of that State and the other seceding States.

Such measures and pretensions led immediately to conflict of jurisdiction and presently to open hostilities, which showed that every prospect of compromise was at an end. Military preparations became necessary on both sides, and the several seceding States found it impossible to avoid increased and onerous taxation, and no one of the number felt the pressure in that regard more heavily than the State where these parties reside.

Different expedients were adopted to replenish the empty treasury of the State, of which none perhaps afforded greater promise than the measure embodied in the act providing for the issue of treasury notes, as it had the effect to call forth the product of the great staple of the State from its secret depositories, and to render it available as the basis of an extended paper circulation. Legislative authority to issue such notes was accordingly granted, but the requirement was that the notes, when executed in the prescribed form, should be deposited in the treasury of the State, to be paid out by the auditor as advances to such of the people of the State as should comply with the before-mentioned terms and conditions prescribed in the act authorizing their issue.

Other provisions of the act also afford very strong confirmatory proof that the act was passed in aid of the rebel-

lion, as, for example, the section which provides that whenever the then present blockade of the ports of the Confederate States should be removed (which was to be determined by the proclamation of the governor declaring the fact) the governor should in the same form require all persons to whom advances had been made, to deliver the cotton specified in their respective receipts within ninety days from the date of the proclamation. Nothing could be received by the governor in lieu of the cotton "but gold and silver or the treasury notes issued under the act," and the express requirement is that all the funds so received by the governor in payment of the advances shall be deposited with the treasurer, and be placed in the treasury of the State.

Attempt is made in argument to show the inference drawn from those provisions, that the act was passed in aid of the rebellion, is repelled by another provision of the same act, which in effect provides that such treasury notes shall not be receivable in payment of the tax levied under a prior law and which is denominated a military tax, but it is a sufficient answer to that suggestion to say that by the terms of the act said notes are made receivable in payment of all taxes then due to the State or counties except the military tax, and that when so received the notes might "again be paid out by the treasurer *upon any warrant of the auditor drawn upon the general treasury.*" Nor is there anything in that exception inconsistent with the theory that the act was passed in aid of the rebellion, as it is highly probable that the legislature supposed that the other provisions of the act were sufficient to insure confidence in the paper emission without making the notes receivable in payment of the military tax.

Suppose that is so, still it is insisted that the conclusion of the State court that the act was passed in aid of the rebellion cannot be supported, because the members of the legislature which passed the act were elected before the ordinance of secession was adopted; but two answers may be made to that proposition, either of which is sufficient to show that it is destitute of merit: (1.) That the act, if passed in aid of the rebellion, would be void even if passed by a

legislature otherwise innocent of any treasonable act. (2.) That the legislature in question, subsequent to the adoption of the secession ordinance and of the ordinance by which the State acceded to and became a member of the insurrectionary confederacy, ceased to represent the State as a constitutional member of the Federal Union.

Members of the legislature may perpetrate treasonable acts after the legislature is organized as well as before they take their seats, nor is the question affected in the least by the fact that the legislature was duly organized before the State seceded, as the public history of the period shows that the whole government and people of the State joined in the rebellion before the act in question was passed through the forms of legislation.

II. Extended discussion of the second proposition submitted by the appellant will be unnecessary, as the cases referred to in support of the theory that the prior decision of that court upon the subject under consideration is overruled, do not afford the proposition any countenance whatever. They are as follows: *Buchanan* v. *Smith*,* *Mister* v. *McLean*,† and *Lawson* v. *Jeffries*.‡ Neither of these cases support the proposition for which they are cited. On the contrary they decide, in substance and effect, that acts necessary to peace and good order among citizens—such, for example, as laws which sanction and protect marriage and domestic relations, govern the course of descents, regulate the conveyance and transfer of property, provide remedies for injuries to person and estate, and other similar acts which would be valid if emanating from a lawful government—must be regarded as valid when proceeding from an actual, though unlawful, government, but that acts in furtherance and support of rebellion and against the just rights of the citizens must be regarded as invalid, which accords with the rule of decision adopted and promulgated in the prior decision of the same court, and which is all that need be said responsive to that proposition.

* 43 Mississippi, 97. † Ib. 268. ‡ 47 Id. 686.

III. Under the circumstances it will not be necessary to add much to what has been remarked responsive to the preceding proposition to refute the third one of the series, as the language of the final proposition decided by the State appellate court is borrowed from the decision in *Texas* v. *White** of this court upon the same subject.

Certain acts, such as those described by the State appellate court, it is admitted are valid, but the late Chief Justice, as the organ of the court, proceded to say that acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of the citizens, and other acts of like nature, must be regarded as invalid and void. Nor is there anything in the case of *White* v. *Hart*† which is in the slightest degree inconsistent with the rule laid down in the preceding case.

Exactly the same doctrines were laid down in the case of *Huntington* v. *Texas*,‡ in which the opinion of the court was also given by the late Chief Justice. Bonds for the payment of money to a large amount were issued, before the rebellion, by the United States to the State of Texas, to adjust certain claims made by that State growing out of a dispute as to her boundaries. Part of those bonds were still in the treasury of the State when the rebellion broke out. Texas joined the rebellion, and during that period some of those bonds were used by the ruling power of the State. War ensued, but in the progress of events the rebellion was crushed. Various efforts were subsequently made to reorganize the State as one of the States of the Federal Union, and those efforts were so far successful before the suit in the case last cited was commenced that the Supreme Court decided that the State was competent to sue. She brought that suit to recover part of those bonds. Defences of various kinds were set up by the defendant in the subordinate court. Exceptions were filed by him to the ruling of the court and the case was removed here by writ of error.

In disposing of the case here the court remarked as fol-

* 7 Wallace, 733. † 13 Id. 650. ‡ 16 Id. 413.

lows: "Whether the alienation of the bonds by the usurping government divests the title of the State depends, as we have said, upon other circumstances than the quality of the government. If the government was in the actual control of the State the validity of its alienation must depend on *the object and purpose of it.* If that was just in itself and laudable, the alienation was valid, but if the object and purpose were to break up the Union and to overthrow the constitutional government, the alienation was invalid."

Surely such remarks do not serve to support the proposition of the appellant; and he is equally unfortunate in his reference to the case of *Horn* v. *Lockhart*,* in which the opinion was given by Mr. Justice Field. "Order," say the court in that case, "was to be preserved, police regulations maintained, crime prosecuted, property protected, contracts enforced, marriages celebrated, estates settled, and the transfer and descent of property regulated precisely as in times of peace. No one that we are aware of," say the court, "seriously questions the validity of judicial or legislative acts in the insurrectionary States touching these and kindred subjects *where they were not hostile in their purpose or mode of enforcement to the authority of the national government, and did not impair the rights of citizens under the Constitution.*"

Viewed in the light of the qualifying phrase the remarks reproduced accord with the present views of the court, as the qualifying phrase is equivalent to an affirmative decision that judicial and legislative acts *hostile in their purpose or mode of enforcement* to the authority of the national government, or which impaired the rights of citizens under the Constitution, are invalid and void, which in principle is exactly what the State appellate court decided in this case.

DECREE AFFIRMED.

* 17 Wallace, 580.

Statement of the case.

UNITED STATES *v.* SAUNDERS.

1. A statute is to be interpreted not only by its exact words, but also by its apparent general purpose. If its general purpose have plain reference to one class of persons, it will not include a single individual in a distinct class, though the mere words might include him.
2. The Botanical Garden, at Washington, a long-established public garden, and regarded by various acts as under the immediate direction and control of the Joint Library Committee of Congress, is a different garden from the garden established of more recent years by the Department of Agriculture, an executive department, as an appendage to that department.
3. The eighteenth section of the act of July 28th, 1866, providing an increase of 20 per cent. in pay for several persons employed under the direction of the two Houses of Congress, or their committees, including "the three superintendents of the public gardens," and not providing for the pay of any employed in the executive departments, does not embrace a Superintendent of the Public Gardens of the Department of Agriculture. It is confined to the superintendents of the Botanical Garden.

   The Superintendent of the Public Garden of the Department of Agriculture is provided for by a joint resolution of 28th of February, 1867, which gives an increase in pay for one year to persons employed in the executive departments.

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

On the 28th of July, 1866, Congress enacted:*

"That there be allowed and paid to the officers, clerks, committee clerks, messengers, and all other employés of the Senate and House of Representatives, and to the Globe and official reporters of each House, and the stenographer of the House, and to the Capitol police, and *the three superintendents of the public gardens*, their clerks and assistants, and to the Librarian, assistant librarians, messengers, and other employés of the Congressional Library, an addition of twenty per cent. on their present pay, to commence with the present Congress."

This act was repealed July 12th, 1870.

By a joint resolution of the 28th of February following, it was resolved†—

* 14 Stat. at Large, 323.

† 14 Stat. at Large, 569.

Statement of the case.

"That there shall be allowed and paid to . . . its civil officers, clerks, messengers, and watchmen and employés in the executive mansion, and in any of the following named departments, or any bureau thereof, to wit: State, Treasury, War, Navy, Interior, Post Office, Attorney-General, *Agricultural*, and including civil officers and . . . clerks and employés in the office of the coast survey, naval observatory, navy-yard, arsenal, paymaster-general, &c., &c., an additional compensation of twenty per cent. on their respective salaries as fixed by law, &c., . . . *for one year*."

With these two proceedings of Congress, the act of 1866 and the joint resolution of 1870 in force, one Saunders, who was engaged at a salary in superintending the public gardens of the *Department of Agriculture*, at Washington, applied and got an addition of 20 per cent. to it under the joint resolution, for the *one year*, during which the resolution gave the increase.

Subsequently, assuming that the act of Congress was a continuing act and not one making an allowance for one year only, and assuming also *that his employment brought him within its provisions*, he filed a petition in the Court of Claims, alleging that he was "Superintendent of Gardens in the Department of Agriculture," from March 4th, 1865, to July 1st, 1870, and asking the addition of 20 per cent. given by *the act of Congress* during that time.

The Court of Claims found as a fact that "he held the position and performed the duties of Superintendent of the Public Gardens of the Department of Agriculture," and during the time for which the 20 per cent. was claimed; and conceiving that he came within the act, gave him the addition prayed for.

From this, its decision, the United States appealed.

The only question considered by this court was whether Saunders was within the act of Congress.

Mr. G. H. Williams, Attorney-General, and Mr. John Goforth, for the appellant; Mr. J. W. Denver, contra.

Opinion of the court.

Mr. Justice BRADLEY delivered the opinion of the court.

We are clearly of opinion that the claimant, in this case, was not within the intent and meaning of the eighteenth section of the act of July 28th, 1866.

The Court of Claims finds, it is true, that he held the position of superintendent of the public garden of the Agricultural Department during the period for which the claim is made. But it is well known that the botanical garden near the Capitol has been regarded as a public garden for many years, and long before the experimental garden of the Agricultural Department was established; and that it was managed by a superintendent and assistant superintendents. It is equally well known that this garden has for a long period, if not always, been under the immediate direction and control of the Joint Library Committee of Congress. The public statutes contain a long series of appropriations for both garden and superintendents. Thus, in the appropriation bill of July 2d, 1864, for the year ending June 30th, 1865,* the following appropriation was made:

"*Botanic Garden.*—For grading, draining, procuring manure, tools, fuel, and repairs, purchasing trees and shrubs, under the direction of the Library Committee of Congress, $3300.

"For pay of superintendent of Botanic Garden, and assistants in the Botanic Garden and green-houses, to be expended under the direction of the Library Committee of Congress, $6145.80."

A similar provision is made in the appropriation bill for the year ending June 30th, 1866, adding $2500 to be expended under direction of the Joint Committee of the Library, for erecting four green-houses.† The like appropriation for salaries was made in the appropriation bill for the year ending June 30th, 1867.‡ Then comes the act in question, increasing the salaries 20 per cent., to commence with that Congress, to wit, March 4th, 1865. The act increases the salaries of "the three superintendents of the public gardens." Now, in the next appropriation bill, for the year ending June 30th, 1868, not only is the ordinary appropria-

* 13 Stat. at Large, 349. † 14 Stat. at Large, 21. ‡ Ib. 193.

tion made for the "botanic garden under direction of the Library Committee of Congress, $3300;" and, "for pay of *superintendent and assistants*, and assistants in the botanic garden and green-house, under direction of the Library Committee of Congress, $6145.80;" but a continuation of the 20 per centum is added, thus: "for 20 per centum additional on the pay of the above, $1229.16." The designation, "superintendent and assistants," implies at least three in number. No such appropriation is found in reference to the experimental garden attached to the Department of Agriculture. Whilst the botanic garden, under the direction of the Joint Library Committee of Congress, with its superintendent and assistants *eo nomine*, have thus been the subject of appropriations for a long period, the experimental garden, established by the Department of Agriculture, was comparatively recent, and regarded as an appendage of that department, and the appropriations therefor had been made under the general head of appropriations for the said department, and no appropriation for any superintendent thereof, *eo nomine*, had ever been made up to the time of the passage of the act of July 28th, 1866. The appropriation had been for the "experimental garden," and for the salary of the foreman and laborers.*

From this legislative history it is apparent that the botanic garden near the Capitol was regarded as a public garden; that it had a superintendent and assistant superintendents; that appropriations had for years been made for their salaries as superintendent and assistants by name; and that they were employed, and the garden was managed, under the immediate direction of the Joint Library Committee of the two Houses of Congress. They were, in fact, employés of this committee.

Now, it seems to us that the eighteenth section of the act of July 28th, 1866, which provides for the addition of the 20 per centum now claimed by the appellee, had reference only to persons employed under the direction of the two Houses

* See the acts, 13 Stat. at Large, 155; 14 Id. 202.

of Congress, or their committees, and not to those of any of the executive departments. The section itself is its own best interpreter. In view of the long supervision over the botanic garden by the Library Committee, and of the previous legislation referred to, language could hardly be plainer than that which it contains.

But there is additional evidence that this increase of salary was intended to be confined to persons employed under the immediate direction of the two Houses of Congress and their committees, in the fact, that by a joint resolution of February 28th, 1867,* 20 per cent. was added to the salaries of all employés of the several executive departments, including the Department of Agriculture, for one year from and after the 30th of June, 1866; and the claimant actually received such addition accordingly. It is not reasonable to suppose that Congress intended to single out this particular employé from all the government employés as alone entitled to a double addition of 20 per cent. to his compensation, which he certainly would receive for the year named, if his construction of the act of July 28th, 1866, is the correct one.

JUDGMENT REVERSED, and the cause remanded with directions to

DISMISS THE PETITION.

PIATT'S ADMINISTRATOR *v.* UNITED STATES.

Where a contractor has large claims on different accounts against the United States, and the United States have a counter claim of fixed though of much less amount against him, and arrest him and put him in jail, and then by an act passed for his relief direct the accounting officers of the government to "settle" his accounts on just and equitable principles, giving all due weight and consideration to certain settlements and allowances already made, and to certain assurances and decisions of one of the executive departments which the party alleged to have been made to him, "*provided that the sum allowed under the said assurances shall not exceed the amount claimed by the United States and for which suits have*

* 14 Stat. at Large, 569.

Statement of the case.

been commenced;" a settlement by the accounting officers and a reception by the party of the amount fixed will not, in the absence of words to show that it is meant as a payment in full, prevent his recovering any further balance due, and which the proviso in italics prevented the accounting officers of the government from allowing. The case distinguished from *United States* v. *Child* (12 Wallace, 232), and *United States* v. *Justice* (14 Id. 535), and *Mason* v. *United States* (17 Id. 70).

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

J. H. Piatt, on the 26th of January, 1814—during our second war with Great Britain—by a written contract with the then Secretary of War, General Armstrong, became a contractor of supplies for the Northwestern Army for one year, to begin on the 1st day of June, 1814, and end on the 31st day of May, 1815, at an average rate of twenty cents the ration; and as the usage then was to make advances in money to contractors, he retained in his hands, as an advance from the department, the balance of the commissariat fund; which at the close of his engagements amounted to $48,230.77.

On the 26th of January, 1814, when the contract was made, the government was in good credit and paying its debts in gold and silver. By the 1st of June following, when it was to take effect, the gold and silver were exhausted, and the government had resorted to treasury notes, which passed at a discount. In the month of August, 1814, the enemy captured Washington and burnt the capitol; an event which assisted to depress the business of the country. All the banks south and west of New York suspended specie payments. The currency soon became the irredeemable paper of State banks. Its value went down and the price of produce went up, till supplies could not be had for less than forty-five cents the ration.

By the 1st of January, 1815, after expending the balance of the commissariat fund, and all other funds he had received, the United States owed him, for supplies already delivered, a large sum of money, and his drafts on the government lay under protest for the want of funds in the treasury to pay them.

In this condition of things, and in an exigent moment, on the 26th of December, 1814—the army in the Northwest being about to make a move—requisition was made on him for a large further supply of rations. He went, on the 1st of January, 1815, to Washington, to lay matters before the War Department; and, *as the Court of Claims found as facts of the case*, "at a personal interview there with him, notified to Mr. Monroe, then Secretary of War, that he would furnish no more rations under the contract. Secretary Monroe admitted to Piatt the inability of the government to comply with the terms of the contract on their part, both as to money already due, and as to money which might become due for future supplies. But the military exigency then rendering it necessary that a large quantity of rations should be furnished immediately for the Northwestern Army, it was thereupon agreed by parol, between Piatt and the secretary, that if Piatt would furnish the rations which might be required, he should receive for them whatever price they should be reasonably worth at the time and place of delivery; and that the defendants, instead of paying as required by the terms of the original contract, should defer payment until such time or times as they should have the requisite funds."

Under the parol agreement, Piatt furnished and delivered to the government 73,007,010 rations, the reasonable value of which, at the times and places at which they were furnished, was 45 cents per ration, amounting in the aggregate to	$328,531 54
But, on the settlement of Piatt's account at the close of the war, the officers of the treasury, having no knowledge or evidence of the parol agreement under which the rations were furnished, allowed and paid to him only the price designated in the original written contract, amounting in the aggregate to . .	148,791 87
And leaving due a balance of . . .	$179,739 67

Piatt performed, as he alleged, other valuable services for the government—transportation, &c., to friendly Indians and to distressed refugees of Michigan—(confessedly outside of those contemplated by either the original or the parol agreement), to the value of . . $63,620 48

In September, 1819, an action was brought by the United States against him, and he was arrested on a *capias ad respondendum* for an alleged balance of $48,230.77, due from him as commissary of subsistence. He now brought his claim before Congress, but the Judiciary Committee of the Senate reported against it. However, while the suit was still pending, and he on bail, Congress (8th May, 1820) passed a private act for his relief, as follows:

"*Be it enacted*, That the proper accounting officers of the Treasury Department be, and they are hereby, authorized and required to *settle* the accounts of J. H. Piatt, *including his accounts for transportation*, on just and equitable principles, giving all due weight and consideration to the settlements and allowances already made, and to the assurances and decisions of the War Department:

"*Provided*, That the sum allowed under the said assurances shall not exceed the amount now claimed by the United States, and for which suits have been commenced against the said Piatt."

Under this act, the accounting officers of the treasury settled the accounts of Piatt thus:

1st. They allowed him a credit of $63,620.48 for the transportation, &c., furnished by him for the use of the Indians and refugees, not embraced within either of the agreements before described.

2d. They allowed him a credit upon a certain specified portion of the rations delivered upon the parol agreement, equal to the amount then claimed by the United States in the suit against him, to wit, the sum of $48,230.77. The credit was thus ascertained: They first estimated the reasonable value of the specific portion of the rations thus

referred to; they then deducted therefrom the price per ration already paid to him; and from the balance thus ascertained, they made a further deduction sufficient to reduce the amount of the credit to the said sum of $48,230.77, as required by the proviso to the act of Congress, mentioned on the preceding page.

The allowance of the $48,230.77 which did not require the payment of money, was passed to his credit, and the action against him dismissed.

The $63,620.48 allowed for the transportation, &c., &c., to the Indians and refugees was not paid, there having been no appropriation applicable to that claim. His creditors became impatient and put him into prison; and he died in the prison bounds in the city of Washington on the 12th of February, 1822.

Congress subsequently (24th May, 1824) passed an act, making an appropriation for this last-mentioned account, and there was paid under the act, to the administrator of Piatt, the sum of $63,620.48, the same being for the transportation, &c., furnished to Indians and refugees, and not for army supplies.

But the balance of his original claim under the parol contract for $179,739 67
having been reduced by only 48,230 77

his administrator now alleged that his estate was entitled to $131,508 90
and for this sum filed a petition—the petition in the present case—in the Court of Claims.

The petition set out, with circumstance and color, a case which, in its essence, was the same as above given; and after stating the interview with Mr. Monroe, and that Mr. Monroe admitted that the right of the United States to enforce the original written contract had been forfeited by its failure to make payment according to its contract, and that Piatt had a right to refuse to furnish rations under the call made December 26th, 1814, alleged that Mr. Monroe had "appealed to him as a patriot not to desert his country in that

day of its trial, assuring him that he should be fully indemnified, and should not be a loser." The petition then alleged that on the faith of these assurances he, Piatt, had gone on and furnished the subsequently required rations to the amount stated.

Though it did not seem to have been doubted that the rations actually cost the amount claimed, the officers of the treasury, feeling themselves bound only by what appeared of record in the department, allowed in the settlement of the account for rations furnished after the 1st day of January, 1815, no more than the original contract price per ration. The petition then said:

"Under these circumstances Piatt brought his claim before the Secretary of War, Mr. Crawford, who would have settled it on the principles for which the said Piatt then contended, and which your petitioner now claims to be legal and just, *but that, by reason of what he considered countervailing evidence, he had doubts whether such assurances had ever been given.*"*

The Court of Claims, however, as already stated, found as a fact of the case that they had been given.

Being equally divided upon the right of the claimant to recover, the court could only give a judgment *pro formâ*, and for the purposes of an appeal to the Supreme Court, decided accordingly as conclusions of law:

I. That the parol agreement entered into by Piatt and Mr. Monroe, then Secretary of War, after the forfeiture and abandonment of the original written contract, being a new contract upon a new consideration was valid, and, under such agreement, the government became indebted to Piatt for the reasonable value of the rations furnished under it, and for the balance of $131,508.90.

II. But that this action was barred by the allowance made by the accounting officers of the treasury under the private act of May 8th, 1820, which must be construed to have been intended by Congress as a settlement of all claims against the defendants.

* See Reports of Senate Committee, April 5th, 1820, Doc. 102, p. 5.

The petition was accordingly dismissed, and Piatt's administrator appealed, assigning this second conclusion of law for error.

Messrs. William Johnson and Thomas Wilson, for the appellant:

I. *The act of* 1820 *cannot be, and never was intended by Congress to be, a settlement of all of Piatt's claims against the government, because—*

1st. The proviso attached to the act limits the settlement, prevents it from being full and complete, and prescribes a narrower or smaller amount of relief than that of justice.

This takes the case out of decisions such as *United States* v. *Child*, and similar cases which will doubtless be cited on the other side. Where a settlement is made and a party accepts payment under it, he is *generally* estopped to claim more. And why? Because the arbitrators have taken into consideration everything bearing on the case, and have allowed it full weight. Thus, presumptively, the settlement was fair. But when, by the very order of settlement, the arbitrator is told, "Though the party may have a plain right to such and such items of credit you must not allow them," clearly such a settlement is not made on a just principle, and it ought not to estop further claim.

2d. The act does not say that what was to be done was to be "in full payment," or "in full satisfaction" of his claim, and if the intention that it should be had existed, apt words could have been used to declare it.

3d. The accounting officers of the treasury did not regard the act in the way in which the government now regards it, for they proceeded to state Piatt's accounts, and allowed him in that statement the item of $63,620.48, while the only relief which could have been afforded him under the act was for the sum of $48,230.77, for which a suit had been brought.

4th. Upon the report of the accounting officers, the subsequent Congress appropriated and paid the above sum of $63,620.48.

The intention of Congress in passing the act was appar-

ently this: Congress knew that a balance stood on the books of the treasury against Piatt for moneys due from him as an officer; that a suit had been brought by the United States to recover that balance; that he had been arrested, thrown into prison, and was then on bail; that he alleged that on a true statement of the accounts between him and the United States, it would be shown that he was not indebted to the United States, and that possibly the United States would be found to be indebted to him. Congress, without expressing any opinion upon the facts of the case, enacted that the accounting officers should settle his accounts "on just and equitable principles, giving all due weight and consideration to the settlements and allowances already made, and to the assurances and decisions of the War Department;" and if, upon the making of this settlement or statement it should be found that Piatt was not indebted to the United States, that there was enough coming to him upon these accounts, "assurances," transportation, and the like, to offset the balance claimed from him in the suits commenced, then that this balance should be cancelled and the suits dismissed and he discharged from jail; but if these accounts should not be sufficient to entirely offset this balance, then it should do so *pro tanto*, and upon payment of the remainder he should be discharged from jail.

All question as to payment to him of other moneys which he might claim was reserved for future consideration.

The purpose of Congress seems to have been much the same as when it passed the act for the relief of William Peck.* Peck was indebted to the United States, was sued, judgment recovered against him, and he imprisoned for the debt. Congress declared that he should be released from imprisonment, *provided*, first, that he should assign all the property "which he may now own or be entitled to" to the United States; and second, that any property which he might thereafter acquire should be liable to be taken.

On a question whether the debt was released by his dis-

* 6 Stat. at Large, 109.

charge from imprisonment, this court, in *Hunter* v. *United States*,* says:

"From this proviso it clearly appears that the release from imprisonment was the only object of the statute, and a proper construction of it does not release the judgment."

II. *The circumstances in which Piatt was placed at this time prevent any such legal effect, even if the intention were clearly expressed in the act.*

From the facts, as admitted or found, it is plain that, instead of Piatt being indebted to the United States in the sum of $48,230.77, for which he had been sued, the United States was indebted to him in the two sums of $63,620.48 and $131,508.90. Instead of being the debtor, he was the creditor. Instead of his owing the United States, the United States owed him; and instead of the suit being "*The United States* v. *Piatt*," it might properly have been "*Piatt* v. *The United States*."

These were the circumstances under which the act of 1820 was passed.

Now when a debtor, being a powerful party, on a false allegation of the state of accounts between him and his creditor, arrests that creditor, and throws him into jail, and then, while his creditor is thus illegally imprisoned, offers him a settlement which the creditor accepts in order to be released, *such* settlement, *so* made, is surely of no binding force as a settlement, however definitely or plainly it may have been stipulated and agreed upon.†

Mr. G. H. Williams, Attorney-General, and Mr. John Goforth, Assistant Attorney-General, contra:

Piatt's claim was in dispute. Mr. Crawford doubted the alleged assurances of Mr. Monroe. Piatt could not get the claim allowed.

Being under arrest, the act of May 8th, 1820, was passed,

* 5 Peters, 185.

† Brown *v.* Pierce, 7 Wallace, 214; United States, Lyon, et al. *v.* Huckabee, 16 Id. 431.

requiring the officers of the treasury to "settle his accounts," including his accounts for transportation.

The word settle has an established legal meaning, and implies the mutual adjustment of accounts between different parties, and an agreement upon the balance.*

There was no limit to any claim he might make except the one upon the assurances. All the accounts between the government and himself—all things in dispute—were meant, it is obvious, to be included in the reference to the accounting officers and settled.

Piatt went before the accounting officers and presented his proofs, and made his claims much in excess of the amount awarded him. The settlement was made upon proofs; as to the assurances he was allowed $48,230.77, all that under the act could be allowed.

As to the assurances, the sum of $48,230.77 was paid by passing the amount to his credit and so balancing his debt. A further sum of $63,620.48 was found to be due him, for transportation of friendly Indians and refugees. He accepted these settlements without protest.

The $63,620.48 was paid by an appropriation, made by Congress A.D. 1824.

An allowance by the legislature in full, when accepted by a claimant, is an estoppel of further claim.† That the claimant has no other remedy at the time does not affect the question. This appears to be settled by the case of *Mason v. United States*,‡ in this court, and by other cases here.§

No compulsion was exercised over Piatt at any stage of the proceedings.

Mr. Justice CLIFFORD delivered the opinion of the court.

Attempt is made, chiefly on two grounds, to vindicate the conclusion of the Court of Claims, that the cause of action

* Baxter *v.* Wisconsin, 9 Wisconsin, 44; see also 11 Alabama, 419.

† Sholes *v.* The State, 2 Chandler, 182; Calkins *v.* The State, 13 Wisconsin, 389.

‡ 17 Wallace, 76.

§ United States *v.* Child et al, 12 Wallace, 232; United States *v.* Justice, 14 Id. 535.

is barred by the allowance reported by the accounting officers of the treasury. The grounds are:

(1.) That the auditor passed to the credit of the deceased claimant the amount claimed by the United States as due from him as commissary of subsistence, and that he, the claimant, accepted the settlement without protest.

(2.) That Congress intended by the act directing the adjustment of his accounts that the settlement should be final and conclusive; that the act was in the nature of an offer for a disputed claim, and that the acceptance of the adjustment is a bar to the claim.

1. Verbal agreements between the parties to a written contract made before or at the time of the execution of the contract are, in general, inadmissible to vary its terms or to affect its construction, as all such agreements are considered as merged in the written contract. Both parties admit that proposition, nor is it denied by the defendants that oral agreements subsequently made, on a new and valuable consideration, before the breach of the contract, may have the effect to enlarge the time of performance of the contract, if it is not one within the statute of frauds, or that such an oral agreement may have the effect to vary any of the terms of the written contract or to waive or discharge it altogether.

Exceptions, it is everywhere admitted, exist to the rule that parol evidence is not admissible to contradict or vary the terms of a written instrument. Most of such exceptions are enumerated by Mr. Greenleaf, and in the course of that enumeration he says: "Neither is the rule infringed by the admission of oral evidence to prove a *new and distinct agreement* upon a new consideration, whether it be as a substitute for the old or in addition to and beyond it; and if subsequent and involving the same subject-matter it is immaterial whether the new agreement be entirely oral or whether it refers to and partially or totally adopts the provisions of the written contract, provided the old agreement be rescinded and abandoned."*

* 1 Greenleaf on Evidence, 12th edition, § 303; 2 Taylor on Evidence, 6th edition, § 1044; Goss *v.* Nugent, 5 Barnewall & Adolphus, 65; Nelson

Sufficient appears in the very nature of the new arrangement to show that the promise of the United States was made upon a good and valid consideration, as nothing is better settled than the rule that if there is a benefit to the defendant and a loss to the plaintiff consequent upon and directly resulting from the defendant's promise in behalf of the plaintiff, there is a sufficient consideration moving from the plaintiff to enable the latter to maintain an action upon the promise to recover compensation.*

Other authorities state the rule much stronger, authorizing the conclusion that benefit to the party by whom the promise is made, or to a third person at his instance, or damage sustained at the instance of the party promising by the party in whose favor the promise is made is sufficient to constitute a good and valuable consideration for the support of an action of assumpsit.†

Modern authorities supporting the proposition that parol evidence is admissible to prove such a new agreement, under the circumstances disclosed in this case, are very numerous and are quite sufficient to show that the proposition may be regarded as an established rule of decision.‡

Apply that rule to the case and it is quite clear that the whole amount claimed by the plaintiff was due to the deceased claimant at the time his accounts were adjusted by the accounting officers of the treasury in addition to the amount claimed by the United States in set-off for balance due from him as commissary of subsistence. Well-founded doubt upon that subject cannot be entertained, as it satisfactorily appears that in order to reduce his claim to an amount not exceeding the claim of the United States, those

v. Boynton, 3 Metcalf, 400; Leonard *v.* Vredenburgh, 8 Johnson, 39; Marshall *v.* Lynn, 6 Meeson & Welsby, 109; Stead *v.* Dawber, 10 Adolphus & Ellis, 57; Stowell *v.* Robinson, 3 Bingham's New Cases, 927.

* 1 Parsons on Contracts, 6th edition, 431.

† Violett *v.* Stettinius, 5 Cranch, 150; Chitty on Contracts, 28; Townsley *v.* Sumrall, 2 Peters, 182.

‡ Cummings *v.* Arnold, 3 Metcalf, 489; Bank *v.* Woodward, 5 New Hampshire, 99; Blood *v.* Goodrich, 9 Wendell, 75; Lindley *v.* Lacey, 17 Common Bench, New Series, 584.

officers found it necessary to deduct from the aggregate estimate of the value of the rations furnished under the parol agreement, an amount exactly equal to the balance found due to the claimant by the subordinate court from whose judgment the appeal is prosecuted in this case.

Nothing was paid to the claimant under that private act except what was allowed to the claimant for services and expenses in furnishing transportation and rations for the use of Indians and indigent citizens. He was discharged from arrest and the balance due from him to the United States for the moneys in his hands as commissary of subsistence was also discharged, but nothing was paid to him for the large balance now found to be due by the court below. Argument to show that such a settlement is not a bar to the residue of the claim is unnecessary, as the proposition is utterly destitute of merit and repugnant to the plainest dictates both of law and justice.

2. Opposed to that is the suggestion, in behalf of the United States, that the act of Congress was in the nature of an offer of compromise, and that the acceptance of the adjustment is a bar to the claim.

Support to that proposition is attempted to be drawn from the decision of this court in the case of *Mason* v. *United States*,* but the court here is very clearly of the opinion that the case cited affords no countenance whatever to any such conclusion. Muskets were wanted by the United States in that case, and it appears that the plaintiff in that controversy contracted to manufacture and deliver at a specified time large quantities of such arms at the price specified in the contract. Arms of the kind were delivered and paid for, and the plaintiff was notified by order of the Secretary of War that a larger quantity would be received. Preparations were accordingly made by the plaintiff to fill the second order, but the Secretary of War subsequently appointed a special commission to audit and adjust all such orders and claims. They reported that the contract should be con-

* 17 Wallace, 70.

firmed to a certain extent upon the condition that the contractor should, within fifteen days after notice of their decision, execute a bond, with good and sufficient sureties, for the performance of the modified contract, and the case shows that he executed the modified contract and gave the required bond. By that contract he engaged to manufacture thirty thousand muskets, and the finding of the subordinate court showed that the contract was fulfilled by both parties.

What the court decided in that case was that the claimant voluntarily accepted the modification of the contract as suggested by the commissioners and that he executed the new contract in the place of the one superseded, which new contract he must have understood was intended to define the obligations of all concerned. Beyond all doubt the new contract in that case was substituted for the old one, and the court held that no party, after accepting such a compromise and executing such a discharge, could be justified in claiming damages for a breach of the prior contract which had been voluntarily modified and surrendered.

Other cases to the same effect have been decided by this court.* None of those cases, however, proceed upon the ground that such a commission possesses any judicial power to bind the parties by their decision or to give the decision any conclusive effect. Claimants in such cases may appear before the commission or not, as they choose, but the decision is, if they do appear and accept the terms awarded as a final settlement of the controversy, without protest, they must be understood as having precluded themselves from further claim and litigation.

Where a party accepts the amount awarded in such a case it is just to conclude that he acquiesces in the decision of the tribunal by which a part of the claim is rejected as well as in the finding in his favor, but the accounting officers in this case were forbidden by law to allow the claimant anything beyond the amount in his hands as commissary of subsistence, and they obeyed the directions given in the act

* United States *v.* Child, 12 Wallace, 232; United States *v.* Justice, 14 Id. 535.

of Congress. Manifestly the claimant had no option upon the subject, and in the opinion of the court it would be an unreasonable construction of the act of Congress to suppose that its framers intended that the claimant should relinquish the large balance found to be due him in consideration of his discharge from arrest and the discontinuance of the suit against him for the recovery of the amount due from him to the United States.

Certain cases from the State reports are referred to which it is supposed assert a different rule, but the court here is of a different opinion.*

Suffice it to say that in the case before the court no appropriation whatever was made in favor of the claimant. Where the claim is disputed and an appropriation is made in favor of the claimant for an amount less than the amount claimed, and appropriation purports to be in full payment of the demand, the rule may be different, but it is sufficient to say in response to those authorities that nothing was appropriated in this case, and the accounting officers of the treasury were forbidden to allow anything beyond what was involved in the pending suit against the claimant.

JUDGMENT REVERSED, and the cause remanded with instructions to render JUDGMENT IN FAVOR OF THE PETITIONER for $131,508.90, the amount found to be due him in the findings of the Court of Claims.

Mr. Justice BRADLEY, with whom concurred Justices SWAYNE, DAVIS, and HUNT, dissenting:

I dissent from the judgment of the court in this case. In my view the case was decided and settled more than fifty years ago. The claim cannot be established without opening that settlement, and declaring that a valid contract was made which had been decided not to be a valid contract, but only a mere claim for some equitable allowance which was in fact made and accepted at that time.

* Sholes *v.* State, 2 Chandler, 182; Baxter *v.* State, 9 Wisconsin, 44; Calkins *v.* State, 13 Id. 389.

Piatt, the original claimant, was an army contractor in the Northwest during the war of 1812. Becoming embarrassed by not receiving funds from the government, and from the great rise in the prices of provisions, he threatened to throw up his contract; but, the allegation is, that at the request of Mr. Monroe, then acting Secretary of War, and upon his assurances that he should not be the loser, he went on, and furnished supplies to a large amount. For these supplies he claimed a large allowance beyond the amount stipulated in his contract. The petition, after alleging that the officers of the treasury, feeling themselves bound only by what appeared of record in the department, allowed to Piatt, in the settlement of his account for rations furnished after the first day of January, 1815, no more than the original contract price per ration, states further that Piatt then brought his claim before the Secretary of War, Mr. Crawford, who would have settled it on the principles for which Piatt then contended, "but that, by reason of what he considered countervailing evidence, he had doubts whether such assurances had ever been given."

Thus it is seen that there were two sides to the question at that early day, when all the events were fresh, and when Mr. Monroe was living at the seat of government, and accessible at any moment.

In 1820, Piatt was arrested for $48,230.77, the balance found due to the government in his accounts, as ascertained by the settlement at the department. He then brought his claim before Congress, and the Judiciary Committee of the Senate reported adversely thereto. But on the 8th of May an act was passed for his relief.*

Thereupon his accounts were restated under the provisions of the act; and the officers of the department, after allowing him the sum of $63,620.48 for provisions furnished to friendly Indians and to distressed settlers of Michigan (which was entirely outside of his contract, and was afterwards paid in full), allowed him a credit on the footing of

* See it set out, *supra*, p. 499.—REP.

the assurances of Mr. Monroe for $48,230.77, the full amount of the claim for which he had been arrested. He was thereupon discharged from custody on the 25th of July, 1820, and died in February, 1822. The present claim is prosecuted by his representatives.

Upon these facts it seems difficult to resist the conviction that, in the contemplation of both parties (Piatt and the government), this case was then and there forever ended and determined. Between individuals it must necessarily have been so. Had such a disputed and doubtful claim been held by one man against another, and left to arbitration, subject to the condition that no sum should be awarded beyond a certain amount, and had that amount been awarded and accepted, can there be a doubt that the award would have been binding and conclusive? I think not.

The present case is stronger. Congress proposed to allow Piatt a settlement of his claim by the Treasury Department, in which due weight and consideration should be given to the assurances in question, provided that the sum allowed under them should not exceed the amount claimed by the United States against him, and for which suit had been commenced. He accepted the law, had the benefit of the settlement, and was allowed under the assurances the amount named, which justly cancelled the debt for which he was sued and arrested by the government. Thereupon he was discharged. The declaration of Congress thus made binding by the acts of the party that nothing should be allowed against the government on that claim beyond a certain amount named, was equivalent to a solemn adjudication. It amounted to a declaration of the government that it would not suffer itself to be pursued or molested for a greater sum. Can it now be contended that the act of 1855 constituting the Court of Claims, and allowing suits to be brought against the government on contracts made with it, has opened this adjudication—this settlement and determination of the case? In my judgment, certainly not. The act constituting the Court of Claims was not intended to disturb past adjudica-

tions and settlements, and to open afresh claims that had been disposed of. The Court of Claims had no right to go behind the final settlement, and attempt to establish the original facts of the case. Its findings of fact, in this respect, were illegal and void. The government has never consented to be sued on this claim, or on any claims similarly situated.

The conclusion of law to which the court came, I think, was correct, and the decree should be affirmed.

ROBINSON ET AL. *v.* ELLIOTT.

1. Under the Statute of Frauds in Indiana, which enacts in

> "SECTION 10. That no assignment of goods by way of mortgage shall be valid against any other person than the parties thereto, when such goods are not delivered to the mortgagee, or assignee, and retained by him, unless such assignment or mortgage shall be duly recorded—"

And in

> "SECTION 21. That the question of fraudulent intent in all cases shall be deemed a question of fact—"

A mortgagor of chattels personal may, if the transaction be fair and the mortgage made by him be duly recorded, retain possession of personal chattels.

2. But the effect of the statute is not to make every recorded mortgage, which prior to the statute would have been held fraudulent in law, *primâ facie* valid.

3. The recording of the mortgage contemplated by the statute was meant as a substitute for possession, but was not meant to protect a mortgage from all illegal stipulations contained in it.

4. Hence, where a trading firm in a city in Illinois owing money evidenced by a series of notes, coming due from time to time for some months in advance, made a mortgage of their stock of goods, the mortgage containing this clause:

> "And it is hereby expressly agreed, that until default shall be made in the payment of some one of said notes, or some paper in renewal thereof, the parties of the first part may remain in possession of said goods, wares, and merchandise, and may sell the same as heretofore, and supply their places with other goods, and the goods substituted by purchase for those sold shall, upon being put into said store, or any other store in said city where the same may be put for sale by said parties of the first part, be subjected to the lien of this mortgage—"

Statement of the case.

The instrument then concluding with powers to the mortgagee, upon any default, to have the right to enter into said store of the firm and take possession of a sufficient amount of goods to satisfy, pay, and discharge all the paper due, and have full power and authority, upon ten days' public notice, to sell at public auction such amounts of said goods as should be necessary to pay said paper; *Held*—

1. That the court was the proper party to say whether on its face the mortgage was void.
2. That it was so void.

APPEAL from the Circuit Court for the District of Indiana; the case, as appeared by bill and demurrer, being thus:

On the 7th of July, 1871, John and Seth Coolidge, brothers, were partners in the retail dry goods trade in Evansville, Indiana, having been thus in business there since the year 1863. On the day just named they owed to a Mrs. Sloan $3174, for money previously borrowed of her to aid them in their business.

They also owed the First National Bank of Evansville $7600, evidenced by seven promissory notes of the firm—all maturing between the 25th of July and the 6th of October of the year 1871—on which one Robinson was then an accommodation indorser; and to secure to Mrs. Sloan the payment of what was due to her and to indemnify Robinson as indorser, they made to them a chattel mortgage upon their stock of goods then in their rented store, including also the furniture and fixtures connected with the same.

The mortgage, after reciting the liability of the firm to Robinson, on the notes indorsed by him, stated that it was contemplated, that in order to take up the notes, or some of them, it might become necessary to renew the same, or to discount other notes. The recital of the indebtedness to Mrs. Sloan, by note at four months, with interest, was also made with the statement that, if not convenient to the firm to pay it at maturity, it might be renewed from time to time, as the parties should agree.

After these recitals, and that of the mutual understanding of the parties concerning the continuance of the debts, the property was conveyed; the mortgage proceeding thus:

Statement of the case.

"And it is hereby expressly agreed that until default shall be made in the payment of some one of said notes, or some paper in renewal thereof, the parties of the first part may remain in possession of said goods, wares, and merchandise, *and may sell the same as heretofore and supply their places with other goods, and the goods substituted by purchase for those sold shall, upon being put into said store or any other store in said city where the same may be put for sale by said parties of the first part, be subjected to the lien of this mortgage.*"

The instrument concluded with separate powers to the mortgagees, Robinson and Mrs. Sloan, on default in payment of their respective claims, to seize and sell sufficient goods to satisfy the same.

All the debts owing by the firm at the date of the mortgage, other than those secured by it, have been paid, except $3500 due to one Alfred Coolidge, father of the two partners Coolidge, for borrowed money.

The mortgagors remained in possession of the property, and bought and sold as they had been accustomed to do, from the date of the mortgage, to August 7th, 1873, when Seth Coolidge, one of the partners, died. During this interval of twenty-five months the interest and less than $100 of the principal of Mrs. Sloan's debt was paid, and the interest and about one-third of the principal of the bank debt. The note of Mrs. Sloan's was not renewed, but was overdue about twenty-one months. Robinson continued to indorse for the firm. Immediately after the death of Seth Coolidge the property of the firm, consisting of the old stock, goods subsequently purchased, and debts due the firm, was inventoried and appraised, and found to be very little in excess of the debts owing by the firm. This inventory and appraisement was completed on September 15th, and on the following day Robinson and Mrs. Sloan seized the goods and were about to sell them. However, on the 26th of September and before the ten days required by the terms of the mortgage for notice of sale had expired, proceedings in bankruptcy were begun against the surviving partner, Seth Coolidge, and an injunction was got to stay any sale.

Argument in support of the mortgagees.

Coolidge having been decreed a bankrupt, one Elliott, on the 15th of November, 1873, was appointed his assignee, and demanded the goods from Robinson and Mrs. Sloan. They refused to deliver them to him. Hereupon Robinson and Mrs. Sloan filed a bill against Elliott, setting forth the facts as above given, and praying that an account might be taken of what was due to them, and that the goods might be sold to pay it. Elliott, the assignee, demurred, and the court below sustained the demurrer, and rendered a decree dismissing the bill. Robinson and Mrs. Sloan then brought the case here.

The Statute of Frauds* of Indiana makes the following provisions:

"SECTION 10. No assignment of goods by way of mortgage shall be valid against any other person than the parties thereto, when such goods are not delivered to the mortgagee or assignee, and retained by him, unless such assignment or mortgage shall be acknowledged, as provided in cases of deeds of conveyance, and recorded in the recorder's office of the county where the mortgagor resides, within ten days after the execution thereof.

"SECTION 21. The question of fraudulent intent in all cases arising under the provisions of this act, shall be deemed a question of fact, nor shall any conveyance or charge be adjudged fraudulent as against creditors or purchasers solely upon the ground that it was not founded on a valuable consideration."

Messrs. A. Inglehart and A. L. Robinson, for the appellants:

It is manifest from the tenth and twenty-first sections of the Statute of Frauds of Indiana, that the legislature of that State, while intending to guard against frauds, intended also to permit the use of personal property by way of chattel mortgages as a security for the payment of debts, in the same manner that real estate is used for that purpose, and that questions of fraud, which might arise under the law, should be questions of *fact* and not of *law*.

Previous to the enactment of this statute of registration, it was necessary to the validity of chattel mortgages that

* 1 G. & H. R. 351.

there should be a manual delivery of the mortgaged property to the mortgagee, who should continue to hold the same in his possession, but under this statute the record of the mortgage is substituted for such delivery, and is full and complete notice to all the world of the rights and interests of the parties.*

The questions which present themselves in this case have not, it is true, been fully and clearly determined by the Supreme Court of Indiana. But we submit that the decisions which *have* been made are all in our favor, and settle these propositions:

1. Where the mortgage has been duly recorded in time, the same is *primâ facie* valid.

2. Where the mortgage is recorded and contains such a provision as the one in the mortgage here, it is still *primâ facie* valid, and the question of fraud is a question for the jury. In other words, that there is no such thing recognized in our courts in this class of cases as fraud *per se*.

3. Where a mortgage is made in terms to include after-acquired property, the mortgage will attach to the property when it is acquired, and will operate as a lien upon it in equity.

The case of *Maple* v. *Burnside*† would, indeed, seem to have decided the question under consideration. The main question before the court was, whether Maple, the attachment defendant, had sold, conveyed, or otherwise disposed of his property with the intent to cheat, hinder, or delay any of his creditors. The fact of fraud relied on was the making of a chattel mortgage, permitting the mortgagor to remain in possession of the goods, and deal with them as his own.

The court below, among others, gave the following instruction:

"If, after the mortgage was given, the defendant remained in possession of the property mortgaged, after the time named in

* Wright *v.* Bundy, 11 Indiana, 398; Duke *v.* Strickland, 43 Id. 494.

† 22 Indiana, 139; and see Chissom *v.* Hawkins, 11 Id. 316; Coe *v.* McBrown, 22 Id. 252.

it, using and trading with the property as the owner, it is a fraud, and you must find for the plaintiff."

In delivering the opinion of the court, Hanna, J., says:

"It appears to us this instruction was calculated to confuse and mislead the jury to the prejudice of the defendant. . . . If it was intended to say that the defendant could not hold possession after the date of the mortgage, it is certainly erroneous. If some other point of time was intended to be indicated at which the possession of the defendant should cease to be rightful, it should have been more specific, especially in view of the fact that the date when the debts secured by the mortgage were to become due is not stated particularly, and the right to retain said possession was to remain in the mortgagor until the maturity and failure to pay said debts."

The case was reversed for the error contained in the instruction given.

It must be admitted that this opinion of the Supreme Court, in which the judge undertakes to state the case, is wanting in perspicuity in the statement of the facts. But the record clearly shows that the validity of the mortgage was in question; and that the Circuit Court had assumed in its instruction, just as the circuit judge has decided here, that if the mortgagor after the mortgage was executed, kept possession of the goods and sold and dealt with them as his own, the mortgage would be fraudulent and void.

If we are right as to what is the law in Indiana on this question, and if the validity of the mortgage is to be settled, as of course it is to be, by that law, we may rest the argument here. As for the authority of cases decided in other States of the Union that the mortgage is invalid, it is enough to say that the opinion of the Supreme Court of Maine,* the Supreme Court of Massachusetts, with Shaw as its chief,† the Supreme Court of Michigan, with Cooley as its chief,‡ the Supreme Court of Iowa, with Dillon as its chief,§

* Abbott *v.* Goodwin, 20 Maine.

† Macomber *v.* Parker, 14 Pickering, 497.

‡ Oliver *v.* Eaton, 7 Michigan, 108; Gray *v.* Bidwell, Ib. 520.

§ Torbert *v.* Hayden, 11 Iowa, 435; Hughes *v.* Cory, 20 Id. 399.

the Circuit Court of the United States for the first circuit, Story, J., presiding;* and the Supreme Court of Indiana, the State where, and under whose statutes the question arises, are arrayed against the vacillating and unsatisfactory rulings of New York, rendered under peculiar constructions of their statutes, against the cases in Illinois, under their very peculiar statutes, and the cases in Ohio, and perhaps Wisconsin and Missouri, following the same line of argument.

Mr. W. E. Niblack, contra, contended—

That no question about the respective domains of law and fact could arise in this case; the proceeding being by bill in chancery, and the case being made by a demurrer to it.

That while in *Maple* v. *Burnside*, relied on by the other side, the case was so confusedly stated, that it was difficult to say exactly what it was, there was nothing in the report to show that the mortgage contained any provision permitting the mortgagee to remain in possession and deal with the goods, and that the judgment established no right in a mortgagor of chattels even in Illinois to do so.

That the tenth section of the statute of Indiana did not change this rule of the common law, and that the argument of the plaintiff in error went to the extent of allowing the enactment, that a mortgage of chattels, where possession did not accompany the title, should nevertheless be valid when *recorded*, to set up as valid every fraudulent device which under the aspect of a mortgage might be put on record in pursuance of the statute.

That from the case of *Grantham* v. *Hawley*, decided so far back as the time of Hobart,† it had been settled that a mortgage was void as to after-acquired property except where the mortgagor had a present actual interest in it or concerning it; that there must be something *in præsenti* of which the thing *in futuro* was to be the product, or with which it was to be connected as necessary for its use, or as incident to it,

* Mitchell *v.* Winslow, 2 Story, 630.

† Hobart, 132*.

constituting a tangible, existing basis for the contract. The future property must be an accretion to the property already owned by the mortgagor, either by adding the future to the present, or by growth. Thus, to take Hobart's illustration, that while one might mortgage all the wool which should grow for a term of years on any number of sheep *owned by him* at the time, he could not mortgage the wool to be grown on any sheep at all *if he did not own them;* a position for the principle of which the counsel cited cases from nearly every State in the Union.

And in short, that although the question might appear, to some extent, an open one in Indiana, a reference to the notes, English and American, upon Twyne's case in Smith's Leading Cases,* would show that the judicial mind of both England and the United States had ascertained and fixed the rule that after-acquired chattels were not subject to lien by way of mortgage; that this rule was moreover a wise one, since to sanction a contrary rule and so to give effect to transactions like the one under consideration, would open a door to frauds innumerable and of the most extensive sort.

Mr. Justice DAVIS delivered the opinion of the court.

There are few subjects which have been more discussed in the courts of this country, with less uniformity of decision, than that of sales and mortgages of personal goods, without delivery of possession. In Indiana the statute of 13th Elizabeth has been adopted, and two provisions applicable to this case engrafted on it. The first declares that "no assignment of goods by way of mortgage shall be valid against any other person than the parties thereto, when such goods are not delivered to the mortgagee, or assignee, and retained by him, unless such assignment or mortgage" shall be duly recorded. And the second says, "that the question of fraudulent intent in all cases shall be deemed a question of fact."

Prior to the incorporation of these provisions in the statute it was necessary to the validity of chattel mortgages in

* Seventh American edition, vol. 1, p. 7.

Indiana that there should be a manual delivery of the mortgaged property to the mortgagee, who should continue to hold the same in his possession. These provisions changed the law in this particular, and permitted the retention of the possession of personal property by the mortgagor in a chattel mortgage given as a security for the payment of debts. And there can be no question that in Indiana a mortgage, which simply allows the mortgagor to retain the possession and use of the property until breach of the condition is, when duly recorded, *primâ facie* valid. But it is insisted that the effect of these provisions is also to make a mortgage of a stock of goods, containing a provision authorizing the mortgagor to retain possession for the purpose of selling in the usual course of trade, *primâ facie* valid, and that the court cannot, as a matter of law, pronounce it fraudulent. This, we think, is going beyond what the legislature intended. If registration was intended, as we think it was, as a substitute for delivery of possession, it was not meant to be a protection for all the other stipulations contained in a mortgage. If so, it could be used as a cover for any fraudulent transaction, which would have to be treated, on the theory advanced, as valid, until the contrary was shown.

It is true the law conferred on the parties the right to agree that the possession of the property could remain with the mortgagor, provided the mortgage be recorded; but if the mortgage contains other provisions, which, on legal principles, vitiates the whole instrument, it is difficult to see how recording it could make it even *primâ facie* valid. The Bill of Sales Registration Act in England makes void all bills of sale not filed as required, if unaccompanied by possession. An eminent writer in speaking of this act says: "Of course the mere fact of due registration of a bill of sale, under this act, does not necessarily make it good against creditors. The act was not passed with a view of making good a title which was not good before, but for the protection of creditors."* And to the same effect is *Wood* v. *Lowry*.†

* May on Fraudulent Conveyances, p. 120. † 17 Wendell, 495–6.

It is argued, however, that there can be no such thing in this class of cases as constructive fraud, because under the statute the question of fraudulent intent is one of fact. But the Supreme Court of Indiana has decided the question differently. The statute of that State for the prevention of frauds embraces twenty-two sections. The tenth relates to the registration of chattel mortgages; the seventeenth enacts that every assignment, &c., of any estate in lands, or of goods, made with intent to hinder, delay, or defraud creditors, shall be void; and the twenty-first declares that the question of fraudulent intent, in all cases arising under the provisions of this act, shall be deemed a question of fact. It will thus be seen that the last section applies to conveyances of land as well as to assignments of goods by way of mortgage. In *Jenners and others* v. *Doe on the demise of Pomeroy and others*,* the question was whether a deed of trust on certain lands was void as to creditors who did not consent to it. The court of original jurisdiction held the deed void upon its face as a question of law. It was contended that this ruling was erroneous, and that in all cases the instrument must be referred to the jury in connection with the facts. But the Supreme Court held the ruling to be correct. They say that the provisions embraced in the seventeenth and twenty-first sections of the statute have declared, not changed, the law on the subject; that the court must, in the first instance, determine upon the legal effect of a written instrument, and if that be to delay creditors it is rejected. If, however, on its face it conforms to the law, it is received in evidence, and the question of the intent with which it was executed is an open one for the jury. It would seem to be the view of the court in this case, as well as in the preceding one in the same volume, of *Nutter* v. *Harris*, that the twenty-first section applies to cases of actual or meditated and intentional fraud, and is not applicable to written instruments which the law adjudges to be fraudulent on their face and consequently void.

There is, therefore, nothing in the way of the considera-

* 9 Indiana, 461.

tion of the main question involved in this controversy on its merits.

If chattel mortgages were formerly, in most of the States, treated as invalid unless actual possession was surrendered to the mortgagee, it is not so now, for modern legislation has, as a general thing (the cases to the contrary being exceptional) conceded the right to the mortgagor to retain possession, if the transaction is on good consideration and *bonâ fide*. This concession is in obedience to the wants of trade, which deem it beneficial to the community that the owners of personal property should be able to make *bonâ fide* mortgages of it, to secure creditors, without any actual change of possession.

But the creditor must take care in making his contract that it does not contain provisions of no advantage to him, but which benefit the debtor, and were designed to do so, and are injurious to other creditors. The law will not sanction a proceeding of this kind. It will not allow the creditor to make use of his debt for any other purpose than his own indemnity. If he goes beyond this, and puts into the contract stipulations which have the effect to shield the property of his debtor, so that creditors are delayed in the collection of their debts, a court of equity will not lend its aid to enforce the contract. These principles are not disputed, but the courts of the country are not agreed in their application to mortgages, with somewhat analogous provisions to the one under consideration. The cases cannot be reconciled, by any process of reasoning, or on any principle of law. As the question has never before been presented to this court, we are at liberty to adopt that rule on the subject which seems to us the safest and wisest. It is not difficult to see that the mere retention and use of personal property until default is altogether a different thing from the retention of possession accompanied with a power to dispose of it for the benefit of the mortgagor alone. The former is permitted by the laws of Indiana, is consistent with the idea of security, and may be for the accommodation of the mortgagee; but the latter is inconsistent with the nature and

character of a mortgage, is no protection to the mortgagee, and of itself furnishes a pretty effectual shield to a dishonest debtor. We are not prepared to say that a mortgage under the Indiana statute would not be sustained which allows a stock of goods to be retained by the mortgagor, and sold by him at retail for the express purpose of applying the proceeds to the payment of the mortgage debt. Indeed, it would seem that such an arrangement, if honestly carried out, would be for the mutual advantage of the mortgagee and the unpreferred creditors. But there are features engrafted on this mortgage which are not only to the prejudice of creditors, but which show that other considerations than the security of the mortgagees, or their accommodation even, entered into the contract. Both the possession and right of disposition remain with the mortgagors. They are to deal with the property as their own, sell it at retail, and use the money thus obtained to replenish their stock. There is no covenant to account with the mortgagees, nor any recognition that the property is sold for their benefit. Instead of the mortgage being directed solely to the *bonâ fide* security of the debts then existing, and their payment at maturity, it is based on the idea that they may be indefinitely prolonged. As long as the bank paper could be renewed, Robinson consented to be bound, and in Mrs. Sloan's case it was not expected that the debt would be paid at maturity, but that it would be renewed from time to time, as the parties might agree. It is very clear that the instrument was executed on the theory that the business could be carried on as formerly by the continued indorsement of Robinson, and that Mrs. Sloan was indifferent about prompt payment. The correctness of this theory is proved by the subsequent conduct of the parties, for the mortgagees remained in possession of the property, and bought and sold and traded in the manner of retail dry-goods merchants, from July 7th, 1871, to August 7th, 1873. During this period of twenty-five months Robinson indorsed as usual, and Mrs. Sloan was content with the payment of a small portion of the principal of her debt. Instead of getting it

renewed, as contemplated by the mortgage, she seems to have been willing to let it remain dishonored, and the fair inference from the averments of the bill is that Robinson would have continued to indorse, and Mrs. Sloan exhibit the same easy indifference on the subject of her indebtedness, if the death of Seth Coolidge had not dissolved the firm and compelled an inventory and appraisement, showing the desperate condition of the mortgagors. It hardly need be said that a mortgage which, by its very terms, authorizes the parties to accomplish such objects is, to say the least of it, constructively fraudulent.

Manifestly it was executed to enable the mortgagors to continue their business and appear to the world as the absolute owners of the goods, and enjoy all the advantages resulting therefrom. It is idle to say that a resort to the record would have shown the existence of the mortgage, for men get credit by what they apparently own and possess, and this ownership and possession had existed without interruption for ten years. There was nothing to put creditors on their guard. On the contrary, this long-continued possession and apparent ownership were well calculated to create confidence and disarm suspicion. But apart from this, security was not the leading object. If so, why does Mrs. Sloan's note remain overdue for twenty-one months, and why does Robinson continue to indorse? This conduct is the result of trust and confidence, which, as Lord Coke tells us, are ever found to constitute the apparel and cover of fraud.

In truth, the mortgage, if it can be so called, is but an expression of confidence, for there can be no real security where there is no certain lien.

Whatever may have been the motive which actuated the parties to this instrument, it is manifest that the necessary result of what they did do was to allow the mortgagors, under cover of the mortgage, to sell the goods as their own, and appropriate the proceeds to their own purposes; and this, too, for an indefinite length of time. A mortgage which, in its very terms, contemplates such results, besides

being no security to the mortgagees, operates in the most effectual manner to ward off other creditors; and where the instrument on its face shows that the legal effect of it is to delay creditors, the law imputes to it a fraudulent purpose. The views we have taken of this case harmonize with the English common-law doctrine, and are sustained by a number of American decisions. In the American editor's note to Twyne's case,* most of the cases in this country on the subject are collected and classified.†

It is contended by the appellants that the rulings of the Indiana courts are in favor of the validity of this mortgage, and the main case relied on to support this position is *Maple* v. *Burnside.* The facts of this case are stated in the opinion of the court in a way to render it difficult for any practitioner outside of the State to understand the application to them of the legal rules which are discussed, but there is nothing to show that the mortgage there considered contained any provision permitting the mortgagor to remain in possession of the property and deal with it as his own, nor does the judgment of the court involve any such question. The case would seem to be chiefly valuable as an authoritative exposition of certain points of nisi prius practice. Although we have been unable to find any case from Indiana of similar facts with the one at bar, yet the decision in the *New Albany Insurance Company* v. *Wilcoxson*,‡ would seem to imply that when such a case did arise it would be decided in accordance with the views we have presented. The point ruled in that case is, that if a mortgage is executed merely to protect property in the hands of the mortgagor from his creditors other than the mortgagee, the mortgagor retaining possession and the right of disposition, and these facts appear upon the face of the mortgage, it would be fraudulent and void as against other creditors, and should be so declared by the court. And the court, to sustain this proposition,

* In Smith's Leading Cases, vol. i, p. 52, 7th American edition.

† See, also, Mittnacht *v.* Kelly, 3 Keyes, 407; Yates *v.* Olmsted, 65 Barbour, 43; Barnet *v.* Fergus, 51 Illinois, 352; Re Manly, 2 Bond, 261; Re Kahley, 2 Bissell, 383.

‡ 21 Indiana, 355.

refer to *Freeman* v. *Rawson*,* a standard authority in this class of cases, for the views we have advanced on this subject.

Finally, it is insisted if the mortgage is held void in law, still the delivery of the goods in pledge vests a sufficient lien, *primâ facie*, to enable the appellants to enforce their lien in equity.

The answer to this is, that the case made by the bill does not proceed upon such a delivery at all, but upon the mortgage and seizure under it. Besides, if the appellants could turn the proceeding into a voluntary pledge by the debtors, it would not help them, for it would violate the preference clause of the Bankrupt Act, as they got the goods only twelve days before the petition in bankruptcy was filed.

DECREE AFFIRMED.

TUCKER *v.* FERGUSON ET AL.

1. Congress, by act of 1857, granted public lands to a State, to be "held" by it, to aid in the construction of a railroad through the State, the road, when made, to be and remain a public highway for the use of the government of the United States, free from toll or other charges upon the transportation of property or troops of the United States; the government to have a right also to carry the mails thereon.

The lands were to be exclusively applied in the construction of the road, disposed of only as the work progressed, and applied to no other purpose whatsoever. The act prescribed that the mode of disposition should be by sale made from time to time as the road advanced.

The State, by act of its legislature, accepted the lands "with the restrictions and upon the terms and conditions contained in the said act of Congress," and by the same act, in which the acceptance was made, vested in a then recently organized railroad company the lands "fully and completely, according to the act of Congress relating thereto and the direction of the board of control" of the State (a body appointed by its governor and Senate), and "*whose* duty" it was made by the act "to manage and dispose of the lands" in aid of the construction; the company being made, moreover, subject to such rules and regulations as the legislature of the State might from time to time enact and pro-

* 5 Ohio State, 1.

Statement of the case.

vide in regard to the management and disposition of the lands, not inconsistent with the act of Congress, &c.

The company not being able to *sell* the lands (then a wilderness) in the manner contemplated by Congress, before the road was made through them, issued its bonds and mortgaged the lands to trustees, the mortgages containing a clause empowering the trustees to sell the mortgaged lands and apply the proceeds to the payment of the bonds.

The road was completed by aid of the money for which the bonds were sold, and a certain number (a small proportion) of the bonds were taken up and cancelled by the trustees from the proceeds of the land sold for the purpose of doing this.

Before the residue of the bonds were paid, and while the bulk of the lands were yet unsold in the hands of the trustees, the State taxed them.

Held, upon this part of the case, that the lands had been "sold" within the meaning of the act of Congress; and that though the State while she held the title as trustee of the United States could not tax them, she now could do so.

2. A statute after laying a certain tax *on a "railroad company"*—a specific annual tax of one per cent. on the cost of the road—and reserving a right to impose a further tax upon gross earnings, enacted that "the above several taxes shall be in lieu of all other taxes to be imposed within the State."

Held, that the statute imposed a tax in reference to the railroad itself, and had no relation to lands owned by the company and not used nor necessary in working the road, and in the exercise of its franchise, but which it had mortgaged and was holding for sale, even though the chief purpose of the sale was to pay the mortgage debt, a heavy one, and one which had been contracted for the exclusive purpose of building the road. And that these lands might be taxed notwithstanding the above-mentioned agreement.

3. An act of the legislature exempting property of a railroad from taxation is not a "contract" to exempt it, unless there be a consideration for the act. An agreement where there is no consideration is a nude pact; the promise of a gratuity spontaneously made, which may be kept, changed, or recalled at pleasure: and this rule of law applies to the agreements of States made without consideration as well as to those of persons.

4. No presumption exists in favor of a contract by a State to exempt lands from taxation. Every reasonable doubt should be resolved against it.

5 When such a contract exists it must be rigidly scrutinized and never permitted to extend, either in scope or duration, beyond what the terms of the concession clearly require.

APPEAL from the Circuit Court for the Western District of Michigan.

The Flint and Père Marquette Railway Company was a railway corporation of Michigan, and the present suit was

a bill in equity brought by Tucker et al., trustees for the holders of bonds issued by the said company, which bonds were secured by a mortgage and deed of trust executed by the company to them, the said Tucker et al., as trustees, upon lands granted by Congress to the State of Michigan, and by that State granted, in a qualified way, to the company to aid in constructing a road which it was about to make; the object of the bill having been to restrain one Ferguson et al., who were supervisors and assessing officers of Osceola County, Michigan, from levying and collecting local taxes upon the said lands situate in the said county.

The general purpose of the bill was to restrain the assessment of taxes at any time on the lands granted by Congress, during the term allowed for the completion of the road. But if the court should think there was no ground for so general a restraint, then to restrain the collection of taxes which had been already assessed on the lands for the year 1873; the bill alleging that in no event were they taxable prior to April 1st, 1874.

The case, more particularly stated, was thus:

On the 3d of June, 1856,* Congress granted to the State of Michigan, to aid in the construction of certain proposed railroads, including one from Flint, in the southeasterly part of the State, to Père Marquette, on Lake Michigan, in the northwestern part—a distance of about one hundred and seventy miles, much of the western part of which especially was a wilderness—every alternate section of land designated by odd numbers, for six sections in width on each side of said roads, "which lands," said the act of Congress granting them, "shall be *held by the State of Michigan* for the use and purpose aforesaid." By the terms of the first section of the act the lands were to be located in no case further than fifteen miles from the lines of the road, and it was enacted that they should be "exclusively applied" in the construction of the road; "disposed of only as the

* 11 Stat. at Large, 21, § 1.

work progressed, and applied to no other purpose whatsoever."

Section third enacted that the lands thus granted to the State, should "be subject to the disposal of the legislature thereof *for the purpose aforesaid, and no other*, and that the railroads shall be and remain public highways *for the use of the government of the United States, free from toll or other charges upon the transportation of any property or troops of the United States.*"

Section fourth was in these words:

"That the lands hereby granted to said State shall be disposed of by said State *only* in manner following; that is to say, that a quantity of land not exceeding one hundred and twenty sections for each of said roads, and included within a continuous length of twenty miles of each of said roads, may be *sold;* and when the governor of said State shall certify to the Secretary of the Interior that any twenty continuous miles of any of said roads is completed, then another quantity of land hereby granted, not to exceed one hundred and twenty sections for each of said roads having twenty continuous miles completed as aforesaid, and included within a continuous length of twenty miles of each of such roads, may be *sold*, and so, *from time to time*, until said roads are completed; and *if any of said roads is not completed within ten years,* no further sales shall be made, and the lands unsold shall revert to the United States.*"

Section fifth enacted that the United States mail should be transported over the road, under the direction of the Post-Office Department, at such price as Congress might by law direct.

On the 12th of February, 1857, and, of course, after the passage of the act of Congress, the Flint and Père Marquette Company was organized under the *general* railroad law of Michigan. And two days after this, again, that is to say, on the 14th of February, 1857, the State of Michigan by an act enacted,

"That the lands, franchises, rights, powers, and privileges

* That is to say, by June 4th, 1866.—REP.

granted to, and conferred upon, the State of Michigan by an act of Congress, approved June 3d, 1856, be, and the same are hereby, *accepted*, with the *restrictions and upon the terms and conditions* contained in said act of Congress."

The act proceeded in substance thus:

"SECTION 2. So much of the aforesaid lands, &c., as are or may be granted and conferred in pursuance of said act of Congress, to aid in the construction of a railroad, . . . from Flint to Père Marquette, are hereby *vested fully and completely* in the Flint and Père Marquette Railway Company, *according to the provisions of the act of Congress relating thereto, and the direction of the board of control hereby appointed.* The said railroad company shall be subject to all the conditions, restrictions, and obligations imposed upon them by this act, as hereinafter provided.

"SECTION 3. The lands, &c., hereby conferred upon and vested in the railroad company, shall be exclusively applied in the construction of its line of road, and to no other purposes whatsoever."

Section seventh enacted that after the completion of twenty continuous miles of road, the company might sell sixty sections of land in any twenty continuous miles of line of road, &c.; "and after the full and final completion of the entire length of its road, and the acceptance of the same by the board of control herein provided, then the company may sell the remainder of the lands, &c., and not before." The act further enacted,

"None of the lands hereby granted shall be liable to taxation for seven years from 1st September next [*i. e.*, shall not be liable till September, 1863], except such parts as shall be sold or be improved."

The act went on:

"SECTION 8. . . . For the purpose of properly managing and disposing of the lands . . . the governor of the State of Michigan, together with six commissioners to be nominated by the governor and confirmed by the senate, are hereby constituted a board of control of the same, *whose* duty it shall be to manage and *dispose* of such lands in aid," &c.

Statement of the case.

"SECTION 12. The said railroad company shall at all times and in all matters be subject to the laws of this State, and to such rules and regulations as may from time to time be enacted and provided by the legislature of the State of Michigan, in regard to the management and *disposition* of the said lands, not inconsistent with the provisions of this act and the act of Congress making the said grant of lands to this State, and they shall be entitled to all the immunities and privileges conferred by said laws."

"*Provided*, That nothing herein contained shall be so construed as to relinquish the right of the State to any specific tax imposed upon any railroad company within this State."

The company was bound by the nineteenth section to complete and put in running order at least twenty continuous miles during each year after 1st December, 1857, and to complete the road within seven years from 15th November next, 1857, *i. e.*, by the 16th of November, 1864; a term, however, by both State legislation and act of Congress subsequently enlarged till March 3d, 1876.

At the time when the Flint and Père Marquette Railway Company was organized, all railroad companies in Michigan were liable, under a *general* railroad act (section forty-five), to a specific tax of one per cent. on their "paid in capital stock." Of course, in the case of a company like the Père Marquette, and the other companies provided for in the act of Congress,—built, all of them, chiefly by the land grant,—the tax was a light one.

The twentieth section of the present act, which raised one of the important questions in the case, now made for the Flint and Père Marquette Company, as well as for the others, a heavier tax. The section was as follows:

"SECTION 20. In consideration of the grants of land and other privileges hereby conferred . . . the said several railroad companies are hereby required, within sixty days from and after the first day of each and every year, to pay into the treasury of this State, *as a specific annual tax, one per cent. upon the cost of the road and its equipments and appurtenances of whatever kind;* and it shall be lawful for the legislature of this State, in their

discretion, after ten years, to impose upon either or each of said railroad companies the payment of a further tax upon the gross or total earnings of such road of not exceeding two per cent.; *which said above several taxes shall be in lieu of all other taxes to be imposed within this State.*"

The Flint and Père Marquette Company accepted the grant made by this act.

It may be here stated, that it was afterwards enacted by Congress that the State of Michigan might authorize the *sale* of *sixty* sections, whenever the governor might certify that *ten* additional miles was completed. The original act, it will be remembered, had prescribed a sale of one hundred and twenty sections, on a certificate of twenty miles completed, &c. This last matter is, perhaps, unimportant.

As the reader will doubtless have observed, in reading what goes before, Congress granted the lands which it did grant to the State, to be disposed of "only" in a certain manner in the act of grant stated. They were to be "sold"* from time to time, as certain lengths of the road were completed; and no other manner of disposing of them is stated in the act as contemplated. And the State of Michigan in accepting the lands, accepted them "with the restrictions and upon the terms and conditions contained in said act of Congress."† It was soon found, however, as the road progressed westward, that it was coming to regions which were uninhabited, and that the land there being in a wilderness could not be *sold* for twenty miles ahead of even a completed twenty miles of road; that is to say, could not be *sold* in advance of the construction of the road *through* them. It was the road itself which first gave value to them. Thus it happened that no money could be got out of the lands by sale in advance of a road through the twenty miles. A plan of obviating this difficulty now suggested itself. It being found that the bonds of the company (which now had a part of its road completed) could be sold, and the funds requisite to finish the rest of the road raised on such bonds,

* *Supra*, p. 530.

† *Supra*, pp. 530, 531.

provided they were secured by mortgage with power of sale in the mortgagee on the unsold lands, it was resolved to carry out an arrangement on this basis. The company did accordingly in September, 1866, by a mortgage and *trust deed containing a power of sale* and terms and conditions for the management of the trust, convey to Tucker et al. as trustees, 153,600 acres of land as security for bonds to the amount of $500,000, which bonds were issued and sold, and which were now outstanding . . . except such portions thereof as had been taken up and cancelled from the proceeds of land sold for that purpose.

Subsequently the company, desiring to raise a further sum of money to enable it to prosecute the further construction of its road, made, September, 1868, a second mortgage and trust deed, by which it mortgaged and conveyed all the remaining lands of the land grant for the purpose of securing bonds to the amount of $2,500,000, which were issued and sold upon the market.

It did not appear from anything in the transcript of the record sent here, what value the lands mortgaged bore to the amount of bonds issued.

Tucker and the other, as trustees, were to hold said lands together with other property in said trust deed mentioned, as security for such bondholders. The second mortgage and trust deed, like the first, contained a power of sale.

In this way funds were obtained and the road was in process of completion, when a difficulty occurred between the trustees and the assessors of Osceola County, which was the cause of the present suit.

This part of the matter was thus:

The reader will remember that by the twentieth section of the act of the legislature of Michigan accepting the grant from Congress, it was enacted that the railroad company should pay into the treasury of the State, *as a specific annual tax, one per cent. upon the cost of the road and its equipments and appurtenances of whatever kind;* and that the said twentieth section made it lawful for the legislature of the State, after ten years, to impose upon the company the payment of a

further tax upon the gross or total earnings of such road of not exceeding two per cent.; "*which said above several taxes*," the section declared, "*shall be in lieu of all other taxes to be imposed within this State.*"*

By two subsequent acts—one of the 14th and one of the 15th of February, 1859—this twentieth section was repealed; the company was to sell one hundred and twenty sections on completing twenty miles, and not sell any sections before; was to have a right when the road was finished through its entire length and accepted by the board of control, to sell all the remaining lands; all the lands granted were declared to be free from taxation for seven years, from September 1st, 1859, *i. e.*, till September 2d, 1866, and the company was declared to be subject to the tax imposed in the already mentioned forty-fifth section of the *general* railroad law of 1855, by which section a tax of one per cent. upon the capital stock paid in was imposed, which tax of one per cent. upon the capital stock paid in, it was by the new acts enacted—

"*Shall be in lieu of all other taxes upon the property of the said company*, whether real, personal, or mixed, except penalties by this act imposed."

This tax of one per cent. on capital paid in—necessarily a very small tax, as we have already remarked, in the case of a road built chiefly or wholly by land grants of Congress—was, of course, more favorable to the company than that laid by the twentieth section of the old act now repealed.

On the 18th of April, 1871, came another act, laying by its thirty-seventh section—an act and a section of much importance in this case—a new tax; that is to say, "*an annual tax upon gross receipts.*" The section, after laying this tax, proceeded:

"*This tax shall be in lieu of all other taxes upon the property of said company*, whether real, personal, or mixed, except penalties imposed by law, except real property not necessary for carrying on the ordinary operations or franchises of their road.

* See *supra*, p. 532.

Statement of the case.

"*Provided*, Only such lands granted to any railroad company shall be liable to local taxation as are or may be opposite to and coterminous with the constructed portion and portions of said roads respectively.

"*And provided further*, That no such lands shall be subject to taxation until after the expiration of three years from and after the 1st day of April, A.D. 1871, and until after three years from the date of the certificate showing that such lands have been earned by said railroad company, after which time said lands shall be taxed as other lands, except as hereinafter provided.

"*And provided further*, That the lands of the several land-grant railroad companies, opposite to and coterminous with their lines as now in operation, shall be subject to taxation in two years from said 1st day of April, A.D. 1871."

Finally, came an act of May 1st, 1873, a "general railroad law," as it was called, and the cause of the present difficulty. This act, which provided for the incorporation of railroad companies, the details of their organization, and which prescribed a great variety of rules, regulations, &c., in regard to their stock, routes, rights, liabilities, power to borrow money, obligation to pay, &c., &c., enacted:

"SECTION 3. Every company . . . shall, on or before the 1st day of July in each year, pay to the State treasurer an annual tax upon the gross receipts of said company; which amount or tax shall be in lieu of all other taxes upon the property of such companies, *except such real estate as is owned and can be conveyed by such corporation under the laws of this State and not actually occupied in the exercise of its franchises, and not necessary or in use in the proper operation of its road; but such real estate so excepted shall be liable to taxation in the same manner, for the same purposes, and to the same extent, and subject to the same conditions and limitations as to assessment for taxation, to taxation, and to the collection and return of taxes thereon as is other real estate in the several townships within which the same may be situated.*"

Under this law—the Flint and Père Marquette Railway not being yet finished, but on the contrary having forty miles yet to make out of the hundred and seventy which if finished it would consist of—the defendants below, Fer-

guson and others, supervisors of Osceola County, taxed for the year 1873 the lands which the company had by the two mortgages already mentioned, mortgaged with power of sale to Tucker and others, to raise funds to *complete* the road; *these lands being none of them opposite to or coterminous with the line of the railroad in operation in April*, 1871.

There had been issued and sold of the bonds, and were still outstanding in the hands of purchasers, on the 1st of January, 1873:

Under the mortgage and trust deed of 1863, . .	$146,000
" " " " 1868, . .	2,224,000
	$2,370,000*

The lands now taxed, as stated already, were in Osceola County. There had been in that county,

Originally, ...	28,598 acres,
Of which the company had sold, . . .	17,705 "
Leaving unsold and now taxed, . . .	10,892 "

Hereupon, on the 20th of August, 1873—the road being still unfinished to the extent already stated, and $2,368,000 being unpaid out of the $3,000,000 of bonds issued or secured and capable of being issued—the trustees, Tucker et al., filed a bill, the bill in the present suit, praying an injunction on the assessors against levying the taxes laid.

I. The bill referred to the act of Congress of June 3d, 1856, granting the land to the State of Michigan, to be held by it to aid in the construction of a railroad between Flint and Père Marquette, to be subject to the disposal of the legisla-

* The case did not show with distinctness whether the *whole* $3,000,000 of bonds had been *sold* and gone into the hands of purchasers, and whether $630,000 had been taken up and cancelled (which, since only $2,370,000 were now outstanding, would necessarily have been the case had the whole $3,000,000 been issued), or whether, while the mortgages and trust deeds were made to *secure* the whole $3,000,000, an amount less than that whole had been put on the market and sold. But it was clear that a *portion* of whatever were put on the market and sold had been "taken up and cancelled under an execution of the power in the trust deed," from "the proceeds of lands sold for the purpose."

ture of the State for that purpose alone, and to be sold by it, and to be applied to the road; the said road to be a public highway for the use of the government of the United States, and the lands to revert to the United States unless the road were made within ten years.

It referred also to the act of the State of February 14th, 1857, accepting the said grant, "with the restrictions and upon the terms and conditions contained in said act of Congress."

It alleged that the title of lands, &c., granted by Congress to the State, were by the last act vested fully and completely in the Flint and Père Marquette Company, then just incorporated, to be applied exclusively to the construction of the road, and to no other purpose whatsoever.

It set forth further that the company, to enable it to raise money, for the purpose of constructing the road, had made the two mortgages and trust-deeds of September, 1866, and September, 1868—giving the history of them exactly as already stated—conveying certain parts of the lands to the complainants as trustees to secure certain bonds, "which bonds," said the bill, "were issued and sold, and which are now outstanding in the hands of divers persons unknown . . . excepting such portion thereof as has been taken up and cancelled from the proceeds of lands held for that purpose . . . that the said trust deeds contained a power of sale, and terms and conditions for the management of the trust."

[The bill referred to the mortgages and deeds of trust as annexed to the bill. But none were annexed in the transcript of the record that came here.—REP.]

The bill submitted that the title to the lands taken *by the State* under the act of June 3d, 1856, was taken *in trust* for the specific purpose in the act named, and that it was a violation of the trust thus created for the State to assume to derive a revenue from them, as it was now seeking to do by its general railroad law of 1873, before they were *sold*.

II. The bill further alleged that the said general railroad law violated the obligation of CONTRACTS made by the State with the company. For that,

Statement of the case.

1st. By the twentieth section of the act of the legislature of Michigan, of 1857, accepting the grant, and by the grant from the State to the company, and by the company's construction of the road, a contract had been made with the company that none but specific taxes should be imposed upon it; that accordingly the company's lands should be free from taxation.

2d. By the act of the legislature of Michigan of April 18th, 1871, it was, in the thirty-seventh section of the act, provided that railroad companies, under the provisions of the act, should pay a specific tax upon gross receipts, and provided that only such lands granted to any railroad company should be liable to local taxation as might be opposite and coterminous with the constructed portion of its road; and that no such lands should be subject to taxation until after the expiration of three years from April 1st, 1871, nor until after three years from the date of the certificate showing that such lands had been earned; and providing further that the lands of the several land-grant companies opposite and coterminous with their line then in operation should be subject to taxation in two years from April 1st, 1871.

The bill now alleged that the lands which the supervisors of Osceola County, the defendants in the case, had listed for taxation for the year 1873, were not, any of them, opposite to or coterminous with the line of the said Flint and Père Marquette Railway Company, in operation in April, 1871; and, therefore, that under the proviso of the section they could not, even if in view of former enactments they were taxable at all, be taxed before April, 1874.

III. The bill made another point.

In the year 1850, as previously thereto, railroad corporations in Michigan were taxed by specific taxes; and a constitution of the State adopted in that year, and in force when the Flint and Père Marquette Company was organized, and all the other matters above spoken of were occurring, thus ordained:

"The State may *continue* to collect all specific taxes accruing to the treasury under existing laws. The legislature may pro-

vide for the collection of *specific taxes* from banking, *railroad*, plank-road, and other *corporations* hereafter created."

The bill stated that from the very organization of the State until the year 1870, the property of railway companies in Michigan had never been taxed by local assessment and taxation, nor in any other manner than by specific taxes. And it insisted that under the constitution of the State the property was liable to specific taxation only, and that it was not competent for the legislature of the State to change the manner and mode of taxation in respect to such property.

The argument meant to be presented by the bill, in its making this statement was this: that specific taxes having been the sort of taxes always collected from railroad corporations, prior to the adoption of the constitution, and that instrument having authorized the continuance of *such* taxes, it was meant that those taxes and no others should be collected; that the language though, in form, permissive, was, in fact, mandatory and restrictive; since, if it were not so construed, the clause might as well be stricken out; the power to levy all sorts of taxes, specific as well as others, existing under the *general* legislative power of the State.

The bill stated that the Flint and Père Marquette Railway Company had been assessed, and had paid each year a specific tax, levied and collected under the laws of Michigan, and that the sum of $23,446 had been paid for the specific tax assessed under the general railroad law of 1873, which last named sum was due and was paid on the 1st day of July, 1873.

The defendants demurred to the bill. To understand one ground on which their demurrer was meant to be founded it is necessary to mention another provision of the constitution of Michigan, which as they conceived bore in their favor. It was thus:

"Corporations may be formed by *general* laws; but shall not be created by special act except for municipal purposes. All laws passed pursuant to this section may be amended, altered, or repealed."

Statement of the case.

The manner in which, according to the ideas of the counsel for the State, this provision bore on the subject of controversy was this: For that whereas the contracts which the railroad company alleged to have been made not to tax, &c., were made by the *general* railroad laws of 1855 and 1871, these laws were, by this provision of the constitution, open to be amended, altered, or repealed.

The reader will have remarked that the ground other than that of specific contract relied on by the bill for injunction, was that the State was a trustee for sale as prescribed by the Act of Congress, and as such trustee could not tax the lands before they were sold.

In argument in the court below this ground was sought to be strengthened by reliance on the *interest* which both the United States and the State had in the lands the subject of the trust, and on the ground of contract made by the trust.

The position thus, by way of addition or as ancillary or explanatory, sought to be wrought into the grounds for relief, were exfoliated in three propositions, thus:

"1st. That the interest of the United States in the lands was not so completely extinguished as that they were subject to State taxation in 1873, and would not be so extinguished until the State had finally executed the trust created by the act of Congress granting them, by the application of the proceeds of the *sales* of the lands to the cost of constructing the railroad.

"2d. That in executing this trust the State still retained, as to the road uncompleted or *unpaid* for, an interest in and supervision over the unsold lands, which could not be relinquished until the trust was finally executed as aforesaid; and that this interest and supervision was inconsistent with the right to tax the lands until after they had been *sold*.

"3d. That the National and State legislation granting the lands to and the acceptance of them by the railway companies, on the stipulated terms, and their compliance with those terms, created a contract between the State and the company, that the lands should be applied exclusively and without diminution to the construction of the railroads,

which contract would be impaired by taxation before they had been *sold* and their proceeds so applied."

The court dismissed the bill.

In its opinion it said:

"The three propositions which in different forms object to the tax because the lands are 'unsold' are sufficiently answered by deciding that within the meaning of the act of Congress and the legislation of the State, the disposition of the lands already made constitutes a sale.

"'. . . What the General Government intended has been accomplished. The act has been done which under the statute vested the power of sale."

"A power of sale to raise money is well executed by the creation of a mortgage for that purpose."

To the propositions that, under the constitution of Michigan, it was unconstitutional to tax the corporation other than by a specific tax, and that by the twentieth section of the act of 1857 and the thirty-seventh section of the act of 1871 the State had entered into contracts not to tax the lands, the court said, that an exemption from taxation could not be inferred unless an intention to exempt appeared by language wholly unambiguous; that no such intention here thus appeared in either of the sections relied on; and further, that so far as regarded the provision of the constitution and the twentieth section of the act of 1857, neither applied to the property in question; and that no such contract appeared in the section of the act of 1871.

In this court the following errors were assigned:

"That the interest of the United States in the lands was not so far extinguished that they were liable to taxation by the State.

"That the State, as trustee, has still an interest in the lands inconsistent with taxation.

"That there was a contract between the State and the company that the lands should be applied exclusively and without diminution of value to the construction of the road, and that

this contract is impaired by taxing them before they are sold and the proceeds so applied.

"That the twentieth section of the act of the legislature of 1857 contained a contract that none but specific taxes should be imposed upon railroad companies, and that the taxation of the lands in question under the act of 1873 was a violation of that contract.

"That the State had no power to impair this contract to the prejudice of the company and its creditors.

"That the thirty-seventh section of the act of 1871 contained a grant that lands opposite to and coterminous with the constructed portions of the road should not be subject to local taxation until three years from the 1st of April, 1871, and that the taxation of the lands in question in 1873 impaired that grant, and was illegal.

"That the constitution of Michigan prohibits the imposition of any but specific taxes upon railway corporations."

From the decree dismissing the bill the trustees took this appeal.

It should be here stated that not only at the time when the bill in this case was filed, August 20th, 1873, but afterwards when the case was argued in the court below, and even when the briefs for this court were printed and the above-quoted assignment of errors was made, the road was not yet finished; no rails being yet laid on the western end. So that the reversionary and other *interest* in the United States under the terms of its grant to the State of Michigan was a matter that could be insisted upon in argument with more or less plausibility or reason.

On the case coming here for argument, however, February 17th, 1875, and after it had been called, it was announced at the bar, by the counsel for the State of Michigan, that the road was now built through to its western terminus and open for travel along its entire route, and had been accepted by the State of Michigan. And this was not denied by the other side.

Hence in the oral argument by the complainants here, the reversionary *interest* of the United States in the lands was

not pressed as it had been in the court below, and even in the briefs, though the points as there made were left to stand; the counsel for the company still asserting that the State's trusteeship was still so far unexecuted, that the clause providing for the reversion of the lands to the United States under the Act of Congress was an important factor in ascertaining the extent of the State's responsibility as trustee.

However, as to the immediate object of the bill—an injunction against collecting the taxes laid for 1873, at which date, as the bill alleged, forty miles of the track were not laid, out of the one hundred and seventy necessary to be laid—the argument from interest retained, perhaps, whatever weight it had originally.

Mr. T. J. Coffey, for the appellants:

The case shows that the lands had been mortgaged to trustees to secure payment of the railroad bonds; that the mortgage conferred on the trustees power to sell the lands and apply their proceeds to pay the bonds, and that some lands, but not all, had been sold, and some bonds, but not all, had been paid—in other words, that the trust was in a process of execution but not fully executed—when the tax complained of was laid.

Our first position therefore is, that although the tracks of the road may be laid, and cars may be running on them, yet so long as all this has been brought about no otherwise than with money borrowed on the security of the lands and under a trust created at the time of the loan, and as a condition of it, that the money lent and yet unpaid should be repaid by a *sale* of the lands—that is to say, so long (within, of course, the term limited by statute for finishing the road)—so long as these lands remain as they are, on a trust for sale, in process of execution, but not fully executed, so long the State cannot tax them.

This, our first point, is independent of and rests on different grounds from our second one, which alleges a specific *contract* not to tax the lands; and our third one, based on the provision in the constitution of Michigan.

Argument against the right to tax.—Violation of trust.

I. The act of Congress of 1856 granted the lands, &c., "to aid in the construction" of the road. It enacts that the lands thus granted "shall be *held* by the State of Michigan," for the use and purpose aforesaid, and be "exclusively applied in the construction" of the road, and "shall be applied to no other purpose whatsoever."* The lands thus granted to the State of Michigan are, indeed, to be "subject to the disposal of the legislature thereof" (that is to say, they are to be disposed of by the legislature), but they are to be disposed of "for the purposes aforesaid and no other."†

And as respects the party to dispose of them and the manner of disposal, they are not to be disposed of by anybody, either artificial or natural that the State may transfer the trust to, nor to be disposed of by the legislature, even as in its good judgment it sees fit. They must be disposed of only by the State, and in a particular way, prescribed by the act of Congress. For the act of that body says:

"SECTION 4. The lands hereby granted to the said State shall be disposed of *by said State only in manner following.*"

And the same section prescribes the manner. That manner is through the process of *sale*, and sale of a special sort. The lands may be "sold;" but not sold in a body, but sold in certain quantities, not all at one time, but from time to time "as the work progresses" and "until said road is completed."

The act, in short, creates a trust; a trust to hold certain lands; to apply them through a process of sale, and sale only, and sale made in certain quantities and from time to time, and as the construction of the railroad advanced, in aid of the construction of that road.‡ And the State of Michigan is the party invited to act as trustee. Nothing is said in any part of the act of Congress about any company created or to be created.

* Section 1, *supra*, pp. 529, 530. † Section 3, *supra*, p. 530.

‡ Rice *v.* Railroad Company, 1 Black, 378; Illinois Central Railroad *v.* McLean County, 17 Illinois, 291; People *v.* Auditor-General, 7 Michigan, 84.

The purpose of Congress in all this was clear. Congress wanted to have a railroad for the transportation of its mails, its troops, munitions of war, and other property. The State, of its own means, could not build the road. Capitalists, of theirs, would not. Congress, therefore, comes in and supplies the effective means. Aiding thus munificently, it desired also that its munificence should not be brought to naught, either through the sinister interests or the bad judgment or the reckless doings of any persons to whom, as directors of a corporation or otherwise, the execution of the enterprise might be committed.

Congress, we say, wanted roads for important purposes of the nation; but it did not want, even for these purposes, roads built in fraud. It did not want roads on which common laborers had bestowed their daily toil only to be wronged out of their daily wages. It did not want transportation over rails which had been furnished by contractors who would be ruined by a misplaced confidence in the corporation making the road. And it wanted, we may believe, as little as it wanted any other disgrace and immorality, the disgrace and immorality of repudiated railroad bonds, or even of railroad bonds which though acknowledged were yet dishonored and unpaid.

Hence all the particularity of the act in everything. A trustee of the highest dignity—a State—is selected. No authority is given to mortgage or otherwise incumber, at any time or in any way, the lands conveyed in trust; or to resort to any other of the numerous well-known equivocal expedients, by which so many roads in our country have been made and so many makers of them ruined.

The State of Michigan understood all this. Its act of February 14th, 1857, speaks of the grant offered by Congress to it as one offered with "restrictions," and upon "terms and conditions." The State was free to reject the proffered trust or to accept it. She accepted it; and accepted it in so many words, "with the restrictions and upon the terms and conditions contained in said act of Congress."

The State of Michigan thus became a trustee. And a

Argument against the right to tax.—Violation of trust.

part of the trust was that the State of Michigan should remain and act as trustee; that IT should hold the lands; that IT, of course, should make the sales prescribed.

And while, of course, the State could act only by officers and agents, including, if desirable, a railroad company specially incorporated to take charge of the details of the trust, it was still the State that was bound to do all that was done, and without the consent of the United States the State could neither pass away the legal estate of the trust nor disown its own obligation to administer the trust, nor change in any way the terms prescribed for its equitable parts by the acts of Congress, by which it was created.

Now, it will be conceded, we assume, that if the State is trustee—is herself holding the lands and administering the trust—she cannot, before the lands are "sold"—sold within the meaning of the act of Congress—tax them. In Michigan, as in other States, taxes make a lien and are payable annually. If not paid, the lands are sold, and all prior titles and trusts are swept away.

The reasons why the State, while acting as trustee, cannot tax are plain. A party owning a large body of valuable lands, which the State has no right to tax, conveys those untaxable lands to her IN TRUST to apply them through a process of sale—in other words, to sell them and apply the proceeds—to building a road in which, when made, the party founding the trust shall have certain rights of user, and also a right of having the lands, or a part of them, back again, if the road is not made. And the State accepts the lands on these trusts. Of course she can do nothing which renders the trust less easy of accomplishment, which imperils its existence in any way, or which abstracts or gives a direction different from that contemplated by the founder of the trust, to any part of the trust property, or of its proceeds. Her relations to the trust forbid her to do anything of this sort, and especially in the case of a trust where it is a very part of the trust, explicitly made known, that the *whole* of the trust property is to be applied "exclusively" to the building of the road, and "to no other purpose whatsoever."

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And all this is true even if she have a right to shift and do shift the execution of the trust from herself to some one else; whether an individual or a corporation. She cannot, without the consent of the party founding the trust, change or even modify the trusts themselves; she having accepted the trusts from that other, and the founder of the trusts having the same interest in the proper execution of the trusts, whether State, corporation, or private person administer them. The *trusts* remain exactly as they were, whoever may be trustee. And the State, having once recognized and approved the trust by accepting the trust property, she can, at a later day, when the legal estate of the trust is transferred to another—if it is transferred—by no act of her own any more impede or misdirect the operations of the trust, in the hands of the new trustee—or imperil its existence—than she could while she herself was acting as trustee and administering the trust.

All this rests on general principles of the law of trusts; a fundamental one of which is that trustees and even all who stand in fiduciary relations do nothing inconsistent with their positions; in other words, be faithful to their trusts or fiduciary relations.

It would be true, we rather suppose, if the founder were a private individual conveying to any other private individual, in trust, for a beneficial public purpose, lands previously free from taxes (or possibly lands previously taxable), the same to be devoted exclusively to that purpose, there being no fund provided from which to pay taxes, and the State knowing all this, and while knowing it all, approving and encouraging the grant on the trusts specified.

Whether true or not, in the case just supposed, it is certainly true when the United States is the party founding the trust, out of the public lands; when *it*, for the purposes of the Federal government is interested, in every part of the matter; in the making of the road primarily, that it may be able to transport its mails and troops and property, and in its not being made, contingently, by its right, through reverter, in the lands if the road be not made.

The State then, until the lands pass out of the trustee through the process of sale—in other words, until the trust is executed—be the trustee the State or the assignee of the State—is estopped from taxing:

1st. On the general principle of the law of trusts.

2d. By the fact that the United States is interested in the proper and complete execution of the trust, and interested not to have its execution either impeded, misdirected, imperilled, or destroyed.

We need not, under this second head, talk about rights of reverter or of re-entry for conditions broken, especially not in the present form of action; nor of the freedom from State power of the instrumentalities of the United States. It is enough that the United States are interested in the way just above stated.

Now, there has been no "sale," unless made by either:

1*st*. The second section of the act of 1857, vesting the lands in a body, and at the same moment in the Flint and Père Marquette Railway, according to the act of Congress relating thereto, and the board of control of the State which the act constituted; or by

2*d*. The mortgage with power to sell. . . .

In regard to the first, it is enough to say:

1. The State, a mere trustee, had no power to *sell*, except in the way that the act of Congress prescribed, that is to say, in certain amounts and as the road advanced. Any attempt to sell in another way would have been a breach of trust, a fraud on the act, and a mere nullity.

2. The transaction had no aspect of a sale in fact. The company gave no money. The State received none.

3. The act of the State of Michigan shows that the State did not pretend to sell, nor even to discharge herself of the duty and position of a trustee, but meant only to employ an agent or department charged with this special matter, one constituted by herself to act for her and under the direction of her officers; the duty of executing the trust remaining still with her. This is her language:

"SECTION 2. All the lands, &c., which are or may be granted

and conferred in pursuance of said act of Congress . . . are hereby vested fully and completely in the Flint and Père Marquette Railway Company, *according to the provisions of the act of Congress relating thereto, and the direction of the board of control hereby appointed.*"

There is, indeed, in the words of the act—"are hereby vested fully and completely in the Flint and Père Marquette Railway Company, according to the provisions relating thereto"—enough (taking the expressions by themselves) on which to found an argument that the State meant—not to sell—but to transfer the legal estate of the lands, &c., to the company as a trustee in its place; in other words to relieve itself from the execution of the trust, and to put it wholly on the Flint and Père Marquette Company.

To this, one answer is that it was a part of the trust as granted to and as accepted by the State that it should itself execute the trust; and that it had no power, without the assent of the United States, to pass away its duty to another.

But a better answer is, that the State did not mean to get out of the obligations of the trust, and put them on anybody else. And this is shown by reference to other parts of the act.

By the first section of that same act in which the above-quoted words make the second, the State *eo instanti* in which it makes the transfer, accepts the trust, "with the restrictions, and upon the terms and conditions" contained in the act of Congress; one of which conditions was that the lands granted "shall be held by the State of Michigan," and also that they "shall be disposed of by said *State*," and shall be disposed of by it "*only* in manner following"—that manner being prescribed, and bearing no resemblance to a transfer in gross, but being by "sales" in certain quantities, from time to time, and as the road progressed. The State, we assume, did not accept a trust only in the same instant to throw it up, and also to throw it up in violation of its duty.

In addition. Though the lands are vested fully and completely in the company by the words above mentioned, yet

it is not the duty of, nor have the company any power in itself to manage and dispose of them. That power and that duty by the eighth section* belongs exclusively to the board of control; a board composed of the governor of the State and of six persons, to be appointed by him with the consent of the State senate. And as if this were not enough, by the twelfth section,† the company is made "at all times and in all matters" subject to the rules which *the State*, through its legislature, may prescribe, "in regard to the management and *disposition* of the lands."

It is obvious, therefore, that the Flint and Père Marquette Company was nothing but a *depository* of the barest legal title, with a residuary beneficial interest in itself as to the lands, which by a final completion of the road in the mode contemplated by Congress—in other words, by the execution of the trust—should be earned. The board of control of the State and the legislature—in other words the State itself, through its board of control and its legislature—were to manage and *dispose* of the lands; the company being absolutely subjected to whatever the legislature by rules and regulation might from time to time—that is to say at any and all times—provide, consistently with the act of Congress.

Was not the State of Michigan then still the real trustee? the manager and disposer, through its board of control and legislature, of everything in or about the lands? And if it was inconsistent with its relations to the trust or to the United States to tax before this so-called vesting fully and completely in the railroad corporation, was it not so equally afterwards?

But as we have already said, if the State had divested itself completely of its trusteeship, the *trusts* remained as they were, and the State, having encouraged and approved of them, could not impede, imperil, misdirect, or destroy them by taxation of anybody in the execution of them.

No sale then has been made up to this date, and the State

* *Supra*, p. 531.

† *Supra*, p. 532.

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then still remains the trustee; the trustee to sell still. Up to this time she has no power to tax.

2. Has the State executed her trust and made a "sale" by the mortgage to Tucker, made doubtless through or with the approval of its agents?

The learned judge below says that it has, and this mortgage it is, according to his idea, which makes the "sale," which, if made, makes the land taxable. . . . He does not attempt to rest a sale on the second section "vesting the lands fully and completely" in the company. He saw plainly that they were thus vested by this section in the company only as an agent of the State; the State managing everything, "according to the provisions of the act of Congress," by its own board of control.

Now, in this assumption of the learned judge below, he assumes exactly that which this court, in *Railroad Company* v. *McShane*, just now decided,* declined on a stronger case to decide. There the trust was to "sell or *dispose of*" the property mortgaged. It was pressed on the court that this, if not a sale, was at least a "disposition of" the lands. But this court would not rest the case on such ground.

Undoubtedly, when Congress conveyed the lands to the State of Michigan on a trust to "sell" them, that body had no idea of anything but a sale in the ordinary meaning of the word; a final operation where one party gets a deed in fee simple and keeps the land, and the other receives the money, and is never expected to be called on to repay it.

In most States of this Union a mortgage bears no resemblance, even in law, to so much as a defeasible conveyance, to say nothing of a sale. In almost all of our States, and especially in Michigan, it is a lien, and no more. It conveys no title. That remains with the mortgagor. A chief justice of Michigan speaks of the expression "equity of redemption" as an antiquated phrase;† and so to half the bar it is.

* *Supra*, p. 464.

† Gorham *v.* Arnold, 22 Michigan, 247; and see Blackwood *v.* Van Vleet, 11 Id. 252; Caruthers *v.* Humphrey, 12 Id. 278; Ladue *v.* Detroit and Milwaukee Railroad Company, 13 Id. 380.

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When you come to speak of the two things in fact, and in reference to a matter like the present one, the difference between a mortgage and a sale is as wide. If the lands are *sold* and the company gets money, the road is built and the company is free from debt. But when they are mortgaged only, if sold for taxes—and we may mention as a fact that some of these very lands have been so sold—the company has lost, perhaps, half of that which it should have applied exclusively to build the road; it is still in debt, while with all this catastrophe its creditor is entirely unsecured!

The truth is that in the present case the mortgaging was a mere step in the way to a sale. It was to bring into existence, subserve and advance the capacity of an actual sale. Money was borrowed, and had to be borrowed, to build the road, and the road when built gave the practical capacity to sell at high rates. Sale, however, not mortgaging—a complete out and out disposition, not mere incumbrancing—was the object of the conveyance to the trustee here appellant. But the sale had to be conducted through this preliminary stage. The mortgaging gave a sort of resting-place, where the company might prepare things for its further and real purpose. The trust was not for a single object, but for two objects conjoined, or rather two objects one sequent to the other. The conveyance to the trustees was as much to sell after mortgaging as to mortgage before sale, and more so. It was really to mortgage first in order to sell to good advantage afterwards. Indeed, could there have been as good a sale without a mortgage as with, no mortgage would have been given.

The lands now taxed have, therefore, never been "sold" at all; though they are now held on a trust to be sold, and to pay a debt contracted in building the road.

Then the question is this: When there is a trust, in the first place to *sell* lands, and after sale to apply the lands—meaning, of necessity, the proceeds of them—exclusively to a particular purpose, as *ex. gr.*, the construction of a railroad—one purpose of the trust being obviously, as is shown by numerous limitations, terms, and conditions put on the

trustee, as to his times and modes of sale, to provide money to pay everybody who has contributed to build the road, so that to the extent of the full value of the lands it may be clear of debt—the question we say is this: When there is a trust to sell in order to build a road, and in order that by means of the existence of the road itself you may be able to sell, you borrow, and as a condition of the loan to you, mortgage in trust with a power to sell, and owe that borrowed money still—the question, we say, is—Is your trust executed before you have sold, even though you have mortgaged? And if thus, while in a way to selling and for the purpose of enabling you to sell at all, and for the further purpose of assisting you to sell advantageously, you mortgage before sale, are you not morally and equitably bound to apply the proceeds of your sale to satisfy your creditors by mortgage, whose money has been put by them into the construction of your road; and who do in some sort have a right to be subrogated to the claims of your day laborers and furnishers, to satisfy whose claims you were bound to *sell*, and whose claims, have been discharged by the money raised upon mortgage?

The mortgagees, of course, have the power to compel you to sell. And why? Only because it is the duty of the trustees to sell under the power of sale in the mortgages. But if it is their duty to sell under that power, and pay the mortgages, and they do not sell and pay them, how is the trust, which has been assumed under the act of Congress, executed? It is not executed at all.

It will not do to assert, as did the court below, that "what the General Government intended has been accomplished;" that the act had been done which, under the statute, vested the power of "sale." This we deny. What the government intended has not been accomplished. The act which, under the statute, vested the power of sale, has not been done. The government conveyed land not to build a road simply, but to build a road in a way that it prescribed in detail, and which to the *whole* extent of the land given, should leave no debts behind to any one, and which by se-

curing a sale of every alternate odd section should secure a probable settlement of it, and so secure a sale of its own even ones. It made a gift, but a gift with "restrictions, terms, and conditions." May you build a road in a way the reverse in all particulars of the way prescribed, and which does leave a vast debt behind, and does not secure any probable sale of the unsold sections retained by the government, and yet say that what the General Government intended has been done? May a donee of a gift with conditions prescribed by a donor, cast away all the conditions and enjoy the gift simply?

Suppose that no lands at all had been sold; that the whole road had been built in fraud; not one contractor nor one day laborer paid, and that all the iron was got with some absolute and equal disregard of right. Has that which the General Government intended, been accomplished? Has the company under the act of Congress earned any lands at all? Do they not all belong to the United States? As we have seen, the lands were granted on "restrictions, terms, and conditions," and restrictions, terms, and conditions which follow the gift wherever it goes. If none of these conditions are performed, if no land has ever been sold, will the mere fact that rails are laid—laid as we have supposed in fraud of everybody—and that cars roll upon them, give the company a title to the lands under the act of Congress? Surely not.

Is the case altered by the fact that to secure a *part* of the debts contracted in building the road, you have pledged the lands, and that while the day laborer and the contractors, and the furnishers of iron and other materials have all been paid, the persons from whom you have borrowed money to pay them, are all left unpaid? Suppose that instead of borrowing money to pay the day laborers, contractors, and furnishers, you had left them unpaid and mortgaged the lands directly to them or to somebody in trust for them to secure a payment. Is your trust executed before a sale? It makes no difference in morals or in law who it is that is left unpaid, so long as anybody is left unpaid; the debt left unpaid

being one contracted in making the road under the act of Congress. The case of *Denniston* v. *Unknown Owners*, in the Supreme Court of Wisconsin,* a case on its facts closely like this one, expresses the true view. The court say:

"It must be presumed . . . that the legislature intended so to dispose of these lands as to secure the completion of the work as soon as practicable, and also the payment of all lawful claims and demands against the improvement fund. In no other way could it fully discharge its obligation to the United States which it had assumed."

A trust of the sort created in the present case, we may here remark, bears some analogy to a charitable use. In fact, gifts from the government for promoting works of public use are considered as gifts to charitable uses;† and are to be administered by courts of equity on the principles on which such uses are habitually administered; that is to say, upon such rules of construction as will secure the *most* complete, pervading, and effectual execution of the trust, and in the sense *most* consistent with the honor, the purpose, and the interest of the donor; in this case the nation. Administering it thus, the court will administer it in a way that shall insure payment of all the company's debts contracted in constructing the road; whether the debts be for labor, materials, or money borrowed to procure them.

II. *The act of May 1st, 1873—the general railroad law of that year‡—violated the obligation of contracts; violating at least two specifically made.*

1. It violated one made by the twentieth section of the act of February 14th, 1857,§ vesting the title to the lands in the Flint and Père Marquette Company.

When that company was organized in 1857 all railroad companies were subject, under the general railroad act of 1855, to the specific tax of one per cent. on "*paid in*" capital

* 29 Wisconsin, 360.

† Attorney-General *v.* Heelis, 2 Simon & Stuart, 67, 76.

‡ *Supra*, p. 536.

§ *Supra*, pp. 532, 533.

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stock. The present road was built chiefly by land grant. The tax under the general railroad act would, of course, have been small. The State, regarding the land grant as a valuable gift, "in consideration of the grant," &c., imposed a greater specific tax than the general railroad law exacted. It imposed one per cent. on the *cost of the road*, &c., and reserved the right, after ten years, in its discretion, to add a further tax on gross receipts. Here was taxation, "in consideration of the grant," greatly in excess of existing, or prospective, taxation on other roads. But, because of this unequal burden, present and prospective, the State pledged itself that it should "be in lieu"—not of all other specific taxation, but in lieu of ALL other taxes within the State.*

There was, therefore, an agreement on consideration; in other words a contract, that the State would make no other taxes than the specific tax then laid. The general railroad act of 1873, in taxing lands within the State, violates the contract.

2. It violates—so far as relates to the taxes immediately in question, the taxes of 1873—another contract made by the thirty-seventh section of the act of April 18th, 1871. This act of April, 1871, indeed, itself, so far as it undertook to tax our land grant at all, violated previous contracts of the State. However, we now speak only of the contract made in the thirty-seventh section. That section, after imposing an annual tax on gross receipts, declared it to be in lieu of all other taxes on the property of the company, whether real, personal, or mixed, except penalties, and "except real property not necessary for carrying on the ordinary operations or franchises of their road." Then, by a first and second proviso, lands opposite to, and coterminous with, the constructed portions of roads were promised exemption *until after April 1st*, 1874.

Here, then, is a plain agreement not to tax these lands prior to April 1st, 1874. And this agreement was one on consideration; in other words it was a contract. What was

* See *supra*, p. 533.

the consideration? This plainly: The mortgage of 1868 had been executed, and the bonds which it secured by these lands were seeking a market, and the road through the lands here assessed was in a course of construction with the proceeds of these bonds. The only condition on which the bonds could be sold was that the security on the lands should be unimpaired. All men knew that if the lands were exposed to the dangerous and ever-increasing burden of local taxation, in a country where population and wealth were yet undeveloped, the bonds could not be sold. The legislature, of course, knew it. Hence, and in order to tempt investors to buy the bonds, in order to secure to the State of Michigan the benefits which the railroads would bring the State, it was promised that the security of the bonds—these lands—should be exempt from taxation until 1st April, 1874. On the faith of that promise the investors parted with their money, which act was an injury to them; and the road was constructed, *afterwards*, through the lands now in question, which act was a benefit to the State. Here is benefit to one side, and loss to the other. Certainly if a consideration—a consideration in the fullest common-law sense of the word,—can ever exist, one existed here. Now, confessedly the lands listed for taxation were not, in April, 1871, opposite to, and coterminous with, the line of road then in operation; and we insist that to tax them now under the acts of 1873, in that year, is a breach of a contract.

It is, however, but fair to the legislature, we think, to assume that, in subjecting the lands of the company to local taxation by the act of 1873, it did not intend to include the lands exempted by the thirty-seventh section of the act of 1871. Nothing in the act of 1873 repeals, in terms, the clauses of the act of 1871 now in view. The act of 1873 is general in its scope, and finds enough to operate on without seeking out these specially and temporarily exempted lands.

III. If there were no violation of a trust in the case, and if we had no special contract about anything, the constitution of the State, adopted in 1850, and before the organiza-

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tion of our company, makes the tax invalid. The bill alleges, and such is undeniably the fact, that prior to the adoption of this constitution, it had always been the practice of the State to collect specific taxes from railroad companies, and to collect no other. The clause of the constitution is thus:

"The State may *continue* to collect all specific taxes accruing to the treasury under existing laws. The legislature may provide for the collection of *specific* taxes from banking, railroad, plankroad, and other corporations hereafter created."

This constitutional provision was evidently framed with a view to the continuation of that practice. Railroad corporations not having been subjected to local taxation, the framers of the constitution intended that they should not be.

Now, although this language is permissive in form, it is to be construed as mandatory in effect—as a limitation upon the power of the legislature to impose taxes upon the corporations therein named, other than specific taxes: and for the obvious reason that if the language of the section is to be construed but as conferring a power on the legislature to be exercised at its discretion, the entire section might be obliterated from the constitution without changing the effect of that instrument. The power and the discretion as to its exercise would still remain in the legislature, under the general grant of legislative power.

Words of permission in statutes are frequently construed as obligatory. *May*, in a statute, means *must*, whenever third persons or the public have an interest in having the act done which is authorized by such permissive language.* And the rules of interpretation of constitutions and of statutes are substantially the same, with this difference, however, that constitutional provisions are more rarely treated as directory than are statutory ones.†

* Rex *v.* Barlow, 2 Salkeld, 609; Rex *v.* Flockwold, 2 Chitty, 251; Newburg Turnpike Co. *v.* Miller, 5 Johnson's Chancery, 113; Malcolm *v.* Rodgers, 5 Cowen, 188.

† Potter's Dwarris on Statutes, p. 654; Cooley's Constitutional Lim., 74.

Argument in favor of the right to tax.—The mortgage a sale in effect.

Messrs. C. A. Kent and I. Marston, Attorney-General of Michigan, with whom was Mr. C. Upson, contra:

I. *The great question in the first part of this case is, "Has there been a* sale *of these lands by any one having authority to sell?"*

If there has been such a sale, and if the proceeds have been applied exclusively to the construction of the road, there is an end of the case, so far as respects this part of it. The questions of violation of the specific contract and of the constitution of Michigan, remain of course for subsequent consideration.

Now, whatever may have been the nature of the transfer from the State to the Flint and Père Marquette Railway Company, it will be conceded on the other side, that a valid conveyance by way of mortgage was made by the company to the complainant, Tucker; that the company, in consideration of the lands thus conveyed, did receive $2,370,000, and that the company did apply that sum of money exclusively to the construction of the road, and to no other purpose; and that in consequence of the money so received and applied, the road is now a completed road, which the government of the United States and all persons may safely use in the way that the act of Congress intended.

Whether practically a mortgage is a lien, or whether it is a sale, depends generally upon the amount which the sum lent bears to the value of the land on which it is lent. When, for example, one lends $1000 on land worth $10,000, the mortgage is paid and is proved to have been a lien only. If, however, he lends $11,000 on the same property, the transaction generally reveals itself in its true legal character, that is to say, of a defeasible conveyance not defeated. One party, not the original owner of it, keeps the money, and the other, not the original owner of *it*, keeps the land. And this is the same thing exactly which occurs in an ordinary sale.

Further. It will be admitted, we suppose, that we are not engaged in inquiring whether, technically and by definitions given in text-books, &c., what has been done, apparently by way of mortgage, would come within the term "sale." It is enough if practically what was then done was,

Argument in favor of the right to tax.—The mortgage a sale in effect.

in consideration of the $2,370,000, a final parting by the State, company, or trustees—whichever you please—with the lands, and for about their money value, so that if the trustees executed their power of technical *sale*, little money would be got by them above the sum and interest due on the bonds.

Now this case comes here on bill and demurrer. A pleader is always held to have stated his own case as strongly as the case makes it possible for him to state it. And doubtless the complainant here so stated his case.

Yet, though it may be inferred from the statements of the bill filed here that the company has a right to the surplus, if any, that may remain from the sale of the lands after the bonds are paid, there is no averment that any surplus will remain; nor so much as a statement of the value of the lands mortgaged compared with the amount of the outstanding bonds, from which so much as an inference can be made on the subject. Neither directly, therefore, nor indirectly, is there any averment of a surplus. On the contrary, so far as things are stated, there will presumably be no surplus. The only lands specifically spoken of in the bill as mortgaged are—

The lands in Osceola County, taxed—acres, . .	10,892
While of outstanding bonds there are still, . .	$2,370,000

So far as the bill specifically shows a security, it shows one plainly inadequate to yield a surplus. If there were other lands mortgaged, their amount or value does not appear.

On the case, therefore, of the complainant, as shown by himself, the company has parted with the lands for their substantial value, or for more than such value.

With the lands thus practically sold, and the property of other people—with an equity of redemption in the company that amounts to a mere shadow—nothing can be less soundly argued than that they should be still exempt from taxation, as still belonging to the company.

The most that could be so argued would be that they should be exempted from taxation to the small degree of

Argument in favor of the right to tax.—The mortgage a sale in effect.

value which the equity of redemption bears to the interest conveyed or secured by mortgage.

Then again, and on the other hand, suppose that there will be a large surplus. What is the opposing argument? This only, that there should be no debts left unpaid. But all workmen and all contractors, and all persons furnishing work or equipments to the road have confessedly been paid. And if the persons who have lent the money to pay them are made abundantly secure by the mortgage, what harm has been done, or can occur to any one?

The purpose of the United States was that the road should be made; that so much of the land as was necessary to make it should be applied to making it; that any surplus should belong to the company. An application of the necessary portion of the land through a process of sale, was, no doubt, the process contemplated for getting the money. But the process through which the application of the land was to be made, was a modal matter simply, not one of essence. Any surplus of the land, as we have said, after an application of enough of it to get the requisite amount of money to make the road, belonged to the company; and, whether that surplus remained in the form of an equity of redemption, or in the form of a part of the lands clear of any mortgage, was of no importance to the United States; and, indeed, concerned nobody but the company. As things now stand, the road is built, it is paid for, it is paid for out of the land. The conscience of the company, it seems, is exercised because the bondholders who have lent money on the faith of the mortgage are not paid off. But they hold the land; and they can compel a sale of it if they are not paid. Suppose they lose, that is to say, suppose they have given more for the bonds than they are worth; more than the land secures. They are no worse off than if for the same money they had bought the land at a sale of it; nor as badly off, since the company is bound on the bonds. If the land is worth greatly more than the amount which it secures, and the company, in the face of its own interests, suffers the bondholders to take it, wherein does the com-

pany stand worse off than if for the amount borrowed, it had sacrificed the land on a sale?

The matter, as we have said, concerns the question of surplus only; and the surplus concerns no one but the company. If the bonds are paid without any sale, and satisfaction entered on the mortgage, then all is well, for all has ended well.

Thus far we have contemplated the matter in a point of view not technical; in a point of view such as men of plain and practical sense would take.

But if we need come to technical rules, technical rules declare that the mortgage was a sale. The whole purpose of the grant by the United States was to raise money to build the road. The power to sell was given only to do this thing. But it is well settled that a power of sale to raise money is well executed by the creation of a mortgage for that purpose.*

So far as any interest in the United States is concerned—a matter much pressed in the points taken, and on the argument in the court below, and in the briefs; but which, since the case of *Railroad Company* v. *McShane*, just now decided in this court,† and qualifying and restraining the operation of *Railway Company* v. *Prescott*,‡ and since the completion of the road, is feebly pressed in the oral argument here,—the United States are the only party who could complain therefor. The case of *Baker* v. *Gee*§ is in point.

II. *The State of Michigan has not entered into any contract with the Flint and Père Marquette Company, or with complainants, which forbids the proposed taxation.*

The power of taxation is an attribute of sovereignty and essential to every independent government. It is well settled that an intention to exempt private property from taxa-

* Sugden on Powers, 513; Mills *v.* Banks, 3 Peere Williams, 9; Williams *v.* Woodard, 2 Wendell, 492.

† *Supra*, pp. 461–2.

‡ 16 Wallace, 603.

§ 1 Wallace, 333; and see Burlington and Missouri Railroad Co. *v.* Hayne, 19 Iowa, 137; and Iowa Homestead Co. *v.* Webster, 21 Id. 221; and Cedar Rapids and Missouri Railroad Co. *v.* Woodbury County, 29 Id. 247.

tion by legislative contract will never be inferred except from the clearest language. There is no safety in any other rule.*

And it is of the essence of such contract, as it is of every other contract, that it have a consideration.† Privileges which are granted by the State without any agreement as to their continuance, and without the passing of any consideration from the grantees, may be withdrawn at any time.‡

1. To the claim of exemption founded on the twentieth section of the act of 1857, there are two answers.

(*a*) The section, by its terms, refers only to taxation upon the cost of the road and its equipments, and to taxation of the gross receipts, and the limitation in the last clause must be referred only to the taxation previously mentioned. There is here no reference to the taxation of the lands in question.

It is settled that laws which provide for the exemption or the specific taxation of corporations, though in terms including their entire property, will be construed to extend only to property which is needed in the performance of the public duties of the corporation, and that it does not include that held for general investment or profit.§

The settled tendency of all the courts is to a narrow construction of all exemptions from taxation.

(*b*) Section twenty was repealed by the legislature of 1859, and the taxation of the land-grant railroads was made uniform with that of other railroads, under the *general* railroad law of 1855, which provided for a tax of one per cent. upon the capital stock paid in of any company.‖

* Providence Bank *v.* Billings, 4 Peters, 561; Philadelphia, &c., Railroad Co. *v.* Maryland, 10 Howard, 393; Jefferson Branch *v.* Skelly, 1 Black, 447; Delaware Railroad Tax, 18 Wallace, 225.

† Cooley's Constitutional Limitations, 281; 16 American Jurist, 253.

‡ Christ Church Hospital *v.* County of Philadelphia, 24 Howard, 300; Salt Co. *v.* East Saginaw, 13 Wallace, 373.

§ The Vermont Central Railroad Co. *v.* The Town of Burlington, 28 Vermont, 193; The Inhabitants of Worcester *v.* The Western Railroad Corporation, 4 Metcalf, 564; The State *v.* Newark, 1 Dutcher, 315; The State *v.* Flavell & Fredericks, 4 Zabriskie, 370.

‖ Laws of 1859, pp. 442, 558; Compiled Laws of 1857, vol. i, p. 652.

Argument in favor of the right to tax.—Constitution not violated.

This change diminished the rate of taxation upon the Flint and Père Marquette Company, and they assented to it by paying the lesser taxes. Hence they can claim no rights under the law thus repealed. If it be said that that enactment putting this company under the tax as laid by the general railroad law of 1855, was substituted for section twenty, as a part of the contract, the answer is that the general railroad law of 1855 was in every section of it made amendable or repealable at any time by the constitution of Michigan,* and that the tax provided in the law of 1855 has been changed by the act of 1873, and the company has paid its tax for the year 1873 in accordance with this last law.

(*c*) Section seven of the same act† of 1857, under which the exemption is claimed, is inconsistent with the construction sought to be put by the complainant upon section twenty. The inference, from the existence in the act of section seven, is irresistible, that section twenty was not supposed to make any provision as to the taxation of these lands, and that by providing that they should not be taxed for seven years both parties supposed them taxable after the seven years had expired.

2. To the allegation that the general railroad law of 1871, which provided a specific rate of taxation, constituted a contract between the State and the companies that no other tax would be laid, it is enough to say that no consideration was ever given by the company for the alleged contract, and the provision was in "general law," which is expressly made subject to amendment or repeal, at the pleasure of the legislature. At the most the provisions relied on were but grants of privileges, which could be withdrawn at any time.

III. *The taxation is not in conflict with the constitution of Michigan.*

To the position, that it is so, there are at least two sufficient replies:

1. The specific taxes which may be imposed upon corporations, cover only such property as is used in the prosecu-

* See *supra*, p. 540.

† See *supra*, p. 531.

tion of the purpose for which the corporation is organized. This we have already said, citing some authorities, in commenting on the claim for exemption set up under the twentieth section of the act of 1857.*

2. A comparison of the clause of the constitution of Michigan relied on shows that the word "may" does not, in the clause relied on, mean "shall."

Indeed, we submit that the word "may" does mean "shall," only when some officer has been given an authority which, under certain circumstances, it is his duty to protect.

Reply:

I. It is plainly inferable from the statements of the bill that before the road was made, the lands were mortgaged to pay bonds sold in order to make it; that a power to sell the lands and redeem the bonds accompanied the mortgage; that since the bonds were issued the road has been made or is a making; that a portion of the bonds have been taken up by a sale of the lands, and that this process is now going on. This shows that the lands are worth more than they are mortgaged for; and it stands to reason, that lands which were valuable enough, before the road was made, to tempt capitalists to advance money on them, are now more valuable since the road has been actually made, and the amount of the debt reduced by the cancellation of some of the bonds issued in order to make it.

II. We admit that the power of taxation is an essential one to every government, and that anybody claiming an exemption from it under statute must show an intention expressed in unambiguous terms; that a consideration is of the essence of every contract, &c., &c. But of what pertinence in this case is the enunciation of such general and universally admitted truths; it being perfectly settled that contracts to exempt, when expressed with any such plainness as shows their meaning, and when resting on a sufficient consideration are valid, and to be enforced?† The

* See *supra*, p. 564.

† New Jersey *v.* Wilson, 7 Cranch, 164; McGee *v* Mathis, 4 Wallace, 143;

Reply.—Contracts existed not to tax.

only inquiry pertinent is, does the language of the statutes in *this* case, plainly show a purpose to confine the taxation in the way which we allege, and was there a consideration *here?* And we refer to the language itself, of the different acts, as a conclusive argument to show that the statutes do clearly show such purpose, and to the facts of the case, to show that they rest on considerations both pecuniarily valuable and having strongest foundation in policy and honor.

While, however, we admit that a consideration is necessary to make a binding contract even on a State, we cannot but recognize some distinction between individuals, who can be summoned by any one before the courts of the country when it is alleged that they have broken their contracts, and States, which by individuals, at least, cannot be; and we respond reluctantly to the position that a State of this Union can violate a promise, deliberately made by it, published on its statute-book, enrolled in its capitol, and sent forth to the nations, on the ground—that no "consideration" was received by it for what it did.

It is argued—

(*a*) That by the settled rules of construction the general words at the conclusion of section twenty, that the "said above several taxes shall be in lieu of *all* other taxes *to be imposed within this State*," are to be referred to the "specific annual tax, one per cent., &c.," then laid, and that the right is reserved to make a further tax on gross earnings, spoken of in the previous part of the section, and that only such specific taxes are meant to be referred to.

The argument in the face of the words which we have italicized is incomprehensible. Is the tax laid on these lands a tax not specific, and is it imposed within the State of Michigan? Certainly it is both. Then it is void, for the State has contracted that a specific tax laid in another act shall be "in lieu of *all* such taxes." No rule of construc-

Home of the Friendless, &c., *v.* Rouse, 8 Wallace, 430; Furman *v.* Nichol, Ib. 44; Chicago *v.* Sheldon, 9 Id. 50; Wilmington Railroad *v.* Reid, 13 Id. 264; Raleigh and Gaston Railroad *v.* Reid, Ib. 259; Humphreys *v.* Pegues, 16 Id. 244.

tion will infer a contrary effect in the case of such words as these, for no rule of construction will allow us to disregard the meaning of words when the meaning is clear.

It is said that laws which provide for the exemption or for the specific taxation of property, which include their entire property, will be construed to extend "only to property which is used in the performance of the public duties of the corporation, and that it does not include that held for general investment or profit." And the inference is supposed to follow, that the contract of the twentieth section to exempt from all but specific taxes does not apply to these lands. Concede the rule to be true, yet the inference supposed to follow does not follow; for the application of it to these lands would be a misapplication of it.

The lands are not held by the railway company for any purpose of use in connection with the running of its road, or the exercise of its ordinary business. Neither are they held for general purposes of investment or profit. They were the gift of Congress to build the road; the substance out of which the road is a making. They constitute a part of the capital stock, taking the place, and doing the work, which the money paid in by shareholders does in ordinary railway enterprises.* Lands held by railway companies for investment or profit, or for purposes merely convenient to the business of their roads, are purchased out of the capital stock or other assets, and held incidentally to the main business. And as to these, questions of taxation properly arise. But the lands in question, standing in place of the paid-in stock, are in no sense of that class. They are as much property exempt as the paid-in stock, or the road-bed, rails, and rolling stock which they are pledged to pay for. It is directly out of their pledge and sale that the road exists, that its business is prosecuted, and that it earns the money to pay its specific tax.

It is further argued—

(*b*) That section twenty of the act of 1857 was repealed by an act of 1859, and a less rate of taxation established, to

* *Supra*, pp. 529–30.

which rate the company assented; and that the act of 1859 was not a contract.

But these amendments relaxing the provisions of section twenty, were made at the instance of and for the benefit of the company. Of course, legislation made in such circumstances does not raise an inference that there was a change of contract, or that the legislature had any right to change the contract to the prejudice or against the interests of the company.

The general railroad act of 1873 was in truth the first attempt of the legislature to impair the obligation of the contract made in the twentieth section, and the company has resisted it from the first.

It is argued next—

(*c*) That because the seventh section of the act of 1857 exempts the lands from taxation for seven years, the implication is irresistible that after the seven years had expired they might be taxed; and, therefore, that we misconstrue the twentieth section of the act.

The argument is plausible, but it is refuted by the fact that this seventh section is followed by another section, the nineteenth, which provides that the whole of the railroad is to be completed within seven years. The two sections are to be construed in connection with each other. The assumption of the legislature was that the road would be completed within seven years (the nineteenth section being a mandate to that effect), and the seventh section holding out a promise that if persons would invest capital in the road, then, inasmuch as the road was to be built in seven years, that the land should not be taxed during that time. So far from being evidence of a purpose not to make a contract of that kind, it is evidence that the legislature held out that the land would not be subject to taxation until after the trust had been executed, and until after the land had done the proposed work and passed into private ownership.

This seventh section, it is to be observed, provides that nothing in the act shall be so construed as to relinquish the right of the State to any specific taxes. This shows that

the legislature thought the provision about the lands made an irrevocable contract. Why else reserve the right to impose specific taxes?

2. A clause in the constitution of Michigan is invoked. The clause authorizes corporations to be formed under general law, and forbids their creation by specific act except for municipal purposes. It adds:

"All laws passed pursuant *to this section* may be amended, altered, or repealed."

Now, what laws may be passed pursuant to that section? Obviously, general laws under which corporations may be formed, or special acts for municipal purposes. But the act of February, 1857 (the contract act), is neither a general law forming a corporation, nor a special act for municipal purposes. Therefore, it is not a law "passed pursuant to this section," and hence not a law which may be amended, altered, or repealed under the clause of the constitution relied on.

III. The specific taxes which the constitution allows the continuance of in the case of railroad corporations cover, it is said—just as was said in regard to statutes—only the property used in the prosecution of the purpose for which the road is organized.

But the bill alleges, and the demurrer admits it to be true, that prior to the adoption of that constitution "*the property of railway corporations* had never been taxed by local assessment, nor otherwise than by specific taxation;" and these taxes and these alone, it seems to be admitted by the opposite counsel, the State may lay; the position being only that the clause does not apply to lands like those of the land grant. But if "*the property*" of railway corporations had never been assessed otherwise than by specific taxation, and only such taxation may be continued, surely the lands cannot be taxed. They are "the property" of railroad corporations exactly, and fully as much as the railroad bed itself; and in common comprehension, as being more external to the corporation, even more so.

Opinion of the court.—The State's duties as a trustee.

Mr. Justice SWAYNE, having referred to the statutes and recapitulated the facts bearing on the case, delivered the opinion of the court.

The appellants have assigned in this court various errors.*

We shall consider the several propositions which they state without specifically enumerating them.

The United States granted the lands to the State for a specific purpose. That purpose was "to aid in the construction of railroads" upon the routes designated. The land was made "subject to the disposal of the legislature for the purpose aforesaid, and no other." Congress prescribed certain safeguards to secure their application to the construction of the roads, and to prevent failure or diversion. The precautions were few and simple. Except as to the first one hundred and twenty sections, the power of sale was to attach only as the road was completed in successive sections of twenty miles each. Subsequently the extent of the sections and the quantity of land were reduced one-half. If the entire road was not completed within the time limited, no further sales were to be made, and all the unsold land was to revert to the United States. Subsequently the reverter was limited to the lands to which the right to sell had not attached. In other words, it was confined to those where the title was inchoate only, and had no application to those where the title was complete. As to those of the former class, there was not, when the bill was filed, and is not now, any default. If the fact were otherwise, it would be for the United States, by office found, or other proper proceeding, to assert their rights. But they do not complain, and the complainants cannot do it vicariously for them.† It is a conclusive answer to the proposition we are considering that the United States have no more claim, legal or equitable, touching the lands here in question than they have to lands which they have sold and patented to others in the regular course of the administration of the land department of the government; and that Congress has not seen

* See them set out as made, *supra*, pp. 542–3.—REP.

† Baker *v.* Gee, 1 Wallace, 333.

fit, either expressly or by implication, to impose any restriction upon the taxing power of the State. That subject was remitted, as, under the circumstances, it might well be, wholly to her wisdom and discretion.

The State accepted the grant subject to all the conditions prescribed. She thereupon became the agent and trustee of the United States. The powers and duties with which she was clothed might all have been discharged by private individuals. The characters of sovereign and trustee were united in the same party. The State did not in any wise abdicate her sovereignty by accepting the trust, but the former might be exercised to render more effectual the discharge of the latter. She was in no wise fettered, except as she had agreed to fulfill all the terms and conditions which accompanied the grant. To that extent she was clearly bound, and anything in conflict with those conditions would be *ultra vires* and cannot be supported. What were the terms to which she submitted herself? She was to devote the lands to the accomplishment of the object which Congress had in view, and there was an implied agreement on her part to take all the measures reasonably within her power to make their application effectual to that end. The mode was left entirely to herself. We see no ground upon which it can be claimed she bound herself any further. Upon general principles she could not tax the land while the title remained in the United States, nor while she held them as the trustee of the United States, which, in the view of the law, was the same thing. But when the State, proceeding in the execution of the trust, had transferred her entire title to the company, and they had perfected their title and acquired the right to sell, the case assumed a very different aspect.

The validity of the mortgages is not drawn in question, and is too clear to be doubted. We need not, therefore, consider that subject. When the mortgages were executed the complainants took the legal title, so far as the company held by that title, and the equitable or inchoate title of the company to the residue of the lands. Copies of the mort-

gages are not attached to the bill, and we are not advised particularly of their contents. If they contain a covenant of warranty, the legal title, as fast as it was acquired by the company, inured to the mortgagees.*

If there was no warranty, and the *land*, and not the *title*, of the company was conveyed, the company is barred by estoppel from setting up the after-acquired title, and the estoppel runs with the land. The result is the same as if there had been a warranty.†

When the grant was made by the State to the company, the entire title before held by the former passed to the latter. Nothing remained to the State but the performance of the remaining duties of the trust, without any title, present or potential, to the lands.

Forbearance to tax was a bounty voluntarily given by the State. Forbearance for a time doubtless increased to some extent the value of the lands. Never to tax would have increased their value still more.‡ There is no foundation for a claim for one more than for the other. The State, in the act accepting the grant, agreed *sua sponte*, to forbear to tax for seven years. There is no complaint that this stipulation has been violated. Any obligation, legal or equitable, to do more in this way is wanting.

The company, so far as the matter of right is concerned, were upon a footing with all other alienees of the United States. The imposition of taxes can in no just sense be said to be a diminution of the value of the lands.§ If Congress had thought so, they would have forbidden it. Liability to taxation is an incident to all real estate. Exemption is an exception. When claimed, to be effectual it must be clearly made out.

The proposition founded upon the twentieth section of the act of the legislature of the 14th of February, 1857, is un-

* Bank of Utica *v.* Masereau, 3 Barbour's Chancery, 367.

† Van Rensselaer *v.* Kearney et al., 11 Howard, 323.

‡ New Jersey *v.* Wilson, 7 Cranch, 164.

§ Burlington and Missouri Railroad Company *v.* Hayne, 19 Iowa, 143.

sound. There are several answers. We shall state but one of them. That section imposes a tax with reference to the railroad itself. It has no relation to the lands owned by the company not used nor necessary in operating the road. The lands of the class of those here in question doubtless were not present to the mind of the legislature when that section was framed. The language employed cannot receive the comprehensive construction contended for.* The subject of taxing the lands of the company had already been dealt with. The seventh section of the act provided that they should not be taxed for seven years from the 1st of September, 1857. It would have been a solecism to exempt them for seven years and in the same act to exempt them without limit of time. Our view gives harmony and symmetry to the two provisions. Where such an exemption is claimed, the language from which it is alleged to arise is always to be strictly construed.

This provision for exemption was by the clearest implication an assertion by the State *in limine* of the power to tax. The subsequent exemption involves the like claim.

The provision of the thirty-seventh section of the act of 1871, exempting the lands specified from local taxation until three years from the 1st of April, 1871, which period has not elapsed, was not a contract. There was no consideration. The company was required to do nothing, and did nothing in return. As between individuals the stipulation would belong to the category of *nude pacts*. It has no higher character because one of the parties was a State, the other a corporation, and it was put in the form of a statute. It was the promise of a gratuity spontaneously made, which might be kept, changed, or recalled at pleasure. The case of *Christ Church Hospital* v. *The County of Philadelphia*† is

* Vermont Central Railroad Co. *v.* The Town of Burlington, 28 Vermont, 193; The State *v.* The City of Newark, 1 Dutcher, 315; The Inhabitants of Worcester *v.* The Western Railroad Corporation, 4 Metcalf, 564; The State *v.* Flavell & Fredericks, 4 Zabriskie, 370

† 24 Howard, 301.

instructive upon this subject. In 1833 the legislature of Pennsylvania passed an act declaring "that the real property, including ground-rents, now belonging to Christ Church Hospital, in the city of Philadelphia, so long as the same shall continue to belong to said hospital, shall be and remain free from taxes." In 1853 a law was passed which subjected the ground-rents to taxation. The Supreme Court of the State sustained the validity of the latter act. The hospital removed the case, by a writ of error under the twenty-fifth section of the Judiciary Act of 1789, to this court. Here it was insisted that the act of 1833 was a contract in perpetuity, and the contract clause of the Constitution of the United States was invoked for its protection. This court unanimously affirmed the judgment of the Supreme Court of the State.

The taxing power is vital to the functions of government. It helps to sustain the social compact and to give it efficacy. It is intended to promote the general welfare. It reaches the interests of every member of the community. It may be restrained by contract in special cases for the public good, where such contracts are not forbidden. But the contract must be shown to exist. There is no presumption in its favor. Every reasonable doubt should be resolved against it. Where it exists it is to be rigidly scrutinized, and never permitted to extend, either in scope or duration, beyond what the terms of the concession clearly require. It is in derogation of public right, and narrows a trust created for the good of all.*

Whether under the constitution of Michigan the State can impose taxes other than those which are specific upon the Flint and Père Marquette Company, is a question which in this case does not arise. The taxes involved in this controversy were not to be upon the corporation, nor

* Providence Bank *v.* Billings, 4 Peters, 561; Philadelphia Railroad Co. *v.* Maryland, 10 Howard, 393; Jefferson Branch *v.* Skelly, 1 Black, 447; Delaware Railroad Tax, 18 Wallace, 225.

Statement of the case.

upon property used in the exercise of its franchises, but upon lands which it had mortgaged and was holding for sale. The distinction and the consequences have been considered. We need say nothing further upon the subject.

We think the demurrer was necessarily sustained, and the bill properly dismissed.

DECREE AFFIRMED.

ROSS, ADMINISTRATOR, *v.* JONES.

1. The late civil war was flagrant in Arkansas from April, 1861, till April, 1866, and the statutes of limitation did not run during that term. This principle applies to suits between persons in different States of the late so-called Confederate States of America, as much as to suits between citizens of States of the North, which remained loyal, and citizens of the said so-called Confederate States, with which they were at war.
2. An indorser of a promissory note, though an indorser for accommodation only, is not a "person bound as security" within the meaning of the statute of Arkansas which enacts that any person bound as "security" for another, on any bond, bill, or *note*, may at any time after action has accrued thereon require the person having such right of action forthwith to commence suit against the principal debtor, on penalty of such security being exonerated.

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

On the 11th of June, 1864,* Congress enacted that:

"Whenever, during the existence of the present rebellion, any action . . . shall accrue against any person who by reason of resistance to the execution of the laws of the United States, or the interruption of the ordinary course of judicial proceedings, cannot be served with process; OR whenever after such action . . . shall have accrued such person cannot, &c.

"The time during which such person shall so be beyond the reach of legal process, shall not be deemed or taken as any part

* 13 Stat. at Large, 123.

of the time limited by law for the commencement of such action."

In addition to this, this court has repeatedly decided that during the civil war, the courts of the United States in the insurrectionary States were closed, and that statutes of limitation did not run against suitors having a right to sue in the Federal courts.*

It has also decided that in Arkansas the war was flagrant from April, 1861, till April, 1866.†

In the State just named, actions of assumpsit are barred by the statute of limitations in five years.

Another statute of the State‡ thus enacts:

"SECTION 1. Any person bound as security for another in any bond, bill, or *note*, for the payment of money, or the delivery of property, may, at any time after action hath accrued thereon, by notice in writing, require the person having such right of action forthwith to commence suit against the principal debtor and other party liable.

"SECTION 2. If such suit be not commenced within thirty days after the service of such notice, and proceeded in with due diligence, in the ordinary course of law, to judgment and execution, *such security* shall be exonerated from liability to the person notified."

In this condition of the law, on the 31st of January, 1860, Rives gave to Bull—both persons being citizens of Arkansas—a promissory note, payable on the 1st of November, 1861. Bull indorsed it to Jones, of Memphis, Tennessee; both the States of Tennessee and Arkansas having, in the late civil war, been members of the so-called Confederate States of America. The note was not paid at its maturity, and it having been protested, notice of the dishonor, &c., was given to Bull.

Bull died in November, 1869, and letters of administration on his estate were granted to one Ross.

* Hanger *v.* Abbott, 6 Wallace, 539; Brown *v.* Hiatts, 15 Id. 177, and other cases.

† Batesville Institute *v.* Kauffman, 18 Id. 151.

‡ Gould's Digest, 1015.

Statement of the case.

Jones, now, October 13th, 1871, brought assumpsit on the note against the administrator, Ross, on the indorsement of Bull, his intestate.

The defendant pleaded two pleas.

1. The first plea was the statute of limitations of five years.

The plaintiff replied to this plea:

"That from the 1st of June, 1861, to the 2d of April, 1866, a war existed between the United States and the Confederate States, including the State of Arkansas, where during all that period the said Bull resided, and that during all that period the courts of the United States in and for the State of Arkansas were, by reason of the said war, closed, and no process could be issued therefrom or served on the said Bull, the authority of the United States therein being resisted, &c. That the said Bull died in said State on the 15th November, 1869, and that letters testamentary were granted, &c.; and that, counting out the period of the said war, the plaintiff's cause of action did accrue within five years next before the said grant of letters on the estate of Bull."

The defendant rejoined:

"That during the said rebellion, and on account thereof, the said courts were so closed that legal process could not be issued against this defendant from the month of May, 1861, until the month of March, 1865, and not longer; without this, that said courts were so closed from the 1st day of June, 1861, to the 6th of August, 1865."

The plaintiffs demurred to the rejoinder:

"Because it puts in issue a matter of public law pleaded in the said replication."

The court sustained this demurrer.

2. The second plea (which was founded on the above-quoted statute about persons bound as security for another in any bill, note, &c.) was thus:

"That Bull was only an indorser on the note, and, as such, only security; that Rives was the principal, and had ample property and effects out of which to make the debt, and that after the note had become due and payable and been protested

for non-payment, to wit, on the 1st day of January, 1861, Bull had given notice to Jones to bring suit upon the note immediately, and that in default of then doing so he, Bull, would hold himself free from all liability on the same. But that Jones had not brought suit on the note for more than the space of thirty days, nor indeed until the bringing of the present suit, October, 1871."

The plaintiffs demurred to this plea because:

"1. The indorsement of Bull made him primarily liable to the plaintiffs on his contract of indorsement. His contract was separate and distinct from that of Rives, the maker of the note. There was no unity or privity of contract between Rives and Bull; and Bull was in no sense the surety of Rives on his contract.

"2. The liability of Bull on his contract as indorser became perfect on protest of the note and notice, and he could not discharge it by the matter set up in the plea under the statute of Arkansas."

The court sustained this demurrer. Both demurrers being thus sustained, judgment was given for the plaintiff; and the administrator brought the case here, assigning for errors—

1. That the court erred in sustaining the plaintiff's demurrer to defendant's rejoinder to his replication to plea of statute of limitation.

2. That the court erred in sustaining the demurrer to defendant's third plea.

Messrs. S. F. Clark and S. W. Williams, for Bull's administrator, the plaintiff in error:

I. *In regard to the first error assigned.*

The replication is founded upon the act of Congress of June 11th, 1864.

The gist of the replication is the fact that the courts were closed, and that no legal proceedings could be had for a certain length of time during the war, under this act of Congress. And the real issue, if it raises any at all, is whether the courts were so closed a sufficient length of time to take the case out of the operation of the statute. The act does

not provide any particular length of time during which the statute of limitation should cease to run, but only during such time as the courts were closed, and thus left it a matter of fact to be determined by evidence. It being a matter of fact, the rejoinder is a special traverse.*

The demurrer admits the truth of the rejoinder, *i. e.*, that the courts were not closed from June 1st, 1861, to April 2d, 1866, but only from the month of May, 1861, to the month of March, 1865, which would not be a sufficient length of time to take the case out of the operation of the statute. Now, it is plain that if the gist of the replication is the time during which, under the act of Congress, the courts were closed, then the rejoinder sets up a matter of fact, and the rejoinder is well pleaded. But no matter what is the substance of the replication if the rejoinder pleads only matters of law, then the replication is obnoxious to the same objection. A bad rejoinder is good enough for a bad replication. The effect of demurrer, in such case, is to reach back to the replication.

In such cases judgment must be given against the party committing the first fault in pleading, which is here the plaintiff's. And if the demurrer be sustained, the judgment should be against the replication, and the court erred in not so deciding. If the judgment on the demurrer is right, then the plea of the statute of limitations is unanswered, and as the plea is a good bar, the final judgment should have been for the defendant.

The replication plainly sets up the war and the closing of the courts thereby, as jointly operating under the act of Congress referred to, to intercept the running of the statute. The allegation of neither one of these facts alone would have been an answer to the plea. The act does not contemplate a case where the war might have existed, but where the courts were nevertheless open, and the parties were at liberty to prosecute their actions. Yet that was the fact here, and in all or most cases where both parties to the suit resided in the States in insurrection. The case, therefore,

* 1 Chitty's Pleadings, 620.

does not come within the principle involved in *Hanger* v. *Abbott*,* a case between a debtor and creditor, citizens of two opposing belligerents at war. The parties here were at all times citizens of Arkansas and Tennessee, respectively—both States being States of the Southern Confederacy and same belligerent in the war. Intercourse between these States was not at any time interdicted, either by proclamation of the President or as an effect of the war. A payment of the debt at any time would have been legal. At any time the plaintiffs were at liberty to sue on the claim, provided any court had been open having jurisdiction of the cause. And it is judicially known that the court which tried this case below was open and doing business as early as April, 1864. From that time, at least, there was no impediment, either in law or fact, in the way of the plaintiff's recovering his debt. It has never been held in England that civil war and commotion in any manner arrested or suspended the laws, except between communities as to whom belligerent rights had attached, and non-intercourse had been declared. By one unbroken chain of decisions, from Henry the Eighth's time to the present, it has been held that insurrection and civil war did not interfere with the running of their various laws of limitation.†

Had the statute of limitations ceased to run by operation of our civil war, there would not have been the act of Congress of the 11th June, 1864.

II. *As to the second error assigned, that the court below erred in sustaining the plaintiff's demurrer to defendant's second plea.*

The action of the court below assumed that an indorser of a note is not a "security" within the statute of Arkansas, which authorizes securities to insist upon the obligee to use diligence in pursuing the principal; that it is the duty of the indorser to take up the note, and thus pursue his remedy over against the maker or other party. This no doubt is

* 6 Wallace, 532.

† Stowel *v.* Zouch, 1 Plowden, 353; Prideaux *v.* Webber, 1 Levinz, 31; Hall *v.* Wybourn, 2 Salkeld, 420; Aubry *v.* Fortescue, 10 Modern, 206; Miller *v.* Predeaux, 1 Keble, 157.

true with reference to indorsers in due course of business under the law merchant. But the statute of Arkansas gives a specific right to this remedy to "any person bound as security for another in any *bond*, *bill*, *or note*," &c. And the facts alleged in the plea, which are admitted by the demurrer, make him a security within that statute. The statute certainly contemplates that a party *can* become connected in some way as "security" in a note. But how can he become so more fitly than in the way here resorted to? His being a security is a matter of fact, and does not at all depend upon the form of his relation to the note. He may be security in many ways, as indorser or as maker.

It will not do to say that a party *cannot*, as an indorser, be a security. The utmost that the law, independent of the statute, declares, is that he is not such by virtue of the relationship. And it has been always held that he might prove himself so in fact, in order to entitle himself to the rights of a security as against the principal.

In *Bradford* v. *Corey*,* the court say:

"But although an indorser stands in the relation of a security to the drawer, in consequence of an indorsement of *an accommodation* note, or of a special promise of the latter to save him harmless, he does not lose his character as indorser, as respects the holder of the note, and he cannot be made liable on the note without a demand and notice. *He continues indorser*, with all *the privileges of a surety*."

Mr. A. H. Garland, *contra*:

I. *As to the first error assigned.*

The replication does not rest on the act of Congress so much as it rests on what this court has adjudged in several cases since the war broke out, and especially what it adjudged in *Batesville Institute* v. *Kauffman*,† and where it held that the war was flagrant in Arkansas from April, 1861, to

* 5 Barbour, 461; and see Bank *v.* Klingensmith, 7 Watts, 523; Grew *v.* Burditt, 9 Pickering, 265.

† 18 Wallace, 151.

April, 1866, and that the courts of the United States, in contemplation of law, were closed during that time, and that hence the statutes of limitation did not run during it. That is all matter of law.

Counting out this period, the action was not barred.

The replication to the plea of limitation set up, in effect, that the courts were closed during that period.

The rejoinder to the replication alleged, in effect, that the courts were closed for a shorter period, which presented a matter of law merely, and the demurrer was properly sustained to it.

The counsel for the plaintiff in error insists that inasmuch as both parties resided within the States in rebellion, the limitation was not suspended during the legal period of the war in Arkansas. But whatever countenance such a doctrine may find in the cases referred to in Plowden, Levinz, Keble, and other reporters of cases during the different civil wars in England, it has no countenance in the decisions of this court.

In *Adger* v. *Alston*,* the plaintiff below was a citizen of South Carolina, and the defendant's intestate a citizen of Louisiana, and the court applied the principle settled in *Hanger* v. *Abbott*.†

In *Batesville Institute* v. *Kauffman*,‡ the plaintiff resided in Louisiana and the defendant was domiciled in Arkansas, and the court held that the statutes of limitation were suspended during the period above stated.

The demurrer to the rejoinder was, therefore, still properly sustained.

II. *As to the second error assigned.*

The statute of Arkansas enacts that a *surety* in any bond, bill, or note, may give the holder notice to sue the principal in writing, and if he fails to do so within thirty days the surety shall be discharged.

This plea was demurred to, on the grounds: 1. That the

* 15 Wallace, 560. † 6 Id. 532. ‡ 18 Id. 153.

indorsement of Bull made him primarily liable to plaintiffs on his contract of indorsement. That his contract was separate and distinct from that of Rives, the maker of the note. That there was no unity or privity of contract between Rives and Bull, and Bull was in no sense the surety of Rives on his contract. 2. That the liability of Bull on his contract as indorser became perfect on protest of the note and notice, and he could not discharge it by the matter set up in the plea under the Arkansas statute.

The Supreme Court of Arkansas has never decided that an indorser of a bill or note was a *surety* under the above statute.

The indorser of a note or bill is not a *surety* within the meaning of this statute.

The note was dated and payable in Tennessee, and the contract of the maker governed by the laws of Tennessee. The indorsee lived in Tennessee, and could in no event be affected by an Arkansas statute.

The contract of an indorser renders him primarily liable to the holder. He stands in the attitude of the drawer of a new bill. This is text-book law.*

The indorser cannot, like a *surety*, call upon the holder of the note to proceed and collect it of the maker; for the indorser, though in the nature of a surety, is answerable upon an independent contract, and it is his duty to take up the note when dishonored. An accommodation indorser stands in the relation of a surety towards the party for whose accommodation the indorsement is made, and may recover against him the costs to which he has been subjected; but he does not thereby lose the character of an indorser, as respects the holder of the note.†

Mere indulgence or delay by the holder to sue the maker, will not discharge the indorser. There is no obligation to

* 2 Parsons on Bills and Notes, 25.

† Edwards on Bills and Promissory Notes, p. 292, 293; citing Pain *v.* Packard, 13 Johnson, 174; Trimble *v.* Thorne, 16 Id. 152; Warner *v.* Beardsley, 8 Wendell, 194; Bradford *v.* Corey, 5 Barbour, 461—the indorser in this case added to his signature the word "*surety.*"

use the diligence, as is generally the case against a principal, in order to hold a surety liable, at least where the surety calls upon the creditor to act.*

If the holder of a promissory note be called upon by the indorser, after the note has become due, to prosecute the maker, of whom the amount might then be collected, but who afterwards becomes insolvent, and he neglects so to do, this will not discharge the indorser.†

The case, therefore, on both points, is one entirely clear.

Mr. Justice CLIFFORD delivered the opinion of the court.

Two errors are assigned, as follows:

1st. That the court erred in sustaining the demurrer of the plaintiffs to the rejoinder filed by the defendant to the plaintiffs' replication to the first special plea of the defendant.

2d. That the court erred in sustaining the demurrer of the plaintiffs to the third plea of the defendant.

I. Unsealed written contracts are barred by the statute of limitations of that State in five years from maturity, and it appears that the note described in the declaration matured on the first of November next after its date, but the record shows that the indorser deceased on the fifteenth of November, 1869, leaving the note unpaid and outstanding. Under the laws of the State the general statute of limitations runs from the maturity of the contract to the granting of administration upon the estate of the decedent, when the general statute ceases to run and the statute of limitations applicable to the estates of deceased persons begins to run.‡

* Byles on Bills, margin, p. 193—Sharswood's notes; Bank *v.* Myers, 1 Bailey, 412; Powell *v.* Waters, 17 Johnson, 176; Worsham *v.* Goar, 4 Porter, 441; Stafford *v.* Yates, 18 Johnson, 327; Sterling *v.* Marietta Co., 11 Sergeant & Rawle, 179; State Bank *v.* Wilson, 1 Devereux, 484; Foreman's Bank *v.* Rollins, 1 Shepley, 202; Page *v.* Webster, 3 Id. 244; Pierce *v.* Whitney, 1 Id. 113; Bank of Utica *v.* Ives, 17 Wendell, 501.

† Byles on Bills, margin, p. 193, top, p. 312, note by Sharswood, citing: Trimble *v.* Thorne, 16 Johnson, 152; Beebe *v.* West Branch Bank, 7 Watts & Sergeant, 375

‡ Brown *v.* Merrick, 16 Arkansas, 612; Biscoe *v.* Madden, 17 Id. 533.

Hence the defendant pleaded that the cause of action did not accrue to the plaintiffs at any time within five years next before the grant of letters of administration upon the estate of the deceased indorser.

War, when duly declared or recognized as such by the war-making power, imports a prohibition to the subjects or citizens of all commercial intercourse and all correspondence with citizens or persons domiciled in the enemy country. Total inability, therefore, on the part of an enemy creditor to sustain any contract in the tribunals of the other belligerent, exists by the law of nations during the continuance of the war, but the restoration of peace removes the disability and opens the doors of the courts.

Unquestioned right to sue is the *status* of the creditor if the contract was made during peace, but the effect of war is to suspend the right, not only without any fault on the part of the creditor, but under circumstances which make it his duty to abstain from any such attempt. His remedy is suspended by the acts of the two governments and by the law of nations, not applicable to the contract at its date, but which comes into operation in consequence of an event over which he has no control.*

Peace, it is said, restores the right and the remedy, but as that cannot be if the statute of limitations continues to run during the period the creditor is rendered incapable of suing, it necessarily follows that the operation of the statute is also suspended during the same period.

Attempt is made to distinguish the case before the court from the case in which that rule of decision was first promulgated by this court, but it is clear that the attempt must be unsuccessful, as the same doctrines have since been applied in a case where a mortgagee, who was a citizen and resident of one of the Confederate States, brought a suit after the close of the war upon a bond and mortgage executed prior to the war by citizens of one of the loyal States, and the court held that the period from the proclama-

* Hanger *v.* Abbott, 6 Wallace, 539.

tion of the blockade to the proclamation that the war was closed, must be deducted in the computation of the time which the statute of limitations of the loyal State had run against the right of action.*

Extended discussion of that topic is quite unnecessary, as the oft-repeated decisions of this court have established the rule that the statute of limitations was suspended in the rebellious States during the existence of the late rebellion, and the express decision of this court is that the war was flagrant in that State for the whole period specified in the replication filed by the plaintiffs.†

Viewed in the light of that decision it is clear that the rejoinder filed by the defendant is insufficient and that the ruling of the Circuit Court adjudging it bad was correct.‡

II. Due demand of the maker, protest, and notice to the indorser of non-payment are admitted, and it is alleged that the indorser *subsequently*, by a certain notice in writing, required the plaintiffs, as holders of the note, to sue the maker and the indorser at a time when the maker was solvent and able to pay the same, and that the plaintiffs omitted for more than thirty days to comply with the terms of the notice, during which time the maker became insolvent.

Based on these facts the second defence set up is that the indorser was discharged by the neglect of the holders of the note to comply with the terms of that notice, which must depend in a great measure upon the nature of the obligation that the indorser assumed by his contract of indorsement. If the holder of a negotiable promissory note does anything, the effect of which is to suspend, impair, or destroy the right of the prior parties to indemnity from those otherwise liable over to them, he cannot resort to the parties affected by his conduct to make good the default of the maker of the instrument.§

* Brown *v.* Hiatts, 15 Wallace, 177.

† Batesville Institute *v.* Kauffman, 18 Id. 155.

‡ The Protector, 12 Wallace, 700; Adger *v.* Alston, 15 Id. 555; Semmes *v.* Insurance Company 13 Id. 158; Levy *v.* Stewart, 11 Id. 253.

§ Bank *v.* Hatch, 6 Peters, 258; McLemore *v.* Powell, 12 Wheaton, 556; Wood *v.* Bank, 9 Cowen, 194; Bank *v.* Hanrick, 2 Story, 416; Newcomb *v.*

Simple indulgence, however, or mere delay to enforce payment, without a binding contract to give time, will not, under the general rules of commercial law, have that effect, even in the case of a party occupying strictly the contract relation of a surety.*

Indorsers, it is sometimes said, are sureties, but their contract, which is a new one as compared with the maker of the note, differs in some important respects from that of the surety, who is a joint promisor with the principal, as the holder of such an instrument is under no obligation to use diligence to enforce payment against the maker in order to hold the indorser.†

Even in a case where the holder of a promissory note was, after the note fell due, called upon by the indorser to prosecute the maker, of whom the amount might then have been collected, but who afterwards became insolvent, and the holder neglected to do as requested, still it is held that such neglect will not discharge the indorser.‡

Judicial decisions of high authority deny that the indorser is to be regarded as a surety after his liability is fixed by due presentment, demand, and notice of the dishonor of the note, and insist that when his liability is fixed by those acts of the holder, that he, the indorser, becomes a principal debtor himself, subject only to the condition that the holder shall do no act to suspend, impair, or destroy his remedy over against prior parties to whom he has a right to resort for a remedy; and support to that view is certainly derived from the conceded fact that the indorser is answerable upon an independent contract, which makes it his legal duty to

Raynor, 21 Wendell, 108; Byles on Bills (11th ed.), 247 n. 1; 3 Story on Notes (5th ed.), § 413.

* Philpot *v.* Briant, 4 Bingham, 721; Story on Notes (5th ed.), § 415.

† Bank *v.* Myers, 1 Bailey, 418; Powell *v.* Waters, 17 Johnson, 179; Stafford *v.* Yates, 18 Id. 329; Bank *v.* Rollins, 13 Maine, 205; Page *v.* Webster, 15 Id. 256; Bank *v.* Ives, 17 Wendell, 502; Sterling *v.* Marietta and S. T. Co., 11 Sergeant & Rawle, 182; Kennard *v.* Knott, 4 Manning & Granger, 474.

‡ Trimble *v.* Thorne, 16 Johnson, 159; Beebe *v.* Bank, 7 Watts & Sergeant, 375.

pay the note when duly presented and demanded and due notice is given to him of its dishonor; and also from the fact, which is also conceded, that he has not the same reason as may exist in common cases of suretyship to compel the creditor to active diligence against the maker, as he has in general the complete power, by paying the note, to reinstate himself in the possession and ownership of the same, and thus to entitle himself to a personal remedy against the maker.*

Doubtless the indorser is in some respects a surety, but his principal relation to the instrument is that expressed by the commercial term applied to every party who contracts that obligation. Such a party to such an instrument contracts with the indorsee and every subsequent holder to whom the note is transferred, as follows: (1.) That the instrument and antecedent signatures are genuine. (2.) That he, the indorser, has a good title to the instrument. (3.) That he is competent to bind himself in such a contract. (4.) That the maker is competent to bind himself to the payment, and that he will, upon due presentment of the note, pay it at maturity. (5.) That if, when duly presented, it is not paid by the maker, he, the indorser, will, upon due and reasonable notice being given him of the dishonor, pay the same to the indorsee or other holder.†

Confirmation that the indorser is not a surety in the general sense is also derived from the fact that he stands in the attitude of the drawer of a new bill, and that he is not primarily liable to make the payment, but only in case of the default of the maker and proof of due presentment, protest, and notice of dishonor, and that even then he cannot be joined with the maker, as the surety *proper* may be, because the maker and indorser are liable on different contracts.‡

* McLemore *v.* Powell, 12 Wheaton, 556; 2 Parsons on Notes and Bills, 243–245; 3 Kent (12th ed.), 114*.

† Story on Notes (5th ed.), § 135; Story on Bills, § 108; 2 Parsons on Bills and Notes, 23; Ogden *v.* Saunders, 12 Wheaton, 341; 3 Kent (12th ed.), 88; Bateman on Commercial Law, § 319.

‡ 2 Parsons on Bills and Notes, 25

Opinion of the court.

Suppose that is so, when the theory is tested by the rules of commercial law, still it is insisted by the defendant that the contract of the indorser in this case was made in the State where he resides, and that the indorser, by the law of that State, is discharged, for the reason that the holder of the note omitted to seek his remedy against the maker, as thereto requested by the indorser.

Support to that defence as exhibited in the second assignment of errors is attempted to be drawn from the statute of the State where the indorser resides, which provides in effect that a surety in any bond, bill, or note, may give the holder notice to sue the principal in writing, and if the holder fails to do so within thirty days the surety shall be discharged.*

Founded on that statute the defendant alleges that the indorsement was made in that State, and the allegation also is that the consideration of the note was a debt due from the maker to the plaintiffs, and that it was made payable to the decedent and was by him indorsed merely as a means of procuring his liability for the payment of the said debt due to the plaintiffs.

Grant that the contract of indorsement was actually executed in that State, still it is the better opinion that the case is not governed by the statute of that State already referred to, for the reason that the statute of the State does not include the contract of an indorser.

Sureties in a note who become joint promisors with the maker, it may be conceded, are within the terms of that statute, as they stand in the same relation to the principal as in a bond given for the payment of money or the delivery of property. Authority to give the described notice arises immediately after the bond, bill, or note falls due, which evidently refers to the lapse of time specified in the contract; but the absolute obligation to pay does not arise in the case of an indorser before notice of dishonor, which can never be given to the indorser till after the note is presented to the maker, and he has refused or neglected to

* Gould's Digest of Statutes, 1015.

fulfil his promise to pay, so that the notice in writing requiring the holder to sue the indorser with the maker, would seem to be inapplicable before the liability of the indorser is fixed by demand of payment of the maker and his refusal to comply, and notice is given to the indorser of the dishonor of the note.

Evidently the statute contemplates that the cause of action will accrue against the principal and surety at the same time, which is never the case with the indorser and maker. Such a notice may unquestionably be given by a surety proper, whether his contract is expressed in a bond, bill, or note, as soon as the instrument falls due; but it would be unreasonable to suppose that an indorser would give such a notice before his liability had become fixed, as it may be that such a demand to sue would operate as waiver of the right to notice of the dishonor of the note. Nor is it necessary to extend the operation of the statute so as to include an indorser, in order to satisfy the literal scope of the language employed. "Persons, bound as security for another," are the words of the statute, which undoubtedly includes sureties proper in a bond, bill, or note, but it would be extending the words of the statute beyond their reasonable meaning, to hold that it includes an indorser whose liability is fixed by the required notice of the dishonor of the bill or note.

Beyond all doubt the statute is one passed in derogation of the common law, even if restricted to sureties in the general sense, but it would be even more so, if by a broad construction, it could be extended to include indorsers upon bills of exchange and negotiable promissory notes.

Statutes passed in derogation of the common law, it is everywhere held, should be construed strictly, nor is there any subject-matter to which that rule should be applied with greater intensity than where the attempt is made to change by local legislation the rules of commercial law, applicable to that class of commercial instruments. Remedies of a statutory character, where the right to be enforced was unknown at the common law, are to be followed with strict-

ness, both as to the methods to be pursued and the cases to which they are to be applied.*

When a statute alters the common law the meaning shall not be strained beyond the meaning of the words, except in cases of public utility, as when the end in view appears to be more comprehensive than the enacting words.†

Where the expression is in general terms, statutes are to receive such a construction as may be agreeable to the rules of the common law in cases of that nature, for statutes are not presumed to make any alteration in the common law, beyond what is expressed in the statute.‡

Argument to show that the statute in question, if it be construed to include the indorser of a bill or note, is in derogation of the rule of the commercial law, is scarcely necessary, as it appears to be well settled that it is no part of the duty of the holder of a note which has been dishonored and due notice thereof given to the indorser, to sue the maker merely because the indorser requests him so to do. On the contrary the holder has his choice to sue any one of the parties to the note who is in default, and it is the duty of the indorser, if he desires to secure the amount against the maker, to pay the note himself and thus to entitle himself to bring a suit against that party.§

Such a holder, says Judge Story, is perfectly at liberty to sue any or all the parties at his pleasure, and he is not bound to any diligence in seeking his reimbursement. Nor can the indorser insist that the holder should, upon his request, use any such diligence. His remedy is to pay the note and then to seek recourse against the maker or any other party liable over to him.‖

Such an indorser, that is, one whose liability is fixed by due notice of the maker's default, is not entitled to the aid

* Lease *v* Vance, 28 Iowa, 509.

† Potter's Dwarris on Statutes, 186.

‡ 9 Bacon's Abridgment, by Bouvier, 245; Sedgwick on Statutes, 2d ed. 267; 1 Kent, 12th ed. 464; Broom's Legal Maxims, 4th ed. 552.

§ Story on Notes, 5th ed. § 115, a.

‖ Ib. § 419; Beebe *v.* Banks, 7 Watts & Sergeant, 375.

of a court of equity as a surety, as he has the right to pay the amount of the note to the holder, and to be subrogated to all his rights as against the maker.*

None of these suggestions are intended to deny the well-known rule that the maker of the note is in general the principal debtor, nor that all the other parties are in a special sense sureties for him; they, if indorsers, being liable only in case of his default, unless they have waived demand and notice. Though all the other parties are sureties in respect to the maker, still they are not co-sureties, but each prior party is a principal in respect to each subsequent party.

An indorser of a promissory note, though in the nature of a surety, is not for all purposes entitled to the privileges of that character, as he is answerable upon an independent contract, and it is his duty to take up the note when it is dishonored.†

Unquestionably there is in some respects a resemblance between the indorser and a surety, but in others there is none, as he does not in any case lose his character of indorser nor can he be made liable on the note without proof of due demand and notice.‡

Proof of the kind, if the demand and notice are seasonable and in due form, removes every condition from his liability except that the holder will do no act to suspend, impair, or destroy his right to indemnity from such other parties to the instrument as are bound to save him harmless.§

Negotiable promissory notes, like bills of exchange, are commercial paper in the strictest sense, and as such must ever be regarded as favored instruments, as well on account of their negotiable quality as for their universal convenience in mercantile transactions. Hence the law encourages their

* Lenox *v.* Prout, 3 Wheaton, 525; Trimble *v.* Thorne, 16 Johnson, 153; Warner *v.* Beardsley, 8 Wendell, 199; Same *v* Same, 6 Id. 610; Frye *v.* Barker, 4 Pickering, 382; Hunt *v.* Bridgham, 2 Id. 581.

† Ellsworth *v.* Brewer, 11 Pickering, 320.

‡ Bradford *v.* Corey, 5 Barbour, 462.

§ Woodman *v.* Eastman, 10 New Hampshire, 359; Warner *v.* Beardsley, 8 Wendell, 2d ed., 195 and note.

use as a safe and convenient medium for the settlement of balances among mercantile men, and any course of judicial decision calculated to restrain or impede their unembarrassed circulation would be contrary to the soundest principles of public policy.

Mercantile law is a system of jurisprudence recognized by all commercial nations, and upon no subject is it of more importance that there should be, as far as practicable, uniformity of decision throughout the world.*

Apply these several suggestions to the case and it follows that the statute, when properly construed, does not include the indorser of a negotiable promissory note whose liability has become absolute by due notice of the dishonor of the note.

JUDGMENT AFFIRMED.

RAILROAD COMPANY *v.* ANDROSCOGGIN MILLS.

The Evansville and Crawfordsville Railroad Company, of Indiana, owning a railroad running from the south line of that State northward to another point in it, and which made a line of road by which cotton was brought from Columbus, Mississippi, to Boston, Massachusetts, established, apparently with the view of procuring freights over its road, an agency in the former place; and there, as it seemed, was in the habit of contracting for the transportation of cotton from Columbus to Boston, its own road providing one link of the chain for transportation.

Planters in Columbus shipped from that place to manufacturers in Boston a quantity of cotton. The bill of lading, dated at Columbus, Mississippi, and signed by the agent, at Columbus, of the railroad company, had in display letters at its top—

"EVANSVILLE AND CRAWFORDSVILLE RAILROAD COMPANY.

"Great *through* fast freight route to all points north and east, via Pennsylvania Central, Erie, and New York Central Railroads. Contract for through rate. This reliable *through* line makes the shipment of cotton a specialty, and guarantees quick time and delivery in good order."

The bill, after stating the destination of the cotton to be Boston, Massachusetts, went on to say:

"The Evansville and Crawfordsville Railroad Company hereby agree that

* Goodman *v.* Simonds, 20 Howard, 364.

upon arrival at Evansville, and delivery of the property, they will receive and forward said property to destination upon the following conditions: That the shipper, owner, and consignee do hereby release the said company and the boats and railroads with which they connect, from the acts of Providence, or from damage or loss by fire or other casualty while in depots or places of transhipment; also, damage or delays by unavoidable accidents; also, loss by fire, collision, or dangers of navigation, or for loss or difference in weights, torn baggage, or condition of said property.

"*The Evansville and Crawfordsville Railroad Company will not be liable for loss or damage by fire, from any cause whatever.*

"All property shipped on this contract will be subject to the expense of necessary repairs and remarking. In the event of loss or damage under the provisions of this agreement, the value or cost at the point of shipment shall govern the settlement of the same. Said property to be forwarded immediately after its arrival at Evansville, . . . and to be delivered at Boston, upon the payment of the freight and charges as herein specified.

"Through rate $10.25 per bale, from Columbus to Boston."

The exemption just above put in italics was printed in red ink. *Held*—

1. That the cotton being delivered to the company's agent, at Columbus, there was a contract by the company to carry from Columbus to Boston.
2. That the exemption in red ink applied to the whole route, between Columbus and Boston, and not to the part alone between Evansville and Boston; and that the cotton having been burned between Columbus and Evansville, without fault of the railroad company, the exemption in red ink applied, and absolved the company from liability for the loss.

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

The Evansville and Crawfordsville Railroad Company was a railroad company incorporated by the State of Indiana, and having a railroad between Evansville, in the southern part of Indiana, and Crawfordsville, in the northern. The road is part of a line of road for the transportation of cotton between the cotton fields of the South and the cotton mills of the North. For the purpose, apparently, of procuring freights over its road, this company had established an agency at Columbus, in Mississippi, and was in the habit of making contracts there for the transportation of cotton from that place to Boston, Massachusetts, its own road forming one link of the chain of transportation.

On the 10th of January, 1873, Mitchell & Co. shipped, from the said Columbus, in Mississippi, to B. F. Bates, the treasurer of the "Androscoggin Mills," an incorporated

company in New England, two hundred bales of cotton, to be delivered at Boston.

The bill of lading, creating the contract between the parties, was as follows, viz.:

EVANSVILLE AND CRAWFORDSVILLE RAILROAD COMPANY.

Great through Fast Freight Route to all points North and East, via Pennsylvania Central, Erie, and New York Central Railroads.

CONTRACT FOR THROUGH RATE.

A. E. SHRADER,
General Freight Agent, Evansville, Indiana.

This reliable through line makes the shipment of cotton and tobacco a specialty, and guarantees quick time and delivery in good order.

COLUMBUS, MISS., January 10th, 1873.

Received from Mitchell & Co. the following packages (contents unknown), in apparent good order, viz.:

Mark, consignees, and destination.	Articles.	Weight, Subject to correction.
<B A>B. F. Bates, Treas., Boston, Mass.	200 bales cotton.	

The Evansville and Crawfordsville Railroad Company hereby agree that, **upon arrival at Evansville, and delivery of the property** above described and consigned, **they will receive and forward said property to destination** upon the **following** conditions: That the shipper, owner, and consignee do hereby release the said Evansville and Crawfordsville Railroad Company, and the boats and railroads with which they connect, from the acts of Providence, or from **damage** or **loss by fire** or other casualty **while in depots or places of transhipment**; also, damage or delays by **unavoidable accidents**; also, **loss by fire,** collision, or dangers of navigation, or for loss or difference in weights, torn baggage, or condition of said property.

THE EVANSVILLE AND CRAWFORDSVILLE RAILROAD COMPANY WILL NOT BE LIABLE FOR LOSS OR DAMAGE BY FIRE, FROM ANY CAUSE WHATEVER.

All property shipped on this contract will be subject to the

expense of necessary repairs and remarking. In the event of loss or damage under the provisions of this agreement, the value or cost at the point of shipment shall govern the settlement of the same. Said property to be forwarded immediately after its arrival at Evansville, or as soon thereafter as it is ready for shipment, and to be delivered at Boston, Massachusetts, upon the payment of the freight and charges as herein specified.

In witness whereof the agent hath affirmed to four bills of lading of this tenor and date, one of which being accomplished the others to stand void.

Through rate $10.25 per bale, from Columbus to Boston.

L. Q. AYRES,
Agent.

The words in small capital letters at or near the bottom of the preceding page were printed, in the bill of lading, in red ink, so as to be conspicuous. Those in bold face in the twelve lines before, are here so put by the Reporter, being words on which the question partly turned.

The cotton was burned on the way from Columbus to Evansville; that is to say, was burned before it ever reached Evansville.

The Androscoggin Mills now sued the Evansville and Crawfordsville Railroad Company, declaring upon that clause of the contract which contained the provision that "upon the arrival at Evansville and delivery of the property above consigned, they will receive and forward said property to destination upon the following conditions;" conditions among which, as the reader has noted, was one that the company would not be liable for loss by fire while in depots or places of transhipment; and another, that they would not be liable for loss by fire, collision, or dangers of navigation, or loss or difference in weights, &c. And as the cotton had not arrived at Evansville when the loss occurred, the argument of the Androscoggin Mills was that the condition of an exemption from liability in the case of a loss by fire did not attach, and that the railroad company was to be subjected to the loss upon the general principle of its liability as a common carrier.

On demurrer the court below was of the opinion that this position was a sound one, and gave judgment against the Evansville and Crawfordsville company.

From that judgment the company appealed.

Mr. A. Inglehart, for the plaintiff in error:

I. The bill acknowledges receipt of the cotton at Columbus, Mississippi, but only undertakes to carry the same when it arrives at Evansville; and to construe the undertaking according to its terms, the railroad company is not liable till the goods reached Evansville. Now, as the goods never reached Evansville, and were never delivered to the company within the terms of the contract sued on, there is no liability at all.

II. But if the court should hold the bill of lading to be a contract to carry from Columbus to Boston, then clearly the whole contract with all its conditions and stipulations is also extended to the whole distance.

The exemption, which is declared in the most general terms, "The Evansville and Crawfordsville Railroad Company will not be liable for loss by fire for any cause whatever," is surely as broad as the obligation to carry. It is almost equivalent in words to saying that the company will not be liable for loss by fire wherever occurring.

This declaration is made the subject of a new and isolated paragraph, displayed, by red ink, as a prominent and pervading feature of the contract.

As confessedly the loss occurred without the fault of the company, it is under the exemption not liable.

This company, it is obvious, was seized and pervaded by a sense of peril from fire. We have no less than three provisions in about as many lines, against liability for loss by it. Can it be supposed that the company meant to say that if a fire occurred on the first part of the route they would pay the loss with pleasure, but that if it occurred on the second they would not pay it at all?

Argument for the owner of the goods.

Mr. Charles Denby, contra:

The opposing counsel admits the *receipt* by the company's agent of the cotton at Columbus, Mississippi, and the position is that there was no contract to carry from Columbus to Evansville at all, but only to carry from Evansville to Boston. Hence, that there can be no liability for the loss between Columbus and Evansville. But what was the company to do with the cotton after receiving it unless to carry it? keep it forever at Columbus?

Having received the cotton at Columbus it was the plain duty of the company to deliver it in Boston. The plaintiff had lost all power or control over it, and it being exclusively in the hands of the company *it* must be responsible for its safe delivery at Boston via Evansville, where the company had agreed to receive and to forward it, upon the restricted terms of the bill of lading as applied to that portion of the route from Evansville to Boston.

Flanders, in his authoritative work on Shipping,* considers this exact case. He says:

"The responsibility attaches from the moment of the receipt. . . . Contracts to forward goods from one place to another and distant place, subject the party as common carrier for the whole route, although his own transportation line extends only part of the distance, and the loss occurs on a portion of the route in which he is not interested."

It is quite plain, however, in looking at the bill of lading, that the *exemptions* do have a special reference to the transit from Evansville to Boston; and so plain is this, that the other side is actually led into the position that unless and until the cotton got to Evansville, there was not even a contract to carry at all.

Anybody looking at the bill of lading will see that while in general there is a contract to carry all the way through from Columbus to Boston, the exemptions—the earlier ones confessedly—have an exclusive reference to carriage between Evansville, where the company's road begins, and

* Section 311.

Boston. That is a matter to be decided by "inspection." "Upon arrival at Evansville and delivery of the property" *there*, it is that the company will receive and forward it upon "the *following* conditions." Does not the condition in red ink follow, and follow without a word interposited to show that it does not come into operation until "upon arrival and delivery at Evansville, and delivery of the property." What has red ink or a new paragraph—devices of the printer merely—got to do with the legal interpretation of a contract? Either may make the exemption more conspicuous, but neither can make it apply to that which it would not have applied to, had it been in black ink or without the paragraph. The exemption is sensible enough as it stands. The bill makes three exemptions about fire:

1. "*Damage* OR *loss* by fire while in depots or places of transhipment."

2. "Damage or delays by *unavoidable accident;* also *loss* by fire; *i. e.*, loss by fire arising by unavoidable accident, or else, perhaps, loss by fire whether occurring in depots, &c., or not."

3. "Loss or damage from *any cause whatever.*"

We have here a progressive series of exemptions. The first two have confessedly reference to the transit between Evansville and Boston. Why shall the third not have the same? The third only extends what the first two less fully provide for. It may attempt to extend the exemption to an unlawful degree in attempting to exempt "from loss or damage by fire *from any cause whatever.*" But the question here is not about the lawfulness of it, but as to what it applies.

We admit that the exemptions, meant to be secured by the bill, are confusedly stated. But there is less difficulty in interpreting them as we would interpret them, than in the way in which the other side would interpret them. If you would apply the red-letter exemption to the whole transit, of what effect are the two exemptions confessedly confined to the partial transit between Evansville and Boston?

If you confine it to the transit between Columbus and Evansville, then you give, for that part of the road, an exemption *greater* than that for the other; that other which it is plain from other provisions was the part more particularly meant to be guarded. The construction is, perhaps, one of a balance of difficulties. The difficulties of the construction sought to be set up by the other side are more weighty than those of the one sought to be maintained by us.

Mr. Justice HUNT delivered the opinion of the court.

Had the bill of lading contained nothing more than the terms and clauses in the part of it which is before the red-letter clause, the argument made in behalf of the Androscoggin Mills would be a strong one. We must, however, examine the whole contract, and construe and give effect to all its provisions.

This bill of lading, in the first place, is a contract covering the cotton during the entire period of its transmission from Columbus to Boston, and over every part of the route. Not only is this the general law of the bill of lading, from the fact that Columbus was the place of receiving, and Boston the place of delivering, the cotton, but this bill of lading is emphatic in its declaration that such is its character. It is headed, "Great through fast route to all points north and east," &c. It says: "This reliable through line makes the shipment of cotton and tobacco a specialty;" "contract for a through rate;" and again, "Through rate $10.25 per bale from Columbus to Boston." It is evident, therefore, that the cotton is the subject of the contract of carriage not only from Evansville to Boston, to which the plaintiffs in error would confine it, but from Columbus to Evansville as well.

Bearing this in mind, it will be observed in the second place, that the contract separates itself into two parts—one, limiting the liability of the railroad company from Evansville to Boston, the other governing its liability generally. Thus the portion already referred to as relied upon by the defendants in error, undoubtedly was intended to be limited in its range. The liability under it and the exemption also,

is expressly made dependent on the arrival of the goods at Evansville, and until they have so arrived, neither the liability nor the exemption commences. We can, however, be asked to hold that the liability or the exemption on a portion of the route is entirely omitted from the terms of a bill of lading which provides for transportation over the whole route, and where the compensation is specified as covering the whole route, only where it so appears by the plainest language. No doubt terms might be used in a bill of lading for the transportation of cotton from Mississippi to Massachusetts, by which exemptions from liability for loss by fire while in a railroad car from Evansville northward should be made, and no such exemptions should be made while the cotton was on the deck of a steamboat. We should not, however, expect to find such provisions, and we should require them to be clearly expressed.

All of the first general paragraph of the bill of lading may fairly be said to relate to the conditions upon which the transportation from Evansville northward shall be made. In its general terms we have already considered that paragraph.

A new subject, however, is taken up in the next sentence. It is not only the beginning of another paragraph, with the usual space between it and what precedes it, but it is printed in red ink, while what precedes it is in ordinary black type. Its importance in the opinion of the shippers is thus manifested. Attention is called to it as involving important provisions. Dropping the reference to Evansville, and the arrival of the goods there, it uses the most general terms: "*The Evansville and Crawfordsville Railroad Company will not be liable for loss or damage by fire, from any cause whatever.*" It is an evident addition to the contract as expressed in the first clause. The railroad company there define the terms and conditions upon which they will be liable after the property has reached Evansville. While on the passage from Evansville northward, non-liability for loss by fire is twice stipulated for,—once while in depots or places of transhipments, and again in general terms,—the evident object and

intent of the first clause is to affect this part of the route only. A new branch of the contract is then taken up, and the difference is intended to be made plain to the eye as well as the understanding. In the red-ink clause they use terms applicable to the entire contract of shipment, viz.: They "will not be liable for loss or damage by fire, from any cause whatever." No language of limitation is used. It is as if they had said, "Should damage by fire occur to this cotton during any part of the route, and from any cause whatever, this company will not be liable."

It is quite unreasonable to suppose that the company here intended to guard themselves against a liability for which they had twice already stipulated that they should not be *liable*, to wit, of loss by fire after the cotton had reached Evansville. The clause in red was intended to cover the whole contract. Wherever, whenever, or however they would by law be liable for a loss by fire, from that liability they intended to relieve themselves. The exemption was intended to be as broad as was the original liability.

A careful reading of the bill of lading shows that the red-ink clause not only, but all that follows it, must have been understood by the parties to cover the whole route, and not to be limited to a part of the distance only. Thus, after providing an exemption from liability for loss by fire from any cause whatever, the bill of lading goes on to say, "All property shipped on this contract will be subject to the expense of necessary repairs and remarking." Can it be doubted that if the sacks of this cotton had required repairing or remarking from causes occurring before it reached Evansville, that it would have been a proper item of expense under this clause? "In the event of loss or damage under the provisions of this agreement (it proceeds) the value or cost at the point of shipment shall govern the settlement of the same." No one can doubt that the value at Columbus will govern the amount of a recovery under this clause. And again, the clause, "Said property to be forwarded immediately after its arrival at Evansville, . . . and to be delivered at Boston upon the payment of freight and charges,"

is, by its very terms, applicable to goods not yet at Evansville, when the contract takes effect.

We are of opinion that the argument of the defendants in error, upon which the judgment below was based, that the exemption from liability by fire was limited to fire occurring after the cotton had been received at and shipped from Evansville, was erroneous. The exemption covers the entire route.

JUDGMENT REVERSED, and judgment upon the demurrer ordered in favor of

THE PLAINTIFFS IN ERROR.

BAILEY v. RAILROAD COMPANY.

1. In December, 1868, a railroad company, which was in existence in 1862, and before, but which by its charter was limited to 10 per cent. dividends on its capital, now all taken, reciting that it had "hitherto expended of its earnings for the purpose of constructing and equipping its road, and in the purchase of real estate and other properties with a view to the increase of its traffic, moneys equal to 80 per cent. of its capital," and reciting further that the stockholders were "entitled to evidence of such expenditure and to reimbursement of the same at some convenient future period," resolved to give them and did give them in proportion to the amount of stock held by them respectively, certificates which it called "interest certificates;" which certified that A. B. "being the holder of —— shares of the capital stock of the company, was entitled to $——, payable ratably with the other like certificates, *at the pleasure* of the company out of its future earnings, with dividends thereon at the same rates and times as dividends should be paid upon the capital stock of the company." The "certificate" was declared to be transferable on the books of the company, and had a transfer in blank at the foot of it, in the form common at the foot of certificates of stock, with an appointment in blank of an attorney to transfer.

Held, that this was a "dividend in scrip," within the twenty-second section of the Internal Revenue Act of June 30th, 1864, as subsequently amended, which enacts that "any railroad company which may have declared any *dividend in scrip* or money due or payable to its stockholders as part of the earnings, profits, income, or gains 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 such

dividends or profits, whenever and wherever the same shall be payable;" and which authorized the company making such dividend to withhold the five per cent. tax.

2. The said company having declared, in February and August, 1869, two dividends on these certificates, as well as on its stock, and having paid a tax of 5 per cent. on all the dividends, without any suggestion by the revenue officers that any further tax was due, became, in February, 1870, under legislative authority, consolidated with another company; the statute under which the consolidation was effected, enacting that it should be lawful for the old company "to merge and consolidate its capital stock, franchises, and property" with the other company which it was proposed to become united with; but enacting also "that the rights of all creditors of and all liens upon the property of either of said corporations shall be preserved unimpaired, and the respective corporations shall be deemed to continue in existence to preserve the same; and that all debts and liabilities incurred by either of said corporations (except mortgages) shall thenceforth attach to such new corporation and be enforced against it."

Held, that the new company was liable to the five per cent. tax on the dividend in scrip, which the old one was bound to pay. And the new company having paid it under protest, to save its property from being sold on a levy for it; *held* further, on *assumpsit* brought by the new company against the collector to recover back the money, that the dividend in scrip having been decided to be a proper subject for the five per cent. tax, and the company—notwithstanding a violation of its own duty in making, without demand, a return of the dividend—having had, in fact, a full hearing before the officers of internal revenue, and obtained thereby a large abatement from the tax as originally assessed, this court would not suffer a recovery by the railroad company against the collector, because, in compelling payment of the tax, he had not conformed with certain proceedings of form intended to secure a full hearing to taxpayers, which the act made it lawful and perhaps proper for the assessor to do before resorting to the ulterior measure of levy on the company's property.

3. On a question whether the so-called "interest certificates" were taxable as a dividend in scrip, evidence from the Reports, both of the old and of the new company, was allowable, to show that from the time the "interest certificates" were issued up to the time of the suit, dividends were declared and paid on them, just as on the company's capital stock.

ERROR to the Circuit Court for the Northern District of New York; the case being thus:

The 22d section of the Internal Revenue Act of June 30th, 1864,* enacts:

* 13 Stat. at Large, 284, as amended by the Internal Revenue Act of July 13th, 1866; 14 Id. 138.

Statement of the case.

"That any railroad company that may have declared *any dividend in scrip or money*, due or payable to its stockholders, as part of the *earnings, profits, income, or gains* of such company *carried to the account of any fund or used for construction*, shall be subject to and pay a tax of 5 per centum on the *amount of all such dividends* or profits, whenever and wherever the same shall be payable; and said companies are hereby authorized to deduct and withhold from all *payments* on account of any *dividends, due and payable*, as aforesaid, the tax of 5 per centum.

"And a list or return shall be made and rendered to the assessor, on or before the 10th of the month following that in which said dividends *became due and payable*, and as often as every six months; and said list or return shall contain a true and faithful account of the amount of tax, and there shall be annexed thereunto a declaration of the president or treasurer of the company, under oath or affirmation, that the same contains a true and faithful account of said tax.

"And for any default in making or rendering such list or return, or in the payment of the tax aforesaid, the company making such default shall forfeit as a penalty the sum of $1000."

The fourteenth section of the act thus enacts:*

"If any person shall not deliver a monthly or other list or return by the time required by law; or if any person shall deliver or disclose to any assessor or assistant assessor any list, statement, or return, which in the opinion of the assessor is false or fraudulent, or containing any understatement or undervaluation, it shall be *lawful* for the assessor to summon such person, his agent, or other person having possession, custody, or care of books of account containing entries relating to such person, to appear before such assessor, produce such books at any time or place therein named, to give testimony, to answer interrogations under oath or affirmation respecting any objects liable to tax as aforesaid on the lists, statements, or returns thereof on any trade, business, or profession liable to any tax as aforesaid; and the assessor may summon as aforesaid any person residing or found within the State in which his district is situated; and when the person intended to be summoned

* Section fourteen of the act of June 30th, 1864 (13 Stat. at Large, 226), as amended by the ninth section of the act of July 13th, 1866, 14 Id. 138.

does not reside, and cannot be found within the State, then the assessor may enter any collection district where such person may be found and there make the examination, hereinbefore authorized, and to this end he shall have and may exercise all the power and authority he has or may lawfully exercise in the district to which he is commissioned. . . . It shall be the duty of the assessor or assistant assessor of the district within which such person may have taxable property to enter into and upon the premises, *if it be necessary*, of such person so refusing or neglecting, or rendering a false or fraudulent return, and to make, according to the best information he can obtain, including that derived from the evidence elicited by the examination by the assessor, and on his own view and information, such list or return, according to the form prescribed, of the property, goods, merchandise, wares, and all articles or objects liable to tax, owned or possessed, or under the care or management of such person, and assess the tax thereon, including the amount, if any, due for special or income tax. . . . And the list or return *so made*, and subscribed by said assessor or assistant assessor, shall be taken and reputed as good and sufficient for all legal purposes."

Section nineteen of the same statute enacts:*

"That the assessor . . . shall give notice by advertisement, in one newspaper published in each county, and shall post notices, &c., stating the time and place where appeals shall be received and determined, relative to any erroneous or excessive valuation. . . . And such assessor is hereby authorized at any time to hear and determine in a summary way, according to law and right, upon any and all appeals by parties who shall appear voluntarily before him, &c. And shall have power to re-examine and determine upon the assessments and valuations, and rectify the same as shall appear just and equitable."

On the 19th of December, 1868—the above-quoted enactment being then in force—the New York Central Railroad—a company having its road between Albany and Buffalo, and which had been in existence since 1853—passed resolutions authorizing the issue of certain certificates to the stockholders of the company, to the amount of 80 per cent.

* 14 Stat. at Large, 102; amending section nineteen of the act of 1864.

of the amount of the capital stock of the company. The company by its charter was restricted to annual dividends of 10 per cent. The certificates were named "interest certificates," and the aggregate amount of them authorized by the said resolutions was $23,036,000. The amount of the capital stock of the company, at the time said resolutions were passed, was $28,795,000, and it was at this time all taken. The resolutions and certificate referred to each other, and all together made the form of the certificate. The following is a copy of the resolutions and certificate:

"THE NEW YORK CENTRAL RAILROAD COMPANY.

"*Whereas*, This company has hitherto expended of its earnings for the purpose of constructing and equipping its road, and in the purchase of real estate and other properties, with a view to the increase of its traffic, moneys equal in amount to 80 per cent. of the capital stock of the company; and whereas, the several stockholders of the company are *entitled to evidence of such expenditure*, and to reimbursement of the same at some *convenient future period*; now, therefore,

"*Resolved*, That a certificate, signed by the president and treasurer of this company, be issued to the stockholders severally, declaring that such stockholder is entitled to 80 per cent. of the amount of the capital stock held by him, payable ratably with the other certificates issued under this resolution, *at the option of the company, out of its future earnings, with dividends thereon, at the same rates and times as dividends shall be paid on shares of the capital stock of the company, and that such certificates may be, at the option of the company, convertible into stock of the company, whenever the company shall be authorized to increase its capital stock to an amount sufficient for such conversion.*"

The certificates were in this form:

THE NEW YORK CENTRAL RAILROAD COMPANY.

No. *Interest Certificate.*

Under a resolution of the board of directors of this company, passed December 19th, 1868, of which the above is a copy, the New York Central Railroad Company hereby certifies that A. B., being the holder of —— shares of the capital stock of said company, is entitled to —— dollars payable ratably with

the other certificates issued under said resolution *at the pleasure of the company out of its future earnings*, with dividends thereon, at the same rates and times as dividends shall be paid upon the shares of the capital stock of said company.

This certificate may be transferred on the books of the company on the surrender of this certificate.

In witness whereof, the said company has caused this certificate to be signed by its president and treasurer, this 19th day of December, 1868.

_____,
President.

_____,
Treasurer.

At the foot of each certificate there was a form of transfer in blank:

For a valuable consideration I, A. B., do hereby sell, assign, and transfer all interest in the above certificate to C. D., and do hereby irrevocably appoint E. F. attorney, to execute a transfer thereof on the books of the railroad company therein mentioned.

The company declared two dividends of $921,440 each upon these interest certificates, payable respectively, February 20th and August 20th, 1869, which were duly returned to the United States assessor, who assessed a tax of $46,072 upon each of them, which tax the company paid. The company also declared two dividends of $1,151,800 each, upon its capital stock, payable, respectively, February 20th and August 20th, 1869, which were also duly returned to the United States assessor, who assessed a tax of $57,590 upon each of them, which tax also the company paid. At the times these dividends upon the interest certificates and upon the stock were returned to the United States assessor, no allegation was made by the officers of the government, that the returns of the said dividends were false, or, that as to them there was "any understatement or undervaluation," or, that there had been any neglect on the part of the company to make a return as to the issue of said interest certificates; or that the said returns should have included the

interest certificates themselves as well as the dividends upon them.

At the time when these certificates were issued and taxes were paid, as for some years before, there existed in the State of New York a railroad company known as the Hudson River Railroad Company; a company having a road running from the city of New York to East Albany, and there connecting by ferry with the road of the New York Central Railroad Company, just above mentioned; the two making a line of transit from the city of New York to Buffalo.

On the 1st of November, 1869, somewhat less than a year after the 80 per cent. "dividend of scrip" above mentioned was made by the New York Central Company, the two roads were consolidated, under a general act of the legislature of New York, into a new company by the name of "The New York Central and Hudson River Railroad Company."

The act under which the consolidation was made, enacts that it shall be lawful for any railroad company "to *merge and consolidate* its capital stock, franchises, and property with the capital stock, franchises, and property of any other company."

The fifth section of the act provided that—

"The rights of all creditors of, and all liens upon, the property of either of said corporations, parties to said agreement and act, shall be preserved unimpaired, and the respective corporations shall be deemed to continue in existence to preserve the same, and all debts and liabilities incurred by either of said corporations, except mortgages, shall thenceforth attach to such new corporation, and be enforced against it and its property to the same extent as if said debts or liabilities had been incurred or contracted by it."

On the 26th of February, 1870, fourteen months after the certificates were authorized, and nearly four months after the consolidation of the New York Central Railroad Company with the Hudson River Railroad Company, the United States assessor sent a notice, directed to "Charles Wendell,

Esq., Acting Treasurer, New York Central Railroad Company," and dated—

ASSESSOR'S OFFICE, FOURTEENTH DISTRICT, N. Y.,
ALBANY, February 26th, 1870.

SIR: I am directed by the commissioner of internal revenue, &c., to cause an assessment of taxes against the *New York Central Railroad Company* upon the scrip dividend, issued by resolution of the board of directors of said company, December 19th, 1868.

I am also requested to furnish the supervisor the names of persons to whom such scrip was issued. Will you please furnish me with the amount of such dividend, and the names of the persons to whom the scrip was issued?

Respectfully,
R. P. LATHROP,
Assessor.

CHARLES WENDELL, ESQ.,
Acting Treasurer of the New York Central Railroad Company.

The assessor received no answer from Mr. Wendell, nor from the New York Central Railroad Company in reply to the foregoing notice.

On the 3d of March, 1870, more than four months after the consolidation, and more, considerably, than a year after the "dividend" above mentioned had been made, the assessor of internal revenue for the district of Albany, where the New York Central Railroad Company had had its principal office, made what he called, and asserted to be, an "assessment" against *that* company. The document ran thus:

UNITED STATES INTERNAL REVENUE.

Assessment against the New York Central Railroad Company.

The New York Central Railroad Company having failed to make return of the scrip dividend, or interest certificates, voted at a meeting of the directors of said company, held December 19th, 1868, as required to do by section 122, act June 30th, 1864, act July 13th, 1866, internal revenue laws.

Now, therefore, by the authority vested in me, and as required by the several sections of said internal revenue laws, I

do assess against the president, directors, and company of the *New York Central Railroad*, the following tax, to wit:

Capital stock, December 19th, 1868, . . .	$28,795,000 00
Scrip dividend, or interest certificates, being 80 per cent. of said capital, ...	23,036,000 00
Tax on same at 5 per cent., ...	$1,151,800 00
Penalty for failure, ...	1,000 00
Amount of tax, ...	$1,152,800 00

R. P. LATHROP,
Assessor, Fourteenth District, N. Y.

ALBANY, March 3d, 1870.

This assessment was made on the day it bore date by the assessor alone in his office. He made no examination of the books or officers of the company for the purpose of ascertaining whether the certificates were one of the objects liable to tax under the internal revenue law, nor gave notice when an appeal from the assessment could be heard, nor did any other of the things of form prescribed by the above-quoted fourteenth and nineteenth sections of the Revenue Act, as things lawful to be done, &c., in cases where the party liable to the tax had neglected or refused to make a return. He ascertained the amount of the scrip dividend from a document rendered by the company to the legislature of the State.

On an appeal made in February, 1872, from this assessment to the commissioner of internal revenue, that officer held that the company was liable to a tax of 5 per cent. without penalty, on $9,214,400, being six-fifteenths of the entire dividend, the proportionate amount chargeable to the period between September 30th, 1862, and September 30th, 1868. This reduced the assessment to $460,720. And he directed that on payment of that sum the remainder of the assessment, viz., $692,080, including the $1000 penalty, should be abated.

The assessment was accordingly reformed; but the New York Central and Hudson River Railroad Company still declined to pay it. The matter being referred by the reve-

nue bureau to its solicitor, this officer gave it as his opinion that the certificates were not taxable at all. It was afterwards submitted to Mr. Orton, former commissioner of internal revenue, Mr. Smyth, former supervisor of the same, and to the assessor who, under direction, had made the assessment; and these officers concurred in opinion with the solicitor. For the sake of having the matter judicially decided, the collector thereupon, under three different warrants, reciting that "The New York Central Railroad Company, OR the New York Central and Hudson River Railroad Company" had become liable to the tax, seized a large number of the last-named company's locomotives and cars, and was proceeding to sell them, when the amount claimed was paid under protest. The company now sued the collector in assumpsit to get back the money.

In the course of the trial the counsel of the collector offered to read from the reports of the New York Central Railroad Company for the year 1869, and from the reports from the New York Central and Hudson River Railroad for the years 1870, 1871, and 1872, for the purpose of showing that the interest certificates were merged in the capital stock of the defendant in error in 1872, and that dividends were declared and paid on such interest certificates in 1869, 1870, and 1871, the same as upon the capital stock.

The counsel for the latter company, the plaintiff, objected to the evidence as incompetent and irrelevant, upon the ground that it was immaterial what was done with the certificates after they were issued; that the question was whether they were taxable by their character and in the circumstances existing at the time they were issued.

The court sustained the objection; the counsel for the collector excepting.

The case being closed, the court charged:

"Dividends are included as a well-known indicia of the income of corporations, and constitute the profits divided by them after paying the expenses of their business and operations. They are usually declared in money, but as they are sometimes declared in stock, and known as scrip dividends, and as when

Statement of the case.—Charge of the court below.

so declared they represent income as profits which are apportioned to stockholders in stock instead of in money, Congress, intending to reach income in every form, subjected to tax 'dividends in scrip or money.' The inquiry then is, were the interest certificates, as issued by the company, a stock dividend? If they conferred on the respective stockholders any greater interest in the earnings or capital of the corporation than they had before receiving them, then they were a stock dividend though called 'interest certificates.' If they did not, they are not a stock dividend. Congress did not intend to tax dividends in stock which were not so in fact, and did not seek, while in search of income, to subject to tax that which is not income. In other words, they do not intend to tax, as stock dividends, those myths which, in the process known as watering stock, are sometimes assigned to shareholders of corporations as stock dividends. This intent is apparent from the limitation expressed. The tax is imposed on dividends declared in scrip or money, 'due as part of the earnings, profit, income, or gains of such company.' The certificates issued by the New York Central Railroad Company were issued as representing earnings and profits accruing from the operations of the company, and to that extent meet the requisites of a stock dividend. But did they vest in its stockholders any greater interest in its earnings or capital than they had prior thereto?

"In my judgment they did not. By the certificates and resolutions the stockholders are entitled severally to 80 per cent more of the stock than they had before, 'at the option of the company.' In other words, each stockholder shall have additional stock to that amount if the company shall, in its discretion and at its pleasure, see fit to assign it to him.

"The directors of the company reserve the right to decline, at their volition or caprice, to assign any additional stock. The stockholder receives nothing by the declaration of the resolutions and certificates, but the naked assurance of a possibility which, at some indefinite future period, may result to his advantage. It is in no sense a vested right, capable of enforcement, for he never could compel the company to transfer to him additional stock. It is true that the resolutions and certificates entitle the stockholder to a dividend to be paid on the 80 per cent. 'at the same time and ratably with dividends on the capital stock.' But I fail to see how this, in any manner, inures to his

advantage. The earnings of the company, instead of being applied to dividends on his capital stock, are applied on that and the certificates ratably, and to the extent that he receives a dividend on the certificates, his dividend on the capital stock is reduced. The stockholder derives and the company appropriates no income by the transaction which would not have been derived and appropriated if the certificates had never been issued. Another feature of the certificates is an important one, as marking a wide difference between their legal effects and that of a certificate of stock. The 80 per cent. is not to be paid out of the general assets and earnings of the corporation, neither are the dividends which are thereafter to be made. The dividends to be declared upon the certificates are only to be paid out of the future earnings of the company. Upon a dissolution of the corporation these certificate-holders would receive no part of the assets, except those accumulated from the earnings after the certificates were issued. An assignment of all dividends thereafter to arise upon stock may, in law, amount to a transfer of the stock, because it would entitle the assignee to receive all the original stockholder could have obtained of the assets of the corporation. But a holder of these certificates would have no such right, and would not stand at all in the position of a stockholder towards the corporation in case of a dissolution.

"It is not asserted that these certificates give to the holder the right to vote, and here again in an important feature, these certificates fail to vest the holder with the rights of a stockholder.

"Tested by all the rules by which we are to determine whether these certificates were certificates of stock, and as such entitle the holder to the rights of a stockholder in the corporation, the result is adverse to a conclusion in the affirmative. The tax was intended to be imposed upon gains and profits actually appropriated by the company and derived by the stockholders.

"The section which imposed it authorizes the company to deduct or withhold from all payments on account of any dividend due and payable as aforesaid, the tax of 5 per cent. from the stockholder to whom the same is payable. Can it be seriously asserted that if the New York Central Railroad Company had withheld 5 per cent. of the 80 per cent. from the amount of its dividend next declared after it issued these certificates, and deducted that sum from the dividends due to a stockholder, the

company would have been protected? The stockholder would have insisted that he had received no additional income by reason of the certificates, and it was not intended by the law to tax him through the corporation for that for which he could not be taxed personally.

"Or suppose, again, the assessor had attempted to compel the stockholder to pay a 5 per cent. tax on a sum equivalent to 80 per cent. of his stock in the company, on the ground that the company had not deducted the tax from his dividend, would it not be revolting to common sense to insist that he should pay these certificates as income actually received by him, when he had not only received no income in fact, but had not received that from which he could enforce or derive income in the future by any legal remedy?

"If the certificates did not represent income received by the stockholders, they were not of the character which the law intended to reach, because the dividends subjected to the tax were only those from which, by the act, the corporation could deduct the 5 per cent. imposed on the income of a stockholder, derived by him in the form of a dividend.

"My conclusion is that the tax was erroneously assessed, and the defendant must pay the amount realized by his proceedings.

"Had the tax been assessed upon the 'profits of such company, carried to the account of any fund, or used for construction,' it might have been enforced for the amount actually carried to the fund or used for construction since 1862, when the Internal Revenue Act was adopted."

The court thereupon directed the jury to render a verdict for the plaintiff for the sum of $594,002.89, which the jury did; and judgment being entered accordingly, the collector brought the case here; assigning for error:

1. The action of the court below, on the trial, excluding the report of the New York Central Railroad Company, and the reports of the plaintiff, offered by the defendant for the purpose of showing that the interest certificates were merged in the capital stock of such plaintiff in the year 1872, &c., &c.

2. The instruction of the court that the action of the New York Central Railroad Company, as evidenced by the reso-

lution and certificates issued December 19th, 1868, was not a declaration of a dividend in scrip within the meaning of the United States Internal Revenue Act then in force.

3. The direction given to the jury to render a verdict for the plaintiff for $594,002.89, and the judgment given therefor.

Mr. G. H. Williams, Attorney-General, and Mr. S. F. Phillips, for the plaintiff in error:

I. It will be admitted by opposing counsel that the resolution and certificate witness a dealing between the company and its stockholders, based upon earnings theretofore made, in the course of which a written instrument had been delivered by the company to each of its stockholders as evidence of such earnings, and of their having been expended in constructing and equipping the road and in the purchase of real estate and other properties; also that they were to be reimbursed at some convenient future period; two different methods of redeeming such instrument being left optional with the company, viz., its payment out of future earnings, or its conversion into stock, dividends thereon being in the meantime payable at the same rates and times as upon shares of the capital stock.

(1.) The paper, therefore, is upon its face evidence for each stockholder to persons with whom he may deal against the company—

(*a*) Of previous earnings;

(*b*) Of the expenditure (or investment) of such earnings to a specified large amount, in construction, equipment, and purchase of property; and

(*c*) That certain dividends will accrue, *pari passu*, &c., upon the amount specified therein.

(2.) It is also upon its face *notice* to such stockholder and his assignees that the company have a right to call it in whenever it may choose, and either pay it off or convert it into stock.

It is said by the court below that the holder of one or more of these certificates has no rights whatever except to

the dividends mentioned; that for the principal sum mentioned in the certificate he has no promise except the optional one specified therein, and that upon the whole the certificate effected nothing more than the substitution of two bits of paper for one, inasmuch as the stockholder who received it gained nothing by it which he had not before under his certificate of stock.

We submit that, on the contrary, this double option as to dealing with the subject-matter of the certificate does not exhaust the duty of the company to its holder; but that over and beyond such option it owes to such holder a duty arising out of the nature of the transaction, a duty which is, indeed, not technically a debt or an implied absolute assumpsit, but is of like sort with that implied in behalf of those who hold stock, viz., that at all events he shall have a *pro rata* share in the distribution of whatever assets may remain at the dissolution of the company.

It is said also that the transaction did not vest in its stockholders any greater interest in the earnings or capital of the company than they had before.

The same would have been true in the same sense had it been a dividend of stock based upon earnings. The stockholder who had a beneficial interest in a tenth part of the capital would, after receiving a dividend of stock, still have had no more than a tenth. After receiving a dividend of a tenth part of the stock, he would also still have had no greater interest in the road, rolling stock, or other capital of the company than he had before. This would all have remained the property of the *company*, and no part of it have become, because of such dividend, property of the *stockholder*.* We submit that the proposition that dividends transfer to stockholders property which previously belonged to the company is true only of ordinary money dividends, and never of dividends of stock. The subject-matter of a stock dividend is a thing created, *not transferred*, by the *declaration*. It is a *chose*, taking the place of an *aliquot share* in

* Van Allen *v.* The Assessors, 3 Wallace, 584.

capital.* That which a stockholder obtains is not a thing previously held by the company, but is only a definite and formal partition of some beneficial interest in the capital of the company, which previously he had held indefinitely and in common with other stockholders. Of this the certificate is *evidence*.

Indeed, even of dividends in money the stockholder acquires no new property by the dividend. Before being declared it was his; though not set apart from capital, nor passed into his specific control.

Again, it is said that dividends of stock do not *per se*, as intimated, entitle the holder to any additional vote in a company. Whether they do so in any particular case depends upon the charter. The question now before the court cannot turn upon matters merely incidental to stock, but depends upon the nature of stock *per se*. So far as a stockholder is a member of the company he has such right, but this right does not necessarily increase with an increase of stock or lessen with its diminution.†

Again, the test applied by the court below, *i. e.*, a deduction or withholding of the tax paid by the company from all payments to the stockholder on account of any dividend, &c., would have the same bearing upon a stock dividend as upon the transaction under consideration.

The only point in which, as occurs to us, it seems questionable whether what is objected by the court below to the present transaction as a subject of taxation, is not to be objected as well to a dividend of stock, is that of the rights of the holder of the certificate, as such, to a share in the assets after a dissolution of the company.

Even here it seems not difficult to maintain that the holder of such certificate is entitled, upon such dissolution, in case the assets remain as at the time of its issue, or be increased to the eighty dollars mentioned upon its face. Whether upon the diminution of such assets the certificate-holders would be *postponed* to the stockholders seems unnec-

* Frazer *v.* Seibern, 16 Ohio State, 620.

† Taylor *v.* Griswold, 2 Green (N. J.), 222.

essary to discuss. All that seems material is, to maintain that such certificate-holders had at their issue a trust which attached upon the assets and business of the company, as well for principal as for interest, just as if they had been holders of stock.

The "resolution" before the court speaks of the stockholders as being *entitled* to these certificates, as *evidence* that certain earnings of the road had been invested to a certain amount in that property which ordinarily constitutes railroad capital. We understand that this evidence was intended to be, like that above, evidence to parties outside; evidence upon which bargains might be made and trading done. This interpretation of the provision in the resolution is borne out by the insertion of a transfer clause in the certificate.

Our views are that the company, finding that by the application of previous earnings its capital had increased in substance by eighty per cent., not having that amount in hand in cash, and not being authorized to issue additional shares of stock, pressed also by some motive for enlarging the area of the dividend-yielding subject, devised this method of apportioning amongst its stockholders such additional capital; distributable in the end as its other capital, subject however to a condition, *in favor of the stock*, of being paid off before.

It is said by the court below that if the tax had been assessed upon the "profits of such company, carried to the account of any fund, or used for construction," it might have been enforced for the amount actually carried to the fund, or used for construction, since 1862, &c. Admitting, for the sake of argument, the truth of this proposition, we submit with confidence that where a fund composed of earnings expended (*i. e.*, invested) in construction, &c., or carried to any account whatever, is made the basis of scrip distributed amongst the several stockholders of a company, whatever other term in the revenue law may be applicable thereto, the transaction creates also a partition or distribution, *i. e.*, a dividend, a dividend in scrip.

Argument against the tax.—Assessment in violation of statute.

We find no case which bears much resemblance to the present. But three, to which we refer, seem to throw light upon one or other of the points under discussion.*

II. We dismiss the first assignment of error with the suggestion that the important point being the meaning of the transaction of December, 1868, any subsequent dealing of the parties thereto calculated to throw light thereupon is competent evidence of such meaning, and is one of the ordinary instruments of proof. If in 1872 the New York Central and Hudson River Railroad Company, as representative of the old New York Central Railroad Company, converted these certificates into stock, and thereby secured to some extent dividends thereon, such act is evidence that the parties to the transaction of 1868 regarded such certificates as conveying to their holders more than a mere estimate of the future business of the company and its probable future dividends.

Messrs. Roscoe Conkling and S. T. Fairchild, contra:

1st. *The issuing of the certificates by the New York Central Railroad Company, on the 19th of December, 1868, was not the declaration of a dividend in scrip, such as is made taxable by section 122 of the Internal Revenue law.*

To fall within the section, certificates must be—

1st. "A dividend."

2d. A dividend "due or payable"—due or payable at some time fixed or determinable.

3d. A dividend of part of the earnings, profits, income, or gains of the company.

4th. A dividend of earnings, profits, income, or gains, acquired within the year preceding the assessment, or at least a dividend falling within the year.

What is a dividend? Is it not something set apart to be divided, and divided at the time? Can it be a mere agreement to divide in future, contingently and conditionally, or

* Minot *v.* Paine, 99 Massachusetts, 101; Boston and Lowell Railroad Company *v.* Commonwealth, 100 Id. 399; Brown *v.* The Lehigh Company, 49 Pennsylvania State, 270.

even positively? To make a dividend, must not a corporation part with something it has, and must not the stockholder get something he had not before? Must not something before belonging to the corporation as a whole, pass over by distribution to the stockholders in severalty? Must not a debt be created as against the corporation by the declaration of a dividend?

There was in law and in fact, at the time that these certificates were issued, nothing to divide. There were no moneys belonging to the company on which they were based, or with which they could be paid. The earnings, as the certificates state, had been expended for the purpose of constructing and equipping the road, and in the purchase of real estate, &c.

There was no power to create or divide stock. All the stock had been divided before.

It cannot be argued that the corporation had at the time divisible property to answer the certificates.

No *debt* was created. There is no room to suppose that the idea or semblance of a debt entered into the transaction, because a debt or obligation might have robbed the shareholders, by absorbing the future moneys and earnings of the company, and by taking precedence of the stock. Such a debt would, indeed, have imperilled the stockholders' possession of the road itself.

That these certificates, or rather that certificates more efficacious than these, created no debt or obligation, was decided in the cases of *The Sun Insurance Company* v. *Mayor of New York*,* *Mutual Insurance Company of Buffalo* v. *Erie County*,† *People, ex rel., &c.* v. *County of New York*.‡

These interest certificates bear no resemblance to stock. Stock represents capital,—principal. Stock has absolute and ultimate force and value between the corporation and the holder. Each share of stock is the title to an aliquot part of the assets and property of the corporation. Whenever the corporation is wound up the assets belong abso-

* 4 Selden, 241. † 4 Comstock, 442. ‡ 16 New York, 424.

Argument against the tax.—No "dividend in scrip."

lutely and wholly to the stockholders; and while the corporation continues the stockholders govern and own it. Not so with the certificates and their holders. While the corporation lives the holders of certificates do not vote, or govern, or own it. They have no claim on it in any event, except for interest on their certificates, if interest is in future earned, and even that is contingent. And when the corporation dies, they have no claim on it for anything, and no ownership or interest in its assets at any time. If a stockholder owns also a certificate, he does not, at the dissolution, receive a cent more for his certificate than he would have done had the certificates never been issued. If one not a stockholder becomes owner of a certificate, he acquires no ownership in the capital or assets during the life or at the death of the corporation.

The company in issuing these certificates parted with no control over any property that it had. A stockholder acquired no interest whatever in anything that he did not have before, except in another piece of paper; another evidence of his joint ownership in property that he had a joint ownership in before, and to the same extent precisely. These certificates and the stock certificates represent the same property, real and personal, of every description, after the certificates were issued that the stock certificates represented before.

If these certificates had never been issued, the stockholders would have received precisely the same dividends upon their stock that they now receive upon their stock and interest certificates. It would have been a dividend of the net profits of the company distributed among the stock certificates instead of being distributed between the stock certificates and the interest certificates.

In short. Of principal, the certificates have none; of ownership in the corporation, there is none; of obligation binding the corporation, there is none. They are but the contingent promise of a shadowy by and by. Something radically different from all this is necessary to constitute a "dividend in scrip."

Argument against the tax.—Assessment in violation of statute.

2. *No assessment was made which the law would tolerate in any case, however clear the liability to tax, even if aimed at the right company and during its existence.*

The statute under consideration, all will admit, is one of the most arbitrary statutes ever enacted by Congress, even in the emergency of war. It is a rigorous, a summary, and a searching statute on the side of the United States. It requires discovery of books and papers, and compels full disclosure, punishing any shortcomings heavily. It denounces a penalty of $1000 for disobedience to the summons of the assessor, or for refusing to produce any books or papers in his judgment necessary. The history of the country has no parallel in legislation to it in some respects, in nearness of approach to the verge of constitutional power. To be defended, it must be preserved from perversion, and must not be stretched by lax construction. It is justifiable by reason of its safeguards and mitigations. Without these, it would be tyrannous, and destructive of the fundamental principles of the Constitution.

The fourteenth and nineteenth sections point out particularly in every case of default as to making returns, the function, power, and duty of the government assessor. These provisions are designed to preserve something, at least in form, of the right to due process of law. They were deemed, by those who enacted them, not only wise and suitable, but exacted by the principles of justice, and by the letter of the Constitution itself.

The assessor then could do only what the statute permitted and directed him to do; and at the time of the alleged assessment, March 3d, 1870, he could do nothing unless the New York Central Company was in default according to the statute. There must have been a time certain when the corporation was bound to make a list or return of a "scrip dividend" of $23,036,000, which return it neglected to make, or made falsely. The default was a fact requisite to give jurisdiction, and a condition precedent to any action whatever by the assessor. Assuming that default had been made, the action of the assessor was illegal and void, be-

cause in disregard of the provisions applicable to the case. In case of default, the act of Congress points out the way, and the only way, in which the assessor may proceed. The alleged delinquent must receive notice and be given a hearing with a view to "*the ascertainment* of liability *to tax.*" An inquiry must be made into the facts, and the assessor or his deputy must view, consider, and determine judicially. Time and opportunity must be given for appeal to the assessor. Every one of these provisions was disregarded, and by a mere *ipse dixit*, without the semblance of assessment or hearing, and without any notice known to the law, requisition was made for $1,151,800, and $1000 penalty for failure.

III. *The so-called assessment, even had it been otherwise good in point of form, was against a company which had no existence.*

The assessment, as will be seen by a reference to it,* is in its terms throughout an assessment against the New York Central Railroad Company; and was made on the 3d of March, 1870. But the New York Central Railroad Company ceased to exist on the previous 1st of November, 1869. At the time of the assessment it had become extinct, in law and in fact. An assessment against it, was an assessment against a dead person. No lien could come from such an assessment; nothing could come from it. It was absolutely void.

Nothing, however, was lost to the United States by the death of the New York Central Railroad Company. If, during its lifetime, it became liable to pay a tax, that "*liability*" lived after the debtor's death. The statute kept it alive and held the new corporation amenable to it. The statute of New York preserved such a debt if it existed, but ascribed it to the new corporation. It could not remain with the old. No *additional* corporation, it must be remembered, was created by the act of consolidation. The old New York Central Railroad Company was not left standing, but the old company was, by the terms of the consolidating statute, "merged and consolidated" in the new. The con-

* *Supra*, p. 611.

solidation obliterated and extinguished each of the old companies. There was no coeval existence of old and new for one moment. The birth of the new was the death of the old.

The effect of this statute and the consolidations under it have often been considered. The bar and the bench of New York have never supposed that the service of process on the New York Central Company after November 1st, 1869, was of any effect whatever. Process was so served for a time in ignorance or inadvertence, but no defence was made, no attention was paid to it, and no fruit ever came of it.

The Court of Appeals of New York construed the act of consolidation in this regard in *Prouty* v. *Railroad Company*.*

The syllabus of the case is as follows:

"Where two or more railroad companies are consolidated, as far as the creditors of one of the original companies are concerned, the consolidated company is the successor of the old company, but in respect to the properties of the other company it is a new and independent company, and such creditors have no claim against it upon their original contracts, but only by virtue of the assumption of the obligations of the old company.

"A subsequent order substituting the consolidated company and its officers as defendants was error, as it made them liable upon the original contracts, and subjected them, and all the funds and property of the consolidated company, to *the restraints adjudged against said old company*."

The opinion thus closes:

"But however clearly it may appear that the plaintiff and those in whose behalf the action purports to be brought are entitled to such a remedy, it can legally be obtained only in an action against the parties named, that is, the new company, founded upon their assumption of the liabilities of the other, and not by the summary process of a motion to insert their names as defendants, and then apply," &c.

Thus, bringing a suit against the old company after consolidation, and substituting a new one, was held to be wrong;

* 52 New York, 363.

yet that is the sort of operation which has been attempted here. The assessment is against the old company. The levy was, in fact, on the property of the new.

The principle of the decision above quoted, as well as its application to our case, is plain. When a corporation dies, it has no board of directors or agents. There is no authority to speak or act for it, or to employ an attorney to speak or act for it. All this is true if the corporation be simply extinguished; is it not more manifest when the law creates and names a corporation to take its place, and to be liable and responsible in every case in which the defunct corporation was liable in its lifetime?

The words of the consolidation act, "and the respective corporations shall be deemed to continue in existence to preserve the same," do not help the case of the other side. What is "preserved" by these words? "The rights of creditors," where they exist; and also "liens," where they exist. The words do not create a lien, and do not transfer or transplant a lien from the property of one to the property of another.

IV. *But if a dead corporation be suable, and assessable, still the distraint in this case was illegal. The seizure was of the property of the defendant in error, on an assessment against another person.*

By adverting to the notice of assessment* it will be seen, as we have just said, that it purports, in terms throughout, to be against the New York Central Railroad Company. The New York Central and Hudson River Railroad Company is not named in it. But the seizure was of the goods of the New York Central and Hudson River Railroad Company; a different company from the one which had been assessed. It is not pretended that the locomotives, cars, &c., of the New York Central and Hudson River Railroad seized in 1873 was the property of the New York Central Railroad in 1870. In point of fact we may state that the property seized had no existence in 1870.

* See it, *supra*, p. 611.—REP.

It was the seizure of the goods of one man on a judgment and execution against somebody else.

As respects the reception of the evidence objected to on the trial, we leave it on the ground then stated against its admissibility, to wit, that it was immaterial what was done with the certificates after they were issued; that the question was whether they were taxable by their character and in the circumstances existing when they were issued?

Reply: We have considered that the only important quesiton in this particular sort of case—a suit in assumpsit to recover back a tax because the object taxed was not taxable—was the one which we have argued, viz., whether the transaction of December 19th, 1868, made a "dividend in scrip;" since if it was, it was taxable. As the act of consolidation declared that as to the rights of all creditors the corporations should be continued in existence, the New York Central Railroad Company was the proper party to assess, even after the so-called "merger," for what it had owed and ought to have paid. For the rest, even admitting, *argumenti gratiâ*, the irregularity of the assessment, so far as mere form is concerned, yet if the New York Central and Hudson River Company is really bound for the tax, and on a more formal mode of assessment would have to pay it, the court would not affirm the judgment in the present sort of suit, only because a tax which could be properly collected by the observance of certain forms had been informally got. It would have to affirm the judgment on grounds not going to the merits, but going to form only, and therefore irrespective of merits.

Independently of which, the New York Central and Hudson River Railroad Company suffered nothing by disregard of form. It had an ample hearing, and on the hearing had an immense reduction of the tax as assessed.

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

Authority to tax the plaintiffs in this case, if it existed at

all, was derived from that clause of the Internal Revenue Act which provides to the effect that dividends declared by a railroad company, in scrip or money, due and payable to their 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, are proper subjects of taxation, and that the company declaring such dividends in scrip or money shall pay a tax of 5 per centum on the amount of all such interest or coupons, dividends or profits, whenever and wherever and to whatsoever party or person the same may be payable.

Unless the authority to tax the plaintiffs was derived from that provision it is clear that it did not exist, and it is equally clear that it was not derived from that provision unless the certificates issued by the company to their stockholders are dividends of scrip within the meaning of the act levying the tax in controversy.

Viewed in that light, as the question should be, it is evident that the first instruction given by the court to the jury is the exact equivalent of the second, as it is clear that if the certificates issued by the company to their stockholders are not dividends in scrip within the true intent and meaning of that provision, the taxation of the company was unauthorized by law, and the plaintiffs were, in view of the evidence, entitled to a verdict. These instructions, therefore, may be considered together, and inasmuch as they involve the whole merits of the controversy they will be examined in advance of the exceptions to the ruling of the court.

Sufficient appeared to obviate the necessity for any extended reply to the suggestions that the certificates were not issued by the plaintiffs, or that the assessment was made to one of the old companies, which for many purposes went out of existence when the consolidated company was formed. All of these imaginary difficulties, which were the subject of repeated reference at the argument, are forever silenced by the legislative act of the State under which the plaintiffs came into existence.

By that act it is provided that the rights of all creditors

of, and of all liens upon, the property of the corporations, parties to the agreement and the act, shall be preserved unimpaired and the respective corporations shall be deemed to continue in existence to preserve the same, and all debts and liabilities incurred by either of the corporations, except mortgages, *shall thenceforth attach* to such new corporation and be enforced against it and its property to the same extent as if such debts or liabilities had been incurred or contracted by such new company.*

Apply that rule to the case and it follows that by virtue of that provision the new company formed by the act of consolidation assumed all the obligations of the old companies, except mortgages; or, in other words, that all debts and all liabilities, except mortgages, incurred by either of those companies attached to such new corporation and became enforceable against the same and their property to the same extent as if such debts or liabilities had been incurred or contracted by such new corporation.

Attempt is made in argument to question the soundness of that proposition as applied to the case before the court, and reference is made to the case of *Prouty* v. *Railroad Company*,† as promulgating a rule of decision inconsistent with the theory that the new corporation became liable for the internal revenue tax in question, or that the tax became enforceable against such corporation or their property, but the court here is of the opinion that the case cited supports the proposition that the payment of the tax in question is one of the obligations which the new company assumed when the consolidation became complete, as the liability to such taxation, on the part of the old company, existed before the consolidation was formed, and that the liability to pay the same attached to the new corporation and became enforceable against the same and their property to the same extent as if such liability had been incurred or contracted by such new corporation.

* 2 Sessions Acts of New York, 1869, chapter 917, page 2402.

† 52 New York, 366.

Opinion of the court.

Power was conferred by the legislative act to form the consolidation, subject to the condition that all debts and liabilities incurred by either company, except mortgages, should thenceforth attach to the new corporation and be enforceable against such new corporation and their property, and all the Court of Appeals decided in the case referred to, which is applicable to this case, is that the consolidated company in such a case becomes responsible for the debts and liabilities of the old companies only by virtue of the assumption of those obligations as part of the terms of the consolidation, which is sufficient to show that the theory of the plaintiffs cannot be sustained.

Scrip dividends as well as dividends in money, it must be admitted, are proper objects of taxation under that section of the Internal Revenue Act, and the same section provides that a list or return shall be made and rendered to the assessor or assistant assessor, on or before the tenth day of the month following that in which the interest, coupons, or dividends become due and payable, and as often as every six months, which shall contain a true and faithful account of the amount of the tax, verified under oath by the president or treasurer of the company.

Payment of the tax is required of the company, and for any default in making or rendering such list or return, or of the payment of the tax or any part thereof, the company making such default shall forfeit as a penalty the sum of one thousand dollars, and the assessment and collection of the tax and penalty, in case of such default, shall be made according to the provisions of law in other cases of neglect or refusal.

Except where the stockholder is exempt from such an exaction the tax may properly be assessed against the company required to render the return, and it is the company which is to make the payment and which becomes liable to the penalty in case of default.*

Liabilities of the kind do not attach to the company in

* Barnes *v.* The Railroads, 17 Wallace, 303.

cases where the stockholder is exempt by law from such an exaction, as the same section of the act provides that the company in such a case is authorized to deduct and withhold the amount of the tax from all payments on account of such interest or coupons and dividends, which cannot have any application in a case where the stockholder is by law exempt from any such exaction.*

Exemptions of the kind constitute an exception to the general rule, as the tax, in cases where no such exemption exists, may be assessed against the railroad company.†

None of these propositions are controverted by the plaintiffs, but they insist that the amount which they paid for the tax in this case should be refunded for the following reasons: (1.) Because, as they insist, the scrip in question is not a dividend in scrip within the meaning of the Internal Revenue Act. (2.) Because the assessment was illegal and void even if the scrip is a proper subject of taxation and the assessment is made against the proper party. (3.) Because the railroad company assessed ceased to exist, and became extinct before the assessment was made. (4.) Because the distraint was illegal, inasmuch as the goods of one party were seized to pay a tax assessed against another party.

1. For years the old company had earned moneys greatly in excess of their current expenses without any satisfactory scheme being suggested to render such accumulating surplus available to their stockholders, as they were not authorized to increase their capital stock and were forbidden by law to make dividends for the benefit of the stockholders beyond ten per cent. Difficulties of the kind existing, the excess of earnings beyond current expenses had been expended in constructing and equipping their railroad and in the purchase of real estate and other properties with a view to the increase of their traffic.

Accumulations of the kind had been appropriated in that

* United States *v* Railroad Company, 17 Wallace, 327.

† Stockdale *v.* Insurance Company, 20 Id. 323.

way until the same amounted in the aggregate to a sum equal to eighty per cent. of the capital stock of the company. Dissatisfaction arose among the stockholders, and all admitted that they were entitled to evidence that the excess of the earnings of the company beyond the current expenses had been appropriated in that way, and to reimbursement of the same at some convenient future period.

Motives, such as those recited, induced the company to grant the certificates, and they were accordingly issued to the stockholders, severally declaring on their face that such stockholder is entitled to eighty per cent. of the amount of the capital stock held by him, payable ratably with the other certificates issued under the same resolution, at the option of the company, out of their future earnings, with dividends thereon at the same rates and times as dividends shall be paid on the shares of the capital stock of the company; or they may be, at the option of the company, converted into stock whenever the company shall be authorized to increase their capital stock to an amount sufficient for such conversion.

Interest certificates of the kind were issued as evidence to the stockholders that an equal amount of the earnings of the company beyond current expenses had been expended for the objects stated in the preamble of the certificates, and to show that the respective stockholders were entitled to reimbursement of such expenditure at some convenient future period, and also to show that the stockholders were entitled to dividends on the same whenever dividends were paid on the shares of the *capital stock*, and that the certificates were to be paid out of the future earnings of the company, or to be converted, at the option of the company, into stock, if thereafter authorized to exercise that option.

Such a paper, therefore, by whatever name it may be called, is, upon its face, evidence for each stockholder, to persons with whom he may have dealings, of the amount of the previous net earnings of the company; that such net earnings, to the amount specified, have been expended in constructing and equipping the railroad and in the purchase

of real estate and other properties appertaining to the same, and that the holders of the certificates will be entitled to dividends whenever dividends are paid upon the capital stock.

By the terms of the paper it is stated that it may be transferred on the books of the company, and the form of the transfer is appended to the same, which also shows that the transferee, like the original holder, will be entitled to be reimbursed for the amount of the expenditure therein certified at some convenient future period, unless the company should elect to convert the same into the stock of the company instead of paying the same ratably out of their future earnings.

Stockholders to whom such certificates were issued, it is insisted by the plaintiffs, acquired no rights whatever by virtue of the instruments beyond what they had before, except the right to accruing dividends, but it is clear that the proposition is founded in mistake, as the certificates possessed every quality of stock except that they conferred no power to vote and may be redeemed by payment out of the future earnings of the company. Like stock certificates they are made conveniently transferable, as they may be transferred upon the books of the company, and possess an equal value with stock when used as collateral security or as the basis of credit in any moneyed transaction.

Money dividends could not lawfully be made to exceed ten per cent., and inasmuch as the law of the State forbade the company to increase their capital stock they devised the scheme of issuing these certificates to their stockholders as evidence that such expenditure of the net earnings of the company had been made, in the manner stated, and that the stockholders were entitled to reimbursement of the same at some convenient future period; and in order that the certificates might approximate as near as possible to stock, without exposing the company to the hazard of an actual addition to the same, in violation of law, they provided that the holders of the certificates should be entitled to dividends whenever dividends were paid by the company on the shares

of the capital stock, and that the certificates themselves should either be paid ratably out of the future earnings of the company, or be converted into stock at the option of the company.

Bonâ fide holders of the certificates might demand that the certificates should be paid out of the future earnings of the company, or that they should be converted into stock whenever the company should be authorized to increase their capital to an amount sufficient for the purpose, and that they should have a pro rata share in the distribution of whatever assets may remain at the dissolution of the company.

Stock dividends it is conceded are a proper object of taxation under the Internal Revenue Act, and if so, it is difficult to see why those certificates are not, as they differ from the former only in the fact that they do not confer the right to vote and that they may be cancelled by payment out of the future earnings of the company.

No attempt is made in argument to show that the fact that the company has reserved the right to pay the certificates out of their future earnings exempts them from liability to taxation under that act, and it is clear that the fact that they do not confer the right to vote cannot have any such effect, as dividends in stock do not necessarily entitle the holder to any additional vote. Whether they do so or not depends in any particular case upon the terms of the certificate and the charter of the company.*

Usually a stockholder is a member of the company and as such has a right to vote, but it does not necessarily follow that the right increases with the increase of stock, or that the right is lessened in case the number of shares owned by the stockholder should be diminished.

Net earnings of such a company may be expended or invested in constructing or equipping the railroad, or in the purchase of real estate or other properties, but the investment, whatever it may be, belongs to the stockholders, and

* Taylor *v.* Griswold, 2 Green (New Jersey), 226.

may be distributed, as they may direct, in dividends of stock or of scrip or of money, payable out of the future earnings of the company, or by a sale of property not necessary to effect the purposes for which the company was created.

Deductions such as are authorized by the second clause of the section imposing the tax in this case cannot be made in the case of a dividend of stock any more than in the case of a dividend in scrip, which of itself is a complete answer to the proposition that the certificates are not the proper objects of taxation because they cannot be subjected to such deduction, it being conceded that certificates of stock are the proper objects of such taxation.

Corporation bonds are the representatives of money, because they are issued for sale in negotiable form, but certificates of stock are not securities for money, nor are they negotiable instruments in the strict commercial sense. Like dividends in scrip they are simply muniments of and evidence of the holder's title to a described share or interest in the property and franchises of the corporation, and the dividend in scrip evidences the same extent of interest in such property and franchise as the dividend of stock, except that it is the right of the company to pay the same out of their future earnings, and that the dividend in scrip confers no right to vote.*

Much discussion to show that a dividend in scrip declared by a railroad as part of their earnings, profits, income, or gains is the proper subject of taxation by virtue of the Internal Revenue Act is scarcely necessary, as the express words of the act are that such a dividend "shall be subject to and pay a tax of five per centum whenever and wherever and to whatsoever party or person the same may be payable."†

Taken in a general sense the stock of an incorporated company may be defined to mean the capital of the company in the form of transferable shares of a specified amount, but the word is frequently employed in a much more re-

* Bank *v.* Railroad, 13 New York, 627; Bank *v.* Burr, 24 Maine, 264.

† State *v.* Bank, 11 Ohio, 95.

stricted sense. Stock, when it means anything else than the capital of a corporation, usually refers to the interests of the respective shareholders, and the aggregate of those interests may with propriety in many cases be denominated the stock of the corporation. *

Unless otherwise provided by the charter or by-laws of a corporation the profits and surplus funds of a corporation, whenever they have accrued, are, until separated from the capital by the declaring of a dividend, a part of the stock itself and will pass with the stock under this name in a transfer or bequest.†

Purchasers of stock have a right to claim and receive all dividends subsequently declared, no matter when the fund appropriated for the purpose was earned, whether before or after the transfer and delivery of the certificates constituting the evidence of ownership.‡

As a general rule stock dividends, even when they represent net earnings, become at once a part of the capital of the company, and, of course, entitle the holder to vote, unless it is otherwise provided in the charter or by-laws. Such a dividend, if earned and declared, necessarily increases the value of the old stock if new stock is not issued, and in that mode reaches substantially the same result.§

By the terms of the act a dividend in scrip declared by such a company as a part of its earnings, &c., is subject to the described tax whenever or wherever or to whatsoever party or person the same shall be payable. What is required to be due is the scrip and not the fund, money, or proceeds which it represents. Beyond doubt such scrip becomes operative and due within the meaning of the Revenue Act when it is unconditionally declared without containing any provision postponing its effect.

These certificates are not dividends in money, nor are they

* People *v.* Commissioners, 23 New York, 220.

† Iron Company *v.* Commonwealth, 55 Pennsylvania State, 451; Brundage *v.* Brundage, 1 Thompson & Cook, 90; Phelps *v.* Bank, 26 Connecticut, 269.

‡ March *v.* Railroad, 43 New Hampshire, 515.

§ Railroad *v.* Commonwealth, 100 Massachusetts, 404.

stock or certificates of stock in the strict sense, but they are exactly what they are described to be in the Revenue Act, to wit, dividends in scrip, which entitles the holder to just what he is promised in the instrument, or, in other words, his right must be determined by the contract under which alone he can claim, and that contract is found in the scrip issued by the company.*

Funds set apart as capital out of which debts are to be paid, it is held, amounts to a contract with those who become creditors on the faith of the transaction that the fund shall not be withdrawn and appropriated to the use of the owner or owners of the capital stock, and the court is of the opinion that the vote of the company issuing these certificates is a valid contract of the company with the holders of the certificates that the same shall be paid, at some convenient period, out of the future earnings of the company, unless the company, when thereto authorized, elect to convert the same into capital stock.†

Tested by these considerations it is quite clear that the first instruction given by the court to the jury is erroneous.

2. Suppose that is so, still it is insisted by the plaintiffs that the judgment should be affirmed even if the scrip is the proper subject of taxation, because the assessment, though made against the proper party, is in other respects illegal and void.

Mere irregularities may be passed over without remark, as the suit is an action of assumpsit brought by the plaintiffs to recover back money which they paid to the collector, and the burden is upon them to show that the defendant *ex equo et bono* is bound to refund the amount which they paid.‡ *Indebitatus assumpsit* is founded upon what the law terms an implied promise on the part of the defendant to pay what in good conscience he is bound to pay to the plaintiff.

* Brown *v.* Coal and Navigation Company, 49 Pennsylvania State, 273; People *v.* New York, 16 New York, 427.

† Insurance Company *v.* Mayor, 4 Selden, 250; Same *v.* Supervisors, 4 Comstock, 445.

‡ Swift *v.* Poughkeepsie, 37 New York, 512.

Where the case shows that it is the duty of the defendant to pay, the law imputes a promise to fulfil that obligation, but the law never implies a promise to pay unless some duty creates such an obligation, and more especially it never implies a promise to do an act contrary to duty or contrary to law.*

Throughout the argument for the plaintiffs it is admitted that they never complied with the requirement which made it their duty to make and render a list or return to the assessor or assistant assessor of the interest, coupons, or dividends described in the Internal Revenue Act as the proper objects of taxation.

Complaint is made that the assessor did not pursue the directions of the fourteenth section of the Internal Revenue Act before he made the assessment in this case, but the powers there given the assessor were conferred for the benefit of the United States. Taxpayers, if they make the required return, will have no cause to complain that the assessor did not issue a summons to them or those representing such taxpayer to appear and give evidence upon the subject, or that the assessor did not enter the place where the taxpayer resides and make the examination of his books and papers as authorized by that section of the act. Doubtless he may do so if he deems it necessary, but the tax is not rendered illegal if the assessor omits to procure the necessary information in that way. Steps of the kind may be taken by the assessor or they may be omitted, but he is required to give a written notice to the taxpayer requiring him to render the described list or return within a specified time, and the record shows that the assessor did substantially comply with that requirement.

Due notice of the assessment was also given, and the record shows that the plaintiffs appealed to the commissioner with a degree of success rarely ever surpassed, as it appears that they induced the commissioner to abate six

* Curtis *v.* Fiedler, 2 Black, 478; Cary *v.* Curtis, 3 Howard, 236; Philadelphia *v.* Collector, 5 Wallace, 732; Elliott *v.* Swartwout, 10 Peters, 150; Bend *v.* Hoyt, 13 Id. 267.

hundred and ninety-two thousand and eighty dollars of the tax, or nine-fifteenths of the same, with the whole penalty, though the plaintiffs now suggest in argument that they, if liable at all, are liable for the whole amount. Whether or not they are liable for the whole amount is not a question in this case, but the court is very clearly of opinion that the instruction given by the Circuit Court to the jury that they should render their verdict for the plaintiffs is erroneous, unless it shall appear that there is greater merit in the third and fourth objections to the assessment than is found in the first or the one under consideration.

Irregularity in giving the notice of the assessment is now certainly unimportant, as it is required chiefly to enable the party assessed to appeal and claim a review of the action of the commissioner. Such an appeal having been granted and all rights under it fully exercised and enjoyed, it is now too late to object that the notice of the assessment was irregular.*

3. Enough has already been remarked to show that there is no merit in the third objection to the assessment, as the act providing for the consolidation of the two companies enacts that the liabilities of the old company assessed in this case may be enforced against the new corporation and their property to the same extent as if such liabilities had been incurred or contracted by such new company.

4. Nor is there any merit in the fourth objection to the assessment, as the complaint is the same in principle as that contained in the third, and is decided to be unfounded for the same reason.

Most or all of these objections were sustained by the Circuit Court, and it was in view of their merit and influence that the presiding justice instructed the jury to render a verdict for the plaintiffs. Evidently that instruction is erroneous as well as the first instruction, and for these reasons the judgment must be reversed. Having come to that conclusion it is unnecessary to enter into any extended discus-

* State *v.* Dulle, 48 Missouri, 287.

sion of the exception to the ruling of the court in excluding certain evidence offered by the defendant. Suffice it to say that the court here is of the opinion that the ruling is erroneous; that the evidence was properly admissible as explanatory of the surrounding circumstances.

Judgment REVERSED with costs, and the cause remanded with directions to issue

A NEW VENIRE.

UNITED STATES *v.* O'GRADY.

When the government means to set up any counterclaim to the claim of a party suing in the Court of Claims, as *ex. gr.*, when on a suit under the Captured and Abandoned Property Act, to recover the proceeds of cotton sold under that act, it means to set up a tax, such as what is known as the "cotton tax," it must plead that tax by way of set-off or counterclaim to the suit, as is contemplated by the act of March 3d, 1863; or move for a new trial, under the provisions of the act of June 25th, 1868. It cannot, after judgment has been given for the amount claimed by the petitioner, irrespective of such counterclaim, and without any motion for a new trial having been made, set up and deduct at the treasury the counterclaim when the amount awarded by the decree of the court is asked for there.

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

By the act organizing the Court of Claims, A.D. 1855, power was given to it to hear and determine all claims *against the United States* founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States.*

Doubts, however, were suggested immediately upon the act going into practical operation and on suits being brought against the United States, whether the act meant to allow the United States to file set-offs in such suits, and to give jurisdiction to the court to hear and determine them in the

* Act of February 24th, 1855 (10 Stat. at Large, 612).

way usually practiced in suits between private parties. If the act did thus mean, its meaning was not clearly expressed. Congress accordingly, by an act passed March 3d, 1863,* enacted that—

"In addition to the jurisdiction now conferred by law, the court shall also have jurisdiction of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever, on the part of the government, against any person making claim against the government in said court; and upon the trial it shall hear and determine such claim and demand, both for and against the government and the claimant; and if upon the whole case it finds the claimant is indebted to the government it shall render judgment to that effect, and such judgment shall be final, with the right of appeal, as in other cases," &c.

A still subsequent act—one passed June 25th, 1868†—enacted:

"That the said Court of Claims, at any time while any suit or claim is pending before or on appeal from said court, or within two years next after the final disposition of any suit or claim, may on motion of the United States grant a new trial in any such suit or claim, and stay the payment of any judgment therein, upon such evidence as shall reasonably satisfy said court that any fraud, wrong, or injustice has been done to the United States."

These two acts being in force, one O'Grady sued the United States in the said Court of Claims, to recover the proceeds of certain cotton, confessedly his, which had been seized and sold under the Captured and Abandoned Property Act, and which proceeds were now in the treasury of the United States. That act, provides‡ that the owner of such property shall be entitled to receive the residue of the proceeds thereof, "after the deduction of any purchase-money which may have been paid, together with the ex-

* 12 Stat. at Large, 765. † 15 Id. 75.

‡ 12 Stat. at Large, 820, act of March 12th, 1863.

pense of transportation and sale of said property, and any *other lawful expenses* attending the disposition thereof."

The United States appeared, pleaded various pleas, but no plea in the nature of set-off, nor did it make any claim for or allusion to any sum as due for a "tax" on the cotton under any act of the United States, approved June 30th, 1864, or any other act, or as due otherwise for any tax.

The Court of Claims having heard the case and allowed to the United States a deduction from the gross proceeds for its outlay of purchase-money, expense of transportation, sale, and other lawful expenses as claimed, decreed in favor of O'Grady for $72,450.

On O'Grady's presenting his claim as thus fixed for payment at the treasury, the secretary refused to pay it without the deduction of $4181, which sum he alleged that he had a right to retain as a tax under acts of Congress, in force at the time of the capture of this cotton, one of which did confessedly assume to impose a tax of two cents a pound upon all cotton produced or sold and removed for consumption, and upon which no duty had been levied, paid, and collected; the tax being made by the act, until paid, a lien upon the cotton in the possession of any person whomsoever,* and another of which† enacted that "whenever any cotton, &c., shall arrive from any State in insurrection against the government, the assessor shall immediately assess the taxes due thereon."

This deduction was submitted to under protest, and an agreement was entered into "that the rights of the several parties in respect to this tax are reserved, and remain subject to the decision of the Supreme Court."

To bring the question to this court under this agreement, a petition was filed—the petition in the present case—praying judgment for $4181.40, the amount of the tax claimed. The government pleaded that the government "is not indebted to the claimant in the said sum of money or in any part thereof."

* 13 Stat. at Large, 16. † Act of June 30th, 1864, § 177, Ib. 305.

Argument in support of the secretary's act.

Judgment was given for the claimant, and the government now brought the case here.

The sole question thus was whether the secretary was justified in withholding the amount for the reason stated by him, to wit, the debt of the claimant to the government for the tax of two cents per pound on cotton.

Mr. C. H. Hill, Assistant Attorney-General, for the United States, appellant:

The cotton itself, on the sale of which the tax was claimed, was confessedly liable to that tax; the question, much agitated some time since, about the constitutionality of the cotton tax, not being here raised.

Why, then, could not the secretary deduct it?

It has been decided that the government held this sort of property as trustee for the owners.* This being so, it is but a reasonable construction of the language of the statute to hold that the payment of an excise tax due upon the property, and made a lien thereon, was a lawful expense attending the trust, which the secretary was justified in deducting. The deduction of the tax may be assumed to be made at the time of the payment of the proceeds of the sale of the cotton into the treasury, and as the statute makes the amount due certain, no technical assessment of the tax was necessary.†

Besides, it is not to be presumed that the statute intended that the owner should be paid the amount of the proceeds of the cotton and the government lose its lien for the tax. The sale of the cotton by the government would entirely destroy the lien unless one subsisted on the proceeds in the treasury; and construing the act imposing the tax and the Captured and Abandoned Property Act together, full effect can be given to both by holding that the lien for the tax remains upon the proceeds in the treasury, and the tax is to be deducted before payment thereof to the owner.

* United States *v.* Klein, 13 Wallace, 128.

† Dollar Savings Bank *v.* United States, 19 Wallace, 227.

Argument in opposition to the secretary's act.

Messrs. P. Phillips and T. J. Fuller, contra:

We raise no question in this case about the constitutionality of the cotton tax, since the judgment below can be fully sustained, conceding the tax to be constitutional.

The institution of the Court of Claims was to remove the anomaly of permitting a party to contracts, express or implied, from an arbitrary decision in his own cause.

Claims against the government were therefore submitted to the judicial determination of officers, whose tenure of office under the Constitution was regarded as a guarantee of independence. Thenceforward, claimants under contracts, express or implied, had a standing in court to enforce them. But under the organizing act the court only had jurisdiction when an individual was plaintiff and the United States were defendants.

There thus remained in the hands of executive agents the assertion of claims in favor of the government. Ordinarily these could only be enforced by suits in the courts of the United States. But it often occurred that when a party had a liquidated admitted claim against the government, he was met on demand of its payment by the assertion of a claim due by the party to the government, and on a settlement of these conflicting rights the claimant had to submit to such decision as the government agent might make of it.

This presented an evil which the institution of the court was intended to remedy, and in order fully to remedy the evil, the amendatory act of 1863 was passed.

If this view of the legislation is the correct one, and it was the object of Congress, as we suppose, to give to parties dealing with the government the same protection of the judiciary as was offered to dealings between individuals, it follows that any counterclaim which the government had against O'Grady, should have been presented before the court was called to adjudge the original claim, and thus enable the claimant to contest its validity or justice and have judicial action upon the same. It is a violation of the spirit as well as the letter of the law for the secretary to withhold his counterclaim—the character of which was fully known

to him—to permit a judgment to be rendered in favor of the claimant, the finality of which is declared by statute, and then to refuse payment thereof, unless the party should allow a deduction for an asserted claim on the part of the government, the amount and validity of which should be determined by his own judgment.

If, then, the government had any right to the tax, it was bound to assert that right in the course of the litigation, and having failed to do so has thereby forfeited it.

In addition to its ability to have set up its counterclaim in pleading, the government had the right to move for a new trial under the extraordinary provisions of the act of June 25th, 1868.

Having failed to do this, it is precluded in every way from doing what it now attempts to do, by the act of its Secretary of the Treasury.

Mr. Justice CLIFFORD delivered the opinion of the court.

Judgment was recovered by the claimants for the whole amount of the net proceds of the cotton in the original suit, and it is not even suggested that the United States filed any set-off or counterclaim in that case, nor would it now make any difference if the claim of set-off or counterclaim had been filed in that case, for if filed and rejected the appropriate remedy of the United States was by appeal to the Supreme Court. Appeal to this court in such a case undoubtedly would lie; nor was that the only remedy left to the United States, as the Court of Claims, on motion, might grant a new trial in such a case, if it appeared that any fraud, wrong, or injustice had been done to the United States.*

But the United States did not appeal from the judgment of the Court of Claims, nor does it appear that any application in their behalf was made to that court for a new trial, as expressly authorized by an act of Congress. On the contrary, it appears that the United States acquiesced in the

* 15 Stat. at Large, 75.

judgment and claimed to deduct from it the amount now in controversy as due to the government for the internal revenue tax. Such a power is not vested in the Secretary of the Treasury, nor in any other executive officer of the government, even if it could be; and it is clear that the judgments of this court, rendered on appeal from the Court of Claims, if no such power is conferred by an act of Congress, are beyond all doubt the final determination of the matter in controversy; and it is equally certain that the judgments of the Court of Claims, where no appeal is taken to this court, are, under existing laws, absolutely conclusive of the rights of the parties, unless a new trial is granted by that court as provided in the beforementioned act of Congress.*

By the act of the 3d of March, 1863, it was provided that no money shall be paid out of the treasury for any claim passed upon by the Court of Claims till after an appropriation therefor *shall be estimated for* by the Secretary of the Treasury, which provision was of course as applicable to the judgments on appeal, rendered by this court, as to the original judgments rendered by the Court of Claims, as the subject-matter of the suit in either case is one "passed upon by the Court of Claims."†

Either party by virtue of that act was allowed an appeal to the Supreme Court, but the Supreme Court declined to take jurisdiction of such appeals, chiefly for the reason that the act practically subjected the judgments of the Supreme Court rendered in such cases to the re-examination and revision of the Secretary of the Treasury.‡

Subsequently Congress repealed the provision conferring that authority upon the Secretary of the Treasury, and since that time no doubt has been entertained that it is proper that the Supreme Court should exercise jurisdiction of appeals in such cases.§

Judicial jurisdiction implies the power to hear and determine a cause, and inasmuch as the Constitution does not

* Ex parte Russell, 13 Wallace, 664.
† 12 Stat. at Large, 768.
‡ Gordon *v.* United States, 2 Wallace, 561.
§ 14 Stat. at Large, 9.

contemplate that there shall be more than one Supreme Court, it is quite clear that Congress cannot subject the judgments of the Supreme Court to the re-examination and revision of any other tribunal or any other department of the government.

Opposed to that is the suggestion that the internal revenue tax is a lien upon the property taxed, and that the lien, when the property is sold, is transferred to the proceeds of the sale, as in the case of a maritime lien when the *res* is sold and the proceeds of the sale have been paid into the registry of the court. Whether that is so or not is not a question in this case; but suppose the question is presented, it is a sufficient answer to the suggestion, that the United States, if they desire to enforce such a right, must seek some other remedy than the one pursued in the case before the court, as it is clear that when such a claim as that preferred by the claimants in the original petition passes into judgment in a court of competent jurisdiction it ceases to be open, under any existing act of Congress, to revision by any one of the executive departments or of all such departments combined. Remedies, such as have been suggested, if seasonable, may be pursued in a proper case, but it will be time enough to decide the question whether any remedy now remains when the question is properly presented.

Should it be suggested that the judgment in question was rendered in the Court of Claims, the answer to the suggestion is that the judgment of the Court of Claims, from which no appeal is taken, is just as conclusive under existing laws as the judgment of the Supreme Court, until it is set aside on a motion for new trial.

JUDGMENT AFFIRMED.

APPENDIX.

SECTION 709 of the Revised Statutes of the United States (in its main provisions, the same as the twenty-fifth section of the Judiciary Act of 1789, and the second section of the act of 1867, much similar to it) being referred to in the body of this book more than once, is here given below. The section, for convenience of reference, is broken up by the reporter into paragraphs.

SECTION 709. A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had,

Where is drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision is against their validity,

OR where is drawn in question the validity of a statute of or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of 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 upon a writ of error. 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 be the same, except that the Supreme Court may, at their discretion, proceed to a final decision of the case, and award execution or remand the same to the court from which it was so removed.

INDEX.

ACCORD AND SATISFACTION. See *Action.*

ACTION. See *Bankrupt Act*, 3; *Court of Claims*, 1; *Rebellion*, 1, 2.

A voluntary acceptance, by a claimant on the United States, of a sum found due upon settlement by the treasury officers, on a reference to them, by act of Congress, to "settle" the accounts between the claimant and the government, *provided that certain sums claimed by him did not exceed a certain amount named*, is not, in the absence of words to show that the acceptance was meant as an acceptance in full of all claim, such an acceptance as will prevent the claimant's recovering any further balance due, and which the proviso in italics prevented the treasury officers from allowing. *Piatt's Administrator* v. *United States*, 496.

ADMIRALTY. See *Submission to Award.*

ADMISSION. See *Evidence*, 1, 3–5; *Jurisdiction*, 3.

Every admission upon which a party relies, is to be taken as an entirety of the fact which makes for his side, with the qualifications which limit, modify, or destroy its effect. *Insurance Company* v. *Newton*, 32.

AGENT. See *Implied Contract; Rebellion*, 3.

ANSWER IN CHANCERY. See *Bill of Review*, 2, 3; *Trustee's Sale.*

ARKANSAS. See *Indorser.*

The late civil war was flagrant in, from April, 1861, till April, 1866, and the statutes of limitation did not run during that term as against citizens of other States of the Southern Confederacy. *Ross* v. *Jones*, 576.

ASSESSMENT. See *Internal Revenue*, 3, 4.

ATTACHMENT.

1. An attachment to procure satisfaction of a judgment, laid on property appraised as of a value less than the amount of the judgment, is no satisfaction of it. *Maxwell* v. *Stewart*, 77.
2. Nor is the mere seizure of property, though it be of sufficient value to satisfy the judgment, to be taken as satisfaction on a suit on the judgment, unless the defendant show affirmatively that it was in fact applied to and satisfied the judgment. *Ib.*

ATTORNEY-AT-LAW, HIS POWER TO BIND CLIENT.

Where a party files a bill to set aside a decree made in a chancery proceeding against him, he is bound by the answer filed in that proceeding by his solicitor, though he did not himself read it, unless he can show mistake or fraud in filing it. *Putnam* v. *Day*, 60.

AWARD. See *Submission to Award.*

BANKRUPT ACT. See *Tax Sales.*

1. When an assignee in bankruptcy voluntarily submits himself to the jurisdiction of a State court, and that court renders judgment against him, it is too late for him to allege that the Federal courts alone have jurisdiction in bankruptcy. *Scott* v. *Kelly*, 57.
2. When the question in a State court is not whether if the bankrupt had title, it would pass to his assignee under the Bankrupt Act, but whether he had title at all, and the State court decides that he had not, no question of which this court can take jurisdiction under section 709 of the Revised Statutes is presented. *Ib.*
3. The assignee in bankruptcy of the estate of an individual partner of a debtor copartnership, cannot maintain a suit to recover back money previously paid to a creditor of the copartnership, upon the ground that the money was paid to such creditor in fraud of the other creditors of the firm, and in fraud of the provisions of the Bankrupt Act. The suit should be by the assignee of the partnership. *Amsinck* v. *Bean*, 395.
4. The mere fact that one partner of a firm composed of two partners, after a stoppage of payment, suffered the other, who had put in two-thirds of the capital, and who was in addition a large creditor of the partnership for money lent, to manage the partnership assets apparently as if they had been his own, proposing to creditors a compromise at seventy cents on the dollar, taking the partnership stock, transacting business in his own name, buying some new stock, selling old and new, and mingling the funds—though keeping separate accounts—does not, of itself, dissolve the partnership, and vest such acting partner with the partnership property in such way as that on a decree of bankruptcy against him *individually*, the partnership assets pass to his assignee in bankruptcy. *Ib.*
5. Under the thirty-ninth section of the Bankrupt Act, enacting that a person may, in certain events, be decreed an involuntary bankrupt, "on the petition of one or more of his creditors, the aggregate of whose debts provable under this act amounts to at least $250," it is not necessary that the *principal* of the debt should amount to $250. If with interest plainly due on it, according to what appears on the face of the petition, it amounts to at least $250, that authorizes the decree. *Sloan* v. *Lewis*, 150.
6. In a case where the decree is thus authorized in other words, where jurisdiction exists in the District Court of the United States to decree a person a bankrupt, and the person has been decreed a bankrupt accordingly, a party against whom the assignee in bankruptcy brings suit in another court, not appellate, to recover assets of the bank-

BANKRUPT ACT (*continued*).

rupt's estate, cannot show that payments made on account had reduced the petitioning creditor's debt so low as that the bankrupt did not owe as much as the petitioning creditor in his petition alleged. The finding of the District Court of the existence of a debt to the amount of $250, due from the party proceeded against to the petitioning creditor, is conclusive, in a collateral action, of the fact that a debt of that amount was due. *Sloan* v. *Lewis*, 150.

7. Where a person owing money, principal and interest, for some time overdue, but secured by mortgage, accounts with his creditor, and on computation a sum is found as due for the principal and interest added together, any new mortgage given for the whole and on the same property on which the former mortgage was given, is not, upon satisfaction being entered on the old mortgage, to be considered as a new security and so open to attack under the Bankrupt law if made within four months before a decree in bankruptcy against the debtor. If the old security was not a preference, neither will the new one be so. They are to be considered as being for the same debt. *Burnhisel* v. *Firman*, 170.

8. In those States where the landlord has no lien upon the personal property of his tenant on the premises leased, before an actual levy of distress, if proceedings in bankruptcy are begun by other persons against his tenant before such warrant of distress be actually levied, the subsequent assignment in bankruptcy will vest the property in the assignee, to the exclusion of the landlord's right to levy on it. The act prevents any particular creditor asserting any lien but such as existed when the petition in bankruptcy was filed. *Morgan* v. *Campbell*, 381.

BILL OF REVIEW.

1. On a bill of review in equity nothing can be examined but the pleadings, proceedings, and decree, which, in this country, constitute what is called the record in the cause. The proofs cannot be looked into as they can on appeal. *Putnam* v. *Day*, 60

2. On such a bill filed by a defendant to set aside the decree, he is bound by the answer filed on his behalf by his solicitor, though he did not himself read it, unless he can show mistake or fraud in filing it. The answers of other defendants cannot be read in his favor. *Ib.*

3. Where the defendant, by his answer, admits the claim to be due, and prays contribution from other defendants, without setting up any defence to the demand, he cannot, after a decree, and on a bill of review, ask to have the decree set aside on the ground of laches on the part of the complainant in bringing suit. *Ib.*

BILL OF REVIVOR.

New defences, *i. e.*, defences not made in an answer to the original bill, cannot be first set up in an answer to a bill of revivor. Such bill puts in issue nothing but the character of the new party brought in *Fretz* v. *Stover*, 198.

BOTANICAL GARDEN, THE.

At Washington, is a different garden from the garden established by the Department of Agriculture; and the eighteenth section of the act of July 28th, 1866, providing an increase of 20 per cent. in pay for several persons, including "the three superintendents of the public gardens," is confined to the superintendents of the former garden. *United States* v. *Saunders*, 492.

CAPTURED AND ABANDONED PROPERTY See *Court of Claims*, 1; *Executory Contract*, 1, 2; *Rebellion*, 1, 2.

CASES DOUBTED, DENIED, OR OVERRULED.

Railway Company v. *Prescott* (16 Wallace, 603) modified and overruled so far as it asserts the contingent right of pre-emption, in lands granted to the Pacific Railroad Company, to constitute an exemption of those lands from State taxation. *Railway Company* v. *McShane*, 444.

CHANCERY. See *Bill of Review; Bill of Revivor; Conflict of Jurisdiction*, 2; *Demurrable Bill; Injunction; Parties; Practice*, 2–7; *Trustee's Sale.*

CHATTEL MORTGAGE.

The effect of the tenth and twenty-first sections of the statute of frauds in Indiana, which enact "that no assignment of goods by way of mortgage shall be valid against any other person than the parties thereto, when such goods are not delivered to the mortgagee, or assignee, and retained by him, unless such assignment or mortgage shall be duly recorded," and "that the question of fraudulent intent in all cases shall be deemed a question of fact," considered and passed upon. *Robinson* v. *Elliott*, 513.

CLIENT AND SOLICITOR. See *Bill of Review*, 2.

"COLLECTION OF JUDGMENTS."

1. A. having certain judgments claimed by B. against an embarrassed railroad company, in which B. was a large stockholder, the road was sold under a mortgage existing prior to the judgments and was bought by A., who, under the laws of the State where it was, organized a new company, issued new stock, and having got, as an allotment to him, a quantity of such stock, which he sold for more than enough to pay the judgments—entered satisfaction on the judgments—*held*,

1st. That such satisfaction was not in any sense a "collection" of the judgments. *French* v. *Hay*, 231.

2. That if it could be so considered, yet that the sale to A. having been judicially declared void (as it was afterwards declared), and set aside, and the old company thus brought again into existence, and B so reinstated in his old ownership of his stock in it, unimpaired by the sale, he could claim no proceeds of the judgments from A., because, if they were ever his (B.'s), they remained his still, since no one but the owner could enter satisfaction on them. *Ib.*

COMMON CARRIER.

1. On a suit for injury to person, against a railway company carrying passengers, the doctrine of *Stokes* v. *Saltonstall* (13 Peters, 181) affirmed; that if the passenger is in the exercise of that degree of care which may reasonably be expected from a person in his situation, and injury occur to him, this is *primâ facie* evidence of the carrier's liability. *Railroad Company* v. *Pollard*, 341.
2. Whether a passenger in a rail car, standing up in it, when getting into the station-house, at the close of the journey, but before an actual stoppage of the car, is guilty of negligence in the circumstances of the case, is a question of fact for the jury to decide under proper instructions. *Ib.*
3. Though where goods received at one place are to be transported over several distinct lines of road to another and distant one, the liability of the common carrier receiving them (where no special contract is made) is limited to his own line, yet he may subject himself by special contract to liability for them over the whole course of transit. *Railroad Company* v. *Pratt*, 123; *Railroad Company* v. *Androscoggin Mills*, 594.
4. A waybill in which the heading spoke of the goods as goods to be transported *by* the first road, *from* the place of departure *to* the place at the end of the whole line, and at which the owner wished to have them delivered, is evidence of such a contract; as is also a waybill speaking of a "through route;" and of the particular contract as one "for through rate." *Ib.*
5. Where in such a line of roads as that described in the third paragraph above, the common carrier owning the first road undertakes to carry goods over the entire line—part of the goods being put aboard the cars on his line, and a part *to be* put on at its termination and where the next road begins—the fare asked and agreed to be paid being, however, the fare usually asked and paid for the carriage over the whole line, and the contract being for transportation over the whole road and not for carriage to the end of the first line and then for delivering to the carrier owning the next road and for carriage by him—the fact that a part of the goods were put on the cars only where the second road begins, will not exonerate the owner of the first road from liability for their loss. *Railroad Company* v. *Pratt*, 123.
6. Where on such a line of road as that in the said third paragraph described, the second road posts *its* rules in the station-house of the first, a person furnishing goods for transportation "through" is not to be held as of necessity to have notice of them from the fact of such posting, and because he was often in the station-house of the first company where they were posted. Independently of which, his contract being with the first company only, and *it* agreeing to carry for the whole distance, *its* rules are the rules that are to govern the case. *Ib*
7. If a common carrier by rail is negligent and careless in furnishing cars, and so furnish cars unsuitable for the case—even though they be cars for cattle, which cars the owner of the cattle himself sees, and which cattle the owner himself attends—the carrier is not relieved from

COMMON CARRIER (*continued*).
responsibility, even though there have been an agreement that he shall not be responsible. *Railroad Company* v. *Pratt*, 123.

8. An exemption against fire, on the bills of lading of a company owning a road which was but a link in a chain of roads over which it transported goods, *held*, in a case not free from some obscurity as to meaning, to apply to the whole road. *Railroad Company* v. *Androscoggin Mills*, 594.

CONDITIONS. See *Insurance*, 2.

CONFLICT OF JURISDICTION. See *Judicial Comity*.

BETWEEN FEDERAL AND STATE COURTS.

1. When an assignee in bankruptcy voluntarily submits himself to the jurisdiction of a State court, and that court renders judgment against him, it is too late for him to allege that the Federal courts alone have jurisdiction in bankruptcy. *Scott* v. *Kelly*, 57.
2. When, in a case which is properly removed from a State court, under one of the acts of Congress relating to removals, into the Circuit Court of the United States, a complainant, getting a decree in the State court and sending a transcript of it into another State, sues the defendant on it there, the Circuit Court into which the case is removed may enjoin the complainant from proceeding in any such or other distant court until *it* hears the case; and if, after hearing, it annuls the decree in the State court, and dismisses, as wanting equity, the bill on which the decree was made, it may make the injunction perpetual. *French, Trustee*, v. *Hay*, 250.
3. Whether a court established during the rebellion by the proclamation of a general commanding the army of the United States, in a department and State then lately in rebellion, and now held only by military occupation—the jurisdiction of the court being nowhere clearly defined in the order constituting it—acted, in fact, within its jurisdiction in a case adjudged by it, where one bank of the State was claiming from another bank of the same State a large sum of money, is not a question for this court to determine, but a question exclusively for the State tribunals. *Mechanics' and Traders' Bank* v. *Union Bank*, 276.

CONSIDERATION.

A consideration is of the essence of any binding agreement, that is to say of any contract. An agreement without a consideration is not a contract, but is only a nude pact; the promise of a gratuity spontaneously made, and which may be kept, changed, or recalled at pleasure; and this rule applies to agreements made by States as well as to those made by persons. *Tucker* v. *Ferguson*, 527; and see *Bailey* v. *Magwire*, 215.

CONSTRUCTION, RULES OF. See *Judicial Comity*.

I. AS APPLIED TO STATUTES OR CONSTITUTIONS.

1. A provision in a constitution of a State, that no law enacted by the legislature of a State shall relate to more than one subject, and that shall be expressed in its title, is not violated by an act having va-

CONSTRUCTION, RULES OF (*continued*).

rious details, provided they all relate to one general subject. *Woodson* v. *Murdock*, 351.

2. Statutes are to be interpreted not only by their exact words, but also by the apparent general purpose of the statutes. If, *ex gr.*, a statute in its general purpose have plain reference to a *class* of persons, it will not include a person, a single individual merely, in a distinct class, though the mere words might include him. *United States* v. *Saunders*, 492.

II. As applied to Contracts.

3. Although since the legal tender acts, an undertaking to pay in gold may be *implied*, and be as obligatory as if made in express words, yet the implication must be found in the language of the contract, and cannot be gathered from the mere *expectations* of the parties. *Maryland* v. *Railroad Company*, 105.

4. A reference to what are called "surrounding circumstances," is allowed for the purpose of ascertaining the subject-matter of a contract, or for an explanation of the terms used, not for the purpose of adding a new and distinct undertaking. *Ib.*

5. An implication that a railroad company having an unfinished road in which the State was largely interested should pay gold instead of currency to the State which has lent to the company sterling bonds of the State, of which the interest was payable abroad, and, of course, in coin, cannot be made from the fact that unless the contract between the company and the State be so interpreted, the State has not exacted from the company all that was necessary to its own complete indemnification; this being especially true in the case of a contract, where, in other parts, a complete indemnification was specifically and carefully provided for, and in one where at the time it was made there was no difference, existing or anticipated, in the value of currency and coin, and the difference having been brought about by events supervening long afterwards. *Ib.*

CONTEMPT OF COURT.

Where the purpose of a suit (a proceeding in equity) is to establish the complainant's right to certain property (negotiable bonds), and to free it from embarrassment by *any* claim or title to it on the part of the defendant, and a decree, in which nothing further remains to be executed, has been made in favor of the plaintiff, perpetually enjoining the defendant from setting up *any* such claim or title, the defendant commits a contempt of court if he subsequently assert ownership to the property, even though he now assert a different title or source of title from the one imputed to him in the suit where the decree was made, and defended by him. *In re Chiles*, 157.

CONTINUING DEBT. See *Bankrupt Act*, 7.

CONTRACT. See *Construction, Rules of*, 3–5; *Evidence*, 7; *Executory Contract; Implied Contract.*

A consideration is of the essence of any binding agreement, or in other

CONTRACT (*continued*).
words, of any contract. An agreement without a consideration is not a contract, but is only a nude pact; the promise of a gratuity spontaneously made, and which may be kept, changed, or recalled at pleasure; and this rule applies to agreements made by States as well as to those made by persons. *Tucker* v. *Ferguson*, 527; and see *Bailey* v. *Magwire*, 215.

"COSTS OF CONVEYING."
The meaning of this expression, used in an act of Congress of July 2d, 1864, in reference to certain public lands, not clear; there being no statute which this court knew of authorizing a charge for issuing a patent. *Hunnewell* v. *Cass County*, 465.

"COTTON NOTES."
Certain notes, thus called, issued by the State of Mississippi, A.D. 1861, declared void, as in aid of the rebellion. *Taylor* v. *Thomas*, 479.

COUNTER CLAIM. See *Court of Claims*.

COURT AND JURY. See *Chattel Mortgages*.
There exists no such rule as that if there is a scintilla of evidence in a case tried before a jury, the case must be submitted to the jury. The rule is, that where the court would decide for the defendant on a demurrer to all the evidence—in other words, if, to the judicial mind, the evidence, tested by the law of the issue and the rules of evidence, is not sufficient to justify a jury fairly and reasonably in finding a verdict for the plaintiff—the court should so tell the jury; or, to put the matter in yet different words, if the court can see that if a verdict for the plaintiff should be rendered, it ought to be set aside as being unwarranted by the testimony, such instruction should be given in advance of the verdict. *Pleasants* v. *Fant*, 116.

COURT OF CLAIMS. See *Rebellion*, 1, 2.
1. Under the act of March 12th, 1863, relating to captured and abandoned property, and which enacted that any person claiming to be the owner of such property may, "at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof in the Court of Claims, and, on proof . . . that he has never given any aid or comfort to the present rebellion," receive the proceeds of the sale of such property, a person who did give aid and comfort to the rebellion, and who has not been pardoned until after two years from the suppression of the rebellion, cannot, on then preferring his petition, obtain the benefit of the act, even though in cases generally the limitation of actions in the said court is one of six years. The question is not one of limitation but of jurisdiction. And the inability of an unpardoned rebel to sue in the Court of Claims does not control the operation of the statute. *Haycraft* v. *United States*, 81.
2. When the government means to set up any counter claim to the claim of a party suing in the Court of Claims, it must be set up in the pleadings or on motion for new trial. *United States* v. *O'Grady*, 641.

CREDITOR AND DEBTOR. See *Rebellion*, 3.

CURATIVE ACT. See *Special Legislation.*

DEMURRABLE BILL. See *Practice*, 2.

A., by executory contract, offered to sell to B. a large amount ($31,000) of judgments which he, B., held against a railroad company, if B. would pay him $5000. B., regarding the contract as one executed, and as transferring the judgments to him *in præsenti*, filed a bill against A., alleging that A. had collected the judgments, and claiming the proceeds less the $5000 and interest. *Held* that the bill was demurrable, it not being one of discovery and the complainant having complete remedy at law. *French* v. *Hay*, 231.

DEPARTMENT OF AGRICULTURE. See *Botanical Garden.*

DEPOSITION. See *Evidence*, 6.

DISSOLUTION OF PARTNERSHIP. See *Bankrupt Act*, 4.

DIVIDEND. See *Internal Revenue*, 1, 2; *Preferred Stock.*

"DIVIDEND IN SCRIP."

The nature of this sort of dividend in connection with the internal revenue laws taxing it. *Bailey* v. *Railroad Company*, 604.

EQUITY. See *Bill of Review; Bill of Revivor; Conflict of Jurisdiction*, 2; *Demurrable Bill; Injunction; Parties; Practice*, 2–7; *Trustee's Sale.*

EVIDENCE. See *Common Carrier*, 4; *Insurance*, 1; *Louisiana Purchase*, 2; *Presumption.*

1. Every admission upon which a party relies is to be taken as an entirety of the fact which makes for his side, with the qualifications which limit, modify, or destroy its effect. *Insurance Company* v. *Newton*, 32.
2. The preliminary proofs presented to an insurance company, in compliance with the condition of its policy of insurance, are admissible as *primâ facie* evidence of the facts stated therein, against the insured and on behalf of the company. *Ib.*
3. Where the question before the jury is whether F. (the defendant) was a partner with K., so as to make him liable for the debts of the firm, K.'s declarations to third persons are not admissible in favor of the plaintiffs until they have established a *primâ facie* case of partnership by other evidence. *Pleasants* v. *Fant*, 116
4. The admission of the defendant and the eposition of K. to the effect that the defendant had procured for K. a loan of money to be used in a purchase of cotton, and that K. had voluntarily promised to give the defendant a part of the profits, if any were made, for his assistance in procuring the loan, when no sum or proportion of profits was named, does not raise such a presumption of partnership. *Ib.*
5. Nor is such evidence sufficient to require the court to submit the question of partnership to a jury; and its instruction to find for the defendant was right. *Ib.*

EVIDENCE (*continued*).

6. In courts of the United States, under section 858 of the Revised Statutes, which enacts (with a proviso excepting to a certain extent suits by or against executors, administrators, or guardians) that in those courts no witness shall be excluded in any civil action because he is a party to or interested in the issue tried, parties to a civil suit (the suit not being one of the sort excepted by or against executors or guardians) may testify by deposition as well as orally, there being, under the act of Congress, no difference between them and other persons having no interest in the suit. *Railroad Company* v. *Pollard*, 341.
7. Where a written contract in plain terms is conditional, and declares that IF, after a certain time, A. shall be in person or have an attorney in person in a place named, *then* the party of the other side (the party binding himself), shall have a right to tender him a certain sort of money (depreciated money) in payment of a debt, parol evidence is inadmissible to show that it was part of the contract that the person should be in the place named after the date named. *Gavinzel* v. *Crump*, 308.

EXECUTORY CONTRACT.

1. On the 31st of July, 1863, during the late rebellion, E. and C., owning certain crops of cotton in Wilkinson County, Mississippi, executed a paper thus: "We *have*, this 31st of July, 1863, *sold* unto Mr. L. our crops of cotton, now lying in the county aforesaid, numbering about 2100 bales, at the price of ten cents per pound, currency, the said cotton to be delivered at the landing of Fort Adams, and to be paid for when weighed; Mr. L. agreeing to furnish at his cost the bagging, rope, and twine necessary to bale the cotton unginned, *and we do acknowledge to have received, in order to confirm this contract, the sum of thirty dollars.* This cotton will be received and shipped by the house of D. & Co., New Orleans, and *from this date is at the risk of Mr. L.* This cotton is said to have weighed an average of 500 lbs. when baled." *Held* (under some circumstances), that the contract was executory only and had not divested E. and C. of their property in the cotton; no money but the thirty dollars having been paid, and nothing else done in execution of the contract; and that in a suit for the proceeds of it under the Captured and Abandoned Property Act, which gives to the "owner" a right to recover, under certain circumstances, property captured or abandoned during the late civil war, they alone could sue. *The Elgee Cotton Cases*, 180.
2. The same E. and C, subsequently to the above-quoted contract with L., made another contract with N. (he not having notice of the first contract), by which E. and C. contracted for the sale to N. "for so much of the 2100 bales as N. should get out in safety to a market, for the price of £15 per bale, to be paid at Liverpool. The risk of the cotton to be on the vendors." *Held*, equally, that no property passed by the contract; no cotton ever having been got out. *Held*, further, that this was not altered by a letter in these words from the owners of the cotton: "It having been agreed on between you and myself that I sell to you all the cotton of E and C. now baled and under

EXECUTORY CONTRACT (*continued*).

shed, for the price of £15 sterling per bale, payable in Liverpool, you will cause the same to be placed to my credit with J. A. J. & Co., of Liverpool." *The Elgee Cotton Cases*, 180.

3. In 1859 A. lent to B., who was largely interested in an embarrassed railroad, $5000 to buy certain judgments against the road, and B. having bought, in 1859 and the early part of 1860, judgments to the amount of $31,000, assigned the whole of them to A., absolutely. Subsequently, that is to say in August, 1860, A. made a transfer (so-called) of them to B., "upon B.'s payment of $5000, with interest from this date," and gave to B. a power of attorney of the same date, authorizing him "for me and in my name" to dispose of them as he might see proper. *Held*, that the so-called transfer was executory, amounting only to an offer that if B. would pay the $5000, B. should become owner of the judgments. *French* v. *Hay*, 231.

FEDERAL QUESTION. See *Jurisdiction*, 4, 5

FEME COVERT. See *Married Woman*.

FLINT AND PÈRE MARQUETTE RAILROAD COMPANY. See "*Sale*;" *Taxation*, 1–4.

FRAUD. See *Chattel Mortgages; Omnia contra proferentem præsumuntur; Trustee's Sale.*

Not a good plea to an action in one State, upon a judgment in another. *Maxwell* v. *Stewart*, 77.

ILLINOIS.

Under the Landlord and Tenant Act of Illinois, a landlord has no lien upon the personal property of his tenant prior to an actual levy of distress, and consequently if proceedings of bankruptcy are begun by other persons against his tenant before such warrant of distress be actually levied, the subsequent assignment in bankruptcy will vest the personal property of the tenant in the assignee, to the exclusion of the landlord's right to levy on it. *Morgan* v. *Campbell*, 381.

IMPLIED CONTRACT. See *Construction, Rules of*, 3–5.

In November, 1863, during the rebellion, Confederate notes being then so much depressed in market value that in Richmond, Virginia, $3260 of them were worth but $204 in gold coin, G., a Swiss, at the time resident in Richmond, but desirous to go to Europe—to escape to which through the rebel lines was then extremely difficult—agreed to lend C., an American, resident in Richmond, the said sum of $3260 in the Confederate notes above mentioned, and C. borrowed the said sum in such notes. C. executed his bond to G., by which it was agreed that the money was not to become due and payable until the civil war should be ended (during which no interest should be chargeable), nor become payable then unless demand was made for it; and, moreover, that if C. was not at that time prepared to pay the said sum, he should have a right to retain it for two years longer, when it should become absolutely payable. The bond continued:

IMPLIED CONTRACT (*continued*).

"And upon this further condition, that at any time after the 1st day of April, 1864, and during the continuance of said war, IF the said G., or any attorney in fact duly authorized by him to receive payment of said sum, shall be present *in person* in the city of Richmond, I shall have the right (if I elect to do so) to tender said sum, without interest thereon, to said G. *in person*, or to his said attorney in fact *in person*, in said city, in current bankable funds; and upon such tender being made the said G. or his attorney in fact shall be bound to receive the same in full payment and satisfaction of this obligation, and thereupon the said obligation shall be surrendered and cancelled. But said tender is not to be made except to said G. or his said attorney in fact in person, in the city aforesaid."

G. went to Europe after the execution of the bond, and did not return till after the war was ended, that is to say, not until June, 1865. On suit by him then for the $3260 in lawful money of the United States, *held*, that there was nothing in this above-quoted paragraph of the bond which impliedly obliged G. either to be himself in Richmond at any time after the 1st day of April, 1864, and during the continuance of the war, or to have an attorney in fact there to receive the money due on the bond. *Gavinzel* v. *Crump*, 308.

IMPLIED REPEAL OF STATUTES. See *Judicial Comity*, 2.

A statute making it unlawful for any company for internal improvement to mortgage its works so as to defeat, postpone, endanger, or delay contractors, laborers, or workmen employed in its construction, and in favor of whom the statute makes a lien, is not repealed as to a particular company, simply by a subsequent statute authorizing that company to borrow money and to pledge its income and property to secure the payment. *Fox* v. *Seal*, 424.

INDIANA.

The tenth and twenty-first sections of its statute of frauds, relating to chattel mortgages and the effect of recording them, considered and declared. *Robinson* v. *Elliott*, 513.

INDORSER.

Of a promissory note, though an indorser for accommodation only, is not a "security" within the meaning of that word as used in a statute of Arkansas, which declares that any person bound as "security" for another on any bond, bill, or note, may require the person having the right to sue on the instrument, to proceed against the principal under penalty of the surety's being exonerated. *Ross* v. *Jones*, 576.

INJUNCTION. See *Conflict of Jurisdiction*, 2.

The court will not, on any ground, issue an injunction to stay taxation by State authorities of land granted by the United States to a State corporation for the purpose of public improvements, when it is in doubt as to the meaning of certain statutes, Federal and State, on which the prayer for relief by injunction is prayed. *Hunnewell* v. *Cass County*, 465.

INSURANCE. *Evidence*, 1.

1. The preliminary proofs presented to an insurance company, in compliance with the condition of its policy of insurance, are admissible as *primâ facie* evidence of the facts stated therein, against the insured and on behalf of the company. *Insurance Company* v. *Newton*, 32.
2. Where a policy of life insurance contains the following conditions, to wit: "This policy is issued by the company, and accepted by the assured, on the following *express conditions and agreements, which are a part of the contract of insurance. First.* That the statements and declaration made in the application for said policy, and on the faith of which it is issued, *are in all respects true*, and without the suppression of any fact relating to the health or circumstances of the insured *affecting the interests of the company.*" And the further condition: "That in case of the violation of the foregoing condition, . . . this policy shall become *null and void*"—any answer untrue in fact, and known by the applicant for insurance to be so, avoids the policy, irrespective of the question of the materiality of the answer given, to the risk. *Jeffries* v. *Life Insurance Company*, 47.

INTEREST.

1. Where a party agrees, by note, to pay a certain sum at the expiration of a year, with interest on it at a rate named, the rate being higher than the customary one of the State where he lives, and does not pay the note at the expiration of the year, it bears interest not at the old rate but at the customary or statute rate. *Burnhisel* v. *Firman*, 170.
2. If, however, the parties calculate interest and make a settlement upon the basis of the old rate, and the debtor gives new notes and a mortgage for the whole on that basis, the notes and mortgage are, independently of the Bankrupt Act, and of any statute making such securities void *in toto* as usurious, valid securities for the amount which would be due on a calculation properly made. They are bad only for the excess above proper interest. *Ib.*

INTERESTED PARTY. See *Evidence*, 6.

INTERNAL REVENUE.

1. Where depositors in a savings bank do not receive a fixed rate of interest independently of what the bank itself may make or lose in lending their money, but receive a share of such profits as the bank, by lending their money, may, after deducting expenses, &c., find that it has made, such share of profits is a "dividend" within the meaning of the Internal Revenue Act of 1864, as amended by the act of 1866, and not "interest." *Cary, Collector*, v. *The Savings Union*, 38
2. "Dividend in scrip." The nature of this sort of dividend explained and settled in connection with the internal revenue laws, laying a tax of 5 per cent. upon it. *Bailey* v. *Railroad Company*, 604.
3. The provisions of the fourteenth section of the Internal Revenue Act of 1864, as amended by the act of 1866, which make it *lawful* for the assessor to do various things in order to get at the taxable property

INTERNAL REVENUE (*continued*).

of a party whom he is seeking to assess, and who will not make proper returns of his estate, do not make it *obligatory* on him to do so. *Bailey* v. *Railroad Company*, 604.

4. Irregularity in giving the notice of time and place of appeal, &c., required by the nineteenth section of the same act, is not important where the party subsequently takes an appeal in fact. *Ib.*

INTERPRETATION OF CONTRACTS AND STATUTES. See *Construction, Rules of.*

JUDGMENT, VALIDITY OF.

1. To make a record of a judgment valid upon its face, it is only necessary for it to appear that the court had jurisdiction of the subject-matter of the action and of the parties, and that a judgment had in fact been rendered. *Maxwell* v. *Stewart*, 77.
2. A trial by the court without the waiver of a jury is at most only error. A judgment after such a trial is not necessarily void. Mere errors cannot be set up as a defence to an action brought upon it. *Ib.*
3. When the record of a case, a judgment in which is sued upon, shows that an attachment was issued in it and laid on property appraised at a less sum than the judgment was given for, a demurrer which makes, in virtue of the attachment, a defence of payment and satisfaction, is not good. *Ib.*
4. A seizure of personal property even to the full value of the sum claimed, under an order of attachment issued during the pendency of an action, is not necessarily a satisfaction of the judgment when afterwards obtained. The defendant must show affirmatively that it was applied to and satisfied the judgment. *Ib.*
5. A court will acquire jurisdiction of the person in a suit originally commenced by an attachment *in rem*, if the party against whom the claim is set up voluntarily appears and submits himself to the jurisdiction, demurs, pleads, and goes to trial on issues made. *Ib.*
6. Fraud cannot be pleaded to an action in one State upon a judgment in another. *Ib.*
7. Nor can *nil debet*. *Ib.*
8. Where a decree in bankruptcy has been made by a court having jurisdiction in bankruptcy, a party sued by the assignee in bankruptcy as having assets of the estate, cannot show that the debt on which the party was decreed a bankrupt had been so far reduced by credits, as that it was not large enough to give jurisdiction to the court to consider the petition in bankruptcy. *Sloan* v. *Lewis*, 150.

JUDICIAL COMITY.

1. In a suit on a replevin bond given to the sheriff, where the question whether the proper party to sue is the sheriff or the party for whose benefit the bond was given depends upon the statutes or code of practice of a particular State or Territory, this court will not reverse the decision of the Supreme Court of that State or Territory on the question; that being a question on the construction of their own statutes or code. *Sweeney* v. *Lomme*, 208.

JUDICIAL COMITY (*continued*).

2. Whether or not an act of a State prescribing a particular mode of taxation, has been impliedly repealed by a general revenue act of the same State confessedly not in terms repealing it, is a matter peculiarly within the province of the highest courts of the State, whose acts are the subjects of the question, to decide. And when such courts have decided the question, their decision is controlling. *Bailey* v. *Magwire*, 215.

JURISDICTION. See *Court of Claims*, 1; *Judgment, Validity of*, 5, 8.

1. A court will acquire jurisdiction of the person in a suit originally begun *in rem*, if the party against whom the claim is made voluntarily appears and submits himself to the jurisdiction, demurs, pleads, and goes to trial on the issues made. *Maxwell* v. *Stewart*, 77.
2. Whether a court established during the rebellion, by the proclamation of a general commanding the army of the United States, and occupying a place lately in rebellion and now held by military occupation, was in fact acting within its jurisdiction in a civil controversy between two banks of the place, about a sum of money, does not present a question for this court on error; the order establishing the court not having with any clearness defined its jurisdiction, whether civil r criminal, and the courts of the State having decided in the particular case that it was acting within its jurisdiction. *Mechanics' and Traders' Bank* v. *Union Bank*, 276.
3. Although consent of the parties to a suit cannot give jurisdiction to the courts of the United States, the parties may admit the existence of facts which show jurisdiction, and the facts being true the courts may act judicially upon such an admission. *Railway Company* v. *Ramsey*, 322.

OF THE SUPREME COURT OF THE UNITED STATES.

(*a*) It HAS jurisdiction under section 709 of the Revised Statutes—

4. When a plaintiff in error alleges that a court which has decided a case against him was constituted in violation of the Federal Constitution, and the Supreme Court of the State where the court sat has decided that it was not so constituted. *Mechanics' and Traders' Bank* v. *Union Bank*, 276.

(*b*) It has NOT jurisdiction under section 709 of the Revised Statutes—

5. When the question in a State court is not whether, if the bankrupt had title, it would pass to his assignee under the Bankrupt Act, but whether he had title at all, and the State court decides that he had not. *Scott* v. *Kelly*, 57.

JURY. See *Court and Jury; Judgment, Validity of*, 2.

LACHES. See *Removal of Causes*.

LANDLORD AND TENANT. See *Bankrupt Act*, 8.

LEGAL TENDER. See *Construction, Rules of*, 3–5; *Implied Contract; Rebellion*, 3.

LEGISLATIVE POWER.

One legislature cannot in matters of ordinary and general legislation tie

LEGISLATIVE POWER (*continued*).

up the power of subsequent ones to act on the same subject; *ex. gr.*, in a State where, though a *statute* may require that no bonds be issued by counties to make roads unless the voters have approved the expenditure, there is nothing in the State *constitution* which forbids the legislature from conferring on counties the authority to borrow money for the purpose named without such approval; the legislature can confer on counties the power to borrow money to pay debts already contracted for this purpose without such consent, and bonds issued accordingly will be valid. *Ritchie* v. *Franklin County*, 67.

LIEN. See *Pennsylvania*, 1.

LIFE INSURANCE. See *Insurance.*

LIMITATIONS, STATUTE OF. See *Court of Claims*, 1; *Statute of Limitations.*

LOUISIANA PURCHASE.

1. Under proceedings before the boards of commissioners appointed under the act of March 2d, 1805, for ascertaining and adjusting the claims to land embraced in the Louisiana purchase, and the several subsequent acts on the same subject, where a claimant presents not only the evidence of original concession, but that also which purports to be the evidences of the title to himself, the confirmation, though made to the original grantee (or "concessionee," as he is sometimes styled), "and *his* legal representatives," operates as a grant to the claimant, although the name of the claimant be omitted in the form of confirmation. *Connoyer* v. *Schaeffer*, 254.
2. In a suit for recovery of land, under the act of Congress of July 4th, 1836, the plaintiff offered in evidence a written request to the recorder of lands in and for the Territory of Missouri, to record all registered concessions found in certain books named, then in his office. But it did not appear that those under whom the plaintiff claimed had any agency in giving the notice, nor that any signer of the paper was interested in the lands in question, nor that any of them represented those who were or professed to be so interested. The notice named no claimant, and described no land, and did not intimate that any one was in fact claiming under the concessions referred to. *Held*, that the paper was not such notice of the claim as the act contemplated. *Ib.*

MARRIED WOMAN.

A married woman may charge her separate property for the payment of her husband's debt, by any instrument in writing in which she in terms plainly shows her purpose so to charge it; she describing the property specifically and executing the instrument of charge in the manner required by law. *Stephen* v. *Beall*, 329.

MISSOURI. See *Legislative Power; Retrospective Legislation; Special Legislation.*

1. The provision of the constitution of Missouri which ordains that "the General Assembly shall have no power, for any purpose whatever, to release the lien held by the State upon any railroad," was not meant,

MISSOURI (*continued*).
in case of a failure by the railroad companies, to prevent the State from making a compromise with any railroad company of any debt due to it or to become due; and on the compromise being effected to release the lien. *Woodson* v. *Murdock*, 351.
2. The provision in the same constitution, "that no law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in its title," is not violated by any act having various details, provided they all relate to one general subject. *Ib.*

NEGLIGENCE. See *Common Carrier*, 1, 2, 7.

NEW ORLEANS. See *Rebellion*, 4–6.

NEW SECURITY. See *Bankrupt Act*, 7.

NIL DEBET.
Not a good plea to an action in one State upon a judgment in another. *Maxwell* v. *Stewart*, 77.

NOTICE. See *Common Carrier*, 6.

NUDE PACT,
That is to say, an agreement without consideration, is not a contract, and is of no obligation on the party making it, whether such party be a person or a State. *Tucker* v. *Ferguson*, 527; and see *Bailey* v. *Magwire*, 215.

OMNIA CONTRA PROFERENTEM PRÆSUMUNTUR.
Complainants, *cestui que trusts* under a deed, who alleged a fraudulent sale by their trustee and a purchase for himself, through a nominal third party, and who relied on the trustee's possession of the trust property after an alleged sale of it, as evidence of it, not stating *when* the trustee came into possession—that is to say, how soon after his former sale—the court assumed the time to be thirteen years; this term having elapsed between the date of the sale by the trustee and the filing of the bill (or cross-bill, rather) to set it aside; the court acting on the presumption that the complainant stated the case as favorably as he could for himself, and would have mentioned the fact that the trustee had been in possession long before the bill was filed, if he had really been so. *Stephen* v. *Beall*, 330.

OWNER.
A person who has been decreed a bankrupt, considered such, within statutes authorizing a redemption by "the owner of lands" sold for taxes. *Hampton* v. *Rouse*, 263.

PARTIES.
1. Where one of four joint tenants makes a deed of trust (a mortgage) of land conveyed to the four—the deed of trust purporting to convey the *whole* estate—it is not necessary, on a bill filed to have the land sold under the deed of trust (in other words, to foreclose the mortgage), to make the three who do not convey parties defendant to the bill. *Stephen* v. *Beall*, 329.
2. When a bill claiming real estate alleges that certain persons named,

PARTIES (*continued*).

being several in number, *all* claim through a deed which the bill alleges was void for reasons stated, no demurrer lies to the bill on the ground that the defendants were improperly joined, inasmuch as they had separate and distinct interests which could not be joined in one suit. *House* v. *Mullen*, 42.

PARTNERSHIP, DISSOLUTION OF. See *Bankrupt Act*, 4; *Evidence*, 3–5.

PASSENGERS BY RAIL CARS. See *Common Carrier*, 1, 2, 7.

PATENTS.

I. GENERAL PRINCIPLES RELATING TO.

1. A reissue cannot be granted of a patent which describes and claims a composite device (as a tunnel) composed of elements (such as sides, top, and bottom), so as to claim as distinct inventions the several components of such integral devices, such as the side, the top, or the bottom of the tunnel. *Gill* v. *Wells*, 1.

Where a patentee in his *original* patent claimed a tunnel composed of four parts, top, two sides, and bottom, and subsequently discovered that the top of said tunnel or sides of said tunnel alone would serve a useful purpose, he could not surrender and obtain a *valid* reissue for such use of the top, the sides, or the bottom *alone*. This would be an invention different from the original one and made subsequently to the original patent. The description of such new mode of operation as would be involved in the use of only a portion of the elements composing the tunnel, would constitute "*new matter*," which is forbidden by the Patent Act of 1870. *Ib.*

2. The rule laid down in *Gould* v. *Reese* (15 Wallace, 394), restated, viz., that an "equivalent," in the sense of the Patent law, must be one known to be a proper substitute at the date of the original patent. *Ib.*

II. PARTICULAR PATENTS, VALIDITY OF.

3. Wells's reissued patent for a machine for making hat-bodies, No. 2942, would be held invalid by the court. *Ib.*

PENNSYLVANIA.

1. Under the joint resolution of the legislature of this State, passed January 21st, 1843, intended for the protection of unpaid contractors, laborers, or workmen, upon railroads, canals, or other internal improvements in the State, such persons have a lien of indefinite duration on the road, which has precedence over every right that can be acquired by any mortgage made after the debt to the road was incurred; and such lien is not merged in any judgment got by the contractor against the company for his debt, nor by any proceedings in or judgment on a scire facias brought by him to revive his original judgment. The characteristics of the liens given by the statute stated. *Fox* v. *Seal*, 424.

2. The joint resolution not repealed as to a particular road company, by a statute authorizing the company to borrow money and to pledge its income and property to secure the payment. *Ib.*

PENNSYLVANIA (*continued*).

3. Mortgagees in this State are not terre-tenants, in such a sense that on a scire facias to revive a judgment against an owner of land notice need be given to a mortgagee as terre-tenant. *Fox* v. *Seal*, 424.

PLEADING. See *Omnia contra proferentem præsumuntur.*

Neither fraud nor "*nil debet*" can be pleaded to an action in one State upon a judgment in another. *Maxwell* v. *Stewart*, 77.

PRACTICE. See *Bill of Review; Bill of Revivor; Judgment, Validity of*, 2.

(*a*) *In cases generally.*

1. When it appears, for the first time in the argument of a cause, that the existence of the judgment appealed from is not stated in the record, the court of its own motion may allow the plaintiff in error a certiorari and time to produce a certified copy of it. *Sweeny* v. *Lomme*, 208.

(*b*) *In chancery.*

2. Where a bill is properly demurred to on a matter of form merely, and therefore matter capable of being amended, and is also demurred to *im*properly on a ground of substance (as *ex. gr.*, the statute of limitations), which last ground of demurrer a reference to the bill shows to be unfounded in fact, and the bill, instead of being dismissed "without prejudice," or with a statement in the decree that it is dismissed for the matter of form, is dismissed "generally," this court will not affirm, as it would have done had the dismissal been in either of the two ways last mentioned. It will reverse and remand with directions to allow the complainant to amend his bill, or in his failing to do that, to dismiss the bill without prejudice. *House* v. *Mullen*, 42.
3. The point cannot be first made in this court that no replication has been made to an answer in chancery, and, therefore, that the answer is to be taken as conclusively true in all points. If such a point is meant to be insisted on here, it should have been made in the court below. *Fretz* v. *Stover*, 198.
4. New defences, *i. e.*, defences not made in an answer to the original bill, cannot be first set up in an answer to a bill of revivor. Such bill puts in issue nothing but the character of the new party brought in. *Ib.*
5. Where an original bill was filed in a State court by a trustee of lands against two persons, B. and C., charging both with a fraudulent purchase of the land, and charging B. with a receipt of the rents, but not so charging C., and a final decree was made charging B., but not charging C., it was grossly irregular in an amended bill filed after such final decree to charge C. with the rents; and a decree *pro confesso* against C., so charging him—he having had no knowledge of the amended bill, and no proof being made of the truth of the allegations of the bill, and he on obtaining knowledge of the bill denying all its allegations—was rightly annulled *in toto* by the Circuit Court of the United States, on the case being removed from the State court into the Circuit Court. *French, Trustee*, v. *Hay et al*, 238.
6. But the decree against B was not rightly annulled; the decree in the State court on the original bill against him for the rents having been *res judicata* and unimpeachable as to everything covered by it. *Ib.*

PRACTICE (*continued*).

7. The amended bill, above mentioned, in the State court having charged B. with damage to certain furniture in the premises with whose rents he had been charged, and an issue having been directed by the State court to be tried as to that matter, and B. having had leave to answer the amended bill, *held* further, that as to that matter the decree of the State court should not have been annulled *in toto*, and things put as if nothing had been done, but that the Circuit Court should have ascertained by a jury, or by a master, the amount of damages, and have decreed accordingly. *French, Trustee*, v. *Hay et al.*, 238.

PREFERRED CREDITOR. See *Bankrupt Act*, 7, 8.

"PREFERRED STOCK."

This term, in companies whose capital is divided into shares, and which also issue bonds, is to be taken generally as referring to the shares, and not to anything in the nature of debt; and this is true equally of the term "preferred stock." Hence, where a railroad company, built by money contributed as stock or capital, which had incumbered its road with a succession of mortgages, and which had also issued bonds unsecured by any liens, became embarrassed, and being about to have its road sold under the mortgages reorganized itself, converting, by the terms of its reorganization, the unsecured bondholders into holders of "preferred stock," with a declaration in the deed of reorganization that "such preferred stock shall be entitled to preferred *dividends* out of the *net* earnings of said road, payable after payment of mortgage interest and delayed coupons in full;" *held* that mortgagees subsequent to the reorganization were entitled to have the interest on their mortgages paid in preference to the promised dividends on the preferred stock. *St. John* v. *Erie Railroad*, 137.

PRESUMPTION.

1. A court established by proclamation of the commanding general in New Orleans, on the 1st of May, 1862, during the late rebellion, on the occupation of the city by the government forces, will in the absence of proof to the contrary be presumed to have been established by the consent and authorization of the President. *Mechanics' and Traders' Bank* v. *Union Bank*, 276.

2. Where the statutes of the United States authorizing a removal into the Circuit Court of the United States of a cause brought originally in the courts of a State, require that the parties to the suit shall be citizens of different States, and where a cause has been removed from a State court to a Circuit Court, and all the papers in it have been afterwards destroyed by fire, and the parties then, by writing filed in the Circuit Court, admit that the cause was brought to the Circuit Court by transfer from the State court, *in accordance with the statutes in such case provided*, and—being now anxious apparently only to get to trial—simply ask and get leave to file a declaration and plea as substitutes for the ones originally filed and now destroyed,—in such case this court will, in the absence of all proof to the contrary, presume that the citizenship requisite to give the Circuit Court jurisdic-

PRESUMPTION (*continued*).
tion was shown in some proper manner; though it be not apparent on the mere pleadings. *Railway Company* v. *Ramsey*, 322.

PROMISSORY NOTE. See *Indorser*.

PROVOST COURT. See *Rebellion, The*, 4–6.

PUBLIC LANDS. See "*Costs of Conveying*;" *Taxation*.

PUBLIC LAW. See *Rebellion*.

PUBLIC POLICY. See *Common Carrier*, 7.

RAILROAD COMPANY. See *Common Carrier*; "*Preferred Stock*;" "*Sale*;" *Taxation*, 1, 2.

REBELLION, THE. See "*Cotton Notes*;" *Court of Claims*, 1; *Statute of Limitations*.

1. Corporations created by the legislatures of rebel States while the States were in armed rebellion against the government of the United States, have power, since the suppression of the rebellion, to sue in the Federal courts, if the acts of incorporation had no relation to anything else than the domestic concerns of the State, and they were neither in their apparent purpose nor in their operation hostile to the Union or in conflict with the Constitution, but were mere ordinary legislation, such as might have been, had there been no war or no attempted secession, and such as is of yearly occurrence in all the States. *United States* v. *Insurance Companies*, 99.
2. Such corporations may in proper cases sue under the Captured and Abandoned Property Act. *Ib.*
3. After the late rebellion broke out, debtors in the rebellious States had no right to pay to the agents or trustees of their creditors in the loyal States debts due to these last in any currency other than legal currency of the United States. Payment in Confederate notes or in Virginia bank notes (security for whose payment was Confederate bonds, and which notes like the bonds themselves never, after the rebellion broke out, were safe, and before it closed had become worthless), *held* to have been no payment, and the debtor charged *de novo*. *Fretz* v. *Stover*, 198.
4. The Constitution did not prohibit the creation by military authority of courts for the trial of civil causes during the civil war in conquered portions of the insurgent States. The establishment of such courts was the exercise of the ordinary rights of conquest. *Mechanics' and Traders' Bank* v. *Union Bank*, 276.
5. A court established by proclamation of the commanding general in New Orleans, on the 1st of May, 1862, on the occupation of the city by the government forces, will, in the absence of proof to the contrary, be presumed to have been established with the consent and authorization of the President. *Ib.*
6. Though, in the order establishing it, a court was *called* a Provost's Court, a larger jurisdiction than that commonly given to such courts, that is to say larger than jurisdiction over minor criminal offences, might have been properly, in fact, given to it. *Ib.*

REBELLION, THE (*continued*).

7. Whether such larger jurisdiction and one over civil cases was given to it, is not a Federal question, the case being one where the order defining the jurisdiction did not show at all clearly what jurisdiction was given to it, and where the courts of the State decided that it had a cognizance of civil suits. *Mechanics', &c., Bank* v. *Union Bank*, 276.

REDEMPTION. See *Tax Sales.*

REFERENCE. See *Submission to Award.*

REISSUED PATENT. See *Patent.*

REMAND. See *Practice*, 2.

REMOVAL OF CAUSES. See *Conflict of Jurisdiction*, 2; *Presumption*, 2.

When a case has been removed from a State court into the Circuit Court of the United States, under one of the acts of Congress relating to such removal of cases, an objection that the act has not been complied with in respect of time and other important particulars, will not be listened to in this court, the point not having been made in the court below until three years after the removal made, and when the testimony was all taken and the case ready for hearing. Nor ought it under such circumstances to have been listened to in the Circuit Court. It came too late, and must be held to have been conclusively waived. *French, Trustee*, v. *Hay et al.*, 238.

REPEAL OF STATUTE. See *Implied Repeal of Statute.*

REPLEVIN BOND. See *Judicial Comity*, 1.

1. In a suit on a replevin bond the defendants cannot avail themselves of the failure of the court to render in the replevin suit the alternative judgment for the return of the property or for its value; even if that were an error for which that judgment might be reversed. *Sweeny* v. *Lomme*, 208.
2. If a return be awarded in the replevin suit, the surety is liable on the condition of the bond to return, and this without execution or other demand for its return. The judgment establishes the liability. *Ib.*
3. Nor is this liability to be measured in this action by the value of the interest in the property of the attachment debtor, for whose debt it was seized by the sheriff. The value of the property at the time it was replevied, limited by the debt still due on the attaching creditor's judgment and the penalty of the replevin bond, are the elements of ascertaining the damages in the suit on that bond. *Ib.*

REPLICATION. See *Practice*, 3.

RETROSPECTIVE LEGISLATION. See *Special Legislation.*

The act of the legislature of Missouri of March 21st, 1868, to authorize County Courts to issue bonds for the purpose of paying for the building of bridges and macadamized roads *theretofore* contracted to be built, is valid under the constitution of the State, though the constitution forbids both special and retrospective legislation, whether the act be considered as an original act or as one merely curative. *Ritchie* v. *Franklin County*, 67.

REVERSAL See *Practice*, 2.

REVISED STATUTES OF THE UNITED STATES.

The following sections referred to, commented on, or explained:

Section 630. See *Presumption*, 2.

Section 709. See *Bankrupt Act*, 2; *Jurisdiction*, 4, 5.

Section 858. See *Evidence*, 6.

"SALE."

What amounts to a sale of lands, within the meaning of acts of Congress, making grants of land to aid in the making of railroads, so that the lands shall be open to taxation by State laws, as having passed into private ownership free from trust. The matter specially considered in relation to the act of June 3d, 1856, granting lands to the State of Michigan to aid in the construction of certain railroads. How far a mortgage is such a sale. *Tucker* v. *Ferguson*, 527; and see *Railroad Company* v. *McShane*, 444.

SAVINGS BANK. See *Internal Revenue*, 1.

"SCRIP, DIVIDEND IN."

The nature of this sort of dividend explained as respects the internal revenue laws taxing it. *Bailey* v. *Railroad Company*, 604.

"SECURITY."

An indorser of a promissory note, even though it be an accommodation note, is not one; but is a principal debtor if the note be not paid and proper steps have been taken to fix his liability. *Ross* v. *Jones*, 576.

SET-OFF. See *Court of Claims*.

SETTLEMENT OF ACCOUNTS. See *Action*, 2.

SPECIAL LEGISLATION.

Where a constitution of a State forbids special legislation, an act demanded by considerations of high justice and by the fact that carelessness in the language of previous statutes has worked the necessity for the act, may be presumed to have been meant as a curative act, and as applicable to a particular case as well as to all others similar, and this is true though the new act be couched in general words only. *Ritchie* v. *Franklin County*, 67.

STATUTES. See *Construction, Rules of*, 1, 2; *Implied Repeal of Statutes; Judicial Comity*.

A provision in a constitution, that no law enacted by the legislature shall relate to more than one subject, and that this shall be expressed in its title, is not violated by an act having various details, provided they all relate to one subject. *Woodson* v. *Murdock*, 351.

STATUTE OF LIMITATIONS. See *Court of Claims*.

Ran, during the flagrancy of the late civil war, not only as between citizens of the loyal States and those of the rebellious ones, but also between citizens of the general ones of this latter class. *Ross* v. *Jones*, 576.

STATUTES OF THE UNITED STATES. See *Revised Statutes of the United States.*

The following, among others, referred to, commented on and explained:

1805.	March 2d	See *Louisiana Purchase.*
1806.	April 21st.	See *Louisiana Purchase.*
1832.	July 9th.	See *Louisiana Purchase.*
1833.	March 2d.	See *Louisiana Purchase.*
1855.	February 24th.	See *Court of Claims*
1856.	June 3d.	See *Sale.*
1862.	July 1st.	See *Taxation*, 5, 6.
1863.	March 3d.	See *Court of Claims.*
1863.	March 12th.	See *Court of Claims.*
1864.	June 30th	See *Internal Revenue.*
1864.	July 1st.	See *Costs of Conveying.*
1864.	July 2d.	See *Costs of Conveying.*
1866.	July 13th.	See *Internal Revenue.*
1867.	March 2d.	See *Bankrupt Act; Illinois; Practice*, 5–7; *Removal of Causes; Tax Sales.*
1868.	June 25th.	See *Court of Claims.*

STOCK. See *Preferred Stock.*

SUBMISSION TO AWARD.

1. There is nothing in the nature of the admiralty jurisdiction, or of an appeal in admiralty, which prevents parties in the court of admiralty, whether sitting in prize or as an instance court, from submitting their case by rule of the court to arbitration. *United States* v. *Farragut*, 406.
2. Awards made in pursuance of submissions in that court are to be construed on appeal, and their effect is to be determined, by the same general principles which would govern them in a court of common law or of equity. *Ib.*
3. An expression in the agreement of submission, that all questions of *law* in the case are to be concluded by the award, held to mean no more than a submission of all matters involved in the suit. *Ib.*
4. *Held* further, and accordingly, where the award found facts, it was conclusive; where it found or announced concrete propositions of law, unmixed with facts, its mistake, if one was made, could have been corrected in the court below, and could be corrected here; that where a proposition was one of mixed law and fact, in which the error of law, if there was any, could not be distinctly shown, the parties must abide by the award. *Ib.*
5. That the award was also liable, like any other award, to be set aside in the court below, for such reasons as would be sufficient in other courts; as for exceeding the power conferred by the submission, for manifest mistake of law, for fraud, and for all other reasons on which awards are set aside in other courts of law or chancery. *Ib.*

SURROUNDING CIRCUMSTANCES.

A reference to is allowed for the purpose of ascertaining the subject-matter of a contract, or for an explanation of the terms used, but not for

SURROUNDING CIRCUMSTANCES (*continued*).
the purpose of adding a new and distinct undertaking. *Maryland* v. *Railway Company*, 105

TAX SALES.
1. Under a statute which enacts that the "owner," may within a time named, redeem land sold for taxes, a redemption may properly be made by a person who has been decreed a bankrupt, the lands having been his. In the case here before the court there had as yet been no appointment of an assignee, nor assignment and conveyance to such person, as provided for in the fourteenth section of the Bankrupt Act of 1867; and the redemption was made between the date of the decree and of such appointment *Hampton* v. *Rouse*, 263.
2. A charge that a person who had been decreed a bankrupt on his own application had by *such decree* ceased to be owner and had lost the right to redeem, *held* to be erroneous; there having been evidence tending to show a redemption by such a person. *Ib.*

TAXATION. See *Injunction; "Sale."*
1. A statute, after laying a certain tax *on a "railroad company"*—a specific annual tax of one per cent. on the cost of the road—and reserving a right to impose a further tax upon gross earnings, enacted that "the above several taxes shall be in lieu of all other taxes to be imposed within the State:"
Held, that the statute imposed a tax in reference to the railroad itself, and had no relation to lands owned by the company and not used nor necessary in working the road, and in the exercise of its franchise, but which it had mortgaged and was holding for sale. And that these lands might be taxed notwithstanding the above-mentioned agreement. *Tucker* v. *Ferguson*, 527.
2. An act of the legislature exempting property of a railroad from taxation is not a "contract" to exempt it, unless there be a consideration for the act. An agreement where there is no consideration is a nude pact, the promise of a gratuity spontaneously made, which may be kept, changed, or recalled at pleasure; and this rule of law applies to States as well as to persons. *Ib.*
3. No presumption exists in favor of a contract by a State to exempt lands from taxation. Nothing is to be implied in such a matter. Every reasonable doubt should be resolved against the existence of a contract. *Ib.*; and see *Bailey* v. *Magwire*, 215.
4. When such a contract exists it must be rigidly scrutinized and never permitted to extend, either in scope or duration, beyond what the terms of the concession clearly require. *Ib.*
5. Public lands of the United States, granted to States or companies for public improvements, on which the costs of survey have not been paid, and for which the United States have not issued a patent to the company, are exempt from State taxation. *Railroad Company* v. *McShane*, 444.
6. Where, however, the government has issued the patent, the lands are

TAXATION (*continued*).

taxable, whether payment of those costs have been made to the United States or not. *Railroad Company* v. *McShane*, 444.

7. The contingent right of the United States in public lands of the United States granted to the Pacific Railroad Company does not constitute an exemption of those lands from taxation. *Ib.*

TITLE OF STATUTES See *Statutes*

TRUSTEE'S SALE. See *Omnia contra proferentem præsumuntur.*

Though equity will enforce in the most rigid manner good faith on the part of a trustee, and vigilantly watch any acquisition by him in his individual character of property which has ever been the subject of his trust, yet where he has sold the trust property to another, that sale having been judicially confirmed after opposition by the *cestui que trust*, the fact that thirteen years afterwards he bought the property from the person to whom he once sold it does not, of necessity, vitiate his purchase. The question in such a case becomes one of actual fraud. And where on a bill charging fraud, the answer denies it in the fullest manner, alleging a purchase *bonâ fide* and for full value paid, and that when he, the trustee, made the sale to the person from whom he has since bought it, the purchase by himself, now called in question, was not thought of either by himself or his vendee, the court will not decree the purchase fraudulent, the case being heard on the pleadings, and without any proofs taken. *Stephen* v. *Beall*, 329.

UNCONSTITUTIONAL STATUTE. See *Statutes.*

UNPARDONED REBEL See *Court of Claims*, 1.

USURY. See *Interest.*

WAIVER OF JURY. See *Judgment, Validity of*, 2.

WITNESS. See *Evidence*, 6.