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CASES

ARGUED AND ADJUDGED

IN

THE SUPREME COURT

OF

THE UNITED STATES.

OCTOBER TERM, 1875.

REPORTED BY

WILLIAM T. OTTO

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JUSTICES

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. EDWARDS PIERREPONT.

SOLICITOR-GENERAL.

HON. SAMUEL FIELD PHILLIPS.

CLERK.

DANIEL WESLEY MIDDLETON, ESQUIRE.

ALLOTMENT, ETC., OF THE JUSTICES

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 JUSTICE, AND STATE FROM WHENCE APPOINTED.	NUMBER AND TERRITORY OF THE CIRCUIT.	DATE OF COMMISSION, AND BY WHOM APPOINTED.
CHIEF JUSTICE.		
Hon. M. R. WAITE, Ohio.	FOURTH. Maryland, West Virginia, Virginia, N. Carolina, and S. Carolina.	1874. Jan. 21. President Grant.
ASSOCIATES.		
Hon. N. CLIFFORD, Maine.	FIRST. Maine, New Hampshire, Massachusetts, and Rhode Island.	1858. Jan. 12. President Buchanan.
Hon. WARD HUNT, New York.	SECOND. New York, Vermont, and Connecticut.	1872. Dec. 11. President Grant.
Hon. WM. STRONG, Pennsylvania.	THIRD. Pennsylvania, New Jersey, and Delaware.	1870. Feb. 18. President Grant.
Hon. J. P. BRADLEY, New Jersey.	FIFTH. Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas.	1870. March 21. President Grant.
Hon. N. H. SWAYNE, Ohio.	SIXTH. Ohio, Michigan, Kentucky, & Tennessee.	1862. Jan. 24. President Lincoln.
Hon. DAVID DAVIS, Illinois.	SEVENTH. Indiana, Illinois, and Wisconsin.	1862. Dec. 8. President Lincoln.
Hon. S. F. MILLER, Iowa.	EIGHTH. Minnesota, Iowa, Missouri, Kansas, Arkansas, & Nebraska.	1862. July 16. President Lincoln.
Hon. S. J. FIELD, California.	NINTH. California, Oregon, and Nevada.	1863. March 10. President Lincoln.

AMENDMENTS TO GENERAL RULES.

Amendment to Rule 6.

Add, at the end of paragraph 3 : —

"There may be united with a motion to dismiss a writ of error to a State court a motion to affirm, on the ground, that, although the record may show that this court has jurisdiction, it is manifest the writ was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument."

[Promulgated May 8, 1876.]

Amendment to Rule 7.

"The clerk shall deposit in the Law Library, to be there carefully preserved, one copy of the printed record in every case submitted to the court for its consideration, and of all printed motions, briefs, or arguments, filed therein."

[Promulgated Oct. 25, 1875.]

Amendments to Rule 10.

Paragraph 1 to read as follows : —

"In all cases, the plaintiff in error or appellant (on docketing a cause and filing the record) shall enter into an undertaking to the clerk, with security to his satisfaction, for the payment of his fees, or otherwise satisfy him in that behalf."

[Promulgated May 8, 1876.]

Paragraph 2 is amended by striking out the word "fifteen" when it occurs, and inserting in lieu thereof the word "twenty," so that it will read, "shall have twenty copies," &c.

[Promulgated Nov. 1, 1875.]

Paragraph 6 to read as follows : —

"In all cases of dismissal for want of jurisdiction, the fees for the copy shall be taxed against the party bringing the cause into court, unless the court shall otherwise direct."

[Promulgated May 8, 1876.]

TABLE OF CASES.

REPORTS OF THE DECISIONS

OF THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1875.

McComb, Executor, *v.* Commissioners of Knox County, Ohio.

The judgment of the Supreme Court of a State reversing that of a Court of Common Pleas, and remanding the cause for "further proceedings according to law," is not final, nor can the judgment subsequently rendered by the inferior court be re-examined here.

Error to the Court of Common Pleas for the County of Richland, State of Ohio.

The facts are stated in the opinion of the court.

Mr. W. H. Smith for the defendant in error. No counsel appeared for the plaintiff in error.

Mr. Chief Justice Waite delivered the opinion of the court.

The Commissioners of Knox County having sued McComb in the Court of Common Pleas of Richland County, he filed an answer to their petition, to which they demurred, alleging for cause that it did not contain facts sufficient to bar the action. This demurrer was overruled, and replies were thereupon filed. McComb then demurred to the replies, because the facts stated did not constitute a defence to the matter set up in the answer. This demurrer was sustained, and judgment given in favor of McComb.

The case was then taken by writ of error to the Supreme

Court of the State, where the judgment of the Common Pleas was reversed for error in sustaining the demurrer to the replies, and overruling that to the answer; but, upon suggestion by McComb that he might ask leave to amend his answer, the cause was remanded "for further proceedings according to law." Upon the filing of the mandate in the Common Pleas, that court, in accordance with the decision of the Supreme Court, overruled the demurrer to the replies, and sustained that to the answer. McComb did not ask leave to amend his answer, but elected to rely upon his defence, as already stated. Thereupon the court gave judgment against him upon the case made by the petition.

This writ of error is prosecuted to reverse that judgment.

The Court of Common Pleas is not the highest court of the State; but the judgment we are called upon to re-examine is the judgment of that court alone. The judgment of the Supreme Court is one of reversal only. As such, it was not a final judgment. *Parcels* v. *Johnson*, 20 Wall. 653; *Moore* v. *Robbins*, 18 id. 588; *St. Clair* v. *Lovingston*, id. 628. The Common Pleas was not directed to enter a judgment rendered by the Supreme Court and carry it into execution, but to proceed with the case according to law. The Supreme Court, so far from putting an end to the litigation, purposely left it open. The law of the case upon the pleadings as they stood was settled; but ample power was left in the Common Pleas to permit the parties to make a new case by amendment. In fact, the cause was sent back for further proceedings because of the suggestion by McComb that he might want to present a new defence by amending his answer.

The final judgment is, therefore, the judgment of the Court of Common Pleas, and not of the Supreme Court. It may have been the necessary result of the decision by the Supreme Court of the questions presented for its determination; but it is none the less, on that account, the act of the Common Pleas. As such, it was, when rendered, open to review by the Supreme Court, and for that reason is not the final judgment "of the highest court in the State in which a decision in the suit could be had." Rev. Stat. sect. 709.

The writ is dismissed.

WILMINGTON AND WELDON RAILROAD COMPANY *v.* KING, EXECUTOR.

1. Contracts made during the war in one of the Confederate States, payable in Confederate currency, but not designed in their origin to aid the insurrectionary government, are not, because thus payable, invalid between the parties.
2. In actions upon such contracts, evidence as to the value of that currency at the time and in the locality where the contracts were made is admissible.
3. A statute of North Carolina of March, 1866, enacting that in all civil actions "for debts contracted during the late war, in which the nature of the obligation is not set forth, nor the value of the property for which such debts were created is stated, it shall be admissible for either party to show on the trial, by affidavit or otherwise, what was the consideration of the contract, and that the jury, in making up their verdict, shall take the same into consideration, and determine the value of said contract in present currency in the particular locality in which it is to be performed, and render their verdict accordingly," in so far as the same authorizes the jury in such actions, upon the evidence thus before them, to place their own estimate upon the value of the contracts, instead of taking the value stipulated by the parties, impairs the obligation of such contracts, and is, therefore, within the inhibition upon the State of the Federal Constitution. Accordingly, in an action upon a contract for wood sold in that State during the war, at a price payable in Confederate currency, an instruction of the court to the jury, that the plaintiff was entitled to recover the value of the wood without reference to the value of the currency stipulated, was erroneous.

ERROR to the Supreme Court of the State of North Carolina.

Submitted on printed argument by *Mr. J. M. Carlisle* and *Mr. J. D. McPherson* for the plaintiff in error. No counsel appeared for the defendant in error.

MR. JUSTICE FIELD delivered the opinion of the court.

The contract between the defendant and the plaintiff's testatrix, upon which the present action was brought, was made in North Carolina during the war. By its terms, the wood purchased by the railroad company was to be paid for in Confederate currency. Contracts thus payable, not designed in their origin to aid the insurrectionary government, are not invalid between the parties. It was so held in the first case in which the question of the validity of such contracts was presented, — that of *Thorington* v. *Smith*, 8 Wall. 1, — and the doctrine of that case has been since affirmed in repeated in-

stances. The treasury-notes of the Confederate government, at an early period in the war, in a great measure superseded coin within the insurgent States, and, though not made a legal tender, constituted the principal currency in which the operations of business were there conducted. Great injustice would, therefore, have followed any other decision invalidating transactions otherwise free from objection, because of the reference of the parties to those notes as measures of value. *Hanauer* v. *Woodruff*, 15 Wall. 448; and the *Confederate Note Case*, 19 id. 556.

But as those notes were issued in large quantities to meet the increasing demands of the Confederacy, and as the probability of their ultimate redemption became constantly less as the war progressed, they necessarily depreciated in value from month to month, until in some portions of the Confederacy, during the year 1864, the purchasing power of from twenty-one to upwards of forty dollars of the notes equalled only that of one dollar in lawful money of the United States. When the war ended, the notes, of course, became worthless, and ceased to be current; but contracts made upon their purchasable quality existed in large numbers throughout the insurgent States. It was, therefore, manifest, that, if these contracts were to be enforced with any thing like justice to the parties, evidence must be received as to the value of the notes at the time and in the locality where the contracts were made; and, in the principal case cited, such evidence was held admissible. Indeed, in no other mode could the contracts as made by the parties be enforced. To have allowed any different rule in estimating the value of the contracts, and ascertaining damages for their breach, would have been to sanction a plain departure from the stipulations of the parties, and to make for them new and different contracts.

In the case at bar, the State court of North Carolina declined to follow the rule announced by this court, and refused to instruct the jury that the plaintiff was entitled to recover only the value of the currency stipulated for the wood sold, and instructed them that he was entitled to recover the value of the wood, without reference to the value of that currency. This was nothing less than instructing them that they might put a different value upon the property purchased from that placed

by the parties at the time. In this ruling the court obeyed a statute of the State, passed in March, 1866, which enacted, "that in all civil actions which may arise in courts of justice for debts contracted during the late war, in which the nature of the obligation is not set forth, nor the value of the property for which such debts were created is stated, it shall be admissible for either party to show on the trial, by affidavit or otherwise, what was the consideration of the contract; and the jury, in making up their verdict, shall take the same into consideration, and determine the value of said contract in present currency in the particular locality in which it is to be performed, and render their verdict accordingly."

This statute, as construed by the court, allowed the jury to place their own judgment upon the value of the contract in suit, and did not require them to take the value stipulated by the parties. A provision of law of that character, by constituting the jury a revisory body over the indiscretions and bad judgments of contracting parties, might in many instances relieve them from hard bargains, though honestly made upon an erroneous estimate of the value of the articles purchased, but would create an insecurity in business transactions which would be intolerable. It is sufficient, however, to say that the Constitution of the United States interposes an impassable barrier to such new innovation in the administration of justice, and with its conservative energy still requires contracts, not illegal in their character, to be enforced as made by the parties, even against any State interference with their terms.

The extreme depreciation of Confederate currency at the time the wood, which is the cause of the suit, was purchased, gives a seeming injustice to the result obtained. But, until we are made acquainted with all the circumstances attending the transaction, we cannot affirm any thing on this point. The answer alleges that the wood was to be cut by the defendant's hands, and that the plaintiff's testatrix was only to furnish the trees standing. It may be that under such circumstances the cost of felling the trees and removing the wood was nearly equal to the value of the wood by the cord as found by the jury, which was fifty cents. Be that as it may, it is not for the court to give another value to the contract than that stipulated by the

parties, nor is it within the legislative competence of a State to authorize any such proceeding.

The judgment of the Supreme Court of North Carolina must be reversed, and the cause remanded for further proceedings.

MR. JUSTICE BRADLEY dissenting.

I dissent from the judgment of the court in this case. The parties never contracted that the price to be paid for the wood was to be equivalent to any amount of specie. The price contracted for was one dollar per cord. Specie at that time was worth twenty-one dollars to one of Confederate currency. Can it be supposed that the parties agreed on a value of five cents per cord for the wood? The suggestion does not appear to me to be reasonable. The truth is, that the relation between Confederate currency and specie in North Carolina at that time is entirely unsuitable to be used as a rule in estimating the value of contracts. Specie could not be had at all, and consequently the relation between currency and specie was no guide as to the value of currency in purchasing commodities. The verdict finds that the wood, at the time of the contract, was worth fifty cents in specie per cord; and yet it sold for a dollar in currency. This shows that currency was equivalent to fifty cents on the dollar in purchasing capacity. I hold, therefore, that the law of North Carolina, in allowing the jury to estimate the real value of the consideration in cases where it is impossible to get at the true value of the money named in the contract, is a most sensible and just law.

By what authority do we scale down the price named in the contract at all? Is it not on the ground that the value of the money named by the parties is not a true criterion of the value of the contract? When once we admit this, we make that money a mere commodity, and endeavor to find its true value. How, then, is its true value to be measured? Is it to be measured only by the amount of specie it would purchase at the time, when, perhaps, no specie existed in the country? Why not measure its value by the amount of United States treasury notes which it would buy? They were money, as well as specie. But suppose they were not to be had in the market

any more than specie. Under such circumstances, is not the only true method of ascertaining its value the purchasing capacity which it had? I hold that this is the true test, when, as stated by the Legislature of North Carolina in its preamble to the act, it is impossible to scale the value of Confederate money accurately for all parts of the State under the varying circumstances that arose. Under such circumstances, the only fair mode of ascertaining the purchasing value of the currency used is to ascertain the true value of the consideration or thing purchased. This is not to set aside the contract of the parties, but to carry out their contract. It is the proper method of ascertaining what their contract really meant, and giving it full force and effect.

Where a regular current ratio exists between a paper currency and specie or other lawful money, of course it ought to be used as the rule to ascertain the true value of contracts. But when no such regular marketable value does exist, then the next best mode of getting at the value of the contract, or of the currency mentioned therein, is to ascertain the true value of the subject-matter about which the contract was made. This is what the Legislature of North Carolina authorized to be done, and what was done in this case.

I think the judgment should be affirmed.

MATTHEWS *v.* MCSTEA.

1. It was not until the 16th of August, 1861, that all commercial intercourse between the States designated as in rebellion and the inhabitants thereof, with certain exceptions, and the citizens of other States and other parts of the United States, became unlawful.
2. A partnership between a resident of New York and other parties, residents of Louisiana, was not dissolved by the late civil war as early as April 23, 1861; and all the members of the firm are bound by its acceptance of a bill of exchange bearing date and accepted on that day, and payable one year thereafter.

ERROR to the Court of Common Pleas for the City and County of New York.

The original cause of action was (*inter alia*) an acceptance

of a bill of exchange by the firm of Brander, Chambliss, & Co., of New Orleans, dated April 23, 1861, payable in one year to the order of McStea, and accepted on the day of its date by the firm, whereof Matthews, it was alleged, was then a member. The principal defence, and the only one which presents a Federal question, was, that, at the time when the acceptance was made, the defendant, Matthews, was a resident of the State of New York; that the other members of the firm (also made defendants in the suit, but not served with process) were residents of Louisiana; and that, before the acceptance, the copartnership was dissolved by the war of the rebellion. This defence was not sustained in the Common Pleas, and the judgment of that court was affirmed by the Court of Appeals.

Matthews sued out this writ of error.

Mr. John Sherwood and *Mr. William M. Evarts* for the plaintiff in error.

The war began in Louisiana, April 19, 1861. *The Protector*, 12 Wall. 700. The proclamation of April 19, 1861, declaring the blockade, was a notice of prohibition of commercial intercourse. The proclamations of April 17 and 19, and the act of Congress of July 13, 1861, do not contain any permission to trade, or any inference that such trade was permitted. Commercial intercourse during war being unlawful, it cannot be implied from the proclamations of the Executive and the acts of Congress. *The Prize Cases*, 2 Black, 635; *United States* v. *Lane*, 8 Wall. 185; *Cappell* v. *Hall*, 7 id. 542.

The copartnership of Brander, Chambliss, & Co., was dissolved, even if a limited intercourse was permitted. The courts of Louisiana were closed. The legality of commerce and the mutual use of courts of justice must be inseparable. *Griswold* v. *Waddington*, 16 Johns. 468.

Mr. J. Hubley Ashton, *contra*.

There was no dissolution of partnership prior to the President's proclamation of Aug. 16, 1861, issued in pursuance of the act of July 13, 1861.

No proclamation of the President, previous to the assembling of Congress in 1861, professed to interfere with the commercial intercourse between the inhabitants of the loyal and of the insurgent States, which did not involve a breach of the blockade

of the ports within certain States; and such intercourse continued long after April 23, 1861.

The fifth section of the act of July 13, 1861, shows that, in the opinion of Congress, positive legislation was necessary in order to render unlawful all commercial intercourse between the insurgent and the loyal States.

MR. JUSTICE STRONG delivered the opinion of the court.

The single question which this record presents for our consideration is, whether a partnership, where one member of the firm resided in New York and the others in Louisiana, was dissolved by the war of the rebellion prior to April 23, 1861.

That the civil war had an existence commencing before that date must be accepted as an established fact. This was fully determined in *The Prize Cases*, 2 Black, 635; and it is no longer open to denial. The President's proclamation of April 19, 1861, declaring that he had deemed it advisable to set on foot a blockade of the ports within the States of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana, and Texas, was a recognition of a war waged, and conclusive evidence that a state of war existed between the people inhabiting those States and the United States.

It must also be conceded, as a general rule, to be one of the immediate consequences of a declaration of war and the effect of a state of war, even when not declared, that all commercial intercourse and dealing between the subjects or adherents of the contending powers is unlawful, and is interdicted. The reasons for this rule are obvious. They are, that, in a state of war, all the members of each belligerent are respectively enemies of all the members of the other belligerent; and, were commercial intercourse allowed, it would tend to strengthen the enemy, and afford facilities for conveying intelligence, and even for traitorous correspondence. Hence it has become an established doctrine, that war puts an end to all commercial dealing between the citizens or subjects of the nations or powers at war, and "places every individual of the respective governments, as well as the governments themselves, in a state of hostility:" and it dissolves commercial partnerships existing between the subjects or citizens of the two contending parties prior to the war;

for their continued existence would involve community of interest and mutual dealing between enemies.

Still further, it is undeniable that civil war brings with it all the consequences in this regard which attend upon and follow a state of foreign war. Certainly this is so when civil war is sectional. Equally with foreign war, it renders commercial intercourse unlawful between the contending parties, and it dissolves commercial partnerships.

But, while all this is true as a general rule, it is not without exceptions. A state of war may exist, and yet commercial intercourse be lawful. They are not necessarily inconsistent with each other. Trading with a public enemy may be authorized by the sovereign, and even, to a limited extent, by a military commander. Such permissions or licenses are partial suspensions of the laws of war, but not of the war itself. In modern times, they are very common. Bynkershoek, in his Quæst. Jur. Pub., lib. 1, c. 3, while asserting as a universal principle of law that an immediate consequence of the commencement of war is the interdiction of all commercial intercourse between the subjects of the States at war, remarks, "The utility, however, of merchants, and the mutual wants of nations, have almost got the better of the laws of war as to commerce. Hence it is alternatively permitted and forbidden in time of war, as princes think it most for the interests of their subjects. A commercial nation is anxious to trade, and accommodates the laws of war to the greater or lesser want that it may be in of the goods of others. Thus sometimes a mutual commerce is permitted generally; sometimes as to certain merchandise only, while others are prohibited; and sometimes it is prohibited altogether." Halleck, in his "Treatise on the Laws of War," p. 676 *et seq.*, discusses this subject at considerable length, and remarks, "That branch of the government to which, from the form of its constitution, the power of declaring or making war is intrusted, has an undoubted right to regulate and modify, in its discretion, the hostilities which it sanctions. . . . In England, licenses are granted directly by the crown, or by some subordinate officer to whom the authority of the crown has been delegated, either by special instructions, or under an act of Parliament. In the United States, as a general rule,

licenses are issued under the authority of an act of Congress; but in special cases, and for purposes immediately connected with the prosecution of the war, they may be granted by the authority of the President, as commander-in-chief of the military and naval forces of the United States."

It being, then, settled that a war may exist, and yet that trading with the enemy, or commercial intercourse, may be allowable, we are brought to inquire whether such intercourse was allowed between the loyal citizens of the United States and the citizens of Louisiana until the 23d of April, 1861, when the acceptance was made upon which this suit was brought. And, in determining this, the character of the war and the manner in which it was commenced ought not to be overlooked. No declaration of war was ever made. The President recognized its existence by proclaiming a blockade on the 19th of April; and it then became his duty as well as his right to direct how it should be carried on. In the exercise of this right, he was at liberty to allow or license intercourse; and his proclamations, if they did not license it expressly, did, in our opinion, license it by very cogent implications. It is impossible to read them without a conviction that no interdiction of commercial intercourse, except through the ports of the designated States, was intended. The first was that of April 15, 1861. The forts and property of the United States had, prior to that day, been forcibly seized by armed forces. Hostilities had commenced; and, in the light of subsequent events, it must be considered that a state of war then existed. Yet the proclamation, while calling for the militia of the several States, and stating what would probably be the first service assigned to them, expressly declared, that, "in every event, the utmost care would be observed, consistently with the repossession of the forts, places, and property which had been seized from the Union, to avoid any devastation, destruction of or interference with property, or any disturbance of peaceful citizens in any part of the country." Manifestly, this declaration was not a mere military order. It did not contemplate the treatment of the inhabitants of the States in which the unlawful combinations mentioned in the proclamation existed as public enemies. It announced a different mode of treatment, — the treatment due

to friends. It is to be observed that the proclamation of April 15, 1861, was not a distinct recognition of an existing state of war. The President had power to recognize it, *The Prize Cases*, *supra;* but he did not prior to his second proclamation, that of April 19, in which he announced the blockade. Even then, the war was only inferentially recognized; and the measures proposed were avowed to be "with a view to . . . the protection of the public peace and the lives and property of quiet and orderly citizens pursuing their lawful occupations, until Congress shall have assembled." The reference here was plainly to citizens of the insurrectionary States; and the purpose avowed appears to be inconsistent with their being regarded as public enemies, and consequently debarred from intercourse with the inhabitants of States not in insurrection. The only interference with the business relations of citizens in all parts of the country, contemplated by the proclamation, seems to have been such as the blockade might cause. And that it was understood to be an assent by the Executive to continued business intercourse may be inferred from the subsequent action of the government (of which we may take judicial notice) in continuing the mail service in Louisiana and the other insurrectionary States long after the blockade was declared. If it was not such an assent or permission, it was well fitted to deceive the public. But in a civil more than in a foreign war, or a war declared, it is important that unequivocal notice should be given of the illegality of traffic or commercial intercourse; for, in a civil war, only the government can know when the insurrection has assumed the character of war.

If, however, the proclamations, considered by themselves, leave it doubtful whether they were intended to be permissive of commercial intercourse with the inhabitants of the insurrectionary States, so far as such intercourse did not interfere with the blockade, the subsequent act of Congress passed on the thirteenth day of July, 1861, ought to put doubt at rest.

The act was manifestly passed in view of the state of the country then existing, and in view of the proclamation the President had issued. It enacts, that in a case therein described, a case that then existed, "it may and shall be lawful for the President, by proclamation, to declare that the inhab-

itants of such State, or any section or part thereof where such insurrection exists, are in a state of insurrection against the United States; and *thereupon* all commercial intercourse by and between the same and the citizens thereof, and the citizens of the rest of the United States, shall cease and be unlawful so long as such condition of hostility shall continue." Under authority of this act, the President did issue such a proclamation on the 16th of August, 1861; and it stated that all commercial intercourse between the States designated as in insurrection and the inhabitants thereof, with certain exceptions, and the citizens of other States and other parts of the United States, was unlawful. Both the act and the proclamation exhibit a clear implication, that before the first was enacted, and the second was issued, commercial intercourse was not unlawful; that it had been permitted. What need of declaring it should cease, if it had ceased, or had been unlawful before? The enactment that it should not be permitted after a day then in the future must be considered an implied affirmation that up to that day it was lawful; and certainly Congress had the power to relax any of the ordinary rules of war.

We think, therefore, the Court of Appeals was right in holding that the partnership of Brander, Chambliss, & Co., had not been dissolved by the war when the acceptance upon which the plaintiff in error is sued was made.

The judgment is affirmed.

DAINESE *v.* HALE.

1. Judicial powers are not necessarily incident to the office of consul, although usually conferred upon consuls of Christian nations in Pagan and Mahometan countries, for the decision of controversies between their fellow-citizens or subjects residing or commorant there, and for the punishment of crimes committed by them.
2. The existence and extent of such powers depend on the treaty stipulations and positive laws of the nations concerned.
3. The treaty between the United States and the Ottoman Empire, concluded June 5, 1862 (if not that made in 1830), has the effect of conceding to the United States the same privilege, in respect to consular courts and the civil and criminal jurisdiction thereof, which are enjoyed by other Christian nations; and the act of Congress of June 22, 1860, established the necessary regulations for the exercise of such jurisdiction.

4. But as this jurisdiction is, in terms, only such as is allowed by the laws of Turkey, or its usages in its intercourse with other Christian nations, those laws or usages must be shown in order to know the precise extent of such jurisdiction.
5. The court cannot ordinarily take judicial notice of foreign laws and usages: a party claiming the benefit of them by way of justification must plead them.
6. The defendant, as Consul-General of Egypt, in 1864 issued an attachment against the goods of the plaintiff, there situate. The plaintiff, and the persons at whose suit the attachment was issued, were citizens of the United States, and not residents or sojourners in the Turkish dominions. For this act the plaintiff brought suit to recover the value of the goods attached. The defendant pleaded his official character, and, as incident thereto, claimed jurisdiction to entertain the suit in which the attachment was issued. *Held*, that the plea was defective for not setting forth the laws or usages of Turkey upon which, by the treaty and act of Congress conferring the jurisdiction, the latter was made to depend, and which alone would show its precise extent, and that it embraced the case in question.

ERROR to the Supreme Court of the District of Columbia.

This action was brought to recover the value of certain goods, chattels, and credits of the plaintiff, which the defendant, in November, 1864, then being Consul-General of the United States in Egypt, caused to be attached. The declaration alleged that the defendant, by usurpation and abuse of his power as such consul-general, and for the malicious purpose of injuring the plaintiff, took cognizance of a certain controversy between the plaintiff and Richard H. and Anthony B. Allen (all being citizens of the United States, and none of them residents of or sojourners within the Turkish dominions at that time), and made and issued the order of attachment by virtue of which the seizure in question was made.

The defendant pleaded, that, at the time of issuing the attachment, he was agent and Consul-General of the United States in Egypt, and was furnished with a letter of credence from the President of the United States to the Pacha; that in his said official capacity he exercised the functions and duties of a minister; and by the law of nations, as well as the laws of the United States, he was invested with judicial functions and power over citizens of the United States residing in Egypt, and, in the exercise of those functions, took cognizance of the cause referred to in the declaration, and issued the attachment complained of.

To this plea there was a general demurrer, which was overruled.

Mr. F. P. Cuppy and *Mr. S. S. Henkle* for the plaintiff in error, and *Mr. W. Penn Clarke* for the defendant in error.

MR. JUSTICE BRADLEY delivered the opinion of the court.

The defendant, by his plea, asked the court to take judicial notice that his official character gave him the jurisdiction which he assumed to exercise. Could the court do this? Can this court do it?

It cannot be contended that every consul, by virtue of his office, has power to exercise the judicial functions claimed by the defendant; for it is conceded that this is not the case in Christian countries. And whilst, on the other side, it is also conceded that in Pagan and Mahometan countries it is usual for the ministers and consuls of European States to exercise judicial functions as between their fellow-subjects or citizens, it clearly appears that the extent to which this power is exercised depends upon treaties and laws regulating such jurisdiction. The instructions given by the British Foreign Office to their consuls in the Levant in 1844, as quoted by Mr. Phillimore, do not claim any thing more. They say, —

"The right of British consular officers to exercise any jurisdiction in Turkey in matters which in other countries come exclusively under the control of the local magistracy depends originally on the extent to which that right has been conceded by the sultans of Turkey to the British crown; and, therefore, the right is strictly limited to the terms in which the concession is made. The right depends, in the next place, on the extent to which the Queen, in the exercise of the power vested in her Majesty by act of Parliament, may be pleased to grant to any of her consular servants authority to exercise jurisdiction over British subjects." Int. Law, vol. ii. p. 273, sect. 276.

Historically, it is undoubtedly true, as shown by numerous authorities quoted by Mr. Warden in his treatise on "The Origin and Nature of Consular Establishments," that the consul was originally an officer of large judicial as well as commercial powers, exercising entire municipal authority over his countrymen in the country to which he was accredited. But the

changed circumstances of Europe, and the prevalence of civil order in the several Christian States, have had the effect of greatly modifying the powers of the consular office; and it may now be considered as generally true, that, for any judicial powers which may be vested in the consuls accredited to any nation, we must look to the express provisions of the treaties entered into with that nation, and to the laws of the States which the consuls represent.

The transactions which are the subject of this suit took place in 1864; and the powers of our Consul-General in Egypt at that time must be regulated by the treaties with Turkey and by the laws of the United States then in force.

The first treaty between the United States and the Ottoman Porte was concluded in 1830; and, amongst other things, it provided, in Article III., that "American merchants established in well-defended States of the Sublime Porte for purposes of commerce shall not be disturbed in their affairs, nor shall they be treated in any way contrary to established usages." By Article IV., it was further provided as follows: —

"If litigations and disputes should arise between the subjects of the Sublime Porte and citizens of the United States, the parties shall not be heard, nor shall judgment be pronounced, unless the American dragoman be present. Causes in which the sum may exceed five hundred piasters shall be submitted to the Sublime Porte, to be decided according to the laws of equity and justice. Citizens of the United States of America, quietly pursuing their commerce, and not being charged or convicted of any crime or offence, shall not be molested; and, even when they may have committed some offence, they shall not be arrested and put in prison by the local authorities, but they shall be tried by their minister or consul, and punished according to their offence, following, in this respect, the usage observed towards other Franks."

In 1848 an act of Congress was passed, entitled "An Act to carry into effect certain provisions in the treaties between the United States and China and the Ottoman Porte, giving certain judicial powers to ministers and consuls of the United States in those countries." 9 Stat. 276. A treaty had been made with China in 1844, conceding to the authorities of the United States full civil and criminal jurisdiction between citizens of

the United States in that country. The law was passed in reference to this treaty and to that with the Ottoman Porte before cited.

This act contained regulations as to the mode of exercising the judicial powers stipulated for in the treaty with China. It conferred these powers upon the resident commissioner and consuls respectively, and authorized them to adjudicate in accordance with the laws of the United States and the common law, supplemented, when these were insufficient, by decrees and regulations to be made by the commissioner himself. The commissioner, with the advice of the consuls, was to prescribe the forms of process and proceeding. By the twenty-second section of the act, its provisions, so far as related to crimes committed by citizens of the United States, were extended to Turkey under the treaty of 1830, to be executed by the ministers and consuls of the United States in that country, who were *ex officio* vested with the powers given by the act to similar officials in China, so far as regarded the punishment of crime.

It is evident that this act failed to confer upon the consuls of the United States in Turkey any power to exercise judicial functions in civil cases, whatever may have been the scope and intention of the treaty of 1830. Whilst it may be true that the expression in the third article of the treaty, that American merchants shall not be disturbed in their affairs, nor treated contrary to established usages, was understood to and did confer upon American merchants the same privileges of exterritoriality enjoyed by the subjects of other Christian nations, the act of 1848 did not assume to enforce such a construction of it.

But, in 1860, another act was passed to carry into effect a new treaty made with China in 1858, and other treaties made with Japan, Siam, Persia, and other countries (12 Stat. 72), by which very full and explicit regulations were again made in reference to the exercise of judicial powers by ministers and consuls of the United States in those countries. By the twenty-first section of this act, the same declaration was made as in the twenty-second section of the act of 1848 in reference to the criminal jurisdiction to be exercised by the minister and consuls of the United States in Turkey; and a clause was added, giving them

civil jurisdiction also, as follows: "who [referring to such minister and consuls] are hereby *ex officio* vested with the powers herein conferred upon the minister and consuls in China, for the purposes above expressed, so far as regards the punishment of crime;" adding, "and also for the exercise of jurisdiction in civil cases wherein the same is permitted by the laws of Turkey, or its usages in its intercourse with the Franks or other foreign Christian nations."

So far, then, as the true construction of the treaty of 1830 would permit the exercise of civil jurisdiction by our consuls, the act of 1860 authorized it to be exercised, and supplied all the regulations necessary for that purpose.

In 1862 another treaty was entered into with the Ottoman Porte, by which, after confirming all such parts of the treaty of 1830 as were not abrogated or changed, amongst other things it was provided, in Article I., as follows: "All rights, privileges, or immunities which the Sublime Porte now grants or may hereafter grant to, or suffer to be enjoyed by, the subjects, ships, commerce, or navigation of any foreign power, shall be equally granted to and exercised and enjoyed by the citizens, vessels, commerce, and navigation of the United States of America." If, therefore, it be true, as laid down by writers and public documents, that the subjects of other Christian nations have and enjoy in Turkey the right to have their civil controversies decided by their own minister and consuls, it would seem clear, that under the treaty of 1862, if not under that of 1830, the same right is guaranteed to citizens of the United States.

But it is objected, that, in 1864, no act had been passed by Congress to carry the last treaty into effect. Such an act was passed in 1866, simply, however, extending to Egypt and the consul-general there the provisions of the act of 1860. Sect. 11 of Appropriation Bill, 14 Stat. 322. This clause was probably adopted merely to obviate any doubt on the subject. For as treaties made under the authority of the United States are, by the Constitution, declared to be part of the supreme law of the land, when they are complete in themselves, and need no supplemental legislation to carry them into effect, such legislation is not necessary for the purpose of giving them force and

validity. So far as relates to the jurisdiction in question, this is the character of the treaty of 1862, taken in connection with the act of 1860. The act gave the jurisdiction so far as usage in Turkey would permit it. The treaty secured the consent of the Turkish government to its exercise.

The State Department of the United States seems to have regarded the treaty of 1830 as establishing the jurisdiction in question. In the instructions contained in the "Consuls' Manual," promulgated by the department in December, 1862 (adopting the learned opinion of Attorney-General Cushing, dated Oct. 23, 1855), it is said that the acts of Congress of 1848 [and 1860] provide in terms for the exercise of judicial authority by ministers and consuls in Turkey only so far as regards the punishment of crime, leaving the question of civil jurisdiction to stand upon treaties or the peculiar public law of the Levant. § 165. And after referring to the language of Article III. of the treaty of 1830, which stipulated that "American merchants established in the well-defended States of the Sublime Porte for purposes of commerce . . . shall not be disturbed in their affairs, nor shall they be treated in any way contrary to established usages," and conceding that its construction might admit of discussion, the following conclusions were, nevertheless, reached: —

"As to all civil affairs to which no subject of Turkey is a party, Americans are wholly exempt from the local jurisdiction; and in civil matters, as well as criminal, Americans in Turkey are entitled to the benefit of 'the usage observed towards other Franks.' . . . The phrase in the second article engages that citizens of the United States in Turkey shall not be 'treated in any way contrary to established usages.' The 'established usages' are the absolute exemption of all Franks, in controversies among themselves, from the local jurisdiction of the Porte.

"The general doctrine thus in force in the Levant, of the exterritoriality of foreign Christians, has given rise to a complete system of peculiar municipal and legal administration, consisting of, —

"1. Turkish tribunals for questions between subjects of the Porte and foreign Christians.

"2. Consular courts for the business of each nation of foreign Christians.

"3. Trial of questions between foreign Christians of different nations in the consular court of the defendant's nation.

"4. Mixed tribunals of Turkish magistrates and foreign Christians, at length substituted in part for cases between Turks and foreign Christians.

"5. Finally, for causes between foreign Christians, the substitution at length of mixed tribunals in place of the separate courts, — an arrangement introduced first by the legations of Austria, Great Britain, France, and Russia, and then tacitly acceded to by the legations of other foreign Christian nations." Consuls' Manual of December, 1862, §§ 169–171.

These conclusions, being publicly issued by the proper executive department of the government for the instruction and guidance of our cousuls, are entitled to the highest respect in construing the statutes and treaties upon which their powers depend. And in view of the confirmatory as well as independent effect of the act of 1860, and the treaty of 1862, we have no doubt, that in 1864, when the transactions in question took place, the minister and principal consuls of the United States in Turkey (including the consul-general in Egypt) had all such jurisdiction in civil causes between citizens of the United States as was permitted by the laws of Turkey, or its usages in its intercourse with other Christian nations.

But here we are met by a difficulty arising from the extreme generality of the defence set up in the plea. What are the laws of Turkey and its usages in its intercourse with other Christian nations, in reference to the powers allowed to be exercised by their public ministers and consuls in judicial matters? The plea does not inform us. It leaves the court to infer or to take judicial knowledge of those laws and usages. But can it do this? Foreign laws and usages are, as to us, matters of fact, and not matters of law; and although the court may take judicial cognizance of many matters of fact of public importance, yet of foreign laws and customs, which are multiform and special in their character, it would be very dangerous for it to do so, at least without having had them brought to its attention and knowledge by previous adjudications or proofs. The general fact that public ministers and consuls of Christian States in Turkey exercise jurisdiction in civil matters between

their fellow-citizens or subjects might be assumed as sufficiently attested by the works on international law and the acts and instructions of our own government. But the precise extent of this jurisdiction is unknown to us. Whether it applies to any but residents in Turkey, or to travellers as well; whether to persons not in the country at all, but having property there, or claims against persons who are there; whether to cases like the present, where neither party resides in Turkey, or is sojourning there, — are questions which are not answered by the ordinary statements made in reference to this jurisdiction. As the power of the consuls of the United States, according to the treaties and laws as they stood in 1864, depended on the laws or usages of Turkey, those laws or usages should have been pleaded in some manner, however briefly, so that the court could have seen that the case was within them; for, failing to do this, the plea was defective in substance, and judgment should have been rendered for the plaintiff on the demurrer.

The judgment of the Supreme Court of the District of Columbia must be reversed, and the cause remanded with directions to allow the defendant to amend his plea on payment of costs.

SEMMES v. UNITED STATES.

1. The power of amending a writ of error returnable to the Circuit Court is vested in that court as fully as it is in the Supreme Court on writs of error returnable to it.
2. The judgment of the Circuit Court ought not to be reversed for defects of form in the process returnable on error to that court, which are amendable by the express words of an act of Congress.
3. The proclamation of the President of the United States, bearing date Sept. 7, 1867, did not work the dismissal of legal proceedings against property seized under the confiscation act of July 17, 1863, or provide for the restoration of all rights of property to persons engaged in the rebellion.
4. Property so seized became the property of the United States from the date of the decree of condemnation.
5. The writ of error vested the Circuit Court with complete jurisdiction; and that court having reversed the second decree of the District Court, dismissing the libel, and adjudged that the first decree condemning the property should remain in full force, might "proceed to pass such decree as should have been passed" by the subordinate court; and, if a decree confirming the sale of the property was necessary, it was entirely competent for the Circuit Court to pass it.

ERROR to the Circuit Court of the United States for the District of Louisiana.

The facts are stated, and the assignment of errors is referred to, in the opinion of the court.

Submitted on printed arguments by *Mr. Thomas J. Semmes*, in *propria persona*, and *Mr. Robert Mott*, for the plaintiff in error, and by *Mr. Solicitor-General Phillips* and *Mr. Assistant Attorney-General Edwin B. Smith* for the defendant in error.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Proceedings *in rem* were instituted in the District Court on the 7th of August, 1863, under the confiscation act of the 17th of July, 1862, against certain real property of the respondent; which proceedings resulted, on the 5th of April, 1865, in the condemnation of the property described in the libel. On the 11th of the same month a writ of *venditioni exponas* was issued, commanding the marshal to sell the property on the 18th of the same month; but the marshal did not sell the same on that day, for the reason, as appears by his return, that the best price bid at the time and place of the sale did not amount to two-thirds of the appraised value of the property; and, for the reason stated, the marshal withdrew the property from sale, and again advertised the same for sale, as directed by the prior order of the court.

Two lots of land were embraced in the libel and the decree of condemnation, which, in fact, were not the property of the respondent. Accordingly, the true owner of the same in the mean time — to wit, on the 2d of May, 1865 — filed a petition in the same court, setting forth his right to the two lots in question, and stating that they were improperly advertised for sale by the marshal, and prayed the court to open the decree to allow him to assert his title.

Consent in writing to that effect having been given by the district attorney, the court subsequently entered a decree opening the decree of condemnation *for the purpose of* enabling the petitioner to submit to the court his claim to those lots, as evidenced by the proofs on file. Pursuant thereto, the court, on the 31st of May in the same year, rendered judgment, restoring those two lots to the intervenor, as claimed in his petition.

Such correction of the decree of condemnation having been made, the return of the marshal shows that he sold the residue of the lots condemned, in pursuance of the second advertisement, to E. W. Burbank, for the amount specified in the record, and that he paid the money over to the clerk of the court.

On the 4th of March, 1868, the respondent having first suggested that the decree of condemnation had been opened, and that a portion of the property libelled had never been condemned by any subsequent decree, moved the court to set aside the default against him, and for leave to file his claim and answer. Hearing was had on the motion, and the court ordered that the purchaser of the property should be made a party to the rule. Burbank, the purchaser, accordingly appeared, and filed an exception to the rule, that his rights as purchaser could not be questioned in such a form of proceeding, and offered in evidence the deed of the marshal and the decree of condemnation, together with the writ of *venditioni exponas*. Both parties were again heard; and the court, on the 15th of April in the same year, overruled the exceptions of the purchaser, and set aside the default of the respondent, and granted him leave to file his claim and answer.

Leave to that effect having been granted, the respondent filed his answer, alleging his ownership of the property, the insufficiency of the allegations contained in the libel, and denied that the President ever authorized the seizure of his property, and averred that he had been pardoned by the President, and that he was included in the general amnesty proclamation. Proofs were introduced; and the court, on the 27th of June following, entered a final decree, dismissing the libel, and restoring the property to the respondent upon the payment of all costs.

Proper steps were taken in behalf of the United States to sue out a writ of error, and the cause was by the United States removed into the Circuit Court, where the decree of the District Court was in all things reversed, and a decree entered in favor of the United States, that the decree of condemnation originally pronounced by the District Court stand and remain in full force and effect, and that the sale made by virtue thereof do stand confirmed. Whereupon the respondent sued out a writ of error, and removed the cause into this court.

Certain formal errors are assigned as follows, which will first be considered: —

1. That the writ of error from the Circuit Court to the District Court was made returnable on the first Monday of December, instead of the first Monday in November, as it should have been; and because the writ of error was not returnable in accordance with the order allowing the same, nor according to the citation.

2. Errors affecting the merits are also assigned, as follows: (1.) That the President had by his proclamation of amnesty dismissed all proceedings against any person or his property, engaged, or in any manner implicated, in the rebellion. (2.) That, the original decree having been opened, the property of the respondent could not be sold at all, as there was no subsisting decree of condemnation. (3.) That the sale to the purchaser was null, because it was not made on the day specified in the writ of *venditioni exponas*. (4.) That the Circuit Court had no authority to confirm the sale to the purchaser. (5.) That the special pardon as well as the amnesty proclamation entitled the respondent to a restoration of his property in case the sale by the marshal was null and void.

1. Evidently the alleged preliminary defect is one of form, and it is equally clear that the power to amend all process returnable to the Circuit Court is vested in that court as fully as it is in the Supreme Court; and the express provision is that the Supreme Court may allow an amendment of a writ of error when there is a mistake in the title of the writ or a seal to the writ is wanting, or when the writ is returnable on a day other than the day of the commencement of the term next ensuing; and, by the true construction of the provision upon the subject, the same power of amendment is vested in the Circuit and District Courts in all cases where the process is returnable in those respective courts. 17 Stat. 197. *Hampton* v. *Rouse*, 15 Wall. 686.

Grave doubts are also entertained whether the supposed error would avail the respondent, even if no such act of Congress had been passed, as it appears that the copy of the writ lodged with the clerk of the District Court was correct, and that the transcript of the record of the case was actually made out,

returned, and filed in the Circuit Court, before the commencement of the term of the Circuit Court next ensuing. Such being the fact, the better opinion is that the supposed defect is now wholly immaterial.

Suppose, however, it is otherwise: still the court here is of the opinion that the decree of the Circuit Court ought not to be reversed for a defect of form in the process which is amendable by the express words of an act of Congress, unless it appears that the alleged defect may have injured the complaining party, or that he would have been prejudiced if the defect had been amended.

2. Nor is it correct to suppose that legal proceedings against the property of the respondent were dismissed by the amnesty proclamation, or that the amnesty proclamation provided for the restoration of all rights of property to persons engaged in the rebellion. On the contrary, the proclamation referred to contains the express exception "as to property with regard to slaves," and "in cases of legal proceedings under the laws of the United States." 15 Stat. 700.

Suffice it to remark, that a decree of condemnation in due form of law was entered in this case nearly two years and a half before the amnesty proclamation was issued, which shows to a demonstration that the property in controversy in this case falls within the exception contained in that proclamation; which is all that need be said upon that subject.

3. Sufficient appears in the record to show that the decree was never opened except for the special purpose of allowing the true owner of the two specified lots to file his claim and answer to that part of the libel, as authorized in the written stipulation signed by the district attorney. Argument to show that the true owner of those lots, without such consent in writing, would have been remediless, is unnecessary; and it is equally certain that the court could not open the decree three years after it was entered for any other purpose than that specified in the written stipulation, and the record shows that it never was attempted to be opened for any other purpose. Viewed in the light of the actual facts disclosed in the record, the assignment of error in that regard is utterly destitute of merit.

4. Properties condemned as forfeited to the United States,

under the aforesaid act of Congress, become the property of the United States from the date of the decree of condemnation. 12 Stat. 591, sect. 7.

Judgment of forfeiture was rendered in this case on the 5th of April, 1865, and the land in question became from that date the property of the United States; and it may well be contended, that, from that time, it could not concern the respondent whether the proceedings of the marshal in selling the same were regular or irregular, as the title to the land was lost to him when it became vested in the United States. He now contends that the sale is null, because it was not made on the day named in the writ of *venditioni exponas;* to which the United States make answer, that he cannot be heard to raise that question, as his title was divested by the decree of condemnation. But it is not necessary to rest the decision upon that ground, as it is well-settled law that the marshal, in the exercise of a sound discretion, may adjourn the sale in such a case to another day; and the court is of the opinion that the circumstances disclosed in the record were of a character to fully justify the marshal in the course which he pursued. *Blossom* v. *Railroad*, 3 Wall. 209; *Collier* v. *Whipple*, 13 Wend. 229; *Requa* v. *Rea*, 2 Paige, 339.

5. Beyond doubt, the original decree of the District Court was complete and correct; and it is doubtless true that the decree of the Circuit Court reversing the second decree of the District Court, and adjudging that the first decree of the District Court should stand and remain in full force and effect, would have been sufficient without any decree confirming the sale by the marshal: but, even if the decree confirming the sale be regarded as an act of supererogation, it cannot render invalid what would have been valid without it.

Complete jurisdiction of the cause was vested in the Circuit Court by virtue of the writ of error; and the Circuit Court, having reversed the second decree of the District Court, might "proceed to pass such decree as should have been passed" by the subordinate court; and it follows, that, if a decree confirming the sale was necessary, it was entirely competent for the Circuit Court to pass such a decree. 1 Stat. 85.

6. Such proceedings under the confiscation act in question

are justified as an exercise of belligerent rights against a public enemy, and are not, in their nature, a punishment for treason. Consequently, confiscation being a proceeding distinct from, and independent of, the treasonable guilt of the owner of the property confiscated, pardon for treason will not restore rights to property previously condemned and sold in the exercise of belligerent rights, as against a purchaser in good faith and for value. *Miller* v. *United States*, 11 Wall. 267; *Confiscation Cas.*, 20 id. 92; *Gay's Gold*, 13 id. 351.

By the seizure of the property, the District Court acquired jurisdiction to pass the decree of condemnation. All of the proceedings prior to and in the sale of the land were regular; and the assumption of power by the District Court, nearly three years subsequently, to restore the land, was wholly unauthorized, and was clearly error. Nor did the opening of the decree as to the two lots, not owned by the respondent, afford any justification for the action of the court in restoring the residue of the property, as it is settled law that a judgment may be good in part, and bad in part, — good to the extent it is authorized by law, and bad for the residue. *Bigelow* v. *Forest*, 9 Wall. 339; *Day* v. *Micou*, 18 id. 156; *Ex parte Lange*, 18 id. 163.

Much discussion of the special pardon is unnecessary, as it contained the provision that the respondent should not, "by virtue thereof," claim any property, or the proceeds of any property, that had been sold by the order, judgment, or decree of a court under the confiscation laws of the United States. Authorities to show that a pardon may be special in its character, or subject to conditions and exceptions, are quite unnecessary, as they are very numerous, and are all one way.

Decree of the Circuit Court is affirmed.

McLemore v. Louisiana State Bank.

Where, in time of war, a bank was, notwithstanding the protest of its officers, put in liquidation by order of the commanding general of the United States forces, and its effects transferred to commissioners appointed by him, who, during their administration, sold for less than their face value choses in action held by the bank as collateral security at the time of the transfer, — *held*, that as the proceedings of the commanding general and the commis-

sioners constituted "superior force," which no prudent administrator of the affairs of a corporation could resist, the bank was neither responsible for those proceedings, nor for a loss thereby occasioned.

ERROR to the Circuit Court of the United States for the District of Louisiana.

The facts are stated in the opinion of the court.

Mr. Charles B. Singleton for the plaintiff in error. *Messrs. E.* and *A. C. Janin, contra.*

MR. JUSTICE DAVIS delivered the opinion of the court.

It is unnecessary to consider whether in all respects the charge of the Circuit Court to the jury was correct, because the record shows the case of the plaintiff to be so fatally defective, that the judgment below would not be reversed for instructions, however erroneous. *Brobst* v. *Brock*, 10 Wall. 519; *Decatur Bank* v. *St. Louis Bank*, 21 id. 301. The case is this: The plaintiff was the owner of certain promissory notes and acceptances, in possession of the commercial firm in New Orleans of which he was a member, which were pledged by the firm, in 1861 and 1862, to the bank, as security for the payment of their promissory notes discounted by the bank. These notes were not met at maturity, and, with the collaterals pledged for their payment, remained in possession of the bank until June 11, 1863, when it was put in liquidation by order of Major-General Banks, and its effects transferred to military commissioners appointed to close it up. Its officers, while submitting to this order because they had no power to resist it, deemed it unjust and oppressive, and entered a protest against it on their minutes. During the administration of these commissioners, the pledged paper was sold for less than its face. In January, 1866, the military liquidation ceased by order of Major-General Canby, and the effects of the bank which were unadministered were restored to it. The plaintiff, on the ground that the securities were parted with illegally, seeks to make the bank responsible for the proceedings of the commissioners; but this he cannot do. Certainly no act was done, or omitted to be done, by it, inconsistent with its duty; for it was only bound to take that care of the pledge which a careful man bestows on his own property.

It is true, it was the duty of the bank to return the pledge, or show a good reason why it could not be returned. This it has done by proof, that without any fault on its part, and against its protest, the pledge was taken from it by superior force. Where this is the case, the common as well as the civil law holds that the duty of the pledgee is discharged. 2 Kent, 579; Story on Bailments, sect. 339; *Commercial Bank* v. *Martin*, 1 Annual, 344. That the proceedings of General Banks and the liquidators appointed by him constituted "superior force," which no prudent administrator of the affairs of a corporation could either resist or prevent, is too plain for controversy. It was in the midst of war that the order was made, and with an army at hand to enforce it. There was nothing left but submission under protest. Any other course of action, under the circumstances, instead of benefiting, would have injured, every one who had dealings with the bank. It has turned out that the plaintiff has suffered injury, but not through the fault of the officers of the bank; for they retained the notes and bills long after the paper for which they were given as security had matured, and until they were dispossessed of them by military force. Under such circumstances, they have discharged every duty which they owed to the plaintiff; and, if loss has been occasioned in consequence of the order in question, the bank is not responsible for it.

The judgment is affirmed.

FARMERS' AND MECHANICS' NATIONAL BANK *v.* DEARING.

1. The only forfeiture declared by the thirtieth section of the act of June 3, 1864 (13 Stat. 99), is of the *entire interest* which the note, bill, or other evidence of debt, carries with it, or which has been agreed to be paid thereon, when the rate knowingly received, reserved, or charged by a national bank is in excess of that allowed by that section; and no loss of the entire debt is incurred by such bank, as a penalty or otherwise, by reason of the provisions of the usury law of a State.
2. National banks organized under the act are the instruments designed to be used to aid the government in the administration of an important branch of the public service; and Congress, which is the sole judge of the necessity for their creation, having brought them into existence, the States can exercise no control over them, nor in any wise affect their operation, except so far as it may see proper to permit.

ERROR to the Court of Appeals of the State of New York.

The facts are stated in the opinion of the court.

Mr. E. G. Spaulding for the plaintiff in error.

The real question presented in this case is, whether the discount of a note by a national bank, — organized under the act of Congress, approved June 3, 1864, — at a greater rate of interest than allowed by the statute of the State where such bank is located, renders it liable to the penalty for usury provided by the State statute.

The act of June 3, 1864, supersedes the State laws imposing penalties for usury in so far as they are applicable to national banks. *Davis, Receiver, &c.* v. *Randall*, 115 Mass. 547; *Central National Bank* v. *Pratt*, id. 539; *National Bank of Erie* v. *Brown*, 72 Penn. 209; *Wiley* v. *Starbuck*, 44 Ind. 298; *Tiffany* v. *Missouri State Bank*, 18 Wall. 409; *Citizens' National Bank of Piqua* v. *Leming*, 8 Int. Rev. Record, 132; *First National Bank of Columbus* v. *Gurlinghouse*, 22 Ohio St. 492.

Mr. Thad. C. Davis for the defendant in error.

No privilege of immunity from the usury laws of the State is conferred upon the national banks by the act of Congress of 1864; and a contract for a loan made in the State of New York with one of these organizations, by which it reserves a greater rate of interest than seven per cent, is void. *First National Bank of Whitehall* v. *Lamb*, 50 N. Y. 95.

MR. JUSTICE SWAYNE delivered the opinion of the court.

The question presented for our determination involves the construction of the provisions of the national bank act of Congress of the 3d of June, 1864, 13 Stat. 99, upon the subject of the interest to be taken by the institutions organized under that act.

The plaintiff in error is one of those institutions. The thirtieth section of the act declares "that every association may take, receive, reserve, and charge, on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State or Territory where the bank is located, and no more; except that where, by the laws of any State, a different rate is limited for banks of

issue organized under State laws, the rates so limited shall be allowed for associations organized in any such State under this act. And, when no rate is fixed by the laws of the State or Territory, the bank may take, receive, reserve, or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt, has to run. And the knowingly taking, receiving, reserving, or charging a rate of interest *greater than aforesaid* shall be held and adjudged a forfeiture of the entire interest which the note, bill, or other evidence of debt, carries with it, or which has been agreed to be paid thereon. And, in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back, in any action of debt, twice the amount of interest thus paid from the association taking or receiving the same, provided that such action is commenced within two years from the time the usurious transaction occurred. But the purchase, discount, or sale of a *bona fide* bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts, in addition to the interest, shall not be considered as taking or receiving a greater rate of interest."

The facts of the case are few and simple. On the 2d of September, 1874, it was agreed between the parties that Dearing should make his promissory note to one Deitman for $2,000, payable one month from date, and that the bank should discount the note for Dearing at the rate of interest of ten per cent per annum. This agreement was carried out. The bank received the note, and paid to Dearing the sum of $1,981.67. The discount reserved and taken was $18.33. The rate of interest which the bank was legally authorized to take was seven per cent per annum. The excess reserved over that rate was $5.50. Dearing failed to pay the note at maturity. The bank thereupon sued him in the Superior Court of Buffalo. He answered, that the agreement touching the discount was usurious, corrupt, and illegal; that it avoided the note; and that he was in no wise liable to the plaintiff. The court sustained this defence, and gave judgment for the defendant.

At a general term of that court the judgment was affirmed,

and the judgment of affirmance was subsequently affirmed by the Court of Appeals.

No searching analysis is necessary to eliminate the several provisions of the section to be considered to develop the true meaning of each, and to draw the proper conclusions from all of them taken together.

(1.) The rate of interest chargeable by each bank is to be that allowed by the law of the State or Territory where the bank is situated.

(2.) When, by the laws of the State or Territory, a different rate is limited for banks of issue organized under the local laws, the rate so limited is allowed for the national banks.

(3.) Where no rate of interest is fixed by the laws of the State or Territory, the national banks may charge at a rate not exceeding seven per cent per annum.

(4.) Such interest may be reserved or taken in advance.

(5.) Knowingly reserving, receiving, or charging "a rate of interest *greater than aforesaid* shall be held and adjudged a forfeiture of the interest which the note, bill, or other evidence of debt, carries with it, or which has been agreed to be paid thereon."

(6.) If a greater rate has been paid, twice the amount so paid may be recovered back, provided suit be brought within two years from the time the usurious transaction occurred.

(7.) The purchase, discount, or sale of a bill of exchange, payable at another place, at not more than the current rate of exchange on sight drafts, in addition to the interest, shall not be considered as taking or reserving a greater rate of interest than that permitted.

These clauses, examined by their own light, seem to us too clear to admit of doubt as to any thing to which they relate. They form a system of regulations. All the parts are in harmony with each other, and cover the entire subject.

But it is contended that the phrase, "a rate of interest greater than aforesaid," as it stands in the context, has reference only to the preceding sentence, which relates to banks where no rate of interest is fixed by law; and that hence it leaves the consequences of usury, where such rate is fixed, to be governed wholly by the local law upon the subject. This, in the State

of New York, would, in all such cases, render the contract a nullity, and forfeit the debt. Such the Court of Appeals held to be the law of this case, and adjudged accordingly.

Neither of these views can be maintained. The collocation of the terms in question does not grammatically require such a construction. Viewed in this light, the phrase is as much applicable to both the foregoing clauses as to the next preceding one. The point to be sought is the intent of the law-making power. The offence of usury under this section is as great where the local law does not, as where it does, define the rate of interest. The same considerations apply in both cases. Why should Congress punish in one class of cases, and, so far as its action is concerned, exempt in the other? Why such discrimination? The result would be, that in Pennsylvania, where the contract would be void only as to the unlawful excess, the bank would lose nothing but such excess; while in New York, under a contract precisely the same, except as to the identity of the lender, the entire debt would be lost to the bank. This would be contrary to the plainest principles of reason and justice.

A purpose to produce or permit such a state of things ought not to be imputed to Congress, unless the circumstances are so cogent as to render that result inevitable.

We find nothing within the scope of the subject of that character.

The second proposition — that the State law, including its penalties, would apply if the first proposition be sound — is equally untenable. If the construction contended for were correct, the State law would have no bearing whatever upon the case.

The constitutionality of the act of 1864 is not questioned. It rests on the same principle as the act creating the second bank of the United States. The reasoning of Secretary Hamilton and of this court in *McCulloch* v. *Maryland* (4 Wheat. 316) and in *Osborne* v. *The Bank of the United States* (9 id. 708), therefore, applies. The national banks organized under the act are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end. Of

the degree of the necessity which existed for creating them Congress is the sole judge.

Being such means, brought into existence for this purpose, and intended to be so employed, the States can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see proper to permit. Any thing beyond this is "an abuse, because it is the usurpation of power which a single State cannot give." Against the national will "the States have no power, by taxation or otherwise, to retard, impede, burthen, or in any manner control, the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government." *Bank of the United States* v. *McCulloch*, *supra*; *Weston and Others* v. *Charleston*, 2 Pet. 466; *Brown* v. *Maryland*, 12 Wheat. 419; *Dobbins* v. *Erie County*, id. 419.

The power to create carries with it the power to preserve. The latter is a corollary from the former.

The principle announced in the authorities cited is indispensable to the efficiency, the independence, and indeed to the beneficial existence, of the General Government; otherwise it would be liable, in the discharge of its most important trusts, to be annoyed and thwarted by the will or caprice of every State in the Union. Infinite confusion would follow. The government would be reduced to a pitiable condition of weakness. The form might remain, but the vital essence would have departed. In the complex system of polity which obtains in this country, the powers of government may be divided into four classes: —

Those which belong exclusively to the States;

Those which belong exclusively to the National Government;

Those which may be exercised concurrently and independently by both;

And those which may be exercised by the States, but only with the consent, express or implied, of Congress.

Whenever the will of the nation intervenes exclusively in this class of cases, the authority of the State retires and lies in abeyance until a proper occasion for its exercise shall recur. *Gilman* v. *Philadelphia*, 3 Wall. 713; *Ex parte McNeil*, 13 id. 240.

The power of the States to tax the existing national banks lies within the category last mentioned.

It must always be borne in mind that the Constitution of the United States, "and the laws which shall be made in pursuance thereof," are "the supreme law of the land" (Const., art. 6), and that this law is as much a part of the law of each State, and as binding upon its authorities and people, as its own local constitution and laws.

In any view that can be taken of the thirtieth section, the power to supplement it by State legislation is conferred neither expressly nor by implication. There is nothing which gives support to such a suggestion.

There was reason why the rate of interest should be governed by the law of the State where the bank is situated; but there is none why usury should be visited with the forfeiture of the entire debt in one State, and with no penal consequence whatever in another. This, we think, would be unreason, and contrary to the manifest intent of Congress.

Where a statute prescribes a rate of interest, and simply forbids the taking of more, and more is contracted for, the contract is good for what might be lawfully taken, and void only as to the excess. *Burnhisel* v. *Firman, Assignee*, 22 Wall. 170; *German* v. *Calvert*, 12 Serg. & R. 46. Forfeitures are not favored in the law. Courts always incline against them. *Marshall* v. *Vicksburg*, 15 Wall. 156. When either of two constructions can be given to a statute, and one of them involves a forfeiture, the other is to be preferred. Vattel, 20th Rule of Construction.

Where a statute creates a new offence and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes. *Stafford* v. *Ingersoll*, 3 Hill, 38; *First National Bank of Whitehall* v. *Lamb*, 57 Barb. 429.

The thirtieth section is remedial as well as penal, and is to be liberally construed to effect the object which Congress had in view in enacting it. *Gray* v. *Bennet*, 3 Met. 539.

The forty-sixth section of the banking act of Feb. 25, 1863, 12 Stat. 679, declared that reserving or taking more than the interest allowed should "be held and adjudged a forfeiture of

the debt or demand." In the act of 1864 the forfeiture of the debt is omitted, and there is substituted for it the forfeiture of the interest stipulated for, if it had only been reserved, and the recovery of twice the amount where the interest had been actually paid.

In the Revised Statutes of the United States of the 22d of June, 1874, 1011, the provisions of the thirtieth section of the act of 1864 are divided into two sections, and the language is so changed as to render impossible in that case the same construction as that of the thirtieth section contended for by the counsel of the defendant in error in this case.

In the "Act to amend the usury laws of the District of Columbia," of the 22d of April, 1870 (16 Stat. 91), it is provided that six per cent per annum shall be the lawful rate of interest, but that parties may contract for ten per cent; and that, if more than ten per cent be contracted for, the entire interest shall be forfeited, and that only the principal debt shall be recoverable. It is further declared, that, if the unlawful interest has been paid, it may be recovered back, provided it be sued for within a year.

It is declared in the last section that this act shall not affect the banking act of 1864.

This later legislation shows the spirit by which Congress was animated in passing the thirtieth section of the act here under consideration, and is not without value as affording light whereby to ascertain the true meaning of that section, if there could otherwise be any doubt upon the subject.

This section has been elaborately considered by the highest court of Massachusetts, of Pennsylvania, of Ohio, and of Indiana. *Davis, Receiver*, v. *Randall*, 115 Mass. 547; *Central Nat. Bank* v. *Pratt*, id. 539; *Second Nat. Bank of Erie* v. *Brown*, 72 Penn. 209; *First Nat. Bank of Columbus* v. *Gurlinghouse*, 22 Ohio St. 492; *Wiley et al.* v. *Starbuck*, 44 Ind. 298. In all these cases, views were expressed in conflict with those maintained in the *First Nat. Bank of Whitehall* v. *Lamb et al.*, 50 N. Y. 100. This adjudication controlled the result of the litigation between these parties.

Upon reason and authority, we have no hesitation in coming to the conclusion that there is error in the case before us.

The plaintiff below was entitled to recover the principal of the note sued upon, less the amount of the interest unlawfully reserved. Whether he was entitled to recover interest upon the amount of the principal so reduced, after the maturity of the note, is a point which has not been argued, and upon which we express no opinion.

The judgment of the Court of Appeals is reversed, and the case will be remanded with directions to proceed in conformity with this opinion.

BROWN ET AL. *v.* PIPER.

1. The application by the patentee of an old process to a new subject, without any exercise of the inventive faculty, and without the development of any idea which can be deemed new or original in the sense of the patent laws, is not the subject of a patent.
2. Evidence of what is old and in general use at the time of an alleged invention is admissible in actions at law under the general issue, and in equity cases, without any averment in the answer touching the same.
3. The court can take judicial notice of a thing in the common knowledge and use of the people throughout the country.

APPEAL from the Circuit Court of the United States for the District of Massachusetts.

Piper filed a bill to enjoin Brown and Seavey from infringing two patents, one of which, not being insisted on at the hearing, need not be considered. The other — No. 732, dated March 19, 1861 — makes claim as follows: —

"Preserving fish and other articles in a close chamber by means of a freezing mixture, having no contact with the atmosphere of the preserving chamber."

The defendants by their answer, among other objections not necessary to be mentioned, denied the novelty of the alleged invention.

The court below rendered a decree sustaining the validity of the patent, and perpetually enjoined the defendants from using or employing the invention therein described. They bring this appeal.

Mr. George Gifford and *Mr. Edward Avery* for appellants.
Mr. Causten Browne for appellee.

MR. JUSTICE SWAYNE delivered the opinion of the court.

The bill is founded upon two patents granted by the United States to the appellee, — one numbered 732, of the 19th of March, 1861; the other numbered 36,107, and dated Aug. 5, 1862. The second and later patent was not relied upon in the argument here, and may, therefore, be laid out of view. Our attention will be confined to the prior one. It is declared in the specification to be "for a new and improved method of preserving fish and meats." The invention is alleged to consist "in a method of preserving fish and other articles in a chamber, and cooling the latter by means of a freezing mixture, so applied that no communication shall exist between the interior of the preserving chamber and that of the vessels in which the freezing mixture is placed." The specification continues: "I do not profess to have invented the means of artificial congelation, nor to have discovered the fact that no decay takes place in animal substances so long as they are kept a few degrees below the freezing-point of water; but the practical application of them to the art of preserving fish and meats, as above described, is a new and very valuable improvement. The apparatus for freezing fish and keeping them in a frozen state may be constructed in various ways and of different shapes. The apparatus shown in the drawing, however, will suffice to illustrate the principle and mode of operation."

The process and apparatus are then described as follows: A box of wood or other suitable material, surrounded by a packing of charcoal or other non-conducting substance, is to be provided, and the fish in small quantities laid in it on a rack. Metallic pans filled with a freezing mixture, such as salt and ice, are then to be set over them, and a cover shut over the pans. "In about twenty-four hours, the freezing mixture having been changed once in twelve hours, the fish will be frozen completely through."

After being frozen, the fish or meat may, if desired, be covered with a thin coating of ice; and this coating may be preserved by applying the substances named, which will exclude the air,

and prevent the juices from escaping by evaporation. "The fish are then *to be packed closely* in a large preserving box, which is enclosed in a still larger box; the space between the boxes being filled with charcoal or other non-conducting material, to exclude the heat." Other minor details are described, which it is not deemed material to repeat. The patentee then declares: "I do not desire to be understood as confining myself to the specific apparatus above described, nor to the use of either or both the preliminary processes of freezing and cooling; but I have described the mode of operation, which, by experience, I have found best for preserving the most delicate varieties of fish." The summation and claim are: "Having described my invention, what I claim as new, and desire to secure by letters-patent, is, *preserving fish or other articles in a close chamber by means of a freezing mixture, having no contact with the atmosphere of the preserving chamber, substantially as set forth.*"

The patent is not for the principle long and well known to physicists, that a low degree of cold, like a high degree of heat, prevents the decay of animal matter; nor is it for the freezing of the articles to be preserved before or after they are placed in the preserving chamber; nor is it for applying, by means of an apparatus with any particular details of construction, cold to the articles to be preserved; nor is it for the frigorific effect of the freezing mixture upon the atmosphere of the inner chamber; but it is for the application to such articles of the degree of cold necessary to preserve them, by means of "a close chamber," in which they are to be placed, and "a freezing mixture, having no communication with the atmosphere of the preserving chamber."

If this result be reached by the means designated in any way substantially the same with that described, having the feature of the non-contact of the freezing mixture with the air of the preserving chamber, there is a clear invasion of the territory which the patentee has marked out and seeks to appropriate to himself.

It was earnestly maintained by the learned counsel for the appellee that the essence of the invention is the creation of "a freezing atmosphere" in the preserving chamber.

To this there are several answers. There is nothing in the

specification or claim to warrant the proposition. The direction is, that "the fish are to be packed closely." This implies clearly that as many fish are to be put into the preserving chamber as it can be made to contain.

Atmospheric air is itself an agent of decay; and in all such cases it is important to preclude as far as possible its presence and contact. "If air be absolutely excluded, putrefaction ceases; and the result is the preservation of the substance in some circumstances, perhaps in all." 3 Ure's Dict. of Arts, 548. "On this principle is founded Appert's process, by which easily decomposable articles of food and drink, such as meat, fish, vegetables, milk, &c., are preserved for years; viz., by packing them in air-tight bottles or soldered tin cans, heating the vessels for several hours in boiling water, and keeping them carefully closed." 2 Watts's Dict. of Chem. 625. The patentee is to be presumed to have known this property of air.

The patent is for "a new and useful improvement" in the art to which it relates. It was issued under the act of July 4, 1836. The rights of the parties are to be considered in the light of that act. The defence relied upon in the answer is the want of novelty; and several instances of prior use and knowledge, with the requisite circumstances of time, place, and persons, are alleged.

We deem it sufficient to consider one of them. On the 17th of August, 1842, a patent was issued to John Good "for a corpse preserver." The apparatus, as described, was an outer case with a close-fitting lid. The case was made double; there being a partition to within four or five inches, more or less, of the top of the outer one, leaving a space between the two of several inches, which was to be filled with ice. There was a false bottom with holes in it in the inner compartment. It rested upon ledges, which kept it four or five inches above the bottom. The intervening space was a receptacle for ice. The corpse was deposited upon the false bottom. A tray was placed over it, and under the lid. The tray was four or five inches deep, used to contain the freezing mixture, and had a flange to prevent the mixture from escaping. Proper outlets were provided for the passage of the water from the melting ice. There was no communication between the tray containing the freezing

mixture and the inner compartment containing the body. Swartz, an intelligent and unimpeached witness, was examined on the 15th of October, 1869. He testified that he was an undertaker, and had used the apparatus for about twenty years, sometimes with ice under the false bottom, and sometimes without it. In either case, he applied a sufficient degree of cold to prevent putrefaction before interment. He thought the bodies were sometimes frozen, but was not certain. The material point in his business was the prevention of decay for the time being; and that was always accomplished.

Here was the application of the requisite degree of cold exactly in the manner called for in the specification of the appellee.

This is hardly denied; but it is insisted that the process was never applied by the witness to the preservation of fish and meats.

The answer is, that this was simply the application by the patentee of an old process to a new subject, without any exercise of the inventive faculty, and without the development of any idea which can be deemed new or original in the sense of the patent law. The thing was within the circle of what was well known before, and belonged to the public. No one could lawfully appropriate it to himself, and exclude others from using it in any usual way for any purpose to which it may be desired to apply it.

This is fatal to the patent. *Ames* v. *Howard*, 1 Sumner, 487; *Howe* v. *Abbot*, 2 Story, 194; *Bean* v. *Smalwood*, id. 411; *Winans* v. *B. & P. R. R.*, id. 412; *Hotchkiss et al.* v. *Greenwood et al.*, 11 How. 248.

There is another view of the case that may properly be taken.

Evidence of the state of the art is admissible in actions at law under the general issue without a special notice, and in equity cases without any averment in the answer touching the subject. It consists of proof of what was old and in general use at the time of the alleged invention. It is received for three purposes, and none other, — to show what was then old, to distinguish what was new, and to aid the court in the construction of the patent.

Of private and special facts, in trials in equity and at law, the court or jury, as the case may be, is bound carefully to exclude the influence of all previous knowledge. But there are many things of which judicial cognizance may be taken. "To require proof of every fact, as that Calais is beyond the jurisdiction of the court, would be utterly and absolutely absurd." Gresley's Ev. in Eq. 294. Facts of universal notoriety need not be proved. See Taylor's Ev., § 4, note 2. Among the things of which judicial notice is taken are the law of nations; the general customs and usages of merchants; the notary's seal; things which must happen according to the laws of nature; the coincidences of the days of the week with those of the month; the meaning of words in the vernacular language; the customary abbreviations of Christian names; the accession of the Chief Magistrate to office, and his leaving it. In this country, such notice is taken of the appointment of members of the cabinet, the election and resignations of senators, and of the appointment of marshals and sheriffs, but not of their deputies. The courts of the United States take judicial notice of the ports and waters of the United States where the tide ebbs and flows, of the boundaries of the several States and judicial districts, and of the laws and jurisprudence of the several States in which they exercise jurisdiction. Courts will take notice of whatever is generally known within the limits of their jurisdiction; and, if the judge's memory is at fault, he may refresh it by resorting to any means for that purpose which he may deem safe and proper. This extends to such matters of science as are involved in the cases brought before him. See 1 Greenleaf's Ev. 11; Gresley's Ev., *supra;* and Taylor's Ev., § 4, and *post.*

In the *Ohio L. & T. Co.* v. *Debolt*, 16 How. 435, it was said to be "a matter of public history, which this court cannot refuse to notice, that almost every bill for the incorporation of companies" of the classes named is prepared and passed under the circumstances stated. In *Hoare* v. *Silverlock*, 12 Ad. & Ell. N. S. 624, it was held that where a libel charged that the friends of the plaintiff had "realized the fable of the frozen snake," the court would take notice that the knowledge of that fable existed generally in society. This power is to be exer-

cised by courts with caution. Care must be taken that the requisite notoriety exists. Every reasonable doubt upon the subject should be resolved promptly in the negative.

The pleadings and proofs in the case under consideration are silent as to the ice-cream freezer. But it is a thing in the common knowledge and use of the people throughout the country. Notice and proof were, therefore, unnecessary. The statute requiring notice was not intended to apply in such cases. The court can take judicial notice of it, and give it the same effect as if it had been set up as a defence in the answer and the proof were plenary. See *M. & A. Glue Co.* v. *Upton*, 6 Patent Office Gazette, 843, and *Needham* v. *Washburn*, 7 id. 651, — both decided by Mr. Justice Clifford upon the circuit. We can see no substantial diversity between that apparatus and the alleged invention of the appellee. In the former, as in the apparatus of the appellee, "the freezing mixture" has "no contact with the atmosphere" of the chamber where the work is to be done. If the freezer be full, and the preserving chamber be full, there would be room for but little air in either. If either were only partially full, the vacuum would be filled with that substance. The cold is generated by the same materials, and applied under the same circumstances. If the cream were taken out of the freezer, and fish put in, there would be, in all substantial respects, the same apparatus, process, and result. If the preserving chamber were as tight as the freezer, either might be convertibly used for the purpose of the other.

"The preservative effect of cold, and especially of dry cold, is well known and exemplified in the keeping of meat and fruit in ice-houses. Animals have been found undecomposed in the ice of Siberia which belong to extinct species, and which must have been embalmed in ice for ages." Tit. "Antiseptic," 1 Amer. Encyclo. 570.

Artificial freezing is usually applied to water, and articles of food.

"There are two general methods of effecting it; viz., by liquefication and by vaporization and expansion. The method by liquefication is performed by freezing mixtures, which are formed by mixing together two or more bodies, one or all of which may be solid. They are used together in vessels having three or more

concentric apartments, — an inner one, containing the article to be frozen; one eccentric to this, containing the freezing mixture, provided with some contrivance for agitation; one, again, outside of this, filled with a non-conductor of heat, as powdered charcoal, gypsum, or cotton wool; and sometimes one between them for holding water." Tit. "Freezing," 7 Amer. Encyclo. 474.

Here the principle and substance of the appellee's claim are set forth as belonging to the general domain of knowledge and science. It is known that Lord Bacon applied snow to poultry to preserve it. He said the process succeeded "excellently well." The experiment was made in his old age, imprudently, and brought on his last illness.

Examined by the light of these considerations, we think this patent was void on its face, and that the court might have stopped short at that instrument, and without looking beyond it into the answers and testimony, *sua sponte*, if the objection were not taken by counsel, well have adjudged in favor of the defendant.

These views render it unnecessary to consider the exceptions to the master's report.

The decree of the Circuit Court is reversed; and the cause will be remanded, with directions to dismiss the bill.

PIPER v. MOON ET AL.

MR. JUSTICE SWAYNE delivered the opinion of the court.

The appellant's bill in this case is founded upon the same patent as the bill of the appellee in *Brown et al.* v. *Piper*, above reported.

In this case the court below dismissed the bill, and the complainant appealed to this court. What was said in the case referred to disposes of this.

The decree of the Circuit Court is affirmed.

UPTON, ASSIGNEE, *v.* TRIBILCOCK.

1. The original holder of stock in a corporation is liable for unpaid instalments of stock, without an express promise to pay them; and a contract between a corporation or its agents and him, limiting his liability therefor, is void both as to the creditors of the company and its assignee in bankruptcy.
2. Representations by the agent of a corporation as to the non-assessability of its stock, beyond a certain percentage of its value, constitute no defence to an action against the holder of the stock to enforce payment of the entire amount subscribed, where he has failed to use due diligence to ascertain the truth or falsity of such representations.
3. The word "non-assessable" upon the certificate of stock does not cancel or impair the obligation to pay the amount due upon the shares created by the acceptance and holding of such certificate. At most, its legal effect is a stipulation against liability from further assessment or taxation after the entire subscription of one hundred per cent shall have been paid.
4. Assuming the representations of the agent of the company, as to the non-assessment of the stock, to be a fraud which would avoid the contract, the question arises, whether the defendant discharged his duty in discovering the fraud, and repudiating the contract on that account, and not on account of another fraud not in issue. *Held*, that the plaintiff was entitled to the opinion of the jury on that precise question.

ERROR to the Circuit Court of the United States for the District of Iowa.

The facts are stated in the opinion of the court.

Mr. C. C. Nourse for the plaintiff in error.

Mr. George G. Wright for the defendant in error.

MR. JUSTICE HUNT delivered the opinion of the court.

Two points are presented in this case. Upon the first point, the facts are as follows: —

The plaintiff, as assignee of the Great Western Insurance Company, a corporation organized under the statute of the State of Illinois, brought his action against the defendant, alleging that he was a stockholder of said corporation to the amount of ten thousand dollars; that twenty per cent only had been paid upon his stock; alleging also the bankruptcy of the company, the appointment of the plaintiff as assignee, and the demand of the amount claimed, and seeking to recover the eight thousand dollars remaining unpaid. The complaint averred that the defendant did verbally agree to become such stockholder, and, with intent to become such, did accept a certificate for the

same, whereby he became bound to pay the full amount thereof, as follows: Five per cent upon delivery of the certificates; five per cent in three months; five per cent in six months; five per cent in nine months; and the residue whenever called for by the company, according to the charter of the company and the laws of the State of Illinois.

The defence is, that the subscription was obtained by the fraudulent representations of the agent of the company to the effect that the defendant would only be responsible for twenty per cent of the subscription made by him; that afterwards he executed his promissory note for the twenty per cent, and secured the same by a mortgage of real estate; "and that thereupon (in the language of the answer), and pursuant to agreement, said subscription contract was surrendered and delivered up to defendant;" and also in the language of the answer, "that said note was a full payment and discharge of all obligations and personal liabilities of all kinds whatsoever by reason of his contract so made and the relations created by the delivery to him of said certificate, and said note was received in full payment."

In his third amended answer, the defendant avers that he did subscribe for stock on the conditions mentioned; that after that contract was made, and before a certificate was delivered to him, and before executing his note, an agreement was made with Overton on behalf of the company to the effect before stated; and thereupon he made and delivered the note and mortgage which was received by Overton in full discharge and payment of the amount due on his said subscription.

The evidence contained in the bill of exceptions leaves the case substantially as is averred in the pleadings. The defendant offered evidence tending to prove representations that twenty per cent only was required to be paid; that eighty per cent was non-assessable, and created no personal liability; that the agent, Overton, exhibited a blank form of certificate with the word "non-assessable" printed across the face, "being a copy similar to that subsequently filled up and delivered to defendant by Overton." It appears, that, before the defendant made his subscription, a copy of the charter and by-laws had been furnished to him by Overton; and that, in returns made

by the company to the Auditor of the State of Illinois of the amount of "unpaid subscribed capital for which the subscribers were liable," the amount of the defendant's note was included.

The case standing in this position upon the pleadings and the evidence, the plaintiff requested the court to charge the jury as follows: —

2d. That any contract between the company or its agents and the stockholders, limiting their liability as to unpaid instalments of stock, is void as to creditors of the company, and as to the rights of the assignee who represents the creditors in this action.

3d. That if the jury find from the evidence that the defendant, J. D. Tribilcock, became a stockholder of the Great Western Insurance Company in the month of August, 1870, and that he continued to own and hold said stock until after the insolvency of the company in February, 1873, that any representations by any agent of the company at the time defendant became such stockholder as to the matter of his liability for eighty per cent of the stock, or any indorsement on the stock of the word "non-assessable," are wholly immaterial, and constitute no defence to this action.

This request was refused.

It is hardly necessary to argue the proposition, that if the defendant became a holder of shares of the capital of this insurance company to the amount of $10,000, and had paid but twenty per cent thereof, its creditors were entitled to require of him the payment of the eighty per cent remaining unpaid. The acceptance and holding of a certificate of shares in an incorporation makes the holder liable to the responsibilities of a shareholder. *Brigham* v. *Mead*, 10 Allen, 245; *Buff. City R. R. Co.* v. *Douglass*, 14 N. Y. 336; *Seymour* v. *Sturges*, 26 id. 134. The capital stock of a moneyed corporation is a fund for the payment of its debts. It is a trust fund, of which the directors are the trustees. It is a trust to be managed for the benefit of its shareholders during its life, and for the benefit of its creditors in the event of its dissolution. This duty is a sacred one, and cannot be disregarded. Its violation will not be undertaken by any just-minded man, and will not be per-

mitted by the courts. The idea that the capital of a corporation is a foot-ball to be thrown into the market for the purposes of speculation, that its value may be elevated or depressed to advance the interests of its managers, is a modern and wicked invention. Equally unsound is the opinion, that the obligation of a subscriber to pay his subscription may be released or surrendered to him by the trustees of the company. This has been often attempted, but never successfully. The capital paid in, and promised to be paid in, is a fund which the trustees cannot squander or give away. They are bound to call in what is unpaid, and carefully to husband it when received. *Sawyer* v. *Hoag*, 17 Wall. 610; *Tuckerman* v. *Brown*, 33 N. Y. 297; *Ogilvie* v. *Knox Ins. Co.*, 22 How. 380; *Osgood* v. *Laytin*, 3 Keys, 521; 37 How. Pr. 63, affg. 48 Barb. 463; Gross, Ill. Stat., p. 356, § 16.

We are of the opinion that the alleged representation of the non-assessability of the stock held by him was quite immaterial. It was so held in *Ogilvie* v. *Knox Ins. Co.*, 22 How. 380.

Again: if full effect is given to the evidence of the defendant and to his claim in this respect, it shows this, and nothing more: He became a stockholder under a certificate signed by the president and secretary that he was entitled to one hundred shares of the stock of $100 each, payable five per cent on receipt of the certificate; five per cent in three months; five per cent in six months; five per cent in nine months from date; the time or manner of the payment of the residue not being specified. Upon the face of this certificate were stamped in red ink the figures "$100," and in another place was stamped the word "non-assessable." This certificate he held until the insolvency of the company in 1873 was known to him.

The legal effect of this instrument was to make the remaining eighty per cent payable upon the demand of the company. We see no qualification of this result in the word "non-assessable," assuming it to be incorporated into and to form a part of the contract. It is quite extravagant to allege that this word operates as a waiver of the obligation created by the acceptance and holding of a certificate to pay the amount due upon his shares. A promise to take shares of stock imports a promise to pay for them. The same effect results from

an acceptance and holding of a certificate. *Palmer* v. *Lawrence*, 3 Sand. S. C. 761; *Brigham* v. *Mead*, 10 Allen, 245. At the most, the legal effect of the word in question is a stipulation against liability to further taxation or assessment after the holder shall have fulfilled his contract to pay the one hundred per cent in the manner and at the times indicated. We cannot give to it the consequence of destroying the legal effect of the certificate.

Still, again, the representations relied upon as a defence, it will be noticed, were as to the legal effect of the defendant's subscription and certificate. It is alleged that the agent represented, that by the laws of the State of Illinois, and by the charter of this company, the defendant might become a subscriber to the amount of $10,000; and, by means of a certificate to be given to him like that exhibited, he would really be liable only to the extent of one-fifth of his said subscription, and that good lawyers had given their advice to this effect.

There was here no error, mistake, or misrepresentation of any fact. The defendant made the subscription he intended to make, and received the certificate he had stipulated for; and, as there is no evidence to the contrary, it is to be presumed the good lawyers advised as was stated: but, in law, the defendant incurred a larger liability than he anticipated. *Leavitt* v. *Palmer*, 3 N. Y. 19.

He had received, several days before this time, a copy of the charter and by-laws of the company, and then had them in his possession. The twenty-fifth section of the by-laws was as follows: "Every person who shall subscribe for $10,000 of stock, and pay twenty per cent thereof, shall be constituted a director of this company, and shall continue such director so long as he shall retain of such stock an amount equal to $10,000; but such $10,000 shall not be reckoned in the election of other directors."

It was under this section and the succeeding one, authorizing the establishment of a branch in any place where such subscription was made, and by which the defendant became a director and might be president thereof, that the transaction took place.

That the defendant did not read the charter and by-laws, if such were the fact, was his own fault. It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they are written. But such is not the law. A contractor must stand by the words of his contract; and, if he will not read what he signs, he alone is responsible for his omission. *Jackson* v. *Croy*, 12 Johns. 427; *Leis* v. *Stubbs*, 6 Watts, 48; *Farly* v. *Bryant*, 32 Me. 474; *Coffing* v. *Taylor*, 16 Ill. 457; *Slafyton* v. *Scott*, 13 Ves. 427; *Alvanly* v. *Kinnaid*, 2 Mac. & G. 7; 29 Beav. 490.

That a misrepresentation or misunderstanding of the law will not vitiate a contract, where there is no misunderstanding of the facts, is well settled.

In *Fish* v. *Clelland*, 33 Ill. 243, the principle is expressed in these words: "A representation of what the law will or will not permit to be done is one on which the party to whom it is made has no right to rely; and if he does so it is his folly, and he cannot ask the law to relieve him from the consequences. The truth or falsehood of such a representation can be tested by ordinary vigilance and attention. It is an opinion in regard to the law, and is always understood as such." See *Star* v. *Bennett*, 5 Hill, 303; *Lewis* v. *Jones*, 4 B. & C. 506; *Rashall* v. *Ford*, Law Rep. 2 Eq. 750.

The law is presumed to be equally within the knowledge of all parties.

That a stockholder may relieve himself from his liability by proof that he was misinformed as to the effect of his contract when he made it would be a disastrous doctrine.

That a defendant, who could not by contract lawfully relieve himself from liability as a stockholder, can accomplish that result by proof that it was fraudulently represented to him that he could so relieve himself, would be strange indeed. *Ogilvie* v. *Knox Ins. Co.*, 22 How. 380.

The rule, that a mistake of law does not avail, prevails in equity as well as at common law. *Bank of U. S.* v. *Daniel*, 12 Pet. 32; *Hunt* v. *Rousman*, 1 id. 1; 8 Wheat. 174; *Mellech* v. *Robertson*, 25 Vt. 603; *Leant* v. *Palmer*, 3 Comst. 19.

"If ignorance of law was admitted as a ground of exemption, the court would be involved in questions which it were scarcely possible to solve, and which would render the administration of justice next to impossible; for in almost every case ignorance of law would be alleged, and the court would, for the purpose of determining this point, be often compelled to enter upon questions of fact insoluble and interminable." Austin's Jour., vol. ii. p. 172; Kerr, 397.

A statement that the insurance company had consulted with good lawyers, and that their opinion was as stated, should have been clear proof to the defendant that a representation of the law was a matter of opinion only.

We think the judge erred in not charging as was requested.

The facts upon which the second point arises are these: Assuming that fraudulent representations had been made to the defendant respecting his non-liability for the eighty per cent, and that they were of a character that might relieve him from his contract, it was objected that he had not used proper diligence in discovering the fraud and in repudiating his contract. The transaction took place in August, 1870; and the defendant himself gave evidence "that he never suspected any liability as to said eighty per cent, or that the said representation as to the laws of Illinois were false, until the agent of the assignee made a demand upon him for the eighty per cent in the year 1873; and that, as no claim had been made upon him, he never made any investigation as to the truth of such representations until after said demand in 1873." In February, 1871, the defendant did ask for a rescission of his contract, on the untenable ground that it had been fraudulently represented to him that his note should be retained and held in Bloomfield, Iowa; which representation had been violated by a sale of the same, and a removal thereof to the city of Chicago. The defendant is explicit and emphatic in his evidence that this attempted repudiation "was based wholly on what was represented" as to the intended disposition of the notes and mortgage.

The plaintiff thereupon requested the court to charge the jury as follows: —

"7. That if he, defendant, offered to surrender his stock to the officers of the company, but not upon the ground that he had been

induced to subscribe for the stock upon a fraudulent representation as to his liability for the eighty per cent, but upon another ground, — to wit, that the company had sold and assigned his note and mortgages, — then such offer is immaterial, and the evidence of fraud in such misrepresentations as to his liability for the eighty per cent cannot be made available in this suit, and constitutes no defence in this action.

"12. That if defendant was induced, in August, 1870, to become a stockholder of the Great Western Insurance Company by a representation of the agent of the company that eighty per cent of the stock was non-assessable, and that the laws of the State of Illinois allowed the company to make such contract with those who took stock, then it was the duty of the defendant to use reasonable diligence to ascertain the truth of such representations, and to ascertain what the law of Illinois was on that subject; that if he did not do so within a reasonable time, and did not ascertain the truth of said matter until after the insolvency of the company in 1873, then he cannot, as to the creditors of the company, maintain any defence by means of such representations. The court instructs you, as matter of law, that the defendant could have ascertained the truth of such representations within a few months from the time they were made, and that not doing so is negligence on the part of the defendant that bars such defence as to the assignee."

The defence arising from the alleged promissory representations that the note and mortgage of the defendant should not be removed from Bloomfield, but should be retained in charge of the branch of the company at that place, was frivolous, and was practically abandoned on the trial. The case was submitted to the jury solely on the question arising upon the representations of the non-assessability of the eighty per cent. The attempted rescission on account of the representation as to non-removal and its violation was, however, unfortunately introduced into the charge in a manner that prejudiced the right of the plaintiff.

The requests as above stated were declined; but the judge charged the jury as follows: That, "as respects creditors, the law requires of one, who has been drawn by fraud into the purchase of stock, that he shall be guilty of no negligence or want of reasonable care in discovering the fraud, and, on discovering it, promptly repudiating the purchase. If you find from the

evidence, that, within a few months after receiving the stock certificate, the defendant, discovering that he had been deceived in *some respects*, procured the agent who had obtained his certificate to go to Chicago, delivering to such agent his stock certificate, and instructed the agent to surrender up the stock and demand back the note for twenty per cent; and if the agent accordingly went to Chicago, and offered to the company to surrender the stock and rescind the contract, which the company refused; and if you find that the defendant never afterwards acquiesced in being a member of the company; that in September, 1871, he brought an action of replevin for the note, based on the ground of fraud; and if afterwards he refused to receive any dividend; and if all this took place before bankruptcy or insolvency of the company, — I instruct, that, in point of law, this is a sufficient repudiation of the contract to become a stockholder to enable defendant, living in another State, to resist an action for the payment of the eighty per cent, provided you find that defendant was induced to become a stockholder by fraud, as before explained; and also further find, in view of all the circumstances, that defendant was not unreasonably negligent in discovering the fraud, and was guilty of no want of reasonable diligence in taking steps to repudiate the transaction."

To this charge the plaintiff excepted.

The general principles set forth in this charge are no doubt sound. If the alleged promissory representation as to the non-removal of the note had been available, and had the question been submitted to the jury, the charge would have been well enough. But that question was not before them. The questions submitted to them related exclusively to the representations that the eighty per cent should not be required to be paid. That was the fraud before the jury; and the question involved in the seventh and twelfth requests was this: Assuming that representation to be a fraud which would avoid the contract, had the defendant discharged his duty in discovering that fraud, and repudiating the contract on account of that fraud, and not on account of another fraud not now in question? We think the plaintiff was entitled to the opinion of the jury on that precise question. The charge refused him this right.

The jury were charged, that if, within a few months after receiving the certificate, the defendant, discovering that he had been deceived in some respects, sent an agent to Chicago to surrender his certificate and demand his note, if he never afterwards acquiesced in being a member of the company, if he brought an action of replevin for the note, and if he refused to receive a dividend, this was sufficient evidence of repudiation. This was well enough as to the abandoned fraud which was not before the jury, but was entirely inapplicable to the fraud that was before them. As to that fraud, the defendant testified that he had no knowledge or suspicion of its existence until after the demand made upon him in 1873 by the assignee, and that he never made any investigation as to the truth of the representation as to the eighty per cent liability until after said demand in 1873. On this point there was no contradictory evidence. It should have been ruled as a question of law. *Pettibone* v. *Stevens*, 15 Conn. 19; *Beers* v. *Bottsford*, 13 id. 146. The submission should have been made, if not ruled as a question of law, on these facts only, as requested; and the failure to do so, and the introduction of the facts tending to show a repudiation on the ground of another fraud, could not fail to confuse the jury, and was error on the part of the judge.

Wright's Case (Law Rep. 12 Eq. 1871, pp. 331–351) is an authority on this point. It was there held, first, that, under the English act, a surrender and cancellation of shares did not relieve the holder from his liability to creditors of the bank; and, second, that a surrender by Wright of his shares in November, on the ground of an apprehended difficulty in the affairs of the bank, did not enable him to claim a rescission of his subscription on account of a fraudulent representation in the prospectus of the company, which fraud was then unknown to him. *Henderson* v. *Royal British Bank*, 7 E. & B. 356; *Parris* v. *Harding*, 1 C. B. N. S. 533; *Oates* v. *Turquand*, L. R. 2 Ap. Cas. 325.

The principle laid down in the charge of the judge, that one who claims to have been drawn into a fraudulent purchase must exercise care and vigilance to discover the fraud, and must be prompt in repudiating his contract on the ground

of such fraud, is a sound one. *Thomas* v. *Barton*, 48 N. Y. 193.

The defendant sought to become a member of a corporation of the State of Illinois, and to obtain the benefits and advantages of its special privileges. If he is not held to be bound to know and accept all the consequences of this connection, he certainly is bound to use care and attention to ascertain his position, and promptly to make his choice of retaining it with its advantages and responsibilities, or of abandoning it. To subscribe for stock in a corporation in August, 1870, to rest quietly until the year 1873, never making any investigation as to the position in which he stood until that time, and until after the assignee in bankruptcy had made a demand upon him, falls very far short of what the law requires. Especially is this the case when it is shown that he lived in an adjoining State; that he sent an agent to Chicago, and himself went to that city in 1871 to obtain his note and mortgage from that very company for an alleged misconduct in another respect. It was his plain duty to have inquired and to have ascertained his position long before he did. "A party must use reasonable diligence to ascertain the facts." *Buford* v. *Brown*, 6 B. Mon. 553.

Mere lapse of time, where a party has not asserted his claim with reasonable diligence, is a bar to relief. Relief is not given to those who sleep on their rights. *Beckford* v. *Wade*, 17 Ves. 87–97; *Jones* v. *Tuberville*, 2 Ves. Jr. 11.

Equity will not assist a man whose condition is attributable only to that want of diligence which may be fairly expected from a reasonable person. *Duke of Beaufort* v. *Neald*, 2 Cl. & F. 248–286.

Parties who are shareholders, and claim to be relieved on the ground of fraud, must act with the utmost diligence and promptitude. *Smith's Case*, L. R. 2 Ch. Ap. 613; *Denton* v. *MacNeil*, L. R. 2 Eq. 532; *Peel's Case*, L. R. 2 Ch. Ap. 684.

The judgment must be reversed, and a new trial had.

MR. JUSTICE MILLER (with whom concurred MR. CHIEF JUSTICE WAITE and MR. JUSTICE BRADLEY) dissenting.

I am of opinion, that, where an agent of an existing corporation procures a subscription of additional stock in it by fraudu-

lent representations, the fraud can be relied on as a defence to a suit for the unpaid instalments, when suit is brought by the corporation; and that if the stockholder has in reasonable time repudiated the contract, and offered to rescind before the insolvency or bankruptcy of the corporation, the defence is valid against the assignee of the corporation.

I also think there was evidence of such fraud in this case, and that the question of reasonable diligence in the offer to rescind was fairly put to the jury by the Circuit Court.

SANGER v. UPTON, ASSIGNEE.

1. Where, in a district court of the United States, a corporation was adjudged a bankrupt, an assignee appointed, and an order made that the balance unpaid upon the stock held by the several stockholders should be paid to him by a certain day, that notice of the order should be given by publication in a newspaper or otherwise, and that in default of payment he should collect the amount due from each delinquent stockholder, and it appearing that he had given the notice required, and that the defendant below had failed to make payment pursuant to the order, — *Held*, that the order was conclusive as to the right of the assignee to bring suit to enforce such payment.
2. The court pronouncing the decree of bankruptcy had jurisdiction and authority to make the order; and it was not necessary that the stockholders should have received actual notice of the application therefor. In contemplation of law, they were before the court in all the proceedings touching the corporation of which they were members.
3. It was competent for the court to order payment of the unpaid stock subscriptions, as the directors, under the instructions of a majority of the stockholders might, before the decree in bankruptcy, have done.
4. The capital stock of an incorporated company is a fund set apart for the payment of its debts.
5. As the company might have sued a stockholder for his unpaid subscription at law, the assignee succeeding to all its rights has the same remedy.
6. It appearing in evidence that two certificates of stock in blank as to the stockholder's name were issued and delivered to the plaintiff in error, that she had paid to the company all that was then payable, and received a dividend, and that her name was placed upon the stock list, she was estopped from denying her ownership.

ERROR to the Circuit Court of the United States for the Northern District of Illinois.

This was an action of assumpsit, brought by Clark W. Upton,

as assignee in bankruptcy of the Great Western Insurance Company, against Mary C. Sanger, for the balance unpaid on her stock. The Bankruptcy Court made an order that the amount unpaid on the capital stock of the corporation should be paid to the assignee on or before Aug. 15, 1872, and, in default thereof, that the assignee proceed to collect the same; and that notice of this order be given to the stockholders by publication or otherwise. Notice was given by publication, and by mailing to each subscriber a copy of the order, with a demand for payment. Defendant below failing to pay, this suit was brought. The evidence offered on the part of the plaintiff below, and excepted to by the defendant below, is stated in the opinion of the court.

Mr. H. S. Monroe and *Mr. L. H. Bisbee* for plaintiff in error.

1. Plaintiff in error not bound by the order of July 5, 1872, as she was not before the court.

2. Under the evidence in the case, the plaintiff in error was not liable.

Mr. L. H. Boutell for defendant in error.

1. The District Court had authority to pass the order of July 5, 1872. Upon the bankruptcy of the company, its corporate powers, so far at least as they were necessary for the winding up of its affairs, were transferred to that court.

2. No notice to the stockholders of the application to the District Court for the assessment was necessary. *Ward* v. *Griswold Manuf. Co.*, 16 Conn. 593; *Ex parte Herodry*, 15 Ves. 498; *Ogilvie et al.* v. *Knox Co. Ins. Co.*, 22 How. 380; Angell & A. on Corp. (9th ed.) 599–604; *Sawyer* v. *Hoag*, 17 Wall. 610, 619.

3. An action at law is the proper remedy.

MR. JUSTICE SWAYNE delivered the opinion of the court.

Several errors are assigned and relied upon touching the admission of evidence and the instructions given to the jury.

We shall give our views of the case as it is presented in the record, so as to meet these objections without adverting specifically to any of them.

The original charter of the Great Western Insurance Company fixed its capital at $100,000. By an amendment of the

charter, the capital was increased to $5,000,000. It became insolvent. A petition was filed against it in the District Court of the United States for the Northern District of Illinois; and on the 6th of February, 1872, it was adjudged a bankrupt. On the 11th of April, 1872, the defendant in error was appointed its assignee in bankruptcy. Upon the application of the assignee, the District Court made an order that the balance unpaid upon the stock held by the several stockholders should be paid to the assignee on or before the fifteenth day of August, 1872; that notice of the order should be given by publication in a newspaper or otherwise; and that, in default of payment, the assignee should proceed to collect the amount due from each delinquent. The assignee gave notice by publishing the order accordingly, and by mailing a copy, with a demand of payment, to each stockholder. The plaintiff in error was so notified. It was claimed that she was the owner of $10,000 of the stock, upon which it was alleged there was due sixty per cent. The original charter required the payment of five per cent of the capital stock, and that the balance should be secured in the manner prescribed. The amended charter is silent upon the subject. The stock certificates issued by the company set forth that twenty per cent was to be paid in four quarterly instalments of five per cent each, "the balance being subject to the call of the directors as they may be instructed by the majority of the stockholders represented at any regular meeting."

This was a regulation of the company, and not a requirement of either the original or amended charter. It did not appear that any call was ever made by the directors, or authorized by the stockholders.

The plaintiff in error having failed to pay pursuant to the order of the court, this suit was instituted by the assignee.

The order was conclusive as to the right of the assignee to bring the suit. Jurisdiction was given to the District Court by the Bankrupt Act (Rev. Stat., sect. 4972) to make it. It was not necessary that the stockholders should be before the court when it was made, any more than that they should have been there when the decree of bankruptcy was pronounced. That decree gave the jurisdiction and authority to make the order. The plaintiff in error could not, in this action,

question the validity of the decree; and, for the same reasons, she could not draw into question the validity of the order. She could not be heard to question either, except by a separate and direct proceeding had for that purpose. She might have applied to the District Court to revoke or modify the order. Had she done so, she would have been entitled to be heard; but it does not appear that any such application was made. As a stockholder, she was an integral part of the corporation. In the view of the law, she was before the court in all the proceedings touching the body of which she was a member. In point of fact, stockholders in such cases can hardly be ignorant of the measures taken to reach the effects of the corporation. If they choose to rest supine until cases against them like this are on trial, they must take the consequences. Not having spoken before, they cannot be permitted to speak then, especially to make an objection which looks rather to the embarrassment and delay than to the right and justice of the case. A different rule would be pregnant with mischief and confusion. *Hall* v. *U. S. Ins. Co.*, 5 Gill, 484; *Sagory* v. *Dubois*, 3 Sandf. Ch. 510.

This court has applied the same rule to an order made by the comptroller of the currency, under the fiftieth section of the National Bank Act, appointing a receiver, and directing him to proceed to make collections from the stockholders of an insolvent bank. *Kennedy* v. *Gibson and Others*, 8 Wall. 505.

In that case it was said, "It is for the comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or any part, and, if a part, how much, should be collected. These questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders cannot controvert it. Its validity is not to be questioned in the litigation that may ensue. He may make it at such time as he may deem proper, and upon such data as shall be satisfactory to him."

This principle was applied also in *Cadle, Receiver*, v. *Baker & Co.*, 20 Wall. 650.

It was competent for the court to order payment of the stock, as the directors under the instruction of a majority of the stock-

holders might, before the decree in bankruptcy, have done. The former is as effectual as the latter would have been. It may, perhaps, be well doubted whether the stockholders would have voluntarily imposed such a burden upon themselves. The law does not permit the rights of creditors to be subjected to such a test. It would be contrary to the plainest principles of reason and justice to make payment by the debtor for such a purpose in any wise dependent upon his own choice. A court of equity has often made and enforced the requisite order in such cases. The Bankrupt Court possessed the same power in the case in hand. The order rests upon a solid foundation of reason and authority. *Ward* v. *The Griswold Manuf. Co.*, 16 Conn. 599; *Adler* v. *The Mil. Pat. Brick Manuf. Co. et al.*, 13 Wis. 61; *Sagory* v. *Dubois*, 3 Sandf. Ch. 510; *Man* v. *Pentz*, 2 id. 285.

A resolution or agreement that no further call shall be made is void as to creditors. 3 Sandf. Ch., *supra*. An agreement that a stockholder may pay in any other medium than money is also void as a fraud upon the other stockholders, and upon creditors as well. *Henry et al.* v. *Vermilion & A. R.R. Co.*, 17 Ohio St. 187. The owner of stock cannot escape liability by taking it in the name of his infant children. *Roman* v. *Fry*, 6 J. J. Mar. 634. Nor is it any defence to show that the holder took and held the stock as the agent of the corporation, to sell for its benefit. *Allibone* v. *Hager*, 46 Penn. St. 48.

The capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liability which subsists in private copartnerships. When debts are incurred, a contract arises with the creditors that it shall not be withdrawn or applied, otherwise than upon their demands, until such demands are satisfied. The creditors have a lien upon it in equity. If diverted, they may follow it as far as it can be traced, and subject it to the payment of their claims, except as against holders who have taken it *bona fide* for a valuable consideration and without notice. It is publicly pledged to those who deal with the corporation, for their security. Unpaid stock is as much a part of this pledge, and as much a part of the assets of the company, as the cash which has been paid in upon it. Creditors have the same right to look to it

as to any thing else, and the same right to insist upon its payment as upon the payment of any other debt due to the company. As regards creditors, there is no distinction between such a demand and any other asset which may form a part of the property and effects of the corporation. *Curran* v. *Arkansas*, 15 How. 308; *Wood* v. *Dummer*, 3 Mas. 308; *Slee* v. *Bloom*, 19 Johns. 474; *Briggs* v. *Penniman*, 8 Cow. 387; *Society, &c.* v. *Abbot*, 2 Beav. 559; *Walworth* v. *Holt*, 4 Myl. & C. 789; *Ward* v. *Griswoldville Man. Co.*, 16 Conn. 598; *Fowler* v. *Robinson*, 31 Me. 789; Angell & A. on Corp., sect. 600 and *post*; *Wright* v. *Petrie*, 1 Sm. & M. 319; *Nathan* v. *Whitelock*, 3 Edw. C. 215; 4 Am. Law Mag. 93.

The earliest authority upon the point under consideration is *Dr. Salmon* v. *The Hamborough Company*, decided in 1670. 1 Cas. in Ch. 204; 6 Viner's Abridg. 310, 311. The bill in that case alleged that Salmon held a bond of the company of eighteen hundred pounds, given to him for lent money. The company was incorporated, and had power to assess rates upon cloths, in which it dealt, "and, by poll on every member, to defray the charges of the company." The company had imposed rates accordingly, — to wit, "4*s*. 6*d*. upon every white cloth exported, and divers others, — and thereby raised eight thousand pounds per annum," &c.

"And the bill did charge, that, the company having no common stock, the plaintiff had no remedy at law for his debt, but did charge that their usage had been to make taxes, and levy actions upon the members and their goods, to bear the charge of their company to pay their debts; and did complain that they now did refuse to execute that power; and did particularly complain against divers of the members by name, that they did refuse to meet and lay taxes, and that they did pretend want of power by their charter to lay such taxes; whereas they had formerly exercised power, and thereby gained credit: whereupon the plaintiff lent them two thousand pounds, which was for the use and support of the company's charge, and so ought to be made good by them, and so prayed to be relieved."

The company, though served with a process, failed to appear. "But divers particular members, being served in their natural capacities, did appear, and demur for that they were not in that

capacity liable to the plaintiff's demand." The Lord Chancellor sustained the demurrer, and, as to them, dismissed the bill. The case was taken by appeal to the House of Lords. There the decree of the Chancellor was reversed; and the case was remanded to his court, with directions to cause the officers of the company "to make such *leviation* upon every member of said company who is to be contributory to the public charge as shall be sufficient to satisfy the said sum to be decreed to the plaintiff in this cause, and to collect and levy the same, and to pay it over to the plaintiff as the court shall direct." Ample provision was made in the decree for the enforcement of this order. See also *Curson* v. *The African Co.*, decided in 1682, 1 Vern. 124.

By the deed of assignment, all the property and effects of every kind, which belonged to the company when the petition to have it declared a bankrupt was filed, passed to the assignee. Bump on Bankruptcy, 473, 478; Rev. Stat. sect. 5044. He was clothed with the power and duty to sue whenever suit was necessary. The statute in terms gave him the same right in any litigation he might institute which the bankrupt would have had "if the decree in bankruptcy had not been rendered, and no assignment had been made." Id. sect. 5047; Bump on Bank. 528. The liability of the plaintiff in error, and the right and title of the company, were legal in their character. If the company had sued, it might have sued at law. The rights of the company passed to the assignee, and he also could enforce them by a legal remedy. The assignee was subrogated to all the rights, legal and equitable, of the bankrupt corporation. This suit was, therefore, well brought in the form adopted. *Hall* v. *U. S. Ins. Co.*, 5 Gill, 484.

The assignee might have filed a bill in equity against all the delinquent shareholders jointly. *Ogilvie et al.* v. *Knox Ins. Co. et al.*, 22 How. 380. But if the company is utterly insolvent, in any event, a separate action at law in each case is much to be preferred. It is cheaper, more speedy, and more effectual. If the contingency should occur that the assets realized exceed the liabilities to be met, the District and Circuit Courts will see that no wrong is done to those adversely concerned. It is not to be doubted that this power will be exercised upon all proper occasions.

Upon the trial a large mass of testimony was given by the plaintiff, consisting of a prospectus and the original charter of the company, certified copies of the papers in the office of the secretary of the State touching the amendment to the charter, the deed of the register to the assignee, the petition of the assignee and order of the District Court relative to further stock payments, and proof of the publication of the order, and of the sending of a copy of the order, with a demand of payment, to the defendant by mail. The admission of all this evidence was excepted to. Further testimony was given tending to prove that the defendant bought and received from the company two stock certificates of $5,000 each, dated March 10, 1870, in the usual form, and in all respects complete, except that there was a blank for the name of the owner, which was not filled up. And further, —

"That said defendant paid for said stock twenty per cent of the par value of the same, paying part of said twenty per cent in northwestern land scrip, and giving her notes for the balance of said twenty per cent, which notes were duly paid to said company; and that said stock stood in her name upon the books of said company, and that there was evidence introduced tending to show that she received a dividend from said company thereon.

"And that shortly after the fire of Oct. 9, 1871, General Stewart, the president of the company, and brother of defendant, paid for her a call of twenty per cent made upon said certificates of stock by the company; but that said defendant never authorized such payment, but repudiated the same, and that no more than forty per cent had ever been paid on said stock.

"No evidence was introduced tending to show that said defendant ever subscribed for said certificates of stock or for any stock of said company, or that her name appeared on any list of stockholders of said stock circulated by said company.

"No other express contract was shown to have been made between said company and defendant."

The court charged the jury, in effect, that, if they believed the testimony, the defendant was liable. The charge was excepted to by the defendant. It was clearly correct. The only question was, whether she owned the stock. No one else claimed it. The certificates were issued and delivered to her. They belonged to her. They were the muniment of her title.

She could have filled the blanks with her name whenever she thought proper. She had paid to the company all that was then payable, and subsequently received a dividend. Her name was placed upon the stock list. These facts were conclusive against her. She was estopped from denying her ownership. She could not assert her title if there were a profit, and deny it if there were a loss. The certificates showed the par of the stock and the amount to be paid. Upon receiving them, the law implied an agreement on her part to respond to the balance whenever called upon in any lawful way to do so. No special express agreement, written or oral, was necessary. The former was as obligatory as the latter could have been. It would be a mockery of justice to permit such an objection to prevail. *Ellis* v. *Schmoeck and Thomas*, 5 Bing. 521; *Doubleday* v. *Musket et al.*, 7 id. 110; *Harvey et al.* v. *Kay*, 9 Barn. & Cress. 356; *Upton, Assignee*, v. *Tribilcock*, *supra*, p. 45.

Where there are defects in the organization of a corporation which might be fatal upon a writ of *quo warranto*, a stockholder who has participated in its acts as a corporation *de facto* is estopped to deny its rightful existence. *Eaton et al.* v. *Aspinwall*, 19 N. Y. 119; *Abbot* v. *Aspinwall*, 26 Barb. 202.

Where a party executes a deed-poll, reserving rent, and the grantee enters into possession, he is under the same liability to pay such rent as if the deed were an indenture *inter partes*, and he had executed it. The law implies a promise to pay which may be enforced by an action of *indebitatus assumpsit*. *Goodwin et al.* v. *Gilbert et al.*, 9 Mass. 484. It has been held frequently in cases of this class, where the instrument was under seal and executed by only one of the parties, that covenant would lie against the other. *Finley* v. *Simpson*, 2 Zabr. 310.

We find no error in the record, and the judgment is affirmed.

CARVER v. UPTON, ASSIGNEE.

ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The decision of this case is controlled by the opinion in *Sanger* v. *Upton, Assignee*, *supra*, p. 56.

The judgment of the Circuit Court is affirmed.

WEBSTER *v.* UPTON, ASSIGNEE.

1. The doctrine announced in *Upton* v. *Tribilcock, supra,* that the original holders of the stock of a corporation are liable for the unpaid balances at the suit of its assignee in bankruptcy, without any express promise to pay, reaffirmed.
2. The transferee of stock is liable for calls made after he has been accepted by the company as a stockholder, and his name registered on the stock books as a corporator; and, being thus liable, there is an implied promise that he will pay calls made upon such stock while he continues its owner.
3. A purchase of stock is of itself authority to the vendor to make a legal transfer thereof to the vendee on the books of the company.

ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The facts are stated in the opinion of the court.

Submitted on printed arguments by *Mr. E. Van Buren* for the plaintiff in error, and *Mr. L. H. Boutell* for the defendant in error.

MR. JUSTICE STRONG delivered the opinion of the court.

The Great Western Insurance Company, of which the plaintiff below is the assignee in bankruptcy, was incorporated under the laws of Illinois in 1857, with general power to insure all kinds of property against both fire and marine losses. Subsequently to its organization, its capital was increased to more than $1,000,000, and it was authorized by law further to increase its capital to $5,000,000. It does not appear, however, from the record, that, of the stock subscribed, more than about $222,000 was ever paid in, — a sum equal to nearly twenty per cent of the par value, — leaving over $965,000 of subscribed capital unpaid. In this condition the company went into bankruptcy in 1872, owing a very large sum, equal to if not greater than its entire subscribed capital; and Clark W. Upton, the plaintiff, became the assignee. The District Court then directed a call to be made for the eighty per cent remaining unpaid of the capital stock. A call was accordingly made; and, payments having been neglected, the assignee brought this suit against the defendant, averring that he was the holder of one hundred shares, of the par value of one hundred dollars each, and, as such, responsible for the

eighty per cent unpaid. On the trial, evidence was given tending to show that one Hale was the owner of a large amount of the stock of the company, for which he held the company's certificates; and that he had, through his brother, sold one hundred shares to the defendant, on which twenty per cent had been paid. The books of the company had been destroyed in the great fire in Chicago in 1871; but there was evidence tending to show that the defendant's name was on the stock ledger, and that the defendant transferred, or caused the stock bought from Hale to be transferred to himself on the books of the company. The district judge submitted to the jury to find whether the defendant actually thus became a stockholder, recognized as such on the books of the company; instructing them, that, if he did, he was liable for the eighty per cent unpaid as if he had been an original subscriber. A verdict and judgment having been recovered by the plaintiff, the case was removed by writ of error to the Circuit Court, where the judgment was affirmed; and the judgment of affirmance we are now called upon to review.

The leading assignment of error here is that the court below erroneously ruled that an assignee of stock, or of a certificate of stock, in an insurance company, is liable for future calls or assessments without an agreement or promise to pay. This, however, is not a fair statement of what the court did rule. The court instructed the jury, in effect, that the transferee of stock on the books of an insurance company, on which only twenty per cent of its nominal value has been paid, is liable for calls for the unpaid portion made during his ownership, without proof of any *express* promise by him to pay such calls. This instruction, we think, was entirely correct. The capital stock of an insurance company, like that of any other business corporation, is a trust fund for the protection of its creditors or those who deal with it. Neither the stockholders, nor their agents the directors, can rightfully withhold any portion of the stock from the reach of those who have lawful claims against the company. And the stock thus held in trust is the whole stock, not merely that percentage of it which has been called in and paid. This has been decided so often, that it has become a familiar doctrine. But what is it worth if there is

no legal liability resting on the stockholders to pay the unpaid portion of their shares, unless they have expressly promised to pay it? Stockholders become such in several ways, — either by original subscription, or by assignment of prior holders, or by direct purchase from the company. An express promise is almost unknown, except in the case of an original subscription; and oftener than otherwise it is not made in that. The subscriber merely agrees to take stock. He does not expressly promise to pay for it. Practically, then, unless the ownership of such stock carries with it the legal duty of paying all legitimate calls made during the continuance of the ownership, the fund held in trust for creditors is only that portion of each share which was paid prior to the organization of the company, — in many cases, not more than five per cent; in the present, only twenty. Then the company commences business and incurs obligations, representing all the while to those who deal with it that its capital is the amount of stock taken, when in truth the fund which is held in trust for creditors is only that part of the stock which has been actually paid in. This cannot be. If it is, very many corporations make fraudulent representations daily to those who give them credit. The Great Western Insurance Company reported to the auditor of public accounts, as required by law, that the amount of its capital stock outstanding (par value of shares $100 each) was $1,188,000, that the amount of paid-up capital stock was $222,831.42, and that the amount of subscribed capital for which the subscribers or holders were liable was $965,168.58. This report was made on the 10th of January, 1871. Thus those who effected insurances with the company were assured that over one million of dollars were held as a trust fund to secure the company's payment of their policies. But, if the subscribers and holders of the shares are not liable for the more than eighty per cent unpaid, the representation was untrue. Persons assured have less than one-fifth the security that was promised them. This is not what the statutes authorizing the incorporation of the company contemplated. The stock was required to be not less than a given amount, though the company was authorized to commence business when five per cent of that amount was paid in. Why fix a minimum amount of stock if all of it was not

intended to be a security for those who obtained insurance? There is no conceivable reason for such a requirement, unless it be either to provide for the creditors a capital sufficient for their security, or to secure the stockholders themselves against the consequences of an inadequate capital. The plain object of the statute, therefore, would be defeated if there is no liability of the stockholder to pay the full prescribed amount of each share of his stock. With this plain object of the legislature in view, it must be assumed, after the verdict of the jury, the defendant voluntarily became a stockholder. Either he must have designed to defeat the legislative intent, or he must have consented to carry it out. The former is not to be presumed; and if the latter was the fact, coming as he did into privity with the company, there is a necessary implication that he undertook to complete the payment of all that was unpaid of the shares he held whenever it should be demanded. To constitute a promise binding in law, no form of words is necessary. An implied promise is proved by circumstantial evidence; by proof of circumstances that show the party intended to assume an obligation. A party may assume an obligation by putting himself into a position which requires the performance of duties.

What we have said thus far is applicable to the case of an original subscriber to the stock, and equally to a transferee of the stock who has become such by transfer on the books of the company. There are, it is true, decisions of highly respectable courts to be found, in which it was held that even a subscriber to the capital stock of an incorporated company is not personally liable for calls, unless he has expressly promised to pay them, or unless the act of incorporation or some statute declares that he shall pay them. Such was the decision of a Supreme Court of New York, in *The Fort Edward and Fort Miller Plank Road Company* v. *Payne*, 17 Barb. 567. A similar ruling was made in *The Kennebec and Portland Railroad Company* v. *Kendall*, 31 Me. 470. A like ruling has also been made in Massachusetts. In most if not all of these cases, it appeared that the law authorizing the incorporation of the companies had provided a remedy for non-payment of calls or assessments of the unpaid portions of the stock taken. The company was authorized to

declare forfeited or to sell the stock for default of the stockholder; and, the law having given such a remedy, it was held to be exclusive of any other. Yet in them all it was conceded, that, if the statute had declared the calls or assessments should be paid, an action of assumpsit might be maintained against the original stockholder on a promise to pay, implied only from the legislative intent. Surely the legislative intent that the full value of the stock authorized and required to be subscribed, in other words, the entire capital, shall be, in fact, paid in when required, — that it shall be real, and not merely nominal, — is plain enough when the authority to exist as a corporation and to do business is given on condition that the capital subscribed shall not be less than a specified sum. A requisition that the subscribed stock shall not be less than one million of dollars would be idle if the subscribers need pay only a first instalment on their subscriptions; for example, five per cent. Manifestly that would not be what the law intended; and, if its intent was that the whole capital might be called in, it is difficult to see why a subscriber, knowing that intent, and voluntarily becoming a subscriber, does not impliedly engage to pay in full for his shares when payment is required. It is, however, unnecessary to discuss this question further; for it is settled by the judgment of this court. In *Upton, Assignee*, v. *Tribilcock*, *supra*, 45, we ruled that the original holders of the stock are liable for the unpaid balances at the suit of the assignee in bankruptcy, and that without any express promise to pay. The bankrupt corporation in that case was the same as in this.

But, if the law implies a promise by the original holders or subscribers to pay the full par value when it may be called, it follows that an assignee of the stock, when he has come into privity with the company by having stock transferred to him on the company's books, is equally liable. The same reasons exist for implying a promise by him as exist for raising up a promise by his assignor. And such is the law as laid down by the text-writers generally, and by many decisions of the courts. *Bond* v. *The Susquehanna Bridge*, 6 Har. & J. 128; *Hall* v. *United States Insurance Company*, 5 Gill, 484; *Railroad Company* v. *Boorman*, 12 Conn. 530; *Haddersfield Canal Company* v. *Buckley*, 7 T. M. 36. There are a very few cases, it

must be admitted, in which it has been held that the purchaser of stock, partially paid, is not liable for calls made after his purchase. Those to which we have been referred are *Canal Company* v. *Sansom*, 1 Binn. 70, where the question seems hardly to have been considered, the claim upon the transferee having been abandoned; and *Palmer* v. *The Ridge Mining Company*, 34 Penn. St. 288, which is rested upon *Sansom's Case*, and upon the fact, that, by the charter, the company was authorized to forfeit the stock for non-payment of calls. We are also referred to *Seymour* v. *Sturgess*, 26 N. Y. 134, the circumstances of which were very peculiar. In neither of these cases was it brought to the attention of the court that the stock was a trust fund held for the protection of creditors in the first instance, a fund no part of which either the company or its stockholders was at liberty to withhold. They do not, we think, assert the doctrine which is generally accepted. In Angell and Ames on Corporations, sect. 534, it is said, —

"When an original subscriber to the stock of an incorporated company, who is so bound to pay the instalments on his subscription from time to time as they are called in by the company, transfers his stock to another person, such other person is substituted not only to the rights, but to the obligations, of the original subscriber, and he is bound to pay up the instalments called for after the transfer to him. The liability to pay the instalments is shifted from the outgoing to the incoming shareholder. A privity is created between the two by the assignment of the one and the acceptance of the other, and also between them and the corporation; for it would be absurd to say, upon general reasoning, that, if the original subscribers have the power of assigning their shares, they should, after disposing of them, be liable to the burdens which are thrown upon the owners of the stock."

So in Redfield on Railways, 53, it is said the cases agree that whenever the name of the vendee of shares is transferred to the register of shareholders, the vendor is exonerated, and the vendee becomes liable for calls. We think, therefore, the transferee of stock in an incorporated company is liable for calls made after he has been accepted by the company as a stockholder, and his name has been registered on the stock books as a corporator; and, being thus liable, there is an implid promise that he will pay calls made while he continues the owner.

All the cases agree that creditors of a corporation may compel payment of the stock subscribed, so far as it is necessary for the satisfaction of the debts due by the company. This results from the fact that the whole subscribed capital is a trust fund for the payment of creditors when the company becomes insolvent. From this it is a legitimate deduction that the stock cannot be released; that is, that the liabilities of the stockholders cannot be discharged by the company to the injury of creditors without payment. The fact, therefore, that in this case the certificate of stock taken by the defendant below was marked "non-assessable," is of no importance. The suit is brought by the assignee in bankruptcy, who represents creditors; and, as against him, the company had no right to release the holders of the stock from the payment of the eighty per cent unpaid.

The second assignment of error and the third are, in substance, that the court should not have admitted in evidence the order of the District Court, directing a call by the assignee of the unpaid balance of the stock, and should not have ruled that the call made under the order was effective to make the liability of the defendant complete. That these assignments cannot be sustained was decided in *Sanger* v. *Upton*, *supra*, p. 56, — a case before us at this term. Nothing more need be said in reference to them.

The last assignment of any thing that can be assigned for error is, that the court charged the jury as follows: "The only question is, was the defendant a stockholder of the company? If the testimony satisfies you that the defendant purchased of Hale one hundred shares of this stock, and that it was transferred in the books of the company, either by Webster, the defendant, or by Hale, who sold the stock, or by the direction of either of them, then the defendant is liable the same as if he had subscribed for the stock." The objection urged against this is that a transfer on the books directed by Hale, after the purchase by Webster, could not affect the latter's liability. But, if Webster became the purchaser, it was his vendor's duty to make the transfer to him, where only a legal transfer could be made, — namely, on the books of the company; and the purchase was in itself authority to the vendor to make the transfer.

Still further, it was Webster's duty to have the legal transfer made to relieve the vendor from liability to future calls. A court of equity will compel a transferee of stock to record the transfer, and to pay all calls after the transfer. 3 De G. & Sm. Ch. 310. If so, it is clear that the vendor may himself request the transfer to be made; and that, when it is made at his request, the buyer becomes responsible for subsequent calls. This, however, does not interfere with the right of one who appears to be a stockholder on the books of a company to show that his name appears on the books without right and without his authority.

The judgment of the Circuit Court is affirmed.

UNITED STATES v. UNION PACIFIC RAILROAD COMPANY.

1. The solution of the question, whether the Union Pacific Railroad Company is required to pay the interest before the maturity of the principal of the bonds issued by the United States to the company, depends on the meaning of the fifth and sixth sections of the original act of 1862 "to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes," and of the fifth section of the amendatory act of 1864. *Held*, upon consideration of said sections, of the scheme of said original act, and of the purposes contemplated by it, that it was not the intention of Congress to require the company to pay the interest before the maturity of the principal of the bonds.
2. As commonly understood, the word "maturity," in its application to bonds and other similar instruments, applies to the time fixed for their payment, which is the termination of the period they have to run.
3. A provision in the charter that the grants thereby made are upon the condition that the company "shall pay said bonds at maturity," while it implies an obligation to pay both principal and interest when the bonds shall become due, does not imply an obligation to pay the interest as it semi-annually accrues.
4. In construing an act of Congress, the court may recur to the history of the times when it was passed, in order to ascertain the reason for, as well as the meaning of, particular provisions in it; but the views of individual members in debate, or the motives which induced them to vote for or against its passage, cannot be considered.

APPEAL from the Court of Claims.

Under the authority of the second section of the act of Con-

gress of March 3, 1873,[1] the Union Pacific Railroad Company filed its petition in the Court of Claims, alleging that it had rendered services to the government in the transportation of the mails, troops, supplies, and public stores of the United States, between the dates of February, 1871, and February, 1874, both inclusive, and praying for judgment that the United States pay the company one half part of the amount due for such services, and give credit to the company on account of the bonds issued by the United States in aid of the construction of the road to the amount of the remaining half part of said amount.

The United States filed an answer and counterclaim denying their indebtedness, and alleging that they had issued to the company their coupon bonds to the amount of $100,000,000, bearing interest at the rate of six per cent per annum, payable semi-annually, pursuant to the acts of Congress of July 1, 1862, and July 2, 1864, and paid to the holders of said bonds, at the stated semi-annual periods, the interest due thereon; and that the company, although bound by law to reimburse them for payments so made for such interest, had never paid any part thereof; and they prayed judgment against the company for $12,000,000.

The provisions of the acts of July 1, 1862, and the amendatory act of July 2, 1864, which bear upon the questions at issue, are as follows: —

Act of July 1, 1862, 12 Stat., p. 489. "SECT. 5. The Secretary of the Treasury shall, upon the certificate in writing of said commissioners, . . . issue to said company bonds of the United States of

[1] That the Secretary of the Treasury is directed to withhold all payments to any railroad company and its assigns, on account of freights or transportation over their respective roads, of any kind, to the amount of payments made by the United States for interest upon bonds of the United States issued to any such company, and which shall not have been reimbursed, together with the five per cent of net earnings due and unapplied, as provided by law; and any such company may bring suit in the Court of Claims to recover the price of such freight and transportation; and in such suit the right of such company to recover the same upon the law and the facts of the case shall be determined, and also the rights of the United States upon the merits of all the points presented by it in answer thereto by them; and either party to such suit may appeal to the Supreme Court; and both said courts shall give such cause or causes precedence of all other business."

one thousand dollars each, payable in thirty years after date, bearing six per centum per annum interest, said interest payable semi-annually, . . . to the amount of sixteen of said bonds per mile; . . . and to secure the repayment to the United States, as hereinafter provided, of the amount of said bonds so issued and delivered to said company, together with all interest thereon which shall have been paid by the United States, the issue of said bonds and delivery to the company shall *ipso facto* constitute a first mortgage on the whole line of the railroad and telegraph, together with the rolling stock, fixtures, and property of every kind and description; and, in consideration of which, said bonds may be issued; and on the refusal or failure of said company to redeem said bonds, or any part of them, when required to do so by the Secretary of the Treasury, in accordance with the provisions of this act, the said road, with all the rights, functions, immunities, and appurtenances thereto belonging, and also all lands granted to the said company by the United States which at the time of said default shall remain in the ownership of said company, may be taken possession of by the Secretary of the Treasury for the use and benefit of the United States.

"SECT. 6. The grants aforesaid are made upon condition that said company shall pay said bonds at maturity; . . . and all compensation for services rendered for the government shall be applied to the payment of said bonds and interest until the whole amount is fully paid. Said company may also pay the United States, wholly or in part, in the same or other bonds, treasury notes or other evidences of debt against the United States, to be allowed at par; and after said road is completed, until said bonds and interest are paid, at least five per cent of the net earnings of said road shall also be annually applied to the payment thereof."

Act of July 2, 1864, 13 Stat., p. 356. "SECT. 5. Only one-half of the compensation for services rendered for the government shall be required to be applied to the payment of the bonds issued by the government in aid of the construction of said road."

The Court of Claims found in favor of the company, and adjudged that it recover from the United States $512,632.50, and that the counterclaim of the United States be dismissed.

The United States appealed to this court.

Mr. Attorney-General Pierrepont for the appellant.

The primal question is, whether the railroad company is

bound to reimburse the interest as the same falls due, or whether it may postpone the payment thereof (which the government advances half-yearly) until the maturity of the bonds.

Should the decision on this question be adverse to the appellant, then the only other question is, whether the government can retain all the earnings of the company made in the service of the government, or only half thereof.

In 1862, Walter S. Burgess and his associates obtained a charter from the United States to build the Union Pacific Railroad, subject to the conditions, *inter alia*, that the company shall do the government's transportation at rates not to exceed the amounts paid by private parties; that all compensation for services rendered for the government shall be applied to the payment of the bonds and interest; and that after the road is completed, until the bonds and interest are paid, at least five per centum of the net earnings shall be annually applied to the payment thereof.

Two years went by. This corporation then procured the passage of the act of 1864, which confers large additional donations and privileges. Sects. 5 and 10 grant an extension of one year for completing the road, and require that only one-half of the compensation for services rendered the government shall be applied to the payment of the bonds. They authorize the company, on the completion of each section of the road and telegraph line, to issue its bonds to an amount not exceeding the amount of those issued to it by the United States; and they give to the mortgage for securing its bonds priority over that of the United States.

In 1871, Congress required the Secretary of the Treasury to pay over to the company, in money, one-half of the compensation for services to the United States theretofore or thereafter rendered; but declared that this provision should not affect the legal rights of the government or the obligations of the company, except as therein specially provided.

In 1873, Congress passed the act of March 3.

It is submitted, *First*, The question before the court is, whether the United States are entitled to retain the whole value of the service which they have received from the company, and apply the same towards payment of the interest ad-

vanced from time to time by the government upon the bonds loaned to the company, — a question not embarrassed by the acts of 1864 and 1871, as they were repealed by the act of 1873.

The whole question of the liability of the company to pay the interest on the government bonds before their maturity is raised by the counterclaim set up by the United States, and is before the court.

Second, That the Union Pacific Railroad Company is a private corporation has been settled. *The Company* v. *Peniston*, 18 Wall. 31.

A grant of privileges and exemptions to a corporation is strictly construed. *Ohio Life & Trust Co.* v. *Debolt*, 16 How. 435; *Dubuque & Pacific R.R.* v. *Litchfield*, 23 id. 88, 89; Opinion of Attorney-General Black, 9 Opinions of Attorneys-General, 59, 60.

Third, Applying these and other well-settled principles of construction to the statutes relating to the company, there is no difficulty in arriving at their true meaning.

There is nothing ambiguous about the fifth section of the act of 1862. The government proposed to advance to the company bonds bearing interest at six per cent, "said interest payable semi-annually;" and, to secure them *according to their terms*, the company agreed to give a first mortgage, and also to give additional security for the *interest* as well as the principal. The mortgage was *executed* when the company received the bonds.

Fourth, By the act of 1864, the company is required to assume nothing; but the *absolute right* to amend or repeal is reserved.

Fifth, The fact that the company, under the act of 1864, issued its mortgage to secure the same amount of bonds as it was entitled to receive from the government, and made the interest thereon payable *half-yearly*, is conclusive as to the understanding of the company when it filed its assent to the provisions of the act.

The Attorney-General referred at some length to the consequences to the government should the decision be against it, and cited the debates in Congress on the passage of the act of 1862 as furnishing the clearest proof of the purpose of that body to require the immediate repayment by the company of the interest advanced by the government.

Mr. Sidney Bartlett and *Mr. E. W. Stoughton* for appellee.

The rule, that, where the entire purpose of a charter is to confer bounties on corporations, the construction of any provision therein about which there is doubt must be in favor of the government, does not extend to charters where there are stipulations for services, or pecuniary returns by the party endowed. *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420; *Ohio L. & T. Co.* v. *Debolt*, 16 How. 435; *Dubuque & P. R. Co.* v. *Litchfield*, 23 id. 88. That the charter of the Union Pacific Railroad Company contains such stipulations, either by condition or contract, cannot be controverted.

The only sections having a direct bearing upon the question at issue — the right of the government to have the immediate reimbursement of the interest paid by it — are five, six, and seventeen of the act of July 1, 1862, and five of the act of July 2, 1864. Under them, we submit, that while conditions are imposed on the company, a breach of which would work a forfeiture, there is no assumpsit or covenant, express or implied, *on which, by action at law or set-off*, the company can be compelled to reimburse the principal or interest of the bonds issued to it; but should we concede that such a covenant or assumpsit could be found in the charter, then the covenant or assumpsit to pay the interest is to pay the same as each bond or class of bonds *matures*, and not from time to time, each six months, as it shall have been paid by the government.

Upon an analysis of the charter as to the time at which the interest was to be reimbursed, it will be seen that the earliest clause is the mortgage clause set out in the fifth section of the act of 1862. It contains two provisions, neither of which fixes, in terms, the period at which either the bonds or the interest thereon is to be reimbursed. The words are, the "grants aforesaid are made on condition that the company shall pay said bonds at maturity." Will the court, then, import into the statute the words "and each semi-annual payment of interest as it accrues"? Unquestionably not. If such had been the purpose of Congress, why was it not so stated? One thing would seem clear from the terms used, — namely, that, whatsoever payment was to be made, *the period of such payment is definitely* fixed at the maturity of the bonds; and, if words are

to be interjected so as to include interest, why should further alterations be made by the insertion of a new and different period for its payment? These are the only provisions which apply to the *time* of payment.

The clauses as to the *mode* of payment are found in the sixth section.

Sect. 5 of the act of 1864 provides "that only one-half of the compensation for services rendered for the government by said companies shall be required to be applied *to the payment of the bonds* issued by the government." The act of March 3, 1871, sect. 9, and the proviso thereto reserving the rights of the government, were designed to leave open for legal construction the question of when and how interest was payable; and the purpose of the act of 1873 was not to repeal the charter, or any part of it, since it authorized the suit to be brought by the company against the United States to recover the price of freight and transportation due under existing laws. If Congress meant to repeal the provision for the payment of one-half of the transportation, it would have been an empty mockery to authorize a suit to recover for that very transportation. The right of the company to be paid in some form is indisputable; but its right to recover without its being subject to set-off was the one matter in controversy. The purpose of the act was to remit to judicial determination the question, whether, upon the true construction of the charter, the government was legally bound to pay the company for one-half the transportation; or whether it might retain that half, and apply it towards interest on the bonds.

MR. JUSTICE DAVIS delivered the opinion of the court.

The Union Pacific Railroad Company, conceding the right of the government to retain *one-half* of the compensation due it for the transportation of the mails, military and Indian supplies, and apply the same to reimburse the government for interest paid by it on bonds issued to the corporation to aid in the construction of its railroad and telegraph line, seeks to establish by this suit its claim to the other moiety. The United States, on the other hand, having paid interest on these bonds in excess of the sums credited to the company for services

rendered by it, insist upon their right to withhold payment altogether. One of the grounds on which this right is sought to be maintained is by reason of the general right of set-off, which, as a general proposition, exists in the government, and is commonly exercised by it when settling with those having claims against it. But, manifestly, the rules applicable to ordinary claimants for services rendered the United States do not apply to this controversy. The bonds in question were issued in pursuance of a scheme to aid in the construction of a great national highway. In themselves they do not import any obligation on the part of the corporation to pay; and whether, when the United States have paid interest on them, a liability to refund it is imposed on the company, depends wholly on the conditions on which the bonds were delivered to and received by it. These conditions are embodied in the legislation of Congress on the subject; and if, on a fair interpretation of it, the corporation is found to be now a debtor to the United States, the deduction for interest paid on the bonds can be lawfully made. But, if the converse of this proposition is true, the government cannot rightfully withhold from the corporation one-half of its earnings.

In construing an act of Congress, we are not at liberty to recur to the views of individual members in debate, nor to consider the motives which influenced them to vote for or against its passage. The act itself speaks the will of Congress, and this is to be ascertained from the language used. But courts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it. *Aldridge* v. *Williams*, 3 How. 24; *Preston* v. *Browder*, 1 Wheat. 120.

Many of the provisions in the original act of 1862 are outside of the usual course of legislative action concerning grants to railroads, and cannot be properly construed without reference to the circumstances which existed when it was passed. The war of the rebellion was in progress; and, owing to complications with England, the country had become alarmed for the safety of our Pacific possessions. The loss of them was feared in case those complications should result in an open

rupture; but, even if this fear were groundless, it was quite apparent that we were unable to furnish that degree of protection to the people occupying them which every government owes to its citizens. It is true, the threatened danger was happily averted; but wisdom pointed out the necessity of making suitable provision for the future. This could be done in no better way than by the construction of a railroad across the continent. Such a road would bind together the widely separated parts of our common country, and furnish a cheap and expeditious mode for the transportation of troops and supplies. If it did nothing more than afford the required protection to the Pacific States, it was felt that the government, in the performance of an imperative duty, could not justly withhold the aid necessary to build it; and so strong and pervading was this opinion, that it is by no means certain that the people would not have justified Congress if it had departed from the then settled policy of the country regarding works of internal improvement, and charged the government itself with the direct execution of the enterprise.

This enterprise was viewed as a national undertaking for national purposes; and the public mind was directed to the end in view, rather than to the particular means of securing it. Although this road was a military necessity, there were other reasons active at the time in producing an opinion for its completion besides the protection of an exposed frontier. There was a vast unpeopled territory lying between the Missouri and Sacramento Rivers which was practically worthless without the facilities afforded by a railroad for the transportation of persons and property. With its construction, the agricultural and mineral resources of this territory could be developed, settlements made where settlements were possible, and thereby the wealth and power of the United States largely increased; and there was also the pressing want, in time of peace even, of an improved and cheaper method for the transportation of the mails, and of supplies for the army and the Indians.

It was in the presence of these facts that Congress undertook to deal with the subject of this railroad. The difficulties in the way of building it were great, and by many intelligent persons considered insurmountable.

Although a free people, when resolved upon a course of action, can accomplish great results, the scheme for building a railroad two thousand miles in length, over deserts, across mountains, and through a country inhabited by Indians jealous of intrusion upon their rights, was universally regarded at the time as a bold and hazardous undertaking. It is nothing to the purpose that the apprehended difficulties in a great measure disappeared after trial, and that the road was constructed at less cost of time and money than had been considered possible. No argument can be drawn from the wisdom that comes after the fact. Congress acted with reference to a state of things believed at the time to exist; and, in interpreting its legislation, no aid can be derived from subsequent events. The project of building the road was not conceived for private ends; and the prevalent opinion was, that it could not be worked out by private capital alone. It was a national work, originating in national necessities, and requiring national assistance.

The policy of the country, to say nothing of the supposed want of constitutional power, stood in the way of the United States taking the work into its own hands. Even if this were not so, reasons of economy suggested that it were better to enlist private capital and enterprise in the project by offering the requisite inducements. Congress undertook to do this, in order to promote the construction and operation of a work deemed essential to the security of great public interests.

It is true, the scheme contemplated profit to individuals; for, without a reasonable expectation of this, capital could not be obtained, nor the requisite skill and enterprise. But this consideration does not in itself change the relation of the parties to this suit. This might have been so if the government had incorporated a company to advance private interests, and agreed to aid it on account of the supposed incidental advantages which the public would derive from the completion of the projected railway. But the primary object of the government was to advance its own interests, and it endeavored to engage individual co-operation as a means to an end, — the securing a road which could be used for its own purposes. The obligations, therefore, which were imposed on the company incorporated to build it,

must depend on the true meaning of the enactment itself, viewed in the light of contemporaneous history.

It has been observed by this court, that the title of an act, especially in congressional legislation, furnishes little aid in the construction of it, because the body of the act, in so many cases, has no reference to the matter specified in the title. *Hadden* v. *The Collector*, 5 Wall. 110. This is true, and we have no disposition to depart from this rule; but the title, even, of the original act of 1862, incorporating the appellee, seems to have been the subject of special consideration, for it truly discloses the general purpose of Congress in passing it. It is "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes." That there should, however, be no doubt of the national character of the contemplated work, the body of the act contains these significant words: "And the better to accomplish the object of this act, — namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes, — Congress may at any time, having due regard for the rights of said companies named herein, add to, alter, amend, or repeal this act." 12 Stat. p. 497. Indeed, the whole act contains unmistakable evidence, that, if Congress was put to the necessity of carrying on a great public enterprise by the instrumentality of private corporations, it took care that there should be no misunderstanding about the objects to be attained, or the motives which influenced its action.

If it had been equally explicit in the provision regarding the bonds to be issued in aid of the company, there would have been no occasion for this suit. But even in this particular, looking to the motives which prompted the act and to the objects intended to be effected by it, we do not think there is any serious difficulty in getting at the true meaning of Congress. The act itself was an experiment. It must be considered in the nature of a proposal to enterprising men to engage in the

work; for, with the untried obstacles in the way, there was no certainty that capital could be enlisted. If enlisted at all, it could only be on conditions which would insure, in case of success, remuneration proportionate to the risk incurred.

The proffered aid was in lands and interest-bearing bonds of the United States. There is no controversy about the terms on which the lands were granted; and the only point with which we have to deal relates to the nature and extent of the obligation imposed by Congress on the company to pay these bonds. It is not doubted that the government was to be reimbursed, both principal and interest; but the precise question for decision is, whether the company was required to pay the interest before the maturity of the principal.

The solution of this question depends upon the meaning of the fifth and sixth sections of the original act of 1862, and the fifth section of the amendatory act of 1864. The fifth section of the original act contains the undertaking of the government, and the sixth defines the obligation of the company. By the fifth it is provided, that, on the completion of the road in sections of forty miles, there shall be issued and delivered to the company a certain number of interest-bearing bonds of the United States, maturing thirty years after date, with interest payable semi-annually. And "to secure the repayment to the United States, as '*hereinafter provided*,' of the amount of said bonds, together with all interest thereon which shall have been paid by the United States," it is further provided that the issue and delivery of the bonds shall constitute a first mortgage on the property of the company, with a right reserved to the government to declare a forfeiture and take possession of the road and telegraph line in case "of the refusal or failure of the company to redeem said bonds, or any part of them, when requested to do so by the Secretary of the Treasury, *in accordance with the provisions of the act.*" The manifest purpose of this section is to take a lien on the property of the corporation for the ultimate redemption of the bonds, principal and interest; but the manner and time of redemption are left for further provision.

That the government was expected in the first instance to pay the interest is clear enough; for the mortgage was taken to

secure the repayment of the bonds, "together with all interest thereon which shall have been paid by the United States." This phrase implies a *prior* payment by the United States, whatever may be the duty of the corporation in regard to reimbursement as subsequently defined. Besides this, when repayment is spoken of, it is understood that something has been advanced which is to be paid back. Apart from this, had it been the intention that the corporation itself should pay the interest as it fell due, apt words denoting such a purpose would have been used. But when and how the reimbursement was to be made was declared to be "as hereinafter provided," — that is, in conformity with the terms prescribed in another portion of the act; and that this is so is evident enough from the latter part of the section, which directs the Secretary of the Treasury to enforce the forfeiture and take possession of the road on failure of the corporation to redeem said bonds, or any part of them (referring to the different periods of their issue), according to the plan of redemption thus provided, or, in other words, "in accordance with the provisions of this act." The obligations imposed on the corporation, or assumed by it, in relation to the repayment of the bonds, are set forth *entire* in the sixth section; which, on account of its importance, is here given at length: —

"SECT. 6. And be it further enacted, That the grants aforesaid are made upon condition *that said company shall pay said bonds at maturity*, and shall keep said railroad and telegraph line in repair and use, and shall at all times transmit despatches over said telegraph line, and transport mails, troops, and munitions of war, supplies and public stores, upon said railroad, for the government, whenever required to do so by any department thereof; and that the government shall at all times have the preference in the use of the same for all the purposes aforesaid (at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service); and *all compensations for services rendered for the government* shall be applied to the payment of said bonds *and interest* until the whole amount is fully paid. Said company may also pay the United States, wholly or in part, in the same or other bonds, treasury notes, or other evidences of debt against the United States, to be allowed at par; *and after said road is completed*, until said bonds and interest are paid, at least five per

centum of the net earnings of said road shall also be annually applied to the payment thereof."

Leaving out of consideration the parts of this section not pertinent to the present inquiry, there are three things, and three only, which the corporation is required to do concerning the bonds in controversy. 1st. To pay said bonds at maturity. 2d. To allow the government to retain the compensation due the corporation for services rendered, and apply the same to the payment of the bonds and interest until the whole amount is fully paid. 3d. To pay over to the government, after the road shall have been fully completed, five per cent of the net earnings of the road, to be appropriated to the payment of the bonds and interest.

If the language used is taken in its natural and obvious sense, there can be no difficulty in arriving at the meaning of the condition "to pay said bonds at maturity." As commonly understood, the word "maturity," in its application to bonds and other similar instruments, refers to the time fixed for their payment, which is the termination of the period they have to run. The bonds in question were bonds of the United States, promising to pay to the holder of them one thousand dollars thirty years after date, and the interest every six months. This obligation the government was required to perform; and, as the bonds were issued and delivered to the corporation to be sold for the purpose of raising money to construct its road, it is insisted that Congress must have meant to impose a corresponding obligation on the corporation. In support of this construction, it is sought to give to the word "maturity" a double signification, applying it to each payment of interest as it falls due, as well as to the principal. But this is extending, contrary to all legal rules, the operation of words by a forced construction beyond their real and ordinary meaning. Courts cannot supply omissions in legislation, nor afford relief because they are supposed to exist. "We are bound," said Justice Buller in an early case in the King's Bench, "to take the act of Parliament as they have made it: a *casus omissus* can in no case be supplied by a court of law, for that would be to make laws; nor can I conceive that it is our province to consider whether such a law that has been passed be tyrannical or not." *Jones* v. *Smart*, 1 T. R. 44–52.

Lord Chief Baron Eyre, in *Gibson* v. *Minet*, 1 H. Bl. 569–614, said, "I venture to lay it down as a general rule respecting the interpretation of deeds, that all latitude of construction must submit to this restriction; namely, that *the words may bear the sense* which by construction is put upon them. If we step beyond this line, we no longer construe men's deeds, but make deeds for them." This rule is as applicable to a statute as to a deed. The words "to pay said bonds at maturity" do not *bear the sense* which is sought to be attributed to them. They evidently imply an obligation to pay both principal and interest when the time fixed for the payment of the principal has arrived, but not to pay the interest as it accrues. It is one thing to be required to pay principal and interest when the bonds have reached maturity, and a wholly different thing to be required to pay the interest every six months, and the principal at the end of thirty years. The obligations are so different, that they cannot both grow out of the words employed; and it is necessary to superadd other words in order to include the payment of semi-annual interest as it falls due. Neither on principle nor authority is such a plain departure from the express letter of the statute warranted, especially when it leads to so great change in the condition annexed to the grant.

The failure to perform that condition is a cause of forfeiture. If the natural meaning of the words be adopted as the true meaning, there can be no forfeiture until the bonds themselves have matured. On the contrary, if the construction contended for be allowed, the grant is subject to forfeiture on each occasion that six months' interest falls due and is not met by the corporation. It would require a pretty large inference to draw from the language used authority to vary in a particular so essential the terms of a condition assumed by the corporation when it assented to the act. Besides this, when Congress imposed this condition, it well knew that the undertaking of the government bound it to pay interest every six months, and the principal at the time the bond matured. With this knowledge, dealing as it did with the relations the company was to bear to the government on the receipt of these bonds, it would, had it intended to exact the payment of interest before their maturity, have declared its purpose in unequivocal language. But if the

words, "to pay said bonds at maturity," do not give notice that this exaction was intended, neither do the other provisions of the sixth section. They created no obligation to keep down the interest, nor were they so intended. The provision for retaining the amount due for services rendered, and applying it towards the general indebtedness of the company to the government, cannot be construed into a requirement that the company shall pay the interest from time to time, and the principal when due. It was in the discretion of Congress to make this requirement, and then, as collateral to it, provide a special fund or funds out of which the principal could be discharged. This Congress did not choose to do, but rested satisfied with the entire property of the company as security for the ultimate payment of the principal and interest, and in the mean time, with special provisions looking to the reimbursement of the government for interest paid by it, and to the application of the surplus if any remained, to discharge the principal. The company, for obvious reasons, might be very willing to accept the bonds on these terms, and very unwilling to make an absolute promise to pay the interest as it accrued. If it were in a condition, either during the progress or on the completion of the road, to earn any thing, there would be no hardship in applying the compensation due it; but, as can be readily seen, if it were required to raise money every six months to pay interest, when all its available means were necessary to the prosecution of the work, the burden might be very heavy. Congress did not see fit to impose it, and thus place the company in a position to incur a forfeiture of all its grants in case of failure to provide the means to pay current interest. Besides, it is fair to infer that Congress supposed that the services to be rendered by the company to the government would equal the interest to be paid. That this was not an unreasonable expectation is shown by the published statistics of the vast cost of transporting military and naval stores and the mails to the Pacific coast by the modes of transit then in use.

The views presented on the provision for retaining the compensation are equally applicable to the provision, that, after the road is completed, five per cent of its net earnings shall

be *annually* applied to the payment of bonds and interest. It is not perceived how, on any principle of construction, an obligation of the corporation to pay the interest on the bonds every six months after they shall have been issued can be based on this provision, any more than on the other. Each created a reserved fund, out of which the government was to be reimbursed in the first instance the interest it had paid, leaving the surplus, if any, to be applied to the payment of the principal.

In addition to all that has been said, there is enough in the scheme of the act, and in the purposes contemplated by it, to show that Congress never intended to impose on the corporation the obligation to pay current interest. The act, as has been stated, was passed in the midst of war, when the means for national defence were deemed inadequate, and the public mind was alive to the necessity of uniting by iron bands the destiny of the Pacific and the Atlantic States. Confessedly the undertaking was beyond the ability of unaided private capital. Only by the helping hand of Congress could the problem, difficult of solution under the most favorable circumstances, be worked out. Local business, as a source of profit, could not be expected while the road was in course of construction, on account of the character of the country it traversed; and whether, when completed, it would prove valuable as an investment, was a question for time to determine. But vast as was the work, limited as were the private resources to build it, the growing wants as well as the existing and future military necessities of the country demanded that it be completed. Under the stimulus of these considerations Congress acted, not for the benefit of private persons, nor in their interest, but for an object deemed essential to the security as well as to the prosperity of the nation.

Compelled as it was to incorporate a private company to accomplish its object, it proffered the terms on which it would lend its aid. If deemed too liberal now, they were then considered, with the lights before it, not more than sufficient to engage the attention of enterprising men, who, if not themselves possessing capital, were in a position to command the use of it. These terms looked to ultimate security rather than im-

mediate reimbursement, inasmuch as the corporation would require all its available means in construction; and to require it, while the work was in progress, to keep down the interest on the bonds of the United States, might seriously cripple the enterprise at a time when the primary object of Congress was to advance it. There could, however, be no reasonable objection to the application "of all compensation for services rendered for the government" from the outset, and of "five per cent of the net earnings after the completion of the road" to the payment of the bonds and interest. These exactions were accordingly made.

Of necessity there were risks to be taken in aiding with money or bonds an enterprise unparalleled in the history of any free people, the completion of which, if practicable at all, would require, as was supposed, twelve years. But these risks were common to both parties. Congress was obliged to assume its share, and advance the bonds, or abandon the enterprise; for clearly the grant of lands, however valuable after the road was finished, could not be available as a resource for building it.

If the road were a success, in addition to the benefits it would confer on the United States, the corporation would be in a situation to repay the advances for interest and the principal when due. If, on the contrary, it proved to be a failure, subjecting the private persons who invested their capital in it to a total loss, there would be left the entire property of the corporation, of which immediate possession could be taken by the government on a declaration of forfeiture.

The circumstances under which the act of 1862 was passed, the purposes to be accomplished by it, and its scope and effect, are inconsistent with the position assumed by the appellant.

Notwithstanding the favorable terms proposed by Congress, the enterprise languished. The effect of this was the amendatory act of 1864. By it the grant of lands was doubled, a second in lieu of a first mortgage accepted by the government, and a provision inserted that "only one-half of the compensation for services rendered for the government by said companies (meaning this and the auxiliary companies incorporated at the

same time) shall be required to be applied to the payment of the bonds issued by the government in aid of the construction of said road."

This provision was, without doubt, intended merely to modify the original act, so as to allow the government to retain only one-half of such compensation, instead of all. That act applied the whole compensation "to pay the bonds *and interest;*" and it cannot be supposed that Congress intended to relinquish the right thereby secured to make the application in the first place to the interest, and then to the principal. The purpose could have been nothing more than to surrender the right to retain the *whole* of the companies' earnings for services to the government, and to accept, in lieu of it, the right to retain the *half*. This very material change was intended, doubtless, as a substantial favor to the companies; but, on the principle contended for by the appellant, it would be of no value. Of what possible advantage could it be to them to receive one-half of their earnings, if they were subject to a suit to recover it back as soon as it was paid? And this is the effect of the provision, if they are debtors to the government on every semi-annual payment of interest. They could not, in the nature of things, have accepted the stipulation with an understanding that any such effect would be given it. If the government consents to diminish its security, so that only half of the money due for services is to be applied to the payment of the interest or principal, what is to become of the other half? There is no implication that the government shall keep it; and, if not, who is to get it? Assuredly the companies who have earned it.

It is very clear that the Congress of 1864 did not suppose, in making this concession, that it would be barren of results; but, as the rights of the parties have been settled by the construction given to the original provision on this subject, it is unnecessary to consider the question further.

The practice for a series of years was in conformity with the views we have taken of the effect of the charter, until the Secretary of the Treasury withheld the payment of the money earned by the companies for services rendered the government. His action brought the subject to the attention of Congress; and the act of March 3, 1871 (16 Stat., p. 525, sect. 9), was

passed, directing that one-half of the money due the Pacific Railroad companies for services rendered, either "heretofore or hereafter," be paid them, leaving open the question of ultimate right for legal decision.

Another act was subsequently passed, by virtue of which this suit was instituted by the appellee. Act of March 3, 1873, 17 Stat., p. 508, sect. 2. It is contended that this act repeals that portion of the charter of the company which contains the provisions we have discussed. But, manifestly, its purpose was very different. Although it directs the Secretary of the Treasury to withhold all payments to the companies on account of freights and transportation, it at the same time authorizes any company thus affected to bring suit in the Court of Claims for "such freight and transportation;" and in such suit "the right of such company to recover the same upon the law and the facts shall be determined, and also the rights of the United States upon the merits of all the points presented by it in answer thereto by them." This means nothing more or less than the remission to the judicial tribunals of the question, whether this company, and others similarly situated, have the right to recover from the government one-half of what they earned by transportation; and this question is to be determined upon its merits.

The merits of such a question are determined when the effect of the charter is ascertained and declared. It is hardly necessary to say that it would have been idle to authorize a suit, had Congress intended to repeal the provision on which alone it could be maintained.

Counsel have dwelt with special emphasis upon the consequences which would result from a decision adverse to the appellant. We cannot consider them in disposing of the questions arising upon this record. The rights of the parties rest upon a statute of the United States. Its words, as well as its reason, spirit, and intention, leave, in our opinion, no room for doubt as to its true meaning. We cannot sit in judgment upon its wisdom or policy. When we have interpreted its provisions, if Congress has power to enact it, our duty in connection with it is ended.

Judgment affirmed.

NATIONAL BANK OF COMMERCE OF BOSTON *v.* MERCHANTS' NATIONAL BANK OF MEMPHIS.

1. A bill of lading of merchandise, deliverable to order, when attached to and forwarded with a time draft, sent without special instructions to an agent for collection, may be surrendered to the drawee on his acceptance of the draft. It is not the agent's duty to hold the bill after such acceptance.
2. The holder of a bill of lading, who has become such by indorsement and by discounting the draft drawn against the consigned property, succeeds to the rights of the shipper. He has the same right to demand acceptance of the accompanying draft, and no more; and, if the shipper cannot require such acceptance without surrendering the bill of lading, neither can the holder.

ERROR to the Circuit Court of the United States for the District of Massachusetts.

This was a suit brought by the Merchants' National Bank of Memphis against the National Bank of Commerce of Boston for alleged negligence in surrendering three bills of lading attached to three drafts, — two at thirty days, and one on sight, — which were sent by the Metropolitan National Bank of New York to the defendant, who surrendered the bills of lading to the drawees upon their acceptance of the drafts. These were drawn against the cotton mentioned in the bills of lading. The defendant had no information that the drafts had been discounted by the Bank of Memphis, and no instructions either to surrender the bills upon acceptance, or to hold them until payment of the drafts. The defendant had received through the same bank in New York drafts to a large amount on the same parties, accompanied by bills of lading, which they had always surrendered on acceptance, except in one instance, when special instructions were given to hold the latter until the accompanying draft was paid.

A verdict was rendered for the plaintiff.

Several questions were raised in the court below; but it is not deemed material to mention any thing more than two portions of the charge of the court, which were as follows: —

"In the absence of any consent of the owner of the bill of exchange, other than such as may be implied from the mere fact of sending for collection a bill of exchange, the bank so receiving the two papers for collection would not be authorized to separate the

bill of lading from the bill of exchange, and surrender it before the bill of exchange was paid."

"If the Metropolitan Bank merely sent to the defendant bank the bill of exchange with the bills of lading attached 'for collection,' with no other instructions, either express or implied from the past relations of the parties, they would not be justified in surrendering on acceptance only."

To both of these instructions the defendant excepted.

Messrs. H. W. Paine and *H. C. Hutchins* for plaintiff in error.

In the absence of instructions, the plaintiff in error was authorized to infer that the bills of lading were annexed to the drafts to secure their acceptance, and were to be surrendered on acceptance. *Lanfear* v. *Blossom*, 1 La. Ann. 148; *Coventry* v. *Gladstone*, L. R. 4 Eq. 493; *Gurney* v. *Behrend*, 3 Ell. & Bl. 622; *Shepherd* v. *Harrison et al.*, L. R. 4 Q. B. 196; *Schuchardt et al.* v. *Hall et al.*, 36 Md. 590; *Bryan* v. *Nix*, 4 M. & W. 775; *Marine Bank of Chicago* v. *Wright et al.*, 48 N. Y. 1; *Shepherd* v. *Harrison et al.*, L. R. H. of L. 5, 116; *Wisconsin Bank* v. *Bank of British N. A.*, 21 Upper Canada Queen's Bench, 284; *Clark* v. *Bank of Montreal*, 13 Grant's Ch. (Upper Canada) 211.

Mr. W. G. Russell, contra.

The later authorities in England and this country hold, that the holder of a draft, discounted *bona fide* for value, with the bill of lading attached, holds it as security for payment, and not for acceptance merely. *Gilbert* v. *Guignon*, L. R. 8 Ch. 16 (1872); *Seymour* v. *Newton*, 105 Mass. 272; *Newcomb* v. *Boston & Lowell R.R.*, 115 Mass. 230; *Stollenwerck et al. v. Thacher et al.*, 115 Mass. 224. The bank which holds the bill of exchange and the bill of lading attached "for collection" holds them in trust for both parties, and is under obligation not to detach one from the other.

Mr. Justice Strong delivered the opinion of the court.

The fundamental question in this case is, whether a bill of lading of merchandise deliverable to order, when attached to a time draft and forwarded with the draft to an agent for collection, without any special instructions, may be sur-

rendered to the drawee on his acceptance of the draft, or whether the agent's duty is to hold the bill of lading after the acceptance for the payment. It is true, there are other questions growing out of portions of the evidence, as well as one of the findings of the jury; but they are questions of secondary importance. The bills of exchange were drawn by cotton-brokers residing in Memphis, Tenn., on Green & Travis, merchants, residing in Boston. They were drawn on account of cotton shipped by the brokers to Boston, invoices of which were sent to Green & Travis; and bills of lading were taken by the shippers, marked in case of two of the shipments "To order," and in case of the third shipment marked "For Green & Travis, Boston, Mass." There was an agreement between the shippers and the drawees that the bill of lading should be surrendered on acceptance of the bills of exchange; but the existence of this agreement was not known by the Bank of Memphis when that bank discounted the drafts, and took with them the bills of lading indorsed by the shippers. We do not propose to inquire now whether the agreement, under these circumstances, ought to have any effect upon the decision of the case. Conceding that bills of lading are negotiable, and that their indorsement and delivery pass the title of the shippers to the property specified in them, and therefore that the plaintiffs, when they discounted the drafts and took the indorsed railroad receipts or bills of lading, became the owners of the cotton, it is still true that they sent the bills with the drafts to their correspondents in New York, the Metropolitan Bank, with no instructions to hold them after acceptance; and the Metropolitan Bank transmitted them to the defendants in Boston, with no other instruction than that the bills were sent "for collection." What, then, was the duty of the defendants? Obviously, it was first to obtain the acceptance of the bills of exchange. But Green & Travis were not bound to accept, even though they had ordered the cotton, unless the bills of lading were delivered to them contemporaneously with their acceptance. Their agreement with their vendors, the shippers, secured them against such an obligation. Moreover, independent of this agreement, the drafts upon their face showed that they had been drawn upon the cotton covered by the bills of

lading. Both the plaintiffs, and their agents the defendants, were thus informed that the bills were not drawn upon any funds of the drawers in the hands of Green & Travis, and that they were expected to be paid out of the proceeds of the cotton. But how could they be paid out of the proceeds of the cotton if the bills of lading were withheld? Withholding them, therefore, would defeat alike the expectation and the intent of the drawers of the bills. Hence, were there nothing more, it would seem that a drawer's agent to collect a time bill, without further instructions, would not be justified in refusing to surrender the property against which the bill was drawn, after its acceptance, and thus disable the acceptor from making payment out of the property designated for that purpose.

But it seems to be a natural inference, indeed a necessary implication, from a time draft accompanied by a bill of lading indorsed in blank, that the merchandise (which in this case was cotton) specified in the bill was sold on credit, to be paid for by the accepted draft, or that the draft is a demand for an advance on the shipment, or that the transaction is a consignment to be sold by the drawee on account of the shipper. It is difficult to conceive of any other meaning the instruments can have. If so, in the absence of any express arrangement to the contrary, the acceptor, if a purchaser, is clearly entitled to the possession of the goods on his accepting the bill, and thus giving the vendor a completed contract for payment. This would not be doubted, if, instead of an acceptance, he had given a promissory note for the goods, payable at the expiration of the stipulated credit. In such a case, it is clear that the vendor could not retain possession of the subject of the sale after receiving the note for the price. The idea of a sale on credit is that the vendee is to have the thing sold on his assumption to pay, and before actual payment. The consideration of the sale is the note. But an acceptor of a bill of exchange stands in the same position as the maker of a promissory note. If he has purchased on credit, and is denied possession until he shall make payment, the transaction ceases to be what it was intended, and is converted into a cash sale. Everybody understands that a sale on credit entitles the purchaser to immediate possession of the property sold, unless there be a special agreement that it may be retained

by the vendor; and such is the well-recognized doctrine of the law. The reason for this is, that very often, and with merchants generally, the thing purchased is needed to provide means for the deferred payment of the price. Hence it is justly inferred that the thing is intended to pass at once within the control of the purchaser. It is admitted that a different arrangement may be stipulated for. Even in a credit sale, it may be agreed by the parties that the vendor shall retain the subject until the expiration of the credit, as a security for the payment of the sum stipulated. But, if so, the agreement is special, something superadded to an ordinary contract of sale on credit, the existence of which is not to be presumed. Therefore, in a case where the drawing of a time draft against a consignment raises the implication that the goods consigned have been sold on credit, the agent to whom the draft to be accepted and the bill of lading to be delivered have been intrusted cannot reasonably be required to know, without instruction, that the transaction is not what it purports to be. He has no right to assume and act on the assumption that the vendee's term of credit must expire before he can have the goods, and that he is bound to accept the draft, thus making himself absolutely responsible for the sum named therein, and relying upon the vendor's engagement to deliver at a future time. This would be treating a sale on credit as a mere executory contract to sell at a subsequent date.

If the inference to be drawn from a time draft accompanied by a bill of lading is, not that it evidences a credit sale, but a request for advances on the credit of the consignment, the consequence is the same. Perhaps it is even more apparent. It plainly is, that the acceptance is not asked on the credit of the drawer of the draft, but on the faith of the consignment. The drawee is not asked to accept on the mere assurance that the drawer will, at a future day, deliver the goods to reimburse the advances: he is asked to accept in reliance on a security in hand. To refuse to him that security is to deny him the basis of his requested acceptance: it is remitting him to the personal credit of the drawer alone. An agent for collection having the draft and attached bill of lading cannot be permitted, by declining to surrender the bill of lading on the accept-

ance of the bill, to disappoint the obvious intentions of the parties, and deny to the acceptor a substantial right which by his contract is assured to him. The same remarks are applicable to the case of an implication that the merchandise was shipped to be sold on account of the shipper.

Nor can it make any difference that the draft with the bill of lading has been sent to an agent (as in this case) "for collection." That instruction means simply to rebut the inference from the indorsement that the agent is the owner of the draft. It indicates an agency. *Sweeny* v. *Easter*, 1 Wall. 166. It does not conflict with the plain inference from the draft and accompanying bill of lading that the former was a request for a promise to pay at a future time for goods sold on credit, or a request to make advances on the faith of the described consignment, or a request to sell on account of the shipper. By such a transmission to the agent, he is instructed to collect the money mentioned in the drafts, not to collect the bill of lading; and the first step in the collection is procuring acceptance of the draft. The agent is, therefore, authorized to do all which is necessary to obtaining such acceptance. If the drawee is not bound to accept without the surrender to him of the consigned property or of the bill of lading, it is the duty of the agent to make that surrender; and if he fails to perform this duty, and in consequence thereof acceptance be refused, the drawer and indorsers of the draft are discharged. *Mason* v. *Hunt*, 1 Doug. 297.

The opinions we have suggested are supported by other very rational considerations. In the absence of special agreement, what is the consideration for acceptance of a time draft drawn against merchandise consigned? Is it the merchandise? or is it the promise of the consignor to deliver? If the latter, the consignor may be wholly irresponsible. If the bill of lading be to his order, he may, after acceptance of the draft, indorse it to a stranger, and thus wholly withdraw the goods from any possibility of their ever coming to the hands of the acceptor. Is, then, the acceptance a mere purchase of the promise of the drawer? If so, why are the goods forwarded before the time designated for payment? They are as much, after shipment, under the control of the drawer, as they were before. Why

incur the expense of storage and of insurance? And if the draft with the goods or with the bill of lading be sent to a bank for collection, as in the case before us, can it be incumbent upon the bank to take and maintain custody of the property sent during the interval between the acceptance and the time fixed for payment? (The shipments in this case were hundreds of bales of cotton.) Meanwhile, though it be a twelvemonth, and no matter what the fluctuations in the market value of the goods may be, are the goods to be withheld from sale or use? Is the drawee to run the risk of falling prices, with no ability to sell till the draft is due? If the consignment be of perishable articles, — such as peaches, fish, butter, eggs, &c., — are they to remain in a warehouse until the term of credit shall expire? And who is to pay the warehouse charges? Certainly not the drawees. If they are to be paid by the vendor, or one who has succeeded to the place of the vendor by indorsement of the draft and bill of lading, he fails to obtain the price for which the goods were sold.

That the holder of a bill of lading, who has become such by indorsement and by discounting the draft drawn against the consigned property, succeeds to the situation of the shipper, is not to be doubted. He has the same right to demand acceptance of the accompanying bill, and no more. If the shipper cannot require acceptance of the draft without surrendering the bill of lading, neither can the holder. Bills of lading, though transferable by indorsement, are only *quasi* negotiable. 1 Parsons on Shipping, 192; *Blanchard* v. *Page*, 8 Gray, 297 *a*. The indorser does not acquire a right to change the agreement between the shipper and his vendee. He cannot impose obligations or deny advantages to the drawee of the bill of exchange drawn against the shipment which were not in the power of the drawer and consignor. But, were this not so in the case we have now in hand, the agents for collection of the drafts were not informed, either by the drafts themselves or by any instructions they received, or in any other way, that the ownership of the drafts and bills of lading was not still in the consignors of the cotton. On the contrary, as the drafts were sent "for collection," they might well conclude that the collection was to be made for the drawers of the bills. We do

not, therefore, perceive any force in the argument pressed upon us, that the Bank of Memphis was the purchaser of the drafts drawn upon Green & Travis, and the holder of the bills of lading by indorsement of the shippers.

It is urged that the bills of lading were contracts collateral to the bills of exchange which the bank discounted, and that, when transferred, they became a security for the principal obligation; namely, the contract evidenced by the bills of exchange, — for the *whole* contract, and not a part of it; and that the whole contract required not only the acceptance, but the payment of the bills. The argument assumes the very thing to be proved; to wit, that the transfer of the bills of lading were made to secure the payment of the drafts. The opposite of this, as we have seen, is to be inferred from the bills of lading and the time drafts drawn against the consignments, unexplained by express stipulations. The bank, when discounting the drafts, was bound to know that the drawers on their acceptance were entitled to the cotton, and, of course, to the evidences of title to it. If so, they knew that the bills of lading could not be a security for the ultimate payment of the drafts. Payment of the drafts by the drawees was no part of the contract when the discounts were made. The bills of exchange were then incomplete. They needed acceptance. They were discounted in the expectation that they would be accepted, and that thus the bank would obtain additional promisors. The whole purpose of the transfers of the bills of lading to the bank may, therefore, well have been satisfied when the additional names were secured by acceptance, and when the drafts thereby became completed bills of exchange. We have already seen, that whether the drafts and accompanying bills of lading evidenced sales on credit, or requests for advancements on the cotton consigned, or bailments to be sold on the consignor's account, the drawees were entitled to the possession of the cotton before they could be required to accept; and that, if they had declined to accept because possession was denied to them concurrently with their acceptance, the effect would have been to discharge the drawers and indorsers of the drafts. The demand of acceptance, coupled with a claim to retain the bills of lading, would have been an insufficient de-

mand. Surely the purpose of putting the bills of lading into the hands of the bank was to secure the completion of the drafts by obtaining additional names upon them, and not to discharge the drawers and indorsers, leaving the bank only a resort to the cotton pledged.

It is said, that if the plaintiffs were not entitled to retain the bills of lading as a security for the payment of the drafts after their acceptance, their only security for payment was the undertaking of the drawees, who were without means, and the promise of the acceptors, of whose standing and credit they knew nothing. This may be true; though they did know that the acceptors had previously promptly met their acceptances, which were numerous, and large in amount. But, if they did not choose to rely solely on the responsibility of the acceptors and drawers, they had it in their power to instruct their agents not to deliver the cotton until the drafts were paid. Such instructions are not infrequently given in case of time drafts against consignments; and the fact that they are given tends to show that in the commercial community it is understood, that, without them, agents for collection would be obliged to give over the bills of lading on acceptance of the draft. Such instructions would be wholly unnecessary, if it is the duty of such agents to hold the bills of lading as securities for the ultimate payment.

Thus far, we have considered the question without reference to any other authority than that of reason. In addition to this, we think the decisions of the courts and the language of many eminent judges accord with the opinions we avow. In the case of *Lanfear* v. *Blossom*, 1 La. Ann. 148, the very point was decided, after an elaborate argument both by the counsel and by the court. It was held that "where a bill of exchange drawn on a shipment, and payable a certain number of days after sight, is sold, with the bill of lading appended to it, the holder of the bill of exchange cannot, in the absence of proof of any local usage to the contrary, or of the imminent insolvency of the drawee, require the latter to accept the bill of exchange, except on the delivery of the bill of lading; and when, in consequence of the refusal of the holder to deliver the bill of lading, acceptance is refused, and the bill protested,

the protest will be considered as made without cause, the drawee not having been in default, and the drawer will be discharged." This decision is not to be distinguished in its essential features from the opinions we have expressed. A judgment in the same case to the same effect was given in the Commercial Court of New Orleans by Judge Watts, who supported it by a very convincing opinion. 14 Hunt's Merchants' Magazine, 264. These decisions were made in 1845 and 1846. In other courts, also, the question has arisen, What is the duty of a collecting bank to which time drafts, with bills of lading attached, have been sent for collection? and the decisions have been, that the agent is bound to deliver the bills of lading to the acceptor on his acceptance. In the case *The Wisconsin Marine & Fire Insurance Company* v. *The Bank of British North America*, 21 Upper Canada Queen's Bench, 284, decided in 1861, where it appeared that the plaintiff, a bank at Milwaukee, Wis., had sent to the defendants, a bank at Toronto, for collection, a bill drawn by A. at Milwaukee on B. at Toronto, payable forty-five days after date, together with a bill of lading, indorsed by A., for certain wheat sent from Milwaukee to Toronto, it was held, that, in the absence of any instructions to the contrary, the defendants were not bound to retain the bill of lading until payment of the draft by B., but were right in giving it up to him on obtaining his acceptance. This case was reviewed in 1863 in the Court of Error and Appeals, and the judgment affirmed. 2 Upper Canada Error and Appeal Reps. 282. See also *Goodenough* v. *The City Bank*, 10 Upper Canada Com. Pleas, 51; *Clark* v. *The Bank of Montreal*, 13 Grant's Ch. 211.

There are also many expressions of opinion by the most respectable courts, which, though not judgments, and therefore not authorities, are of weight in determining what are the implications of such a state of facts as this case exhibits. In *Shepherd* v. *Harrison et al.*, L. R. Q. B., vol. iv., p. 493, Lord Cockburn said, "The authorities are equally good to show, when the consignor sends the bill of lading to an agent in this country to be by him handed over to the consignee, and accompanies that with bills of exchange to be accepted by the consignee," that that "indicates an intention *that the handing over*

of the bill of lading, and the acceptance of the bill or bills of exchange, should be concurrent parts of one and the same transaction." The case subsequently went to the House of Lords, 5 H. L. 133; when Lord Cairns said, "If they (the drawees) accept the cargo and bill of lading, and accept the bill of exchange drawn against the cargo, the object of those who shipped the goods is obtained. They have got the bill of exchange in return for the cargo; they discount, or use it as they think proper; and they are virtually paid for the goods." In *Coventry* v. *Gladstone*, 4 L. R. Eq. 493, it was declared by the Vice-Chancellor that "the parties shipping the goods from Calcutta, in the absence of any stipulation to the contrary, did give their agents in England full authority, if they thought fit, to pass over the bill of lading to the person who had accepted the bill of exchange" drawn against the goods, and attached to the bill of lading; and it was ruled that an alleged custom of trade to retain the bill of lading until payment of the accompanying draft on account of the consignment was exceptional, and was not established as being the usual course of business. In *Schuchardt et al.* v. *Hall et al.*, 39 Md. 590, which was a case of a time draft, accompanied by a bill of lading, hypothecated by the drawer, both for the acceptance and payment of the draft, and when the drawers had been authorized to draw against the cargo shipped, it was said by the court, "Under their contract with the defendants, the latter were authorized to draw only against the cargo of wheat to be shipped by the 'Ocean Belle;' and they (the drawees) were, therefore, not bound to accept without the delivery to them of the bill of lading." See also the language of the judges in *Gurney* v. *Behrend*, 3 Ell. & Bl. 622; *Marine Bank* v. *Wright*, 48 N. Y. 1; *Cayuga Bank* v. *Daniels*, 47 id. 631.

We have been unable to discover a single decision of any court holding the opposite doctrines. Those to which we have been referred as directly in point determine nothing of the kind. *Gilbert* v. *Guignon*, L. R. 8 Ch. 16, was a contest between two holders of several bills of lading of the same shipment. The question was, Which had priority? It was not all whether the drawee of a time draft against a consignment has not a right to the bill of lading when he accepts. The drawer

had accepted without requiring the surrender of the first indorsed bill of lading; and the Lord Chancellor, while suggesting a query whether he might not have declined to accept unless the bills of lading were at the same time delivered up to him, remarked, "If he was content they should remain in the hands of the holder, it was exactly the same thing as if he had previously and originally authorized that course of proceeding; and that (according to the Chancellor's view) was actually what had happened in the case." Nothing, therefore, was decided respecting the rights of the holder of a time draft, to which a bill of lading is attached, as against the drawee. The contest was wholly *inter alios*.

Seymour v. *Newton*, 105 Mass. 272, was the case of an acceptance of the draft, without the presentation of the bill of lading. In that respect, it was like *Gilbert* v. *Guignon*. No question, however, was made in regard to this. The acceptor became insolvent before the arrival of the goods; and all that was decided was, that, under the circumstances, the jury would be authorized to find that the lien of the shippers had not been discharged. It was a case of stoppage *in transitu*. It is true, that, in delivering the opinion of the court, Chief Justice Chapman said, "The obvious purpose was, that there should be no delivery to the vendee till the draft should be paid." But the remark was purely *obiter*, uncalled for by any thing in the case. *Newcomb* v. *The Boston & Lowell Railroad Corporation*, 115 Mass. 230, was also the case of acceptance of sight drafts, without requiring the delivery of the attached bills of lading: and the contest was not between the holder of the drafts and the acceptor; it was between the holder of the drafts with the bills of lading and the carrier. We do not perceive that the case has any applicability to the question we have now under consideration. True, there, as in the case of *Seymour* v. *Newton*, it was remarked by the judge who delivered the opinion, "The railroad receipts were manifestly intended to be held by the collecting bank as security for the acceptance and payment of the drafts." Intended by whom? Evidently the court meant by the drawees and the bank; for it is immediately added, "They continued to be held by the bank after the drafts had been accepted by Chandler & Co. (the drawees), and until at

Chandler & Co.'s request they were paid by the plaintiff; and the receipts with the drafts still attached were indorsed and delivered by Chandler & Co. to the plaintiff." In *Stollenwerck et al.* v. *Thacher et al.*, 115 Mass. 224 (the only other case cited by the defendants in error as in point on this question), there were instructions to the agent to deliver the bill of lading only on payment of the draft; and it was held that the special agent, thus instructed, could not bind his principal by a delivery of the bill without such payment. Nothing was decided that is pertinent to the present case. In *Bank* v. *Bayley*, reported in the same volume, p. 228, where the instructions given to the collecting agent were, so far as it appears, only that the drafts and bills of lading were remitted for collection, and where acceptance was refused, Chief Justice Gray said, "The drawees of the draft attached to each of the bills of lading were not entitled to the bill of lading, or the property described therein, except upon *acceptance* of the draft." It is but just to say, however, that this remark, as well as those made by the same judge in the other Massachusetts cases cited, was aside from the decision of the court.

After this review of the authorities cited, as in point, in the very elaborate argument for the defendants in error, we feel justified in saying, that, in our opinion, no respectable case can be found in which it has been decided that when a time draft has been drawn against a consignment to order, and has been forwarded to an agent for collection with the bill of lading attached, without any further instructions, the agent is not justified in delivering over the bill of lading on the acceptance of the draft.

If this, however, were doubtful, the doubt ought to be resolved favorably to the agent. In the case in hand, the Bank of Commerce, having accepted the agency to collect, was bound only to reasonable care and diligence in the discharge of its assumed duties. *Warren* v. *The Suffolk Bank*, 10 Cush. 582. In a case of doubt, its best judgment was all the principal had a right to require. If the absence of specific instructions left it uncertain what was to be done further than to procure acceptances of the drafts, and to receive payment when they fell due, it was the fault of the principal. If the consequence was a loss, it would be most unjust to cast the loss on the agent.

Applying what we have said to the instruction given by the learned judge of the Circuit Court to the jury, it is evident that he was in error. Without discussing in detail the several assignments of error, it is sufficient for the necessities of this case to say that it was a mistake to charge the jury, as they were charged, that "in the absence of any consent of the owner of a bill of exchange, other than such as may be implied from the mere fact of sending 'for collection' a bill of exchange with a bill of lading pasted or attached to a bill of exchange, the bank so receiving the two papers for collection would not be authorized to separate the bill of lading from the bill of exchange, and surrender it before the bill of exchange was paid." And again: there was error in the following portion of the charge: "But if the Metropolitan Bank merely sent to the defendant bank the bills of exchange with the bills of lading attached for collection, with no other instructions, either expressed or implied from the past relations of the parties, they would not be so justified in surrendering (the bills of lading) on acceptance only." The Bank of Commerce can be held liable to the owners of the drafts for a breach of duty in surrendering the bills of lading on acceptance of the drafts, only after special instructions to retain the bills until payment of the acceptances. The drafts were all time drafts. One, it is true, was drawn at sight; but, in Massachusetts, such drafts are entitled to grace.

What we have said renders it unnecessary to notice the other assignments of error.

The judgment of the Circuit Court is reversed, and the record is remitted with directions to award a new trial.

LONG ET AL. *v.* CONVERSE ET AL.

1. This court has no jurisdiction to review the decision of a State court against a right and a title under a statute of the United States, unless such right and title be specially set up and claimed by the party for himself, and not for a third person under whom he does not claim.
2. So far as it relates to the above point, sect. 709 of the Revised Statutes, which authorizes this court, in certain cases, to re-examine upon a writ of error the judgment or decree of a State court, does not differ from the twenty-fifth section of the Judiciary Act of 1789.
3. Former decisions of this court upon said twenty-fifth section cited and examined.

ERROR to the Supreme Judicial Court of the State of Massachusetts.

On the 20th of July, 1870, a bill was filed in the Supreme Judicial Court of Massachusetts for the foreclosure of a mortgage, executed by the Boston, Hartford, and Erie Railroad Company, to secure the payment of certain bonds. The bill prayed a sale of the mortgaged property, and the appointment of receivers. Henry N. Farwell was named as one of the defendants, he being one of the trustees under the mortgage, and also one of the directors of the company. Process was served upon him July 21, 1870.

On the 2d of August, 1870, an order was made appointing receivers, with authority to take possession of all the property of the railroad company, including all moneys, credits, choses in action, evidences of debt, books, papers, and vouchers.

On the 1st of March, 1871, the railroad company was adjudged a bankrupt by the District Court of the United States for the District of Massachusetts; and on the 18th of the same month an assignment of its property, according to the provisions of the Bankrupt Act, was made to Charles S. Bradley, Charles L. Chapman, and George M. Barnard, as assignees. This assignment was made to include all the property of which the company was possessed on the 21st of October, 1870.

On the 20th of September, 1871, the receivers of the railroad company filed in the Supreme Judicial Court their petition against George W. Long and John C. Watson, alleging, in substance, that, when the order appointing them receivers was made, Farwell had in his possession, as one of the officers of the railroad company, certain coupons of bonds of the Hartford, Providence, and Fishkill Railroad Company, and of bonds of the city of Providence, which were the property of the Boston, Hartford, and Erie Railroad Company, and which, by the decree, he was ordered to deliver to them; that the railroad company had no right to sell or transfer the coupons, or put them in circulation; that he had no right to the coupons or their possession; that, notwithstanding this, he had, subsequently to their appointment as receivers, transferred to Long and Watson five hundred of the coupons of the bonds of the city of Providence; and that Long and Watson, at the time, had full knowledge of the

rights of the railroad company, and that Farwell had no power or authority to make the transfer.

The petitioners asked that Long and Watson might be ordered to deliver the coupons to them, and restrained from collecting the money due thereon.

Long and Watson answered this petition, denying that Farwell, at the time of the appointment of the receivers, held the coupons in trust for the railroad company, and averring that he held them as collateral security for a debt owing to him by the Hartford, Providence, and Fishkill Railroad Company. Having no knowledge whether the Boston, Hartford, and Erie Railroad Company had authority to sell the coupons, or put them in circulation, they left the petitioners to make such proof of that fact as they might deem material. They admitted the transfer to them by Farwell after the appointment of the receivers, but denied any knowledge of the rights of the railroad company, and averred that they purchased the coupons of Farwell in good faith, believing that he had the right to make the transfer.

Subsequently, on the 27th of June, 1872, they filed an amendment to their answer, setting up the bankruptcy of the railroad company and the assignment to the assignees, and concluding as follows: "Wherefore these respondents submit that the said petitioners had not, at the date of the filing of the said petition, if they ever had, any right to the possession of any of the property of the said Boston, Hartford, and Erie Railroad Company, and particularly to the possession of the coupons in said petition alleged to be the property of the said company, and in the possession of these respondents."

The cause was referred to a special master. Upon the coming in of his report, exceptions were filed; and at the April Term, 1872, an entry was made on the docket of the court, as follows: "Plaintiffs' exceptions sustained. Decree for the receivers upon the evidence reported." The cause was then continued. On the 28th August, 1872, the assignees in bankruptcy filed in the cause a paper addressed to the court, in which they represented, that "having read . . . the proposed decree of this court against George W. Long and John C. Watson, ordering them to surrender and deliver up to the receivers

the coupons of the bonds of the city of Providence described in the petition against them, we do assent to said decree, and to the delivery of the coupons to the receivers, as therein ordered."

Afterwards, on the 5th of May, 1873, a decree in form was entered by the court, in which it was "found as a matter of fact, and further ordered, adjudged, and decreed, that the respondents, George W. Long and John C. Watson, took the interest coupons sought in this petition to be recovered of them, to wit, &c., under circumstances which preclude said Long and Watson from claiming the right of holders for value in good faith; and that, as against the petitioners in said petition, said Long and Watson acquired no better title to said coupons than Henry N. Farwell himself had, and that said Farwell had no right or title to the same; and that the right to the possession of and the title to said coupons are now in the petitioners, . . . notwithstanding the amended answer of said defendants and the alleged adjudication in bankruptcy and subsequent assignment made therein." Thereupon it was further decreed that the receivers recover of Long and Watson the money which it appeared they had collected during the pendency of the suit from the city of Providence upon the coupons received by them from Farwell.

To reverse this decree, the present writ of error has been prosecuted by Long and Watson.

The error assigned is, that the court below held that the right and title to the coupons in controversy were in the defendants in error, as receivers of the Boston, Hartford, and Erie Railroad Company; and that they were entitled to maintain suit to recover the same, notwithstanding the adjudication of the bankruptcy of that company, and the assignment of all its property by register in bankruptcy to assignees in bankruptcy before suit brought by the defendants in error.

Mr. Benjamin F. Butler, with whom was *Mr. Causten Browne*, for the plaintiffs in error.

First, The question presented by the assignment of error is one within the jurisdiction of this court.

1. This was a final decree in a suit in equity in the highest court of law or equity of the State of Massachusetts.

Though in form, under the practice in Massachusetts, this petition is entitled in the suit in which the receivers were appointed, it was really a bill in equity, and the suit was in all respects a suit in equity.

2. There was drawn in question the validity of an authority exercised under a State, on the ground of its being repugnant to the laws of the United States; and the decision was in favor of such authority.

The receivers were officers of the State court; and the validity of their authority as such officers, after the bankruptcy of the railroad company and the assignment of its property, was directly drawn in question, on the ground of its being repugnant to the Bankrupt Law of the United States; and the decision was expressly in favor of such authority.

Second, The receivers of the Boston, Hartford, and Erie Railroad Company were not entitled to maintain suit for the recovery of the coupons in controversy after the adjudication of the bankruptcy of that company, and the assignment of all its property by a register in bankruptcy to assignees in bankruptcy duly elected and appointed.

The statute of the United States, the paramount law of the land, in force at the time of the commencement of proceedings in bankruptcy against the company, provided that, as soon as the assignee in bankruptcy was appointed and qualified, the judge of the District Court, or, in case of 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*," &c. 14 Stat. 522, sect. 14.

The statute is explicit and peremptory that the title to all the property and estate of the bankrupt shall, upon assignment duly made to the assignee in bankruptcy, vest by operation of law in such assignee.

It is submitted, that, after such assignment, the assignee, and he alone, is entitled to bring suit for the possession of

property claimed to be the property of the bankrupt. *Smith* v. *Buchanan*, 8 Blatch. 153.

The cases in which it has been held that the United States bankruptcy courts will not interfere with property in possession of a State court do not apply in this case.

Whether or not the principle of those cases can be maintained it is not necessary to discuss. They are distinguished from this case by the fact that in all of them the officers of the State court were *actually in possession of the property in controversy* at the time of the commencement of the proceedings in bankruptcy. *Sedgwick* v. *Menck*, 6 Blatch. 156; *Clark* v. *Bininger*, 3 N. B. R. 524; *Alden v. Railroad Co.*, 5 id. 230; *Beecher* v. *Bininger*, 7 Blatch. 171.

The question of the right of receivers appointed by a State court to maintain suit for the recovery of the alleged property of a bankrupt, after an adjudication in bankruptcy and the assignment thereunder, has never been decided.

It cannot be contended that the decree appointing the receivers of its own force put them into possession of the property in controversy. The decree cannot be so construed. Its language and spirit are directly opposed to such a construction.

To hold that the mere appointment of receivers by a State court *ipso facto* puts them into possession of all the debtor's property would be to deal an almost fatal blow at the Bankrupt Law; for if, as has been held, the Bankruptcy Court will not interfere with property in the possession of receivers, and the mere fact of their appointment puts them in possession, it will be an easy matter to avoid the operation of that law, or make proceedings under it a solemn farce, by simply suing the debtor, and procuring the appointment of a receiver of his property.

It is submitted that the defendants in error were not entitled to maintain their suit in the court below; and that the decree should be reversed, with directions to dismiss the petition.

Mr. Benjamin F. Brooks and *Mr. James J. Storrow* for defendants in error.

It is clear that the amended answer does not set up any title in the plaintiffs in error accruing to them under any statute of

the United States. It is well settled that the right to bring a writ of error under the second clause of the twenty-fifth section of the old Judiciary Act is given to the party who claims the right or the title under the statute, the construction of which is drawn in question: it is for him to exercise it or not as he sees fit, to protect his own interests. The writ is not given to strangers, volunteers, mere trespassers or wrong-doers, who hold not under, but adversely to, such right or title. *Henderson* v. *Tennessee*, 10 How. 311, and cases cited; *Hale* v. *Gaines*, 22 id. 149; *Verden* v. *Colman*, 1 Black, 472.

The act of 1867, sect. 2, under which this writ was brought, re-enacted in this respect the language of the old law; the only change made serving to make the case still stronger against the plaintiffs in error. For the language of the old law, which seemed to give some color to the idea that it was enough that the right claimed was such that it "drew in question the construction of any clause of . . . a statute of the United States," was omitted; and the present act is in terms restricted (as by the decisions of this court the former act was restricted) to cases of a "right, title, &c., claimed under . . . any statute of the United States." R. S., sect. 709, follows the act of 1867.

The first part of sect. 2 of the act of 1867 (R. S. sect. 709) must receive the same construction. It is true that the receivers exercise an authority given by the State court, the power of which the plaintiffs in error deny; and they assign a statute of the United States as the ground of their denial. But the same reasons which led the court in *Murdock* v. *Memphis* (20 Wall. 590) to hold that a very striking change of language did not indicate an intention to change the old construction with regard to the questions raised will lead the court now to say that a re-enactment of the language without variation in the same section forbids any inference of an intention to inaugurate a change in the settled rule as to the persons who are entitled to raise the questions; and to hold that a different rule applied in resisting a claim made by State authority, and asserting an immunity claimed under Federal authority, would be, not merely to introduce discord into the law, but to provide grounds for opposite decisions in the same case. Indeed, the language of this part of the section is less strong in favor of the plain-

tiffs' claim than the language of the act of 1789, upon which the cases first above cited were decided.

The writ should therefore be dismissed for want of jurisdiction.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

Our jurisdiction in this case depends upon the effect to be given to that provision of the Judiciary Act which authorizes this court to re-examine the decisions of the highest court of a State in certain cases, "where any title, right, privilege, or immunity is claimed under" any statute of the United States.

The plaintiffs in error did not claim under the assignees in bankruptcy. They set up the title of the assignees, not to protect their own, but to defeat that of the receivers appointed by the State court. They claimed adversely to both the receivers and assignees. They did not even allege that the assignees had ever attempted to assert title. The contest was one originally for the possession of certain papers. The decree for money was given, because, pending the suit, the papers sought for had been exchanged for money, and the receivers were willing to accept the exchange. In the absence of the assignees from the case, the decree could have no effect upon their title to the coupons or money. If, when the demand was made by the receivers, the plaintiffs in error had surrendered the coupons, that surrender would have been a complete defence to a future action by the assignees, inasmuch as they had not before that time asserted their claim, either by demand or notice. The title of the assignees to the property would not have been defeated by the transfer. Whatever rights they had against the plaintiffs in error could be enforced by an appropriate proceeding against the receivers. The whole effect of the surrender, so far as the assignees were concerned, was to transfer the custody of the property from the plaintiffs in error to the receivers. In this case the transfer was not voluntary, but in pursuance of a decree rendered by a court of competent jurisdiction, with the assent of the assignees. Under such circumstances, it is not easy to see how the assignees can proceed further against the parties, who have only obeyed the commands of the court. Clearly, their remedy, if they have any, is against the property in the hands of the receivers.

The second section of the act of Feb. 5, 1867 (14 Stat. 385), which was in force when this writ of error was brought, and which has been substantially re-enacted in the Revised Statutes (sect. 709), differs only from the twenty-fifth section of the Judiciary Act of 1789, so far as the provision now under consideration is concerned, in the substitution of the word "immunity" for "exemption." In the old act, the words were "title, right, privilege, or *exemption;*" in the last, "title, right, privilege, or *immunity*." This does not materially affect the rights of the parties in the present case. The words, when used in this connection and applied to the circumstances of this case, have substantially the same meaning.

The construction of this provision in the act of 1789 came before this court for consideration as early as 1809, in the case of *Owing's Lessee* v. *Norwood*, 5 Cranch, 344. That was an action of ejectment in a State court. The defendant, being in possession, set up an outstanding title in a third person under a treaty. The writ of error from this court was dismissed for want of jurisdiction. In the progress of the argument, Chief Justice Marshall used this language: "Whenever a right grows out of or is protected by a treaty, it is sanctioned against all the laws and decisions of the States; and whoever may have this right, it is to be protected. But if the person's title is not affected by the treaty, if he claims nothing under a treaty, his title cannot be protected by a treaty. If Scarth or his heirs had claimed, it would have been a case arising under a treaty. But neither the title of Scarth nor of any person claiming under him can be affected by the decision of this case." In *Montgomery* v. *Hernandez*, 12 Wheat. 129, a suit was brought in a State court by parties beneficially interested in a bond given to the United States by a marshal to secure the faithful performance of his official duties. The suit was in the names of the beneficiaries, and not in that of the United States for their use. It was insisted that there could be no recovery, because the action should have been prosecuted in the name of the United States; and this was assigned for error in this court. But it was said that "the plaintiff in error did not and could not claim any right, title, privilege, or exemption by or under the marshal's bond, or any act of Congress giving authority to sue

the obligors for a breach of the condition," and that the court had no jurisdiction of the case on that ground. Again: the same question was presented and elaborately argued in *Henderson* v. *Tennessee*, 10 How. 311, decided in 1850. That also was an action of ejectment in a State court, in which the defendant set up an outstanding title in a third person, under an Indian treaty; and there, too, the writ was dismissed. In delivering the opinion of the court, Chief Justice Taney said, "It is true, the title set up in this case was claimed under a treaty; but, to give jurisdiction to this court, the party must claim the right for himself, and not for a third person in whose title he has no interest. . . . The heirs of Miller appear to have no interest in this suit, nor can their rights be affected by the decision. The judgment in this case is no obstacle to their assertion of their title in another suit brought by themselves or any person claiming a legal title under them." To the same effect are *Hale* v. *Gaines*, 22 How. 149, 160, and *Verden* v. *Coleman*, 1 Black, 472. This must be considered as settling the law in this class of cases; and it seems to be decisive of this case. The plaintiffs in error claim no title, right, privilege, or immunity under the Bankrupt Law. Their obligation to account for the coupons in their hands is not discharged by the law. The title of the assignees cannot be affected by the decree, except through their consent. It follows, therefore, that this case must be *dismissed for want of jurisdiction.*

NOTE. — *Farwell* v. *Converse et al.*, in error to the Supreme Judicial Court of Massachusetts, differs from the preceding case in this, that the decree against Farwell was for the delivery of the coupons which still remained in his hands, and not for the money collected upon them. The writ in this case was, therefore, dismissed for the reasons appearing in the opinion given in that case.

SAWYER ET AL. *v.* TURPIN ET AL.

As the exchange of a valid security for one of equal value within four months prior to the filing of a petition in bankruptcy, even when the creditor and debtor know of the insolvency of the latter, takes nothing away from the other creditors, and is, therefore, not in conflict with the thirty-fifth section of the Bankrupt Act, — *Held*, that a chattel mortgage, taken within that period of time by a creditor in exchange for a prior valid bill of sale of the same property, and recorded pursuant to the laws of the State where the transaction took place before any rights of the assignees in bankruptcy accrued, cannot be impeached by them as a fraudulent preference within the meaning of that act.

APPEAL from the Circuit Court of the United States for the District of Massachusetts.

On the fifteenth day of May, 1869, J. C. Bacheller, in order to secure a debt due by him to Novelli & Co., executed a bill of sale conveying his chattel interest in certain property to Turpin, one of the defendants below.

This conveyance was not recorded, nor was possession had thereunder.

On the 31st of July, 1869, Turpin having surrendered the bill of sale, Bacheller, in exchange therefor, executed to him a mortgage upon the same property. This mortgage was recorded on the 17th of the following September.

Bacheller filed his petition in bankruptcy the twenty-second day of October then next ensuing; and the appellants, his assignees, filed their bill in the District Court to set aside the mortgage as a fraudulent preference of a creditor, alleging that Bacheller was insolvent when the mortgage was given, and that Turpin, and Novelli & Co., the other defendants, knew of the fact.

The District Court passed a decree dismissing the bill, which was affirmed by the Circuit Court. The assignees appealed to this court.

The recording statutes of Massachusetts which apply to the case are set forth in the opinion of the court.

Mr. Benjamin Dean and *Mr. J. G. Abbott* for the appellants.

The question presented in this case is, whether the chattel mortgage of July 31, 1869, given by the bankrupt Batcheller to the defendant Turpin, is void as against the assignees, as being a fraudulent preference of a creditor under the Bankrupt Act.

The defendants cannot claim under the absolute conveyance of May 15, because it is admitted by them that it was surrendered. They took the mortgage under which they claim as collateral security for a pre-existing debt due from the mortgagor. He was then insolvent, and they knew it. The case comes exactly within the provisions of the Bankrupt Act, avoiding such transactions as fraudulent; and it is entirely immaterial that a prior conveyance of the same property was given up.

The conveyance of May 15 was null and void against cred-

itors or their representatives, as it was never recorded, nor was possession of the mortgaged property given or taken under it. Stat. of Mass., ch. 151, sect. 1.

The Bankrupt Act substantially provides that a mortgage, to be valid against assignees, must be recorded according to the laws of the State where it is made. Bankrupt Act, sect. 14, prov. 2.

No sale or delivery was intended. The instrument of May 15 was given only as security for a debt, not to make an absolute sale of the property; so that, even between the parties, no title had passed before it was surrendered.

It has been repeatedly held, in reference to questions of bankruptcy and insolvency, that the validity of any instrument claimed under against an assignee must be determined by the state of facts existing at the time of its execution. *Forbes* v. *Howe*, 162 Mass. 427; *Blodgett* v. *Hildreth*, 11 Cush. 311; *Paul* v. *Waite*, 11 Gray, 190; *Simpson* v. *Carlton*, 1 Allen, 109; *Denny* v. *Same*, 2 Cush. 160.

Every conveyance by a bankrupt, which by the laws of the State where it is made is void against creditors, is also void against the assignee in bankruptcy. *Allen* v. *Massey*, 17 Wall. 357; *Bank of Leavenworth* v. *Hunt*, 11 id. 391; *Kane, Assignee*, v. *Rice*, Nat. Bank Reg., vol. x. 469; *Edmondson* v. *Hyde*, id. vol. vii. 1; *Thornhill* v. *Link*, id. vol. viii. 521; *In re Wynne*, id. vol. iv. 5, Chase, C. J.

The assignee takes what any creditor could take; otherwise the creditors, instead of gaining by the Bankrupt Act, are losers.

Mr. Joshua D. Ball for the appellees.

The surrender of the deed was a sufficient consideration for the mortgage.

Even if never recorded or exchanged for the mortgage, and if no possession had been taken, the deed, being valid as against Bacheller, would have been valid as against his assignees in bankruptcy.

Assignees in bankruptcy take, except in cases of fraud only, the rights of the bankrupt, and subject to all the equities and incumbrances which exist against the bankrupt; and an unrecorded mortgage of chattels, being valid as against the bankrupt, is valid as against his assignees. *In re J. Dow*, 6 N. B. R. 11;

In re Griffiths, 3 id. 179; *Sawyer* v. *Turpin*, 5 id. 339, 346; *Winslow* v. *McLellan*, 2 Story, 495, 500; *Mitchell* v. *Winslow*, id. 630; *Fletcher* v. *Morey*, id. 555; *Ex parte Newhall*, id. 363; *Fiske* v. *Hunt*, id. 584; *Parker* v. *Muggridge*, id. 334.

An exchange of security, even after the debtor is known to be insolvent, is perfectly valid if the creditor by the exchange receives no more in value than he gives up. *Stevens* v. *Blanchard*, 3 Cush. 169.

The validity of the mortgage depends not upon the state of facts existing at its date; but, as it was exchanged for another form of security on the same property, its validity will be upheld because the security for which it was an exchange was valid, and made and delivered more than four months before proceedings in bankruptcy were commenced. *Stevens* v. *Blanchard*, *supra*; *Winslow* v. *McLellan*, 2 Story, 495, 500; *Clark* v. *Iselin*, 21 Wall. 360; *Cook* v. *Tullis*, 18 id. 340; *Watson* v. *Taylor*, 21 id. 378; *Burnhisel* v. *Firman*, 11 Nat. Bank Reg. 505; *Catlin* v. *Hoffman*, 9 id. 342.

The deed which was given up might have been recorded by Turpin at any moment. He could at any time have taken possession of the property, and exercised full and absolute control over it.

It is said, that, before the exchange, no possession had been taken under the deed, and that it had not been recorded.

Such a deed as between the parties was valid without possession or record. Gen. Stat. of Mass., ch. 151, sect. 1.

No rights of creditors had intervened when the exchange took place.

The Supreme Judicial Court of Massachusetts, in one of their leading decisions made in the year 1856, say, "The time when the record shall be made is not specially prescribed; though it must undoubtedly precede the possession by others subsequently acquiring an interest in the mortgaged property. Rev. Stat., ch. 74, sect. 5. To prevent it passing to them, it will be sufficient that the record is made at any time before such possession is taken, though it be long after the execution of the mortgage." *Mitchell et al.* v. *Black et al.*, 6 Gray, 106. *Briggs* v. *Parkman*, 2 Metc. 258; *Adams* v. *Wheeler*, 10 Pick. 199; *Seaver* v. *Spink*, 8 Nat. Bank Reg. 218; *Cragin* v. *Car-*

michael, 11 id. 511; *In re Wynne*, 4 id. 23; *Gibson* v. *Warden*, 14 Wall. 244.

MR. JUSTICE STRONG delivered the opinion of the court.

The only question presented by this appeal is, whether the mortgage given by the bankrupt on the thirty-first day of July, 1869, to Edward Turpin, the agent of Novelli & Co., was a fraudulent preference of creditors within the prohibition of the Bankrupt Act, and therefore void as against the assignees in bankruptcy. That it was a security given for the protection of a pre-existing debt, and that it was given within four months immediately preceding the filing of the petition in bankruptcy, are conceded facts. It may also be admitted that the bankrupt was insolvent when the mortgage was made, and that the creditors had then reason to believe he was insolvent.

The petition in bankruptcy was filed on the 22d of October, 1869. On the 15th of May next preceding that date, Bacheller, the bankrupt, who was indebted to Novelli & Co. in the large sum of $27,839 in gold, conveyed to Turpin, who was their agent, as a security for the debt, the building described in the subsequent mortgage of July 31. It was a frame building, erected upon leased ground; and Bacheller had, therefore, only a chattel interest in it. The conveyance was by a bill of sale absolute in its terms, having no condition or defeasance expressed; but it was understood by the parties to be a security for the debt due. It was in substantial legal effect, though not in form, a mortgage. Having been executed more than four months before the petition in bankruptcy was filed, there is nothing in the case to show that it was invalid. True, it was not recorded; and it may be doubted whether it was admissible to record. True, no possession was taken under it by the vendee; but for neither of these reasons was it the less operative between the parties. It might not have been a protection against attaching creditors, if there had been any; but there were none. It was in the power of Turpin to put it on record any day, if the recording acts apply to such an instrument; and equally within his power to take possession of the property at any time before other rights against it had accrued. These powers were conferred by the instrument itself, immediately on

its execution. In regard to chattel mortgages, the recording statutes of Massachusetts, enacted in 1836, provide as follows: "No mortgage of personal property hereafter made shall be valid against any other person than the parties thereto, unless possession of the mortgaged property be delivered to and retained by the mortgagee, or unless the mortgage be recorded by the clerk of the town where the mortgagor resides." Rev. Stat. 473, ch. 74. The statute contains a clear recognition of the validity of an unrecorded chattel mortgage, as between the parties to it; though no possession be taken under it. And the General Statutes of the State, enacted in 1860 (Gen. Stat. 769, ch. 151), contain the same recognition. Their language is the following: "Mortgages of personal property shall be recorded on the records of the town where the mortgagor resides when the mortgage is made, and on the records of the city or town in which he then principally transacts his business, or follows his trade or calling. If the mortgagor resides without the State, his mortgage of personal property within the State, when the mortgage is made, shall be recorded on the records of the city or town where the property then is. Unless a mortgage is so recorded, or the property mortgaged is delivered to and retained by the mortgagee, it shall not be valid against any person, *other than the parties thereto*, except as provided in the following section." The exception extends only to mortgage contracts of bottomry, or *respondentia*, to transfers, assignments, or hypothecations of ships or vessels, and to transfers in mortgage of goods at sea or abroad. Neither of these acts prescribes when the record must be made, or the possession be taken; but, when made, the instrument takes effect, as against third persons as well as between the parties, from the time of its execution, unless intervening rights have been obtained. In *Mitchell et al.* v. *Black et al.*, 6 Gray, 100, it was ruled by the Supreme Court of Massachusetts that one who had taken bills of sale of merchandise from his debtor as a security for money advanced, and who had allowed the debtor to sell portions of the merchandise in the usual course of his business as if he were the owner thereof, might take possession of it at any time in order to secure his debt; and that such taking of possession, though at a time when the

debtor was known by himself and the creditor to be insolvent, was effectual, notwithstanding the State Insolvent Law, which contained provisions very like those of the Bankrupt Act. The court held unqualifiedly that the bills of sale, absolute as they were in terms, though in fact intended only as a security, and though unattended by possession of the property, and though not placed upon record, vested a complete title in the creditor, subject only to be defeated by the discharge of the debt, or by some intervening right acquired before the possession was taken. This was a case of bills of sale, like the present, not a case of a technical mortgage. In speaking of the registration of mortgages, the court said, "The time when the record shall be made is not specifically prescribed by the statute, though it must undoubtedly precede the possession by others subsequently acquiring an interest in the mortgaged property. To prevent it from passing to them, it will be sufficient that the record is made at any time before such possession is taken, though it be long after the execution of the mortgage."

It should not be doubted, then, that the bill of sale of May 15, 1869, conveyed to Turpin all Bacheller's interest in the frame building; that it was effective for the purposes for which it was made; and, no other rights having intervened, that it was a valid security, to the extent of the value of the property, for the debt due Novelli & Co. on the 31st of July, 1869, when the mortgage impeached by the bill was made. The mortgage covered the same property. It embraced nothing more. It withdrew nothing from the control of the bankrupt, or from the reach of the bankrupt's creditors, that had not been withdrawn by the bill of sale. Giving the mortgage in lieu of the bill of sale, as was done, was, therefore, a mere exchange in the form of the security. In no sense can it be regarded as a new preference. The preference, if any, was obtained on the 15th of May, when the bill of sale was given, more than four months before the petition in bankruptcy was filed. It is too well settled to require discussion, that an exchange of securities within the four months is not a fraudulent preference within the meaning of the Bankrupt Law, even when the creditor and the debtor know that the latter is insolvent, if the security given up is a valid one when the exchange is made, and

if it be undoubtedly of equal value with the security substituted for it. This was early decided with reference to the Massachusetts insolvent laws (*Stevens* v. *Blanchard*, 3 Cush. 169); and the same thing has been determined with reference to the Bankrupt Act. *Cook* v. *Tullis*, 18 Wall. 340; *Clark* v. *Iselin*, 21 id. 360; *Watson* v. *Taylor*, 21 id. 378; and *Burnhisel* v. *Firman*, 22 id. 170. The reason is, that the exchange takes nothing away from the other creditors. It is, therefore, not in conflict with the thirty-fifth section of the act, the purpose of which is to secure a ratable distribution of the property of a bankrupt owned by him at the time of his becoming bankrupt, and undiminished by any fraudulent preferences given within four months prior thereto.

It follows that the mortgage of July 31 was not prohibited by the Bankrupt Act when it was given, and that it was valid. Hence, as it was recorded on the seventeenth day of September, 1869, pursuant to the requisitions of the State law, before any rights of the assignees in bankruptcy accrued, it cannot be impeached by them.

It has been argued, however, on behalf of the assignees, that the bill of sale of May 15 was an insufficient consideration for the mortgage, because, as alleged, there was an agreement between Bacheller and Turpin that it should not be recorded, and should be kept secret. If the fact were as alleged, it is not perceived that it would be of any importance; for it is undeniable that the bill of sale rested on a valuable consideration, — to wit, the debt of $27,839 in gold, due to Novelli & Co.; and it is not denied that it gave to Turpin the right to take possession of the property described in it. It was, therefore, a valuable security, even if there was an agreement not to record it. If it be said failure to put it on record enabled the debtor to maintain a credit which he ought not to have enjoyed, the answer is that the Bankrupt Act was not intended to prevent false credits. Its purpose is ratable distribution. But the evidence does not justify the assertion that there was in fact any agreement that the bill of sale should not be recorded, or that possession should not be taken under it.

Upon all points, therefore, the case is with the appellees, and the decree of the Circuit Court must be affirmed.

JACKSON *v.* JACKSON.

1. Although, by the common law, the money which the wife has at the time of her marriage, not secured to her by a settlement or contract, and that which she subsequently earns, belong to the husband, it is competent and lawful for him to allow its investment in the purchase and improvement of real property for her separate use, if the rights of existing creditors are not thereby impaired.
2. The doctrine of resulting trusts has no application to an investment of this kind: it constitutes a voluntary settlement upon the wife, whether made through the husband, or directly by the wife with his consent.
3. A divorce granted to the wife for cruel treatment by the husband is not of itself sufficient reason for awarding to him any portion of the property thus settled upon her.

APPEAL from the Supreme Court of the District of Columbia.

This is a case of divorce. The parties were married on the 25th of November, 1856, in the District of Columbia, where they then and ever since have resided. Each prayed for a dissolution of the marriage contract for the alleged misconduct of the other. The appellee, in his cross-bill, set up that the appellant held in her individual name the title to certain real estate in said District which had been acquired and paid for since their marriage with his money and earnings, and prayed that she be decreed to convey the same to him.

The appellant's answer to the cross-bill alleged that the land had been purchased with money received from her father's estate, and from the proceeds of her own industry and savings.

The cause being set down for hearing, the court found, as a matter of fact, that the appellee was guilty of cruel treatment, as charged in the appellant's bill; that the cause of divorce in the cross-bill mentioned was not made out; and that the property was in part acquired and paid for with money belonging to the appellant at the time of her marriage, and for the rest with moneys earned by the joint efforts of said parties.

The court thereupon decreed that the married relations between the parties be dissolved; that the title to the property be held by the appellee in trust for both parties; and that, from the date of the decree, the appellant should hold, as of her own absolute right, a specifically described portion thereof, and convey in fee-simple the remainder to the appellee.

From so much of the decree as relates to the property the plaintiff below appealed to the General Term of said Supreme Court. The decree being affirmed, an appeal was taken to this court.

There is no conflict in the proofs as to the purchase of the real estate by the appellant with the money which she possessed at the time of her marriage. The rent of the house which was then standing on the property, and her earnings, were used in the erection of the additional buildings; but the evidence adduced by the appellee tended to show that a part of his earnings was applied to the same purpose.

The appellant took the deed in her own name, paid taxes on the property, caused it to be insured, and managed and controlled it as her own separate estate, with the full knowledge and consent of the appellee.

The common law as to the rights of a married woman to real or personal property belonging to her at the time of her marriage, or thereafter acquired, prevailed in said District until April 20, 1869, when an act was passed to regulate such rights. 16 Stat. 45.

The ninth section of the "Act to authorize divorces in the District of Columbia, and for other purposes," approved June 19, 1860 (12 Stat. 59), provides "that, in all cases where a divorce is granted, the court allowing the same shall have power, if it see fit, to award alimony to the wife, and to retain her right of dower, and to award to the wife such property, or the value thereof, as she had when she was married, or such part, or the value thereof, as the court may deem reasonable, having a regard to the circumstances of the husband at the time of the divorce."

The above provisions, except in so far as they relate to alimony and the right of dower, appear not to have been re-enacted in the Revised Statutes.

The case was argued by *Mr. A. G. Riddle* for the appellant, and by *Mr. William A. Meloy* and *Mr. Francis Miller* for the appellee.

MR. JUSTICE FIELD delivered the opinion of the court.

The land in controversy in this case was purchased by the wife with money which she had previous to her marriage, given to her by her father. The buildings erected thereon were con-

structed partly with such money, and partly with her subsequent earnings. The deed of the land was taken in her name; the contract for the houses was made by her alone with the builder; the policy of insurance upon the buildings was executed to her; and she paid the taxes upon the property. It is true, that at the date of the marriage, and when the land was purchased and the improvements were made, the common law governed in the District of Columbia as to the rights of married women to the personal property possessed by them previous to their marriage, and not secured by a settlement or contract to their separate use, and as to their subsequent earnings. By that law, the money which the wife then possessed and her subsequent earnings belonged exclusively to her husband. They vested as absolutely in him as though the money had been originally his, and the earnings were the proceeds of his own labor and industry. This harsh rule of the common law was founded upon the idea, that, as the husband was bound by the marriage to support the wife and the rest of the family, he was entitled to whatever she possessed, or subsequently acquired, which was available for that purpose, — a rule which would have had some good ground for its existence, had it only applied when the money or earnings of the wife were necessary for that purpose. But, becoming absolutely the property of the husband, they were subject to his disposal without regard to the necessities of the family, and might be taken from them at the suit of his creditors. They partook of the condition, and were subject to the fate, of his separate property.

But though the money which the wife in the present case had at her marriage, and her subsequent earnings, must be regarded as the property of the husband, it was competent and lawful for him to allow her to invest them for her own use, so as to be beyond his reach and control. Being at the time free from debt, he could have taken whatever money she had, whether given to her or earned by her own labor, and purchased with it the land in controversy, and received the deed in her name. The investment would then have been an advancement for her benefit, — a voluntary settlement upon her; and the subsequent application of her earnings to the construction of improvements would have equally been a legal disposition of them. The improvement of property settled upon the wife

is not forbidden to the husband, if not made with a fraudulent intent; and the moneys used for that purpose do not interfere with any rights of existing creditors.

The law on the subject of post-nuptial settlements of this character is well settled, and will be found stated in numerous adjudications of the American courts. *Picquet* v. *Swan*, 4 Mas. 444; *Haskell* v. *Bakewell*, 10 B. Mon. 206. The doctrine of resulting trusts, arising where a conveyance is taken in the name of one person and the consideration is advanced by another, has no application to investments of this kind. Such trusts are raised by the law from the presumed intention of the parties, and the natural equity that he who furnishes the means for the acquisition of property should enjoy its benefits. But no presumption that a personal benefit was intended to the party advancing the funds for a purchase in the name of another can arise where an obligation exists on his part, legal or moral, to provide for the grantee, as in the case of a husband for his wife, or a father for his child. The circumstance that the grantee stands in one of these relations to the party is of itself sufficient evidence to rebut the presumption of a resulting trust, and to create a contrary presumption of an advancement for the grantee's benefit. *Murless* v. *Franklin*, 1 Swans. 17; *Grey* v. *Grey*, 2 id. 597; *Finch* v. *Finch*, 15 Ves. 50; *Guthrie* v. *Gardner*, 19 Wend. 414; Perry on Trusts, sects. 143, 144.

The case of *Sexton* v. *Wheaton*, 8 Wheat. 229, which arose in the District of Columbia, is a determination of this court upon the points here presented. There the husband had purchased a house and lot within the District, and taken the conveyance in the name of his wife, and afterwards improvements were made upon the property. Subsequent creditors, having obtained judgment against him, filed a bill to subject the property to its payment, contending that the conveyance to the wife was fraudulent and void as to them, and praying, that, if the conveyance was sustained, the wife might be compelled to account for the value of the improvements. But the court held, Mr. Chief Justice Marshall delivering its opinion, that, the husband at the time being free from debt, the conveyance to the wife was to be deemed a voluntary settlement upon her, which, not being made with any fraudulent intent, was operative and binding against subsequent creditors; and that the

improvements upon the property stood upon the same footing as the conveyance itself, they being made before the debts were contracted. The Chief Justice observed that it would seem to be a consequence of that absolute power which a man possesses over his own property, that he might make any disposition of it which did not interfere with the existing rights of others; that such disposition, if it were fair and real, would be valid; and that the limitations upon this power were those only which were prescribed by law. The Chief Justice then proceeded to show that the law only limited this power when its exercise impaired the rights of existing creditors; and that a voluntary settlement by a husband in favor of his wife could not be impeached by subsequent creditors, unless it was made to defraud them.

The present case is one much stronger than the case cited; for here there are no creditors complaining. It differs from the one cited in this, that the investment was made directly by the wife, instead of being made through the husband; but we do not perceive in this fact any valid objection to the legality of the transaction. There can be no doubt that she acted with his approval. Fifteen years of acquiescence in her holding the land in her name, and in making improvements thereon with her earnings, ought to be deemed satisfactory evidence of his original authorization of the investments. The amount paid for the land was only $300 (less than one-sixth of the sum received from her father), and the whole cost of the improvements for the fifteen years was only about $2,000; and it does not appear that any third parties have been in any respect prejudiced by the investments, or have ever questioned their validity.

The divorce decreed was not of itself a sufficient reason for restoring to the husband any rights to the property thus settled upon the wife. That was granted for cruel treatment; and, whatever may be the power of the court over the property of parties upon the dissolution of the marriage relation, there was no call for its exercise in a case like the present.

The decree of the Supreme Court of the District, so far as it awards any portion of the property in controversy to the husband, and directs a conveyance by the wife to him, must be reversed; and it is so ordered.

Mr. Justice Davis dissenting.

I agree to the legal propositions advanced by the court; but, in my opinion, the evidence in this case does not warrant the application that has been made of them.

It would serve no useful purpose to discuss the evidence, in order to show that it is so; and I shall, therefore, content myself with saying, that it justified the conclusion reached by the court below, that the property should be divided between the parties. As the appeal only brought up the question of property rights, I am not at liberty to consider the merits of the decree for divorce.

Baltimore and Potomac Railroad Company *v.* Trustees of Sixth Presbyterian Church.

Affidavits, depositions, and matters of parol evidence, though appearing in the transcript of the proceedings of a common-law court, do not form part of the record unless they are made so by an agreed statement of facts, a bill of exceptions, a special verdict, or a demurrer to the evidence.

Error to the Supreme Court of the District of Columbia.

The facts are stated in the opinion of the court.

Mr. Daniel Clarke and *Mr. Wayne MacVeagh* for the plaintiff in error.

The court declined hearing *Mr. James A. Garfield* and *Mr. R. D. Mussey* for the defendant in error.

Mr. Justice Clifford delivered the opinion of the court.

Compensation was claimed in this case by the Trustees of the Sixth Presbyterian Church of this District for injuries occasioned to their real property by the railroad company; and they made application to a justice of the peace in and for the District, representing that the railroad company "have laid their tracks and are now running their trains along Sixth Street and in front of the property of said church, and have built and now occupy and use a dépôt building upon said Sixth Street and in the near vicinity of said church, to the great damage of the same."

Pursuant to that application the magistrate to whom it was

addressed issued a warrant to the marshal of the District, commanding him to summon a jury of twenty citizens of the District, possessing the qualifications therein described, to meet at said church building on the day therein named, to proceed to value, in accordance with law, the damages which the said church organization has sustained in consequence of the things done as aforesaid by said company.

Two objections to the warrant were filed with the marshal by the railroad company: (1.) That the warrant requires the jury to value damages for causes which are not authorized by law. (2.) That the form of the oath administered to the jury is not correct.

Enough appears to show that the objections did not prevail, and that the inquisition was taken; the jurors being first sworn by the marshal that they would truly and impartially assess the damages, if any, the applicants may sustain by the laying of the track along Sixth Street by the railroad company; and that the jury assessed the damages sustained by the applicants, by reason of the railroad company laying their track along Sixth Street, at the sum of eleven thousand five hundred dollars. Due return of the proceedings was made by the marshal, in which it also appears that both parties met at the time and place appointed, and that the marshal duly certified the warrant and inquisition to the Supreme Court of the District, as required by law.

Two days later, the railroad company moved the court to quash the warrant and set aside the inquisition for the reasons following: (1.) Because the warrant required the marshal to summon a jury to assess damages not authorized by law. (2.) Because the warrant required the marshal to summon a jury to assess damages for the running of the company's trains along Sixth Street and in front of the property of the church, and for having built and now occupying and using a dépôt building in the near vicinity of the church. (3.) Because the return of the marshal shows that he did not administer to the jurors the oath required by law. (4.) Because the marshal permitted evidence to go to the jury to show that the property had been damaged by the use and occupation of the track by the railroad company, and by the smoke and noise arising from

such occupation. (5.) Because the jury, in assessing the damages, did not confine their inquiries to the question of appreciation and depreciation of the value of the property by reason of the laying of the track along Sixth Street.

Pending that motion, the plaintiffs suggested to the court that the law required that the inquisition should be confirmed at the session of the court held next after the same was filed, and moved the court that the cause be placed upon the calendar, and stand for hearing; and the court granted the motion, and placed the case on the trial-calendar. Four days afterwards, the plaintiffs moved the court to confirm the award of the jury; and on the same day the defendants moved the court to strike the cause from the calendar for the want of jurisdiction to try the same, except on appeal.

Affidavits of their counsel were offered by the defendants to prove that the plaintiffs were permitted to give evidence to the inquisition against the objections of the company, that the church was greatly annoyed and injured by the location of the engine dépôt, in consequence of the smoke arising from the engines being wafted by the wind into the church building, and also from the noise of the engines and the passing trains and the ringing of the engine-bells. Two jurors also gave affidavits, which were also offered in evidence, to show, that, in arriving at the conclusion, they took into consideration all the surrounding circumstances, such as the passing of trains in front of the church, the danger in passing to and from the church, the expense of removing to another location, and the smoke and noise arising from the passing engines.

Seasonable objection was made by the plaintiffs to the admissibility of those affidavits; but the court overruled the objections, and the affidavits were introduced, and allowed to be read.

Hearing was had on the motion of the plaintiffs and on the motions of the defendants to strike the case from the calendar, and to set the inquisition aside. Both motions of the defendants were overruled; and the court, finding no error in the record, confirmed the inquisition and finding of the jury, and gave judgment in favor of the plaintiffs for the amount awarded. Neither party tendered any bill of exceptions; but the defendants sued out a writ of error, and removed the cause into this court.

Neither depositions nor affidavits, though appearing in the transcript of a common-law court of errors, can ever be regarded as a part of the record, unless the same are embodied in an agreed statement of facts, or are made so by a demurrer to the evidence, or are exhibited in a bill of exceptions. Matters of parol evidence in such a case can never be made a part of the record so as to become re-examinable in a court of errors, unless it be in one of four ways: (1.) By an agreed statement of facts. (2.) By a bill of exceptions. (3.) By a special verdict. (4.) By a demurrer to the evidence; which latter mode is seldom or never adopted in modern practice.

Exceptions may be taken by the opposite party to the introduction of depositions or affidavits; and the party introducing such evidence in a subordinate court may insist that the court shall give due effect to the evidence, and, in case of refusal to comply with such a request, may except to the ruling of the court, if it be one prejudicial to his rights. Where neither party excepts to the ruling of the court, either in respect to its admissibility or legal effect, the fact that such a deposition or affidavit is exhibited in the transcript is not of the slightest importance in the Appellate Court, as nothing of the kind can ever constitute the proper foundation for an assignment of error. *Suydam* v. *Williamson*, 20 How. 433.

Errors apparent in the record, it is true, are open to revision, whether the error be made to appear by bill of exceptions, or in any other legal manner. *Slacum* v. *Pomery*, 6 Cr. 221; *Bennet* v. *Butterworth*, 11 How. 669; *Garland* v. *Davis*, 4 id. 131.

When a party is dissatisfied with the decision of his cause in an inferior court, and intends to seek a revision of the law applied to the case in a superior jurisdiction, he must take care to raise the question of law to be revised, and put the facts on the record for the information of the appellate tribunal; and, if he omits to do so in any of the methods known in the practice of courts of errors, he must be content to abide the consequences of his own neglect.

Evidence, whether written or oral, and whether given to the court or the jury, does not become a part of the record unless made so by some regular proceeding at the time of the trial,

and before the rendition of the judgment. Whatever the error may be, and in whatever stage of the cause it may have occurred, it must appear in the record, else it cannot be revised in a court of error exercising jurisdiction according to the course of the common law.

Viewed in the light of these suggestions, it is clear that it will not be necessary to give a separate examination to all the alleged errors of the court below in confirming the inquisition, and in rendering judgment for the plaintiffs. Sufficient has already been remarked to show that the affidavits constituting the whole basis of the theory of fact involved in the errors assigned, affecting the merits of the controversy, are no part of the record; and consequently the errors assigned are utterly destitute of any legal foundation.

Attempt is made to overcome that difficulty by the suggestion that the writ of error is addressed to the judgment, and that the office of the writ of error is to remove the judgment of the subordinate court into this court for re-examination, which is undoubtedly correct; but it is equally true, that, if the transcript does not show that any error exists in the record, the judgment must in all cases be affirmed, except where it appears that there has been a mis-trial. *Minor* v. *Tillotson*, 1 How. 287; *Taylor* v. *Morton*, 2 Black, 484; *Barnes* v. *Williams*, 11 Wheat. 415; *Carrington* v. *Pratt*, 18 How. 63.

Inquisitions like the present one bear a strong analogy in many respects to the report or award of referees appointed under a rule of court, to whom is referred a pending action. Referees in such cases make their report to the court; and in such a case the report, unlike an award at common law, must be confirmed before the prevailing party is entitled to the benefit of the finding of the referees. When the report is filed in court, the losing party may file objections in writing to the confirmation of the report, and may introduce evidence in support of the objections; and it is well-settled law, that the ruling of the court in overruling such objections is the proper subject of a bill of exceptions. *Railroad* v. *Myers*, 18 How. 250.

Doubts were expressed at one time whether a bill of exceptions could be claimed in such case; but the decision referred to removed every doubt upon the subject. *Strothers* v. *Hutch-*

inson, 4 Bing. N. C. 83; *Ford* v. *Potts*, 1 Halst. 388; *Nesbitt* v. *Dallam*, 7 Gill & J. 507; *Tomson* v. *Moore*, 9 Port. 137.

Evidence in support of the objections to the award was received in that case; and the judge overruled the objections, and embodied the testimony and his ruling in a bill of exceptions, reserving his opinion as to the regularity of the proceeding, and whether the judgment could be revised. Pursuant to the arrangement, the losing party in the court below sued out a writ of error; and this court sustained the writ of error, and decided that the equity of the statute allowing a bill of exceptions in courts of common law of original jurisdiction embraces all such judgments or opinions of the court that arise in the course of a cause which are the subjects of revision by an appellate court, and which do not otherwise appear on the record. 18 id. 251; *Canal Co.* v. *Archer*, 9 G. & J. 481; *Walker* v. *Railroad*, 3 Cush. 8.

Doubtless other modes may be devised of accomplishing a revision of the legal questions in a case like the present; but the court does not find it necessary to pursue the inquiry, as all the court intends to decide is, that the affidavits in the transcript are not a part of the record, and that in such a case an assignment of errors, such as the one exhibited in this case, so far as the same depends upon the affidavits, presents no question for re-examination by this court.

Three other questions of a formal character must receive a brief consideration. They arise from certain preliminary objections made by the defendants, as follows: (1.) That the warrant directed the marshal to summon a jury to assess damages not authorized by law. (2.) Because the marshal did not administer to the jury the oath required by law. (3.) They also denied the jurisdiction of the court below, because the case was not removed into that court by appeal from the special term.

By the warrant, it appears that the applicants represented to the magistrate that the railroad company had laid their tracks and are now running their trains along Sixth Street and in front of the property of the applicants, and have built and now occupy and use a dépôt building on said street in the near vicinity of the church; and the command to the marshal is, that he should

summon a jury of the number and described qualifications "to proceed to value, *in accordance with law*, the damages which the said church organization has sustained in consequence of the things done by said company as aforesaid."

Properly construed, it is by no means certain that the warrant professes to confer any greater power than that conferred by the statute; as the express direction of the warrant is, that the jury shall proceed to value the damages in accordance with law; which phrase may well be regarded as a limitation upon the phrase, "in consequence of the things done by said company." Suppose, however, the terms of the warrant are more comprehensive than the words of the statute: still the court is of the opinion that it furnishes no sufficient cause to reverse the judgment, for the reason that the transcript furnishes no legal evidence that the excess of power conferred, if any, was ever exercised by the jury to the prejudice of the rights of the defendants. Nothing appears in the transcript upon the subject, except what is contained in the affidavits; and it has already been determined that the affidavits are not properly to be regarded as a part of the record. *Pomeroy* v. *Bank*, 1 Wall. 600; *Young* v. *Martin*, 8 id. 356; *Coddington* v. *Richardson*, 10 id. 518.

Enough appears in the record to show that the jurors were duly sworn that they would truly and impartially assess the damages sustained by the applicants by the laying of the railroad-tracks, taking into consideration the appreciation and depreciation of the property belonging to the church. Seasonable objection was made to the form of the oath; but the objecting party did not point out in what respect it was erroneous to their prejudice, nor have they done so in the assignment of errors; which is all that need be said upon the subject.

Argument is hardly necessary to show that the third objection is without merit, as the course pursued is fully justified by the act of Congress. 12 Stat. 763.

Parties aggrieved by any order, judgment, or decree made or pronounced at a special term, may, if the same involve the merits of the action or proceeding, appeal therefrom to the general term; but the same section provides that the justice holding the special term may, in his discretion, order any

motion or suit to be heard in the first instance at a general term. Unquestioned power being shown to warrant the proceeding, the action of the court must be presumed to be correct until the contrary is shown by evidence embodied in the record. *Thompson* v. *Riggs*, 5 Wall. 676. *Judgment affirmed.*

MR. JUSTICE BRADLEY did not sit on the argument of this cause, and took no part in the decision.

BEAUREGARD *v.* CASE.

1. An agreement provided that the party of the first part should obtain in his own name, but for the joint account of himself and the parties of the second part, a lease of a railroad, and manage the same at a designated salary, for their mutual benefit; and that the parties of the second part should furnish the money necessary to carry out the enterprise, to be reimbursed, with interest, out of its annual profits; and then declared, that, after the payment of the capital thus invested and interest, the annual profits should be equally divided between all the parties, and that all losses should be equally borne between them. *Held*, that the agreement constituted a partnership.
2. According to the law of Louisiana, the partnership in this case being an ordinary one, as distinguished from those which are commercial, each partner is only bound individually for his share of the partnership debts; but to that extent a debt contracted by one partner, even without authority of the others, binds them, if it be proved that the partnership was benefited by the transaction.
3. By operation of law, a partnership debt is not extinguished or compensated by the indebtedness of the creditor to one of the partners; although such partner may, by way of defence or by exception, as it is termed in the practice of Louisiana, offset or oppose the compensation of *his* demand to that of the creditor.
4. Where the petition prayed for a judgment against all the defendants *in solido* for the whole amount of the partnership debt, but the facts alleged by the pleadings and disclosed by the proofs showed that the partnership was not a commercial but an ordinary one within the law of Louisiana, — *held*, that a verdict against each defendant for his proportionate share of such debt and the judgment rendered thereon were not vitiated by such a departure from the issues.

ERROR to the Circuit Court of the United States for the District of Louisiana.

Case, as receiver of the First National Bank of New Orleans, brought an action against Beauregard, May, and Graham, to

recover the sum of $237,008.39, alleging that said defendants were commercial partners engaged in carrying on the New Orleans and Carrolton Railroad; and that the partnership account, which was kept in said bank in the name of Beauregard as lessee, was largely overdrawn, and the money applied to the use of the partnership; that May, while acting as president of said bank, and to make a nominal settlement, executed a promissory note, in the name of Beauregard, as lessee, payable to the bank on demand, for $40,000; and that said May also drew a bill of exchange on A. C. Graham in New York, in favor of the bank, for $125,000, and caused it, as well as the note, to be placed to the credit of said lessee. The petition also avers that the note was not paid, and that the bill of exchange was not stamped, and never forwarded for presentation, acceptance, or collection; that both of said credits were false, fraudulent, and fictitious; and that May acted with fraudulent intent, well knowing that the note had not been discounted by the bank, and that the bill would not be paid; and further averring, that, as the money thus obtained was used for the benefit of the partnership, the partners are liable therefor *in solido*.

Graham was not served with process, and did not appear.

Defendants severed in their answer. May filed a general denial of the matters in the petition stated, and also averred that he was a discharged bankrupt.

Beauregard, in his answer, denied the existence of a partnership and his liability on account thereof, alleging that he was merely a salaried officer; that, under stipulations of agreement, May and Graham were exclusively responsible for the enterprise; and that the indebtedness to the bank was contracted upon that responsibility, said bank being aware of the state of facts. Beauregard denied the authority of May to execute the note for $40,000 in his name.

In a supplemental answer, he averred that on the 13th of May, 1867, the bank was indebted to May in the sum of $315,779.10; and that if there was any indebtedness by him (Beauregard), as claimed by the plaintiff, it was extinguished by the bank's indebtedness to May.

There was read in evidence an act passed before a notary public, bearing date April 12, 1866, between said Beauregard

and the New Orleans and Carrolton Railroad Company, by which the latter leased its track and appurtenances to Beauregard for the term of twenty-five years from the sixteenth day of that month. It contains sundry stipulations on the part of said Beauregard. The concluding part recites, —

"And thereupon personally came and appeared Thomas P. May and Augustus C. Graham, who, having taken cognizance of this act, declared they do hereby bind themselves and their heirs, *in solido*, with the present lessee, to the said New Orleans and Carrolton Railroad Company, their successors and assigns, as well for the true and faithful compliance on the part of said Beauregard with all the clauses, conditions, and stipulations herein contained, as for the true and punctual payment of the whole rents therein specified."

Said act was signed by the proper officer of said company, and by Beauregard, May, and Graham; and also a further agreement, bearing date the eighteenth day of said month, between Beauregard, May, and Graham, as follows: —

"ARTICLE 1. Gustave Toutant Beauregard shall obtain in his name, but for the joint account of the appearers, the lease of the New Orleans and Carrolton Railroad: he shall take charge, conduct, manage, and direct the undertaking, at a salary of five thousand dollars per annum, payable monthly at the rate of four hundred and sixteen dollars sixty-six cents and two-thirds per month, promising and binding himself to do his best endeavors to the utmost of his skill and ability for their mutual advantage; and also he shall have the right to select and appoint his assistants, with proper salaries.

"ART. 2. The said Thomas P. May and Augustus C. Graham shall furnish the amount of money necessary to carry out the enterprise, which amount shall not exceed one hundred and fifty thousand dollars for each of them, making an aggregate amount of three hundred thousand dollars. The said T. P. May and A. C. Graham shall be reimbursed, in capital and interest, at the rate of eight per cent per annum from the annual net profit of the enterprise.

"ART. 3. After the payment of said capital and interest as aforesaid, the annual net profits, gains, and increase as shall arise shall be equally divided between the said appearers, share and share alike; and also all losses as shall happen by bad debts or otherwise shall be paid and borne equally between them.

"ART. 4. The said T. P. May and A. C. Graham promise and bind themselves to pay the above sum of one hundred and fifty thousand dollars, each of them in manner following: to wit, twenty thousand dollars (each of them) immediately after the signing of the lease by the New Orleans and Carrolton Railroad Company; then twenty thousand dollars (each of them) per month during the next four succeeding months; then ten thousand dollars per month (should they be required by the lessee G. T. Beauregard) until final payment of the said sum of one hundred and fifty thousand dollars by each of them.

"ART. 5. There shall be kept just and true books of accounts, wherein shall be entered as well all the money received and expended in and about the said enterprise, as also all commodities and merchandises bought by reason and on account of the present copartnership between the appearers, and all other matters and things in any wise belonging or appertaining thereto, so that either of them may at any time have free access thereto.

"ART. 6. On the first of each month, a statement of amounts received and expended during the preceding month shall be furnished to the said Thomas P. May and A. C. Graham by said G. T. Beauregard, who will make his deposits in the First National Bank in this city.

"ART. 7. This copartnership shall continue from the date of the lease by the said New Orleans and Carrolton Railroad Company to the said G. T. Beauregard, for and during and to the full end and term of twenty-five years next ensuing.

"ART. 8. In case any of the said copartners shall happen to decease before the expiration of the said term of twenty-five years, the present copartnership shall continue between the surviving copartners and the heirs or assigns of the deceased, under the same charges, clauses, and conditions as above set forth.

"And the said parties hereby bind themselves, their heirs, executors, and administrators, for the performance of all and every of the above agreements."

There was evidence conducing to prove the matters stated in the petition and in the supplemental answer; there being to May's credit on the books of said bank, May 13, 1867, the sum of $317,779.10, for which sum he on that day gave a check to the United States in payment of a debt due them.

Beauregard requested the court to charge the jury, —

"If the jury shall find from the evidence that Thomas P. May

is individually indebted to the First National Bank of New Orleans in the sum claimed in plaintiff's petition for moneys obtained by him from the bank upon his sole credit and responsibility or by overdraft upon said bank, paid without the knowledge of the board of directors, and solely through the orders and control of said May as president or leading director of said bank; that said debt had matured at the date of plaintiff's appointment as receiver, and when, as preliminary thereto, the bank was taken in charge by the agent of the Comptroller of the Currency; and that said May then owed no other debts to said bank; and that at said dates the said bank was indebted to said May in the sum of $315,779 for a balance of his general deposit account, which has never been paid; then the jury are instructed that the debt sued for in this case was compensated and extinguished by the said indebtedness of the said bank: which charge the court refused to give, but gave it with the addition, provided that said May was the sole debtor of the bank; to which refusal of the court to charge as requested, and to the charge as given, Beauregard excepted."

Beauregard further requested the court to charge the jury,—

"If the jury shall find from the evidence, that, under the contract between T. P. May, A. C. Graham, and G. T. Beauregard, said May and Graham were to furnish, at their own exclusive charge and responsibility, and as their equivalent for their interest in the profits of the road, the means to carry on the same under said lease; that, after said means so furnished were repaid to them from the earnings of said road, the profits of the road were to be divided between them and said Beauregard, until which said Beauregard was to be paid a salary from the earnings of said road for his services in managing the same; and if the jury find, that, in accordance with said contract, May did furnish for said road the amount claimed in this suit which he obtained from the First National Bank, which debt thus created has never been paid, and that the earnings of the road were never sufficient to pay the same, or any part thereof; then the jury are instructed that G. T. Beauregard is not liable to plaintiff therefor, although the same was expended for the road, unless the jury find that he bound himself for the same, either expressly or by fair implication arising from dealings by him with the bank. But the court refused to charge as requested, but gave the charge with this addition, provided the bank had notice of the terms of said contract between said May, Graham, and Beauregard; to which refusal of the court to charge as requested, and to the charge as given, Beauregard excepted."

The jury found a verdict against Beauregard and May, each for one-third of the whole amount claimed; and the court rendered judgment accordingly.

Beauregard sued out a writ of error; but May refused to join therein.

Mr. James M. Carlisle and *Mr. John D. McPherson* for the plaintiff in error.

Mr. P. Phillips and *Mr. Charles Case* for the defendant in error.

MR. JUSTICE FIELD delivered the opinion of the court.

This was an action brought by the plaintiff, as receiver of the First National Bank of New Orleans, against the defendants, Beauregard, May, and Graham, to recover a sum exceeding two hundred and thirty-seven thousand dollars, alleged to have been overdrawn from the bank on their account. Three questions are presented by the record for our determination: *First*, whether the agreement entered into by the defendants on the 18th of April, 1866, created a copartnership between them in operating the New Orleans and Carrolton Railroad, by which the defendant Beauregard became liable with them for the partnership debts before their advances were reimbursed; *second*, whether if a copartnership were thus created, and the defendant Beauregard became from its commencement jointly liable with the other defendants, the indebtedness of the copartnership to the bank was compensated and extinguished by the indebtedness at the time of the bank to the defendant May; and, *third*, whether the verdict was defective in that it found against each defendant served only his proportional third of the whole partnership debt, instead of finding against these defendants the whole amount of the indebtedness.

The agreement of April 18, 1866, provided, on the one hand, that Beauregard should obtain in his own name, but for the joint account of the defendants, a lease of the railroad, and take charge of and control and manage it at a designated monthly salary, for their mutual benefit; and, on the other hand, that May and Graham should furnish the money necessary, not exceeding for each the sum of one hundred and fifty thousand dollars, to carry out the enterprise, to be reimbursed

with interest out of its annual net profits; and then declared that after the payment of the capital thus invested, and interest, the annual net profits, gains, and increase should be equally divided between the parties, share and share alike; and that all losses, from bad debts or otherwise, should be equally borne between them. It designated in terms the contract as one of partnership, and declared that it should continue from the date of the lease of the railroad for the period of twenty-five years.

There was in this agreement all the essential conditions for the creation of a partnership, — provisions for a union of services and money, and a division of profits and losses. The postponement of a division of profits between the three partners until the capital advanced by two of them should be refunded, with interest, did not alter the character of the agreement as one of partnership, nor the liability of all the partners to third persons for debts contracted in the prosecution of its business. It was sufficient to create the partnership relation that profits to be ultimately divided between the parties were contemplated from their joint enterprise (Civil Code of 1870, art. 2811); and the agreement in fixing the commencement of the partnership determined the date of their joint liability.

The partnership belonged to that class of partnerships which is designated in the law of Louisiana as ordinary partnerships, as distinguished from those which are commercial. The latter are such as are formed for the purchase and sale of personal property as principals, or as factors or brokers, or for the carriage of personal property for hire in ships or other vessels. Ordinary partnerships embrace all other kinds, and they differ essentially from the former in the powers and liabilities of the several partners. That which is material in the present case is, that, in ordinary partnerships, each partner is only bound individually for his share of the partnership debts; but to that extent a debt contracted by one partner, even without authority from the others, binds them if it be proved that the partnership was benefited by the transaction. Civil Code of 1870, arts. 2872, 2894. In the present case, there was evidence tending to show that the moneys overdrawn by Beauregard were applied to the purposes of the copartnership. The instruction presented by his counsel assumed that they were thus used; and,

if such were the case, there can be no doubt of his liability for the same jointly with his partners, unless by the terms of the contract with them they were to furnish the moneys used on their separate responsibility, and the bank had notice of the contract at the time. The addition placed by the court to the instruction was, therefore, a just and proper qualification.

The indebtedness of the partnership to the bank was in no respect affected by the attempted credit of the note of Beauregard, signed by May, for $40,000, and the draft of May on Graham for $125,000. These instruments were mere devices of May to show on the books of the bank a reduction of the large amount which was overdrawn on the partnership account. They had at no time any existence as instruments of value entitled to credit at the bank. The draft was never transmitted to New York, where Graham resided, and was never presented to him. The instruments never having been paid, the indebtedness of the partnership to the bank remained as it existed previously.

That indebtedness was not compensated and extinguished by operation of law by the indebtedness at the time of the bank to May, if such existed. Personal debts are only set off to each other, or compensated the one by the other, by operation of law, when they are of the same personal character. A partnership debt is not thus offset or compensated by a demand of one individual member against the creditor. There is no mutuality in such cases between the parties.

It is true, as already stated, that the members of an ordinary partnership, by the law of Louisiana, are only liable to their common creditor for their proportional part of the indebtedness of the partnership; and, in a suit by the creditor against the firm, a partner having an individual demand against the creditor may, by way of defence, or by exception, as it is termed in the practice of the State, offset or oppose the compensation of his demand to that of the creditor. But this is a very different thing from one partner attempting to offset or oppose the compensation of the personal demand of his associate to the claim of their common creditor. For this position we can find no authority in the code of Louisiana or the decisions of its courts. In the present case, for example, the defendant May might

have set up against the claim of the plaintiff his personal demand against the bank, had he not previously disposed of that demand to the United States; but the defendant Beauregard could not set up that demand of May's in compensation of the bank's claim against him for his share of the partnership indebtedness, any more than he could set up a similar demand of a stranger.

The instruction presented by his counsel assumed that the defendant May might have been individually indebted for the whole of the amount of the moneys obtained from the bank for the joint enterprise, and asked, in that event, that the jury be charged that the debt in suit was compensated and extinguished by the indebtedness of the bank to him. At the time this instruction was presented, the contract of partnership was before the court, with evidence tending to show that the moneys obtained had been expended for the joint enterprise. It thus appeared that there was or might be a joint liability of the partners to the bank, whatever the extent of their individual liability for the same indebtedness. The qualification placed by the court to the instruction was, therefore, a proper limitation upon the doctrine of compensation applicable to the case. If there was any liability on the part of May for the indebtedness of the firm, except as partner, it was a liability as surety; and there could be no compensation, by operation of law, between the demand of the bank against him as surety and the indebtedness of the bank to him personally.

The verdict and judgment do, it is true, vary from the prayer of the petition. That seeks a judgment against all the defendants *in solido* for the whole amount of the partnership debt. It is based upon the hypothesis that the defendants were commercial partners, and were thus jointly and severally liable for the whole amount of the partnership debts. But the facts alleged by the pleadings and disclosed by the proofs showing that the partnership between the defendants was not a commercial one within the law of Louisiana, but one there designated as an ordinary partnership, no verdict would have been legal that found any greater sum against each of the partners served than his proportional share of the indebtedness. Code of 1870, art. 2086. There was in this no such departure from

the issues made as to vitiate the verdict and judgment thereon. The reported decisions of the Supreme Court of Louisiana show numerous instances where similar verdicts upon like petitions have been sustained. *Judgment affirmed.*

ATHERTON ET AL. *v.* FOWLER ET AL.

1. As the appellate jurisdiction of this court over the State courts is confined to a re-examination of the final judgment or decree in any suit in the highest court of a State in which the decision of a suit could be had, the writ of error sued out here should be sent only to such court; unless the latter, after pronouncing judgment, sends its record and judgment, in accordance with the laws and practice of the State, to the inferior court, where they thereafter remain. In such case, the writ may be sent either directly to the latter court, or to the highest court, in order that, through its instrumentality, the record may be obtained from the inferior court having it in custody or under control.
2. Where the Supreme Court of California reversed the judgment of an inferior court, and directed a modification thereof as to the amount of damages, but without permitting further proceedings below, if the defendants consented to the modification, and the record shows that such consent was given, — *held*, that the judgment of the Supreme Court is final within the meaning of the act of Congress, and that the writ of error was properly directed to that court.
3. Under the authority of sect. 1005 of the Revised Statutes, a writ of error may be amended by inserting the proper return day.

MOTION to dismiss a writ of error to the Supreme Court of the State of California.

This is an action of replevin, brought in the District Court for the Fourth Judicial District of the State of California, to recover certain hay cut from lands in Solano County, to which the plaintiffs claimed title in consequence of rights alleged to have been acquired under an act of Congress entitled "An act to grant the right of pre-emption to certain purchasers on the 'Soscol Ranch,' in the State of California," approved March 3, 1863. 12 Stat. 808. The plaintiff having died *pendente lite*, his executors were substituted in his stead. The defendants denied the plaintiff's title, and averred that they, in good faith and under color of title, held the land adversely to his pretended claim. The jury found a verdict in favor of

the defendants for the value of the hay in controversy, with interest thereon. Judgment was for the defendants for $13,-896.43. The plaintiffs appealed to the Supreme Court of the State, which adjudged "that the judgment be reversed, and the cause remanded, with directions to the court below to proceed to try the cause anew, unless, within twenty days after the filing of the *remittitur* in the court below, the defendants shall file with the clerk of that court a written consent that the judgment be modified by striking out the damages therein awarded, and inserting, in lieu thereof, the sum of $8,989; and, upon such consent being filed, it is ordered that the judgment be modified accordingly, and also that it be made payable in due course of administration." The written consent of the defendants having been filed in the District Court, the judgment of that court was modified as ordered by the Supreme Court.

On the fourteenth day of July, 1875, the plaintiffs sued out this writ of error, directed to the Supreme Court of California. The writ bears test on the day of its issue, but contains no return day.

Mr. M. A. Wheaton for the defendants in error, in support of the motion to dismiss.

The State court having decided the case upon principles of law as recognized and administered in California, and without reference to the construction or effect of any provision in the Constitution or any act of Congress, no jurisdiction exists in this court to review that decision, even though, in some other aspect of the case, a Federal question might possibly have been applicable, but upon which the State court did not pass. *Insurance Co.* v. *The Treasurer*, 11 Wall. 209; *Klinger* v. *Missouri*, 13 id. 263; *West Tennessee Bank* v. *Citizens' Bank*, id. 432; *Caperton* v. *Bowyer*, 14 id. 216; *Commercial Bank* v. *Rochester*, 15 id. 639; *Marquez* v. *Bloom*, 16 id. 351; *Crowell* v. *Randall*, 10 Pet. 397; *Farney* v. *Towle*, 1 Black, 351; *Boggs* v. *Mining Co.*, 3 Wall. 304; *Maxwell* v. *Newbold*, 18 How. 516; *Hoyt* v. *Sheldon*, 1 Black, 522.

A judgment of the highest court of a State reversing that of an inferior court, and awarding a *venire de novo*, is not a final judgment in the sense in which that term is used in the statute authorizing a review thereof by this court. *Tracy*

v. *Holcombe*, 24 How. 426; *Miners' Bank* v. *United States*, 5 id. 214; *Brown* v. *Union Bank*, 4 id. 465; *Weston* v. *Charlestown*, 2 Pet. 449; *Winn* v. *Jackson*, 12 Wheat. 135; *Houston* v. *Morse*, 3 id. 434.

A judgment remanding a case to a lower court for further proceedings in accordance with the opinion is not such a final judgment. *Pepper* v. *Dunlap*, 5 How. 52; *Moore* v. *Robbins*, 18 Wall. 588; *St. Clair* v. *Livingston*, id. 628; *Parcels* v. *Johnson*, 20 id. 654.

If there has been any final judgment in this case, it must have been rendered by the District Court; to which, therefore, the writ of error should have issued. *Gelston* v. *Hoyt*, 3 Wheat. 304; *Webster* v. *Reid*, 11 How. 457; *Miller* v. *Joseph*, 17 Wall. 655; *McGuire* v. *The Commonwealth*, 3 id. 386.

Under the Judiciary Act of 1792, a writ made returnable on any other day than the first day of the next ensuing term was held void. Conklin's Treatise, p. 635; *Insurance Co.* v. *Mordecai*, 21 How. 200; *Porter* v. *Foley*, id. 393; *Agricultural Co.* v. *Pierce County*, 6 Wall. 246; *Rules of S. C.*, No. 8, Subdivision 5.

It was held, prior to the act of June 1, 1872, that this court had no power to amend the writ in this respect. *Vide* cases cited above. *Hodge* v. *Williams*, 22 How. 88; *City of Washington* v. *Denison*, 6 Wall. 496; *Hampton* v. *Rouse*, 15 id. 684.

The date of test of the writ is not a day of a term of this court. No application to amend being made, it is ground for dismissal. Conklin's Treatise, p. 634; 2 Abbott's U. S. Practice, p. 251.

Mr. Montgomery Blair, *contra*.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The plaintiffs in error claimed title to the hay in controversy in this case in consequence of alleged rights acquired under the act of Congress, passed March 3, 1863, entitled "An act to grant the right of pre-emption to certain purchasers on the 'Soscol Ranch,' in the State of California." 12 Stat. 808. The decision of the State court was against their title. This presents a question within the jurisdiction of this court.

The judgment of the Supreme Court is the final judgment in the suit, within the meaning of the act of Congress. Rev. Stat. 709. It reversed and modified the judgment below, and did not permit further proceedings in the inferior court, if the defendants consented to the modification directed as to the amount of damages. This consent has been given, as the record shows; and the judgment of the court below is the judgment which the Supreme Court directed that court to enter and carry into execution. The litigation was ended by the decision of the Supreme Court. No discretion was left in the court below if the required consent was given.

The writ of error was properly directed to the Supreme Court of the State. We can only re-examine the "final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had." Rev. Stat. sect. 709. For the purposes of such a re-examination, we require the record upon which the judgment or decree was given, and we send out our writ of error to bring it here. That writ is to operate on the court having the record, and not upon the parties. *Cohens* v. *Virginia*, 6 Wheat. 410. The citation goes to the parties, and brings them before us. The writ of error, therefore, is properly "directed to the court which holds the proceedings as part of its own records, and exercises judicial power over them." *Hunt* v. *Palas*, 4 How. 590. If the highest court of the State retains the record, the writ should go there, as that court can best certify to us the proceedings upon which it has acted and given judgment. As it is the judgment of the highest court that we are to re-examine, we should, if we can, deal directly with that court, and through it, if necessary, upon the inferior tribunals. It is, perhaps, safe to say that a writ will never be dismissed for want of jurisdiction, because it is directed to the highest court in which a decision was and could be had. We may not be able in all cases to reach the record by such a writ, and may be compelled to send out another to a different court before our object can be accomplished; but that is no ground for dismissal. We have the right to send there to see if we can obtain what we want.

But, in some of the States, — as, for instance, New York and Massachusetts, — the practice is for the highest court, after its

judgment has been pronounced, to send the record and the judgment to the inferior court, where they thereafter remain. If in such a case our writ should be sent to the highest court, that court might with truth return that it had no record of its proceedings, and, therefore, could not comply with our demand. Upon the receipt of such a return, we should be compelled to send another writ to the court having the record in its possession. It has been so expressly decided in *Gelston* v. *Hoyt*, 3 Wheat. 246, and *McGuire* v. *Commonwealth*, 3 Wall. 382. So, too, if we are in any way judicially informed, that, under the laws and practice of a State, the highest court is not the custodian of its own records, we may send to the highest court, and seek through its instrumentality to obtain the record we require from the inferior court having it in keeping, or we may call directly upon the inferior court itself. But if the highest court is the legal custodian of its own records, and actually retains them, we can only send there. This, we think, has always been the rule of practice, notwithstanding Mr. Justice Story, in delivering the opinion of the court in *Gelston* v. *Hoyt*, said that the writ might be "directed to either court in which the record and judgment on which it is to act may be found." 3 Wheat. 304. This was in a case where the judgment had been rendered in the Court of Appeals of New York, but, after its rendition, the record with the judgment had been sent down to the inferior court, there to be preserved in accordance with the law and uniform practice in that State. Strictly speaking, the record cannot be found in two courts at the same time. The original record may be in one and a copy in another, or one court may have the record and another the means of making one precisely the same in all respects; but the record proper can only be in one place at the same time.

In *Webster* v. *Reid*, 11 How. 457, the general language of Mr. Justice Story in *Gelston* v. *Hoyt* was somewhat limited; for, in stating the ruling of the court in that case, Mr. Justice McLean gives it as follows: "The writ of error may be directed to any court in which the record and judgment on which it is to act may be found; and, if the record has been remitted by the highest court to another court in the State, it may be brought by writ of error from that court." To the same effect

is *McGuire* v. *Commonwealth*, 3 Wall. 386. That was a case from Massachusetts. The suit was pending in the Superior Court of that State; and after verdict, but before judgment, certain exceptions were sent up to the Supreme Judicial Court for its opinion. That court subsequently sent down its rescript overruling the exceptions; and thereupon final judgment was entered in the Superior Court upon the verdict. This was according to the law and practice in Massachusetts, and the effect was to leave the entire record in the inferior court. Upon this state of facts, this court held that the judgment in that case was the judgment of the Superior Court, and that that court was the highest court in which the decision of the suit could be had, and, therefore, the only court to which the writ could go. But it was also held, that if the Supreme Judicial Court had rendered the final judgment, and had sent the judgment to the Superior Court, and with the judgment had sent the record, the direction of the writ to the Superior Court would have been proper. *Green* v. *Van Buskirk*, 3 Wall. 450, was also a New York case, and is to be considered in the light of the peculiar practice in that State. The record had been sent from the Court of Appeals to the Supreme Court.

The rule may, therefore, be stated to be, that if the highest court has, after judgment, sent its record and judgment in accordance with the law of the State to an inferior court for safe keeping, and no longer has them in its own possession, we may send our writ either to the highest court or to the inferior court. If the highest court can and will, in obedience to the requirement of the writ, procure a return of the record and judgment from the inferior court, and send them to us, no writ need go to the inferior court; but, if it fails to do this, we may ourselves send direct to the court having the record in its custody and under its control. So, too, if we know that the record is in the possession of the inferior court, and not in the highest court, we may send there without first calling upon the highest court; but if the law requires the highest court to retain its own records, and they are not in practice sent down to the inferior court, our writ can only go to the highest court. That court, being the only custodian of its own records, is alone authorized to certify them to us.

In this case, our writ went to the Supreme Court; and, in obedience to its command, that court has sent us its record. There is now no need of a further writ, even if the practice in California permitted the transmission of records from the Supreme Court to the inferior courts. But such, as we understand, is not the practice. The Supreme Court is there the sole custodian of its own records. Cases go there upon a transcript of the proceedings in the court below. This transcript is retained in the Supreme Court, and is the foundation of the proceedings there. The transcript is without doubt a copy of the proceedings in the court below; but that does not make the record below the record above. The court above acts only upon the transcript, and from that its record is made.

The writ of error may be amended under the authority of sect. 1005 of the Rev. Stat. by inserting the proper return day. It is no objection to the writ that it bears test on the day of its issue. Rev. Stat. sect. 912.

The motion to dismiss is denied.

ROEMER *v.* SIMON ET AL.

1. This court cannot, after an appeal in equity, receive new evidence; nor can it upon motion set aside a decree of the court below, and grant a rehearing.
2. The court below can grant a rehearing during the term at which the final decree was rendered, but not thereafter; and an application therefor must be addressed to that court.
3. Should the court below, after the record has been filed here, request a return thereof for the purpose of further proceedings in the cause, this court would, in a proper case and under suitable restrictions, make the necessary order.

APPEAL from the Circuit Court of the United States for the District of New Jersey.

On motion. The bill filed in this case was for an alleged infringement of letters-patent, No. 56,801, granted to the appellant, bearing date July 31, 1866, for improvements in travelling-bags, and prayed for an account and an injunction.

Upon a final hearing, a decree was rendered at the March Term of said Circuit Court, 1874, dismissing the bill.

Mr. Thomas Marshall presented the petition and affidavit of the appellant, stating in substance that new and material evidence, previously unknown to him, had been discovered since the appeal herein. The affidavits of sundry persons, setting forth as well the nature of the evidence as the matters thereby established, were attached to the petition. He thereupon moved that leave be granted the appellant to give to the appellees the requisite notice of a further motion for a rule requiring them to show cause why this court should not remit the record to the court below for a rehearing of the cause.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

It is clear, that, after an appeal in equity to this court, we cannot, upon motion, set aside a decree of the court below, and grant a rehearing. We can only affirm, reverse, or modify the decree appealed from, and that upon the hearing of the cause. No new evidence can be received here. Rev. Stat. sect. 698. The court below cannot grant a rehearing after the term at which the final decree was rendered. Equity Rule, 88. It would be useless to remand this cause, therefore, as the term at which the decree was rendered has passed. If the term still continued, the proper practice would be to make application to the court below for a rehearing, and have that court send to us a request for a return of the record, in order that it might proceed further with the cause. Should such a request be made, we might, in a proper case and under proper restrictions, make the necessary order; but we cannot make such an order on the application of the parties. The court below alone can make the request of us. The application of the parties must be addressed to that court, and not to us.

Motion denied.

ROBERTS v. RYER.

1. The doctrine announced in *Smith* v. *Nichols*, 21 Wall. 112, — that "a mere carrying forward or new or more extended application of the original thought, a change only in form, proportions, or degree, doing substantially the same thing in the same way, by substantially the same means, with better results," is not such an invention as will sustain a patent, — reaffirmed.

2. It is no new invention to use an old machine for a new purpose. The inventor of a machine is entitled to the benefit of all the uses to which it can be put, no matter whether he had conceived the idea of the use or not.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The bill in this case was filed by the assignee of D. W. C. Sanford, alleging an infringement of a patent to Sanford for an improvement in refrigerators.

The principal defence relied upon was the prior invention of Lyman. The Circuit Court sustained this defence, and dismissed the bill. From this decree the complainant appealed.

Mr. Thomas A. Jenckes and *Mr. George F. Seymour* for the appellant.

Mr. F. H. Betts for the appellee.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

In order that we may proceed intelligently in our inquiries as to the validity of the patent presented for our consideration in this case, it is important to ascertain at the outset what it is that has been patented.

Looking to the original patent, issued Nov. 13, 1855, we find the invention is there described as consisting "of an improvement in refrigerators, whereby the whole of the contained air is kept in continual rotation, purification, desiccation, and refrigeration, and with economy of ice;" and that the inventor claimed and obtained a patent for "the arrangement set forth for causing the perpetual rotation of the whole of the air contained within the refrigerating apartments, said arrangement consisting, when the refrigerator is closed, of an endless passage or chamber, the walls, shelves, and ice receptacle of which are so placed and constructed that the air is compelled to circulate through the entire apartment or apartments, and from which the water of the melting ice is discharged immediately from the refrigerator, instead of flowing between its walls." Mention is nowhere made in the specifications attached to this patent of any advantage which the descending current of air has over the ascending. The whole apparent object of the inventor was

to produce a circulation of the confined air without the introduction of external air. The drawings exhibit shelves perforated so as to permit the passage of the air in its downward and upward progress; but the shelves seem only to be alluded to in the specifications, for the purpose of indicating the necessity of their perforation, or of some equivalent arrangement, so as to allow the free transit of the air. They appear as part of the refrigerator to be improved, and are in no respect necessary for the accomplishment of the object the inventor had in view. Being in the refrigerator, they are perforated, or otherwise so arranged as to permit the circulation which the inventor is attempting by his device to create. But for this, they would prevent, or at least interfere with, the accomplishment of his object. The shelves themselves form no part of his improvement; but their perforation or its equivalent, when they are used, does.

In the reissued patent, the invention is described precisely the same as in the old; and then the following is added: "It is well known that mould will not generate in a current of air; and it is known, that, when once formed, it propagates itself, and spreads with rapidity: therefore, if any one part of the refrigerator be out of the direct course of the circulation, the air will stagnate there, and will develop mould, which will contaminate the whole apartment. The apartment D may vary in width, and it may be . . . so narrow as to serve merely as a passage for the ascending current of air, the greatest benefit being always derived from the downward current in apartment C." This last paragraph certainly has much the appearance of an expansion of the original invention.

The claim, however, as made in the reissue, is materially changed from that in the old. It is capable of division into three parts, and may be stated as follows: —

1. The employment of an open-bottom ice-box, or its equivalent, in combination with a dividing partition, open above and below, so placed that by means of self-operating internal circulation the whole of the contained air shall be kept in motion, and caused to revolve around the partition in currents, moving downward only on one side of this partition, and upward only on the other side, when the same is combined

with a chamber for the refrigeration of food, &c., placed directly under the ice-box.

2. Placing shelves or fixtures for holding articles to be refrigerated, or the articles themselves, in the descending current, directly under an open-bottom ice-box, in combination with a dividing partition open above and below.

3. The construction of the open-bottom ice-box in combination with the shelves or fixtures in such manner that the air may pass freely down through the same, and fall directly from the ice upon the articles to be refrigerated, while at the same time the drip of the water is prevented.

The patent is, therefore, for a combination of three elements; to wit: 1. An open-bottom ice-box, or its equivalent, so constructed that the air may pass freely down through it, while, at the same time, the drip of the water from the melting ice is prevented by collecting the water, and taking it in an escape-pipe outside of the refrigerator; 2. A dividing partition, open above and below, separating the refrigerator into two apartments; and, 3. A chamber directly under the open-bottom ice-box, in which articles to be refrigerated may be placed in such manner as to receive the descending current of air from the ice-box directly upon them.

There is no doubt of the utility of this combination. If the patentee was its original and first inventor, the device was patentable to him.

It will be observed that no particular form of the opening in the bottom of the ice-box is essential. In fact, an equivalent may be used. It is so expressly stated. Any device which will allow of the passage of the cooled air out from among the ice, or cooling surfaces, into the chamber below, will come within the specifications. Hence the bottom may be in the form of a grate, or it may be constructed of bars running only longitudinally, or it may have one or many open spaces of any form. In this respect, all is left to the judgment of the builder. He may adopt any arrangement which he considers the best suited to the accomplishment of the object to be attained; which is the cooling of the air by the ice, and its discharge into the chamber below. Neither is there any special requirement as to the manner in which the water from the

melted ice is to be collected and conducted outside the refrigerator. It is said in the specifications, that the bottom of the ice-box was made funnel-shaped; but this was so that the water might be conducted to the central discharge, and from thence fall into the escape-pipe. This particular shape, however, is not made an essential ingredient. Any device that will collect the water in the discharge-pipe and prevent the drip will meet this requirement of the invention. So, too, of the escape-pipe: it may be of any desirable form. As little space as possible should be occupied, so that it may not obstruct the downward passage of the air; but even this is left as a matter of judgment alone.

Neither is any particular form of partition made essential. It need not even be vertical. All that is required is, that it shall be open at the top and bottom, and divide the refrigerator into two apartments. There are no specifications as to the size of the openings or their form, or as to the comparative size or form of the two apartments. It is said that the apartment for the ascending current may be so narrow, that it will serve only as a passage for the air; but there is nothing to prevent that for the descending current being narrow also, if the purposes of the refrigerator are such as to make that desirable. As the greatest benefit is generally to be derived from the use of the descending current, it is probable that this chamber will ordinarily be made as large as is consistent with a steady and continuous flow of the air; but, if a rapid descent is considered essential for any of the purposes of refrigeration, there is nothing to prevent a suitable contrivance for that purpose. If that can be accomplished by a larger chamber above leading into a smaller one below, for the purpose of concentrating the cold-air current as it descends, a proper structure may be employed. If, in any place, the air descending from the ice-box can strike directly upon the articles to be refrigerated, the structure will be within the limits of the patent. It may be desirable to preserve the temperature at a lower degree until it strikes the article than it would be if permitted to remain in a chamber extending the whole size of the ice-box to the bottom of the refrigerator. In such case, a proper contrivance for that purpose may be employed. Shelves or other fixtures for holding the articles to be refrigerated are not necessary, as the articles themselves may

be placed in the descending current without the aid of any fixtures. But, if they were, their particular form is not specified. A nail driven into the wall of the chamber would be a fixture within the meaning of this call of the specifications. All the specifications do require is, that, if shelves or fixtures are used, they shall be so constructed or placed as to interfere as little as possible with the free passage of the air.

Such being the patent, we now proceed to consider the defence; which is, that the invention patented had been anticipated by Asel S. Lyman and others. Sanford, the patentee, does not carry his invention back of the summer of 1855, when, it perhaps sufficiently appears, his application was filed.

On the 21st September, 1854, Lyman filed his application for a patent for "a new and improved mode of cooling, drying, and disinfecting air for ventilators and refrigerators." His improvement in refrigerators consisted "in so arranging them, that, as fast as the air became warm and moist and impure by contact with the meat, it is drawn off and passed through the material, where it is cooled, dried, and disinfected, and then returned to use again in the refrigerator, collecting moisture and impurities, which it deposits in the receptacle intended for that purpose; thus keeping up a full circulation, and thoroughly ventilating the refrigerator with dry, pure, cold air."

His device consisted of a receptacle for ice, with a grate for its bottom, on which the ice rested. This receptacle was placed in the upper part of the refrigerator, and on one side. Below it was a cold-air chamber, into which the air flowed from the ice through the grate. The water from the melting ice was collected in this chamber, and conducted by a pipe to the outside of the refrigerator. From the cold-air chamber was a conduit leading downwards, but which did not extend to the bottom of the refrigerator. At the top of the ice receptacle, and on its side, was an opening into the refrigerator. The operation Lyman described to be as follows: —

"The receptacle being filled with fragments of ice, the air among this ice will be cooled, and, becoming more dense, will settle down through the grate into the cold-air chamber; thence down the conduit; and, so long as the air in the ice is colder and heavier than that in the refrigerator, it will continue to fall down the conduit,

mingling with the lower strata, and forcing the upper strata or warmest air through the opening into the ice receptacle. When the air comes in contact with the cold surfaces of the ice, its capacity for moisture is lessened, and the moisture is deposited on the ice. By this arrangement of the ice receptacle in the upper part of the refrigerator, with an opening for receiving air in its upper part, and a grate in the lower part on which the ice rests, a cold-air chamber below the grate and a descending conduit from this cold-air chamber, or with an arrangement of parts substantially the same, so that the air shall be caused to circulate rapidly from bottom to top in the refrigerating chamber, and from top to bottom in the separate combinations as described, the air is not only cooled, but it is, by being frequently passed through the interstices of the ice, thoroughly dried, and it is washed as by a hail-storm; a decided improvement in its smell is effected; and the apparatus becomes not only cooling and drying, but, to some extent, a disinfecting apparatus."

He then claimed as his invention "the combination of the reservoir of cooling, drying, and disinfecting material with the descending tube or conduit, so that the cold and condensed air in this conduit shall, on account of its increased weight, cause the warmer air to pass more rapidly through the material, where it is cooled, dried, and disinfected, and in its turn fall down the conduit, being by its sides kept separate from the other air until it mingles with the lower strata, substantially as described for the purposes aforesaid."

There was, therefore, in this invention of Lyman, the open-bottom ice-box, and the partition open above and below, dividing the refrigerator into two apartments, in one of which the air passed downward only, and in the other upward only. This constituted all there was of the "endless passage or chamber" in the original Sanford patent, "so constructed that the air is compelled to circulate through the entire apartment or apartments." True, the partition was not vertical; and the apartments need not be of equal or of any particular proportionate size. Neither was this necessary, as has been seen in the Sanford patent. Each, however, called for the circulation of air, and each obtained it substantially by the same device. They each passed the air cooled in the ice-box through convenient openings downwards in one apartment, and upwards

through the other. In each device the cooled air passed through the opening in the bottom of the partition, and the warmed air through that in the top. All this was done in both cases for the purpose of cooling, desiccating, and purifying the confined air, and to prepare it for the purposes of refrigeration. There was, therefore, one common object to be accomplished by both the inventors; and they each devised substantially the same plan for that purpose.

Undoubtedly Lyman expected to use the ascending air principally for the purposes of refrigeration, and he therefore supposed the greatest benefit would be derived from that current; but there was nothing in his specifications to prevent the use of the descending air, or from so constructing his refrigerator as to make that available. If it should be thought advisable to extend the size of the chamber for the descending air, there was nothing to prevent it. It would still operate as a conduit in which the cold air would fall down and be kept separate by the sides from the other air until it mingled with the lower strata.

It being, then, certain that Lyman contrived a machine which would produce the desired circulation, and could be used for refrigeration in the ascending current, it remains only to consider, whether, if one desired to make use of the descending current for the same purpose, he could claim such use as a new invention.

It is no new invention to use an old machine for a new purpose. The inventor of a machine is entitled to the benefit of all the uses to which it can be put, no matter whether he had conceived the idea of the use or not.

Lyman had the descending current. True, he concentrated the air as it fell, and sent it downwards through a space smaller than that which would be contained in a chamber extending the full size of the bottom of the ice-box to the bottom of the refrigerator; but he did have a space large enough to expose in it some articles to the effect of that current. If it should be found desirable to utilize that current to a greater extent than was at first contemplated, all that need be done is to enlarge the conduit. If the circulation is kept up, the device will be within the specifications. In fact, the proof is abundant, that

in his experiments, while perfecting his invention, Lyman did, in more cases than one, utilize the descending current. With both the inventors, the circulation by means of an ascending and descending current was the principal object to be obtained. One considered the greatest benefit for the purposes of refrigeration was to be derived from the use of the descending current, while the other had his attention directed more particularly to the advantages of the ascending. They each had both, and could utilize both. It is no invention, therefore, to make use of one rather than the other.

Lyman had conceived the idea of his invention as early as Aug. 19, 1852; for he then filed his *caveat* in the Patent Office. His ideas were, at that time, undoubtedly crude; but it is clear that he kept steadily at his work. He built many refrigerators upon his general plan; and, in some at least, the descending current was made use of. A part had shelves arranged in such a manner as to expose the articles in that current; and in some the articles were placed on the bottom of the refrigerator, immediately under the outlet of the conduit. In some the conduit was large, and in others it was small. The size was made in all cases to depend upon the judgment of the builder, and the purposes to which the machine, when completed, was to be applied.

As has been seen, Lyman, after having, as he thought, perfected his invention, applied for his patent, Sept. 21, 1854. Technical objections were made; and on the 19th April, 1855, he withdrew the application. He, however, still kept up his correspondence with the department, vigorously pushing his claim. On the 28th November, 1855, only thirteen days after the grant of the patent to Sanford, he filed a new application, and, in doing so, distinctly connected it with the first. There certainly is no material difference between the old and the new. On the 25th March, 1856, a patent was in due form issued to him.

Down to this time, it is impossible to discover any material difference between the two patented inventions. Clearly Lyman was the oldest inventor, and his patent was consequently the best, although that of Sanford antedated his. His last application was rejected Dec. 5, because it had been antici-

pated by Sanford; but afterwards the subject was reconsidered, and a patent issued to him.

After this grant of a patent to Lyman, Sanford surrendered his original patent, and obtained his reissue upon the amended specifications and claim. These have already been stated. All that can possibly be claimed for this amendment is a combination of the use of the descending current with the device for the circulation. There was no change in the machine: it was only put to a new use. If there was any change of construction suggested, it was only to increase its capacity for usefulness. It was "a mere carrying forward or new or more extended application of the original thought, a change only in form, proportions, or degree, doing substantially the same thing in the same way, by substantially the same means, with better results." This is not such an invention as will sustain a patent. We so decided no longer ago than the last term, in *Smith* v. *Nichols*, 21 Wall. 112. Clearly, we think, therefore, the invention of Sanford was anticipated by Lyman; and his patent is, on that account, void.

We have been cited to the case of *Roberts* v. *Harnden*, 2 Cliff. 500, decided by Mr. Justice Clifford, upon the circuit, as an authority against the view we have taken. In that case, the same construction substantially was given to the patent that we give to it here. We place our decision upon the facts shown to us. We think the evidence establishes, beyond all question, that Lyman, and not Sanford, was the original and first inventor of all there is of this improvement. In that case the court said "that the respondent had not introduced any satisfactory evidence tending to show that the patentee (Sanford) is not the original and first inventor of the improvement." What was submitted to that court we do not know. The report of the case does not contain the evidence, or any intimation of what it was.

Upon the evidence submitted to us, we think a clear case is made in favor of the defendants, and that the bill was properly dismissed. *The decree of the Circuit Court is affirmed.*

NOTE. — In *Roberts* v. *Buck*, on appeal from the Circuit Court for the District of Massachusetts, the decree of the Circuit Court was affirmed, for the reasons stated in *Roberts* v. *Ryer*, *supra*; the questions presented in both cases being substantially the same.

HALL ET AL. *v.* LANNING ET AL.

1. A member of a partnership, residing in one State, not served with process and not appearing, is not personally bound by a judgment recovered in another State against all the partners after a dissolution of the firm, although the other members were served, or did appear and caused an appearance to be entered for all, and although the law of the State where the suit was brought authorized such judgment.
2. After the dissolution of a partnership, one partner has no implied authority to cause the appearance of another partner to be entered to a suit brought against the firm. *Quære*, whether such implied authority exists during the continuance of the partnership.

ERROR to the Circuit Court of the United States for the Northern District of Illinois.

This was an action of debt brought on a judgment rendered in New York against the plaintiffs in error. One of them, Lybrand, pleaded separately *nul tiel record*, and several special pleas questioning the validity of the judgment as against him for want of jurisdiction over his person. On the trial, the plaintiff simply gave in evidence the record of the judgment recovered in New York, which showed that an attorney had appeared and put in an answer for both defendants, who were sued as partners. The answer admitted the partnership, but set up various matters of defence. The cause was referred, and judgment given for the plaintiffs. This was the substance of the New York record. The plaintiffs gave no further evidence.

Lybrand then offered to prove that he never was a resident or citizen of the State of New York; and that he had not been within said State of New York at any time since, nor for a long time before, the commencement of the suit in which the judgment was rendered, upon which the plaintiff in this case brought suit; and that he never had any summons, process, notice, citation, or notice of any kind, either actual or constructive, ever given or served upon him; and that he never authorized any attorney or any other person to appear for him; and that no one ever had any authority to appear for him in said suit in the State of New York, or to enter his appearance therein, nor did he ever authorize any one to employ an attorney to appear for him in the action in which said judgment was entered; and that he never entered his appearance therein in

person; and that he knew nothing of the pendency of said suit in the said State of New York until the commencement of the present suit in this court; that he was a partner in business with his co-defendant Hall at the time the transaction occurred upon which the plaintiffs brought suit in New York, though said partnership had been dissolved, and due notice thereof published, some six months prior to the commencement of said suit in New York.

This evidence, being objected to, was overruled by the court, which instructed the jury as follows: "That the record introduced in evidence by the plaintiffs was conclusive evidence for the plaintiffs to maintain the issues submitted to the jury by the pleadings; and that they should return a verdict for the plaintiffs, and against both defendants."

A bill of exceptions was taken to this ruling, and the matter brought here on writ of error.

Mr. Samuel W. Packard for the plaintiffs in error.

The controlling question in this case is, whether the court erred in refusing to allow the introduction of evidence to show that the judgment obtained in New York was void, as to Lybrand, for want of jurisdiction of the person. The *general rule* of law in that State is, that "want of jurisdiction may always be interposed against a judgment when sought to be enforced, or when any benefit is claimed from it: the want of jurisdiction, either of the subject-matter or of the person of either party, renders the judgment a mere nullity." *Kerr* v. *Kerr*, 41 N. Y. 275, per James, J.; *Shumway* v. *Stillman*, 6 Wend. 447; *Borden* v. *Fitch*, 15 Johns. 121; *Dobson* v. *Pearce*, 12 N. Y. 164, per Allen, J.; *Kinnier* v. *Kinnier*, 45 id. 542, per Church, C. J.

For the purpose of showing that the court did not have jurisdiction, the recitals in the judgment record may be contradicted. *Adams* v. *Saratoga & Vermont R. W. Co.*, 10 N. Y. (6 Selden) 332, 333, per Gridley, J.; *Harrington* v. *People*, 6 Barb. 607, 610, per Paige, J., and other cases in New York there cited; *Latham* v. *Edgerton*, 9 Cow. 228, and cases there cited.

But there is this exception to the general rule above stated in New York. Where an attorney has appeared without authority

for a party, he cannot be allowed to dispute the authority of the attorney when the judgment is brought in question, except by a *direct proceeding* in the court where the judgment remains; and he cannot always do that if the attorney is responsible, as a suit against the attorney is, under some circumstances, held an adequate remedy.

The *reasons* of the exception are, because the title to real estate depends to a great extent upon the records of the courts; and the injured party has an ample remedy against the attorney, if responsible, or he can apply to the court in which judgment was rendered for relief. *Brown* v. *Nichols*, 42 N. Y. 26, per Ingall, J., 32, and per Earle, J., 30; *Denton* v. *Noyes*, 6 Johns. 296.

These reasons do not apply to a suit upon such judgment in another State; because,

First, The title to real estate is not thereby affected.

Second, There is no remedy in *any* of the courts of the State where suit is brought upon the judgment, either by direct application to the court in which it was rendered, or by suit against the attorney who appeared without authority.

The fact that a party must resort to a distant forum outside the limits of his own State for redress has frequently been held to be an inadequate or insufficient remedy, and almost equivalent to none at all. *Buckmaster* v. *Grundy*, 3 Gilman (Ill.), 626, 630, 631; *Tribbles* v. *Toul*, 7 Mon. 455; *Green* v. *Campbell*, 2 Jones (Eq.), N. C. 448; *Richardson* v. *Williams*, 3 id. 119; *Smith* v. *Field*, 6 Dana (Ky.), 364; *Taylor* v. *Stowell*, 4 Met. (Ky.) 176, 177; *Pander* v. *Cox*, 28 Ga. 306, 307; *Key* v. *Robinson*, 29 id. 34; *Lirch* v. *Foster*, 1 Ves. Sr. 88; *Edminson* v. *Baxter*, 4 Hayw. (Tenn.) 112; *Graham* v. *Tarkersby*, 15 Ala. N. S. 644; *Hinrichson* v. *Reinbach*, 27 Ill. 301.

As the evidence offered by Lybrand that the attorney who appeared for him did so without authority does not contradict, but simply explains, the record, he was not estopped. *Shelton* v. *Tiffin*, 6 How. 186; *Gleason* v. *Dodd*, 4 Met. 338; *Barden* v. *Fitch*, 15 Johns. 121; *White* v. *Jones*, 38 Ill. 163; *Welch* v. *Sykes*, 3 Ill. 200; *Hall* v. *Williams*, 6 Pick. 232; *Shumway* v. *Stillman*, 6 Wend. 447; *Aldrich* v. *Kinney*, 4 Conn. 380, and cases cited therein; *Haskin* v. *Blackmer*, 20 Iowa, 162, and

cases cited therein; *Kerr* v. *Kerr*, 41 N. Y. 272; *Wilson* v. *Bank of Mt. Pleasant*, 6 Leigh, 570; *Price* v. *Ward*, 1 Dutch. 229; Bigelow on Estoppel, 226; 6 Robinson's Practice, 438; 2 American Leading Cases (5th ed.), 633, 642, and cases cited; Freeman on Judgments, sect. 563 (2d ed. p. 559).

The recitals in the record of a judgment of one State, when sought to be enforced in another, can be contradicted as to any jurisdictional fact, notwithstanding their conclusive effect in the State where the judgment was rendered, and notwithstanding the constitutional provision "that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State," and the act of Congress passed to carry it into effect. *Thompson* v. *Whitman*, 18 Wall. 457; *Knowles* v. *Gas-Light & Coke Co.*, 19 id. 59; *Starbuck* v. *Murray*, 5 Wend. 148, per Marcy, J.; *Rope* v. *Heaton*, 9 Wis. 328, 332–337; *Kerr* v. *Kerr*, 41 N. Y. 272; *Shumway* v. *Stillman*, 6 Wend. 453; *Noyes* v. *Butler*, 6 Barb. 613; *Norwood* v. *Cobb*, 24 Tex. 551; *Carleton* v. *Bickford*, 13 Gray, 591.

Mr. Sidney S. Harris for the defendants in error.

The excluded evidence, if admitted, would not have impeached the validity of the judgment.

Hall and Lybrand were partners. The suit in New York which resulted in the judgment related wholly to their partnership transactions. The authority of one partner to employ an attorney to represent the firm in a suit, and to enter the appearance of all its members, rests on the undisputed doctrine, that such partner, in all things relating to the firm transactions, can lawfully represent the firm, unless restricted by agreement. Parsons on Partn. 174.

It is clear that one partner can make contracts for the partnership which will not only bind it to the extent of its assets, but which may lead to the ultimate individual liability of all the partners. This is a necessary legal result of his exercise of partnership authority; and either partner, acting for the firm, can employ an attorney to resist a recovery in a suit against it and to defend its interests. Parsons on Partn. 175, note; *Harrison* v. *Stickney*, 7 T. R. 208, Dampier, *arguendo;* Collyer on Partn., sects. 441, 678, and note; *Winship* v. *The Bank*

of the United States, 5 Pet. 561; *Bennett* v. *Stickney*, 17 Vt. 531; *Everson* v. *Gehrman*, 10 How. Pr. 301; *Taylor* v. *Coryell*, 12 S. & R. 250.

One partner can *bona fide* admit service of process for both, and the judgment rendered will not be set aside on the motion of the other partner. *Olwell* v. *McLaughlin*, 10 N. Y. Leg. Obs. 316; *Lippman* v. *Judson*, 1 Code, N. S. 161, note; *Hammond* v. *Harris*, 2 How. Pr. 331; *Crane* v. *French*, 1 Wend. 311; *Grazebrook* v. *McCrudie*, 17 id. 437; *Blodget* v. *Conklin*, 9 How. Pr. 442.

If the partnership was dissolved, Hall still had the power to act for the firm in respect to any transactions which occurred when the partnership continued. *Wood* v. *Braddick*, 1 Taunt. 104, per Lord Mansfield; *Pritchard* v. *Draper*, 1 Russ. & Myl. 191; *Vinal* v. *Burrill*, 16 Pick. 401; *Bridge* v. *Gray*, 14 id. 55; *Simpson* v. *Geddes*, 2 Bay, 533; *Garland* v. *Agee*, 7 Leigh, 362; *Woodworth* v. *Downer*, 13 Vt. 522.

The rule in this country is, that the dissolution operates as a revocation of all authority to make new contracts, but not to arrange, liquidate, settle, and pay those before created (*Darling* v. *March*, 22 Me. 184); and that either partner, after dissolution, may acknowledge in the name of the partnership a balance due from it (*Ide* v. *Ingraham*, 5 Gray, 106). In Pennsylvania it is held that a partner may, after dissolution, borrow money to pay partnership debts (*Estate of Davis*, 5 Whart. 530), renew the notes of the firm (*Brown* v. *Clark*, 14 Penn. St. 469), or give notes in its name in payment of debts (*Robinson* v. *Taylor*, 4 Barr, 242).

As the power of each partner must be equal to that of any other partner, unless modified by agreement, this power of one partner of winding up the affairs of the firm must be complete.

The conclusion to be drawn is, that a partner, after dissolution, has the same power as before in regard to suits brought by or against the firm; and that, if Hall had the power to authorize an appearance for the firm during its existence, he still had such power after its dissolution.

MR. JUSTICE BRADLEY delivered the opinion of the court.

The question to be decided in this case is, whether, after the

dissolution of a copartnership, one of the partners in a suit brought against the firm has authority to enter an appearance for the other partners who do not reside in the State where the suit is brought, and have not been served with process; and, if not, whether a judgment against all the partners, founded on such an appearance, can be questioned by those not served with process in a suit brought thereon in another State. We recently had occasion, in the case of *Thompson* v. *Whitman*, 18 Wall. 457, to restate the rule, that the jurisdiction of a foreign court over the person or the subject-matter embraced in the judgment or decree of such court is always open to inquiry; and that, in this respect, the court of another State is to be regarded as a foreign court. We further held in that case, that the record of such a judgment does not estop the parties from demanding such an inquiry. The cases bearing upon the subject having been examined and distinguished on that occasion, it is not necessary to examine them again, except as they may throw light on the special question involved in this cause. In the subsequent case of *Knowles* v. *The Gas-Light Company*, 19 Wall. 58, we further held, in direct line with the decision in *Thompson* v. *Whitman*, that the record of a judgment showing service of process on the defendant could be contradicted and disproved.

It is sought to distinguish the present case from those referred to, on the ground that the relation of partnership confers upon each partner authority, even after dissolution, to appear for his copartners in a suit brought against the firm, though they are not served with process, and have no notice of the suit. In support of this proposition, so far as relates to any such authority after dissolution of the partnership, we are not referred to any authority directly in point; but reliance is placed on the powers of partners in general, and on that class of cases which affirm the right of each partner, after a dissolution of the firm, to settle up its business. But, in our view, appearance to a suit is a very different thing from those ordinary acts which appertain to a general settlement of business, such as receipt and payment of money, giving acquittances, and the like. If a suit be brought against all the partners, and only one of them be served with process, he may undoubtedly, in his own de-

fence, show, if he can, that the firm is not liable, and to this end defend the suit. But to hold that the other partners, or persons charged as such, who have not been served with process, will be bound by the judgment in such a case, which shall conclude them as well on the question whether they were partners or not when the debt was incurred as on that of the validity of the debt, would, as it seems to us, be carrying the power of a partner, after a dissolution of the partnership, to an unnecessary and unreasonable extent.

The law, indeed, does not seem entirely clear that a partner may enter an appearance for his copartners without special authority, even during the continuance of the firm. It is well known, that by the English practice, in an action on any joint contract, whether entered into by partners or others, if any defendant cannot be found, the plaintiff must proceed to outlawry against him before he can prosecute the action; and then he declares separately against those served with process, and obtains a separate judgment against them, but no judgment except that of outlawry against the defendant not found. 1 Chitty's Plead. 42; Tidd's Pract., ch. vii. p. 423, 9th ed. A shorter method by *distringas* in place of outlawry has been provided by some modern statutes, but founded on the same principle. Now, it seems strange that this cumbrous and dilatory proceeding should be necessary in the case of partners, if one partner has a general authority to appear in court for his copartners. On the basis of such an authority, had it existed, the courts, in the long lapse of time, ought to have found some means of making service on one answer for service on all. But this was never done. In this country, it is true, as will presently be shown, legislation to this end (applicable, however, to all joint debtors) has been adopted; but it is generally conceded that a judgment based on such service has full and complete effect only as against those who are actually served. Further reference to this subject will be made hereafter.

It must be conceded, however, that the general authority of one partner to appear to an action on behalf of his copartners, during the continuance of the firm, has been asserted by several text-writers. Gow on Partn. 163; Collyer on Partn. sect. 441; Parsons on Partn. 174, note. But the assertion is based on

somewhat slender authority. We find it first laid down in Gow, who refers to a *dictum* of Serjeant Dampier, made in the course of argument (7 T. R. 207), and to the case of *Morley* v. *Strombong*, 3 Bos. & Pull. 254, where the court refused to discharge partnership goods taken on a *distringas* to compel the appearance of an absent partner, unless the partner who was served would enter an appearance for him. As to this case, it may be said that it is not improbable that the home partner had express authority to appear in suits for his copartner; for, in a subsequent case (*Goldsmith* v. *Levy*, 4 Taunt. 299), a *distringas*, issued under the same circumstances, *was* discharged where the home partner made affidavit that the goods were his own, and that he had no authority to appear for his copartner. These seem to be the only authorities relied on.

But, as said before, these authorities, and one or two American cases which follow them, refer only to appearances entered whilst the partnership was subsisting; and it is pertinent also to add, that they only refer to the validity and effect of judgments in the state or country in which they are rendered.

Domestic judgments, undoubtedly (as was shown in *Thompson* v. *Whitman*), stand, in this respect, on a different footing from foreign judgments. If regular on their face, and if appearance has been duly entered for the defendant by a responsible attorney, though no process has been served and no appearance authorized, they will not necessarily be set aside; but the defendant will sometimes be left to his remedy against the attorney in an action for damages: otherwise, as has been argued, the plaintiff might lose his security by the act of an officer of the court. *Denton* v. *Noyes*, 6 Johns. 296; *Grazebrook* v. *McCreedie*, 9 Wend. 437. But, even in this case, it is the more usual course to suspend proceedings on the judgment, and allow the defendants to plead to the merits, and prove any just defence to the action. In any other State, however, except that in which the judgment was rendered (as decided by us in the cases before referred to), the facts could be shown, notwithstanding the recitals of the record; and the judgment would be regarded as null and void for want of jurisdiction of the person.

So, where an appearance has been entered by authority of one of several copartners on behalf of all, it may well be that the courts of the same jurisdiction will be slow to set aside the judgment, unless it clearly appears that injustice has been done; and will rather leave the party who has been injured by an unauthorized appearance to his action for damages.

There are many other cases in which a judgment may be good within the jurisdiction in which it was rendered so far as to bind the debtor's property there found, without personal service of process, or appearance of the defendant; as in foreign attachments, process of outlawry, and proceedings *in rem*.

Another class of cases is that of joint-debtors, before alluded to. In most of the States legislative acts have been passed, called joint-debtor acts, which, as a substitute for outlawry, provide that if process be issued against several joint-debtors or partners, and served on one or more of them, and the others cannot be found, the plaintiff may proceed against those served, and, if successful, have judgment against all. Various effects and consequences are attributed to such judgments in the States in which they are rendered. They are generally held to bind the common property of the joint-debtors, as well as the separate property of those served with process, when such property is situated in the State, but not the separate property of those not served; and, whilst they are binding personally on the former, they are regarded as either not personally binding at all, or only *prima facie* binding, on the latter. Under the Joint-debtor Act of New York, it was formerly held by the courts of that State that such a judgment is valid and binding on an absent defendant as *prima facie* evidence of a debt, reserving to him the right to enter into the merits, and show that he ought not to have been charged.

The validity of a judgment rendered under this New York law, when prosecuted in another State against one of the defendants who resided in the latter State, and was not served with process, though charged as a copartner of a defendant residing in New York, who was served, was brought in question in this court in December Term, 1850, in the case of *D'Arcy* v. *Ketchum*, 11 How. 165. It was there contended, that by the Constitution of the United States, and the act of Congress

passed May 26, 1790, in relation to the proof and effect of judgments in other States, the judgment in question ought to have the same force and effect in every other State which it had in New York. But this court decided that the act of Congress was intended to prescribe only the effect of judgments where the court by which they were rendered had jurisdiction; and that, by international law, a judgment rendered in one State, assuming to bind the person of a citizen of another, was void within the foreign State, if the defendant had not been served with process, or voluntarily made defence, because neither the legislative jurisdiction nor that of the courts of justice had binding force.

This decision is an authority which we recognized in *Thompson* v. *Whitman* and in *Knowles* v. *Gas-Light Company*, before cited, and which we adhere to as founded on the soundest principles of law; and, in view of this decision, it is manifest that many of the authorities which declare the effect of a domestic judgment, in cases where process has not been served on one or all of the defendants, and where those not served have not authorized any appearance and do not reside in the State, can have little influence as to the effect to be given to such a judgment in another State.

It appearing to be settled law, therefore, that a member of a partnership firm, residing in one State, cannot be rendered personally liable in a suit brought in another State against him and his copartners, although the latter be duly served with process, and although the law of the State where the suit is brought authorizes judgment to be rendered against him, the case stands on the simple and naked question, whether his copartners, after a dissolution of the partnership, can without his consent and authority involve him in suits brought against the firm by voluntarily entering an appearance for him.

We are of opinion that no authority can be found to maintain the affirmative of this question.

In the case of *Bell* v. *Morrison*, 1 Pet. 351, this court decided, upon elaborate examination, that, after a dissolution of the partnership, one partner cannot by his admissions or promises bind his former copartners. Appearance to a suit is certainly quite as grave an act as the acknowledgment of a debt.

It is well settled by numberless cases, that, even before dissolution, one partner cannot confess judgment, or submit to arbitration so as to bind his copartners. *Stead* v. *Salt*, 3 Bing. 101; *Adams* v. *Bankart*, 1 Cromp. Mee. & R. 681; *Karthaus* v. *Ferrer*, 1 Pet. 222, and cases referred to in Story on Partn., sect. 114; 1 Amer. Lead. Cas., 5th ed. 556; Freeman on Judgments, sect. 232; Collyer on Partn., sects. 469, 470, and notes; Parsons on Partn. 179, note.

It is equally well settled, that, after dissolution, one partner cannot bind his copartners by new contracts or securities, or impose upon them a fresh liability. Story on Partn., sect. 322; *Adams* v. *Bankart*, *supra*.

Appearance to a suit does impose a fresh liability. If there is no doubt of the validity of the demand, it places that demand in a position to be made a debt of record. If there is doubt of it, it renders the defendant liable to have it adjudicated against him, when, perhaps, he has a good defence to it.

On principle, therefore, it is difficult to see how, after a dissolution, one partner can claim implied authority to appear for his copartners in a suit brought against the firm. It may, in some instances, be convenient that one partner should have such authority; and, when such authority is desirable, it can easily be conferred, either in the articles of partnership or in the terms of dissolution. But, as a general thing, one can hardly conceive of a more dangerous power to be left in the hands of the several partners after the partnership connection between them is terminated, or one more calculated to inspire a constant dread of impending evil, than that of accepting service of process for their former associates, and of rendering them liable, without their knowledge, to the chances of litigation which they have no power of defending.

Few cases can be found in which the precise question has been raised. The attempt to exercise such a power does not appear to have been often made. Had it been, the question would certainly have found its way in the reports; for a number of cases have come up in which the power of a partner to appear for his copartners during the continuance of the partnership has been discussed. The point was raised in *Phelps* v. *Brewer*, 9 Cush. 390; but the court, being of opinion that the

power does not exist even pending the partnership, did not find it necessary to consider the effect of a dissolution upon it.

In Alabama, where a law was passed making service of process on one partner binding upon all, it was expressly decided, after quite an elaborate argument, that such service was not sufficient after a dissolution of the partnership, and that acknowledgment of service by one partner on behalf of all was also inoperative as against the other partners. *Duncan* v. *Tombeckbee Bank*, 4 Port. 184; *Demott* v. *Swaim's Adm.*, 5 Stew. & Port. 293.

In the case of *Loomis & Co.* v. *Pearson & McMichael*, Harper (S. C.), 470, it was decided, that, after a dissolution of partnership, one partner cannot appear for the other; although it is true that it had been previously decided by the same court, in *Haslet* v. *Street et al.*, 2 McCord, 311, that no such authority exists even during the continuance of the partnership.

But the absence of authorities, as before remarked, is strong evidence that no such power exists.

In our judgment, the defendant Lybrand had a right, for the purpose of invalidating the judgment as to him, to prove the matter set up by him in his offer at the trial; and for the refusal of the court to admit the evidence the judgment should be reversed, with directions to award a *venire de novo*.

Judgment reversed.

MR. CHIEF JUSTICE WAITE, MR. JUSTICE STRONG, and MR. JUSTICE HUNT, dissented.

SEWALL *v.* JONES.

1. Patents No. 34,928, dated April 8, 1862, and No. 35,274, dated May 13, 1862, issued to Isaac Winslow for a new and useful improvement in preserving Indian corn, are void for want of novelty.
2. To entitle a party to recover for the violation of a patent, he must be the original inventor, not only in relation to the United States, but to other parts of the world.
3. When a patentee recommends in his specifications a particular method, he does not thereby constitute it a portion of his patent.

APPEAL from the Circuit Court of the United States for the District of Maine.

This suit was brought by Jones, assignee of Winslow, against

Clark, and revived after his death, against Sewall, his administrator. Jones alleged that Clark had infringed certain patents for an improvement in preserving Indian corn, granted to Winslow; and he prayed for an injunction and an account. A decree was rendered for the complainant. The defendant appealed.

Four patents were granted to Winslow; but it is only necessary to set forth two which were held good in the court below. The principal defence relied on was that they were void for want of novelty.

These two patents of Winslow and the specification of Durand's patent, which is mentioned in the opinion of the court, are as follows: —

"No. 34,928.

"*The United States of America, to all to whom these letters-patent shall come:* —

"Whereas Isaac Winslow, of Philadelphia, Penn., has alleged that he has invented a new and useful improvement in preserving green corn (he having assigned his right, title, and interest in said invention to John W. Jones of Portland, Me.), which he states has not been known or used before his application; has made affirmation that he is a citizen of the United States; that he does verily believe that he is the original and first inventor or discoverer of the said invention, and that the same hath not, to the best of his knowledge and belief, been previously known or used; has paid into the treasury of the United States the sum of thirty dollars, and presented a petition to the Commissioner of Patents, signifying a desire of obtaining an exclusive property in the said invention, and praying that a patent may be granted for that purpose: —

"These are, therefore, to grant, according to law, to the said John W. Jones, his heirs, administrators, or assigns, for the term of seventeen years from the eighth day of April, one thousand eight hundred and sixty-two, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said invention, a description whereof is given in the words of the said Isaac Winslow in the schedule hereunto annexed, and is made part of these presents.

"In testimony whereof, I have caused these letters to be made patent, and the seal of the Patent Office has been hereunto affixed.

"Given under my hand, at the city of Washington, this eighth day of April, in the year of our Lord one thousand eight hundred

and sixty-two, and of the independence of the United States of America the eighty-sixth.

"CALEB B. SMITH, *Secretary of the Interior.*

"Countersigned, and sealed with the seal of the Patent Office.

"[L. S.] D. P. HOLLOWAY, *Commissioner of Patents.*"

The schedule referred to in these letters-patent, and making part of the same, is as follows: —

"*To all whom it may concern:* —

"Be it known that I, Isaac Winslow, of Philadelphia, in the county of Philadelphia and State of Pennsylvania, have invented a new and useful improvement in preserving Indian corn in the green state; and I hereby declare that the following is a full and exact description thereof: —

"In my first attempt to preserve Indian corn in the green state, without drying the same, I did not remove the kernels from the cob. The article thus obtained was very bulky, and, when used, the peculiar sweetness was lost, the same being absorbed, as I suppose, by the cob. After a great variety of experiments, I have overcome the difficulties of preserving Indian corn in the green state without drying the same, thus retaining the milk and other juices and the full flavor of fresh green corn until the latter is desired for use. Instead of a hard, insipid, or otherwise unpalatable article, I have finally succeeded in producing an entirely satisfactory article of manufacture, in which my invention consists. I have employed several methods of treatment of the green corn with good results. My first success was obtained by the following process: The kernels, being removed from the cob, were immediately packed in cans, and the latter hermetically sealed, so as to prevent the escape of the natural aroma of the corn, or the evaporation of the milk or other juices of the same. Then I submitted the sealed cans and their contents to boiling or steam heat about four hours. In this way the milk and other juices of the corn are coagulated, as far as may be; boiling thus preventing the putrefaction of these more easily destructible constituents. At the same time, the milk and other juices are neither diluted nor washed away, as would be more or less the case if the kernels were mixed with water and boiled. By this method of cooking green corn in the vapor of its juices, as it were, the ends of the sealed cans are bulged out, as though putrefaction and the escape of the resulting gases had commenced within the cans. Consequently, strong cans are required; and dealers are

likely to be prejudiced against corn thus put up. I recommend the following method: Select a superior quality of sweet corn in the green state, and remove the kernels from the cob by means of a curved and gauged knife, or other suitable means. Then pack these kernels in cans, and hermetically seal the latter so as to prevent evaporation under heat or the escape of the aroma of the corn. Now expose these cans of corn to steam or boiling heat for about one hour and a half; then puncture the cans, and immediately seal the same while hot, and continue the heat for about two hours and a half longer. Afterwards the cans may be slowly cooled in a room at the temperature of seventy to one hundred degrees Fahrenheit. Indian corn thus packed and treated may be warranted to keep in any climate. Being preserved in its natural state as near as possible, it retains the peculiar sweetness and flavor of fresh corn right from the growing field. It is only necessary to heat this preserved corn, and season the same, in order to prepare it for the table, as it is fully cooked in process of preserving. Other methods of treatment may be adopted without departing from my invention, so long as the hermetical sealing and use of the heat are so managed as to secure the aroma and fresh flavor, and prevent putrefaction; thus producing the new article of manufacture substantially described.

"Having thus fully described my invention, what I claim and desire to secure by letters-patent from the United States is the above-described new article of manufacture; namely, Indian corn when preserved in the green state, without drying the same, the kernels being removed from the cob, hermetically sealed and heated, substantially in the manner and for the purpose set forth.

"ISAAC WINSLOW."

"No. 35,274.

"*The United States of America to all to whom these letters-patent shall come:*—

"Whereas Isaac Winslow, of Philadelphia, Penn., has alleged that he has invented a new and useful improvement in preserving green corn (he having assigned his right, title, and interest in said improvement to John W. Jones of Portland, Me.), which he states has not been known or used before his application; has made affirmation that he is a citizen of the United States; that he does verily believe that he is the original and first inventor or discoverer of the said improvement, and that the same hath not, to the best of his knowledge and belief, been previously known or

used; has paid into the treasury of the United States the sum of thirty-five dollars, and presented a petition to the Commissioner of Patents, signifying a desire of obtaining an exclusive property in the said improvement, and praying that a patent may be granted for that purpose: —

"These are, therefore, to grant, according to law, to the said John W. Jones, his heirs, administrators, or assigns, for the term of seventeen years from the thirteenth day of May, one thousand eight hundred and sixty-two, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said improvement, a description whereof is given in the words of the said Isaac Winslow in the schedule hereunto annexed, and is made a part of these presents.

"In testimony whereof, I have caused these letters to be made patent, and the seal of the Patent Office has been hereunto affixed.

"Given under my hand, at the city of Washington, this thirteenth day of May, in the year of our Lord one thousand eight hundred and sixty-two, and of the independence of the United States of America the eighty-sixth.

"CALEB B. SMITH, *Secretary of the Interior.*

"Countersigned and sealed with the seal of the Patent Office.

"[L. S.] D. P. HOLLOWAY, *Commissioner of Patents.*"

The schedule referred to in these letters-patent, and making part of the same, is as follows: —

"*To all whom it may concern:* —

"Be it known that I, Isaac Winslow, of Philadelphia, in the county of Philadelphia, and State of Pennsylvania, have invented a new and useful improvement in preserving green corn; and I do hereby declare that the following is a full and exact description thereof, reference being had to the accompanying drawings, and to the letters of reference marked thereon: —

"It has long been common to boil green or unripened Indian corn, or maize, and then dry the same for winter use. But corn thus dried, when prepared for the table by again boiling, is more or less hard and insipid, having lost the fine flavor of fresh green corn.

"If ears of corn be boiled, and then hermetically sealed in cans, the cob seems to absorb the sweetness of the kernels; or if the kernels are removed from the cob after boiling, and then preserved, the finest flavor of the natural corn is lost. After many and varied

attempts to preserve green corn without drying the same, finding that I did not obtain a satisfactory result, I finally conceived the idea of first removing the corn from the cob, and then boiling or cooking the kernels thus separated, and preserving them. But this was met by a new difficulty. The kernels of corn being somewhat broken by removal from the cob, the milk and other juices were dissolved out in the process of boiling; and thus the corn was left insipid and unpalatable. I then attempted to cook the corn without contact with water, by exposing the cans containing the corn to boiling water.

"This mode of preserving I found unsatisfactory. The milk of the corn was evaporated, and the corn more or less dried, whilst a long time was requisite to cook the corn sufficiently for preservation. Finally I adopted the process of removing the corn from the cob, packing the kernels in cans, hermetically sealing the same, and then boiling the cans until the corn contained therein became completely cooked. The result of this process was extraordinary, the corn being of finer flavor than corn fresh from the field when boiled upon the cob in the usual way. Since this discovery, I have adopted the practice of boiling or steaming the cans containing the corn-kernels thus sealed about four hours, though a shorter time may answer for most purposes.

"The cans should be very strong, to prevent their bursting by heat. I have sometimes practised puncturing the cans after they are well heated, — say for ten minutes. This allows the air to escape; when I immediately reseal the cans, so as to prevent the evaporation of the juices of the corn or the loss of the natural aroma.

"This puncturing has two advantages: it prevents the possible bursting of the cans; and allows the heads of the cans to press inward when cool, so that dealers can see by this test that the corn is perfectly preserved. When the cans are not punctured, their ends will remain pressed outward after cooling, and yet the corn is perfectly preserved. The above-described process of removing the corn from the cob, and then preserving the kernels, affords several advantages over any method of preserving corn heretofore known. Among these advantages are the following: 1st, The peculiar sweetness and excellent flavor of the corn thus preserved, these qualities being consequent upon retaining all the milk and other juices, together with its fine natural aroma; 2d, The economy of space in boiling and packing, and convenience of handling, transportation, and sale. Having thus fully described my improved

process, what I claim, and desire to secure by letters-patent of the United States, is the above-described process of first removing the corn from the cob, and then preserving the kernels substantially in the manner and for the purposes set forth.

"ISAAC WINSLOW."

"Witnesses:

"SAMUEL C. OGLE.

"WILLIAM OGLE."

Preserving Animal and Vegetable Food.—Durand's Specification.

"*To all to whom these presents shall come:*—

"I, Peter Durand, of Hoxton Square, in the county of Middlesex, merchant, send greeting:—

"Whereas his most excellent Majesty King George the Third did by his letters-patent, under the great seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster the twenty-fifth day of August, in the fiftieth year of his reign, give and grant unto me, the said Peter Durand, my executors, administrators, and assigns, his special license, full power, sole privilege and authority, that I, the said Peter Durand, my executors, administrators, and assigns, during the term therein mentioned, should and lawfully might make, use, exercise, and vend, within England, Wales, and the town of Berwick-upon-Tweed, an invention communicated to me by a certain foreigner residing abroad, of the method of 'preserving animal food, vegetable food, and other perishable articles, a long time from perishing or becoming useless;' in which said letters-patent there is contained a proviso, obliging me, the said Peter Durand, by an instrument in writing under my hand and seal, to cause a particular description of the nature of the said invention, and in what manner the same is to be performed, to be enrolled in his Majesty's High Court of Chancery within six calendar months after the date of the said recited letters-patent, as in and by the same, relation being thereunto had, may more fully and at large appear:—

"Now know ye, that, in compliance with the said proviso, I, the said Peter Durand, do hereby declare that the nature of the said invention, and the manner in which the same is to be performed, are particularly described and ascertained as follows; that is to say:—

"*First*, I place and enclose the said food or articles in bottles or other vessels of glass, pottery, tin, or other metals or fit materials; and I do close the aperture of such containing vessels, so as completely to cut off and exclude all communication with the external

air; and as to the method of closing, I do avail myself of the usual means of corking, airing, luting, or cementing; and in large vessels I make use of corks formed of pieces glued together in such a manner as that the pores of that substance shall be in a cross-direction with regard to the aperture into which such corks are to be driven; and I do also, in such vessels as may admit of or require the same, make use of stoppers fitted or ground with emery or screw-caps, with or without a ring of leather or other soft substance between the faces of closure, and also of cocks or cross-plugs or covers of leather, cloth, parchment, bladder, and the like.

"*Secondly*, When the vessels have been thus charged and well closed, I do place them in a boiler, each separately surrounded with straw, or wrapped in coarse cloth, or otherwise defended from striking against each other; and I fill the said boiler so as to cover the vessels with cold water, which I gradually heat to boiling, and continue the ebullition for a certain time, which must depend upon the nature of the substances included in the vessels, and the size of the said vessels, and other obvious circumstances, which will be easily apprehended by the operator without further instructions. Vegetable substances are to be put into the vessel in a raw or crude state, and animal substances partly or half cooked, although these may also be put in raw. The food or other articles thus prepared may be kept for a very long time in a state fit for use, care being taken that the vessel shall not be opened until their said contents shall be wanted for consumption.

"And, *lastly*, I do declare, that although the application of the water-bath, as hereinbefore described, may be the most commodious and convenient, I do likewise avail myself of the application of heat by placing the said vessel in an oven, or a stove, or a steam-bath, or any other fit situation for gradually and uniformly raising the temperature of the same, and suffering them to cool again; and, further, that I do, as the choice of the consumer or the nature of the said food or other articles may render preferable, leave the aperture of the vessel, or a small portion thereof, open until the effect of the heat shall have taken place, at which period I close the same.

"In witness whereof, I, the said Peter Durand, have hereunto set my hand and seal the thirtieth day of August, in the year of our Lord one thousand eight hundred and ten.

"PETER DURAND. [L. S.]

"And be it remembered, that on the thirtieth day of August, in

the year of our Lord one thousand eight hundred and ten, the aforesaid Peter Durand came before our said lord the king in his chancery, and acknowledged the specification aforesaid, and all and every thing therein contained and specified in form above written; and also the specification aforesaid was stamped according to the tenor of the statute made for that purpose. Enrolled the thirtieth day of August, in the year of our Lord one thousand eight hundred and ten."

Mr. E. N. Dickerson for appellant.

The process claimed is substantially described in specifications of Durand and Gunter published in the United States and England before the application for the patents in question. The original discovery was by Appert, a scientific Frenchman.

Mr. W. H. Clifford, contra.

The English patent of Durand was the invention of Appert; but the process described in Durand's patent does not cover the invention of Winslow.

MR. JUSTICE HUNT delivered the opinion of the court.

Jones, as assignee of four several patents for a new and useful improvement in preserving Indian corn, brought his action against Clark, the original defendant, alleging infringements of the same. These patents were issued to Isaac Winslow, and were as follows: viz., No. 34,928, dated April 8, 1862, "for a new and useful improvement in preserving Indian corn;" No. 35,274, dated May 13, 1862, "for a new and useful improvement in preserving green corn;" No. 35,346, dated May 20, 1862, and No. 36,326, dated Aug. 26, 1862.

The two patents last above mentioned were declared and adjudged by the court below to be void; and from this judgment no appeal has been taken. They are no longer elements in the case before us, and are dismissed from further consideration.

The patent first mentioned is for an article of manufacture, — a result. The second one is for a process by which a result is obtained. The first is the more full, and embraces all that is contained in the second.

The first objection made to the patents is the want of novelty. It is contended that they were anticipated by the Appert process embodied in the Durand patent of 1810; also by the patent of Gunter of 1841, and by that of Wertheimer of 1842. It is

an elementary proposition in patent law, that, to entitle a plaintiff to recover for the violation of a patent, he must be the original inventor, not only in relation to the United States, but to other parts of the world. Even if the plaintiff did not know that the discovery had been made before, still he cannot recover if it has been in use or described in public prints, and if he be not in truth the original inventor. *Dawson* v. *Follen*, 2 Wash. C. C. 311; *Bedford* v. *Hunt*, 1 Mas. 302.

Durand's patent is described in his specification, enrolled in the English Court of Chancery, as based "upon an invention communicated to him by a certain foreigner, residing abroad, of the manner of preserving animal food, vegetable food, and other perishable articles, a long time from perishing or becoming useless."

In describing the nature of the invention and the manner in which the same is to be performed, he says, —

"*First*, I place the said food or articles in bottles of glass, pottery, tin, or other metals or fit materials, and I close the aperture so as completely to cut off or exclude all communication with the external air;" and he describes the various means of effecting that purpose.

"*Second*, When the vessels are thus charged and well closed, I place them in a boiler, each separately surrounded with straw or wrapped in a coarse cloth, or otherwise defended from striking against each other. I fill the boiler so as to cover the vessels with cold water, which I gradually heat to boiling, and continue the ebullition for a certain time, which must depend upon the nature of the substances included in the vessels, and the size of the vessels, and other obvious circumstances which will be readily apprehended by the operator. Vegetable substances are to be put into the vessel in a raw or crude state, and animal substances partly or half cooked, although these may also be put in raw."

The specification then declares that the inventor did avail himself of the application of heat by placing the vessel in an oven, stove, steam-bath, or other fit situation for gradually and uniformly raising the temperature and suffering it to cool again, and that as the choice of the consumer or nature of the said food or other articles may render preferable, leave the aperture of the vessel, or a small portion thereof, open until the effect of the

heat shall have taken place, at which period the same is to be closed.

The points following are embraced in this patent: —

1. It is for the purpose of preserving for a long time animal or vegetable food.

2. The articles thus to be preserved are to be placed in tin or other vessels, so arranged as to exclude communication with the external air.

3. An aperture may be left in the vessel, at the choice of the operator, until the effect of the heat shall have taken place, when it is to be closed.

4. The vessels thus prepared are placed in a boiler filled with cold water, which is heated to a boiling point, which boiling shall be continued for such time as shall be required by the substances contained in the vessels.

5. Although a water-bath is preferred, the inventor declares that he avails himself of heat through an oven, stove, steam-bath, or any other situation fit for gradually raising the temperature and suffering it to cool again.

6. Vegetables are to be put into the vessels in a raw or crude state; animal substances raw or partly cooked.

7. The invention is general in its terms, embracing all vegetables and all animal substances capable of being thus dealt with.

Winslow's patent of April 8, 1862, No. 34,928, is declared to be for an improvement in preserving Indian corn in the green state.

The letters-patent declare that the first "success of the inventor was obtained by the following process: The kernels, being removed from the cob, were immediately packed in cans hermetically sealed, so as to prevent the escape of the natural aroma of the corn or the evaporation of the milk or other juices of the same. I then submitted the sealed cans and their contents to boiling or steam heat for about four hours. . . . By this method of cooking green corn in the vapor of its juices, the ends of the cans are bulged out. Strong cans are required, and dealers are likely to be prejudiced against corn thus put up. I recommend the following method: Select a superior quality of green corn in the natural state; remove the kernels from the

cob by means of a curved and gauged knife, or other suitable means; then pack in cans, hermetically seal the cans, expose them to steam or boiling heat for about an hour and a half; then puncture, seal while hot, and continue the heat for about two hours and a half." At the close, the inventor says that what he claims to secure by the patent is the new article of manufacture; namely, Indian corn preserved in the green state without drying, the kernels being removed from the cob, hermetically sealed, and heated as described.

Let us now state the points embraced in this, the plaintiff's patent, and compare them with the points heretofore stated as included in the Durand patent.

1. Winslow's declared object is the preservation of Indian corn in the green state.

Durand's is for preserving Indian corn not only, but all vegetable substances in their raw or crude state.

2. Winslow recommends removing the kernels from the cob before the process of preservation is commenced, placing the kernels in cans, sealing them, and exposing them to heat.

Durand, not limiting himself to the article of corn, provides that the articles to be preserved shall be placed in cans, and subjected to heat in the same manner. He does not stipulate or recommend that the article shall be first removed from the cob, the vine, the twig, or whatever may be the natural support of the vegetable to be preserved, as the corn from the cob, the pea from its pod, the grape or the tomato from its vine, the peach from its stem, the berry from its stalk. Neither does he recommend that it shall not be so removed. His process embraces the article in whatever form it may be presented. It is for the preservation of raw or crude or uncooked vegetables in whatever form they may be presented, and necessarily includes a case where they have been previously removed from their natural support. A prior removal from the stalk would be the natural, and, in many cases, a necessary proceeding.

3. Winslow directs that the kernels shall be subjected to the heat for a period of about one and a half hours before puncturing, and for about two and a half hours after the puncturing. The double use of the word "about" indicates that the time is not to be considered as precisely specified.

Durand directs that the boiling shall continue for such length of time as shall be required by the particular substances contained in the vessel. Corn, pease, tomatoes, peaches, berries, asparagus, may very likely require great difference in the time in which the heat shall be applied to produce the required effect. In each case, that is to be the measure of the time.

4. Winslow says other modes may be adopted so long as hermetical sealing and the use of heat are so managed as to secure the aroma and fresh flavor and prevent putrefaction.

Durand declares that he intends to include in his patent heat through an oven, stove, steam, or any other situation by which the temperature is gradually raised and suffered to cool again.

The same idea is put forth at the close of Winslow's specification, where he declares that what he claims by his patent is the manufacture of Indian corn in its green state, the kernels being removed from the cob, hermetically sealed, and heated.

We are of the opinion that the substance of all that is found in Winslow's patent had, nearly half a century before he obtained his patent, been put forth in Durand's patent. If Durand's patent were now in force in this country, and a suit brought upon it against Jones, the claimant under Winslow, for an infringement, the right to recover could not be resisted. Durand would show a patent intended to effect the same purpose, — to wit, the preservation of vegetables for a long time; employing the same process, — to wit, the effect of heat upon vegetables placed in a metallic vessel, the gradual cooling of the same, hermetically sealed after puncture to allow the escape of gases. This is also Winslow's process.

To constitute an infringement, the thing used by the defendant must be such as substantially to embody the patentee's mode of operation, and thereby to attain the same kind of result as was reached by his invention. It is not necessary that the defendant should employ the plaintiff's invention to as good advantage as he employed it, or that the result should be the same in degree; but it must be the same in kind. *Winans* v. *Denmead*, 15 How. 330.

To infringe a patent, it is not necessary that the thing patented should be adopted in every particular. If the patent is adopted substantially by the defendants, they are guilty of

infringement. *Root* v. *Ball*, 4 McLean, 177; *Alden* v. *Deney*, 1 Story C. C. 336.

In an action for infringement, the first question is, whether the machine used by the defendant is substantially, in its principle and mode of operation, like the plaintiff's. If so, it is an infringement to use it. *Howe* v. *Abbott*, 2 Story C. C. 190; *Parker* v. *Haunth*, 4 McLean, 370.

If he has taken the same plan and applied it to the same purpose, notwithstanding he may have varied the process of the application, his manufacture will be substantially identical with that of the patentee. Curtis, sect. 312.

Erskine, J., says, in *Walter* v. *Potter*, Webs. Pat. Cas. 585, 607, the question of infringement depends upon whether the plan which the defendant has employed is in substance the same as the plaintiff's, and whether all the differences which have been introduced are not differences in circumstances not material, and whether it is not in substance and effect a colorable evasion of the plaintiff's patent.

When a party has invented some mode of carrying into effect a law of natural science or a rule of practice, it is the application of that law or rule which constitutes the peculiar feature of the invention. He is entitled to protect himself from all other modes of making the same application; and every question of infringement will present the question, whether the different mode, be it better or worse, is in substance an application of the same principle. Curtis, sect. 320.

It is said, however, that a distinction exists in this, — that Winslow's patent provides that the corn shall be removed from the cob before the process begins, and that Durand does not specify this idea. If this be conceded, it does not alter the case. Although he may preserve Indian corn by removing it from the cob more advantageously than by letting it remain on the cob, he does it by using the Durand process. He still applies Durand's process of heating, puncturing, and cooling, and no more takes the practice out of Durand's patent than if he should specify that pears or peaches would be the better preserved if their outer coating should be first removed, or that meat could the better be preserved if the bones were previously extracted. Whether the improvement or combination could be the subject of a patent, it is not material to consider.

It is said again, that "instead of packing the kernels in the vessels selected for the purpose, in their crude state, as suggested in the English patent, the process patented by the assignor of the plaintiff directs that the kernels should be cut from the cob in a way which leaves a large part of the hull on the cob, and breaks open the kernels, liberating the juices, to use the language of the patentee, and causing the milk and other juices of the corn to flow out and surround the kernels as they are packed in the cans, in such a mode that the juices form the liquid in which the whole is cooked, when the cans are subjected to the bath or boiling water."

This argument is based upon an error in fact. There is no such language in the patent. The sole expression of the patent is to provide, first, that the corn shall be removed from the cob; and, second, that it shall be subjected to heat in vessels hermetically sealed. Thus Winslow recites that difficulty had been encountered by him in preserving the corn upon the cob. This produced an insipid article; and accordingly he says, "My first success was obtained by the following process: The kernels, being removed from the cob, were immediately packed in cans and hermetically sealed, so as to prevent the escape of the aroma, and submitted to heat," &c. There is not a word in the patent to the effect that the kernels shall be cut off in a particular way, or that a large part of the hull shall be left on the cob, nor, indeed, that the kernels shall be cut off at all. It is simply provided that the corn shall be removed from the cob. The means are not specified.

Farther on, the patentee, Winslow, says, "I recommend the following method." This is not of the substance of the patent. A recommendation is quite different from a requirement. The latter is a demand, an essential, a necessity. The former is a choice or preference between different modes or subjects, and is left to the pleasure or the judgment of the operator. He may adopt it. He will do well if he does. But he may reject it, and still accomplish his object by means of the patent.

The principle is this: The omission to mention in the specification something which contributes only to the degree of benefit, providing the apparatus would work beneficially and be worth adopting without it, is not fatal, while the omission

of what is known to be necessary to the enjoyment of the invention is fatal. Curtis, sect. 248.

An excess of description does not injure the patent, unless the addition be fraudulent. Id. sect. 250.

Accordingly, when the inventor says, "I recommend the following method," he does not thereby constitute such method a portion of his patent. His patent may be infringed, although the party does not follow his recommendation, but accomplishes the same end by another method.

But the patentee does not even recommend that the kernels shall be cut off in such manner that a large portion of the hull shall remain upon the cob, nor does he distinctly recommend the cutting off of the kernels in any manner. His recommendation is simply that the kernels be removed by any convenient and suitable method. His language is, "I recommend the following method: Select a superior quality of sweet corn in the green state, and remove the kernels from the cob by means of a curved and gauged knife or other suitable means." Any means that are suitable for removing the kernels, whether by knife or any other method, are within this language.

That the simple removal of the corn from the cob, before it is subjected to heat, without reference to cutting it off in such manner as to leave a portion of the hull on the cob, or without reference to cutting at all, is the claim of Winslow's patent, is clearly shown by another consideration.

The first patent of Winslow and his second patent, as stated in the opinion of the court below, are intended to effect the same purposes; the one being a patent for the article, the other for the process by which the article is produced. "Both patents (it is there said) may be considered together, as all the proofs applicable to one apply equally to the other; and the positions taken in argument are the same in both, without an exception."

Now, it is quite significant of the intent of the claimant, and of the meaning of the first patent, that his second patent, which is for the process, and would properly be more specific as to every essential mode, makes no claim that the corn shall be removed from the cob by cutting, much less that it should be cut in any particular manner, or with a view to any particular

effect. After describing his disappointment in the result when he merely cooked the corn, and in attempting to preserve it when packed, without removal from the cob, or where it was removed after having been boiled on the cob, he says, "Finally I adopted the process of removing the corn from the cob, packing the kernels in cans, hermetically sealing the same, then boiling the cans until the corn contained therein became completely cooked." The word "cutting" is not to be found in this patent. Removal from the cob before commencing the preservation, without reference to the manner or means, except only that they should be suitable, is the plain intent of both patents. In this respect they are identical with each other, and are not inconsistent with Durand's patent.

The discovery in question has been of immense benefit to mankind. By means of food preserved in a compact and nutritious form, protected from its natural tendency to decay, deserts are traversed, seas navigated, distant regions explored. It is less brilliant, but more useful, than all the inventions for the destruction of the human race that have ever been known. It is to France that the honor of this discovery belongs, and to Appert, a French citizen. It does not belong to America or to Winslow. Appert's process presents all that we now know upon the subject. It contains absolutely every thing of value that is contained in Winslow's patent.

Other grave questions are presented by the record before us. We are satisfied, however, to place our decision upon the ground that the want of novelty in the patents of Winslow is fatal to the plaintiff's right of recovery. We do not discuss the other questions.

The decree must be reversed, and a decree ordered in favor of the defendant below.

MR. JUSTICE CLIFFORD dissenting.

Damages are claimed in this case by the complainants for an alleged infringement of two certain letters-patent, which are fully described in the bill of complaint. Those letters-patent are as follows: (1.) No. 34,928, dated April 8, 1862, for a new article of manufacture; namely, Indian corn when preserved in the green state, without drying the same, the kernels being

removed from the cob, hermetically sealed, and heated, substantially in the manner and for the purpose set forth in the specification. (2.) No. 35,274, for a new and useful improvement in preserving green corn.

Two other patents were included in the bill of complaint; but they were held to be invalid in the court below, and are not in issue in this investigation.

Both the patents in issue were introduced in evidence at the hearing; and the repeated decisions of this court have established the rule, that a patent duly issued, when introduced in evidence by the complainant in a suit for infringement, is *prima facie* evidence that the patentee is the original and first inventor of what is therein described as his invention.

Much consideration need not be given to the question of infringement, as the respondent admits that his foreman put up seven hundred cans of green corn, preserved by the same process substantially as that described in the letters-patent of the complainants.

Viewed in the light of these suggestions, it is clear that the decision of the case depends upon the defences set up in the answer. Of the separate defences pleaded, it will be sufficient to examine the first, as the decision of the court is placed chiefly on the defence set up in that part of the answer; which is, that the assignor of the patentee is not the original and first inventor of the improvements described in the respective letters-patent.

Defences involving the validity of a patent cannot be satisfactorily examined or their sufficiency or insufficiency determined without first ascertaining what the inventions are which are the subject-matter of the controversy. Beyond doubt, the invention secured by the first patent is for a new and useful manufacture described as Indian corn preserved in the green state. What the inventor desired to accomplish was to preserve the unripe corn in the green state for table use, without drying the same; and he states, that, in his first attempt to accomplish the desired result, he did not remove the kernels from the cob, but that the product manufactured in that mode was not satisfactory, as the article obtained was very bulky, and failed to retain the peculiar sweetness of green corn cooked in

the ordinary way, the same being absorbed, as the patentee supposes, by the cob.

Experiments of various kinds were made to overcome the difficulties attending the effort to preserve the corn without drying the same, which were also unsuccessful, as the kernels when preserved did not retain the milk and other juices of the corn, leaving the product hard, insipid, and unpalatable, and without the full flavor of fresh green corn. All such experiments were, therefore, abandoned; but he finally succeeded in producing an entirely satisfactory new article of manufacture, which is the one described in the specification and claim of the first patent.

His description of the method he adopted in manufacturing the product is substantially as follows: Select a superior quality of sweet corn when in the milk or green state; remove the kernels from the cob by means of a curved and gauged knife or other suitable means; pack the kernels with the juices of the same in cans, and hermetically seal the cans, so as to prevent evaporation under heat, or the escape of the aroma of the corn. Other suitable means are such means, and such *only*, as will perform the same functions. When packed, the cans with their contents are to be exposed to steam or boiling heat for an hour and a half; then take the cans out of the steam or boiling heat and puncture the cans, and immediately reseal the same while hot, and continue the heat for two hours and a half longer.

Exposure to heat in the manner stated is for the purpose of cooking the contents of the cans; and, when that is accomplished, the cans may be taken out of the boiling heat, and be slowly cooled in a room at the temperature of seventy to a hundred degrees Fahrenheit. Green corn thus packed and treated, the patentee states, may be warranted to keep for an indefinite period in any climate. Being preserved in its natural state as near as possible, it retains the peculiar sweetness and flavor of fresh green corn right from the growing field; and it is only necessary to heat the corn in order to prepare it for the table, as it is fully cooked in the process of preserving.

Argument to show that the commissioner may grant a patent for a product or new manufacture and one for the process is quite unnecessary, as that question is now firmly settled in

favor of the power by the unanimous decision of this court. *Goodyear* v. *Rubber Co.*, 9 Wall. 788; 2 Cliff. 371; *Seymour* v. *Osborne*, 11 Wall. 559; *Goodyear* v. *Railroad*, 2 Wall. C. C. 356; Curt. on Patents, 4th ed., sect. 269.

2. Pursuant to that rule, the second patent of the complainants was issued, which embodies an invention for a new and useful improvement in preserving green corn; or, in other words, the patented invention is for the process of manufacturing the new product described and secured to the inventor in the other letters-patent.

Applicants for a patent are required to describe their respective inventions; but an invention for a product and an invention for the process to produce the product bear so close a relation to each other, that it is difficult even for an expert to describe the latter without more or less reference to the former. Defects of the kind, however, are of no importance, if the patent for the product contains no claim to the invention for the process.

Separate applications may be made in such a case; or the inventor, if he sees fit, may describe both inventions in one application. Accordingly, the patentee in this case presented only one application in the first place for both patents; but, pending the hearing in the Patent Office, he filed separate specifications, the second containing some of the same phrases as those employed in the specification describing the invention of the new manufacture. Among other things, he admits that it has long been common to boil green or unripened corn, and then to dry the same for winter use; but he adds that corn thus dried must be boiled again when prepared for the table, and that it is more or less hard and insipid, as it loses the fine flavor of fresh green corn. Ears of corn also, he says, are sometimes boiled, and hermetically sealed in cans: but the cob seems to absorb the sweetness of the kernels; or if the kernels are removed from the cob after boiling, and then preserved, still the fine flavor of the natural corn is lost.

Many and varied attempts were made by the patentee to preserve green corn on the cob without drying the same; but all his efforts in that behalf were unsuccessful, as they left the article dry and unpalatable, as the sweetness of the green corn was absorbed by the cob. Experiments of the kind having all

failed, he conceived the idea of first removing the corn from the cob, and then boiling or cooking the kernels, and preserving them as separated from the cob.

Some benefit, it seems, resulted from that new conception; but a new difficulty arose, from the fact, that, the kernels of corn being more or less broken in being removed from the cob, the milk and other juices of the corn were dissolved and diluted by the water in the process of boiling, leaving the product insipid, unpalatable, and comparatively tasteless.

Unable to overcome the difficulty in that mode, he next attempted to cook the corn without allowing it to come in contact with the water, by exposing the cans containing the corn to boiling water; but he soon found that that mode of preserving the corn was unsatisfactory, as a long time was required to cook the corn sufficiently for preservation, and the corn became more or less dried and hard.

Sufficient has already been remarked to show that both patents may be considered together, for the reason that all the proofs applicable to the patent for the product are equally applicable to the patent for the process, and the positions taken in argument are the same in both, without an exception.

Want of novelty is the principal defence set up in the answer; and the court decides that the respective patents are invalid, chiefly upon the ground that the foreign invention secured to Peter Durand is prior in date. Before examining that defence, it becomes necessary to refer somewhat more fully to the nature and peculiar characteristics of the respective improvements, in order that the evidence introduced may be correctly understood and properly applied.

Unripe ears of corn may be boiled and hermetically sealed in cans without infringing the inventions of the patentee; but the difficulty with that product is, that the cob absorbs the sweetness of the kernels, and the article becomes insipid and unpalatable, and consequently it is not salable to any considerable extent. Sales of such a product do not infringe the patents of the complainants; and it is clear that the kernels may be removed from the cob, and then preserved in cans in the ordinary mode, without any conflict with the improvements embodied in the complainants' patents: but the product which such a process

produces is comparatively valueless, as the fine flavor of green corn cooked in the usual way for table use is lost in the process of manufacture.

Indian corn may also be preserved when in a green state by removing the kernels from the cob, and boiling or cooking the same before the kernels are packed in cans hermetically sealed, without subjecting the manufacturer to the charge of infringing the patents described in the bill of complaint; but the decisive objection to that process is, that the kernels, or many of them, in being removed from the cob, are broken, and consequently the milk and other juices of the corn in that state are dissolved out in the process of boiling or cooking, and the natural aroma of green corn cooked in the usual way is lost, and the product becomes of little or no value as an article of commerce.

Attempts were made by the patentee in this case to remedy that difficulty by packing the kernels in cans not sealed, and exposing the cans containing the kernels to boiling water; but the experiments were not satisfactory, as it required a long time to cook the corn, during which the milk and other juices of the corn evaporated, and left the kernels dry and hard. All such experiments having failed, the inventor adopted the process of removing the corn from the cob by means of a curved and gauged knife, and packing the kernels with the milk and other juices of the same in cans hermetically sealed, and then boiling the cans with their contents until the same became completely cooked: but he states that the cans containing the corn must be very strong, or the internal pressure will cause them to burst; and, to prevent that, he practised puncturing them after they became well heated, to allow the air to escape, immediately resealing the same to prevent the evaporation of the juices of the corn and the loss of its natural aroma.

Sealed cans, if sufficiently strong, it would seem, may be used to complete the process without the necessity of puncturing during the period they are exposed to the boiling bath; but, unless the cans are very strong, the recommendation is to puncture them, in order to relieve the internal pressure and to prevent them from bursting. Other advantages result from puncturing the cans which deserve consideration. Even if the cans when not punctured do not burst, still the air contained

in the same and the vapor become more or less expanded by the heat, so as to press the heads of the can outward, giving the can the appearance of cans which contain gaseous products of decomposition; and the statement is, that such appearances, even when the corn is perfectly preserved, diminish the value of the product as an article of commerce, and show that it is better to puncture and reseal the cans during the process of boiling.

Looked at in any light, it is clear that the purpose of the invention secured by the second patent, as evidenced by the language of the description, is to preserve not only the farinaceous elements of the kernels, but also the milk and juices of the same which give the peculiar aroma or flavor to green corn when cooked for the table in the usual way, during the season when the kernel is full, but before the milk and juices of the kernel become concrete, as in ripe corn.

Beyond all doubt, the patented process, if the directions are properly followed, will accomplish the purpose for which it was invented, and will enable the manufacturer to preserve the kernels of the green corn, with all the milk and juices which the kernels contain, without any chemical or other change except what is produced by the cooking, which is effected by putting the sealed cans containing the kernels with their milk and other juices, just as the same were removed from the cob by the curved and gauged knife, into the boiling water for the periods specified in the description of the specification.

Proof to that effect of the most satisfactory character is exhibited in the record; and the fact that the product of the patented process, to the extent that it has become known, has driven the product of all other processes intended to effect a like result out of the market, attests its accuracy and truth. Suffice it to say, that the remarks made are sufficient to explain and describe what the inventions are which give rise to the present controversy; and, having accomplished that purpose, the next inquiry is, whether the assignor of the complainants was the original and first inventor of the respective improvements.

Examined merely in the light of the pleadings, the affirmative of the issue is upon the complainants; but, the complain-

ants having introduced the respective patents in question, the rule is well settled that the burden of proof is changed, and that it is incumbent upon the respondent to show by satisfactory proof that the alleged inventor was not the original and first inventor of the respective improvements, as they have alleged in their answer.

Ample time was given to both parties in the Circuit Court to prepare for a hearing, and the respondents attempted to meet the issue in two ways: —

Suppose it be true that the assignor of the complainants was the first person in the United States who practised the patented process, and preserved green corn even in that mode of operation: still it is contended that the alleged inventor was not the original and first inventor of the improvement, because the process had been previously known and used in a foreign country: but the Circuit Court ruled and determined that the mere previous knowledge or use of a thing patented in a foreign country was not sufficient to defeat a patented invention granted under the Patent Act; that no evidence of the kind could have that effect, unless it appeared that the same invention had been previously patented in some foreign country, or been described in some public work, anterior to the supposed discovery thereof here by the alleged inventor; that it is well-settled law, that the mere introduction of a foreign patent or a foreign publication, though of a prior date, will not supersede a domestic patent, unless the description or specifications or drawings contain or exhibit a substantial representation of the patented improvement in such full, clear, concise, and exact terms as to enable any person, skilled in the art or science to which the invention appertains, to make, construct, and practise the invention to the same practical extent as he would be enabled to do if the information was derived from a prior patent issued in pursuance of the Patent Act. *Seymour* v. *Osborne*, 11 Wall. 555.

Unable to controvert those propositions, the respondent next refers to the English patent granted to Durand, and insists that it supersedes both of the patents of the assignor of the complainants. His patent bears date the 30th of August, 1810; and the specification states, in substance, that he encloses the

food or articles to be preserved in bottles, or other vessels of glass, pottery, tin, or other metals or fit materials, and closes the apertures of the vessels so as completely to cut off and exclude all communication with the external air. When the vessels have been thus charged and well closed, he places them in a boiler, each separately surrounded with straw or wrapped in coarse cloth, or otherwise defended from striking against each other. He then fills the boiler so as to cover the vessels with cold water, and gradually heats the water till it boils, and continues the ebullition for a certain time, which, as he says, must depend upon the nature of the substances and other obvious circumstances.

Vegetable substances, the specification states, are to be put into the vessels in the raw or crude state. Animal substances are to be partly or half cooked, although these may be put in raw; and he adds that articles thus prepared may be kept for a very long time and in a state fit for use; and no doubt is entertained that unripe corn prepared in that way may be kept for a long time, as it is evident that the kernels would be dried by the heat, but they would necessarily cease to have the flavor of fresh green corn when cooked in the usual way for table use. Confirmation of that is found in what immediately follows in the specification, which shows that the patentee also claims the application of heat in other modes, as by placing the vessels in an oven or a stove, the effect of which, beyond all doubt, would be to dry the kernels, and make it necessary to reboil the contents of the vessel in order to fit the same for table use.

Certain vegetable substances may, perhaps, be preserved to advantage in that way; but it is clear that the application of high heat to the vessels containing green corn, unless the kernels were surrounded by water or some other suitable liquid, would necessarily dry the kernels, and render them unfit for table use without soaking or reboiling. Doubtless the term "vegetable substances" is comprehensive enough to include green corn: but the patentee, in enumerating the articles to be preserved, does not mention green corn; and, of course, the specification contains nothing to indicate whether the kernels are or are not to be removed from the cob before they are placed in the bottles or other vessels; or, if to be removed, in what man-

ner the removal is to be effected; nor whether the kernels are to be left whole or broken, as in the mode of operation described in the patents in question.

Corn at that period was unknown in England, and it is not probable that the patentee had ever heard of such an article, and it does not appear that a can of green corn has ever been preserved in that mode of operation to the present time. Patented inventions must be described so that those skilled in the art or science may be able to make, construct, and practise the same; and yet it is plain that no amount of study or examination of the foreign specification would ever enable any person to preserve green corn in the mode of operation employed by the assignor of the complainants.

Study it as you will, and the conclusion must be that the vegetable substance, whatever it may be, is to be placed in the bottles or other vessels in the raw or crude state, without any previous preparation, and without any liquid to prevent the substance from drying. Indian corn on the cob, or unbroken kernels of green corn, cannot be preserved in that way so as to possess any commercial value.

Instead of packing the kernels in the cans in their crude state, the process patented by the assignor of the complainants directs that the kernels should be cut from the cob in a way which leaves the coarser part of the hull on the cob, and breaks open the kernels, liberating the juices, to use the language of the patentee, and causing the milk and other juices of the corn to flow out and surround the kernels as they are packed in the cans, in such a mode that the milk and juices of the kernels form the liquid in which the whole is cooked when the sealed cans are subjected to the bath of boiling water. Water is never added to the mixture to be preserved; nor is it necessary, as the liquid composed of the milk and juices of the kernels is sufficient to prevent the heat from drying the vegetable substance to be preserved; and, if water should be added, it would dilute the milk and other juices, and render the product insipid and valueless.

Evidently much is due to that feature in the patented mode of operation in preserving the product in its natural state, and causing it to retain the sweetness, peculiar flavor, and natural

aroma of green corn fresh gathered from the field, and boiled in the usual way for table use. Nothing of the kind is suggested in the foreign patent; and it is clear that a careful comparison of the description of the complainants' patents with that of the Durand patent fully justifies the opinion of the learned expert examined by the complainants, that the two patented processes are essentially and substantially unlike, and confirms the conclusion already expressed, that persons having no other knowledge of the complainants' process than what they can derive from perusing the specification of the foreign patent would never be able to preserve green corn by the complainants' mode of operation.

Palpable as those differences are, they ought not to be overlooked in determining the issues between these parties. Meritorious inventors are entitled to protection; and the proofs are full to the point that the product, manufactured by the process of the complainants, is far superior to that preserved in any other mode; which, beyond all question, is the cause that induced the respondent to abandon other methods, and to practise the patented process at the risk of a suit for infringement.

Other vegetables, such as beets and carrots, or pease and beans, may be packed in cans in a crude state under the foreign process, as they retain their juices, and may perhaps be tolerably well preserved in that mode of operation if entirely secluded from the atmosphere, as by packing ripe vegetables in hermetically-sealed cans; but the chemical composition of such vegetables is very different from green sweet corn, which is much more difficult to preserve in its natural freshness without loss of its peculiar flavor and aroma, as accomplished by the complainants' process. When the kernels are cut from the cob, they are opened, and the milk and other juices flow out, and become the liquid in which the kernels are to be cooked, and the milk and the other juices become a constituent part of the vegetable substance to be preserved.

Prompt action is required to accomplish the object; for, if the mixture is exposed to the air for any considerable time before the cans are filled, the chemical relations of the constituents will be changed, and the whole substance will become sour and unwholesome. Exposure to heat, if seasonable, will prevent that tendency, as the relations of the constituents of which the

mixture is composed will become fixed, and the danger of putrefaction or souring will be greatly diminished, or be entirely averted.

Throughout the experiments, the aim of the patentee was to perfect the process of preserving green corn without losing any of the flavor of the milk and natural juices of the cereal in its green state, and to discover the method or means of fixing the constituents or elements of the corn when in the milk, so that, when packed in vessels to be preserved, the chemical relations of the constituents of the substance to each other would never change, unless the vessels containing the mixture were opened. Such a purpose, it is obvious, could not be accomplished by packing the corn in cans in the crude state, or before the kernels were removed from the cob, as the juices of the kernels would be absorbed by the cob in the cooking: nor could he accomplish his object by cutting the kernels from the cob and boiling them in water before they were packed in the cans, or by cooking the kernels in open vessels without water; as in the one case the milk and other juices would be washed out of the kernels, and with that operation all the peculiar flavor of the cereal in the green state; and, in the other case, the aroma and juices of the kernels would be lost by evaporation.

His process includes the mode of preparing the mixture for filling the cans, as well as the mode of cooking and preserving the same; for, if it did not, the great aim he had in view would not be accomplished. Preserved green corn, unless it is packed and cooked in its own milk and juices, is of very little value, as it is only in that mode of operation that the preserved articles will retain the peculiar flavor and sweetness which the cereal possesses when fresh gathered from the field and cooked in the usual way.

No doubt the kernels may be removed from the cob without cutting, and may be preserved in that form under the process described in the foreign patent: but the decisive answer to that concession is, that that process is not the process of the complainants; and the product preserved in that mode of operation is of a very inferior quality, as appears by the concurrent testimony of all the witnesses. Sweet corn in the green state is a peculiar substance, differing in material respects from any other cereal or vegetable used for food. Its constituents are such, that

it is singularly susceptible to fermentation, decomposition, and change, — more so than any other vegetable that has been successfully preserved in hermetically-closed vessels for any considerable length of time. Such liability to rapid change is not due to any one particular constituent, but to the presence of several, such as gluten, sugar, fat, and starch, in such proportions as are calculated to promote fermentation and action upon each other. As compared with sweet pease, for instance, the kernels of sweet corn are much more delicate, and liable to change, as they contain a much larger proportion of milk, juice, or sap, which itself contains more sugar, starch, and oil than the juice of sweet pease, and the glutinous constituents which act as the ferment or primary cause of change are much more active in the juice of sweet corn than in that of sweet pease.

Equally instructive support to the same view is derived by comparing sweet corn with such fruits as peaches, as the juice of the peach contains no oil and more water than the corn, besides other differences of an equally important character; showing that such fruits as peaches are much less liable to ferment than sweet corn, and that they are much more easily preserved.

Examined in the light of these suggestions, as the case should be, it is clear that the mode of operation described in the complainants' specification differs widely from every process which preceded it, and that it effects a new and highly useful result. Wide differences in the mode of operation from any thing which it is proved ever existed before is shown in every descriptive feature of the complainants' specification; and so palpable and marked are those differences, that it would create astonishment and surprise if any competent expert can be found who would now venture to testify that the foreign process given in evidence is the same as that practised by the complainants.

Great injustice, in my opinion, is done to the appellees in this case: but they may still enjoy the satisfaction to know, that, while courts of justice may alter the names of things, they cannot change the things themselves without exercising positive invention; nor can they obliterate the relation between cause and effect, for the reason that the law which regulates that relation is irrepealable.

THE "FREE STATE."

1. It is the duty of a steamer to keep out of the way of a sailing vessel when they are approaching in such directions as to involve a risk of collision. The correlative obligation rests upon the sailing vessel to keep her course, and the steamer may be managed upon the assumption that she will do so.
2. Where a sailing vessel, ascending the Detroit River in a direction nearly north, bore two or three points to the west, while an ascending steamer overtook and passed her, to give a wider berth to such steamer, which steamer passed to the east of a descending steamer, — *Held*, 1. That the descending steamer had the right to assume that the sailing vessel would hold her westerly course, and that she was in the right in shaping her course to the east for the purpose of passing the sailing vessel; and that a subsequent change of the course of the sailing vessel to the east when within three hundred feet of the descending steamer was unjustifiable, and that the collision resulting therefrom was solely the fault of the sailing vessel. 2. That there was no fault in the descending steamer in not slackening or stopping until such change of course in the sailing vessel rendered a collision probable.
3. It is not the rule of law, under the sixteenth of the articles enacted by Congress to avoid collisions, when a steam-vessel is approaching another vessel, and where a collision may be produced by a departure of the latter from the rules of navigation, that the former vessel is bound to slacken her speed, or stop and reverse. Each vessel may assume that the other will reasonably perform its duty under the laws of navigation; and if, upon this assumption, there could be no collision, the case under the sixteenth article does not arise. The steamer is not bound to take measures to avoid a collision until some danger of collision is present.

APPEAL from the Circuit Court of the United States for the Eastern District of Michigan.

The facts are stated in the opinion of the court.

Mr. W. A. Moore for the appellants, and *Mr. George B. Hibbard* and *Mr. Ashley Pond* for the appellee.

MR. JUSTICE HUNT delivered the opinion of the court.

There is but a single question of fact in issue between the parties; and that is as to the course and conduct of the "Meisel" shortly before the collision.

There is but a single question of law in the case; and that is as to the duty of the propeller under the sixteenth of the articles established by Congress for avoiding collisions of vessels.

The facts, as established by the evidence on both sides, and which cannot justly be disputed, are as follows: About daybreak on the morning of July 17, 1870, the weather being fine,

and free from fog, the sailing scow "Meisel" entered the Detroit River on her voyage from Lake Erie to a port on Lake Michigan. The wind was west-south-west, free to the scow; and she sailed in a course generally north, but by the marks upon the land, which were well known to her captain, and plainly visible, rather than by the compass, keeping nearer to the Canadian than the other shore. As she passed the village of Amherstberg, the steamer "Jay Cooke" came out from the dock at that place, and passed the scow on her starboard side, at a distance of twice or three times the length of the steamer. The propeller "Free State" was then approaching on her passage down the river. As the steamers approached each other, the "Jay Cooke" gave one blast of her whistle, which was responded to by the "Free State" by the same signal. This indicated that the steamers would pass each other port to port. After the "Cooke" had passed away from her, the scow ported her helm to get into the wake of the "Cooke." As the propeller approached nearer, a second order to port was given by the master of the scow; and she was sailing under this order when she was struck by the propeller on her port side, near the main rigging. The scow was sunk by the collision, and the wife and child of the master were drowned.

The propeller "Free State" was on her voyage down the lakes from Chicago to Buffalo; was making nine or ten miles an hour when she sighted the "Meisel." The scow showed her green light only as she came in sight of the propeller. As she passed the "Cooke," the propeller "Free State" bore to the Canada shore, intending to leave the scow to windward. As the propeller was thus bearing to port, the scow changed her course to port, as already mentioned. The master of the propeller ordered her helm hard-a-port, and rang the bell to stop and back. It was then too late to avoid a collision.

The point of fact in dispute is this: As the "Cooke" was passing her, as already stated, did the scow put her helm to the starboard, thus changing her direction to the west, and authorizing the propeller to believe that she would continue to hold her course westerly, so that it became the duty of the propeller to pass her on her starboard side?

We are of the opinion that she did, not only on the testimony

of all on board the propeller, but by the testimony of the master and mate of the scow. The evidence of the master shows, that, as she entered the Detroit River, the course of the scow was northerly, the wind being west-south-west, the sails on her starboard side, and within two hundred or three hundred feet of the Canada shore. He says, that, when the "Cooke" passed him, the propeller was three hundred or four hundred feet distant between him and the shore; that, as soon as the "Cooke" had passed, he ordered the man at the wheel to keep her off a little; that she swung right off to the mainland (the Canada side). He told him to steady, and he did so. The "Cooke" had, before this, blown the single whistle; and the captain says he supposed he could follow in her track, and pass the propeller on the port side.

This master does not state distinctly, nor does he deny, the very obvious fact, that, as the "Cooke" began to pass him, he put his helm to the starboard, and bore up into the wind. Such must have been the fact, as he was previously steering as nearly north as might be, in the same course with the "Cooke;" and, after she had passed him, it was necessary to port his helm to bring him again into that line. He was out of the line, and could only have been so by starboarding his helm as the "Cooke" was passing him. The "Cooke" was three hundred or four hundred feet from him; and, as she preserved a safe distance from the shore, the scow was probably about the middle of the channel when the "Cooke" had passed her.

The mate is more explicit. He says, that, as the "Cooke" was coming up under their quarter, the captain gave the order to keep her up a little, so as to give the "Cooke" more room, and that under this order she swung to port between two and three points of the compass, and ran under that order till the "Cooke" had passed them. How long a period of time this was, or what distance of travel it covered, is not stated. The "Cooke" had just come out of the dock at Amherstberg, and probably had not acquired much speed. The scow was a free sailer, as is stated, handled well and easily; and, with all sails drawing, she was under way. As the "Cooke" began to lap her quarter, she bore to the west, and so continued till the "Cooke" had entirely left her. Although we do not know the time or the distance that

they so sailed together, we do know that it was so long and so far: first, that the "Cooke" escaped entirely from her; and, second, that the propeller deemed her then course to be the course adopted by the scow; that she would continue upon that course; and that, to pass her safely, she must shape her own course to the eastward.

Supposing her original direction to have been due north, a variation of three points to the west — as stated by the mate — would have carried the scow to north-west by north three thirty-second parts ($\frac{3}{32}$), or nearly one-tenth of a circle westerly of her former course.

The propeller, assuming that the scow would continue her course of north-west by north, bore to the east, intending to pass between the scow and the Canada shore; which she could have done easily and safely, had the scow so continued her course. The subsequent order, however, to keep off the scow, frustrated this intention, and produced the collision.

This somewhat tedious statement of the facts of the case determines not only that the scow was in the wrong and the propeller in the right in the particulars we have considered, but will aid materially in settling the point of law which is in dispute between the parties. That question arises upon the sixteenth of the rules enacted by Congress for avoiding collisions. It is in these words: "Every steamship, when approaching another ship so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse; and every steamship shall, when in a fog, go at a moderate speed." 13 Stat. 60, 61.

It is contended that here was risk of collision; that the propeller did not slacken her speed or stop and reverse in time, and hence that she was also in fault, and the damage should be apportioned. A collision did certainly occur; but was the situation of the parties such that the principle of this article applied to the propeller? Does this article contemplate a case where a collision is the result of sheer negligence, and disobedience of well-known rules? or does it apply to cases, where, supposing the parties intend to perform and do reasonably perform their respective duties, the emergency is such that there is still danger that a collision may occur? — as if, instead of their being, as

was the fact, but the three vessels — the "Cooke," the "Meisel," and the propeller — within a mile of the scene of action, and with a channel a thousand feet in width, there had been two other sailing vessels alongside of or immediately in the rear of the "Meisel." The "Meisel," as the "Cooke" approached, bore off to the west. If one of the other supposed vessels had borne to the east, and the third had continued a northerly course, the propeller would have been placed in an embarrassing position. If she should bear westerly, she would meet the "Meisel;" if easterly, she would encounter the second vessel; and, if she continued her course without variation, she would be upon the third supposed vessel. It would be the plain duty of the propeller under these circumstances, in compliance with the sixteenth article, to slacken her speed, to stop and reverse if necessary, and wait until time should point out the safe course to be pursued. It would be a case involving risk of collision.

The fifteenth article provides that "if two ships, one of which is a sailing ship and the other a steamship, are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing ship." It has been repeatedly held under this article, that the sailing vessel must hold its course, and rely upon the steamship to avoid a collision. This is not only the right of the sailer, but it is its duty; and the steamer is bound to believe that the sailer will so act, and may manage its own vessel upon that supposition. *The Nichols*, 7 Wall. 656; *The Scotia*, 14 id. 170; *The Potomac*, 8 id. 590.

The scow, after the "Jay Cooke" had reached her, stood up the river upon a course of north-west by north. The steamer was coming down the same stream in a direction nearly south. Observing that the scow was sailing in the direction mentioned, the steamer starboarded her helm, thus bearing to the east of south. On these courses there was no risk of collision with the scow. There was no possibility of collision. The faster and the farther the vessels sailed, the farther apart were they. The vessels adopted the principle of the fifteenth article: the scow selected her course; and the steamer, acquiescing in that selection, took the suitable means to pass her in safety. There was no risk of collision. The sixteenth rule did not come into use; and it was not necessary that the steamer should slacken, stop, or reverse.

Subsequently, and when the vessels were within three hundred feet of each other, and probably within three minutes of time, the scow changed her course, and practically ran under the bows of the steamer. Then there was risk of collision, but not until then. The steamer, in this emergency, did stop and reverse; but the time was too short, and the distance too small, to prevent the catastrophe.

To permit a risk of collision under circumstances like these before us is of itself a fault. There is no evidence that there was another vessel within a mile of the three we have mentioned. The channel was a thousand feet wide; and it was the duty of the steamer to shape her course so as to avoid all risk before the vessels were so near each other that any risk could arise. She would have been greatly in fault if she had permitted the point of slackening or stopping and reversing to arise.

The appellants insist that the rule of law is this: That where a steam-vessel is approaching another vessel, and where a collision might be produced by a departure of the latter from the rules of navigation, the former vessel is bound to slacken her speed, or stop and reverse.

We have examined with care the authorities cited by the appellants; but we find none that sustain this proposition. The rule is otherwise.

If two steamers are meeting each other end on, or nearly so, where there is plenty of sea-room, and at a considerable distance from each other, it is not the duty of either to stop, reverse, or to slacken. The duty of each is to pass on the port side, and the rate of speed is not an element in the case. The risk of collision is not present under such circumstances.

In the case of the "Scotia," above quoted, the court say (14 Wall. 170), "This duty of a steamer to keep out of the way implies a correlative obligation to the ship to keep her course, and to do nothing to mislead. Nor is the steamer called to act except where she is approaching a vessel in such a direction as to involve a risk of collision. She is required to take no precautions when there is no apparent danger. Was the "Scotia," then, in fault? We have already said that she was not bound to take any steps to avoid a collision until danger of a collision

should have been apparent; and we think there was no reason for apprehension until the ship light was seen closing in upon her. It is not the law that a steamer must change her course or must slacken her speed the instant she comes in sight of another vessel, no matter in what direction it may be. *The Earl of Elgin*, L. R. 4 P. C. L.; *The Potomac*, 8 Wall. 590; *Williamson* v. *Barrett*, 13 How. 101.

The decree of the Circuit Court was right, and must be affirmed.

MITCHELL *v.* BOARD OF COMMISSIONERS OF LEAVENWORTH COUNTY, KANSAS.

Where, for the purpose of evading the payment of a tax on his money on deposit, which the law of a State required to be listed for taxation March 1 in each year, a party withdrew it Feb. 28 from a bank where it was subject to his check, converted it into notes of the United States, and deposited them to his general credit March 3, and the State court passed a decree dismissing the bill in equity by him filed to restrain the collection of the tax thereon,—*Held*, that the decree was correct; and that, although such notes were exempt from taxation by or under state or municipal authority, a court of equity would not use its extraordinary powers to promote such a scheme devised for the purpose of enabling a party to escape his proportionate share of the burdens of taxation.

ERROR to the Supreme Court of Kansas.

THIS case presents the following facts: Mitchell, the plaintiff, kept his account with a banking firm in Leavenworth. On the 28th February, 1870, he had a balance to his credit of $19,350 in current funds, for which he that day gave his check, payable to himself in United States notes. They were paid to him. He immediately enclosed them in a sealed package, and placed them for safe keeping in the vault of the bank. On the 3d March he withdrew his package, and deposited the notes to his credit. This was done for the sole purpose of escaping taxation upon his money on deposit.

Personal property in Kansas, which includes money on deposit, is listed for taxation as of March 1 in each year. Mitchell did not list any money on deposit. The taxing officers, in due time, on discovery of the facts, added $9,000 to his assessment on account of his money in bank. He asked the

proper authorities to strike off this added assessment. This was refused. A tax was thereupon in due form levied, and its collection threatened.

He then filed his bill in equity against the defendants, who are the proper authorities, to restrain the collection of this tax, alleging for cause, in substance, that as his bank balance had been converted into United States notes, and was held in that form on the day his property was to be listed, he could not be taxed on that account. The Supreme Court of Kansas, on appeal, dismissed the bill, for the reason, as appears by the opinion, — which in this case is sent here as part of the record, — that "a court of justice, sitting as a court of equity, will not lend its aid for the accomplishment of any such purpose." Mitchell sued out a writ of error.

Messrs. R. M. & Quinton Corwine and *Mr. J. W. English* for the plaintiff in error.

The statute of Kansas imposing a tax on personal property provides that all property shall be listed as on the first day of March in each year. Its intent is to assess such property as is then *liable to taxation*. If there is none *on that day*, there is no *right* of taxation.

The object of all taxation is to compel lawfully taxable property of every kind to contribute its just proportion of taxes. It must, however, on the proper day of assessment, have an actual *bona fide* existence as such, in order that the law of the State may reach it.

The right of the plaintiff in error to withdraw his deposit and convert it into legal-tender notes is unquestionable. The money was his own, and he could invest it in United States bonds, legal-tender notes, mortgage-paper, or whatever securities he might elect.

The question here is, not what was his motive in making the investment, but what was the character of that investment on the day of his tax return with respect to its liability or non-liability to pay taxes to the State.

The facts show, that, on the day fixed by the statute for the assessment of the tax, the property of Mitchell consisted of notes of the United States. It was, therefore, exempt from taxation.

The presumption is, that the bank listed its taxable property, including this money exchanged by Mitchell. If so, the same money has been twice assessed. Even upon the theory of the Supreme Court of Kansas, this assessment is manifestly unjust.

No counsel appeared for the defendant in error.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

We think the decision in this case was correct. United States notes are exempt from taxation by or under state or municipal authority; but a court of equity will not knowingly use its extraordinary powers to promote any such scheme as this plaintiff devised to escape his proportionate share of the burdens of taxation. His remedy, if he has any, is in a court of law.

The decree is affirmed.

THE "SUNNYSIDE."

1. If a sailing vessel, when approaching a steamer, fails to adopt all reasonable precautions to prevent a collision, she will not be excused, even though she displays her proper signal-lights; and is entitled, in the absence of exceptional circumstances or special danger, to keep her course.
2. A collision occurred on Lake Huron, about three miles from the shore, near the head of St. Clair River, between a steam-tug and a sailing vessel. The former, heading east by north half north, waiting for a tow in conformity with a well-known usage in those waters, with her machinery stopped, but with her signal-lights burning as the law requires of a steamer under way, was drifting at the rate of a mile and a half per hour. The sailing vessel, with all her sails set and displaying her proper signal-lights, was heading north half west at a speed of nine miles per hour. *Held*, that it was the duty of the sailing vessel, in view of the special circumstances, to put up her helm and go to the right, or to put it down and suffer the steam-tug to drift past in safety; and, both vessels being at fault, the damages were equally apportioned between them.
3. The doctrine announced in *The Continental*, 14 Wall. 345, reaffirmed.

APPEAL from the Circuit Court of the United States for the Eastern District of Michigan.

The facts are stated in the opinion of the court.

Mr. W. A. Moore and *Mr. Ashley Pond* for the appellants,

and *Mr. F. H. Canfield* and *Mr. D. B. Duffield* for the appellees.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Marine collisions are every year becoming more and more frequent; and experience shows that a large proportion of the disasters result from the neglect of those in charge of the vessels to comply with the rules of navigation.

Litigations often arise in which the libellants or respondents, or both, allege that nothing more could have been done at the time of the collision by the party making the allegation to have prevented the disaster; and the proofs sometimes show that the allegations in that regard, of both parties, are true, even when it is apparent to a careful observer that both parties are in fault for having placed their respective vessels in a situation where nothing could be done to prevent them from coming together.

Disasters of the kind are doubtless sometimes the result of inevitable accident; but they much more frequently arise from the want of seasonable precaution on the part of those intrusted with the navigation of the vessels, even when the proofs show to a demonstration that nothing more could have been done at the moment of the collision by either party to have prevented the cause of the litigation. *The Virgil*, 2 W. Rob. 205.

Precautions not seasonable are of little or no value, nor do such efforts constitute a compliance with the usages of the sea or the statutory rules of navigation. Such precautions must be seasonable in order to be effectual; and if they are not so, and a collision ensues in consequence of the delay, it is no defence to say that nothing more could be done to avoid the collision, nor that the necessity for precautionary measures was not perceived until it was too late to render them availing. *The Steamboat New York*, 18 How. 225.

Inability to avoid a collision usually exists at the time the collision occurs; but it is seldom a matter of much difficulty to trace the cause of the disaster to some antecedent omission of duty on the part of one or the other, or both, of the colliding vessels. *The Governor*, 1 Cliff. 97.

Suppose it be true that a steamer, after she has approached within a certain distance of a sail-vessel, is not then able to

turn either to the right or to the left so as to avoid a collision: still the proof of that fact without more will not constitute a good defence, if it appears that the fault consisted in placing herself in that situation.

Steamers approaching sail-vessels, if the two are proceeding in such directions as to involve risk of collision, must keep out of the way of the sail-ship; and, in order to perform that duty, the steamer may go either to the right or to the left: but, if the steamer neglects to change her helm until the vessels are so near that the collision cannot be avoided, it is no defence to say that nothing could be done at the moment to avert the disaster, as it would be clear in such a case that the collision might have been prevented if the helm of the steamer had seasonably been put to port or to the starboard.

Rules of navigation are adopted to save life and property; and they are required to be observed, and are enforced to accomplish the same beneficent end, and not to promote collisions. Consequently, they have exceptions; and no party ought ever to be permitted to defend or excuse a plain error by invoking a general rule of navigation, when it is clear that the case falls within an admitted exception.

If two sailing ships are meeting nearly end on, so as to involve risk of collision, the statutory rule is that the helms of both shall be put to port, so that each may pass on the port side of the other; but if the lines of approach are parallel, and the approaching vessels are each to the starboard of the other, the effect of porting the helms of the vessels would be to render a collision more probable. Where one of two vessels is required to keep out of the way, the other is required, as a correlative duty, to keep her course; but the act of Congress, following the usages of navigation, provides that that rule shall be subject to certain reasonable and necessary qualifications. Special circumstances may exist in particular cases, rendering a departure from the rule necessary in order to avoid immediate danger; and the act of Congress, among other things, expressly provides that nothing in the statutory rules shall exonerate any ship from the consequences of the neglect of any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case. 13 Stat. 61.

Proceedings *in rem* were instituted by the owner of the steam-tug "William Goodnow," in the District Court, against the bark "Sunnyside," in a cause of collision civil and maritime, in which the libellant claimed damages for injuries received by the steam-tug in a collision that took place in Lake Huron on the 14th of June, 1869, between the steam-tug and the bark, about fifteen minutes past three o'clock in the morning, by which the steam-tug was sunk in the lake. Though sunk in the lake, yet she was subsequently raised and towed to Detroit, and was there repaired; the expense of repairing her, including the cost of raising her, amounting to nine thousand five hundred dollars. Damages are also claimed for demurrage in the sum of three thousand six hundred dollars, amounting in the whole to the sum of thirteen thousand and one hundred dollars.

Service was made, and the owner of the bark appeared as claimant, and made answer to the libel, and filed a cross-libel, charging that the collision was occasioned solely by the negligence, unskilfulness, and carelessness of the persons navigating the steam-tug, and claiming damages for injuries received by the bark in the collision. Witnesses were examined on both sides; and, the parties having been fully heard, the District Court entered a decree that the bark and the tug were equally in fault in bringing about the collision, and that the loss and damage accruing to the two vessels be apportioned between them in equal moieties, and referred the cause to a commissioner to assess and report the amount.

Suffice it to say, that the report of the commissioner, made in pursuance of the decretal order, gave the sum of seven thousand three hundred and fifteen dollars and fifty-one cents to the owner of the steam-tug, the libellant in the principal case.

Exceptions were filed by the respondent, some of which were sustained, and others were overruled; and the record shows that the District Court entered a final decree for the libellant in that suit of four thousand seven hundred and twenty-four dollars and nine cents, together with costs of suit. Whereupon the respondent in the principal suit, and libellant in the cross-libel, appealed to the Circuit Court for that district.

Sufficient appears to warrant the conclusion that the evidence was the same in the Circuit Court as in the District Court. Both

parties were again heard in the Circuit Court; and the Circuit Court reversed the decree of the District Court, and entered a decree for the libellant in the cross-libel, and dismissed the libel in the suit instituted by the owner of the steam-tug. Instead of holding that both vessels were in fault, the Circuit Court decided that the steam-tug was wholly in fault; and the libellant in the principal suit appealed to this court, and now seeks to reverse that decree.

Much difference of opinion respecting what took place just before and at the time of the collision cannot exist, as most of the material facts are either conceded, or so fully proved, that much discussion of the evidence, save in a single particular, is rendered unnecessary. Avoiding immaterial details, the facts may be stated as follows: —

That the steam-tug lay in the lake, three miles from the shore, near the head of St. Clair River, with her white and colored lights burning, waiting for a tow, in conformity to a well-known usage with such steamers plying in those waters. By the evidence, it also appears that the steam-tug was heading east by north half north; that the night was clear, and that the morning had so far dawned that such a vessel could be seen, even without lights, from one and a half to two miles by another vessel approaching from a north-easterly direction; that the bark was coming up the lake, on her way from Erie to Chicago, laden with coal, under a wholesail breeze, and was heading north half west. Beyond all doubt, she had plenty of sea room on each side; and the evidence shows that she had all her sails set, including her studding-sails, and that she was moving through the water at a speed of nine miles an hour.

Preceding the collision, the steam-tug had for several hours been lying with her machinery stopped, waiting for a tow, which those in charge of her expected to find, as vessels passed up or down the lake on that route. Steam-tugs waiting there for such employment remain as nearly stationary as possible, without coming to anchor. Of course, the vessels are liable to drift before the wind; and the evidence in this case shows that the wind was south-west, and that the steam-tug drifted at the rate of a mile or a mile and a half per hour, though all of her machinery was stopped, and she had her "rudder lashed to the

starboard," and her signal-lights burning, as required by law, when in motion.

Both courts below came to the conclusion that the steam-tug did not have a competent lookout; and the court here is of the same opinion, even if the testimony of the mate is entitled to full credit. All agree that it was the mate's watch. He admits that his attention was called to the lights of the bark when she was quite distant; and he states to the effect, that, not being able to see very well where he was standing, he started forward; that, when he got about midships, he saw the jib-boom of the bark coming over the steam-tug just forward of the pilot-house, which was just before the collision occurred; and it appears that the steam-tug sunk in fifteen or twenty minutes after the two vessels came together.

Throughout the period, from the time the attention of the mate was called to the lights of the bark to the time of the collision, it does not appear that either he or the lookout made any effort to ascertain the situation or course of the approaching vessel, except that the mate started to go forward just before the steam-tug was struck by the bark. When his attention was called to the lights of the approaching vessel, both he and the lookout were aft; and it does not appear that the lookout even started to go forward after he had notified the mate that lights were approaching, nor that he did any thing else in the line of his duty, nor was he examined as a witness in the case.

Damages for the entire injuries received by the bark are claimed by her owners, not only on the ground that she was without fault, but on the further ground that the steam-tug, having been without a competent lookout, is liable in the Admiralty Court for all the loss or damage which the bark sustained.

Errors committed by one of two vessels approaching each other from opposite directions do not excuse the other from adopting every proper precaution required by the special circumstances of the case to prevent a collision; as the act of Congress provides, that, in obeying and construing the prescribed rules of navigation, due regard must be had to the special circumstances rendering a departure from them neces-

sary in order to avoid immediate danger. 13 Stat. 61; *The Maria Martin*, 12 Wall. 47; *The Lucille*, 15 id. 679.

Steamboats and propellers navigating the Northern and Western lakes during the night were required to show signal-lights of a prescribed character fifteen years before the passage of the act applying rules and regulations in that regard to the navy and the general mercantile marine of the United States. 9 Stat. 382. Subsequent to the passage of that act, a disastrous collision occurred on Lake Erie between the steamer "Atlantic" and the propeller "Ogsdenburg," each charging the other with fault; and it appeared on appeal here that the propeller did not show the prescribed signal-lights, in consequence of which it was insisted by the owners of the steamer that the propeller was liable for all the loss and damage sustained by the steamer. Attempt was made to maintain that proposition, in view of the language of the act of Congress requiring such steam-vessels to show signal-lights; but this court held otherwise, and remarked to the effect following: —

Such is not the language of the section; and we think the construction contended for would be both unwarranted and unreasonable. Owners of the vessels named in that section are made liable for the consequences resulting from their own acts, or from the acts of those intrusted with the control and management of their own vessels, and not for any damage resulting from the misconduct, incompetency, or negligence of the master or owners of the other vessel. They are made liable for their own neglect, and not for the neglect of the other party.

Failure to comply with the statutory regulations, in case a collision ensues, is declared to be a fault, and the offending party is made responsible for all the loss and damage resulting from the neglect; but it is not declared by that section, or by any other rule of admiralty law, that the neglect to show signal-lights on the part of one vessel discharges the other, as they approach, from the obligation to adopt all reasonable and practicable precautions to prevent a collision.

Lights of the kind are required by law; and the absence of them, in cases falling within the prescribed regulations, renders the vessel liable for her neglect; but it does not confer any

right upon the other vessel to disregard or violate any rule of navigation, or to neglect any reasonable and practicable precaution to avoid the impending danger which the circumstances afford the means and opportunity to adopt. Steamers displaying proper signal-lights are, in that respect, without fault; but they have other duties to perform to prevent collisions besides complying with that requirement, and their obligations to perform such other duties remain unaffected by any thing contained in that act of Congress.

Vessels of the kind are required to show signal-lights, in order that each may be seen by the other in time to adopt reasonable and necessary precautions to prevent the loss of life and property by collisions; but if one has such lights, and the other has not, yet if the one having such lights actually sees the other vessel as she approaches in ample season to avoid the collision, and neglects to take any proper precaution to prevent it, and it ensues, it cannot be said in such a case that all the loss and damage resulted from the neglect of the vessel without signal-lights, as the collision might have been prevented, and, but for the negligence and omission of duty on the part of those in charge of the other vessel, would never have occurred.

Enforced by those reasons, this court decided in that case that the neglect of the propeller to show signal-lights did not vary the obligations of the steamer to observe the rules of navigation, and to adopt all such reasonable and necessary precautions to prevent the collision as the circumstances in which she was placed gave her the opportunity to employ. *Chamberlain* v. *Ward*, 21 How. 567.

Apply the foregoing rules of decision to the case before the court, and it is clear that the important question remains to be considered, whether the bark was or was not also in fault; for, if she was, the rule is well settled by the repeated decisions of this court that the damages should be divided between the offending vessels. *The Catharine*, 17 How. 170; *The Morning Light*, 2 Wall. 557; *Union Steamship Co.* v. *Steamship Co.*, 24 How. 313.

Where the collision occurs exclusively from natural causes, and without any fault on the part of the owner of either vessel

or those intrusted with their control and management, the maritime rule, as defined by the Federal courts, is, that the loss shall rest where it falls, on the principle that no one is responsible for such a disaster when produced by causes over which human skill and prudence can exercise no control.

Admiralty courts everywhere have now adopted that rule: but it cannot be applied where either or both of the vessels are in fault; as, where the vessel of the respondent is alone in fault, the libellant is entitled to a decree for his damages. The converse of the proposition is equally true, that, if the vessel of the libellant is alone in fault, the proof of that fact is a sufficient defence to the libel; but if both vessels are in fault, then the damages must be equally apportioned between the offending vessels. *The Continental*, 14 Wall. 355.

Reciprocal faults were charged in that case; but the Circuit and District Courts decided that the propeller was wholly in fault, because she did not show proper signal-lights; the theory being, that the failure of the propeller to display proper signal-lights misled the steamer as to the true character of the approaching vessel. On the other hand, the charge against the steamer was, that she put her helm to starboard instead of porting, as required by the rules of navigation.

Satisfactory proof having been given to make good the charge against the steamer, the court here reversed the decree of the Circuit Court, and gave directions that the damages should be divided.

Absence of proper signal-lights in such a case, say the court, renders the owners liable for the consequences resulting from the omission; but it does not confer any right upon the other vessel to disregard or violate any rule of navigation, or to neglect any reasonable or practicable precaution to avoid a collision which the circumstances afford the means and opportunity to adopt. Navigators often have other duties to perform to prevent collisions besides displaying signal-lights; and if they neglect to perform such other duties, and a collision ensues in consequence of that neglect, they will not be held blameless because they displayed the signal-lights required by law. *The Gray Eagle*, 9 Wall. 511.

Evidence of the most satisfactory character is exhibited in

the record that the lights of the steam-tug were seen by the lookout of the bark and by the officer of the deck when the two vessels were nearly or quite two miles apart. Beyond controversy, it was the lookout of the bark who first discovered the lights: but it is beyond dispute that he immediately reported to the mate, as the officer of the deck, that there was a light ahead, a little on the port bow; which is fully confirmed by the testimony of the mate, who states, that, when the lookout sang out that there was a light ahead, he ran forward to the lookout, who was stationed on the top-gallant forecastle, in the forward part of the vessel.

Taking his account of what transpired as true, all he did was to look briefly at the light, and to remark to the lookout that he supposed it was a steamer, adding that he guessed she would take care of herself, and returned aft, apparently unconcerned, to look after other lights. He admits that he gave no order to the wheelsman, and that he heard nothing further of the steam-tug until the lookout sang out that the light was close under the bow of the bark.

Without stopping to state what the mate did or attempted to do in that emergency, it may be well in the first place to ascertain what, if any thing, the lookout did to ward off the impending peril, after the officer of the deck returned aft when first summoned and shown that there were lights ahead. Lookouts are expected to obey the officer of the deck; and all experience shows that seamen acting in that capacity are more or less vigilant as the orders or conduct of the officer in charge of the deck seem to require. Indifference in respect to an approaching light, such as that manifested by the mate, was not calculated to induce much vigilance on the part of the lookout; and his own testimony shows that his services in that regard, after the mate left the forecastle and returned aft, were of no value whatever. What he says is, in effect, that the steam-tug showed her green and bright lights, that she appeared to be heading to the eastward, but that he could not tell whether she was in motion or not; and he admits, that, after the mate said he guessed she would take care of herself, he paid no attention to her until he saw her close under the jib-boom of the bark, when the steam-tug appeared to be drifting.

Hurry, confusion, and alarm followed, as is obvious from the testimony of the mate. When the lookout gave the second warning, the mate testifies that he shouted to the man at the wheel, "Hard up!" that he shouted as he ran from where he was standing, fifteen feet abaft the mainmast, a distance of eighty or ninety feet to the top-gallant forecastle, where the lookout was: but he admits that the order was too late to be of any avail; that the vessel had then no time to swing off; that the collision was inevitable; and that the bark struck the steam-tug on her starboard side, forward of the pilot-house. Haste then was useless; and there can be no doubt that what the mate finally says is true, that there was nothing then that could have been done on their part to avoid the collision.

Negligence more manifest, culpable, or indefensible, in view of the circumstances, is seldom exhibited in controversies of this character; and the only excuse offered for it is, that the eighteenth sailing rule provides, that, where one of two ships is required to keep out of the way, the other shall keep her course; entirely overlooking the fact that the mandate of that rule is declared by the rule itself to be subject to the qualification, that, in obeying and construing the rule, due regard must be had to all dangers of navigation and to any special circumstances which may exist in any particular case, rendering a departure from the rule necessary in order to avoid immediate danger.

Years before the act of Congress referred to was passed, this court promulgated the doctrine, that rules of navigation are adopted to prevent collisions, and to save life and property at sea, and not to promote such disasters; and decided that the neglect of one of two approaching vessels to show the signal-lights required by law did not vary the obligations of the other to observe the rules of navigation, and to adopt all such reasonable and necessary precautions to prevent the collision as the circumstances in which she was placed gave her the opportunity to employ. *Steamship* v. *Rumball*, 21 How. 383; *Chamberlain* v. *Ward*, id. 568.

Reasonable doubt cannot, we think, be entertained, that Congress in enacting the sailing rules intended to promote the same objects by substantially the same requirements; for which there

is abundant confirmation in art. 20 of the sailing rules, which is as follows: "Nothing in these rules shall exonerate any ship, or the owner, master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen or the special circumstances of the case." 13 Stat. 61.

Leave was granted to the libellant in the District Court to amend the libel; and he amended the fourth article of the same to the effect following: That the steam-tug was lying motionless upon the water, out of the track of vessels going up and down the lake; that the bark had no competent lookout properly stationed on the vessel; that the collision was occasioned by the neglect of the officers and crew of the bark to see the steam-tug, or to discover that she was not in motion in season to take any steps to prevent the collision.

Vigilance as well as experience is required of a lookout; and, if he is inattentive to his duty, it is no sufficient excuse to say that he was competent to perform the required service. No doubt the bark had a lookout; and the evidence tends to prove that he was competent, but his own testimony shows conclusively that he did not properly perform his duty after the mate came forward and returned aft. He admits that he could not tell whether, at that time, the steam-tug was stationary or in motion; and he must have known that the mate left the forecastle and went aft as ignorant upon the subject as he himself was.

Suppose that was so (and there is no apparent reason to doubt it), then it was his plain duty, the moment he ascertained that the lights ahead were stationary, to have reported that fact to the mate as the officer of the deck. Steamers in motion, the mate might think, would take care of themselves; but the lookout could not know what the mate would think if he should be informed that the lights were stationary.

Lookouts, as he supposes, are not required to report the same light a second time; though he admits it might become the duty of a lookout to do so in case the circumstances were materially changed. He did not make a second report in season to be of any avail, except, perhaps, to arouse the mate to a consciousness

of his prior neglect in not making some effort to ascertain whether the lights ahead were stationary or in motion.

Whether a second report before the collision became inevitable would have dispelled the feeling of security manifested by the mate cannot be known; but it is clear that no such second report was made in season to enable the mate to adopt any effectual precaution whatever; and the only excuse the lookout offers is what the mate remarked when the first report was made, that it was a steamer, and that he guessed she would take care of herself. Beyond all question, the steam-tug was left to take care of herself until the moment the collision occurred, when neither the shouting nor the hurried orders of the mate could prevent the disaster.

Culpable misconception as to his duty on the part of the mate, and inattention and carelessness on the part of the lookout, induced, perhaps, by the remarks of the mate that it was a steamer, and that she would take care of herself, were the primary causes of the neglect and omission of duty which led to the collision. Substantially the same view of the facts was taken by the district judge; and he decided that the rule, that, when a sailing vessel and a steamship are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing ship, and that the sailing ship shall keep her course, do not excuse the sailing ship from the observance of ordinary care in her navigation, nor from the use of such means as may be in her power to avoid a collision in case of immediate danger, even though that danger may have been made imminent by the non-observance of duty on the part of the steamship.

Authorities were cited by the district judge in support of his proposition; and he also adverted very fully to the evidence showing what took place between the mate and the lookout, and then remarked that the mate then left the forecastle and went to another part of the vessel to watch some lights at the leeward of the bark, and paid no further attention to the lights of the steam-tug; and proceeds to say, — what is fully supported by the testimony, — that from that time the lights of the steam-tug were not reported by the lookout, nor was any watch kept or notice whatever taken of them on board the

bark until the lookout saw and reported that the steam-tug was right under the bows of the bark, and a collision was inevitable.

Throughout it should be observed that the lights of the steam-tug were seen by the lookout and mate of the bark when the two vessels were from a mile and a half to two miles apart, and that the speed of the bark did not exceed nine miles an hour.

Viewed in the light of the circumstances, it is obvious that the mate and lookout of the bark had abundant time to have determined whether the steam-tug was in motion, or only drifting, if they had used common care and ordinary vigilance in that regard, as they were bound to do; nor would there have been any difficulty in avoiding the collision, if proper precaution had been seasonably adopted for that purpose; and, inasmuch as no such precaution was taken by those in charge of the deck of the bark, it follows that she also is in fault, and must answer for her fair proportion of the loss occasioned by the collision, as the fault of the steam-tug does not excuse the fault of the bark, if the latter was in any substantial degree a contributory cause of the collision. *The Adriadne*, 13 Wall. 479.

Due appeal was taken to the Circuit Court; and the circuit judge reversed the decree of the District Court, and determined that the bark was without fault, deciding, among other things, that the officer in charge of the deck of the bark, having once observed the light ahead, had full authority to act upon the assumption that the steam-tug would keep out of the way; and he also ruled, that if a light in such a case is reported to an officer in charge of a vessel required by the rule to keep her course, and, from full observation, the unambiguous, apparent condition, in reference to wind, atmosphere, course, distance, and character of the vessel, all indicate absolute safety, if the rule of the road is complied with, he may leave the future watching of such a light to an experienced lookout, and that it will not be a fault if he does not himself remain with the latter, and participate in his observation.

Even suppose that can be admitted, it is difficult to see how the admission can in any way benefit the bark, as the bark is responsible for the negligence of her lookout as well as the

officer in charge of her deck; and the circuit judge states that the lookout testified that he did perceive that the steam-tug was at rest, and he adds that the fact is too apparent to admit of discussion.

All admit that steamships engaged in navigation are to keep out of the way of sailing ships when the two are proceeding in such directions as to involve risk of collision; and that the sailing ship under such conditions is to keep her course, subject to the qualifications contained in art. 19 of the sailing rules, and subject to the obligation applicable to all ships under way, which is ordained in the twentieth article of the same rules, that nothing contained in those rules shall exonerate any ship from the consequences of the neglect of any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case.

Doubts may well be entertained whether the bark did keep her course with such exactness as is supposed by her owners. Both parties assume that the steam-tug was drifting eastward from one and a half to two miles an hour, and that the bark, when the lights of the steam-tug were first seen by the lookout and mate, was heading north half west. None of the witnesses pretend that the speed of the bark exceeded nine miles an hour; and the proof is full to the point that the lights of the steam-tug, when first seen from the bark, bore less than a half point over the port bow of the bark, and that she struck the steam-tug square on her starboard side, forward of the pilot-house.

Tested by these conceded facts, it is almost past belief that the bark maintained her course of north half west from the time the lights of the steam-tug were first seen to the time of the collision; but we prefer to rest the decision upon the ground that it was the duty of the bark, in view of the special circumstances, to have put up her helm and have gone to the right, or to have put it down and suffered the steam-tug to have drifted past in safety.

Cases arise in navigation where a stubborn adherence to a general rule is a culpable fault, for the reason that every navigator ought to know that rules of navigation are ordained, not to promote collisions, but to save life and property by preventing

such disasters. In general, says Mr. Parsons, established rules and known usages should be carefully followed; for every vessel has a right to expect that every other vessel will regard them, but not where they will, from peculiar circumstances, certainly cause danger; as if a vessel, near a rock or shore, must strike it by putting her helm to port, which the general rule might require: and he adds, that "no vessel is justified, by pertinacious adherence to a rule, for getting into collision with a ship which she might have avoided;" which is the exact case before the court. 1 Pars. Ship. and Ad. 580.

Decided cases to support that proposition are very numerous, besides those to which reference has already been made, as will be seen by referring to the same page of the treatise just cited.

It must be remembered, says Mr. Justice Curtis, that the general rule is for a sailing vessel meeting a steamer to keep her course, while the steamer takes the necessary measures to avoid a collision; and though this rule should not be observed when the circumstances are such that it is apparent its observance must occasion a collision, while a departure from it will prevent one, yet it must be a strong case which puts the sailing vessel in the wrong for obeying the rule; for the court must clearly see, not only that a deviation from the rule would have prevented the collision, but that the officer in charge of the sailing ship was guilty of negligence or a culpable want of seamanship in not perceiving the necessity for a departure from the rule, and for acting accordingly. *Crocket* v. *Newton*, 18 How. 583.

Sailing vessels on the larboard tack and close-hauled are, in general, required to keep their course; but Dr. Lushington held that such a vessel is not justified in pertinaciously keeping her course, even though the vessel she meets is on the starboard tack, and with the wind free. Where practicable, said that learned judge, such a vessel is bound to take the necessary precautions for avoiding the collision, although the other vessel is acting wrongfully in not giving way in time; and in that case he held that both vessels were in fault. *The Commerce*, 3 W. Rob. 287; *Handaysyde* v. *Wilson*, 3 Car. & P. 530.

Reasonable care and vigilance would have enabled the mate as well as the lookout to have perceived that the steam-tug was

not in motion, and they cannot be excused for their negligence merely by the fact that the steam-tug showed the lights required to be displayed by a steamer under headway; nor are the owners of the same estopped from showing what the special circumstances were because she showed such lights. Navigators know that the rule requiring steamers to keep out of the way of sailing ships, and which require sailing ships to keep their course, apply to vessels in motion, and not to a vessel at anchor, nor to one which is lying fastened to the wharf; nor do they apply to a vessel going about in stays, if it appears that she was properly put in stays, for the reason that such a vessel for the time being is almost as helpless as a vessel at anchor. *The Nymph*, Lush. 23.

Due care and caution should be used by steam-tugs lying with their helms lashed waiting for employment; but approaching vessels have no right to regard them as mere obstructions to commerce, nor as fit objects to be run down with impunity. Persons navigating the seas or lakes have no right to cast themselves upon such vessels, as upon an obstruction which has been made by the fault of another, and then avail themselves of it for any defensive purpose, unless they show that they themselves used common and ordinary caution to be in the right. *Butterfield* v. *Forrester*, 11 East, 60; *Farnum* v. *Concord*, 2 N. H. 393.

Admiralty courts everywhere hold that a sailing vessel should keep her course when a steamer is approaching, so as to involve risk of collision, unless the case is such as clearly to bring it within the qualifications and exceptional special circumstances contained and described in the nineteenth and twentieth articles of the sailing rules; but where no dangers of navigation prevail, nor any exceptional or special circumstances are shown, the general rule must be applied, as appears by all the standard authorities. *The Warrior*, Law Rep. 3 Ad. & Ecc. 555.

Decree of the Circuit Court reversed, and the cause remanded with directions to enter a decree affirming the decree of the District Court.

POLLARD *v.* LYON.

1. Spoken words charging a woman with fornication in the District of Columbia are not actionable *per se*, as the misconduct they impute, although involving moral turpitude, is not an indictable offence.
2. In an action for such words, inasmuch as the right to recover depends solely upon the special loss or injury which the plaintiff has sustained, it is not sufficient to allege that she "has been damaged and injured in her name and fame:" but such special loss or injury must be particularly set forth; and, if it is not, the declaration is bad in substance.

ERROR to the Supreme Court of the District of Columbia.

The facts are stated in the opinion of the court.

Mr. Joseph H. Bradley and *Mr. A. G. Riddle* for the plaintiff in error, and *Mr. Walter S. Cox* for the defendant in error.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Words both false and slanderous, it is alleged, were spoken by the defendant of the plaintiff; and she sues in an action on the case for slander to recover damages for the injury to her name and fame.

Controversies of the kind, in their legal aspect, require pretty careful examination; and, in view of that consideration, it is deemed proper to give the entire declaration exhibited in the transcript, which is as follows: —

"That the defendant, on a day named, speaking of the plaintiff, falsely and maliciously said, spoke, and published of the plaintiff the words following, 'I saw her in bed with Captain Denty.' That at another time, to wit, on the same day, the defendant falsely and maliciously spoke and published of the plaintiff the words following, 'I looked over the transom-light and saw Mrs. Pollard,' meaning the plaintiff, 'in bed with Captain Denty;' whereby the plaintiff has been damaged and injured in her name and fame, and she claims damages therefor in the sum of ten thousand dollars."

Whether the plaintiff and defendant are married or single persons does not appear; nor is it alleged that they are not husband and wife, nor in what respect the plaintiff has suffered loss beyond what may be inferred from the general averment that she had been damaged and injured in her name and fame.

Service was made, and the defendant appeared and pleaded

the general issue; which being joined, the parties went to trial; and the jury, under the instructions of the court, found a verdict in favor of the plaintiff for the whole amount claimed in the declaration. None of the other proceedings in the case, at the special term, require any notice, except to say that the defendant filed a motion in arrest of judgment, on the ground that the words set forth in the declaration are not actionable, and because the declaration does not state a cause of action which entitles the plaintiff to recover; and the record shows that the court ordered that the motion be heard at general term in the first instance. Both parties appeared at the general term, and were fully heard; and the court sustained the motion in arrest of judgment, and decided that the declaration was bad in substance. Judgment was subsequently rendered for the defendant, and the plaintiff sued out the present writ of error.

Definitions of slander will afford very little aid in disposing of any question involved in this record, or in any other, ordinarily arising in such a controversy, unless where it becomes necessary to define the difference between oral and written defamation, or to prescribe a criterion to determine, in cases where special damage is claimed, whether the pecuniary injury alleged naturally flows from the speaking of the words set forth in the declaration. Different definitions of slander are given by different commentators upon the subject; but it will be sufficient to say that oral slander, as a cause of action, may be divided into five classes, as follows: (1.) Words falsely spoken of a person which impute to the party the commission of some criminal offence involving moral turpitude, for which the party, if the charge is true, may be indicted and punished. (2.) Words falsely spoken of a person which impute that the party is infected with some contagious disease, where, if the charge is true, it would exclude the party from society; or (3.) Defamatory words falsely spoken of a person, which impute to the party unfitness to perform the duties of an office or employment of profit, or the want of integrity in the discharge of the duties of such an office or employment. (4.) Defamatory words falsely spoken of a party which prejudice such party in his or her profession or trade. (5.) Defamatory words falsely spoken of a person, which, though not in themselves actionable, occasion the party special damage.

Two propositions are submitted by the plaintiff to show that the court below erred in sustaining the motion in arrest of judgment, and in deciding that the declaration is bad in substance: (1.) That the words set forth in the declaration are in themselves actionable, and consequently that the plaintiff is entitled to recover, without averring or proving special damage. (2.) That if the words set forth are not actionable *per se*, still the plaintiff is entitled to recover under the second paragraph of the declaration, which, as she insists, contains a sufficient allegation that the words spoken of her by the defendant were, in a pecuniary sense, injurious to her, and that they did operate to her special damage.

Certain words, all admit, are in themselves actionable, because the natural consequence of what they impute to the party is damage, as if they import a charge that the party has been guilty of a criminal offence involving moral turpitude, or that the party is infected with a contagious distemper, or if they are prejudicial in a pecuniary sense to a person in office or to a person engaged as a livelihood in a profession or trade; but in all other cases the party who brings an action for words must show the damage he or she has suffered by the false speaking of the other party.

Where the words are intrinsically actionable, the inference or presumption of law is that the false speaking occasions loss to the plaintiff; and it is not necessary for the plaintiff to aver that the words alleged amount to the charging of the described offence, for their actionable quality is a question of law, and not of fact, and will be collected by the court from the words alleged and proved, if they warrant such a conclusion.

Unless the words alleged impute the offence of adultery, it can hardly be contended that they impute any criminal offence for which the party may be indicted and punished in this district; and the court is of the opinion that the words do not impute such an offence, for the reason that the declaration does not allege that either the plaintiff or the defendant was married at the time the words were spoken. Support to that view is derived from what was shown at the argument, that fornication as well as adultery was defined as an offence by the provincial statute of the 3d of June, 1715, by which it was enacted that

persons guilty of those offences, if convicted, should be fined and punished as therein provided. Kilty's Laws, ch. xxvii., sects. 2, 3.

Beyond all doubt, offences of the kind involve moral turpitude; but the second section of the act which defined the offence of fornication was, on the 8th of March, 1785, repealed by the legislature of the State. 2 Kilty, ch. xlvii., sect. 4.

Sufficient is remarked to show that the old law of the province defining such an offence was repealed by the law of the State years before the Territory, included within the limits of the city, was ceded by the State to the United States; and inasmuch as the court is not referred to any later law passed by the State, defining such an offence, nor to any act of Congress to that effect passed since the cession, our conclusion is that the plaintiff fails to show that the words alleged impute any criminal offence to the plaintiff for which she can be indicted and punished.

Suppose that is so: still the plaintiff contends that the words alleged, even though they do not impute any criminal offence to the plaintiff, are nevertheless actionable in themselves, because the misconduct which they *do* impute is derogatory to her character, and highly injurious to her social standing.

Actionable words are doubtless such as naturally imply damage to the party; but it must be borne in mind that there is a marked distinction between slander and libel, and that many things are actionable when written or printed and published which would not be actionable if merely spoken, without averring and proving special damage. *Clement* v. *Chivis*, 9 Barn. & Cress. 174; *McClurg* v. *Ross*, 5 Binn. 219.

Unwritten words, by all, or nearly all, the modern authorities, even if they impute immoral conduct to the party, are not actionable in themselves, unless the misconduct imputed amounts to a criminal offence, for which the party may be indicted and punished. Judges as well as commentators, in early times, experienced much difficulty in extracting any uniform definite rule from the old decisions in the courts of the parent country to guide the inquirer in such an investigation; nor is it strange that such attempts have been attended with so little success, as it is manifest that the incongruities

are quite material, and, in some respects, irreconcilable. Nor are the decisions of the courts of that country, even of a later period, entirely free from that difficulty.

Examples both numerous and striking are found in the reported decisions of the period last referred to, of which only a few will be mentioned. Words which of themselves are actionable, said Lord Holt, must either endanger the party's life, or subject him to infamous punishment; that it is not enough that the party may be fined and imprisoned, for a party may be fined and imprisoned for a common trespass, and none will hold that to say one has committed a trespass will bear an action; and he added that at least the thing charged must "in itself be scandalous." *Ogden* v. *Turner*, 6 Mod. 104.

Viewed in any proper light, it is plain that the judge who gave the opinion in that case meant to decide that words, in order that they may be actionable in themselves, must impute to the party a criminal offence affecting the social standing of the party, for which the party may be indicted and punished.

Somewhat different phraseology is employed by the court in the next case to which reference will be made. *Onslow* v. *Horne*, 3 Wil. 186. In that case, De Grey, C. J., said the first rule to determine whether words spoken are actionable is, that the words must contain an express imputation of some crime liable to punishment, some capital offence or other infamous crime or misdemeanor, and that the charge must be precise. Either the words themselves, said Lord Kenyon, must be such as can only be understood in a criminal sense, or it must be shown by a colloquium in the introductory part that they have that meaning; otherwise they are not actionable. *Holt* v. *Scholefield*, 6 Term, 694.

Separate opinions were given by the members of the court in that case; and Mr. Justice Lawrence said that the words must contain an express imputation of some crime liable to punishment, some capital offence or other infamous crime or misdemeanor; and he denied that the meaning of words not actionable in themselves can be extended by an innuendo. 4 Co. 17 *b*.

Prior to that, Lord Mansfield and his associates held that words imputing a crime are actionable, although the words de-

scribe the crime in vulgar language, and not in technical terms; but the case does not contain an intimation that words which do not impute a crime, however expressed, can ever be made actionable by a colloquium or innuendo. *Colman* v. *Godwin*, 3 Doug. 90; *Woolnoth* v. *Meadows*, 5 East, 463.

Incongruities, at least in the forms of expression, are observable in the cases referred to, when compared with each other; and when those cases, with others not cited, came to be discussed and applied in the courts of the States, the uncertainty as to the correct rule of decision was greatly augmented. Suffice it to say, that it was during the period of such uncertainty as to the rule of decision when a controversy bearing a strong analogy to the case before the court was presented for decision to the Supreme Court of the State of New York, composed, at that period, of some of the ablest jurists who ever adorned that bench.

Allusion is made, in the opinion given by Judge Spencer, to the great "uncertainty in the law upon the subject;" and, having also adverted to the necessity that a rule should be adopted to remove that difficulty, he proceeds, in the name of the court, to say, "In case the charge, if true, will subject the party charged to an indictment for a crime involving moral turpitude, or subject the party to an infamous punishment, then the words will be in themselves actionable;" and that rule has ever since been followed in that State, and has been very extensively adopted in the courts of other States. *Brooker* v. *Coffin*, 5 Johns. 190; 1 Am. Lead. Cas. (5th ed.) 98.

When he delivered the judgment in that case, he was an associate justice of the court; Chancellor Kent being the chief justice, and participating in the decision. Fourteen years later, after he became chief justice of the court, he had occasion to give his reasons somewhat more fully for the conclusion then expressed. *Van Ness* v. *Hamilton*, 19 Johns. 367.

On that occasion he remarked, in the outset, that there exists a decided distinction between words spoken and written slander; and proceeded to say, in respect to words spoken, that the words must either have produced a temporal loss to the plaintiff by reason of special damage sustained from their being spoken, or they must convey a charge of some act criminal in

itself and indictable as such, and subjecting the party to an infamous punishment, or they must impute some indictable offence involving moral turpitude; and, in our judgment, the rule applicable in such a case is there stated with sufficient fulness, and with great clearness and entire accuracy.

Controverted cases involving the same question, in great numbers, besides the one last cited, have been determined in that State by applying the same rule, which, upon the fullest consideration, was adopted in the leading case, — that in case the charge, if true, will subject the party charged to an indictment for a crime involving moral turpitude, or subject the party to an infamous punishment, then the words will be in themselves actionable.

Attempt was made by counsel in the case of *Widrig* v. *Oyer*, 13 Johns. 124, to induce the court to modify the rule by changing the word "or" into "and;" but the court refused to adopt the suggestion, and repeated and followed the rule in another case reported in the same volume. *Martin* v. *Stillwell*, 13 id. 275. See also *Gibbs* v. *Dewey*, 5 Cowen, 503; *Alexander* v. *Dewey*, 9 Wend. 141; *Young* v. *Miller*, 3 Hill, 22; in all of which the same rule is applied.

Other cases equally in point are also to be found in the reported decisions of the courts of that State, of which one or two more only will be referred to. *Bissell* v. *Cornell*, 24 Wend. 354. In that case, the words charged were fully proved; and the defendant moved for a nonsuit, upon the ground that the words were not in themselves actionable; but the circuit judge overruled the motion, and the defendant excepted. Both parties were subsequently heard in the Supreme Court of the State, Nelson, C. J., giving the opinion of the court, in which it was held that the words were actionable; and the reason assigned for the conclusion is, that the words *impute an indictable offence involving moral turpitude.*

Defamatory words to be actionable *per se*, say that court, must impute a crime involving moral turpitude punishable by indictment. It is not enough that they impute immorality or moral dereliction *merely*, but the offence charged must be also indictable. At one time, said the judge delivering the opinion, it was supposed that the charge should be such, as, if true, would

subject the party charged to an infamous punishment; but the Supreme Court of the State refused so to hold. *Widrig* v. *Oyer*, 13 Johns. 124; *Wright* v. *Page*, 3 Keyes, 582.

Subject to a few exceptions, it may be stated that the courts of other States have adopted substantially the same rule, and that most of the exceptional decisions are founded upon local statutes defining fornication as a crime, or providing that words imputing incontinence to an unmarried female shall be construed to impute to the party actionable misconduct.

Without the averment and proof of special damage, says Shaw, C. J., the plaintiff, in an action on the case for slander, must prove that the defendant uttered language the effect of which was to charge the plaintiff with some crime or offence punishable by law. *Dunnell* v. *Fiske*, 11 Met. 552.

Speaking of actions of the kind, Parker, C. J., said that words imputing crime to the party against whom they are spoken, which, if true, would expose him to disgraceful punishment, or imputing to him some foul and loathsome disease which would expose him to the loss of his social pleasures, are actionable, without any special damage; while words perhaps equally offensive to the individual of whom they are spoken, but which impute only some defect of moral character, are not actionable, unless a special damage is averred, or unless they are referred, by what is called a *colloquium*, to some office, business, or trust which would probably be injuriously affected by the truth of such imputations. *Chaddock* v. *Briggs*, 13 Mass. 252.

Special reference is made to the case of *Miller* v. *Parish*, 8 Pick. 385, as authority to support the views of the plaintiff; but the court here is of the opinion that it has no such tendency. What the court in that case decided is, that whenever an offence is imputed, which, if proved, may subject the party to punishment, though not ignominious, but which brings disgrace upon the party falsely accused, such an accusation is actionable; which is not different in principle from the rule laid down in the leading case, — that if the charge be such, that, if true, it will subject the party falsely accused to an indictment for a crime involving moral turpitude, then the words will be in themselves actionable.

Early in her history, the legislature of Massachusetts defined

the act of fornication as a criminal offence, punishable by a fine, and which may be prosecuted by indictment; and, if the person convicted does not pay the fine, he or she may be committed to the common jail or to the house of correction. None of the counts in that case contained an averment of special damage; but the court held, that, inasmuch as the words alleged imputed a criminal offence which subjected the party to punishment involving disgrace, the words were actionable; and it is not doubted that the decision is correct. Exactly the same question was decided by the same court in the same way twenty-five years later. *Kenney* v. *Laughlin*, 3 Gray, 5; 1 Stat. Mass. 1786, 293. Other State courts, where the act of fornication is defined by statute as an indictable offence, have made similar decisions; but such decisions do not affect any question involved in this investigation. *Vandcrip* v. *Roe*, 23 Penn. St. 182; 1 Am. Lead. Cas. (5th ed.) 103; *Simons* v. *Carter*, 32 N. H. 459; Sess. Laws (Penn. 1860), 382; Purdon's Dig. 1824, 313.

That the words uttered import the commission of an offence, say the court, cannot be doubted. It is the charge of a crime punishable by law, and of a character to degrade and disgrace the plaintiff, and exclude her from society. Though the imputation of crime, said Bigelow, J., is a test, whether the words spoken do amount to legal slander, yet it does not take away their actionable quality if they are so used as to indicate that the party has suffered the penalty of the law, and is no longer exposed to the danger of punishment. *Krebs* v. *Oliver*, 12 Gray, 242; *Fowler* v. *Dowdney*, 2 M. & Rob. 119.

Courts affix to words alleged as slanderous their ordinary meaning: consequently, says Shaw, C. J., when words are set forth as having been spoken by the defendant of the plaintiff, the first question is, whether they impute a charge of felony or any other infamous crime punishable by law. If they do, an innuendo, undertaking to state the same in other words, is useless and superfluous; and, if they do not, an innuendo cannot aid the averment, as it is a clear rule of law that an innuendo cannot introduce a meaning to the words broader than that which the words naturally bear, unless connected with proper introductory averments. *Alexander* v. *Angle*, 1 Crompt. & Jer. 143; *Goldstein* v. *Foss*, 2 Younge & Jer. 146; *Carter* v. *Andrews*, 16 Pick. 5; *Beardsley* v. *Tappan*, 2 Blatch. 588.

Much discussion of the cases decided in the Supreme Court of Pennsylvania is quite unnecessary, as we have the authority of that court for saying that the leading cases establish the principle, that words spoken of a private person are only actionable when they contain a plain imputation, not merely of some indictable offence, but one of an infamous character, or subject to an infamous or disgraceful punishment; and that an innuendo cannot alter, enlarge, or extend their natural and obvious meaning, but only explain something already sufficiently averred, or make a more explicit application of that which might otherwise be considered ambiguous to the material subject-matter properly on the record, by the way of averment or colloquium. *Gosling* v. *Morgan*, 32 Penn. St. 275; *Shafter* v. *Kinster*, 1 Binn. 537; *McClurg* v. *Ross*, 5 id. 218; *Andres* v. *Koppenheafer*, 3 S. & R. 255.

State courts have in many instances decided that words are in themselves actionable whenever a criminal offence is charged, which, if proved, may subject the party to punishment, though not ignominious, and which brings disgrace upon the complaining party; but most courts agree that no words are actionable *per se* unless they impute to the party some criminal offence which may be visited by punishment either of an infamous character, or which is calculated to affect the party injuriously in his or her social standing. *Buck* v. *Hersey*, 31 Me. 558; *Mills* v. *Wimp*, 10 B. Monr. 417; *Perdue* v. *Burnett*, Minor, 138; *Demarest* v. *Haring*, 6 Cow. 76; Townsend on Slander, sect. 154; 1 Wendell's Stark. on Slander, 43; *Redway* v. *Gray*, 31 Vt. 297.

Formulas differing in phraseology have been prescribed by different courts: but the annotators of the American Leading Cases say that the Supreme Court of the State of New York, in the case of *Brooker* v. *Coffin*, appear "to have reached the true principle applicable to the subject;" and we are inclined to concur in that conclusion, it being understood that words falsely spoken of another may be actionable *per se* when they impute to the party a criminal offence for which the party may be indicted and punished, even though the offence is not technically denominated infamous, if the charge involves moral turpitude, and is such as will affect injuriously the social standing of the party. 1 Am. Lead. Cas. (5th ed.) 98.

Decided support to that conclusion is derived from the English decisions upon the same subject, especially from those of modern date, many of which have been very satisfactorily collated by a very able text-writer. Addison on Torts (3d ed.), 765. Slander, in writing or in print, says the commentator, has always been considered in our law a graver and more serious wrong and injury than slander by word of the mouth, inasmuch as it is accompanied by greater coolness and deliberation, indicates greater malice, and is in general propagated wider and farther than oral slander. Written slander is punishable in certain cases, both criminally and by action, when the mere speaking of the words would not be punishable in either way. *Villiers* v. *Mousely*, 2 Wils. 403; *Saville* v. *Jardine*, 2 H. Bl. 532; Bac. Abr. Slander, B; *Keiler* v. *Sessford*, 2 Cr. C. C. 190.

Examples of the kind are given by the learned commentator; and he states that verbal reflections upon the chastity of an unmarried female are not actionable, unless they have prevented her from marrying, or have been accompanied by special damage; but, if they are published in a newspaper, they are at once actionable, and substantial damages are recoverable. 2 Bl. Com. 125, n. 6; *Janson* v. *Stuart*, 1 Term, 784.

Comments are made in respect to verbal slander under several heads, one of which is entitled defamatory words not actionable without special damage; and the commentator proceeds to remark that mere vituperation and abuse by word of mouth, however gross, is not actionable unless it is spoken of a professional man or tradesman in the conduct of his profession or business. Instances of a very striking character are given, every one of which is supported by the authority of an adjudged case. *Lumby* v. *Allday*, 1 Crompt. & Jer. 301; *Barnet* v. *Allen*, 3 H. & N. 376.

Even the judges holding the highest judicial stations in that country have felt constrained to decide, that to say of a married female that she was a liar, an infamous wretch, and that she had been all but seduced by a notorious libertine, was not actionable without averring and proving special damage. *Lynch* v. *Knight*, 9 H. of L. Cas. 594.

Finally, the same commentator states that words imputing to a single woman that she gets her living by imposture and prosti-

tution, and that she is a swindler, are not actionable, even when special damage is alleged, unless *it is proved*, and the proposition is fully sustained by the cases cited in its support. *Welby* v. *Elston*, 8 M. G. & S. 142; Addison on Torts (3d ed.), 788; Townsend on Slander, sects. 172 and note, 516–518.

Words actionable in themselves, without proof of special damage, are next considered by the same commentator. His principal proposition under that head is that words imputing an indictable offence are actionable *per se* without proof of any special damage, giving as a reason for the rule that they render the accused person liable to the pains and penalties of the criminal law. Beyond question, the authorities cited by the author support the proposition, and show that such is the rule of decision in all the courts of that country having jurisdiction in such cases. *Heming* v. *Power*, 10 Mees. & Wels. 570; *Alfred* v. *Farlow*, 8 Q. B. 854; *Edsall* v. *Russell*, 5 Scott, N. R. 801; *Brayne* v. *Cooper*, 5 Mees. & Wels. 250; *Barnet* v. *Allen*, 3 H. & N. 378; *Davies* v. *Solomon*, 41 Law Jour. Q. B. 11; *Roberts* v. *Roberts*, 5 B. & S. 389; *Perkins* v. *Scott*, 1 Hurlst. & Colt. 158.

Examined in the light of these suggestions and the authorities cited in their support, it is clear that the proposition of the plaintiff, that the words alleged are in themselves actionable, cannot be sustained.

Concede all that, and still the plaintiff suggests that she alleges in the second paragraph of her declaration that she "has been damaged and injured in her name and fame;" and she contends that that averment is sufficient, in connection with the words charged, to entitle her to recover as in an action of slander for defamatory words with averment of special damage.

Special damage is a term which denotes a claim for the natural and proximate consequences of a wrongful act; and it is undoubtedly true that the plaintiff in such a case may recover for defamatory words spoken of him or her by the defendant, even though the words are not in themselves actionable, if the declaration sets forth such a claim in due form, and the allegation is sustained by sufficient evidence; but the claim must be specifically set forth, in order that the defendant may be duly notified of its nature, and that the court may have

the means to determine whether the alleged special damage is the natural and proximate consequence of the defamatory words alleged to have been spoken by the defendant. *Haddan* v. *Scott*, 15 C. B. 429.

Whenever proof of special damage is necessary to maintain an action of slander, the claim for the same must be set forth in the declaration, and it must appear that the special damage is the natural and proximate consequence of the words spoken, else the allegation will not entitle the plaintiff to recover. *Vicars* v. *Wilcox*, 8 East, 3; *Knight* v. *Gibbs*, 1 Ad. & Ell. 46; *Ayre* v. *Craven*, 2 id. 8; *Roberts* v. *Roberts*, 5 B. & S. 389.

When special damage is claimed, the nature of the special loss or injury must be particularly set forth, to support such an action for words not in themselves actionable; and, if it is not, the defendant may demur. He did demur in the case last cited; and Cockburn, C. J., remarked that such an action is not maintainable, unless it be shown that the loss of some substantial or material advantage has resulted from the speaking of the words. Addison on Torts (3d ed.), 805; *Wilby* v. *Elston*, 8 C. B. 148.

Where the words are not in themselves actionable, because the offence imputed involves neither moral turpitude nor subjects the offender to an infamous punishment, special damage must be alleged and proved in order to maintain the action. *Hoag* v. *Hatch*, 23 Conn. 590; *Andres* v. *Koppenheafer*, 3 S. & R. 256; *Buys* v. *Gillespie*, 2 Johns. 117.

In such a case, it is necessary that the declaration should set forth precisely *in what way* the special damage resulted from the speaking of the words. It is not sufficient to allege generally that the plaintiff has suffered *special damages*, or that the party has been put to great costs and expenses. *Cook* v. *Cook*, 100 Mass. 194.

By special damage in such a case is meant pecuniary loss; but it is well settled that the term may also include the loss of substantial hospitality of friends. *Moore* v. *Meagher*, 1 Taunt. 42; *Williams* v. *Hill*, 19 Wend. 306.

Illustrative examples are given by the text-writers in great numbers, among which are loss of marriage, loss of profitable employment, or of emoluments, profits, or customers; and it was

very early settled that a charge of incontinence against an unmarried female, *whereby she lost her marriage*, was actionable by reason of the special damage alleged and proved. *Davis* v. *Gardiner*, 4 Co. 16 *b*, pl. 11; *Reston* v. *Pomfreicht*, Cro. Eliz. 639.

Doubt upon that subject cannot be entertained: but the special damage must be alleged in the declaration, and proved; and it is not sufficient to allege that the plaintiff "has been damaged and injured in her name and fame," which is all that is alleged in that regard in the case before the court. *Hartley* v. *Herring*, 8 Term, 133; Addison on Torts, 805; Hilliard on Remedies (2d ed.), 622; *Beach* v. *Ranney*, 2 Hill, 309.

Tested by these considerations, it is clear that the decision of the court below, that the declaration is bad in substance, is correct. *Judgment affirmed.*

MUTUAL BENEFIT LIFE INSURANCE COMPANY *v.* TISDALE.

In a suit brought by the plaintiff in his individual character, and not as administrator, to recover a debt upon a contract between him and the defendant, where the right of action depends upon the death of a third person, letters of administration upon the estate of such person granted by the proper Probate Court, in a proceeding to which the defendant was a stranger, afford no legal evidence of such death.

ERROR to the Circuit Court of the United States for the District of Iowa.

This action was brought, in December, 1867, by Mrs. Tisdale, upon a policy of insurance, bearing date March 1, 1866, issued to her upon the life of Edgar Tisdale, her husband. Evidence was given tending to show his death on the 24th of September, 1866. This evidence consisted chiefly in his sudden and mysterious disappearance under circumstances making probable his death by violence. It seems from the charge of the court that evidence was given by the defendant tending to show that he had been seen alive some months after the date of his supposed death. To sustain her case, the plaintiff offered in evidence letters of administration upon his estate, issued to her by the County Court of Dubuque County, Iowa. The

defendant objected to the admission of this evidence. The objection was overruled, and the letters were read in evidence; to which the defendant excepted.

The court charged the jury that "the real question is, whether Edgar Tisdale was dead at the time of issuing the letters of administration. It is incumbent on the plaintiff to prove that fact. She has shown, as evidence of that fact, letters of administration issued to her as administratrix by the probate judge. It is the duty of the court to instruct you that this makes a *prima facie* case for the plaintiff, and changes the burden of proof from the plaintiff to the defendant. . . . Without contradictory evidence, these (the letters of administration) give the plaintiff the right to recover." To the charge in this respect the defendant excepted.

The defendant prayed the court to instruct the jury, that "in an action brought by the plaintiff in her own right on a contract between herself and the defendant below, and not in a representative capacity, she must establish by competent testimony the death of the insured, independently of the letters of administration;" and that, "when the issue in a suit brought upon a policy of life insurance is the death of the insured, letters of administration granted upon his estate are not *prima facie* evidence of his death, where the suit is not brought by his administrator." But the court refused to give such instructions; to which the defendant excepted. Judgment was rendered against the defendant, who sued out this writ of error.

Mr. Frederick T. Frelinghuysen and *Mr. Edwin L. Stanton* for the plaintiff in error.

The real question in this case is, whether, in an action brought by a plaintiff in his own right upon a contract between himself and the defendant, in which the issue is, whether a person who has not been absent seven years is dead, — the legal presumption being that he is alive, — letters of administration issued upon his estate by a probate court in an *ex parte* proceeding are sufficient evidence to countervail that presumption, shift the burden of proof, and, in the absence of contradictory evidence, establish the death. In such an action, it matters not, as respects their admissibility and effect, whether they were granted to the plaintiff or to some third person.

It is believed, that, upon a review of adjudicated cases and of the opinions of text-writers, the rulings of the court below will be found to be opposed to the weight of authority on this question. *French* v. *French*, 1 Dick. 268; *Lloyd, Executrix*, v. *Finlayson*, 2 Esp. 564; *Thompson* v. *Donaldson*, 3 id. 64; *Moons* v. *De Bernales*, 1 Russ. 307; *Clayton* v. *Gresham*, 10 Ves. 288; *Leach* v. *Leach*, 8 Jur. 211; 2 Stark. on Ev. 365; 1 Phil. on Ev. 343; Taml. on Ev. (41 Law Lib.) 154; Hubback on Ev. of Succession to Real and Pers. Prop. (37 Law Lib.) 162.

Upon principle and analogy, as well as authority, it is submitted that letters of administration are not, in the case at bar, admissible as proof of death. The only ground for their admission is, that granting them is a judicial act in the nature of a judgment *in rem*. But a judgment is not evidence of any matter to be inferred by argument therefrom, or which comes collaterally in question, or is incidentally cognizable. *The Duchess of Kingston's Case*, 11 St. Tr. 261; 1 Stark. on Ev. 257. The grant of letters to the plaintiff on the personal estate of Edgar Tisdale was the *res* in the Probate Court. Unless impeached for fraud, the grant is conclusive as to her title in her representative capacity to that estate, and as to her right to execute the trust of administratrix. This was directly and conclusively adjudicated; but the death of Edgar Tisdale is only matter of inference from such grant.

Mr. George Crane for the defendant in error.

Letters of administration are admissible as *prima facie* evidence of the death of the person upon whose estate they are issued. *Tisdale* v. *Conn. Life Insurance Co.*, 26 Iowa, 170; *Jeffers* v. *Radcliff*, 10 N. H. 242; *Newman, Adm.* v. *Jenkins*, 10 Pick. 516; *Ketland* v. *Administrator of Lebering*, 2 Wash. U. S. Ct. Ct. 201; *Cunningham* v. *Smith, Adm.*, 70 Penn. St. 450; *Munro* v. *Merchant*, 26 Barb. 383, 397; *Belden* v. *Administrator, &c.*, 47 N. Y. 308; *French* v. *Frazer, Adm.*, 7 J. J. Marsh. 431; 1 Greenl. on Ev. (8th ed.) sect. 550 and cases there cited; 2 id. (8th ed.) sects. 278 *a*, 278 *b*, 278 *c*, 278 *d*, and 355; *Tisdale* v. *Conn. Life Insurance Co.*, 28 Iowa, 12.

As the whole "scope and bearing" of the charge on this subject must be taken together (*Hollingsworth* v. *Thompson*,

7 Pet. 348), it will be observed that the court below permitted the jury to attach less weight to the letters than is ascribed to them by some of the authorities.

Mr. Justice Hunt delivered the opinion of the court.

In an action brought, not as administrator, but in an individual character, to recover an individual debt, where the right of action depends upon the death of a third party, — to wit, an insurance upon his life, — do letters of administration upon the estate of such party, issued by the proper Probate Court, afford legal evidence of his death? This is the question we are called upon to decide. It is presented sharply, and is the only question in the case.

The authority in favor of the admission of the letters as evidence of the death of the party, in a suit between strangers, is a general statement to that effect in 1 Greenl. Ev. sect. 550. The cases cited by the writer in support of the proposition are *Thompson* v. *Donaldson*, 3 Esp. 64; *French* v. *French*, Dick. 268; *Hamblin's Case*, 3 Rob. (La.) 130; *Jeffers* v. *Radcliff*, 10 N. H. 245. In the case first cited, the authority does not support Mr. Greenleaf's statement. It was held that the letters did not afford sufficient proof of death; and, no further evidence being given, the verdict was against the claimant. In *French* v. *French*, the court held in terms against the theory that the letters were evidence of death, "but, under all the circumstances, admitted the probate as evidence of death." This case was that of a bill filed by an heir against one in possession of the estate; and in that case Mr. Greenleaf hardly contends that the letters are evidence of death. In *Tisdale* v. *Conn. Life Ins. Co.*, 26 Iowa, 177, and in the same case in 28 Iowa, 12, cited by the defendant in error, the law was held as claimed by her. The other cases cited by the defendant in error are those where the administrator or executor was a party to the suit in his representative capacity, in relation to which a different rule prevails.

In the New Hampshire case above cited, there was evidence to sustain the ruling, independently of the letters; and the case concedes that the law is otherwise in England, and bases itself upon the peculiar organization of the courts of that State.

On the other hand, the text-writers — Phil. on Ev. (2d vol., 93 *m*, ed. 1868); Tamlyn (48 Law Lib.), 154, referring to *Moons* v. *De Bernales*; Hubback on Succession, 162 (51 Law Lib.) — concur against the rule laid down by Mr. Greenleaf.

In *Moons* v. *De Bernales*, 1 Russ. 307, it was held that letters of administration were not *prima facie* evidence of death, and the defect was supplied by other evidence. Lord Eldon says, in *Clayton* v. *Graham*, 10 Ves. 288, that it is the constant practice to require proof of death, and that probate is not sufficient. In *Leach* v. *Leach*, 8 Jur. 211, Sir Knight Bruce refused to order the payment of money upon letters alone, but required other evidence. In *Blackham's Case*, 1 Salk. 290, it was held that the sentence of the Spiritual Court in granting letters is not evidence upon any collateral matter which would have prevented the issuing of the letters.

In speaking of judgments *in rem*, and where the judgment may be evidence against one not a party or privy to it, Mr. Starkie says, "This class comprehends cases relating to marriage and bastardy where the ordinary has certified; sentences relating to marriage and testamentary matters in the Spiritual Court." 1 Stark. on Ev. 372 *m*. What is meant by this is explained at a subsequent place, where he says, "The grant of a probate in the Spiritual Court is conclusive evidence against all as to the title to personalty, and to all rights incident to the character of an executor or administrator." P. 374 *m*. He cites, in support of this statement, the case of *Allen* v. *Dundas*, 3 T. R. 125, that payment of money to an executor who has obtained probate of a forged will is a discharge to the debtor. The grant is conclusive in all business transacted as executor, and concerning the duties of the executor, that it was properly made.

This accords with the principle hereafter laid down.

The chief ground of argument to admit letters testamentary as evidence of the death of the party is, that the order of the Probate Court issuing them is an order or judgment *in rem*. But a judgment *in rem* is not *prima facie* evidence: it is conclusive of the point adjudicated, unless impeached for fraud. 1 Stark. on Ev. 372 *m*; Freeman, *infra*. If admissible on this principle, the letters were conclusive evidence of the death of Tisdale. But this is not claimed by any argument.

Again: the Probate Court has never adjudicated that Tisdale was dead. Death was not the *res* presented to it. Shall Mrs. Tisdale receive letters of administration, was the *res;* and upon that only has there been an adjudication. Hubback, *supra*, 162 *m.*

The letters issued to an executor or an administrator by a probate court are, as a general rule, evidence only of their own existence. They prove, that is to say, that the authority incident to that office or duty has been devolved upon the person therein named, that he has been appointed, and that he is executor or administrator of the party therein assumed to have departed this life. Different States have different provisions as to who may be executor or administrator, excluding some persons and preferring others, in the order and manner in their statutes specified. Thus persons convicted of infamous crime are excluded from this office, and persons of notoriously evil lives may be passed by in the discretion of the Probate Court. Sons or daughters or widows are entitled to take in preference to others: unmarried women are entitled in preference to married women. Certain notices may be, and usually are, required to be given of the proceedings to obtain letters; and the letters are the evidence that the proceedings have been regularly taken, and that the person or persons therein named are those by law entitled to the office. Upon these points the court has adjudicated. No proof to the contrary can be admitted in an action brought by the executor as such. Parties wishing to contest that point must do it before the Probate Court at the time application is made for the letters, or upon subsequent application, as the case may require.

In an action brought by such executor or administrator touching the collection and settlement of the estate of the deceased, they are conclusive evidence of his right to sue for and receive whatever was due to the deceased. The letters are conclusive evidence of the probate of the will. It cannot be avoided collaterally by showing that it is a forgery, or that there is a subsequent will. The determination of the Probate Court is upon these precise points, and is conclusive. 2 Smith's Lead. Cas. (6th Am. ed.) 669; *Vanderpool* v. *Van Valkenberg*,

6 N. Y. 190; *Collins* v. *Ross*, 2 Paige, 396; Freeman on Judgments, 507, citing numerous cases.

If the present suit were brought by the plaintiff as executor or administrator to collect a debt due to her deceased husband, or to establish a claim arising under a will, of which probate had been made by her, she would have been within these rules. The letters testamentary would not only have been competent evidence, but they would have been conclusive of her right to bring the suit, and unimpeachable except for fraud.

Such, however, is not the case before us. The suit is by the plaintiff as an individual, to recover a debt alleged to be due to her as an individual. It is a distinct and separate proceeding, in which the question of the death of the husband has never been passed upon. That fact must be established by proof competent upon common-law principles.

The books abound in cases which show that a judgment upon the precise point in controversy cannot be given in evidence in another suit against one not a party or privy to the record. This rule is applied not only to civil cases, but to criminal cases and to public judicial proceedings, which are of the nature of judgments *in rem*.

If an indictment for an assault and battery by A. upon B. is prosecuted to a trial and conviction, the record is conclusive evidence in favor of A. upon a subsequent indictment for the same offence; but, if B. sues A. for the same assault and battery, it cannot be doubted that it would be incompetent to introduce that record as evidence of the offence. For this purpose, it is *inter alios acta*. B. was no party to that proceeding. In theory of law he was not responsible for it, nor capable of being benefited by it. 1 Stark. Ev. 317 *m*.

So, if B. should afterwards be indicted for an assault upon A., arising out of the same transaction, the record would not be competent evidence to show that A., and not B., was in fact the offending party.

In some States, provision is made for the admeasurement and setting apart of dower to the widow of a deceased person. Officers are appointed for this purpose, who make their certificate awarding particular property to her use, and file their report in the proper office. Although this certificate is judicial

in its character, and assumes that the deceased had title to the property described, and the certificate is valueless except upon that supposition, it has still been held that it is no evidence of title, and that the title must be proved as in other cases. *Jackson* v. *Randall*, 5 Cow. 168; *Same* v. *Ely*, 6 id. 316.

It has been held that a comptroller's deed for the non-payment of a tax due the State is not even *prima facie* evidence of the facts giving him the right to sell, such as the assessment and non-payment of the tax, although they are recited in the deed, and this deed is in compliance with the statute. These facts must have existed to give a right to sell; but they are not established by the deed. They must be made out by independent proof. *Tallman* v. *White*, 2 N. Y. 66; *Williams* v. *Peyton*, 4 Wheat. 77; *Beekman* v. *Bigham*, 5 N. Y. 366.

A certificate of naturalization issues from a court of record when there has been the proper proof made of a residence of five years, and that the applicant is of the age of twenty-one years, and is of good moral character. This certificate is, against all the world, a judgment of citizenship, from which may follow the right to vote and hold property. It is conclusive as such; but it cannot, in a distinct proceeding, be introduced as evidence of the residence or age at any particular time or place, or of the good character of the applicant. *Campbell* v. *Gordon*, 6 Cr. 176; *Stark* v. *Chesapeake Ins. Co.*, 7 Cr. 420.

The certificate of steamboat inspectors, under the act of Congress of 1852, is evidence that the vessel was inspected by the proper officer; but it is held that it is not evidence of the facts therein recited, when drawn in question by a stranger, although the officer was required by law to make a return of such facts. *Erickson* v. *Smith*, 2 Abb. Ct. of App., N. Y. 64; 38 How. Pr. 454.

So it has been held, that where a sheriff sells real estate, giving to the purchaser a certificate thereof, although there can lawfully be no sale unless there be a previous judgment, and although the sale is based upon and assumes such judgment, and although the law requires the sheriff to give such certificate, the recital by the sheriff of such judgment furnishes no evidence thereof. It must be proved independently of the certificate. *Anderson* v. *James*, 4 Rob. Sup. Ct. 35.

So on an application by a wife for alimony, pending a divorced suit prosecuted against her, the fact that her husband has recovered a verdict against a third person for criminal connection with her has been held not to be even presumptive evidence of her guilt. *Williams* v. *Williams*, 3 Barb. Ch. 628.

Authorities of this nature might be greatly extended. Enough has been said to demonstrate that neither upon principle nor authority was it proper, in the individual suit of Mrs. Tisdale against a stranger, to admit letters of administration upon the estate of her husband as evidence of his death.

The judgment must be reversed, and a new trial had.

BUTTERFIELD *v.* USHER.

Where the Supreme Court of the District of Columbia, at the general term thereof, rendered a decree vacating and setting aside a judicial sale of lands which had been confirmed by an order of the special term of said court, and directing a resale of them, — *Held*, that the decree was not final, and that no appeal would lie therefrom to this court.

APPEAL from the Supreme Court of the District of Columbia.

On the 7th June, 1872, a decree was rendered by the Supreme Court of the District of Columbia in a suit in equity between Horace S. Johnston, plaintiff, and George Usher, defendant, directing a sale of certain lands, the property of Usher. In pursuance of this decree, a sale of the property was made to John W. Butterfield on the 30th of September. This sale was reported to the court Oct. 16; and on the 15th November an order of confirmation was entered, unless cause to the contrary should be shown on or before Dec. 10. Cause was not shown by the time limited; and thereupon, on the 12th December, Butterfield paid the amount of his bid to the trustee who made the sale, and received from him a deed of the property. Previous to this time, there had been no order of the court directing a conveyance; but on that day the trustee reported to the court that he had received the purchase-money, and executed the deed; and thereupon an order was entered,

ratifying and confirming the sale and approving the deed. This deed was left for record in the land records of the District on the day of its execution.

On the 14th December, and during the same term of the court, the order of Dec. 12 was set aside on the petition of Usher, and leave granted him until Dec. 21 to show cause against the confirmation. At the appointed time he did appear, and made his showing; but on the 25th January an order of confirmation was again entered. From this order Usher appealed to the general term, where, on the 7th June, the following decree was entered: —

"Upon the offer of the defendant making an advance on the sale heretofore made, it is ordered, adjudged, and decreed by the court, this seventh day of June, A. D. 1873, that the sale heretofore made in this cause by Francis Miller, Esq., trustee, be, and the same is hereby, vacated and set aside. And it is further ordered that the said trustee may proceed to advertise and resell the property, and that the expenses of the cause heretofore incurred may be paid out of the proceeds to be realized from the sale hereby directed to be made. And it is further ordered that the money in the hands of the trustee be paid back to the purchaser, with interest thereon at the rate of ten per cent per annum, to be paid by the defendant Usher, and to be deducted by the trustee from the proceeds to come into his hands from the further sale hereby ordered. And it is further ordered that the trustee, in reselling the property, put up the same at a price not lower than the sum realized at the former sale, together with the sum of five hundred dollars advance offered by George W. Hauptman."

From this decree Butterfield has taken this appeal. He alone appears as appellant, and Usher alone as appellee.

An appeal lies to this court from the *final* decree of the Supreme Court of the District of Columbia in any case where the matter in dispute exceeds the sum of one thousand dollars. Rev. Stat. sect. 705.

"In case of the sale of things, real or personal, under a decree in equity, the decree confirming the sale shall divest the right, title, or interest sold, out of the former owner, party to the suit, and vest it in the purchaser, without any conveyance by the officer or agent of the court conducting the sale; and the decree shall be notice to all the world of this transfer of title when a copy thereof shall be regis-

tered among the land records of the district; but the court may, nevertheless, order its officer or agent to make a conveyance, if that mode be deemed preferable in particular cases." Rev. Stat. relating to the Dist. of Col., sect. 793.

Mr. Enoch Totten for the appellant, and *Mr. Richard T. Merrick* for the appellee.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The decree here appealed from disposed finally of a motion made in the case, but not of the case itself. It simply set aside one sale that had been made, and ordered another. A decree confirming the sale would have been final. But this decree is analogous to a judgment of reversal with directions for a new trial or a new hearing, which, as has been often held, is not final. Where the practice allows appeals from interlocutory decrees, an appeal might lie from such a decree as this. Such was the practice in New York. 2 Rev. Stat. (N. Y.) 605, sects. 78, 79; id. 178, sects. 59, 62. Consequently it was said, in *Delaplaine* v. *Lawrence*, 10 Paige, 604, "In sales by masters, under decrees and orders of this court, the purchasers who have bid off the property and paid their deposits in good faith are considered as having inchoate rights, which entitle them to a hearing upon the question whether the sales shall be set aside; and, if the court errs by setting aside the sale improperly, they have the right to carry the question by appeal to a higher tribunal." But our jurisdiction upon appeal is statutory only. If some act of Congress does not authorize a case to be brought here, we cannot take jurisdiction. Appeals cannot be taken to this court from the Supreme Court of the District, except after a final decree in the case by that court. The decree in this case not being final, we have no jurisdiction.

We do not wish to be understood as holding that a purchaser at a sale under a decree in equity may not, at a proper stage of the case, appeal from a decree affecting his interests. All we do decide is, that there cannot be such an appeal to this court until the proceedings for the sale under the original decree are ended.

In *Blossom* v. *R.R. Co.*, 1 Wall. 655, and 3 id. 196, we en-

tertained such an appeal; but the decree there appealed from was final. There was no order to resell, for the reason, that, between the time of Blossom's bid and the time of the order of the court appealed from, the decree for the satisfaction of which the sale had been ordered was paid. The decree against Blossom, therefore, was the last which the court could make in the case. It ended the proceedings, and dismissed the parties from further attendance upon the court for any purpose connected with that action.

This appeal is, therefore, dismissed for want of jurisdiction.

MÜLLER ET AL. *v.* EHLERS.

Where the court below rendered judgment upon a finding, and at the next term, in the absence of any special circumstances in the case, and without the consent of parties or any previous order on the subject, allowed and signed a bill of exceptions, and directed it to be filed as of the date of the trial, — *Held*, that the bill, although returned with the record, cannot be considered here as a part thereof.

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

The parties to this suit, by stipulation in writing filed with the clerk, waived a jury, and submitted to a trial by the court, which was had at the October Term, A. D. 1872, when the case was taken under advisement. At the next term, and on the 28th April, 1873, the court found generally for the plaintiff: whereupon defendants moved for a new trial. This motion was continued until the next term; when, on the 15th July, it was overruled, and judgment entered on the finding.

On the 25th July, 1873, this writ of error, returnable on the second Monday of October then next ensuing, was sued out and served, and on the same day a *supersedeas* bond was approved and filed. The citation was filed Aug. 4, 1873.

Down to this date, as appears by the record, a bill of exceptions had not been signed or allowed, nor time given, either by consent of the parties or by order of the court, to prepare one. In this condition of the case, the court adjourned for the term.

At the next term, on the 27th October, 1873, and after the return day of the writ of error, a bill of exceptions was signed and filed by order of the court, as of the 28th April, 1873. It nowhere appears from the record that this was done with the consent of the plaintiff, or even with his knowledge. It is for errors appearing in this bill of exceptions alone that a reversal of the judgment is asked.

Mr. Matt. H. Carpenter for the plaintiff in error, and *Mr. F. W. Cotzhausen* for the defendant in error.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

It perhaps sufficiently appears from the bill of exceptions in this case, if it is to be taken as a part of the record, that the rulings complained of were excepted to in proper form at the time of the trial; but it does not appear that the bill of exceptions was filed, signed, tendered for signature, or even prepared, before the adjournment of the court for the term at which the judgment was rendered. No notice was given to the plaintiff of any intention on the part of the defendants to ask for the allowance of a bill of exceptions, either during the term or after. No application was made to the court for an extension of time for that purpose. No such extension of time was granted, and no consent given.

Upon the adjournment for the term the parties were out of court, and the litigation there was at an end. The plaintiff was discharged from further attendance; and all proceedings thereafter, in his absence and without his consent, were *coram non judice*. The order of the court, therefore, made at the next term, directing that the bill of exceptions be filed in the cause as of the date of the trial, was a nullity. For this reason, upon the case as it is presented to us, the bill of exceptions, though returned here, cannot be considered as part of the record.

This case differs very materially from that of *United States* v. *Breitling*, 20 How. 253. There the bill of exceptions was prepared during the term, and presented to the court for allowance four days before the adjournment. It was handed back to the attorney presenting it, three days before the adjourn-

ment, with the request that he submit it to the opposing counsel. Delay occurred, and the signature was not actually affixed until after the term. Under the special circumstances of that case, the signature, after the term, was recognized as proper. The particular grounds for this ruling are not stated; but it was probably for the reason, that, upon the facts stated, the consent to further time beyond the term for the settling of the exceptions might fairly be presumed. That case went to the extreme verge of the law upon this question of practice, and we are not inclined to extend its operation. It was said by this court in *Generes* v. *Bonnemer*, 7 Wall. 565, that "to permit the judge to make a statement of the facts on which the case shall be heard here, after the case is removed to this court by the service of the writ of error, or even after it is issued, would place the rights of parties who have judgments of record entirely in the power of the judge, without hearing and without remedy." This language is substantially adopted in *Flanders* v. *Tweed*, 9 Wall. 425, where it was said "the statement of facts by the judge is filed upon the 29th May, 1868, nearly three months after the rendition of the judgment. This is an irregularity, for which this court is bound to disregard it, and to treat it as no part of the record."

As early as *Walton* v. *United States*, 9 Wheat. 651, the power to reduce exceptions taken at the trial to form, and to have them signed and filed, was, under ordinary circumstances, confined to a time not later than the term at which the judgment was rendered. This, we think, is the true rule, and one to which there should be no exceptions without an express order of the court during the term or consent of the parties, save under very extraordinary circumstances. Here we find no order of the court, no consent of the parties, and no such circumstances as will justify a departure from the rule. A judge cannot act judicially upon the rights of parties, after the parties in due course of proceeding have both in law and in fact been dismissed from the court. *The judgment is affirmed.*

WRIGHT *v.* TEBBITTS.

A commission called together, in pursuance of treaty stipulations or otherwise, to settle and adjust disputed claims, with a view to their ultimate payment and satisfaction, is, for that purpose, a *quasi* court; and there is nothing illegal, immoral, or against public policy, in an agreement by an attorney-at-law to present and prosecute a claim before it, either at a fixed compensation, or for a reasonable percentage upon the amount recovered.

ERROR to the Supreme Court of the District of Columbia.

Wright, the defendant below, a licensed trader in the Choctaw country at the commencement of the rebellion, claimed that he had sustained large losses by the use of his property by the Choctaw nation, and that large sums were due to him for goods taken by or sold to members of the nation, and for money advanced to it. By a treaty, concluded April 28, 1866, between the United States and the Choctaws and Chickasaws, it was stipulated and agreed that this claim, with others, should be investigated and examined by a commission to be appointed by the President, and that such sum as might be found due should be paid by the United States out of any money belonging to that nation in the possession of the United States. 14 Stat. 781.

Tebbitts, the plaintiff below, an attorney-at-law, was employed by Wright to present and prosecute his claim before this commission; and he accordingly, in August, 1866, appeared before the commissioners, and presented an argument in its support. Afterwards, on the 9th August, 1866, Wright executed to Tebbitts a memorandum in writing, as follows:—

"Jonas M. Tebbitts having rendered valuable services to me in securing my claims under the fiftieth article of the treaty of April 28 with the Choctaws and Chickasaws, I hereby bind myself to pay him one-tenth of whatever I may realize from the Choctaw Indians under said article, whenever the money comes into my hands; which payment, when made, will be in full compliance with my verbal contract, made in April last, with John B. Luce."

Wright subsequently realized on his claim $20,541.28; the last payment having been made to him in June, 1869. This suit was brought by Tebbitts to recover compensation for his services, which Wright refused to pay. He claimed $2,054,

being ten per cent on the sum paid to Wright; and for this amount he obtained judgment upon the verdict of a jury.

To reverse this judgment, the present writ of error has been prosecuted.

Mr. George W. Paschal for the plaintiff in error, and *Mr. R. D. Mussey* for the defendant in error.

Mr. CHIEF JUSTICE WAITE delivered the opinion of the court.

The errors assigned upon this record are, in substance, that the contract given in evidence is illegal: —

1. Because it is an assignment of a one-tenth interest in the claim of Wright, and not "freely made and executed in the presence of at least two witnesses, *after* the allowance of the claim, the ascertainment of the amount due, and the issuance of a warrant for the payment thereof," as required by sect. 3477, Rev. Stat.;

2. Because it is tainted with illegality and immorality, and is against public policy; and,

3. Because it is champertous, as it was a bargain to pay one-tenth of whatever might be collected.

1. As to the first objection, all that need be said is, that there is no claim of any lien upon the fund. All Wright undertakes to do is to pay "one-tenth of whatever he may realize from the Choctaw Indians, . . . whenever the money comes into his hands." Tebbitts asserts no claim upon the fund: he only asks that he may be paid by Wright for his services after the money has been collected, and in accordance with the stipulations of the contract or memorandum.

2. Tebbitts has not engaged in any improper or illegal service. Wright had a claim against the Choctaw Indians, which they, by their treaty, had agreed to submit to an adjudication by commissioners to be appointed for that purpose. He employed Tebbitts to appear for him professionally before that commission, and enforce his claim. Tebbitts appeared, and presented an argument in behalf of his client. This is all he did, and all he engaged to do. It was legitimate service rendered in a legitimate employment. To deprive a claimant of the means of obtaining such professional service would be to deprive him, in many instances, of the means of asserting and

enforcing his claim. In this case, so far as any thing appears by the record, Wright neither contracted for nor received any thing else than legitimate and honorable professional assistance. Such an agreement we held to be valid in *Trist* v. *Child*, 21 Wall. 450; for we then said, speaking through Mr. Justice Swayne, "We entertain no doubt . . . an agreement, express or implied, for purely professional services, is valid." Such services, we say, "rest on the same principle of ethics as professional services rendered in a court of justice, and are no more exceptionable." In fact, the commission acting on this claim was a *quasi* court. It was, in no material respect, for all the purposes of the present controversy, different from the "Court of Commissioners of Alabama Claims," or the "Southern Claims Commission," or the "Mexican Claims Commission," or "Spanish Claims Commission," which have been called together, in pursuance of treaty stipulations or otherwise, to settle and adjust disputed claims, for the purpose of their ultimate payment and satisfaction. There is nothing illegal, immoral, or against public policy, in a professional engagement to present and prosecute such claims before such tribunals.

3. In *Wylie* v. *Coxe*, 15 How. 415, we decided that an agreement to pay a reasonable percentage upon the amount of recovery was not an illegal contract. Here, after the service had been rendered, and after, as was supposed, the claim had been secured, Wright agreed to pay ten per cent of the amount eventually realized as compensation for the labor done. We see no reason to find fault with this; and the jury seem also to have adopted this rule, which the parties established for themselves, as presenting the true criterion for estimating the reasonable value of the services rendered.

The judgment is affirmed.

HAINES ET AL. v. CARPENTER ET AL.

Except where otherwise provided by the Bankrupt Law, the courts of the United States are expressly prohibited by sect. 720 of the Revised Statutes from granting a writ of injunction to stay proceedings in a State court.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

Celia A. Groves of Madison Parish, Louisiana, by her will, dated the 27th of January, 1872, among other things bequeathed to the Baptist church in the city of Vicksburg, the plantation on which she lived, except one hundred and fifty acres, which were designated; and expressed a desire that the church should hold it, and not sell it, and that the proceeds should be employed to educate young men for the ministry. She appointed her brother-in-law, Charles Carpenter, her universal legatee and executor, giving him seizure of the estate to carry out the provisions of the will and the purposes of the trust. The will was admitted to probate on the 16th of March, 1872, by the parish judge; and Carpenter assumed the duties of executor, and took possession of the estate.

The bill in this case was filed in September, 1872, by the appellants, as Trustees of the Vicksburg Baptist Church of Vicksburg in Mississippi, a body corporate of that State, alleging that said church was the one intended by the will, and charging various matters of complaint upon which relief is sought. The defendants are, first, the executor, Charles Carpenter; secondly, one Elias S. Dennis, who claims to have been a partner of testatrix; thirdly, Mary Stout, Julia Trezevant, and others, who claim to be the heirs of the testatrix; fourthly, Richard H. Groves and others, who claim to be the heirs of her deceased husband, George W. Groves; fifthly, John A. Klein and others, legatees named in the will.

The bill states that Carpenter is unfit and incompetent to manage and control the estate, and that he lets it run to waste; and asks that he be removed, and a receiver appointed.

It further states that Dennis has instituted a suit against the executor in the Thirteenth District Court of Louisiana, claiming to have been a partner of testatrix, and that a large amount is due him as such, with a view of absorbing the succession by a judgment; and that the executor is colluding and combining with him, and asks that they be enjoined from continuing such combination.

It also states that Mary Stout, Julia Trezevant, and others, claiming to be the testatrix's heirs, have instituted a suit in the

Parish Court of Madison Parish, alleging that the bequest to the church is void, and praying that it may be declared void, for various reasons, amongst others, as being uncertain, against the laws of Louisiana, and attempting to establish a perpetuity; and that the complainants answered the petition in said suit, which is still pending.

And further, that Richard H. Groves and others, alleging themselves to be the heirs of George W. Groves, the testatrix's husband, have also commenced a suit in said Thirteenth District Court, claiming that the property bequeathed belonged to him, and that the will is null and void, and praying that it may be declared void.

In view of these various proceedings, the bill claims that the case presents a multiplicity of suits, sufficient to induce a court of equity to interfere for the protection of the complainants. It also alleges that full and adequate relief cannot be had unless the Circuit Court take cognizance of all the questions presented by said suits, and of the whole subject-matter of the succession, and of all suits and litigations affecting it. It also alleges that such local prejudices exist against the church, that it cannot obtain justice in the State courts.

The bill prays that the executor may account for all moneys received by him from the succession, and for a reference to a master to ascertain and settle all claims against the estate, and that a receiver may be appointed to take charge of the estate; that the will may be declared valid; that the complainants may be put into possession of the plantation; that the executor may be removed; and that an injunction may issue to enjoin and restrain the defendants from further prosecuting the said suits, or any other suits or litigation in the premises.

This bill was dismissed by the court below on demurrer; and from that decree this appeal was taken.

Submitted on printed brief by *Mr. Joseph Casey* for the appellant, who cited *Payne* v. *Hook*, 7 Wall. 425.

No counsel appeared for the appellee.

MR. JUSTICE BRADLEY delivered the opinion of the court.

A mere statement of the bill is sufficient to show that it cannot be sustained. Whilst it undoubtedly presents some matters

of equitable consideration, they are so mixed up with others of a different character, or which cannot be entertained by the Circuit Court of the United States, and which constitute the main object and purpose of the suit, as to make the bill essentially bad on demurrer. In the first place, the great object of the suit is to enjoin and stop litigation in the State courts, and to bring all the litigated questions before the Circuit Court. This is one of the things which the Federal courts are expressly prohibited from doing. By the act of March 2, 1793, it was declared that a writ of injunction shall not be granted to stay proceedings in a State court. This prohibition is repeated in sect. 720 of the Revised Statutes, and extends to all cases except where otherwise provided by the Bankrupt Law. This objection alone is sufficient ground for sustaining the demurrer to the bill. In the next place, the claim that the court ought to interfere on account of multiplicity of suits is manifestly unfounded. Only three suits are specified for this purpose in the bill, and each of these has a distinct object, founded on a distinct ground, and is instituted by a distinct class of claimants, who had a perfect right to institute the suit they did. The State courts have full and ample jurisdiction of the cases, and no sufficient reason appears for interfering with their proceedings. *The decree of the Circuit Court is affirmed.*

McMURRAY ET AL. *v.* BROWN.

Where a party furnished materials for the construction of a building, under an agreement that the owner thereof, by way of payment for them, would convey to him certain real estate at a stipulated price per foot, — *Held*, that on the refusal of the owner so to convey, or in lieu thereof to pay for such materials, the party is entitled to his lien, provided that in due time he gives the notice required by law.

APPEAL from the Supreme Court of the District of Columbia.

This was an action to enforce a mechanics' lien under sect. 1 of the act of Congress approved Feb. 2, 1859, 11 Stat. 376, which provides, "That any person who shall hereafter, by virtue of any contract with the owner of any building, or with

the agent of such owner, perform any labor upon, or furnish any materials, engine, or machinery for the construction or repairing of, such building, shall, upon filing the notice prescribed in sect. 2 of this act, have a lien upon such building and the lot of ground upon which the same is situated for such labor done, or materials, engine, or machine furnished, when the amount shall exceed twenty dollars."

The second section provides, "That any person wishing to avail himself of this act, whether his claim be due or not, shall file in the office of the clerk of the Circuit Court of the District of Columbia at any time after the commencement of the said building, and within three months after the completion of such building or repairs, a notice of his intention to hold a lien upon the property declared by this act liable to such lien for the amount due or to become due to him, specifically setting forth the amount claimed. Upon his failure to do so, the lien shall be lost."

Mrs. McMurray, one of the defendants, was indebted to the complainant in the sum of $1,230.62 for materials furnished by him in the construction of two dwelling-houses on lots belonging to her in the city of Washington, under an agreement, that, upon the delivery of said materials, she would, in payment therefor, convey to him, at the rate of forty-five cents per square foot, certain real estate situate in said city. She subsequently refused to comply with the agreement, but promised to pay him the amount of his bill in cash.

No payment having been made, he, on the 13th of February, 1872, the houses then being uncompleted, gave the required notice of his intention to hold the property subject to his lien.

The court below rendered a decree in favor of the complainant; from which an appeal was taken to this court.

Mr. James S. Edwards for the appellants.

It is insisted as matter of law, that the complainant, upon his own showing, is not entitled to relief. "Where there is a special contract between a mechanic and the owner or builder of a house for the work which the former is to do in constructing the house, he must look to his contract alone for his security, and cannot resort to the remedy which the me-

chanics' lien law provides." *Haley* v. *Prosser*, 8 W. & S. 133; *Grant* v. *Strong*, 18 Wall. 623.

The complainant must have been entitled to file his lien when the contract was made. He can do nothing afterwards to alter his position. *Hoatz* v. *Patterson*, 5 W. & S. 537.

He clearly had no right to file his lien when the alleged agreement was made; for, by its terms, Mrs. McMurray was to convey a certain lot in exchange for the material furnished. His action for a breach of the contract is by a different proceeding. He has a remedy at law; no standing here.

Mr. Edwin L. Stanton for the appellee.

It is submitted that the facts show a contract within the statute; but the appellant insists "that the complainant, upon his own showing, is not entitled to the relief he seeks, for the contract upon which he relies is a *special* one." In support of this proposition, he cites the cases of *Haley* v. *Prosser*, 8 W. & S. 133; *Hoatz* v. *Patterson*, 5 id. 537; *Grant* v. *Strong*, 18 Wall. 623.

The two former decisions "were a surprise to the profession, acted almost as a nullification of the law, and were followed by an act of the legislature extending the lien to all cases of contracts." Phill. on Mech. Liens, 166, citing *Lay* v. *Millette*, 1 Phila. 513; *Russell* v. *Bell*, 44 Penn. 47.

Grant v. *Strong* in no manner supports the proposition, that, when a special contract has been made, the material-men or laborers have no lien.

The complainant, having no other security, was not deprived of his lien by reason of agreeing to accept land instead of money for his materials. There is no distinction in principle between an agreement to pay money or property which can possibly affect the remedy provided. Phill. on Mech. Liens, 182; *Campbell & Kennedy* v. *Scaife et al.*, 1 Phila. 187; *Haviland* v. *Pratt*, id. 364; *Hinchman* v. *Lybrand*, 14 S. & R. 32; *Reiley* v. *Ward*, 4 Iowa, 21.

Mr. Justice Clifford delivered the opinion of the court.

Mechanics or other persons, who, by virtue of *any contract* with the owner of any building, or with the agent of such owner, have, since the 2d of February, 1859, performed labor,

exceeding the value of twenty dollars, upon such building, or have furnished materials, engine, or machinery exceeding that value, for the construction or repairing of such building, shall, upon filing the notice prescribed in the second section of the Lien Act of that date, have a lien upon such building, and the lot of ground upon which the same is situated, for such labor done, or materials, engine, or machinery furnished. 11 Stat. 376.

Building materials of great value, such as bricks and lumber, were furnished by the complainant to the first-named respondent, by virtue of a verbal agreement, as he alleges, between him and the husband of the respondent, acting as her agent.

Service was made, and the respondent appeared, and by her answer admitted the averments of the first, second, fourth, and seventh paragraphs of the bill of complaint, but denied every other material allegation which it contains.

Proofs were taken; and, the parties having been fully heard, the judge, at special term, entered a decree that the complainant recover of the respondent the sum of twelve hundred and thirty dollars and sixty-two cents, with interest, as therein provided; and that the described real estate, — to wit, lots numbered thirty-six and thirty-seven, — together with the buildings and improvements thereon, be, and hereby are, subjected to the satisfaction of the complainant's demand.

Due appeal was taken by the respondent to the general term, where the decree of the special term was in all things affirmed; and the respondent appealed to this court.

Two other persons were named as respondents in the bill of complaint who never filed any answer, and are not parties to the decree, for the reason that no relief is sought against them, they having been joined as respondents merely for the purpose of discovery in respect to a prior lien held on the premises by the one named as trustee, to secure a debt due to the other.

Seasonable appearance was entered by the respondent, and she filed an answer; but, the answer having been lost, it is stipulated and agreed between the parties, that the answer, as before stated, admitted all the averments of the first, second, fourth, and seventh paragraphs of the bill of complaint, and that it denied every other allegation of the complainant.

Lumber and bricks were furnished by the complainant for two houses; and the evidence shows that the respondent owned both lots on which the houses were being constructed, and that she was represented throughout the transaction by her husband, who acted as her agent in constructing the houses. Nothing further need be remarked respecting the deed of trust of prior date, as it is admitted by stipulation that the deed is cancelled, and that the debt secured by it is discharged.

Due notice of the intention of the complainant to hold a lien upon the property, as required by the act of Congress, is admitted by the answer; nor is it necessary to discuss the question as to the agency of her husband in the transaction, as that also is admitted by the respondent. What the respondent denies is, that either she, or her agent in her behalf, ever made any such contract with the complainant as that set forth in the bill of complaint, or that the complainant ever furnished and delivered to her or her agent the building materials specified in the bill of particulars annexed to the bill of complaint, or that the materials were ever used by her or by her authority in the construction of the said houses.

Lots thirty-six and thirty-seven belonged to the respondent, and the proof is that they adjoin each other. Prior to the alleged agreement with the complainant, the respondent entered into a contract with another party to build a two-story brick house for her on the lot first named, the contractor agreeing to build the house, and furnish, at his own proper cost and expense, all the materials necessary to complete the same in a workmanlike manner; for which the respondent agreed to pay to the contractor the sum of one thousand dollars, and at the same time to convey to him lot thirty-seven, and to pay the balance, amounting to twelve hundred dollars, in notes of fifty dollars each, payable monthly, at eight per cent interest, to be secured by a deed of trust on lot thirty-six, and the house to be built by the contractor, subject to a prior deed of trust on the same lot. By the record, it appears that the contract, though it bears date the 6th of June, 1871, was not actually executed until about the middle of July following, and that the contractor failed to fulfil the stipulations of the written contract.

Perkins, the contractor, was without means or credit, and

possessed no capital whatever, except his skill as a builder; and the husband of the respondent, though he controlled the real estate standing in the name of his wife, was without any ready means at his command: consequently the materials for completing the house could not be obtained except by exchanging some of the real estate for the same. Detailed account is given, in the testimony, of the measures adopted by the parties to effect such an exchange of real estate for building materials; but it must suffice to say that all of the negotiations failed.

All of these attempts to procure building materials by exchanging real estate for the same took place before the contract for building the house was signed; and, at the close of those attempts, an interview occurred between the contractor under the written agreement and the complainant, when the latter informed the former that he would furnish lumber and bricks in exchange for lot thirty-seven, computing the value of the lot at forty-five cents per foot. Within two hours after the conversation, the former contractor reported the same to the husband of the respondent, and told him to have the deed of the lot made directly to the complainant, and proposed, at the same time, to divide between them the five cents per foot advance in price which the seller would receive beyond the consideration promised by the former contractor.

Abundant evidence is given to show that the offer of the complainant to take conveyance of the lot, and furnish the building materials as required, was accepted by the husband of the respondent; and that he, the agent, agreed that the lot should be conveyed to the complainant as proposed.

Pursuant to that arrangement, which appears to have been fairly and understandingly made, the complainant continued to deliver the required building materials; and the conduct of the husband of the respondent throughout the whole period the materials were furnished and delivered shows to the entire satisfaction of the court that the materials were furnished and delivered in pursuance of that understanding, and that he knew that the owner and furnisher of the same was parting with his property in the just and full expectation that the whole passed to the benefit of his wife under that arrangement. Evidence

to that effect is found in the testimony of several witnesses; and it is not going too far to say that there is nothing in the record worthy of credit to contradict that theory.

Part of the building materials furnished by the complainant before he made his contract with the respondent were used by the first contractor in the erection of a house on lot thirty-seven, which he designed for himself; but the title and ownership of that lot, as well as lot thirty-six, were in the respondent; and on the 1st of November, 1871, she took actual possession of the lot and the unfinished structure thereon which had been commenced by the former contractor, and ever after continued in the possession and control both of the lot and the building.

Nothing further was ever done by the contractor to complete these houses, and the record shows that the same were completed by another contractor employed by the same agent of the respondent. All of the materials for that purpose were furnished by the complainant; and the record also shows that he furnished all the materials used in constructing and completing both houses, except a small part of the bricks, worth perhaps one hundred dollars, which were purchased by the managing agent of the respondent.

Attempt is made by the respondent to controvert the proposition that her agent ever contracted with the complainant to furnish the building materials in question, and to take the conveyance of lot thirty-seven in payment for the same: but the evidence is so full and satisfactory to that effect, that it is not deemed necessary to add any thing to what has already been remarked upon the subject; nor is it of any importance that she had previously agreed to convey the lot to her former contractor, in case he completed the house for her on lot thirty-six, as he had failed to fulfil the contract, and she had dispossessed him of the premises and of the partly-erected house which he had commenced.

Materials for that purpose to a considerable amount had been furnished by the complainant during the progress of the work, while it was under the superintendence of the former contractor: but inasmuch as the title of both lots was all the time in the respondent, and she had lawfully resumed the possession of lot

thirty-seven on account of the failure of the contractor to complete the building on the other lot within the prescribed time, it was entirely competent for the respondent to make the new contract with the complainant, which it is proved she did make through her agent; and, having made the same, she is bound by its terms and conditions just the same as if it had been in writing.

Suppose the facts are so: still it is insisted by the respondent, as matter of law, that the complainant is not entitled to the relief he seeks, for the reason that the contract set up by him is a special contract. The theory is, that the materials having been furnished upon the verbal contract set out in the bill of complaint, that he, the complainant, should furnish the materials, and that she, the respondent, should convey lot thirty-seven to him in payment for the same, that that contract creates no lien, as the materials were furnished solely upon the faith of the special agreement; but the record shows that her agent who made the contract persuaded the complainant to wait for the conveyance until all the materials had been furnished, and that he, the agent, then refused to make the conveyance. Instead of doing as he agreed, having received an offer of fifteen cents per foot for the lot more than the complainant was to allow, he, the agent, promised to pay the complainant the money for the materials, but failed to make good his promise in that regard.

Both houses were completed; and the proof is, that the complainant furnished all the lumber and nearly all the bricks for the purpose, and that he has received no payment for the materials. On the other hand, it appears that the respondent has sold one of the houses for six thousand dollars, and that she and her husband were living in the other.

Other defences failing, her proposition now is, that, where there is a special contract between a mechanic and the owner or builder of a house for the work which the former is to do in constructing the house, he must look to his contract *alone* for his security, and that he cannot resort to the remedy which the lien law provides. Support to that proposition cannot be derived from any thing contained in the act of Congress passed to enforce mechanics' liens, unless the words of the first section

of the act are shorn of their usual and ordinary import and signification.

Persons who perform labor upon, or furnish materials, &c., for, the construction or repairing of a building, *by virtue of any contract* with the owner of the same, or his agent, have a right to the benefit of the lien if he files the notice prescribed by the second section of the act. Certainly the words *any contract* are sufficiently comprehensive to include special contracts as well as contracts which arise by implication, unless the material-man is secured by a deed of trust or mortgage, or in some other form of security repugnant to the theory that he ever intended "to hold a lien under the mechanics' lien law."

Special reference is made by the respondent to two decided cases in Pennsylvania in support of her proposition that the lien law does not extend to special contracts. *Hoatz* v. *Patterson*, 5 W. & S. 538; *Haley* v. *Prosser*, 8 id. 133. Unexplained, it may be admitted that those cases do afford support to the proposition that the State lien law to which they refer did not extend to the debt of a material-man, arising from the sale and delivery of building materials, if furnished under a special contract; but those decisions were never satisfactory to the legal profession of that State, and it is believed are not regarded as safe precedents even in the jurisdiction where they were made. Instead of that, the legislature of the State, on the 16th of April, 1860, passed a declaratory law, which enacts that the true intent and meaning of the provisions of the prior act extend to and embrace claims for labor done and materials furnished and used in erecting any house or other building which may have been or shall be erected under or in pursuance of any contract or agreement for the erection of the same, and that the provisions of the former "act shall be so construed." Since that time, it has been held by the courts of that State to the effect that special contracts, as well as implied, are within the true intent and meaning of the original lien law of the State. *Russell* v. *Bell*, 44 Penn. 36–54; *Reiley* v. *Ward*, 4 Greene (Iowa), 21.

Cases may arise, undoubtedly, where the rights and responsibilities of the parties are so completely defined by the contract, that neither party is at liberty to claim any thing beyond

the terms of the contract, if the contract is in all respects fulfilled. Consequently, lien laws do not in general create a lien in favor of a material-man who has accepted in full a different security at the time the contract or agreement was made. Examples of the kind, such as a trust-deed or mortgage, may be mentioned, which are regarded as a species of security inconsistent with the idea of a mechanics' lien upon the same land for the same debt. *Grant* v. *Strong*, 18 Wall. 623; Phill. on Mech. Liens, sect. 117.

Such a security is regarded as inconsistent with the intent of the parties that a mechanics' lien should be claimed by the party furnishing building materials, as the owner may obligate himself to pay in money, land, or any specific article of property; but, if he does not fulfil his contract by paying in the manner stipulated, the mechanic is entitled to his lien. *Reiley* v. *Ward*, 4 Greene, 22.

If the labor has been performed or the materials furnished, no matter in what the owner agreed to pay, if he has not paid in any way, the laborer or mechanic has a right to resort to the security provided by law, unless the rights of third persons intervene before he gives the required notice.

Contracts of a special character, such as to give a mortgage to the laborer or mechanic, if duly executed under circumstances showing that the claim to a lien was not intended by the parties, may defeat such a claim; but a mere promise to give such a security, if subsequently broken, will not impair such a right if the requisite notice is given before any right of a third party, as by attachment or conveyance, has become vested in the premises. Laches in that behalf may impair such a right, and it is one which the claimant may waive. Phill. on Mech. Liens, sects. 117, 272.

Liens of the kind, except where the statute otherwise provides, arise by operation of law, independent of the express terms of the contract, in case the stipulated labor is performed or the promised materials are furnished; the principle being, that the parties are supposed to contract on the basis, that, if the stipulated labor is performed or the promised materials are furnished, the laborer or material-man is entitled to the lien which the law affords, provided he gives the required notice

within the specified time. 11 Stat. 376; Phill. on Mech. Liens, sect. 118.

Viewed in any light, it is clear that there is no error in the record. *Decree affirmed.*

BLACK ET AL. v. UNITED STATES.

Where a contract provides for the transportation of military stores and supplies from certain posts, dépôts, or stations, or from and to any other posts, dépôts, or stations, that might be established within a described district, or from one point to another within the route, — *Held*, that Fort Phil. Kearney, being a military post, although not specifically named in the contract, nor established after the date thereof, was "a point" where the contractor was required to receive military stores and supplies for transportation to another point within the route, and that he was entitled to payment under the contract and at the rates therein mentioned for the distance they were actually carried, but not to additional compensation for the travel of his unloaded teams in reaching that fort.

APPEAL from the Court of Claims.

A contract was entered into between the United States and the claimants for the transportation of military stores and supplies on Route No. 1, west of the Missouri River, the material provisions of which are as follows: —

"ARTICLE 1. That the said Black, Kitchen, & Martin shall receive at any time, in any of the months from April 1, 1868, to March 31, 1869, inclusive, from the officers or agents of the quartermaster's department at Fort D. A. Russell, in the Territory of Dakota, or such point as may be determined upon during the year on the Omaha branch of the Union Pacific Railroad, west of Fort D. A. Russell, or at Fort Laramie, Dakota Territory, all such military stores and supplies as may be offered or turned over to them for transportation, in good order and condition, by the officer or agent of the quartermaster's department, at any or all of the above points or places, and transport the same with despatch, and deliver them in like good order and condition to the officer or agent of the quartermaster's department on duty or designated to receive them at any of the posts or dépôts that are now or may be established in the State of Nebraska, west of longitude 102 degrees; in the Territory of Montana, south of latitude 47 degrees; in the Territory of Dakota, west of longitude 104 degrees; in the Territory of Idaho,

east of longitude 114 degrees; and in the Territories of Utah and Colorado, north of latitude 40 degrees, including, if necessary, Denver City, or at any other points or posts on the route, agreeably to the instructions they may receive from the officer or other authorized agent of the quartermaster's department charged with the duty of forwarding the stores and supplies at Fort D. A. Russell or other place of departure; and for the faithful performance of such service they shall be paid in the manner hereinafter provided for in Art. XVII. of this agreement, and at the rates specified and shown in the tabular statement hereto annexed and signed by the parties to this agreement, which statement is considered as part hereof.

"ART. II. That the said Black, Kitchen, & Martin agree and bind themselves, their heirs, executors, and administrators, to transport under this agreement, from the posts, dépôts, or stations named in Art. I., or from and to any other posts, dépôts, or stations that may be established within the district described in said article, any number of pounds of military stores and supplies from and between one hundred thousand pounds and twenty-five millions of pounds in the aggregate.

"ART. XIV. It is understood that if at any time stores or supplies are required to be transported back to any point on the road, or to any of the original points of departure, or from one point to another within the route, they shall be carried upon the same terms and conditions as herein provided.

"ART. XVII. For and in consideration of the faithful performance of the stipulations of this agreement, the said Black, Kitchen, & Martin shall be paid at the office of the quartermaster's department at Omaha, Nebraska, in the legal currency of the United States, according to the distance supplies are transported, and agreeably to the rates specified in the tabular statement hereto annexed, signed by the parties to this agreement."

In order to execute a requirement of the quartermaster's department for the removal of stores from Fort Phil. Kearney, the claimants, having no teams at that post, were obliged to send them there from Fort D. A. Russell and Fort Fetterman. To recover $55,530 as compensation for the distance thus travelled, this action was brought.

The petition was dismissed by the court below.

Mr. C. F. Peck for the appellants, and *Mr. Assistant Attorney-General Edwin B. Smith* for the United States.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The transportation for which compensation is now asked was "from one point to another within the route;" and full payment has been made therefor "according to the distance the supplies were transported, and agreeably to the rates specified in the tabular statement."

It is claimed, however, that as Fort Phil. Kearney, the point at which the supplies were received for transportation, "was within the route," the contractors are entitled to compensation for the distance their teams travelled unloaded to reach that place, as well as for the distance the supplies were carried. This claim is based, not upon any express provision in the contract requiring or even permitting such payment, but because, as is insisted, the service rendered was not included in the obligations of the contract. The argument is, that the places named in Art. I. are the only places at which the contractors were bound to receive the supplies to be transported. But this excludes from consideration Arts. II. and XIV., by which the contractors bound themselves not only to transport under the agreement from the posts, dépôts, and stations named in Art. I., but also "from and to any other posts, dépôts, or stations that might be established within the district described in said article," and "from one point to another within the route." For the purposes of construction, we must look to the whole instrument. The intention of the parties is to be ascertained by an examination of all they have said in their agreement, and not of a part only.

In *Caldwell's Case*, 19 Wall. 264, we decided that the terms "posts, dépôts, or stations," as used in Arts. I. and II. of his contract, "in the presence of actual war, and in reference to military stores," included military posts and stations alone. Consequently, it was held that Caldwell could not claim the right of transporting supplies from railroad stations within the district which were not at the same time military posts, stations, or dépôts. In the present case, the starting-point was Fort Phil. Kearney, a military "post," and, consequently, a "point" within the district at which the contractor could, under the ruling in *Caldwell's Case*, be required to receive

stores and supplies for transportation. It is a noticeable fact, though perhaps under the circumstances of this case unimportant, that the provision for transportation "from one point to another within the route" in Art. XIV. of this contract, which was for 1868–69, is not in Caldwell's contract. The latter was for the year 1866. It is not impossible that the claim made by him may have suggested the necessity for this change in the terms of such agreements. In his contract, too, Art. I. provided that stores should be received for transportation "at any points or places at which posts or dépôts shall be established." Here the same article provided that they should be received "at such point as may be determined upon during the year, on the Omaha branch, &c.," omitting the further provision that it should be a "post" or "dépôt."

We are clearly of the opinion that the services rendered by these appellants were within the requirements of their contract, and that the only compensation they are entitled to is for the distance the articles were actually carried, and agreeably to the rates specified. *The judgment is affirmed.*

MOORE v. UNITED STATES.

1. Where Congress has not provided, and no special reasons demand, a different rule, the rules of evidence, as found in the common law, ought to govern the action of the Court of Claims.
2. The general rule of the common law, disallowing a comparison of handwriting as proof of signature, has exceptions equally as well settled as the rule itself. One of the exceptions is, that if a paper admitted to be in the handwriting of the party, or to have been subscribed by him, is in evidence for some other purpose in the cause, the signature or paper in question may be compared with it by the jury. The Court of Claims determines the facts as well as the law, and may make the comparison in like manner as the jury.

APPEAL from the Court of Claims.

This was a suit to recover the sum of $5,780 on account of cotton seized by the United States.

The court below found that the petitioner, a British subject, owned and was possessed of $26\frac{2}{3}$ bales of cotton stored in a warehouse in St. Joseph's, in the State of Louisiana.

That on the twelfth day of December, 1863, it was seized by the United States, by the boats of their marine brigade under the command of Colonel Ellet, and taken from the possession of the petitioner and sold by the United States, and the net proceeds thereof, amounting to the sum of $5,780, paid into the treasury.

That after said seizure, and while the said cotton was in a boat of the marine brigade, the said petitioner sold the said cotton, as appears by his certificate or paper-writing.

That the original of said certificate or paper-writing was proved in court by a comparison, made by the judges of the court, of the handwriting and signature of said paper-writing with the handwriting and signature of the petitioner in another paper-writing in evidence for other purposes in the cause.

The certificate referred to is as follows: —

"I certify that the cotton taken by the gunboat 'Switzerland,' twenty-six bales, on the 12th December, was my property, and I sold the same and received payment in full, and that the same is registered at the British consul's office, New Orleans; and, as an act of justice, it should be returned.

"JOSEPH MOORE.

"ST. JOSEPH'S, LA., 17th December, 1863."

Judgment was rendered in favor of the defendant, and the petition dismissed.

Mr. Joseph Casey for the appellant.

1. The court erred in admitting proof of the execution of the paper in question by comparison of handwriting. This court has ruled that such proof is inadmissible where the witness had no prior knowledge of the handwriting. *Strother* v. *Lucas*, 6 Pet. 763; *Rogers* v. *Ritter*, 12 Wall. 321.

In Pennsylvania, comparison is only admitted in corroboration of other testimony. *McCorkle* v. *Binns*, 3 Binn. 349; *Bank* v. *Whitehill*, 10 S. & R. 110; *Bank* v. *Haldeman*, 1 Penn. 161; *Baker* v. *Haines*, 6 Whart. 266; *Depue* v. *Place*, 7 Barr, 428.

The same rule prevails in New York. *People* v. *Spooner*, 1 Denio, 343; *Titford* v. *Knott*, 2 Johns. 211; *Jackson* v. *Phillips*, 9 Cow. 94; *Wilson* v. *Kirtland*, 5 Hill, 182.

In Maryland, the doctrine that it is not competent to prove by comparison is too firmly established to be disturbed. *Smith* v. *Walton*, 8 Gill, 77; same in Kentucky, 7 B. Mon. 269; same in Alabama, 2 Ala. 703; same in Rhode Island, 2 R. I. 319; 1 Greenl. Ev., sect. 576 *et seq.*

2. If the evidence of comparison be admissible at all, it must be by experts; and it does not appear in any way that these judges, or any of them, are such experts.

3. The party against whom such evidence is admitted is precluded from testing or gainsaying in any way the accuracy or extent of the knowledge by which the instrument is decided to be his.

This is a fatal error, we think, for which this judgment should be reversed.

Mr. Assistant Attorney-General Edwin B. Smith for the appellee.

The execution of the paper was properly proved.

Comparison of hands has always been considered a legitimate mode of determining the authenticity of a signature. 6 Court of Claims, 429, 432; *Henderson* v. *Hackney*, 16 Ga. 521; *McCorkle* v. *Binns*, 5 Binn. 340; *Lyon* v. *Lyman*, 9 Conn. 55; *Adams* v. *Field*, 21 Vt. 256; *Homer* v. *Wallis*, 11 Mass. 309; *Moody* v. *Rowell*, 17 Pick. 490; *Richardson* v. *Newcomb*, 21 id. 315; *Griffith* v. *Williams*, 1 Cromp. & Jerv. 47; *Solita* v. *Yarrow*, 1 Moody & Rob. 133.

In *Chandler* v. *Le Barron*, 45 Me. 534, the plaintiff was allowed to put in a signature that he had required his opponent's witness to write in the presence of the jury, in order that a comparison of it with the signature in controversy might be instituted by the jury, without the intervention of experts.

In very many cases (*e. g. Hicks* v. *Person*, 19 Ohio, 426) — perhaps in nearly all where the point has been made — *experts* have been allowed to compare signatures, and give their opinion thereon to the jury.

The papers upon which these opinions were formed then go to the jury, and from them they determine whether the expert came to a correct or to an erroneous conclusion. Is it not absurd to say that the jury cannot examine the papers as inde-

pendent testimony, yet can decide, upon an inspection of them, that testimony which has been given for their guide in this matter was unreliable, and the witness mistaken?

Every day, capital causes are determined by comparisons; and where, as in many States, views are ordered, comparisons are made by the jury. They see that the shoe fits an impression, or are told that it did; that a hat fits a certain head; that a child, in features and appearance, resembles or does not resemble the putative father (*Finnegan* v. *Dugan*, 14 Allen, 197); though testimony to such likeness (*Eddy* v. *Gray*, 4 id. 435) or unlikeness (*Young* v. *Makepeace*, 103 Mass. 50) is not admitted. All this is simply recognizing the existence of a natural law of similitude in the matters inquired of, and allowing the jury to determine whether or not such similarity is found in the cause upon trial.

MR. JUSTICE BRADLEY delivered the opinion of the court.

According to the facts found in this case, we think no error was committed by the court below. The only question of importance is, whether the signature to the document bearing date Dec. 17, 1863, and purporting to be executed by the claimant, was properly proved. The court compared it with his signature to another paper in evidence for other purposes in the cause, respecting which there seems to have been no question; and from that comparison adjudged and found that the signature was his. Had the court a right to do this? The Court of Claims, like a court of equity or admiralty, or an ecclesiastical court, determines the facts as well as the law; and the question is, whether they may determine the genuineness of a signature by comparing it with other handwriting of the party. By the general rule of the common law, this cannot be done either by the court or a jury; and that is the general rule of this country, although the courts of a few States have allowed it, and the legislatures of others, as well as of England, have authorized it. In the ecclesiastical courts, which derived their forms of proceeding from the civil law, a different rule prevails. The question is, By what law is the Court of Claims to be governed in this respect? May it adopt its own rules of evidence? or is it to be governed by some system of law? In

our opinion, it must be governed by law; and we know of no system of law by which it should be governed other than the common law. That is the system from which our judicial ideas and legal definitions are derived. The language of the Constitution and of many acts of Congress could not be understood without reference to the common law. The great majority of contracts and transactions which come before the Court of Claims for adjudication are permeated and are to be adjudged by the principles of the common law. Cases involving the principles of the civil law are the exceptions. We think that where Congress has not provided, and no special reason demands, a different rule, the rules of evidence as found in the common law ought to govern the action of the Court of Claims. If a more liberal rule is desirable, it is for Congress to declare it by a proper enactment.

But the general rule of the common law, disallowing a comparison of handwriting as proof of signature, has exceptions equally as well settled as the rule itself. One of these exceptions is, that if a paper admitted to be in the handwriting of the party, or to have been subscribed by him, is in evidence for some other purpose in the cause, the signature or paper in question may be compared with it by the jury. It is not distinctly stated in this case that the writing used as a basis of comparison was admitted to be in the claimant's hand; but it was conceded by counsel that it was, in fact, the power of attorney given by him to his attorney in fact, by virtue of which he appeared and presented the claim to the court. This certainly amounted to a declaration, on his part, that it was in his hand; and to pretend the contrary would operate as a fraud on the court. We think it brings the case within the rule, and that the Court of Claims had the right to make the comparison it did. *The decree is affirmed.*

MR. JUSTICE DAVIS did not sit in this case, and took no part in its decision.

WELTON *v.* THE STATE OF MISSOURI.

1. A license tax required for the sale of goods is in effect a tax upon the goods themselves.
2. A statute of Missouri which requires the payment of a license tax from persons who deal in the sale of goods, wares, and merchandise which are not the growth, produce, or manufacture of the State, by going from place to place to sell the same in the State, and requires no such license tax from persons selling in a similar way goods which are the growth, produce, or manufacture of the State, is in conflict with the power vested in Congress to regulate commerce with foreign nations and among the several States.
3. That power was vested in Congress to insure uniformity of commercial regulation against discriminating State legislation. It covers property which is transported as an article of commerce from foreign countries, or among the States, from hostile or interfering State legislation until it has mingled with and become a part of the general property of the country, and protects it even after it has entered a State from any burdens imposed by reason of its foreign origin.
4. The non-exercise by Congress of its power to regulate commerce among the several States is equivalent to a declaration by that body that such commerce shall be free from any restrictions.

ERROR to the Supreme Court of Missouri.

Welton was indicted, tried, and convicted in the Circuit Court for the County of Henry, in the State of Missouri, for selling goods without a license.

The first section of the statute under which the indictment was found is as follows: —

"Whoever shall deal in the selling of patent or other medicines, goods, wares, or merchandise, except books, charts, maps, and stationery, which are not the growth, produce, or manufacture of this State, by going from place to place to sell the same, is declared to be a peddler."

The other sections prohibit a person dealing as a peddler without license, and impose a penalty therefor, and prescribe the rate of charge for such license. No license is required for selling, "by going from place to place," the growth, produce, or manufacture of the State.

The Supreme Court, on appeal, affirmed the decision of the Circuit Court, on the ground that the statute applied solely to the internal commerce of the State, and made no discrimination against citizens of other States, but merely imposed a tax upon

a *calling* or a *profession*, and neither directly nor indirectly upon property.

For errors in this judgment the case is brought here.

Mr. James S. Botsford and *Mr. S. M. Smith* for the plaintiff in error.

The Supreme Court of Missouri erred in affirming the judgment of the Circuit Court of Henry County, and adjudging the statute of the State relating to peddlers and their licenses to be valid, and not in conflict with the Constitution of the United States.

The statute of a State, which declares that a person who deals in goods, wares, and merchandise not the growth, produce, or manufacture of such State, by going from place to place to sell them, is a peddler, and, as such, imposes a license tax upon him, while it imposes no such tax where the sale is made in the same manner of like articles grown, produced, or manufactured in such State, discriminates in favor of the latter against other States, is a regulation of commerce, and is contrary to the provisions of the Constitution of the United States. *Crow* v. *Missouri*, 14 Mo. 290; *State* v. *North & Scott*, 27 id. 464; 2 Story on the Constitution (4th ed.), sects. 1056–1076; *Corfield* v. *Coryell*, 4 Wash. C. C. 371; *Gibbons* v. *Ogden*, 9 Wheat. 1; *Brown* v. *Maryland*, 12 id. 419; *Almy* v. *California*, 24 How. 169; *Crandall* v. *Nevada*, 6 Wall. 35; *Woodruff* v. *Parham*, 8 id. 123; *Hinson* v. *Lott*, id. 148; *Ward* v. *Maryland*, 12 id. 418; *Railroad Co.* v. *Pennsylvania*, 15 id. 232; *Railroad Co.* v. *Richmond*, 19 id. 589.

The statute attempts to derive a revenue from imports, and, to be valid, must have the sanction of Congress.

The courts below, in holding that it merely imposed a tax on the calling or profession of the vendor, and not upon the thing sold, ignore the doctrine of *Brown* v. *Maryland*, 12 Wheat. 444, that "a tax on the occupation of an importer is in like manner a tax on importation."

Mr. John A. Hockaday, Attorney-General of Missouri, and *Mr. A. H. Buckner*, *contra*.

The statute in question does not provide a system of taxation which discriminates prejudicially against articles manufactured beyond the limits of the State, and it cannot to any extent have that effect. *Osborne* v. *Mobile*, 16 Wall. 479.

It merely defines the calling or occupation of peddler, requires a license therefor at certain specified rates, and renders him liable to a criminal prosecution if he pursues such calling or occupation without a license. The right of a State to tax its own citizens for the prosecution of any particular business or profession within the State has not been doubted. *Nathan* v. *Louisiana*, 8 How. 73; *Cummings* v. *Savannah*, R. M. Charlt. 26; *Roquet* v. *Wade*, 4 Ohio, 114; *Beal* v. *State*, 4 Blackf. 108; *Austin* v. *State*, 10 Mo. 593; *Simmons* v. *State*, 12 id. 268; 5 How. 504, 588; 7 id. 283; 55 Mo. 288; 8 Wall. 123.

Although the doctrine is clearly settled in this country, that the States may even regulate commerce, so long as Congress does not intervene by legislation (7 Pet. 221; 11 id. 102), the question does not arise in this case. The act does not impose a tax upon property, nor does it prevent, or seek to prevent, the importation of any kind of goods whatever; and neither imposes conditions upon, nor places impediments in the way of, a free interchange of commodities with other states or countries.

The cost of the license is not controlled by the value of the goods to be sold, but by the mode in which the business is done. The foot peddler pays less for his license than a wagon or steamboat peddler, although his sales may largely exceed theirs.

As it is entirely within the province of the State to license and tax such avocations as its legislature may deem proper, and as the statute in question does not interfere with inter-State commercial relations, it is constitutional and valid.

MR. JUSTICE FIELD delivered the opinion of the court.

This case comes before us on a writ of error to the Supreme Court of Missouri, and involves a consideration of the validity of a statute of that State, discriminating in favor of goods, wares, and merchandise which are the growth, product, or manufacture of the State, and against those which are the growth, product, or manufacture of other states or countries, in the conditions upon which their sale can be made by travelling dealers. The plaintiff in error was a dealer in sewing-machines which were manufactured without the State of Missouri, and went from place to place in the State selling them without a license for that purpose. For this offence he was indicted and convicted in one of

the circuit courts of the State, and was sentenced to pay a fine of fifty dollars, and to be committed until the same was paid. On appeal to the Supreme Court of the State, the judgment was affirmed.

The statute under which the conviction was had declares that whoever deals in the sale of goods, wares, or merchandise, except books, charts, maps, and stationery, which are not the growth, produce, or manufacture of the State, by going from place to place to sell the same, shall be deemed a peddler; and then enacts that no person shall deal as a peddler without a license, and prescribes the rates of charge for the licenses, these varying according to the manner in which the business is conducted, whether by the party carrying the goods himself on foot, or by the use of beasts of burden, or by carts or other land carriage, or by boats or other river vessels. Penalties are imposed for dealing without the license prescribed. No license is required for selling in a similar way, by going from place to place in the State, goods which are the growth, product, or manufacture of the State.

The license charge exacted is sought to be maintained as a tax upon a calling. It was held to be such a tax by the Supreme Court of the State; a calling, says the court, which is limited to the sale of merchandise not the growth or product of the State.

The general power of the State to impose taxes in the way of licenses upon all pursuits and occupations within its limits is admitted, but, like all other powers, must be exercised in subordination to the requirements of the Federal Constitution. Where the business or occupation consists in the sale of goods, the license tax required for its pursuit is in effect a tax upon the goods themselves. If such a tax be within the power of the State to levy, it matters not whether it be raised directly from the goods, or indirectly from them through the license to the dealer; but, if such tax conflict with any power vested in Congress by the Constitution of the United States, it will not be any the less invalid because enforced through the form of a personal license.

In the case of *Brown* v. *Maryland*, 12 Wheat. 425, 444, the question arose, whether an act of the legislature of Maryland,

requiring importers of foreign goods to pay the State a license tax before selling them in the form and condition in which they were imported, was valid and constitutional. It was contended that the tax was not imposed on the importation of foreign goods, but upon the trade and occupation of selling such goods by wholesale after they were imported. It was a tax, said the counsel, upon the profession or trade of the party when that trade was carried on within the State, and was laid upon the same principle with the usual taxes upon retailers or inn-keepers, or hawkers and peddlers, or upon any other trade exercised within the State. But the court in its decision replied, that it was impossible to conceal the fact that this mode of taxation was only varying the form without varying the substance; that a tax on the occupation of an importer was a tax on importation, and must add to the price of the article, and be paid by the consumer or by the importer himself in like manner as a direct duty on the article itself. Treating the exaction of the license tax from the importer as a tax on the goods imported, the court held that the act of Maryland was in conflict with the Constitution; with the clause prohibiting a State, without the consent of Congress, from laying any impost or duty on imports or exports; and with the clause investing Congress with the power to regulate commerce with foreign nations.

So, in like manner, the license tax exacted by the State of Missouri from dealers in goods which are not the product or manufacture of the State, before they can be sold from place to place within the State, must be regarded as a tax upon such goods themselves; and the question presented is, whether legislation thus discriminating against the products of other States in the conditions of their sale by a certain class of dealers is valid under the Constitution of the United States. It was contended in the State courts, and it is urged here, that this legislation violates that clause of the Constitution which declares that Congress shall have the power to regulate commerce with foreign nations and among the several States. The power to regulate conferred by that clause upon Congress is one without limitation; and to regulate commerce is to prescribe rules by which it shall be governed, — that is, the condi-

tions upon which it shall be conducted; to determine how far it shall be free and untrammelled, how far it shall be burdened by duties and imposts, and how far it shall be prohibited.

Commerce is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities between the citizens of our country and the citizens or subjects of other countries, and between the citizens of different States. The power to regulate it embraces all the instruments by which such commerce may be conducted. So far as some of these instruments are concerned, and some subjects which are local in their operation, it has been held that the States may provide regulations until Congress acts with reference to them; but where the subject to which the power applies is national in its character, or of such a nature as to admit of uniformity of regulation, the power is exclusive of all State authority.

It will not be denied that that portion of commerce with foreign countries and between the States which consists in the transportation and exchange of commodities is of national importance, and admits and requires uniformity of regulation. The very object of investing this power in the General Government was to insure this uniformity against discriminating State legislation. The depressed condition of commerce and the obstacles to its growth previous to the adoption of the Constitution, from the want of some single controlling authority, has been frequently referred to by this court in commenting upon the power in question. "It was regulated," says Chief Justice Marshall, in delivering the opinion in *Brown* v. *Maryland*, "by foreign nations, with a single view to their own interests; and our disunited efforts to counteract their restrictions were rendered impotent by want of combination. Congress, indeed, possessed the power of making treaties; but the inability of the Federal Government to enforce them became so apparent as to render that power in a great degree useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government.

It may be doubted whether any of the evils proceeding from the feebleness of the Federal Government contributed more to that great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by Congress." 12 Wheat. 446.

The power which insures uniformity of commercial regulation must cover the property which is transported as an article of commerce from hostile or interfering legislation, until it has mingled with and become a part of the general property of the country, and subjected like it to similar protection, and to no greater burdens. If, at any time before it has thus become incorporated into the mass of property of the state or nation, it can be subjected to any restrictions by State legislation, the object of investing the control in Congress may be entirely defeated. If Missouri can require a license tax for the sale by travelling dealers of goods which are the growth, product, or manufacture of other states or countries, it may require such license tax as a condition of their sale from ordinary merchants, and the amount of the tax will be a matter resting exclusively in its discretion.

The power of the State to exact a license tax of any amount being admitted, no authority would remain in the United States or in this court to control its action, however unreasonable or oppressive. Imposts operating as an absolute exclusion of the goods would be possible, and all the evils of discriminating State legislation, favorable to the interests of one State and injurious to the interests of other states and countries, which existed previous to the adoption of the Constitution, might follow, and the experience of the last fifteen years shows would follow, from the action of some of the States.

There is a difficulty, it is true, in all cases of this character, in drawing the line precisely where the commercial power of Congress ends and the power of the State begins. A similar difficulty was felt by this court, in *Brown* v. *Maryland*, in drawing the line of distinction between the restriction upon the power of the States to lay a duty on imports, and their acknowledged power to tax persons and property; but the court observed, that the two, though quite distinguishable when they do not approach each other, may yet, like the intervening

colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them; but that, as the distinction exists, it must be marked as the cases arise. And the court, after observing that it might be premature to state any rule as being universal in its application, held, that, when the importer had so acted upon the thing imported that it had become incorporated and mixed up with the mass of property in the country, it had lost its distinctive character as an import, and become subject to the taxing power of the State; but that, while remaining the property of the importer in his warehouse in the original form and package in which it was imported, the tax upon it was plainly a duty on imports prohibited by the Constitution.

Following the guarded language of the court in that case, we observe here, as was observed there, that it would be premature to state any rule which would be universal in its application to determine when the commercial power of the Federal Government over a commodity has ceased, and the power of the State has commenced. It is sufficient to hold now that the commercial power continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character. That power protects it, even after it has entered the State, from any burdens imposed by reason of its foreign origin. The act of Missouri encroaches upon this power in this respect, and is therefore, in our judgment, unconstitutional and void.

The fact that Congress has not seen fit to prescribe any specific rules to govern inter-State commerce does not affect the question. Its inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that inter-State commerce shall be free and untrammelled. As the main object of that commerce is the sale and exchange of commodities, the policy thus established would be defeated by discriminating legislation like that of Missouri.

The views here expressed are not only supported by the case of *Brown* v. *Maryland*, already cited, but also by the case of *Woodruff* v. *Parham*, 8 Wall. 123, and the case of the *State Freight Tax*, 15 Wall. 232. In the case of *Woodruff* v. *Parham*, Mr. Justice Miller, speaking for the court, after observing,

with respect to the law of Alabama then under consideration, that there was no attempt to discriminate injuriously against the products of other States or the rights of their citizens, and the case was not, therefore, an attempt to fetter commerce among the States, or to deprive the citizens of other States of any privilege or immunity, said, "But a law having such operation would, in our opinion, be an infringement of the provisions of the Constitution which relate to those subjects, and therefore void."

The judgment of the Supreme Court of the State of Missouri must be reversed, and the cause remanded, with directions to enter a judgment reversing the judgment of the Circuit Court, and directing that court to discharge the defendant from imprisonment, and suffer him to depart without day.

Western Union Telegraph Company *v.* Western and Atlantic Railroad Company.

1. An agreement between a telegraph company and the State of Georgia, sole owner of a railroad, which provides that the company shall put up and set apart on its poles along said railroad a telegraph wire for the exclusive use of the railroad, equip it with as many instruments, batteries, and other necessary fixtures, as may be required for use in the railroad stations, run the wire into all the offices along the line of road, and put the same in complete working order, fixes the terms upon which officers of the road may transmit and receive messages through the connecting lines of the company, recognizes the right of way of the company along the line of road, regulates the use of the wire, and the compensation for it, and binds the State to pay the cost of constructing the wire, and equipping the same at railroad stations not already supplied with instruments, batteries, and other necessary fixtures, does not constitute a sale of such wire, batteries, and other instruments to the State, but is merely a contract for her exclusive use thereof.
2. As the ownership of such wire and instruments is in the telegraph company, a lease of the railroad by the State confers upon her lessees only such rights as she acquired under her contract with the company.

Appeal from the Circuit Court of the United States for the Northern District of Georgia.

The State of Georgia, sole owner of the Western and Atlantic Railroad, desiring the use of a telegraph for the purposes of

the road along its line, an instrument of writing providing therefor, bearing date Aug. 18, 1870, signed by William Orton, president, on behalf of the Western Union Telegraph Company, and by Foster Blodgett, superintendent of the railroad, was approved by Rufus B. Bullock, governor, and countersigned by H. C. Carsen, secretary of the executive department.

The substance of this agreement was, that the company should put up and set apart on its poles already there, along said railroad, a telegraph line for the exclusive use of the railroad; equip it with as many instruments, batteries, and other necessary fixtures, as might be required for use in the railroad stations; run the wire into all the offices along the line of the road, and put the same in complete working order. Other provisions related to the terms on which the officers of the road might transmit and receive messages through the connecting lines of the company; to the right of way of the company along the line of the road; and to other matters regulating the use of the wire, and compensation for it. The sixth article bound the State to pay, as soon as it could be ascertained, the cost of constructing the wire, and of equipping it at railroad stations not already supplied with instruments, batteries, and other necessary fixtures. Shortly after the wires were set up, and the instruments put in working order, the governor of the State, under authority of an act of the legislature, granted, conveyed, and leased "the Western and Atlantic Railroad, which is the property of the State of Georgia, together with all its houses, workshops, dépôts, rolling-stock, and appurtenances of every character, for the full term of twenty years," to certain persons who became a body corporate by the name of "The Western and Atlantic Railroad Company."

The railroad company took possession of the road and its appurtenances under the lease, including the wire and batteries and instruments put on the road and in its offices by the telegraph company under the contract with the State; but, having this possession, refused to pay for the transmission of messages over connecting lines according to the terms of the contract, and claimed that it was not bound thereby, and that, in fact, the true construction of that agreement being that the State had bought and paid for the wire and instruments, and owned

them, it, as lessee of the State, had the right to control and use them without any liability to the telegraph company.

The telegraph company, in its bill of complaint, states the refusal of the railroad company to recognize its rights in any respect, while insisting on using the wire and apparatus, and withholding from the complainant any use of them in the offices and dépôts of the road; alleges that these considerations induced the complainant to treat as revoked and withdrawn all power and privilege on the part of the defendant to use said wire and apparatus, or to receive compensation therefor; and that the complainant, seeking to recover possession of them, had been hindered and obstructed by the defendant in so doing. The bill prays that the defendant be enjoined from using said wire, from hindering or obstructing the complainant in the use of it, or in severing it from all the offices of the defendant, and for such other and further relief as the nature of the case requires.

The railroad company, in its answer, denies that the contract between the telegraph company and the State is valid, being without authority of law; asserts that, if valid, it, as lessee of the railroad, is not bound by the terms thereof; and that, by the true construction of that contract, the State became the purchaser and owner of the wire and instruments, and that the company succeeded to this ownership without being bound by the other terms of the agreement.

The railroad company also filed a cross-bill, setting up this view of its rights, and praying an injunction against the telegraph company to restrain it from interfering with the use of the wire and apparatus so acquired from the State.

The District Court dismissed this cross-bill on demurrer, and on hearing the original bill of the complainant, the answer and evidence, decreed that the wire and instruments in question are the property of the State of Georgia, and are included in the lease to the railroad company; and that this company is not bound by the terms of the contract in other respects, unless adopted by it; and, therefore, dismissed the bill.

Mr. J. Hubley Ashton for the appellant.

The agreement between the State and the Western Union Telegraph Company neither constituted nor contemplated a

sale of the wire, but merely the right of the State to use it and its equipments for the purposes mentioned in such agreement, subject to all the terms, conditions, and obligations therein expressed. The scheme and objects of the contract, as clearly set forth in the recital, were "to provide necessary telegraph facilities" for the State, as proprietor and manager of the railroad; to settle the terms upon which the telegraph company should occupy the railroad "with the line or lines of telegraph *wires* belonging to" that company; and to define the business relations between it and the State.

No particular covenant of the State was intended to be the special consideration for any *one* covenant on the part of the company; but the consideration on each side was an *entirety*.

As part of this entirety of consideration for all that was stipulated to be done by the telegraph company for the benefit of the State, the latter agreed to pay, as soon as it could be ascertained, the cost of constructing and equipping the wire; not the *value* of the property as upon a sale to a purchaser, but its bare *cost* to the company.

Consequently, it was *not* a contract of "bargain and sale," by which the title to the wire and its equipments was transferred to the State.

It is indisputable that the instrument contains no *expressed* agreement on the part of the telegraph company to *sell*, or on the part of the State to *purchase*, any telegraph wire at any price: on the contrary, the company agreed to "set apart" on its line of poles a telegraph wire for the exclusive use of the State in the transmission of legitimate railroad messages — that is, messages on the business of such railroad — on and along the line of the road.

It is clear that the title to the property in question did not pass to the State under the contract; and she, therefore, had no power to lease it to the railroad company.

The transaction between the railroad company and the State, according to the version of it given in the answer of the former, purports to have been an assignment and lease of the general and absolute property in the wire and equipments for the term of twenty-one years, and not an assignment or lease of the *contract* or the State's restricted right of user; and, if this was

the transaction, there can be no doubt, upon well-settled principles of law, that it was absolutely tortious, and that the use of the property by the railroad company has been from the beginning a continuing trespass as against the Western Union Telegraph Company.

The act of the legislature of Georgia authorized the governor of the State to lease the Western and Atlantic Railroad, together "with all its houses, workshops, dépôts, rolling-stock, and *appurtenances* of every character," for the term of twenty-one years. Georgia Acts 1870, p. 55.

The lease executed in compliance with that act does not in terms purport to pass or transfer the *contract* of the State with the Western Union Telegraph Company. The claim of the railroad company is, that the intention was to pass the *title* of the property in reference to which the contract was made, as a piece of property owned by the State, and appurtenant to the road.

If it be conceded that the right or interest in the State, under the contract of 1870, amounted to a special property in the wire and equipments (as it did not, for there can be no special property without possession, which the railroad had not) which might have been assigned or leased by the State, nevertheless the State had no right to sell or lease the property of the telegraph company; and, if it had a special property in the wire, it thereby determined the contract with that company, and parted with its limited interest, and its lessee rendered itself liable to be dealt with as a trespasser by receiving and using the property under such a transaction. 1 Chit. on Cont. 534; Story on Bail., sect. 322; *McCombie* v. *Davis*, 6 East, 540; *Loeschman* v. *Machin*, 2 Stark. N. P. C. 311; *Cooper* v. *Willomatt*, 1 Com. Bench, 683; *Bryant* v. *Wardell*, 2 Exch. 482; *Fenn* v. *Bittleston*, 7 id. 157; *Farrant* v. *Thompson*, 5 B. & Ald. 529; *Emerson* v. *Fisk*, 6 Greenl. 206; *Croker* v. *Gullifer*, 44 Me. 491; *Hyde* v. *Noble*, 13 N. H. 499; *Stanley* v. *Gaylord*, 1 Cush. 542–551; *Galvin* v. *Bacon*, 2 Fairf. 30; *Austin* v. *Dey*, 46 N. Y. 502; *Ballard* v. *Burgett*, 40 id. 314; *Sanborn* v. *Colman*, 6 N. H. 15; Story on Bail., sect. 396.

But, if the lease of the railroad and its appurtenances is to be deemed a demise or assignment of the *contract* between the State and the telegraph company and the right of user exercisi-

ble by the former under that contract, it is equally clear, upon the averments in the answer, that the railroad company is not in the lawful control or use of the property, as it has announced its determination not to be bound by such contract. *Penn. R.R. Co.* v. *Sly*, 65 Penn. 209; *McMillan* v. *M. S. & N. J. R.R. Co.*, 16 Mich. 102; *Tomlinson* v. *Branch*, 15 Wall. 464; *L. & S. W. R.R. Co.* v. *S. E. Railway Co.*, 8 Exch. 604; *Fouldes* v. *Willoughby*, 8 Mees. & Wels. 549; Story on Bail., sect. 89; *Clark* v. *Gilbert*, 2 Bing. N. C. 343.

Mr. Benjamin H. Hill for the appellee.

The property in dispute is not owned by the Western Union Telegraph Company, but by the State of Georgia. It was purchased by the State, and paid for after the lease to the appellee. It stood upon the poles on the land of the State. She therefore had the exclusive dominion over and the use of it.

When the exclusive use of a thing is granted, the thing itself is by such terms conveyed.

"If the grant be of the uses of and dominion over land, it carries the land itself." 3 Wash. Real Prop. (ed. 1868), p. 333, * 622; Coke, Litt. lib. 1, cap. 1, of Fee-Simple; *Caldwell* v. *Fulton*, 31 Penn. 484.

The State was then operating the road, and the wire was set apart for her exclusive use; and there can be no escape from the conclusion that it was the property of the State. If this is not the proper construction, then there was no *mutuality* in the contract, and it was void.

If the contract has all the force it ever had against the State, then it is insisted that the telegraph company cannot sustain this action, because the railroad company is not bound for the contracts or torts of the State of Georgia prior to the date of the lease, unless it becomes so by contract.

Sect. 4 of the Lease Act (Acts of Georgia, 1870, p. 425) expressly provides that the railroad company "shall be liable for its contracts made after the execution of the lease, and for any cause of action to which it may become liable after said lease is executed.

It is clear, from all the sections of the act of 1870, that the State did not intend that her lessees should assume her obligations; and, in contracting to lease the road, they did not assume them.

It is also clear that the appellee is not in any way bound to the appellant by express contract, because it made none, and refused to be bound by that with the State. If the contract between the telegraph company and the State is a covenant at all, it is a personal covenant, and binding only on the makers thereof. *Taylor* v. *Owen*, 2 Blackf. 301.

Mr. Justice Miller, after stating the case as above, delivered the opinion of the court.

We differ with the District Court as to the construction of the instrument. We do not think that the State simply bought a wire and batteries and other instruments, and became absolute owners of them: on the contrary, we think that the contract was for the use of a wire and instruments of the telegraph company.

The language of the first covenant of the telegraph company is, that it agrees "to set apart on its line of poles along said railroad a telegraph wire for the exclusive use of said party of the second part." The further covenants are all consistent with this. The contract for the use of this wire in connection with the others, and for the use of one of the wires already there when this shall be disabled, the fact that it is placed upon the poles of the company already in use for two other wires, the agreements regulating the offices, and, in short, the whole frame of the contract, show that the wire, the poles, the instruments, were the property of the telegraph company, with exclusive use of *this* wire transferred to the railroad.

This view is perfectly consistent with the idea that the State should pay the cost and expense of the additional wire and instruments rendered necessary by this agreement for its exclusive use, which does not prove that any thing more than this right to exclusive use passed to the State.

If this be true, the railroad company, taking possession of this wire and instrument under claim of right from the State, must use it on the terms which bound the State, or not use it at all.

The ownership being in the telegraph company, the road could only have such use of it, lawfully, as it acquired from the State; and the right of the State to the use of it is governed by the terms of the agreement.

It is said that the contract between the State and the telegraph company is void, because the superintendent and the governor had no power to make it, and because it is oppressive and extortionate.

We do not decide whether this be so or not. Whenever the railroad company or the State shall cease to use the wire, shall abandon the contract and leave the instruments severely alone, and the complainant shall then seek to compel compliance with the contract, it will be time to decide that question; but so long as this company, by the use of the wire and the apparatus, gets the benefit of the contract, it must also abide by the terms in other respects.

We are embarrassed in this view of the subject by the unskilful character of the bill. The relief it seeks is the very last one would think of; namely, to enjoin the railroad company from the use of a wire and battery and instruments running along their line, and fixtures in their offices and dépôts, where they may remain until it be the pleasure of the complainant to take them away. The right to compensation for what the complainant has suffered by the failure of defendant, while using the wire, to comply with the covenants of the State, can be understood, and the right of defendant, when performing the covenants of the State, to use the wire, can be understood; the right to a rescission of the contract, if either party prayed therefor, can be understood: but this right which each claims, that it shall be let alone by the other to do as it pleases in regard to this wire, is very difficult to understand.

Complainant, in the petition, treats as revoked the power and privilege of defendant to use the wire and instruments. Is this an abandonment of the contract by complainant?

But there is in the bill a prayer for such other and general relief as the case may require. There is also the following stipulation after the pleadings are all in, which relieves us of much difficulty: —

"It is agreed by counsel, that if the use of the wire by the defendant is affected by the contract entered into between the complainant and the State (which contract is copied in the exhibit to the bill) in such manner as that the terms of said contract must be observed and complied with by defendant in order to retain the

right to such use, the case is one proper for reference to the master to take an account, unless the court should adjudge that there is no right in complainant to relief in equity."

Now, we are of opinion that the use of the wire by defendant *is* affected by the contract between complainant and the State, in such manner, that such use requires the defendant to comply with the terms of that contract.

We are also of opinion that to prevent multiplicity of suits, and to have an accounting, instead of bringing a suit on every specific violation of the covenants of the State, complainant has a right to relief in equity.

The decree of the Circuit Court is, therefore, reversed, with directions to refer the case to a master to state an account on the terms of the contract between the State and the telegraph company, as between the complainant and defendant, for the time defendant has used the wires, batteries, and equipments put up under that contract, and to render a decree for that amount.

MR. JUSTICE FIELD dissented.

FORSYTHE *v.* KIMBALL.

In the absence of fraud, accident, or mistake, the rule is the same in equity as at law, that parol evidence of an oral agreement alleged to have been made at the time of the drawing, making, or indorsing a bill or note, cannot be permitted to vary, qualify, or contradict, or to add to or subtract from, the absolute terms of the written contract.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The facts are stated in the opinion of the court.

Submitted on printed arguments by *Mr. W. C. Goudy* for the appellant, and by *Mr. John L. Thompson* for the appellee.

MR. JUSTICE SWAYNE delivered the opinion of the court.

The case made by the bill is as follows: —

The appellant, John Forsythe, negotiated a loan of $5,000 from the insurance company. He had four brothers. For $4,000 of the amount loaned, he and each of his brothers gave a separate note of $800. Ten notes of $200 each, signed by all the parties, were given for the interest, which was to be paid semi-annually, at the rate of ten per cent per annum. The notes all bore date on the 5th of January, 1869. Those for the principal were to be paid at the end of five years. At the same time, Robert H. Forsythe, one of the brothers, gave for the residue of the loan his note for $1,000, of the same date with the five notes of $800 each. He also then gave his ten notes of $50 each for the interest, which was at the same rate as that upon the notes of $800, and payable at the same times. The notes were all made payable to J. Y. Scammon, or order.

Four thousand dollars of the money loaned was invested in real estate, and the title taken to the five brothers who had executed the five notes of $800. They secured those notes and the ten interest notes by a mortgage on the premises. The $1,000 for which Robert H. Forsythe gave his notes was invested in land which was conveyed to him, and he secured his notes by a mortgage upon it. Scammon was an active officer of the insurance company. When the loan was negotiated and consummated, the appellant, as an inducement to the company to make it, assumed and promised by parol to pay all the notes above mentioned, both for principal and interest. Upon receiving the securities, Scammon indorsed and transferred them to the insurance company. The appellant insists that the $5,000 was lent by the company, and not by Scammon, and that the loan was to him, and in no part to the other parties who executed the notes. The appellant paid all the interest notes, amounting to $1,250, which fell due prior to the 9th of October, 1871. His brothers are irresponsible, and paid nothing. On the day last named the great Chicago fire occurred. He held fire-policies issued by the company upon buildings which were consumed. The company thus became indebted to him to the amount of $11,000. His losses were settled and adjusted at that sum. No part of it has been paid. On the 28th of April, 1873, his four brothers conveyed to him their rights and titles to the several mortgaged premises.

He seeks to have the amount due to him from the insurance company set off against all the notes, so far as shall be necessary to satisfy and extinguish the latter.

The answer of the assignee denies that the money in question was borrowed from the insurance company, and avers that the company bought the notes from Scammon for a valuable consideration.

The court decreed that the appellant was entitled to a set-off as claimed for the amount of his note of $800, and for his proportionate share of the several interest notes which he had executed. From this decree he appealed to this court.

Upon looking into the record, we find that no testimony was taken upon either side but that of the appellant, which was taken for himself.

In his deposition are the following questions and answers: —

"*Q.* Did you borrow any sum of money from the Mutual Security Insurance Company in the year 1869? If so, state when you borrowed the money, and the amount.

"*A.* I borrowed the sum of $5,000 from said company on or about the fifth day of January, 1869.

"*Q.* What officer of the Mutual Security Insurance Company besides Scammon did you have any conversation with in reference to this loan, if any?

"*A.* Scammon was the only officer of the company.

"*Q.* Do you know whether the money that was paid for this land originally was the money of the company, or the money of Scammon?

"*A.* Scammon paid over the money; but whether it was the company's money or Scammon's, that I don't know.

"*Q.* Why were the notes made payable to Scammon?

"*A.* Because the officers of the company wanted Scammon to take the responsibility of making the loan. He was managing the notes of the company; and he was willing to indorse the notes, knowing all the parties, and looking to me to be the responsible party.

"*Q.* Did you make any agreement or promise to pay these notes, or any part of them? and, if so, what agreement or promise did you make about it?

"*A.* I agreed with Scammon that I would pay the notes, and be responsible for them.

"*Q.* How much of them?

"*A.* All of them."

This is all the deposition contains which is material to the points in controversy between the parties.

The burden of proof rests upon the appellant. His own testimony is weak and inconclusive. The case fails upon the evidence.

It must fail also upon a well-settled principle of law.

If it were clearly proved, as alleged, that the entire sum of $5,000 was lent to the appellant, and that he expressly agreed at the time the securities were executed to pay back himself the entire amount at the end of five years, and to pay the interest in the mean time as stipulated, such proof would be wholly inconsistent with the contract of the parties as reduced to writing, and would, therefore, be unavailing either for or against him. "It is a firmly settled principle, that parol evidence of an oral agreement alleged to have been made at the time of the drawing, making, or indorsing of a bill or note, cannot be permitted to vary, qualify, or contradict, or add to or substract from, the absolute terms of the written contract." 2 Pars. on Bills & Notes, 501; *Specht* v. *Howard*, 16 Wall. 564. It is not claimed that there was either fraud, accident, or mistake touching the securities that were executed.

Under these circumstances, the rule is the same in equity as at law. 2 Story's Eq., sect. 1531.

It is neither alleged nor proved that the mortgage given by the appellant and his brothers was not sufficient to secure him against their shares of the notes executed jointly by him and them. Their shares of the premises have been conveyed to him.

The indemnity is, therefore, in his own hands.

All was given below to the appellant to which in any view of his case he can be deemed entitled.

The decree of the Circuit Court is affirmed.

DOW v. HUMBERT ET AL.

1. In a suit by a judgment creditor of the town of Waldwick against the supervisors of said town for refusing to place upon the tax-list thereof the amount of his judgments as provided by the statutes of Wisconsin, it appeared in evidence, that, since the institution of the suit, the defendants had so placed the only judgment proved in the case. *Held*, that the plaintiff was entitled to recover only nominal damages.

2. Where a judgment is described in the declaration as having been rendered in the Circuit Court for the *District* of Wisconsin, a judgment of the *Circuit* Court for the *Eastern* District of Wisconsin is not admissible in evidence under the plea of *nul tiel record*.

ERROR to the Circuit Court of the United States for the Western District of Wisconsin.

This was an action of tort brought against the defendants below, who were supervisors of the town of Waldwick, Wis., for neglect of duty in refusing to place upon the tax-list, as required by the statutes of Wisconsin, the amount of two judgments recovered by the plaintiff below against said town. Two questions arose in the case: —

First, Whether one of the judgments was properly described in the declaration.

Secondly, Whether the plaintiff was entitled only to recover nominal damages.

To the ruling of the court below on both these points the plaintiff below excepted.

The particulars of the case appear fully in the opinion of the court.

Mr. M. H. Carpenter and *Mr. E. Mariner* for the plaintiff.

No counsel appeared for the defendants.

MR. JUSTICE MILLER delivered the opinion of the court.

The defendants are sued by plaintiff for a failure to perform their duty as supervisors of the town of Waldwick, in the county of Iowa, Wis., in refusing to place upon the tax-list the amount of the judgments recovered by him against that town. By the statutes of Wisconsin, no execution can issue against towns on judgments rendered against them; but the amounts of such judgments are to be placed, by order of the supervisors, on the next tax-list for the annual assessment and collection of taxes; and the amount so levied and collected is to be paid to the judgment creditor, and to no other purpose.

The declaration avers due notice served on the supervisors of these judgments, and demands that they be so placed on the tax-list. The first judgment is described in the declaration as rendered in the Circuit Court for the District of Wisconsin, on

the 27th October, 1870, for $708.90; and the notice to the supervisors, set out in the declaration, uses the same language. The other judgment is described as rendered in the Circuit Court for the Western District of Wisconsin, June 10, 1871, for the sum of $1,531.56.

The answer of the defendants denies that there is any such judgment as that first described: and, as to the second judgment, they say, that, after it was rendered, the town of Waldwick was divided, and a part of it organized into the new town of Moscow; that thirty-seven per cent of the judgment was collectible from that town; and that it was not the duty of the defendants to levy the whole judgment on the property of the citizens of Waldwick.

On these issues the parties went to trial before a jury. In support of the issue as to the existence of the first judgment, plaintiffs introduced a copy of a record of a judgment between the same parties for the same amount, and of the same date as that described in the declaration, in the Circuit Court for the *Eastern* District of Wisconsin; to which defendants objected, because it varied from the judgment described in the declaration, and in the notice given to defendants to place it on the tax-list. The court sustained the objection, and this ruling is the ground of the first assignment of errors. The argument of counsel on this branch of the case rests mainly on the ground of the sufficiency of the notice to the supervisors. But the question before that is, whether such a judgment was admissible under the pleadings as they stood. There had been for many years a Circuit Court for the District of Wisconsin. Shortly before this judgment was rendered the district was divided into two districts, and the Circuit Courts were by the express language of the act of Congress called the Circuit Court for the Eastern District and the Circuit Court for the Western District respectively. There was no such court in existence at the date of the judgment offered as the Circuit Court for the *District of Wisconsin*, and the defendants were justified in pleading *nul tiel record* to a declaration founded on a judgment of that date in that court; and, on this issue as it stood when the record of a judgment in the Circuit Court for the Eastern District was offered, it did not

prove a judgment in the Circuit Court for the District of Wisconsin.

If plaintiff had asked leave to amend his declaration by inserting the word *eastern* before district in his first count, in describing his judgment, it would no doubt have been granted; and the question would then have arisen as to the sufficiency of notice to the supervisors, the notice containing the same mistake: but, on the plea of *nul tiel record* of a judgment of the Circuit Court for the District of Wisconsin, it is clear a judgment of the Circuit Court for the *Eastern* District of Wisconsin is not evidence of such a judgment.

Plaintiff having introduced a record of his judgment for $1,531.56 in the *western* district of Wisconsin, and notice and demand as to that to the supervisors, the defendants were permitted, as the court said, solely in mitigation of damages, to offer the record of the division of the township, and resolutions of the board, adopted after this suit was brought, directing the town-clerk to place this latter judgment, with its interest, on the tax-list in November, 1872; to which exceptions were taken, and this constitutes the ground of the second and third assignments of error. They will be considered in connection with the fourth and last assignment.

This being all the testimony, plaintiff requested the court to charge the jury that the plaintiff was entitled to recover of the defendants the amount of both these judgments, with interest from their date; and, this being refused, he asked the same instruction as to the second judgment, which was refused. Exceptions were taken to both these refusals, and to the following language in the charge which the court did deliver: —

"The jury are instructed upon the whole evidence in the case that the plaintiff is entitled to recover nominal damages from the defendants by reason of their failure to direct the levy of the tax in question. The plaintiff is not entitled to recover any more, because he has not shown that he has suffered any injury from the neglect or omission of the defendants to cause the clerk to put the judgment on the next tax-roll of the town."

The whole case turns upon the soundness of this latter instruction, representing as it does the converse of that which the

plaintiff asked, and which was refused; and the single question presented is, whether these officers, by the mere failure to place on the tax-list, when it was their duty to do so, the judgment recovered by plaintiff against the town, became thereby personally liable to plaintiff for the whole amount of said judgment, without producing any other evidence of loss or damage growing out of such failure.

It is not easy to see on what principle of justice the plaintiff can recover from defendants more than he has been injured by their misconduct.

If it were an action of *trespass*, there is much authority for saying that plaintiff would be limited to actual and compensatory damages, unless the act were accompanied with malice or other aggravating circumstances. How much more reasonable, that for a failure to perform an act of official duty, through mistake of what that duty is, that plaintiff should be limited in his recovery to his actual loss, injury, or damage!

Indeed, where such is the almost universal rule for measuring damages before a jury, there must be some special reason for a departure from it.

In the case before us, it must be presumed that the taxable property of Waldwick township remains to-day as it was when the levy should have been made; that a levy this year would as surely produce the money as if it had been made last year. The debt is not lost. The right to recover remains. The property liable to its satisfaction, and the means of subjecting it to that use, are still open to plaintiff. The only loss, then, is the delay, unless it may be the cost and expense of the unavailing effort to have the debt levied on the tax of the previous year; and this, if proved, could have been recovered under the instructions. For mere delay in paying a moneyed demand, the law has long recognized interest as the only damages to be recovered; and this interest is by law added to the assessment when placed on the tax-list. If A., by the highest class of express contract, say a promissory note or bond, promise to pay B. ten thousand dollars on a day fixed, and fail to do it, B. can only recover interest for the delay, though he may have depended on that money to save his homestead from sacrifice, and has lost it by reason of that failure. So a man buying real

estate may improve, adorn, and have it grow in his hand to a value ten times what he gave for it; but, if he loses all this by a failure of his title, he can only recover of the warrantor the sum which he gave for the land. These are apparent hardships. But wisdom and experience have shown that the danger of holding persons liable for these remote consequences of the violation of their contracts is far more serious in its consequences than occasional failure of full compensation by the application of the rule of interest for delay, and of the purchase-money in a suit on a warranty of title to lands.

"Damages," says Mr. Greenleaf, "are given as a compensation, recompense, or satisfaction to the plaintiff for any injury actually received by him from the defendant. They should be precisely commensurate with the injury, neither more nor less, and this whether it be to his person or estate." 2 Green. Ev., sect. 253. And without entering into the question whether this rule excludes what are called exemplary damages, which are not claimed here, we think this definition of the principle on which damages are awarded in actions at law a sound one.

The expense and cost of the vain effort to have the judgment placed on the tax-list; the loss of the debt, if it had been lost; any impairment of the efficiency of the tax levy, if such there had been; in short, any conceivable actual damage, — the court would have allowed if proved. But plaintiff, resting solely on his proposition that defendants by failing to make the levy had become his debtors for the amount of his judgment, asked for that, and would accept no less.

Counsel for plaintiff relies mainly on the class of decisions in which sheriffs have been held liable for the entire judgment for failing to perform their duty when an execution has been placed in their hands. The decisions on this subject are not harmonious; for while it has been generally held that on a failure to arrest the defendant on a *capias*, or levy an execution on his property, or to allow him to escape when held a prisoner, the amount of the debt is the presumptive measure of damages, it has been held in many courts that this may be rebutted or the damages reduced by showing that the prisoner has been rearrested, or that there is sufficient property subject to levy to satisfy the debt, or other matter, showing that plaintiff has not

sustained damages to the amount of the judgment. This whole subject is fully discussed and the authorities collated in Sedg. on Dam. 506–525; *Richardson* v. *Spence*, 6 Ohio, 13. But, without going into this disputed question, we are of opinion that those cases do not furnish the rule for the class to which this belongs.

The sheriff, under the law of England, was an officer of great dignity and power. He was also custodian of the jail in which all prisoners, whether for crime or for debt, were kept. He had authority in all cases when it was necessary to call out the whole power of the country to assist him in the performance of his duty. The principle of the sheriff's liability here asserted originated undoubtedly in cases of suit for an escape. Imprisonment of the debtor was then the chief if not the only mode of enforcing satisfaction of a judgment for money. It was a very simple, a very speedy, and a very effectual mode. The debtor being arrested on a *capias*, which was his first notice of the action, was held a prisoner, unless he could give bail, until the action was tried. If he gave bail, and judgment went against him, his bail must pay the debt, or he could be rearrested on a *capias ad satisfaciendum;* and, if he had given no bail, he was holden under this second writ until the money was paid. To permit him to escape was in effect to lose the debt; for his body had been taken in satisfaction of the judgment. Inasmuch as the object of keeping the defendant in prison was to compel the payment of the debt through his desire to be released, the plaintiff was entitled to have him in custody every hour until the debt was paid.

It is also to be considered, that, for every day's service in keeping the prisoner, the sheriff was entitled to compensation by law at the hands of the creditor. *Williams* v. *Mostyn*, 4 M. & W. 153; *Williams* v. *Griffith*, 3 Exch. 584; *Wylie* v. *Bird*, 4 Q. B. 566; 6 id. 468.

With the means in the hands of the sheriff for safe-keeping and rearrest, with the escape of the debtor almost equivalent to a loss of the debt, and with compensation paid him by plaintiff for his service, it is not surprising, that, when he negligently or intentionally permitted an escape, he should be held liable for the whole debt.

How very different the duties of the class of officers to which defendants belong, and the circumstances under which their duties are performed! There is no profit in the office itself. It is undertaken mainly from a sense of public duty; and, if there be any compensation at all, it is altogether disproportionate to the responsibility and trouble assumed. They are in no sense the agents of creditors, and receive no compensation from holders of judgments or other claims against the town for the collection and payment of their debts. There are no prisons under their control, no prisoners committed to their custody, no *posse comitatus* to be brought to their aid; but without reward, and without special process of a court to back them, they are expected to levy taxes on the reluctant community at whose hands they hold office. To hold that these humble but necessary public duties can only be undertaken at the hazard of personal liability for every judgment which they fail to levy and collect, whether through mistake, ignorance, inadvertence, or accident, as a sheriff is for an escape, without any proof that the judgment creditor has lost his debt, or that its value is in any manner impaired, is a doctrine too harsh to be enforced in any court where imprisonment for debt has been abolished.

The case of *The King on the Prosecution of Parbury* v. *The Bank of England*, Doug. 524, is cited as sustaining the plaintiff in error. It was an application for a *mandamus* to compel the governor and company of the Bank of England to transfer stock of the bank. The writ was denied on several grounds; among which, as a suggestion, Lord Mansfield said that "where an action will lie for complete satisfaction (as in that case), equivalent to a specific relief, and the right of the party applying is not clear, the court will not interpose the extraordinary remedy of a *mandamus*." He then shows that the *right* of the party in that case to have the transfer made was not clear. As this was not an action against the officers of the bank for damages, the remark that there was other relief is only incidental, and the point as to the measure of damages was not in issue.

A note to the principal case shows that an action of assumpsit was afterwards brought and compromised before final judgment. But on the whole case there is no discussion of the measure of

damages; and that question remained undecided. The case of *Clark* v. *Miller*, 54 N. Y. 528, decided very recently in the commission of appeals, appears to be more in point. It was an action against the supervisor of the town of Southport, Chemung County, for refusing to present to the board of supervisors of the county plaintiff's claim for damages as reassessed for laying out a road through his land.

The court, without much discussion of the principle, holds the defendant liable for the full amount of the reassessment, on the authority of *The Commercial Bank of Buffalo* v. *Kortright*, 22 Wend. 348.

That case was decided in the Court of Errors in 1839. It was an action for refusing to make a transfer of stock of the bank. The chancellor (Walworth) was of opinion that the extent of the damages was the depreciation of the stock, and not its full value; and of this opinion were four senators.

In the case of *The People* v. *The Supervisors of Richmond*, 28 N. Y. 112, also before the court in 20 id. 252, the relator had sued out a writ of *mandamus* requiring the supervisors to audit his claim for damages assessed for land taken as a highway. The supervisors made a return to the writ; which proving false, the Supreme Court rendered a judgment against them personally for the claim of $200, and for $84 damages for delay. The Court of Appeals said, that as the return of the supervisors was false, and the relator has been kept out of the money to which he was entitled from the town, the supervisors may be properly made liable in damages to the extent of the interest upon the $200, — to wit, $84; and they affirm the judgment as to the $84, and reverse it as to the $200, for which they order a peremptory writ of *mandamus*.

This answer accords precisely with our views; and we think it of equal authority with *Clark* v. *Miller*, above cited in 54 N. Y.

We are of opinion, that, in the absence of any proof of actual damage in this case, the defendants were liable to nominal damages and to costs, and no more.

If we are correct in this, the evidence of the division of the township, and that the supervisors had actually placed the judgment of plaintiff in the tax-list of the next year, were

properly received in mitigation; at all events, did him no harm, as he had proved no actual loss or injury.

The judgment of the Circuit Court is affirmed.

MR. JUSTICE CLIFFORD dissenting.

I dissent from the opinion and judgment of the Circuit Court in this case, because the instruction given by the Circuit Court to the jury was erroneous. Plaintiffs were entitled at least to the actual damages sustained by them in view of the whole evidence. Unless the plaintiffs in such a case may recover something more than nominal damages, the debt becomes valueless, as the same conduct by the supervisors may be repeated indefinitely, and the rule necessarily leads to practical repudiation.

UNITED STATES *v.* ALLISON.

The government printing-office not being a bureau or division of either of the executive departments, or mentioned in the joint resolution of Congress of Feb. 28, 1867, 14 Stat. 569, the employés thereof are not entitled to the additional compensation authorized by that resolution.

APPEAL from the Court of Claims.

This was a suit brought by Allison, an employé in the government printing-office, for additional compensation under the joint resolution of Congress approved Feb. 28, 1867 (14 Stat. 569).

The court below found, as a matter of fact, that the claimant was, on the day of the passage of the joint resolution, employed in that office, being paid by the day; and, as a matter of law, that the employés in the government printing-office, on the 28th of February, 1867, were employés in a bureau or division of the Department of the Interior, within the meaning of the joint resolution, and accordingly rendered judgment in favor of the claimant.

From this judgment the United States appealed to this court.

Mr. Solicitor-General Phillips for the appellant.

Mr. James A. Garfield and *Mr. Joseph Daniels, contra.*

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

Allison was an employé in the government printing-office from June 30, 1866, to June 30, 1867, and, in this suit, claims additional compensation for his services in consequence of the joint resolution of Feb. 28, 1867. 14 Stat. 569. He contends that the government printing-office was, during the fiscal year commencing July 1, 1866, a bureau in the Department of the Interior. If it was not, he substantially concedes that he is not entitled to the benefit of the resolution.

The Department of the Interior is one of the executive departments of the government. Rev. Stat., sect. 437. It was made so March 30, 1849. 9 Stat. 395. It is specially charged with the supervision of certain executive bureaus. Its present jurisdiction is defined in sect. 441, Rev. Stat. The government printing-office has never been placed under its jurisdiction by any express statute.

On the 26th August, 1852, Congress passed an act entitled "An act to provide for executing the public printing and establishing the prices thereof, and for other purposes." 10 Stat. 30. It is only necessary to say of this act, that it provided for the appointment of a superintendent of public printing, and that he was to give an official bond to be approved by the Secretary of the Interior. His duties were carefully defined; and he was made in fact, what his name implies, the superintendent of the public printing by the public printers. These public printers were, at that time, appointed by the two Houses of Congress, each House appointing its own.

On the 23d of June, 1860, a joint resolution was passed by Congress "in relation to the public printing." 12 Stat. 117. This resolution dispensed with the public printers appointed by the two Houses of Congress, and placed the whole subject of public printing in charge of the superintendent. In the language of the resolution (sect. 2), he was "to superintend all the printing and binding, the purchase of paper, . . . the purchase of other necessary materials and machinery, and the employment of proof-readers, compositors, pressmen, laborers, and other hands necessary to execute the orders of Congress and of the executive and judicial departments at the city of

Washington." To enable him more effectually to perform his duties, he was to appoint a foreman of printing and a foreman of binding. These foremen were required to report to him, and to furnish him their estimates of the amount and kind of material required. He furnished them their supplies, for which they accounted to him. He was also to report to Congress at the beginning of each session the number of hands employed, and the length of time each had been employed: and by sect. 9 it was made his duty to report to Congress "the exact condition of the public printing, binding, and engraving; the amount and cost of all such printing, binding, and engraving; the amount and cost of all paper purchased for the same; a statement of the several bids for materials; and such further information as may be within his knowledge in regard to all matters connected therewith." By sect. 3 he was required to render to the Secretary of the Treasury, quarterly, a full account of all purchases made by him, and of all printing and binding done in his office for each of the Houses of Congress and for each of the executive and judicial departments. The Secretary of the Treasury was also authorized to advance money to him on account, and he was to settle his accounts of receipts and disbursements in the manner then required of other disbursing officers. By sect. 9 it was made the duty of the superintendent, annually, to prepare and submit to the register of the treasury, in time to have the same embraced in the general estimates from that department, detailed estimates of salaries and other necessary expenses of the printing establishment for the second year. By sect. 7 the joint committee on printing for the two Houses of Congress was directed to fix upon a standard of paper for the printing of congressional documents. The superintendent was to advertise for proposals to furnish the government all paper necessary for the execution of the public printing, and to furnish samples of the standard paper to applicants therefor. The bids were to be opened by him in the presence of the secretary of the Senate and the clerk of the House of Representatives, and he was required to award the contract to the lowest bidder. All differences in opinion between the superintendent and the contractors were to be settled by the joint committee on printing of the two

Houses. Whenever engraving was required to be done to illustrate any document ordered to be printed by either House of Congress, the superintendent was to procure it to be done under the supervision of the committee on printing of the House making the order. Sect. 8. By sect. 7 it was provided, that, if the contractor for furnishing paper failed to make his deliveries, the superintendent might purchase for temporary supply in the open market, "by and with the approval of the Secretary of the Interior." He was also, by the same section, to render to the Secretary of the Interior, at the end of each fiscal year, an account of all paper received from contractors, and of all paper used for the purposes of the government under that act; and also the amount of each class consumed in the printing establishment, and in what works the same were used. Defaults by contractors in furnishing paper under their contracts were to be reported by the superintendent, with a full statement of all the facts, to the solicitor of the treasury for prosecution.

The commissions of all officers under the direction or control of the Secretary of the Interior must be made out and recorded in the Department of the Interior, and the seal of the department must be affixed thereto. 10 Stat. 297, sect. 3. The court below has found as a fact, that "in 1867 the commission of the superintendent of public printing was made out and recorded in the Department of the Interior, and the seal of the department affixed thereto, pursuant to the provisions of" this act. It nowhere appears that any act of Congress expressly required this to be done; neither does it appear at what time in the year 1867 this commission was issued or recorded.

On the 22d February, 1867, Congress passed an act entitled "An act providing for the election of the congressional printer." By this act, the Senate was to elect some competent person "to take charge of and manage the government printing-office." He was given the same powers as the superintendent of public printing. From and after the election of the congressional printer, the office of superintendent of public printing was abolished. 14 Stat. 397. The Senate elected a congressional printer in pursuance of this act, Feb. 26; but he did not take possession of his office until March 1, and the superintendent

continued to act until that time. The superintendent was acting on the 28th February, when the resolution under which Allison claims was passed.

In *Manning's Case*, 13 Wall. 578, it appeared that the guards of the jail in the District of Columbia were selected by the warden, but that their compensation was fixed and paid by the Secretary of the Interior. It also appeared that the whole subject of the jail was under the supervision of the secretary, to whom the warden was required to report. Under these circumstances, we held that the office of the warden of the jail was a bureau or division of the Department of the Interior.

This is as far as any case has yet gone. The Secretary of the Interior has no control whatever over the employment of men by the superintendent of public printing. He cannot fix their wages or supervise the action of the superintendent in that particular. He does not pay them, and has no control whatever of the funds out of which they are paid. He may pay the superintendent for printing done upon the order of his department; but the superintendent disburses without any accountability to him. In short, the superintendent seems to have a department of his own, in which he is in a sense supreme. Certainly he is not under the control of any one of the executive departments. Apparently he is more responsible to Congress than to any other authority. The Secretary of the Interior keeps and approves his bond. The same secretary must, under some circumstances, approve his purchases of paper in open market. He sends to that department also his accounts of the receipts and disbursements of paper. The joint committee on printing in the two Houses of Congress settle all disputes between him and his contractors for the delivery of paper. He reports to Congress in respect to his employés, and to the Secretary of the Treasury in respect to his receipts and disbursements. From that department also he draws his money upon proper requisitions. He is under the direction of the committees of each House of Congress in respect to engraving, and he goes to the Secretary of the Treasury with his estimates.

In our opinion, his employés, as they are not specially enumerated, are not included in the resolution of Feb. 28, 1867; and, on that account, this claim cannot be maintained.

The view we have taken of this case makes it unnecessary to consider the effect of the election of a congressional printer on the 26th February, 1867.

The judgment of the Court of Claims is reversed, and the cause remanded, with instructions to dismiss the petition.

HOOVER, ASSIGNEE, *v.* WISE ET AL.

An account or money demand having been delivered by its owners to a collection agency with instructions to collect the debt, that agency transmitted the claim to an attorney, who, knowing the insolvency of the debtor, persuaded him to confess judgment. The money collected was transmitted to the collection agency, but never reached the creditors. Proceedings in bankruptcy were instituted against the debtor within four months after such confession, and were prosecuted to a decree. *Held*, that as the attorney was the agent of the collection agency which employed him, and not of the creditors, his knowledge of the insolvency of the debtor was not chargeable to them in such sense as to render them liable to the assignee in bankruptcy for the money collected on the judgment. *Quære*, would they have been so liable had the money reached their hands?

ERROR to the Supreme Court of the State of New York.

The facts are stated in the opinion of the court.

Submitted on printed arguments by *Mr. J. H. B. Latrobe* for the plaintiff in error, and *Mr. W. W. Boyce*, *contra*.

MR. JUSTICE HUNT delivered the opinion of the court.

This action is brought by an assignee in bankruptcy to recover back a sum of money collected from the bankrupt after the occurrence of several acts of bankruptcy.

Under the practice of the State of New York the case was referred to a referee, upon whose report judgment was entered at the special term in favor of the plaintiff. From this judgment an appeal was taken by the defendants to the general term.

Upon the hearing at the general term this judgment was reversed, and a new trial was ordered.

When a judgment is reversed, and a new trial ordered, two modes of proceeding are open to the defeated party in the practice of the State of New York. He can accept the terms of

the order, and take a new trial in the court below. If he supposes that he can make a better case upon the facts than is contained in the report of the referee, this will be his proceeding; if he can make no improvement in this respect, or if he is satisfied to risk his case upon the facts as found, he may take an appeal to the Court of Appeals from the order granting a new trial. To make this appeal effectual, his notice of appeal must contain "a consent on the part of the appellant, that, if the order appealed from be affirmed, judgment absolute shall be rendered against him." Code, sect. 11. The order for a new trial thus becomes a final judgment in the case.

The latter course was adopted in the present instance. The plaintiff appealed to the Court of Appeals, giving the stipulation required for that purpose. The Court of Appeals affirmed the judgment of the general term, and remitted the record to the Supreme Court, that the judgment might be there entered and enforced. From this judgment, entered upon that *remittitur*, the present writ of error is brought.

It appears from the record that an account or money demand was delivered by its owners to Archer & Co., a collecting agency in the city of New York, and received by them, with instructions to collect the debt, and with no other instructions; that this agency transmitted the claim to McLennan & Archbold, a firm of practising lawyers in Nebraska City. Several acts of bankruptcy had been committed by Oppenheimer when Mr. McLennan persuaded him to confess judgment for the debt thus sent to him. Proceedings in bankruptcy were instituted against Oppenheimer within four months after such confession, and were prosecuted to a decree of bankruptcy. At the time of receiving the confession McLennan was well aware of the insolvency of Oppenheimer, and that the confession was taken in violation of the provisions of the Bankrupt Act.

The money collected was remitted to the collection agents in New York from whom he received the claim, but never paid by them to Wise & Greenbaum, the creditors.

When the debt in question was delivered to the collection agency in New York, it was so delivered, as testified by one of its owners, "for collection." "Archer & Co.," he says, "were collection agents in New York. I gave them no directions

except to try their best to collect it. They told me they would send it out (to Nebraska). I gave no other instructions." "The business of Ledyard, Archer, & Co. (he says), was to take claims for collection in different parts of the country, and, if necessary, have them sued."

Mr. Archer, of the collection firm, testifies that he received the claim for collection; that he told the defendants, if sent on at once, he thought it could be collected; that the account was verified by one of the defendants, and sent by the witness to Mr. McLennan, a lawyer, at Nebraska City; that he afterwards told the defendants the account had been put in judgment, and that he hoped to make the money, or the greater part of it. When he made this communication he had McLennan's letter in his hand, and communicated it to the defendants. He further testified that the money had been received by him from McLennan, but had never been paid over to Wise & Co.

The referee held that the knowledge of the condition of the bankrupt by the attorneys residing in Nebraska, who took the confession of judgment, was the knowledge of the creditors in New York. The Supreme Court and the Court of Appeals adjudged otherwise, holding them to be the agents of Archer & Co., and not of Wise & Greenbaum, the creditors. It is upon this point of difference that the case is now presented for decision.

The general doctrine, that the knowledge of an agent is the knowledge of the principal, cannot be doubted. *Bk.* v. *Davis*, 2 Hill, 451; *Ingalls* v. *Morgan*, 10 N. Y. 178; *Fulton Bk.* v. *N. Y. & S.*, 4 Paige, 127.

It must, however, be knowledge acquired in the transaction of the business of his principal, or knowledge acquired in a prior transaction then present to his mind, and which could properly be communicated to his principal. *The Distilled Spirits*, 11 Wall. 356; *Weeser* v. *Morgan*, 10 N. Y. 178.

Neither can it be doubted, that, where an agent has power to employ a sub-agent, the acts of the sub-agent, or notice given to him in the transaction of the business, have the same effect as if done or received by the principal. Story on Ag., sects. 452, 454; *Storrs* v. *City of Utica*, 17 N. Y. 104; *Boyd* v. *Vandenberg*, 1 Barb. Ch. 273; *Rourke* v. *Story*, 4 E. D. Smith, 54; *Lincoln* v. *Battle*, 6 Wend. 475.

It is no answer to this liability to say that the act done by the agent was of a fraudulent character, and that the principal did not authorize the commission of a fraud. For a fraud committed by a partner or an agent the principal is not liable criminally; but he is liable in a civil suit if the fraud be committed in the transaction of the very business in which the agent was appointed to act. Story on Ag., sects. 452–54; *Griswold* v. *Haven*, 25 N. Y. 600, 602; 3 Ch. Com. L. 209; *N. R. Bk.* v. *Aymar*, 3 Hill, 262; *Davis* v. *Bemis*, 40 N. Y. 453, n.; *Attorney-General* v. *Sidden*, 1 Cromp. & Jer. 219.

Upon these general principles we find no difficulty. But the real question still remains: Was McLennan of Nebraska the agent and attorney of Wise & Company, the owners of the debt? or were Archer & Co., the collection agents, his principals? and was it to them only, and not to Wise & Co., that he stood in the relation of agent and attorney?

The evidence was uncontradicted in every particular. It became, therefore, as stated in the opinion of the Court of Appeals, a question of law, whether the evidence sustained the findings of the referee.

The rule of law is undoubted, that for the acts of a sub-agent the principal is liable, but that for the acts of the agent of an intermediate independent employer he is not liable. It is difficult to lay down a precise rule which will define the distinctions arising in such cases. The application of the rule is full of embarrassment. For a collection of the cases and illustrations of the doctrine, reference may be had to Story on Agency, sect. 454 and following.

Without attempting to harmonize or to classify the conflicting authorities, we think the case before us falls within a particular range of decisions, in which the preponderance is undoubted.

Among these are the following: —

In Reeves v. *The State Bank of Ohio*, 8 Ohio Stat. 465, the case was this: Reeves & Co. deposited for collection, in the Commercial Bank of Toledo, their draft for $500 on Buckingham & Co. of New York. The draft was forwarded to the American Exchange Bank in New York; and on the 21st of November, 1854, it was paid, and the amount credited to the

Commercial Bank. On the 27th of the same month the Commercial Bank became insolvent, and its assets passed into the possession of the State Bank. Reeves & Co. sued the State Bank as the representative of the Commercial Bank, alleging that the latter bank was their agent, and that the money collected in New York for the latter bank on their draft belonged to them. In an elaborate and exhaustive opinion, in which all the cases, English and American, were reviewed, the Supreme Court of Ohio held, among other things, — 1. That the Commercial Bank was responsible to Reeves & Co. for the conduct of the New York bank, and was liable to them for the amount of the draft immediately on its collection in New York. 2. That the New York bank was the agent of the Commercial Bank, and not the sub-agent of Reeves & Co. The action was sustained.

In *Mackay* v. *Ramsay*, 9 Clark & Fin. 818, "M. employed R. & Co., bankers in Edinburgh, to obtain for him payment of a bill drawn on a person resident at Calcutta. R. & Co. accepted the employment, and wrote promising to credit M. with the money when received. R. & Co. transmitted the bill, in the usual course of business, to C. & Co. of London; and by them it was forwarded to India, where it was duly paid. R. & Co. wrote to M., announcing the fact of its payment, but never actually credited him in their books with the amount. The house in India having failed, it was held that R. & Co. were agents of M. to obtain payment of the bill; that, payment having been actually made, they became *ipso facto* liable to him for the amount received; and that he could not be called upon to sustain any loss from the conduct of the sub-agents, as between whom and himself no privity existed." "To solve the question," says Lord Cottenham, "it is not necessary to go deeper than to refer to the maxim, *Qui facit per alium, facit per se.* R. & Co. agreed, for a consideration, to apply for payment of the bill: they necessarily employed agents for this purpose, who received the amount. Their receipt was in law a receipt by them, and subjected them to all the consequences. The appellant with whom they so agreed cannot have any thing to do with those whom they so employed, or with the state of the account between different parties engaged in this agency."

The banker thus receiving the draft from its owner was held liable for the acts of the person employed by him, although free from negligence or fraud. Cited 8 Ohio, *supra*, 481.

In 3 Seld. 459, *The Montgomery Co. Bank* v. *The Albany City Bank* and *Bank of the State of New York*, the former bank sent to the Albany City Bank, for collection, a draft for $1,800, payable thirty days after date. The Albany bank transmitted the same for collection to its correspondent, the Bank of the State of New York, in the city of New York, who neglected to present the same for payment on its maturity, by means of which negligence the amount thereof was lost. The Court of Appeals of the State of New York held that the Albany bank was the agent of the Montgomery bank; that the bank in New York was the agent of the Albany bank, and not of the Montgomery bank; and that the Albany bank was liable to the Montgomery bank for the neglect of its New York correspondent. To this many cases are cited. The recovery below against the Albany bank was affirmed, and the judgment against the New York bank was reversed.

To the same effect is *The Com. Bank of Penn.* v. *The Union Bank of New York*, 1 Kern. 203, and *Allen* v. *Merchants' Bank*, 22 Wend. 215.

These cases show that where a bank, as a collection agency, receives a note for the purposes of collection, that its position is that of an independent contractor, and that the instruments employed by such bank in the business contemplated are its agents, and not the sub-agents of the owner of the note. It is not perceived that it can make any difference that such collection agency is composed of individuals, instead of being an incorporation. These authorities go far towards establishing the position that Archer & Co., in the case before us, were independent contractors, and that the parties employed by them were their agents only, and not the agents of Wise & Co., in such manner that Wise & Co. are responsible for their negligence, or chargeable with their knowledge. There are, doubtless, cases to be found holding to the contrary of these views; but the principle they decide is nevertheless well established.

Cases, no doubt, may also be found where actions have been sustained by the creditor against the last agent, or where he is

charged with his acts, in which the point before us was not raised or brought to the notice of the court. Such cases are not authority on the point. Nor do we think any great difficulty arises from the case of *Wilson* v. *Smith*, 3 How. 770. That decision is based upon the case of *Commonwealth Bank* v. *Bank of New England*, 1 How. 234, which is the only case referred to in the opinion, and in which case the question was not raised. The question there was not of privity, but of the right to retain under the circumstances stated. Again: in that case it was held, from the course of dealings between the banks, that it was fairly to be inferred that it was understood between them that the collections should be held subject to a settlement of accounts.

There is, however, another class of cases still more to the point.

In *Bradstreet* v. *Everson*, 72 Penn. St. 124, the case was this: The defendants were a commercial agency in Pittsburg, with agents throughout the United States, for the collection of commercial paper. The plaintiffs delivered to them, for collection, four drafts, payable in Memphis, Tenn. They sent them to Mr. Wood, their agent in Memphis, who obtained the money upon them, and, becoming embarrassed, failed to remit. On being called upon for the money, the defendants attempted to excuse themselves, on the ground that they followed the instructions of the plaintiffs, and were their agents merely, reporting from time to time; that Wood, who received the money, was not their agent; that he was a reputable man; and that they had never received the money from him.

Among other points, they insisted upon the following: viz., If the plaintiffs placed the acceptances in the defendants' hands for collection, and knew that their personal attention and direct service in such collection would not, in the usual course of business, be given to it at Memphis, and that the employment of an attorney to attend to it at Memphis was necessary, or the proper and usual course of doing such business, then the plaintiffs thereby made either such person or defendants their agent therein, with power to employ an attorney or sub-agent therein at Memphis; and their immediate agent under such authority would not be responsible for any default of

such sub-agent, if selected with reasonable care and diligence. And again they insisted, If the plaintiffs gave defendants at Pittsburg acceptances to collect at Memphis, they thereby constituted defendants their agents therein; and such agents are not responsible for any loss so long as they have used the usual diligence, and conducted themselves according to the usual course of doing such business. The questions now before us were thus directly presented. In a careful opinion delivered by Mr. Justice Agnew, citing many authorities, these propositions are overruled. The court hold that the receipt for collection imported an undertaking by the collecting agent himself to collect; not merely that he receives it for transmission to another for collection, for whose negligence he is not to be responsible. He is, therefore, liable by the very terms of his receipt for the negligence of the distant attorney who is his agent; and he cannot shift the responsibility from himself upon his client.

Lewis & Wallace v. *Peck & Clark*, 10 Ala. 142, and *Cobb* v. *Beake*, 6 Ad. & Ell. 930, are to the same purport. The last-named case is especially full and explicit.

We are of the opinion that these authorities fix the rule in the class of cases we are now considering; to wit, that of attorneys employed, not by the creditor, but by a collection agent who undertakes the collection of the debt. They establish that such attorney is the agent of the collecting agent, and not of the creditor who employed that agent. We concur, therefore, in the conclusion reached by the Court of Appeals of the State of New York, that McLennan was not the agent of Wise & Greenbaum, the New York creditors, in such a sense that his knowledge of the bankrupt condition of Oppenheimer is chargeable to them. Whether a different conclusion would have been reached if the money had come to the hands of Wise & Greenbaum we are not called upon to consider.

The judgment is affirmed.

MR. JUSTICE MILLER, with whom concurred MR. JUSTICE CLIFFORD and MR. JUSTICE BRADLEY, dissenting.

I feel constrained to express my dissent to the opinion of the court just delivered. Wise & Greenbaum were the *owners* of

the notes in this case. The judgment, which was undoubtedly a preference within the meaning of the Bankrupt Law, was taken in their name, and for their use and benefit. The attorney who procured the bankrupt to confess judgment acted for them, and was compelled to use their name. If the notes had been sent by them directly to McLennan, the attorney, it is conceded that they would have been liable in this action. I am at a loss to see how their liability is changed by the fact that the notes were sent to him through a commercial or collecting agency. This agency had no interest in the notes; was not liable to the attorney for his fees, nor to the bankrupt for costs, if an unsuccessful suit had been brought. The notes were not indorsed to this agency, nor could it in any manner have prevented Wise & Co. from controlling all the proceedings of the attorney for collecting the money.

The numerous cases cited from various courts of the relations between banks acting as collectors of money, among themselves and with others, stand on a different basis.

In all such cases, the note or bill is either indorsed to a bank, or made payable to it. The bank sues, if necessary, in its own name. It passes the amount usually to the deposit account of the person from whom received originally, and the account is so passed as between corresponding banks.

It is from this course of dealing that the series of decisions referred to in the opinion have been made.

So, also, there are numerous cases in which the first agent of a note, or claim-owner, may have acquired vested rights, as for fees or advances, or other considerations, which, as between themselves, authorized the first agent to control the debt.

But these cases differ very widely from the case before us, in which there is no evidence that the collection agency had a particle of interest, or any right to control the proceedings for collection adversely to the owner of the notes.

The effect of the decision is, that a non-resident creditor, by sending his claim to a lawyer through some indirect agency, may secure all the advantages of priority and preference which the attorney can obtain of the debtor, well knowing his insolvency, without any responsibility under the Bankrupt Law.

Very few creditors, when this becomes well known, will fail to act on the politic suggestion.

UNITED STATES *v.* ASHFIELD.

The salary of watchmen on the public grounds in the city of Washington, which are under the charge of the chief engineer of the army, was fixed at $720 *per annum* by the act approved March 3, 1869 (15 Stat. 283).

APPEAL from the Court of Claims.

The facts are stated in the opinion of the court.

Mr. Assistant Attorney-General Edwin B. Smith and *Mr. John S. Blair* for the United States, and *Mr. J. M. Carlisle* and *Mr. J. D. McPherson* for the appellee.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

Ashfield was employed as a watchman in reservation No. 2, part of the public grounds in Washington, from July 1, 1869, until April 12, 1870. He has been paid for his services at the rate of $720 a year. He claims compensation at the rate of $900 a year; and this suit is brought to recover the difference between what he has received and what he claims.

The fifth section of the "Act making appropriations for sundry civil expenses of the government for the year ending June 30, 1867, and for other purposes," passed July 28, 1866 (14 Stat. 321), provided "that each watchman in the public buildings and grounds under the commissioner of public buildings, whose pay is less than $1,000 a year, shall, from the first day of July, 1866, receive a compensation of $900 per annum." The claimant insists that this provision had not been repealed when he performed his services, commencing July 1, 1869; and that it fixes the rate of his compensation after that time. It is conceded that there was not, prior to the Appropriation Act for the year ending June 30, 1870, any express change of this provision. The act making appropriations for the year ending June 30, 1867, provided "for compensation of two watchmen, in reservation No. 2, $1,200." 14 Stat. 206. At the next session there was included in the deficiency bill, under the head of the "Department of the Interior," an appropriation of the further sum of $2,000, "to enable the commissioner of public buildings to pay to the watchmen mentioned in the fifth section

of the act . . . the difference between their pay as fixed prior to the passage of that act and the allowance made by said section." 14 Stat. 374. In the Appropriation Act for the year ending June 30, 1868, $4,500 was appropriated "for the compensation of five watchmen in reservation No. 2" (14 Stat. 456); and in that for the year ending June 30, 1869, $5,000 for the same purpose. 15 Stat. 96. The claimant received for his services during the last of these years $1,000. There was no other provision for this increased compensation than such as may be inferred from the increase of appropriation for the service. He does not now seek to have his compensation regulated by this act. In his petition he only asks to be paid in accordance with the act of 1866, and at the rate of $900 a year.

In the "Act making appropriations for the legislative, executive, and judicial expenses of the government for the year ending June 30, 1870," under the head of "Public Buildings and Public Grounds," $3,000 was appropriated "for compensation of watchmen in reservation No. 2." 15 Stat. 286. There is no designation of the number to be employed. At the end of the first paragraph, under the head of "Department of State," after certain appropriations, a proviso is inserted in the following words: "Provided that the pay of any messenger in either of the departments, executive or judicial, of the government, shall be $840 per annum, and no more; . . . and the pay of all laborers and watchmen . . . employed as afore stated shall be $720 per annum, and no more." P. 287. And at the end of the appropriations, under the head of the "Department of Agriculture," these words are found: "And this act shall not be so construed as to reduce the compensation of any employé of the government below the amount allowed in the last or present appropriation bill." P. 298.

If five watchmen should be employed for the year commencing July 1, 1869, the appropriation actually made would give them compensation only at the rate of $600 a year, if equally divided between them. The findings of the Court of Claims do not show how many were employed; but in the deficiency bill of April 20, 1870 (16 Stat. 90), $600 was appropriated "to pay five watchmen, employed in reservation No. 2, $120

each, in order to make their entire pay for the current year $720 each." Thus it appears that five watchmen were actually employed in these grounds, and that the appropriation as originally made left a deficiency for their compensation at the rate of $720.

The office of "commissioner of public buildings" was created by the act of April 29, 1816. 3 Stat. 324, sect. 2. The commissioner was, for certain purposes, placed under the supervision of the President. On the 3d March, 1849, the Department of the Interior was established (9 Stat. 395), and the supervisory powers of the President over the commissioner were transferred to the secretary of that department. Sect. 8. In the Appropriation Act of Aug. 4, 1854 (10 Stat. 573, sect. 15), it was made the duty of the commissioner to report his operations annually to the Secretary of the Interior, and to submit to the same officer his estimates for approval and transmission to Congress with the annual message of the President. On the 2d March, 1867, the office of commissioner of public buildings was abolished, and its duties transferred to the chief engineer of the army. 14 Stat. 466, sect. 2.

Under the ruling of this court in *Manning's Case*, 13 Wall. 579, the office of commissioner of public buildings, being under the supervision of the Department of the Interior, was a bureau or division of that department. That was one of the executive departments of the government. The chief engineer of the army performs the duties which belonged to the commissioner. He is under the supervision of the Department of War, which, by the act of March 30, 1867, was charged with the direction of the expenditure of all moneys appropriated for the public works of the district. 15 Stat. 12. We are, therefore, clearly of the opinion that Ashfield was a watchman employed in one of the executive departments of the government. For this reason, he comes within the operation of the proviso of the act of 1869 which has been stated. It makes no difference that the proviso is inserted in that part of the act which relates to appropriations for the Department of State. It is general in its language, and applies to watchmen in each of the several executive and judicial departments.

Neither do we think it affects the case, that at the head of

the act, and after the enacting clause, the word "LEGISLATIVE" appears. The act is one making appropriations for the legislative, executive, and judicial departments; but there is no attempt to assign the particular subject of appropriation to any one of these several departments. The appropriation is made for the purpose specified, and the laws organizing the several departments assign it to the one to which it properly belongs. If the theory on which the argument proceeds is correct, then all the appropriations made by the act are for the legislative department; for there is nothing to separate the executive and judicial departments from the legislative, any more than there is the public grounds. The different subdivisions of the section are intended to classify the appropriations, not to designate the department to which they belong.

The compensation of the watchmen in reservation No. 2 was fixed, therefore, for the year ending June 30, 1870, at $720, unless the proviso which so declares is overcome by the subsequent clause declaring that nothing in the act should be so construed as to reduce the compensation of any employé below the amount allowed in the last or present appropriation bill. As has been seen, the last previous appropriation bill did not in terms allow or fix any special rate of compensation for this service. On that account, the claimant in this case seeks to avail himself of the act of 1866. But that is not one of the appropriation bills referred to in this saving clause. We are left, then, to the act of 1869 alone; and that fixes the rate at $720. The clause relied upon was undoubtedly intended to provide for cases where the appropriation made was not sufficient to pay in full at the rate of compensation fixed.

There is nothing in the record sent here by the Court of Claims to show that the United States presented any counterclaim before the case was heard and decided. The addition to the record which has been made fails to show at what time the counterclaim was presented to the court below, or that it was ever filed in the cause.

The judgment is reversed, and the cause remanded with instructions to dismiss the petition.

UNITED STATES *v.* CORLISS STEAM-ENGINE COMPANY.

1. Where the Secretary of the Navy possesses the power, under the legislation of Congress and the orders of the President, to enter into contracts for work connected with the construction, armament, or equipment of vessels of war, he can suspend the work contracted for when from any cause the public interest may so require; and, where such suspension is ordered, he is authorized to settle with the contractor upon the compensation to be paid for the partial performance of the contracts.
2. When a settlement in such a case is made upon a full knowledge of all the facts, without concealment, misrepresentation, or fraud, it is equally binding upon the government and the contractor.

THE facts upon which the decision of the court rests are set forth in its opinion.

Submitted on printed arguments by *Mr. Solicitor-General Phillips* for the United States, and *Mr. Joseph Casey* for the appellees.

MR. JUSTICE FIELD delivered the opinion of the court.

This case comes before us on appeal from the Court of Claims, and involves a consideration of the validity and binding character of a settlement, made between the Secretary of the Navy and the claimant, for work performed by the latter upon contracts with the Navy Department. There is no dispute about the facts of the case (they are fully and clearly stated in the findings of the Court of Claims); and it would seem that there ought not to be any dispute as to the law applicable to them. The validity of the contracts is not questioned. The work upon them was done under the supervision of an inspector of the Navy Department, and no complaint is made of the manner in which it was done. When, in 1869, the department, upon the recommendation of a board of officers of the navy appointed by it, suspended the further progress of the work under the contracts, the claimant made a written proposition, in the alternative, either to take all the machinery and receive $150,000, or to deliver it in its then incomplete condition at the Navy Yard at Charlestown for $259,068, payable on delivery there. The department accepted the latter proposition, recognizing the amount specified as the balance due on settlement of the contracts; stating, however, that, in consequence of the very limited

appropriations, only a partial payment would be made on delivery of the machinery at the Charlestown Navy Yard, and that the balance could not be paid until Congress should make a further appropriation, but that a certificate for the amount due would be given to the claimant.

The machinery was accordingly delivered at the Navy Yard, with the exception of a few articles, for which a deduction from the amount of the settlement was allowed, and the certificate stipulated was given to the claimant. Previous to this, however, the chief engineer of the navy, under direction of the department, examined the machinery, and made a detailed report, by which the department was fully informed of its condition, the progress made in its construction, and what remained to be done for its completion under the contracts. There is no allegation or suggestion that the claimant was guilty of any fraud, concealment, or misrepresentation, on the subject; but on the contrary, it is clear that every fact was known to both parties, and that the whole transaction, as stated by the court below, was unaffected by any taint or infirmity. If such a settlement, as the Chief Justice of the Court of Claims very justly observes, accompanied by the giving-up by one, and the taking possession by the other, of the property involved, cannot be judicially maintained, it would seem that no settlement by any contractor with the government could be considered a finality against the government.

The duty of the Secretary of the Navy, by the act of April 30, 1798, creating the Navy Department, extends, under the orders of the President, to "the procurement of naval stores and materials, and the construction, armament, equipment, and employment of vessels of war, as well as all other matters connected with the naval establishment of the United States." 1 Stat. 553. The power of the President in such cases is, of course, limited by the legislation of Congress. That legislation existing, the discharge of the duty devolving upon the secretary necessarily requires him to enter into numerous contracts for the public service; and the power to suspend work contracted for, whether in the construction, armament, or equipment of vessels of war, when from any cause the public interest requires such suspension, must necessarily rest with him. As, in mak-

ing the original contracts, he must agree upon the compensation to be made for their entire performance, it would seem, that, when those contracts are suspended by him, he must be equally authorized to agree upon the compensation for their partial performance. Contracts for the armament and equipment of vessels of war may, and generally do, require numerous modifications in the progress of the work, where that work requires years for its completion. With the improvements constantly made in ship-building and steam-machinery and in arms, some parts originally contracted for may have to be abandoned, and other parts substituted; and it would be of serious detriment to the public service if the power of the head of the Navy Department did not extend to providing for all such possible contingencies by modification or suspension of the contracts, and settlement with the contractors.

When a settlement in such a case is made upon a full knowledge of all the facts, without concealment, misrepresentation, or fraud, it must be equally binding upon the government as upon the contractor; at least, such a settlement cannot be disregarded by the government without restoring to the contractor the property surrendered as a condition of its execution.

But aside from this general authority of the Secretary of the Navy, under the orders of the President, he was, during the rebellion, specially authorized and required by acts of Congress, either in direct terms or by specific appropriations for that purpose, to construct, arm, equip, and employ such vessels of war as might be needed for the efficient prosecution of the war. In the discharge of this duty, he made the original contracts with the claimant. The completion of the machinery contracted for having become unnecessary from the termination of the war, the secretary, in the exercise of his judgment, under the advice of a board of naval officers, suspended the work. Under these circumstances, we are of opinion that he was authorized to agree with the claimant upon the compensation for the partial performance, and that the settlement thus made is binding upon the government. *Decree affirmed.*

LOBENSTEIN *v.* UNITED STATES.

1. Where a party under his contracts with the United States was entitled to "all hides of beef-cattle slaughtered for Indians" which the Superintendent of Indian Affairs should decide were not required for their comfort, and where the Commissioner of Indian Affairs directed that the cattle be turned over to the agent who gave them out from time to time to the Indians, by whom they were killed, — *Held*, that the order of the Commissioner was in effect a decision that the hides were required for the comfort of the Indians, and excused the United States from delivery to the contractor.
2. The estimate of the number of hides, — about two thousand, more or less, and about four thousand, more or less, — as made in the contracts, does not create an obligation on the part of the United States to deliver that number, as the conditions of the agreement rendered it impossible for either party to determine how many would be reserved for the Indians. Therefore, the number specified could not have been understood to be guaranteed.

APPEAL from the Court of Claims.

Lobenstein filed his petition in the Court of Claims for the recovery of $16,860.42 as damages for a breach of his contract with the United States.

That court found the facts to be as follows: —

In the year 1869, an arrangement was entered into between the Department of the Interior and the Department of War, for the supply, through the Subsistence Department of the Army, of beef-cattle to the Indians, in pursuance of the fourth section of the act of April 10, 1869, "making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June 30, 1870." 16 Stat. 13, 40.

By that arrangement, the Department of War undertook to supply, through its Subsistence Department, such cattle as should be needed for Indians in the vicinity of Camp Supply and Fort Sill; and in reference thereto, as well as to other matters, the Commissary-General of Subsistence of the Army, on the 26th of May, 1869, gave written instructions to Brevet Major-General H. F. Clarke, Assistant Commissary-General of Subsistence in the Military Division of the Missouri; which instructions, in connection with the matter of furnishing said cattle, contained the following words: —

"The cattle should be by contract, if possible, — delivered by

the contractors monthly or weekly, and, when received, actually weighed upon the scales, to be transferred to the agents on foot; the Indians to have the benefit of the fifth quarter extra. The hides to be preserved and saved for sale when practicable."

The agents here referred to were officers of the army, appointed to act as Indian agents at the several places where subsistence-supplies were to be issued to the Indians.

General M. R. Morgan, Chief Commissary of Subsistence of the Military Department of the Missouri, stationed at Fort Leavenworth, Kan., was charged with the supervision of the subsistence of the Indians on the Southern Reservation, which included those to be supplied from Camp Supply and Fort Sill; and the aforesaid instructions to General Clarke were transmitted to him for his guidance.

Supposing himself thereto authorized by the above-quoted words of said instructions, the said Morgan entered into the two written contracts with the claimant sued on, and which are in the words following, to wit: —

"*Articles of agreement between Bt. Brig.-Gen. M. R. Morgan, C. S., United States Army, on the part of the United States, of the first part, and W. C. Lobenstein, of Leavenworth County, State of Kansas, of the other part, made on the twenty-sixth day of July, one thousand eight hundred and sixty-nine.*

"This agreement witnesseth: That the said party of the second part shall have all the hides of beef-cattle slaughtered for Indians at Fort Sill, Indian Territory, up to and including June 30, 1870, which the Superintendent of Indian Affairs at that place shall decide are not required for the comfort of the Indians; the number of hides to be about four thousand (4,000), more or less. The hides shall be of average size, and, when turned over, dry-cured, and in good order and condition. They shall be turned over on the spot, to the said party of the second part or his authorized agent, at the end of each month, at which time said agent of the party of the second part shall give a receipt for the number of hides turned over to him in good order and condition; and the responsibility of the party of the first part on account of said hides shall then cease.

"The agent of the said party of the second part shall superintend the skinning and curing of the hides.

"For and in consideration of the hides received, the party of the

second part shall pay, monthly, the party of the first part the sum of two dollars ($2.00) for each and every hide received, upon the party of the first part surrendering the receipt of the agent of the party of the second part for the number of hides received.

"It is understood that while the party of the first part, after the turning over of the hides to the party of the second part, is not responsible for their safety and care, he will furnish such protection and shelter for the hides as he can conveniently control.

"Subscribed to the year and day first above written.

"M. R. MORGAN,
"*Bt. Brig.-Gen. & C. S.*
"W. C. LOBENSTEIN."

"*Articles of agreement between Bt. Brig.-Gen. M. R. Morgan, C. S., United States Army, on the part of the United States, of the first part, and W. C. Lobenstein, of Leavenworth County, State of Kansas, of the other part, made on the twenty-sixth day of July, one thousand eight hundred and sixty-nine.*

"This agreement witnesseth: That the said party of the second part shall have all the hides of the beef-cattle slaughtered for Indians at Camp Supply, Indian Territory, up to and including June 30, 1870, which the Superintendent of Indian Affairs at that place shall decide are not required for the comfort of the Indians; the number of hides to be about two thousand (2,000), more or less. The hides shall be of average size, and, when turned over, dry-cured, and in good order and condition. They shall be turned over on the spot, to the said party of the second part or his authorized agent, at the end of each month, at which time said agent of the party of the second part shall give a receipt for the number of hides turned over to him in good order and condition; and the responsibility of the party of the first part on account of said hides shall then cease.

"The agent of the said party of the second part shall superintend the skinning and curing of the hides.

"For and in consideration of the hides received, the party of the second part shall pay, monthly, the party of the first part the sum of two dollars ($2.00) for each and every hide received, upon the party of the first part surrendering the receipt of the agent of the party of the second part for the number of hides received.

"It is understood that while the party of the first part, after the turning over of the hides to the party of the second part, is not

responsible for their safety and care, he will furnish such protection and shelter for the hides as he can conveniently control.

"Subscribed to the day and year first above written.

"M. R. MORGAN,
"*Bt. Brig.-Gen. & C. S.*
"W. C. LOBENSTEIN."

It does not appear that any other authority than the above-quoted words from the Commissary-General's instructions was given, either to said Clarke or said Morgan, in reference to the preservation, saving, or sale of hides.

In September, 1869, the Commissioner of Indian Affairs directed that the cattle should all be turned over to the Indian agent on the hoof, which was done; and they gave them out from time to time to the Indians, by whom they were killed and cut up; and no cattle were slaughtered for the Indians at Fort Sill or at Camp Supply by any one acting under the authority of the United States, and the claimant obtained no hides of cattle furnished to the Indians at either of those posts, during the period of time covered by the said contracts.

The number of cattle supplied to the Indians from the date of said contracts to June 30, 1870, was, at Fort Sill, 2,641; and at Camp Supply, 1,172.

The claimant fully prepared himself to carry out and perform said contracts on his part; and to that end he sent an agent to Fort Sill, and one also to Camp Supply, to receive hides for him; and for their services and necessary expenses he paid them $1,256.75. Said agents were not sent to those points by order of General Morgan, nor did they in any way represent him or any other officer of the United States.

Upon these facts, the conclusion of law was that the claimant was not entitled to any recovery, because there had been no breach of the contract by the defendants.

Mr. C. F. Peck for the appellant.

The condition precedent brought forward to defeat this contract most strongly establishes its validity. The agents of the government prevented the Superintendent of Indian Affairs from making a decision by removing all opportunity and ground for it, and then object that the case must fail because

such decision was not made. The rule of law in such a case is well settled.

It will always excuse the performance of a condition precedent when it was hindered or prevented by the other party.

No party can insist upon a condition precedent when its non-performance has been caused by himself. *Williams* v. *The Bank of the U. S.*, 2 Pet. 102; *Betts* v. *Perrine*, 14 Wend. 219; *Camp* v. *Barker*, 21 Vt. 469; *Marshall* v. *Craig*, 1 Bibb, 384; *Majors* v. *Hickman*, 2 id. 218; *Jones* v. *Walker*, 13 B. Mon. 163; *Fleming* v. *Gilbert*, 3 Johns. 528; *McNairy* v. *Bishop*, 8 Dana, 150; *Mayor, &c.* v. *Butler*, 1 Barb. 338.

The number of hides to be furnished was estimated, and that estimate formed the basis of the contract.

The expression, "the number of hides to be about 4,000, more or less," manifests plainly that both General Morgan and Mr. Lobenstein supposed and intended that about so many would be delivered.

While the statement, "4,000, more or less," does not rigidly control the contract, it does not admit of any serious departure from that number. *Day* v. *Finn*, Owen, 133, cited in 9 Vin. Abr. 343, Pl. 10; *Quesnel* v. *Woodlief et al.*, cited in 2 Hen. & Munf. 173, n.; *Nelson* v. *Matthews*, 2 Hen. & Munf. 173; *Cross* v. *Elgin*, 2 Barn. & Adol. 106.

Mr. Assistant Attorney-General Edwin B. Smith for the United States.

The decision of the Superintendent of Indian Affairs as to the number of hides required for the comfort of the Indians was a condition precedent to the claimants becoming entitled to any hides.

It makes no difference whether that official never made any decision, or decided that all the hides were required by the Indians: in either case, the claimant cannot recover. *Thurnell* v. *Balbirnie*, 2 M. & W. 786, 790; *Worsley* v. *Wood*, 6 T. R. 710; *Milner* v. *Field*, 5 Exch. 829; *Morgan* v. *Birnie*, 9 Bing. 672; *Cook* v. *Jennings*, 7 T. R. 384; *Moakley* v. *Riggs*, 19 Johns. 69; *Taylor* v. *Bullen*, 6 Cow. 629.

The contract was subject to the superintendent's arbitration. If he declined to arbitrate, or decided adversely to the claimant's having any hides, the result would be the same. In either

contingency, the contract was at end. Cases cited *supra; Palmer* v. *Clark*, 106 Mass. 389; *Flint* v. *Gibson*, id. 391; *Grafton* v. *Eastern Cos.*, 8 Exch. 699.

The number of hides referred to in the contracts was not a guaranteed number, for the reason that the determination of the question as to how many the Indians would require could be arrived at only by the decision of the Superintendent of Indian Affairs.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

We agree entirely with the Court of Claims in its construction of the contracts sued upon in this case. By one contract, Lobenstein was to have "all the hides of beef-cattle slaughtered *for* Indians at Camp Supply, . . . up to and including June 30, 1870, which the Superintendent of Indian Affairs at that place shall decide are not required for the comfort of the Indians; the number of hides to be about 2,000, more or less." The other contract is similar in its terms for the hides of cattle slaughtered *for* Indians at Fort Sill, the number to be about 4,000, more or less.

The Commissioner of Indian Affairs directed that all the cattle should be turned over to the Indian agent on foot; and this was done. None were slaughtered by any person acting under the authority of the United States; but they were all given out from time to time to the Indians, by whom they were killed. Consequently, no hides could be delivered under the contracts.

There was no obligation on the part of the United States to slaughter the cattle or any portion of them for the Indians; and they were only bound to deliver the hides of such as they did slaughter, in case the Superintendent of Indian Affairs did not decide that they were required for the comfort of the Indians. If he decided that all were required by the Indians, that excused the United States from delivery to Lobenstein. He did, in effect, so decide when the Commissioner directed that the cattle should all be delivered on foot. Lobenstein took this risk when he entered into the contracts, and he undoubtedly made his calculations of profits in case of success accordingly.

The best evidence of this is to be found in the fact that he claims in this action to recover more than $15,000 for alleged loss of profits, while he has actually expended in preparation to meet his obligations only $1,256.75.

The estimate of the number of hides as made in the contracts does not create an obligation on the part of the United States to deliver that number. That estimate was undoubtedly intended as a representation of the probable number of cattle that would be delivered to the Indians. In point of fact, the number actually delivered was very much less. Neither party could determine how many would be reserved by the Commissioner for the use of the Indians. Therefore, necessarily, when the contract was made, the number specified could not have been understood to be a guaranteed number. If that number or its approximation was not guaranteed, none was. It follows as a consequence that this claimant has no right of action. He took his risk, and insured himself in his anticipated large profits if his venture proved a success.

The judgment of the Court of Claims is affirmed.

SHEPLEY ET AL. *v.* COWAN ET AL.

1. Whenever, in the disposition of the public lands, any action is required to be taken by an officer of the land department, all proceedings tending to defeat such action are impliedly inhibited. Accordingly, where an act of Congress of 1812 directed a survey to be made of the out-boundary line of the village of Carondelet, in the State of Missouri, so as to include the commons claimed by its inhabitants, and a survey made did not embrace all the lands thus claimed, the lands omitted were reserved from sale until the approval of the survey by the land department, and the validity of the claim to the omitted lands was thus determined.
2. Where a State seeks to select lands as a part of the grant to it by the eighth section of the act of Congress of Sept. 4, 1841, and a settler seeks to acquire a right of pre-emption to the same lands, the party taking the first initiatory step, if the same is followed up to patent, acquires the better right to the premises. The patent relates back to the date of the initiatory act, and cuts off all intervening claimants.
3. The eighth section of the act of Sept. 4, 1841, in authorizing the State to make selections of land, does not interfere with the operation of the other provisions of that act regulating the system of settlement and pre-emption. The two modes of acquiring title to land from the United States are not in

conflict with each other. Both are to have full operation, that one controlling in a particular case under which the first initiatory step was had.

4. Whilst, according to previous decisions of this court, no vested right in the public lands as *against the United States* is acquired until all the prerequisites for the acquisition of the title have been complied with, parties may, as against each other, acquire a right to be preferred in the purchase or other acquisition of the land, when the United States have determined to sell or donate the property. In all such cases, the first in time in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right.
5. Where a party has settled upon public land with a view to acquire a right of pre-emption, the land being open to settlement, his right thus initiated is not prejudiced by a refusal of the local land-officers to receive his proofs of settlement, upon an erroneous opinion that the land is reserved from sale.
6. The rulings of the land department on disputed questions of fact, made in a contested case as to the settlement and improvements of a pre-emption claimant, are not open to review by the courts when collaterally assailed.
7. The officers of the land department are specially designated by law to receive, consider, and pass upon proofs presented with respect to settlements upon the public lands, with a view to secure rights of pre-emption. If they err in the construction of the law applicable to any case, or if fraud is practised upon them, or they themselves are chargeable with fraudulent practices, their rulings may be reviewed and annulled by the courts when a controversy arises between private parties founded upon their decisions. But, for mere errors of judgment upon the weight of evidence in a contested case before them, the only remedy is by appeal from one officer to another of the department, and perhaps, under special circumstances, to the President.

ERROR to the Supreme Court of the State of Missouri.

The facts are stated in the opinion of the court.

Mr. John R. Shepley and *Mr. P. Phillips* for the plaintiff in error.

Mr. Montgomery Blair and *Mr. Britton A. Hill*, *contra*.

MR. JUSTICE FIELD delivered the opinion of the court.

This is a suit in equity, brought, according to the practice obtaining in Missouri, to settle the conflicting claims of the parties, arising from their respective patents, to a fractional section of land comprising thirty-seven acres and two-fifths of an acre, situated in that State. The plaintiffs assert title to the premises under a patent issued to William M. McPherson by the governor of the State, bearing date on the 27th of February, 1850, purporting to be for lands selected under the eighth section of the act of Congress of Sept. 4, 1841, entitled "An act to appropriate the proceeds of the sales of the public

lands, and to grant pre-emption rights" (5 Stat. 453); and the defendants claim title to the premises under a patent of the United States, bearing date on the 21st of July, 1866, issued to the heirs of Thomas Chartrand upon an alleged pre-emption right acquired by a settlement of their ancestor.

The eighth section of the act of Sept. 4, 1841, declared that there should be granted to each State specified in its first section — and among them was the State of Missouri — five hundred thousand acres of land for purposes of internal improvement, the selection of the land in the several States to be made within their respective limits, in such manner as the legislatures thereof should direct, but in parcels conformably to sectional divisions and subdivisions of the public surveys, and of not less than three hundred and twenty acres in each, from any public land except such as was or might be reserved from sale by any law of Congress or proclamation of the President. Several acts were passed by the legislature of Missouri for the selection and disposition of the land thus granted. One of them, passed on the 10th of March, 1849 (Laws of Missouri of 1849, p. 64), authorized the governor of the State to dispose, at private sale, of so much of the land as then remained to be selected, and to issue to the purchasers certificates empowering them to locate the quantity purchased, in conformity with the act of Congress. The purchasers were to inform the governor of the lands selected, and he was to notify the Secretary of the Treasury that the selections were made for the State; and, if approved by the secretary, patents were to issue to the purchasers.

Where the land selected in any instance contained less than three hundred and twenty acres, the governor was required, upon the request of the purchaser and upon payment for the full amount, to relinquish the surplus to the United States. Of the certificates thus issued, one was held by William M. McPherson; and under it a selection was made by him of the premises in controversy. Of this selection the governor of the State informed the Secretary of the Treasury on the 15th of December, 1849, and requested his approval of it; at the same time relinquishing to the United States the surplus between the amount selected and three hundred and twenty acres. At

that time the supervision of the land-office had been transferred from the Secretary of the Treasury to the Secretary of the Interior, whose department was created in March of that year. The selection of McPherson was accordingly brought to the latter's attention, and was approved by him on the 17th of January following; subject, however, to any rights which may have existed at the time the selection was made known to the land-officers by the agent of the State. On the 27th of February following, a patent of the State of Missouri for the premises was issued to McPherson by the governor. Upon the title thus conferred the plaintiffs repose, and ask judgment in their favor.

In considering the validity of this title, the first question for solution is, whether the premises were then open to selection by the State; for whether the eighth section of the act of 1841 be construed as conferring a grant *in præsenti*, operating to vest the title in the State upon the selection of the land pursuant to its directions, notwithstanding the words of grant used are in the future tense, — in that respect resembling the grant of the State of North Carolina to General Greene, which was the subject of consideration by this court in the case of *Rutherford* v. *Greene's Heirs*, reported in the 2d of Wheaton, — or whether the section be considered as giving only the promise of a grant, and therefore requiring further legislation, or further action in some form of the government, to vest the title of the land selected in the State, as held, or rather implied, by the decision in the case of *Foley* v. *Harrison*, reported in the 15th of Howard, the same result must follow if the land were not at the time open to selection. If not thus open, the whole proceeding on the part of McPherson and the governor of the State to appropriate the land was ineffectual for any purpose. That the land was not thus open, we think there is no doubt. The land was then claimed as part of the commons of Carondelet. The villages of St. Louis and Carondelet, on the acquisition of Louisiana in 1803 and for many years previously, claimed as commons certain lands adjoining their respective settlements. Those of St. Louis extended south of the village of that name, those of Carondelet to the north of its village; and a well-known line was generally recog-

nized as the boundary separating the commons of the two villages. That line commenced on the bank of the Mississippi at what is known as Sugar-loaf Mound, about four miles south of the settlement of St. Louis, and two miles north of that of Carondelet, and ran westerly to the common fields of Carondelet. It was contended, in the controversy which subsequently arose between the cities of St. Louis and Carondelet, that this line had been surveyed and marked by Soulard, a Spanish surveyor, previous to 1800, by order of the lieutenant-governor of the upper province of Louisiana. Be that as it may, it is clear that from the acquisition of the country until June 13, 1812, the land south of this line was claimed and used by the inhabitants of Carondelet as within their commons. On that day Congress passed an act confirming to the inhabitants of these villages their claims to their common lands. 2 Stat. 748. The act was a present operative grant of all the interest of the United States in the property used by the inhabitants of the villages as their commons; but it did not refer to the line mentioned, or designate any boundary of the commons, but left that to be established by proof of previous possession and use. The act at the same time made it the duty of the deputy-surveyor of the territory to survey the out-boundary lines of the villages so as to include the commons respectively belonging to them, and make out plats of the surveys, and transmit them to the surveyor-general, by whom copies were to be forwarded to the Commissioner of the General Land-Office and the recorder of land-titles. No survey appears to have been made, as here directed, of the out-boundary line of the village of Carondelet, until the year 1816; but its inhabitants claimed under the act the ownership and title of the land as part of their commons, up to the line mentioned on the north, as the same had been claimed and used by them previously. In 1816 or 1817, Elias Rector, a deputy-surveyor, under instructions from his superior, made a survey of the commons, running the upper line about a mile below the line alleged to have been established by Soulard. Some years afterwards (in 1834), another deputy-surveyor, by the name of Joseph C. Brown, was ordered by the surveyor-general to retrace and mark anew the lines of this survey, and connect

them with the surveys of adjoining public lands and private claims. This was accordingly done by him; and it would seem by various proceedings of the authorities of Carondelet that the survey thus retraced was at one time acquiesced in by them as a determination of the boundaries of their commons. They had a copy of it framed for the benefit of the town, and they introduced it in several suits with different parties as evidence of the extent of their claim. But at another time they denied the correctness of its northern line, which they insisted should be coincident with that alleged to have been run by Soulard. When St. Louis, in 1836, proceeded to subdivide her commons into lots down to the line of the survey, they gave notice, through a committee, that the lands below the alleged Soulard line were claimed as part of their commons; and, in 1855, Carondelet entered a suit against St. Louis for the possession of those lands. In the mean time, the matter remained undetermined in the land department at Washington until the 23d of February of that year. During this period, the Commissioner of the General Land-Office repeatedly informed the local land-officers that the tract was reserved from sale because it was claimed as part of the Carondelet commons, and on that ground their refusal to receive proofs of settlement from parties seeking to acquire a right of pre-emption was approved; and appropriate entries stating such reservation were made in the books of those officers. At one time (January, 1852) the Secretary of the Interior decided to have a new survey of the commons, and gave orders to that effect. The surveyor-general for Missouri having asked instructions as to the manner of the survey, and stating that, in his opinion, the new survey should include the land in controversy, the secretary then in office, the successor of the one who had ordered a new survey, re-examined the whole subject, and recalled the direction for a new survey made by his predecessor, and held that as the surveys of 1816 and 1834 had been executed by competent authority and approved, and were for years acquiesced in by the inhabitants of Carondelet, both they and the government of the United States were estopped and concluded by them; and that, in consequence, the survey of 1816, as retraced in 1834, should be sustained, excluding therefrom

a tract which had been reserved for a military post. This was the final determination of the boundaries of the Carondelet commons by that department of the government to which the supervision of surveys of public grants was intrusted. A few days before this determination was announced, the suit mentioned, of the city of Carondelet against the city of St. Louis, was commenced to obtain possession of the lands below the Soulard line, over a portion of which the St. Louis commons had been extended. That suit was finally disposed of by the judgment of this court in March, 1862, affirming that of the Supreme Court of the State, to the effect that both the government and Carondelet were concluded by the surveys stated.

The act of 1812 contemplated that the out-boundary line of the village would be surveyed so as to include the commons claimed, in accordance with the possession of the inhabitants previous to 1803, and not arbitrarily, according to the caprice of the surveyor; and any line run by him was subject, like all other surveys of public grants, to the supervision and approval of the land department at Washington. Until surveyed, and the survey was thus approved, the land claimed by Carondelet was, by force of the act requiring the survey and the establishment of the boundaries, necessarily reserved from sale. It was thus reserved to be appropriated in satisfaction of the claim, if that should be ultimately sustained. Whenever in the disposition of the public lands any action is required to be taken by an officer of the land department, all proceedings tending to defeat such action are impliedly inhibited. The allowance of selections by the States, or of pre-emptions by individuals, of lands which might be included within grants to others, might interfere, and in many instances would interfere, with the accomplishment of the purposes of the government. A sale is as much prohibited by a law of Congress, when to allow it would defeat the object of that law, as though the inhibition were in direct terms declared. The general rule of the land department is, and from the commencement of the government has been, to hold as excluded from sale or pre-emption lands which might, in the execution of the laws of Congress, fall within grants to others; and therefore, in this case, until it was decided by the final determination of the Secretary of the Inte-

rior or of the Supreme Court of the United States whether the northern line of the commons was that run, as alleged, by Soulard previous to 1800, or that retraced by Brown in 1834, the land between those lines, embracing the premises in controversy, was legally reserved from sale, and, consequently, from any selection by the State as part of its five hundred thousand acres granted by the act of Sept. 4, 1841.

But there is another view of this case which is equally fatal to the claim of the plaintiffs. If the land outside of the survey as retraced by Brown in 1834 could be deemed public land, open to selection by the State of Missouri from the time the survey was returned to the land-office in St. Louis, it was equally open from that date to settlement, and consequent pre-emption by settlers. The same limitation which was imposed by law upon settlement was imposed by law upon the selection of the State. In either case the land must have been surveyed, and thus offered for sale or settlement. The party who takes the initiatory step in such cases, if followed up to patent, is deemed to have acquired the better right as against others to the premises. The patent which is afterwards issued relates back to the date of the initiatory act, and cuts off all intervening claimants. Thus the patent upon a State selection takes effect as of the time when the selection is made and reported to the land-office; and the patent upon a pre-emption settlement takes effect from the time of the settlement as disclosed in the declaratory statement or proofs of the settler to the register of the local land-office. The action of the State and of the settler must, of course, in some way be brought officially to the notice of the officers of the government having in their custody the records and other evidences of title to the property of the United States before their respective claims to priority of right can be recognized. But it was not intended by the eighth section of the act of 1841, in authorizing the State to make selections of land, to interfere with the operation of the other provisions of that act regulating the system of settlement and pre-emption. The two modes of acquiring title to land from the United States were not in conflict with each other. Both were to have full operation, that one controlling in a particular case under which the first initiatory step was had.

Nor is there any thing in this view in conflict with the doctrines announced in *Frisbie* v. *Whitney*, 9 Wall. 187, and the *Yosemite Valley Case*, 15 id. 77. In those cases the court only decided that a party, by mere settlement upon the public lands, with the intention to obtain a title to the same under the pre-emption laws, did not thereby acquire such a vested interest in the premises as to deprive Congress of the power to dispose of the property; that, notwithstanding the settlement, Congress could reserve the lands for sale whenever they might be needed for public uses, as for arsenals, fortifications, light-houses, hospitals, custom-houses, court-houses, or other public purposes for which real property is required by the government; that the settlement, even when accompanied with an improvement of the property, did not confer upon the settler any right in the land as *against the United States*, or impair in any respect the power of Congress to dispose of the land in any way it might deem proper; that the power of regulation and disposition conferred upon Congress by the Constitution only ceased when all the preliminary acts prescribed by law for the acquisition of the title, including the payment of the price of the land, had been performed by the settler. When these prerequisites were complied with, the settler for the first time acquired a vested interest in the premises, of which he could not be subsequently deprived. He was then entitled to a certificate of entry from the local land-officers, and ultimately to a patent of the United States. Until such payment and entry, the acts of Congress gave to the settler only a privilege of pre-emption in case the lands were offered for sale in the usual manner; that is, the privilege to purchase them in that event in preference to others.

But whilst, according to these decisions, no vested right as *against the United States* is acquired until all the prerequisites for the acquisition of the title have been complied with, parties may, as against each other, acquire a right to be preferred in the purchase or other acquisition of the land, when the United States have determined to sell or donate the property. In all such cases, the first in time in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right. So in this case, Chartrand, the ancestor, by his previous settlement in 1835

upon the premises in controversy, and residence with his family, and application to prove his settlement and enter the land, obtained a better right to the premises, under the law then existing, than that acquired by McPherson by his subsequent State selection in 1849. His right thus initiated could not be prejudiced by the refusal of the local officers to receive his proofs upon the declaration that the land was then reserved, if, in point of fact, the reservation had then ceased. The reservation was asserted, as already mentioned, on the ground that the land was then claimed as a part of the commons of Carondelet. So soon as the claim was held to be invalid to this extent by the decision of this court in March, 1862, the heirs of Chartrand presented anew their claim to pre-emption, founded upon the settlement of their ancestor. The act of Congress of March 3, 1853, 10 Stat. 244, provided that any settler who had settled or might thereafter settle on lands previously reserved on account of claims under French, Spanish, or *other grants*, which had been or should thereafter be declared invalid by the Supreme Court of the United States, should be entitled to all the rights of pre-emption granted by the act of Sept. 4, 1841, after the lands were released from reservation, in the same manner as if no reservation had existed. With the decision declaring the invalidity of the claim to the land in controversy, all obstacles previously interposed to the presentation of the claim of the heirs of Chartrand, and the proofs to establish it, were removed. According to the decisions in *Frisbie* v. *Whitney* and the *Yosemite Valley Case*, Congress might then have withdrawn the land from settlement and pre-emption, and granted it directly to the State of Missouri, or reserved it from sale for public purposes, and no vested right in Chartrand or his heirs as against the United States would have been invaded by its action; but, having allowed by its subsisting legislation the acquisition of a right of preference as against others to the earliest settler or his heirs, the way was free to the prosecution of the claim of the heirs.

If the matter were open for our consideration, we might perhaps doubt as to the sufficiency of the proofs presented by the heirs of Chartrand to the officers of the land department to establish a right of pre-emption by virtue of the settlement and

proceedings of their ancestor, or by virtue of their own settlement. Those proofs were, however, considered sufficient by the register of the local land-office, by the Commissioner of the General Land-Office on appeal from the register, and by the Secretary of the Interior on appeal from the commissioner. There is no evidence of any fraud or imposition practised upon them, or that they erred in the construction of any law applicable to the case. It is only contended that they erred in their deductions from the proofs presented; and for errors of that kind, where the parties interested had notice of the proceedings before the land department, and were permitted to contest the same, as in the present case, the courts can furnish no remedy. The officers of the land department are specially designated by law to receive, consider, and pass upon proofs presented with respect to settlements upon the public lands, with a view to secure rights of pre-emption. If they err in the construction of the law applicable to any case, or if fraud is practised upon them, or they themselves are chargeable with fraudulent practices, their rulings may be reviewed and annulled by the courts when a controversy arises between private parties founded upon their decisions; but, for mere errors of judgment upon the weight of evidence in a contested case before them, the only remedy is by appeal from one officer to another of the department, and perhaps, under special circumstances, to the President. It may also be, and probably is, true that the courts may furnish, in proper cases, relief to a party where new evidence is discovered, which, if possessed and presented at the time, would have changed the action of the land-officers; but, except in such cases, the ruling of the department on disputed questions of fact made in a contested case must be taken, when that ruling is collaterally assailed, as conclusive.

In this case, therefore, we cannot inquire into the correctness of the ruling of the land department upon the evidence presented of the settlement of Chartrand, the ancestor, or of his heirs. It follows that the patent issued by the United States, taking effect as of the date of such settlement, overrides the patent of the State of Missouri to McPherson, even admitting, that, but for the settlement, the land would have been open to selection by the State. *Decree affirmed.*

STONE *v.* TOWNE ET AL.

A. recovered in the Circuit Court of the United States for the Southern District of Mississippi a judgment against the administrator of B., to the payment whereof he sought, by appropriate proceedings in Louisiana, to subject certain lands there situate. C., who was not a party to the judgment, claimed them under an alleged conveyance to his ancestor from B. *Held*, that C., inasmuch as the judgment was not a lien upon the lands, nor binding in any sense upon him, could not sustain a bill in chancery to set it aside.

APPEAL from the Circuit Court of the United States for the Southern District of Mississippi.

The facts are stated in the opinion of the court.

Mr. R. P. Lowe for the appellant, and *Mr. Joseph Casey* for the appellees.

MR. JUSTICE MILLER delivered the opinion of the court.

On the first day of November, 1857, Oliver O. Woodman made his four promissory notes, payable to his own order, at the office of Brown, Johnson, & Co., New Orleans, and indorsed them in blank, and delivered them to said Brown, Johnson, & Co. Three of the notes were for $3,000 each, and one for $2,761.15; and they fell due at various periods within five months. They were given for a pre-existing indebtedness of Woodman to Brown, Johnson, & Co.; and were secured by a mortgage on the cotton farm of Woodman, in Louisiana. None of these notes were paid at maturity. On the twenty-sixth day of May, 1869, William A. Stone, the appellant in this case, brought a suit in the Circuit Court of the United States for the Southern District of Mississippi against Ivory Woodman, as administrator with the will annexed of Oliver O. Woodman, on these notes: and the administrator thereupon confessed a judgment in his favor for the amount of the notes with interest; to wit, $21,868.35.

The suit now before us is a bill in chancery, brought by appellees to set aside this judgment as obtained by fraud. These appellees are citizens of the State of Louisiana, and are the heirs of Robert W. Burney; and the ground on which they seek to interpose in this manner is, that Stone is trying to subject the lands of Woodman to the payment of this judgment, which

lands they claim had in the lifetime of their ancestor, R. W. Burney, been conveyed to him, and, after his death, had descended to them.

The judgment which is assailed is not a lien on this land, since it is rendered in Mississippi, and the land is in Louisiana. It does not bind any of the complainants personally, for they are not parties to it in any way; nor does it bind the administrator or executor of Burney, for the same reason. It is simply a judgment in the State of Mississippi, in the Federal Court, against the administrator of Woodman's will.

It is very difficult to see on what principle the complainants, who were not parties to that judgment, who are not in any sense bound by it, and who cannot be made liable for it *in personam*, can sustain a bill to set aside the judgment, which is of itself no lien on their property, and is in its terms binding only on the administrator of Woodman's will.

The petition in the suit of Stone to enforce this judgment against the estate of Woodman in Louisiana, which is made part of the bill, does not rely upon the mortgage, but upon the fact that the real estate of which Woodman died seized was never really sold or conveyed to Burney; that his heirs have no title to it; that it is still a part of Woodman's succession, and, for that reason, liable, in the hands of the administrator, to the payment of this judgment. Every defence which the heirs of Burney can rightfully make to this petition is open to them. If what it charges is untrue, they can defend against it successfully; if it is true, the property ought to be restored to the succession of Woodman, without regard to the validity of the judgment. That is a matter between the administrator of Woodman or his heirs, and the judgment plaintiff, Stone, in which the heirs of Burney can have no legal interest. If they have such an interest, they can set it up in the Louisiana suit, so far at least as may be necessary to protect their rights; and beyond this they have no right to interfere.

On this ground, we are satisfied that the decree must be reversed, and the bill dismissed; and it is so ordered.

UNION PACIFIC RAILROAD COMPANY *v.* HALL ET AL.

1. The initial point of the Iowa branch of the Union Pacific Railroad was fixed by the act of Congress of July 1, 1862 (12 Stat. 489), on the Iowa bank of the Missouri River.
2. The order of the President of the United States, bearing date the seventh day of March, 1864, established and designated in strict conformity to law the eastern terminus of said branch at a point "on the western boundary of Iowa east of and opposite to the east line of section 10, in township 15, north of range 13, east of the 6th principal meridian, in the Territory of Nebraska."
3. The bridge constructed by the Union Pacific Railroad Company over the Missouri River, between Omaha in Nebraska and Council Bluffs in Iowa, is a part of the railroad. The company was authorized to build it only for the uses of the road, and is bound to operate and run the whole road, including the bridge, as one connected and continuous line.
4. Private persons may, without the intervention of the government law-officer, move for a *mandamus* to enforce a public duty not due to the government as such.

ERROR to the Circuit Court of the United States for the District of Iowa.

Submitted on brief by *Mr. A. J. Poppleton* for the plaintiff in error, and by *Mr. John N. Rogers*, *contra.*

MR. JUSTICE STRONG delivered the opinion of the court.

This is a proceeding instituted under the act of Congress of March 3, 1873 (17 Stat. 509, sect. 4), which confers upon the proper Circuit Court of the United States jurisdiction to hear and determine all cases of *mandamus* to compel the Union Pacific Railroad Company to operate its road as required by law. The alternative writ, as amended, commanded the railroad company to operate the whole of their road from Council Bluffs westward (including that portion thereof between Council Bluffs and Omaha, and constructed over and across their bridge spanning the Missouri River) as one continuous line for all purposes of communication, travel, and transportation; and especially commanded them to start from Council Bluffs their regular through freight and passsenger trains westward bound, and to run their eastern-bound trains of both descriptions through and over said bridge to Council Bluffs under one uniform time-schedule with the remainder of their road, and to

desist and refrain wholly from operating said last-mentioned portion of said road as an independent and separate line, and from causing freight or passengers bound westward or eastward to be transferred at Omaha, or to show cause why they did not obey the writ.

To the alternative *mandamus* the railroad company put in a return, which was met by an answer filed by the relators; and the case was heard by the Circuit Court on the facts stated in the writ, the return, and the answer (the averments of the answer not being controverted), and a peremptory *mandamus* was ordered. It is of this final judgment that the plaintiffs in error now complain.

The obligation of the Union Pacific Railroad Company to operate their road as a continuous line, throughout its entire length, is not denied. The company is a creature of congressional legislation. It was incorporated by the act of Congress of July 1, 1862 (12 Stat. 489); and its powers and duties were prescribed by that act, and others amendatory thereof. By the twelfth section it was enacted that the "whole line of the railroad and branches and telegraph shall be operated and used for all purposes of communication, travel, and transportation, so far as the public and government are concerned, as one connected, continuous line." A similar requisition was made in the fifteenth section of the amendatory act of July 2, 1864. 13 Stat. 356. The contest in the case does not relate to the existence of this duty: it is principally over the question, whether the railroad bridge over the Missouri River, between Omaha in Nebraska and Council Bluffs in Iowa, is a part of the Union Pacific Railroad; for, if it is, there can be no doubt that the company are required by law to use it in connection with, and as a part of, their entire road, operating all parts together as a continuous line.

The answer to this question must be found in the legislation of Congress, and in what has been done under it. By the first section of the act of 1862, the Union Pacific Railroad Company was authorized to construct, maintain, and enjoy a continuous railroad and telegraph, with the appurtenances, from a point on the one hundredth meridian of longitude west from Greenwich to the western boundary of the Territory of Nevada. There it

was intended to meet and connect with the line of the Central Pacific Railroad Company of California (sect. 8), thus forming a continuous line to the Pacific Ocean. This was the main line. But the same act made provision also for several eastern connections. The ninth section authorized the Leavenworth, Pawnee and Western Railroad Company of Kansas (now the Kansas Pacific) to construct a railroad from the Missouri River, at the mouth of the Kansas River (on the south side thereof, so as to connect with the Pacific Railroad of Missouri), to the point of western departure of the Union Pacific on the one hundredth meridian. Thus provision was made for an eastern connection by an unbroken line of road to St. Louis on the Mississippi. This was not all. By the fourteenth section of the act the Union Pacific was authorized and required "to construct a single line of railroad and telegraph from a point on the western boundary of the State of Iowa, to be fixed by the President of the United States, . . . so as to form a connection with the lines of the said company at some point on the one hundredth meridian of longitude aforesaid, from the point of commencement on the western boundary of the State of Iowa." Thus provisions were made for the Iowa eastern branch of the main line. It was doubtless intended to render possible a connection with any railroad that might thereafter be constructed from the western boundary of Iowa eastward. None was then completed; but a railroad was in progress of construction through the State, from its eastern border to the Missouri River.

The fourteenth section also made provision for another eastern connection. It enacted, that whenever there should be a line of railroad completed through Minnesota or Iowa to Sioux City, then the said Pacific (Union Pacific) Railroad Company should be authorized and required to construct a railroad and telegraph from said Sioux City, so as to connect with the Iowa branch, or with the main line, at a point not farther west than the one hundredth meridian of longitude.

The scheme of the act of Congress, then, is very apparent. It was to secure the connection of the main line, by at least three branches, with the Missouri and Iowa Railroads, and with a railroad running eastwardly from Sioux City in Iowa, either through that State or through Minnesota. An observ-

ance of this scheme, we think, will aid in considering the inquiry at what place the act of Congress, and the orders of the President made in pursuance thereof, established the eastern terminus of the Iowa branch. From it may reasonably be inferred that the purpose of Congress was to provide for connections of the branches of the main line of the Union Pacific road with railroads running through the States on the east of the Territory, and to provide for those connections within those States, at points at or near their western boundaries. Thus the northern branch was required to be constructed from Sioux City (which is in the State of Iowa) westward toward the main line; and the southern branch was authorized to build their railroad from the south side of the Kansas River, at its mouth, so as to connect with the Pacific Railroad of Missouri. If, now, the provisions of the act respecting the central or Iowa branch be examined, the same purpose is evident. Those provisions are found in the fourteenth section, and they are as follows: —

"And be it further enacted, That the said Union Pacific Railroad Company is hereby authorized and required to construct a single line of railroad and telegraph from a point on the western boundary of the State of Iowa, to be fixed by the President of the United States, upon the most direct and practicable route, to be subject to his approval, so as to form a connection with the lines of the said company at some point on the one hundredth meridian of longitude aforesaid, from the point of commencement on the western boundary of the State of Iowa."

This clause contains the only provisions of the act respecting the eastern terminus of the Iowa branch, and it twice defines that terminus as "a point on the western boundary of the State of Iowa." The legal boundary of the State is the middle of the channel of the Missouri River. 9 Stat. 52. But it is very evident that Congress did not intend that the road should start from a point in the mid-channel of the river. That would be impossible; and, were it possible, it would not carry out the general design of the act, which, as we have seen, was to provide for connections with the eastern railroads then in existence or contemplated. It is conceded by the counsel of the company that Congress ought not to be held to have intended to fix the initial point in the mid-channel of the river, exactly

on the line which is the legal boundary of the State. Such a construction of the law, it is acknowledged, would be unreasonable, because it would involve the requirement of an impossibility. But, if Congress did not mean to require a construction of the railroad from the imaginary line which is the legal boundary of Iowa, — namely, from the mid-channel of the river, — they must have intended the initial point to be either on the Iowa shore or on the Nebraska shore. If the Nebraska shore was intended, why was it not mentioned? Why was not the west bank of the Missouri River designated? or why was not the eastern boundary of Nebraska fixed as the point of departure? Still more, why was Iowa mentioned at all? or why was the initial point described as a point on the western boundary of Iowa? It is impossible to give a satisfactory answer to these questions, if the eastern or Iowa shore of the river was not intended to be the terminus of the railroad. Unless it was so intended, no reason is found in the acts of Congress for mentioning Iowa at all. The western shore of the river is no nearer the western legal boundary of Iowa than the eastern shore is; while the latter is, in common understanding, the western boundary of the State. Congress may well be supposed to have used language in accordance with the common understanding. It is common usage to speak of the boundary of a state or county as a river, though the legal boundary may be the middle of the river; and particularly when any thing is to be constructed on such a boundary, which from its nature must be constructed on dry land, would no one understand the place of construction as any other than the shore of the river. It is perfectly legitimate and in accordance with every-day usage to say that a house built in Illinois on the eastern shore of the Mississippi stands on the western boundary of the State, though the legal boundary of the State is the mid-channel of the river. In common understanding, therefore, a point on the western boundary of Iowa would be a point in Iowa on the eastern shore of the Missouri, precisely as a point on the eastern boundary of Nebraska would be understood to be in Nebraska, on the western shore of the river. The words "on the boundary of Iowa" are not technical words; and therefore they are to be taken as having been used by Congress in their ordinary signification.

Instances are not rare in which statutes have been construed, not literally, but in accordance with the common use of the language employed by the law-makers. Authority to construct a railroad or turnpike from A. to B., or beginning at A. and running to B., is held to confer authority to commence the road at some point within A., and to end it at some point within B. The words "*from*," "*to*," and "*at*," are taken inclusively, according to the subject-matter. 1 Mas. 126; 1 Stra. 179; *Farmers' Turnpike* v. *Coventry*, 10 Johns. 389. So in the case of *The Mohawk Bridge Company* v. *The Utica and Schenectady R.R. Co.*, 6 Paige, 554, a similar ruling was made. The city of Schenectady was on the south bank of the Mohawk River, the north bounds of the city being the middle of the channel of the river; yet it was held that a railroad company authorized to build a railroad "commencing at or near the city of Schenectady, and running thence on the north side of the Mohawk River," was by those words empowered to build a bridge over the Mohawk, and commence their railroad at or within the city. These decisions bear some analogy to the construction given by the Circuit Court to the phrase "on the western boundary of Iowa;" and that construction is the only one consistent with the paramount purpose manifested in the act of Congress, to provide for connections with the railroads of the States east of Nebraska Territory, — a purpose to which we have already referred. Unless the Iowa branch of the Union Pacific was intended to commence on the Iowa shore of the Missouri River, its connection with the Iowa railroads would have been impossible. Those roads could not be extended to the Nebraska shore; for the State of Iowa was without power to authorize the erection of a bridge over the river, or even the establishment of a ferry. We do not propose to enter upon a consideration of the question, whether Congress had power to authorize the construction of railroads within a State: it is not necessary for the present case. Even the appellants would shrink from denying the lawful existence of their bridge. What is to be sought now is the intention of Congress, not its power. Did Congress intend the place of connection to be on the eastern shore of the river? That they did is manifest, if they intended any connection; for no other was possible, either with or without the co-operation of Iowa.

In accordance with this understanding of the act of 1862 was the action of the President. The fourteenth section of the act required the company to construct the Iowa branch from a point on the western boundary of Iowa, *to be fixed by the President of the United States.* In discharging the duty thus imposed, the President, by an executive order, dated Nov. 17, 1863, fixed so much of the western boundary of the State of Iowa as lies between the north and south boundaries of the United States township within which the city of Omaha is situated as the point from which the line of railroad and telegraph should be constructed. This designation was, in one particular, indefinite. While it adhered to the western boundary of Iowa, it left undetermined at what place on that boundary the initial point should be, except that it should be somewhere between the north and south boundaries of a township, those boundaries being six miles apart. The President, therefore, on the seventh day of March, 1864, by a second executive order, made a more definite location. By that order he designated and established the point from which the railroad company was authorized to construct the road as a point "on the western boundary of Iowa east of and opposite to the east line of section 10, in township 15, north of range 13, east of the 6th principal meridian, in the Territory of Nebraska." Section 10 is a fractional section, its eastern boundary being the Missouri River. That the President understood this designation as fixing the point on the eastern shore of the river, and within the State of Iowa, is manifest from the message which, two days afterwards, he sent to Congress accompanying a copy of his official orders, in which he declared that the orders fixed the point on the western boundary of Iowa, "within the limits of the township in Iowa opposite the town of Omaha, in Nebraska." And such appears to be the plain meaning of the executive orders. The point could not have been "east of and opposite to the east line of section 10, in township 15" (the section spoken of), if it was on the western shore of the river. It would then have been in Nebraska. The designation by the President was thus in strict conformity with the act of Congress; for, whenever that act spoke of the terminus of the Iowa branch with reference to its location, it described it, not as being in Nebraska, not even as

being in the Missouri River, but as on the western boundary of Iowa.

Thus far we have confined our attention to the act of 1862, and to the President's action under it. From that act alone we have deduced the conclusion that the company was authorized and required to build their railroad to the Iowa shore. That authority included within itself power to build a bridge over the Missouri. No express grant to bridge the river was needed. Whatever bridges were necessary on their line were as fully authorized as the line itself; and the company were as much empowered to build one across the Missouri as they were across the Platte or any other river intersecting the route of their road. *People* v. *The Saratoga & Rensselaer R.R. Co.*, 15 Wend. 130; *Springfield* v. *Connecticut River R.R. Co.*, 4 Cush. 63; *Mohawk Bridge Co.* v. *Utica & Schenectady R.R. Co.*, *ut supra.*

But the amendatory act of 1864 is not to be overlooked. It is to be regarded in connection with the act of 1862, and interpreted as a part of it. By its ninth section the company were expressly authorized to construct bridges over the Missouri, and other rivers which their road might pass in its course, for the convenience of their road; and the act declared this authority to be given to enable the company to make convenient and necessary connections with other roads. This enactment may not have been necessary. The power may have been conferred upon the Union Pacific Railroad Company by the act of 1862; and we think it was. But, whether necessary or not, it shows clearly that Congress had in view the construction of the railroad to the Iowa shore of the river. No bridge could be constructed without making use of the Iowa shore.

It is well to observe here that the authority was given to the company as a railroad company, and not as a bridge company. The bridge was for the convenience of their road, and to enable them to connect it with other roads. They could build it for no other uses. They were not authorized to use it for other purposes than those of their road. They were not allowed to charge rates of toll which they did not charge upon other portions of their line. If they acquired such a right, it was by subsequent legislation, — by the act of 1871, to which we shall

refer hereafter; but if, under the acts of 1862 and 1864, the company were authorized to build a railroad bridge across the river, and if such bridge was a part of their road, and not another railroad, the conclusion is irresistible that their road was intended to have its eastern terminus on the Iowa shore of the river.

It is no answer to this to urge that Congress could not have intended to invade a State by chartering a company to build a railroad in part within the State limits. The stubborn fact remains, that Congress did authorize the building of a railroad bridge on land within the territorial limits of the State, and, as necessarily incidental to that, a railroad upon the necessary approaches to the bridge. So, also, Congress authorized building a railroad from Sioux City, in Iowa, across the Missouri River westward. The statute does show a plain intention that the company's railroad should enter the State under its authority; and the twelfth section enacted what should be done whenever the route of the road should cross the boundary of any *State* or Territory, and authorizes the President of the United States, in case the companies met there and disagreed respecting the location, to determine it.

Our attention has been called to other clauses in the acts of 1862 and 1864, in which the road is spoken of as from the Missouri River to the Pacific coast, or to the navigable waters of the Sacramento, or from Omaha, as indicating that the eastern terminus was intended to be Omaha, or the western shore of the Missouri River. But these clauses have other objects in view than designating the terminus of the road. They are descriptive of the road, but not of its beginning or ending. Whenever the attention of Congress was turned to the eastern terminus alone, and the purpose was to determine its location, there is no variance in the language employed. It is always "a point on the western boundary of Iowa." The different forms of expression employed in other sections and for other purposes can have no bearing upon the question.

Again: it is claimed that the contemporaneous construction given to the charter of the company, by its officers and by the officers of the government, tends to show that the terminus was fixed by the statute on the Nebraska side of the river. It

must be conceded, that, in a case where the interpretation of an instrument is doubtful, the practical construction given to it by the parties is of weight. But we do not discover that the United States government, or its officers, ever acted upon the theory that the eastern terminus of the road was on the western shore of the river. The officers of the company asserted it for a time, it is true, but not in their practical intercourse with the national government. Indeed, it never became a practical question until the bridge was erected; and from that time to the present the government has asserted that the true terminus of the road was fixed on the Iowa shore. There is nothing, we think, in any contemporaneous construction given to the acts of Congress, which ought to have any weight in determining the question now before us.

Our conclusion, therefore, is, that the initial point of the Iowa branch of the Union Pacific Railroad was fixed by the act of Congress on the Iowa bank of the Missouri River.

If we are correct in this conclusion, it seems to be clear that the bridge over the river, built by the railroad company, is a part of their railroad, and required by law to be so operated. It was commenced in 1869 under the acts of 1862 and 1864. These acts were the only authority the company had at the time of its commencement for building it. It is a railroad bridge, a continuation of the line west of the river; and it connects the road with its required eastern terminus. The acts chartering the company manifest no intention to distinguish between the bridge over the Missouri River and other bridges on the line of their road. If it is not a part of their road, neither is any bridge between the Missouri and the western boundary of Nevada; for the power to build all bridges was given in the same words.

It has been argued, however, that the bridge is not a part of the company's railroad, because it is not located opposite section 10, east of and opposite to which, on the western boundary of Iowa, the President fixed the terminus. It is, however, the only bridge the company has extending their road to the western boundary of Iowa; and clearly they have no authority to build any other. True, it is not opposite section 10; but the company has taken up its road from that section, and now it comes

to the river where the bridge is actually constructed. Having abandoned their road, so far as it extended above that point; having commenced their bridge where it is; having applied to Congress for power to mortgage it, and for special power to levy tolls and charges for the use of it; and having obtained those powers, — they are not at liberty now to assert that they have located their bridge at the wrong place. There is nothing, either in the act of 1862 or 1864, or in that of Feb. 24, 1871, which empowers them to build more than one bridge over the Missouri for the Iowa branch; and the latter act contains an implied recognition of their right under the former acts to build their bridge on its present location. There is no intimation in it of a distinct bridge franchise. It grants no power to build a bridge. Its main purpose manifestly was to give the company additional means and privileges for the completion of a structure already authorized, not to enable them to construct a new and independent road. To hold that the bridge is not a part of the road would defeat the plain object Congress had in view in 1862 and 1864, — a continuous line for connection with the Iowa roads. It would be allowing the connection to be made in Nebraska, instead of on the western boundary of Iowa, when the act of 1871 expressly declared that nothing therein should be so construed as to change the eastern terminus of the Union Pacific Railroad from the place where it was then fixed by existing laws. Indeed, that proviso was quite unnecessary if the bridge was not thought to be a part of the railroad connecting the other part with the western boundary of Iowa.

Holding then, as we do, that the legal terminus of the railroad is fixed by law on the Iowa shore of the river, and that the bridge is a part of the railroad, there can be no doubt that the company is under obligation to operate and run the whole road, including the bridge, as one connected and continuous line. This is a duty expressly imposed by the acts of 1862 and 1864, and recognized by that of 1871. What this means it is not difficult to understand. It is a requisition made for the convenience of the public. An arrangement, such as the company has made, by which freight and passengers destined for or beyond the eastern terminus are stopped two or three miles from it and transferred to another train, and again transferred

at the terminus, or by which freight and passengers going west from the eastern end of the line must be transferred at Omaha, breaks the road into two lines, and plainly is inconsistent with continuous operation of it as a whole. If not, the injunction of the statute has no meaning. The *mandamus* awarded in this case, therefore, imposes no duty beyond what the law requires.

Such is our opinion of the merits of this case. A single objection made and urged against the form of proceeding remains to be considered. The appellants contend that the court erred in holding that Hall and Morse, on whose petition the alternative writ was issued, could lawfully become relators in this suit on behalf of the public without the assent or direction of the Attorney-General of the United States, or of the district attorney for the district of Iowa. They were merchants in Iowa, having frequent occasion to receive and ship goods over the company's road; but they had no interest other than such as belonged to others engaged in employments like theirs, and the duty they seek to enforce by the writ is a duty to the public generally. The question raised by the objection, therefore, is, whether a writ of *mandamus* to compel the performance of a public duty may be issued at the instance of a private relator. Clearly in England it may. Tapping on Mandamus, p. 28, asserts the rule in that country to be, that, "in general, all those who are legally capable of bringing an action are also equally capable of applying to the Court of King's Bench for the writ of *mandamus*." This is true in all cases, it is believed, where the defendant owes a duty, in the performance of which the prosecutor has a peculiar interest; and it is equally true, we think, in case of applications to compel the performance of duties to the public by corporations. In *The King* v. *The Severn & Wye Railway Co.*, 2 Barn. & Ad. 646, a private individual, without any allegation of special injury to himself, obtained a rule upon the company to show cause why a *mandamus* should not issue commanding them to lay down again and maintain part of a railway which they had taken up. Under an act of Parliament, the railway was a public highway; and all persons were at liberty to pass and repass thereon, with wagons and other carriages, upon payment of the rates. What the prosecutor complained of was the loss by the public, and

particularly by the owners of certain collieries (of which he does not appear to have been one), of the benefit of using the railway taken up. The writ was awarded. It was not even claimed that the intervention of the Attorney-General was needed. Other cases to the same effect are numerous. *Clarke* v. *The Leicestershire & Northamptonshire Union Canal Co.*, 6 Ad. & El. N. S. 898; 1 Chit. 700.

In this country there has been diversity of decision upon the question whether private persons can sue out the writ to enforce the performance of a public duty, unless the non-performance of it works to them a special injury; and in several of the States it has been decided that they cannot. An application for a *mandamus*, not here a prerogative writ, has been supposed to have some analogy to a bill in equity for the restraint of a public nuisance. Yet, even in the supposed analogous case, a bill may be sustained to enjoin the obstruction of a public highway, when the injury complained of is common to the public at large, and only greater in degree to the complainants. It was in the *Wheeling Bridge Case*, 13 How. 518, where the wrong complained of was a public wrong, an obstruction to all navigation of the Ohio River.

The injury to the complainants in that case was no more peculiar to Pennsylvania than is the injury to Hall and Morse in this peculiar and special to them.

There is, we think, a decided preponderance of American authority in favor of the doctrine, that private persons may move for a *mandamus* to enforce a public duty, not due to the government as such, without the intervention of the government law-officer. *People* v. *Collins*, 19 Wend. 56; *County of Pike* v. *The State*, 11 Ill. 202; *Ottawa* v. *The People*, 48 id. 233; *Hamilton* v. *The State*, 3 Ind. 452; *Hall* v. *The People*, 57 N. Y. 307; *People* v. *Halsey*, 37 id. 344; *State* v. *The County Judge of Marshall*, 7 Iowa, 186; *State* v. *Railway*, 33 N. J. Law, 110; *Watts* v. *Carroll Parish*, 11 La. Ann. 141. See also Dillon on Mun. Corp., sect. 695, and High on Ex. Rem., sects. 431, 432; *Cannon* v. *Janvier*, 3 Houst. 27; *State* v. *Rahway*, 33 N. J. Law, 110. The principal reasons urged against the doctrine are, that the writ is prerogative in its nature, — a reason which is of no force in this country, and no longer in England, — and

that it exposes a defendant to be harassed with many suits. An answer to the latter objection is, that granting the writ is discretionary with the court, and it may well be assumed that it will not be unnecessarily granted.

There is also, perhaps, a reasonable implication that Congress, when they authorized writs of *mandamus* to compel the Union Pacific Railroad Company to operate their road according to law, did not contemplate the intervention of the Attorney-General in all cases. The act of 1873 does not prescribe who shall move for the writ, while the Attorney-General is expressly directed to institute the necessary proceedings to secure the performance of other duties of the company. For these reasons, we think the Circuit Court did not err in holding that Hall and Morse were competent to apply for the writ in this case.

The decree of the Circuit Court is affirmed.

MR. JUSTICE BRADLEY dissenting.

I am obliged to dissent from the judgment of the court in this case. The Missouri River is, by common acceptation, the western boundary of Iowa; and the fair construction of the charter of the Union Pacific Railroad Company, which adopts that boundary as its eastern terminus, is, that the road was to extend from the Missouri River westwardly. The subsequent express authority given to construct a bridge across the river, in my judgment, confirms this view of the subject; and as a *mandamus* is a severe remedy, requiring a clear right and clear duty to support it, I think it ought not to be granted in this case, especially as it requires the company to use the bridge as a part of their continuous line with all their trains, which may impose much inconvenience on them, without corresponding benefit to the public.

AMORY v. AMORY ET AL.

1. A cause will not, on the ground that it has no merits, be advanced for argument; nor will it be dismissed on motion simply because the court may be of opinion that it has been brought here for delay only.
2. The court will not hesitate to exercise its power to adjudge damages where it finds that its jurisdiction has been invoked merely to gain time.

ERROR to the Supreme Court of the State of New York.

Mr. M. H. Carpenter in support of a motion to advance and dismiss the cause.

Mr. George F. Edmunds, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

We cannot dismiss a case on motion simply because we may be of the opinion that it has been brought here for delay only. Both parties have the right to be heard on the merits; and one party cannot require the other to come to such a hearing upon a mere motion to dismiss. To dismiss under such circumstances would be to decide that the case had no merits. Neither can we advance a cause for argument for the reason that we may think it has no merits. Further argument may show the contrary.

We can adjudge damages, under sect. 1010 Rev. Stat. and rule 23, in all cases where it appears that a writ of error has been sued out merely for delay. This gives us the only power we have to prevent frivolous appeals, and writs of error; and we deem it not improper to say that this power will be exercised without hesitation in all cases where we find that our jurisdiction has been invoked merely to gain time.

Motion denied.

MORSELL ET AL. *v.* FIRST NATIONAL BANK.

A judgment at law is not a lien upon real estate in the District of Columbia, which, before the judgment was rendered, had been conveyed to trustees with a power of sale to secure the payment of the debts of the grantor described in the deed of trust.

APPEAL from the Supreme Court of the District of Columbia.

The facts are stated in the opinion of the court.

Mr. J. J. Johnson and *Mr. R. K. Elliot* for the appellants.

Mr. Enoch Totten, contra.

MR. JUSTICE SWAYNE delivered the opinion of the court.

The question presented for our determination in this case is, whether a judgment at law is a lien upon real estate in the city of Washington, which, before the judgment was rendered, had been conveyed to trustees with a power of sale to secure the payment of the debts of the grantor described in the deed of trust.

The facts, so far as it is necessary to state them, are few and simple: —

On the 4th of November, 1867, the appellant, Morsell, executed a deed of trust to Flodoardo Howard to secure the payment of certain promissory notes held by the *cestuis que trust*, as set forth in the deed.

On the 21st of October, 1869, Morsell executed a like deed to Frederick W. Jones and William R. Woodward to secure the payment to the Co-operative Building and Deposit Association of the sum of $3,050 and future advances.

On the 24th of January, 1871, the appellee, the First National Bank of Washington, recovered a judgment against Morsell for $800, with interest from the 17th of May, 1869, and costs. Execution was issued upon this judgment, and returned *nulla bona*.

On the 10th of February, 1871, Means, Skinner, & Co. recovered a judgment against Morsell for $267.68, with interest as specified, and costs. Execution was returned *nulla bona* also upon this judgment.

On the 1st of March, 1871, Morsell executed to Frederick W. Jones and Joseph R. Edson another deed to secure the payment to the association above mentioned of the sum of $1,060 and future advances.

All these deeds were of the same premises; to wit, lot No. 44, in reservation No. 10, in the city of Washington.

Advances were made to Morsell by the association named from time to time, after the execution of the deed of trust of the 21st of October, 1869, to the amount, in the aggregate, of $2,950. The latest advance was one of $500, made on the 11th of January, 1871. The entire amount claimed to be secured by this deed was, therefore, $6,000.

The amount secured to the association by the deed of the

1st of March, 1871, was $1,500. The latest advance under this deed was made on the 27th of April, 1871. There is no controversy as to these particulars.

On the 22d of September, 1871, the bank, in behalf of itself and such other judgment creditors of Morsell as might choose to come in and be made parties, filed this bill. It was subsequently amended in the prayer. It brought the proper parties before the court, and prayed that the premises described in the deeds might be ordered to be sold, the proceeds be brought into court, and the fund distributed according to the rights of the parties.

Means, Skinner, & Co., by a petition, came in under this bill. The premises were sold pursuant to a decree, and yielded, after deducting costs and charges, the sum of $8,235.22 for distribution. The fund was held subject to the further order of the court. No question was made as to the preference claimed for the amount due to the *cestuis que trust* under the deed to Howard. But the balance left after discharging that liability was insufficient to pay the amount due to the association, laying the judgments out of view. Hence a controversy arose between the association and the judgment creditors, each party claiming priority of payment out of the fund. The auditor of the court, to whom the case was referred, reported in favor of the association. The other parties excepted. The court in general term held that the association was entitled to priority to the extent of $6,000, the amount secured by the deed of trust of the 21st of October, 1869; and that the judgments were to be next in the order of payment, both being prior in date to the last deed of trust. This left nothing applicable to the debt secured by the latter. The association thereupon removed the case by appeal to this court.

The "Act concerning the District of Columbia," of the 27th of February, 1801, 2 Stat. 103, declared, "That the laws of the State of Maryland, as they now exist, shall be and continue in force in that part of said District which was ceded by that State to the United States and by them accepted as aforesaid."

A part of the laws so adopted was the common law. *Van Ness* v. *Hyatt*, 13 Pet. 298. It was well settled in the English

jurisprudence, that, according to the common law, no equitable interest in property of any kind was liable to execution. *Scott* v. *Schooley*, 8 East, 467; *Metcalf* v. *Schooley*, 5 Bos. & Pul. 461; *Lyster* v. *Dolland*, 1 Ves. Jr. 431.

Judgments by the common law were not liens upon real estate. The lien arose from the power to issue a writ of *elegit*. That power was given by the statute of Westminster. C. 18, 13 Ed. I. The right to extend the land fixed the lien upon it. *Massingal* v. *Downs*, 7 How. 765; *Shrew* v. *Jones*, 2 McLean, 80; *United States* v. *Morrison*, 4 Pet. 136; *United States* v. *Wooster*, 2 Brock. 252; *Ridge* v. *Prather*, 1 Blackf. 401.

If the judgment debtor died after the *elegit* was executed upon his lands, and before the judgment was satisfied, a court of equity, upon being applied to, would decree a sale of the land upon which it had been executed, and payment of the judgment out of the proceeds. *Stillman* v. *Ashdown*, 1 Atk. 607; *Tyndal* v. *Warre*, 3 Jac. 212. The same principle was adopted by Lord Redesdale into the equity jurisprudence of Ireland. *O'Gorman* v. *Comyn*, 2 Sch. & Lef. 130; *O'Fallon* v. *Dillon*, id. 18.

The reason why lands were not liable to be taken in execution at common law is thus stated by Bacon (2 Bac. Ab. Execution, A): "The lands were not liable because they were obliged to answer the duties of the feudal lord, and a new tenant could not be forced upon him without his consent in the alienation; and the person was not liable because he was obliged by the tenure to serve the king in the wars, and at home the several lords, according to the distinct nature of the tenure."

The premises in question are situated in that part of the District of Columbia ceded by Maryland to the United States. Our attention has been called to no statute passed by Maryland before the cession, or by Congress since, which affects the question before us. We assume that there is none. That question has been definitively settled by this court. In *Van Ness* v. *Hyatt*, *supra*, it was held, after a very elaborate examination of the subject, that, according to the laws of Maryland at the time of the cession, the equity of redemption of a mortgagor could not be sold under execution upon a judgment against him.

In *The Bank of the Metropolis* v. *Guttschick*, 14 Pet. 19, where the controversy involved a deed of trust of a lot in the city of Washington, it was said, "The only right of the grantor in the deed is the right to whatever surplus may remain, after the sale, of the money for which the property sold." It is clear that there could be no lien of a judgment upon such a *chose in action*, as well as that it could not be sold upon execution. The case of *Smith's Lessee* v. *McCann*, 24 How. 398, is an instructive one upon the subject we are considering. It was a case from Maryland; and the opinion of the court was delivered by Chief Justice Taney, who was, of course, well versed in Maryland law. There a sale had been made under a judgment and execution against a party to whom the premises had been conveyed in trust for the benefit of his wife and children. The action was ejectment by the purchaser. It was held that the statute of 5 Geo. II. which was in force in Maryland at the time of the cession, and which made "houses, land, negroes, and other hereditaments and real estate," liable to execution "in like manner as personal estate," &c., "did not interfere with the established distinction between law and equity, and that an equitable interest could not be seized under a *fi. fa.* until the law of Maryland was in this respect altered by the act of the assembly of the State in 1810."

This act expressly authorized the sale of equitable interests in real estate under execution. This enactment carried with it an implication, equivalent, under the circumstances, to an express declaration, that it could not be done before. Such, in the case last referred to, is stated to have been the law of Mayland up to that time. No such act has been passed by Congress. The law in the Maryland part of the ceded territory has remained as it was at the time of the cession. Other authorities to the same effect with those we have considered might be cited from the adjudications of Maryland and other States; but it is unnecessary to pursue the subject further.

The judgments in no wise affected the trust premises until the bill was filed. That created a lien in favor of the judgment creditors. There was none before. This was posterior to the execution of both the deeds of trust in favor of the association, and to all the advances made under them.

The court below was clearly in error in sustaining the exception to the auditor's report, and in giving priority of payment to the judgments over the amount secured by the last deed of trust.

The decree is, therefore, reversed; and the cause will be remanded with directions to overrule the exception to the auditor's report, and to enter a decree in conformity with this opinion.

ARTHUR *v.* CUMMING ET AL.

1. The term "burlaps," used in the revenue statutes, does not in commercial usage, by which descriptive terms applied to articles of commerce must be construed, mean "oil-cloth foundations," or "floor-cloth canvas."
2. "Oil-cloth foundations" and "floor-cloth canvas" are in commerce convertible terms for designating the same article; and it is clear that Congress intended that they should be so understood.
3. While the act of June 6, 1872 (17 Stat. 232), provides that an import duty of thirty per cent *ad valorem* shall be levied "on all burlaps and like manufactures of flax, jute, or hemp, or of which flax, jute, or hemp shall be the component material of chief value, except such as may be suitable for bagging for cotton," the fact that such burlaps are suitable, and can be and are used for oil-cloth foundations, or for any other purpose except bagging for cotton, is entirely immaterial, and does not subject them to an *ad valorem* duty of forty per cent.

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

Mr. Assistant Attorney-General Edwin B. Smith for the plaintiff in error.

Mr. George S. Sedgwick and *Mr. Stephen G. Clarke, contra.*

MR. JUSTICE SWAYNE delivered the opinion of the court.

The defendants in error were the plaintiffs in the court below. They claim that they were the importers of certain burlaps, upon which the duty chargeable by law was thirty per cent *ad valorem;* that the collector insisted the goods were "oil-cloth foundations," upon which the duty is forty per cent *ad valorem*, and compelled them to pay accordingly. They paid under protest, and brought this suit to recover back the alleged excess of ten per cent. Under the instructions of the court, a

verdict and judgment were given in their favor. The collector thereupon sued out this writ of error.

The case arises under the fourth section of the act of June 6, 1872 (17 Stat. 232), and turns upon the construction to be given to that section with respect to the particulars here in controversy.

That section declares, that after the 1st of August, 1872, in lieu of the duties theretofore levied upon the articles mentioned in the section, there should be paid upon those articles imported from foreign countries the following duties; to wit: —

"*On all burlaps* and like manufactures of flax, jute, or hemp, or of which flax, jute, or hemp shall be the component material of chief value, except such as may be suitable for bagging for cotton, thirty per centum *ad valorem*. *On all oil-cloth foundations or floor-cloth canvas*, made of flax, hemp, or jute, or of which flax, hemp, or jute shall be the component material of chief value, forty per centum *ad valorem*. On all bags, cotton-bags, and bagging, and all other like manufactures not herein provided for, except bagging for cotton, composed wholly or in part of flax, hemp, jute, gunny-cloth, gunny-bags, or other material, forty per centum *ad valorem*."

All the testimony produced upon the trial is embodied in the bill of exceptions. It was introduced by the plaintiffs. The United States adduced none.

The rule to be followed in the construction of revenue statutes in cases like this is well settled in this court. It is, that the descriptive terms applied to articles of commerce shall be understood according to the acceptation given to them by commercial men in our own ports at the time of the passage of the act in which they are found. *United States* v. *Two Hundred Chests of Tea*, 9 Wheat. 230; *Elliot* v. *Swartout*, 10 Pet. 151; *Curtis* v. *Martin*, 3 How. 106.

The statute here in question declares that "on *all* burlaps and like manufactures of flax, jute, or hemp, . . . except such as may be suitable for bagging for cotton, a duty of thirty per centum *ad valorem* shall be paid."

The mercantile testimony in the record shows that the articles in question were "burlaps," that they were a "manufacture of jute," and that they were not suitable for bagging for cotton. The exception may, therefore, be laid out of view.

The language of the statute is clear and explicit. It is, "*all* burlaps" made of jute, &c. The mercantile proof brings the case exactly within this category. The fact that the burlaps were suitable, and could be and were used for oil-cloth foundations, or for any other purpose except bagging for cotton, is entirely immaterial. The maxim, *Expressio unius, exclusio alterius*, applies with cogent effect.

This view is conclusive, unless it is overcome by something else found in the statute.

The counsel for the United States insists that it is answered by the next category defined in the section; which is, that "on *all oil-cloth foundations* or *floor-cloth canvas* made of flax, jute, or hemp," a duty shall be levied "of forty per cent *ad valorem*."

Here, again, we must look to the mercantile testimony in the record. It is there stated that "*floor-cloth canvas*" is used exclusively for the manufacture of *floor oil-cloth*. "It has a harder twist, is heavier, is a more expensive article than burlaps, and is not calendered as burlaps are. . . . Floor-cloth canvas is a commercial term implying a well-known article of merchandise thus described; and a merchant, in speaking of *foundations for oil-cloths*, would be considered to refer to '*floor-cloth canvas*.' Floor-cloth canvas is not called burlaps, nor is burlaps called *floor-cloth canvas*."

This testimony establishes two things: first, that the terms *oil-cloth foundations* and *floor-cloth canvas*, as used in the statute, mean in commerce the same thing; and, second, that the thing so understood is not *burlaps*, but a thing entirely distinct and different from that article.

The second clause of the statute in no wise affects the first one. There is, therefore, no just ground for maintaining that the goods imported by the plaintiffs below were dutiable as *oil-cloth foundations*, not as *burlaps*.

The researches of the counsel for the defendants in error have brought to our attention many instances in which two phrases with the like conjunction between them have been used to designate the same thing. In those cases it was obviously done to make clear and certain the meaning of the legislature, and to leave no room for doubt upon the subject. Such

in this section seems to have been the purpose of Congress. The phrase *oil-cloth foundations* would not necessarily import the article known in commerce as *floor-cloth canvas;* nor would the phrase *floor-cloth canvas* necessarily import an article to be used for "*oil-cloth foundations.*"

Considering the juxtaposition and connection in which the two phrases are found, and letting in upon them the light of the mercantile evidence, the inference is clear that Congress used them, and intended that they should be understood, as convertible terms. This gives all the certainty and freedom from doubt which could be effected by the largest circumlocution.

It evinces unmistakably the purpose that the *floor-cloth canvas* which is known in commerce as the article used for *oil-cloth foundations* should pay a duty of forty per cent *ad valorem.* The two designations have no effect beyond this result.

This examination of the statute and the record leaves no doubt in our minds upon the questions presented for our consideration.

As the case stood before the jury, the plaintiffs were clearly entitled to a verdict. The court, therefore, properly directed the jury to find accordingly. *Shugart* v. *Allens*, 1 Wall. 359.

It would have been error to refuse so to instruct them.

The judgment of the Circuit Court is affirmed.

THE "D. R. MARTIN."

Where the libellant recovered in the District Court a decree for $500, which, upon appeal by the adverse party, was reversed by the Circuit Court and the libel dismissed, and the libellant thereupon appealed to this court, — *Held*, that, the amount in controversy in the Circuit Court and here being but $500, the appeal must be dismissed.

APPEAL from the Circuit Court of the United States for the Eastern District of New York.

This suit was brought by Barney, the libellant, to recover damages for his wrongful eviction from the steamboat "D. R. Martin." He demanded in his libel $25,000 damages, but in

the District Court recovered only $500. From this decree the claimant appealed. Barney did not appeal. The Circuit Court reversed the decree of the District Court, and dismissed the libel. From this decree of the Circuit Court Barney appealed to this court.

Mr. Thomas Young for the appellee moved to dismiss the appeal because the matter in dispute did not exceed $2,000.

Mr. John M. Guiteau, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

Barney, having failed to appeal from the decree of the District Court, is concluded by the amount found there in his favor. He appears upon the record as satisfied with what was done by that court. In the Circuit Court, the matter in controversy was his right to recover the sum which had been awarded him as damages. If that court had decided against the claimant, he could not have asked an increase of his damages. *Stratton* v. *Jarvis*, 8 Pet. 9, 10; *Houseman* v. *Schooner North Carolina*, 15 id. 40. As the matter in dispute here is that which was in dispute in the Circuit Court, it follows that the amount in controversy between the parties in the present state of the proceedings is not sufficient to give us jurisdiction. *Gordon* v. *Ogden*, 3 Pet. 34; *Smith* v. *Honey*, id. 469; *Walker* v. *United States*, 4 Wall. 164. *The appeal is dismissed.*

THE "JUNIATA."

Depositions taken under a commission from a circuit court in an admiralty case, after an appeal to this court, will not be made a part of the record, unless a sufficient excuse be shown for not taking the evidence in the usual way before the courts below.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

The decree of the Circuit Court in this case was signed Feb. 13, 1874. An appeal was taken therefrom, and the record filed here on the thirteenth day of the following October.

Mr. Thomas J. Durant filed a certified copy of the order of the said Circuit Court, bearing date June 1, 1875, for a commission to take the deposition of certain witnesses to be used here, and moved that the depositions taken thereunder be made a part of the record.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The depositions in question were taken since the appeal, under a commission issued from the Circuit Court. Further proof in the case has not been ordered by this court. No such order would have been granted if application therefor had been made, unless a sufficient excuse was shown for not taking the evidence in the usual way before the courts below. This was the rule established in the case of *The Mabey*, 10 Wall. 419. We cannot admit depositions taken under a commission from the Circuit Court, except upon a similar showing. That has not been made. Leave is granted to renew the motion if this defect can be supplied. *Motion denied*,

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KOHL ET AL. *v.* UNITED STATES.

1. The right of eminent domain exists in the government of the United States, and may be exercised by it within the States, so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution.
2. Where Congress by one act authorized the Secretary of the Treasury to purchase in the city of Cincinnati a suitable site for a building for the accommodation of the United States courts and for other public purposes, and by a subsequent act made an appropriation "for the purchase at private sale, or by condemnation of such site," power was conferred upon him to acquire, in his discretion, the requisite ground by the exercise of the national right of eminent domain; and the proper Circuit Court of the United States had, under the general grant of jurisdiction made by the act of 1789, jurisdiction of the proceedings brought by the United States to secure the condemnation of the ground.
3. Where proceedings for the condemnation of land are brought in the courts of Ohio, the statute of that State treats all the owners of a parcel of ground as one party, and gives to them collectively a trial separate from the trial of the issues between the government and the owners of other parcels; but each owner of an estate or interest in each parcel is not entitled to a separate trial.

ERROR to the Circuit Court of the United States for the Southern District of Ohio.

This was a proceeding instituted by the United States to appropriate a parcel of land in the city of Cincinnati as a site for a post-office and other public uses.

The plaintiffs in error owned a perpetual leasehold estate in a portion of the property sought to be appropriated. They moved to dismiss the proceeding on the ground of want of jurisdiction; which motion was overruled. They then demanded a separate trial of the value of their estate in the property; which demand the court also overruled. To these rulings of the court the plaintiffs in error here excepted. Judgment was rendered in favor of the United States.

There are three acts of Congress which have reference to the acquisition of a site for a post-office in Cincinnati. The first, approved March 2, 1872, 17 Stat. 39, is as follows: —

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he is hereby, authorized and directed to purchase a central and suitable site in the city of Cincinnati, Ohio, for the erection of a building for the accommodation of the United States courts, custom-house, United States depository, post-office, internal-revenue and pension offices, at a cost not exceeding three hundred thousand dollars; provided that no money which may hereafter be appropriated for this purpose shall be used or expended in the purchase of said site until a valid title thereto shall be vested in the United States, and until the State of Ohio shall cede its jurisdiction over the same, and shall duly release and relinquish to the United States the right to tax or in any way assess said site and the property of the United States that may be thereon during the time that the United States shall be or remain the owner thereof."

In the Appropriation Act of June 10, 1872, 17 Stat. 352, a further provision was made as follows: —

"To commence the erection of a building at Cincinnati, Ohio, for the accommodation of the United States courts, custom-house, United States depository, post-office, internal-revenue and pension offices, and for the purchase, at private sale or by condemnation, of ground for a site therefor, — the entire cost of completion of which

building is hereby limited to two million two hundred and fifty thousand dollars (inclusive of the cost of the site of the same), — seven hundred thousand dollars; and the act of March 12, 1872, authorizing the purchase of a site therefor, is hereby so amended as to limit the cost of the site to a sum not exceeding five hundred thousand dollars."

And in the subsequent Appropriation Act of March 3, 1873, 17 Stat. 523, a further provision was inserted as follows: —

"For purchase of site for the building for custom-house and post-office at Cincinnati, Ohio, seven hundred and fifty thousand dollars."

Mr. E. W. Kittredge for plaintiffs in error.

1. For upwards of eighty years, no act of Congress was passed for the exercise of the right of eminent domain in the States, or for acquiring property for Federal purposes otherwise than by purchase, or by appropriation under the authority of State laws in State tribunals. A change of policy by Congress in this regard should not be supposed, unless the act is explicit. We do not raise the question as to the existence of the right of eminent domain in the national government; but Congress has never given to the Circuit Court jurisdiction of proceedings for the condemnation of property brought by the United States in the assertion or enforcement of that right.

In view of the uniform practice of the government, the provision in the act of Congress "for the purchase at private sale or by *condemnation*" means that the land was to be obtained under the authority of the State government in the exercise of its power of eminent domain. This is apparent from the language of the same section of the act of Congress of June 10, 1872, which appropriated a further sum for the "purchase" of a site in Cincinnati, and also appropriated money "to obtain by purchase, or to obtain by condemnation in the courts of the State of Massachusetts," a site for a post-office in Boston.

In this case, the State delegates its sovereign power of eminent domain. The United States, if it accepts this grant of power, accepts it as other corporations do, as the agent of the State, and must exercise it in the mode and by the tribunal which the State has prescribed.

2. If the proceeding was properly brought in the Circuit Court,

then the act of Congress of June 1, 1872, 17 Stat. 522, requires that it shall conform to the provisions of the law of the State in a like proceeding in a State court. The eighth section of the act of Ohio of April 23, 1872, 69 Ohio Laws, 88, secures to the owner of "each separate parcel" of property a separate trial, verdict, and judgment. The court below erred in refusing this demand of the plaintiff.

Mr. Assistant Attorney-General Edwin B. Smith, contra.

1. The right of eminent domain is an "inseparable incident of sovereignty." *Giesy* v. *C. W. & T. R.R. Co.*, 4 Ohio St. 323, 324; *West River Bridge* v. *Dix*, 6 How. 507; 2 Kent, 339; Cooley, Const. Lim. 526.

Of course the right of the United States is superior to that of any State. *Dobbins* v. *Comms.*, 16 Pet. 447.

The authority to purchase includes the right of condemnation. 4 Kent's Com. 372; *Burt* v. *Ins. Co.*, 106 Mass. 364; 7 Opinions of Att'y-Gen. 114.

Congress, by the use of the term "condemnation," indicated an expectation that it might and would be resorted to.

The legislature of Ohio concurred in this view of the power and necessity of such action, and passed an act of expropriation. 69 Ohio Laws, 81. But the right of a State to act as an agent of the Federal government, in actually making the seizure, has been denied. 23 Mich. 471.

The power to establish post-offices includes the right to acquire sites therefor, and by appropriation if necessary. *Dickey* v. *Turnpike Co.*, 7 Dana, 113; 2 Story on Const., sect. 1146.

Original cognizance "of all suits of a civil nature at common law or in equity," where the United States are plaintiffs or petitioners, is given to the Circuit Court of the United States.

"The term [suit] is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy which the law affords." 2 Pet. 464.

No provision of local law confining a remedy to a State court can affect a suitor's right to resort to the Federal tribunals. *Hyde* v. *Stone*, 20 How. 170; *Payne* v. *Hook*, 7 Wall. 425; *Railway Co.* v. *Whitton*, 13 id. 270.

Therefore the United States had the right to pursue in the

Circuit Court the remedy given by the legislature of Ohio. 70 Ohio Laws, 36.

2. The power to consolidate different suits by various parties, so as to determine a general question by a single trial, is expressly given by act of July 22, 1833. 3 Stat.; 21 R. S., ch. 18, sect. 921, p. 175.

The statute of Ohio, 69 Ohio Laws, 88, requires that the trial be had as to each parcel of land taken, not as to separate interest in each parcel.

MR. JUSTICE STRONG delivered the opinion of the court.

It has not been seriously contended during the argument that the United States government is without power to appropriate lands or other property within the States for its own uses, and to enable it to perform its proper functions. Such an authority is essential to its independent existence and perpetuity. These cannot be preserved if the obstinacy of a private person, or if any other authority, can prevent the acquisition of the means or instruments by which alone governmental functions can be performed. The powers vested by the Constitution in the general government demand for their exercise the acquisition of lands in all the States. These are needed for forts, armories, and arsenals, for navy-yards and light-houses, for custom-houses, post-offices, and court-houses, and for other public uses. If the right to acquire property for such uses may be made a barren right by the unwillingness of property-holders to sell, or by the action of a State prohibiting a sale to the Federal government, the constitutional grants of power may be rendered nugatory, and the government is dependent for its practical existence upon the will of a State, or even upon that of a private citizen. This cannot be. No one doubts the existence in the State governments of the right of eminent domain, — a right distinct from and paramount to the right of ultimate ownership. It grows out of the necessities of their being, not out of the tenure by which lands are held. It may be exercised, though the lands are not held by grant from the government, either mediately or immediately, and independent of the consideration whether they would escheat to the government in case of a failure of heirs. The right is the offspring of political necessity; and it is inseparable

from sovereignty, unless denied to it by its fundamental law. Vattel, c. 20, 34; Bynk., lib. 2, c. 15; Kent's Com. 338–340; Cooley on Const. Lim. 584 *et seq.* But it is no more necessary for the exercise of the powers of a State government than it is for the exercise of the conceded powers of the Federal government. That government is as sovereign within its sphere as the States are within theirs. True, its sphere is limited. Certain subjects only are committed to it; but its power over those subjects is as full and complete as is the power of the States over the subjects to which their sovereignty extends. The power is not changed by its transfer to another holder.

But, if the right of eminent domain exists in the Federal government, it is a right which may be exercised within the States, so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution. In *Ableman* v. *Booth*, 21 How. 523, Chief Justice Taney described in plain language the complex nature of our government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each, within its sphere of action prescribed by the Constitution of the United States, independent of the other. Neither is under the necessity of applying to the other for permission to exercise its lawful powers. Within its own sphere, it may employ all the agencies for exerting them which are appropriate or necessary, and which are not forbidden by the law of its being. When the power to establish post-offices and to create courts within the States was conferred upon the Federal government, included in it was authority to obtain sites for such offices and for court-houses, and to obtain them by such means as were known and appropriate. The right of eminent domain was one of those means well known when the Constitution was adopted, and employed to obtain lands for public uses. Its existence, therefore, in the grantee of that power, ought not to be questioned. The Constitution itself contains an implied recognition of it beyond what may justly be implied from the express grants. The fifth amendment contains a provision that private property shall not be taken for public use without just compensation. What is that but an implied assertion, that, on

making just compensation, it may be taken? In Cooley on Constitutional Limitations, 526, it is said, —

"So far as the general government may deem it important to appropriate lands or other property for its own purposes, and to enable it to perform its functions, — as must sometimes be necessary in the case of forts, light-houses, and military posts or roads, and other conveniences and necessities of government, — the general government may exercise the authority as well within the States as within the territory under its exclusive jurisdiction: and its right to do so may be supported by the same reasons which support the right in any case; that is to say, the absolute necessity that the means in the government for performing its functions and perpetuating its existence should not be liable to be controlled or defeated by the want of consent of private parties or of any other authority."

We refer also to *Trombley* v. *Humphrey*, 23 Mich. 471; 10 Pet. 723; *Dickey* v. *Turnpike Co.*, 7 Dana, 113; *McCullough* v. *Maryland*, 4 Wheat. 429.

It is true, this power of the Federal government has not heretofore been exercised adversely; but the non-user of a power does not disprove its existence. In some instances, the States, by virtue of their own right of eminent domain, have condemned lands for the use of the general government, and such condemnations have been sustained by their courts, without, however, denying the right of the United States to act independently of the States. Such was the ruling in *Gilmer* v. *Lime Point*, 18 Cal. 229, where lands were condemned by a proceeding in a State court and under a State law for a United States fortification. A similar decision was made in *Burt* v. *The Merchants' Ins. Co.*, 106 Mass. 356, where land was taken under a State law as a site for a post-office and sub-treasury building. Neither of these cases denies the right of the Federal government to have lands in the States condemned for its uses under its own power and by its own action. The question was, whether the State could take lands for any other public use than that of the State. In *Trombley* v. *Humphrey*, 23 Mich. 471, a different doctrine was asserted, founded, we think, upon better reason. The proper view of the right of eminent domain seems to be, that it is a right belonging to a

sovereignty to take private property for its own public uses, and not for those of another. Beyond that, there exists no necessity; which alone is the foundation of the right. If the United States have the power, it must be complete in itself. It can neither be enlarged nor diminished by a State. Nor can any State prescribe the manner in which it must be exercised. The consent of a State can never be a condition precedent to its enjoyment. Such consent is needed only, if at all, for the transfer of jurisdiction and of the right of exclusive legislation after the land shall have been acquired.

It may, therefore, fairly be concluded that the proceeding in the case we have in hand was a proceeding by the United States government in its own right, and by virtue of its own eminent domain. The act of Congress of March 2, 1872, 17 Stat. 39, gave authority to the Secretary of the Treasury to purchase a central and suitable site in the city of Cincinnati, Ohio, for the erection of a building for the accommodation of the United States courts, custom-house, United States depository, post-office, internal-revenue and pension offices, at a cost not exceeding $300,000; and a proviso to the act declared that no money should be expended in the purchase until the State of Ohio should cede its jurisdiction over the site, and relinquish to the United States the right to tax the property. The authority here given was to purchase. If that were all, it might be doubted whether the right of eminent domain was intended to be invoked. It is true, the words "to purchase" might be construed as including the power to acquire by condemnation; for, technically, purchase includes all modes of acquisition other than that of descent. But generally, in statutes as in common use, the word is employed in a sense not technical, only as meaning acquisition by contract between the parties, without governmental interference. That Congress intended more than this is evident, however, in view of the subsequent and amendatory act passed June 10, 1872, which made an appropriation "for the purchase at private sale or by condemnation of the ground for a site" for the building. These provisions, connected as they are, manifest a clear intention to confer upon the Secretary of the Treasury power to acquire the grounds needed by the exercise of the national right of eminent do-

main, or by private purchase, at his discretion. Why speak of condemnation at all, if Congress had not in view an exercise of the right of eminent domain, and did not intend to confer upon the secretary the right to invoke it?

But it is contended on behalf of the plaintiffs in error that the Circuit Court had no jurisdiction of the proceeding. There is nothing in the acts of 1872, it is true, that directs the process by which the contemplated condemnation should be effected, or which expressly authorizes a proceeding in the Circuit Court to secure it. Doubtless Congress might have provided a mode of taking the land, and determining the compensation to be made, which would have been exclusive of all other modes. They might have prescribed in what tribunal or by what agents the taking and the ascertainment of the just compensation should be accomplished. The mode might have been by a commission, or it might have been referred expressly to the Circuit Court; but this, we think, was not necessary. The investment of the Secretary of the Treasury with power to obtain the land by condemnation, without prescribing the mode of exercising the power, gave him also the power to obtain it by any means that were competent to adjudge a condemnation. The Judiciary Act of 1789 conferred upon the circuit courts of the United States jurisdiction of all suits at common law or in equity, when the United States, or any officer thereof, suing under the authority of any act of Congress, are plaintiffs. If, then, a proceeding to take land for public uses by condemnation may be a suit at common law, jurisdiction of it is vested in the Circuit Court. That it is a "suit" admits of no question. In *Weston* v. *Charleston*, 2 Pet. 464, Chief Justice Marshall, speaking for this court, said, "The term [suit] is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy which the law affords. The modes of proceeding may be various; but, if a right is litigated in a court of justice, the proceeding by which the decision of the court is sought is a suit." A writ of prohibition has, therefore, been held to be a suit; so has a writ of right, of which the Circuit Court has jurisdiction (*Green* v. *Liter*, 8 Cranch, 229); so has *habeas corpus*. *Holmes* v. *Jamison*, 14 Pet. 564. When,

in the eleventh section of the Judiciary Act of 1789, jurisdiction of suits of a civil nature at common law or in equity was given to the circuit courts, it was intended to embrace not merely suits which the common law recognized as among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined as distinguished from rights in equity, as well as suits in admiralty. The right of eminent domain always was a right at common law. It was not a right in equity, nor was it even the creature of a statute. The time of its exercise may have been prescribed by statute; but the right itself was superior to any statute. That it was not enforced through the agency of a jury is immaterial; for many civil as well as criminal proceedings at common law were without a jury. It is difficult, then, to see why a proceeding to take land in virtue of the government's eminent domain, and determining the compensation to be made for it, is not, within the meaning of the statute, a suit at common law, when initiated in a court. It is an attempt to enforce a legal right. It is quite immaterial that Congress has not enacted that the compensation shall be ascertained in a judicial proceeding. That ascertainment is in its nature at least *quasi* judicial. Certainly no other mode than a judicial trial has been provided.

It is argued that the assessment of property for the purpose of taking it is in its nature like the assessment of its value for the purpose of taxation. It is said they are both valuations of the property to be made as the legislature may prescribe, to enable the government, in the one case, to take the whole of it, and in the other to take a part of it for public uses; and it is argued that no one but Congress could prescribe in either case that the valuation should be made in a judicial tribunal or in a judicial proceeding, although it is admitted that the legislature might authorize the valuation to be thus made in either case. If the supposed analogy be admitted, it proves nothing. Assessments for taxation are specially provided for, and a mode is prescribed. No other is, therefore, admissible. But there is no special provision for ascertaining the just compensation to be made for land taken. That is left to the ordinary processes of the law; and hence, as the government is a suitor for the property under

a claim of legal right to take it, there appears to be no reason for holding that the proper Circuit Court has not jurisdiction of the suit, under the general grant of jurisdiction made by the act of 1789.

The second assignment of error is, that the Circuit Court refused the demand of the defendants below, now plaintiffs in error, for a separate trial of the value of their estate in the property. They were lessees of one of the parcels sought to be taken, and they demanded a separate trial of the value of their interest; but the court overruled their demand, and required that the jury should appraise the value of the lot or parcel, and that the lessees should in the same trial try the value of their leasehold estate therein. In directing the course of the trial, the court required the lessor and the lessees each separately to state the nature of their estates to the jury, the lessor to offer his testimony separately, and the lessees theirs, and then the government to answer the testimony of the lessor and the lessees; and the court instructed the jury to find and return separately the value of the estates of the lessor and the lessees. It is of this that the lessees complain. They contend, that whether the proceeding is to be treated as founded on the national right of eminent domain, or on that of the State, its consent having been given by the enactment of the State legislature of Feb. 15, 1873 (70 Ohio Laws, 36, sect. 1), it was required to conform to the practice and proceedings in the courts of the State in like cases. This requirement, it is said, was made by the act of Congress of June 1, 1872. 17 Stat. 522. But, admitting that the court was bound to conform to the practice and proceedings in the State courts in like cases, we do not perceive that any error was committed. Under the laws of Ohio, it was regular to institute a joint proceeding against all the owners of lots proposed to be taken (*Giesy* v. *C. W. & T. R.R. Co.*, 4 Ohio St. 308); but the eighth section of the State statute gave to "the owner or owners of each separate parcel" the right to a separate trial. In such a case, therefore, a separate trial is the mode of proceeding in the State courts. The statute treats all the owners of a parcel as one party, and gives to them collectively a trial separate from the trial of the issues between the government and the owners of other parcels. It

hath this extent; no more. The court is not required to allow a separate trial to each owner of an estate or interest in each parcel, and no consideration of justice to those owners would be subserved by it. The Circuit Court, therefore, gave to the plaintiffs in error all, if not more than all, they had a right to ask. *The judgment of the Circuit Court is affirmed.*

MR. JUSTICE FIELD dissenting.

Assuming that the majority are correct in the doctrine announced in the opinion of the court, — that the right of eminent domain within the States, using those terms not as synonymous with the ultimate dominion or title to property, but as indicating merely the right to take private property for public uses, belongs to the Federal government, to enable it to execute the powers conferred by the Constitution, — and that any other doctrine would subordinate, in important particulars, the national authority to the caprice of individuals or the will of State legislatures, it appears to me that provision for the exercise of the right must first be made by legislation. The Federal courts have no inherent jurisdiction of a proceeding instituted for the condemnation of property; and I do not find any statute of Congress conferring upon them such authority. The Judiciary Act of 1789 only invests the circuit courts of the United States with jurisdiction, concurrent with that of the State courts, of suits of a civil nature at common law or in equity; and these terms have reference to those classes of cases which are conducted by regular pleadings between parties, according to the established doctrines prevailing at the time in the jurisprudence of England. The proceeding to ascertain the value of property which the government may deem necessary to the execution of its powers, and thus the compensation to be made for its appropriation, is not a suit at common law or in equity, but an inquisition for the ascertainment of a particular fact as preliminary to the taking; and all that is required is that the proceeding shall be conducted in some fair and just mode, to be provided by law, either with or without the intervention of a jury, opportunity being afforded to parties interested to present evidence as to the value of the property, and to be heard thereon. The proceeding by the States, in the

exercise of their right of eminent domain, is often had before commissioners of assessment or special boards appointed for that purpose. It can hardly be doubted that Congress might provide for inquisition as to the value of property to be taken by similar instrumentalities; and yet, if the proceeding be a suit at common law, the intervention of a jury would be required by the seventh amendment to the Constitution.

I think that the decision of the majority of the court in including the proceeding in this case under the general designation of a suit at common law, with which the circuit courts of the United States are invested by the eleventh section of the Judiciary Act, goes beyond previous adjudications, and is in conflict with them.

Nor am I able to agree with the majority in their opinion, or at least intimation, that the authority to purchase carries with it authority to acquire by condemnation. The one supposes an agreement upon valuation, and a voluntary conveyance of the property: the other implies a compulsory taking, and a contestation as to the value. *Beekman* v. *The Saratoga & Schenectady Railroad Co.*, 3 Paige, 75; *Railroad Company* v. *Davis*, 2 Dev. & Batt. 465; *Willyard* v. *Hamilton*, 7 Ham. (Ohio), 453; *Livingston* v. *The Mayor of New York*, 7 Wend. 85; *Koppikus* v. *State Capitol Commissioners*, 16 Cal. 249.

For these reasons, I am compelled to dissent from the opinion of the court.

ROMIE ET AL. v. CASANOVA.

Where, in a State court, both parties to a suit for the recovery of the possession of lands claimed under a common grantor whose title under the United States was admitted, and where the controversy extended only to the rights which they had severally acquired under it, — *Held*, that, as no Federal question arose, this court has no jurisdiction.

ERROR to the Supreme Court of the State of California.

This is an action of ejectment, commenced in the District Court for the Third Judicial District of the State of California. That court found as follows: —

"*First*, That on the seventeenth day of December, 1845, Felix

Buelna was alcalde of the pueblo de San José, and, as such, granted and conveyed in fee to Bicenta Padia a lot of land in said pueblo, fifty varas in front and one hundred varas in depth, and on that day measured the same, and delivered to said Padia the possession thereof; and that said Padia shortly afterwards and within one year thereafter enclosed said lot with a fence, and lived upon and cultivated the same.

"*Second*, That afterwards, and before the commencement of this action, said Bicenta Padia sold and conveyed said lot of land to defendant, Teresa Casanova; and that she is now, and was at the time of the commencement of this action, and ever since has been, the owner in fee thereof.

"*Third*, That said lot so granted and conveyed to said Padia is situated in the city of San José, within the boundaries named in the complaint herein, immediately south of the lot known as the Ceseña lot, and formerly known as the Buelna lot, and latterly occupied by Meserve, fronting on the old Monterey road fifty varas, and extending back one hundred varas westerly.

"*Fourth*, That, at the time of the commencement of this action, defendant, Teresa Casanova, with her husband, Francisco Casanova (now deceased), was in possession of said lot of land granted and delivered to said Padia, but not of any other part of the premises described in the complaint of plaintiff.

"*Fifth*, That the present city of San José is the former pueblo de San José; that the title of said city to the lands within her boundaries, claimed under grant from the Spanish government, has been finally confirmed to said city by the courts and authorities of the United States.

"*Sixth*, That defendant, Teresa Casanova, is now, and was at the commencement of this action, the owner in fee of the said lot of land granted to Padia, and located as aforesaid; and that the plaintiffs are not and never were the owners, nor was any one of them the owner thereof or any part thereof."

The court found, as conclusions of law, that plaintiffs were not entitled to judgment against defendant, Teresa Casanova, for the premises sued for, or any part thereof, and that said defendant, Teresa Casanova, was entitled to judgment against plaintiffs for her costs, and that she is the owner of said premises occupied by her as above described; and gave judgment accordingly.

On appeal to the Supreme Court of the State of California,

the judgment of the District Court was affirmed: whereupon the plaintiffs sued out this writ of error.

Submitted on printed arguments by *Mr. S. O. Houghton* and *Mr. John Reynolds* for the plaintiffs in error, and by *Mr. John A. Grow*, *contra*.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

No Federal question is presented by the record in this case. The action was brought to recover the possession of certain lands. Both parties claimed title from the city of San José; and the question to be determined was, which of the two had actually obtained a grant of the particular premises in controversy. The title of the city was not drawn in question. Even if it depended upon the treaty of Guadaloupe Hidalgo and the several acts of Congress to ascertain and settle private land claims in California, the case would not be different. Both parties admit that title, and their litigation extends only to the determination of the rights which they have severally acquired under it. *The writ is dismissed.*

THE "DOVE."

1. The decree of a district court, dismissing a cross-libel for want of merit, from which no appeal was taken, determines the questions raised by such cross-libel, but does not dispose of the issues of law or of fact involved in the original suit.
2. By such dismissal, without appeal, both parties to the cross-libel are remitted to the pleadings in the original suit; and every issue therein is open on appeal as fully as if no cross-libel had ever been filed.

APPEAL from the Circuit Court of the United States for the Eastern District of Michigan.

The facts are stated in the opinion of the court.

Mr. H. F. Canfield and *Mr. D. B. Duffield* for the appellant.

Mr. Ashley Pond and *Mr. W. A. Moore*, *contra*.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Efforts, sometimes of a persistent character, are made in controversies of the kind, to establish a theory, which, if true, would

show that the respective vessels of the parties never collided, even when it is admitted that the collision did occur at the time and place alleged in the libel, and that the vessel of the complaining party became a total loss. Such efforts are useless, as it is hardly to be expected that the attention of the court, if accustomed to such investigations, can be diverted from the great inquiry in such a case, which of the parties, if either, is responsible for the loss occasioned by the disaster.

Compensation is claimed by the owners of the steamer "Dove" for damages received by the steamer in a collision, which occurred in St. Clair River, May 31, 1869, between the steamer and the propeller "Mayflower," about eleven o'clock in the evening of that day, in which the propeller struck the steamer on her port bow, and caused such injuries to the steamer, that her master found it necessary, in order to prevent her from sinking in deep water, to port her helm, and strand her on the Canada channel-bank of the river.

Process was served, and the owner of the propeller appeared and filed an answer. He also filed a cross-libel, in which he charged that the collision was occasioned by the fault of the steamer; and the owners of the steamer appeared and filed an answer to the cross-libel, denying the charge that the steamer was in fault, and reaffirming all the material allegations of the original libel.

Testimony was taken on both sides; and, the parties having been fully heard, the District Court entered a decree in favor of the owners of the steamer for the sum of $14,114.62, with interest and costs, as set forth in the decree, and dismissed the cross-libel with costs, at the same time the decretal order was entered in favor of the libellants in the original suit promoted by the owners of the steamer; from which decree dismissing the cross-libel no appeal was ever taken by either party.

Seasonable appeal to the Circuit Court was taken by the owner of the propeller from the decree of the District Court in the original suit, and further testimony was there taken before the final hearing. On the part of the propeller, the same views were maintained in the Circuit Court as those urged in the District Court; but the owners of the steamer submitted an additional proposition, to the effect, that, inasmuch as no

appeal had been taken from the decree of the District Court in the cross-libel, the libellant in that suit was estopped to deny the charge in the answer to the cross-libel, that the collision was occasioned wholly by the fault of the propeller.

Both parties were again heard, and the Circuit Court affirmed the decree of the District Court; and the respondent in the original suit appealed to this court. His principal propositions here are, that the collision occurred on the Canada side of the river, and that the steamer was wholly in fault.

Opposed to the first proposition, it is insisted by the libellant that the collision took place on the American side of the river; that the propeller was wholly in fault; and that her owner is estopped to deny that allegation, because no appeal was taken from the decree of the District Court dismissing the cross-libel.

Special reference is made in the argument to the case of *Ward* v. *Chamberlain*, 21 How. 554, as tending to support the proposition of estoppel; but the court here is of the opinion that nothing is found in that case which has any such tendency. Two remarks will be sufficient to show that the inference drawn from that case is not well founded: (1.) That no cross-libel was filed in that case. Due process was issued in the original suit, and the respondents appeared and filed an answer, and the parties entered into an agreement that the answer in the primary suit should also be considered and operate as a libel in the cross-action. (2.) That in the case before the court there is a cross-libel, in regular form, in addition to the answer filed to the original libel, and that the libellant in the original libel appeared in the cross-suit and filed an answer.

Causes of the kind may be tried together or separately, as it is obvious that the pleadings in each are complete without any reference to the other. Nothing is required on the part of the respondent in the original suit beyond his answer, unless he claims that his vessel was injured, and that the collision was occasioned wholly by the fault of the vessel of the original libellant. For all purposes of defence to the charges made by the libellant, his answer, if in due form, is sufficient; but if he intends to claim a decree for the damages suffered by his own vessel, then he should file a cross-libel. Damages for injuries to his own vessel cannot be decreed to him under an answer to

the original libel, as the answer does not constitute a proper basis for such a decree in favor of the respondent. Consequently, whenever he desires to prefer such a claim, he should file an answer to the original libel, and institute a cross-action to recover the damage for the injuries sustained by his own vessel.

Controversies of the kind are usually tried together; and it appears that the two suits in this litigation were so tried in the District Court, and that the District Court came to the conclusion that the cross-suit was without merit, and dismissed the cross-libel; and, inasmuch as the libellant in that suit did not appeal from that decree, the suit is ended and determined. But the determination of that suit by such a decree did not determine the rights of the parties in the original suit: on the contrary, it left the issues in the latter suit just as they would have been had the cross-suit never been commenced.

Beyond doubt, the final decree dismissing the libel in the cross-suit determines that the libellant in that suit is not entitled to recover affirmative damages for any injuries suffered by his vessel in the collision; but it does not dispose of the issues of law or fact involved in the original suit. Instead of that, both parties in the cross-suit, if no appeal is taken from the decree in that suit, are remitted to the pleadings in the original suit; and it is undeniable that every issue in those pleadings is open to the parties, just the same as if no cross-libel had ever been filed.

Filed, as the cross-libel was, to enable the libellant in that suit to recover affirmative damages for the injuries received in the collision by his own vessel, which he could not recover under his answer in the original suit, the effect of the adverse decree, not appealed from, must be to preclude him from all such recovery in any subsequent judicial proceeding; but it was never heard that such a decree in a cross-libel impaired the right of the libellant, as the respondent in the original suit, to make good, if he can, every legal defence of law or fact set up and well pleaded in his answer to the original libel. Usually such suits are heard together, and are disposed of by one decree or by separate decrees entered at the same time; but a decision in the cross-suit adverse to the libellant, even if

the decree is entered before the original suit is heard, will not impair the right of the respondent in the original suit to avail himself of every legal and just defence to the charge there made which is regularly set up in the answer, for the plain reason that the adverse decree in the cross-suit does not dispose of the answer in the original suit.

Such a decree, if not appealed from, is conclusive that the libellant in the cross-suit is not entitled to recover affirmative damages for any injuries received by his own vessel; but it does not preclude him from showing in the original suit, if he can, that the collision was the result of inevitable accident, or that it was occasioned by the negligence of those in charge of the other vessel, or that it is a case of mutual fault, where the damages should be divided. *The Milan*, Lush. 398; Williams & Bruce Prac. 72, 254; *The Washington*, 5 Jur. 1067; *The Shannon*, 1 W. Rob. 463; *The Calypso*, Swab. 29; *The Navarro*, Olcott, 127; *Snow* v. *Carrutts*, 1 Sprague, 524; *Nichols* v. *Trimlet*, 1 id. 631; *North American*, Lush. 79.

Whether the controversy pending is a suit in equity or in admiralty, a cross-bill or libel is a bill or libel brought by a defendant in the suit against the plaintiff in the same suit or against other defendants in the original suit or against both, touching the matters in question in the original bill or libel. It is brought in the admiralty to obtain full and complete relief to all parties as to the matters charged in the original libel; and in equity the cross-bill is sometimes used to obtain a discovery of facts.

New and distinct matters, not included in the original bill or libel, should not be embraced in the cross-suit, as they cannot be properly examined in such a suit, for the reason that they constitute the proper subject-matter of a new original bill or libel. Matters auxiliary to the cause of action set forth in the original libel or bill may be included in the cross-suit, and no others, as the cross-suit is, in general, incidental to, and dependent upon, the original suit. *Ayers* v. *Carter*, 17 How. 595; *Field* v. *Schieffelin*, 7 Johns. Ch. 252; *Shields* v. *Barrow*, 17 How. 145.

Apply these rules to the case before the court, and it is clear that the whole merits of the controversy, under the pleadings in

the original suit, is open to both parties, the same as if the cross-suit had never been commenced.

Coming to the merits, the facts may be succinctly stated as follows: That the steamer, having passengers on board and a small cargo of general merchandise, was passing up the river, on the American side of the channel, on a trip from Detroit to Port Huron; and that the propeller, laden with a cargo of grain and flour, was coming down the river on the Canada side, bound on a voyage from Chicago to Buffalo. All agree that the night was somewhat dark, and that there was considerable fog, which sometimes lifted for a brief period, so that the banks of the river, one or both, could be seen, and then would settle down so that neither could be seen by those on board either vessel. Sufficient appears to show that the steamer was well manned and equipped; that she showed the proper signal-lights; and that she had competent lookouts properly stationed on the vessel, and that they were faithful and vigilant in the performance of their duty.

Nothing need be remarked respecting her trip up the river until she reached Marine City, where it appears she stopped fifteen or twenty minutes. When she started from there, it was the intention of her master to touch at Ricard's Dock; and, with that view, those who had charge of her navigation when she left the wharf at that landing laid her course due north for that place; and the evidence is full to the point that she pursued that course close to the American side of the channel until within a short distance — less than a quarter of a mile — of Ricard's Dock, when, it being suggested that the vessel touched bottom, she ported her helm, and was put upon a course of north by east, which still kept her close to the channel bank on the American side of the river; and it appears that she kept that course until the two vessels were so near together, that a collision was inevitable.

Throughout the whole period from the time she left the landing at Marine City, both before and after it was suggested that she touched bottom, the evidence is entirely satisfactory that she was proceeding slowly under check, constantly blowing two blasts of her whistle, once in two or three minutes, to signify that her course was on the American side of the channel.

Proof equally satisfactory is also exhibited in the record showing that the blasts of her whistle were answered several times by two blasts of the whistle from the descending propeller, to signify that she was coming down the river on the Canada side of the channel.

Much discussion took place at the bar as to the place of the collision, it being insisted by the libellant that it was on the American side of the channel, and by the respondent that it was on the Canada side: but the evidence is so persuasive and convincing that the theory of the libellants in that regard is correct, that it would seem to be a work of supererogation to reproduce it. Nor is it necessary, in any point of view, as a full analysis of all the testimony on both sides is given by the district judge in his opinion published in the record.

Before adverting to the circumstances attending the collision, it becomes necessary to recur to the evidence, showing what were the antecedent acts of the propeller. Many of the facts, also, in respect to the propeller, are either conceded or so fully proved as to render much discussion unnecessary. She was a large vessel, with a full cargo, and was coming down the river at full speed; and it is not doubted that she kept pretty close to the Canada side of the channel until she got down opposite Bowen's Dock, when it is clear from the evidence that she ported her helm, intending to cross to the other side of the river, and to touch at Marine City, where her master resided. Just after she ported her helm, under the order of the mate, the master came on deck; and the evidence is convincing that neither the master nor the mate knew where the propeller was, and yet she was kept on her course under a port helm, without any diminution of her speed, until it was too late to adopt any effectual precaution to prevent a collision.

Enough appears to show, beyond all doubt, that the master intended to leave the Canada side of the river, and to stop at Marine City; and it may be that the helm of the propeller was put to port much earlier than was necessary for that purpose, or that the propeller was more distant from the Canada shore when the helm of the propeller was put to port than those in charge of her deck supposed. Suppose that was so: still it affords no defence for the propeller, as the evidence is

decisive that neither the master nor the mate knew whether the propeller was in the centre of the channel, or on the American or Canada side of the channel. Instead of that, the mate testifies in the most positive manner that no one could see the shore on either side, and that neither the master nor any one else could say whether a light which they saw was on one side or the other of the river.

Suffice it to say, the collision occurred; and the evidence shows beyond all doubt, in the judgment of the court, that it occurred on the American side of the channel. Attempt is made to controvert that proposition, chiefly upon three grounds: (1.) Because it appears that the propeller, when she answered the whistle of the steamer, was evidently on the Canada side of the river. (2.) Because the propeller struck the steamer on her port bow. (3.) Because the steamer sank on the Canada side of the channel of the river.

No doubt the propeller was on the Canada side of the channel until she ported her helm to pass over to the other side of the river preparatory to effect the intention of the master to touch at Marine City, where the master intended to stop. Equally satisfactory answer may be given to the other two objections taken to the theory of the libellants.

Persuasive proof having been introduced that the steamer was on the American side, it must be that the propeller crossed over to the American side before the steamer came up, and, being somewhat nearer to the American shore than the steamer, struck her as she came up half a point on her port bow; and the master of the steamer testifies that he immediately found that the steamer was in danger of sinking, and consequently put his helm hard to port, and headed the steamer towards the opposite shore, and that she stranded on the Canada channel-bank.

Beyond question, the effect of the blow when the collision occurred was to turn the stem of the steamer from the American shore out into the stream. Besides, it also appears that the stem of the steamer was so damaged by the collision that the vessel would not obey her helm against the current; which of itself, it may be, rendered it necessary for the master to change the course of the steamer. That he did so is fully

proved; and there is nothing in the record to show that a skilful mariner would have adopted any other course.

Examined in the light of these suggestions, it is clear, in the judgment of the court, that the collision occurred on the American side of the channel, and that the propeller was wholly in fault for the disaster. Both courts below concurred in that view; and this court finds no error in the record.

Decree of the Circuit Court affirmed.

COOKE ET AL. v. UNITED STATES.

1. Where notes purporting to be 7-30 treasury-notes, indorsed by the holders thereof "to the order of the Secretary of the Treasury for redemption," were purchased, before their maturity, under the authority of the act of Aug. 12, 1866 (14 Stat. 31), by an assistant-treasurer of the United States, — *Held*, that the payment by him therefor did not, without the further order of the Secretary of the Treasury, retire them. Until such order be given, or until it ought to have been given, the government does not accept the notes as genuine.
2. Where such notes, indorsed as aforesaid, and sold and delivered at different times between Sept. 20 and Oct. 8 at the office of the sub-treasury of the United States in New York, were returned Oct. 12 by the Treasury Department, as spurious, to the assistant-treasurer in that city, who had purchased or redeemed them with the money of the United States, and due notice was given the following day to the party from whom he had received them, — *Held*, that there was no such delay in returning the notes as would preclude the United States from recovering the money paid therefor.
3. The ruling of the district judge, that though the notes may be printed in the department from the genuine plates, and may be all ready to issue, yet, if they are not in fact issued by an officer thereunto authorized, they do not come within the statute of Aug. 12, 1866, and the United States are not bound to redeem them, — *Held* to be error.

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

The case was as follows: —

On the 3d of March, 1865, Congress authorized the Secretary of the Treasury to borrow, on the credit of the United States, not exceeding six hundred millions of dollars, and to issue therefor bonds or treasury-notes of the United States, bearing interest not exceeding seven and three-tenths per centum per

annum, payable semi-annually. 13 Stat. 468. Such notes were not made a legal tender. Under this act, treasury-notes to a large amount were issued by the Secretary of the Treasury, payable three years after date.

On the 12th of August, 1866, Congress, by another act, authorized the Secretary of the Treasury, at his discretion, to receive any treasury-notes or other obligations issued under any act of Congress, whether bearing interest or not, in exchange for any description of bonds authorized by the previous act of March 3, 1865, and also to dispose of any description of bonds authorized by such previous act . . . for lawful money of the United States, or for any treasury-notes . . . which had been, or which might be, issued under any act of Congress, the proceeds thereof to be used only for retiring treasury-notes or other obligations issued under any act of Congress; but nothing therein contained to be construed to authorize any increase of the public debt. 14 Stat. 31.

On each of several days, from and including Sept. 20 and Oct. 8, 1867, the defendants below (the plaintiffs in error) presented large amounts of treasury-notes purporting to be issued under the act of 1865, dated June 15, 1865, and payable three years after date to the Assistant-Treasurer of the United States at the city of New York, who purchased the amount and description of notes at the prices and premium mentioned in bills of sale made by the plaintiffs in error, and paid them therefor with the money of the United States. Such bills of sale were in the following form: —

"Sold Hon. H. H. Van Dyck, Assistant-Treasurer of the United States, No. 700, by Jay Cooke & Co., corner of Wall and Nassau Streets, Sept. 20: —

$400,000, June 7$\frac{3}{10}$,	107	$428,000
	97 days	7,760
$100,000, July	,, 107	107,000
	67 days	1,340
		$544,100

Before the delivery of the notes, the plaintiffs in error, by a stamp, which, for their convenience, they were permitted to employ in lieu of their written signature, printed on the back

of each the words, "Pay to the Secretary of the Treasury for redemption. — Jay Cooke & Co."

The notes were forwarded to the Secretary of the Treasury at Washington; and, on examination there, eighteen thereof, of one thousand dollars each, were pronounced not to be genuine treasury-notes issued by the government of the United States, and were thereupon returned to the assistant-treasurer at New York, who, on the 13th of October, 1867, duly notified the plaintiffs in error, and required them to refund the money paid for the counterfeit notes, or substitute other notes for them. On the refusal of the plaintiffs in error to comply with this requirement, this suit was brought.

The declaration contained special counts describing the cause of action as an indebtedness by the defendants to the plaintiff for money had and received by the defendants to and for the use of the United States, and of their property, which money was obtained by the defendants upon occasion of their delivering to the plaintiff what purported to be obligations of the United States known as seven-thirty treasury-notes, which were by the defendants, when they delivered them to the officer of the sub-treasury, professed to be, and by the plaintiffs and their officer aforesaid were then supposed to be, valid, genuine notes; and by the defendants' representations and inducements the same were received as valid, genuine notes by the plaintiffs and their officer aforesaid at the sub-treasury of the United States aforesaid, at the city of New York.

That the said notes were in fact counterfeit, and had never been executed or issued by the United States, but had been forged and falsely made and uttered, and were no obligations of the United States, and were by their officers aforesaid received as aforesaid under the belief created by the representations and inducements aforesaid that the notes were good, and formed an adequate consideration for the money received by the defendants, which money was retained by them from the plaintiffs after discovery that the said notes were counterfeit, whereof prompt notice was given to the defendants, that, being so indebted, the defendants promised, &c. There were also other counts in general *indebitatus assumpsit* for money had and received.

The defendants pleaded *non-assumpsit.*

Upon the trial, exceptions were taken by the defendants to the ruling of the district judge in the admission and exclusion of evidence, and also to certain portions of his charge to the jury.

A verdict was rendered in the District Court in favor of the United States for the amount paid to the defendants, with interest thereon, — $23,630.88.

The judgment of the District Court was affirmed by the Circuit Court: whereupon the defendants below sued out this writ of error.

The alleged errors relied on here were as follows: —

First, That the District Court erred in refusing to charge the jury in accordance with the prayer of the defendants below.

1. If the defendants honestly believed the notes in question to be genuine obligations issued by the United States, and, so believing, passed them in good faith to Mr. Van Dyck, the Assistant-Treasurer of the United States, and the latter, under the like belief and in good faith, received the notes and paid for them, the plaintiffs are not entitled to recover, although the notes may not have been genuine obligations issued by the United States.

2. That, in determining whether the eighteen notes in question are genuine obligations, the jury are entitled to take into consideration the fact that said notes were supposed to be genuine by the assistant-treasurer in New York, and passed through his hands and the hands of other officials connected with the Treasury Department.

3. That the burden of proving that the eighteen notes in question, "C 1" to "C 18," are not genuine obligations of the United States, rests upon the plaintiffs; and, if the evidence be insufficient to establish the fact that such notes are not genuine obligations as aforesaid, the defendants are entitled to a verdict.

Second, That the court erred in ruling, during the progress of the trial and in the charge, that defendants below were not entitled to a verdict unless the notes in question were *actually issued* under an act of Congress, and that the act of issuing such notes was a *physical act;* and that although the notes were printed in the department from the genuine plates, and might

be all ready to issue, still, if they were not in fact so issued, the defendants below were not entitled to a verdict.

Third, That the court erred in admitting in evidence the "K" notes which were claimed by the government to be genuine, and in admitting in evidence the coupons alleged to have been attached to said notes, and to have been paid by the United States.

Fourth, The court erred in admitting the following evidence on the part of the United States: —

Questions to Casilear. George W. Casilear, superintendent of engraving and transferring in the Treasury Department, proved that the work on the genuine "7-30" notes was made up under his supervision, and that the plates were engraved in the treasury-building under his superintendence, and that he did some of the engraving on the plates, and he pointed out the particular portions of his work; but the plates were not produced.

He was asked these questions: —

"1. *Q.* From your observation of these notes, and your knowledge of the genuine plates, were these notes, 'C 1' to 'C 18,' printed from those plates?"

Question objected to. Objection overruled.

"2. *Q.* Were those eighteen notes, 'C 1' to 'C 18,' printed or not from any plate referred to by you as having been got up by you under your supervision in the Treasury Department, from which 7-30 notes of the second series used by the government were printed, so far as you know?"

Same objection. Overruled.

"*A.* They were not."

Questions to Cooper. David M. Cooper, a witness for the plaintiffs, testified that he engraved the original die from which the seals used on the alleged genuine notes were produced by what is termed the transfer process, and was asked these questions: —

"3. *Q.* Could that die, which you engraved, have produced that seal on the counterfeit?"

Objected to. Objection overruled.

"*A.* It could not.

"4. *Q.* Did you ever know of a note, like those marked 'C,' to be printed from the plate from which the notes marked 'K' were taken?"

An exception was taken to this question, which was overruled, and the witness answered in the negative.

Fifth, That the court erred in overruling and excluding the following questions put by the defendants below: —

Question to Holmes. Plaintiffs below read from the letter-book of Jay Cooke & Co. twelve letters, copies of all of which, except one which was illegible, are inserted among the exhibits at the end of the case, which letters were received as admissions by Jay Cooke & Co. that these identical notes had been transferred by them to the assistant-treasurer.

The defendants thereupon offered to prove, by Philip W. Holmes, that he wrote or drafted and sent all these letters, acting on the information derived from the sub-treasurer that the statement in reference to the notes being counterfeit was correct, and without knowing about the identity of them. This was objected to, and the objection sustained.

The eighteen notes claimed to be counterfeit were introduced in evidence by the United States, and marked "C 1" to "C 18."

Questions to Ryerson. U. C. Ryerson, called as a witness by defendants below, testified that he was in the transfer department of the "National Note Bureau," of which S. M. Clark was at the head for three years, from February, 1863, to 1866.

The witness was asked, —

"*Q.* Do you discover any discrepancies or differences between these two notes, which, in your experience, may not have been caused by a defect in the transfer?"

The question was overruled.

"*Q.* Look at these two notes, 'C' and 'K.' Can you state from your experience in the department, and from your knowledge of the plates there used to print the second series of seven-thirty notes, whether or not these two classes of notes — 'C' and 'K' — were printed from the same plate in different conditions, occasioned by a re-entry?"

Question excluded by the court.

Questions to Tichener, witness for defendants. He testified that he was a geometrical-lathe operator, and familiar with other branches of engraving.

"*Q.* Does it not sometimes occur, that, in the process of burnishing a roll, a portion of the work on the roll becomes obliterated and erased, or in other respects changed?

"*Q.* Can you, after an examination of these specimen-notes 'C' (the notes alleged to be counterfeit) and 'K' (valid notes), and, if so, state whether they were printed from the same plate in different conditions, caused by re-entering?"

Questions excluded by the court.

Mr. J. E. Burrell and *Mr. R. L. Ashhurst* for plaintiffs in error.

The debtor is presumed to know whether the obligations paid by him are genuine; and money paid by him to an innocent holder of them cannot be recovered.

The transaction was not a purchase of securities.

The party to whom forged obligations are passed must immediately notify the person from whom he received them, and tender the instruments. In this case, no notice was given until three weeks had elapsed, and the notes had been defaced. *Thomas* v. *Todd*, 6 Hill, 340; 2 Pars. on Contr. 265.

The liability of government for acts of its agents is unquestionable. Story on Agency, 8th ed., 307 *a*; *Martin* v. *Mott*, 12 Wheat. 19–31.

Seven-thirty notes have all the qualites of commercial paper. *Mercer County* v. *Hacket*, 1 Wall. 83.

Mr. Attorney-General Pierrepont and *Mr. Solicitor-General Phillips* for the defendants in error.

When paid, these notes were not due; and they were paid under a special authority derived from the act of 1866, ch. 39, 14 Stat. 31. By that act, the Secretary of the Treasury was to apply certain funds thereby provided "for retiring treasury-notes issued under any act of Congress." A treasury-note which originally went into circulation surreptitiously is not included in that description.

If the assistant-treasurer had no authority to redeem these notes, his action can be ratified only by Congress.

The point, that the cancellation of the notes at the treasury disables the government from recovery, is not well taken.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The United States sued Jay Cooke & Co., in this action, to recover back money paid them by the assistant-treasurer in New York for the purchase or redemption before maturity, under the the act of Aug. 12, 1866 (14 Stat. 31), of what purported to be eighteen 7-30 treasury notes, issued under the authority of the act of March 3, 1865 (13 Stat. 468), but which it is alleged were counterfeit. Cooke & Co. insist, that if they honestly believed the notes in question were genuine, and, so believing, in good faith passed them to the assistant-treasurer, and he, under a like belief, and with like good faith, received and paid for them, there can be no recovery, even though they may have been counterfeit.

As this defence meets us at the threshold of the case, it is proper that it should be first considered.

It was conceded in the argument, that, when the United States become parties to commercial paper, they incur all the responsibilities of private persons under the same circumstances. This is in accordance with the decisions of this court. *The Floyd Acceptances*, 7 Wall. 557; *United States* v. *Bk. of Metropolis*, 15 Pet. 377. As was well said in the last case, "From the daily and unavoidable use of commercial paper by the United States, they are as much interested as the community at large can be in maintaining these principles." It was also conceded that genuine treasury-notes, like those now in question, were, before their maturity, part of the negotiable commercial paper of the country. We so held at the last term, in *Vermilye & Co.* v. *Express Co.*, 21 Wall. 138.

It is, undoubtedly, also true, as a general rule of commercial law, that where one accepts forged paper purporting to be his own, and pays it to a holder for value, he cannot recall the payment. The operative fact in this rule is the acceptance, or more properly, perhaps, the adoption, of the paper as genuine by its apparent maker. Often the bare receipt of the paper accompanied by payment is equivalent to an adoption within

the meaning of the rule; because, as every man is presumed to know his own signature, and ought to detect its forgery by simple inspection, the examination which he can give when the demand upon him is made is all that the law considers necessary for his protection. He must repudiate as soon as he *ought* to have discovered the forgery, otherwise he will be regarded as accepting the paper. Unnecessary delay under such circumstances is unreasonable; and unreasonable delay is negligence, which throws the burden of the loss upon him who is guilty of it, rather than upon one who is not. The rule is thus well stated in *Gloucester Bank* v. *Salem Bank*, 17 Mass. 45: "The party receiving such notes must examine them as soon as he has opportunity, and return them immediately: if he does not, he is negligent; and negligence will defeat his action."

When, therefore, a party is entitled to something more than a mere inspection of the paper before he can be required to pass finally upon its character, — as, for example, an examination of accounts or records kept by him for the purposes of verification, — negligence sufficient to charge him with a loss cannot be claimed until this examination ought to have been completed. If, in the ordinary course of business, this might have been done before payment, it ought to have been, and payment without it will have the effect of an acceptance and adoption. But if the presentation is made at a time when, or at a place where, such an examination cannot be had, time must be allowed for that purpose; and, if the money is then paid, the parties, the one in paying and the other in receiving payment, are to be understood as agreeing that a receipt and payment under such circumstances shall not amount to an adoption, but that further inquiry may be made, and, if the paper is found to be counterfeit, it may be returned within a reasonable time. What is reasonable must in every case depend upon circumstances; but, until a reasonable time has in fact elapsed, the law will not impute negligence on account of delay.

So, too, if the paper is received and paid for by an agent, the principal is not charged unless the agent had authority to act for him in passing upon the character of the instrument. It is the negligence of the principal that binds; and that of the agent has no effect, except to the extent that it is chargeable to the principal.

Laches is not imputable to the government, in its character as sovereign, by those subject to its dominion. *United States* v. *Kilpatrick*, 9 Wheat. 735; *Gibbons* v. *United States*, 8 Wall. 269. Still a government may suffer loss through the negligence of its officers. If it comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there. Thus, if it becomes the holder of a bill of exchange, it must use the same diligence to charge the drawers and indorsers that is required of individuals; and, if it fails in this, its claim upon the parties is lost. *United States* v. *Barker*, 12 Wheat. 559. Generally, in respect to all the commercial business of the government, if an officer specially charged with the performance of any duty, and authorized to represent the government in that behalf, neglects that duty, and loss ensues, the government must bear the consequences of his neglect. But this cannot happen until the officer specially charged with the duty, if there be one, has acted, or ought to have acted. As the government can only act through its officers, it may select for its work whomsoever it will; but it must have some representative authorized to act in all the emergencies of its commercial transactions. If it fail in this, it fails in the performance of its own duties, and must be charged with the consequences that follow such omissions in the commercial world.

Such being the principles of law applicable to this part of the case, we now proceed to examine the facts.

The Department of the Treasury is by law located at the seat of government as one of the executive departments, and the Secretary of the Treasury is its official head. Rev. Stat., sect. 233; 1 Stat. 65. All claims and demands against the government are to be settled and adjusted in this department (Rev. Stat., sect. 236; 3 Stat. 366), and the Treasurer of the United States is one of its officers. Rev. Stat., sect. 301; 1 Stat. 65. His duty is to receive and keep the money of the United States, and disburse it upon warrants drawn by the Secretary of the Treasury, countersigned by either comptroller, and recorded by the register, and not otherwise. Rev. Stat., sect. 305; 1 Stat. 65. The rooms provided in the treasury-building at the seat of government for the use of the treasurer are by law the

treasury of the United States. Rev. Stat., sect. 3591; 9 Stat. 59. Assistant-treasurers are authorized and have been appointed to serve at New York and other cities. Rev. Stat., sect. 3595; 9 Stat. 60. The rooms assigned by law to be occupied by them are appropriated to their use and for the safe-keeping of the public money deposited with them. Rev. Stat., sect. 3598; 9 Stat. 59. The assistant-treasurers are to have the charge and care of the rooms, &c., assigned to them, and to perform the duties required of them relating to the receipt, safe-keeping, and disbursement of the public money. Rev. Stat., sect. 3599; 9 Stat. 59. All collectors and receivers of public money of every description within the city of New York are required, as often as may be directed by the Secretary of the Treasury, to pay over to the assistant-treasurer in that city all public money collected by them or in their hands. Rev. Stat., sect. 3615; 9 Stat. 61. The Treasurer of the United States, and all assistant-treasurers, are required to keep all public money placed in their possession till the same is ordered by the proper department or officer of the government to be transferred or paid out, and, when such orders are received, faithfully and promptly to comply with the same, and to perform all other duties as fiscal agents of the government that may be imposed by any law or by any regulation of the Treasury Department made in conformity to law. Rev. Stat., sect. 3639; 9 Stat. 60. All money paid into the treasury of the United States is subject to the draft of the treasurer; and, for the purpose of payment on the public account, the treasurer is authorized to draw on any of the depositaries as he may think most conducive to the public interest and the convenience of the public creditors. Rev. Stat., sect. 3644; 9 Stat. 61.

Thus it is seen that all claims against the United States are to be settled and adjusted "in the Treasury Department;" and that is located "at the seat of government." The assistant-treasurer in New York is a custodian of the public money, which he may pay out or transfer upon the order of the proper department or officer; but he has no authority to settle and adjust, that is to say, to determine upon the validity of, any claim against the government. He can pay only after the adjustment has been made "in the Treasury Department,"

and then upon drafts drawn for that purpose by the treasurer.

By the act of April 12, 1866, the Secretary of the Treasury was authorized, at his discretion, to receive the treasury-notes issued under any act of Congress in exchange for certain bonds; or he might sell the bonds, and use the proceeds to retire the notes. 14 Stat. 31. This exchange or retirement of the notes involved an adjustment of the claims made on their account against the government. That adjustment, as has been seen, could only be had in the Treasury Department; and the government cannot be bound by any payment made without it, through one of the assistant-treasurers, until a sufficient time has elapsed, in the regular course of business, for the transmission of the notes to the department, and an examination and verification there.

That such was the expectation of Congress is apparent from the legislation authorizing the issue of such notes. On the 23d December, 1857, an act was passed "to authorize the issue of treasury-notes." 11 Stat. 257. The payment or redemption of these notes was to be made to the lawful holders upon presentment at the treasury. Sect. 2. The notes were to be prepared under the direction of the Secretary of the Treasury, and to be signed in behalf of the United States by the treasurer thereof, and countersigned by the register of the treasury. Each of these officers was to keep, in books provided for that purpose, accurate accounts, showing the number, date, amount, &c., of each note signed or countersigned by himself, and also showing the notes received and cancelled. These accounts were to be carefully preserved in the treasury. Sect. 3. The notes were made receivable for public dues. Sect. 6. The officer receiving the same was required to take from the holder a receipt upon the back of each note, stating distinctly the date of payment and amount allowed. He was also required to make regular and specific entries of all notes received by him, showing the person from whom he received each note, the number and date thereof, and the amount of principal and interest allowed thereon. These entries were to be delivered to the treasurer with the notes; and, if found correct, he was to receive credit for the amount allowed. Sect. 7. To promote the public

convenience and security, and protect the United States as well as individuals from fraud and loss, the Secretary of the Treasury was authorized to make and issue such instructions as he should deem best to the officers required to receive the notes in behalf of, and as agents in any capacity for, the United States, as to the custody, disposal, cancelling, and return of the notes received, and as to the accounts and returns to be made to the Treasury Department of such receipts. Sect. 8. The Secretary of the Treasury was directed to cause such notes to be paid when they fell due, and he was authorized to purchase them at par for the amount of the principal and interest due at the time of the purchase. Sect. 9.

The act of July 17, 1861, "to authorize a national loan, and for other purposes," provided for an issue of 7-30 treasury-notes, and, in terms, re-enacted all the provisions of the act of Dec. 23, 1857, so far as the same were applicable and not inconsistent with what was then enacted. 12 Stat. 259, sects. 1 and 10.

The acts of June 30, 1864 (13 Stat. 218), and March 3, 1865 (13 Stat. 468), which authorized further issues of the same class of notes, did not in terms re-enact the provisions of the acts of 1857 and 1861; but they did authorize and require the Secretary of the Treasury to make and issue such instructions to the officers who might receive the notes in behalf of the United States as he should deem best calculated "to promote the public convenience and security, and to protect the United States as well as individuals from fraud and loss." 13 Stat. 221, sect. 8.

These are public laws of which all must take notice. In the absence of any evidence showing a regulation permitting an exchange or redemption of notes at any other place than the treasury, and after settlement and adjustment in the department, it will not be presumed that one was made. The notes in question are not made payable at any particular place: consequently they are in law payable at the treasury, and this is at the seat of government and in the Treasury Department. In this department the secretary represents the government. His acts and his omissions, within the line of his official duties, are the acts or omissions of the government itself; and in all com-

mercial transactions his official negligence will be deemed to be the negligence of the government. He is specially charged with the duty of retiring these treasury-notes by exchange, payment, or purchase; and he is the only agent authorized to act for the government in that behalf. All who deal with the government in respect to these notes are presumed to know his exclusive authority; for it is public law. Until such time, therefore, as he has acted, or in due course of business ought to have acted, there can have been no such laches as will charge the government. He is presumed to act officially only in his department. His attention can only be demanded after the presentation of the notes at that place. It was there that the accounts and records of the issues and redemptions under the early laws were by statute required to be kept; and that is the appropriate place for keeping such similar records as the Secretary of the Treasury may by regulation prescribe, under the later laws, to protect against fraud and loss.

Such seems to have been the understanding of the parties in the transaction which is now under consideration. The notes were "sold" to the assistant-treasurer, and were, by stamp upon their back at the appropriate place for their indorsement, made payable "to the order of the Secretary of the Treasury, for redemption." The payment by the assistant-treasurer under such circumstances, for the purchase, did not "retire" the notes. That upon the face of the transaction required the further order of the Secretary of the Treasury. Undoubtedly it was expected, that, in due course of business, that order would be given; but until given, or at least until it ought to have been given, it cannot be said that the government has accepted the notes, and adopted them as genuine.

Neither has there been such delay in returning the notes to Cooke & Co., after their receipt by the assistant-treasurer, as will throw the burden of the loss upon the government. The return should have been made within a reasonable time; and what is a reasonable time is always a question for the courts when the facts are not disputed. *Wiggins* v. *Burkham*, 10 Wall. 133. Here there is no dispute. The notes were delivered to the assistant-treasurer on different days between Sept. 20 and Oct. 8. The first suspicion in Washington in regard to their

character was Oct. 5, when a note was found, of which, upon inspection of the record, a duplicate was already in. All the notes were found and returned to New York Oct. 12, and the next day Cooke & Co. were notified.

The amount of 7-30 notes issued by the government was many hundreds of millions of dollars. Necessarily, the accounts and records of their issue and redemption were voluminous. Between Sept. 20 and Oct. 8, Cooke & Co. themselves sold to the assistant-treasurer for redemption more than $7,500,000. Other parties were at the same time making sales to large amounts. Time must be given for careful examination and scrutiny; and we do not think, that, under all the circumstances, any unreasonable delay occurred either in their transmission to or return from the Treasury Department.

We are all clearly of the opinion, therefore, that, if the notes were in fact counterfeit, their receipt by the assistant-treasurer and his payment therefor did not preclude the United States from receiving back the money paid. So far, there was no error in the courts below.

It was, however, contended by Cooke & Co., that if the notes were not counterfeit, but genuine notes unlawfully and surreptitiously put in circulation, the government was bound for their payment to a *bona-fide* holder, and consequently that there could be no recovery. We quite agree with the lamented judge of the Circuit Court who had this case before him upon error to the District Court, that the evidence tending to show a fraudulent or surreptitious issue of notes printed from the genuine plates was exceedingly meagre, and by no means sufficient to warrant a verdict to that effect; but the jury was not permitted to pass upon that question, as the district judge charged "that if the notes were printed in the department, and all ready for issue, yet, if they were not in fact issued, the United States could recover. The issue to bind the government," said the judge, "must be a physical act of an authorized officer."

It was conceded on behalf of the government, in the argument here, that, if the notes had been due when they were received and paid, this part of the charge could not be sustained. We need not, therefore, examine that question. The

notes were perfect and complete as soon as printed. They did not require the signature of any officer. As soon as they had received the impression of all the plates and dies necessary to perfect their form, they were ready for circulation and use. In this respect they did not differ from the coins of the mint when fully stamped and prepared for issue. Coin is the money of commerce, and circulates from hand to hand as such. These notes represent the promises of the government to pay money, and were intended to circulate and take the place of money, to some extent, for commercial purposes. Although not made legal tender as between individuals, they were, for their then face value, exclusive of interest, as between the government and its creditors. 13 Stat. 221, sect. 8. They were issued under the authority of "an act to provide ways and means for the support of the government" (13 Stat. 218, title) in its great peril, and they bore the "imprint of the seal of the Treasury Department as further evidence of lawful issue." Id. 220, sect. 6. Their aggregate amount was very large; and they were of all convenient denominations, not less than ten dollars. Id. 218, sect. 2. The people were appealed to, through their patriotism, to accept and give them circulation. They entered largely, and at once, into the commerce of the country, and passed readily from hand to hand as, or in lieu of, money. After the close of the war, they became, in a sense, too valuable for circulation, and were on that account, to a large extent, withdrawn, and held for investment.

But it is insisted on the part of the government, that as the act of April 12, 1866, only authorized the Secretary of the Treasury to retire, before their maturity, notes "issued" under the authority of some act of Congress, he could only take up such as were actually put out by the "physical act" of some authorized officer of the government in pursuance of law. This, we think, is too narrow a construction of the act. At the time it was passed, the war of the rebellion was over. In the prosecution of this war, an immense debt had been contracted. To meet the pressing demands upon the credit of the government, various forms of securities had been put forth, some of which, like those now under consideration, would mature at an early date, and sooner, perhaps, than they could be met with-

out the negotiation of new loans. In view of this possible contingency, Congress seems to have been desirous of meeting its obligations of this class, whenever they could be exchanged for or retired with the proceeds of the sale of certain specified bonds having a longer time to run. The object evidently was to get rid of this species of debt; and we think the act may be fairly construed to authorize the retirement of all notes of this class outstanding which the government would be required to meet at maturity.

This leads to a reversal of the judgment. There have been other errors assigned upon the rulings made in the progress of the trial as to the admission of evidence. These need not be specially alluded to. It is sufficient to say that we think there is no error here. The same may be said as to the ruling of the court upon the punching or cancellation of the notes. If they were counterfeit, the cancellation could do no harm; for they were worthless before. If they were genuine, they had already been cancelled by the payment.

The judgment of the Circuit Court is reversed, and the cause remanded, with instructions to reverse the judgment of the District Court, and to award a venire de novo.

MR. JUSTICE MILLER did not sit on the argument of this cause, and took no part in the decision.

MR. JUSTICE CLIFFORD, with whom concurred MR. JUSTICE FIELD and MR. JUSTICE BRADLEY, dissenting.

I dissent from the opinion of the court in this case, —

1. Because I am of the opinion that the United States are not liable for forged paper under any circumstances.

2. Because I am of the opinion that the United States are not liable for its paper-promises fraudulently or surreptitiously put into circulation, not even if the fraudulent act was perpetrated by treasury officials.

SCUDDER *v.* UNION NATIONAL BANK.

1. Where a bill of exchange was drawn by a party in Chicago upon a firm in St. Louis, and verbally accepted by a member of the firm then present in Chicago, — *Held,* that the validity of such acceptance was to be determined by the law of Illinois.
2. In Illinois, a parol acceptance of a bill of exchange is valid, and a parol promise to accept it is an acceptance thereof.
3. Matters bearing upon the execution, interpretation, and validity of a contract are determined by the law of the place where it is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy depend upon the law of the place where the suit is brought.

ERROR to the Circuit Court of the United States for the Northern District of Illinois.

This was an action of assumpsit against William H. Scudder and others, constituting the firm of Henry Ames & Co., to recover the amount of a bill of exchange. Process was served only upon Scudder, who pleaded *non-assumpsit* and several special pleas.

The statute of Illinois on which one of the pleas is based provides that no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, "unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him specially authorized."

The Missouri statute provides: —

"SECTION 1. No person within this State shall be charged as an acceptor of a bill of exchange, unless his acceptance shall be in writing, signed by himself or his lawful agent.

"SECT. 2. If such acceptance be written on a paper other than the bill, it shall not bind the acceptor, except in favor of a person to whom such acceptance shall have been shown, and who, upon the faith thereof, shall have received the bill for a valuable consideration.

"SECT. 3. An unconditional promise in writing, to accept a bill before drawn, shall be deemed an actual acceptance in favor of every person to whom such written promise shall have been shown, and who, upon the faith thereof, shall have received the bill for a valuable consideration.

"SECT. 4. Every holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill; and a refusal to comply with such request shall be deemed a refusal to accept, and the bill may be protested for non-acceptance.

"SECT. 5. The preceding sections shall not be construed to impair the right of any person to whom a promise to accept a bill may have been made, and who, on the faith of such promise, shall have drawn or negotiated the bill, to recover damages of the party making such promise, on his refusal to accept such bill."

The parties went to trial; and the bank offered evidence tending to establish, that for over a year prior to the seventh day of July, 1871, the firm of Henry Ames & Co. were engaged in business at St. Louis, Mo., and that Leland & Harbach, commission-merchants in Chicago, had from time to time bought lots of pork for said firm, on commission; that on the seventh day of July, 1871, the defendant Scudder, a member of said firm, came to Chicago at the request of Leland & Harbach, who were then in an embarrassed condition, owing to speculations in grain; that, on the same day, John L. Hancock delivered to Leland & Harbach 500 barrels of pork, which they had bought of him for Ames & Co., by their request and direction, at $16.25 per barrel, in May, to be delivered in July, of which purchase said Ames & Co. had been duly advised; that, in payment of said pork, Leland & Harbach gave Hancock their check on the Union National Bank of Chicago for $8,031; and that the charges for inspection and commissions made the total cost of the pork $8,125.

That Leland & Harbach, on the same day, shipped the pork to Ames & Co. at St. Louis, Mo., who received and sold it; and that, at the time the bill was drawn, Scudder, who was then present in the office of Leland & Harbach, consented to the receipt of said pork, and verbally authorized them to draw on Ames & Co. for the amount due therefor.

That a bill of exchange in words and figures following —

"$8,125.00. "CHICAGO, July 7, 1871.

"Pay to the order of Union National Bank eight thousand one hundred and twenty-five dollars, value received, and charge to account of "LELAND & HARBACH.

"To Messrs. Henry Ames & Co., St. Louis, Mo."

— was on said seventh day of July, 1871, presented for discount at the Union National Bank by Leland & Harbach's clerk; and the vice-president of the bank declined to give Leland & Harbach credit for the bill without a bill of lading or other security. That the clerk then returned to Leland & Harbach's office, and stated the bank's objections, Scudder being present; and, in the presence and hearing of said defendant, Scudder, the clerk was told by Leland or Harbach to return to the bank, and tell the vice-president that Scudder, one of the firm of Ames & Co., was then in Chicago, and had authorized the drawing of said draft, and that it was drawn against 500 barrels of pork that day bought by Leland & Harbach for Henry Ames & Co., and duly shipped to them. That the clerk returned, and made the statement as directed; and the vice-president, upon the faith of such statement that the bill was authorized by defendants, discounted said bill, the proceeds were passed to Leland & Harbach's credit, and the check given by them to Hancock in payment of said pork was paid out of the proceeds of said draft.

The bank then offered in evidence the said bill of exchange with a notarial certificate of protest, showing that the bill was presented to Henry Ames & Co. for payment July 8, 1871, and duly protested for non-payment.

It was admitted that said Ames & Co. had never paid said bill.

The court charged the jury. To the following parts thereof Scudder excepted: —

"If you find from the evidence that Mr. Scudder, one of the defendants, authorized the drawing of the draft in question, and authorized the clerk, George H. Harbach, to so state to the vice-president of the bank, and that the said draft was discounted by the bank upon the faith of such statement, such conduct on the part of Mr. Scudder may be considered by you as evidence of an implied promise by the defendants to pay the draft: and it is not necessary for that purpose that Mr. Scudder should have expressly sent word to the bank if such statements were made in his hearing and presence, and no objections made to them by him; that is to say, if he stood by and allowed either Leland or Harbach to send such word to the bank without dissenting therefrom. If you find by a fair preponderance of the testimony that Mr. Scudder knew the pork had been delivered to Leland & Harbach at the time the draft was

drawn, and acquiesced in the drawing of the draft, and acquiesced in the word sent to the bank that he had authorized it, you may from such facts find an implied promise by the defendants to pay the draft. It was not necessary that Scudder should go to the bank and state that he had authorized the draft, if you are satisfied that he allowed such statements to be made by the messenger.

"It being an admitted fact that the defendants have the proceeds of the pork against which this draft was drawn, such fact may also be considered by you as an additional circumstance tending to show a promise on the part of the defendants to pay the draft.

"The real issue in this case is, whether Mr. Scudder authorized the drawing of the draft in question, and expressly or impliedly promised to pay it."

The jury found a verdict in favor of the bank; and the court, overruling a motion for a new trial, rendered judgment. Scudder sued out this writ of error.

Mr. John H. Thompson for plaintiff in error cited *Maggs* v. *Ames*, 4 Bing. 470; 2 Par. on Notes and Bills, 324 *et seq.*; Story's Confl. of Laws, sects. 280, 318; *Worcester Bank* v. *Wells et al.*, 8 Met. 107; *Hunt* v. *Standart*, 15 Ind. 33; *Boyce* v. *Edwards*, 4 Pet. 123; *Frazier* v. *Warfield*, 9 Sm. & M. 220; *Springer* v. *Foster*, 2 Story, 387.

Mr. Melville W. Fuller, contra.

An acceptance of a bill need not be in writing, except when so required by statutory provisions. 1 Par. on Notes and Bills, 285.

In Illinois it is well settled that a parol promise to pay an existing bill is valid (*Jones* v. *C. Bluff's Bank*, 34 Ill. 319), and a parol promise to pay an existing or non-existing bill is a virtual acceptance thereof. *Nelson* v. *First Nat. Bank*, 48 id. 39; *Mason* v. *Dousay*, 35 id. 424; *Jones* v. *Bank*, 34 id. 319.

MR. JUSTICE HUNT delivered the opinion of the court.

It is not necessary to examine the question, whether a denial of the motion to set aside the summons can be presented as a ground of error on this hearing. The facts are so clearly against the motion, that the question does not arise.

Nor does it become necessary to examine the question of pleading, which is so elaborately spread out in the record. The

only serious question in the case is presented upon the objection to the admission of evidence and to the charge of the judge.

Upon the merits, the case is this: The plaintiff below sought to recover from the firm of Henry Ames & Co., of St. Louis, Mo., the amount of a bill of exchange, of which the following is a copy; viz.: —

"$8,125.00. "CHICAGO, July 7, 1871.

"Pay to the order of Union National Bank eight thousand one hundred and twenty-five dollars, value received, and charge to account of "LELAND & HARBACH.

"To Messrs. Henry Ames & Co., St. Louis, Mo."

By the direction of Ames & Co., Leland & Harbach had bought for them, and on the seventh day of July, 1871, shipped to them at St. Louis, 500 barrels of pork, and gave their check on the Union bank to Hancock, the seller of the same, for $8,000.

Leland & Harbach then drew the bill in question, and sent the same by their clerk to the Union Bank (the plaintiff below) to be placed to their credit. The bank declined to receive the bill, unless accompanied by the bill of lading or other security. The clerk returned, and reported accordingly to Leland & Harbach. One of the firm then directed the clerk to return to the bank, and say that Mr. Scudder, one of the firm of Ames & Co. (the drawees), was then in Chicago, and had authorized the drawing of the draft; that it was drawn against 500 barrels of pork that day bought by Leland & Harbach for them, and duly shipped to them. The clerk returned to the bank, and made this statement to its vice-president; who thereupon, on the faith of the statement that the bill was authorized by the defendants, discounted the same, and the proceeds were placed to the credit of Leland & Harbach. Out of the proceeds the check given to Hancock for the pork was paid by the bank.

The direction to inform the bank that Mr. Scudder was in Chicago and had authorized the drawing of the draft was made in the presence and in the hearing of Scudder, and without objection by him.

The point was raised in various forms upon the admission of evidence, and by the charge of the judge, whether, upon this

state of facts, the firm of Ames & Co., the defendants, were liable to the bank for the amount of the bill. The jury, under the charge of the judge, held them to be liable; and it is from the judgment entered upon that verdict that the present writ of error is brought.

The question is discussed in the appellant's brief, and properly, as if the direction to the clerk had been given by Scudder in person. The jury were authorized to consider the direction in his name, in his presence and hearing, without objection by him, as made by himself.

The objection relied on is, that the transaction amounted at most to a parol promise to accept a bill of exchange then in existence. It is insisted that such a promise does not bind the defendants.

The suit to recover upon the alleged acceptance, or upon the refusal to accept, being in the State of Illinois, and the contract having been made in that State, the judgment is to be given according to the law of that State. The law of the expected place of performance, should there be a difference, yields to the *lex fori* and the *lex loci contractus*.

In Wheaton on Conflict of Laws, sect. 401 *p*, the rule is thus laid down: —

"Obligations, in respect to the mode of their solemnization, are subject to the rule *locus regit actum;* in respect to their interpretation, to the *lex loci contractus;* in respect to the mode of their performance, to the law of the place of their performance. But the *lex fori* determines when and how such laws, when foreign, are to be adopted, and, in all cases not specified above, supplies the applicatory law."

Miller v. *Tiffany*, 1 Wall. 310; *Chapman* v. *Robertson*, 6 Paige, 634; *Andrews* v. *Pond*, 13 Pet. 78; *Lamesse* v. *Baker*, 3 Wheat. 147; *Adams* v. *Robertson*, 37 Ill. 59; *Ferguson* v. *Fuffe*, 8 C. & F. 121; *Bain* v. *Whitehaven and Furness Junction Ry. Co.*, 3 H. L. Cas. 1; *Scott* v. *Pilkinton*, 15 Abb. Pr. 280; Story, Confl. Laws, 203; 10 Wheat. 383.

The rule is often laid down, that the law of the place of performance governs the contract.

Mr. Parsons, in his "Treatise on Notes and Bills," uses this language: "If a note or bill be made payable in a particular

place, it is to be treated as if made there, without reference to the place at which it is written or signed or dated." P. 324.

For the purposes of payment, and the incidents of payment, this is a sound proposition. Thus the bill in question is directed to parties residing in St. Louis, Mo., and contains no statement whether it is payable on time or at sight. It is, in law, a sight draft. Whether a sight draft is payable immediately upon presentation, or whether days of grace are allowed, and to what extent, is differently held in different States. The law of Missouri, where this draft is payable, determines that question in the present instance.

The time, manner, and circumstances of presentation for acceptance or protest, the rate of interest when this is not specified in the bill (*Young* v. *Harris*, 14 B. Mon. 556; *Parry* v. *Ainsworth*, 22 Barb. 118), are points connected with the payment of the bill; and are also instances to illustrate the meaning of the rule, that the place of performance governs the bill.

The same author, however, lays down the rule, that the place of making the contract governs as to the formalities necessary to the validity of the contract. P. 317. Thus, whether a contract shall be in writing, or may be made by parol, is a formality to be determined by the law of the place where it is made. If valid there, the contract is binding, although the law of the place of performance may require the contract to be in writing. *Dacosta* v. *Hatch*, 4 Zab. 319.

So when a note was indorsed in New York, although drawn and made payable in France, the indorsee may recover against the payee and indorser upon a failure to accept, although by the laws of France such suit cannot be maintained until after default in payment. *Aymar* v. *Shelden*, 12 Wend. 439.

So if a note, payable in New York, be given in the State of Illinois for money there lent, reserving ten per cent interest, which is legal in that State, the note is valid, although but seven per cent interest is allowed by the laws of the former State. *Miller* v. *Tiffany*, 1 Wall. 310; *Depeau* v. *Humphry*, 20 How. 1; *Chapman* v. *Robertson*, 6 Paige, 634; *Andrews* v. *Pond*, 13 Pet. 65.

Matters bearing upon the execution, the interpretation, and

the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit is brought.

A careful examination of the well-considered decisions of this country and of England will sustain these positions.

There is no statute of the State of Illinois that requires an acceptance of a bill of exchange to be in writing, or that prohibits a parol promise to accept a bill of exchange: on the contrary, a parol acceptance and a parol promise to accept are valid in that State, and the decisions of its highest court hold that a parol promise to accept a bill is an acceptance thereof. If this be so, no question of jurisdiction or of conflict of laws arises. The contract to accept was not only made in Illinois, but the bill was then and there actually accepted in Illinois, as perfectly as if Mr. Scudder had written an acceptance across its face, and signed thereto the name of his firm. The contract to accept the bill was not to be performed in Missouri. It had already, by the promise, been performed in Illinois. The contract to pay was, indeed, to be performed in Missouri; but that was a different contract from that of acceptance. *Nelson* v. *First Nat. Bank*, 48 Ill. 39; *Mason* v. *Dousay*, 35 id. 424; *Jones* v. *Bank*, 34 id. 319.

Unless forbidden by statute, it is the rule of law generally, that a promise to accept an existing bill is an acceptance thereof, whether the promise be in writing or by parol. *Wynne* v. *Raikes*, 5 East, 514; *Bank of Ireland* v. *Archer*, 11 M. & W. 383; *How* v. *Loring*, 24 Pick. 254; *Ward* v. *Allen*, 2 Met. 53; *Bank* v. *Woodruff*, 34 Vt. 92; *Spalding* v. *Andrews*, 12 Wright, 411; *Williams* v. *Winans*, 2 Green (N. J.), 309; *Storer* v. *Logan*, 9 Mass. 56; Byles on Bills, sect. 149; *Barney* v. *Withington*, 37 N. Y. 112. See the Illinois cases cited, *supra*.

Says Lord Ellenborough, in the first of these cases, "A promise to accept an existing bill is an acceptance. A promise to pay it is also an acceptance. A promise, therefore, to do the one or the other, — i.e., to accept or certainly pay, — cannot be less than an acceptance."

In *Williams* v. *Winans*, Hornblower, C. J., says, "The first question is, whether a parol acceptance of a bill will bind the acceptor; and of this there is at this day no room to doubt. The defendant was informed of the sale, and that his son had drawn an order on him for $125; to which he answered, it was all right. He afterwards found the interest partly paid, and the evidence of payment indorsed upon it in the handwriting of the defendant. These circumstances were proper and legal evidence from which the jury might infer an acceptance."

It is a sound principle of morality, which is sustained by well-considered decisions, that one who promises another, either in writing or by parol, that he will accept a particular bill of exchange, and thereby induces him to advance his money upon such bill, in reliance upon his promise, shall be held to make good his promise. The party advances his money upon an original promise, upon a valuable consideration; and the promisor is, upon principle, bound to carry out his undertaking. Whether it shall be held to be an acceptance, or whether he shall be subjected in damages for a breach of his promise to accept, or whether he shall be held to be estopped from impeaching his word, is a matter of form merely. The result in either event is to compel the promisor to pay the amount of the bill with interest. *Townley* v. *Sumdel*, 2 Pet. 170; *Boyce* v. *Edwards*, 4 id. 111; *Goodrich* v. *Gordon*, 15 Johns. 6; *Scott* v. *Pilkinton*, 15 Abb. Pr. 280; *Ontario Bank* v. *Worthington*, 12 Wend. 593; *Bissell* v. *Lewis*, 4 Mich. 450; *Williams* v. *Winans*, *supra*.

These principles settle the present case against the appellants.

It certainly does not aid their case, that after assuring the bank, through the message of Leland & Harbach, that the draft was drawn against produce that day shipped to the drawees, and that it was drawn by the authority of the firm (while, in fact, the produce was shipped to and received and sold by them), and that the bank in reliance upon this assurance discounted the bill, Mr. Scudder should at once have telegraphed his firm in St. Louis to delay payment of the draft, and, by a subsequent telegram, should have directed them not to pay it.

The judgment must be affirmed.

First Unitarian Society of Chicago v. Faulkner et al.

1. Where conversations of a third party were admitted in evidence on the assurance of counsel that they expected to prove that such third party was the agent of the defendant, which, however, was not done, nor the attention of the court afterwards called to the subject, — *Held*, that upon the hypothesis of the case submitted to the jury in the charge of the court, the evidence becoming immaterial, an exception to its admission was properly overruled.
2. Instructions given by the court are entitled to a reasonable interpretation, and are not, as a general rule, to be regarded as the subject of error, on account of omissions not pointed out by the excepting party.

Error to the Circuit Court of the United States for the Northern District of Illinois.

The plaintiffs below, who are defendants here, brought suit against the First Unitarian Society of Chicago to recover for services rendered as architects in preparing plans for a church-edifice.

Judgment was rendered for the plaintiffs below: whereupon the defendant sued out this writ of error.

The assignment of errors is referred to in the opinion of the court.

Submitted on printed briefs by *Mr. Daniel L. Shorey* for the plaintiff in error, and by *Messrs. R. M. Corwine, Quinton Corwine, & J. A. L. Whittier, contra.*

Mr. Justice Clifford delivered the opinion of the court.

Services were rendered by the plaintiffs, as architects, in making plans and designs, and in furnishing drawings, specifications, and estimates for the corporation defendants, preparatory to the erection and completion of a church-edifice for their religious society. Annexed to the declaration is a bill of particulars, setting forth the claim of the plaintiffs, which is as follows: —

For services as architects in making designs, plans, drawings, specifications, and estimates for a church-building, with basement, to cost seventy-eight thousand dollars	$2,730.00
For second design and drawings, showing the elevation of the church-building, with chapel in rear, and tower	

Amount brought forward	$2,730.00
between the church and chapel, to cost seventy thousand dollars	700.00
For modification of the above design, with chapel in rear, and tower at angle of the church, to cost seventy thousand dollars	700.00
For design of church with basement, but without tower, to cost forty thousand dollars	400.00
	$4,530.00

Due service was made, and the defendants appeared and pleaded that they never promised in manner and form as alleged in the declaration. Issue being joined, the parties went to trial; and the verdict was for the plaintiffs, in the sum of $3,862.50, part of which was subsequently remitted, and judgment was rendered for the plaintiffs in the sum of $2,900. Exceptions were duly filed by the defendants to the rulings and instructions of the court, and they sued out the present writ of error.

Enough appears in the transcript to show that the plaintiffs were partners, seeking employment as architects, and that the firm was represented in all the negotiations reported in the bill of exceptions by the junior member of the firm. Testimony was given by him at the trial, tending to prove that the plaintiffs, at the request of the defendants, had submitted plans to the latter for a church-edifice, in competition with other architects, for the examination and choice of those composing the defendant corporation. Evidence was also offered by the plaintiffs, consisting of the testimony of the same witness, tending to prove conversations between him and the pastor of the church, and of the action of the plaintiffs in consequence thereof; and they also offered his testimony in evidence tending to show statements and admissions purporting to have been made by the pastor, in relation to the employment of the plaintiffs by the defendants as architects, at a social meeting of the church: to all of which the defendants objected, because no evidence had been given tending to show that the pastor was, in any sense, the agent of the defendants, or that he had any authority to act for them in relation to the employment of the plaintiffs as architects.

Responsive to that objection, the plaintiffs stated to the court that they expected to prove that the pastor acted in that behalf as the agent of the society, and that the society acquiesced in his acts; and upon that understanding the objection was overruled, the court remarking that the testimony would become material if the plaintiffs should subsequently give evidence to prove the agency of the pastor at the time of the interview with the business-partner of the plaintiffs when the plans were submitted or modified, and also at the social meeting of the society, when certain members of the building committee and many members of the society were present.

Exceptions were taken by the defendants to the ruling of the court in admitting these several declarations and admissions; but the bill of exceptions shows to the satisfaction of the court that the evidence was admitted subject to the condition that the plaintiffs should subsequently prove that the party who made the declarations was the agent of the society. No such evidence was afterwards introduced by the plaintiffs; but the bill of exceptions also shows that the attention of the court was not again called to the subject, and that the case was submitted to the jury on the hypothesis that it was not proved that the plaintiffs were the architects of the society.

Declarations of the pastor were not competent evidence, unless it was proved that he was the agent of the society, and that the declarations or admissions were made in respect to matters within the scope of his agency. But it is not absolutely necessary that the proof of agency in every such case should be first introduced. Except in special cases, it is the better practice that the foundation, in such a case, should be laid before the declarations or admissions are admitted; but it is competent for the presiding judge, if in his judgment the ends of justice require it, to relax the rules of practice, and to admit the evidence offered before the proper foundation for the admissibility of the same is laid, if he is well assured by the party offering the evidence that the agency in question will be subsequently proved.

Rules of practice, in conducting jury-trials, are necessarily somewhat flexible; and that remark applies as well to the rules having relation to the order of proof as to those which regulate the number of witnesses which a party may examine, or the

time, manner, or extent of a cross-examination. All agree that in ordinary cases the plaintiff must begin, and the general rule is that he must introduce all of his substantive evidence before the defendant is required to open his defence; and the corresponding general rule applicable to the defendant is, that he must introduce all of his substantive evidence before the plaintiff is required to give evidence in rebuttal.

Beyond all doubt, those are good general rules; but it is competent for the presiding judge to relax either of them, in case the ends of justice so require, and to allow evidence to be given by either party in such other order as he, the said judge, in the exercise of a sound discretion, may direct. Where an agreement was offered in evidence, and it was necessary, in order that it should be competent for the consideration of a jury, that proof should be given that the signer was authorized to execute it, and the instrument having been admitted before the authority of the signer was proved, the opposite party excepted to the ruling of the court in admitting it; but Judge Story held that there was nothing in the exception, and remarked that "it was as competent for the party to prove the authority after, as it was before, giving the agreement in evidence." *Bank* v. *Guttschlick*, 14 Pet. 29.

Equally decisive are the views of this court as expressed in a subsequent case in the same volume. Speaking of the general subject, the court say, that the mode of conducting trials, the order of introducing evidence, and the times when it is to be introduced, are properly matters belonging to the practice of the circuit courts, with which this court ought not to interfere, unless it shall choose to prescribe some fixed general rules upon the subject. *Railroad Company* v. *Stimpson*, 14 Pet. 463; *Wood* v. *U. S.*, 16 id. 361; *Kelly* v. *Crawford*, 5 Wall. 790.

State courts have adopted the same rules of practice; and they are of such immediate necessity, that we should come to the same conclusion, even if the question was not controlled by the repeated decisions of this court. *Smith* v. *Britton*, 4 Humph. 202; *Cushing* v. *Billings*, 3 Cush. 159; *Caton* v. *Carter*, 9 G. & J. 477.

Whenever the strict rule is relaxed in such a case, it is the duty of the party to whom the indulgence has been extended to make good the assurances given to the court; and, in case of unreasonable delay, it would be quite proper for the court to

call attention to the subject, and inform the delinquent party that the evidence admitted would be stricken out unless proof to lay the foundation for its admission was introduced before the evidence was closed. Nor must it be understood that the other party can remain silent, and suffer an error to be committed by the court, in order that he may have a valid exception if the verdict is in favor of his adversary.

Viewed in any light, it was not an error in the court to admit the evidence; and the attention of the court not having been again called to the subject, and inasmuch as the bill of exceptions shows that the evidence admitted, in view of the hypothesis adopted by the court in submitting the case to the jury, became entirely immaterial, the exception is overruled.

Evidence was exhibited tending to show that the defendants, at a legal meeting held on the 22d of January, 1872, appointed a building committee consisting of five persons, preparatory to the erection of a new church-edifice, and instructed the committee to obtain plans for such a building, and to submit the plans to the society. Plans were accordingly solicited; and it appears that several were submitted to the committee at a subsequent meeting, and among others the plan prepared by the business-partner of the plaintiffs. Preference, it seems, was given to the plan of the plaintiffs, as appears by the action of the committee. They voted to adopt the plan presented by the plaintiffs, subject to certain conditions: (1.) That it be modified according to the wishes and suggestions of the committee. (2.) That the *contract* for building the church shall not exceed $58,000. (3.) That the action of the committee be ratified at a legal meeting of the society.

Alterations were made in the plan; and the society subsequently instructed the committee to build the church according to the first plan of the plaintiff architect, provided the same could be built, all complete and satisfactory, at a cost not to exceed $58,000, including such materials as the society had on hand; and, if it could not be built at that cost, to build according to the plan of another architect, which was submitted to the society at that meeting.

Proof was also introduced by the defendants showing that bids or contracts for the building of the church according to the plaintiffs' plan could not be procured for less than $78,000;

in consequence of which the society refused to construct the church-building according to that plan. Payment for the plans and modifications of the same furnished by the plaintiffs being refused, they instituted the present suit to recover compensation for the services rendered in that behalf by their business-partner.

Extended comments upon the evidence given to the jury were made by the presiding justice; to a certain portion of which remarks the defendants excepted. Before adverting to those remarks, it is proper to state that the judge instructed the jury, that if what the business-partner of the firm did, after the qualified acceptance of his plan, was done upon the same conditions under which the various competing plans were originally submitted, then the plaintiffs could not recover; nor could they recover upon the theory that it was understood between the parties that in case the plan of the plaintiffs should be ultimately rejected, as in fact it was, they were to have a reasonable compensation for their services; by which is meant, as the court here understands the matter, that there was no sufficient evidence in the case to prove such an express agreement. He also instructed the jury that the defendants were *only* liable for the acts of agents duly authorized, or for acts of persons subsequently ratified by the society; and he also gave the jury instructions as to the rule of damages in case they should find for the plaintiffs.

Plans had been submitted in the beginning by several architects; and the presiding justice, in the course of his remarks, adverted to that fact, and to the inquiry whether the plans were submitted with the understanding on both sides that there was to be no compensation unless the plans were accepted; and he added, that, if such was the understanding, then every architect worked at his own risk and cost. All we know upon the subject, continued the judge, is what is stated by the plaintiff witness; from which it is perhaps fairly to be inferred that the plans originally presented were submitted upon that understanding by all the architects in competition at that time. But the difficulty in the case, said the judge, is, that the plan of the plaintiffs was subsequently accepted in a qualified sense. If the original plan submitted by the plaintiffs had been rejected

at the time, there could have been no controversy. Except for that qualified acceptance, there would have been no trouble; but the difficulty now is to ascertain on what footing the parties stood in relation to the plans and modifications of the same presented by the business-partner of the plaintiffs. He supposes he was the architect of the church; which, perhaps, is not strange, as the committee seem to have supposed that they had a right, on certain conditions, to make him such.

Throughout the remarks, the theory of the judge appears to have been that the plans were presented by the architects in the beginning at their own risk and cost; and the main purpose of this charge seems to have been to submit the question to the jury, in view of the whole evidence, whether the condition that they were to work at their own risk and cost, in case their plans were ultimately rejected, ceased to operate against the plaintiffs, in consequence of the acts of the committee and the action of the society; or, in other words, whether or not it was the understanding, in view of all that took place subsequent to the qualified acceptance of the original plan presented by the business-partner of the plaintiffs, that he was to go on at his own expense, and risk his own labor and that of those who were in his employment, if in point of fact the plans and the modifications of the same which he presented should finally be rejected by the society.

Those explanations prepare the way for an examination of that part of the charge of the court which is the subject of the only remaining exception to be considered in the case.

Mere verbal criticisms of the charge of the judge are not entitled to any considerable weight in a court of errors. Such courts look at the substance and legal effect of the language employed, without much regard to mere inaccuracy of expression, unless the error is one which might prejudice the rights of the party seeking redress.

Indirect allusion is made by the judge to the second condition in the vote of the committee adopting the plan of the plaintiffs, that the cost of the church when completed should not "exceed fifty-eight thousand dollars;" and he remarked, that there must be a reasonable construction given to that language. Contracts, said the judge, it is manifest, might have been let to

parties apparently responsible at the time, for that price, and yet the actual cost might have turned out to be much greater. There are certain elements, continued the judge, always entering into matters of the kind, making it necessary that the language should be reasonably construed, in reference to the subject-matter and the circumstances; and, when so construed, his opinion was, and he so stated to the jury, that it could not be supposed that the meaning of the resolution was, that the church should not cost, to a dollar, beyond that amount; that the sum specified was intended as a reasonable limit, applying to the language the ordinary rules which reasonable men would apply to such a transaction.

In the course of the charge, he also adverted to the fact that one of the building committee had given the language of the condition a closer construction, and continued his remarks by saying that he understood the condition to mean, that though it was in the nature of a limit to the architect and to the committee, yet that the language must receive a reasonable construction; and that it should be regarded, not as an absolute limit, but one as nearly exact and absolute as the subject-matter and the nature and circumstances of the case would admit.

Even if taken literally, it would be very difficult to point out any legal error in those remarks; but the remarks are somewhat qualified by what follows in the succeeding sentence, in which the judge proceeds to say to the effect, that the view previously presented to the jury is in no respect material, except so far as it may bear on the question, whether the business-partner of the plaintiffs was all the time performing service at his own expense, and with the understanding, that, if his plans were ultimately rejected, he was to receive no compensation. Those remarks, it is obvious, had respect to the theory of the defendants, that the plaintiffs' plans had never in any way, or to any extent, been adopted either by the society or the committee.

Quite a different theory was maintained by the plaintiffs; and in respect to that the judge remarked, that, if the plans had been accepted and the contract made at the price specified in the second condition of the vote of the committee, it

would scarcely be contended, if it turned out that the society had to expend a sum greater than the prescribed limit, that the plaintiffs would not be entitled to any thing for services performed as architects. Suppose, said the judge, the contractor should become bankrupt, or fail: was the architect to have nothing for his services, even if the church did cost more than the contract price?

Two or three passages of the charge, it must be admitted, are quite indefinite, and somewhat obscure; but they are not more so than the exceptions of the defendants, which are addressed to nearly a page of the remarks of the judge, without any attempt to specify any particular paragraph or passage as the subject of complaint; nor does the assignment of errors have much tendency to remove the ambiguity.

Instructions given by the court to the jury are entitled to a reasonable interpretation; and they are not, as a general rule, to be regarded as the subject of error on account of omissions not pointed out by the excepting party. *Castle* v. *Bullard*, 23 How. 189.

Even now, though the complaining party has filed an assignment of errors and submitted a written argument, it is by no means certain what the precise complaint is, unless it be that the verdict, in their view, is for the wrong party. Courts of error have nothing to do with the verdict of the jury, if it is general and in due form, except to ascertain, if they can, whether improper evidence was admitted to the jury, or whether the jury were misdirected by the presiding judge. No error of the kind is shown in the record; and

The judgment is affirmed.

EX PARTE FRENCH.

Where the judgment in favor of the defendants upon a special finding by the Circuit Court, embracing only part of the issues, was reversed here, and the case remanded, "with instructions to proceed in conformity with the opinion," —*Held*, that the court below is precluded from adjudging in favor of the defendants upon the facts set forth in that finding, but can in all other respects proceed in such manner as, in its opinion, justice may require.

FRENCH sued Edwards and others to recover the possession of certain lands, alleging that he was the owner in fee, and that the defendants unlawfully withheld the possession from him.

The defendants answered, setting up several defences, and among others the following: —

1. Want of title in the plaintiff.
2. Statute of limitations.
3. In some instances, title in themselves.

The case was submitted to the court without a jury; and upon the trial there was a special finding of facts, to the effect that the defendants were in the adverse possession of the property; that the plaintiff once held the title, but that, on the 9th January, 1863, and before the commencement of the suit, he had executed a certain instrument of writing, a copy of which was given.

Upon these facts the court found, as a matter of law, that the legal title passed out of the plaintiff by the operation of the instrument set forth, and did not revert on the failure of the conditions it contained, but still remained, and was vested in the grantees. Judgment was given in favor of the defendants upon this finding. The case was then brought here, and error assigned upon this ruling. At the last term it was decided, that, upon the facts found, the court below should have presumed a reconveyance of the property to the plaintiff by the grantees in the instrument of Jan. 9, and adjudged accordingly. The judgment was for this reason reversed, and the case remanded, "with instructions to proceed in conformity with the opinion." (See the case reported, 21 Wall. 147.)

Upon the filing of the mandate in the court below, the case was set down for a new trial. French now moves here for a *mandamus*, directing the Circuit Court to enter judgment in his favor for the recovery of the lands upon the facts found.

The statute covering the case is as follows (Rev. Stat., sect. 649): —

"Issues of fact in civil cases in any circuit court may be tried and determined by the court without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."

Sect. 700:—

"When an issue of fact in any civil cause in a circuit court is tried and determined by the court without the intervention of a jury, according to sect. 649, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and, when the finding is special, the review may extend to the determination of the sufficiency of the facts found to support the judgment."

Sect. 701:—

"The Supreme Court may affirm, modify, or reverse any judgment, decree, or order of a circuit court, or district court acting as a circuit court, or of a district court, in prize-causes, lawfully brought before it for review, or may direct such judgment, decree, or order to be rendered, or such further proceedings to be had by the inferior court, as the justice of the case may require. The Supreme Court shall not issue execution in a cause removed before it from such courts, but shall send a special mandate to the inferior court to award execution thereupon."

The motion was submitted, on behalf of French, by *Mr. S. O. Houghton* and *Mr. John Reynolds*, on printed arguments.

The law provided, that, when the court tried a case without a jury, the findings might be general or special, and should have the same effect as a verdict of a jury. Rev. Stat. 469.

Rev. Stat., sect. 914, adopts the State practice in common-law cases; and sect. 701, so far as it affects this question, is substantially the same as the statutes of California, under which it has been the settled practice in the Supreme Court of California, since *Holland* v. *San Francisco*, decided in 1857, to direct final judgment on the reversal of a judgment, when the case was decided in the Supreme Court upon special findings of fact. Stat. of Cal. 1853, p. 289, sect. 8; Stat. of 1863, p. 334, sect. 7; Code C. P., sect. 45; *McMillan* v. *Richards*, 9 Cal. 421; *Wallace* v. *Moody*, 26 id. 387; *Page* v. *Rogers*, 31 id. 293; *McMillan* v. *Vischer*, 14 id. 242. All the facts necessary to a final determination of the case were found.

Mr. George F. Edmunds, contra.

This court has *not* directed any judgment to be entered in favor of the plaintiff below.

To command the court below to enter a judgment for the plaintiff would be contrary to truth and justice, as appears from the facts disclosed by the record.

In cases arising under sects. 649 and 700, where the facts found are not sufficient to support the judgment below, it should be reversed here, and the cause remanded for a new trial. An order for a judgment for the other party would be improper.

If the parties in such a case desire to bring up *every thing* for review here, they can easily turn the findings into the form of pleas and replications, and thus have the cause heard here as if on a demurrer.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The finding brought here for review was special, and met only a part of the issues. If the conclusion of law to which the court came was correct, the other issues were immaterial. The case was disposed of without reaching them. We have, however, determined that the facts found were not sufficient to justify the conclusion reached; and have ordered the court to proceed with the case, notwithstanding the finding. In effect, we have decided that the court erred in not proceeding to try the other issues. Our action only precludes that court from adjudging in favor of the defendants upon the special facts found and sent here for our opinion. In all other respects, it is at liberty to proceed in such manner as, according to its judgment, justice may require.

The petition for a mandamus is denied.

NUDD ET AL. *v.* BURROWS, ASSIGNEE.

1. Where, in a suit by an assignee in bankruptcy to recover moneys paid a creditor within four months prior to the filing of the petition in bankruptcy, the evidence tended to prove that the payment was the result of a conspiracy between the bankrupt and the creditor to give the latter a fraudulent preference within the meaning of the Bankrupt Act, — *Held*, that the declarations

of the bankrupt at and prior to the time of such payment, although made in the absence and without the knowledge of the creditor, were, when offered by the assignee, admissible in evidence.

2. The assignee claimed that a partnership formerly existing between the bankrupt and other parties had been dissolved prior to a certain transaction; and that, consequently, that transaction was had with the bankrupt individually, and not with the firm. The defendants, insisting to the contrary, offered the declarations of such other parties touching the points in controversy. *Held*, that such declarations were not evidence.

3. The defendants having claimed that they appropriated the money and proceeds of the property in question, in the exercise of a factor's lien, to satisfy a prior indebtedness alleged to be due them by the bankrupt, — *Held*, that the attempt to set up such a lien, when the creditor knew that the debtor was on the eve of bankruptcy, and thus secure a preference over other creditors, was a fraud upon the Bankrupt Act.

4. The Practice Act of Illinois provides that the court shall instruct the jury only as to the law; and that the jury shall, on their retirement, take the written instructions of the court, and return them with their verdict. In this case, the court below, while it commented upon the evidence, but without withdrawing from the jury the determination of the facts, refused to allow the jury to take to their room the written instructions given them. *Held*, that the act of Congress of June 1, 1872, sect. 5 (17 Stat. 197), has no application to the case, and that there was no error in the action of the court below.

ERROR to the Circuit Court of the United States for the Northern District of Illinois.

This was an action brought by the defendant in error, as the assignee of one Norton Emmons, a bankrupt, against the plaintiffs in error, to recover the net proceeds of about eleven carloads of live-stock and dressed hogs shipped by the bankrupt to the plaintiffs in error, and one thousand dollars in money paid by him to them, which proceeds and money they had applied to the payment of his indebtedness to them, in fraud, as contended by the assignee, of the provisions of the act to establish a uniform system of bankruptcy throughout the United States, approved March 2, 1867. Judgment was rendered in favor of the assignee.

A bill of exceptions was allowed in the court below, which is in substance as follows: —

The plaintiff introduced evidence tending to show that Emmons had for a number of years been engaged in the stock business in Wisconsin, purchasing cattle, sheep, and hogs, and shipping them chiefly, but not always, to the defendants at Chicago, for sale upon commission; that about the first day of July, 1870, Emmons associated with him Richard B. Chan-

dler and James W. Chandler, and that said parties thenceforth, under the firm name of Emmons & Chandler, continued the business, also shipping chiefly to the defendants the stock which they bought; that about the thirteenth day of December, 1870, said firm was indebted to the defendants between $4,000 and $5,000; that Emmons was then insolvent; that it was then arranged between the defendants, said Emmons and said Richard B. and James W. Chandler, that said firm of Emmons & Chandler should dissolve; that James W. Chandler had previously gone out; that Emmons should continue the business until the first of the following January, and should at the close of the year buy a large amount of stock upon credit, which should be shipped to and sold by the defendants, and the proceeds applied to pay his indebtedness to them; that the firm of Emmons & Chandler did dissolve about the thirteenth day of December; that Emmons did in the first four days of the following January, in his own name and on his own account, ship to the defendants nine car-loads of cattle, sheep, and hogs, which were sold by them, and the proceeds held to pay the said indebtedness; that upon the sixth day of January, 1871, Emmons paid to the defendants $1,000 in money; that the net proceeds of said last shipment, so held by them, was $7,553.27; that a large part of the stock which went into the last shipment was paid for by drafts drawn by Emmons on the defendants, which were not accepted or paid by them; that the amount of drafts so drawn and unpaid was about $4,000; that a petition in bankruptcy was filed against Emmons in the District Court of the United States for the Eastern District of Wisconsin, on the eighteenth day of February, A.D. 1871, on which petition he was duly adjudicated a bankrupt; that the defendants, at the time of making the aforesaid arrangement, — to wit, on or about the thirteenth day of December, 1870, — had reasonable cause to believe said Emmons was insolvent.

As tending to show some of said matters, the plaintiff introduced in evidence a document as follows: —

"CHICAGO, Dec. 13, 1870.

"*To whom it may concern:* —

"This certifies that whereas Mr. R. B. Chandler has been a joint partner with Norton Emmons from the first day of July, 1870, to date, we release him from all further obligations that may be trans-

acted between us and Norton Emmons, and look to Norton Emmons only for balance of present account and all business that may hereafter be transacted with him.

"The above release of R. B. Chandler is made by the consent of all parties. "I. P. NUDD & Co."

Also the ledger of the defendants, showing the account of Emmons and of the firm of Emmons & Chandler with the defendants.

The last item upon the account of Emmons & Chandler is as follows: —

"1870, Dec. 13. By balance due Nudd, $1,617.43."

Under which is written the following: —

"The above balance we transfer to the individual account of Norton Emmons, by request of both parties."

Immediately after and upon the same ledger page is the following, showing all the entries made subsequent to said Dec. 13, 1870: —

DR. NORTON EMMONS. CR.

1870.			1870.		
Dec. 13	To balance due Nudd, and transferred from the ac. of Emmons & Chandler . . .	$1,617 43	Dec. 24	By net proceeds . .	$1,140 07
" 13	To paid draft . . .	1,500 00	" 24	" " " . .	4,767 51
" 14	" " " . . .	1,500 00	" 3	" " dressed hogs .	107 04
" 15	" " " . . .	1,500 00	" 28	" " proceeds . .	651 88
" 16	" " E. Peterson .	750 00	" 28	" " " . .	766 31
" 21	" " draft . . .	187 00	" 28	" " " . .	1,929 48
" 22	" " " . . .	1,500 00	" 29	" " " . .	765 84
" 23	" " " . . .	3,500 00	" 20	E. & C., dressed hogs	1,396 64
" 23	" " " . . .	200 00	" 29	" " " E. & C., dressed hogs	863 58
			1871.		
" 23	" " " . . .	500 00	Jan. 7	" " " "	1,444 15
" 24	" " S. W. Montague	55 72	" 6	" " cash rec'd .	1,000 00
" 24	" " draft . . .	1,000 00	" 10	" net proceeds . .	4,002 03
" 24	" " " . . .	400 00	" 10	" " dr. h. . . .	1,174 37
" 16	" " Chandler . .	40 00	" 10	" " dr. h. . . .	1,268 16
" 16	" " Peterson . .	35 00			
" 16	" " Johnson . .	5 00			
" 3	" " protest fees .	10 20			
" 27	" " draft . . .	300 00			
" 28	" " " . . .	600 00			
" 31	" " " . . .	4,000 00			
" 31	" " " . . .	1,000 00			
" 31	" " " . . .	750 00			
Jan. 11	" acceptance . . .	334 84			

To certain questions put to the witnesses, calling for the declarations and statements of Emmons at and before the

consignment was made, the defendants objected, because said declarations, not being made in the presence of either of the defendants, nor brought to the knowledge of either, could not be used to prejudice them; which objections being overruled by the court, and the answers admitted, the defendants then and there excepted.

The defendants introduced evidence tending to show that they acted as the factors of said Emmons prior to the time of his partnership with Richard B. and James W. Chandler, and for said firm of Emmons & Chandler after that time and until the closing of the account, Jan. 10, 1871; that during all this time it had been the usual course of business and the regular practice of the defendants to advance money to these parties to buy stock, relying upon the consignments to be made to them to cover such advances; that the defendants continued to make such advances after the thirteenth day of December, 1870, in the same manner as before, receiving consignments, and selling the same to cover their previous advances; that the indebtedness to the defendants at the time of the last shipments of stock was for such advances; that these advances were made by payment of drafts upon the defendants; that such drafts were drawn in the name of Emmons, as well after as before the formation of the copartnership of Emmons & Chandler; that the bank business of the firm of Emmons & Chandler was done at the First National Bank of Madison, Wis., in the name of Emmons alone, as well after as before the formation of said copartnership, and that the drafts upon the defendants usually came through said bank; that their ledger, introduced in evidence, correctly shows the sums advanced by them upon drafts since the 13th December, 1870; that such advances were made in good faith, and in the usual and ordinary course of business, and relying upon consignments to be made to the defendants to cover such advances; that there was no such arrangement for the payment of the indebtedness to the defendants made about the 13th of December, 1870, or at any other time, between the defendants, or either of them, and said Emmons, Richard B. Chandler, and James W. Chandler, or either of them, as claimed by the plaintiff; that said firm of Emmons & Chandler did not dissolve

upon or about the 13th December, 1870; that said James W. Chandler did not go out before that time, but that certainly James W. Chandler, and probably Richard B. Chandler, continued to be interested in business with said Emmons subsequently to that time, and continued so interested till the time of the closing of the account with defendants, Jan. 10, 1871; that the transfer of the account on the book of the defendants from the name of Emmons & Chandler to that of Norton Emmons was made at the request of said Emmons and the Chandlers; that the reason given to defendants for such request was, that all drafts were drawn in the name of Emmons alone; their bank business of Madison, Wis., was done in his name, and they desired their account on the defendants' books to correspond; that defendants had no idea that the firm of Emmons & Chandler was dissolved, or that their dealings with said firm were thereby brought to a close, or that, by making such a change, they released either of the Chandlers, but regarded the transfer simply as a change in the manner of keeping their books; that the receipt or release to Richard B. Chandler was not given to him until about the middle of January, 1871, after the account with the defendants was closed; that it was antedated at the request of said Richard B. Chandler; that it was given by the defendants unhesitatingly, and with but little inquiry into the reasons of Chandler for wishing the same antedated, because, at the time it was actually given, their account was paid in full; that business was conducted in the same manner subsequently to the 13th December, 1870, as before that time, and the defendants supposed they were doing business with the firm of Emmons & Chandler up to the time the account was closed, and, until such time, knew of nothing from which they could infer the dissolution of said firm; that there was nothing unusual about the size or quality of the last shipments, and the same were not, nor was any part of them, sold by the defendants under any arrangement with said Emmons and the Chandlers, or either of them, that the proceeds should be used to close up the account with the defendants; that shipments continued to be made after Dec. 13, 1870, and up to the time of the closing of the account, with one or two exceptions, in the name of Em-

mons & Chandler, and not in the name and on account of Emmons alone; that Richard B. Chandler was worth $15,000 or $20,000; that James W. Chandler, though of small means, was solvent; that if the copartnership of Emmons & Chandler continued subsequently to the 13th December, 1870, and up to the time of closing the account, said firm was not insolvent; that the defendants did not know at any time prior to the closing of said account that said Emmons was insolvent, and that they had no reasonable cause to believe that he was. A witness for the defendants testified that the partnership between Emmons, Richard B. Chandler, and James W. Chandler, continued until some time in January of 1871. To a question in this connection as to the declarations of Richard B. Chandler after the 13th of December, respecting his being interested in the firm carried on in the name of Norton Emmons, the plaintiff objected; and, the objection being sustained by the court, the defendants duly excepted.

A witness for the defendants having testified that James W. Chandler frequently came to Chicago after Dec. 13, 1870, in charge of the consignments of stock, the defendants asked what if any thing was said respecting the sale or prices at which stock should be sold.

To which, and to the admission of any declarations of said Chandler, plaintiff objected. The court sustained the objection, and refused to admit the evidence; and the defendants excepted.

Before the charge to the jury, and in apt time, defendants' counsel requested that the court would in all respects in its charge be governed by and follow the practice of courts of record of the State of Illinois and the laws of the State applying to such matters; but the court refused so to do, and defendants' counsel then and there excepted.

Defendants' counsel then prepared and handed to the court the following instructions in writing, requesting that they be given to the jury, with permission to take them to their room: —

"*First*, If the jury believe, from the evidence, that either R. B. or J. W. Chandler was a partner with Norton Emmons subsequent to the 13th of December, 1870, and remained so until the settle-

ment of the account with the defendants, and, as such partner or partners, was or were interested in the dealings with the defendants subsequent to that date, they are instructed, that, in such case, the plaintiff cannot maintain this suit.

"*Second*, If the jury believe from the evidence that the defendants advanced money to Norton Emmons to buy stock to be consigned to them, relying upon those consignments for the repayment of those advances, they are instructed, that, in such a case, the defendants would have a lien upon such consignments for such advances as soon as the same came to their possession, even if the defendants knew at the time of making such advances that said Emmons was insolvent."

The court gave the first instruction, but added to and commented upon it as follows: —

"I have charged you, as requested by the defendants' counsel, that if this debt on the part of the defendants was against Emmons and the Chandlers, or either of them, the plaintiff cannot recover. . . . On the main question, which covers most of the property, I shall not occupy much time. The evidence to establish it rests in writing, under the defendants' own signature. By the defendants' books, it appears that the partnership account of Emmons & Co. was settled, and the balance transferred upon their books to the individual account of Norton Emmons on the 13th of December; that after that it was kept with him alone, and the defendants did not pay any amount to the Chandlers without an order from Emmons; and, in addition to this, they signed a receipt, release, or declaration, as follows: —

"'CHICAGO, Dec. 13, 1870.

"'*To whom it may concern*: —

"'This certifies that whereas Mr. R. B. Chandler has been a joint partner with Norton Emmons from the first day of July, 1870, to date, we release him from any further obligation that may be transacted between us and Norton Emmons, and look to Norton Emmons only for balance of present account and all business that may hereafter be transacted with him.

"'The above release of R. B. Chandler is made by the consent of all parties.'

"That would seem to settle all controversy upon this question. That matter having been so carefully reduced to writing by the defendants at the time, or soon after, while the matter was fresh in their memory, it would seem most remarkable to allow them now to

swear it away. The book and the release show that they agreed to deal thereafter with Emmons, and released Chandler altogether, and did so on their books. So far as Chandler and Emmons are concerned, it was an individual matter with them; but as the assignee represents Emmons's right, and is entitled to the benefits under his contract, as to him, it would be very remarkable that they could, in view of these entries and the statement or release, be allowed to set up that he was still a party in interest as to that. Written testimony is much stronger than parol. It is like a disputed case in regard to the boundaries of real estate in which a government boundary is discovered. It generally disposes of the dispute, and outweighs, ordinarily, any amount of verbal testimony depending upon the recollection of witnesses, particularly interested parties and witnesses.

"Nudd says he drew the release; but he says he did not draw it until in January, after that date. The time when it was drawn is quite immaterial. It declares the fact that they did business with Emmons alone; and, if that is so, that disposes of the defence on that ground. There is some testimony that the receipt was given to Chandler on the 13th. Emmons says he heard him say that he had a receipt when he returned home.

"If you are satisfied that the receipt was made at the time it bears date, or afterwards, with a view to furnish evidence to release Chandler from the 13th, and as stating the true condition of their affairs, I hardly think that you will be justified in finding that the transaction between the parties was not as stated in the books of the defendants and this release or declaration; and it would be unsafe to reject written evidence of that character upon the evidence of interested parties."

To all of which modifications and comments, and to that portion of the charge, save as requested by them, the defendants then and there excepted.

The court gave the second instruction asked by the defendants, but modified and commented upon it as follows: —

"The books of account of defendants read in evidence, together with the testimony, tend to show that the defendants had been advancing the bankrupt money from time to time after the thirteenth day of December, 1870; and that on the thirty-first day of December, 1870, the time of the last item of account, the bankrupt was owing to them the sum of $8,553.87. This money it is claimed was advanced by defendants, who were stock-brokers and general

commission-men in this city, engaged in the business of receiving stock, cattle, and hogs, making advances thereon, and selling for the benefit of shippers. They state that their ordinary mode of doing business was not to pay drafts drawn by their country customers or consignors until after the receipt of stock, but in this case they permitted the bankrupt to draw and obtain the money to use in buying stock. When that stock was received and sold, they credited his account with the proceeds; and such appears to have been the way they dealt with the bankrupt, so that he had overdrawn his shipments on the first day of January in the sum of $8,553.87, above stated. This being the mode of business pursued, as I understand to be stated, I think it would constitute the relation of debtor and creditor between the bankrupt and the defendants; that he, in law and fact, was owing on the first of January to the amount above stated, which was unsecured at that time; that the advances did not create a lien on such stock purchased with the money advanced or loaned for that purpose until the bankrupt had actually shipped them to the defendant.

"As I have charged you, at the request of the defendants' counsel, that the lien of the defendants did not attach until the actual receipt of the stock by the defendants, such being the law, the subsequent receipt of stock and appropriation of the avails to the payment of the debts due them would be void, as a preferential payment, provided the other facts hereinafter mentioned are found to have existed; by which I mean to be understood, that, if the transactions between the parties were as I have before stated them, they would constitute the relation of debtor and creditor, and bring their debt under the provisions of the Bankrupt Act the same as any other debt."

To all of which defendants' counsel excepted.

The court having charged the jury upon the facts, notwithstanding the request that it would follow and be governed by the laws of the State of Illinois and the practice of her courts of record, defendants' counsel excepted thereto, as well as to its refusal to permit the jury to take to their room the written instructions given by the court, or the account-book, freight-bills, and other papers introduced in evidence, other than the depositions.

Mr. W. H. Swift and *Mr. W. C. Grant*, for plaintiffs in error, filed printed briefs, from which the following points are taken:—

1. The declarations of J. W. Chandler should have been admitted. Phil. on Ev., vol. i. 498; *Cady* v. *Shepherd*, 11 Pick. 407; *Pool* v. *Bridges*, 4 id. 378; *Richardson* v. *Cato*, 10 Humph. 138; 1 Greenl. Ev., sect. 181.

2. The court erred in not following the practice of the courts of Illinois, and the laws of Illinois applying to such matters. Rev. Stat. U. S., sect. 914.

"The court, in charging the jury, shall only instruct as to the law of the case." 2 Gross's Stat. Ill., ch. 83, sect. 139.

"Instructions shall be taken by the jury in their retirement, and returned by them with their verdict." Id., sect. 142.

3. The court erred in the instruction given upon the question of copartnership.

This question of the continuance of the partnership is material. If a preference is given by a firm of which only one member goes into bankruptcy, such preference cannot be avoided by the assignee of the bankrupt partner. *Forsaith* v. *Merritt*, 3 N. B. 48; *In re Shepherd*, id. 172.

4. The court erred in its instruction upon the question of a factor's lien.

The bankrupt estate is in no worse condition, if the defendants are allowed to retain the proceeds of the consignments, than it would have been if the defendants had never made the advances in reliance upon these consignments. *Anderson* v. *Clark*, 2 Bing. 20; *Harle* v. *Smith*, 1 B. & P. 563; 3 Pars. on Contr. 260; *Foxcroft* v. *Devonshire*, 2 Burr. 931.

Messrs. H. W. Tenney, H. M. Lewis, and *J. C. McKenney*, *contra*.

1. As to the declarations of the bankrupt.

When a conspiracy is formed to do an illegal act, or to commit a fraud, the acts or declarations of any of the conspirators may be given in evidence. 1 Greenl., sect. 111; *American Fur Co.* v. *United States*, 2 Pet. 358.

2. The declarations of R. B. Chandler were properly excluded. He could have been called as a witness.

3. As to the objection that the court did not follow the practice of the courts of Illinois.

The court did not instruct the jury as to the facts, but only as to the law.

4. As to the lien claimed by the defendants below as factors or brokers. The indebtedness of the bankrupt to the defendants below, Jan. 1, 1871, stood upon the same footing as any other unsecured creditor. *Arnold* v. *Maynard*, 2 Story, C. C. 349; *Wager et al.* v. *Hall*, 16 Wall. 584; Story on Ag., sect. 377; Russel on Factors, 207 (Law Lib., vol. xlvi.).

The lien of a factor does not attach when the possession comes to him wrongfully or by fraud. 2 Kent, Com. 638; *Larupriere* v. *Pasley*, 2 Term R. 485; Story on Ag., sects. 360, 361.

MR. JUSTICE SWAYNE delivered the opinion of the court.

The first of the assignments of error presents the question, whether the court erred in admitting in evidence the declarations of the bankrupt.

The suit was brought by the assignee to recover against Nudd and Noe for money and property which they had received from Emmons. They had applied the money and the proceeds of the property in payment of a debt which Emmons owed them. The property was live-stock, consisting of cattle, sheep, and hogs. The net proceeds were $7,553.27. The money was $1,000. The aggregate amount in controversy was $8,553.27. The assignee claimed that the stock was bought largely upon credit; that Emmons was at the time hopelessly insolvent; that Nudd and Noe knew it; and that the transaction was the fruit of a conspiracy between the parties, having for its object the giving to Nudd and Noe by Emmons a fraudulent preference over his other creditors.

Nudd and Noe received the property and money in January, 1871. The petition in bankruptcy against Emmons was filed in the following month of February. The action is founded on the thirty-fifth and thirty-ninth sections of the Bankrupt Act. The transaction was within four months before the filing of the petition. Upon the trial, the plaintiff proposed to prove what Emmons had said touching the purchase of the stock and the payment of the money to the defendants.

To each and all of the questions asked with this view the counsel for the defendants objected, "on the ground that they

called for the declarations of Emmons not made in the presence of either of the defendants, or brought to their knowledge."

Was this ground of objection well taken?

The counsel for the defendant in error insists that they were competent as the declarations of a co-conspirator.

In general, the rules of evidence are the same in civil and criminal cases. *United States* v. *Gooding*, 12 Wheat. 469.

"Where two or more persons are associated for the same illegal purpose, any act or declaration of one of the parties in reference to the common object, and forming a part of the *res gestæ*, may be given in evidence." *American Fur Company* v. *United States*, 2 Pet. 365.

The bill of exceptions does not purport to give all the evidence. What proof had been given of the alleged concert and conspiracy on the part of the defendants when the declarations of Emmons were offered to be proved does not appear.

It is to be presumed it was sufficient to lay the proper foundation as to them for the introduction of the evidence. The declarations were competent to prove the whole case as against Emmons. 1 Taylor's Ev. 486.

Whether the declarations were made in the presence or brought to the knowledge of either of the defendants is immaterial. The objection as taken was confined to this point; and this is the only aspect in which it is necessary to consider it. If it were intended to rest it upon any other ground, it should have been so presented; and the court advised accordingly.

In the early part of December, 1870, Emmons and James W. and Richard Chandler were partners, under the name of Emmons & Chandler. The plaintiff claimed that the partnership was dissolved on the 13th of that month. The defendants insisted that it continued down to the close of the business in question, and that the transaction was not with Emmons alone, but with the firm of Emmons & Chandler.

They offered in evidence the declarations of the Chandlers touching the points in controversy. The court excluded the testimony, and the defendants excepted.

This ruling was correct. The declarations of a party may be evidence against him; but, except under circumstances which had no existence in this case, they cannot be received in his

favor. The Chandlers might have been called as witnesses. Their declarations were merely hearsay, and, as regards this case, were *res inter alios acta*.

It appears by the bill of exceptions, that, in charging the jury, the judge commented upon the evidence.

Questions of law are to be determined by the court; questions of fact, by the jury. The authority of the jury as to the latter is as absolute as the authority of the court with respect to the former.

No question of fact must be withdrawn from the determination of those whose function it is to decide such issues.

The line which separates the two provinces must not be overlooked by the court. Care must be taken that the jury is not misled into the belief that they are alike bound by the views expressed upon the evidence and the instructions given as to the law. They must distinctly understand that what is said as to the facts is only advisory, and in no wise intended to fetter the exercise finally of their own independent judgment. Within these limitations, it is the right and duty of the court to aid them by recalling the testimony to their recollection, by collating its details, by suggesting grounds of preference where there is contradiction, by directing their attention to the most important facts, by eliminating the true points of inquiry, by resolving the evidence, however complicated, into its simplest elements, and by showing the bearing of its several parts and their combined effect, stripped of every consideration which might otherwise mislead or confuse them. How this duty shall be performed depends in every case upon the discretion of the judge. There is none more important resting upon those who preside at jury-trials. Constituted as juries are, it is frequently impossible for them to discharge their function wisely and well without this aid. In such cases, chance, mistake, or caprice, may determine the result.

We do not think the remarks and suggestions of the learned judge in this case exceeded the proper license.

They did not go beyond the verge of what has been often sanctioned by this and other courts. *Games et al.* v. *Stiles*, 14 Pet. 337; *United States* v. *Fourteen Packages*, Gilp. 254; 1 Taylor's Ev. 35.

The modifications of the two instructions asked for by the defendants were, we think, correct in point of law. Only the second one calls for any remarks.

There was proof tending to show that on the 13th of December, 1870, the defendants adjusted their account with Emmons & Chandler, and, by the agreement of all the parties, transferred the amount due to themselves to the separate account of Emmons, and gave the Chandlers a release. The balance found due, and so transferred, was the same with the amount in controversy, as before stated. The business of the defendants was the selling of live-stock upon commission. The balance accrued in the course of their previous business in this way with the firm of Emmons & Chandler. They claimed a factor's lien upon the money and proceeds of the property in question for the satisfaction of this demand.

The court charged, that, as the lien could not attach until the money and proceeds were received by the defendants, if the previous transactions created the relation of debtor and creditors between them and Emmons, and they could have sued Emmons for the amount, "this would bring the debt under the Bankrupt Act the same as any other debt."

This must necessarily be so. The lien attempted to be set up was repelled by the circumstances referred to. Such a claim occupies no better ground than would a mortgage, pledge, or power to confess judgment, given at the same time and for the same purpose; otherwise every factor might be thus secured when his debtor was in the article of bankruptcy, and this class of creditors would have a monopoly of the preferences so given. Such preference, to whomsoever given, is forbidden by the Bankrupt Law, and is a fraud upon it. Fraud destroys the validity of every thing into which it enters. It affects fatally even the most solemn judgments and decrees. Bankrupt Act, sect. 35; 1 Story's Eq., sect. 252; Freeman on Judgments, sect. 486.

Whenever fraud is perpetrated by one party to the injury of another, the offender is liable. *Paisley* v. *Freeman*, 3 T. R. 51; *Benton* v. *Pratt*, 2 Wend. 385. Here the jury have found the facts charged by the assignee. This is conclusive against the defendants with respect to any claim upon the fund.

The last assignment relates to alleged errors of the court in

matters of practice. Before the judge began his charge to the jury, the counsel for the defendants requested him, in giving it, to conform in all things to the practice of the courts of record and the law of the State. This he refused to do. He also refused to allow the jury to take with them to their room the written instructions he had given them, and likewise the account-book, bills of lading, and additional papers, which had been introduced in evidence, other than the depositions. To each of these refusals the defendants excepted.

The Practice Act of Illinois provides that the court, in charging the jury, shall instruct them only as to the law of the case; that no instruction shall be given, unless reduced to writing; that instructions asked shall not be modified by the court, except in writing; that the instructions shall be taken by the jury in their retirement, and returned with the verdict; and that papers read in evidence, other than depositions, may be carried from the bar by the jury. 1 Gross's Stat. 289.

It is declared by the act of Congress of June 1, 1872 (17 Stat. 197, sect. 5), "that the practice, pleadings, and forms and modes of proceeding, in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform as near as may be" to the same things "existing at the time in the courts of record of the State within which such circuit and district courts are held."

The purpose of the provision is apparent upon its face. No analysis is necessary to reach it. It was to bring about uniformity in the law of procedure in the Federal and State courts of the same locality. It had its origin in the code-enactments of many of the States. While in the Federal tribunals the common-law pleadings, forms, and practice were adhered to, in the State courts of the same district the simpler forms of the local code prevailed. This involved the necessity on the part of the bar of studying two distinct systems of remedial law, and of practising according to the wholly dissimilar requirements of both. The inconvenience of such a state of things is obvious. The evil was a serious one. It was the aim of the provision in question to remove it. This was done by bringing about the conformity in the courts of the United States which it prescribes. The remedy was complete. The personal ad-

ministration by the judge of his duties while sitting upon the bench was not complained of. No one objected, or sought a remedy in that direction.

We see nothing in the act to warrant the conclusion that it was intended to have such an application.

If the proposition of the counsel for the plaintiff in error be correct, the powers of the judge, as defined by the common law, were largely trenched upon.

A statute claimed to work this effect must be strictly construed. But no severity of construction is necessary to harmonize the language employed with the view we have expressed. The identity required is to be in "the practice, pleadings, and forms and modes of proceeding." The personal conduct and administration of the judge in the discharge of his separate functions is, in our judgment, neither *practice*, *pleading*, nor *a form* nor *mode of proceeding* within the meaning of those terms as found in the context. The subject of these exceptions is, therefore, not within the act as we understand it.

There are certain powers inherent in the judicial office. How far the legislative department of the government can impair them, or dictate the manner of their exercise, are interesting questions; but it is unnecessary in this case to consider them. *Houston* v. *Williams*, 13 Cal. 24. *Judgment affirmed.*

UNITED STATES *v.* McKEE ET AL.

The claim of the heirs and legal representatives of Colonel Francis Vigo against the United States, on account of supplies by him furnished in 1778 to the regiment under the command of George Rogers Clarke, who was acting under a commission from the State of Virginia, was, by an act of Congress approved June 8, 1872 (17 Stat. 687), referred to the Court of Claims, with the direction that the court, in settling it, should be governed by the rules and regulations theretofore adopted by the United States in the settlement of like cases, and without regard to the Statute of Limitations. *Held*, that the act removes the bar of the lapse of time; and that, as the case is like those in which interest was to be allowed by the fifth section of the act of Aug. 5, 1790 (1 Stat. 178), the claimants are entitled to recover the principal sum, with interest thereon.

APPEAL from the Court of Claims.

The court below allowed the claim, with interest thereon from the time it accrued, and, among other facts, found that "no rules and regulations have heretofore been adopted by the United States in the settlement of like cases, except such as may be inferred from the policy of Congress when passing private acts for the relief of various persons. When passing such private acts, Congress has allowed interest upon the claim up to the time that the relief was granted."

The facts are stated in the opinion of the court.

The case was submitted on printed arguments by *Mr. Solicitor-General Phillips* for the United States, and by *Mr. William Penn Clarke*, for the claimants.

Only so much of their argument as relates to the allowance of interest can be here given.

The Solicitor-General submitted, that, so far as he knew, this was the first case in which interest had been allowed for so long a period. The court below had allowed it from March the 20th, 1779, to the day when judgment was entered, although this court, in *Gordon* v. *United States*, had expressly declared that it did not sanction the allowance of interest on claims against the government. The right of the claimants to interest must turn entirely upon the wording of the act of 1872 referring this case to the Court of Claims, inasmuch as, under the general law, that court has no authority to allow interest in such a case. Rev. Stat., sect. 1091. Undoubtedly Congress has the power to order that interest shall be paid; but no such order was given by that act. The words relied on by the other side are, "And, in making such adjustment and settlement, the said court shall be governed by the rules and regulations heretofore adopted by the United States in the settlement of like cases; giving proper consideration to official acts, if any have heretofore been had in connection with this claim, and without regard to the Statute of Limitations." Referring to the specific finding of the Court of Claims upon this point, it seems, —

First, That "rules and regulations," in the above connection, refer to the action of the departments under general principles governing "like cases," and not to the exceptional dealing

evidenced by *special* acts of Congress. Prior legislation for special cases is not included in these words. They are well known to refer to the *quasi* legislation by heads of departments, &c., in reference to matters ordinarily coming before them.

Second, Also that the court will *sua sponte* inform itself of the action of the United States by rules and regulations in such cases.

Third, Therefore that the above finding of the Court of Claims appears to be inadvertent, inasmuch as it can be seen that "rules and regulations" *have been* heretofore adopted by the United States in the settlement of like cases, and that these rules *exclude interest*, unless given in terms by an act of Congress.

The Solicitor-General inserted in his brief the following note from the First Comptroller of the Treasury: —

"FIRST COMPTROLLER'S OFFICE, Nov. 13, 1875.

"SIR, — In answer to your inquiry, I have to state, that in the adjustment and settlement of claims for services rendered by officers of the United States during the Revolutionary war, or for supplies furnished the troops in that war, the rules and regulations heretofore adopted by the United States prohibit the payment of interest, unless authority to pay is expressly given by act of Congress in special cases.

"Executive document No. 42, vol. ii., second session Twenty-fifth Congress, contains a synopsis of the legislation of Congress on Revolutionary claims up to 1837, showing the cases in which interest has and has not been allowed.

"Very respectfully,

"R. W. TAYLOR, *Comptroller.*

"Hon. S. F. PHILLIPS, *Solicitor-General.*"

And referred to the opinion of Mr. Whittlesey when first comptroller in regard to a claim for interest upon a Revolutionary debt preferred by the heirs of one John Campbell: —

"The rules of settlement of the treasury do not permit the allowance of *interest*, except where it is specially provided for in cases of contracts, or expressly authorized by law. Consequently, the item of interest charged by said claimant has been deemed inadmissible."

The act which made it the duty of the Treasury Department to audit and adjust that claim required that this should be done *upon principles of equity and justice*. Upon this point Mr. Whittlesey says, —

"Suppose the act had directed the account to be settled and paid, and had said nothing more: interest could not have been computed without violating the principles which have controlled the settlement of accounts and claims from the commencement of the government; and, as I have said before, the discretion to settle the claim on the principles of 'justice and equity' does not confer the power to allow interest." P. 53.

Mr. Whittlesey, in confirmation of his opinion, cites a former decision upon the same question by Richard Harrison, first auditor, and Joseph Anderson, first comptroller; also an opinion of Mr. Hagner, first auditor for many years after the organization of the government, against the allowance of interest upon Revolutionary claims, except where specially given by an act of Congress. Ex. Doc. H. R., No. 260, First Sess. 26th Congress, vol. vii.

As the "rules and regulations" of the United States refuse interest unless specially given by some act of Congress, and as the present act refers the question of interest entirely to the "rules and regulations," and otherwise is silent thereupon, it seems that the claimants are, at all events, entitled to no interest.

Mr. Clarke, contra.

By the following acts of Congress, interest was allowed; viz.: —

Act of Jan. 14, 1793, in case of Return J. Meigs and the legal representatives of Christopher Greene, deceased. 6 Stat. 11.
Act of May 31, 1794, in case of Arthur St. Clair. Id. 16.
Act of Feb. 27, 1795, in case of Angus McLean. Id. 20.
Act of Jan. 23, 1798, in case of General Kosciusko. Id. 32.
Act of May 3, 1802, in case of Fulwar Skipwith. Id. 48.
Act of Jan. 14, 1804, in case of John Coles. Id. 51.
Act of March 3, 1807, in case of Oliver Pollock. Id. 65.
Act of March 3, 1807, in case of Stephen Sayre. Id. 65.
Act of April 25, 1810, in case of Moses Young. Id. 89.

Act of Jan. 10, 1812, in case of John Burnham. Id. 103.

Act of July, 1812, in case of Anna Young. Id. 110.

Act of Feb. 25, 1813, in case of John Dixon and John Murray; also the second section of same act, in case of John Murray. Id. 117.

Act of April 13, 1814, in case of Joseph Brevard. Id. 134.

Act of April 26, 1816, in case of heirs of Alexander Roxburgh. Id. 167.

Act of April 14, 1818, in case of John Thompson. Id. 208.

Act of May 11, 1820, in case of Samuel B. Beall. Id. 249.

Act of May 15, 1820, in case of Thomas Leiper. Id. 252.

Act of May 7, 1822, case of the legal representatives of John Guthry, deceased. Id. 269.

Act of same date, in case of John Crute. Id. 276.

Act of March 3, 1823, in case of the legal representatives of James McClung. Id. 284.

Act of May 5, 1824, in case of Amasa Stetson. Id. 298.

Act of May 20, 1826, in case of heirs of John W. Baylor. Id. 351.

Act of March 3, 1827, in case of B. J. V. Valkenburg, — a case in which the government paid interest upon interest. Id. 365.

Act of May 19, 1828, in case of the legal representatives of Patience Gordon. Id. 378.

Act of May 24, 1828, in case of Ward & Brothers. Id. 386.

Act of May 31, 1830, in the same case. Id. 450.

Act of May 29, 1830, in case of Benjamin Wells. Id. 447.

Act of March 2, 1831, in case of Lucien Harper. Id. 457.

Act of May 19, 1831, in case of Richard G. Morris. Id. 486.

Acts of July 4, 1832, in cases of Aaron Snow, id. 503; and W. P. Gibbs, id. 504.

Two acts of July 14, 1832, — one in case of Gertrude Gates, id. 521; and the other in case of John Peck, id. 524.

Act of same date, in case of John Laurens. Id. 514.

Four acts of March 2, 1833, in cases of Archibald Watt, id. 537; Eleanor Courts, id. 542; and in cases of two officers in the army of the Revolution, id. 543, 544.

Act of June 19, 1834, in case of Dr. John Berrien. Id. 565.

Act of June 27, 1834, in case of the legal representatives of Christian Ish. Id. 570.

Three similar acts. Id. 574, 576.

Act of June 30, 1834, in case of John Peck, id. 582. Act of same date in case of Captain George Hurlburt, id. 589.

And act of July 2, 1836, in case of the same Captain George Hurlburt. Id. 674.

Act of March 3, 1847, in case of the legal representatives of Simon Spaulding, id. 694.

Act of Aug. 18, 1856, in case of Thomas H. Baird, administrator of the estate of Absalom Baird. 11 id. 467.

Mr. Clarke referred further to the following acts of Congress, authorizing settlements and payment of accruing interest in cases where money had been *advanced* for the United States, or where drafts drawn by its disbursing officers had been protested for non-payment; viz.: —

Act of July 14, 1832, in case of the widow and children of E. T. Warren. 6 id. 513.

Act of July 14, 1832, in case of Hartwell Vick. Id. 523.

Act of Feb. 27, 1833, in case of Riddle, Becktle, Headington, & Co. Id. 537.

Act of July 7, 1838, in case of Richard Harrison. Id. 734.

Act of Aug. 3, 1846, in case of Felix St. Vrain. Id. 658.

Act of Aug. 10, 1846, in case of Abraham Horbach. 9 id. 677.

Act of Feb. 5, 1859, in case of Thomas Laurent. 11 id. 558.

It might be contended that Revolutionary claims of this class are not entitled to bear interest until they have been settled, and certificates of final settlement issued. Many of the statutes cited disprove such a position, and show that Congress authorized the payment of interest from the date of the rendition of the services, or the furnishing of the supplies. In further elucidation of this point, the following acts of Congress are referred to; viz: —

Act of July 14, 1832, in case of the heirs of Thomas Davenport. 6 id. 518.

Act of July 14, 1832, in case of John J. Jacobs. Id. 516.

Also act of July 14, 1832, in case of the heirs of Colonel Robert H. Harrison. Id. 437.

It is submitted that the act of Congress under which this suit was brought authorizes the Court of Claims, in the settlement and adjustment of the claim, to allow interest, and that it was the purpose of Congress to treat this case as other Revolutionary cases had been treated. By no other construction can effect

be given to the words, "And, in making such adjustment and settlement, the said court shall be governed by the rules and regulations heretofore adopted by the United States in the settlement of like cases." If Congress had intended that only the face of the draft should be paid, it could have said so in much fewer words; in fact, it would most probably have made a direct appropriation for the payment of that sum. However much the decisions of the accounting officers in other cases may be respected, they cannot be regarded as binding, in face of the expressed will of Congress, and the whole scope of legislation governing "like cases."

MR. JUSTICE MILLER delivered the opinion of the court.

The claim of the State of Virginia to dominion over that region of country called the Territory North-west of the Ohio River, which is now filled with a population of many millions and divided into five States of the Union, was not undisputed in the days when that State was a province of Great Britain. The French had numerous settlements there; and the government of Great Britain claimed, both by the acquisition of Canada and by settlement, a large part of that loosely defined country. They had their military posts there, as well as peaceful villages. The Indians also denied all right of the Colony of Virginia to rule over them; and some of the most warlike tribes of that race were known to occupy, with claim of exclusive right, the largest part of the country.

During the Revolutionary war, General George Rogers Clarke, acting under a commission from the State of Virginia, fitted out a warlike expedition, and starting from the falls of the Ohio, now called Louisville, made his appearance suddenly before the military post of Kaskaskia, then held by the British, and captured it and several other posts, and, in the course of one of the most romantic campaigns which the history of that region down to this day affords, effectually settled the right of Virginia to supremacy in that quarter.

General Clarke was not very vigorously supported by Virginia in this enterprise; for it occurred during the war of the Revolution, and that Commonwealth, as she now called herself, was engaged in more pressing affairs. It seems, however, that the

State had in New Orleans an agent on whom Clarke drew several drafts for funds to aid him in the matter, most of which were paid.

In the year 1778 he drew one of these drafts in favor of Francis Vigo for $8,616, which was not paid for want of funds. This draft was given for supplies furnished to Clarke's regiment, and has never yet been paid. It does not appear that the State of Virginia ever denied the justice of this debt; but by the finding of the Court of Claims, from which this record comes to us on appeal, it does appear that an officer of that State, called the Commissioner of Revolutionary Claims, examined into this one in the year 1835, and adjusted it, including interest, at $32,654.85.

In the course of the negotiation for the relinquishment of title by the States to their outlying territories, one of the resolutions passed by the Continental Congress Oct. 16, 1780 (6 Jour. of Cong. 213), was, that, when so ceded, "the necessary and reasonable expenses which any particular State shall have incurred since the commencement of the present war, in subduing any British post, or in maintaining forts or garrisons within and for the defence, or in acquiring any part, of the territory that may be ceded or relinquished to the United States, shall be reimbursed."

The debt represented by this draft comes directly within the language of this resolution, which was repeated by the Virginia legislature in the act of cession.

But by the act of Aug. 5, 1790, by which Congress constituted a board of commissioners to adjust all claims of the several States against the United States, there was a provision that no claim of a citizen of a State should be admitted as a claim against the United States which had not been allowed by the State before the twenty-fourth day of September, 1788. As the claim of Vigo, on account of this draft, had not then been allowed by the State of Virginia, this proviso has remained as a perpetual bar to its payment or allowance by those commissioners, or by any other officer of the government.

Congress, however, by many private acts, has authorized the payment of other claims similarly barred. This claim has been

constantly pressed upon the attention of Congress by the heirs of Vigo; until finally the case was, by the act of June 8, 1872, referred to the Court of Claims in the following language: —

"The claim of the heirs and legal representatives of Colonel Francis Vigo, deceased, late of Terre Haute, Ind., for money and supplies furnished the troops under command of General George Rogers Clarke in the year 1778, during the Revolutionary war, be, and the same hereby is, referred, along with all the papers and official documents belonging thereto, to the Court of Claims, with full jurisdiction to adjust and settle the same; and, in making such adjustment and settlement, the said court shall be governed by the rules and regulations heretofore adopted by the United States in the settlement of like cases, giving proper consideration to official acts, if any have heretofore been had in connection with this claim, and without regard to the statutes of limitations."

We entertain no doubt that the claim was a just claim in the hands of Vigo against the State of Virginia, and that, under the resolutions of the Congress of the United States and the State of Virginia, it belonged to that class of claims which Congress had assumed on receiving from that State the cession of the territory north-west of the Ohio. The wisdom of the act of Congress of 1790 in fixing a date after which the States could not make allowances of claims which should bind the United States is apparent; and nothing could be more just or honorable than that Congress, when appealed to for a relaxation of this salutary general rule of exclusion in favor of the private citizen who had a meritorious case, should grant relief. It seems clear to us, that, in the act of 1872, Congress did mean to remove this bar of the lapse of time, and to authorize the Court of Claims, if they found the claim to be a just one, to settle and allow it.

That the allowance of the principal sum was right, we think is beyond question; but the allowance of interest admits of discussion.

It has been the general rule of the officers of government, in adjusting and allowing unliquidated and disputed claims against the United States, to refuse to give interest. That this rule is sometimes at variance with that which governs the acts of private citizens in a court of justice would not authorize us to

depart from it in this case. The rule, however, is not uniform; and especially is it not so in regard to claims allowed by special acts of Congress, or referred by such acts to some department or officer for settlement.

The counsel for claimant has, in a careful brief, collected with much labor numerous cases in which interest has been allowed by Congress in the adjustment of disputed claims. The fifth section of the act of Aug. 5, 1790, already referred to, directed the commissioners, who under that act were to settle the claims of the States against the General Government, to allow interest; and, but for the bar of time in that act, this case would have come under that statute. The act under which the Court of Claims took jurisdiction of this case directed it to be "governed by the rules and regulations heretofore adopted by the United States in settlement of like cases." This is a like case to those in which interest was to be allowed by the act of 1790.

The bill of exchange drawn by Clarke in favor of Vigo is an instrument, which, by the commercial usage of all nations, bears interest after it becomes due. It also evidences the claim as a liquidated sum. There has never been any dispute about the amount due, if the claim was legal; and though the United States is not directly bound by the instrument, yet, if they choose to remove the bar of time, as the act of 1872 does in express terms, and it is found that the claim is one which the government has by law agreed to pay, we see no reason why it should not be paid in full, with all its legal incidents, as the State of Virginia should and would have paid it, had not the liability been assumed by the United States when she received the cession of that immense country, — a consideration ample enough for this and all other obligations she assumed in that contract.

The judgment of the Court of Claims is affirmed.

MR. JUSTICE DAVIS did not hear the argument in this case, and took no part in its decision.

MR. JUSTICE CLIFFORD, with whom concurred MR. JUSTICE HUNT, dissenting.

I dissent from so much of the opinion of the court as allows

interest to the claimant. Unless where the contract is express to that effect, the United States are not liable to pay interest. Interest should never be allowed on old claims, where payment has been deferred because the accounting officers of the treasury were of the opinion that further legislation was necessary to authorize their allowance, unless the new law clearly provides for the payment of interest as well as principal.

TOWNSEND *v.* TODD ET AL.

This court is bound to follow the courts of the State of Connecticut in their uniform decisions, in construing the recording acts of that State, that a mortgage must truly describe the debt intended to be secured; and that it is not sufficient that the debt be of such a character that it might have been secured by the mortgage had it been truly described.

APPEAL from the Circuit Court of the United States for the District of Connecticut.

Mr. John S. Beach for the appellant.

Mr. Simeon E. Baldwin, contra.

MR. JUSTICE HUNT delivered the opinion of the court.

The validity of the mortgage of $50,000 is attacked on the ground that it is in violation of the spirit and policy of the statutes and recording system of the State of Connecticut. The district and the circuit judge, each familiar with the statutes and decisions of that State, sustained this proposition. The precise objection to the mortgage is, that it does not truly describe the debt intended to be secured. The mortgage by its terms was given to secure the payment of a note of $50,000, dated April 12, 1873, executed by George T. Newhall to the order of James M. Townsend, payable on demand, with interest at the rate of seven per cent, payable semi-annually in advance. The bill alleges, and it is found by the district judge to be true, that Newhall was not at the date of the mortgage, and when the same was recorded, indebted to Townsend in any sum whatever which was secured by said note. The understanding was that Townsend would endeavor to borrow money or avail-

able securities to furnish to Newhall's creditors in satisfaction of his debts, and the mortgage was to stand as security for the repayment of the values thus advanced. The mortgage and note were to be placed in the hands of one White; and, if Townsend was unable to render this pecuniary aid, the sum of $40,000 was to be indorsed upon the note and mortgage by White, and the mortgage was to stand as security for the Chapman mortgage of $7,500, and a debt of $2,500 due to Townsend, also secured by another mortgage. Townsend did not obtain or borrow money or securities from any third person on the faith of this mortgage; but, in reliance upon the security of the mortgage, he did indorse notes for Newhall, and pay money to an amount exceeding $6,000. The struggle on the part of Townsend is to hold his mortgage for this sum of $6,000.

The question depends upon the recording acts of the State of Connecticut; and we are bound to follow the decisions of the courts of the State in their construction of those acts, if there has been a uniform course of decisions respecting them. *Allen* v. *Massey*, 17 Wall. 354; *Swift* v. *Tyson*, 16 Pet. 1; *Chicago City* v. *Robbins*, 2 Black, 428.

The cases of *Pettebone* v. *Griswold*, 4 Conn. 158; *Shepard* v. *Shepard*, 6 id. 37; *North* v. *Belden*, 13 id. 383; *Hart* v. *Chalder*, 14 id. 77; *Merrils* v. *Swift*, 18 id. 257; *Bacon* v. *Brown*, 19 id. 30; and several others,—are clear and decisive against the validity of the mortgage in question. In *Brown* v. *Mix*, 20 Conn. 420, and *Potter* v. *Holden*, 31 id. 385, the Supreme Court of that State held to its principles in words, but in effect considerably relaxed the rule. If those cases stood alone, or if there was no later case, there would be some room for doubt what the rule should be. The very recent case, however, of *Flood* v. *Bramhall*, 41 Conn. 72, fully and distinctly reasserts the rule laid down in the earlier cases. It is there held that the mortgage must truly describe the debt intended to be secured, and that it is not sufficient that the debt be of such a character that it might have been secured by the mortgage had it been truly described.

In most of the States, a mortgage like the one before us, reciting a specific indebtedness, but given in fact to secure ad-

vances or indorsements thereafter to be made, is a valid security, and would be good to secure the $6,000 actually advanced before other incumbrances were placed upon the property. 11 Ohio St. 232; 12 id. 38; 34 N. Y. 307; 35 id. 500; 22 id. 380; 2 Sand. Ch. 78; 6 Duer, 208.

We should be quite willing to give the appellant the benefit of this principle to the extent of his actual advances; but the contrary rule seems to be so well settled in Connecticut, that we are not at liberty to do so. The decree below vacating and cancelling the appellant's mortgage, being in conformity with that rule, is *Affirmed.*

Grand Trunk Railroad Company v. Richardson et al.

1. The erection of buildings by the permission of a railroad company within the line of its roadway by other parties, for convenience in delivering and receiving freight, is not inconsistent with the purposes for which the charter was granted; and a license by the company to such other parties is admissible to show its consent to the occupation of its premises.
2. The determination of an issue, as to whether the destruction of property by fire communicated by a locomotive was the result of negligence on the part of a railroad company, depends upon the facts shown as to whether or not it used such caution and diligence as the circumstances of the case demanded or prudent men ordinarily exercise, and not upon the usual conduct of other companies in the vicinity.
3. Where the statute of a State provides, that, "when an injury is done to a building or other property by fires communicated by a locomotive-engine of any railroad corporation, the said corporation shall be responsible in damages for such injury," and have an insurable interest in such property "along its route," — *Held*, that the phrase "along its route" means in proximity to the rails upon which the locomotive-engines run; and that the corporation is liable for such an injury to buildings or other property along its route, whether they are outside of the lines of its roadway, or lawfully within those lines.
4. In an action for such an injury, evidence was offered by the plaintiff, that, at various times during the same summer before the fire in question occurred, the defendant's locomotives scattered fire when going past the buildings, without showing that either of those which he claimed communicated the fire in question was among the number, or was similar to them in its make, state of repair, or management. *Held*, that the evidence was admissible, as tending to prove the possibility, and a consequent probability, that some locomotive caused the fire, and to show a negligent habit of the officers and agents of the corporation.
5. The statute applies to an injury to such buildings and property which is caused by fire spreading from other buildings to which it was first communicated by the locomotive.

Error to the Circuit Court of the United States for the District of Vermont.

This is an action by the defendants in error to recover damages for the destruction of their saw-mill, lumber-shed, store, boarding-house, manufactured lumber, and other personal property, by fire, alleged to have been communicated by a locomotive-engine of the plaintiff in error on the seventh day of June, 1870.

It was conceded on the trial that the railroad was duly laid out, located, and surveyed, six rods in width, under a charter granted by the legislature of the State of Vermont to another company; and that, about the year 1853, the railroad, with all the property, rights, and privileges of that company, came into the possession of the plaintiff in error, who had since that time continued to operate the same.

It was further conceded, that the saw-mill, lumber-shed, and store of the defendants in error, when consumed, stood in part upon the company's land, having been erected and placed there after the plaintiff in error came into possession of the railroad.

The defendants in error gave evidence that their mill, lumber-shed, and store were thus erected in part upon the company's land in 1854, and had been occupied by them from that date to the time of the fire; that these buildings were so erected near the railway-track for the purpose of delivering and receiving freight; that, soon after the mill was built, the plaintiff in error constructed a side track near to its main track, along the platform of the mill and lumber-shed, and up to the end of the mill, and the side track had been used since that time in loading lumber upon the cars; that there was a platform extending from the store of the defendants in error nearly to the main track of the railroad, and that the company was accustomed to deliver freight from its cars at said store.

The defendants in error gave in evidence a receipt, dated North Stratford, Oct. 27, 1870, and signed by the station-agent at that place, for one dollar, in payment of land-rent at their mill for the year ending Oct. 31, 1870. It appeared that this rent was charged by the company at the suggestion of its engineer having the general charge of the road-bed on that division of the road where the said mill, shed, &c., were located;

and that the engineer, before the date of the receipt, had requested Mr. Richardson, one of the defendants in error, to pay the company a nominal rent for the use of the land which they were occupying, in order to prevent the latter from acquiring or claiming right thereto by adverse possession; that they had assented to this request, and, at the date of the receipt, the station-agent presented a bill for the rent against them, which purported to come from the company's principal office in Montreal; and thereupon Richardson paid the rent, and took the receipt. They never had any writing, except as above stated, authorizing them to erect or maintain said buildings on the land of the corporation, or to occupy said land or buildings. All the foregoing testimony bearing upon the matter of a license was seasonably objected to as incompetent; but the same was admitted, subject to exception.

The court thereupon held that the company's evidence would authorize the jury to find a license to maintain the said buildings, and occupy the land; to which no exception was taken.

The following provisions of the General Statutes of Vermont (ch. 28, sects. 78, 79) were relied upon as authorizing the right to recover: —

"Sect. 78. When any injury is done to a building or other property by fire communicated by a locomotive-engine of any railroad corporation, the said corporation shall be responsible in damages for such injury, unless they shall show that they have used all due caution and diligence, and employed suitable expedients to prevent such injury.

"Sect. 79. Any railroad corporation shall have an insurable interest in such property as is mentioned in the preceding section along its route, and may procure insurance thereon in its own name and behalf."

The evidence tended to show that the fire was communicated from one of two locomotive-engines belonging to the plaintiff in error, the first drawing a passenger-train westerly, passing about half-past one o'clock in the afternoon the mill of the defendants in error; and the other, drawing a freight-train easterly, passing it about four o'clock the same afternoon. The mill and other property were situated in the town of Bruns-

wick, Essex County, Vt., about five miles westerly from North Stratford Station, on the Connecticut River, in New Hampshire, and about twelve miles easterly from the Island Pond Station, in Vermont.

One-half to three-fourths of an hour after the last-mentioned train passed by the mill, the fire was discovered burning on the westerly end of a covered railroad-bridge, which was one hundred and ten feet long. Witnesses testified, in substance, that a strong wind was blowing at the time, which carried the fire through the bridge with great rapidity, consuming it entirely, and setting on fire the saw-mill, the north-westerly corner of which was located within twelve or fifteen feet of the south-easterly corner of the bridge, and about the same distance from the main track of the railroad; that it was a very dry time, and, by reason of the wind blowing the fire through and from the bridge, it caught upon the saw-mill and consumed it, and was blown and carried thence to the other buildings and property sued for, consuming the same.

The defendants in error also claimed to recover the value of a large quantity of manufactured lumber, consisting of headings and boards which were piled upon and near the roadway, and burned. The headings were piled in the lumber-shed and on the adjoining platform, awaiting transportation. The boards were stuck up in the mill-yard to dry, for the purpose of being manufactured into headings, and extended back from the roadway at the lumber-shed in a southerly direction.

The plaintiff in error seasonably objected to the admission of the testimony bearing upon this point; but the court overruled the objection, and exception was taken.

When the defendants in error rested their case, the plaintiff in error moved that a verdict be rendered in its favor, for the following reasons: —

1. Because the damages claimed were too remote.

2. Because a large part of the property sued for was wrongfully on their railroad, and not within the statutes of Vermont referred to; but the court denied the motion.

The evidence of the plaintiff in error tended to show that this fire was not communicated by either of the engines complained of; but, on the contrary, that the defendants in error

for a long time had maintained a constant fire at the end of their tramway, about 163 feet down stream on the same bank of the river, where the westerly end of the railroad-bridge rested, for the purpose of burning the edgings, stickings, slabs, and other waste material from the saw-mill; and that the fire which consumed their bridge and the property of the defendants in error ran along the bank of the river, or was blown by the wind to the westerly end of the bridge, where it was first discovered as aforesaid.

It having appeared that the company, before and at the time of this fire, had employed one Turcot to watch their bridge on account of the danger of its being burned, and the defendants in error having claimed on the trial that the company had not used all due caution and diligence and had not employed all suitable expedients to prevent the fire, for the reason, amongst others, that said Turcot (as the defendants in error contended) did not watch the bridge more closely just before the fire, the company offered to show that it was not the usual practice among railroads in that section of the country to employ a man to watch bridges like the one destroyed; but, on objection, the court excluded this testimony, to which the company excepted.

After the plaintiff in error had rested its case, the defendants in error, subject to its exception, were allowed to prove, that at various times during the same summer, before this fire occurred, some of the company's locomotives scattered fire when passing the mill and bridge, without showing either that those which it was claimed communicated the fire in question were among the number, or that they were similar in their make, state of repair, or management, to said locomotives.

The plaintiff in error requested the court to charge, —

1. That if the jury found that the erection of plaintiffs' buildings or the storing of plaintiffs' lumber so near to the defendant's railroad track, as the testimony would show, was an imprudent or careless act, and that such a location of this property in any degree contributed to the loss which ensued, then the plaintiffs could not recover, even though the fire was communicated by the defendant's locomotive.

2. That at all events, under the circumstances disclosed

in this cause, it was incumbent upon plaintiffs to use due caution and diligence and to employ suitable expedients to prevent the communication of fire.

3. That the statute upon which the action is predicated does not apply to property located within the limits of the railroad, nor to personal property temporarily on hand.

The court refused to charge the jury on the first and third points as requested, but gave the charge requested on the second point, with the qualification, that there was no evidence in the case to which it had any application; to all which the defendant excepted.

The defendant also renewed its motion that a verdict be ordered in its favor for the reasons above set forth; which was again denied by the court, and the defendant excepted.

The court charged the jury that the burden of proof was upon the plaintiffs, in the first instance, to show that the fire in question was communicated from some of the defendant's locomotive-engines to the bridge; and that, if the jury were satisfied of that fact by a fair balance of evidence, then the plaintiffs were entitled to recover, unless the defendant had established, by a fair balance of evidence, that it had used all due caution and diligence and had employed all suitable expedients to prevent the fire; that the burden of proof was on the defendant as to the latter branch of the case; to which exception was taken.

The jury returned a verdict for $22,312.12 damages. The company moved to set aside the verdict and grant a new trial for reasons set forth in the bill of exceptions; which motion was overruled, and the company excepted.

Mr. George A. Bingham and *Mr. Ossian Ray* for the plaintiff in error.

The receipt, dated Oct. 27, 1870, for rent for the year ending Oct. 31, 1870, was incompetent evidence, because it was given subsequent to the fire, when the relations, rights, and liabilities of the parties at the time of such fire could not and ought not to be varied; nor was the transaction had for any other purpose than to show a surrender on the part of the defendants in error of any right they had gained by adverse possession.

It was competent for the plaintiff in error to show that it

was not the usual practice of railroad companies in that vicinity to employ men to watch bridges like that destroyed. The presumption is, that it exercised common care and prudence in preserving its property from destruction; and the evidence rejected certainly tended to show that it not only exercised such care, but that the employment of a watchman was an act of extraordinary and unusual precaution and diligence.

It was error to admit testimony showing that some of the company's locomotives had previously scattered fire, unless it was shown that either of those in question was among the number, or was similar in construction, state of repair, or management. *Boyce* v. *Cheshire R.R.*, 42 N. H. 97; *Phelps* v. *Conant*, 30 Vt. 277, 284; *Malton* v. *Nesbit*, 1 Car. & Payne, 70; *Hubbard* v. *Railroad Co.*, 39 Me. 506; *Standish* v. *Washburn*, 21 Pick. 237; *Collins* v. *Dorchester*, 6 Cush. 396; *Robinson* v. *Railroad Co.*, 7 Gray, 92, 95; *Jordan* v. *Osgood*, 109 Mass. 457. The effect of such evidence could not be otherwise than highly prejudicial to the plaintiff in error. *Sheldon* v. *Railroad Co.*, 29 Barb. 226; *Smith* v. *Railroad Co.*, 37 Mo. 287; *Railroad Co.* v. *Doak*, 52 Penn. St. 379.

Railway corporations cannot, without the consent of the legislature, surrender their franchises or any portion thereof, nor part with the control and occupancy of their roadway. 2 Gray, 404; 11 Allen, 65. A license, therefore, for the permanent use of ground, within their chartered limits, should be held void as contrary to sound public policy, and the intruder treated as a wrong-doer or trespasser, until, at least, his occupancy has ripened into a prescriptive right. *Troy & Boston R.R. Co.* v. *Potter*, 42 Vt. 265, 275, 276; *Jackson* v. *Rutland & Burlington R.R. Co.*, 25 id. 150–159; *Hurd* v. *Rutland & Burlington R.R. Co.*, id. 116, 121; *Richards* v. *Railroad Co.*, 44 N. H. 127, 136.

If the receipt was not competent, it is clear that the property of the defendants in error was wrongfully upon the roadway; and the company was liable for its loss only upon proof of gross negligence, according to common-law principles. *Jackson* v. *Rutland & Burlington R.R. Co.*, and *Hurd* v. *Rutland & Burlington R.R. Co.*, *supra*; *Bemis* v. *C. & P. R. R.R. Co.*, 42 Vt. 375; *Railroad Co.* v. *Anderson*, 20 Mich. 244.

As the property outside the roadway limits was destroyed solely by reason of the burning of that portion within them, the defendants in error cannot take advantage of their own wrong in placing their property upon the company's land.

The statute of Vermont has no application to property injured or destroyed *within* the limits of the roadway, *even if it is rightfully there*. Where property thus situated is destroyed, it is incumbent upon the plaintiffs to establish, not only the fact that the fire was communicated by the defendant's locomotives, but that it was through carelessness and negligence.

No fair construction of the seventy-eighth and seventy-ninth sections of chap. 28 of the General Statutes of Vermont gives the corporation a right to insure property wrongfully upon its premises. *Chapman* v. *Railroad Co.*, 37 Me. 92.

The phrase "along its route," employed in the seventy-ninth section, clearly means by the side of, alongside, along the line of, lengthwise of, or near to the chartered limits of the roadway as surveyed and located, and not within, upon, over, or across the route. *Bailey* v. *White*, 41 N. H. 337; *Peaslee* v. *Gee*, 19 id. 273.

The act was passed for the purpose of aiding the adjoining land-owner, in case his property — located upon his own land, and not upon the railway — should be injured by fire from a locomotive, by casting the burden of proof on the corporation to show the exercise of due care and suitable expedients to prevent injury. *Metallic Co.* v. *Railroad Co.*, 109 Mass. 277; *Garris* v. *Scott*, 9 Exch. Law, 125; *Atkinson* v. *Waterworks Co.*, 9 id. 125; *Hall* v. *Brown*, 54 N. H. 495.

The plaintiff in error was entitled to a verdict because the damages claimed were too remote. *Ryan* v. *N. Y. Central R.R.*, 35 N. Y. 210; *Penn. R.R.* v. *Kerr*, 62 Penn. St. 353; *Hooksett* v. *Concord R.R.*, 38 N. H. 242–246; *Harrison* v. *Berkley*, 1 Strob. (S. C.) 548; *Morrison* v. *Davis*, 20 Penn. St. 171; *Insurance Co.* v. *Tweed*, 7 Wall. 44, 52; 3 Pars. on Contr. 198.

That was at least a question for the jury. *Holden* v. *Railroad Co.*, 30 Vt. 297, 303, 304; *Saxton* v. *Bacon*, 31 id. 540, 546, 547; *Toledo, &c. R.R. Co.* v. *Pindar*, 53 Ill. 447; *Fant* v. *Toledo, &c. R.R. Co.*, 59 id. 351; *Fairbanks* v. *Kerr*, 70 Penn.

St. 86; *Kellogg* v. *Milwaukee & St. Paul R.R. Co.*, reported in Whart. on Neg., sect. 154.

Also as to whether the defendants in error were not guilty of contributory negligence. *Kelsey* v. *Glover*, 15 Vt. 708, 714–716; *Allen* v. *Hancock*, 16 id. 230; *Cassedy* v. *Stockbridge*, 21 id. 391; *Robinson* v. *Cone*, 22 id. 213, 225; *Sessions* v. *Newport*, 23 id. 9; *Barber* v. *Essex*, 27 id. 62; *Briggs* v. *Taylor*, 28 id. 183; *Swift* v. *Newbury*, 36 id. 355, 358, 359; *Hill* v. *New Haven*, 37 id. 501; *Vinton* v. *Schwab*, 32 id. 612; *Folsom* v. *Underhill*, 36 id. 580, 591, 592; *Hodge* v. *Bennington*, 43 id. 450; *Willard* v. *Pinard*, 44 id. 34; *McCully* v. *Clark*, 40 Penn. St. 399; *Hackford* v. *Railroad Co.*, 53 N. Y. 654; *Gonzales* v. *Railroad Co.*, 38 id. 440; *Munger* v. *Railroad Co.*, 4 id. 349; *Railroad Co.* v. *Van Steinburg*, 17 Mich. 99; *Railroad Co.* v. *Mills*, 42 Ill. 407; *Railroad Co.* v. *Frazier*, 47 id. 505; *Railroad Co.* v. *Shanefelt*, 47 id. 497; *Railroad Co.* v. *Terry*, 8 Ohio St. 570; *Webb* v. *Railroad Co.*, 57 Me. 117; Bigelow's Lead. Cas. on Torts, 589, 596; Whart. on Neg., ch. 11, sects. 420–427; *Page* v. *Parker*, 43 N. H. 363; *Sioux City & P. R.R. Co.* v. *Stout*, 17 Wall. 657; *Wakefield* v. *C. & P. R. R.R. Co.*, 37 Vt. 330; Shearm. and Redf. on Neg., ch. 3, sects. 25–34.

If the defendants in error are entitled to stand in the position of licensees, or of persons going upon the railroad premises to transact business, as upon invitation, then each party is bound to use ordinary care in respect to the other, and the question of contributory negligence is for the jury. Saund. on Neg. 71–73; *Balch* v. *Smith*, 7 Hurlst. & Norm. 741; *Scott* v. *London Docks Co.*, 11 Law Times, N. S. 383; *Hounsel* v. *Smith*, 7 C. B. N. S. 738; *Barnes* v. *Wood*, 9 C. B. 392; *Eagan* v. *Railroad Co.*, 101 Mass. 315; *Shaw* v. *Railroad Co.*, 8 Gray, 45; *Bailey* v. *Railroad Co.*, 107 Mass. 496.

It is contended that as they, at best, occupied the company's land merely as licensees, the company was not involved in any liability as to the fitness of its use. Whart. on Neg., sect. 831; *Murray* v. *McLean*, 57 Ill. 378; *Sweeney* v. *Railroad Co.*, 10 Allen, 368; *Nicholson* v. *Railroad Co.*, 41 N. Y. 525, 530; *Kenney* v. *Railroad Co.*, 34 N. J. 513; *Zoebisch* v. *Tarbell*, 10 Allen, 385; *Chapman* v. *Rothwell*, El. B. & E. 668; *Hill* v. *New Haven*, 37 Vt. 501, 509; *Gahajan* v. *Railroad Co.*, 1 Allen,

187; *Telfer* v. *Railroad Co.*, 30 N. J. 188; *Michigan Central R.R. Co.* v. *Anderson*, 20 Mich. 244.

It was error for the court to refuse the charge that the statute has no application to property located within the limits of the railroad, or to personal property temporarily on hand. 1 Redf. on Rail. (3d ed.), sect. 126, p. 456; *Pratt* v. *Railroad Co.*, 42 Me. 579. The burden of proof remained with the defendants in error throughout the trial; and they were not entitled to recover without proving the negligence of the company, as well as the communication of the fire.

Mr. Halbert E. Paine for the defendants in error.

The competency and admissibility of the evidence bearing upon the question of license, authorizing the defendants in error to occupy the company's land and maintain buildings thereon, is clear upon both principle and authority. 1 Wash. Real Prop. 542, and cases cited; 2 Am. Lead. Cases, 563, and cases cited; 1 Hill. Real Prop. 302, and cases cited.

As the statute of Vermont not only imposes a liability upon railroad companies for the destruction of property near and adjoining the route of the railway, but expressly confers upon them an insurable interest in such property, and authorizes them to procure such insurance in their own name and behalf, the damages in the case at bar were not too remote; and the company is liable, whether the fire was communicated directly and immediately to the property destroyed, or through another building. *Insurance Co.* v. *Tweed*, 7 Wall. 44; *Webb* v. *R.R. Co.*, 49 N. Y. 420; *Piggot* v. *R.R. Co.*, 54 E. C. L. 229; *Smith* v. *R.R. Co.*, 5 Com. Pleas, 98; *Fant* v. *R.R. Co.*, 4 Chicago Legal News (1 Redf. Cas., 2d ed., 350); *R.R. Co.* v. *Stanford*, 12 Webb (Kan.), 354; *Kellogg* v. *R.R. Co.*, 26 Wis. 223; *Hart* v. *R.R. Co.*, 13 Mass. 99; *Perley* v. *R.R. Co.*, 98 id. 414; *Quigley* v. *R.R. Co.*, 8 Allen, 438; *Hooksett* v. *R.R. Co.*, 38 N. H. 242; *Cleveland* v. *R.R. Co.*, 42 Vt. 449.

The cases of *Ryan* v. *N. Y. Cen. R.R. Co.*, 35 N. Y. 210, and *Penn. R.R. Co.* v. *Kerr*, 62 Penn. St. 353, are contrary to the doctrine announced in all the other authorities bearing upon the question.

If the evidence offered by the plaintiffs below in relation to the scattering of fire by engines of the company at various

times previous to the fire, without showing that either of those alleged to have communicated the fire in question was among the number, or that said locomotives were similar in their construction, state of repair, or management, to those which were claimed to have scattered the fire complained of, was admissible to either maintain the plaintiffs' case or rebut the defendant's proof, no objection to its reception can be sustained here.

Evidence that two engines had crossed the bridge shortly before it and the buildings were burned was admitted without question, and manifestly on the ground that it tended to establish a probability that one of the engines communicated the fire. But why did it tend to establish such a probability? Not because there was any evidence before the jury showing, or tending to show, that their construction was such as to necessitate or admit of the scattering of sparks or coals. No such evidence had been adduced. It tended to show the probability that one of them communicated the fire, because the mind accepts the fact that the engines at a dry season crossed this long wooden bridge just before it was found to be on fire, as tending, of itself, to show a probability that the fire was communicated by one of them. It tended to show, not a *mere possibility* of such a result, but a possibility which was coupled with, or rather constituted an element of, a probability of more or less strength, that the fire was communicated to the bridge by one of the engines, because, at the present time, many locomotive-engines do in fact emit sparks or coals, and lack such devices as will perfectly prevent their escape; and such fact shows a probability, for the same reason and to the same extent that it shows a possibility, that the fire was so communicated. If the use of completely and invariably effectual safeguards had become universal, then the crossing of an engine might not show such a probability, any more than the crossing of a hand-car.

While the mere fact of the crossing of an engine shows such a probability, without affirmative proof that it scatters fire, so is evidence that such engine in fact scatters fire competent as tending to strengthen a probability shown by the mere fact of the crossing without such proof. In the present condition of railway equipment, without proof that the engine actually scat-

tered fire at the time, a presumption of more or less strength would arise, in case of a fire following the passage of these engines across the bridge, that they were not both provided with safeguards against the escape of fire which are at all times absolutely effectual; and, although the probability would be strengthened by the presence of proof that these engines actually scattered fire, it would not be wholly removed by the withdrawal of such proof. It was not necessary for the plaintiffs to show that the two engines which crossed the bridge just before the fire *were not* so constructed, or, as an alternative, to fail wholly in the attempt to establish a probability that they caused the fire; but it was incumbent on the defendant, in order to destroy the probability raised by proof that the engines had previously crossed the bridge, to show that they *were* so constructed. Under the circumstances, proof that several of the engines of the same road had been seen to scatter fire tends to strengthen the probability that the engines which crossed the bridge were without effective safeguards, and so occasioned the fire. Certainly the fact that a part of the engines of a railway company were unprovided with such safeguards raises a probability, not that the others were, but that they were not, so provided. There being a unity of management in a railway company, evidence that some of its engines are permitted to scatter fire impeaches that management, and raises a probability more or less strong as to the cause of the particular loss.

If evidence that two unknown engines crossed the bridge, a little before the fire, raised a probability, however slight, that the damage resulted from the negligent acts of the defendant, and was therefore competent, there can be no doubt that the further evidence that several unknown engines had scattered fire near the same time and place would tend to strengthen the probability so raised.

As the evidence offered would tend to show a possibility — which, under the circumstances, was tantamount to a probability — that the fire was communicated by one of the engines which crossed a little before its discovery, it was competent. Upon principle, this would seem to be the true doctrine; and it is supported by most, if not all, of the authorities. *Piggot*

v. *R.R. Co.*, *supra*; *Field* v. *R.R. Co.*, 32 N. Y. 339; *Webb* v. *R.R. Co.*, *supra*; *Cleaveland* v. *R.R. Co.*, *supra*; *Burk* v. *R.R. Co.*, 7 Heisk. 456; *Garrett* v. *R.R. Co.*, 36 Iowa, 122; *Gandy* v. *R.R. Co.*, 30 id. 420; *R.R. Co.* v. *Williams*, 42 Ill. 356; *Smith* v. *R.R. Co.*, 10 R. I. 22; *Longabaugh* v. *R.R. Co.*, 4 Nev. 811; *Fitch* v. *R.R. Co.*, 45 Mo. 322.

If it had appeared that some of these engines did scatter fire, then the fact of the passage of the two engines would have established such a possibility and probability. The plaintiffs met any possible claim, that none of the defendant's engines used in the vicinity could scatter fire, by showing affirmatively that some of them did. The plaintiffs thereby established the possibility, and consequent probability, that the damage resulted from the negligent act of the defendant; and clearly fastened upon it the burden of showing that the particular engines which crossed the bridge before the fire were both so constructed, regulated, and operated as to prevent the scattering of fire. Proof that other engines have thrown fire as far as the building destroyed, offered in a case where the building is separated from the track, stands upon precisely the same footing as proof that other engines have "scattered fire," offered in a case where a railway bridge itself is first burned. The question in each case is, whether the fire can be thrown far enough to occasion the damage. It is thrown far enough when "scattered," in one case, as clearly as when thrown to the distant building destroyed, in the other.

The court properly refused to charge the jury, that if they found that the erection of the plaintiffs' buildings or the storing of their timber so near to the defendants' railway track was an imprudent or careless act, and that such a location of this property in any degree contributed to the loss which ensued, then the plaintiffs could not recover, even though the fire was communicated by the defendant's locomotive.

When a person, in the lawful use of his own property, places it in a situation of hazard and exposure near the line of a railway, he does not thereby lose his remedy for injuries occasioned by the negligent acts of the railway company. *Cook* v. *The Champlain Transportation Co.*, 1 Den. 91; *Fero* v. *R.R. Co.*, 22 N. Y. 215.

The rule releasing the defendant from liability on account of contributory negligence of the plaintiff is limited to cases where the negligent act or omission of the plaintiff is the proximate cause of the loss. *Flynn* v. *R.R. Co.*, 40 Cal. 18, and cases cited; *Lowell* v. *R.R. Co.*, 23 Pick. 31; *Littleton* v. *Richardson*, 32 N. H. 59; *Norris* v. *Litchfield*, 35 id. 271; *Ingersoll* v. *R.R. Co.*, 8 Allen, 438; *Davies* v. *Mann*, 10 M. & W. 545; *Richmond* v. *R.R. Co.*, 18 Cal. 357; *Kline* v. *R.R. Co.*, 37 id. 400; *Needham* v. *R.R. Co.*, id. 409; *Wright* v. *Brown*, 4 Ind. 98; *Kerwhacker* v. *R.R. Co.*, 3 Ohio St. 172; *R.R. Co. v. Elliott*, 4 id. 474.

The plaintiffs' failure to take *unusual* care of the property destroyed is no defence to the action. Shearm. Neg. (3d ed.) 35, 404, and cases cited; *Kellogg* v. *R.R. Co.*, 26 Wis. 223.

"Negligence of the plaintiff which precludes a recovery is where, in the presence of a *seen* danger (as where the fire has been set), he omits to do what prudence requires to be done, under the circumstances, for the protection of his property, or does some act inconsistent with its preservation. When the danger is *not seen*, but anticipated merely, or dependent on future events (such as the future continuance of defendant's negligence), plaintiff is not bound to guard against it by refraining from his usual course (being otherwise a prudent one) in the management of his property and business. In the exercise of his lawful rights, every person has a right to presume that every other person will perform his duty, and obey the law; and it is not negligence for him to assume that he is not exposed to a danger which can only come to him through a disregard of the law on the part of some other person." *Kellogg* v. *R.R. Co.*, 26 Wis. 223, and cases cited.

The next exception is based upon the refusal of the court to charge the jury "that the statute upon which the action is predicated does not apply to property located within the limits of the railroad, nor to personal property temporarily on hand."

The circumstance that the property destroyed was located on the defendant's land by leave of the defendant, and without charge for rent, would not defeat the plaintiffs' right to recover. *R.R. Co.* v. *Derby*, 14 How. 485; *Steamboat New World et al.* v. *King*, 16 id. 469; *Ingersoll* v. *R.R. Co.*, 8 Allen, 440.

It is probable that the second branch of this exception rests upon the case of *Chapman* v. *R.R. Co.*, 37 Me. 92. But if it were possible, in the absence of other authorities, to extend the scope of that decision so as to cover the broad, unqualified proposition, that the statute does not apply to personal property temporarily on hand, nevertheless the case of *Pratt* v. *R.R. Co.*, 42 id. 579, decided two years later by the same court, effectually and completely disposes of such a construction. *Trask* v. *R.R. Co*, 15 Gray, 71; *Perley* v. *R.R. Co.*, 98 Mass. 418; *Cleaveland* v. *R.R. Co.*, 42 Vt. 449; *Ross* v. *R.R. Co.*, 6 Allen, 87.

If there could be any doubt at common law respecting the correctness of the charge of the court on the tenth point, there can be none under the statute of Vermont.

Mr. Justice Strong delivered the opinion of the court.

The plaintiffs below were permitted to adduce evidence that those of the injured buildings which were within the lines of the roadway had been erected within those lines by the license of the company, for the convenience of delivering and receiving freight. The admission of this evidence is the subject of the first assignment of error; and in its support it has been argued that it was the duty of the railroad company to preserve its entire roadway for the use for which it was incorporated; that it had no authority to grant licenses to others to use any part thereof for the erection of buildings; and, therefore, that the license to the plaintiffs, if any was made, was void. Thus the basis of the objection to the evidence appears to be, that it was immaterial. We are, however, of opinion that it was properly admitted. If the buildings of the plaintiffs were rightfully where they were, if there was no trespass upon the roadway of the company, it was clearly a pertinent fact to be shown; and while it must be admited that a railroad company has the exclusive control of all the land within the lines of its roadway, and is not at liberty to alienate any part of it so as to interfere with the full exercise of the franchises granted, we are not prepared to assert that it may not license the erection of buildings for its convenience, even though they may be also for the convenience of others. It is not doubted that the defendant might

have erected similar structures on the ground on which the plaintiffs' buildings were placed, if in its judgment the structures were convenient for the receipt and delivery of freight on its road. Such erections would not have been inconsistent with the purposes for which its charter was granted. And, if the company might have put up the buildings, why might it not license others to do the same thing for the same object; namely, the increase of its facilities for the receipt and delivery of freight? The public is not injured, and it has no right to complain, so long as a free and safe passage is left for the carriage of freight and passengers. There is, then, no well-founded objection to the admission of evidence of a license, or evidence that the plaintiffs' buildings were partly within the line of the roadway by the consent of the defendant. The objection to the mode of proof is equally unsustainable. There was quite enough, without the receipt of Oct. 27, 1870, to justify a finding by the jury that the plaintiffs were not trespassers. But the receipt itself was competent evidence. It is true, it was given after the occurrence of the fire; but it was a mutual recognition by the company and by one of the plaintiffs that the occupation of the roadway by the buildings had been, and that it was at the time of the fire, permissive, and not adverse. Taking the receipt, as the bill of exception shows, was the act of the defendant by its agent, the engineer who had charge of the road-bed. It was, therefore, an admission by the company that there had been consent to the occupation.

The second assignment of error is, that the court excluded testimony offered by the defendant to show that the usual practice of railroad companies in that section of the country was not to employ a watchman for bridges like the one destroyed. It is impossible for us to see any reason why such evidence should have been admitted. The issue to be determined was, whether the defendant had been guilty of negligence; that is, whether it had failed to exercise that caution and diligence which the circumstances demanded, and which prudent men ordinarily exercise. Hence the standard by which its conduct was to be measured was not the conduct of other railroad companies in the vicinity; certainly not their usual conduct. Besides, the degree of care which the law requires in

order to guard against injury to others varies greatly according to the circumstances of the case. When the fire occurred which caused the destruction of the plaintiffs' buildings, it was a very dry time, and there was a high wind. At such a time, greater vigilance was demanded than might ordinarily have been required. The usual practice of other companies in that section of the country sheds no light upon the duty of the defendant when running locomotives over long wooden bridges, in near proximity to frame buildings, when danger was more than commonly imminent.

The third assignment of error is, that the plaintiffs were allowed to prove, notwithstanding objection by the defendant, that, at various times during the same summer before the fire occurred, some of the defendant's locomotives scattered fire when going past the mill and bridge, without showing that either of those which the plaintiffs claimed communicated the fire was among the number, and without showing that the locomotives were similar in their make, their state of repair, or management, to those claimed to have caused the fire complained of. The evidence was admitted after the defendant's case had closed. But, whether it was strictly rebutting or not, if it tended to prove the plaintiffs' case, its admission as rebutting was within the discretion of the court below, and not reviewable here. The question, therefore, is, whether it tended in any degree to show that the burning of the bridge, and the consequent destruction of the plaintiffs' property, were caused by any of the defendant's locomotives. The question has often been considered by the courts in this country and in England; and such evidence has, we think, been generally held admissible, as tending to prove the possibility, and a consequent probability, that some locomotive caused the fire, and as tending to show a negligent habit of the officers and agents of the railroad company. *Piggot* v. *R.R. Co.*, 3 M. G. & S. 229; *Sheldon* v. *R.R. Co.*, 14 N. Y. 218; *Field* v. *R.R. Co.*, 32 id. 339; *Webb* v. *R.R. Co.*, 49 id. 420; *Cleaveland* v. *R.R. Co.*, 42 Vt. 449; *R.R. Co.* v. *Williams*, 42 Ill. 358; *Smith* v. *R.R. Co.*, 10 R. G. 22; *Longabaugh* v. *R.R. Co.*, 4 Nev. 811. There are, it is true, some cases that seem to assert the opposite rule. It is, of course, indirect evidence, if it be evidence at all. In this

case it was proved that engines run by the defendant had crossed the bridge not long before it took fire. The particular engines were not identified; but their crossing raised at least some probability, in the absence of proof of any other known cause, that they caused the fire; and it seems to us, that, under the circumstances, this probability was strengthened by the fact that some engines of the same defendant, at other times during the same season, had scattered fire during their passage. We cannot, therefore, sustain this assignment.

It is contended further on behalf of the defendant, that there was error in the court's refusal to direct a verdict in its favor because a large part of the property destroyed was wrongfully on their railway, and not within the purview of the statute of Vermont, on which the plaintiffs relied. If, however, we are correct in what we have heretofore said, it was not for the court to assume that any part of the property was on the roadway wrongfully, and to instruct the jury on that assumption; and, even if it had been wrongfully there, the fact would not justify its destruction by any wilful or negligent conduct of the defendant. In *Bains* v. *R.R. Co.*, 42 Vt. 380, it was said that a railroad company in the discharge of its duties, and in the exercise of its right to protect its property from injury to which it is exposed by the unlawful act or neglect of another, is bound to use ordinary care to avoid injury even to a trespasser. If this be the correct rule (and it cannot be doubted), how could the Circuit Court have charged as a conclusion of law that the plaintiffs could not recover because their property was wrongfully within the lines of the defendant's roadway?

Again: the court was asked to direct a verdict for the defendant, for the alleged reason that the damages were too remote. The bill of exceptions shows that the fire originated in the bridge of the defendant, and spread thence to the mill and other property of the plaintiffs; and we are referred to the rulings in *Ryan* v. *The New York Central R. W. Co.*, 35 N. Y. 210, and *Penn. R.R. Co.* v. *Kerr*, 62 Penn. St. 353, as showing, that, in such a case, negligently setting the bridge on fire is not to be considered the proximate cause. We do not, however, deem it necessary to inquire whether the doctrine asserted in those cases is correct. It is in conflict with that laid down in

many other decisions; indeed, in conflict, we think, with the large majority of decisions made by the American courts in similar cases. But we think the statute of Vermont has a direct bearing upon the defendant's liability, and contemplates such buildings and property as were destroyed in this instance. The buildings were along the route of the railroad; though some of them were, in whole or in part, within the lines of the roadway. It is obvious to us that the phrase "along its route" means in proximity to the rails upon which the locomotive-engines run. That the statute gave an insurable interest in the property, for the destruction of which the corporation was made liable, does not necessarily show that the only property intended was such as was outside the lines of the roadway. That, indeed, was comprehended; but property lawfully within the lines, which the company did not own, equally needed protection. The statute was designed to be a remedial one, and it is to be liberally construed. In Massachusetts, there is a statute almost identical with that of Vermont; and under it the Supreme Judicial Court of that State held, in *Ingersoll* v. *The Stockbridge & Pittsfield R.R. Co.*, and *Quigley* v. *Same*, 8 Allen, 438, that the company was liable to both the plaintiffs, though the fire communicated directly from the locomotive to Ingersoll's barn, and spread through an intervening shed, which stood partly upon the railroad location, to the barn of Quigley. The court said, "There is nothing in the statement to show that any fault of the plaintiff contributed to the loss, if the buildings were lawfully placed where they stood. The fact that a building stands near a railroad, or wholly or partly on it, if placed there with the consent of the company, does not diminish their responsibility in case it is injured by fire communicated by their locomotives. The legislature have chosen to make it a condition of the right to run carriages impelled by the agency of fire, that the corporation employing them shall be responsible for all injuries which the fire may cause." These cases are directly in point as to the reach of the statute. They show that it embraces buildings on the line of the roadway, and buildings injured by fire spreading from other buildings to which fire was first communicated from a locomotive. To the same effect is *Hart* v. *The Western R.R. Co.*, 13 Met. 99. And, if it be con-

ceded that the statute is applicable only to injuries of buildings and other property which the railroad company may insure, we do not perceive why it may not obtain insurance of buildings and property on its location with its consent. But, if the statute is applicable to the case, it is plain that the Circuit Court could not direct a verdict for the defendant for the reason that the damages were too remote.

Exception was taken at the trial to the refusal of the court to affirm the defendant's points; the first of which was, that "if the jury should find that the erection of the plaintiffs' buildings, or the storing of their lumber so near the defendant's railroad track, as the evidence showed, was an imprudent or careless act, and that such a location in any degree contributed to the loss which ensued, then the plaintiffs could not recover, even though the fire was communicated by the defendant's locomotive." We think the court correctly refused to affirm this proposition. The fact that the destroyed property was located near the line of the railroad did not deprive the owners of the protection of the statute, certainly, if it was placed where it was under a license from the defendant. Such a location, if there was a license, was a lawful use of its property by the plaintiffs; and they did not lose their right to compensation for its loss occasioned by the negligence of the defendant. *Cook* v. *Champlain Transp. Co.*, 1 Den. 91; *Fere* v. *Railroad Co.*, 22 N. Y. 215. Besides, it was not for the court to affirm that even an imprudent location of the plaintiffs' buildings and property was a proximate cause of the loss.

The second request for instruction was, "that at all events, under the circumstances disclosed in the case, it was incumbent upon the plaintiffs to use due caution and diligence, and to employ suitable expedients to prevent the communication of fire." The request was broad; but the court gave the instruction asked, adding only that there was no evidence in the case to which it had any application; and we have been unable to find any in the record. A question is not to be submitted to a jury without evidence.

The third prayer for instruction was based on the assertion, that "the statute upon which the action was predicated does not

apply to property located within the limits of the railroad, nor to personal property temporarily on hand." This view of the statute, as we have already remarked, is not, in our judgment, correct as a general proposition, and certainly not in its application to a case where property is placed within the lines of a railway, by the consent of a railway company, for the convenience in part of its traffic.

It remains only to add, that we see no just ground of complaint of the affirmative instruction given to the jury. It was in accordance with the rule prescribed by the statute; and there seems to have been no controversy in the Circuit Court respecting the question, whether, if the fire was communicated to the bridge by a locomotive, it caused the injury to the plaintiffs. *The judgment is, therefore, affirmed.*

OSBORN v. UNITED STATES.

1. Subject to exceptions therein prescribed, a pardon by the President restores to its recipient all rights of property lost by the offence pardoned, unless the property has by judicial process become vested in other persons.
2. A condition annexed to a pardon, that the recipient shall not by virtue of it claim any property, or the proceeds of any property, sold by the order, judgment, or decree of a court, under the confiscation laws of the United States, does not preclude him from applying to the court for the proceeds of a confiscated money-bond secured by mortgage, which were collected by the officers of the court in part by voluntary payment by the obligors, and in part by sale of the lands mortgaged. The condition is only intended to protect purchasers at judicial sale, decreed under the confiscation laws, from any claim of the original owner for the property sold or the purchase-money.
3. The proceeds of property confiscated, paid into court, are under its control until an order for their distribution is made, or they are paid into the hands of the informer entitled to them, or into the treasury of the United States.
4. Where moneys belonging to the registry of the court are withdrawn from it without authority of law, the court can, by summary proceedings, compel their restitution; and any one entitled to the moneys may apply to the court by petition for a delivery of them to him.

ERROR to the Circuit Court of the United States for the District of Kansas.

Submitted on printed arguments by *Messrs. R. M. Corwine, Q. Corwine, J. W. English, Henry Beard*, and *C. H. Armes*, for

the plaintiff in error, and by *Mr. E. S. Brown* for the defendant in error.

MR. JUSTICE FIELD delivered the opinion of the court.

The material questions presented in this case for our determination relate, first, to the effect of the President's pardon upon the rights of the petitioner to the proceeds of his property confiscated by the decree of the District Court; and, second, to the power of the court to compel restitution to its registry of moneys illegally received by its former officers.

In May, 1863, the District Court of Kansas decreed the condemnation and forfeiture to the United States of the several bonds and mortgages described in the information filed by the government. In June following, it ordered that the several debtors on these bonds should, within five months thereafter, pay into court the money due by them respectively; and that, in default of such payment, the clerk should issue to the marshal orders for the sale of the mortgaged property, upon which he should proceed as on execution under the laws of Kansas. Some of the debtors paid the amounts due by them into court; but the majority of them failed in this respect, and orders for the sale of the property mortgaged were issued to the marshal. To him the greater number paid without sale; but, in some instances, sales were made. Over $20,000 in this way came into the possession of officers of the court.

There were at the time numerous other confiscation cases pending in the court, and the moneys received from them were indiscriminately mixed with the moneys received in the cases against the property of the petitioner. None of the moneys received in any of the cases was paid into the treasury of the United States, and no order was made by the court for any such payment. Some of them were deposited in a banking-house at Leavenworth, designated as the place of deposit of moneys paid into court, and afterwards drawn out; some were obtained by officers of the court, and to an extent greatly in excess of their legal charges; and some of them were paid to the judge. The moneys from the different confiscation cases, being indiscriminately mixed, would seem to have been taken by the officers of the court whenever funds were needed by

them, without regard to the sources from which they were derived, or the propriety of their application to the purposes for which they were used.

In April, 1866, the petitioner applied to the court for leave to file a petition for the restoration to him of the proceeds of his property, after deducting the costs of the legal proceedings, alleging that he had been pardoned by the President of the United States, and setting forth a copy of the pardon. The pardon was issued in September, 1865, and was in terms a full pardon and amnesty for all offences committed by the petitioner, arising from participation, direct or indirect, in the rebellion, subject to certain conditions. One of these conditions provided that the petitioner should pay all costs which may have accrued in proceedings instituted or pending against his person or property before the acceptance of the pardon. Another condition was, that the petitioner should not by virtue of the pardon claim any property, or the proceeds of any property, which had been sold by the order, judgment, or decree of a court under the confiscation laws of the United States.

The District Court refused the application; but the Circuit Court, on appeal, reversed its order, and allowed the petition to be filed. The District Court held, it would seem, that the conditions attached to the pardon precluded the petitioner from seeking to obtain the proceeds of his property: but the Circuit Court was of opinion that the effect of a pardon was to restore to its recipient all rights of property lost by the offence pardoned, unless the property had, by judicial process, become vested in other persons, subject to such exceptions as were prescribed by the pardon itself; that until an order of distribution of the proceeds was made in these cases, or the proceeds were actually paid into the hands of the party entitled as informer to receive them, or into the treasury of the United States, they were within the control of the court, and that no vested right to the proceeds had accrued so as to prevent the pardon from restoring them to the petitioner. Woolworth's Rep. 198. This ruling is here assailed by officers of the court, who are called upon to make restitution of a portion of the proceeds they obtained, not by the United States, who are alone interested in the decision. It is not a matter for these officers to

complain that proceeds of property adjudged forfeited to the United States are held subject to the further disposition of the court, and possible restitution to the original owner. That is a matter which concerns only the United States, and they have not seen fit to object to the decision. But, independently of this consideration, we are clear that the decision was correct. The pardon, as is seen, embraces all offences arising from participation of the petitioner, direct or indirect, in the rebellion. It covers, therefore, the offences for which the forfeiture of his property was decreed. The confiscation law of 1862, though construed to apply only to public enemies, is limited to such of them as were engaged in and gave aid and comfort to the rebellion. 12 Stat., sect. 7, p. 590. The pardon of that offence necessarily carried with it the release of the penalty attached to its commission, so far as such release was in the power of the government, unless specially restrained by exceptions embraced in the instrument itself. It is of the very essence of a pardon that it releases the offender from the consequences of his offence. If in the proceedings to establish his culpability and enforce the penalty, and before the grant of the pardon, the rights of others than the government have vested, those rights cannot be impaired by the pardon. The government having parted with its power over such rights, they necessarily remain as they existed previously to the grant of the pardon. The government can only release what it holds. But, unless rights of others in the property condemned have accrued, the penalty of forfeiture annexed to the commission of the offence must fall with the pardon of the offence itself, provided the full operation of the pardon be not restrained by the conditions upon which it is granted. The condition annexed to the pardon of the petitioner does not defeat such operation in the present case. The property of the petitioner forfeited consisted of numerous money-bonds, secured by mortgage on lands in Kansas. These bonds were not sold under the confiscation laws: they were collected by the officers of the court, in part by voluntary payments by the obligors, and in part by sale of the lands mortgaged. These lands did not belong to the petitioner. A mortgage in Kansas does not pass the title of the property mortgaged: it is a mere security for the debt, to

which the creditor may resort to enforce payment. The property mortgaged was not confiscated nor sold under the confiscation laws. When a bond of one of the debtors was not voluntarily paid, the court proceeded to enforce its payment by the ordinary measure resorted to in the case of mortgages; that is, a sale of the security.

The object of the condition in question annexed to the pardon was to protect the purchaser of property of the petitioner, at a judicial sale decreed under the confiscation laws, from any claim by him either for the property or the purchase-money. Numerous sales had been made under decrees in confiscation cases, and a similar condition was usually inserted in pardons to secure the purchasers from molestation. Full effect is thus given to the condition; and, as a pardon is an act of grace, limitations upon its operation should be strictly construed.

But it is contended, that, as the bonds were forfeited to the government by the decree of the District Court, there can be no restitution except by grant or conveyance of some kind from the government, and that the proprietary interests of the government can only be disposed of by act of Congress. The answer is, that the forfeiture results, not from the decree of the court, but from the offence which the decree establishes and declares. The pardon, in releasing the offence, obliterating it in legal contemplation (*Carlisle* v. *United States*, 16 Wall. 151), removes the ground of the forfeiture upon which the decree rests, and the source of title is then gone.

But, were this otherwise, the constitutional grant to the President of the power to pardon offences must be held to carry with it, as an incident, the power to release penalties and forfeitures which accrue from the offences.

The petitioner being restored by the pardon to his rights in the proceeds of the property forfeited, after deducting from them the costs of the legal proceedings, naturally invoked the aid of the court in which the proceedings were had, or to which they were transferred, for restitution of the proceeds. Proceedings in confiscation cases are required by the statute to conform as nearly as may be to proceedings in admiralty or revenue cases; and in admiralty it is the constant practice for persons having an interest in proceeds in the registry of the

court to intervene by petition and summary proceedings to obtain a delivery of the moneys to which they are entitled. The forty-third admiralty rule recognizes this right; and in cases without number the right has been enforced. The power of the court over moneys belonging to its registry continues until they are distributed pursuant to final decrees in the cases in which the moneys are paid. If from any cause they are previously withdrawn from the registry without authority of law, the court can, by summary proceedings, compel their restitution. In the present case, it is no answer to the order for restitution that the appellants received the moneys they obtained as officers of the court, and that they have long since ceased to be such officers. If the moneys were illegally taken, they must be restored; and, until a decree of distribution is made and enforced, the summary power of the court to compel restitution remains intact. The power could be applied in no case more fittingly than to previous officers of the court.

The careful and labored reports of the commissioners appointed by the court to examine into the proceedings in the confiscation cases, ascertain the expenses incurred, and trace out as far as possible the moneys received, were properly confirmed. There is no objection to their findings which merits consideration.

The decree brought before us for review must be affirmed, except as to the costs of the proceedings subsequent to the presentation of the application of the petitioner. Those costs should be apportioned against the parties ordered to make restitution, according to the respective amounts they are adjudged to restore. The cause will, therefore, be remanded, with directions to modify the decree in this particular; but, in all other respects, *The decree is affirmed.*

LLOYD ET AL. *v.* FULTON.

1. As the provision of the English Statute of Frauds touching promises made in consideration of marriage is in force in Georgia, a promise there made, but not in writing, to settle property upon an intended wife, is void. Such promise after marriage is also void for want of consideration.

2. The indebtedness of a husband at the time of his execution of a conveyance by way of settling property in trust for the sole and separate use of his wife and children is only a presumptive proof of fraud which may be explained and rebutted; and this being the established doctrine in Georgia, where the property in question is situate, such a conveyance was upheld against existing creditors where the debtor reserved property greater in value than two and a half times the amount of his debts, and where the transaction rested upon a basis of good faith, and was free from the taint of any dishonest purpose.

APPEAL from the Circuit Court of the United States for the Northern District of Georgia.

Fulton, the appellee, having by his marriage acquired large means, which he had verbally agreed before and after his marriage should be held for the sole and separate use of his wife, executed the following indenture: —

"STATE OF GEORGIA, *Columbia County.*

"This indenture, made this, the fourteenth day of September, 1864, between Montroville C. Fulton, of the county and state aforesaid, of the first part, and James S. Hamilton, of the same county and state, of the second part, witnesseth that said party of the first part, for and in consideration of the natural love and affection which he has and bears towards his wife, Virginia C. Fulton, as well as in consideration of the sum of ten dollars to him in hand paid by said party of the second part at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath given, granted, bargained, sold, delivered, released, conveyed, and confirmed, and by these presents doth give, grant, bargain, sell, deliver, release, convey, and confirm, unto the said party of the second part, and to his successors and assigns, subject to the uses and trusts hereinafter expressed, the following-described real and personal property; to wit (*the description of the property is omitted*).

"In trust, nevertheless, to and for the sole and separate use, benefit, and behoof of Virginia F. Fulton, wife of the said party of the first part, for and during the term of her natural life, free from the debts, liabilities, or contracts of the said party of the first part, or any future husband, with remainder at her death to her children then in life, or who have issue alive at that time (the issue of any deceased child taking the parent's proportionate share); but should she die leaving no child, or issue of a child, surviving her, then with remainder to her heirs at law. Provided

always, and it is distinctly understood, that said Virginia F. Fulton, at any time after the execution of these presents, during coverture or widowhood, may, by her last will and testament, give, demise, or bequeath the entire trust-estate, with income and increase thereof, to such person or persons as she may see fit, as if she were sole and unmarried; but in case of her death without leaving any will, or of any legal disability to make a will, then the trust-estate shall, after her death, vest as aforesaid in her children or other heirs in law. And provided, further, that the said Virginia F. Fulton shall be authorized at any time, upon the death, resignation, or removal of the party of the second part, or any of his successors, by instrument in writing, under her hand and seal, to appoint the said party of the first part, or any other fit and proper person, trustee in the place and stead of the previous trustee; and the person so appointed shall immediately and *ipso facto* become entitled to all the right and authority hereinafter granted, unless restrained in the deed of appointment, which said Virginia F. shall be authorized to do. And provided, also, that the said party of the second part, or the party of the first part in the event of becoming trustee under this instrument, shall be authorized at any time to sell, mortgage, lease, exchange, or otherwise dispose of at discretion, the trust-estate, or its increase, or any portion thereof, reinvesting the proceeds in such other property, real, personal, or mixed, as may be deemed best by him; and shall also be authorized, for the purpose of supporting, maintaining, and educating the said Virginia F. and her children, to encroach upon the corpus of the estate without authority from any court. That all subsequent trustee or trustees shall only be authorized to sell, lease, or exchange, and to reinvest, upon the written consent of said Virginia F., and for the purpose of support, maintenance, and education, shall only be allowed to encroach upon the corpus during the existing war, and upon the written direction of said Virginia F. so to do.

"And provided, finally, that the separate receipt of the said Virginia F., notwithstanding coverture, shall be a sufficient and legal discharge to the party of the second part or party of the first part (in the event of his appointment as trustee) for the yearly income of the trust-estate, or any portion of the corpus consumed, and maintenance and education, and that they shall not be required to make annual or other returns to the court of ordinary or other court. That in the event of the death of the said Virginia F. without making a will, and leaving children, or issue of children, the party of the second part or the party of the first part, if the

trustee, shall be authorized to keep the estate together, exercising the same power hereinbefore granted until such time as he shall deem it advisable to distribute the estate among the remaindermen; but in the event of the death of the said Virginia F. intestate, and leaving no child, or issue of a child, surviving her, then the trustee for the time being is to distribute the estate among the heirs at law immediately.

"In witness whereof, the said party of the first part hath hereunto set his hand and seal, the day and year first above written in duplicate.

"MONTROVILLE C. FULTON. [L. S.]

"Signed, sealed, and delivered in presence of us,

ROBERT MARTIN.
B. B. WILKERSON.
J. E. SMITH.
E. J. SHORT, J. I. C."

The property conveyed, exclusive of slaves, was of less value than that reserved; and the latter was, at the date of the indenture, worth more than double the amount of all his indebtedness.

The original trustee having resigned his office, the appellee was appointed in his stead. He had given his two promissory notes bearing date May 16, 1861, one payable Sept. 1 then next ensuing, and the other Sept. 1, 1862, each for the sum of $5,000, to James Lloyd. Suit having been brought upon these notes, judgment was rendered against him, May 15, 1871, and an execution levied upon the trust-property. He, as trustee, thereupon sued out an injunction restraining a sale. The Circuit Court having decreed in his favor, the case comes here on appeal.

The facts are further stated in the opinion of the court.

Sect. 1954 of the Code of Georgia, in force Sept. 14, 1864, reads as follows: —

"*Acts Void against Creditors.* — The following acts by debtors shall be fraudulent in law against creditors, and as to them null and void; viz.: —

"1. Every assignment or transfer by a debtor, insolvent at the time, of real or personal property of any description, to any person, either in trust or for the benefit of himself or any one or more of

his creditors, or any person appointed by him, to the exclusion of any other creditor in the equal participation of such property, *unless* such assignment or transfer is a *bona fide* sale, in extinction, in whole or in part, of the debt of the purchaser, and without any trust or benefit reserved to the seller or any person appointed by him.

"2. Every conveyance of real or personal estate by writing or otherwise, and every bond, suit, judgment, and execution, or contract of any description, had or made with intention to delay or defraud creditors, and such intention known to the party taking; a *bona fide* transaction on a valuable consideration, without notice or ground for reasonable suspicion, shall be valid.

"Every voluntary deed or conveyance, not for a valuable consideration, made by a debtor insolvent at the time of such conveyance."

Mr. P. Phillips for the appellant.

The deed upon its face shows that it is a voluntary conveyance; and there is nothing *dehors* which entitles it to any other character. The debt which it seeks to avoid was contracted four years prior to its execution. The *prima facie* presumption is, therefore, that the deed is fraudulent as against a prior creditor. *Howard* v. *Snelling*, 32 Ga. 206.

The conveyance, under the circumstances, is void. *Parish* v. *Murpheree*, 13 How. 93.

Mr. John D. Pope, *contra*.

MR. JUSTICE SWAYNE delivered the opinion of the court.

All the testimony in this case was taken by the appellee. He was complainant in the suit. Only two witnesses were examined, — himself, and his brother-in-law James S. Hamilton. There is no discrepancy in their statements. The facts lie within narrow limits.

Fulton, the appellee, married Virginia F. Hamilton, the daughter of Thomas N. Hamilton, in the year 1851. Her father was a man of very large fortune. Fulton received by her, before and after her father's death, more than $100,000. He had himself, at the time of his marriage, substantially nothing. His father-in-law died intestate in 1859. Before and after his marriage, Fulton promised his father-in-law to settle his wife's fortune upon her. After his father-in-law's death, he made the same promise to her brother, James S. Hamilton,

who administered upon his father's estate. Nothing in fulfilment of these promises was done by Fulton until the 14th of September, 1864. On that day he executed to James S. Hamilton the deed made a part of the bill. It conveyed the premises in controversy in trust for the sole and separate use of the wife of the appellee and her children. The deed contained, among other things, a provision, that, if Hamilton should die, resign, or be removed from the trusteeship, she might appoint her husband, or any other fit person, as trustee in his place. On the same day Hamilton resigned, and Fulton was appointed. On the 16th of May, 1861, Fulton executed to James Lloyd two notes of $5,000 each, one payable on the 1st of September following, the other on the 1st of September, 1862. There was due on these notes, at the date of the trust-deed, $11,780. Fulton then owed to other persons not exceeding $2,000. This was the extent of his indebtedness. The aggregate of his liabilities was less than $14,000. He retained in his hands property worth $36,000, besides non-enumerated articles worth $20,000 in Confederate currency. The point of depreciation which that currency had then reached is not shown. The property reserved was of greater value than that conveyed. After the execution of the deed, he was able to pay the notes. In 1862 he offered to pay them in Confederate currency, which was then but little depreciated. Payment in that medium was refused. His ability to pay continued until 1866. In that year he embarked in the enterprise of raising cotton in Arkansas. The result wrecked his fortune, and ruined him. He has since been unable to pay the notes. Suit was commenced against him upon the notes in February, 1868; and in May, 1871, judgment was recovered for $10,000 with interest, amounting to $6,447.81 and costs. Execution was issued and levied upon the trust-property described in the bill. This suit was brought to enjoin the sale, and the Circuit Court decreed in favor of the complainant.

The provision of the English Statute of Frauds, touching promises made in consideration of marriage, is in force in Georgia.

The promise of Fulton to Thomas N. Hamilton before the marriage was, therefore, void. Browne's Stat. Frauds, 220, 514.

His promise after the marriage was without consideration, and therefore of no validity. The same remark applies to the like promise to James S. Hamilton, the administrator.

The principle of the wife's equity has no application to this case. *Wicks* v. *Clarke*, 3 Ed. Ch. 63. The trust-deed was clearly a voluntary conveyance. Lloyd was a prior creditor.

Was the deed good against him?

This question is the core of the controversy between the parties.

Formerly, according to the rule of English jurisprudence, such deeds, as against such creditors, were void. *Townsend* v. *Windham*, 2 Ves. 10. The same principle was applied in such cases in this country. *Read* v. *Livingston*, 3 J. C. R. 481. It has been overruled in the English courts. *Lush* v. *Wilkinson*, 5 Ves. 384; *Townsend* v. *Westocot*, 2 Beav. 345; *Gale* v. *Williamson*, 8 M. & W. 410; *Shares* v. *Rogers*, 3 B. & A. 96; *Freeman* v. *Pope*, 5 Ch. App. Cases Eq. 544, 545. It has been also overruled by this court (*Hinde's Lessee* v. *Longworth*, 11 Wheat. 213; *Kehr* v. *Smith*, 20 Wall. 35) and in most of the States of our Union. The State adjudications to this effect are too numerous to be cited. We shall refer to a few of them. *How* v. *Ward*, 4 Me. 195; *Moritz* v. *Hoffman*, 35 Ill. 553; *Leroy* v. *Wilmarth*, 9 Allen, 382; *Miller* v. *Wilson*, 15 Ohio, 108; *Young* v. *White*, 25 Miss. 146; *Taylor* v. *Ewbank*, 3 Marsh. 329; *Salmon* v. *Bennett*, 1 Conn. 525; *Worthington* v. *Shipley*, 5 Gill, 449; *Townsend* v. *Maynard*, 45 Penn. 199.

Such is also the law of the State whence this case came to this court. *Weed* v. *Davis*, 25 Ga. 686. It is a rule of property there; and this court is therefore bound to apply it, in the case in hand, as if we were sitting as a local court in that State. Jud. Act of 1789, sect. 34; *Olcott* v. *Bynum et al.*, 17 Wall. 44.

The rule as now established is, that prior indebtedness is only presumptive and not conclusive proof of fraud, and this presumption may be explained and rebutted. Fraud is always a question of fact with reference to the intention of the grantor. Where there is no fraud, there is no infirmity in the deed. Every case depends upon its circumstances, and is to be carefully scrutinized. But the vital question is always the good faith of the transaction. There is no other test.

Perhaps no more striking illustration can be found of the application of this principle, and of the opposition its establishment encountered, than is presented in the several cases of *Van Wick* v. *Seward*. On the 6th of November, 1817, Seward assigned a judgment to Van Wick, and gave him a guaranty that it was collectible. The judgment was a lien upon lands fairly to be presumed more than sufficient to satisfy it. On the 16th of April, 1818, Seward conveyed all his real estate, consisting of a farm of two hundred acres, to his son. The consideration of the deed was the payment of a specified sum to each of two daughters of the grantor, and an annuity for life of $500 to the grantor himself, who was then aged and infirm. The lands bound by the lien of the judgment were sold under execution, and bought in by Van Wick for a nominal sum. He thereupon sued Seward upon his guaranty, and recovered a judgment, which was docketed on the 13th of September, 1820.

Van Wick thereupon sold under execution and bought in the farm which Seward had conveyed to his son, and brought an action of ejectment to recover possession. The jury found that there was no actual fraud. The Supreme Court, nevertheless, upon the ground that the liability was prior to the deed, following the ruling of Chancellor Kent in *Reed* v. *Livingston*, gave judgment for the plaintiff's lessor. *Jackson* v. *Seward*, 5 Cow. 67. This judgment, upon grounds chiefly technical, was reversed by the Court of Errors of New York. *Seward* v. *Jackson*, 8 Cow. 423. Van Wick thereupon filed a bill in equity to avoid the deed. Chancellor Walworth concurred with the jury in the prior case as to the absence of fraud; and upon that ground, and the further ground of the circumstances of the sale of the property covered by the lien of the judgment, dismissed the bill. *Van Wick* v. *Seward*, 6 Paige, 63. The Court of Errors, upon appeal, affirmed this decree by a majority of one. The vote was fourteen to fifteen. *Van Wick* v. *Seward*, 18 Wend. 375. So ended the litigation. Perhaps in no case was the subject more elaborately examined. This case was fatal to the old rule. We think the new one more consonant to right and justice, and founded in the better reason.

In *Miller* v. *Wilson*, 15 Ohio, 108, the doctrine of this case

was expressly affirmed by the Supreme Court of Ohio, though the result upon the facts was in favor of the creditors. The facts of the case in hand are more favorable for the support of the deed than those in *Van Wick* v. *Seward*. Here the debtor reserved property worth more than twice and a half the amount of his debts. He expected and intended to pay all he owed. He continued able to do so until he lost his means by the hazards of business. The creditor rested supine for a long time. He did not take his judgment until more than eight years after the second note matured, and more than six years after the execution of the trust-deed. More than seven years had elapsed when the levy was made. The validity of the deed was then challenged for the first time. The creditor quietly looked on until after misfortune had deprived the debtor of the ample means of payment which he had reserved, and now seeks to wrest from the wife the small remnant of property which her husband acquired by means derived wholly from her estate, and which, in part fulfilment of his promise repeatedly made both before and after his marriage, he endeavored to secure to her and her children.

The evidence, as it stands in the record, satisfies us of the honesty of the transaction on his part. The non-payment and the inability to pay are the results, not of fraud, but of accident and misfortune. When Fulton executed the deed, he did what he then had the right to do, and was morally, though not legally, bound to do.

The proofs would not warrant us in holding that the settlement does not rest upon a basis of good faith, or that it is not free from the taint of any dishonest purpose.

The decree of the Circuit Court is affirmed.

ZELLER ET AL. v. SWITZER.

Where the Supreme Court of a State on appeal overruled an exception which had been sustained in a lower court, and, on setting aside the judgment below, remanded the case to be proceeded with according to law, — *Held*, that the judgment of such Supreme Court was not final, and that the writ of error must be dismissed.

ERROR to the Supreme Court of the State of Louisiana.

This action was brought upon a bond given to release the steamboat "Frolic" from a provisional seizure. The defendants answered the petition Nov. 25, 1870, setting up several defences, and, Dec. 5, 1870, filed a peremptory exception. The court below, upon hearing, sustained this exception, and gave judgment in favor of the defendants. The defences set up in the answer were not passed upon.

From this judgment an appeal was taken to the Supreme Court, where a judgment was entered as follows: —

"On appeal from the Second Judicial Court, parish of Jefferson, it is ordered and adjudged that the judgment of the lower court be set aside; that the exception be overruled; that the case be remanded to be proceeded with according to law; and that the appellee pay costs of appeal."

To reverse this judgment the present writ of error has been prosecuted.

Mr. John A. Grow moved to dismiss the writ of error for want of jurisdiction, the judgment below not being final.

Mr. E. T. Merrick and *Mr. G. W. Race*, *contra*.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

We think this motion must be granted. The judgment is one of reversal only, and the case is remanded to be proceeded with according to law. The Supreme Court decided that the defence set forth in the peremptory exception was not good; and that is all that court decided. The case was, therefore, sent back for trial upon the defences set up in the answer, or any other that might be properly presented. If the decision below upon the exception had been correct, such a trial would have been unnecessary. The Supreme Court having decided that it was not correct, the inferior court must now proceed further. This brings the case within our ruling at the present term in *Ex parte French*, *supra*, p. 423.

The writ is dismissed.

MILWAUKEE AND ST. PAUL RAILWAY COMPANY *v.* ARMS ET AL.

1. A passenger in a railway-car who has been injured in a collision caused by the negligence of the employés of the company, is not, as a general rule, entitled in an action against the company to recover damages beyond the limit of compensation for the injury actually sustained.
2. Exemplary damages should not be awarded for such injury, unless it is the result of the wilful misconduct of the employés of the company, or of that reckless indifference to the rights of others which is equivalent to an intentional violation of them.

ERROR to the Circuit Court of the United States for the District of Iowa.

This action against the railroad company to recover damages for injuries received by Mrs. Arms, by reason of a collision of a train of cars with another train, resulted in a verdict and judgment for $4,000. The company sued out this writ of error.

The bill of exceptions discloses this state of facts: Mrs. Arms, in October, 1870, was a passenger on defendant's train of cars, which, while running at a speed of fourteen or fifteen miles an hour, collided with another train moving in an opposite direction on the same track. The jar occasioned by the collision was light, and more of a push than a shock. The fronts of the two engines were demolished, and a new engine removed the train. This was all the testimony offered by either party as to the character of the collision, and the cause of it; but there was evidence tending to show that Mrs. Arms was thrown from her seat, and sustained the injuries of which she complained. After the evidence had been submitted to the jury, the court gave them the following instruction: "If you find that the accident was caused by the gross negligence of the defendant's servants controlling the train, you may give to the plaintiffs punitive or exemplary damages."

Mr. John W. Cary for the plaintiff in error.

The court below erred in its charge to the jury, because there was no testimony which warranted the submission of the question of gross negligence for any purpose.

The undisputed facts raise the simple legal proposition, Does the mere negligence of the defendant's servants, which resulted

in the collision, authorize the jury to give punitive or exemplary damages?

It is submitted that the authorities support the negative of this proposition. *Philadelphia & Reading R.R. Co.* v. *Derby*, 14 How. 468; *Philadelphia, Wilmington, & Baltimore R.R. Co.* v. *Quigley*, 21 id. 202–213; *Finney* v. *Milwaukee & Mississippi R.R. Co.*, 10 Wis. 388; *Craker* v. *Chicago & North-western R.R. Co.*, 36 id. 657; *Cleghorn* v. *New York Central & Hudson River R.R. Co.*, 56 N. Y. 44; *Hamilton* v. *Third Avenue R.R. Co.*, 53 id. 25; *Weed* v. *Railroad*, 17 id. 362; *Hagan* v. *Providence & Worcester R.R. Co.*, 3 R. I. 88; *Ackerson* v. *Erie R.R. Co.*, 32 N. J. 254; *New Orleans, Jackson, & Great Northern R.R. Co.* v. *Stathan*, 42 Miss. 607; *Turner* v. *North Beach & Mission R.R. Co.*, 34 Cal. 594; *Wardrobe* v. *California Stage Co.*, 7 id. 118; *Du Laurans* v. *First Division of St. Paul & Pacific*, 15 Minn. 49; *Great Western R.R. Co.* v. *Miller*, 19 Mich. 305–315; *Pennsylvania Co.* v. *Kelly*, 31 Penn. 372; *Heil* v. *Gendening*, 42 id. 493; *Hill* v. *The New Orleans & Opelousas & Great Western R.R. Co.*, 11 La. Ann. 292; *Peoria Bridge Association* v. *Loomis*, 20 Ill. 235; *Chicago & Rock Island R.R. Co.* v. *McKean*, 40 id. 218; *Louisville & Portland R.R. Co.* v. *Smith*, 2 Duv. 556; *Kentucky Central R.R. Co.* v. *Dills*, 4 Bush, 593.

Mr. C. C. Nourse for the defendants in error.

The petition charges the plaintiff in error with gross negligence and carelessness in suffering the trains to collide. The company offered no evidence to explain the cause of the collision. It is not to be presumed that the cause was known to the plaintiff; but that it was known to the company cannot be doubted, and the absence of testimony tending to excuse or palliate it affords the strongest possible presumption that no excuse or palliating circumstances existed. This presents, therefore, a case, not simply of collision, which is of itself *prima facie* evidence of gross negligence, but one in which the railroad company, standing dumb in the face of an accusation and charge of gross carelessness and negligence, offers no word of explanation or excuse for the calamity. The jury, therefore, were fully warranted in finding negligence of the grossest character. It remains to be considered, whether in a case of gross carelessness,

without palliating circumstances, a railroad company is liable for exemplary or punitive damages.

Gross negligence, where the highest degree of care is required, should be, and from motives of public policy is, regarded as criminal; and the elementary works furnish many instances where it is punished as a crime. Whart. Am. Crim. Law, sect. 1002 *et seq.*

In no cases is the application of this doctrine more salutary than in those where railway companies are parties.

Recognizing this fact, the legislatures of many of the States have prescribed severe punishment for negligence in the management of trains upon railways.

"Gross negligence," as used in this connection, has acquired a meaning in the law akin to wantonness. In general, it is defined to be the absence of slight diligence. Bouvier, tit. "Negligence." It is utter recklessness. Gross negligence of a railway company in the management of its passenger trains is nothing less than an utter disregard of human life; and public policy requires that it should be so considered.

The liability of railway and other corporations to exemplary damages for gross negligence is a well-settled question. *Hopkins* v. *Atlantic & St. Lawrence R.R. Co.*, 36 N. H. 9; *Taylor* v. *Railway Co.*, 48 id. 304, 318; *Goddard* v. *Grand Trunk R.R. Co.*, 57 Me. 202 (also reported in Am. Law Reg., vol. x. p. 17); Redf. on Railw. 515 *et seq.*; Shearm. & Redf. on Neg., sect. 600; *New Orleans, Jackson, & Great Northern R.R. Co.* v. *Albritton*, 36 Miss. 242; *Same* v. *Bailey*, 40 id. 395; *V. & J. R.R. Co.* v. *Patton*, 31 id. 156; *M. & C. R.R. Co.* v. *Whitfield*, 44 id. 466; *Louisville, Cinn., & Lex. R.R. Co.* v. *Mahony*, 7 Bush (Ky.), 235; *Atlantic & Gt. Western R.R. Co.* v. *Dunn*, 19 Ohio St. 162; *Pittsburgh & Ft. Wayne R.R. Co.* v. *Slusser*, id. 157; 57 Penn. St. 339; *Baltimore & Ohio R.R. Co.* v. *Blocher*, 27 Md. 277; *Williamson* v. *The Western Stage Co.*, 24 Iowa, 171; *Frick & Co.* v. *Coe*, 4 G. Greene, 555; *Chicago & Rock Island R.R. Co.* v. *McKean*, 40 Ill. 218; *C. R. I. & P. R.R. Co.* v. *Herring*, 57 id. 59. See also *Spicer* v. *C. & N. W. R.R. Co.*, 29 Wis. 580.

The right to recover exemplary damages has been expressly recognized by this court. *Day* v. *Woodworth*, 13 How. 363; *Philadelphia and Reading R.R. Co.* v. *Derby*, 14 How. 468.

In *Varillat* v. *The New Orleans & Carollton R.R. Co.*, 10 La. Ann. 88, the court place stress upon the fact that there was no evidence to explain the cause of the collision, and sustain a verdict for exemplary damages.

MR. JUSTICE DAVIS delivered the opinion of the court.

The court doutless assumed, in its instructions to the jury, that the mere collision of two railroad trains is, *ipso facto*, evidence of gross negligence on the part of the employés of the company, justifying the assessment of exemplary damages; for a collision could not well occur under less aggravated circumstances, or cause slighter injury. Neither train was thrown from the track, and the effect of the collision was only to demolish the fronts of the two locomotives. It did not even produce the "shock" which usually results from a serious collision. The train on which Mrs. Arms was riding was moving at a very moderate rate of speed; and the other train must have been nearly, if not quite, stationary. There was nothing, therefore, save the fact that a collision happened, upon which to charge negligence upon the company. This was enough to entitle Mrs. Arms to full compensatory damages; but the inquiry is, whether the jury had a right to go farther, and give exemplary damages.

It is undoubtedly true that the allowance of any thing more than an adequate pecuniary indemnity for a wrong suffered is a great departure from the principle on which damages in civil suits are awarded. But although, as a *general rule*, the plaintiff recovers merely such indemnity, yet the doctrine is too well settled now to be shaken, that exemplary damages may in certain cases be assessed. As the question of intention is always material in an action of tort, and as the circumstances which characterize the transaction are, therefore, proper to be weighed by the jury in fixing the compensation of the injured party, it may well be considered whether the doctrine of exemplary damages cannot be reconciled with the idea, that compensation alone is the true measure of redress.

But jurists have chosen to place this doctrine on the ground, not that the sufferer is to be recompensed, but that the offender is to be punished; and, although some text-writers and courts

have questioned its soundness, it has been accepted as the general rule in England and in most of the States of this country. 1 Redf. on Railw. 576; Sedg. on Measure of Dam., 4th ed., ch. 18 and note, where the cases are collected and reviewed. It has also received the sanction of this court. Discussed and recognized in *Day* v. *Woodworth*, 13 How. 371, it was more accurately stated in *The Philadelphia, Wilmington, & Baltimore R.R. Company* v. *Quigley*, 21 How. 213. One of the errors assigned was that the Circuit Court did not place any limit on the power of the jury to give exemplary damages, if in their opinion they were called for. Mr. Justice Campbell, who delivered the opinion of the court, said, —

"In *Day* v. *Woodworth* this court recognized the power of the jury in certain actions of tort to assess against the tort-feasor punitive or exemplary damages. Whenever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity, the jury are not limited to the ascertainment of a simple compensation for the wrong committed against the aggrieved person. But the malice spoken of in this rule is not merely the doing of an unlawful or injurious act: the word implies that the wrong complained of was conceived in the spirit of mischief, or criminal indifference to civil obligations."

As nothing of this kind, under the evidence, could be imputed to the defendants, the judgment was reversed.

Although this rule was announced in an action for libel, it is equally applicable to suits for personal injuries received through the negligence of others. Redress commensurate to such injuries should be afforded. In ascertaining its extent, the jury may consider all the facts which relate to the wrongful act of the defendant, and its consequences to the plaintiff; but they are not at liberty to go farther, unless it was done wilfully, or was the result of that reckless indifference to the rights of others which is equivalent to an intentional violation of them. In that case, the jury are authorized, for the sake of public example, to give such additional damages as the circumstances require. The tort is aggravated by the evil motive, and on this rests the rule of exemplary damages.

It is insisted, however, that, where there is "gross negligence," the jury can properly give exemplary damages. There

are many cases to this effect. The difficulty is, that they do not define the term with any accuracy; and, if it be made the criterion by which to determine the liability of the carrier beyond the limit of indemnity, it would seem that a precise meaning should be given to it. This the courts have been embarrassed in doing, and this court has expressed its disapprobation of these attempts to fix the degrees of negligence by legal definitions. In *The Steamboat New World* v. *King* (16 How. 474), Mr. Justice Curtis, in speaking of the three degrees of negligence, says, —

"It may be doubted if these terms can be usefully applied in practice. Their meaning is not fixed, or capable of being so. One degree thus described not only may be confounded with another, but it is quite impracticable exactly to distinguish them. Their signification necessarily varies according to circumstances; to whose influence the courts have been forced to yield, until there are so many real exceptions, that the rules themselves can scarcely be said to have a general operation. If the law furnishes no definition of the terms 'gross negligence' or 'ordinary negligence' which can be applied in practice, but leaves it to the jury to determine in each case what the duty was, and what omissions amount to a breach of it, it would seem that imperfect and confessedly unsuccessful attempts to define that duty had better be abandoned."

Some of the highest English courts have come to the conclusion that there is no intelligible distinction between ordinary and gross negligence. Redf. on Car., sect. 376. Lord Cranworth, in *Wilson* v. *Brett* (11 M. & W. 113), said that gross negligence is ordinary negligence with a vituperative epithet; and the Exchequer Chamber took the same view of the subject. *Beal* v. *South Devon Railway Co.*, 3 H. & C. 327. In the Common Pleas, *Grill* v. *General Iron Screw Collier Co.* (Law Reps., C. P. 1, 1865–66) was heard on appeal. One of the points raised was the supposed misdirection of the Lord Chief Justice who tried the case, because he had made no distinction between gross and ordinary negligence. Justice Willes, in deciding the point, after stating his agreement with the dictum of Lord Cranworth, said, —

"Confusion has arisen from regarding 'negligence' as a positive instead of a negative word. It is really the absence of such care

as it was the duty of the defendant to use. 'Gross' is a word of description, and not of definition; and it would have been only introducing a source of confusion to use the expression 'gross negligence' instead of the equivalent, — a want of due care and skill in navigating the vessel, which was again and again used by the Lord Chief Justice in his summing up."

"Gross negligence" is a relative term. It is doubtless to be understood as meaning a greater want of care than is implied by the term "ordinary negligence;" but, after all, it means the absence of the care that was necessary under the circumstances. In this sense the collision in controversy was the result of gross negligence, because the employés of the company did not use the care that was required to avoid the accident. But the absence of this care, whether called gross or ordinary negligence, did not authorize the jury to visit the company with damages beyond the limit of compensation for the injury actually inflicted. To do this, there must have been some wilful misconduct, or that entire want of care which would raise the presumption of a conscious indifference to consequences. Nothing of this kind can be imputed to the persons in charge of the train; and the court, therefore, misdirected the jury.

For this reason the judgment is reversed, and a new trial ordered.

NOTE. — In *Western Union Telegraph Company* v. *Eyser*, in error to the Supreme Court of the Territory of Colorado, it appears from the evidence embodied in the bill of exceptions that the accident which caused the injury to the defendant in error occurred at the corner of F and Blake Streets, in Denver, Col., at which point the agents of the plaintiff in error were engaged in erecting the wire which they had stretched across Blake Street, some two feet above the ground; that Eyser rode down that street on horseback, and, when near the wire, one of the bystanders called to him, warning him, but that the horse, having become entangled in the wire, fell to the ground, thereby causing the injuries complained of.

It does not appear that the plaintiff in error adopted any special means of warning; but the person in charge of the work testifies that he instructed the workmen "to keep people off the wire."

Upon the question of exemplary damages, the court instructed the jury as follows: —

"If the defendant's agents and servants, acting within the scope of their authority from defendant, were engaged in constructing a telegraph line in the city of Denver, and in such construction stretched a wire across one of the public and frequented streets of said city during the hours of the day when such

streets are wont to be frequented, and suffered such wire to remain stretched across said street, and elevated such distance above the ground as to obstruct or entangle the feet of a horse passing upon said street for the space of one half-minute to a longer period; and if, unless such wire was of such size and character as to be easily seen by persons approaching at a moderate speed, defendant's agents omitted to station flag-sentinels or other sufficient means of warning to warn or notify passers-by of the place where such wire was stretched; or if defendant's agents did station such sentinels, and they failed to give warning to plaintiff, — then the defendant was guilty of negligence; and if from such negligence the injury complained of occurred, without culpable negligence on the part of plaintiff contributing thereto, then the jury ought to find for the plaintiff, and, in fixing the plaintiff's damages, should compensate the plaintiff not alone for his actual loss in the loss of time during his confinement or disability, if any, resulting from the alleged accident, but may award exemplary damages proportioned to the nature and extent or character of the injury and all circumstances of aggravation or extenuation attending the alleged negligence of defendant: and the extent of such damages is to be measured by the sound discretion of the jury in view of all the circumstances; but such damages are not to exceed the damages laid in the declaration, — ten thousand dollars ($10,000)."

Mr. J. Hubley Ashton for the plaintiff in error. *Mr. J. W. Denver, contra.*

MR. JUSTICE DAVIS, in delivering the opinion of the court, remarked that the decision rendered in *Milwaukee & St. Paul Railway Company* v. *Arms et al.*, *supra*, controlled this case. In no view of the evidence was the court below justified in instructing the jury that exemplary damages could be recovered. The omission to station flag-sentinels, or to give some other proper warning, while the men were engaged in putting up the wire, was an act of negligence, entitling the plaintiff to compensatory damages. But there was nothing to authorize the jury to consider this omission as wilful: on the contrary, the evidence rebuts every presumption that there was any intentional wrong.

Judgment reversed.

MAYER ET AL. v. HELLMAN.

An assignment by an insolvent debtor of his property to trustees for the equal and common benefit of all his creditors is not fraudulent, and, when executed six months before proceedings in bankruptcy are taken against the debtor, is not assailable by the assignee in bankruptcy subsequently appointed; and the assignee is not entitled to the possession of the property from the trustees.

ERROR to the Circuit Court of the United States for the Southern District of Ohio.

The plaintiff in the court below is assignee in bankruptcy of Bogen and others, appointed in proceedings instituted against them in the District Court of the United States for the Southern District of Ohio; the defendants are assignees of the same

parties, under the assignment law of the State of Ohio; and the present suit is brought to obtain possession of property which passed to the latter under the assignment to them. The facts as disclosed by the record, so far as they are material for the disposition of the case, are briefly these: On the 3d of December, 1873, at Cincinnati, Ohio, George Bogen and Jacob Bogen, composing the firm of G. & J. Bogen, and the same parties with Henry Müller, composing the firm of Bogen & Son, by deed executed of that date, individually and as partners, assigned certain property held by them, including that in controversy, to three trustees, in trust for the equal and common benefit of all their creditors. The deed was delivered upon its execution, and the property taken possession of by the assignees.

By the law of Ohio, in force at the time, when an assignment of property is made to trustees for the benefit of creditors, it is the duty of the trustees, within ten days after the delivery of the assignment to them, and before disposing of any of the property, to appear before the probate judge of the county in which the assignors reside, produce the original assignment, or a copy thereof, and file the same in the Probate Court, and enter into an undertaking payable to the State, in such sum and with such sureties as may be approved by the judge, conditioned for the faithful performance of their duties.

In conformity with this law, the trustees, on the 13th of December, 1873, within the prescribed ten days, appeared before the probate judge of the proper county in Ohio, produced the original assignment, and filed the same in the Probate Court. One of the trustees having declined to act, another one was named in his place by the creditors, and appointed by the court. Subsequently the three gave an undertaking with sureties approved by the judge, in the sum of $500,000, for the performance of their duties, and then proceeded with the administration of the trust under the direction of the court.

On the 22d of June of the following year, more than six months after the execution of the assignment, the petition in bankruptcy against the insolvents was filed in the District Court of the United States, initiating the proceedings in which the plaintiff was appointed their assignee in bankruptcy. As

such officer, he claims a right to the possession of the property in the hands of the defendants under the assignment to them. Judgment having been rendered against them, they sued out this writ of error.

Mr. W. T. Forrest for the plaintiffs in error.

Deeds of trust or assignments made in good faith, and for the common benefit of all the creditors of a debtor, are in aid of the provisions of the Bankrupt Law, and not contrary to its spirit. They have been said "to carry out the equitable provisions of a bankrupt law through the medium of a private contract," and are a cheap, expeditious, and convenient mode of arriving at the objects intended by that law. *Sedgwick* v. *Place*, 1 Nat. Bank. Reg. 204; *Tiffany* v. *Lucas*, 15 Wall. 410; *Clark* v. *Iselin*, 21 id. 360; *Michael* v. *Post*, id. 398; *Langley* v. *Perry*, 2 Nat. Bank. Reg. 180. The statute of Ohio, entitled "An Act regulating the mode of administering assignments in trust for the benefit of creditors," has none of the distinctive features of an insolvent or a bankrupt law. It does not purport or attempt to discharge the debtor either from arrest or imprisonment, or to free him from future liability. His after-acquired property is liable to his creditors to the same extent in every particular as if he had not made an assignment in trust for his creditors. Deeds of trust are not the creatures of that law. They existed in Ohio, and were constantly recognized and used for fifty years before it was passed. They derive their force and effect from the common law, and not from the statute. The statute does not give such deeds any power or validity. All it does is to prescribe a mode of enforcing the trust. It found them already established, and simply provided for the better security of the creditors by requiring that the trustees should give bond for the faithful discharge of their trusts, and should file statements showing what had been done, and provided a simple and speedy means of enforcing and regulating the trust, which, before that act was passed, had to be sought through a court of chancery. *Cook et al* v. *Rogers*, Am. Law Reg. July, 1875, 453; *In re Hawkins*, 2 Nat. Bank. Reg. 122.

Mr. Adam A. Kramer, *contra*.

The main question involved in this case is, whether the adjudication in bankruptcy had the effect of suspending the

further operation of the State assignment laws. The jurisdiction of the United States courts under the Bankrupt Act cannot be concurrent with that of the State courts under the assignment laws of the State. It must be exclusive in that court, which only can and should administer the estate and adjust the affairs of a bankrupt. *Sturges* v. *Crowningshield*, 4 Wheat. 122; *Ogden* v. *Sanders*, 12 id. 213, 214; *Griswold* v. *Pratt*, 9 Met.; *Larrabee* v. *Talbot*, 5 Gill, 426; *Ex parte Lucius Eames*, 2 Story, C. C. 322; *In re Reynolds*, 9 Nat. Bank. Reg. 50; *Allen & Co.* v. *Montgomery*, 10 id. 503. The Bankrupt Act was intended, and must be presumed, to afford the best mode of administering the estates of insolvents. It will not tolerate an attempt to carry into effect any other plan inconsistent therewith. *Cookingham* v. *Morgan*, 5 B. R. 16; 7 Blatch. 480.

It is not claimed, that, although the assignment was a valid, legal, and fair one for the benefit of all the creditors, the subsequent adjudication in bankruptcy rendered it invalid, illegal, and unfair, but that it had the effect of *suspending* its *further* operation.

The Bankrupt Act of March 2, 1867, as soon as it went into operation, *ipso facto* suspended all action arising under State laws. *Commonwealth* v. *O'Hara*, 1 Nat. Bank. Reg. 19; *In re Krogman*, 5 id. 116.

It is immaterial whether the statute of Ohio, under which the assignment was made, is properly an insolvent law. It, however, certainly purports and contemplates the control and disposition of the estate of persons who are unable to pay their debts, and are therefore *insolvent*. It is an *insolvent* act, because it presumes the debtor to be unable to pay his debts; but it is not a *bankrupt* act in the strict sense, for it does not purport to *discharge* the debtor from paying them.

The most important authority on this question, the one containing the clearest reasoning, is the opinion of the court, per Blodgett, J., *In re Merchants' Insurance Company*, 6 Nat. Bank. Reg. 43: —

"It seems clear to us, that in so far as a State law attempts to administer on the effects of an insolvent debtor, and distribute them among his creditors, it is to all intents and purposes an insolvent law, although it may not authorize a discharge of a debtor from

further liability; . . . and, when insolvency exists so as to make the debtor a proper subject for the operation of the Bankrupt Act, the exclusive jurisdiction of the Bankrupt Court attaches, and the State court and those acting under its mandate must surrender the control of its assets."

By *insolvency*, as used in the provisions of the Bankrupt Act when applied to traders and merchants, is meant *their inability to pay their debts* as they become due in the ordinary course of their business.

This is the *legal* definition of the term, and such has been the universal construction of it by the Federal courts. *In re Goldschmidt*, 3 B. R. 165; *In re Freeman*, 4 B. R. 64; *In re Lutgens*, 7 Pac. L. R. 89; *In re Alonzo Pearce*, 21 Vt. 611; *In re Brodhead*, 2 B. R. 278; *Smith* v. *Ely*, 1 N. Y. Leg. Obs. 343; *Sawyer* v. *Turpin*, 5 B. R. 339; *In re Walton et al.*, Deady, 442; s. c., Wall. 584.

MR. JUSTICE FIELD delivered the opinion of the court.

The validity of the claim of the assignee in bankruptcy depends, as a matter of course, upon the legality of the assignment made under the laws of Ohio. Independently of the Bankrupt Act, there could be no serious question raised as to its legality. The power which every one possesses over his own property would justify any such disposition as did not interfere with the existing rights of others; and an equal distribution by a debtor of his property among his creditors, when unable to meet the demands of all in full, would be deemed not only a legal proceeding, but one entitled to commendation. Creditors have a right to call for the application of the property of their debtor to the satisfaction of their just demands; but, unless there are special circumstances giving priority of right to the demands of one creditor over another, the rule of equity would require the equal and ratable distribution of the debtor's property for the benefit of all of them. And so, whenever such a disposition has been voluntarily made by the debtor, the courts in this country have uniformly expressed their approbation of the proceeding. The hinderance and delay to particular creditors, in their efforts to reach before others the property of the debtor, that may follow such a conveyance, are regarded as unavoidable

incidents to a just and lawful act, which in no respect impair the validity of the transaction.

The great object of the Bankrupt Act, so far as creditors are concerned, is to secure equality of distribution among them of the property of the bankrupt. For that purpose, it sets aside all transactions had within a prescribed period previous to the petition in bankruptcy, defeating, or tending to defeat, such distribution. It reaches to proceedings of every form and kind undertaken or executed within that period by which a preference can be secured to one creditor over another, or the purposes of the act evaded. That period is four months for some transactions, and six months for others. Those periods constitute the limitation within which the transactions will be examined and annulled, if conflicting with the provisions of the Bankrupt Act.

Transactions anterior to these periods are presumed to have been acquiesced in by the creditors. There is sound policy in prescribing a limitation of this kind. It would be in the highest degree injurious to the community to have the validity of business transactions with debtors, in which it is interested, subject to the contingency of being assailed by subsequent proceedings in bankruptcy. Unless, therefore, a transaction is void against creditors independently of the provisions of the Bankrupt Act, its validity is not open to contestation by the assignee, where it took place at the period prescribed by the statute anterior to the proceedings in bankruptcy. The assignment in this case was not a proceeding, as already said, in hostility to the creditors, but for their benefit. It was not, therefore, void as against them, or even voidable. Executed six months before the petition in bankruptcy was filed, it is, to the assignee in bankruptcy, a closed proceeding.

The counsel of the plaintiffs in error have filed an elaborate argument to show that assignments for the benefit of creditors generally are not opposed to the Bankrupt Act, though made within six months previous to the filing of the petition. Their argument is, that such an assignment is only a voluntary execution of what the Bankrupt Court would compel; and as it is not a proceeding in itself fraudulent as against creditors, and does not give a preference to one creditor over another, it conflicts

with no positive inhibition of the statute. There is much force in the position of counsel, and it has the support of a decision of the late Mr. Justice Nelson, in the Circuit Court of New York, in *Sedgwick* v. *Place*, First Nat. Bank. Reg. 204, and of Mr. Justice Swayne in the Circuit Court of Ohio, in *Langley* v. *Perry*, 2 Nat. Bank. Reg. 180. Certain it is that such an assignment is not absolutely void; and, if voidable, it must be because it may be deemed, perhaps, necessary for the efficiency of the Bankrupt Act that the administration of an insolvent's estate shall be intrusted to the direction of the District Court, and not left under the control of the appointee of the insolvent. It is unnecessary, however, to express any decided opinion upon this head; for the decision of the question is not required for the disposition of the case.

In the argument of the counsel of the defendant in error, the position is taken that the Bankrupt Act suspends the operation of the act of Ohio regulating the mode of administering assignments for the benefit of creditors, treating the latter as an insolvent law of the State. The answer is, that that statute of Ohio is not an insolvent law in any proper sense of the term. It does not compel, or in terms even authorize, assignments: it assumes that such instruments were conveyances previously known, and only prescribes a mode by which the trust created shall be enforced. It provides for the security of the creditors by exacting a bond from the trustees for the discharge of their duties; it requires them to file statements showing what they have done with the property; and affords in various ways the means of compelling them to carry out the purposes of the conveyance. There is nothing in the act resembling an insolvent law. It does not discharge the insolvent from arrest or imprisonment: it leaves his after-acquired property liable to his creditors precisely as though no assignment had been made. The provisions for enforcing the trust are substantially such as a court of chancery would apply in the absence of any statutory provision. The assignment in this case must, therefore, be regarded as though the statute of Ohio, to which reference is made, had no existence. There is an insolvent law in that State; but the assignment in question was not made in pursuance of any of its provisions. The position, therefore, of counsel, that the

Bankrupt Law of Congress suspends all proceedings under the Insolvent Law of the State, has no application.

The assignment in this case being in our judgment valid and binding, there was no property in the hands of the plaintiffs in error which the assignee in bankruptcy could claim. The assignment to them divested the insolvents of all proprietary rights they held in the property described in the conveyance. They could not have maintained any action either for the personalty or realty. There did, indeed, remain to them an equitable right to have paid over to them any remainder after the claims of all the creditors were satisfied. If a contingency should ever arise for the assertion of this right, the assignee in bankruptcy may perhaps have a claim for such remainder, to be applied to the payment of creditors not protected by the assignment, and whose demands have been created subsequent to that instrument. Of this possibility we have no occasion to speak now.

Our conclusion is, that the court below erred in sustaining the demurrer to the defendant's answer; and the judgment of the court must, therefore, be reversed, and the cause remanded for further proceedings.

EARLE ET AL. *v.* MCVEIGH.

Where the statute of a State provided, that, during the absence of a party and all the members of his family, notice of a suit might be posted upon the front door of his "usual place of abode,"— *Held*, that a notice posted upon a house seven months after it had been vacated by the defendant and his family, and while they were residing within the Confederate lines, was not posted upon his "usual place of abode," and that a judgment founded on such defective notice was absolutely void.

APPEAL from the Circuit Court of the United States for the Eastern District of Virginia.

Mr. S. F. Beach for the appellants.

Mr. P. Phillips, contra.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Due notice to the defendant is essential to the jurisdiction

of all courts, as sufficiently appears from the well-known legal maxim, that no one shall be condemned in his person or property without notice, and an opportunity to be heard in his defence. *Nations* v. *Johnson*, 24 How. 203.

Such notice may be actual or constructive, as prescribed by law. Where actual notice is required, personal service, in a legal manner, of due process, is a compliance with the requirement; and, in cases where constructive notice is allowed, the duty of the moving party is fulfilled if he complies in every respect with the law, usage, or rule of practice, as the case may be, which prescribes that mode of service.

Two suits were commenced by the respondents against the present complainant, and his son, who was not served, to enforce the payment of the several promissory notes described in the declarations in those suits; and the plaintiffs therein obtained service of process in the respective suits on the same day in the words following: —

"Executed the within summons Feb. 24, 1862, on James H. McVeigh, by leaving a copy thereof posted at the front door of his usual place of abode; neither he nor his wife, nor any white person, who is a member of his family and above the age of sixteen years, being found at his said usual place of abode."

Declarations in due form were filed in the respective suits; and, the defendant not appearing in either, judgment was rendered against him in the first suit for the sum of $3,535.49, and in the second for the sum of $8,014.34, with interest in each case, as set forth in the record.

Executions were regularly issued, and returns were made of *nulla bona;* and thereupon the creditors filed their bill of complaint in the county court, in which they set up the said judgments, and alleged that the defendant had no personal assets, and prayed that the lien of their judgments might be enforced by a sale of the real estate of the defendant for the satisfaction of the same; that the defendant might be required to answer the allegations of the bill of complaint; and that a commissioner might be appointed to report the real estate owned by defendant, together with the incumbrances, if any, upon the same; and that the court will enter such decree in the case as the circumstances may require.

Personal service could not be obtained; and, the defendant having failed to enter an appearance or to give bond as required, the court made an order of publication, and directed that a copy of the order be inserted in the "State Journal" once a week for four successive weeks, and that the same be posted at the front-door of the court-house of the county.

Proof of publication was exhibited, and the person appointed to ascertain what real estate was owned by the defendant made a report; and it appearing that the rents and profits of his real estate would not suffice to pay the plaintiffs' judgments, and others mentioned in the same report, within five years, the court did further order, adjudge, and decree that so much of the same as was requisite for the purpose should be sold at public auction, and prescribed the terms of sale, and appointed a commissioner to carry the decree into effect.

Pursuant to the decree of the court, the commissioner advertised the real estate for sale, as appears by a copy of the advertisement exhibited in the record. Enough appears to show that the sale of the real estate was postponed to a later day than that named in the advertisement, and that the defendant, in the mean time, filed an injunction-bond in the case, in which it is recited that the defendant had obtained from the judge of the eleventh circuit of the State an injunction enjoining and restraining the said creditors and the commissioner, until an order is granted by the county Circuit Court to the contrary, from any proceedings to enforce the payment of the said two judgments. Pending the temporary injunction, the defendant sued out a summons commanding the said judgment creditors to appear at the rules of the said court, on the day therein named, to answer to the bill of complaint filed in the said court by the debtor in the said judgments.

Sufficient appears to show that the intent and purpose of the bill of complaint were to obtain a decree enjoining and restraining the said judgment creditors from any proceeding to enforce the payment of the two judgments described in the aforesaid decree of sale; and with that view the judgment debtor alleged that the return to the process in each of those suits was false and fraudulent; that the process was not posted at the front-door of his usual place of abode as the law directs, and that the

respective judgments are illegal, and should be set aside; that the family of the debtor left there six weeks before the Federal forces occupied the place, and that the defendant in those suits left there and joined his family within the Confederate lines six days subsequent to the entry there of the Federal forces, and that he ever after remained with his family within the Confederate lines until the close of the war, and that these facts were well known to the judgment creditors and their counsel.

Service was made, and the judgment creditors appeared as respondents, and filed an answer.

Reference will only be made to a single allegation of the answer, as the others are not material in this investigation. They allege that the return of the process which led to the judgments in each of the two suits "was and is true in every particular, and was and is in no respect false and fraudulent; and that the process in each case was, in fact, executed in exact conformity with the return." No answer having been filed by the commissioner appointed to make the sale, the bill of complaint as to him was taken as confessed, and the complainant filed the general replication to the answer of the other respondents. Hearing was had upon the bill, exhibits, and answer, before the judge of the eleventh circuit of the State, pursuant to notice, and on the motion of the respondents to dissolve the temporary injunction; and it appears from the record that the motion of the respondents was overruled. Whereupon the respondents filed a petition praying for the removal of the cause into the next Circuit Court of the United States for the Eastern District of the State; and the record shows that the petition was granted.

Prior to the removal of the cause, the same had been set down for hearing, but no proofs had been taken; and, instead of taking proofs, the solicitors entered into a stipulation, that on the trial it should be admitted that the complainant was a resident of that city for many years prior to the Federal occupation during the rebellion; that during that time he was extensively engaged in business there, and was the head of a family, owning a dwelling-house, in which he resided, and other real estate; that he sympathized with the rebellion, but did not engage in the military or civil service of the insurgents; that his absence

from the city, throughout the rebellion, was not one which he regarded as absolute and permanent, but contingent and temporary, depending for its continuance upon the fortunes of the war.

Both parties were again heard in the Circuit Court of the United States; and the court entered a decree that the injunction heretofore granted in the cause be perpetuated, and that the respondents pay to the complainant his costs; and the respondents entered an appeal to this court.

Argument to show that no person can be bound by a judgment, or any proceeding conducive thereto, to which he was never a party or privy, is quite unnecessary, as no person can be considered in default with respect to that which it never was incumbent upon him to fulfil. Standard authorities lay down the rule, that, in order to give any binding effect to a judgment, it is essential that the court should have jurisdiction of the person and the subject-matter; and it is equally clear that the want of jurisdiction is a matter that may always be set up against a judgment when sought to be enforced, or where any benefit is claimed under it, as the want of jurisdiction makes it utterly void and unavailable for any purpose. *Borden* v. *Fitch*, 15 Johns. 141.

Notice to the defendant, actual or constructive, is an essential prerequisite of jurisdiction. Due process with personal service, as a general rule, is sufficient in all cases; and such it is believed is the law of the State where the judgments were recovered in this controversy, in all cases where such service is practicable. But the laws of that State also provide for service in three classes of cases in which personal service cannot be effected: (1.) Residents who are temporarily absent from home. (2.) Service may also be made upon persons not residents of the State. (3.) Where the party resides in the State, in case it is not known in what particular county he has his residence.

1. Temporary absence from home will not defeat service, as in that case the statute provides that notice may be given to the party by delivering a copy of the process to the party in person; or, if he be not found at his usual place of abode, by delivering such copy and giving information of its purport to his wife, or any white person found there, who is a member of his family,

and above the age of sixteen years; or, if neither he nor his wife nor any such white person be found there, by leaving such copy posted at the front-door of his usual place of abode.

2. Persons not residing in the State may, in a proper case, be served by the publication of the notice once a week for four consecutive weeks in a newspaper printed in the State. Code 1860, p. 703.

3. Provision is made in respect to the third class, that on affidavit that a defendant is a non-resident of the State, or that diligence has been used to ascertain in what county or corporation he is, without effect, or that process directed to the officer of the county or corporation in which he resides or is has been twice delivered to such officer more than ten days before the return-day, and been returned without being executed, an order of publication may be entered against such defendant. Code, p. 707.

Doubtless constructive notice may be sufficient in certain cases; but it can only be admitted in cases coming fairly within the provisions of the statute authorizing courts to make orders for publication, and providing that the publication, when made, shall authorize the court to decide and decree. *Hollingsworth* v. *Barbour*, 4 Pet. 475; *Regina* v. *Lightfoot*, 26 Eng. L. & Eq. 177; *Nations* v. *Johnson*, 24 How. 205; *Galpin* v. *Page*, 18 Wall. 369.

When the law provides that notice may be posted on the "front-door of the party's usual place of abode," in the absence of the family, the intention evidently is that the person against whom the notice is directed should then be living or have his home in the said house. He may be temporarily absent at the time the notice is posted; but the house must be his usual place of abode, so that, when he returns home, the copy of the process posted on the front-door will operate as notice; which is all that the law requires. By the expression, "the usual place of abode," the law does not mean the last place of abode; for a party may change his place of abode every month in the year. Instead of that, it is only on the door of his then present residence where the notice may be posted, and constitute a compliance with the legal requirement.

Apply that rule to the case before the court, and it is clear

that the notice was insufficient. Neither the complainant nor his family resided there: on the contrary, the case shows that his family left that city six weeks before the same was occupied by the Federal forces, and that they departed, leaving no white person in the house from which they departed, and that these facts were well known to the attorney of the respondents and to the officer who made the returns in question, which was made seven months after the complainant had left the county and was residing within the Confederate lines.

Tested by these considerations, it is clear that the house where the notice, if any, was posted, was not at that time the usual place of abode of the defendant in those suits; and it follows that the judgments founded on such defective notices are absolutely void.

Special reference is made to the act of the 10th of February, 1862, as having some bearing on the case; but the record shows that the present complainant had left his former residence seven months before the passage of that act, and followed his family within the insurgent lines. He abandoned the business in which he was engaged and was known, as is admitted in the stipulation of the parties, throughout the whole period of the rebellion, as having sympathized with it, and adhered to its fortunes.

Other defences failing, it is suggested by the respondents that the complainant, when he departed from the city, left an agent resident there; but it is a sufficient answer to that suggestion to say that the agent referred to did not reside in the house where it is alleged the notices were posted, and that he had no authority whatever to accept or waive notice to the complainant in any such proceeding.

Concede that due service might have been made under the act providing for proceedings against non-residents: still it is clear that the concession cannot benefit the respondents, as they did not attempt to comply with the conditions contained in either section of that act. Sess. Acts, 1861, p. 58.

Viewed in any light, it is plain that the case falls within the rule that the service of process by posting a copy on the door of a dwelling-house is not a good service, if it appears by competent evidence that the house was not the usual place where the

defendant or his family resided at the time the notice was posted. *Harris* v. *Hardeman*, 14 How. 340; *Buchanan* v. *Rucker*, 9 East, 192; *Boswell* v. *Otis*, 9 How. 350; *Oakley* v. *Aspinwall*, 4 Comst. 513.

Even in proceedings *in rem*, notice is requisite in order that the sentence may have any validity. Every person, said Marshall, C. J., may make himself a party to such a proceeding, and appeal from the sentence, but notice of the controversy is necessary in order that one may become a party; and it is a principle of natural justice, of universal obligation, that, before the rights of an individual can be bound by a judicial sentence, he shall have notice, either actual or implied, of the proceedings against him. *The Mary*, 9 Cranch, 144.

No man shall be condemned in his person or property without notice, and an opportunity to be heard in his defence, is a maxim of universal application; and it affords the rule of decision in this case. *Decree affirmed.*

ÆTNA LIFE INSURANCE CO. *v.* FRANCE ET AL.

1. Where a party, in order to effect an insurance upon his life, agreed that if the proposal, answers, and declaration made by him — which he declared to be true, and which were made part and parcel of the policy, the basis of the contract, and upon the faith of which the agreement was entered into — should be found in any respect untrue or fraudulent, then, and in such case, the policy should be null and void, — *Held*, that the company was not liable if the statements made by the insured were not true.
2. The agreement of the parties that the statements were absolutely true, and that their falsity in any respect should void the policy, removes the question of their materiality from the consideration of the court or jury.

ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania.

The facts are stated in the opinion of the court.

Mr. Samuel C. Perkins for the plaintiff in error.

Mr. Nathan H. Sharpless for the defendant in error.

MR. JUSTICE HUNT delivered the opinion of the court.

The action was assumpsit to recover $10,000, the amount of a policy insured upon the life of Andrew J. Chew in July, 1865.

The issuing of the policy, the death of Chew, and the service of the necessary proofs of his death, are not seriously disputed.

The policy contained the following clause: —

"And it is also understood and agreed to be the true intent and meaning hereof, that if the proposal, answers, and declaration made by said Andrew J. Chew, and bearing date the twelfth day of July, 1865, and which are hereby made part and parcel of this policy as fully as if herein recited, and upon the faith of which this agreement is made, shall be found in any respect false or fraudulent, then and in such case this policy shall be null and void."

The issuing of the policy was preceded by a proposal for insurance, which contained a number of questions propounded to Chew by the company, with the answers made by him.

In relation to such questions and answers, the policy contained this clause: —

"It is hereby declared that the above are correct and true answers to the foregoing questions; and it is understood and agreed by the undersigned that the above statements shall form the basis of the contract for insurance, and also that any untrue or fraudulent answers, any suppression of facts in regard to the party's health, or neglect to pay the premium on or before the day it becomes due, shall render the policy null and void, and forfeit all payments made thereon."

Among others were the following questions and answers; viz.: —

"4. *Q.* Place and date of birth of the party whose life is to be insured?

"*A.* Born in 1835, interlined (Oct. 28), Gloster County, N. J.

"5. *Q.* Age next birthday?

"*A.* Thirty years.

"11. *Q.* Has the party ever had any of the following diseases? if so, how long, and to what extent? — palsy, dropsy, palpitation, spitting of blood, epilepsy, yellow fever, consumption, rupture, apoplexy, asthma, convulsions, paralysis, bronchitis, disease of the heart, disease of the lungs, insanity, gout, fistula, affection of the brain, fits.

"*A.* None."

Evidence upon both sides was given as to the age of Chew, tending to show that he was thirty-seven years old, or at least

thirty-five years old, when he signed the application, and upon the question of his having suffered from a rupture. Before the case was submitted to the jury, a number of requests to charge were made by the judge, which will be referred to presently.

In its main features, this case bears a close resemblance to that of *Jeffries* v. *Life Ins. Co.*, decided at the last term of this court. 22 Wall. 47. In that case, as in this, it was insisted that the falsity of a statement made in the application did not vitiate the policy issued upon it, unless the statement so made was material to the risk assumed. The opinion then delivered contains the following language in answer to that claim: —

"The proposition at the foundation of this point is this, that the statements and declaration 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 may 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."

This decision is so recent, and so precise in its application, that it is not necessary to go back of it. It is only necessary to reiterate that all the statements contained in the proposal must be true; that the materiality of such statements is removed from the consideration of a court or jury by the agreement of the parties that such statements are absolutely true, and that, if untrue in any respect, the policy shall be void.

The judge was requested to charge, —

5. If the jury believe that the answers to questions Nos. 4 and 5 in the application for insurance, as to the date of birth, and age next birthday, of said Andrew J. Chew, were false and untrue, the policy issued upon the application is void, and their verdict must be for the defendants.

In response to this request, the judge said, "If the jury be-

lieve that the answer to the questions numbered 4 and 5 were materially untrue as to the age of the said Andrew J. Chew, the policy is void, and the verdict must be for the defendants." The defendants were entitled to the charge they requested, without the addition made by the judge of the word "materially." The judge, however, proceeded to say, "And if he was thirty-seven, or even thirty-five years old, the difference was not immaterial. I give the fifth instruction as requested."

The process of reasoning by which the learned judge reached his conclusion on this point we have held to be erroneous: viz., that, to make the representation important, it must be material to the risk assumed; that the representation that he was but thirty years old, when he was thirty-seven, or even thirty-five, was material to the risk; and, if the jury believed that he was of the greater age mentioned, their verdict must be for the defendants; and therefore he charged as requested. The charge should have been, that, as Chew had represented himself to be but thirty years of age, if the jury found him then to be thirty-five years old the false statement would avoid the policy, and they must find for the defendants, resting his direction upon the falsity alone of the statement.

Still we do not see that the defendants can ask relief for this reason. The charge was right, and could not be misunderstood by the jury. The allegation of the defendants was that Chew had misrepresented his age in the manner stated, and therefore the policy should be adjudged void. The judge charged, that, if he had so misrepresented, the policy was void, and the verdict must be for the defendants. We think no valid exception can be taken to this charge.

Upon the subject of the disease of rupture, or of having been ruptured, the record gives this statement; viz., the defendants requested the court to charge the jury, —

6. If the jury believe that the answer to question No. 11 in the application for insurance, whether said Andrew J. Chew ever had any of the diseases therein specified, &c., was false and untrue as to any one of said diseases, the policy issued upon the application is void, and their verdict must be for the defendants.

7. If, at the time when the application for insurance was made and the policy issued, Andrew J. Chew was or had been ruptured, he was bound, in answer to question No. 11, to state the fact, and also how long, and to what extent; and, if the jury believe that at the time mentioned he was or had been ruptured, his answer "None" to said question No. 11 was untrue and false, and their verdict must be for the defendants.

The judge declined thus to charge, but said, "If you believe that Andrew J. Chew was ruptured at the time, or at any such previous period that the rupture may have been material to any question of the soundness of his health when his life was insured; or if at that time, or within any such prior period, he wore a truss in order that he might repress hernial extrusion, — your verdict should, in either case, be for the defendants. But though he was ruptured in 1846 and 1854, and although the rupture accidentally recurred in a worse form in 1870 from an extraordinary exertion of strength in lifting a heavy weight, yet if you find that from 1855, or thereabouts, until after the last insurance in 1865, he had no such disease, and was, in all this interval, in the habit of working, and using bodily exercise, and occasionally dancing, bathing, and travelling, and could walk long distances without being fatigued, and either did not wear a truss, or wore it only from continuance of early habit; that his health was not impaired or affected by the former rupture; that it would not, if mentioned, have increased the risk or the premium; and that there was, in this respect, no falsehood or wilful suppression, — I cannot give the instruction seventhly requested in the absolute form in which it is expressed."

This charge was erroneous. It left to the decision of the jury, and under circumstances of much embarrassment, a question which the parties had themselves determined. An ordinary jury of twelve men, without the aid of experts, are poorly qualified to determine a question of medical science. To submit to a jury the question, conceding the fact that Chew was ruptured in the year 1846, and again in the year 1854, and again in a worse form in the year 1870, whether, during an intermediate period from 1855 to 1865, he had no disease of rupture, and that the jury might decide that because he walked and worked and danced and bathed without fatigue, and either

did not wear a truss, or wore it only from continuance of early habit, that his health was not impaired, is to impose a great strain upon the powers of a jury. In the ordinary course of things, persons not skilled in medical science could not know what caused a rupture, whether at any particular time the disease was conquered, because its appearance was not then present, or whether it was suspended to reappear sooner or later. Hernia, or rupture, appears in infants of but a few days old, in youth, maturity, and extreme old age. It manifests itself in the abdomen, the groin, the scrotum, the navel, and the thigh. It is external, or may be internal only. Laurence on Rupture, pp. 4, 10. The author quoted says that this "complaint affects indiscriminately persons of both sexes, of every age, condition, and mode of life. . . . It is true," he says, "that a hernia, if properly managed, is not immediately dangerous to the patient, does not affect his health, or materially diminish his enjoyments; but it is a source of constant danger, since violent exercise or sudden exertion may bring it from a perfectly innocent state into a condition which frequently proves fatal. . . . The treatment of rupture," he adds, "demands from all these circumstances as great a combination of anatomical skill, with experience and judgment, as that of any disorders in surgery." Pp. 2, 3.

These facts illustrate the gravity of the error committed on the trial of the cause.

The facts and circumstances stated should not have been given to the jury for their judgment. The parties had themselves adjudged and agreed what should be the result if certain facts existed. It was for the jury to determine whether the facts existed; and, according as they determined upon that point, the one or the other result must necessarily follow. Thus the applicant, when she asked for a policy of insurance, expressly agreed that the answers made by Chew to the questions put to him should be true, and that, if any of them were false, the policy issued to her should be void. She expressly declared, again, that the answers made by him were true, that they formed the basis of the contract of insurance, and that any untrue answer should render the policy void.

It was alleged by the defendants, that when Chew was asked whether he "had ever had any of the following diseases,"

among which was "rupture," and to which he answered "None," that such answer was untrue.

We decided, in the case of *Jeffries* v. *Life Ins. Co.*, *supra*, that the question of the materiality of the answer did not arise; that the parties had determined and agreed that it was material; that their agreement was conclusive on that point; and that the only questions for the jury were, first, Was the representation made? second, Was it false? This principle was precisely embraced within the requests 6 and 7 made in this case, and the judge erred in not charging as therein requested. *New trial granted.*

LATHROP, ASSIGNEE, *v.* DRAKE ET AL.

Under the Bankrupt Act of March 2, 1867 (14 Stat. 517), an assignee in bankruptcy, without regard to the citizenship of the parties, could maintain a suit for the recovery of assets in a circuit court of the United States in a district other than that in which the decree of bankruptcy was made.

APPEAL from the Circuit Court of the United States for the Eastern District of Pennsylvania.

Mr. David C. Harrington and Mr. F. Carroll Brewster for the appellant.

Mr. William H. Armstrong, contra.

MR. JUSTICE BRADLEY delivered the opinion of the court.

The question in this case is, whether, under the Bankrupt Act as passed in 1867, an assignee in bankruptcy, without regard to the citizenship of the parties, could maintain a suit for the recovery of assets in a circuit court of the United States in any district other than that in which the decree of bankruptcy was made; if not, whether the amendatory act of 1874 (18 Stat. 178, sect. 3) validated such a suit already commenced.

The jurisdiction of the circuit courts in cases of bankruptcy, as conferred by the act of 1867, was twofold, — original and appellate; the latter being exercised in two different modes, — by petition of review, and by appeal or writ of error. But the enacting clauses which confer this jurisdiction make such direct

reference to the jurisdiction of the District Court, that it is necessary first to examine the latter jurisdiction. Of this there are two distinct classes: first, jurisdiction as a court of bankruptcy over the proceedings in bankruptcy initiated by the petition, and ending in the distribution of assets amongst the creditors, and the discharge or refusal of a discharge of the bankrupt; secondly, jurisdiction, as an ordinary court, of suits at law or in equity brought by or against the assignee in reference to alleged property of the bankrupt, or to claims alleged to be due from or to him. The language conferring this jurisdiction of the district courts is very broad and general. It is, that they shall have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy. The various branches of this jurisdiction are afterwards specified; resulting, however, in the two general classes before mentioned. Were it not for the words, "in their respective districts," the jurisdiction would extend to matters of bankruptcy arising anywhere, without regard to locality. It is contended that these words confine it to cases arising in the district. But such is not the language. Their jurisdiction is confined to their respective districts, it is true; but it extends to all matters and proceedings in bankruptcy without limit. When the act says that they shall have jurisdiction in their respective districts, it means that the jurisdiction is to be exercised in their respective districts. Each court within its own district may exercise the powers conferred; but those powers extend to all matters of bankruptcy, without limitation. There are, it is true, limitations elsewhere in the act; but they affect only the matters to which they relate. Thus, by sect. 11, the petition in bankruptcy, and by consequence the proceedings thereon, must be addressed to the judge of the judicial district in which the debtor has resided, or carried on business, for the six months next preceding; and the District Court of that district, being entitled to and having acquired jurisdiction of the particular case, necessarily has such jurisdiction exclusive of all other district courts, so far as the proceedings in bankruptcy are concerned. But the exclusion of other district courts from jurisdiction over these proceedings does not prevent them from exercising jurisdiction in matters growing out of or connected

with that identical bankruptcy, so far as it does not trench upon or conflict with the jurisdiction of the court in which the case is pending. Proceedings ancillary to and in aid of the proceedings in bankruptcy may be necessary in other districts where the principal court cannot exercise jurisdiction; and it may be necessary for the assignee to institute suits in other districts for the recovery of assets of the bankrupt. That the courts of such other districts may exercise jurisdiction in such cases would seem to be the necessary result of the general jurisdiction conferred upon them, and is in harmony with the scope and design of the act. The State courts may undoubtedly be resorted to in cases of ordinary suits for the possession of property or the collection of debts; and it is not to be presumed that embarrassments would be encountered in those courts in the way of a prompt and fair administration of justice. But a uniform system of bankruptcy, national in its character, ought to be capable of execution in the national tribunals, without dependence upon those of the States in which it is possible that embarrassments might arise. The question has been quite fully and satisfactorily discussed by a member of this court in the first circuit, in the case of *Shearman* v. *Bingham*, 7 Bank. Reg. 490; and we concur in the opinion there expressed, that the several district courts have jurisdiction of suits brought by assignees appointed by other district courts in cases of bankruptcy.

Turning now to the jurisdiction of the circuit courts, we find it enacted in sect. 2 of the act of 1867, first, that the circuit courts, within and for the districts where the proceedings in bankruptcy are pending, shall have a general superintendence and jurisdiction of all cases and questions arising under the act. This is the revisory jurisdiction before referred to, exercised upon petition, or bill of review. Secondly, "said circuit courts shall also have concurrent jurisdiction with the district courts of the same district of all suits at law or in equity . . . brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property, or rights of property, of said bankrupt, transferable to or vested in such assignee." The act of 1874 changes the words "the same district" to "any dis-

trict," and adds to "person claiming an adverse interest" the words, "or owing any debt to such bankrupt." These changes make the jurisdiction of the Circuit Court for the future clear and undoubted in cases like the present. But we are endeavoring to ascertain what jurisdiction was conferred by the act as originally passed. Reverting to the language used in the second clause above cited, it seems to be express and unqualified, that the Circuit Court shall have concurrent jurisdiction with the district courts of the same district. If, therefore, the District Court has jurisdiction of suits brought by an assignee appointed in another district, the Circuit Court of the same district has concurrent jurisdiction therewith. There is no escape from this conclusion, unless the phrase "the same district" is made to refer back to the beginning of the section, where mention is made of circuit courts within and for the districts where the proceedings in bankruptcy are pending. But the words, "the same district," used in the second clause, refer more naturally to the district in and for which the Circuit Court is held. The phrase, "the circuit courts shall have concurrent jurisdiction with the district courts of the same district," is, by itself, so clear and unambiguous, that a doubt could not have been raised as to its meaning, had it not been embraced in the same section with the other clause; and it is in accord with the general intent of the act to invest the Circuit Court with jurisdiction co-extensive with that of the District Court, except that it is only revisory in reference to the proceedings in bankruptcy.

If jurisdiction was conferred (as we have seen it was) on the various district courts to entertain suits brought by assignees appointed in other districts, there seems to be no reason why the same jurisdiction should not have been conferred on the various circuit courts, but, on the contrary, very cogent reasons why it should have been. Important cases would be very likely to arise, both in amount and in the questions involved, which it would be desirable to bring directly before the Circuit Court, in order, if necessary, that an early adjudication might be had in the court of last resort.

As, therefore, the reason for such a provision, the general intent of the act, and the words themselves, all coincide, we do

not hesitate to say that the Circuit Court had jurisdiction of suits at law and in equity under the original act, co-extensive with the district courts, unless the qualifying words at the end of the clause, confining the jurisdiction to cases "touching any property, or rights of property, of said bankrupt, transferable to or vested in such assignee," may be deemed a restriction. In this case, however, the suit does concern and have reference to property transferable to the assignee. It is brought to compel the defendants to restore to the bankrupt's estate the value of property sold by them under a judgment alleged to have been confessed in fraud of the Bankrupt Act, and within four months of the commencement of proceedings in bankruptcy.

The amendatory act of 1874 has but little bearing upon the construction of the original act in the particular involved in this case. Different views had been expressed in relation to its meaning, and the jurisdiction of the courts under it. The amendatory act removed any ambiguity that may have existed, but did not thereby impress a more restricted meaning upon the language of the original act than was due to it by a fair judicial construction.

As to the merits of the case, it is almost too plain for argument. The general denial of fraud in the answer of the defendants is equivalent to nothing more than a denial of a conclusion of law. The allegation that they were led to believe, by the letters and representations of the bankrupt, that he was solvent at the time of the confession of judgment, and was worth $7,000 over and above his indebtedness, has but little force. If this were true, why did they immediately levy on and sell his whole stock of goods? That sale produced but little more than half the amount of their judgment. These unquestioned facts are sufficiently significant, and the evidence of the bankrupt makes the case a very strong one for the complainant. He had executions against him, and wrote to the defendants that he was in trouble, and requested them to come to his aid. They refused to do any thing unless he would confess judgment for the amount due them, including the amount of the prior judgments. They then immediately levied on all his goods, and sold him out. It was a clear case of preference by a debtor in insolvent circumstances, and known to be such by the judgment creditor.

The prior executions — one in favor of A. Coran & Co. for about $600, and the other in favor of Henry Bloss for about $900 — were probably valid. If the appellees satisfied those executions, or advanced the money for that purpose, the amount being embraced in their judgment, their own execution was good to that extent, and they should have credit therefor. As to the rest, they were answerable for the value of the goods levied on and sold.

The decree of the Circuit Court must be reversed, and the record remitted, with directions to enter a decree in favor of the complainant below for the value of the goods of the bankrupt sold on the defendants' execution, with interest from the time that the same was demanded of them by the assignee, less the amount to which they may be justly entitled for advances to satisfy the said executions of A. Coran & Co. and Henry Bloss.

EYSTER *v.* GAFF ET AL.

1. Where the assignee in bankruptcy of a mortgagor is appointed during the pendency of proceedings for the foreclosure and sale of the mortgaged premises, he stands as any other purchaser would stand on whom the title had fallen after the commencement of the suit. If there be any reason for interposing, the assignee should have himself substituted for the bankrupt, or be made a defendant on petition.
2. A court cannot take judicial notice of the proceedings in bankruptcy in another court; and it is its duty to proceed as between the parties before it, until, by some proper pleadings in the case, it is informed of the changed relations of any of such parties to the subject-matter of the suit.
3. The jurisdiction conferred upon the Federal courts for the benefit of an assignee in bankruptcy is concurrent with and does not divest that of the State courts in suits of which they had full cognizance.

ERROR to the Supreme Court of the Territory of Colorado.

Mr. John A. Wills for the plaintiff in error.

The court declined to hear *Mr. S. Shellabarger* for the defendant in error.

MR. JUSTICE MILLER delivered the opinion of the court.

This suit was an action of ejectment brought originally by Thomas and James Gaff against plaintiff in error in the District

Court of Arrapahoe County, Colorado, in which the plaintiffs below had a recovery, and that judgment was affirmed on appeal by the Supreme Court of that Territory.

The title to certain lots in Denver City is the subject of controversy; and there seems to be no difficulty in considering George W. McClure as the source of title, common to plaintiffs and defendant. McClure had made a mortgage on the lots to defendants in error to secure payment of the sum of $18,000.

A suit to foreclose this mortgage was instituted in the District Court in 1868, which proceeded to a decree and sale, and plaintiffs became the purchasers, receiving the master's deed, which was duly confirmed by the court.

This decree was rendered July 1, 1870. On the ninth day of May preceding, the mortgagor, McClure, filed a petition in bankruptcy, and on the eleventh day of May he was adjudged a bankrupt, and on the fourth day of June John Mechling was duly appointed assignee. The bankrupt filed schedules in which these lots and the mortgage of the Gaffs on them were set out. It will thus be seen, that, pending the foreclosure proceedings which had been instituted against McClure, he had been declared a bankrupt, and Mechling had been appointed his assignee; and that the decree of sale and foreclosure under which plaintiffs asserted title in the present suit was rendered about a month after the appointment of the assignee, and nearly two months after the adjudication that McClure was a bankrupt. The defendant in the ejectment-suit was a tenant under McClure, and defends his possession on the ground of the invalidity of the foreclosure proceedings after the adjudication of bankruptcy and the appointment of the assignee.

The plaintiffs in this suit seem to have relied at first upon the right to recover under the mortgage, and did not give in evidence the proceedings in foreclosure; but when the defendant had read them, so far as the decree and sale, in order to show that the mortgage was merged, the plaintiffs then produced the master's deed. The Supreme Court of Colorado held that the mortgage alone was sufficient to sustain the action, one of the judges dissenting; and the counsel for defendant below insists here that this was error, because the laws of Colorado give to a mortgage only the effect of an equitable lien, and not that of

conveying a legal title. He also insists that all the proceedings in the foreclosure-suit after the appointment of the assignee in bankruptcy are absolutely void, because he was not made a defendant.

We will consider this latter proposition first; for, if the foreclosure proceedings conveyed a valid title to plaintiffs, the judgment must be affirmed, whatever may be the true solution of the question of local law.

It may be conceded for the purposes of the present case that the strict legal title to the land did not pass by the mortgage, and that it did pass to the assignee upon his appointment; and consequently, if that title was not divested by the foreclosure proceedings, it was in the assignee at the trial of the ejectment-suit. On the other hand, if these proceedings did transfer the legal title to plaintiffs, they were entitled to recover as they did in that action.

At the time that suit was commenced, the mortgagor, McClure, was vested with the title, and was the proper and necessary defendant. Whether any other persons were proper defendants does not appear, nor is it material to inquire. But for the bankruptcy of McClure, there can be no doubt that the sale under the foreclosure-decree and the deed of the master would have vested the title in the purchaser, and that this would have related back to the date of the mortgage. Nor can there be any question, that, the suit having been commenced against McClure when the title or equity of redemption (no difference which it is) was in him, any person who bought of him, or took his title or any interest he had pending the suit, would have been bound by the proceedings, and their rights foreclosed by the decree and sale. These are elementary principles. Is there any thing in the Bankrupt Law, or in the nature of proceedings in bankruptcy, which takes the interest in the mortgaged property acquired by the assignee out of this rule?

There is certainly no express provision to that effect. It is maintained by counsel, that, because the assignee is vested by the assignment under the statute with the legal title, there remains nothing from that time for the decree of foreclosure to operate on, and it cannot thereafter have the effect of trans-

ferring the title which is in a party not before the court. But, if this be true in this case, it must be equally true in other suits in which the title is transferred *pendente lite*.

We have already said, and no authority is necessary to sustain the proposition, that a sale and conveyance by the mortgagor pending the suit would not prevent the court from proceeding with the case without the purchaser, nor affect the title of him who bought under the decree. So, in a suit against the vendor of real estate for specific performance, his conveyance of the legal title after suit was brought would not suspend the proceeding or defeat the title under the decree of the court. The obvious reason for this is, that if, when the jurisdiction of the court has once attached, it could be ousted by the transfer of the defendant's interest, there would be no end to the litigation, and justice would be defeated by the number of these transfers. Another reason is, that, when such a suit is ended by a final decree transferring the title, that title relates back to the date of the instrument on which the suit is based, or to the commencement of the suit; and the court will not permit its judgment or decree to be rendered nugatory by intermediate conveyances.

We see no reason why the same principle should not apply to the transfer made by a bankruptcy proceeding. The Bankrupt Act expressly provides that the assignee may prosecute or defend all suits in which the bankrupt was a party at the time he was adjudged a bankrupt. If there was any reason for interposing, the assignee could have had himself substituted for the bankrupt, or made a defendant on petition. If he chose to let the suit proceed without such defence, he stands as any other person would on whom the title had fallen since the suit was commenced.

It is a mistake to suppose that the Bankrupt Law avoids of its own force all judicial proceedings in the State or other courts the instant one of the parties is adjudged a bankrupt. There is nothing in the act which sanctions such a proposition.

The court in the case before us had acquired jurisdiction of the parties and of the subject-matter of the suit. It was competent to administer full justice, and was proceeding, according to the law which governed such a suit, to do so. It could not

take judicial notice of the proceedings in bankruptcy in another court, however seriously they might have affected the rights of parties to the suit already pending.

It was the *duty* of that court to proceed to a decree as between the parties before it, until by some proper pleadings in the case it was informed of the changed relations of any of those parties to the subject-matter of the suit. Having such jurisdiction, and performing its duty as the case stood in that court, we are at a loss to see how its decree can be treated as void. It is almost certain, that if at any stage of the proceeding, before sale or final confirmation, the assignee had intervened, he would have been heard to assert any right he had, or set up any defence to the suit. The mere filing in the court of a certificate of his appointment as assignee, with no plea or motion to be made a party or to take part in the case, deserved no attention, and received none. In the absence of any appearance by the assignee, the validity of the decree can only be impeached on the principle that the adjudication of bankruptcy divested the other court of all jurisdiction whatever in the foreclosure-suit. The opinion seems to have been quite prevalent in many quarters at one time, that, the moment a man is declared bankrupt, the District Court which has so adjudged draws to itself by that act not only all control of the bankrupt's property and credits, but that no one can litigate with the assignee contested rights in any other court, except in so far as the circuit courts have concurrent jurisdiction, and that other courts can proceed no further in suits of which they had at that time full cognizance; and it was a prevalent practice to bring any person, who contested with the assignee any matter growing out of disputed rights of property or of contracts, into the bankrupt court by the service of a rule to show cause, and to dispose of their rights in a summary way. This court has steadily set its face against this view.

The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of those rights by the bankruptcy of his adversary.

The same courts remain open to him in such contests, and the statute has not divested those courts of jurisdiction in such actions. If it has for certain classes of actions conferred a

jurisdiction for the benefit of the assignee in the circuit and district courts of the United States, it is concurrent with and does not divest that of the State courts.

These propositions dispose of this case. They are supported by the following cases decided in this court: *Smith* v. *Mason*, 14 Wall. 419; *Marshall* v. *Knox*, 16 id. 501; *Mays* v. *Fritton*, 20 id. 414; *Doe* v. *Childress*, 21 id. 642. See also *Bishop* v. *Johnson*, Woolworth, 324. *Judgment affirmed.*

GOULD v. EVANSVILLE AND CRAWFORDSVILLE R.R. CO.

If judgment is rendered for the defendant on demurrer to the declaration, or to a material pleading in chief, the plaintiff can never after maintain against the same defendant or his privies any similar or concurrent action for the same cause upon the same grounds as were disclosed in the first declaration; but, if the plaintiff fails on demurrer in his first action from the omission of an essential allegation in his declaration which is supplied in the second suit, the judgment in the first suit is not a bar to the second.

ERROR to the Circuit Court of the United States for the District of Indiana.

This was an action brought by the plaintiff in error against the defendant to recover the amount of a judgment rendered by the Supreme Court of the State of New York in favor of the plaintiff's testator against the defendant corporation.

The defendant pleaded in bar a judgment in its favor on demurrer to the declaration, in a suit brought on the same cause of action in the Knox Circuit Court of Indiana.

A demurrer to this plea was overruled: whereupon the plaintiff below replied, alleging material differences between the facts stated in the declaration in this case and those stated in the declaration in the case in the Knox Circuit Court, claiming that the judgment on demurrer to the declaration in the Knox Circuit Court was not a judgment on the merits. To this replication a demurrer was sustained, and the plaintiff below excepted.

The merits of the case are fully stated in the opinion of the court.

The case was argued by *Mr. C. Tracy* for the plaintiff in error, and by *Mr. Asa Iglehart* for the defendant in error.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Special pleading is still allowed in certain jurisdictions; and, if the plaintiff and defendant in such a forum elect to submit their controversy in that form of pleading, the losing party must be content to abide the consequences of his own election.

Due service of process compels the defendant to appear, or to submit to a default; but, if he appears, he may, in most jurisdictions, elect to plead or demur, subject to the condition, that, if he pleads to the declaration, the plaintiff may reply to his plea, or demur; and the rule is, in case of a demurrer by the defendant to the declaration, or of a demurrer by the plaintiff to the plea of the defendant, if the other party joins in demurrer, it becomes the duty of the court to determine the question presented for decision; and if it involves the merits of the controversy, and is determined in favor of the party demurring, and the other party for any cause does not amend, the judgment is in chief; and it is settled law that such a judgment of the Circuit Court, if the sum or value in controversy is sufficient, may be removed into this court for re-examination by writ of error, under the twenty-second section of the Judiciary Act. *Suydam* v. *Williamson*, 20 How. 436; *Gorman* v. *Lenox*, 15 Pet. 115.

Pleadings which were subsequently abandoned will be passed over without notice, except to say that the suit was commenced by the testator in his lifetime. Briefly described, the suit referred to was an action of debt to recover the amount of a judgment which the testator of the plaintiff, as he alleged, recovered on the 3d of August, 1860, against the defendant corporation, in the Supreme Court of the State of New York, by virtue of a certain suit therein pending, in which, as the decedent alleged, the court there had jurisdiction of the parties and of the subject-matter of the action; and he also alleged that the judgment still remains in full force, and not in any wise vacated, reversed, or satisfied. Defensive averments, of a special character, are also contained in the declaration; to which it will presently become necessary to refer in some detail, in order to determine the principal question presented for decision. Suffice

it to remark in this connection, that the testator of the plaintiff alleged in conclusion, that, by virtue of the several allegations contained in the declaration, an action had accrued to him to demand and have of and from the defendant corporation the sum therein mentioned, with interest from the date of the judgment.

Service was made, and the corporation defendants, in the suit before the court, appeared and pleaded in bar of the action a former judgment in their favor, rendered in the County Circuit Court of the State of Indiana for the same cause of action, as more fully set forth in the record; from which it appears that the testator of the present plaintiff, then in full life, impleaded the corporation defendants in an action of debt founded on the same judgment as that set up in the present suit, and alleged that he, the plaintiff, instituted his action in that case, in the Supreme Court of the State of New York, against the Evansville and Illinois Railroad Company, a corporation created by the laws of the State of Indiana; that the said corporation defendants appeared in the suit by attorney; that such proceedings therein were had, that he, on the 3d of August, 1860, recovered judgment against the said corporation defendants for the sum therein mentioned, being for the same amount, debt and cost, as that specified in the judgment set up in the declaration of the case before the court; that the declaration in that case, as in the present case, alleged that the court which rendered the judgment was a court competent to try and determine the matter in controversy; and that the judgment remains in full force, unreversed, and not paid.

Superadded to that, the defendants in the present suit allege, in their plea in bar, that the plaintiff averred in the former suit that the said Evansville and Illinois Railroad Company, by virtue of a law of the State of Indiana, consolidated their organization and charter with the organization and charter of the Wabash Railroad Company; that the two companies then and there and thereby became one company, by the corporate name of the Evansville and Crawfordsville Railroad Company; that the consolidated company then and there by that name took possession of all the rights, credits, effects, and property of the two separate companies, and used and converted

the same, under their new corporate name, to their own use, and then and there and thereby became and were liable to pay all the debts and liabilities of the first-named railroad company, of which the claim of the plaintiff in that suit is one; that the plaintiff also averred that the consolidated company from that date directed and managed the defence wherein the said judgment was rendered, and that the act of consolidation and the aforesaid change of the corporate name of the company were approved by an act of the legislature of the State; that the consolidated company became and is liable to pay the judgment, interest, and cost; that a copy of the judgment and proceedings mentioned in the declaration in that suit, as also copies of all the acts of the legislature therein referred to, were duly filed with said complaint as exhibits thereto; that the corporation defendants appeared to the action, and demurred to the complaint; and that the court sustained the demurrer, and gave the plaintiff leave to amend.

But the record shows that the plaintiff in that case declined to amend his declaration, and that the court rendered judgment for the defendants. An appeal was prayed by the plaintiff; but it does not appear that the appeal, if it was allowed, was ever prosecuted; and the present defendants aver, in their plea in bar, that the matters and things set forth in the declaration in that case are the same matters and things as those set forth in the declaration in the present suit; that the plaintiff impleaded the defendants in that suit, in a court of competent jurisdiction, upon the same cause of action, disclosing the same ground of claim, and alleging the same facts to sustain the same, as are described and alleged in the present declaration; that the court had jurisdiction of the parties and of the subject-matter, and rendered a final judgment upon the merits in favor of the defendants and against the plaintiff, and that the judgment remains unreversed and in full force.

Plaintiff demurred to the plea; and the defendants joined in the demurrer, and the cause was continued. During the vacation, the original plaintiff deceased; and it was ordered that the cause be revived in the name of the executrix of his last will and testament. Both parties subsequently appeared and were heard; and the court, consisting of the circuit and district judges,

overruled the demurrer to the plea in bar, and decided that the plea is a good bar to the action.

Instead of amending the declaration pursuant to the leave granted, the plaintiff filed a replication to the plea in bar, to the effect following, — that the decision of the County Circuit Court of the State was not a decision and judgment on the merits of the case, but, on the contrary thereof, the judgment of that court only decided that the complaint or declaration did not state facts sufficient to sustain the action, in this, that, according to the allegations of the complaint, the original Evansville and Illinois Railroad Company, on the taking place of the alleged consolidation as set forth in the complaint, ceased to exist as a separate corporation; and that the complaint did not state any matters of fact showing a revivor of the suit against the consolidated company, or any facts which rendered such a revivor unnecessary; that the following allegations contained in the declaration in this case, and which were not contained in the complaint in the prior case, fully supply all the facts, for the want of which the demurrer was so sustained by the judge of the County Circuit Court, and in the defence of which he, the said judge, held that the suit had abated by the consolidation.

Matters omitted in the former declaration and supplied in the present, as alleged in the replication of the plaintiff, are the following: (1.) That the two companies, on the 18th of November, 1852, by virtue of the act to incorporate the Wabash Railroad Company, consolidated their charters, and united into one company under the name and style of the Evansville and Illinois Railroad Company; and that the consolidated company, under that name, continued to appear to and defend the said action in the said Supreme Court. (2.) That the legislature of the State of Indiana subsequently enacted that the corporate name of the consolidated company should be changed, and that the same should be called and known by the name of the Evansville and Crawfordsville Railroad Company, by which name the defendants have ever since been and now are known and called. (3.) That the act of the legislature changing the name of the consolidated company was subsequently duly and fully accepted by the directors of the company, and that the company became

and was liable for all acts done by the two companies and each of them. (4.) That the consolidated company appeared and defended the said action in the Supreme Court of the State of New York by the name of the Evansville and Illinois Railroad Company, and continued to defend the same until final judgment was rendered in the case. (5.) That it did not, in any manner, appear in the former suit that the act of the legislature changing the name of the consolidated company ever went into force by its acceptance, or that the consolidated company had thereby, and by the acceptance of said act, become liable for all acts done by the said two companies before the consolidation, as is provided in the second section of said legislative act. Wherefore the plaintiff says that the decision in that case was not in any manner a decision upon its merits, nor in any manner a bar to this action.

Responsive to the replication, the defendants filed a special demurrer, and showed the following causes: (1.) That the reply is insufficient in law to enable the plaintiff to have and maintain her action. (2.) That the reply does not state facts sufficient to constitute a defence to the defendants' plea. (3.) That the reply does not state facts sufficient to constitute a good reply, nor to avoid the defendants' plea.

Hearing was had; and the court sustained the demurrer to the replication, and rendered judgment for the defendants; and the plaintiff sued out the present writ of error.

Questions of great importance are presented in the pleadings, all of which arise, in the first instance, from the demurrer of the defendants to the replication of the plaintiff. Leave to plead over by the plaintiff, after the testator's demurrer to the defendants' plea in bar, is not shown in the record; but, inasmuch as the replication of the plaintiff to the plea was filed without objection, the better opinion is that it is too late to object that the replication was filed without leave.

Technical estoppels, it is conceded, must be pleaded with great strictness; but when a former judgment is set up in bar of a pending action, or as having determined the entire merits of the controversy involved in the second suit, it is not required to be pleaded with any greater strictness than any other plea in bar, or any plea in avoidance of the matters alleged in the

antecedent pleading. Reasonable certainty is all that is required in such a case, whether the test is applied to the declaration, plea, or replication, as the party whose pleading is drawn in question cannot anticipate what the response will be when he frames his pleading.

Cases undoubtedly arise where the record of the former suit does not show the precise point which was decided in the former suit, or does not show it with sufficient precision, and also where the party relying on the former recovery had no opportunity to plead it; but it is not necessary to consider those topics, as no such questions are presented in this case for decision. Aside from all such questions, and independent even of the form of the plea in bar, the plaintiff makes several objections to the theory of the defendants, that the former judgment set up in the plea is a conclusive answer to the cause of action alleged in the declaration.

First, They contend that a judgment on demurrer is not a bar to a subsequent action between the same parties for the same cause of action, unless the record of the former action shows that the demurrer extended to all the disputed facts involved in the second suit, nor unless the subsequent suit presents the same questions as those determined in the former suit.

Secondly, They also deny that a former judgment is, in any case, conclusive of any matter or thing involved in a subsequent controversy, even between the same parties for the same cause of action, except as to the precise point or points *actually* litigated and determined in the antecedent litigation.

Thirdly, They contend that the declaration in the former suit did not state facts sufficient to sustain the alleged cause of action, and that the present declaration fully supplies all the defects and deficiencies which existed in the said former declaration.

1. Much discussion of the first proposition is unnecessary, as it is clear that the parties in the present suit are the same as the parties in the former suit; and it cannot be successfully denied that the cause of action in the pending suit is identical with that which was in issue between the same parties in the suit decided in the county circuit court. Where the parties and

the cause of action are the same, the *prima facie* presumption is that the questions presented for decision were the same, unless it appears that the merits of the controversy were not involved in the issue; the rule in such a case being, that where every objection urged in the second suit was open to the party, within the legitimate scope of the pleadings, in the first suit, and might have been presented in that trial, the matter must be considered as having passed *in rem judicatam*, and the former judgment in such a case is conclusive between the parties. *Outram* v. *Morewood*, 3 East, 358; *Greathead* v. *Bromley*, 7 Term, 452.

2. Except in special cases, the plea of *res judicata* applies not only to points upon which the court was actually required to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of the allegation, and which the parties, exercising reasonable diligence, might have brought forward at the time. 2 Taylor's Ev., sect. 1513; *Henderson* v. *Henderson*, 3 Hare, 115; *Stafford* v. *Clark*, 2 Bing. 382; *Miller* v. *Covert*, 1 Wend. 487; *Bagot* v. *Williams*, 3 B. & C. 241; *Roberts* v. *Heine*, 27 Ala. 678.

Decided cases may be found in which it is questioned whether a former judgment can be a bar to a subsequent action, even for the same cause, if it appears that the first judgment was rendered on demurrer: but it is settled law, that it makes no difference in principle whether the facts upon which the court proceeded were proved by competent evidence, or whether they were admitted by the parties; and that the admission, even if by way of demurrer to a pleading in which the facts are alleged, is just as available to the opposite party as if the admission was made *ore tenus* before a jury. *Bouchard* v. *Dias*, 3 Den. 244; *Perkins* v. *Moore*, 16 Ala. 17; *Robinson* v. *Howard*, 5 Cal. 428; *Aurora City* v. *West*, 7 Wall. 99; *Goodrich* v. *The City*, 5 id. 573; *Beloit* v. *Morgan*, 7 id. 107.

From these suggestions and authorities two propositions may be deduced, each of which has more or less application to certain views of the case before the court: (1.) That a judgment rendered upon demurrer to the declaration or to a material pleading, setting forth the facts, is equally conclusive of the matters confessed by the demurrer as a verdict finding the same facts would be, since the matters in controversy are established

in the former case, as well as in the latter, by matter of record; and the rule is, that facts thus established can never after be contested between the same parties or those in privity with them. (2.) That if judgment is rendered for the defendant on demurrer to the declaration, or to a material pleading in chief, the plaintiff can never after maintain against the same defendant, or his privies, any similar or concurrent action for the same cause upon the same grounds as were disclosed in the first declaration; for the reason that the judgment upon such a demurrer determines the merits of the cause, and a final judgment deciding the right must put an end to the dispute, else the litigation would be endless. *Rex* v. *Kingston*, 20 State Trials, 588; *Hutchin* v. *Campbell*, 2 W. Bl. 831; *Clearwater* v. *Meredith*, 1 Wall. 43; Gould on Plead., sect. 42; *Ricardo* v. *Garcias*, 12 Cl. & Fin. 400.

Support to those propositions is found everywhere; but it is equally well settled, that, if the plaintiff fails on demurrer in his first action from the omission of an essential allegation in his declaration which is fully supplied in the second suit, the judgment in the first suit is no bar to the second, although the respective actions were instituted to enforce the same right; for the reason that the merits of the cause, as disclosed in the second declaration, were not heard and decided in the first action. *Aurora City* v. *West*, 7 Wall. 90; *Gilman* v. *Rives*, 10 Pet. 298; *Richardson* v. *Barton*, 24 How. 188.

Viewed in the light of that suggestion, it becomes necessary to examine the third proposition submitted by the plaintiff; which is, that the demurrer to the declaration in the former suit was sustained because the declaration was materially defective, and that the present declaration fully supplies all such imperfections and defects.

Different forms of expression, it may be conceded, are used, in several instances, in the declaration in the last suit, from those employed in the complaint exhibited in the former suit; but the substance and legal effect of the two pleadings, in the judgment of the court, are the same in all material respects. Even without any explanation, it is so apparent that the first and second alleged differences in the two pleadings are unsubstantial, that the objections may be passed over without further

remark. Nor is there any substantial merit in the third suggestion in that regard, when the same is properly understood.

3. It is to the effect that the legislative act changing the name of the consolidated companies was accepted by the directors: but the complaint in the former suit alleged that the consolidated companies adopted the name of the Evansville and Crawfordsville Railroad Company, and that they took possession of all the rights, credits, and property of the two companies, and used and converted the same to their own use, in said corporate name; and that said company then and there and thereby became and were liable to pay all the debts and liabilities of the consolidated company, of which the claim of the plaintiff is one.

4. All that need be said in response to the fourth alleged difference is, that the plaintiff averred in the former suit that the defendants, from the consolidation to the rendition of the judgment, by their attorney, directed and managed the original suit wherein the judgment in question was rendered.

5. Finally, the complaint is that it did not appear in the record of the former suit that the act of the legislature changing the name of the consolidated company ever went into force by the acceptance of the same, or that the consolidated company ever became liable for the acts of the two companies done by those companies before the consolidation took place.

Sufficient has already been remarked to show that there is no merit in that objection, for the reason that it appears in the former complaint that the two companies, by virtue of the legislative act, became consolidated, and that the name assumed by the consolidated company was changed by an act of the legislature; that the consolidated company, by the new corporate name, took possession of all rights, credits, effects, and property of the original consolidated company, and that they, under that corporate name, became liable to pay all the debts and liabilities of the prior consolidated company; and they subsequently, by their attorney, directed and managed the defence in the suit wherein the said judgment was rendered.

Tested by these considerations, it is clear that the proposition that the defects, if any, in the declaration in the former suit

were supplied by new allegations in the present suit, is not supported by a comparison of the two pleadings. Should it be suggested that the demurrer admits the proposition, the answer to the suggestion is, that the demurrer admits only the facts which are well pleaded; that it does not admit the accuracy of an alleged construction of an instrument when the instrument is set forth in the record, if the alleged construction is not supported by the terms of the instrument. *Ford* v. *Peering*, 1 Ves. Jr. 78; *Lea* v. *Robeson*, 12 Gray, 280; *Redmond* v. *Dickerson*, 1 Stockt. 507; *Green* v. *Dodge*, 1 Ham. 80.

Mere averments of a legal conclusion are not admitted by a demurrer unless the facts and circumstances set forth are sufficient to sustain the allegation. *Nesbitt* v. *Berridge*, 8 Law Times, N. S. 76; *Murray* v. *Clarendon*, Law Rep. 9 Eq. 11; Story's Eq. Plead. 254 *b*; *Ellis* v. *Coleman*, 25 Beav. 662; *Dillon* v. *Barnard*, 21 Wall. 430.

Examined in the light of these authorities, it is clear that the construction of the declaration in the former suit, as well as in the present, is still open, and that there is no error in the record. *Judgment affirmed.*

Mr. JUSTICE BRADLEY dissented.

LOWER ET AL. *v.* UNITED STATES EX REL.

Where a statute of Illinois requires the board of town-auditors to audit charges including judgments against the town, in order that provision for paying them may be made by taxation, — *Held*, that, where a judgment against the town was rendered by a court having jurisdiction of the parties and the subject-matter, auditing it is a mere ministerial act not involving the exercise of official discretion, the performance of which can be coerced by *mandamus*.

ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The town of Ohio, in the county of Bureau and state of Illinois, issued coupon bonds, bearing date Jan. 1, 1871, by way of payment for its subscription to the stock of the Illinois

Grand Trunk Railway. Such subscription had been made as authorized by an act of the General Assembly of that State in force March 25, 1869, which provided that it should be the duty of the proper authorities of the town to provide for the prompt payment of all interest and other liabilities accruing on such bonds, and to levy such taxes as may be necessary therefor as other taxes are levied. Private Laws of 1869, vol. iii. p. 307.

George O. Marcy, the holder of overdue and unpaid coupons attached to such bonds, brought suit in the Circuit Court of the United States for the Northern District of Illinois against the town, and on the twelfth day of March, 1873, recovered judgment for the sum of $4,286.60 and costs of suit.

On the fifteenth day of September, 1874, $1,500 was paid at the treasury of the State on said judgment. Marcy then presented a claim for the balance due thereon to the board of auditors of the town, who are the plaintiffs in error, and demanded that the same should be audited and certified to the town-clerk, in order that provision might be made for the payment thereof, according to the township organization and revenue laws of the State. The board allowed the sum of $871.78, but refused to audit the remainder, amounting to $2,516.85, so that he was unable to obtain the necessary levy and collection of taxes for the purpose of satisfying it. Whereupon Marcy filed a petition for a *mandamus* against the board.

The board, in their answer, admitting the issue and validity of the bonds and the rendition of the judgment upon the coupons, set up that said bonds were registered at the office of the Auditor of Public Accounts of the State, and that each of them and of the coupons thereto attached was payable at the office of the State treasurer, under and by virtue of an act entitled "An Act to fund and provide for paying the railroad debts of counties, townships, cities, and towns," in force April 16, 1869; and that the mode of collecting the bonds and coupons, or the judgment rendered thereon, was fully and solely prescribed by the provisions of that act.

Submitted on printed arguments by *Mr. J. J. Herron* and *Mr. T. Lyle Dickey* for the plaintiffs in error, and by *Mr. George O. Ide*, *contra*.

MR. JUSTICE DAVIS delivered the opinion of the court.

The answer in this case presents no valid defence. The object of the petition is to compel the plaintiffs in error, as town-auditors, to audit a judgment rendered against the town of Ohio upon overdue coupons attached to bonds issued by that municipal corporation, so that it can be placed in process of collection, in accordance with the Illinois township law. This law provides specifically for the auditing of town-charges, among which judgments are included, and for the levy of taxes to pay them (Rev. Stat. of Ill. 1874, p. 1080); but the plaintiffs in error say that judgments like the one in question can only be collected through the mode pointed out in the Funding Act of April 16, 1869. Id. 791 *et seq.*

If this were so, the relator would be placed in an unfortunate predicament, as he could neither sue out an execution upon the judgment, nor resort to local taxation to collect it, nor oblige the State to pay it.

The Funding Act, originating in the necessities of the indebted municipalities of the State, proposed a mode to help them, by the collection and disbursement of a State tax levied within their respective limits; but the State expressly disclaimed all liability on account of their indebtedness, and only assumed the character of a custodian of the money which reached the treasury. The act did not profess to change the terms of the securities, nor exempt the municipality from the obligation to pay them. They were, it is true, registered in the office of the auditor of public accounts, and payable at the treasury of the State; but the relator was not required to resort only there for payment. This means might fail; but, whether it did or not, his claim against the municipality for the debt evidenced by the coupons was not thereby impaired. This is especially true when they have been merged in a judgment; for there is no provision in the Funding Act to pay it. Even if it could be paid from the taxes levied by the State, the remedy he invoked is not taken away. It would be singular if it were, when the town owes the debt, and the judgment so declares. The statute (Rev. Stat. of Ill. 1874, p. 691) provides "that the writ of *mandamus* shall not be denied because the petitioner may have another specific legal remedy, when such writ will

afford a proper and sufficient remedy." Under it, the inquiry, whether there is even a better mode of redress than the one asked for, does not arise. It is enough to know that the writ is an appropriate and efficient method to compel town-auditors to audit a charge against the town when their action is necessary to determine the amount of money to be raised by taxation. In Illinois, an ordinary execution does not issue on such a judgment; but the corporate authorities can be required to raise by taxation the means of paying it, when the board of auditors have certified that it is a proper charge against the town. The relator took the necessary steps to have this certificate made; but the plaintiffs in error only allowed a small portion of the balance due him, without any legal excuse for not auditing the residue. They admit in their answer all the material averments of the petition, and are not at liberty to question the liability of the town to pay the judgment. It does not differ, so far as they are concerned, from one obtained against the town for ordinary charges. It was rendered by a court having jurisdiction of the parties and the subject-matter, and there is no controversy as to the amount remaining unpaid. Auditing it, so that provision may be made for its payment by taxation, is a mere ministerial act not involving the exercise of official discretion, the performance of which can be coerced by *mandamus*.

The Circuit Court in this case commanded the auditors to meet forthwith and audit the judgment.

Although we are not prepared to say that the court exceeded its power in this particular, yet we are of the opinion that this order, if carried out, might lead to embarrassments, and that it were better it should be modified. The statute requires that the board of auditors shall meet semi-annually to examine and audit town-charges. It is made their duty to cause a certificate of their proceedings to be filed with the town-clerk, for the purpose of having the same certified to the clerk of the county, in order that the amount certified may be by him levied and collected by taxation in the manner prescribed by the revenue laws of the State.

If the clerk should be advised that he was not authorized to extend a tax for the payment of this judgment on a certificate

of the auditors made at an irregular meeting, the relator would be still further delayed, as the writ in this case operates on the auditors, and not on the clerk. In order to avoid the delay, if nothing more, which would occur if such a question were raised, it is advisable that the auditors be required to meet at a time authorized by the statute.

The judgment of the Circuit Court will therefore be modified, so as to direct the board to assemble at their next regular semi-annual meeting and allow said judgment.

BARNES v. DISTRICT OF COLUMBIA.

1. A municipal corporation in the exercise of its duties is a department of the State. Its powers may be large or small: they may be increased or diminished from time to time at the pleasure of the State, or the State may itself directly exercise in any locality all the powers usually conferred upon such a corporation. Such changes do not alter its fundamental character.
2. The statement that a municipality acts only through its agents does not mean that it so acts through subordinate agents only. It may act through its mayor or its common council, its superintendent of streets, or its board of public works.
3. Whether the persons thus acting are appointed by the governor or president, or are elected by the people, does not affect the question whether they are or are not parts of the corporation and its agents. Nor is it important, on that question, from what source they receive their compensation.
4. The act of Congress of Feb. 21, 1871 (16 Stat. 419), creates a "municipal corporation" called "The District of Columbia." It provides for the appointment of an executive officer called a governor, and for a legislative assembly. It creates a board of public works, which is invested with the entire control of the streets of the District, their regulation and repair; and is composed of the governor of the District and four other persons appointed by the President of the United States, by and with the advice and consent of the Senate, to hold their offices for the term of four years, unless sooner removed by the President. The board is empowered to disburse all moneys appropriated by Congress or the District, or collected from property-holders in pursuance of law, for the improvement of streets, avenues, &c.; and is required to make a report to the legislative assembly of the District, and to the governor, who is directed to lay the same before the President for transmission to Congress. *Held*, that the board of public works is not an independent body acting for itself, but is a part of the municipal corporation; and that the District of Columbia is responsible to an individual who has suffered injury from the defective and negligent condition of its streets. *Held further*, that a municipal corporation, holding a voluntary charter as a city or village, is responsible for its mere negligence in the care and man-

agement of its streets. In this respect, there is a distinction between the liability of such a corporation and that of a *quasi* corporation like a county, town, or district. Whether or not this distinction is founded on sound principle, it is too well settled to be disturbed.

ERROR to the Supreme Court of the District of Columbia.

This is an action to recover damages for a personal injury received by the plaintiff on the 14th of October, 1871, in consequence of the defective condition of one of the streets of the city of Washington. The accident occurred on K Street east, and arose from the construction of the Baltimore and Potomac Railroad through that street. The road was built by permission of the corporation, and authority was given to the company to change the grade of the streets according to a plan filed. In making this change, a deep pit or excavation was made, into which the plaintiff fell. The questions touching the plaintiff's injury, the defective condition of the street, and the negligence of those having it in charge, were submitted to the jury, and the issue upon each of them was found in favor of the plaintiff. The verdict of the jury, by which they awarded to him the sum of three thousand five hundred dollars as damages, besides his costs, and the judgment thereon, were set aside at the general term of the Supreme Court of the District, and judgment was ordered in favor of the defendant. From this judgment the present writ of error was brought.

Mr. Edwin L. Stanton for the defendant in error.

The charter of the old corporation having been repealed by the act of Feb. 21, 1871, its ordinance granting permission to the railroad company to construct its road was irrelevant in this case, as the District of Columbia is not responsible for the acts of that corporation. The right to pass along the streets having, independently of the municipal ordinance, been granted by Congress to the company, it was obliged to conform to the grade of the streets, unless Congress authorized a different level. The District had no power whatever to act in the matter.

Whether this action is maintainable against the District of Columbia depends upon the terms and conditions of its charter. *Weightman* v. *The Corporation of Washington*, 1 Black, 50.

Prior to the passage of the act of Feb. 21, 1871, the corpora-

tion of the city of Washington had, under congressional enactments, full power and authority to open and keep in repair the streets, alleys, &c., agreeably to the plan of the city; but this act intrusts no control whatever over the streets and avenues to the new corporation, but vests it in a Federal commission authorized to make all regulations which it might deem necessary for keeping them in repair. The act prescribed the powers of the board of public works as distinctly as it did those of other officers, and made it independent of the legislative assembly in respect to the authority committed to it by Congress.

That this entire control of the streets and avenues, with power to make all regulations which it should deem necessary for keeping the same in repair, was committed to the board of public works, not as a department or subordinate agency of the municipality called the District of Columbia, but as a Federal commission, is clearly shown by the legislation of Congress. Its members were appointed by the President of the United States, by and with the advice and consent of the Senate. The acts of May 8, 1872 (17 Stat. 74), and March 3, 1873 (id. 499, 500), and sect. 76 of the Revised Statutes relating to the District of Columbia, providing for the salaries of the members of the board of public works and other officers of the District, enact that no part of the sums thereby appropriated shall be paid to any member of such board "*who shall hold any other Federal office*," or "who is paid a salary for the discharge of the duties of *any* other *Federal office*, *under the government of the United States*."

The act of June 20, 1874 (18 Stat. 116), abolishing the office of governor, secretary, board of public works, delegate in Congress, and also the legislative assembly, distinguishes between the accounting officers, other officials, laborers, employés, and the indebtedness of the District, and those of the board of public works. This distinction is also made by the acts of Congress of June 10, 1872 (17 Stat. 350, 351), April 20, 1871 (id. 7), Jan. 8, 1873 (id. 405, 406), and June 23, 1874 (18 id. 210).

The conclusion is thus reached, that by the act of Feb. 21, 1871, the entire control over the streets and avenues, which are

the property of the United States, was given to a Federal commission, with exclusive power to make such regulations as it might deem necessary for keeping the same in repair.

Liability on the part of a municipal corporation for the neglect or omission of a corporate duty springs from the particular nature of the duty enjoined, and from the means given for its performance, which must be ample. The duty must relate to the local interests of the municipality, and be imperative, and not discretionary or judicial. *Weightman* v. *The Corporation of Washington*, 1 Black, 50; Dill. on Munic. Corp., sect. 765.

Here the duty was not enjoined, nor were the means given. Therefore the liability for injury resulting from neglect of duty, if it exists at all, must appear, upon a fair review of the charter or statutes, to rest upon the municipal corporation as such, and not upon it as an agency of the State, nor upon its officers as independent public officers. Dill. on Munic. Corp., sects. 772, 789; *Child* v. *City of Boston*, 4 Allen, 41; *Walcott* v. *Swampscott*, 1 id. 101; *Martin* v. *Mayor of Brooklyn*, 1 Hill, 550; *Detroit* v. *Blakely*, 21 Mich. 84; 9 Am. Law Reg. 680, n.

Mr. W. D. Davidge and *Mr. R. K. Elliot*, *contra*.

MR. JUSTICE HUNT delivered the opinion of the court.

The municipal corporation, "The District of Columbia," was organized under the act of Congress of Feb. 21, 1871. 16 Stat. 419.

The first section of the act creates a municipal corporation by the name of "The District of Columbia," with power to sue, be sued, contract, have a seal, and "exercise all other powers of a municipal corporation, not inconsistent with the laws and constitution of the United States and the provisions of this act."

By sect. 2 the executive power is vested in a governor, to be appointed by the President, with the consent of the Senate, and to hold his office for four years. Bills passed by the council, and house of delegates, were to be presented to him for approval or rejection.

A secretary of the District is also provided for, whose duties are specified. The legislative power in the District is vested in two bodies, — a council, and house of delegates, — called a legislative assembly; which power it was in the eighteenth section

declared should "extend to all rightful subjects of legislation within said District, consistent with the Constitution of the United States and the provisions of this act."

It is enacted that the President, with the consent of the Senate, shall appoint a board of health, consisting of five persons, whose duties are pointed out. The salaries of the governor and secretary are prescribed, and are to be paid "at the treasury of the United States." The salaries of the members of the legislative assembly are prescribed; but it is not declared where or how or by whom they shall be paid, unless they are included in the general terms of sect. 38.

By the thirty-seventh section it is provided that there shall be a "board of public works, to consist of the governor and four other persons to be appointed by the President, with the consent of the Senate, who shall have entire control of and make all regulations which they shall deem necessary for keeping in repair the streets, avenues, and alleys and sewers of the city, and all other works which may be intrusted to their charge by the legislative assembly or Congress." They are also required to disburse the money collected for such purposes, and to make an annual report of their proceedings to the legislative assembly, and to furnish a duplicate of the same to the governor.

The charters of the cities of Washington and Georgetown are declared to be repealed, except that they are continued in force for certain specified purposes not necessary to be here considered.

The statute creating this corporation, in its first section, declares it to be a body corporate, not only with power to contract, to sue and be sued, and to have a seal, but also that it is a body corporate for municipal purposes, and that it shall exercise all other powers of a municipal corporation, not inconsistent with the constitution and laws of the United States and the provisions of this act.

A municipal corporation, in the exercise of all of its duties, including those most strictly local or internal, is but a department of the State. The legislature may give it all the powers such a being is capable of receiving, making it a miniature State within its locality. Again: it may strip it of every power, leaving it a corporation in name only; and it may create and

recreate these changes as often as it chooses, or it may itself exercise directly within the locality any or all the powers usually committed to a municipality. We do not regard its acts as sometimes those of an agency of the State, and at others those of a municipality; but that, its character and nature remaining at all times the same, it is great or small according as the legislature shall extend or contract the sphere of its action.

In his work on Municipal Corporations (sect. 835), Judge Dillon says, "As the highways of a State, including streets in cities, are under the paramount and primary control of the legislature, and as all municipal powers are derived from the legislature, it follows that the authority of municipalities over streets, and the uses to which they may be put, depends entirely upon their charter, or legislative enactments applicable to them. It is usual in this country for the legislature to confer upon municipal corporations very extensive powers in respect to streets and public ways within their limits, and the uses to which they may be appropriated. The authority to open, care for, regulate, and improve streets, taken in connection with the other powers usually granted, give to municipal corporations all needed authority to keep the streets free from obstructions and to prevent improper uses, and to ordain ordinances to this end."

A corporation can act only by its agents or servants. This obvious truth does not imply that the acts must be done by inferior or subordinate agents, but, on the contrary, the higher the authority of the agent, the more evident is the responsibility of the principal. While a State may be represented in various ways, no one will doubt that its act, when declared through the means of its legislature or its governor within their respective spheres, is more emphatically obligatory upon it than when made known through its inferior departments.

A municipal corporation may act through its mayor, through its common council, or its legislative department by whatever name called, its superintendent of streets, commissioner of highways, or board of public works, provided the act is within the province committed to its charge. Nor can it in principle be of the slightest consequence by what means these several officers are placed in their position, — whether they are elected by

the people of the municipality, or appointed by the President or a governor. The people are the recognized source of all authority, state and municipal; and to this authority it must come at last, whether immediately or by a circuitous process.

An elected mayor or an appointed mayor derives his authority to act from the same source; to wit, that of the legislature. The whole municipal authority emanates from the legislature. Its legislative charter indicates its extent, and regulates the distribution of its powers as well as the manner of selecting and compensating its agents. The judges of the Supreme Court of a State may be appointed by the governor with the consent of the senate, or they may be elected by the people. But the powers and duties of the judges are not affected by the manner of their selection. The mayor of a city may be elected by the people, or he may be appointed by the governor with the consent of the senate; but the slightest reflection will show that the powers of this officer, his position as the chief agent and representative of the city, are the same under either mode of appointment. Whether his act in a case in question is the act of and binding on the city depends upon his powers under the charter to act for the city, and whether he has acted in pursuance of them, not at all upon the manner of his election. It is equally unimportant from what source he receives compensation, or whether he serves without it.

When the question is, whether an individual is acting for himself or for another, the inquiry whether that other directed him to do the work and controlled its performance, and whether he promised to pay him for his service, may be important in determining that question. In a case like the one before us, where all the actors are in some form under the same authority, where all are created by the same legislature, and it is a question of the distribution of conceded power, these suggestions are unimportant.

Nor are these by any means conclusive considerations in any case. A striking instance to the contrary is found in the case of *The China*, 7 Wall. 53. It is there held, that although the master of the vessel is bound to take a pilot on board his vessel, and bound to take the first one offering his services, the owners are responsible for a collision caused by the negligence of the pilot thus in charge of the vessel.

In the case of the municipal corporation before us, we have no doubt that the governor and the legislative department are equally representatives and agents of that body, unaffected by the circumstance that the one is appointed by the President and the others are elected by the people; or that the one is paid from one source, and the others from another source. They are severally members and parts of a municipal corporation, whose charter emanates from the Congress of the United States, and by which their powers and authority are conferred or defined.

Whether the board of public works is also a part of and an agency of the municipal corporation is the question before us.

1. The authorities state, and our own knowledge is to the effect, that the care and superintendence of streets, alleys, and highways, the regulation of grades, and the opening of new and closing of old streets, are peculiarly municipal duties. No other power can so wisely and judiciously control this subject as the authority of the immediate locality where the work is to be done. Accordingly, although complaints are often made of corruption and venality, as they are, indeed, of all public functionaries, and attempts made to substitute other agencies, the general judgment of the country has always accepted the municipal organization as the one subject to the least objection for the execution of this duty. In inquiring, therefore, where this power was vested in a particular case, we should expect to find that it was given to the municipality.

2. The act of Congress of Feb. 21, 1871, is entitled "An Act to provide a government for the District of Columbia," and its intention is to accomplish that end by the means of a municipal corporation called "The District of Columbia." The powers given to it are to contract, sue and be sued, to have a seal, and all other powers of a municipal corporation, not inconsistent with the constitution and laws of the United States or the provisions of this act. The powers thus given are to be exercised by the means and agencies in the act specified; and, unless these means and agencies do represent the corporation, it has nothing, and does nothing. It is a nonentity. The first of these is the existence of a governor, who is invested with the executive power in and over the District of Columbia. This

office is a large type of a mayoralty; and his acts or declarations, or notices or services upon him, within the sphere of executive authority, are those of or upon the municipal corporation.

The legislative assembly also is a large edition of a common council, and is the especial power and organ of the municipality in regulating its ordinary business and affairs.

The thirty-seventh section defines and locates the power to regulate and repair the streets and highways of the District of Columbia. The persons there referred to are invested with the entire control of the streets, their regulation and repair. It is declared that there shall be "a board of public works," of whom the chief agent of the city corporation — viz., the governor — shall be one, and four other persons to be nominated by the President; and to this board is given the power specified. The full text of the section is as follows: —

BOARD OF PUBLIC WORKS.

"SECT. 37. *And be it further enacted*, That there shall be in the District of Columbia a board of public works, to consist of the governor, who shall be president of said board; four persons, to be appointed by the President of the United States, by and with the advice and consent of the Senate, one of whom shall be a civil engineer, and the others citizens and residents of the District, having the qualifications of an elector therein. One of said board shall be a citizen and resident of Georgetown, and one of said board shall be a citizen and resident of the county outside of the cities of Washington and Georgetown. They shall hold office for the term of four years, unless sooner removed by the President of the United States. The board of public works shall have entire control of and make all regulations which they shall deem necessary for keeping in repair the streets, avenues, alleys, and sewers of the city, and all other works which may be intrusted to their charge by the legislative assembly or Congress.

"They shall disburse upon their warrant all moneys appropriated by the United States or the District of Columbia, or collected from property-holders in pursuance of law, for the improvement of streets, avenues, alleys and sewers, and roads and bridges; and shall assess, in such manner as shall be prescribed by law, upon the property adjoining and to be specially benefited by the improvements authorized by law and made by them, a reasonable proportion of

the cost of the improvement, not exceeding one-third of such cost, which sum shall be collected as all other taxes are collected.

"They shall make all necessary regulations respecting the construction of private buildings in the District of Columbia, subject to the supervision of the legislative assembly.

"All contracts made by the said board of public works shall be in writing, and shall be signed by the parties making the same, and a copy thereof shall be filed in the office of the secretary of the District; and said board of public works shall have no power to make contracts to bind said District to the payment of any sums of money except in pursuance of appropriations made by law, and not until such appropriations shall have been made. All contracts made by said board, in which any member of said board shall be personally interested, shall be void; and no payment shall be made thereon by said District, or any officers thereof. On or before the first Monday in November of each year, they shall submit to each branch of the legislative assembly a report of their transactions during the preceding year, and also furnish duplicates of the same to the governor, to be by him laid before the President of the United States for transmission to the two Houses of Congress; and shall be paid the sum of two thousand five hundred dollars each annually."

1. The four persons composing this board are nominated by the President, and hold their offices for a fixed period of time. They cannot be removed except by the President of the United States. The same thing is true of the governor and of the secretary of the District; except that, as to them, there is no power of removal. Each is appointed in the same manner, and holds until the expiration of his term and until his successor is qualified. The same is true, also, of the members of the council, except that their term is of shorter duration. It is true, also, in relation to the house of delegates, except that they are elected by the people, and hold their offices for a fixed term of one year. We have already endeavored to show that it is quite immaterial, on the question whether this board is a municipal agency, from what source the power comes to these officers, — whether by appointment of the President, or by the legislative assembly, or by election.

2. This board is invested with the entire control and regulation of the repair of streets and alleys, and all other works which may be intrusted to their charge by the legislative as-

sembly or Congress. They shall disburse all the money appropriated by the legislative assembly or by Congress, or collected from property-holders for the improvement of streets and alleys.

It is to be noticed here, that the municipal corporation, as represented by the legislative assembly, may impose upon this board such other duties as they think proper. The board is to perform "all other work intrusted to their charge by the legislative assembly or Congress." In this respect, certainly, it is not an independent body. It is subject to two masters, either of whom may impose upon it any other work it may choose, and which work it is bound to perform. Its dependence upon Congress and upon the legislative assembly in this respect rests upon the same basis. It will not be claimed by any one that it is not subject to the control of Congress, and dependent upon that body.

3. The board shall disburse all moneys appropriated by the United States or the District of Columbia, or collected from property-holders, for improvements of streets or alleys. In doing the two acts here first specified, the board again acts as the hand and agent of the United States or of the District, as the case may be.

4. On or before the first Monday of each year, the board is required to make a report of their transactions during the preceding year to each branch of the legislative assembly, and also to the President, to be placed before Congress by him. This duty is also an indication of their subordination equally to Congress and to the legislative assembly. The powers given to this board are not of a character belonging to independent officers, but rather those which indicate that it is the representative of the municipal corporation.

Notwithstanding these features, and notwithstanding we find this power given by the act which creates the municipality, and that this is one of the powers ordinarily belonging to a municipal government, and although the manner of its bestowal and the selection of the agents who exercise it are similar to that of the other appointees and agents of the municipal corporation, it is still contended that no liability exists on the part of the corporation to compensate the plaintiff for his injuries.

It is denied that a municipal corporation (as distinguished from a corporation organized for private gain) is liable for the injury to an individual arising from negligence in the construction of a work authorized by it. Some cases hold that the adoption of a plan of such a work is a judicial act; and, if injury arises from the mere execution of that plan, no liability exists. *Child* v. *City of Boston*, 4 Allen, 41; *Thayer* v. *Boston*, 19 Pick. 511. Other cases hold that for its negligent execution of a plan good in itself, or for mere negligence in the care of its streets or other works, a municipal corporation cannot be charged. *City of Detroit* v. *Blackely*, 21 Mich. 84, is of the latter class, where it was held that the city was not liable for an injury arising from its neglect to keep its sidewalks in repair.

The authorities establishing the contrary doctrine that a city is responsible for its mere negligence, are so numerous and so well considered, that the law must be deemed to be settled in accordance with them. *English Authorities.* — *Mayor* v. *Henley*, 2 Cl. & Fin. 331; *Mersey Docks* v. *Gibbs*; *Same* v. *Penhallow*, 1 H. Ld. Cas. N. S. 93; 1 H. & N. 439; *Lan. Canal Co.* v. *Parnably*, 11 Ad. & Ell. 223; *Scott* v. *Mayor*, 37 Eng. Law & Eq. 465. *United States Authorities.* — *Weightman* v. *Washington*, 1 Bl. 39; *Nebraska* v. *Campbell*, 2 id. 590; *Robbins* v. *Chicago*, 4 Wall. 658; *Supervisors* v. *U. S.*, id. 435; *Mayor* v. *Sheffield*, id. 194. *New York.* — *Davenport* v. *Ruckman*, 37 N. Y. 568; *Requa* v. *Rochester*, 45 id. 129; *Rochester W. L. Co.* v. *Rochester*, 3 id. 463; *Conrad* v. *Ithaca*, 16 id. 158; *Barton* v. *Syracuse*, 36 id. 54. *Illinois.* — *Browning* v. *City of Springfield*, 17 Ill. 143; *Claybury* v. *City of Chicago*, 25 id. 535; *City of Springfield* v. *Le Claire*, 49 id. 476. *Alabama.* — *Smoot* v. *Mayor of Wecumpka*, 24 Ala. N. S. 112. *Connecticut.* — *Jones* v. *City of New Haven*, 34 Conn. 1. *North Carolina.* — *Meares* v. *Wilmington*, 9 Ired. 73. *Maryland.* — *County Commissioners of Anne Arundel County* v. *Duckett*, 20 Md. 468. *Pennsylvania.* — *Pittsburg City* v. *Grier*, 22 Penn. 54; *Erie City* v. *Schwingle*, id. 388. *Wisconsin.* — *Cook* v. *City of Milwaukee*, 24 Wis. 270; *Ward* v. *Jefferson*, id. 342. *Virginia.* — *Sawyer* v. *Corse*, 17 Gratt. 241; *City of Richmond* v. *Long*, id. 375. *Ohio.* — *Western College* v. *Cleveland*, 12 Ohio, N. S. 377; *McCombs* v. *Akron*, 15 id. 476; *Rhodes* v. *Cleveland*, 10 id. 159.

And here a distinction is to be noted between the liability of a municipal corporation, made such by acceptance of a village or city charter, and the involuntary *quasi* corporations known as counties, towns, school-districts, and especially the townships of New England. The liability of the former is greater than that of the latter, even when invested with corporate capacity and the power of taxation. 1 Dillon, sects. 10, 11, 13; 2 id. sect. 761.

The latter are auxiliaries of the State merely, and, when corporations, are of the very lowest grade, and invested with the smallest amount of power. Accordingly, in *Conrad* v. *Ithaca*, 16 N. Y. 158, the village was held to be liable for the negligence of their trustees; while in *Weet* v. *Brockport* the town was said not to be liable for the same acts by their commissioners of highways. Id. 163, 4, 9. See Brooke's Abridgment, "Action on the Case;" *Russell* v. *Men of Devon*, 2 T. R. 308, and cases there cited; 16 N. Y., *supra*.

Whether this distinction is based upon sound principle or not, it is so well settled that it cannot be disturbed. Decisions or analogies derived from this source are of little value in fixing the liability of a city or a village. See Dillon, *supra*.

Again: it is contended that the board of public works of the District of Columbia is an independent body, acting for itself, not forming a part of the corporation, and that the corporation is not responsible for its acts. We have analyzed the power of this body in a previous part of this opinion, and have set out in full the language of the thirty-seventh section.

Upon this point, also, we are able to derive assistance from the adjudged cases.

The case of *Bailey* v. *Mayor*, in the Supreme Court of New York, 3 Hill, 531, and again in the Court of Errors, 2 Den. 431, is a leading authority upon this question. In the year 1834, the legislature of the State of New York passed an act "to provide for supplying the city of New York with pure and wholesome water." Sess. Laws 1834, p. 531. The act provided that the governor should appoint five persons, to be known as water commissioners, whose duty it was made to examine all matters relative to that subject (sect. 2); to employ such engineers as they should deem necessary (sect. 3); to adopt such

plan as they should deem most advantageous for procuring such supply of water; to ascertain the amount of money needed for the purpose; and to make conditional contracts for the purchase of lands required, subject to the ratification of the common council of New York (sect. 4). The plan, the estimate of the expense, the conditional contracts, and all other matters connected therewith, were to be presented by the commissioners to the common council of New York (sects. 5, 6), who were directed to submit the plan to the electors of New York for their rejection or approval (sect. 7). If approved, the council were to direct the commissioners to proceed with the work; and the council was authorized to raise by loan $2,500,000, which money was to be applied to the purposes of the act "by or under the direction of the commissioners" (sect. 11). The commissioners were authorized to enter upon lands, agree for their purchase or take measures for their condemnation (sects. 12–14), and to use the ground or soil under any street or highway within the State for the purpose of introducing the water (sect. 15). The commissioners were authorized to draw on the city comptroller for all sums due for the purchase of lands, and sums due to contractors, and for their own incidental expenses; and the payments were required to be reported to the council once in every six months.

Under this statute a plan was prepared and approved by the citizens of New York, money was raised, and the work was entered upon. It was proved that the commissioners entered into a contract with Crandall & Van Zandt for building a dam across the Croton River, which was about forty miles from the city of New York, and in another county, in pursuance of the plan adopted. The plaintiff offered also to prove that it was so negligently and carelessly constructed, that upon the occurrence of a freshet in 1841 it was swept away, and the property of the plaintiff, real and personal, situate on both sides of the river below the dam, was destroyed to the value of $60,000. The circuit judge rejected the evidence, and directed the plaintiff to be nonsuited. The case was carried to the Supreme Court, where the nonsuit was set aside. The judgment was delivered by Nelson, C. J., whose opinion opens in these words: "The principal ground taken at the circuit against this action, and

the one upon which it was understood the cause there turned, was that the defendants were not chargeable for negligence or unskilfulness in the construction of the dam in question, inasmuch as the water commissioners were not appointed by them, nor subject to their direction or control." The learned judge repudiates the argument arising from the fact that the commissioners were appointed by the State; that the defendants had no control over their actions; that they were bound to employ them, and submit to the independent exercise of their control. He held that the commissioners were the agents of the city, and that the latter was responsible for their negligent conduct.

The case was then carried to the Court of Errors of the State of New York, 2 Den. 433, where the judgment of the Supreme Court was affirmed. Chancellor Walworth bases his opinion of affirmance chiefly upon the fact that the city was the owner of the land on which the dam was built, and therefore liable for the negligent conduct of those who built it. Senators Hand, Bockee, and Barlow base their judgments of affirmance on the ground that the commissioners were the agents of the city. Gardner, lieutenant-governor, delivered an able dissenting opinion.

This case is nearer to the one we are considering than any other reported in the books. The struggle in the New York courts was between the dictates of that evident justice and good sense which required that the city should indemnify a sufferer for the loss arising from the acts of those doing a work under its authority and for its benefit, and the technical rule which exempted it from liability for acts of officers not under its control or appointed by it.

If these courts had had before them the additional facts which exist in this case, — to wit, that, in the very statute which made the city of New York a municipal corporation, these persons had been appointed to do every thing necessary to be done respecting the care and improvement of the streets, being invested with their exclusive control; that without that body, and two other equally independent bodies (to wit, the mayor and the legislative assembly, neither of them being declared in words to be part of the municipal body), the municipal corporation had no one part of an organized existence, — we think they

would have arrived at the same conclusion, but would have found less difficulty in choosing a ground on which to place their judgment.

In the case before us, we think that Congress intended to make the board of public works a portion of the municipal corporation. The governor, or mayor, as he would ordinarily be called, represented the executive department; the legislative assembly, like a common council, had the exclusive authority to pass all laws or ordinances upon the large class of subjects committed to its charge, with certain specified restrictions; and to the board of public works, like an ordinary agent of the corporation, was given the exclusive control of the streets and alleys. Names are not things. Perhaps there is no restriction on the power of Congress to create a State within the limits of the District of Columbia; but it does not make an organization a State to call its mayor a governor, or its common council a legislative assembly, or its superintendent of streets a board of public works, especially when the statute by which they are created opens with a declaration of its intention to create a municipal corporation. We take the body thus organized to be a municipal corporation, and that its parts are composed of the members referred to; and we hold, therefore, that the proceedings by that body, in the repair and improvement of the street out of which the accident in question arose, are the proceedings of the municipal corporation. That in such case the corporation is responsible, we have already cited the authorities to show.

No doubt there are authorities holding views not in all respects in harmony with those we have expressed. Among these are *Thayer* v. *Boston*, 19 Pick. 510; *Walcott* v. *Swampscott*, 1 Allen, 101; *Child* v. *City of Boston*, 4 id. 41. The first of these cases holds that a city corporation is liable in tort, provided the act is done by the authority and order of the city government, or those branches of the government invested with authority to act for the corporation; but that it must appear that the act was done by the express authority of the city, or *bona fide* in pursuance of a general authority on the subject. To this we assent. *Walcott* v. *Swampscott* was an action against a town. The surveyor of highways employed one O'Grady to drive a horse and cart with a load of gravel for the repair of a highway;

and, while thus engaged, he came in collision with the plaintiff. The town was held not to be liable, on the theory that the surveyor was not an agent or servant of the town, but an independent officer appointed to perform a public duty in which the town had no interest. In *Child* v. *City of Boston* it was held that the city was not responsible for any deficiency in the plan of drainage adopted by the city, although the plaintiff was injured thereby; that the duty in this respect was of a *quasi* judicial nature, involving discretion, and depending upon public considerations; that in this they acted, not as agents of the city, but as public officers. In this respect the case is in hostility to *Roch. White Lead Co.* v. *Rochester*, 3 N. Y. 463, where the city was held liable because it constructed a sewer which was not of sufficient capacity to carry off the water draining into it. The work was well done; but the adoption and carrying out of the plan was held to be an act of negligence. The Boston case, however, holds, that if a sewer, originally well constructed, becomes defective by reason of low lands being filled up so that the outflow is obstructed, it is the duty of the city so to extend the sewer that its efficiency shall be restored, and that for a failure to do so it becomes liable to those whose property is injured by the overflow of the sewer. In its practical results, this is one of the strongest cases to be found in favor of municipal liability.

We do not perceive that the circumstance that the fee of the streets is in the United States, and not in the municipal corporation, is material to the case. In most of the cities of this country, the fee of the land belongs to the adjacent owner; and, upon the discontinuance of the street, the possession would revert to him. The streets and avenues in Washington have been laid out and opened by competent authority. The power and the duty to repair them are undoubted, and would not be different were the streets the absolute property of the corporation. The only questions can be as to the particular person or body by which the power shall be exercised, and how far the liability of the city extends.

The judgment of the General Term is reversed, and the case is remanded to the Supreme Court of the District of Columbia, with directions to affirm the judgment of the Special Term upon the verdict.

MR. JUSTICE FIELD, with whom concurred MR. JUSTICE BRADLEY, dissenting.

I dissent from the judgment in this case. I do not think the District of Columbia should be held responsible for the neglect and omissions of officers whom it has no power to select or control.

MR. JUSTICE SWAYNE and MR. JUSTICE STRONG dissented.

MAXWELL v. DISTRICT OF COLUMBIA.

ERROR to the Supreme Court of the District of Columbia.

Mr. F. P. B. Sands and *Mr. James Hoban* for the plaintiff in error. *Mr. E. L. Stanton, contra.*

MR. JUSTICE HUNT delivered the opinion of the court.

This is an action to recover damages for injuries sustained by the plaintiff on the first day of March, 1872, in consequence of the unsafe condition and negligent management of the streets of the District of Columbia. The court below ruled that the District was not liable, and directed a verdict for the defendant.

The case is controlled by that of *Barnes* v. *District of Columbia, supra*, p. 540.

The judgment is reversed, and a new trial ordered.

MR. JUSTICE SWAYNE, MR. JUSTICE FIELD, MR. JUSTICE STRONG, and MR. JUSTICE BRADLEY, dissented.

DANT v. DISTRICT OF COLUMBIA.

ERROR to the Supreme Court of the District of Columbia.

Mr. Reginald Fendall for the plaintiff in error; and *Mr. E. L. Stanton, contra.*

MR. JUSTICE HUNT delivered the opinion of the court.

This is an action to recover damages sustained by the plaintiff on the 14th of November, 1871, in consequence of the un-

safe condition and negligent management of the streets of the District of Columbia. The court below ruled that the District was not liable, and directed a verdict for the defendant.

The case is controlled by the principles governing that of *Barnes* v. *District of Columbia*, *supra*, p. 540.

The judgment is reversed, and a new trial ordered.

MR. JUSTICE SWAYNE, MR. JUSTICE FIELD, MR. JUSTICE STRONG, and MR. JUSTICE BRADLEY, dissented.

UNITED STATES *v.* NORTON.

A motion to advance a criminal cause made on behalf of the United States must state the facts in such manner that the court may judge whether the government will be embarrassed in the administration of its affairs by delay.

THIS case came up on a certificate of division between the judges of the Circuit Court of the United States for the Southern District of New York.

Mr. Attorney-General Pierrepont, for the United States, submitted a motion to advance the cause.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This is a criminal case. The motion to advance is made on behalf of the United States, upon the representation of the Postmaster-General, in substance, that the questions in dispute will embarrass the operations of the government while they remain unsettled. As our rule has but recently gone into operation, we will, in this case, accept this statement as sufficient, and grant the motion. Hereafter, motions to advance upon this ground must state the facts in such manner that we may judge whether the government will be embarrassed in the administration of its affairs by delay. In the present crowded state of the docket, it is our duty to see that cases are not unnecessarily brought forward to the prejudice of others.

The case may be set down for argument on the fifteenth day of March.

HALL ET AL. *v.* UNITED STATES.

1. The twenty-fifth section of the act of June 30, 1864 (13 Stat. 231), authorizes the Secretary of the Treasury to make, in his discretion, just and reasonable allowances to collectors of internal revenue, in addition to their salaries, commissions, and certain necessary charges. A claim for such allowances, unless it be sanctioned by him, cannot be admitted by the accounting officers of the treasury.
2. In a suit on the official bond of a collector of internal revenue to recover a balance found to be due from him to the United States on a settlement of his accounts by the accounting officers, items of set-off for his extra services and expenses were properly excluded.

ERROR to the Circuit Court of the United States for the District of Minnesota.

Argued by *Mr. Assistant Attorney-General Edwin B. Smith* for defendants, and submitted on printed arguments by *H. J. Horn* for plaintiffs.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Fifteen hundred dollars per annum are allowed to collectors of internal revenue as salary for their services and that of their deputies, to be paid quarterly. Commissions, in addition to salary, are also allowed to such officers, to be computed upon the amounts by them respectively collected, paid over, and accounted for, under the instructions of the Treasury Department, as follows: Three per cent upon the first $100,000; one per centum upon all sums above $100,000, and not exceeding $400,000; and one-half of one per centum on all sums above $400,000. Such an officer may also keep and render to the proper officers of the treasury an account of his necessary and reasonable charges for stationery and blank-books used in the performance of his official duties, and for postage actually paid on letters and documents received or sent, and exclusively relating to official business; and, if the account is approved by the proper accounting officers, the collector is entitled to be paid for the same: but the provision is that no such account shall be approved, unless it shall state the date and the particular items of every such expenditure, and shall be verified by the oath or affirmation of the collector.

Two provisos are annexed to those enactments: (1.) That the

salary and commissions of no collector, exclusive of stationery, blank-books, and postage, shall exceed $10,000 in the aggregate, nor more than $5,000, exclusive of the expenses for rent, stationery, blank-books, and postage, and pay of deputies and clerks, to which such collector is actually and necessarily subjected in the administration of his office. (2.) That the Secretary of the Treasury be authorized to make such further allowances from time to time, as may be reasonable, in cases in which, from the territorial extent of the district, or from the amount of internal duties collected, or from other circumstances, it may seem just to make such allowances. 13 Stat. 231.

Sufficient appears to show that the principal defendant was duly appointed a collector of internal revenue under the act of Congress in that case made and provided, and that the foundation of the suit is the official bond given by the appointee for the faithful discharge of the duties of the office. Breaches of the conditions of the bond having been committed, as alleged, the United States commenced an action of debt in the District Court against the principal and his sureties, claiming the penalties of the bond. Service was made; and the defendants appeared, and pleaded (1.) *non est factum;* (2.) performance; (3.) set-off in the sum of $8,203.06 for money before that time advanced, paid, laid out, and expended by the defendant to and for the use of the plaintiffs, and at their instance, for the work and labor of the defendant and his servants and deputies, done and performed by him, as such collector, for the plaintiffs, and at their instance and request.

Claim is also made for the same sum in the same plea, upon the ground that it was due and owing to the defendant from the plaintiffs for commissions, expenses, and charges for extra services of himself and his servants, done and performed at the special instance and request of the plaintiffs.

Issue was joined by the plaintiffs upon the first plea; and to the second the plaintiffs reply, and deny that the defendant has well and truly performed the conditions of the writing obligatory, and assign the following breaches: (1.) That he has not accounted for and paid over to the United States all the public moneys which came into his hands, in compliance with the orders and regulations of the Secretary of the Treas-

ury. (2.) That he did not faithfully execute and perform all the duties of his office, as more fully set forth in the replication.

Both parties, having waived a trial by jury, went to trial before the court without a jury; and the finding and judgment were for the plaintiffs, in the sum of $11,517.63. Exceptions were filed by the defendants; and they sued out a writ of error, and removed the case into the Circuit Court.

Due settlement of the collector's accounts had been made by the accounting officers of the treasury; and the plaintiffs, to support the issues on their part, introduced the certified transcript of the same, to which the defendants objected: but the court overruled the objection, and admitted the evidence; and the defendants excepted. Said transcript included the statement of differences, and showed that the sum of $20,120 was the balance due from the collector.

Collections, it seems, had been made by the officer, for the preceding year, amounting to $77,702.08; and it did not appear that he had been paid during that period any extra allowance above his salary and commissions, nor that any of the charges claimed as set-off had been credited in the settlement of his accounts. Apart from that, it was admitted by the plaintiffs that the defendants had paid into court the sum of $11,435.17, which is to be deducted from the balance found due from the defendants by the accounting officers of the treasury.

Set-offs were claimed by the defendants, as follows: (1.) $5,010 paid by the collector, during the summer and fall of 1866, to sixteen deputy-collectors employed by him during that period in his district. (2.) $648 paid for the hire of clerks in his office during the quarter ending Sept. 30 of the same year. (3.) $1,100 paid for hire of clerks in making out his accounts and returns during that and the succeeding year.

Nothing being alleged to the contrary, it will be assumed that those several claims had been duly presented to the proper officers of the treasury, and that they had been finally disallowed. They were separately offered in evidence at the trial; and the ruling of the court in each instance was, that the same was properly rejected by the accounting officers of the treasury. Seasonable exception to the ruling of the court was taken by

the defendants. Appearance was entered by each party in the Circuit Court, and they were both there heard; and the Circuit Court affirmed the judgment of the District Court, and the defendants sued out the present writ of error.

Errors have not been assigned, as required by the rules of the court; but the course of the argument, as exhibited in the printed brief, warrants the conclusion that the only errors relied on are the rulings of the District Court, that the accounts filed in set-off were properly rejected by the accounting officers of the treasury. Defendant litigants had no right to file accounts in set-off at common law; nor did they ever have that right until the passage of the statute of 2 Geo. II., ch. 24, sect. 4, which enacted, in substance and effect, that, where there were mutual debts between the plaintiff and the defendant, one debt may be set against the other, and that such matter may be given in evidence under the general issue, or may be pleaded in bar, so that notice shall be given of the sum or debt intended to be offered in evidence. Chit. on Contr. 948.

Questions of the kind, where the United States are plaintiffs, must be determined wholly by the acts of Congress, as the local laws have no application in such cases. *United States* v. *Eckford*, 6 Wall. 490; *United States* v. *Robeson*, 9 Pet. 324; Conklin, Treat. 127.

Judgment in such suits is required to be rendered at the return term, unless the defendant shall, in open court, make oath or affirmation that he is equitably entitled to credits which had not been, previous to the commencement of the suit, submitted to the consideration of the accounting officers of the treasury and rejected, and specifying each particular claim so rejected in the affidavit. 1 Stat. 515; *United States* v. *Giles*, 9 Cranch, 236; 5 Stat. 83.

Sect. 4 of the same act provides, that, in suits between the United States and individuals, no claim for a credit shall be admitted at the trial, except such as shall appear to have been submitted to the accounting officers of the treasury for their examination, and to have been by them disallowed, unless it shall appear that the defendant, at the time of the trial, is in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credit

at the treasury by absence from the United States, or some unavoidable accident.

Claims for credit in suits against persons indebted to the United States, if it appears that the claim had previously been presented to the accounting officers of the treasury for their examination, and had been by them disallowed in whole or in part, may be admitted upon the trial of the suit; but it can only be admitted as a claim for credit, and must be proved to be just and legal before it can be allowed. Equitable claims for credit, if falling within the latter clause of the fourth section of that act, may be admitted at the trial of such a suit, though never presented to and disallowed at the treasury; but the presentation of such a claim will amount to nothing, unless it is proved that the same is justly due to the claimant.

Due returns, it seems, were made by the collector. It is not questioned that his accounts were regularly settled by the accounting officers of the treasury; nor is it suggested that due credit was not given to him for every thing which he could properly claim, except for the extra services and expenses charged in the accounts filed in set-off; and it appears that those accounts were duly presented to the accounting officers of the treasury, and were by them rejected before the suit was instituted. When the claims were offered, the court admitted the evidence; and the only complaint is, that the court ruled that the claims were properly rejected by the accounting officers of the treasury, which is the only question presented for decision.

Independent of the second proviso to the section defining the compensation to be allowed to such collectors, it would be clear beyond every doubt that no claim of the kind could be allowed by any court, as appears from the acts of Congress upon the subject and the decisions of this court. Legislation upon the subject commenced with respect to collectors of the customs, but was ultimately extended to all executive officers with fixed salaries, or whose compensation was prescribed by law. Sect. 18 of the act of the 7th of May, 1822, provided that no collector, surveyor, or naval officer shall ever receive more than $400 annually, exclusive of his compensation as such officer, and the fines and forfeitures allowed by law for any service he may render in any other office or capacity. 3 Stat. 696.

Prior to that, the settled practice and usage were to require collectors to superintend lights and light-houses in their districts, and to disburse money for the revenue-cutter service. Services of the kind were charged as extra services, and extra compensation was in many cases allowed for such service, until Congress interfered, and by that act gave such officers a fixed compensation, subject to the provision that they should never receive more than $400, exclusive of the fixed compensation, and their due proportion of fines, penalties, and forfeitures. Officers not named in that act also received fixed salaries; and they, whenever they performed extra service under the direction of the head of a department, claimed extra compensation. Claims of the kind were in some instances disallowed; and in certain cases, where litigation ensued, it was decided by this court that such claims were a proper set-off to the money demands of the United States. *Miner* v. *United States*, 15 Pet. 423; *Gratiot* v. *United States*, id. 336; *United States* v. *Ripley*, 7 id. 18.

Litigations of the kind became frequent; and Congress again interfered, and provided that no officer in any branch of the public service, or any other person whose salary or whose pay or emoluments is or are fixed by law and regulations, shall receive any extra allowance or compensation, in any form whatever, for the disbursement of public money or the performance of any other service, unless the said extra allowance or compensation be authorized by law. 5 Stat. 349.

Since then many other acts of Congress have been passed upon the subject, of which one more only will be reproduced. Like the preceding act, it provides that no officer in any branch of the public service, or any other person whose salary, pay, or emoluments is or are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same shall be authorized by law; and the appropriation therefor is explicitly set forth that it is for such additional pay, extra allowance, or compensation. 5 Stat. 510; 9 id. 297, 365, 367, 504, 542, 543, 629; 10 id. 97–100, 119, 120.

Compensation for extra services, where no certain sum is

fixed by law, cannot be allowed by the head of a department to any officer who has by law a fixed or certain compensation for his services in the office he holds, unless such head of a department is thereto authorized by an act of Congress; nor can any compensation for extra services be allowed by the court or jury as a set-off, in a suit brought by the United States against any officer for public money in his hands, unless it appears that the head of the department was authorized by an act of Congress to appoint an agent to perform the extra service, that the compensation to be paid for the service was fixed by law, that the service to be performed had respect to matters wholly outside of the duties appertaining to the office held by the agent, and that the money to pay for the extra services had been appropriated by Congress. *Converse* v. *United States*, 21 How. 470.

None of the conditions precedent suggested existed in the case before the court; and it follows that no such allowance could have been made by the accounting officers of the treasury in settling the accounts of the principal defendant, unless the same had been previously approved by the Secretary of the Treasury, under the second proviso in the twenty-fifth section of the act prescribing the compensation to be allowed to the collectors of internal revenue. 13 Stat. 232.

Authority is there given to the Secretary of the Treasury to make such further allowances to such collectors, from time to time, as may be reasonable; but the power to be exercised in that behalf is one vested in his discretion, both as to time and amount. He may make an allowance one year, and refuse it the next, or he may never make it at all, as to him may seem just and reasonable. No appeal lies from his decision in that regard, either to the accounting officers of the treasury or to the courts. Instead of that his decision is final, unless reversed by Congress.

Judgment affirmed.

HALL ET AL. v. UNITED STATES.

ERROR to the Circuit Court of the United States for the District of Minnesota.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Suffice it to say, that the suit in this case is in all material respects exactly similar to the foregoing case, and that the pleadings filed by the defendants are precisely similar. It was commenced in the District Court; and the parties waived a jury, and the finding and judgment were for the plaintiffs. Exceptions were filed by the defendants, and they removed the cause into the Circuit Court. All the questions in the Circuit Court were the same as in the preceding case; and the Circuit Court, having heard the parties, affirmed the judgment of the District Court: whereupon the defendants sued out the present writ of error. Due examination has since been given to the case, and we find no error in the record. Our reasons for the conclusion are given in the other case. *Judgment affirmed.*

UNITED STATES v. NORTON.

1. The act entitled "An Act to establish a postal money-order system," approved May 17, 1864 (13 Stat. 76), is not a revenue law within the meaning of the act entitled "An Act in addition to the act entitled 'An Act for the punishment of certain crimes against the United States,'" approved March 26, 1804 (2 Stat. 290).
2. A person cannot be prosecuted, tried, or punished for the embezzlement of money belonging to the postal money-order office, unless the indictment shall have been found within two years from the time of committing the offence.

ON a certificate of division in opinion between the judges of the Circuit Court of the United States for the Southern District of New York.

The case was argued by *Assistant Attorney-General Edwin B. Smith* for plaintiff, and by *Mr. Abram Wakeman* for defendant.

MR. JUSTICE SWAYNE delivered the opinion of the court.

It appears by the record that Norton was indicted for the embezzlement at different times of money belonging to the

money-order office in the city of New York, he being a clerk in that office when the crimes were committed.

The indictment was found on the 21st of February, 1874. He pleaded "that the several offences did not arise, exist, or accrue within two years next before the finding of said indictment." To this plea the United States demurred. Upon the point thus presented as to the sufficiency of the plea the judges were divided in opinion.

The indictment was founded upon the eleventh section of the "Act to establish a postal money-order system," passed May 17, 1864. 13 Stat. 76.

The "Act for the punishment of certain crimes against the United States," of the 30th of April, 1790 (1 Stat. 119, sect. 32), declares, "Nor shall any person be prosecuted, tried, or punished for any offence not capital, nor for any fine or forfeiture under any penal statute, unless the indictment or information for the same shall be found or instituted within two years from the time of committing the offence or incurring the fine or forfeiture aforesaid."

The act of the 26th of March, 1804, "in addition to the act entitled 'An Act for the punishment of certain crimes against the United States,'" enacts (2 Stat. 290, sect. 3) "that any person guilty of crimes arising under the revenue laws of the United States, or incurring any fine or forfeiture by breaches of said laws, may be prosecuted, tried, and punished, provided the indictment or information be found at any time within five years after committing the offence or incurring the fine or forfeiture, any law or provision to the contrary notwithstanding."

The substantial question presented for our determination is, Which of these two provisions applies as a bar to a prosecution for the offences described in the indictment? The solution of this question depends upon the solution of the further question, whether the "Act to establish a postal money-order system" is a revenue law within the meaning of the third section of the act of 1804.

The offences charged were *crimes arising* under the money-order act. The title of the act does not indicate that Congress, in enacting it, had any purpose of revenue in view. Its object, as expressly declared at the outset of the first section, was "to

promote public convenience, and to insure greater security in the transmission of money through the United States mails." All moneys received from the sale of money-orders, all fees received for selling them, and all moneys transferred in administering the act, are "to be deemed and taken to be money in the treasury of the United States." The Postmaster-General is authorized to allow the deputy-postmasters at the money-order offices, as a compensation for their services, not exceeding "one-third of the whole amount of fees received on money-orders issued," and at his option, in addition, "one-eighth of one per cent upon the gross amount of orders paid at the office." He was also authorized to cause additional clerks to be employed, and paid out of the proceeds of the business; and, to meet any deficiency in the amount of such proceeds during the first year, $100,000, or so much of that sum as might be needed, was appropriated.

There is nothing in the context of the act to warrant the belief that Congress, in passing it, was animated by any other motive than that avowed in the first section. A willingness is shown to sink money, if necessary, to accomplish that object.

In no just view, we think, can the statute in question be deemed a revenue law.

The lexical definition of the term *revenue* is very comprehensive. It is thus given by Webster: "The income of a nation, derived from its taxes, duties, or other sources, for the payment of the national expenses."

The phrase *other sources* would include the proceeds of the public lands, those arising from the sale of public securities, the receipts of the Patent Office in excess of its expenditures, and those of the Post-office Department, when there should be such excess as there was for a time in the early history of the government. Indeed, the phrase would apply in all cases of such excess. In some of them the result might fluctuate; there being excess at one time, and deficiency at another.

It is a matter of common knowledge, that the appellative *revenue laws* is never applied to the statutes involved in these classes of cases.

The Constitution of the United States, art. 1, sect. 7, provides that "all bills for raising revenue shall originate in the House of Representatives."

The construction of this limitation is practically well settled by the uniform action of Congress. According to that construction, it "has been confined to bills to levy taxes in the strict sense of the words, and has not been understood to extend to bills for other purposes which incidentally create revenue." Story on the Const., sect. 880. "Bills for raising revenue" when enacted into laws, become *revenue laws*. Congress was a constitutional body sitting under the Constitution. It was, of course, familiar with the phrase "bills for raising revenue," as used in that instrument, and the construction which had been given to it.

The precise question before us came under the consideration of Mr. Justice Story, in the *United States* v. *Mayo*, 1 Gall. 396. He held that the phrase *revenue laws*, as used in the act of 1804, meant such laws "as are made for the direct and avowed purpose of creating revenue or public funds for the service of the government." The same doctrine was reaffirmed by that eminent judge, in the *United States* v. *Cushman*, 426.

These views commend themselves to the approbation of our judgment.

The cases of *United States* v. *Bromley*, 12 How. 88, and *United States* v. *Fowler*, 4 Blatch. 311, are relied upon by the counsel for the United States. Both those cases are clearly distinguishable, with respect to the grounds upon which the judgment of the court proceeded, from the case before us. It is unnecessary to remark further in regard to them.

It will be certified, as the answer of this court to the Circuit Court, that the indictment against Norton charges offences for which, under the limitation provided in the thirty-second section of the act of Congress approved April 30, 1790, entitled "An act for the punishment of certain crimes against the United States," the defendant cannot be prosecuted, tried, or punished, unless the indictment shall have been found within two years from the time of the committing of the offences; and that the indictment is not for crimes arising under the revenue laws, within the intent and meaning of the third section of the act approved March 26, 1804, entitled "An Act in addition to the act entitled 'An Act for the punishment of certain crimes against the United States.'"

MEYER ET AL. *v.* ARTHUR.

1. Where, in the act of June 6, 1872, to reduce the duties on imports (17 Stat. 230), Congress provided that on and after Aug. 1, 1872, but ninety per centum of the duties theretofore levied should be collected and paid upon all metals not therein otherwise provided for, "and all manufactures of metals of which either of them is the component part of chief value," . . . *Held*, that the words "manufactures of metals" refer to manufactured articles in which metals form a component part, and not to articles in which they have lost their form entirely, and have become the chemical ingredients of new forms.
2. White lead, nitrate of lead, oxide of zinc, and dry and orange mineral, are not manufactures of metals within the meaning of that act.

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

This is a suit to recover import duties alleged to have been unlawfully exacted by the defendant, the collector of the port of New York. The articles on which they were charged were white lead, nitrate of lead, oxide of zinc, and dry and orange mineral, imported after the first day of August, 1872. By the second section of the act to reduce duties on imports, passed June 6, 1872, 17 Stat. 230, it was provided that on and after the first day of August, 1872, only ninety per cent of the duties theretofore imposed should be levied upon certain enumerated articles imported from foreign countries; amongst which were the following, as described in the words of the act: —

"All metals not herein otherwise provided for, and all manufactures of metals of which either of them is the component part of chief value, excepting percussion-caps, watches, jewelry, and other articles of ornament;" with a proviso excepting certain kinds of wire-rope, and chains made of steel wire.

The following facts appeared in evidence upon the trial.

Oxide of zinc is manufactured in European establishments, as follows: —

Sheets of zinc ordinarily sold in commerce are placed in retorts. The face of the retort has an opening large enough to admit the sheet. The backs of the retorts are enclosed in a furnace, and the retorts are heated by bituminous coal to a white heat. The action of the heat vaporizes the spelter, which is entirely consumed. The vapor passes out of the

mouth of the retort into large pipes, into which currents of air are forced. The vapor combines with the oxygen of the air, and becomes white, snow-like flakes. The current bears these flakes along through the pipes, which terminate in long chambers. At the mouth of the pipes bags are suspended, in which the flakes are caught. No further process is required.

The oxide of zinc in suit was manufactured in this way.

Nitrate of lead is a chemical combination of lead and nitric acid. Lead previously melted and cooled is placed in a vessel filled with dilute heated nitric acid, and subjected to a slight additional heat. The nitrate of lead is formed in crystals upon the side of the vessel. Its form as a commodity in the market is ordinarily that of a white, opaque crystal.

Orange or red lead is made by roasting dry white lead in a furnace, and exposing it to the air which is admitted into the heated receptacle. By this process the white lead loses a portion of its carbonic acid, and absorbs oxygen from the air. Orange or red lead is used by paper-stainers, manufacturers of wall-paper, and for highly-colored cards.

White lead is manufactured as follows: —

Small earthen pots are partially filled with vinegar or acetic acid. Pig-lead of commerce, cast into round perforated plates technically called buckles, are placed in the pots above the acid, and not in contact with it. The pots thus filled are placed in a chamber upon a layer of spent tan-bark. Alternate layers of pots and tan-bark are filled up to the roof of the chamber: air is introduced into the chamber through flues and natural crevices. The tan contains moisture, becomes heated, and evolves carbonic acid. By chemical action the lead is oxidized by the oxygen of the air, and then, in combination with the carbonic acid, becomes a carbonate of the oxide of lead.

The acetic acid does not touch the lead; but its presence facilitates the process of oxidation.

In the course of three months the lead has generally become entirely oxidized, of a white color, but retaining its original shape of a buckle. It is then crushed in rollers, any uncorroded pieces of lead having first been separated from it, then ground and dried. Then, if it is to be sold in oil, it is reground with linseed-oil.

An analysis of the articles in question gave the following results: —

OXIDE OF ZINC.

Zinc	79.98
Oxygen	19.67
Insoluble matter and impurities	.35
	100.00

ORANGE MINERAL.

Lead	90.69
Oxygen, with traces of carbonic acid	9.31
	100.00

DRY WHITE LEAD.

Lead	80.11
Oxygen	6.19
Carbonic acid	11.39
Water	2.31
	100.00

WHITE LEAD IN OIL.

Dry white lead *	92.92
Linseed-oil	7.08
	100.00

NITRATE OF LEAD.

Lead	61.90
Oxygen	4.90
Nitric acid	32.35
Moisture	.74
Traces of free nitric acid, insoluble matter	.11
	100.00

* This dry white lead gave the following result: —

Lead	80.20
Oxygen	6.20
Carbonic acid	11.21
Water	2.39
	100.00

The metals named in the respective analyses are the components of chief value. There is no metallic zinc or metallic lead, in the ordinary sense of these words, — that is, no metallic zinc or metallic lead of commerce, — in either of these articles. The ingredients in each of the articles unite by reason of their chemical affinity. Oxide of zinc has a different specific gravity, density, and color, from metallic zinc. White lead and nitrate of lead have each a different specific gravity, density, and color, from metallic lead.

The manufacture of orange or red lead and white lead, either dry or in oil, is carried on by the same persons in the same establishment, commencing with the corrosion of the lead, and stopping the manufacture at certain stages according to the product desired.

Oxide of zinc and white lead are principally used as pigments. Nitrate of lead is used largely in dyeing and in the manufacture of pigments, and as a disinfectant, and for other purposes. It is never ground in oil. Oxide of zinc, white lead, and red lead, are imported both dry and ground in oil. They must be ground in oil before they can be used as paints. The oxide of zinc and the red lead in the invoices in controversy were dry, and the white lead was ground in oil, and were all to be used in the manufacture of or as pigments.

All the articles in suit are generally dealt in by persons connected with the manufacure and sale of pigments, and they are staples of trade in that line of commerce. Nitrate of lead, however, is principally dealt in by wholesale druggists: metal dealers do not usually deal in any of these articles.

The method of the manufacture of white lead has been substantially the same for upwards of twenty-five years.

There being no disputed question of fact in the case, the court informed the jury that the articles in question had been classified in the tariff acts, not with reference to the material of which they were composed, but with reference to the use to which they were destined and for which they were manufactured, and had been classed as paints, and were not, within the true construction and meaning of said acts, manufactures of metal; and directed a verdict for the defendant, which was rendered accordingly. From the judgment on the verdict this writ of error is prosecuted.

Mr. Edward Hartley for the plaintiff in error.

The words "manufactures of metals, of which either of them is the component part of chief value," describe nothing technically: they are evidently used in their ordinary sense, and not as terms of trade or art. *Lottimer* v. *Smythe*, 17 Int. Rev. Rec. 13, 14.

As to what constitutes a manufactured article. *Lawrence* v. *Allen*, 7 How. 793, 794; *Corning* v. *Burden*, 15 id. 267 *et seq.*; 2 Bouv. 101; 2 Barn. & Ald. 345, 350; *Schriefer* v. *Wood*, 5 Blatch. 215. The objection that the articles in suit are not metallic in form, and have been converted by oxidation into substances in which the identity of the metal is lost, is immaterial. Refined distinctions in the construction of tariffs have always been discountenanced. *Two Hundred Chests of Tea*, 9 Wheat. 438; *Schriefer* v. *Wood*, *supra*.

The declared purpose of the act of 1872, "to *reduce* duties on imports," must be considered in interpreting its provisions. *United States* v. *Fisher*, 2 Cr. 358; *United States* v. *Palmer*, 3 Wheat. 610.

Certain exceptions are specified by Congress in the second section of the act, which negative the idea of any *other* than those directly made. *Tinkham* v. *Tapscott*, 17 N. Y. 141; *Bend* v. *Hoyt*, 13 Pet. 271–273.

The intent of the law-makers is the law. A thing within the intention of the makers of a statute is as much within the statute as if it were within the letter. *Zouch* v. *Stowell*, Plowden, 366; *United States* v. *Freeman*, 3 How. 565; *Telegraph Co.* v. *Eyre*, 19 Wall. 427; *Atkins* v. *The Disintegrating Co.*, 18 id. 301.

In no tariff-act have the articles in suit been described by reference to their use, but always under their own proper names.

Mr. Assistant Attorney-General Edwin B. Smith, contra.

The only question in this case is, whether or not white lead and the other articles imported by the plaintiffs are manufactures of metals, or of which metals are the component part of chief value, within the true meaning of the act of June 6, 1862, and of the tariff of which it is amendatory. It is of no consequence what these substances are, chemically or scientifically,

unless they are also classified commercially in the same way as in chemistry or science; for it is, primarily, the commercial language — designation, meaning, and classification — that is adopted in tariff-acts, "although it may not be scientifically correct." *United States* v. *One Hundred and Twelve Casks of Sugar*, 8 Pet. 279; *Elliott* v. *Swartwout*, 10 id. 151; *Two Hundred Chests of Tea*, 9 Wheat. 438; *Curtis* v. *Martin*, 3 How. 109; *Lawrence* v. *Allen*, 7 id. 793, 794; *United States* v. *Breed*, 1 Sum. 159, 163; *United States* v. *Sanchet*, Gilp. 273; *Maillard* v. *Lawrence*, 16 How. 261.

The accomplishment of a result by chemical action is called a *process*. *Corning* v. *Burden*, 15 How. 267.

In some instances a manufacture may be one kind of process, and in some another. *Lawrence* v. *Allen*, 7 How. 793.

The amount of duty is to be determined by the commercial designation of the goods or articles imported. *Lottimer* v. *Smythe*, 17 Int. Rev. Rec. 13; *Durden* v. *Murphy*, 18 id. 174; *Elliott* v. *Swartwout*, 10 Pet. 137; *Riggs* v. *Frick*, Taney, C. J., Rep. 100.

Metals are *elementary* mineral substances. As soon as they combine with aught else, they cease to be metals. White lead is not a manufacture of lead within the meaning of the Tariff Act. It is a distinct article, in which the lead of commerce is not present. There is no lead in it. True, it is produced *from* lead; but it is not a manufacture *of* that article. The other articles imported by the plaintiffs are still farther removed by chemical processes from their metallic bases. The raw metal under the tariff-laws is pig lead, in form designed for manufacture, and purchased by manufacturers. A manufacture of that metal would be some article wrought up for a specific purpose, in the construction of which, lead, *as an elementary metal*, is a component. That such is the case is evident from the exceptions in the second section of the act. 17 Stat. 232.

The special exception of the articles in dispute was unnecessary, because they were not included in the general terms to which the exception was made. There was no occasion to except them, if they were not within the *commercial* sense of the preceding general clause.

MR. JUSTICE BRADLEY delivered the opinion of the court.

The plaintiffs contend that white lead, nitrate of lead, oxide of zinc, and dry and orange mineral, are "manufactures of metals." Whether they are or not is the question at issue.

Unless some special usage to the contrary can be shown, the construction relied on by the plaintiffs is clearly wrong.

When the act speaks of "manufactures of metals," it obviously refers to manufactured articles in which metals form a component part. When we speak of manufactures of wood, of leather, or of iron, we refer to articles that have those substances respectively for their component parts, and not to articles in which they have lost their form entirely, and have become the chemical ingredients of new forms. The qualification which is added to the phrase "manufactures of metals" — namely, "manufactures of metals of which either of them" (that is, either of the *metals*) "is the component part of chief value" — corroborates this view.

If the plaintiffs could show a different legislative usage, there would be some plausibility in their position. But this they have failed to do. So far as our attention has been called to the usage, it corroborates the view above expressed. For example: in the act of March 2, 1861, to provide for the payment of outstanding treasury-notes, &c., the import-duties to be levied on lead, copper, and zinc, in various forms, are imposed by the eighth section; whilst those on white lead, oxide of zinc, red lead, litharge, &c., are separately provided for in the ninth section. And in the act passed July 14, 1862, for increasing duties, &c., the duties on iron in different forms, and on "all manufactures of iron," are provided for in sect. 3, and those on copper and "manufactures of copper," and on zinc and lead, in sect. 4; whilst those "on copperas, green vitriol, or sulphate of iron," "on white and red lead," and "oxide of zinc," are provided for in sect. 7; and those on "litharge" and "verdigris," in sect. 5. In none of these cases is there an intimation that the classes of articles named lap on to each other, or that one duty imposed is exceptional to another; and yet, if the position of the plaintiffs is correct, copperas is a manufacture of iron, white and red led and litharge are manufactures of lead, and verdigris is a manufacture of copper.

The truth is, that, in the nature of things, a metal and its oxide or sulphate are totally distinct and unlike. Any substance subjected to a chemical change by uniting with another substance loses its identity: it becomes a different mineral species. The basis of common clay is the metal aluminium, and the basis of lime is the metal calcium. But no one would think of calling clay and lime metals; nor, if artificially made, would he call them manufactures of metals. They have lost all their metallic qualities. In just the same manner, iron ceases to be iron when it becomes rust, which is oxide of iron; or when it becomes copperas, which is sulphate of iron. None would think of calling blue vitriol copper. So white lead, nitrate of lead, oxide of zinc, and dry or orange mineral, are not metals: they have no metallic qualities. In the poverty of language, they have no distinct names, it is true, as lime and clay and vitriol have; but each is designated by a scientific periphrasis, in which the name of the metal which forms one of its chemical elements is used. This use of the name has probably been one cause of the confusion which has arisen on the subject.

Judgment affirmed.

SPENCER v. UNITED STATES.

No suit can be maintained against the United States under the Abandoned and Captured Property Act (12 Stat. 820), if the property in question was neither captured, seized, nor sold pursuant to its provisions, and the proceeds were not paid into the treasury.

APPEAL from the Court of Claims.

This cause was argued by *Mr. Joseph Casey* for the appellant, and by *Mr. Assistant Attorney-General Edwin B. Smith* for the appellee.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

In this case, the Court of Claims has certified here, in answer to inquiries from us, (1) that the cotton in question did not come into the hands of any agent of the United States as abandoned or captured property, and was not sold as such;

and (2) that the proceeds of the sale were not paid into the treasury of the United States.

Upon this state of facts, the judgment of the court below was clearly right. It is certain that no suit can be maintained against the United States under the Abandoned and Captured Property Act, if the property has neither been captured, seized, nor sold pursuant to its provisions, and the proceeds are not in the treasury. *Judgment affirmed.*

McMANUS *v.* O'SULLIVAN ET AL.

This court has no jurisdiction to re-examine the judgment of a State court where a Federal question was not in fact passed upon, and where a decision of it was rendered unnecessary in the view which the court below took of the case.

ERROR to the Supreme Court of the State of California.

Submitted by *Mr. Calhoun Benham* for plaintiff, and by *Mr. John M. Coghlan* and *Mr. William Irvine* for defendants.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

Terence B. McManus, under whom the plaintiff claims, entered into the possession of the premises in controversy in 1854, or thereabouts. He continued his possession until his death in 1861, at or about which time the defendants entered and held adversely to his estate until the commencement of this action in August, 1867.

When McManus entered, and during all the time he was in possession, the city of San Francisco was asserting title to the property, under a Mexican pueblo right, before the commissioners appointed under the act of Congress providing for the settlement of private land-claims in California, and before the courts upon appeal. A decree was rendered in favor of the city by the Circuit Court of the United States, May 18, 1865. From this decree an appeal was taken to this court; pending which an act was passed, March 8, 1866, entitled "An Act to quiet the title to certain lands within the corporate limits of the city of San Francisco." 14 Stat. 4. Upon the passage of this act, the appeal was dismissed.

McManus and his representatives do not pretend to connect themselves with the city title by any actual grant. The extent of their claim is, that their possession was evidence of their connection with the true title, which was at that time the city title. Neither do the defendants assert any claim under the true title. Their only defence is possession adverse to the estate of McManus, but admitted to be not adverse to the city. Against this the plaintiff insists, that, as the defendants did not claim adversely to all the world, their possession adverse to him could not defeat his right of action.

Thus it will be seen that two questions were properly presented to the Supreme Court of California for adjudication; to wit: —

1. Does possession necessarily connect itself with the true title, in the absence of proof to the contrary? and, —

2. Is possession, within the meaning of the statute of limitation in California, adverse to one who claims title, if it is not also adverse to all the world?

If these questions were decided against the plaintiff, no Federal question could be involved. The record, without the opinion of the court, shows that they were presented, and does not show that any Federal question was decided. Under such circumstances, it is proper, if it can be at any time, to look to the opinion of the court, which has been sent here with the record, to ascertain whether, in point of fact, the court necessarily passed by the intermediate questions, and actually did decide as to the effect of the pueblo right and the treaty, with the accompanying acts of Congress, upon the title of the plaintiff.

Looking to that, we find that the court decided that possession did not carry with it the presumption that the plaintiff held under the city title; and that, if the possession of the defendants was adverse to him, it was a bar to his right of action, even though it was not adverse to all the world. These are questions within the exclusive jurisdiction of the State courts, and not subject in any manner to our re-examination. Their decision against the plaintiff made it unnecessary to consider the proposed Federal question. Thus it is seen that the Federal question was, in fact, not decided; and that, in the view the court below took of the case, such a decision was not necessary. It is clear, therefore, that we have no jurisdiction of this case.

Writ of error dismissed.

WATTS v. TERRITORY OF WASHINGTON.

This court can only review the final judgments of the Supreme Court of the Territory of Washington in criminal cases, when the Constitution or a statute or treaty of the United States is drawn in question.

ERROR to the Supreme Court of the Territory of Washington.

Mr. Nathaniel Wilson for the plaintiff in error. Mr. Assistant Attorney-General Edwin B. Smith, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This court can only review the final judgments of the Supreme Court of the Territory of Washington in criminal cases, when the Constitution or a statute or treaty of the United States is drawn in question. Rev. Stat., sect. 702.

This is a criminal case; but the record does not present for our consideration any question of which we can take jurisdiction. It nowhere appears that the Constitution or any statute or treaty of the United States is in any manner drawn in question. *Writ dismissed for want of jurisdiction.*

DAINESE v. COOKE ET AL.

If the proper officer gives a permit for the erection of certain specially described buildings in Washington City, a clear case of danger to the public safety, or of departure from the permit, must be made before the party acting under it can be arrested midway in the construction of them, and required to remove them.

APPEAL from the Supreme Court of the District of Columbia.

Mr. F. P. Cuppy and *Mr. John W. Ross* for the appellant, and *Mr. Edwin L. Stanton* for the appellees.

MR. JUSTICE MILLER delivered the opinion of the court.

These are appeals by Dainese in two cases from decrees of the Supreme Court of the District of Columbia, in one of which he was complainant, and his bill was dismissed. In the other

he was defendant, and a perpetual injunction was decreed against him. As the subject-matter of these suits is the same, they will be considered together in this court, and should have been consolidated and heard together in the court below, though two separate decrees were rendered, and separate records are presented to us.

The appellant's bill was filed first. He therein alleges, that having made a contract with one Wesley Frey, on the 29th August, 1872, for the construction of a block of frame buildings on the south side of C Street south-east, in Washington City, he applied to Adolph Cluss, inspector of buildings, exhibited to him said contract, and obtained his regular written permit to erect the buildings; that Frey entered upon the work; and, when he had so far progressed with the buildings that he was ready to put on the roof, plaintiff received on the 25th November, from said Cluss, a notification, that, unless he removed them, he, Cluss, would be compelled to take them down at once at complainant's expense. The contract for the buildings, the permit to build, and the demand to remove them, are made exhibits. The latter is based upon the ground that the buildings are not in conformity with the regulations in force in the city, and that they are of insufficient material, and dangerous to the community. The prayer of the bill is for an injunction against the appellees, constituting the board of public works, of which Cluss was a member, to prevent their interference with his buildings. On the filing of this bill a temporary restraining order was granted, and the hearing of the application for injunction set for the seventh day of December.

The record discloses no further action in this case until Jan. 4, when the answer of the appellees and the separate answer of Cluss were filed.

The answer in substance admits that the contract with Frey was shown to Cluss, and that Cluss issued a permit to build. It denies that the buildings conform to the contract or to the permit, and avers that the materials of which they are being constructed are insufficient and dangerous; and that, such being the opinion of Cluss, the inspector of buildings, the board had ordered their further construction to be arrested; and, on the failure of Dainese to conform to their requirements, they ordered that the buildings should be pulled down by the police force.

They annex as exhibits the affidavits of Morsell, Wilson, Edmonston, and Fleming, in support of their allegation of the character of the work; and also the rules and regulations respecting the construction of private buildings, prepared by them as a board of public works.

The next record entry in this case is under date of Jan. 11, 1873, and is as follows: "This cause came on to be heard on bill, answer, and affidavits. It is thereupon this day adjudged, ordered, and decreed, that complainant's bill be, and hereby is, dismissed."

On appeal to the general term, this decree was ordered to be affirmed without prejudice. What this qualification may mean we are quite at a loss to determine.

In this record there is no evidence in behalf of defendants except four affidavits filed with their answer as exhibits. There are eleven affidavits on behalf of complainant.

Adverting now to the other case, it presents a bill filed by the appellees, who compose the board of public works, against Dainese and Frey, to prevent them from proceeding with the work on the same buildings, which are the subject of the first suit. This bill was presented to Judge Wylie on the 31st December, 1872, when he granted a restraining order, and set the motion for an injunction for hearing at the City Hall, Jan. 11, 1873, at eleven o'clock A.M. The bill itself was afterwards — to wit, Jan. 2 — filed in the Supreme Court. The answer of Frey is filed Jan. 6, and that of Dainese Jan. 7; and the next action is on the eleventh of that month, when the following record entry was made: —

"This cause came on to be heard on bill, answer, and affidavits. The cause was argued by counsel. It is, thereupon, this day adjudged, ordered, and decreed, that the injunction prayed for in said bill be, and the same is hereby, made permanent."

There is found in this transcript a statement of Dr. Verdi, health-officer; of A. B. Mullett, who styles himself consulting architect of the board of public works; a protest of some twenty citizens against the buildings, also of the trustees of School District No. 3, — all of which are unsworn, and wholly without authentication.

There are but two affidavits in support of the bill, — that of Entwissle and of Wood.

The bill alleges, in the same general terms as the answer to the bill in the first suit, that the buildings were of insufficient material, dangerous to the community, and in violation of the Building Regulations, especially sects. 3, 5, 6, 9, 32, 33, 36. The answer is a specific and full denial of these allegations, and is supported by four affidavits.

There is no replication to the answer in either case, and no stipulation that the affidavits may be treated as depositions on the hearing. There is no order disposing of the application for a preliminary injunction in either case.

Taking, however, the short and sententious order of the court to be as it purports, — a final hearing on bill, answer, and affidavits in each case, — we are of opinion that the preponderance of evidence as to the only issue made is in favor of the appellant. That issue was, whether the materials were so defective as to justify the arrest of the work after so much had been done, and whether the mode of constructing the buildings endangered the public safety.

In deciding this question, the protest of citizens and of the trustees of the school district, the statement of Dr. Verdi and the certificate of Mullett, cannot be considered, because they are not affidavits, and are not evidence under any circumstances, unless by consent.

Looking to the suit against Dainese, we have his full and unequivocal denial of the charges in his answer; and also that of Frey, supported by a decided preponderance of affidavits: and though we may suspect, from the fact that several of these latter are signed with a cross, that the affiants were not the most intelligent men that could be found, they were probably mechanics engaged in the work, and fully capable of telling whether timbers were in a state of decay, or were badly put together. If it be true that the proper officer, on examining appellant's contract, gave a permit for the erection of such buildings as it contemplated, — and of this there is no denial, — the other side should make a clear case of departure from the permit, or danger to public interests, before appellant should be arrested midway in the construction of the buildings, and

have them summarily torn down, with all the necessary loss and expense to him of such a course. There is no such clear case made, and the evidence preponderates the other way; and we must, on this ground alone, reverse both decrees.

Usually, when a case in chancery has been heard, and a final decree rendered, this court, if it reverses that decree, will direct such decree as the court below should have rendered; which in this case would be to dismiss the bill of the appellees, and render a perpetual injunction against them on the bill of appellant. But, pending the appeal, the board of public works has been abolished. The buildings undoubtedly have been removed; and no injunction against their removal can restore them, or compensate the appellant for their removal.

Besides, the summary and irregular manner in which the case was tried below leaves this court in great doubt as to what was tried, and on what evidence the cases were heard.

On the whole, we shall order the decree of the Supreme Court of the District of Columbia to be reversed in each of the cases; that they be remanded to that court for such further proceedings, including leave to amend pleadings, as may be in accordance with equity and with this opinion. Appellant to recover his costs of appeal in both cases.

HALDEMAN ET AL. v. UNITED STATES.

1. The entry of a judgment, "that the suit is not prosecuted, and be dismissed," is nothing more than the record of a nonsuit.
2. The words "dismissed agreed," entered as the judgment of a court, do not of themselves import an agreement to terminate the controversy, nor imply an intention to merge the cause of action in the judgment.
3. If the agreement under which the suit was dismissed settled or released the matter in controversy, that fact must be shown by the plea to render it available as a bar to a second suit in respect of the same matter.

ERROR to the Circuit Court of the United States for the District of Kentucky.

Mr. John M. Harlan for the plaintiffs in error.

Mr. Assistant Attorney-General Edwin B. Smith, contra.

MR. JUSTICE DAVIS delivered the opinion of the court.

This is an action of debt against the plaintiffs in error on a bond conditioned for the performance of official duty by Haldeman, as surveyor of the customs, and depositary of the public moneys, at Louisville, Ky. They pleaded four pleas of judgment recovered for the same cause of action, to each of which the court below sustained a demurrer. The correctness of these rulings presents the only point in the case.

It is a general rule, that a plea of former recovery, whether it be by confession, verdict, or demurrer, is a bar to any new action of the same or the like nature for the same cause. This rule conforms to the policy of the law, which requires an end to the litigation after its merits have been determined. But there must be at least one decision on a *right* between the parties before there can be said to be a termination of the controversy, and before a judgment can avail as a bar to a subsequent suit. Conceding that this action is between the same parties as well as for the same subject-matter as the former one, are the United States barred from a recovery by reason of any thing alleged in the pleas? The first, second, and fourth pleas are not essentially different. In each the judgment relied on is, "that the said suit is not prosecuted, and be dismissed." This entry is nothing more than the record of a nonsuit, although the customary technical language is not used. But the plaintiffs in error deny that this is the effect of the order, and insist that the pleas present a case of *retraxit*, by which the United States for ever lost their action, because they voluntarily announced to the court, that, on the defendants' paying the costs, the suit would be dismissed. Such an announcement does not imply that they had no cause of action, or, if they had, that they intended to renounce it, or that it was adjusted. Nonsuits are frequently taken, on payment of costs by the adverse party, in order that the controversy may be arranged out of court; but they do not preclude the institution and maintenance of subsequent suits in case of failure to settle the matters in dispute. The defendants, by consenting to pay the costs, gained delay, if nothing more. This doubtless served their purpose; but the idea of turning the mere withdrawal of a suit into an intentional abandonment of the claim or demand asserted thereby is an afterthought.

The third plea alleges that the former suit was identical with this, and was "dismissed agreed" by the judgment of the court. If this plea is true, the others cannot be; for they recite the judgment differently; and there could have been but one record of the judgment, as there was but one suit. In general, a defendant may in different pleas state as many separate and independent grounds of defence as he may be advised is material; but this rule has no application to this case. There is but one defence presented, and that required only a single plea. More than this was unnecessary, and in violation of good practice. It is quite apparent, from the language of the record in the fourth plea (the only one which purports to give it in full), that there was no such entry of judgment as stated in the third plea; and on this account it should have been rejected. But, even if it truly recites the entry of judgment, it is still bad. There must have been a right adjudicated or released in the first suit to make it a bar, and this fact must appear affirmatively. The plea does not aver that the parties had by their agreement adjusted the matter in controversy, or that there was any adjudication thereon. Whatever may be the effect given by the courts of Kentucky to a judgment entry "dismissed agreed," it is manifest that the words do not of themselves import an agreement to terminate the controversy, nor imply an intention to merge the cause of action in the judgment. Suits are often dismissed by the parties; and a general entry is made to that effect, without incorporating in the record, or even placing on file, the agreement. It may settle nothing, or it may settle the entire dispute. If the latter, there must be a proper statement to that effect to render it available as a bar. But the general entry of the dismissal of a suit by agreement is evidence of an intention, not to abandon the claim on which it is founded, but to preserve the right to bring a new suit thereon, if it becomes necessary. It is a withdrawal of a suit on terms, which may be more or less important. They may refer to costs, or they may embrace a full settlement of the contested points; but, if they are sufficient to bar the plaintiff, the plea must show it. Tried by this test, the third plea is, like the others, bad.

Judgment affirmed.

TWIN-LICK OIL COMPANY *v.* MARBURY.

1. A director of a corporation is not prohibited from lending it moneys when they are needed for its benefit, and the transaction is open, and otherwise free from blame; nor is his subsequent purchase of its property at a fair public sale by a trustee, under a deed of trust executed to secure the payment of them, invalid.
2. The right of a corporation to avoid the sale of its property by reason of the fiduciary relations of the purchaser must be exercised within a reasonable time after the facts connected therewith are made known, or can by due diligence be ascertained. As the courts have never prescribed any specific period as applicable to every case like the statute of limitations, the determination as to what constitutes a reasonable time in any particular case must be arrived at by a consideration of all its elements which affect that question.
3. The property in controversy in the present suit had been appropriated and used for the production of mineral oil from wells, — a species of property which is, more than any other, subject to rapid, frequent, and extreme fluctuations in value. The director who bought it committed no actual fraud, and the corporators knew at the time of his purchase all the facts upon which their right to avoid it depended. They refused to join him in it, or to pay assessments then made on their stock; and it was nearly four years thereafter when the hazard was over, and his skill, energy, and money had made his investment profitable, that any claim to, or assertion of right in, the property was made by the corporation or the stockholders. *Held*, that the court below properly dismissed the bill of complaint of the corporation, praying that the purchaser should be decreed to hold as its trustee, and to account for the profits during the time he had the property.

APPEAL from the Supreme Court of the District of Columbia.

Mr. J. D. McPherson and *Mr. Charles Beasten, Jr.*, for the appellants.

Mr. Walter S. Cox and *Mr. W. D. Davidge* for the appellee.

MR. JUSTICE MILLER delivered the opinion of the court.

The appellant here, complainant below, was a corporation organized under the laws of West Virginia, engaged in the business of raising and selling petroleum. It became very much embarrassed in the early part of 1867, and borrowed from the defendant the sum of $2,000, for which a note was given, secured by a deed of trust, conveying all the property, rights, and franchises of the corporation to William Thomas, to secure the payment of said note, with the usual power of sale in default of payment. The property was sold under the deed

of trust; was bought in by defendant's agent for his benefit, and conveyed to him in the summer of the same year. The defendant was, at the time of these transactions, a stockholder and director in the company; and the bill in this case was filed in April, 1871, four years after, to have a decree that defendant holds as trustee for complainant, and for an accounting as to the time he had control of the property. It charges that defendant has abused his trust relation to the company, to take advantage of its difficulties, and buy in at a sacrifice its valuable property and franchises; that, concealing his knowledge that the lease of the ground on which the company operated included a well, working profitably, and by promises to individual shareholders that he would purchase in the property for the joint benefit of the whole, he obtained an unjust advantage, and in other ways violated his duty as an officer charged with a fiduciary relation to the company. As to all this, which is denied in the answer, and as to which much testimony is taken, it is sufficient to say that we are satisfied that the defendant loaned the money to the corporation in good faith, and honestly to assist it in its business in an hour of extreme embarrassment, and took just such security as any other man would have taken; that when his money became due, and there was no apparent probability of the company paying it at any time, the property was sold by the trustee, and bought in by defendant at a fair and open sale, and at a reasonable price; that, in short, there was neither actual fraud nor oppression; no advantage was taken of defendant's position as director, or of any matter known to him at the time of the sale, affecting the value of the property, which was not as well known to others interested as it was to himself; and that the sale and purchase was the only mode left to defendant to make his money.

The first question which arises in this state of the facts is, whether defendant's purchase was absolutely void.

That a director of a joint-stock corporation occupies one of those fiduciary relations where his dealings with the subject-matter of his trust or agency, and with the beneficiary or party whose interest is confided to his care, is viewed with jealousy by the courts, and may be set aside on slight grounds, is a doctrine founded on the soundest morality, and which has received

the clearest recognition in this court and in others. *Koehler* v. *Black River Falls Iron Co.*, 2 Black, 715; *Drury* v. *Cross*, 7 Wall. 299; *Luxemburg R.R. Co.* v. *Maquay*, 25 Beav. 586; *The Cumberland Co.* v. *Sherman*, 30 Barb. 553; 16 Md. 456. The general doctrine, however, in regard to contracts of this class, is, not that they are absolutely void, but that they are voidable at the election of the party whose interest has been so represented by the party claiming under it. We say, this is the general rule: for there may be cases where such contracts would be void *ab initio;* as when an agent to sell buys of himself, and by his power of attorney conveys to himself that which he was authorized to sell. But, even here, acts which amount to a ratification by the principal may validate the sale.

The present case is not one of that class. While it is true that the defendant, as a director of the corporation, was bound by all those rules of conscientious fairness which courts of equity have imposed as the guides for dealing in such cases, it cannot be maintained that any rule forbids one director among several from loaning money to the corporation when the money is needed, and the transaction is open, and otherwise free from blame. No adjudged case has gone so far as this. Such a doctrine, while it would afford little protection to the corporation against actual fraud or oppression, would deprive it of the aid of those most interested in giving aid judiciously, and best qualified to judge of the necessity of that aid, and of the extent to which it may safely be given.

There are in such a transaction three distinct parties whose interest is affected by it; namely, the lender, the corporation, and the stockholders of the corporation.

The directors are the officers or agents of the corporation, and represent the interests of that abstract legal entity, and of those who own the shares of its stock. One of the objects of creating a corporation by law is to enable it to make contracts; and these contracts may be made with its stockholders as well as with others. In some classes of corporations, as in mutual insurance companies, the main object of the act of incorporation is to enable the company to make contracts with its stockholders, or with persons who become stockholders by the very act of making the contract of insurance. It is very true, that as

a stockholder, in making a contract of any kind with the corporation of which he is a member, is in some sense dealing with a creature of which he is a part, and holds a common interest with the other stockholders, who, with him, constitute the whole of that artificial entity, he is properly held to a larger measure of candor and good faith than if he were not a stockholder. So, when the lender is a director, charged, with others, with the control and management of the affairs of the corporation, representing in this regard the aggregated interest of all the stockholders, his obligation, if he becomes a party to a contract with the company, to candor and fair dealing, is increased in the precise degree that his representative character has given him power and control derived from the confidence reposed in him by the stockholders who appointed him their agent. If he should be a sole director, or one of a smaller number vested with certain powers, this obligation would be still stronger, and his acts subject to more severe scrutiny, and their validity determined by more rigid principles of morality, and freedom from motives of selfishness. All this falls far short, however, of holding that no such contract can be made which will be valid; and we entertain no doubt that the defendant in this case could make a loan of money to the company; and as we have already said that the evidence shows it to have been an honest transaction for the benefit of the corporation and its shareholders, both in the rate of interest and in the security taken, we think it was valid originally, whether liable to be avoided afterwards by the company or not.

If it be conceded that the contract by which the defendant became the creditor of the company was valid, we see no principle on which the subsequent purchase under the deed of trust is not equally so. The defendant was not here both seller and buyer. A trustee was interposed who made the sale, and who had the usual powers necessary to see that the sale was fairly conducted, and who in this respect was the trustee of the corporation, and must be supposed to have been selected by it for the exercise of this power. Defendant was at liberty to bid, subject to those rules of fairness which we have already conceded to belong to his peculiar position; for, if he could not bid, he would have been deprived of the only means which his

contract gave him of making his debt out of the security on which he had loaned his money. We think the sale was a fair one. The company was hopelessly involved beside the debt to defendant. The well was exhausted, to all appearance. The machinery was of little use for any other purpose, and would not pay transportation. Most of the stockholders who now promote this suit refused to pay assessments on their shares to aid the company. Nothing was left to the defendant but to buy it in, as no one would bid the amount of his debt.

The next question to be decided is, whether, under the circumstances of this case, the complainant had a right to avoid this sale at the time this suit was brought.

The bill alleges, that, both prior to the sale and since, the defendant made various declarations to other stockholders to the effect that he only designed to purchase the property for the benefit of all or a part of the stockholders; and there is some testimony to show, that, after the sale, he did propose, that, if his debt was paid by the company or the shareholders, he would relinquish his purchase.

But we need not decide whether any of these declarations raised a legal obligation to do so or not; nor whether, without such declarations, the sale and deed were voidable at the election of the complainant, — a proposition which is entitled to more consideration, resting solely on the fiduciary relations of the defendant to the plaintiffs, than on the evidence in this case of the declarations alluded to.

We need not decide either of these propositions, because plaintiff comes too late with the offer to avoid the sale.

The doctrine is well settled, that the option to avoid such a sale must be exercised within a *reasonable* time. This has never been held to be any determined number of days or years as applied to every case, like the statute of limitations, but must be decided in each case upon all the elements of it which affect that question. These are generally the presence or absence of the parties at the place of the transaction, their knowledge or ignorance of the sale and of the facts which render it voidable, the permanent or fluctuating character of the subject-matter of the transaction as affecting its value, and the actual

rise or fall of the property in value during the period within which this option might have been exercised.

In fixing this period in any particular case, we are but little aided by the analogies of the statutes of limitation; while, though not falling exactly within the rule as to time for rescinding, or offering to rescind, a contract by one of the parties to it for actual fraud, the analogies are so strong as to give to this latter great force in the consideration of the case. In this class of cases the party is bound to act with reasonable diligence as soon as the fraud is discovered, or his right to rescind is gone. No delay for the purpose of enabling the defrauded party to speculate upon the chances which the future may give him of deciding profitably to himself whether he will abide by his bargain, or rescind it, is allowed in a court of equity.

In the recent case of *Upton, Assignee* v. *Tribilcock*, *supra*, p. 45, it was held that the purchaser of stock in an insurance company, who had offered to rescind within two or three months because his note had been sent to a bank for collection in fraud of the agreement to the contrary, could not avail himself of that offer to let in as defence other fraudulent representations then unknown to him, when he was sued by the assignee in bankruptcy for the unpaid instalments on that stock after the bankruptcy of the company.

The authorities to the point of the necessity of the exercise of the right of rescinding or avoiding a contract or transaction as soon as it may be reasonably done, after the party with whom that right is optional is aware of the facts which give him that option, are numerous and well collected in the brief of appellees' counsel. The more important are as follows: *Badger* v. *Badger*, 2 Wall. 87; *Harwood* v. *R.R. Co.*, 17 id. 78; *Marsh* v. *Whitman*, 21 id. 178; *Vigers* v. *Pike*, 8 Cl. & Fin. 650; *Wentworth* v. *Lloyd*, 32 Beav. 467; *Follansbee* v. *Kilbreth*, 17 Ill. 522.

The cases of *Bliss* v. *Edmonson*, 8 DeG. M. & G. 787, *Prendergast* v. *Turton*, 1 You. & Coll., while asserting the same general doctrine, have an especial bearing on this case, because they relate to mining property.

The fluctuating character and value of this class of property is remarkably illustrated in the history of the production of mineral oil from wells. Property worth thousands to-day is

worth nothing to-morrow; and that which would to-day sell for a thousand dollars as its fair value, may, by the natural changes of a week or the energy and courage of desperate enterprise, in the same time be made to yield that much every day. The injustice, therefore, is obvious, of permitting one holding the right to assert an ownership in such property to voluntarily await the event, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit.

While a much longer time might be allowed to assert this right in regard to real estate whose value is fixed, on which no outlay is made for improvement, and but little change in value, the class of property here considered, subject to the most rapid, frequent, and violent fluctuations in value of any thing known as property, requires prompt action in all who hold an option, whether they will share its risks, or stand clear of them.

The case before us illustrates these principles very forcibly. The officers, and probably all the stockholders, who were not numerous, knew of the sale as soon as made. As there was no actual fraud, they knew all the facts on which their right to avoid the contract depended. They not only refused to join the defendant in the purchase when that privilege was tendered them, but they generally refused to pay assessments on their shares already made, which might have paid this debt.

The defendant then had a survey made of the ground leased to the corporation, the lease being the main thing he had acquired by the sale. When the lines were extended, the lease was found to embrace a well, then profitably worked by another company. Of this piece of good luck he availed himself, and by suit and compromise he obtained possession of that well. He put more of his money into it, and changed what had been a disastrous speculation by the company into a profitable business. With full knowledge of all these facts, the appellant took no action until this suit was brought, nearly four years after the sale; and not until all the hazard was over, and the defendant's skill, energy, and money had made his purchase profitable, was any claim or assertion of right in the property made by the corporation or by the stockholders.

We think, both on authority and principle, — a principle

necessary to protect those who invest their capital and their labor in enterprises useful but hazardous, — that we should hold that plaintiff has delayed too long. *Decree affirmed.*

BOLLING v. LERSNER.

This court has no jurisdiction to re-examine the judgment or decree of a State court, unless it appears from the record that a Federal question presented to that court was in fact decided, or that the decision was necessarily involved in the judgment or decree as rendered.

ERROR to the Supreme Court of Appeals of the State of Virginia.

Motion to dismiss for want of jurisdiction. *Mr. James V. Brook* and *Mr. James R. Tucker* in support of the motion. *Mr. Conway Robinson, contra.*

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The Circuit Court of Fauquier County, Va., rendered a decree in this cause Sept. 13, 1867. From this decree Lersner prayed an appeal to the District Court of Appeals, May 17, 1869. This was allowed by W. Willoughby, judge. Upon this allowance the appeal was docketed in the Appellate Court, and the parties appeared without objection or protest, and were heard. Upon the hearing, the decree of the Circuit Court was reversed, and the cause remanded with instructions to proceed as directed. When the case came to the Circuit Court upon the mandate of the Appellate Court, Bolling appeared, and objected to the entry of the decree which had been ordered, for the reason, among others, that Willoughby, the judge who allowed the appeal, had been appointed to his office by the commanding-general exercising military authority in Virginia under the reconstruction acts of Congress, and that those acts were unconstitutional and void. This objection was overruled, and a decree entered according to the mandate. From this decree Bolling took an appeal to the Supreme Court of Appeals, where the action of the Circuit Court was affirmed. To reverse

this decree of affirmance the present writ of error has been prosecuted.

We cannot re-examine the judgment or decree of a State court simply because a Federal question was presented to that court for determination. To give us jurisdiction, it must appear that such a question was in fact decided, or that its decision was necessarily involved in the judgment or decree as rendered.

In this case, Bolling presented to the court for its determination the question of the constitutionality of the reconstruction acts. This was a Federal question; but the record does not show that it was actually decided, or that its decision was necessary to the determination of the cause. While it, perhaps, sufficiently appears that the judge was appointed under the authority of the acts in question, it also appears that he was acting in the discharge of the duties of his office, and that he had the reputation of being the officer he assumed to be. It also appears, that, after the allowance of the appeal, the case was docketed in the Appellate Court; that Bolling appeared there; that he submitted himself to the jurisdiction of that court without objection, and presented his case for adjudication; that the case was heard and decided; and that the objection to the qualification of the judge who allowed the appeal was made for the first time in the Circuit Court, when the case came down with the mandate.

From this it is clear that the case might have been disposed of in the State court without deciding upon the constitutionality of the reconstruction acts. Thus, if it was held that the objection to the authority of the judge came too late, or that the allowance of an appeal by a judge *de facto* was sufficient for all the purposes of jurisdiction in the Appellate Court, it would be quite unnecessary to determine whether the judge held his office by a valid appointment. We might, therefore, dismiss the case, because it does not appear from the record that the Federal question was decided, or that its decision was necessary.

But if we go farther, and look to the opinion of the court, which, in this case, has been certified here as part of the record, we find that the Federal question was not decided. All the

judges agreed that Willoughby was a judge *de facto*, and that his acts were valid in respect to the public and third parties, even though he might not be rightfully in office. In this the court but followed its own well-considered holding, by all the judges, in *Griffin* v. *Cunningham*, 20 Gratt. 31, approved in *Quinn* v. *Cunningham*, id. 138, and *Teel* v. *Young*, 23 id. 691, and the repeated decisions of this court. *Texas* v. *White*, 7 Wall. 733; *Thorington* v. *Smith*, 8 id. 8; *Huntington* v. *Texas*, 16 id. 412; *Horn* v. *Lockhart*, 17 id. 580.

Writ dismissed for want of jurisdiction.

WOODRUFF ET AL. *v.* HOUGH ET AL.

1. A., who had covenanted with the supervisors of a county to construct a jail subject to the approval of a superintendent, who was authorized to stop the work if it and the materials furnished did not conform to certain plans and specifications, entered into a contract with B. to manufacture and erect in its proper position all the wrought-iron work for the jail, according to such plans and specifications. *Held*, that B. was entitled to recover on his contract the value of the work done and materials furnished by him, if he substantially complied with the plans and specifications, or a strict compliance therewith had been waived by A., although the supervisors, in the exercise of the power reserved in their contract with A., condemned B.'s work, and required A. to replace a portion of it.
2. Where the charge of the court below covers the whole ground necessary to enable the jury to apply the law to the matters in issue, and is not subject to any just exception, so that, if there be any error in the proceedings, it was committed solely by the jury, this court has no jurisdiction to retry the cause as if it were both court and jury, but must affirm the judgment.

ERROR to the Circuit Court of the United States for the Northern District of Illinois.

On the 5th of July, 1871, a contract was entered into between John Allen and the Board of Supervisors of Winnebago County, Ill., for the erection of a county jail, according to certain plans and specifications; the work to be done under the control of a building committee, which should have the right to make changes in the materials or construction of the building upon giving reasonable notice thereof. The contract also provided that all materials used and work done should be subject to the approval of a superintendent appointed by the

supervisors; and if at any time, in his judgment, the work or materials were not in accordance with the requirements of the contract, he should have power to stop the work until the difference should be adjusted by arbitration.

On the 18th of the same month, Allen made a contract with the defendants in error, who were the plaintiffs below, whereby they agreed to "furnish the material, manufacture, deliver, and erect in its proper position, all the wrought-iron work" for the jail, according to certain plans and specifications mentioned in his contract with the supervisors. It set forth the terms of payment by him, and a provision for an increase or decrease in cost occasioned by any changes in the materials or in the construction of the iron-work which might be made by the building committee.

The plaintiffs in error entered into a written guaranty with the defendants in error for the faithful performance by Allen of his agreement.

During the progress of the work, differences arose between Allen and his sub-contractors, growing out of the refusal of the supervisors to accept the work furnished by the latter, on the ground that it was not in compliance with the specifications of his contract with the supervisors and with defendants in error. After much of the work was done and put in place, it was condemned, and the work abandoned by defendants in error, who brought this suit against Allen's sureties for his failure to pay as they had guarantied he would.

The defendants below asked the court to instruct the jury, that if it appeared from the evidence that the plaintiffs had abandoned their contract with Allen before its entire completion, and after only a partial performance, they could not recover in an action on the special contract.

That even if it appeared from the evidence that the plaintiffs, after commencing work under their said contract, had been improperly obstructed in or prevented from the performance of the same, they could not maintain an action on the special contract sued on without proving a tender to Allen of the balance of the work required to be done by them by their said contract with him.

That if it appeared from the evidence that the payments

actually made to the plaintiffs by Allen, added to the amounts required to be paid by him, under a subsequent contract with a third party for a completion of the wrought-iron work (if such contract was the most economical one that he, under the circumstances, could make for the completion of said work after the same was abandoned by the plaintiffs), equalled or exceeded the whole price at which the work was to be done by the plaintiffs, then there could be no recovery.

That the defendants, being mere sureties upon a special written contract, were not necessarily liable, even though an action might be sustained against Allen.

That, under the facts as disclosed by the evidence, no action was sustainable upon the written contracts mentioned in the declaration, but that the plaintiffs' remedy was limited to an action upon an implied contract on the part of Allen to pay for the value of such work as had been retained by him, after it was furnished by the plaintiffs in alleged partial performance of their contract.

That the defendants were not liable upon their guaranty, if the plaintiffs were not entitled to recover upon their written contract with Allen.

But the court refused to so charge the jury, and thereupon gave its charge substantially as follows: —

To fully understand the obligations and liabilities of the parties, it is necessary to ascertain definitely the duties and obligations which plaintiffs and Allen had respectively assumed under their contract of July 18. The contract recites in substance that Allen had entered into a contract with Winnebago County to build and complete a jail at Rockford, according to certain plans and specifications.

The plaintiffs agreed to furnish the material for, manufacture and deliver, and erect in its proper position, all the wrought-iron work for said jail mentioned, and provided for in said plans and specifications under the caption of "Specifications for wrought-iron work."

These specifications, it will thus be seen, are an important element in the contract between Allen and plaintiffs; and it is only by reference to them that we are able to ascertain definitely what plaintiffs agreed to do.

The first requisite as to the character of the wrought-iron work is, that it is all to be made of the best quality Lake Superior iron, unless otherwise ordered in writing by the superintendent.

The plaintiffs claim that they proceeded, according to the terms of their agreement, to provide the materials and manufacture the iron-work required substantially in the manner called for, and had proceeded to put the iron lining and five of the window-frames in place, and were ready to proceed to put the open-work partition, and cell-doors, and other parts of the work, in place, when they were stopped by Allen and the building committee.

The defendants, besides interposing several technical, or rather legal defences, arising out of what they claim to be the law of the case on the admitted facts, insist that the work brought upon the ground and offered to be put in place did not conform to the plans and specifications, and that the same was therefore rightfully rejected.

It is admitted that the lining furnished by plaintiffs has been built into the wall since they were stopped in the performance of their contract, and has become apparently a part of the structure, without objections from the superintendent or building committee.

It is conceded on the part of the plaintiffs, that, in several important particulars, this work is not in accordance with the specifications; but it is also insisted that a literal compliance with the specifications and plans in those respects is practically impossible; and they are, therefore, excused in the premises.

For want of conformity to the specifications, and by reason of the imperfection in workmanship, Allen claimed the right to reject the work tendered by plaintiffs; and it becomes your duty to determine, under the law and the evidence, how far he was right in so doing.

As to the provision requiring all the iron-work to be made "of best quality Lake Superior iron," it is for you to say, as a matter of fact, from the evidence, whether it was possible for the plaintiff to have literally complied with this condition, or whether, by using iron made partly from Lake Superior ores, this condition has been substantially complied with. Conditions of this nature in contracts or specifications must be construed

in the light of practical affairs; and if you find from the evidence that there was no such distinctive article as "Lake Superior iron" known to persons engaged in the iron trade, then you will be justified in assuming that the parties in using the term really meant and intended to describe iron manufactured partly from Lake Superior ores; and, if the plaintiffs used such iron, they have so far complied with their contract.

In connection with this branch of the case, and as throwing some light upon the construction the parties intended to put upon the term used to describe the material, I call your attention to the fact, that there is no proof that any objection was made to the material or kind of iron employed, with the exception of the lining-plates.

As for failure to use the kind of plates and T iron bars in the iron lining called for by the specifications, the plaintiffs mainly depend upon the consent of Allen and the building committee to accept the building as made, rather than upon their right to insist that they have complied in that regard with the specifications.

If you find from the evidence that they did so agree, then the work as made should be deemed by you to have been substituted by agreement of parties for that described in the specifications; the jury taking into consideration, in fixing the value of the work as made, any imperfections in the workmanship, and the work yet remaining to be done at the time it was abandoned by plaintiffs.

In other words, the jury are to determine from the evidence the value of the lining to Allen for the purpose of completing his contract as plaintiffs left it.

Having heard the testimony in relation to the open-work partition, and had the plans shown and explained to you, it is for you to say, under the proof, whether this part of the work complied with the contract. If it did not, then Allen was not bound to accept it, and had the right to forbid plaintiffs from putting it up.

A word here in regard to the degree of perfection to which work of this character must be carried to comply with the drawings and plans. There should always be a substantial compliance with the model. In all essential particulars, the

thing represented must be produced and come as near to the standard as the state of the art will allow. The plaintiffs' contract binds them to this, and they should not have undertaken the task if they had not the skill or means to accomplish it.

So in regard to the cell-doors, window-frames, and gratings. If the testimony satisfies you that these portions of the work were made substantially as required in the drawings, and that, if the doors are too large for the openings left to receive them, it is due either to the mistake of the mason or to a mistake in the scale on which the drawings were made, then plaintiffs ought not to suffer, and should recover for the value of the window-frames put in place, and also for the value of that ready to be put in place, if it was made in conformity with the drawings, but subject to this reservation.

The contract was an entirety; and the plaintiffs had no right to put in the window-frames, cell-doors, &c., even if they complied in all respects with the drawings and specifications, if they at the same time insisted on putting in the partition also, which did not conform to the plans.

If you believe from the evidence that the plaintiffs insisted on putting in a partition which was not made according to the plans, then they cannot recover for the doors and window-frames not put up and used, even though they may be properly constructed.

If you find from the evidence that the contract has been partially performed by the plaintiffs, and that they have been prevented from performing the remainder of the work by Allen, and that he has adopted or used a portion of the work, then it will be your duty to ascertain from the evidence the value of the work thus done and appropriated, and the plaintiffs will be entitled to recover the value so found as damages: but you should also deduct from the amount thus found any sums due from plaintiffs to Allen for advances made by him on their account; also any damages which Allen has sustained by reason of the non-performance of said contract between plaintiffs and himself, provided you believe there was any breach of contract which entitles Allen to damages; and, in estimating Allen's damages, you must be governed by the evidence in the case, applying it in the same manner as you would do if Allen had not a suit for damages on said contract.

Thereupon the jury gave their verdict in favor of the plaintiffs for $5,000 damages, and judgment was rendered therefor.

The defendants having excepted to the refusal of the court to charge the jury as requested, and also to the charge as given, sued out this writ of error.

Mr. H. K. Whiton for the plaintiffs in error, and *Mr. John N. Jewett* for the defendants in error.

MR. JUSTICE MILLER delivered the opinion of the court.

The errors assigned relate to the charge of the court, and the refusal to charge as requested by plaintiffs in error.

The main ground of error seems to be, that the court did not treat Hough & Butler, the sub-contractors under Allen, as bound by all Allen's contract with the supervisors. But, while they accepted the specifications for the wrought-iron work which were in Allen's contract with the supervisors, they did not agree to be bound by the supervisors' acts in accepting or rejecting the work as coming up to these specifications.

This Allen did in his contract with them; and no doubt this has led to the present controversy. The supervisors reserved the right to decide as between them and Allen whether the work conformed to the specifications. Allen reserved no such power in his contract with defendants. These latter had a right, in the event of a difference on that subject, to have the difference settled by a court of law; and Allen ran that risk if he rejected any of their work. But the supervisors could reject work without such hazard, because Allen had agreed to submit to their judgment in case of such a difference.

The plaintiffs desired to have the court give the jury a more specific construction of the contract than it did as to the kind of work required, and also as to the failure of defendants in error to perform the work as so construed.

The court repeated the details of the contract on the points where the failure was alleged, and then told the jury, that unless the contractors had complied substantially with these specifications, or a strict compliance therewith had been waived, they could not recover. The charge was very full, and covered the whole ground necessary to enable the jury to apply the law to the matters in issue. We do not find in it any error.

The fact that Allen will, under the judgment recovered by defendants in error, taken in connection with the amount he has had to pay to others to complete the wrought-iron work, be a loser to the amount of several thousand dollars, does not prove the instructions of the court to be wrong. If there was any error, it was committed by the jury, and not by the court. It is only another one of those cases, so common from that circuit, in which, with the whole charge of the court and much of the testimony in the bill of exceptions, this court is expected to retry the case as if it were both court and jury. Our repeated refusal to do this will be adhered to, however counsel may continue to press on our attention the mistakes of juries. They are beyond our jurisdiction. *Judgment affirmed.*

GILMAN ET AL. *v.* ILLINOIS AND MISSISSIPPI TELEGRAPH COMPANY.

COYKENDALL, GARNISHEE, *v.* IDEM.

1. Where a trial by the court below was not had under the act of March 3, 1865 (13 Stat. 501), the rulings excepted to in the progress of such trial cannot be reviewed here.
2. Where it is clearly implied by the terms of a mortgage executed by a railroad company that the latter was to hold possession and receive the earnings of the road until the mortgagees should take it or the proper judicial authority intervene, such possession gives the right to the whole fund derived therefrom, and renders it, therefore, liable to the creditors of the company as if no mortgage existed.
3. A decree, silent as to the profits and possession of the mortgaged premises from its date until the sale thereby ordered, does not affect the right to such profits and possession during that period.

THESE cases come here from the Circuit Court of the United States for the District of Iowa, — the former by appeal, and the latter by writ of error.

In 1857, the Des Moines Valley Railroad Company, by its then corporate name, in order to secure the payment of its bonds, executed to certain trustees a mortgage of its road, property, and franchises, "together with the tolls, rents, and profits to be had, gained, or levied therefrom."

One of the provisions of this mortgage was as follows: —

"It is hereby further provided, that until failure to pay the interest on said bonds, or to pay the principal at maturity, or to apply, appropriate, set apart, and deposit the several sums of money to be applied, appropriated, set apart, and deposited, as hereinafter provided, the said party of the first part shall have the sole right to the possession, use, management, and control of the said mortgaged property and premises, and of the receipts and revenues thereof, as if this instrument had not been made; but if the said party of the first part shall fail to pay or cause to be paid the principal of the said bonds, or any of them, at the maturity thereof, or shall fail to pay or cause to be paid the interest on the said bonds, or any of them, or any part thereof, on any day whereon the same is made payable by the terms of the said bond, and the same shall remain unpaid for the space of six months after having been demanded, whereby at the option of the holders of one-third in amount of all the outstanding unconverted and unredeemed bonds the principal sum secured thereby shall become immediately payable, or shall fail to apply, appropriate, set apart, and deposit the several moneys required to be applied, appropriated, set apart, and deposited, as hereinafter provided, then and in that case it shall be lawful for the said parties of the second part, their survivor or successor or successors, and it shall be their duty, to enter upon and take possession of all and singular the property, premises, and franchises hereby granted and conveyed, or so expressed or intended to be, and by themselves, or their agent or agents, substitute or substitutes, duly constituted, have, use, operate, and employ the same, making from time to time all needful repairs, alterations, or additions, collect and receive all the tolls, rents, or profits to be had or gained therefrom, and apply all the moneys arising therefrom to the payment of the interest due and to grow due on all the said bonds which may be outstanding, unconverted, and unredeemed, and to the payment of the principal of all and each and every of such bonds when such principal shall become due and payable."

In 1868 the company executed a second mortgage to certain other trustees, in which was conveyed the road with its appurtenances, and "also all rents, issues, income, tolls, profits, currency, moneys, rights, benefits, and advantages derived or to be derived, had or received therefrom by said company in any way whatever."

"To have and to hold the above granted and bargained premises, with the appurtenances thereof, unto the said trustees, and to the survivors and survivor of them, and to their and his successors and successor, and their and his assigns, in trust, and upon the trust, uses, and purposes hereinafter expressed, of and concerning the same, for the use and benefit of the person or persons, firm or firms, bodies politic or corporate, who shall hereafter at any time become the purchasers or holders, owners or bearers, of any or either of said bonds, subject to the terms, provisions, and stipulations in said bonds contained, and also subject to the possession and management of said railroad and property by said company, and its successors and assigns, so long as no default shall be made in the payment of either interest or principal of said bonds, or in any or either of them, or in payment of the amount of money, as is herein provided for the sinking fund, and so long as the said company shall well and truly observe, keep, and perform all and singular the covenants, agreements, conditions, and stipulations in said bond and in this indenture contained and set forth, and which are to be observed, kept, and performed by and on the part of said company.

"And it is agreed, in case of the default of the payment of the semi-annual interest as above provided, that said trustees and the survivor or successors of them are hereby expressly authorized and empowered, upon the request in writing of a majority in interest of the owners or holders of said bonds, to enter into and upon, and to take actual possession of, all the property, real and personal, rights, franchises, and privileges, of the premises hereby conveyed, and each and every part thereof, and by themselves, or by their attorneys or agents, have, hold, use, and enjoy the same, and from time to time make all repairs and replacements, and all useful alterations, additions, and improvements thereto, as fully as the parties of the first part might have done before such entry, and to collect and receive all tolls, freight, incomes, rents, issues, and profits of the same, and of every part thereof."

The trustees never took possession; but, default having been made in the payment of interest on both mortgages, the trustees in the second mortgage, in July, 1872, commenced suit to foreclose in one of the State courts, making the railway company the trustees in the first mortgage, and various judgment and lien creditors of the company parties defendant, and, among others, the Illinois and Mississippi Telegraph Company. No

receiver was applied for or appointed pending the foreclosure proceedings, except as hereinafter stated.

On May 31, 1873, a decree of foreclosure was entered by the State court, fixing the priorities of the several parties, and holding that the telegraph company's judgment, hereinafter mentioned, was a lien subject to the mortgage in suit and to other specified liens.

The decree ordered a sale of the mortgaged property by the sheriff on special execution, but, as originally entered, made no provision as to the possession or earnings of the road (which was still in the possession of the railroad company, and operated by it) between the date of the decree and the sale which the decree ordered.

On the thirteenth day of June, 1873, the telegraph company issued execution on a judgment for $23,734.10, which it had on the 24th of May, 1872, obtained against the railroad company in the Circuit Court of the United States for the District of Iowa, and garnished, under the statute of the State, moneys in the hands of the agents of the railroad company at its various stations, received by them from the income and earnings of the road.

The trustees in the first and second mortgages filed, June 20, 1873, the present bill in equity against the telegraph company to enjoin the said proceedings upon the execution under its judgment. The bill was, the twenty-seventh day of June, 1873, amended so as to make the Des Moines Valley Railroad Company a defendant; and a temporary injunction, as prayed for, was allowed.

On Sept. 9, 1873, after a sale had been advertised by the sheriff, application was informally made to the State court, by the trustees under the first mortgage, for a modification of the decree of May 31, 1873; and the same was modified by appointing a "special receiver of all the income and earnings of the road" between the date of the decree or sheriff's first publication of notice of sale and the sale to be made by him. This was done, saving the rights of the telegraph company.

The special receiver took possession Sept. 15, 1873. The sale by the sheriff under which the purchasers were let into possession took place Oct. 17, 1873, and left a large amount of the mortgage bonds unpaid.

Between the date of the decree of May 31, 1873, and Sept. 15, 1873, when the special receiver took possession, the road was operated by the railroad company; and, during this period, the net earnings were $27,147.96.

Coykendall, who was garnished, had received $27,000; and judgment in the suit at law was rendered against him for that amount.

The Circuit Court dismissed the bill of the complainants.

Mr. George G. Wright for the appellants and the plaintiff in error.

The railroad company had legal capacity to mortgage, and did mortgage, its future earnings; and they became as much part of the bondholders' security as did the road-bed, rolling-stock, or any other part of the mortgaged property. Act of March 31, 1858; Rev. Stat. of Iowa, 1860, p. 222; *Pennock* v. *Coe*, 23 How. 117; *Jessup et al.* v. *Bridge et al.*, 11 Iowa, 573; *Dunham* v. *Isett*, 15 id. 284; 2 Redf. on Railws. 455, 485; *Galveston Railroad* v. *Cowdry*, 11 Wall. 453.

It may be urged by counsel for defendant, that the lien of the mortgages became merged in and extinguished by the decree. The foreclosure proceeding is not for the purpose of obtaining a better or higher order of *lien*, but simply for the purpose of *enforcing* an already existing and sufficient one. The lien of a mortgage is *not* extinguished by decree of foreclosure. *Riley's Adm'r* v. *McCord's Adm'r*, 21 Mo. 287; *State of Iowa* v. *Lake*, 17 Iowa, 215.

If it be true generally, that a mortgage lien is merged in a foreclosure decree, it will, in exceptional cases, be kept alive for reasons similar to those that operate to prevent merger in other similar cases. It is familiar law, that although ordinarily, when the mortgage interest and the equity of redemption unite in the same person, the former will become merged in the latter, yet, when the interest of the common owner requires that they shall remain distinct and separate, such will be presumed to have been his intention, and the lien of the mortgage will be kept alive for the purpose and to the extent of upholding such interest.

The same rule, for the same reason, should be held to apply in favor of the bondholders in the case at bar to the extent of

keeping alive the mortgage lien as to the item of earnings to whatever extent their interest requires.

If by foreclosure the mortgage lien becomes merged, it can only be so to the extent that the mortgaged property is, by the proceedings and the terms of the decree, sought to be subjected to the payment of the mortgage indebtedness. The bondholders may enjoin a judgment creditor of the road, who, by garnishment, seeks to subject its income and tolls to the payment of his debt. *Dunham* v. *Isett*, 15 Iowa, 284; *Long* v. *Matheison*, 2 Giff. 71; *Furness* v. *Chaterham Railway*, 29 Beav. 358; *State* v. *North Central R.R. Co.*, 18 Md. 193.

Mr. J. Scott Richman and *Mr. J. D. Caton*, *contra*.

The general laws of Iowa provide, that, in the absence of stipulations to the contrary, the mortgagor of real property retains the legal title thereto, and the right to the possession thereof. His estate is the subject of a lien, of a sale under execution, or of his conveyance. *Curtis* v. *Millard et al.*, 14 Iowa, 128.

This estate is not covered by any general mortgage. It can only be parted with by special contract, — by "*stipulations to the contrary.*" If they provide, that, under certain circumstances, this right shall be surrendered in a particular form or way, that form must be followed. Until the claim is made therefor, the possession and the rents and profits of the road belong rightfully and legally to the mortgagor, subject to execution, lien, or sale. *Curtis* v. *Millard et al.*, *supra*.

The decree is now the evidence of the lien of the bondholders upon the railroad. If their lien is not thereby fixed upon the earnings of the road between the date of the decree and the time when the purchaser thereunder would be entitled to the possession of the road, then there is no such lien; and the court below could not give the complainants the relief which the State court withheld, in adjudicating their rights under their mortgage. The debt is the principal thing. The mortgage is a security merely. Whatever satisfies the debt merges the security. If the debt is barred by the statute of limitations, the mortgage is barred also. *Newman* v. *De Lorimer*, 19 Iowa, 214. The appellants, having a lien by virtue of their mortgage, instituted a proceeding to have it enforced.

Having failed to take or demand possession of the railroad, or to pray for the appointment of a receiver, they obtained such relief as they were entitled to upon the case made by the pleadings and proofs. Their mortgage having been merged, it cannot defeat the rights of the telegraph company, which attached by the levy of its execution. *Goodrich et al.* v. *Dunbar*, 17 Barb. 644; Freem. on Judg., sect. 125; *Green* v. *Sarmiento*, 1 Pet. C. C. 74; *Butler* v. *Miller*, 1 Den. 407; *Carson* v. *Montino*, 2 Johns. 308; *United States* v. *Price*, 9 How. 83–94; *Willings & Francis* v. *Consequa*, 1 Pet. C. C. 393; *Ward* v. *Johnson*, 31 Mass. 140; *Robertson* v. *Smith*, 18 Johns. 459; *Eldred* v. *Bank*, 17 Wall. 545; *Mason* v. *Eldred*, 6 id. 231; *Jones* v. *Johnson*, 3 W. & S. 276; *The People* v. *Beebe*, 1 Barb. 388; *Ayres* v. *Cayce*, 10 Tex. 99.

It is well settled in Iowa, that a party cannot have greater relief than he asks for in his petition, or than the averments of his petition entitle him to. Code, sect. 2885; *Cameron* v. *Boyle*, 2 Gr. 164; *Haven* v. *Birch*, 5 Iowa, 503; *Stadler* v. *Parmelee*, 10 id. 23. If, as in this case, the right to the earnings depends upon a contract, or a stipulation which provides the mode in which they shall be received and applied, that mode must be pursued, or there must be some attempt to pursue it by a demand made of whatever may be necessary to secure them. If such demand is refused, then the law points out the remedy; but there must be a foundation laid for the appointment of a receiver by averment and proof of the necessary facts. *Insurance Co.* v. *Stebbins*, 8 Page, 565; *Aston* v. *Turner*, 11 id. 436; *Mitchell* v. *Butler*, 51 N. Y. 447; *Classen* v. *Cooley*, 5 Sandf. 447; *Strong* v. *Dallner & Potter*, 2 id. 444. The cases of *Galveston Railroad* v. *Cowdry*, 11 Wall. 459–482, *Noyes* v. *Rich*, 52 Me. 115, and *City of Bath* v. *Miller*, 51 id. 341, are precisely in point.

As to the judgment against the garnishee, it is submitted that only such rulings of the court below as are excepted to at the time, and duly presented by bills of exceptions, can be reviewed here. *Dickinson* v. *The Planters' Bank*, 16 Wall. 250.

This would be the law, if this case had been tried under the act of March 3, 1865; but it was not. A case at law, in which

there were questions both of law and fact to decide, was submitted to the court. The judgment below must, therefore, be presumed to be right; and it will be affirmed. *Campbell et al.* v. *Clement Boyean*, 21 How. 223; *Gould et al.* v. *Frontin*, 18 id. 135; *Saydam* v. *Williams et al.*, 20 id. 432; *Kelsey et al.* v. *Forsyth*, 21 id. 85; *Kearny* v. *Case*, 12 Wall. 273, 284; *Phillips* v. *Preston*, 5 How. 290.

Mr. William M. Evarts in reply.

In advance of the direct consideration of the equities of the plaintiffs, under their mortgage and subsequent to their foreclosure decree, as against this judgment creditor, under his execution it is well to define and understand these equities as between the plaintiffs and the railroad company (the mortgagor to the plaintiffs and the judgment debtor).

There seems but little controversy on this preliminary relation. The growing income and earnings were, by words most comprehensive and explicit, made a part of the subject mortgaged; and the right of the mortgagee, upon the mere condition of default in payment of interest, to subject the income and earnings to the satisfaction of the mortgage debt, was as clear as such right in respect to the body of the real and personal estate of the company. This was a clear and absolute right by the contract of the mortgage; and the only function of a court of equity, if the mortgagor resisted the execution of this right by the mortgagee taking possession, was to *execute* the right by its process, accomplishing the specific performance of the contract in this behalf. This clear *right* under such a railroad mortgage must not be confounded with an *equity* raised by a chancery court out of special circumstances, and grafted upon a mere mortgage of the fee. Thus, in case of a mortgage of productive property conveying the fee, upon the concurring circumstances of insolvency of the mortgage debtor, and the insufficiency of the fee to satisfy the principal debt and the accumulating interest and costs, the Court of Chancery finds a ground for a *special equity* to lay hold of the rents in aid of the failing security of the fee. This equity springs into existence from these extraneous facts, and *dates from the judgment of the court thereon.* Necessarily, therefore, all competing liens antedating this judgment of the court, legal or equitable, must be

respected and maintained in their priority; but when the *right* of the mortgagee springs from his contract, and dates from the default of the mortgagor for its actionable completeness, no competing lien which does not antedate the mortgagor's default in its asserted priority will be respected and upheld by a court of equity. If the competing lien be asserted by process of a common-law court, the Court of Chancery appealed to for relief rescues the property from its sequestration, because the perfect equitable lien of the contract of the mortgage has rested on the property from the date of default in the debtor, and so the legal process has been anticipated by the equitable lien.

This proposition cannot be disputed. *Gal. & Ch. Un. R.R. Co.* v. *Menzies*, 26 Ill. 121.

It cannot be doubted, that if the debtor recognized this equitable lien, and administered the income and earnings of the road in obedience to it, paying thereout the running expenses, and applying the surplus to the mortgage debt, the mortgagee has no occasion to disturb the possession of the mortgagor by the interposition of a receivership. No doubt the mortgagee may, by want of vigilance, suffer the income and earnings to slip away irrecoverably from his equitable lien, and, by intervening through the powers of a court of equity, can only secure the proper application of the future income or earnings. Whether this will happen or not will depend wholly on the state of things when he intervenes. If he is in season to intercept the income and earnings before they have been collected or *expended*, as between himself and the debtor, he is in time. If the interference comes from a *creditor* of the mortgagor, the like rule applies. If the mortgagee intervenes in time to arrest, by equitable process, the diversion of the income and earnings from under his equitable lien, in point of fact his intervention is seasonable in point of law.

The stress of the argument against the plaintiffs' equity, and in support of the prevalence of the execution at law over it, rests upon the singular suggestion, that the *judgment of foreclosure* has limited and superseded the plaintiffs' equitable lien, and given license to the operation of the judgment creditor's execution, which, but for this consequence of the actual judg-

ment of foreclosure, it would not have had. The reasoning upon which this proposition rests is wholly technical and artificial. It confessedly is without equity, and attempts an advantage from the course of the foreclosure suit which was uncontemplated and unnecessary, and is as surprising as it is unjust.

In the case at bar, the lien of the mortgage and its continuance up to the *sale* of the mortgaged premises is the very life and support of the decree up to its final execution by such sale. As to this judgment creditor, the lien of its *judgment* upon the mortgaged premises, and every part thereof, had been adjudicated in this decree, its subordination to the plaintiffs' lien established, and the possibility of interference with, or disparagement of, the plaintiffs' lien by or through that *judgment*, precluded.

But, subsequent to the decree in foreclosure, process on this *judgment* against income of the mortgaged premises, to accrue between the decree and its execution, issues, on the ground that the income, during this interval, *is not covered by the decree, and the subordination of the judgment to the mortgage in this behalf has not been adjudicated;* in other words, that the execution raises a *new lien* upon a *new subject.*

It is submitted that the decree in foreclosure is no bar to a suit to restrain an inequitable interference with the income of the road, first threatened after the decree, and in respect of income arising thereafter. The injunction suit is ancillary to the objects of the principal suit, and to suppress an inequitable subtraction of a portion of the mortgaged property from the equitable lien of the mortgagee.

If any circumstance were wanting to exhibit the falsity of reasoning and the injustice in result by supporting this garnishee process, it is supplied by the evidence in the principal cause, that the fund sought to be applied in satisfaction of the judgment comes from earnings, for the most part, accruing *after* this injunction bill was filed by the plaintiffs. In effect, an *equitable* execution is given by the Circuit Court to the judgment creditor to sequestrate income confessedly covered by the prior express lien of the plaintiffs' mortgage, *after* suit begun to enforce the lien of the latter.

MR. JUSTICE SWAYNE delivered the opinion of the court.

These cases have been argued together, and will be decided together. The case at law will be first considered.

On the 24th of May, 1872, the telegraph company recovered in the Circuit Court of the United States for the District of Iowa a judgment for the sum of $23,734.04 and costs. On the 13th of June following, execution was issued. On the 17th of that month, the marshal to whom the process was directed served it by attaching as garnishees several persons, one of whom was Coykendall, the plaintiff in error. On the 27th of October, 1873, he filed his answer; and on the 27th of October, 1874, he filed a further answer.

By the first answer he admitted, that, since he was garnished, he had received for and paid over to the railroad company more than $37,000. In his second answer he set forth that he was the agent of the railroad company at Des Moines; and that his duties were to sell tickets and receive and ship freight, and to receive the charges upon such freight. For the moneys received both for tickets and freight a large proportion belonged to other companies, but how much he did not know. All the moneys he received were regularly transmitted to the assistant-treasurer of the Des Moines company.

The proper apportionment of the moneys was made by the officers of that company at Keokuk, and the Des Moines company was accountable to the other companies for what belonged to them. He was not in the employment of any other company or person during the time mentioned, and was not responsible to any other company or person for the moneys which he received, as before stated.

The gross amount received by him, between the time he was garnished and the appointment of the receiver who took possession of the road, was $27,000.

The case was submitted to the court, and argued by the counsel upon both sides. The next day it was stated to the court by the counsel for the defendant that proof could be adduced of the proportion of the moneys in question which belonged to other companies, and time was asked to procure it. The application was overruled, and the court gave judgment

for $27,000 and costs. The garnishee thereupon excepted to the ruling of the court refusing further time.

The case having been submitted to the court and argued by the counsel of both parties, the garnishee not asking for a jury, the record in this respect shows no error. It is to be taken that both parties waived a trial by jury, and they are bound accordingly. *Phillips* v. *Preston*, 5 How. 278; *Campbell* v. *Boyreau*, 21 id. 224; *Kelsey* v. *Forsythe*, id. 86. The proceeding not having been according to the act of March 3, 1865, this court has no power to examine any ruling of the court below excepted to during the progress of the trial. *Campbell* v. *Boyreau*, *supra*; *Guild et al.* v. *Fontin*, 18 id. 135; *Kearney* v. *Case*, 12 Wall. 275; *Dickinson* v. *The Planters' Bank*, 16 id. 250. The only point attempted to be presented by the bill of exceptions was the refusal of the court to give time for the production of further evidence. If this subject was before us in such a shape that we could consider it, it would be a conclusive answer that the matter was one resting in the discretion of the court. Its determination, therefore, could not be reviewed by this tribunal.

This brings us to the examination of the case in equity.

The bill was filed to prevent, by injunction, the collection of the moneys upon which the judgment in favor of the telegraph companies was founded. There is no controversy between the parties as to the facts.

On the 16th of February, 1857, the railroad company, by its then corporate name, executed a mortgage; and on the 1st of October, 1868, by its corporate name as altered, executed another. Both were given to secure the payment of its bonds as set forth. A part of the premises described and pledged by both mortgages, besides the road, was its income.

In case of default in the payment of interest or principal, the mortgagees were authorized to take possession, and collect and receive the income and earnings of the road, and apply them to the debts secured, and, upon the request of one-third of the bondholders, to sell the mortgaged premises.

The conditions of both mortgages having been broken, the mortgagees in the second mortgage filed their bill of foreclosure in the Circuit Court of Polk County, in the State of Iowa.

The mortgagees in the second mortgage — various judgment and lien creditors, among the former the telegraph company — were made defendants. On the 31st of May, 1873, a decree of foreclosure and sale was rendered. It fixed the priorities of the several parties, and held that the judgment of the telegraph company was a lien subject to the mortgage in suit and other specified liens. It ordered a sale of the mortgaged property. The road was still in possession of the company. The decree made no provision for disturbing their possession, and none whatever as to the income of the road between the time of the decree and the time of the sale. The telegraph company proceeded, as we have stated, in disposing of the case at law. On the 20th of June, 1873, the appellants, who are the trustees in the two mortgages, filed this bill. On the 9th of September, 1873, after the sheriff had advertised the mortgaged premises for sale, the decree in the State court was amended by providing for the appointment of "a special receiver of all the income and earnings of the road" between the date of the decree and the time fixed by the sheriff for the sale to be made by him. This was done with a saving of the rights of the telegraph company. The special receiver took possession on the 15th of September, 1873. The sale by the sheriff was made on the 17th of October, 1873. The road was operated by the company up to the time when the receiver took possession.

During this period, the fund was received for which judgment was given against Coykendall.

The proceedings in the case at law having been held valid, the telegraph company is entitled to the fund in controversy, unless the appellants have shown a better right to it. The question arises upon the mortgages. The civil law is the springhead of the English jurisprudence upon the subject of these securities. Originally, according to that jurisprudence, mortgages of the class to which those here in question belong vested the fee, subject to be divested by the discharge of the debt at the day *limited* for its payment. If default was then made, the premises were finally lost to the debtor. In the progress of time more liberal views prevailed, and the debt came to be considered as the principal thing, and the mortgage only as an

incident and security. In the present state of the law, where there is no prohibition by statute, it is competent for the mortgagee to pursue three remedies at the same time. He may sue on the note or obligation, he may bring an action of ejectment, and he may file a bill for foreclosure and sale. 1 Hill. on Mort. 9, 62; id. 104, 111; *Andrews* v. *Sutton*, 2 Bland, 665.

The remedy last mentioned was resorted to in the State court by the mortgagees in the second mortgage, those in the first having been made parties, and that mortgage thus brought before the court. That court, therefore, had full jurisdiction as to the rights of all the parties touching both instruments. It would have been competent for the court *in limine*, upon a proper showing, to appoint a receiver, and clothe him with the duty of taking charge of the road and receiving its earnings, with such limit of time as it might see fit to prescribe. It might have done the same thing subsequently, during the progress of the suit. When the final decree was made, a receiver might have been appointed, and required to receive all the income and earnings until the sale was made and confirmed, and possession delivered over to the vendee.

Nothing of this kind was done. There was simply a decree of sale. The decree was wholly silent as to the possession and earnings in the mean time. It follows that neither, during that period, was in any wise affected by the action of the court.

They were as if the decree were not.

As regards the point under consideration, the decree may, therefore, be laid out of view.

The stipulation renders it unnecessary to consider the amendment to the decree.

Without that stipulation, the result would have been the same. It could not affect rights which had attached before it was made.

Nothing was done in the exercise of the right which the mortgages gave to the mortgagees to intervene and take possession. We may, therefore, lay out of view also both these topics.

This leaves nothing to be examined but the effect of the mortgages, irrespective of any other consideration.

A mortgagor of real estate is not liable for rent while in

possession. 2 Kent's Com. 172. He contracts to pay interest, and not rent. In *Chinnery* v. *Black*, 3 Doug. 391, the mortgagor of a ship sued for freight earned after the mortgage was given, but unpaid. Lord Mansfield said, "Until the mortgagee takes possession, the mortgagor is owner to all the world, and is entitled to all the profit made." It is clearly implied in these mortgages that the railroad company should hold possession and receive the earnings until the mortgagees should take possession, or the proper judicial authority should interpose. Possession draws after it the right to receive and apply the income. Without this the road could not be operated, and no profit could be made. Mere possession would have been useless to all concerned. The right to apply enough of the income to operate the road will not be questioned. The amount to be so applied was within the discretion of the company. The same discretion extended to the surplus. It was for the company to decide what should be done with it. In this condition of things, the whole fund belonged to the company, and was subject to its control. It was, therefore, liable to the creditors of the company as if the mortgages did not exist. They in no wise affected it. If the mortgagees were not satisfied, they had the remedy in their own hands, and could at any moment invoke the aid of the law, or interpose themselves without it. They did neither.

In *Galveston Railroad* v. *Cowdrey*, 11 Wall. 459, substantially the same question arose as that we are considering. The mortgage there contained provisions touching the income of the road similar to those in the mortgages before us.

This court held, that, at least until after a regular demand was made, those who received the earnings were not bound to account for them. See also *The City of Bath* v. *Miller*, 51 Me. 341; *Noyes, Receiver*, v. *Rich*, 52 id. 115.

Upon both reason and authority, we think the appellants have no right to the fund in controversy.

Decree affirmed. Judgment affirmed.

DOWS ET AL. *v.* NATIONAL EXCHANGE BANK OF MILWAUKEE.

1. An invoice is neither a bill of sale nor evidence of a sale, and, standing alone, furnishes no proof of title.
2. A party discounting a draft, and receiving therewith, deliverable to his order, a bill of lading of the goods against which the draft was drawn, acquires a special property in them, and has a complete right to hold them as security for the acceptance and payment of the draft.
3. Where such party forwarded the draft, with the bill of lading thereto attached, to an agent, with instructions, by special indorsement on the bill and by letter, to hold the wheat in the bill mentioned, against which the draft had been drawn, until payment of the draft should be made, the agent had no power, prior to such payment, to make a delivery which would divest the ownership of his principal.
4. Where the agent directed the carrying vessels, on which the wheat was shipped, to deliver it to the Corn Exchange Elevator, the proprietor whereof accepted the wheat in bailment under express instructions that it was to "be held subject to and delivered only on the payment of the draft," — *Held*, that such proprietor, although the drawee of the draft, acknowledged, by the act of receiving the wheat, that it was not placed in his hands as the owner thereof, and that the title of the bailors was not transferred.
5. The drawee having, under such circumstances, possession of the wheat as a mere warehouseman, and not as a vendee, his subsequent sale and delivery thereof conferred no title thereto on the purchaser.
6. Where neither the evidence received nor offered tended to rebut the intent exhibited in the bills of lading, and confirmed throughout by the indorsement thereon and the written instructions, to retain the ownership of the wheat until the payment of the draft, — *Held*, that there was no necessity of submitting to the jury the question, whether there had been a change of ownership.
7. The court below properly charged the jury, that, on the refusal of the party in possession of the wheat to deliver it to the owner, when thereunto requested, the latter was entitled to recover the value thereof, with interest from the date of such refusal.

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

This is an action of trover, instituted by the National Exchange Bank of Milwaukee to recover damages for the alleged conversion, by the plaintiffs in error, of 22,341 bushels of wheat, which the National Exchange Bank of Milwaukee claimed as its property.

The wheat was purchased in Milwaukee, Wis., by McLaren & Co., in the month of September, 1869, upon orders received

from Smith & Co. of Oswego, N.Y., who were in need of it for immediate use, and requested that the drafts on account thereof be drawn on them through the Merchants' Bank of Watertown, N.Y. McLaren & Co. paid for the wheat so purchased, and, to reimburse themselves, shipped it on three vessels, named respectively "Kate Kelly," "Grenada," and "Corsican," and received from the captains of said vessels triplicate bills of lading, which describe McLaren & Co. as the shippers, and by their terms make the wheat deliverable to the account of W. G. Fitch, cashier, care Merchants' Bank, Watertown, N.Y. McLaren & Co. presented drafts drawn on Smith & Co., with the original bills of lading attached thereto, to the National Exchange Bank of Milwaukee. The bank discounted them, placed the proceeds to the credit of McLaren & Co., and retained the original bills of lading. Its cashier, after discounting the drafts, wrote a special indorsement on the back of each bill of lading. The indorsement on that of the "Grenada" reads as follows: —

"On payment of two drafts drawn by McLaren & Co. on Smith & Co., Oswego, N.Y., to my order, dated Sept. 13, 1869, — one draft at thirty days' date for $8,000, and the other at forty-five days' date for $8,000, both drafts being payable at the Merchants' Bank, Watertown, N.Y., — you will surrender the within-mentioned wheat to Smith & Co. or order. Should drafts above mentioned not be promptly paid, hold the wheat for my account, without recourse.

"W. G. Fitch, *Cashier.*

"Milwaukee, 13th September, 1869.

"To Merchants' Bank, Watertown, N.Y."

A similar indorsement, except as to the amounts and dates of the drafts, was made on the bills of lading of the "Kate Kelly" and the "Corsican." McLaren & Co. insured the cargoes for their account from Milwaukee to Oswego, and transferred the insurance certificates to the bank. After making the indorsements on the bills of lading, the cashier enclosed the drafts, bills of lading, and certificates of insurance, to the Merchants' Bank, Watertown, N.Y. The letter enclosing those relating to the "Kate Kelly" is as follows: —

"SEPT. 2.

"To Cashier Merchants' Bank, Watertown, N.Y.:—

"I hand you for collection and remittance to Mercantile National Bank, New York, for my credit,—

McLaren & Co., on Smith & Co., Oswego, $4,080.81 exg.
" " Oct. 5 . . . . . 7,500.00 "
" " Oct. 20 . . . . . 7,500.00 "
B. L. schr. 'Kate Kelly,' 8,727 bushels Amber Mil. wheat.
" " 5,527$\frac{20}{60}$ bushels No. 1, Amber Mil.

wheat, consigned to your bank for my account, and to be held by you subject to the payment of the above drafts.

Insured North-western Nat. Ins. Co. . . . $5,000
Nat. Ins. Co., Boston 5,000
Ætna Ins. Co., Hartford 5,000
Republic Ins. Co. 5,000
Security Ins. Co. 4,000

"I consign this wheat to you, to be held as per indorsed bill of lading, and surrender only on payment of the drafts drawn against it, holding you responsible for the same in case of non-payment of the drafts. Will you receive consignments in this way, charging reasonably for the same?

"Yours truly, "W. G. FITCH, *Cashier.*"

On the 6th of September, 1869, J. F. Moffatt, cashier of the Merchants' Bank, acknowledged the receipt of the letter and its enclosures.

On the 8th of that month Fitch addressed another letter, as follows:—

"To Merchants' Bank of Watertown, N.Y.:—

"In my letter of the 2d, I requested you to state in your letter whether you would hold all wheat I consign to you strictly for my account, holding your bank responsible for the safe keeping of the property for this bank, and holding such property subject to my orders in all cases where the drafts made against it are not paid. Your reply of the 6th instant does not answer my inquiry. Will you please write me by return mail, defining your position? We have adopted the invariable rule, to in no instance consign property only on condition that the consignee acknowledges himself responsible for it, until instructed to hand over to a third party.

"Very respectfully, "W. G. FITCH, *Cashier.*"

In Moffatt's answer of the 11th, he says, "In reply to yours of the 2d instant, I would say that we will receive, until further notice, such consignments as you choose to send us, holding us responsible for the grain in case of non-payments of drafts, and shall charge $\frac{3}{8}$ per cent commissions for so doing." On the 13th he acknowledged the receipt of Fitch's letter of the 8th, and said, "I believe your inquiry was answered in mine of the 11th instant."

Letters, in substantially the same language as that of Sept. 2, were written to the cashier of the Merchants' Bank, enclosing the drafts, bills of lading, and certificates of insurance, of the cargoes of the "Grenada" and "Corsican."

The cashier of the Merchants' Bank, upon receipt of the drafts and bill of lading of the "Kate Kelly," wrote three letters, — one to Smith & Co., dated Watertown, N.Y., Sept. 6, 1869, as follows: —

"Please find enclosed for acceptance, and return the following; to wit: —

McLaren & Co., on your st.		$4,080.81	and exg.
" "	Oct. 5	7,500.00	"
" "	Oct. 20	7,500.00	"

Also inspection certificate."

Another, bearing the same date, as follows: —

"Proprietors of Corn Exchange Elevator, Oswego, N.Y.: —

"Please find enclosed an order for cargo schooner 'Kate Kelly' for 8,727 bushels Amber Milwaukee wheat, and 5,527$\frac{20}{60}$ bushels No. 1 Amber Milwaukee wheat, to be delivered to you; and you will please hold the same subject to, and deliver the grain only on payment of, the following drafts; to wit: —

McLaren & Co., on Smith & Co., st. .		$4,080.81	and exg.
" "	Oct. 5	7,500.00	"
" "	Oct. 20	7,500.00	"

And the third, of the same date, as follows: —

"Merchants' Bank, Watertown, N.Y., Sept. 6, 1869.

"Robert Hayes, Esq., Master schr. 'Kate Kelly,' Oswego, N.Y.: —

"Please deliver to the Corn Exchange Elevator, Oswego, N.Y., your cargo, 8,727 bushels of Amber Milwaukee wheat, and 5,527$\frac{20}{60}$ bushels of No. 1 Amber Milwaukee wheat, consigned to us by W. G. Fitch, Esq., cashier."

Letters of the same purport were written in relation to the cargoes of the "Grenada" and "Corsican," except that, in the case of the "Corsican," the letter enclosing the order to the master of that vessel to deliver her cargo was addressed to "Smith & Co., Proprietors Corn Exchange Elevator." Smith & Co., on the receipt of the letters, paid each of the sight drafts, and returned the time drafts, accepted, to the Merchants' Bank, without objection, and without expressing any dissent to the terms and conditions upon which the wheat was to be delivered, on its arrival, to the Corn Exchange Elevator. The sight drafts were paid, and the time drafts accepted, several days before the arrival of the cargoes at Oswego.

McLaren & Co. forwarded to Smith & Co. invoices of the purchases, with statement of account for disbursements and commissions. The invoice of the "Kate Kelly" is headed, "Account purchase of 14,250$\frac{2}{6}\frac{0}{0}$ bushels wheat, bought for account, and by order of Smith & Co., Oswego, N.Y., through McLaren & Co." Those of the "Grenada" and of the "Corsican" respectively differ from it only in the number of bushels. No bill of lading for either cargo was sent to Smith & Co.

The "Kate Kelly" arrived in Oswego Sept. 16, 1869. Her cargo was discharged into the Corn Exchange Elevator. Seven thousand three hundred bushels were "spouted" direct from the vessel through the elevator into the canal-boat "Frank Alvord," and other quantities into the south, middle, and north team bins; the balance of the cargo went into numbered bins; and 3,047$\frac{1}{6}\frac{0}{0}$ bushels was, on the 18th September, shipped into the canal-boat "Four Sisters," and a bill of lading, dated Sept. 18, 1869, signed by G. A. Bennett, was delivered to Smith & Co. The canal-boat arrived in New York Oct. 9, 1869. Smith & Co. paid the time draft of $7,500, drawn at thirty days. The time draft of $7,500, drawn at forty-five days, was unpaid at the date of this shipment.

The "Grenada" arrived with her cargo on the twenty-fourth day of September, 1860. Two thousand bushels were "spouted" into the boat "Caribbean;" and on the 27th September, 1869, 7,100 bushels were shipped into the canal-boat "B. Hagaman" by Smith & Co., and a bill of lading of that date, signed by G. A. Bennett, was delivered to them. This

canal-boat arrived in New York Oct. 27, 1869. The two time drafts drawn on the cargo of the "Grenada" were unpaid at the date of this shipment.

The "Corsican" arrived with her cargo on the 8th October, 1869; and on the same day Smith & Co. shipped 4,358 bushels of it into the canal-boat "Anna Rebecca," and 7,836 bushels of it into the canal-boat "George Ames," and received bills of lading therefor. These canal-boats arrived in New York on the 4th November, 1869. The time drafts drawn on the cargo of the "Corsican" were not paid at the time of these shipments. The drawees of the drafts were the proprietors of the Corn Exchange Elevator.

The captains of the "Kate Kelly," "Grenada," and "Corsican," on their arrival at Oswego, called at the office of the Corn Exchange Elevator, and there found and received from Smith & Co., before delivering their cargoes, the orders which had been sent for them, in the letters written by the cashier of the Merchants' Bank to the "Proprietors Corn Exchange Elevator," and to "Smith & Co., Proprietors Corn Exchange Elevator." The latter paid the freight on the cargoes, and receipted therefor on the back of the bills of lading retained by the captains.

The shipments by Smith & Co. were made without the knowledge or consent of the officers of the Merchants' Bank.

There was no mixture in the elevator of the cargoes of the "Kate Kelly," "Grenada," or "Corsican."

Smith & Co., on receiving the canal-boat bills of lading, sent the same, with drafts attached, through banks in New York City, to Dows & Co., the plaintiffs in error. They paid the drafts, and received the bills of lading.

All of the time drafts drawn by McLaren & Co. on Smith & Co. (except the thirty-day draft on the cargo of the "Kate Kelly"), being unpaid, were, with the original bills of lading and certificates of insurance, returned by the Merchants' Bank to the Milwaukee bank. The latter having been advised in October that the wheat had been shipped by Smith & Co., William P. McLaren, a member of the firm of McLaren & Co., went to Oswego to look after it. He was there from about the 20th to the 25th of that month, and, on examination, found no wheat in the elevator. Having ascer-

tained on the 22d that portions of the cargoes had been shipped to Dows & Co., a telegram was sent to and received by them on that day, notifying them that the wheat shipped on the canal-boats "Four Sisters," "B. Hagaman," "George Ames," and "Anna Rebecca," was the property of the National Exchange Bank of Milwaukee. The following day, parties interested in the wheat called on Dows & Co., who agreed, that, if no attempt was made to stop the wheat on the canal, it should, on its arrival in New York, be kept separate; that the Milwaukee bank should be notified of its arrival; and that they (Dows & Co.) would identify it as the wheat coming out of the said canal-boats, and would only require proof of the identity of the wheat in the canal-boats at Oswego.

On the arrival of the wheat, a formal demand in writing therefor was made on Dows & Co. by the Milwaukee bank. They refused to deliver it unless they were reimbursed the amount of their advances to Smith & Co., and freight and charges, and unless the Milwaukee bank would take care of an order given by Smith & Co. to Norris Winslow on them for any margins in their hands due Smith & Co.

The jury found a verdict in favor of the plaintiff for $31,111.51.

Judgment was rendered therefor: whereupon the defendants sued out this writ of error.

Mr. C. Van Santvoord for the plaintiffs in error.

The transmission of the invoice on the shipment to the consignment of the Merchants' Bank, on their acceptance of the terms and conditions of the contract, was, by the acts of both parties, an appropriation of the wheat shipped to the use of Smith & Co., which passed the property. *Richardson* v. *Dunn*, 2 Ad. & E. N. S. 217; *Alexander* v. *Gardner*, 1 Bing. N. C. 671.

This invoice, which has the strength of a bill of sale, was documentary evidence of title placed in the hands of Smith & Co. as the purchasers. Their right in the wheat shipped upon acceptance and payment of the sight and acceptance of the time drafts as noted in the invoice was thereby acknowledged: they were thus furnished with the means of asserting that right, and authorized to receive the wheat on delivery through the

Merchants' Bank for their own account. *The Merrimack*, 8 Cr. 318, 329, 330.

Conceding that this property of Smith & Co. was subject to a possessory right or legal title, and right of possession, acquired by the plaintiff by the delivery to it of the bills of lading for the wheat, with the drafts attached, on its discounting them, that right or title, with the right of possession, was transferred to the Merchants' Bank on transmission and delivery of the bill of lading to it, in furtherance of the arrangement that the property should go forward to it, as the consignee named by Smith & Co., for delivery to them. Upon its agreement that it would be responsible for the wheat if the drafts were not paid, it had the legal title, and right of possession, in trust for Smith & Co. as the general owners. The plaintiff, having neither a general nor special property in the wheat, can, therefore, not recover in an action of trover. 1 Ch. Pl. 7 Am. ed. 170; 2 Saund. 47 A, n. 1; Brown on Actions at Law, 426; *Dillenback* v. *Jerome*, 7 Cow. 294; *Hotchkiss* v. *McVicar*, 12 Johns. 403.

The transmission and delivery of a bill of lading to the consignee, or the indorsement of it for a valuable consideration, without notice to the consignee or indorsee of any title better than that of the consignor or indorsor, passes the property. *Dows* v. *Rush*, 28 Barb. 158; *Dows* v. *Greene*, 24 N. Y. 638; *Wilmshurst* v. *Bowker*, 7 Man. & G. 882.

The transfer and delivery of the bill of lading by the plaintiff, in consideration of the absolute agreement of the Merchants' Bank to be responsible for the wheat if the drafts were not paid, effectually passed the possessory right, or legal title and right of possession, to that bank. The instructions by indorsement on the bill, and by letter respecting the disposition of the wheat after the title had passed, had no operation except as matter of contract or condition subsequent. They could not affect the property. It had previously thereto vested.

If a draft, drawn on a shipment, and payable a certain number of days after sight, is sold with the bill of lading appended to it, the holder can, in the absence of proof of any local usage to the contrary, or of the imminent insolvency of the drawee, only require the latter to accept it on the delivery of the bill of lading. *Lamphear* v. *Blossom*, 1 La. Ann. Rep. 148. This

doctrine, in its application to a case where the bill, taken to the order of the consignee, is to go forward, and is transmitted to the consignee designated by the purchaser in the arrangement for the purchase, stands upon the plain obligation of the contract, however it may be when the bill is taken to shipper's order on the shipment, and is indorsed to the purchaser of the draft.

The Constantia, 4 C. Rob., is a direct authority, that, in the stage of the transit, such instructions as were indorsed on these bills are unauthorized, except as a means of exercising the right of stoppage *in transitu* in case of insolvency.

When the owner of property or goods, or choses in action, not negotiable, confers upon another only an apparent title or power of disposition over it, he is estopped from asserting his title as against an innocent third party who has dealt with the apparent owner in reference thereto, without knowledge of the claim of the true owner. *McNeil* v. *The Tenth National Bank*, 46 N. Y. 325; *Moore* v. *Metropolitan Bank*, 55 id. 41; *Pickering* v. *Buske*, 15 East, 38.

The claim of the defendants to protection stands on ground as strong as, if not stronger than, that of a *bona fide* purchaser from a mortgagor in possession of merchandise with power of control under an unrecorded mortgage, as in *Thompson* v. *Blanchard*, 4 Coms. 303; or of a *bona fide* purchaser from a vendee in possession obtained by fraud, as in *Paddon* v. *Taylor*, 44 N. Y. 371; *Rawle* v. *Deshler*, 3 Keyes, 575; s. c. 28 How. Pr. 66; *Griswold* v. *Sheldon*, 4 Coms. 581; *Edgell* v. *Hart*, 5 Seld. 213; *Ford* v. *Williams*, 24 N. Y. 359; 3 R. S. N. Y., 5 ed. 222, sects. 9, 10; Com. Dig. Covin (A), (B 1), (B 3); Vin. Abr. Fraud, L.

Smith & Co. were in possession of the correspondence containing the contract for the purchase for their immediate use, and on a credit, and the invoice with the letters enclosing them, showing a purchase and shipment of wheat for their account, with no other condition than the acceptance or payment of the sight and the acceptance of the time drafts. Knowing that it was shipped under their arrangement with McLaren & Co. for delivery to them through the Merchants' Bank as their bank, and under the agreement of that bank to be

responsible for it if the drafts were not paid, they might conclude that these instructions, of which they were notified, were unauthorized, or were intended either to secure the appropriation of the proceeds in payment of the drafts, or to secure the responsibility of the Merchants' Bank to plaintiff. Its engagement so to be responsible was made in reliance upon Smith & Co.'s responsibility. But certainly no one of mercantile education or ordinary sagacity, in their situation, would, under the circumstances, infer that the intention was that the wheat should be held according to the literal import of these instructions until the time drafts matured and were paid; for this would defeat the very object and purpose of the purchase and consignment for their immediate use.

The effect of the documentary evidence relied on by the plaintiff depending on collateral facts *in pais* and extrinsic circumstances, the inferences from them should have been drawn by the jury. *Etting* v. *Bank of the U. S.*, 11 Whart. 59; *Richardson* v. *Boston*, 19 How. 263; *Railroad* v. *Stout*, 17 Wall. 657; *Brown* v. *McGrau*, 14 Pet. 479; *Barreda* v. *Silsbee*, 21 How. 147.

Mr. H. M. Finch for the defendant in error.

By the transactions between McLaren & Co. and the National Exchange Bank of Milwaukee, the title to the wheat became vested in that bank. *The Aurora*, 4 C. Robinson, 218; *The Frances*, 8 Cran. 354, 418, 9 id. 183; *The Merrimack*, 8 id. 317; *The San Jose Indians*, 1 Wheat. 208; *Seymour* v. *Newton*, 105 Mass. 273; *Cayuga Bank* v. *Daniels*, 47 N. Y. 632; *Turner* v. *Trustees Liverpool Docks*, 6 Exch. 543; *Ward* v. *Taylor*, 6 Ill. 494; *Shepard* v. *Harrison*, L. R. 4 Q. B. 195; *Bailey* v. *Hudson R.R. Co.*, 49 N. Y. 75; *Tilden* v. *Minor et al.*, 45 Vt. 96; *Wait* v. *Baker*, 2 Exch. 1; *Jenkins* v. *Usborne*, 49 Eng. Com. Law, 698; *Williams* v. *Littlefield*, 12 Wend. 362; *Moakes* v. *Nicolson*, 115 Eng. Com. Law, 296; *Ellershaw* v. *Magniac*, 6 Exch. 570; *Jenkins* v. *Brown*, 68 Eng. Com. Law, 495; *Brandt* v. *Bowlby*, 2 B. & Ald. 632; *The Thames*, 14 Wall. 98; *City Bank* v. *R. W. & O. R. Co.*, 44 N. Y. 136; *Marine Bank* v. *Wright*, 48 id. 1; *Dent* v. *N. A. Steamship Co.*, 49 id. 391; *De Wolf* v. *Gardiner*, 12 Cush. 19.

The Merchants' Bank was a special agent for a specific pur-

pose, and clothed only with limited powers to do a particular act with certain parties expressly named. Its acts, beyond the scope of its delegated authority, would not have bound its principal. *Russell* v. *Minor*, 22 Wend. 659; *Lyon* v. *Kent*, 45 Ala. 664; *Wooster* v. *Sherwood*, 25 N. Y. 287; *Wilson* v. *Nason*, 4 Bosw. 155; *Parsons* v. *Webb*, 8 Me. 38; *Conan* v. *Adams*, 10 id. 374–380; *Hodge* v. *Coombs*, 1 Black, 192; *Doubleday* v. *Kress*, 50 N. Y. 410.

The Merchants' Bank had an undoubted legal right to select the Corn Exchange Elevator as the warehouse in which to store the wheat until the maturity of the time drafts. *Kimberly* v. *Patchin*, 19 N. Y. 330; *Burton* v. *Curyea*, 41 Ill. 320; *Gibson* v. *Stevens*, 8 How. 384; *Thayer* v. *Dwight*, 104 Mass. 257; *Wooster* v. *Sherwood*, *supra*; *Hamilton* v. *Bell*, 10 Exch. 544; *Whitefield* v. *Brand*, 16 M. & W. 282; *Lickbarrow* v. *Mason*, 1 Sm. L. C. pt. 2, 1039; *Coggill* v. *H. & N. H. R. Co.*, 3 Gray, 545; *Couse* v. *Tregent*, 11 Mich. 65; *Dehon* v. *Bigelow*, 8 Gray, 159; *Brown* v. *Haynes*, 52 Me. 578; *Hotchkis* v. *Hunt*, 49 id. 213; *Parmlee* v. *Catherwood*, 36 Mo. 479; *Ulmann* v. *Barnard*, 7 Gray, 554; *Miller* v. *Stevens*, 100 Mass. 518; *Hirschen* v. *Cunney*, 98 id. 150; *Herring* v. *Hoppock*, 15 N. Y. 409; *Palmer* v. *Hand*, 13 Johns. 434; *Cragin* v. *Coe*, 29 Conn. 52; *Ballard* v. *Burgett*, 47 Barb. 646; *Kimball* v. *Jackman*, 42 N. H. 242; *Fisk* v. *Ewen*, 46 id. 173; *Buckmaster* v. *Smith*, 22 Vt. 203; *Holmark* v. *Malin*, 5 Coldw. 482; *Moakes* v. *Nicholson*, 115 Eng. Com. Law, 290; *Hunter* v. *Warner*, 1 Wis. 141; *Ballard* v. *Burgett*, 40 N. Y. 314; *Austin* v. *Dye*, 46 id. 500; *McGoldrick* v. *Willits*, 52 id. 318; *Clark* v. *Well*, 45 Vt. 4; *Brook* v. *Hook*, L. R. 6 Exch. 93; *Ranny* v. *Higby*, 5 Wis. 70; *Esser* v. *Lindermann*, 71 Penn. 80; *United States* v. *Shaw*, 1 Cliff. 321.

The letters of the Merchants' Bank, and the orders to the captains of the lake-vessels, clearly show that the wheat was to be delivered to the Corn Exchange Elevator for the account of William G. Fitch, cashier, subject to the order of the Merchants' Bank. No title to the wheat vested in the proprietors of the elevator beyond that of warehousemen; and the plaintiffs in error, therefore, acquired no property, right, or claim, under their purchase. *McNeil* v. *Tenth National Bank*, 46 N. Y. 329; *Taylor* v. *Pope*, 5 Cold. 416; *McGoldrick* v. *Willits*, 52 N. Y.

318; *Wright* v. *Ames*, 2 Keyes, 221; *Ballard* v. *Burgett*, 40 N. Y. 314; *Austin* v. *Dye*, 46 id. 502; *Fawcett* v. *Osborn*, 32 Ill. 411; *Linen* v. *Cruger*, 40 Barb. 636; *Saltus* v. *Everett*, 20 Wend. 275; *Spraights* v. *Hawley*, 39 N. Y. 441; *Cork* v. *Beale*, 1 Bosw. 497; *Williams* v. *Aberle*, 11 Wend. 80; *Evans* v. *Wells*, 22 id. 324; *Andrews* v. *Dietrich*, 14 id. 31; *McMahon* v. *Jones*, 12 Penn. 229; *Bailey* v. *Shaw*, 24 N. H. 297; *Brown* v. *Wilmerding*, 5 Duer, 225; *Anderson* v. *Nichols*, 5 Bosw. 129; *Wooster* v. *Sherwood*, 25 N. Y. 286; *Warner* v. *Martin*, 11 How. 209; *Leckey* v. *McDermott*, 8 S. & R. 500; *Stanly* v. *Gaylord*, 1 Cush. 228; *Hotchkis* v. *Hunt*, 49 Me. 213; *Roland* v. *Gundy*, 5 Ohio, 127; *Strahan* v. *Union S. T. & T. Co.*, 43 Ill. 424; *Burton* v. *Curyea*, 41 id. 320; *Hartop* v. *Hoore*, 2 Stra. 1187; *Taylor et als.* v. *Taylor et als.*, 5 Coldw. 413; *Lehigh Co.* v. *Field*, 8 S. & R. 232.

Mr. Justice Strong delivered the opinion of the court.

The verdict of the jury having established that the wheat came to the possession of the defendants below (now plaintiffs in error), and that there was a conversion, there is really no controversy respecting any other fact in this case than whether the ownership of the plaintiffs had been divested before the conversion. The evidence bearing upon the transmission of the title was contained mainly in written instruments, the legal effect of which was for the court; and, so far as there was evidence outside of these instruments, it was either uncontradicted, or it had no bearing upon the construction to be given to them. We have, therefore, only to inquire to whom the wheat belonged when it came to the hands of the defendants, and when they refused to surrender it at the demand of the plaintiff.

It is not open to question that McLaren & Co., having purchased it at Milwaukee and paid for it with their own money, became its owners. Though they had received orders from Smith & Co. to buy wheat for them, and to ship it, they had not been supplied with funds for the purpose, nor had they assumed to contract with those from whom they purchased on behalf of their correspondents. They were under no obligation to give up their title or the possession on any terms other than such as they might dictate. If, after their purchase, they had

sold the wheat to any person living in Milwaukee or elsewhere, other than Smith & Co., no doubt their vendee would have succeeded to the ownership. Nothing in any agency for Smith & Co. would have prevented it. This we do not understand to be controverted. Having, then, acquired the absolute ownership, McLaren & Co. had the complete power of disposition; and there is no pretence that they directly transmitted their ownership to Smith & Co. They doubtless expected that firm to become purchasers from them. They bought from their vendors with that expectation. Accordingly, they drew drafts for the price; but they never agreed to deliver the wheat to the drawees, unless upon the condition that the drafts should be accepted and paid. They shipped it; but they did not consign it to Smith & Co., and they sent to that firm no bills of lading: on the contrary, they consigned the wheat to the cashier of the Milwaukee bank, and handed over to that bank the bills of lading as a security for the drafts drawn against it, — drafts which the bank purchased. It is true, they sent invoices. That, however, is of no significance by itself. The position taken on behalf of the defendants, that the transmission of the invoices passed the property in the wheat without the acceptance and payment of the drafts drawn against it, is utterly untenable. An invoice is not a bill of sale, nor is it evidence of a sale. It is a mere detailed statement of the nature, quantity, and cost or price of the things invoiced, and it is as appropriate to a bailment as it is to a sale. It does not of itself necessarily indicate to whom the things are sent, or even that they have been sent at all. Hence, standing alone, it is never regarded as evidence of title. It seems unnecessary to refer to authorities to sustain this position. Reference may, however, be made to *Shepherd* v. *Harrison*, Law Rep. 4, Ap. Cas. 116, and *Newcomb* v. *The Boston & Lowell R.R. Co.*, 115 Mass. 230. In these and in many other cases it has been regarded as of no importance that an invoice was sent by the shipper to the drawee of the drafts drawn against the shipment, even when the goods were described as bought and shipped on account of and at the risk of the drawee.

It follows that McLaren & Co. remained the owners of the wheat, notwithstanding their transmission of the invoices to

Smith & Co. As owners, then, they had a right to transfer it to the plaintiff as a security for the acceptance and payment of their drafts drawn against it. This they did by taking bills of lading deliverable to the cashier of the plaintiff, and handing them over with the drafts when the latter were discounted. These bills of lading unexplained are almost conclusive proof of an intention to reserve to the shipper the *jus disponendi*, and prevent the property in the wheat from passing to the drawees of the drafts. Such is the rule of interpretation as stated in Benjamin on Sales, 306; and in support of it he cites numerous authorities, to only one of which we make special reference, — *Jenkyns* v. *Brown*, 14 Q. B. 496. There it appeared that the plaintiff was a commission merchant, living in London, and employing Klingender & Co. as his agents at New Orleans. The agents purchased for the plaintiff a cargo of corn, paying for it with their own money. They then drew upon him at thirty days' sight, stating in the body of the drafts that they were to be placed to the account of the corn. These drafts they sold, handing over to the purchaser with them the bills of lading, which were made deliverable to the order of Klingender & Co., the agents; and they sent invoices and a letter of advice to the plaintiff, informing him that the cargo was bought and shipped on his account. On this state of facts, the court ruled that the property did not pass to the plaintiff; that the taking of a bill of lading by Klingender & Co., deliverable to their own order, was nearly conclusive evidence that they did not intend to pass the property in the corn; and that, by indorsing the bills of lading to the buyer of the bills of exchange, they had conveyed to him a special property in the cargo, so that the plaintiff's right to the corn could not arise until the bills of exchange were paid by him. That such is the legal effect of a bill of lading taken deliverable to the shipper's own order, that it is inconsistent with an intention to pass the ownership of the cargo to the person on whose account it may have been purchased, *even when the shipment has been made in the vessel of the drawee of the drafts against the cargo*, has been repeatedly decided. *Turner* v. *The Trustees of the Liverpool Docks*, 6 Exch. 543; *Schorman* v. *Railway Co.*, Law Rep., 2 Ch. Ap. 336; *Ellerslaw* v. *Magniac*, 6 Exch. 570.

In the present case the wheat was not shipped on the vessels of Smith & Co., and the bills of lading stipulated for deliveries to the cashier of the Milwaukee bank. When, therefore, the drafts against the wheat were discounted by that bank, and the bills of lading were handed over with the drafts as security, the bank became the owner of the wheat, and had a complete right to maintain it until payment. The ownership of McLaren & Co. was transmitted to it, and it succeeded to their power of disposition. That the bank never consented to part with its ownership thus acquired, so long as the drafts it had discounted remained unpaid, is rendered certain by the uncontradicted written evidence. It sent the drafts, with the bills of lading attached, to the Merchants' Bank, Watertown, accompanied with the most positive instructions, by letter and by indorsement on the bills, to hold the wheat until the drafts were paid; and when, subsequently, the Merchants' Bank sent orders to the masters of the carrying vessels to deliver it to the "Corn Exchange Elevator, Oswego, N. Y.," they accompanied the orders with letters to Smith & Co., the proprietors of the elevator, containing clear instructions to hold the grain, and "deliver" it only on payment of the drafts. To these instructions Smith & Co. made no objection. Now, as it is certain that whether the property in the wheat passed to Smith & Co. or not depends upon the answer which must be given to the question whether it was intended by McLaren & Co., or by the Milwaukee bank, their successors in ownership, that it should pass before payment of the drafts, where can there be any room for doubt? What is there upon which to base an inference that it was intended Smith & Co. should become immediate owners of the wheat, and be clothed with a right to dispose of it at once? Such an inference is forbidden, as we have already said, by the bills of lading made deliverable to W. G. Fitch, cashier of the Milwaukee bank; and it is inadmissible, in view of the express orders given by that bank to their special agents, the Merchants' Bank at Watertown, directing them to hold the wheat subject to the payment of the drafts drawn against it. No intent to vest immediate ownership in the drawees of the drafts can be implied in the face of these express arrangements and positive orders to the contrary. It is true that Smith &

Co. were the proprietors of the Corn Exchange Elevator, and that the wheat was handed over to the "custody of the elevator" at the direction of the Merchants' Bank; but it cannot be claimed that that was a delivery to the drawees under and in pursuance of their contract to purchase. The Merchants' Bank, having been only special agents of the owners, had no power to make such a delivery as would divest the ownership of their principals. *Stollenwerck et al.* v. *Thatcher*, 115 Mass. 124. And they made no attempt to divest that ownership. They guardedly retained the *jus disponendi*. Concurrently with their directions that the wheat should be delivered to the elevator, in the very orders for the delivery, they stated that the cargoes were for the account of W. G. Fitch, cashier, and were to be held subject to their order. By accompanying letters to the proprietors of the elevator, they stated that the cargoes were delivered to them "to be held subject to and delivered only on payment of the drafts drawn by McLaren & Co." All this contemplated a subsequent delivery, — a delivery after the receipt of the grain in the elevator, and when the drafts should be paid. It negatives directly the possibility that the delivery into the elevator was intended as a consummation of the purchase, or as giving title to the purchasers. It was a clear case of bailment, utterly inconsistent with the idea of ownership in the bailees. A man cannot hold as bailee for himself. By the act of accepting goods in bailment, he acknowledges a right or title in the bailor. When, therefore, as was said in the court below, "the proprietors of the Corn Exchange Elevator, or Smith & Co., received the wheat under the instructions of the Merchants' Bank, they received it with the knowledge that the delivery to them was not absolute; that it was not placed in their hands as owners, and that they were not thereby to acquire title." They were informed that the holders of the drafts, and bills of lading, had no intention to let go their ownership so long as the drafts remained unpaid. The possession they had, therefore, was not their possession. It belonged to their bailors; and they were mere warehousemen, and not vendees.

We agree, that where a bill of lading has been taken containing a stipulation that the goods shipped shall be delivered to the order of the shipper, or to some person designated by him

other than the one on whose account they have been shipped, the inference that it was not intended the property in the goods should pass, except by subsequent order of the person holding the bill, may be rebutted, though it is held to be almost conclusive; and we agree, that where there are circumstances pointing both ways, some indicating an intent to pass the ownership immediately, notwithstanding the bill of lading, in other words, where there is any thing to rebut the effect of the bill, it becomes a question for the jury, whether the property has passed. Such was the case of *Ogg* v. *Shuter*, 10 Law Rep. C. P. 159. There the ordinary effect of a bill of lading deliverable to the shipper's order was held to be rebutted by the court sitting with power to draw inferences of fact. The delivery to the carrier was "free on board," and the bill of lading was sent to the consignor's agent. The goods were also delivered into the purchaser's bags, and there was a part payment. But in this case there are no circumstances to rebut the intent to retain ownership exhibited in the bills of lading, and confirmed throughout by the indorsements on the bills, and by the written instructions to hold the wheat till payment of the drafts. Nothing in the evidence received or offered tended to show any other intent. Hence there was no necessity of submitting to the jury the question, whether there was a change of ownership. That would have been an invitation to find a fact of which there was no evidence. The circumstances as relied upon by the plaintiffs in error, as tending to show that the property vested in Smith & Co., cannot have the significance attributed to them.

It is certainly immaterial that the wheat was consigned to W. G. Fitch, cashier, care of the Merchants' Bank, Watertown, and that it was thus consigned at the request of Smith & Co., made to McLaren & Co. Had it been consigned directly to that bank, and had there been no reservation of the *jus disponendi* accompanying the consignment, the case might have been different. Then an intent to deliver to the purchasers might possibly have been presumed; but, as the case was, no room was left for such a presumption. The express direction to hold the wheat for the payment of the drafts, and to deliver it only on payment, removes the possibility of any presumed intent to

deliver it while the drafts remained unpaid. A shipment on the purchaser's own vessel is ordinarily held to pass the property to the purchaser; but not so if the bill of lading exhibits a contrary intent, — if thereby the shipper reserves to himself or to his assigns the dominion over the goods shipped. *Turner* v. *The Trustees of the Liverpool Docks*, *supra*. There are many such decisions. A strong case may be found in the Court of Queen's Bench, decided in 1840. It is *Mitchell* v. *Ede*, 11 Ad. & E. N. S. 888. A Jamaica planter, being the owner of sugars, and indebted to the defendant, residing in London, for more than their value, shipped them at Jamaica, on the 4th of April, on a ship belonging to the defendant which was in the habit of carrying supplies to Jamaica to the owner of the sugars, and others, and taking back consignments from him and others. On the same day he took a bill of lading by which the goods were stipulated to be delivered to the defendant at London, he paying freight. Two days afterwards (April 6) the shipper made an indorsement on the bill that the sugars were to be delivered to the defendant only on condition of his giving security for certain payments, but otherwise to the plaintiff's agent. He also drew drafts on the defendant. At the same time he indorsed the bill of lading, and delivered it to the plaintiff, to whom he was indebted. The bill was never in the defendant's hands. The sugars arrived in London; and the defendant paid the drafts drawn by the shipper, but did not comply with the conditions of the indorsement of April 6. On this state of facts, it was held by the court that the plaintiff was entitled to the sugars; that the shipper had not parted with the property by delivering it on board the defendant's ship, employed as it was, nor by accepting the bill of lading as drawn on the 4th of April; and that he was entitled to change the destination of the sugars till he had delivered them or the bill. In the case now in hand, there never was an instant, after the purchase of the wheat by McLaren & Co., when there was not an express reservation of the right to withhold the delivery from Smith & Co., and also an avowed purpose to withhold it until the drafts should be paid. Consent to consign the wheat to W. G. Fitch, cashier, care of Merchants' Bank, amounts, therefore, to no evidence of consent that it should pass into the control and ownership of the purchasers.

It has been argued on behalf of the plaintiffs in error that the correspondence between Smith & Co. and McLaren & Co. shows that the wheat was wanted by the former to supply their immediate need; and that, therefore, it was a legitimate inference that both parties to the correspondence intended an immediate delivery. If this were so, it was still in the power of the vendors to change the destination of the property until delivery was actually, or at least symbolically, made; and that the intention, if any ever existed, was never carried out, the bills of lading prove. It may be that Smith & Co. expected to secure early possession of the wheat by obtaining discounts from the Watertown bank, and then by taking up the drafts. If so, it would account for their request that the drafts and bills of lading might be sent through that bank; but that has no tendency to show an assent by either McLaren & Co. or the Milwaukee bank to an unconditional delivery of the property before payment of the drafts.

Nor does the fact that any engagement to hold themselves responsible for the safe keeping of the wheat for the plaintiff, and subject to its orders until the drafts drawn against it should be paid, was exacted from the Watertown bank, have any tendency to prove such an assent. This was an additional protection to the continued ownership of the plaintiff; and the words of the engagement plainly negative any consent to a divestiture of that ownership.

Without reference, therefore, to the testimony of McLaren, — which was, in substance, that, before the shipments, the agent of Smith & Co. was informed, that while the shipping firm would agree to send their time drafts through any bank he might designate, and consign the property to any responsible bank Smith & Co. might designate, they would adhere to their positive business rule in such cases, and on no account consent that any property so shipped should pass out of the control of the banks in whose care it had been placed until all drafts made against it had been paid, — without reference to this, we think it clear that the ownership of the wheat, for the conversion of which the defendants were sued, never vested in Smith & Co., never passed out of the plaintiff.

This is a conclusion necessarily drawn from the written and

uncontradicted evidence; and there is nothing in any evidence received, or offered by the defendants and overruled by the court, which has any tendency to resist the conclusion. It is unnecessary, therefore, to examine in detail the numerous assignments of error in the admission and rejection of evidence. None of the rulings have injured the defendants.

If, then, the Exchange Bank of Milwaukee was the owner of the wheat when Smith & Co. undertook to ship it to the defendants, and when the defendants received it and converted it to their use, the right of the bank to recover in this action is incontrovertible. Smith & Co. were incapable of divesting that ownership. The defendants could acquire no title, or even lien, from a tortious possessor. However innocent they may have been (and they were undoubtedly innocent of any attempt to do wrong), they could not obtain ownership of the wheat from any other than the owner. The owner of personal property cannot be divested of his ownership without his consent, except by process of law. It is not claimed, and it could not be, that the defendants were deceived or misled by any act of the plaintiff. They are the victims of a gross fraud perpetrated by Smith & Co.; and, however unfortunate their case may be, they cannot be relieved by casting the loss upon the plaintiff, who is at least equally innocent with themselves, and who has used the extremest precaution to protect its title.

It is sufficient to add, that, in our opinion, there is no just reason for complaint against the instruction given by the circuit judge to the jury, and his rulings upon the subject of damages and interest.

Judgment affirmed.

In the case of *Dows et al.* v. *Wisconsin Marine and Fire Insurance Company*, error to the Circuit Court of the United States for the Southern District of New York, Mr. Justice Strong, in behalf of the court, remarked, "This case differs in no essential particulars from that of *Dows* v. *National Exchange Bank*, *supra*. It presents the same questions, and is controlled by the same rules of law. The judgment must, therefore, be affirmed."

KNOTTS ET AL. *v.* STEARNS ET AL.

1. Where, upon a bill filed for that purpose in the proper court by the guardian of infants, a decree for the sale of the real property, whereof their father died seized, was obtained with the consent of his widow, no inquiry, so far as her rights are involved, can be had touching the validity of the sale, if made pursuant to the decree, and approved by the court.
2. Where the interest of the children then in being, or the enjoyment of the dower right of the widow, requires the conversion of such property into a personal fund, a child *en ventre sa mère* does not, until born, possess any estate therein which can affect the power of the court to pass a decree directing such conversion. Whatever estate devolves upon such child at his birth is an estate in the property in its then condition.
3. Under the laws of Virginia, parties in being, possessing an estate of inheritance in property, are regarded as so far representing all persons, who, being afterwards born, may have interests therein, that a decree for the sale thereof binding them will also bind the latter persons.
4. The requirement of the statute of Virgina, which, as an additional security against improvident proceedings for the sale of an infant's estate, provides that all those, who, were he then dead, would be his heirs or distributees, shall be parties, was met, in the present case, by making the mother and her other children parties.
5. The title of a purchaser at a judicial sale is not affected by an order of the court touching the investment of the purchase-money.

APPEAL from the Circuit Court of the United States for the Eastern District of Virginia.

Submitted on printed arguments by *Mr. John Johns, Jr.*, for the appellants, and by *Mr. John A. Meredith* for the appellees.

MR. JUSTICE FIELD delivered the opinion of the court.

This suit was brought to set aside a sale and conveyance of certain real estate situated in Richmond, Va., of which one Edwin Knotts died seized, made in 1865 under a decree of the Circuit Court of that city, and to compel a delivery of the property to the possession of the plaintiffs. The decree for the sale was obtained upon a bill filed for that purpose by the guardian of the infant children of the deceased, to which his widow was made a party. The property sold consisted of a house and lot, which, with a few articles of household furniture, constituted the entire estate of the deceased. The house was at the time much out of repair; so much so, that in its then condition it could not be rented; and neither the widow nor the

children had any means to repair it. Nor had they any other estate to which they could look as a source of support. The widow was entitled to dower in the property, and it was incapable of partition according to the respective rights of the parties. It was therefore manifestly for the interest of all of them that the property should be sold, and the proceeds converted into a fund which would give to them some income. The Circuit Court of Richmond was invested with jurisdiction under such circumstances, upon a proper showing of the facts, to decree a sale of the estate of the children. A law of the State expressly conferred the jurisdiction, and authorized its exercise upon a bill filed by the guardian for that purpose, if it was clearly shown, independently of admissions in the answer, that the interest of the infants would be promoted by the sale, and the court was satisfied that the rights of others would not be violated by the proceeding. Code of Virginia of 1860, c. 128. The widow consented to the decree so far as her interests were concerned; and it is only with reference to the estate of the children that any inquiry into the validity of the sale can now be had.

The greater part of the papers and entries in the suit in the Circuit Court of Richmond was destroyed by the fire which occurred on the 3d of April, 1865, — the day on which the city was occupied by the army of the United States; but their absence was in a great degree supplied by the testimony of the counsel of the guardian, under whose advice the suit was brought and conducted. That testimony, and copies of the decrees preserved, show that the proceedings were regularly taken in accordance with the provisions of the statute and the practice of the court. The bill was filed by the general guardian, and the widow and children were made parties defendants: they all appeared to the suit, the children by a special guardian *ad litem* appointed by the court. A reference was had to a commissioner to ascertain the facts required by the statute to authorize a sale. His report showed the condition of the property, and that the interest of all parties would be promoted by its sale, and that no rights of any other person would be violated thereby. The report was accepted and approved; and a decree for the sale was accordingly made, which was entered on

the 13th of March, 1863. The sale under it was had on the 5th of April following, when the testator of the defendant Stearns became the purchaser for the sum of $13,800 cash. The sale was approved, and a deed of the property ordered and executed to the purchaser.

The widow gave birth to a posthumous child in May following the death of her husband; and the validity of the decree is assailed because this unborn child was not made a party, nor its interests specifically considered, in the previous proceedings in the suit.

The decree, after ordering a sale of the property, also provided for the investment of the proceeds in bonds or stock of the Confederate States, or of any State belonging to the Confederacy, or of the city of Richmond. The proceeds were invested in bonds of the Confederacy, and the investment was approved by the court. It is now contended that the decree of sale was invalid because of the direction for the investment of the proceeds, and the subsequent approval of the investment made; the counsel of the appellants insisting that aid was thus directly given to the rebellion.

These two grounds constitute the principal objections to the decree. Neither of them, in our judgment, affects the validity of the sale.

The posthumous child did not possess, until born, any estate in the real property of which his father died seized which could affect the power of the court to convey the property into a personal fund, if the interest of the children then in being, or the enjoyment of the dower right of the widow, required such conversion. Whatever estate devolved upon him at his birth was an estate in the property in its then condition. That property had then ceased to be realty: it had become, by the sale, converted into personalty. All that was then required for the protection of his interest in it was the appointment of a guardian to take possession of his proportion; and such a proceeding was had. A guardian was appointed; and upon a supplemental bill the original decree was so far modified as to provide for the child having an equal interest in the fund obtained with the other children.

But there is another answer to the objection. Assuming that

the child, before its birth, whilst still *en ventre sa mère*, possessed such a contingent interest in the property as required his representation in the suit for its sale, he was thus represented, according to the law which obtains in Virginia, by the children in being at the time who were then entitled to the possession of the estate. Parties in being possessing an estate of inheritance are there regarded as so far representing all persons, who, being afterwards born, may have interests in the same, that a decree binding them will also bind the after-born parties. In the case of *Franklin* v. *Davis*, which is reported in the 18th of Grattan, this subject is elaborately and learnedly considered. In that case, a trust-estate, created for the benefit of a man and his wife during their joint lives and the life of the survivor of them, and of their children living at the death of the survivor, and of the descendants of such of the children as might be then dead, had been sold by a decree of the Circuit Court of Richmond, rendered in a suit for that purpose brought by the surviving widow, in which the children were made parties, but in which no one appeared to protect the interests of any of their descendants; and the court held that the sale was valid, and that the descendants of any child dying in the lifetime of the surviving widow were bound by the decree, on the ground that the children were to be considered as representing before the court any of their descendants who might, upon their death, become entitled under the trusts of the deed.

The statute of Virginia, as additional security against improvident proceedings for the sale of an infant's estate, requires that all those who would be heirs or distributees of the infant, if dead, shall be made parties. This requirement was met in the case under consideration; for, upon the death of either child, the mother and other child would have been its heirs, and the distributees of its estate.

With the investment of the proceeds of the sale the purchaser under the decree had no concern. A purchaser at a judicial sale is not bound in any case to see to the application of the purchase-money. That is under the control of the court; and the title of the purchaser is not affected, however unwise or illegal the disposition of the money.

The case of *Horn* v. *Lockhart*, 17 Wall. 570, which is invoked by the appellants, lends no support to their pretensions. That was the case of an executor in Alabama seeking to escape an accounting and payment to legatees of proceeds of property of the estate in his hands sold previous to the war, and retained by him for years after he had been called to a final account by the Probate Court of the State, by alleging a voluntary investment of the proceeds in bonds of the Confederate government. Those bonds were issued for the express purpose of raising funds to carry on the war then waged against the United States. The investment was, therefore, held to be illegal, because it constituted a direct contribution to the resources of the Confederate government, thus giving aid and comfort to the enemies of the United States; and the character of the transaction in this respect was not deemed to have been changed by the fact that the investment was authorized by the existing legislation of the State, and was approved by the subsequent decree of its Probate Court. A voluntary proceeding in aid of a treasonable organization could not be thus freed from its original unlawfulness.

There is no analogy between that case and the one at bar. Here no action is sought to be upheld which was taken in aid of the insurrectionary government. The sale in question was not made with any reference to that government, but solely to raise a fund which would yield an income for the support of the widow and children, and was, therefore, a lawful proceeding.

The widow and the guardian were not compelled to take the bonds of the Confederate government: they were allowed the option of investing in such bonds, or bonds of any of the States of the Confederacy, or bonds of the city of Richmond. Having deliberately selected the securities of the insurrectionary government in which to place their money, it would be a strange thing if complaints could now be heard from them against the title of the purchaser of the property, who had nothing to do with the disposition of the money, on the ground that the court did not preserve them from the folly of that investment.

Decree affirmed.

Mississippi and Missouri Railroad Company *v.* Cromwell.

A court of equity is not bound to shut its eyes to the evident character of a transaction where its aid is sought to carry into effect an unconscionable bargain, but will leave the party to his remedy at law.

Appeal from the Circuit Court of the United States for the District of Iowa.

The facts are stated in the opinion of the court.

Submitted by *Mr. George G. Wright* and *Mr. R. P. Lowe* for the appellant, and by *Mr. John N. Rogers* for the appellee.

Mr. Justice Bradley delivered the opinion of the court.

The bill in this case was filed in the court below by the appellee, Cromwell, against the appellants, the Mississippi and Missouri Railroad Company, and Muscatine County, of the State of Iowa, to compel the former to transfer to the complainant on its books, and to issue to him a certificate for, seventeen hundred and fourteen shares of its capital stock standing in the name of Muscatine County, which stock the complainant claims to have purchased at an execution sale made by the marshal of the United States for the District of Iowa.

It is conceded that one James F. Harrison of New York, in October, 1867, recovered a judgment in the Circuit Court of the United States for the District of Iowa against Muscatine County, for $6,500, upon the coupons attached to certain bonds issued by that county in 1854, being a portion of $150,000 of bonds issued in payment of its subscription for said stock; and that under an execution on said judgment in October, 1868, the marshal assumed to levy on said stock, and on the 23d of December, 1868, sold the same at public auction in the city of Des Moines; and that the complainant, Cromwell, became the purchaser for the sum of $50; and that the marshal executed to him a bill of sale accordingly.

The appellants question the validity of the levy made by the marshal, on the ground that the stock was not located in Iowa, but in the city of New York, and could not be levied on in the district of Iowa. Without attempting to decide this point, we

will proceed to the examination of other grounds of defence more directly bearing upon the title to equitable relief.

The certificates of the stock had been deposited, in June, 1866, with the Union Trust Company in the city of New York, in pursuance of an agreement by which the stockholders and bondholders of the Mississippi and Missouri Railroad Company had arranged for a formal judicial sale of the railroad of said company under the foreclosure of a mortgage to the Chicago, Rock Island, and Pacific Railroad Company. By this agreement, the stockholders consenting and depositing their stock as aforesaid were to receive sixteen per cent of the par value thereof, either in money or in the bonds of the Chicago, Rock Island, and Pacific Railroad Company; making the amount to be received by the county of Muscatine for its stock about $27,400, with interest from Dec. 1, 1865. The deposit of the stock held by the county under this arrangement entitled it to this sum. In this state of things, certain creditors of the railroad company (including said Harrison) filed a bill in the Circuit Court of the United States for the District of Iowa, claiming that the arrangement was a fraud on their rights, and that the sixteen per cent which the stockholders had stipulated for ought to be given up to them in payment of their demands as far as it would go for that purpose. This claim was sustained by the court; and a decree to that effect was made in May, 1868, before the issuing of Harrison's execution under which the stock was sold. The total amount of the sixteen per cent reserved to the stockholders, after deducting their share of the expenses, was $541,000; and the total amount of the claims of creditors, to which the money was by the said decree appropriated, was nearly $800,000, — more than sufficient to absorb the whole of it.

Now, as the stock of the Mississippi and Missouri Railroad Company, by the foreclosure and sale of all its property under the mortgage, had become completely valueless, if it had not ceased to exist for any purpose except the perception of the sixteen per cent before mentioned, and as that sixteen per cent was also entirely absorbed and taken away by the outside creditors of the company under this decree, it would appear that the subsequent levy on and sale of the stock belonging to Muscatine County was a vain and useless transaction. The

property of the company was gone; its franchises were gone; the amount which the stockholders had arranged to realize was gone; and consequently the stock could have been nothing but an empty name, and the attempt to keep it afloat for speculative purposes is not such as should recommend it to a court of equity. The parties to such a transaction ought at least to be left to their remedies at law. A court of equity should have no sympathy with any such contrivances to gain a contingent or speculative advantage, if any such is to be gained.

On the other hand, if, as intimated by the counsel, there is a contingency of obtaining the sixteen per cent appropriated to this stock by the arrangement made between the two railroad companies (now amounting to over $32,000), the case stands on no better grounds to recommend it to the special interposition of the court. This result cannot be attained without in some way depriving the county of Muscatine of that sum. If by payment of the county bonds, or in any other way, the sixteen per cent becomes liberated from the decree, the county will be equitably entitled to the money, unless Cromwell, the appellee, has a better equity. To him it will be a windfall, like a prize in a lottery. He paid no adequate consideration to entitle him to claim it as a matter of equity. If the law gives it to him, he should seek his remedy at law. Equity will not lend its aid to any such games of hazard. The levy on the stock and the formal sale of it by Harrison, after having with other creditors obtained a decree for appropriating the sixteen per cent due on it, was evidently not done for the honest purpose of making his debt by the sale, or he would not have allowed it to be sold for fifty dollars. The object must have been to get, by the forms of sale, some ulterior unconscionable advantage by the possession of the stock. The purchaser, Cromwell, stands in no better position. He comes into court with a very bad grace when he asks to use its extraordinary powers to put him in possession of thirty thousand dollars' worth of stock for which he paid only fifty dollars. The court is not bound to shut its eyes to the evident character of the transaction. It will never lend its aid to carry out an unconscionable bargain, but will leave the party to his remedy at law. This has been so often held on bills for specific performance,

and in other analogous cases, that it is unnecessary to spend argument on the subject.

Decree reversed, and cause remanded with directions to dismiss the bill of complaint.

PHILLIPS AND COLBY CONSTRUCTION COMPANY *v.* SEYMOUR ET AL.

1. A., who had undertaken to build a railroad for a company, entered July 18, 1872, into a sealed contract with B. for building a hundred and sixty miles of the road. The contract, among other things, provided that B. should complete the first section, of forty miles, on or before the first day of September then next ensuing; the third section, of twenty miles, by the fifteenth day of that month; the fourth section, of twenty miles, on the fifteenth day of the following November; the fifth section, of twenty miles, on the fifteenth day of December; and so on; the whole to be completed May 1, 1873. Payment was to be made to B. as the work progressed, the 15th of each month, on monthly estimates, by the engineer of the railroad company, of the work done the previous month, except fifteen per cent after the completion of forty miles, which was to be retained as security for the performance by B. until the work should be completed, and to be forfeited to A., and applied to any claim for damages which he might sustain by the failure of B. to have the stipulated work completed at the time specified. Fifteen per cent of the estimates on the first forty miles, and a liquidated sum of $15,000 agreed to be paid for extra work on that section, were to be retained as security for the completion of the first sixty miles. B. failed to finish any portions of the work by the specified time; but A., although authorized by the contract to declare it forfeited, excused the failure, paid B. the estimate for the work then done, and permitted him to proceed with the work. B. continued to do so until A. failed to pay the large sums due him by the estimates for work done in October and November. B. then learned from A. that the latter was unable to pay those estimates, and would probably be unable for a time to pay future monthly estimates. B. thereupon ceased to do any further work, and brought this suit. *Held*, 1. That the declaration of B. was sufficient on demurrer, as it averred, in substance, that from the time he entered upon the performance of the contract in July, 1872, until the fifteenth day of December of that year, when A. wholly failed to make the stipulated payment for the work then actually done, he, with a large force and with suitable equipments along the whole line of the road, had prosecuted the work with all the energy and skill that he possessed, and that A. had expressed satisfaction at the manner in which the work was done. 2. That A. so far waived absolute performance on the part of B. as to consent to be liable on his covenant for the contract price of the completed work, but did not waive his right to whatever damages he may have sustained by the failure of B. to perform

such work by the specified time, and that A. might set up such damages by way of cross-demand against B. 3. The court below erred in charging the jury that time was not of the essence of the contract sued on, and that such damages could not, therefore, be recovered; but, inasmuch as there was no legal evidence of such damages, the misdirection of the court worked no prejudice to A., and affords no ground for reversing the judgment. 4. That B. was not required, after A. had defaulted on a payment due, to proceed with the work at the hazard of further loss; and that he was entitled to recover the contract price of the work done, together with the fifteen per cent on the estimates, and the $15,000, both of which had been retained by A. as a security for B.'s performance of the contract.

2. In an action of covenant, evidence of a parol contract is inadmissible. Had the declaration averred such a contract, it would have been bad on demurrer in the courts of Illinois, as the common-law rules of pleading and the distinction between forms of action prevail in that State.

3. Fifty-two assignments of error were filed in this case. The court condemns such a practice as a flagrant perversion of the rule on that subject.

ERROR to the Circuit Court of the United States for the Northern District of Illinois.

Mr. Thomas Dent and *Mr. Edwin H. Abbot* for the plaintiff in error.

Mr. Jeremiah S. Black and *Mr. H. K. Whiton* for the defendants in error.

MR. JUSTICE MILLER delivered the opinion of the court.

The plaintiff in error, who was defendant in the Circuit Court, is a corporation organized under the laws of Wisconsin. It had undertaken to build the whole or a large part of the Wisconsin Central Railroad, and had made contracts with the defendants in error, whom we shall hereafter call plaintiffs, as they were in the Circuit Court, for the construction of a part of this road. These contracts were drawn with the minuteness of detail usual in such cases, and provided, among other things, that payments should be made by defendant, as the work progressed, on estimates made monthly by the engineer of the railroad company, on the fifteenth day of each month, for all the work done the previous month, except fifteen per cent retained by defendant as security for performance on the part of plaintiffs until the work was completed.

The plaintiffs brought their action of covenant on these contracts, alleging that they had commenced the work in the month of July, 1872, shortly after the contracts were signed,

and prosecuted it vigorously until some time in December; that defendant had failed to pay the large sums due by the estimates for work done in October and November; and, seeing no prospect of payments, plaintiffs were compelled to abandon the work, and bring this suit. They assert a claim for all the work done as estimated, and for various items of damage suffered by them in consequence of this failure of defendant to comply with its covenant to pay as agreed.

A demurrer to this declaration having been overruled, defendant filed fifteen pleas in bar; also an amended plea; and, on these, numerous issues of fact were finally joined.

A verdict and judgment were rendered in favor of plaintiffs for $119,061.46; to reverse which this writ of error is brought.

In this court, plaintiff in error, by one counsel, files forty-five assignments of error, and by another seven more; making fifty-two in all.

The object of the rule requiring an assignment of errors is to enable the court and opposing counsel to see on what points the plaintiff's counsel intend to ask a reversal of the judgment, and to limit the discussion to those points. This practice of unlimited assignments is a perversion of the rule, defeating all its purposes, bewildering the counsel of the other side, and leaving the court to gather from a brief, often as prolix as the assignments of error, which of the latter are really relied on. We can only try to respond to such points made by counsel as seem to be material to the judgment which we must render.

Before we proceed to this examination, however, it may be as well to say, that, in addition to a general verdict in favor of plaintiffs for $107,353.44, the jury made three special findings on matters suggested by the court. These are, —

1. That, at the time of the alleged breach of covenant by defendant, it had waived or excused the failure of plaintiffs up to that time to complete certain parts of their work within the times stipulated in the contract; and that plaintiffs were, at the time of said breach, engaged in the performance of said work, with the consent of defendant.

2. That defendant, at the time plaintiffs stopped the work, had given plaintiffs to understand that defendant was finan-

cially unable to pay the estimates for work then done, and would probably be unable for a time to pay future monthly instalments.

3. That defendant had agreed to pay plaintiffs the extra cost of doing the earth-work by train on certain sections, and that the amount of this extra cost was $11,708.

These findings must be presumed to be in accordance with the facts, and must stand as foundations for the judgment of the court, unless it can be shown that they are affected by some erroneous ruling of the court in regard to the admission of evidence or instructions to the jury.

We now proceed to notice such objections to the rulings of the Circuit Court as we deem of sufficient importance to require it.

1. It is said that the declaration is fatally defective because it does not aver that the plaintiffs were ready, willing, and able to perform the covenants on their part to be performed by the contract. It is true that this might have been alleged in more formal and apt terms than it is. But they do aver, that, from the time they entered upon the work in July until the fifteenth day of December, — the day of the alleged breach on the part of defendant, — they prosecuted the same with all the energy and skill they possessed, having men in large numbers, — to wit, more than 1,000, — with suitable teams and other equipments, along the whole line of the road of 160 miles; and that defendant had expressed entire satisfaction with the manner in which plaintiffs were doing the work.

We are inclined to think, that, coupled with the allegation that defendant was in default for non-payment for work actually done, this was sufficient. It is not like a case where a plaintiff has done nothing, but is required to put a defendant in default by offering to perform, or showing a readiness to perform. Plaintiffs here had already performed, and the defendant failed to do its corresponding duty under the contract; and, defendant having defaulted on a payment due, plaintiffs are not required to go on at the hazard of further loss.

2. By the terms of the contract, plaintiffs bound themselves to complete the first section, of forty miles, by the first day of September; the third section, of twenty miles, by the fifteenth

day of the same month; the fourth section, of twenty miles, by the fifteenth day of November; and so on; and it is conceded that no one of these sections was completed within the time prescribed. It was also agreed, that if plaintiffs failed in this respect, or failed in the opinion of the engineer-in-chief of the railroad company to prosecute the work with sufficient vigor to completion according to the terms of the contract, the defendant might declare it abandoned, and the amount retained out of the monthly estimates forfeited. This was fifteen per cent of each monthly estimate, which, by the agreement, was retained by defendant as security for the due progress of the work.

The main proposition, underlying the whole argument of the defence on the general merits, is, that these covenants to complete certain sections within a definite time, and the covenant to pay, are mutual and dependent covenants; and that time is so far of the essence of this covenant of plaintiffs, that they can recover nothing, because they completed nothing within the specified time.

Where a specified thing is to be done by one party as the consideration of the thing to be done by the other, it is undeniably the general rule that the covenants are mutual, and are dependent, if they are to be performed at the same time; and if, by the terms or nature of the contract, one is first to be performed as the condition of the obligation of the other, that which is first to be performed must be done, or tendered, before that party can sustain a suit against the other. There is no doubt, that in this class of contracts, if a day is fixed for performance, the party whose duty it is to perform or tender performance first must do it on that day, or show his readiness and willingness to do it, or he cannot recover in an action at law for non-performance by the other party.

But, both at common law and in chancery, there are exceptions to this rule, growing out of the nature of the thing to be done and the conduct of the parties. The familiar case of part performance, possession, &c., in chancery, where time is not of the essence of the contract, or has been waived by the acquiescence of the party, is an example of the latter; and the case of contracts for building houses, railroads, or other large and expensive constructions, in which the means of the builder and

his labor become combined and affixed to the soil, or mixed with materials and money of the owner, often afford examples at law.

If A. contract to deliver a horse to B. on Monday next, for which B. agrees to pay $100, A. cannot recover by an offer to deliver on Tuesday; but if A. agree to deliver a horse, buggy, and harness on Monday, and B. accepts delivery of the horse and buggy, can he refuse to pay any thing, though he accepts delivery of the harness on Tuesday? This is absurd. He waives, by this acceptance, the point of time as to the harness, at least so far as A.'s right to recover the agreed sum is concerned. If B. have suffered any damage by the delay, he can recover it by an action on A.'s covenant to deliver on Monday; or, if he wait to be sued, he may recoup by setting it up in that action as a cross-demand growing out of the same contract.

Such we understand to be especially the law applicable to building contracts.

If the builder has done a large and valuable part of the work, but yet has failed to complete the whole or any specific part of the building or structure within the time limited by his covenant, the other party, when that time arrives, has the option of abandoning the contract for such failure, or of permitting the party in default to go on. If he abandons the contract, and notifies the other party, the failing contractor cannot recover on the covenant, because he cannot make or prove the necessary allegation of performance on his own part. What remedy he may have in assumpsit for work and labor done, materials furnished, &c., we need not inquire here; but if the other party says to him, "I prefer you should finish your work," or should impliedly say so by standing by and permitting it to be done, then he so far waives absolute performance as to consent to be liable on his covenant for the contract price of the work when completed.

For the injury done to him by the broken covenant of the other side, he may recover in a suit on the contract to perform within time; or, if he wait to be sued, he may recoup the damages thus sustained in reduction of the sum due by contract price for the completed work.

It is said on the other side in this case, that the right of the

defendant to abandon the contract, and retain in its hands the fifteen per cent, is its only remedy, and that that has been waived. We need not decide this point here; for we are only answering the argument that plaintiffs have lost *all* right to sue on the contract by their failure to complete the sections in the times named.

As it is perfectly clear from the testimony that defendant, at the time these several sections should have been completed, made no point of the failure to do so, but urged the plaintiffs to go on, expressed satisfaction at the manner in which the work was progressing, and paid the estimate after such failure, the verdict of the jury, that defendant had waived strict performance as to time, was so far well founded as to enable plaintiffs to recover for work actually done.

3. This is an appropriate place to dispose of another objection. Defendant set up in its pleas and offered evidence to prove the damage sustained by those delays.

But the court instructed the jury, that, under this covenant, time was not of the essence of the contract; that on that point it was flexible, and defendant could not recover for the delay. As we have stated above, we are inclined to the opinion that defendant did not, by any of the acts proved in this case, waive its right to damages arising from this failure of the plaintiffs to complete the sections in time, but only waived the forfeiture, if it may be so called, of all right on the part of plaintiffs to sue. But an attentive examination of the testimony offered, and of the charge of the court on that subject, shows that no legal evidence of any damage was offered.

The attempt was to show, that, by the use of the road at an earlier day, much profit would have resulted. But the witness stated that the road ran through a wild, uninhabited country; that he expected that saw-mills would have been established along the line of the road, and the transportation of lumber incident to the use of such mills would have made the defendant a profit of $20,000.

The whole basis of this calculation is conjectural, uncertain, and vague. It is manifestly no safe basis on which it can be assumed that any business would have been done in the few days of the delay; or that, if done, it would have been done at

a profit. There was nothing on which a jury could have done any thing but conjecture and speculate, at the hazard of sacrificing truth and justice.

There was, therefore, no error to defendant's prejudice in this part of the case.

4. It is said that the court erred in admitting evidence on the part of plaintiffs of the profits they would have made on the remaining part of the road if defendant had paid, so that they could go on.

Whether the evidence which was given on this subject was admissible or not was rendered immaterial by the subsequent ruling of the judge, who instructed the jury to disregard it, and to allow plaintiffs nothing on the ground of such supposed profits; and it is manifest from the record that nothing was allowed for this in the verdict.

5. The foregoing are the material objections, which are of a general character, to the rulings of the court. The items for which the general verdict ($107,353.44) was had may be divided into three classes: —

I. An agreed sum of $15,000, which was to be paid on the completion of the first sixty miles of the road by the terms of the contract, and which was exclusive of the estimates for work done. Defendant resisted this, on the ground that plaintiffs, not having finished the sixty miles, could not recover it in this action, and also because they had abandoned the work.

In the view we have already expressed, neither of these objections is sound. If, by defendant's breach, plaintiffs were justified in abandoning the work, then they were entitled to all they had earned under that contract, including the $15,000; because the $30,000, of which this $15,000 was part, was a liquidated sum agreed upon as compensation for extra work on the first forty miles of the road which had been completed, and was only withheld, like the fifteen per cent, as security for the future performance by plaintiffs.

Defendant, having by its default terminated the work, had no longer any right to retain either of these sums.

II. The next class consisted of the estimates under the contract, which were unpaid. This is by far the largest item of the verdict; and no serious contest is made except as to $19,937.55, which constituted the reserved fifteen per cent already mentioned.

As in the case of the $15,000, we are of opinion, that since the work was abandoned, and the contract, by reason of the breach thereof by the defendant, ended, it can have no right to retain any part of the estimates for work actually performed. This was to be retained as a security against failure or default of *plaintiffs*, and cannot be held by *defendant after* its own default has caused the abandonment of the work.

III. The third class is composed of a large number of items of damages incidental to the abrupt cessation of the work by reason of defendant's failure to pay, — such as loss of material, supply road, shanties, travel of hands, depreciation in value of tools, materials, &c. We cannot go into all these. After mature consideration of the very full briefs and arguments on these matters, we see no error in any ruling of the court in regard to them, and so dismiss their further consideration.

6. A more difficult point remains to be considered.

The plaintiffs were allowed to introduce evidence to prove that the defendant had made a verbal promise to pay the extra cost of doing by train the earth-work of the sections between 40 and 46; and the jury found a special and separate verdict, that it had so promised, and that this extra cost was $11,708.

There is no allegation of this promise in the declaration, which is an action of covenant on the sealed agreement. There is no allusion to it, or provision for it, in that instrument. It is found by the special verdict to be a promise, and the record shows that it was by parol. Defendant objected to the admission of the evidence of this contract, on the specific ground, that, if valid, it could be enforced in assumpsit only, and not in an action founded solely on the specialty.

The work done under the written contract could be estimated by the engineer, because a price was fixed by it for every thing. He had only to ascertain quantities, apply the prices, and ascertain the amount to be paid. For this extra cost of a special mode of doing part of the work, he had no elements out of which to make an estimate.

It is certainly opposed to the common-law system of pleading which prevails in the Illinois circuit, — to join the actions of covenant and assumpsit. If this had been done in the declaration, the defendant could have successfully demurred.

It is equally clear that covenant cannot be sustained on a verbal promise. Can the plaintiffs be allowed to prove a cause of action, which, if alleged in the declaration, would have been fatal to it on demurrer? and can they recover in an action of covenant on a special parol promise?

The judge below said he would not hazard the general verdict by permitting this matter to be embraced in it. He took the special verdict, and, notwithstanding his doubts, embraced the amount of it in the final judgment.

This matter grows immediately out of, and is intimately connected with, the work done under the written contract. It is merely a verbal agreement, that if the plaintiffs would do the work in a manner different from their obligation, more advantageous to defendant, and more expensive, defendant would pay this difference in expense. It seems reasonable that the claim for this extra cost should be decided in the suit in which the other compensation for the same work is recovered; that plaintiffs, having proved their case and recovered a verdict, should not be compelled to resort to a new suit in which this verdict would stand for nothing. Only a rule of pleading stands in the way, in this court, of doing what the very right of the case requires. We can give the plaintiffs their judgment for the amount of the general verdict, and reject this; or we can do complete justice, and affirm the judgment of the Circuit Court in full.

But the State of Illinois has adhered to the system of pleading which recognizes the lines that separate the forms of action at common law, and the act of Congress requires the Circuit Courts to conform to the mode of pleading of the State in which the court sits. Undoubtedly there was error under that system in admitting proof of a parol contract of this kind in an action of covenant; and as the defendant made this precise objection, and took an exception when overruled, we do not see how we can refuse to give it the benefit of its objection. In those States where the distinction between forms of action have been abolished, the declaration could have been amended, and the two matters joined in the same action. In that case, we might, under the statute of jeofails, disregard the error as one capable of removal by amendment below, and as cured by verdict and judgment when it comes here.

But sect. 954 of the Revised Statutes, which was sect. 32 of the Judiciary Act of 1789, was founded on the English statute of 32 Henry VIII., and is no broader. This act of Congress has been frequently construed by this court in such a manner as to forbid its application to the case before us. *Garland* v. *Davis*, 4 How. 131; *Stockton et al.* v. *Bishop*, id. 155; *Jackson* v. *Ashton*, 10 Pet. 480.

There is no room here for amendment. There could have been none in the court below. To allow a verdict to stand which is responsive to no issue made by the pleadings, or which could have been made by any pleading in that action, is farther than we can go in the promotion of abstract justice.

The judgment of the Circuit Court must be reversed, with direction to the court below to set aside the special verdict of the jury for the $11,708, and to enter a judgment in favor of plaintiffs on the general verdict of $107,353.44, with interest from the day it was rendered; and the plaintiff in error is to recover costs in this court.

If, however, the defendants in error shall within a reasonable time, during the present term of this court, file in the Circuit Court a *remittitur* of so much of the judgment of that court in their favor as is based on the special verdict, and produce here a certified copy of the *remittitur*, the judgment of that court will be affirmed.

NEW LAMP CHIMNEY COMPANY *v.* ANSONIA BRASS AND COPPER COMPANY.

1. The creditor of a manufacturing corporation, which was duly adjudicated a bankrupt, who proved his claim and received a dividend thereon, does not thereby waive his right of action for so much of the claim as remains unpaid.
2. A decree adjudging a corporation bankrupt is in the nature of a decree *in rem* as respects the *status* of the corporation, and, if the court rendering it has jurisdiction, can only be assailed by a direct proceeding in a competent court, unless it appears that the decree is void in form, or that due notice of the petition was not given.

ERROR to the Supreme Court of the State of New York.

The case was argued by *Mr. J. M. Martin* for the plaintiff in error, and by *Mr. D. D. Lord* for the defendant in error.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Corporations, whether moneyed, business, or commercial, and joint-stock companies, are subject to the provisions of the Bankrupt Act; and the thirty-seventh section of the act provides to the effect, that upon the petition of any officer of any such corporation or company, duly authorized by a vote of a majority of the corporators at any legal meeting called for the purpose, or upon the petition of any creditor or creditors of the same, made and presented in the manner provided in respect to other debtors, the like proceedings shall be had and taken as are required in other cases of voluntary or involuntary bankruptcy; but the same section provides that no allowance or discharge shall be granted to any corporation or joint-stock company, or to any person or officer or member thereof. 14 Stat. 535.

Nine overdue promissory notes executed by the corporation defendants were held by the corporation plaintiffs, amounting to the sum of $5,266.94; and they instituted the present suit in the Supreme Court of the State to recover the amount.

Service being made, the defendants appeared, and set up as a defence in their answer, that they, the defendants, had on their own application been declared bankrupt, and that the plaintiffs had proved the claim in suit in the bankrupt proceedings, and had been paid a dividend on the same, and that they were thereby prevented under the Bankrupt Act from recovering the claim or any part of the same in a subsequent action.

Issue being joined, the parties went to trial; and, the bankrupt proceedings having been introduced in evidence, the defendants moved the court to dismiss the suit, insisting that the plaintiffs, having proved the claim in the bankrupt proceedings and received a dividend on the same, had waived the cause of action; but the presiding justice denied the motion, and directed the jury to render a verdict in favor of the plaintiffs for the balance due on the notes. Exceptions were duly filed by the defendants, and they appealed to the general term, where the judgment was affirmed; the court holding that the bankrupt court had no jurisdiction to adjudge the defendant corporation bankrupt, and that the proceedings in bankruptcy were void. *Brass and Copper Company* v. *Lamp Chimney Company*, 64 Barb. 436.

Still dissatisfied, the defendants appealed to the Court of Appeals of the State, where the parties were again fully heard; and the Court of Appeals affirmed the judgment rendered by the court sitting in general term, holding that the decree of the Bankrupt Court adjudging the defendant corporation bankrupt, and the subsequent proceedings in pursuance of the same, did not have the effect to discharge the corporation from the claim in suit beyond the amount paid to the plaintiffs as dividends, even though the claim was proved by the plaintiffs in the bankrupt proceedings. *Same* v. *Same*, 53 N.Y. 124.

Sufficient appears to show that the defendants are a manufacturing corporation organized under the law of the State, which authorizes three persons to form such a corporation, and requires that the trustees shall be stockholders of the company. Sess. Laws (1848), ch. 40, p. 54.

Nothing being alleged to the contrary, it must be assumed that the corporation was duly organized. It appears that a meeting of the trustees was duly called and notified to inquire into the condition of the affairs of the corporation; that the meeting was regularly held, and, it having been ascertained to the satisfaction of the meeting that the corporation was insolvent, it was voted and resolved, by a majority of the trustees present, that the president of the company be required to file a petition in the District Court that the corporation may be adjudged bankrupt. Such a petition was accordingly filed; and, if the president of the company was duly authorized to sign and file it, the plaintiffs do not deny that the bankrupt proceedings were regular.

Two objections are taken to the jurisdiction of the Bankrupt Court, which, in point of fact, involve the same considerations. They are, that the majority of the stockholders did not sign the petition filed in the District Court, and that the president of the corporation was not authorized to sign it; which is a mere inference from the fact that the meeting, when the vote and resolution were adopted, was a regular meeting of the trustees: but inasmuch as the statute of the State requires that the trustees shall be stockholders, and no objection is made to the organization of the company, it may well be presumed that the trustees were stockholders as required by law.

As before remarked, three persons may form such a corporation. The record shows that a majority of the trustees present adopted the vote and resolution, which necessarily implies that a minority did not concur; and if not, then certainly there must have been three or more present. The record does not show that the whole capital stock of the company is not owned by three persons.

Viewed in the light of these suggestions, it follows that the want of jurisdiction in the Bankrupt Court is not clearly shown, and that the case is plainly one where every presumption should be that the action of the court was rightful.

Due notice, it is conceded, was given to all concerned, and that the defendants appeared in the Bankrupt Court, and that they never made any objection to the jurisdiction of the court; and, in view of these circumstances, the rule is that every presumption is in favor of the legal character of the proceedings. *Voorhees* v. *Bank*, 10 Pet. 473.

Concede that, still it is said that courts created by statute cannot have jurisdiction beyond what the statute confers; which is true: but no such question arises in the case before the court, as all concede that the District Court had jurisdiction of the subject-matter, and that the defendants appeared, and claimed and exercised every right which the Bankrupt Act confers. They are, therefore, estopped to deny the jurisdiction of the court; nor are the plaintiffs in any better condition, unless it appears that the bankrupt proceedings are actually void. Void proceedings, of course, bind no one not estopped to set up the objection; and, in order to establish the theory that the proceedings in this case are void, the plaintiffs deny that the president of the corporation was authorized to make and file the petition in the District Court. *McCormick* v. *Pickering*, 4 Comst. 279.

Such a petition might properly be made by the president of the company, and be by him presented to the District Court, if he was thereto duly authorized at a legal meeting called for the purpose by a vote of a majority of the corporators; and whether he was so authorized or not was a question of fact to be dete mined by the District Court to which the petition was presented; and the rule in such cases is, that if there be a total

defect of evidence to prove the essential fact, and the court find it without proof, the action of the court is void; but when the proof exhibited has a legal tendency to show a case of jurisdiction, then, although the proof may be slight and inconclusive, the action of the court will be valid until it is set aside by a direct proceeding for that purpose. Nor is the distinction unsubstantial, as in the one case the court acts without authority, and the action of the court is void; but in the other the court only errs in judgment upon a question properly before the court for adjudication, and of course the order or decree of the court is only voidable. *Staples* v. *Fairchild*, 3 Comst. 46; *Miller* v. *Brinkerhoff*, 4 Den. 119; *Voorhees* v. *Bank*, 10 Pet. 473; *Kinnier* v. *Same*, 45 N. Y. 539.

Jurisdiction is certainly conferred upon the District Court in such a case, if the petition presented sets forth the required facts expressly or by necessary implication, and the court, upon proof of service thereof, finds the facts set forth in the petition to be true; and it is equally certain that the District Court has jurisdiction of "all acts, matters, and things" to be done under and in virtue of the bankruptcy until the final distribution and settlement of the estate of the bankrupt and the close of the bankrupt proceedings. 14 Stat. 518.

Power, it is true, is vested in the circuit courts in certain cases to revise the doings of the district courts, and in certain other cases an appeal is allowed from the District Court to the Circuit Court; but it is a sufficient answer to every suggestion of that sort that no attempt was made in the case to seek a revision of the decree in any other tribunal. Nothing of the kind is suggested, nor can it be, as the record shows a regular decree unreversed and in full force.

Grant that, and still the proposition is submitted that the decree was rendered without jurisdiction, for the reason assigned; and that that question is open to the defendants, even though the decree was introduced as collateral evidence in a suit at law or in equity in another jurisdiction. But the court here is entirely of a different opinion, as the district courts are created by an act of Congress which confers and defines their jurisdiction; from which it follows that their decrees rendered in pursuance of the power conferred are entitled in every

other court to the same force and effect as the judgments or decrees of any domestic tribunal, so long as they remain unreversed and are not annulled. *Shawhan* v. *Merritt*, 7 How. 643; *Huff* v. *Hutchinson*, 14 id. 588; *Parker* v. *Danforth*, 16 Mass. 299; *Pecks* v. *Barnum*, 24 Vt. 76; 2 Smith's Lead. Cas. (7th ed.) 814.

Judgments or decrees rendered in the district courts may be impeached for the purpose of showing that the particular judgment or decree was procured for the purpose of avoiding the effect and due operation of the Bankrupt Act, and competent evidence is admissible for that intent and purpose; but the judgment or decree of the District Court, in a case like the present, is no more liable to collateral impeachment, except to show that it was designed to prevent the equal distribution of the debtor's estate, than it is to such impeachment in the court where it was rendered. *Palmer* v. *Preston*, 45 Vt. 159; *Miller* v. *U. S.*, 11 Wall. 300.

Authority to establish uniform laws upon the subject of bankruptcy is conferred upon Congress; and, Congress having made such provision in pursuance of the Constitution, the jurisdiction conferred becomes exclusive throughout the United States. By the act of Congress, the jurisdiction to adjudge such insolvent corporations as are described in the thirty-seventh section of the act to be bankrupts is vested in the district courts; and it follows that such a decree is entitled to the same verity, and is no more liable to be impeached collaterally than the decree of any other court possessing general jurisdiction; which of itself shows that the case before the court is controlled by the general rule, that where it appears that the court had jurisdiction of the subject-matter, and that process was duly served or an appearance duly entered, the judgment or decree is conclusive, and is not open to any inquiry upon the merits. 2 Smith's Lead. Cas. (7th ed.) 622; Freeman on Judgments (2d ed.), sect. 606; *Hampton* v. *McConnel*, 3 Wheat. 234; *Gelston* v. *Hoyt*, id. 312; *Slocum* v. *Mayberry*, 2 id. 10; *Nations* v. *Johnson*, 24 How. 203; *D'Arcy* v. *Ketcham*, 11 id. 166; *Webster* v. *Reid*, id. 437.

Such a decree adjudging a corporation bankrupt is in the nature of a decree *in rem*, as respects the *status* of the cor-

poration; and, if the court rendering it has jurisdiction, it can only be assailed by a direct proceeding in a competent court, unless it appears that the decree is void in form, or that due notice of the petition was never given. *Way* v. *How*, 10 Mass. 503; *Ex parte Wieland*, Law Rep. 8 Chan. App. 489; *Ocean Bank* v. *Olcott*, 46 N.Y. 15; *Revell* v. *Blake*, Law Rep. 7 C. P. 308.

Suppose that is so: then it is insisted by the defendants that the case before the court is controlled by the twenty-first section of the Bankrupt Act, which, among other things, provides that no creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action and suit against the bankrupt, &c. 14 Stat. 526.

Debtors, other than corporations and joint-stock companies, are certainly within that provision; and if corporations are also within it, then it follows that the judgment must be reversed, as the plaintiffs are not entitled to recover. Instead of that, the plaintiffs deny that corporations or joint-stock companies are within that provision, and insist that the case before the court is controlled by the thirty-seventh section of the Bankrupt Act, which provides that no allowance or discharge shall be granted to any corporation or joint-stock company, or to any person or officer or member thereof; which is the view of the case taken by the Court of Appeals of the State whose judgment is brought into review by the present writ of error. Id. 535; *Brass and Copper Co.* v. *Lamp Chimney Co.*, 53 N. Y. 124.

Difficulties perhaps insurmountable would attend the theory of the plaintiffs if the twenty-first section of the Bankrupt Act stood alone; but it does not stand alone; and, being a part of a general system of statutory regulation, it must be read and applied in connection with every other section appertaining to the same feature of the general system, so that each and every section of the act may, if possible, have their due and conjoint effect without repugnancy or inconsistency.

Statutes must be interpreted according to the intent and meaning of the legislature; and that intention must, if practicable, be collected from the words of the act itself; or, if the language is ambiguous, it may be collected from other acts *in*

pari materia, in connection with the words, and sometimes from the cause or necessity of the statute: but where the language of the act is unambiguous and explicit, courts are bound to seek for the intention of the legislature in the words of the act itself, and they are not at liberty to suppose that the legislature intended any thing different from what their language imports. Potter's Dwarris, 146.

Words and phrases are often found in different provisions of the same statute, which, if taken literally, without any qualification, would be inconsistent, and sometimes repugnant, when, by a reasonable interpretation, — as by qualifying both, or by restricting one and giving to the other a liberal construction, — all become harmonious, and the whole difficulty disappears; and in such a case the rule is, that repugnancy should, if practicable, be avoided, and that, if the natural import of the words contained in the respective provisions tends to establish such a result, the case is one where a resort may be had to construction for the purpose of reconciling the inconsistency, unless it appears that the difficulty cannot be overcome without doing violence to the language of the law-maker.

Sect. 21, if taken literally, would require that the whole claim of every creditor proving his claim, who is included within its operation, should be for ever discharged; but the thirty-third section of the act provides that no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in a fiduciary character, shall be discharged under the Bankrupt Act. Such debts may be proved, and the provision is that the dividend shall be a payment on account of the debt; but it is incorrect to suppose that the creditor, by proving such a debt, waives "all right of action and suit against the bankrupt." On the contrary, it is well settled that no consequences can be allowed to flow from proving a debt which are inconsistent with the provisions of sect. 33. *Ex parte Robinson*, 6 Blatch. 253; *In re Rosenberg*, 2 N. B. R. 81.

Where the bankrupt has in all things conformed to his duty under the Bankrupt Act, he is entitled to receive a discharge; and the thirty-fourth section provides that a discharge duly granted shall, with the exceptions specified in the preceding

section, release the bankrupt from all debts, claims, liabilities, and demands which were or might have been proved against his estate in bankruptcy.

Debts due to the United States are not enumerated in the exceptions contained in sect. 33; but all admit that such debts may be proved in the bankrupt proceedings; and yet it is settled law that the certificate of discharge does not release any debt which the bankrupt owes to the United States. *United States* v. *Herron*, 20 Wall. 253.

Other examples of the kind might be referred to where it has become necessary to qualify, restrict, or limit certain provisions of the Bankrupt Act, in order to reconcile seeming incongruities and inconsistencies; but those mentioned will be sufficient for the present investigation.

Beyond all question, corporations of the kind and joint-stock companies are brought within the provisions of the Bankrupt Act by the thirty-seventh section; and the whole administrative proceedings in respect to such bankrupt corporations and joint-stock companies are specifically regulated by that section as a separate feature of the bankruptcy system. Much of the system applicable to such corporations and companies, it is true, is borrowed by general phrases from the other sections of the same act; but only such portions of the same as are expressly or impliedly adopted by that section are applicable to such corporations and companies, as clearly appears from the distinct features of the regulations prescribed, which are as follows: —

(1.) That the officer signing the petition for voluntary bankruptcy must be duly authorized by a vote of the majority of the corporators at a legal meeting called for the purpose. (2.) That the petition for involuntary bankruptcy may be made and presented by any creditor or creditors in the manner provided in respect to debtors, without any specification as to the number of the creditors or the amount of their debts. (3.) That the like proceedings shall be had and taken as provided in the case of debtors. (4.) That all the provisions in the act which apply to the debtor, or set forth his duties in regard to furnishing schedules and inventories, executing papers, submitting to examination, disclosing, making over, secreting, concealing, conveying, assigning, or paying away his money or property, shall

in like manner, and with like force, effect, and penalties, apply to each and every officer of such corporation or company in relation to the same matters concerning the corporation or company, and the money and property thereof. (5.) That all payments, conveyances, and assignments declared fraudulent and void by the act, when made by a debtor, shall in like manner, and to the like extent, and with like remedies, be fraudulent and void when made by a corporation or company. (6.) That no allowance or discharge shall be granted to any corporation or joint-stock company, or to any person or officer or member thereof. (7.) That all the property and assets of any corporation declared bankrupt by proceedings under the Bankrupt Act shall be distributed to the creditors of the corporation in the manner therein provided in respect to natural persons. 14 Stat. 535.

Special regulations in respect to petitions are enacted by sect. 37 of the Bankrupt Act, where the insolvent is a corporation or joint-stock company, different from those prescribed in cases where the insolvent party is a natural person or partnership. But, subject to the exception that no allowance or discharge shall be granted to any such corporation or joint-stock company, all of the administrative proceedings are to be the same as in case of bankrupt individuals, not because corporations are within the words of the other provisions of the Bankrupt Act, but because the thirty-seventh section of the act provides that the provisions of the act shall apply to such corporations and joint-stock companies; and it appears that all the administrative proceedings, with that exception, are required to be in conformity to the regulations prescribed in respect to individual bankrupt debtors.

By the terms of the section, corporations adjudged bankrupt are also made subject to the same duties as individual bankrupt debtors in regard to all the matters therein specified; but the emphatic exception to all those general regulations is that no allowance or discharge shall be granted to any corporation or joint-stock company, or to any person, officer, or member thereof.

Examined in the light of these suggestions, it is as clear as any thing dependent upon the construction of a statute well

can be, that Congress, in giving jurisdiction to the district courts to adjudge moneyed, business, and commercial corporations and joint-stock companies bankrupt, never intended to adopt the introductory paragraph of sect. 21 or sect. 32 as applicable to such corporations or companies. Neither corporations of the kind nor joint-stock companies are within the words of either of those sections; and it is equally clear that nothing is contained in sect. 37 to support such a conclusion; from which it follows that the claim of the plaintiffs, beyond the amount received as dividends, is not discharged by the proceedings in bankruptcy.

Good and sufficient reasons may be given for granting a discharge from prior indebtedness to individual bankrupts which do not exist in the case of corporations, and equally good and sufficient reasons may be given for withholding such a discharge from corporations which do not in any sense apply to individual bankrupts. Certificates of discharge are granted to the individual bankrupt "to free his faculties from the clog of his indebtedness," and to encourage him to start again in the business pursuits of life with fresh hope and energy, unfettered with past misfortunes, or with the consequences of antecedent improvidence, mismanagement, or rashness.

Many corporations, it is known, are formed under laws which affix to the several stockholders an individual liability to a greater or less extent for the debts of the corporation, which, in case certain steps are taken by the creditors, become in the end the debts of the stockholders. Such a liability does not, in most cases, attach to the stockholder until the corporation fails to fulfil its contract, nor in some cases until judgment is recovered against the corporation, and execution issued, and return made of *nulla bona*. Stockholders could not be held liable in such a case if the corporation is discharged, nor could the creditor recover judgment against the corporation as a necessary preliminary step to the stockholder's individual liability.

Consequences such as these were never contemplated by Congress; and the fact that they would flow from the theory of the defendants, if adopted, goes very far to show that the theory itself is unfounded and unsound. Instances of such

individual liability are not rare; and it appears that the law under which the defendants were organized makes the several stockholders individually liable to the creditors of the company, in an amount equal to the amount of their stock, for all debts and contracts of the company, until the whole amount of the capital stock is subscribed and paid. Sess. Laws of N. Y. 1848, p. 56, sect. 10.

Bankrupts other than corporations or joint-stock companies, if they have conformed in all things to their duty under the Bankrupt Act, are entitled to receive a certificate of discharge; and the provision is that such certificate shall operate to discharge such a bankrupt from all debts and claims which by said act are made provable against his estate, subject, of course, to the exceptions described in the thirty-third section of the same act. *Bennett* v. *Goldthwait*, 109 Mass. 494; *Wilson* v. *Capuro*, 41 Cal. 545; *In re Wright*, 36 How. Pr. 174.

Since this litigation was commenced, Congress has amended the twenty-first section of the Bankrupt Act, and provided that where a discharge has been refused, or the proceedings have been determined without a discharge, a creditor proving his debt or claim shall not be held to have waived his right of action or suit against the bankrupt. 18 Stat. 179.

Comment upon that provision is unnecessary, as it clearly appears that the unamended act did not discharge the claim of the plaintiffs. *Judgment affirmed.*

STATE OF FLORIDA *v.* ANDERSON ET AL.

Certain railroad companies, availing themselves of the provisions of an act of the legislature of Florida of Jan. 10, 1855, to provide for and encourage a liberal system of internal improvements in that State, issued their bonds to the extent of $10,000 per mile, the interest whereon was duly guaranteed by the trustees of the internal-improvement fund created by the act. Such bonds thereby became a first lien or mortgage on the roads, their equipments, and the franchises, of the respective companies. The latter having failed to pay the interest on the bonds, or the instalments due the sinking fund for their ultimate redemption, the roads were seized by the trustees, pursuant to their authority under the act, and sold for an amount equal to the principal of the bonds. The purchasers being allowed the privilege of paying the purchase-money by delivering the bonds at their par value, nearly a million dollars of them were

thus surrendered and cancelled; but a balance of about $472,000 remained unpaid. The purchasers obtained, however, a deed for, and took possession of, the property, being a line of road from Lake City to Quincy, with a branch from Tallahassee to St. Mark's, and procured a new charter from the legislature, under the name of "The Tallahassee Railroad Company." Having subsequently consolidated their interests with the Florida Central Railroad Company, owning the road from Lake City eastward to Jacksonville, they procured another charter, with enlarged powers, creating a corporation by the name of "The Jacksonville, Pensacola, and Mobile Railroad Company." This last act of incorporation authorized the company to acquire and consolidate certain lines of road, and extend the same from Quincy westward to the western boundary of the State; and, with a view to aid the company in the completion of this work, the act, as subsequently amended by the legislature, authorized the governor to loan the company bonds of the State, to an amount equal to $16,000 per mile, in exchange for an equal amount of the first-mortgage bonds of the company. In order to secure the principal and interest of the company's bonds, it was declared "that the State of Florida shall, by this act, have a statutory lien, which shall be valid to all intents and purposes as a first mortgage duly registered on the part of the road for which said bonds were delivered, and on all the property of the company, real and personal, appertaining to that part of the line which it may now have, or may hereafter acquire, together with all the rights, franchises, and powers thereto belonging; and in case of failure by the company to pay either principal or interest of its bonds, or any part thereof, for twelve months after the same shall become due, it shall be lawful for the governor to enter upon and take possession of said property and franchises, and sell the same at public auction." Under this power, bonds of the State to the amount of $4,000,000 were delivered to the company. The balance of the purchase-money due on the trustees' sale remaining unpaid, and the Jacksonville, Pensacola, and Mobile Railroad Company having also failed to pay the interest on their bonds delivered to the State in exchange for those of the State aforesaid, the State and the trustees of the improvement fund commenced suit in a circuit court of the State to recover by a sale of the road the balance of such purchase-money, which was claimed to be a lien thereon. All then known parties having liens against the road were made defendants. Suit was also brought against the company, in another circuit, by certain first-mortgage bondholders. The Circuit Court of the United States for the Northern District of Florida also entertained, at the instance of certain other bondholders, a suit in equity against the company and the trustees; but the bill, as against the latter, was dismissed by the complainants. Under an arrangement between the complainants and the company, a consent decree was obtained, declaring the bonds a first lien on the road, and directing its sale to pay the same. Subsequently to the issue of the execution a bill was filed to carry the decree into execution, making the trustees of the internal-improvement fund defendants, and charging them with intent to seize the road, and praying for an injunction. Meanwhile suit was commenced in the same court against the company by one H. for services alleged to have been rendered it. Judgment was recovered accordingly for $60,000; and, at the sale of the road thereunder, he became the purchaser for $20,000, and entered into possession. Under these circumstances, the State of Florida filed the bill in this suit.

Held, First, That the State has a direct interest in the railroad by reason of holding the $4,000,000 of bonds, which were a statutory lien on the road. That, as the title to the lands composing the internal-improvement fund were vested in the trustees merely as the agents of the State for a particular purpose, her interest is sufficient to give her a standing in court whenever the interests of that fund are brought before a court for inquiry. It is competent for her, therefore, in seeking equitable relief against citizens of another State for the protection of her interests, to file an original bill in this court.

Second, That the equitable lien for the unpaid purchase-money accruing upon the sale by the trustees resulted primarily to them as vendors, and became binding on the road in the hands of all subsequent purchasers taking with notice of the non-payment.

Third, That, as the guaranteed bonds import on their face an absolute promise to pay, the company giving them is primarily liable to the holder thereof for principal and interest as they respectively become due; and while he can, upon a breach of such promise, bring suit against the company, he cannot, as the primary right to proceed under the statutory lien is in the trustees, avail himself of that lien directly, as he could if it were a mortgage given to secure the bonds alone, but must induce the trustees to act in the mode pointed out by the statute. Upon their refusal so to act at the proper time, he may either compel them by *mandamus*, or file a bill in equity to obtain the relief to which he may be entitled.

Fourth, Where a sale is made by the trustees for the non-payment of interest or instalments due the sinking fund, and the principal of the bonds is not due, they have an option, after satisfying the arrears of interest, either to purchase up and retire the bonds, or to pay the balance into the sinking fund, and postpone the payment of the principal until the bonds arrive at maturity. By the purchase of a portion of the bonds, an obligation to purchase the remainder is not imposed upon the trustees, nor are they precluded from changing a resolution so to purchase.

Fifth, Holders of bonds so guaranteed, by procuring with the consent of the company a decree for the sale of the road to pay the interest, and especially the principal thereof, when the bonds contain no stipulation that the principal shall become due by the non-payment of interest, in a proceeding in which neither the State nor the trustees were represented, and when the latter were pursuing their lawful remedy to subject the road to the payment of the purchase-money at a sale made by them, was an inequitable interference with, and a fraud upon, their rights.

THIS is an original suit in equity instituted in this court.

It was argued by *Mr. H. Bisbee, Jr.*, for the complainant; and by *Mr. Henry R. Jackson*, *Mr. Matt. H. Carpenter*, and *Mr. William W. Boyce*, for the defendants.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This is a bill in equity filed by the State of Florida (by its attorney-general), on behalf of the said State and of the trustees of the internal-improvement fund of the State, against

Daniel P. Holland and Edward C. Anderson and others, citizens of Georgia. Sherman Conant, the Marshal of the United States for the Northern District of Florida, is made a formal defendant by reason of having in his hands an execution at the suit of some of the other defendants.

The subject-matter of the suit is a line of railroad in Florida extending from Jacksonville westwardly to Quincy about one hundred and ninety miles, with a branch from Tallahassee to St. Mark's of twenty-one miles. It consists of three divisions, originally built and owned by different companies. The first division, from Jacksonville to Lake City, was built and owned by the Florida, Atlantic, and Gulf Central Railroad Company; the second, from Lake City to Quincy, by the Pensacola and Georgia Railroad Company; and the branch, from Tallahassee to St. Mark's, by the Tallahassee Railroad Company. These companies were chartered in 1853; and after the passage by the State legislature, Jan. 6, 1855, of a certain act entitled "An Act to provide for and encourage a liberal system of internal improvements in this State," they severally availed themselves of its provisions, and issued bonds which were duly guaranteed by the trustees of the internal-improvement fund created by the act. This fund consisted of the five hundred thousand acres of public lands which became vested in the State under the grant made by Congress for the purposes of internal improvement by the act of Sept. 4, 1841 (5 Stat. 455), and of some fifteen millions of acres of swamp and overflowed lands granted by act of Congress of Sept. 28, 1850, to enable the State to construct the necessary levees and drains to reclaim the same. 9 Stat. 519. By the internal-improvement act of Jan. 6, 1855, above referred to, these lands and their proceeds were constituted a distinct and separate fund, to be called "The Internal Improvement Fund of the State of Florida," and were vested in the governor of the State, the comptroller, treasurer, attorney-general, and register of State lands, and their successors in office, in trust to dispose of the same, and invest the proceeds, with power to pledge the fund for the payment of the interest on the bonds (to the extent of $10,000 per mile) which might be issued by any railroad companies constructing roads on certain lines indicated by the act. The

companies, after completing their roads, were to pay, besides interest on their bonds, one per cent per annum on the amount thereof, to form a sinking fund for the ultimate payment of the principal. The act declared that the bonds should constitute a first lien or mortgage on the roads, their equipment and franchises; and, upon a failure on the part of any railroad company accepting the act to provide the interest and the payments to the sinking fund as required thereby, it was made the duty of the trustees to take possession of the railroad and all its property, and advertise the same for sale at public auction.

In the management of the fund the trustees were to fix the price of the lands, having due regard to their location, value for agricultural purposes, &c., and make such arrangement for drainage of the overflowed lands as in their judgment might be most advantageous to the fund and the settlement and cultivation of the land; and they were directed to encourage actual settlement and cultivation of the lands by allowing preemptions under such rules and regulations as they might deem advisable, but not more than one section of land to any one settler. Other duties of a public character in relation to the lands were devolved upon the trustees by subsequent enactments.

At the close of the war, the railroads were in a dilapidated condition; and, the companies having failed to pay the interest and the instalments due to the sinking fund on their bonds, the roads were seized and sold by the trustees under the provisions of the act. The first section, from Jacksonville to Lake City, was sold in 1868, and the purchasers procured an act of incorporation under the name of "The Florida Central Railroad Company." The other two sections were sold on the 20th of March, 1869, for an amount equal to the principal of the outstanding guaranteed bonds issued on them; and, the purchasers being allowed the privilege of paying the purchase-money by delivering the bonds at their par value, nearly $1,000,000 of them were thus surrendered and cancelled. But a balance of about $472,000 remained unpaid. By some contrivance of the purchasers (which both the complainants and E. C. Anderson and his associates agree in characterizing as fraudulent), this balance was not paid at all, but was only formally settled by inducing the agents of the trustees to accept a check for the amount,

upon the receipt of which they delivered to the purchasers a deed for the property which had been executed for that purpose and placed in their hands, and the purchasers possessed themselves of the road. This check was never paid. Anderson and others, defendants, or represented in this cause, hold upwards of $300,000 of the still outstanding guaranteed bonds of the Pensacola and Georgia and Tallahassee Railroad Companies, which the purchasers failed to deliver up, besides $103,000 which are in dispute.

The purchasers of the Pensacola and Georgia and Tallahassee Railroads, and their associates or assigns, applied to the legislature of Florida for a new charter, which was granted to them with the name of "The Tallahassee Railroad Company;" but after a few months, having procured another charter with enlarged powers, creating a corporation by the name of "The Jacksonville, Pensacola, and Mobile Railroad Company," they consolidated their interests with that company as early as May or June, 1870, and have ever since been known under that designation. It is conceded by Anderson and the other bondholders, and is clearly the result of the evidence in the case, that this company, whilst it succeeded to the rights of the purchasers at the trustees' sale, received the property subject to the vendor's lien for the payment of the balance of the purchase-money due on that sale. An adjudication to this effect has been made against the company in the suit in Duval County Circuit Court, hereinafter referred to.

The act which incorporated the Jacksonville, Pensacola, and Mobile Railroad Company authorized that company to consolidate and acquire all the roads before mentioned, and to extend the same from Quincy westward to the western boundary of the State in the direction of Mobile; and, with a view to aid the company in the completion of this work, the same act, as amended by an act passed Jan. 28, 1870, authorized the governor of the State to loan to it the bonds of the State to an amount equal to $16,000 per mile, in exchange for an equal amount of first-mortgage bonds of the company. In order to secure the principal and interest of the company's bonds, it was declared that "the State of Florida shall, by this act, have a statutory lien, which shall be valid to all intents and pur-

poses as a first mortgage, duly registered, on the part of the road for which said bonds were delivered, and on all the property of the company, real and personal, appertaining to that part of the line which it may now have or may hereafter acquire, together with all the rights, franchises, and powers thereto belonging; and, in case of failure of the company to pay either principal or interest of its bonds or any part thereof for twelve months after the same shall become due, it shall be lawful for the governor to enter upon and take possession of said property and franchises, and sell the same at public auction."

Under this power, State bonds to the amount of $4,000,000 were delivered to the company in exchange for $3,000,000 of the company's bonds and $1,000,000 of the bonds of the Florida Central Railroad Company, and have been in whole or in part disposed of.

The balance of purchase-money accruing on the trustees' sale still remaining unpaid, and the Jacksonville, Pensacola, and Mobile Railroad Company having also failed to pay the interest on their bonds, delivered in exchange for State bonds as aforesaid, a suit was instituted in March, 1872, by the State of Florida and the trustees of the internal-improvement fund against the company, in the Circuit Court of Duval County, at Jacksonville, to recover, by a sale of the railroad, the said balance of purchase-money, which was claimed to be a lien thereon. By an amended complaint, all known parties having liens against the railroad were made defendants. Anderson and the other first-mortgage bondholders, who are defendants in this suit, were not made parties, because their interest was not then deemed adverse to that of the State. Holland was not made a party, because at that time he claimed no interest in the property. On the commencement of this suit, the Duval County Circuit Court appointed Jonathan C. Greeley receiver to take possession of the railroad and secure its receipts and earnings. But immediately a crop of litigation sprang up, hostile to the rights asserted by the State and trustees. It was contended that the territorial jurisdiction of the court did not extend beyond the county limits, and that the authority of the receiver was limited thereby, and that the Florida Central Railroad Company was not consolidated with the Jacksonville, Pensacola,

and Mobile Railroad Company; and other positions antagonistic to the rights and proceedings of the State were assumed, and suits were commenced in various courts to carry out these views. Amongst others, the Leon County Circuit Court (at Tallahassee) entertained a suit brought by some first-mortgage bondholders, and appointed a receiver, who took possession of the western part of the road. The result was, that the receiver appointed by the Duval County Court was dispossessed of the entire line.

At this point, in July, 1872, the defendants, Anderson and his associates, commenced a suit in the Circuit Court of the United States for the Northern District of Florida against the Jacksonville, Pensacola, and Mobile Railroad Company, and the trustees of the internal-improvement fund, upon the first-mortgage bonds held by them, claiming that these bonds were still a lien on the railroad, or at least entitled the holders to claim the unpaid purchase-money before referred to, and praying a sale of the road to pay their demand. The trustees pleaded to the jurisdiction of the court, alleging for cause, amongst other things, that it appeared by the bill and exhibits that the subject-matter of the bill was in the jurisdiction and possession of a circuit court of the State. The bill was thereupon voluntarily dismissed as against the trustees; and, by an arrangement made with the railroad company (which withdrew its answer), the complainants obtained a consent decree on the 19th of December, 1872, declaring the bonds a first lien on the railroad, and directing it to be sold to pay the same. An execution was issued on this decree and placed in the marshal's hands, and a sale of the property was advertised. In September, 1873, Anderson and his associates filed in the same court another bill to carry into execution their said decree, making the trustees of the internal-improvement fund defendants, charging them with an intent to seize the railroad, and praying an injunction against their so doing.

Meantime the defendant, Holland, had commenced a suit in the said Circuit Court of the United States against the Jacksonville, Pensacola, and Mobile Railroad Company, to recover compensation for alleged services; and on the 2d of December, 1872, he recovered a judgment by default for over $60,000, and

issued execution thereon. Under this execution the marshal advertised and sold the whole railroad in May, 1873; and Holland became the purchaser for the price of $20,000, and entered into possession. By an arrangement made with Anderson and his associates, Holland kept possession until the appointment of a receiver by this court.

Under these circumstances the State of Florida filed the bill in this suit, setting forth the principal facts before rehearsed, and praying that the sale under Holland's judgment might be declared null and void, and that he might be enjoined from setting up any rights under it; that the decree obtained by Anderson and others might be set aside and declared null and void, and that they might be enjoined from setting up any rights under it. The bill having stated that the principal of the internal-improvement bonds held by the defendants was not yet due, and would not be due for many years to come, the complainant prayed the court further to decree that the defendants have no right to payment of their principal until their bonds mature; and that they are bound to resort to the internal-improvement fund as a primary fund for the payment of both principal and interest before resorting to the railroad. The bill concludes with a prayer for alternative and general relief.

It having become manifest to us in the course of the proceedings that the interest of all parties required that the fund in litigation should be under the control of this court, we appointed a receiver to take charge of the railroad, and operate the same.

A demurrer to the bill having been overruled, answers were filed by the defendants, and proofs taken; and the case is now before us on the pleadings and the evidence.

It is not our purpose to discuss minutely the questions of fact that have been raised by the parties. The most material questions are either conceded by all the parties, or are so free from doubt as to render such discussion unnecessary. Our conclusions thereon will become manifest as we proceed to give our general views upon the case.

The first question which naturally presents itself is, whether the State of Florida has such an interest in the subject-matter

of the suit, and in the controversy respecting the same, as to give it a standing in court. It is suggested that the trustees of the internal-improvement fund are the only parties legally interested, and that they have no right to bring an original bill in this court. To this it may be answered, in the first place, that the State has a direct interest in the subject-matter (the railroad in question) by reason of holding (as it does) the four millions of bonds which are a statutory lien upon the road. In the next place, the interest of the State in the internal-improvement fund is sufficiently direct to give it a standing in court, whenever the interests of that fund are brought before a court for inquiry.

From the statement already made in reference to the history and character of this fund, and the duties of the trustees in regard to it, it is apparent that the trustees are merely agents of the State, invested with the legal title of the lands for their more convenient administration; and that the State remains in every respect the beneficial proprietor, subject to the guaranties which have been made to the holders of railroad bonds secured thereby. The residuary interest in the fund belongs to the State. The fact that the trustees consist of the governor and other executive officers, and that they are charged with the duties of drainage, reclamation, and settlement of the public lands (duties of a purely public character), shows that they are mere public agents invested with an important branch of the State administration.

Now, to protect its interests, it is competent for the State, seeking equitable relief against citizens of another State, to file an original bill in this court. The reference to the trustees in the bill cannot affect the jurisdiction of the court, inasmuch as they are not the litigants before it. It has frequently been decided in the circuit courts, where the jurisdiction depended on the citizenship of the parties, that such jurisdiction is not ousted, where there has been occasion to make a formal party of a sheriff or other public officer by reason of his having a writ of execution, or being named as obligee in an official bond sued for the benefit of private parties, provided that the real parties to the litigation have the requisite citizenship. Thus an administration bond given to the surrogate or to the governor of

a State may be sued in his name in the Circuit Court of the United States, though not having the requisite citizenship, if the party for whose benefit the suit is prosecuted has the requisite citizenship. These authorities apply equally to the case of the marshal who was named in the bill, but against whom no relief was sought. Several of the cases are reviewed in the recent case of the *Coal Company* v. *Blatchford*, 11 Wall. 172; and a further discussion of the subject at this time is unnecessary.

We come, then, to the principal question in the cause; which is, whether upon the pleadings and evidence in the case the complainant has ground for the relief sought, or for analogous relief, admissible under the general prayer of the bill.

The equitable lien for the unpaid purchase-money accruing upon the trustees' sale of the railroad in 1869 resulted primarily to the trustees as the vendors, and became binding on the road in the hands of all subsequent purchasers taking with notice of the non-payment. As before stated, the Jacksonville, Pensacola, and Mobile Railroad Company undoubtedly took the property subject to this lien; and it has been so decided in the Duval County suit. The defendant, Holland, stood in no better situation. He had full knowledge of the circumstances before obtaining his judgment, and purchased only the right, title, and interest of the company. His claim to hold the property clear of the lien, and to take the rents and profits, when the State is seeking to have the road and profits secured and applied to the satisfaction thereof, is inequitable and unjust. Independent of any claim of the State under the $4,000,000 of bonds issued in 1870, he has no right to oppose it in its efforts to secure satisfaction of the original purchase-money of the property. His judgment may be perfectly valid as against the railroad company, and he may have acquired under it all the right, title, and interest of said company; but nothing more. As against the claims of the State, he has no right to appropriate to himself the possession and emoluments of the property. His employment of judicial process for that purpose, even though the powers of the receiver should be successfully controverted, is inequitable so long as the rights of the State are sustained, or not disaffirmed by the proper courts.

As to the bonds given by the railroad company to the State in 1870 in exchange for its bonds, Holland does not directly question their validity, though he insists that the latter were issued in violation of the constitution of the State. The validity of these bonds is a delicate question, and one which it is eminently proper that the courts of Florida should determine. The judges of the Supreme Court of that State, in answer to certain questions propounded by the governor, in accordance with a provision of the State constitution, have given an official opinion which has been generally understood as favorable to the validity of the bonds. Until that court shall decide the contrary, we prefer to take that view; and, regarding the bonds of the company as valid and binding, the right of the State as against the pretensions of Holland to control the possession and emoluments of the property cannot be doubtful. Should the State courts hereafter determine against the validity of those bonds, further consideration of the subject can be had. Of course, if it were necessary to do so, this court would not hesitate to pass upon that question; but we do not deem it necessary in this suit, which, in its nature, is rather to be regarded as ancillary to the judicial proceedings adopted by the State in Florida.

The position of Anderson and his associates is different. They claim that their bonds are still a first lien on the railroad, notwithstanding the trustees' sale; and that at all events, though the principal of their bonds is not due, they are entitled to prosecute the lien for the unpaid purchase-money due on said sale in order to obtain satisfaction of their bonds. They claim that their right to do this is paramount to that of the State or the trustees, inasmuch as the amount to be recovered is applicable to the payment of the said bonds; and this is really the question at issue between these parties. Its solution requires that we should examine a little more carefully the precise nature of the guaranty given to the bonds, and chargeable upon the internal-improvement fund. The entire third section of the act of Jan. 6, 1855, on which the controversy principally depends, is as follows: —

"SECT. 3. *Be it further enacted*, That all bonds issued by any railroad company under the provisions of this act shall be recorded

in the comptroller's office, and so certified by the comptroller, and shall be countersigned by the State treasurer, and shall contain a certificate on the part of the trustees of the internal-improvement fund that said bonds are issued agreeably to the provisions of this act, and that the internal-improvement fund, for which they are trustees, is pledged to pay the interest as it may become due on said bonds. All bonds issued by any railroad company under the provisions of this act shall be a first lien or mortgage on the road-bed, iron, equipment, workshops, dépôts, and franchise; and upon a failure on the part of any railroad company accepting the provisions of this act to provide the interest as herein provided on the bonds issued by said company, and the sum of one per cent per annum as a sinking fund, as herein provided, it shall be the duty of the trustees, after the expiration of thirty days from said default or refusal, to take possession of said railroad and all its property of every kind, and advertise the same for sale at public auction to the highest bidder, either for cash or additional approved security, as they may think most advantageous for the interests of the internal-improvement fund and the bondholders. The proceeds arising from such sale shall be applied by said trustees to the purchase and cancelling of the outstanding bonds issued by said defaulting company, or incorporated with the sinking fund; *provided* that, in making such sale, it shall be conditioned that the purchasers shall be bound to continue the payment of one-half of one per cent semi-annually to the sinking fund until all the outstanding bonds are discharged, under a penalty of the annulment of the contract of purchase and the forfeiture of the purchase-money paid in."

Of course, the company giving the bonds is primarily liable to the bondholders for principal and interest as they become due, inasmuch as the bonds import on their face an absolute promise to pay; and, on failure to pay, suit may be instituted at once against the company. Back of this personal liability of the company, the bondholder has a double security: first, the guaranty of the internal-improvement fund; and, secondly, the statutory lien on the railroad. He cannot avail himself of the latter directly, as he could if it were a mortgage given to secure the bonds alone; but he must induce the trustees to act in the mode pointed out by the statute. If they refuse to act when they ought to do so, the bondholder may either compel them to act by *mandamus*, or file a bill in equity to obtain the relief to which he may be entitled.

It is seen, however, that the primary right to proceed against the property is in the trustees, and not in the bondholders. But if principal or interest become due and be unpaid, and the trustees have not the means to pay it from any available resources of the internal-improvement fund in one case, or the sinking fund in the other, it will be their absolute duty to proceed against the property.

In the present case, the trustees did initiate proceedings, and did sell the property by virtue of the lien created by the statute; and through that sale they succeeded in extinguishing a large amount of the outstanding bonds. But the purchasers failed to pay the entire purchase-money, and a vendor's lien attached. The original lien of the bonds was consummated and merged in the title which the purchasers acquired by the sale. Anderson and company cannot set it up anew without repudiating the sale, and bringing back upon the property, in coexistence with their own claim, the lien of the $1,000,000 of bonds which have been cancelled. This, it is presumed, they are not prepared to do. Indeed, they nowhere attempt to repudiate the sale. They claim, that, notwithstanding the sale, the lien of their bonds still subsists. But this cannot be. The sale was made by virtue of the joint statutory lien of all the bonds, and vested in the purchasers a title clear of them all, subject only to the vendor's lien for the purchase-money. As already seen, by the internal-improvement act, only the interest of the bonds is guaranteed upon the credit of the internal-improvement fund: the principal is provided for by the creation of the sinking fund, which is a charge on the road in the hands of all purchasers until the bonds are satisfied. When a sale is made by the trustees for non-payment of interest or sinking fund, and the principal of the bonds is not due, they have an option (of course, after satisfying the arrears of interest) either to purchase up and retire the bonds, or to pay the balance into the sinking fund, and postpone the payment of the principal until the bonds arrive at maturity. Which of these two things they shall do is entirely in their discretion; and a purchase by them of a portion of the bonds does not impose upon them the obligation to purchase the balance. Nor does a resolution to purchase bonds, formed at one

time, preclude them from changing that resolution at a subsequent time. The contrary position assumed by the defendants we consider as untenable, and repugnant to the spirit of the act.

In the present case, as we have seen, the principal of the bonds is not due; and, if the trustees should collect the balance of purchase-money to-day, it would be in their option to purchase the bonds or not. There is no stipulation in the bonds that the principal shall become due by the non-payment of the interest. The getting of a consent decree by the bondholders for the sale of the road to pay their bonds, and especially the principal thereof, in a proceeding in which neither the State nor the trustees were represented, and when the latter were pursuing their lawful remedy to subject the road to the payment of the purchase-money (as was their duty to do), was an inequitable interference with, and a fraud upon, their rights.

We are of opinion, therefore, that the defendants ought to be enjoined from selling, taking possession of, or interfering with the railroad property in question (that is to say, the line of railroad extending from Lake City to the Chattahoochee River, and from Tallahassee to St. Mark's), so as in any manner to impede, obstruct, or hinder the State of Florida, or the trustees of the internal-improvement fund, in taking possession of the property, or in procuring it to be condemned and sold for the purpose of raising and paying the unpaid purchase-money, and such amount as may be adjudged or decreed by the proper courts or tribunals in that behalf to be due to the State upon the bonds delivered to its officers by the Jacksonville, Pensacola, and Mobile Railroad Company, under the act of Jan. 28, 1870.

A decree will be made accordingly.

It will also be proper to continue the receiver appointed by this court until the property can be delivered up to some proper and competent officer or persons having the requisite authority to receive the same.

The decree should contain a proviso that it is not intended to preclude the right of Anderson and the other first-mortgage bondholders to demand and receive from the State or the trustees, out of the proceeds of said property, or of said internal-

improvement or sinking funds, respectively, any amount of principal or interest which may be or may become due on their bonds; nor to affect the validity of their decree in the Circuit Court, except as above stated.

DECREE.

This cause coming on for hearing upon the pleadings and proofs, and being argued by *Mr. Bisbee* for the complainant, and by *Messrs. Jackson*, *Carpenter*, and *Boyce* for the defendants, and the court having considered of the same, it is now, on this thirteenth day of December, 1875, ordered, adjudged, and decreed, that the defendants, and each of them, be perpetually enjoined from hindering, or interfering with, or disturbing the State of Florida, or any of its officers or agents (including the trustees of the internal-improvement fund of said State), or any officer or receiver appointed or acting in its behalf, in the possession, management, or control of the railroad of the Jacksonville, Pensacola, and Mobile Railroad Company, extending from Lake City westwardly to or beyond the Chattahoochee River, and from Tallahassee to St. Mark's, with the appurtenances thereof and property belonging thereto; and that Edward C. Anderson, Jr., and others, defendants herein, holders of first-mortgage bonds of the Pensacola and Georgia and Tallahassee Railroad Companies, in whose favor a decree was rendered in the Circuit Court of the United States for the Northern District of Florida on the nineteenth day of December, 1872, directing amongst other things a sale of said railroad, be perpetually enjoined from selling, or procuring to be sold, said railroad and property under or by virtue of said decree, or any decree supplementary thereto in the same case: *provided*, however, that nothing herein is intended to preclude the right of the said Anderson and others to demand and receive from the State of Florida or the said trustees, out of the proceeds of said property, or of said internal-improvement fund, or the sinking fund provided in that behalf, respectively, the principal and interest which may be or may become due on their said bonds; nor to affect the validity of the said decree, except as above expressed: and provided, further, that this decree is not intended to prejudice the right of the defendant, Daniel

P. Holland, to contest in any competent court or proceeding the validity of the bonds issued by the Jacksonville, Pensacola, and Mobile Railroad Company in exchange for the bonds of the State of Florida under the act of the legislature of said State passed Jan. 28, 1870, recited in the pleadings in this cause; nor to prejudice any right which said Holland may have to redeem said railroad by the payment of the unpaid purchase-money mentioned in the said pleadings, with all interest thereon and lawful charges on said road, in case it should be adjudged that the said bonds are invalid.

It is further ordered and decreed, that the legal costs and charges of the State of Florida in this cause, and the fees and costs due to the officers of this court therein, be allowed and paid out of the moneys in the hands of the receiver.

It is further ordered, that the receiver do pay out of the moneys in his hands the lawful fees and charges of the master who took the depositions and proofs in the cause; and that he settle his accounts before the clerk of this court, subject to the direction and approval of the Chief Justice.

And all further equities and directions arising upon the decree are hereby reserved.

At a subsequent day of the term, *Mr. Edward N. Dickerson* submitted a motion, due notice having been given thereof, that so much of the railroad and property thereto belonging as lies between Quincy and the Chattahoochee may be surrendered to James G. Gibbs, and that the receiver be discharged from that portion of the railroad, and be ordered to pay said Gibbs for the use thereof during such time as the same has been in the possession of the receiver.

At the same time, Anderson and others filed a petition for further direction under the decree. The Jacksonville, Pensacola, and Mobile Railroad Company filed a petition for the possession of the road as against the State; and the complainant moved to discharge the receiver, and surrender the entire property to such agent as should be appointed by the State of Florida. A petition was also filed for the payment of legal costs, charges, &c.

The matters arising upon the motions and petitions were argued by *Mr. E. N. Dickerson*, *Mr. H. Bisbee, Jr.*, *Mr. Matt.*

H. Carpenter, *Mr. W. W. Boyce*, *Mr. W. G. M. Davis*, *Mr. D. P. Holland*, and *Mr. William Birney*, on behalf of the respective parties in interest.

MR. JUSTICE BRADLEY delivered the opinion of the court.

By the decree made in this case, we granted an injunction against the defendants to restrain them from hindering, interfering with, or disturbing the State of Florida in the possession, management, or control of the Jacksonville, Pensacola, and Mobile Railroad, extending from Lake City westwardly to or beyond the Chattahoochee River, and from Tallahassee to St. Mark's; saving to Edward C. Anderson, Jr., and others, holders of the first-mortgage bonds, their right to demand and receive from the State of Florida, or the trustees of the internal-improvement fund of said State, the amount due or to become due on their bonds; and saving to the defendant, Daniel P. Holland, the right to contest the bonds given by said company in exchange for bonds of the State of Florida to the amount of three millions of dollars, and any right of redemption which the said Holland might have in said property. The rights claimed by Holland have since been fully contested by him in the State courts, and their decision is adverse thereto. The Supreme Court of Florida has adjudged that the sale of the railroad under Holland's execution was null and void as against the State, and gave him no right to the possession or income thereof. This decision relieves this court from any embarrassment as to the disposition of the property. The State is the only proper party to receive it.

This suit was brought against Anderson and company and Holland, to prevent them from intermeddling with the property whilst being pursued by the State in due course of litigation in the State courts. It was in part ancillary to the relief sought there. When brought, neither of the defendants was a party to that litigation, all being citizens of Georgia, and not personally amenable to the courts of Florida, except by their own consent, or by being accidentally found there. Since then, however, Holland has voluntarily made himself a party to the suit in the State court, and has procured the decision referred to. By that decision, it is determined that the bonds given by

the railroad company to the State in exchange for State bonds in 1870 are valid to the extent of being security to the purchasers of the State bonds for the amount justly due to them, and create a statutory lien on the railroad prior to the judgment obtained by Holland or any other party, and entitle the State to seize and sell the same; and Holland has, therefore, been perpetually enjoined by the State court from interfering with the State in the possession of the road and its appurtenances. The majority of the Supreme Court went even farther, and held, that, by the laws of Florida, the railroad could not be levied on and sold under an execution at all.

Under these circumstances, and in view of the decree already made by this court, it would be improper to direct the delivery of the property to Holland. As this court has not cognizance of the principal litigation in the case, and cannot make any final disposition of the property, — being only called upon to decide on the conflicting rights of the State and the respective defendants to the immediate possession of it, — the only thing left for the court to do (having exercised all the jurisdiction it was called upon to exercise) is to order the receiver to deliver the property to the State, and to dispose of any moneys in the hands of the receiver.

Holland strenuously insists that the property ought to be restored to him, because he was in possession of it at the commencement of the suit. But he went into possession after the commencement of the suit in the State court, and we have expressly decided that his possession was inequitable; and, before the appointment of a receiver by this court, he had been deprived of that possession by the action of the State court. The receiver appointed by that court had taken the property out of his hands. It is true, we had required Holland to account to us for the income, and regarded the seizure of the property as interfering with that jurisdiction which the State itself, the complainant here, and also the complainant and moving party in the State court, had requested us to assume. We therefore felt justified in appointing a receiver to take full possession of the property; and the State court has since been held to have had no jurisdiction over the subject-matter. But there is nothing in these circumstances that gives Holland any right to

reclaim that possession when it may be resigned by our receiver. Holland's claim has been overruled by both the judgment of this court and of the State courts; and it would be worse than a vain and idle ceremony to deliver the property to him after these adjudications. It would be plunging the whole property into a new sea of litigation.

The claim of Gibbs to the possession of the road west of Quincy has more plausibility. It seems, that, at the commencement of this suit, Holland had possession of that part as a tenant of Gibbs. But the road is certainly a part of the entire line, and the title of Gibbs is disputed by the State, who claims that the statutory lien of the bonds issued in 1870 is paramount to all others; and neither Gibbs, nor any person holding under him, was in possession when the receiver was appointed by this court. Our receiver, in taking possession, did not take it from his hands, but from the hands of the receiver appointed by the State court, in the manner before adverted to. We think that no injustice will be done, but that the interest of all parties will be subserved, by delivering the road entire to the agent appointed by the State to receive the property, subject to the right on the part of Gibbs to institute legal proceedings against said agent for testing the question as to his right of possession. That part of the road, therefore, will be delivered to said agent subject to this right, so that Gibbs may not be embarrassed by being placed in the position of having to bring suit against the State. The question of his right is a question of law which can be submitted to the courts of Florida without much delay or expense.

The counsel of Gibbs object that he is not a party to this suit, and his rights ought not to be compromitted by the judgment or action of the court; and they insist that he ought to be placed *in statu quo ante bellum*. We do not decide upon his rights; we leave them just as they were: and as to the possession, we place it in the hands of the party at whose instance the receiver was appointed who had possession when it was assumed by this court.

As to the railroad between Lake City and Jacksonville belonging to the Florida Central Railroad Company, and which is still in the possession of our receiver for the purpose of ob-

taining payment of advances made by him in making necessary improvements on the road, as the amount due for those advances has been much reduced, we see no reason for further withholding the possession from the Florida Central Railroad Company. That road, therefore, will be directed to be delivered to said company, but subject to a claim on the part of the State to any balance which may be still due for the advances made by the said receiver, after all proper allowances to said company upon a due adjustment of the accounts between it and the receiver.

The court has taken into consideration various other matters necessary to be adjusted; and the result to which it has come will be expressed in the decree now made, which will not require further explanation. The balance of moneys that may remain in the hands of the receiver, after all proper payments and allowances, will be directed to be paid into the registry of this court for future disposition upon the final settlement and confirmation of the receiver's accounts.

The claim of Anderson and others remains, as regards the possession and sale of the road, exactly as when the former decree was made. The fact that some of their bonds have matured does not change their position in that respect.

The application of the Jacksonville, Pensacola, and Mobile Railroad Company for the possession of the road as against the State is not entitled to any consideration whatever. When the company shall have paid the balance of purchase-money due for the road, and the interest on its bonds, it will be time enough for it to put forth its pretensions.

The following order will be entered: —

And now, on this first day of May, A. D. 1876, the court being advised of certain proceedings and decrees had and made by and before the Circuit Court for Duval County, in the State of Florida, and by and before the Supreme Court of said State in the cause mentioned in the bill and pleadings in this case, wherein the State of Florida and the trustees of the internal-improvement fund of said State were plaintiffs, and the Jacksonville, Pensacola, and Mobile Railroad Company, and others, were defendants, whereby it hath been held and adjudged that the three thousand bonds for $1,000 each, issued by the said

company in the year eighteen hundred and seventy, in exchange for State bonds, are valid and binding, and create a statutory lien upon the railroad and property of said company, and that by virtue thereof the said State is entitled to take possession of said property and sell the same, not only to raise and pay the unpaid purchase-money mentioned in the said original bill, but also what may be justly due on said bonds; and that the sale of said railroad and property under execution at the suit of the defendant, Daniel P. Holland, was void and of no effect, and gave him no right or title, as against the said State, to the possession of said railroad and property, or to the income, tolls, or revenues thereof; and it appearing that the possession of that part of said railroad between Quincy and the Appalachicola River is claimed by one James G. Gibbs, but is a part of the said Jacksonville, Pensacola, and Mobile Railroad, and was not in possession of said Gibbs when the receiver was appointed by this court, nor of any person claiming under said Gibbs, and that his right to the possession thereof is denied by the said State as the holder of said bonds; and the said State of Florida, through its executive and the said trustees of the internal-improvement fund, having deputed Dennis Eagan, the commissioner of lands and immigration of said State, to receive the said railroad and property from the receiver of this court: —

Therefore it is ordered and decreed, that Robert Walker, the receiver appointed by this court, do, on or before the first day of June next, deliver the said railroad and all its appurtenances, extending from Lake City to the Appalachicola River, and from Tallahassee to St. Mark's, and all the rolling-stock and property connected therewith, to the said Dennis Eagan, commissioner of lands and immigration of the State of Florida on behalf of said State; reserving, however, to said James G. Gibbs, the right to institute against said Eagan and his successors having possession of said road any legal proceedings for the determination of his claim to the possession of the railroad between Quincy and the Appalachicola River, and the delivery to said Eagan of that portion of said railroad is subject to said right of the said Gibbs to institute such proceedings. And as to the railroad and property of the Florida

Central Railroad Company, which the said receiver still holds in his possession for the purpose of recovering the balance due for moneys expended by him in the improvement thereof, it is ordered that the same be delivered to the said Florida Central Railroad Company, subject to the payment of said balance that may be now due after all proper allowances to the State of Florida.

It is further ordered, that the said receiver do close and settle up the business of his receivership with all convenient speed; that he collect all moneys due for freights, passage, mail-service, and other services, and all dues of every kind which shall have accrued up to the time of his delivery of the possession as aforesaid, under his administration of said road and property; and that he settle his accounts for all receipts and expenses as receiver before the clerk of this court, who is hereby authorized to audit and settle the same under the direction of the Chief Justice; and that he exhibit his vouchers therefor. It is further ordered, that he have the use of all vouchers, reports, and statements connected with the operations or business of the said railroad during his administration which he may require in the settlement of his accounts, and that he be authorized to retain permanent possession of all books, papers, and accounts connected with his administration of the property during his receivership; giving access thereto, for the purpose of necessary information, to the officers of the State having the management of the said railroad.

It is further ordered and decreed, that out of the moneys in the hands of the receiver, or that may come to his hands, arising from the income, tolls, and revenues of said railroad, or other sources connected therewith, over and above the charges and expenses paid, he pay the following charges, demands, and amounts, in the order in which the same are here named; that is to say: —

First, The costs and expenses of this suit, including the fees and costs of the officers of this court, and of any master or examiner appointed by the court to take accounts or testimony in the case, and the taxable costs and charges of the complainant.

Secondly, All expenses and debts due or incurred by the receiver, and all proper claims arising against him, in the

administration of his trust as receiver, and not before paid or discharged, including stationery, clerk-hire, and travelling and other incidental expenses.

Thirdly, A sum of money to be retained by the receiver for his compensation as such, at the rate of $10,000 per annum, from the time of his assuming the duties of his appointment to the time of closing up the business incident thereto, including a reasonable time for the settlement of his accounts not later than the first day of July next.

Fourthly, To the Rogers Locomotive and Machine Works the sum of $15,800.84, and interest on the sum of $10,707.81, at the rate of seven per cent per annum, from the twenty-fourth day of August, 1874, till paid; being the amount due to said company for locomotives received and used by said receiver, on which said company had a specific lien.

Fifthly, All unpaid sums due to laborers and servants actually employed in the operation and care of said railroad west of Lake City, during the pendency of this suit, and prior to the time when the said receiver took charge of said property (namely, from the 9th of December, 1873, to the sixth day of May, 1874); which sums, according to the report of said receiver, amount to $12,000, or thereabouts.

Sixthly, Any balance of moneys that may remain in the hands of said receiver after the payment of the said charges, demands, and amounts, above specified, shall be paid by the receiver to the clerk of this court, who is hereby appointed register of the court to receive and keep the same subject to the further order of the court.

WARFIELD v. CHAFFE ET AL.

The petition for the allowance of a writ of error forms no part of the record of the court below; and this court has no jurisdiction to determine a Federal question presented in such petition, but not disclosed by the record sent here from the State court.

ON motion to dismiss a writ of error to the Supreme Court of the State of Louisiana.

Messrs. Durant and *Hornor* for the defendant in error, in support of the motion.

Mr. W. J. Q. Baker for the plaintiff in error, in opposition thereto.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This action was commenced in the Fourteenth District Court in and for the Parish of Ouachita, La., to recover the amount due upon a note made by Mrs. Warfield, the plaintiff in error, to W. J. Q. Baker, and by him indorsed to the plaintiffs below, — John Chaffe & Brother, — and also to enforce a vendor's privilege. Judgment was asked for the amount claimed to be due upon the note, and also for "fifteen dollars costs of stamping." Attached to the petition was a copy of the note, bearing date May 3, 1867; below which was the following: "Original act duly stamped and cancelled by collector of Third District of Louisiana, this third day of September, 1872. — F. A. Hall, D'y Recorder."

Mrs. Warfield answered the petition; and, among other defences, she insisted that there were not any revenue-stamps on the note when it went into the hands of the plaintiffs, and that they had no authority to put stamps upon it. She thus, by the pleadings, tendered an issue of fact.

The principal contest between the parties was as to the plaintiffs' title to the note; and W. J. Q. Baker was permitted to intervene in his own behalf, and to insist that he was the owner.

At the trial in the District Court, no question as to the stamping of the note appears to have been presented or decided: certainly no testimony was offered on either side in respect to it. All the testimony in the case appears to be incorporated in the record. Judgment having been given against Mrs. Warfield and Baker in the District Court, they each appealed to the Supreme Court, where the judgment was affirmed in July, 1874. In the opinion of the court, which comes here as part of the record, the only reference to the question of stamps which appears is as follows: "The objection that the note was not stamped, not having been made when it was received in evidence, cannot now be considered."

In the petition presented to the Chief Justice of the Supreme

Court of the State for the allowance of this writ, it is stated, for the first time in the case, that the defendant, Mrs. Warfield, claimed the privilege, right, and immunity of being relieved and exempted from all liability on the note or obligation sued on, under the laws of the United States requiring such instruments to be stamped to give them validity at the time the instrument sued upon was executed; and the decision of the Supreme Court of the State denied the claim.

The record sent here from the Supreme Court does not disclose any such claim. The petition for the allowance of the writ in this court is not part of the record of the court below. We act only upon that record; and that does not show that any Federal question was either presented by the pleadings or upon the trial in the District Court, or decided by the Supreme Court. *Writ of error dismissed for want of jurisdiction.*

THE "COLORADO."

1. At night, during a dense fog, a collision occurred on Lake Huron between a bark of 420 tons, bound down, and a propeller of 1,500 tons, bound up, the lake. The wind was from the south. The bark, well manned and equipped, having competent lookouts, properly stationed and vigilant in the performance of their duty, and with her foresail and light sails furled, was, at a speed not exceeding four miles an hour, sailing by the wind, close-hauled on her starboard tack, heading south-east by east, displaying the proper lights, and, as required by law and the custom of the lakes, giving frequent signals of two blasts from her fog-horn, which could be heard at the distance of half a mile; which signify in that locality that she was on her starboard tack, close-hauled. She held this course, until, a collision becoming inevitable, her helm was put to starboard. The propeller, with but one lookout and an insufficient watch on deck, was heading north-north-west, and moving at the rate of five or six miles per hour. The officer in charge of the propeller heard but one blast of the bark's fog-horn when the vessels were near each other, and ported her helm; but then, hearing two blasts of a second signal, ordered her helm hard a-starboard. Before this order had much effect, she struck the bark, at an angle of about forty-five degrees, on her starboard side, nearly opposite the mainmast, thereby causing the total loss of that vessel and her cargo. *Held*, that the propeller was responsible for the disaster.
2. Where, in a collision between a propeller and a sailing vessel, the proofs show that the latter kept her course, the presumption of fault on the part of the propeller, arising in the absence of evidence tending to bring the case within

any of the exceptions in the nineteenth article of the sailing rules, can only be overcome by showing that she took every reasonable precaution to meet any emergency which might arise, and that she was not guilty of the want of ordinary care, caution, or maritime skill.

APPEAL from the Circuit Court of the United States for the Eastern District of Michigan.

Mr. George B. Hibbard for the appellant.

Mr. J. G. Abbott and *Mr. Ashley Pond* for the appellee.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Lights and other signals are required by law, and sailing rules are prescribed, to prevent collisions and to save life and property at sea; and all experience shows that the observance of such regulations and requirements is never more necessary than in a dense fog, whether in the harbor or in the open ocean, if the vessel is in the common pathway of commerce.

Mariners dread a fog much more than high winds or rough seas. Nautical skill, if the ship is seaworthy, will usually enable the navigator to overcome the dangers of the wind and waves; but the darkness of the night, if the fog is dense, brings with it extreme danger, which the navigator knows may defy every precaution within the power of the highest nautical skill.

Signal-lights in such an emergency are valuable; but they may not be seen. Bells and fog-horns, if constantly rung or blown, may be more effectual; but they may not be heard. Slow speed is indispensable; but it will not entirely remove the danger; nor will all these precautions, in every case, have that effect. Perfect security, under such circumstances, is impossible.

Danger attends the vessel if she ceases to move, as other vessels astern may come up; and, even if she goes about and takes the back track, she is still in danger from the vessels astern which have not changed their course. Such a change of course is not required by the sailing rules or by the usages of navigation. Instead of that, the best precautions are bright signal-lights, very slow speed, just sufficient to subject the vessel to the command of her helm, competent lookouts properly stationed and vigilant in the performance of their duties, constant ringing of the bell or blowing of the fog-horn, as the case may

be, and sufficient force at the wheel to effect, if necessary, a prompt change in the course of the vessel. Where all these precautions are faithfully observed, such disasters rarely occur, and the courts hear very little about inevitable accidents.

Injuries were received by the bark, as her owner alleges, on the 11th of May, 1869, in a collision which took place on Lake Huron between the bark and the propeller "Colorado," off Saginaw Bay, about half-past eleven o'clock at night, whereby the bark was sunk in the lake, and with her cargo, consisting of 45,000 bricks and 35,000 bushels of oats, became a total loss. Compensation is claimed in the libel for the value of the vessel, freight, and cargo.

By the record, it appears that the bark — a sail vessel of 425 tons — was bound down the lake on a voyage from Milwaukee to Buffalo; and that the propeller, — a large steamer of 1,500 tons, — with a small cargo of general merchandise, was bound up the lake on a voyage from Buffalo to Chicago.

Service was made, and the owners of the propeller appeared and filed an answer. Testimony was taken; and, the parties having been fully heard, the District Court entered an interlocutory decree in favor of the libellant, and referred the cause to a master to ascertain the amount of the damages. Hearing was had before the master, and he made a report. Exceptions were taken to the report by the respondent, some of which were sustained, and others were overruled; and the District Court entered a final decree in favor of the libellant for the sum of $33,675.26, with interest and costs, as set forth in the decree. Immediate appeal was taken by the respondents to the Circuit Court, where the decree of the District Court was in all things affirmed; and the respondents appealed to this court.

Errors of fact are assigned by the owners of the propeller, all of which deny that the propeller was in fault, which is the principal question in the case. Fault is also imputed to the bark; but the evidence to support the accusation is so slight, that it will not demand any extended examination. Sufficient appears to show that the night was dark, and that the fog was quite dense at the time of the collision; that the wind at that time was south; that the bark was sailing by the wind, close-hauled, on her starboard tack, heading south-east by east; that

she had pursued that course for some time, and continued to pursue it without changing her helm, until the collision was inevitable, when her helm was put to starboard; that she was stanch and strong, and well manned and equipped; that she showed the requisite signal-lights; that she had competent lookouts properly stationed on the vessel, and that they were vigilant in the performance of their duty; that she blew her fog-horn as required by law and the custom on the lakes, and that her speed was moderate. Two blasts were given by her fog-horn; which signify in that locality that the approaching vessel is on the starboard tack, close-hauled. Signals of two blasts were given in order that approaching vessels might be able to determine her course, and that she was on the starboard tack.

Prior to ten o'clock, the bark was making good speed; but, when the fog became dense, the bark commenced to shorten sail; and the evidence shows that all her light sails were taken in half an hour before the collision. Her speed before the light sails were furled did not exceed five or six knots an hour, and subsequently did not exceed four miles, as appears by the weight of the evidence.

Steamers must keep out of the way of sailing ships when the two are proceeding in such directions as to involve risk of collision; and in such a case the rule is that the sailing ship shall keep her course, so that the steamer may not be baffled or misled in the performance of the duty required of her to keep out of the way. Special circumstances may exist in certain cases rendering a departure from that rule necessary in order to avoid immediate imminent danger; but there is no evidence in this case making it necessary to consider any of the qualifications to the general rule. *The Warrior*, Law Rep., 3 Ad. & Ecc. 555.

Beyond all doubt, the evidence establishes the proposition that the bark did keep her course, as required by the eighteenth article of the sailing rules; and, it appearing that there is no evidence tending to bring the case within any of the qualifications contained in the nineteenth article of the same rules, the *prima facie* presumption is that the propeller was in fault.

Three answers are given to that theory by the owner of the propeller, either of which, if true, is conclusive that the decree below is erroneous: (1.) That the bark was in fault. (2.) That the propeller was not in fault. (3.) That the collision was the result of inevitable accident.

1. Much discussion of the first proposition is unnecessary, as it has already been shown that the signal-lights of the bark were well displayed; that she had competent lookouts properly stationed, and that they were vigilant in the performance of their duty. Due signals from her fog-horn were given as frequently as required by law or the custom of the lakes, and her speed was moderate; her foresail and all her light sails having been furled or taken down at least a half-hour before the disaster.

What more the bark ought to have done the owner of the propeller does not state. Doubtless he knows that a sailing vessel cannot absolutely stop without coming to anchor; and there is no regulation or usage which requires a sailing vessel "to lie to" or go about in stays, under such circumstances; nor would it add any thing to the safety of life or property at sea if such a precaution was adopted, as the vessel would still be in the pathway of commerce, and be exposed to collision by vessels approaching from any and every direction. All her light sails had been taken in, as matter of precaution, to lessen her speed, and to put the vessel more completely at the command of her helm. Both the master and second mate were on deck; and the wheelsman was an able seaman of experience, and the lookout was stationed on the top-gallant forecastle.

When the wind is high, it is frequently necessary to reef some or all of the other sails; but it is not usual to do so *in the open sea*, when the wind is moderate, or properly described as merely a fresh breeze. Emergencies frequently arise, in rough weather, when good seamanship requires that the sails, part or all, should be furled; and it appears that part of the sails of the bark were furled. Besides, it was the propeller that struck the bark on her starboard side, nearly opposite the mainmast; and the evidence shows that the propeller cut nearly or quite ten feet into the side of the bark, having struck the bark at an angle of about forty-five degrees.

Viewed in the light of all the circumstances, the court is of the opinion that the proposition of the owner of the propeller, that the bark was in fault, is not sustained.

2. Suppose that is so: still it is insisted by the owner of the propeller that his vessel was not in fault; which is a proposition that will deserve more consideration. Attempt is made in argument to establish the proposition that the bark ought to have changed her course, and kept out of the way of the propeller; but it is a sufficient answer to that suggestion, that the evidence does not disclose any special circumstances which would have justified the bark in departing from the rule, that, when the steamer is required to keep out of the way, the sailing ship shall keep her course. Due regard, it is true, must be had in such a case to all dangers of navigation, and to any special circumstances which may exist in any particular case, rendering a departure from the rule necessary in order to avoid immediate danger. Concede that, but still it is equally well settled, that where no special circumstances are proved, showing that a departure from the rule was necessary to avoid immediate danger, the obligation on the part of the sailing vessel is imperative to keep her course. *The Sunnyside*, *supra*, 205; *Crocket* v. *Newton*, 18 How. 583; 1 Pars. Ship. & Ad. 580.

Still it is insisted by the respondent that the propeller was not in fault; and, in order to determine that question satisfactorily, it will be necessary to refer again to the evidence. Nor can the details of the evidence be entirely avoided, as there is some conflict in the testimony of the witnesses.

All agree that the night, subsequent to eleven o'clock, was foggy, and that the wind was south, blowing only a moderate breeze; and the evidence shows that the mate of the propeller had charge of her navigation. His watch consisted of the wheelsman, one lookout (stationed forward on the promenade-deck), and one engineer, who had charge of the engine; that the propeller was one of the largest on the lake, measuring fourteen hundred and seventy tons; that she was heading north-north-west at the time the fog settled down, and that her speed was between nine and ten miles an hour. It appears from the testimony of the mate that the fog became very dense, and that he spoke to the master, who was in his room, lying on a

lounge, and that, pursuant to the master's suggestions, he directed the engineer to let the propeller go slow; and he testifies that he took his position in front of the pilot-house, where he continued to sound the whistle, every one or two minutes, up to within a very short time of the collision. He is confirmed by the master as to the directions given to the engineer; and the master admits that he immediately returned to the lounge, where he fell asleep, and that it was the jar of the collision that aroused him from the lounge.

Enough appears to show conclusively that there was but one lookout, and no other seamen to assist the wheelsman in any emergency which might arise; though the master, as well as the mate, was fully apprised that the fog was unusually dense, and both knew full well that the course of the propeller was in the much-frequented pathway of commerce. Such a watch, consisting only of the mate, one wheelsman, and one lookout besides the engineer, could hardly be deemed sufficient for such a large propeller, even in a clear night; and if not, it certainly cannot be regarded as one equal to the emergencies likely to arise in a dark night, when the fog was as dense as it was on the night of the collision.

Ocean-steamers, as remarked by this court on a former occasion, usually have, in addition to the officer of the deck, two lookouts, who are generally stationed, one on the port and one on the starboard side of the vessel, as far forward as possible. During the time they are charged with that service, they have no other duties to perform; and no reason is perceived why any less precaution should be taken by first-class steamers on the lakes. Their speed is quite as great, and the navigation is no less exposed to the dangers arising from the prevalence of mist and fog, or from the ordinary darkness of the night; and the owners of vessels navigating there are under the same obligations to provide for the safety and security of life and property as attaches to those who are engaged in navigating the sea. *Chamberlain* v. *Ward*, 21 How. 571.

Required, as steamers are, to keep out of the way of sailing vessels, the propeller is at least bound to show that she took reasonable precaution to meet any emergency which might arise from the darkness of the night, and that she was not

guilty of the want of any ordinary care, caution, or of maritime skill. Those in charge of her navigation knew that she was in waters frequented by other vessels, and that many other vessels were in the vicinity at that time, as indicated by the fog-horns heard from almost every direction.

Signal-lights were obscured by the density of the fog; but the sound of the fog-horns could be heard, and the evidence shows that the number blown ought to have admonished the master before he went to sleep, as well as the mate, that the surrounding and approaching dangers might make it necessary to effect sudden changes in the course of the propeller.

Sudden dangers of collision might reasonably have been expected from the extreme darkness of the night and the known vicinity of other vessels. Under such circumstances, it is apparent that the watch on deck, considering the size of the propeller and her speed, was not sufficient for the occasion. Support to that view, if more is needed, is found in the fact, that when the emergency came the mate deemed it necessary, when he gave the second order to the wheelsman, to direct the lookout to leave the place where he was stationed, and go to the wheel to help the wheelsman to put the same hard a-starboard, leaving the propellor for the time being without any lookout. *The George*, 9 Jur. 670; *The Mellona*, 3 W. Rob. 13.

Lookouts are valueless unless they are properly stationed, and vigilantly employed in the performance of their duty; and if they are not, and in consequence of their neglect the approaching vessel is not seen in season to prevent a collision, the fault is properly chargeable to the vessel, and will render her liable, unless the other vessel was guilty of violating the rules of navigation. *Baker* v. *City of N. Y.*, 1 Cliff. 84; *Whitridge* v. *Dill*, 23 How. 453; *The Catharine*, 17 id. 177.

Evidence entirely satisfactory is exhibited in this case, showing that the fog-horn of the bark could be heard for half a mile; and yet it is clear, both from the testimony of the lookout and the mate, that the fog-horn of the bark was not heard until the two vessels were quite near together; and they both testify that they heard only one blast of the horn in the first instance. They agree in respect to the conversation between them when they heard that blast of the horn; and the mate

states that he was standing in front of the pilot-house, but the lookout testifies that they were forward on the promenade-deck. Probably the statement of the mate is correct: and he also states that he and the lookout heard the blast of the horn about the same time; that he immediately gave the order to the man at the wheel to port, and went to the top of the pilot-house and gave the signal to stop both engines; that he gave the order to port just as he started, and went to the top of the pilot-house as quick as he could; that he then heard two blasts of the fog-horn from the bark; and that he immediately gave the order to the wheelsman to put the wheel hard a-starboard, and ordered the lookout "to the wheel to help put it over," and gave the signal for the engines to back.

Steamers of such size, under such circumstances, ought never, in a dark night, to be without a watch on deck sufficiently effective to change the course of the vessel with celerity, without withdrawing the lookout from his station and appropriate duties; nor is it good seamanship for the officer of the deck, if without any assistant in the navigation of the vessel, to station himself in a position where he cannot in such an emergency give immediate signals to the engineer in charge. Even seconds are of great importance when the peril is impending and the danger imminent, as the lives of all on board, and property to a large amount, may be sacrificed by a moment's delay.

Owners of steamships are bound to afford such reasonable protection to life and property as may be in their power in such emergencies, and moments of extreme peril; and, in the judgment of the court, a watch consisting of one officer only and one wheelsman and one lookout, in such a night and under such circumstances, is not sufficient to afford the security to life and property which the owners of such a steamer are bound to afford. Where there is only one officer left on deck, and only one man assigned to duty as a lookout, the watch on deck, including the officer, ought always, in a dark night, to be sufficient to navigate the vessel, even in an emergency, without calling off the lookout to assist at the wheel; as such a steamer in such a night should never, in the judgment of the court, be

without at least one lookout to keep watch for approaching vessels.

Forewarned as the master was of the impending danger, he might, if he found it necessary that he should go to the lounge for repose, have increased the watch on deck, or have ordered the second mate or another seaman to the temporary assistance of the lookout, especially as the lookout had been on duty four or five hours when the mate informed the master of the density of the fog. All the master did was to direct the mate to tell the engineer to "let her go slow," and then he went to sleep. Doubtless the order was given to the engineer, and it appears that he slackened the speed of the steamer. Before that, her speed had been between nine and ten miles an hour. Considerable change undoubtedly was made under the order communicated to the engineer by the mate. The engineer testifies that her speed after that did not exceed four miles an hour; but other witnesses entitled to credit testify that the steamer still made five or six miles an hour. Judging from the effect of the blow when the propeller struck the bark on her starboard side, it is scarcely possible to believe that the estimate of the engineer is correct.

Steamships have great power, and in many instances are capable of great speed, and consequently are always required to observe a great degree of caution, particularly in a dark night. When the night is dark, they are required to be watchful, both as to their speed and course. In regard to the former, it is a question of fact, in each particular case, whether the speed was excessive or not; and, in determining that question, the locality, the hour, the state of the weather, and all the circumstances of the occasion, are to be fully considered. *The Europa*, 2 Eng. Law & Eq. 564; 1 Pars. on Ship. & Ad. 575; *Newton* v. *Stebbens*, 10 How. 606; *The Rose*, 2 W. Rob. 3; *The Steamer Charles*, 19 How. 111.

Vessels propelled by steam, if navigating in thoroughfares of commerce, are always required, whenever the darkness is such that it is impossible or difficult to see approaching vessels, to slacken their speed, or even to stop and back, according to circumstances; and this court intimated that the principle of that requirement might be applied in a qualified sense to sailing

vessels, in crowded thoroughfares, when the darkness was so intense that vessels ahead could not be seen, if it appeared that the sailing vessel was proceeding *with a strong breeze under a full press of canvas and with all her studding-sails set. The Morning Light*, 2 Wall. 558.

Subject to the qualifications there stated, no doubt is entertained that those suggestions are correct; but they are not applicable to the case before the court, for two reasons: (1.) Because the general rule is, that sailing vessels may proceed on their voyage *in the open sea*, although it is dark, observing all the rules of navigation, with such additional care and precaution as experienced and prudent navigators usually employ under similar circumstances. (2.) Because the bark did shorten sail, and adopt every necessary precaution. Sailing ships should never, in a dark, foggy night, hazard an *extraordinary press of sail;* and, in case *of unusual darkness*, it may be reasonable to require them, when navigating *in a narrow pathway*, where they are liable to meet other vessels, to shorten sail, if wind and weather will permit. *The Morning Light, supra.*

Requirements of the kind are intended as precautions; but the more important rule is, that steamships shall keep out of the way of sailing vessels; and the sixteenth article of the sailing rules provides, that when steamships are approaching another ship, so as to involve risk of collision, they shall slacken their speed, or, if necessary, stop and reverse; and the express provision is that every steamship shall, when in a fog, go at a moderate speed.

Great difficulty would attend any effort to define, with mathematical precision, what is a moderate speed in any particular case, further than to say that the speed ought not to be so great that the steamer cannot perform the duty imposed upon her by the act of Congress, — "to keep out of the way of the sailing vessel," if the latter has in all respects complied with the rules of navigation. Different formulas have been suggested by different judges as criterions for determining whether the speed of a steamer in any given case was or was not greater than was consistent with the duty which the steamer owed to other vessels navigating the same waters; but perhaps no one yet suggested is more useful, or better suited to enable

the inquirer to reach a correct conclusion, than the one adopted by the Privy Council. *The Batavier*, 40 Eng. L. & Eq. 25.

In that case the court say, "At whatever rate she (the steamer) was going, if going at such a rate as made it dangerous to any craft which she ought to have seen, and might have seen, she had no right to go at that rate." Apply even a less strict rule to the case before the court, and it is clear that the propeller, in view of the insufficiency of the watch on deck for such a steamer in such a night, and the extreme darkness, was guilty of negligence in not slacking down her speed to a slower rate.

Beyond all question, it was her duty to have seen and heard the bark in season to have complied with the requirement to keep out of the way of the bark; and it appears that she might have done so, if those responsible for the navigation of the propeller had not been guilty of negligence. Two blasts of the fog-horn were blown by the bark; but the mate and lookout did not, in the first instance, hear but one, when the mate gave the order to port, which proved to be a wrong order. Presently both the mate and the lookout heard two blasts; and then the mate gave the order, "Hard a-starboard!" and sent the lookout to assist in carrying the order into effect; but the collision occurred before the last order had much effect.

Examined in the light of these facts, which are fully proved, it is obvious that neither of the orders was given in season to be of any substantial avail, and that the propeller is responsible for the disaster.

3. Other defences failing, it is next insisted by the owner of the propeller that the collision was the result of inevitable accident; but, having decided that the propeller was in fault, the discussion of that proposition is unnecessary, as such a defence can never be maintained, unless it appears that both parties were without fault.

Exceptions were taken in the District Court to the report of the master; and it is insisted, in behalf of the propeller, that error was committed in confirming that report. Some of the exceptions were sustained, and others overruled; and, in the judgment of the court, the report as confirmed is correct.

Decree affirmed.

WARREN ET AL. *v.* SHOOK.

1. The substance of the business of a banker, as defined by the acts of Congress approved June 30, 1864 (13 Stat. 252), and March 3, 1865 (id. 472), is having a place of business where deposits are received and paid out on checks, and where money is loaned upon security.
2. By the same acts, a broker is defined to be one whose business it is to negotiate purchases or sales of stocks, exchange, bullion, coined money, bank-notes, promissory notes, or other securities, for himself or for others.
3. The words "whose business it is," employed in the ninth subdivision of the seventy-ninth section of the act of 1864, qualify all parts of the definition of a broker as given in the act; so that a person becomes a broker, within the meaning of the statute, only when making sales and purchases is his business, trade, profession, means of getting his living, or making his fortune.
4. While the sale by a person doing a banking business only of a security received by him for the repayment of a legitimate loan does not make him a broker, and subject him to taxation as such, yet, when it is his business, the statute properly holds all such acts, whether in the name of himself ostensibly or in the name of others, to be those of a broker.
5. Congress, by enacting "that all brokers, and bankers doing business as brokers, shall be subject" to the duties specified, plainly intended to include the entire class of persons engaged in the business of buying and selling stocks and coin.

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

This case was tried upon the following agreed statement of facts: —

First, "That the plaintiffs, from the first day of April, 1865, to the first day of May, 1866, were copartners in the city of New York, doing business under the firm name of 'John Warren & Son.'"

Second, That, during such time, the plaintiffs, as such copartners, had a place of business in the thirty-second collection district of New York, where credits were opened by the deposit and collection of money and currency subject to be paid or remitted upon draft, check, or order, and where money was advanced and loaned by plaintiffs on stocks, bonds, bullion, bills of exchange, and promissory notes, and where stocks, bonds, bullion, bills of exchange, and promissory notes, were received by plaintiffs for discount and sale.

Third, That, during the period aforesaid, the said plaintiffs, as such copartners, duly paid the special tax imposed upon

them as bankers, in accordance with the provisions of the seventy-ninth section of the act of Congress entitled "An Act to provide internal revenue to support the government," &c., approved June 30, 1864.

Fourth, That, during the period aforesaid, the defendant was collector of internal revenue for the said thirty-second collection district of New York.

Fifth, That, during the period aforesaid, the plaintiffs bought and sold stock and gold, both of their own property on their own account, and also upon commission for other parties.

The sales in question were of three kinds: —

1st, Sales of their own property.

2d, Sales of gold, stocks, bonds, bullion, &c., transmitted to them by their correspondents, and the same or the proceeds drawn against; in some of which cases the sales of the transmitted property were made immediately, and the proceeds at once applied to the payment of drafts so drawn, and in others of which the drafts were accepted or paid; and the gold, stock, &c., were held for a better market, or to await further orders, and in the mean time stood as their security for their advances, and to provide reimbursement therefor. In other cases there were no actual advances, but the property held for sale; and, when sold by order of the customer, the proceeds were placed to credit, subject to draft.

3d, Sales of stock made in pursuance of an arrangement for what is called carrying stocks on a margin, wherein they, upon the deposit with them of a percentage on the amount of the stocks, advanced money and purchased stocks for the dealer or speculator (who dealt in hope of making a profit by the rise in the market-price), and held the same subject to his order to sell, and finally sold the same for his account as to profit and loss. These transactions were conducted in the name of the plaintiffs, the name of the customer not being disclosed to those to whom the stocks were finally sold.

Upon these purchases and sales they charged and received from their customers the usual commission for purchasing and selling stocks for account of others; and the tax imposed and paid to the United States on the sales was also charged to such customers. If the transaction showed a profit, it was paid

to the customer, with a return to him of the cash or security held as a margin; if the transaction resulted in a loss, the amount of such margin returned to the customer was correspondingly reduced.

Sixth, That, during the period aforesaid, the assessor of internal revenue for the said district assessed monthly against the said plaintiffs the tax of one-twentieth of one per centum on stock, securities, gold, &c., provided for by the ninety-ninth section of the act aforesaid, to be paid by brokers, and bankers doing business as brokers, and assessed such tax against the plaintiffs alike upon the securities, stocks, bullion, &c., sold by them on commission for others, and upon those owned by said plaintiffs, and sold by them upon their own account.

Seventh, That, at the times of the said several assessments so made by said assessor, the plaintiffs protested against their liability to pay, and against the right of the said assessor to impose or assess, the said tax of one-twentieth of one per centum, or any other sum whatever, upon the value of the stocks, gold, or securities owned by said plaintiffs, and sold by them upon and for their own account, and not upon commission or for others.

Eighth, That the assessment-roll containing said assessment was transmitted to the said defendant as such collector; and the said defendant, as such collector, demanded from said plaintiffs the whole sum so assessed against them by said assessor as and for the said tax; and the plaintiffs were compelled to pay, and did pay under protest, to the said defendant, as such collector, the said tax upon the whole amount of their sales during said period, including sales made on their own account as aforesaid.

Ninth, That the amount of such payments so made by the said plaintiffs, with the dates thereof, are correctly set forth in the schedule hereto annexed, marked "A:" the first column in such schedule showing the whole amount of such tax paid at the respective dates therein indicated; and the second column showing the portions of said several payments, which were for taxes upon sales made by plaintiffs upon their own account, and not upon commission, and which plaintiffs seek in this action to recover.

Tenth, That about the third day of December, 1870, the plaintiffs duly appealed, pursuant to law and the regulations of

the Treasury Department made in pursuance thereof, to the Commissioner of Internal Revenue, from the assessment and collection of said taxes, imposed upon said plaintiffs, upon sales made by them upon their own account, and claimed by them to be erroneously and illegally assessed against and collected from them; and the said commissioner, on the twenty-fourth day of May, 1871, and less than six months before the commencement of this action, rendered his decision upon said appeal adversely to these plaintiffs.

No further evidence was offered by either party.

Thereupon the counsel moved the said court that judgment be entered for the defendant, and said plaintiffs' counsel moved that judgment be entered for the plaintiffs.

After argument and deliberation, the court denied the said motion of said plaintiffs' counsel: whereupon the said counsel for the plaintiffs did then and there duly except thereto.

The court then directed that judgment be entered for the defendant; to which direction and conclusions of law of the court upon the foregoing facts set forth in said direction the said plaintiffs' counsel then and there duly excepted, and sued out this writ of error.

SCHEDULE A.

List of Taxes paid by John Warren & Son on Sales of Stocks and Gold.

			Bills paid.	Amt. for own account.
1865.				
June 16.	For April, on stock . . .	$597.50		
	" " on gold . . .	28.78		
			$626.28	$501.28
17.	For May, on stock . . .	$324.65		
	" " on gold . . .	38.42		
			363.07	295.25
Aug. 19.	For June, on stock . . .	$242.50		
			242.50	219.00
Sept. 18.	For July, on stock . . .	$515.75		
	" " on gold . . .	60		
			516.35	366.75
	Carried forward . . .			$1,382.28

	Brought forward . . .			$1,382.28
Oct. 13.	For August, on stock . .	$346.50		
		———	$346.50	287.50
Dec. 1.	For September, on stock .	$422.95		
	„ „ on stock .	510.20		
		———	933.15	422.95
1866.				
Jan. 6.	For October, on stock . .	$805.97		
	„ „ on stock . .	685.50		
		———	1,491.47	685.50
18.	For November, on stock .	$520.11		
	Allowed overpaid for Sept.	422.95		
		———	103.16	124.20
April 2.	For February, on stock .	$185.60		
	„ „ on stock .	172.50		
		———	358.10	172.50
28.	For March, on stock . .	$227.10		
	„ „ on stock . .	311.50		
		———	538.60	311.50
Sept. 21.	For April, on stock . . .	$210.31		
	„ May, „ „ . . .	93.86		
	„ „ „ „ . . .	95.64		
		———	399.81	. . . . .
				$3,386.43

Mr. B. K. Phelps for the plaintiffs in error.

Mr. Assistant Attorney-General Edwin B. Smith for the defendant in error.

MR. JUSTICE HUNT delivered the opinion of the court.

The plaintiffs were licensed bankers in the city of New York. They also bought and sold gold and stocks for others upon a commission paid to them for that service. On their own account, they also dealt largely in gold and stocks. They have paid the taxes imposed by the revenue laws upon bankers. The government agents have now imposed upon them, and collected the taxes chargeable by law upon brokers. This includes the tax of one-twentieth of one per cent upon sales made by the plaintiffs on their own account, as well as upon sales made for others. It is to this that the plaintiffs object, and the present action is brought to recover back such taxes.

The questions would seem to be, —

1st, Do the transactions specified make the defendants brokers within the meaning of the revenue laws?

2d, Are licensed bankers, who also do business as brokers, liable to the additional tax imposed upon brokers?

3d, More precisely, are the plaintiffs liable to pay taxes upon sales made on their own account, as well as when made for others?

Sect. 110 of the act to provide internal revenue, &c., approved June 30, 1864 (13 Stat. 277), imposes a duty of one-twenty-fourth of one per cent each month on deposits, one-twenty-fourth of one per cent each month on the capital, one-twelfth of one per cent each month on the circulation, and an additional one-sixth of one per cent on certain specified excess of circulation, to be paid by "any bank, association, company, or corporation, or person engaged in the business of banking, beyond the amount invested in United States bonds."

Sect. 79, subdivision of the same act (13 Stat. 251), provides "that bankers using or employing a capital not exceeding the sum of $50,000 shall pay $100 for each license," and for every additional $1,000 of capital two dollars; and that "every person, firm, or company, and every incorporated or other bank having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check, or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes, or where stocks, bonds, bullion, bills of exchange, or promissory notes, are received for discount or sale, shall be regarded a banker under this act."

The same sect. 79, subd. 9, as amended by the act of March 3, 1865 (13 Stat. 252, 472), provides "that every person, firm, or company, except such as hold a license as a banker, whose business it is, as a broker, to negotiate purchases or sales of stocks, exchange, bullion, coined money, bank-notes, promissory notes, or other securities, for themselves or others, shall be regarded as a broker under this act; provided that any person holding a license as a banker shall not be required to take out a license as a broker;" and it further provides that "brokers shall pay fifty dollars for each license."

The ninety-ninth section of the same act provides (13 Stat. 273) "that all brokers and bankers doing business as brokers shall be subject to pay the following duties, and rates of duties, upon the sales of merchandise, produce, gold and silver, bullion, foreign exchange, uncurrent money, promissory notes, stocks, bonds, and other securities, as hereinafter mentioned, &c.; that is to say, upon all sales, and contracts for sales, of stocks and bonds, one-twentieth of one per centum on the par value thereof; and of gold and silver, bullion and coin, foreign exchange, promissory notes, or other securities, one-twentieth of one per centum on the amount of such sales and of all contracts for sales."

The sections we have quoted furnish satisfactory definitions of the business of a banker and of that of a broker. "Every person, &c., having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check, or order, or where money is advanced on stocks, bonds, bullion, bills of exchange, or promissory notes, or where stocks, bonds, bullion, bills of exchange, or promissory notes, are received for discount or sale, shall be regarded as a banker under this act." Sect. 79, subd. 1.

Having a place of business where deposits are received and paid out on checks, and where money is loaned upon security, is the substance of the business of a banker.

By the same section, subd. 9, a broker is defined to be one whose business it is to negotiate purchases or sales of stocks, exchange, bullion, coined money, bank-notes, promissory notes, or other securities, for himself or for others. Ordinarily, the term "broker" is applied to one acting for others; but the part of the definition which speaks of purchases and sales for himself is equally important as that which speaks of sales and purchases for others. All parts of the definition are qualified by the words "whose business it is." Thus, if A. B. has $10,000 which he desires to invest, and purchases United States stock, or State stock, or any other securities, he does not thereby become a broker. Nor if he owns $10,000 of United States stock which he wishes to sell to raise money to pay his debts, or because he is not satisfied with six per cent interest, is he

thereby made a broker. It is only when making sales and purchases is his business, his trade, his profession, his means of getting his living, or of making his fortune, that he becomes a broker within the meaning of the statute. Nor is it believed that a sale, by one doing a banking business only, of a security received by him for the repayment of a legitimate loan, would make him a broker, and subject to the tax. This would not be deemed an act of brokerage, either under the statute or upon general principles of law. When it is his business, the statute properly holds all such acts, whether in the name of himself ostensibly or in the name of others, as the acts of a broker. The danger and the facility for evasion of the statute furnish excellent reasons for the adoption of this provision.

The contention of the plaintiffs is, that, because they hold a license as bankers, they are not liable to the duty of one-twentieth of one per centum on sales made on their own account. This is based upon the words of sect. 79, subd. 9, that all persons, &c., except such as hold a license as bankers, shall be liable to this duty on sales made for themselves as well as others, and upon the further suggestion that sect. 99 does not contain the words "for themselves or others." We agree with the statement of Mr. Justice Grier in *U. S.* v. *Fisk*, 3 Wall. 445, that the idea of Congress would have been better expressed if the words "for themselves or others" had been inserted in sect. 99, rather than where they are now found. Still we find no difficulty in reaching the conclusion, that the tax in this case was properly imposed.

The intent of Congress to subject to taxation all sales made by those engaged in the business of brokers is plain enough. When it was said (sect. 99) "that all brokers and bankers doing business as brokers shall be subject" to the duties specified, it was intended to encompass the entire class of persons engaged in the business of buying and selling stocks and coin. Brokers were included by name and by definition. Bankers would not so certainly be embraced by the definition given in sect. 79, subd. 1. To meet this possible exception, it was enacted, that, when bankers should do the business of brokers, they should be subject to the duty specified. In this manner, brokers technically, and bankers doing the business of brokers, were made

liable to the duty. If the right to tax bankers upon sales made for themselves rested on the seventy-ninth section alone, a plausible argument could be made in the plaintiffs' favor, arising from the words "except such as hold a license as a banker;" but when we read in sect. 99, "that all brokers, and bankers doing business as brokers," shall be subject to the tax, and consider the statutory definition of a broker, the plausibility of the argument ceases.

We have carefully considered the cases of *U. S.* v. *Fisk*, 3 Wall. 445, *U. S.* v. *Cutting*, id. 441, and *Clark* v. *Gilbert*, 5 Blatch. 330, but do not deem it necessary to comment upon them in detail. *Judgment affirmed.*

RAYMOND *v.* THOMAS.

The special order, issued May 28, 1868, by the officer in command of the forces of the United States in South Carolina, wholly annulling a decree rendered by a court of chancery in that State in a case within its jurisdiction, was void. It was not warranted by the acts approved respectively March 2, 1867 (14 Stat. 428), and July 19 of the same year (15 id. 14), which define the powers and duties of military officers in command of the several States then lately in rebellion.

ERROR to the Supreme Court of the State of South Carolina.

Mr. P. Phillips for the plaintiff in error.

Mr. W. W. Boyce for the defendant in error.

MR. JUSTICE SWAYNE delivered the opinion of the court.

The facts in this case, as disclosed in the record, are somewhat involved and complicated. So far as it is necessary to consider them for the purposes of this opinion, they are not voluminous.

On the 25th of August, 1863, Mary Raymond bought from Thomas, the defendant in error, a small house and lot situated in Greenville, S.C., for which she gave him her note for $7,000, payable six months after the ratification of peace between the Confederates and the United States, or before, at her option, with annual interest from the first day of September, 1863. The premises were conveyed at the time of the sale, and the

grantee gave back a mortgage to secure the payment of the note.

On the 28th of May, 1866, Thomas filed his bill in the Court of Common Pleas of Greenville County to foreclose the mortgage. The vendee answered. The case was heard in July, 1866, before Chancellor Johnson. The chancellor held that the note was intended by the parties to be payable in Confederate money; and that, in view of all the circumstances, the amount of principal equitably due upon it was $2,500. The case was referred to a master to compute the aggregate principal and interest due upon this basis. This decree, upon the appeal of Thomas, was affirmed by the Court of Errors of the State at its December Term, 1867. On the 25th of January, 1868, Chancellor Carrol, sitting in the Common Pleas, decreed that the amount due in conformity to the master's report was $3,265.62; that, unless that sum was paid as directed, the commissioner should sell the premises; and that, if the proceeds were insufficient to pay the debt and costs, the complainant might issue execution for the balance.

On the 28th of May following, General Canby issued an order whereby he annulled this decree. The order contains a slight error in the description of the decree; but the meaning of the order is clear. The discrepancy is, therefore, immaterial. On the 24th of December, 1868, the military order *non obstante*, the commissioner reported that he had sold the premises for $1,005. On the 2d of January, 1869, Mary Raymond filed her bill in the Court of Common Pleas of Charleston County, setting forth the facts above stated; and further, that the sheriff of that county was about to proceed to collect from her the balance still due upon the decree, amounting to $2,653.26. She prayed that Thomas and all others be perpetually enjoined from further enforcing the decree. The court decreed accordingly. Subsequently Gaillard (the purchaser) and Thomas answered, and moved to dissolve the injunction. In July, 1869, this motion was overruled, and the injunction again ordered to be made perpetual. An appeal was taken to the Supreme Court of the State, but failed for want of prosecution.

In December, 1870, Thomas obtained leave to amend his original bill of foreclosure. He did so, setting forth, among

other things, that the original defendant, Mary Raymond, had died, and that Henry H. Raymond had been appointed her executor, and making him a party. In due time he answered, denying that he was either executor or administrator of the deceased, and insisting that he was not bound to answer, and that no decree could be taken against him. He admitted that he was in possession of her estate, and averred that he was ready to pay all her just debts. The amended bill and this answer set forth other things not necessary to be repeated.

The case in this new aspect came on to be heard. It was decreed that the sale of the mortgaged premises be confirmed, that the purchaser have a writ of assistance to enable him to obtain possession, and that the complainant have leave to enter up a judgment against the defendant for the balance due him, and interest and costs, as before decreed. Raymond thereupon removed the case by appeal to the Supreme Court of the State. That court, at the April Term, 1873, affirmed the decree of the lower court. This writ of error was thereupon sued out by Raymond; and the judgment of the Supreme Court is thus brought before us for review.

Outside of the record, our attention has been called to an act of the legislature of South Carolina of the 2d of September, 1868, touching certain military orders therein mentioned. The act does not embrace or affect the order of General Canby in question in this case.

Nothing more need be said in regard to the act.

The only point insisted upon here by the counsel for the plaintiff in error is the order of General Canby of the 2d of May, 1868, and its disregard by the Supreme Court of South Carolina in the judgment before us. The validity of the order is denied by the defendant in error. Our remarks will be confined to that subject.

The war between the United States and the insurgents terminated in South Carolina, according to the judgment of this court, on the 2d of April, 1866. *The Protector*, 12 Wall. 701. The National Constitution gives to Congress the power, among others, to declare war and suppress insurrection. The latter power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently rightful

authority to guard against an immediate renewal of the conflict, and to remedy the evils growing out of its rise and progress. *Stewart* v. *Kahn*, 11 Wall. 506.

The close of the war was followed by the period of reconstruction, and the laws enacted by Congress with a view to that result.

These laws are the acts of March 2, 1867 (14 Stat. 428), the act of July 19, 1867 (15 id. 14), and the act of June 25, 1868 (id. 73). The two acts first mentioned defined the powers and duties of the military officers placed in command in the several States lately in rebellion. The act of June 25, 1868, provided, among other things, that, whenever the legislature of South Carolina should ratify the Fourteenth Amendment to the Constitution of the United States, she should be again admitted to representation in Congress; and that it should be the duty of the President, within ten days after receiving official information of the ratification, to issue a proclamation announcing the fact. Such a proclamation was issued on the 11th of July, 1868 (15 Stat. 704). This replaced the State in her normal relations to the Union. Nothing further was necessary, but the elections provided for (which speedily followed), to render her rehabilitation complete.

We have looked carefully through the acts of March 2, 1867, and July 19, 1867. They give very large governmental powers to the military commanders designated, within the States committed respectively to their jurisdiction; but we have found nothing to warrant the order here in question. It was not an order for mere delay. It did not prescribe that the proceeding should stop until credit and confidence were restored, and business should resume its wonted channels. It wholly annulled a decree in equity regularly made by a competent judicial officer in a plain case clearly within his jurisdiction, and where there was no pretence of any unfairness, of any purpose to wrong or oppress, or of any indirection whatsoever.

The meaning of the legislature constitutes the law. A thing may be within the letter of a statute, but not within its meaning; and within its meaning, though not within its letter. *Stewart* v. *Kahn*, *supra*.

The clearest language would be necessary to satisfy us that

Congress intended that the power given by these acts should be so exercised.

It was an arbitrary stretch of authority, needful to no good end that can be imagined. Whether Congress could have conferred the power to do such an act is a question we are not called upon to consider. It is an unbending rule of law, that the exercise of military power, where the rights of the citizen are concerned, shall never be pushed beyond what the exigency requires. *Mitchell* v. *Harmony*, 13 How. 115; *Warden* v. *Bailey*, 4 Taunt. 67; *Fabrigas* v. *Moysten*, 1 Cowp. 161; s. c., 1 Smith's L. C., pt. 2, p. 934. Viewing the subject before us from the stand-point indicated, we hold that the order was void.

This is the only Federal question presented for our consideration. As the Supreme Court of the State decided it correctly, our jurisdiction terminates at this point: we can look no farther into the case. *Judgment affirmed.*

NICHOLS, ASSIGNEE, *v.* EATON ET AL.

1. A devise of the income from property, to cease on the insolvency or bankruptcy of the devisee, is good; and a limitation over to his wife and children, upon the happening of such contingency, is valid, and the entire interest passes to them: but if the devise be to *him* and his wife or children, or if he has in any way a vested interest thereunder, that interest, whatever it may be, may be separated from that of his wife or children, and paid over to his assignee in bankruptcy.
2. Where, upon certain trusts therein limited and declared, a devise of real and personal property to trustees directed them to pay the income arising therefrom to A., and provided, that if he should alienate or dispose of it, or should become bankrupt or insolvent, the trust expressed respecting it should thereupon cease and determine, and authorized them, in the event of such bankruptcy or alienation, to apply it to the support of the wife, child, or children, of A., and, if there were none, to loan or reinvest it in augmentation of the principal sum or capital of the estate until his decease, or until he should have a wife or children capable of receiving the trust forfeited by him; and also provided that the trustees might at any time, in their discretion, transfer to him any portion not exceeding one-half of the trust-fund; and in case, after the cessation of income on account of any cause specified in the will other than death, it should be lawful for the trustees, in their discretion, but without its being obligatory upon them, to pay to or apply for the use of A., or that of his wife and family, the income to which he would have been entitled in case the forfeiture had not happened, — *Held*, that the bankruptcy or insolvency of A. terminated all his legal vested right

in the estate, and left nothing in him to which his creditors or his assignee in bankruptcy could assert a valid claim. *Held, further*, that a payment voluntarily made to A., after his bankruptcy, by the trustees under the terms of the discretion reposed in them cannot be subjected to the control of his assignee.

3. No case is cited or known to the court which goes so far as to hold that an absolute discretion in trustees — a discretion which, by the express language of the will, they are under no obligation to exercise in favor of the bankrupt — confers such an interest on the latter as can be successfully asserted in any court by him or his assignee in bankruptcy.
4. When trustees are in existence, and capable of acting, a court of equity will not interfere to control them in the exercise of a discretion vested in them by the instrument under which they act.
5. While the will in question is considered valid in all its parts upon the extremest doctrine of the English Chancery Court, this court does not wish it understood that it accepts the limitations which that court has placed upon the power of testamentary disposition of property by its owner; nor does it sanction the doctrine that the power of alienation is a *necessary* incident to a devisee's life-estate in real property, or that the rents and profits of real and the income and dividends of personal property cannot be given and granted by a testator to a person free from all liability for the debts of the latter.
6. If that doctrine be sustained at all, it must rest exclusively on the rights of creditors: but, in this country, all wills or other instruments creating such trust-estates are recorded in public offices, where they may be inspected by every one. The law, in such cases, imputes to all persons concerned notice of all the facts which they might know by inspection. When, therefore, it appears by the record of a will that the devisee holds either a life-estate, or the income, dividends, or rents of real or personal property payable to him alone, to the exclusion of the alienee or creditor, the latter knows that he has no right to look to that estate, or to such income, dividends, or rents, as a fund to which he can resort to enforce the payment of a claim against the devisee. In giving the latter credit, he is neither misled nor defrauded when the object of the testator is carried out by excluding him from any benefit of such a devise.
7. American cases cited and examined.

APPEAL from the Circuit Court of the United States for the District of Rhode Island.

The controversy in this case arises on the construction and legal effect of certain clauses in the will of Mrs. Sarah B. Eaton. At the time of her death, and at the date of her will, she had three sons and a daughter; being herself a widow, and possessed of large means of her own. By her will, she devised her estate, real and personal, to three trustees, upon trusts to pay the rents, profits, dividends, interest, and income of the trust-property to her four children equally, for and during their natural lives, and, after their decease, in trust for such

of their children as shall attain the age of twenty-one, or shall die under that age having lawful issue living; subject to the condition, that if any of her children should die without leaving any child who should survive the testatrix and attain the age of twenty-one years, or die under that age leaving lawful issue living at his or her decease, then, as to the share or respective shares, as well original as accruing, of such child or children respectively, upon the trusts declared in said will concerning the other share or respective shares. The will also contained a provision, that if her said sons respectively should alienate or dispose of the income to which they were entitled under the trusts of the will, or if, by reason of bankruptcy or insolvency, or any other means whatsoever, said income could no longer be personally enjoyed by them respectively, but the same would become vested in or payable to some other person, then the trust expressed in said will concerning so much thereof as would so vest should immediately cease and determine. In that case, during the residue of the life of such son, that part of the income of the trust-fund was to be paid to the wife and children, or wife or child, as the case might be, of such son; and, in default of any objects of the last-mentioned trust, the income was to accumulate in augmentation of the principal fund.

There is another proviso, which, as it is the main ground of the present litigation, is here given *verbatim*, as follows: —

"Provided also, that in case at any future period circumstances should exist, which, in the opinion of my said trustees, shall justify or render expedient the placing at the disposal of my said children respectively any portion of my said real and personal estate, then it shall be lawful for my said trustees, in their discretion, but without its being in any manner obligatory upon them, to transfer absolutely to my said children respectively, for his or her own proper use and benefit, any portion not exceeding one-half of the trust-fund from whence his or her share of the income under the preceding trusts shall arise; and, immediately upon such transfer being made, the trusts hereinbefore declared concerning so much of the trust-fund as shall be so transferred shall absolutely cease and determine; and in case after the cessation of said income as to my said sons respectively, otherwise than by death, as hereinbefore

provided for, it shall be lawful for my said trustees, in their discretion, but without its being obligatory upon them, to pay to or apply for the use of my said sons respectively, or for the use of such of my said sons and his wife and family, so much and such part of the income to which my said sons respectively would have been entitled under the preceding trusts in case the forfeiture hereinbefore provided for had not happened."

The daughter died soon after the mother, without issue, and unmarried. Amasa M. Eaton, one of the sons of the testatrix, failed in business, and made a general assignment of all his property to Charles A. Nichols for the benefit of his creditors, in March, 1867; and in December, 1868, was, on his own petition, declared a bankrupt, and said Nichols was duly appointed his assignee in bankruptcy. Said Amasa was then, and during the pendency of this suit, unmarried, and without children. He, William M. Bailey, and George B. Ruggles (a son of testatrix by a former husband), were the executors and trustees of the will.

It will be seen at once, that whether regard be had to the assignment before bankruptcy, or to the effect of the adjudication of bankruptcy, and the appointment of Nichols as assignee in that proceeding, one of the conditions had occurred on which the will of Mrs. Eaton had declared that the devise of a part of the income of the trust-estates to Amasa M. Eaton should cease and determine; and, as he had no wife or children in whom it could vest, it became, by the alternative provision of the will, a fund to accumulate until his death, or until he should have a wife or child who could take under the trust.

But Nichols, the assignee, construing the whole of the will together, and especially the proviso above given *verbatim*, to disclose a purpose, under cover of a discretionary power, to secure to her son the right to receive to his own use the share of the income to which he was entitled before the bankruptcy, in the same manner afterwards as if that event had not occurred, brought this bill against the said executors and trustees to subject that income to administration by him as assignee in bankruptcy for the benefit of the creditors.

Upon a final hearing the Circuit Court dismissed the bill, and Nichols appealed to this court.

Mr. Horatio Rogers and *Mr. C. S. Bradley* for the appellant.

The principles of the law do not permit a debtor to have the use and enjoyment of wealth to the exclusion of any rights of his creditors; and hence in the law of trusts, peculiarly and solely within the cognizance of courts of equity, contrivances for the enjoyment of property by a debtor, and for withholding it from his creditors, are against conscience, and void. *Tillinghast* v. *Bradford*, 5 R. I. 212; *Brandon* v. *Robinson*, 18 Ves. 429; Tud. Lead. Cas. (2d ed.) 862; *Piercy* v. *Roberts*, 1 M. & K. 4; *Kearsley* v. *Woodcock*, 3 Hare, 185; *Wallace* v. *Anderson*, 16 Beav. 533; *Sharp* v. *Casserat*, 20 id. 470; *Carr* v. *Living*, 28 id. 644; Watson's Comp. of Eq., vol. ii. 1149; *Graves* v. *Dolphin*, 1 Sim. 66; *Green* v. *Spicer*, 1 R. & My. 395; *Younghusband* v. *Gisborne*, 1 Coll. 400; Roper on Leg. (4th ed.) 794.

Confessedly no decided case has sustained the validity of a discretion in trustees to give to a bankrupt the entire equitable estate which he had prior to his bankruptcy. The doctrine of chancery plainly is, that attempts, through the so-called discretion of trustees, to secure that result, have ever been considered as fraudulent devices to continue the property in him after the law has taken away his capacity to retain it. Consequently, what remains unapplied belongs to the assignee. *Green* v. *Spicer*, 1 R. & Myl. 395; *Piercy* v. *Roberts*, 1 Myl. & Kee. 4; *Snowden* v. *Dales*, 6 Sim. 524; *Rippon* v. *Norton*, 2 Beav. 63; *Kearsley* v. *Woodcock*, 3 Hare, 185; *Lord* v. *Bunn*, 2 You. & Coll. 98; *Davidson* v. *Chalmers*, 33 Beav. 653.

Mr. Abraham Payne and *Mr. Samuel Currey* for the appellees.

It is clear that the assignee in bankruptcy can take only what was vested in the debtor at the date of filing his petition. 1 Benedict D. C. 407; *In re Patterson*, 6 Int. Rev. Rec. 157; *Carleton* v. *Leighton*, 3 Meriv. 667; *Mitchell* v. *Winslow*, 2 Story's C. C. 630; 1 Jarm. on Wills, 816; *Hall* v. *Gill*, 10 Gill & J. 325; *In re Barret*, 2 N. B. 165; *Brown* v. *Heathcote*, 1 Atk. 162; *Mitford* v. *Mitford*, 9 Ves. 100.

The question then is, whether, under the will of Mrs. Eaton, her son Amasa had, at the date of filing his petition in bankruptcy, any vested interest in her estate which could pass to his assignee. There is no question, that, until his bankruptcy,

he had an absolute right to one-fourth of the income of the trust-estate until the death of his sister, and after that time to one-third of such income, so long as he did not attempt to alienate or dispose of it. Upon the occurrence of either of these events, the will provides that the trust in his favor shall immediately cease and determine, and that thereafter the income should be devoted to other trusts.

Such provisions for the cesser of income upon alienation or upon the bankruptcy of the *cestui que trust* are unquestionably valid. *Tillinghast* v. *Bradford*, 5 R. I. 205; *Dommett* v. *Bedford*, 3 Ves. 149; *Brandon* v. *Robinson*, 18 id. 429; *Joel* v. *Mills*, 3 K. & J. 458; *Rochford* v. *Hackman*, 9 Hare, 475; *Cooper* v. *Wyatt et als.*, 5 Madd. Ch. 297; 2 Story Eq., sect. 974; *Rockford* v. *Hardeman*, 10 Eng. L. & Eq. 67.

The powers under which the trustees must act in making payments are merely discretionary. They are expressly declared not to be imperative; and this is the distinction laid down in the books between them and trusts. "Powers," says Wilmot, C. J., "are never imperative: they leave the acts to be done at the will of the party to whom they are given. Trusts are always imperative, and are obligatory upon the conscience of the party intrusted." *Attorney-General* v. *Downing*, Wilm. 23. It is settled that the court will never exercise a mere discretionary power, either in the lifetime of the trustees, or upon their death, or refusal to act. Hill on Trustees, 486. Nor will it interfere to control the trustees acting *bona fide* in the exercise of their discretion. Id. 489; Lewin on Trusts, 538; *Maddison* v. *Andrew*, 1 Ves. 60; *Boss* v. *Godsell*, 1 Yo. & Col. 617.

Payments made by the trustees to Eaton in the exercise of these powers would be in the nature of after-acquired property, to which his assignee has no title. Any thing they may choose to give is as much a free gift as though it came from the bounty of an entire stranger.

MR. JUSTICE MILLER, after stating the case, delivered the opinion of the court.

The claim of the assignee is founded on the proposition, ably presented here by counsel, that a will which expresses a pur-

pose to vest in a devisee either personal property, or the income of personal or real property, and secure to him its enjoyment free from liability for his debts, is void on grounds of public policy, as being in fraud of the rights of creditors; or as expressed by Lord Eldon in *Brandon* v. *Robinson*, 18 Ves. 433, "If property is given to a man for his life, the donor cannot take away the incidents of a life-estate."

There are two propositions to be considered as arising on the face of this will as applicable to the facts stated: 1. Does the true construction of the will bring it within that class of cases, the provisions of which on this point are void under the principle above stated? and 2. If so, is that principle to be the guide of a court of the United States sitting in chancery?

Taking for our guide the cases decided in the English courts, the doctrine of the case of *Brandon* v. *Robinson* seems to be pretty well established. It is equally well settled that a devise of the income of property, to cease on the insolvency or bankruptcy of the devisee, is good, and that the limitation is valid. *Demmill* v. *Bedford*, 3 Ves. 149; *Brandon* v. *Robinson*, 18 id. 429; *Rockford* v. *Hackmen*, 9 Hare; Lewin on Trusts, 80, ch. vii., sect. 2; *Tillinghast* v. *Bradford*, 5 R. I. 205.

If there had been no further provision in regard to the matter in this will than that on the bankruptcy or insolvency of the devisee, the trust as to him should cease and determine; or if there had been a simple provision, that, in such event, that part of the income of the estate should go to some specified person other than the bankrupt, there would be no difficulty in the case. But the first trust declared after the bankruptcy for this part of the income is in favor of the wife, child, or children of such bankrupt, and in such manner as said trustees in their discretion shall think proper. If the bankrupt devisee had a wife or child living to take under this branch of the will, there does not seem to be any doubt that there would be nothing left which could go to his assignee in bankruptcy. The cases on this point are well considered in Lewin on Trusts, above cited; and the doctrine may be stated, that a direction that the trust to the first taker shall cease on his bankruptcy, and shall then go to his wife or children, is valid, and the entire interest passes to them; but that if the devise be to *him*

and his wife or children, or if he is in any way to receive a vested interest, that interest, whatever it may be, may be separated from those of his wife or children, and be paid over to his assignee. *Page* v. *Way*, 3 Beav. 20; *Perry* v. *Roberts*, 1 Myl. & K. 4; *Rippon* v. *Norton*, 2 Beav. 63; *Lord* v. *Bunn*, 2 You. & Coll. Ch. 98. Where, however, the devise over is for the support of the bankrupt and his family, in such manner as the trustees may think proper, the weight of authority in England seems to be against the proposition that any thing is left to which the assignee can assert a valid claim. *Twopenny* v. *Peyton*, 10 Sim. 487; *Godden* v. *Crowhurst*, id. 642.

In the case before us, the trustees are authorized, in the event of the bankruptcy of one of the sons of testatrix without wife or children (which is the condition of the trust as to Amasa M. Eaton), to loan and reinvest that portion of the income of the estate in augmentation of the principal sum or capital of the estate until his decease, or until he shall have wife or children capable of receiving the trust of the testatrix forfeited by him.

There does not seem, thus far, any intention to secure or revest in the bankrupt any interest in the devise which he had forfeited; and there can be no doubt, that, but for the subsequent clauses of the will, there would be nothing in which the assignee could claim an interest. But there are the provisions, that the trustees may, at their discretion, transfer at any time to either of the devisees the half or any less proportion of the share of the fund itself which said devisee would be entitled to if the whole fund were to be equally distributed; and the further provision, that, after the cesser of income provided for in case of bankruptcy or other cause, it shall be lawful, but not obligatory on her said trustees, to pay to said bankrupt or insolvent son, or to apply for the use of his family, such and so much of said income as said son would have been entitled to in case the forfeiture had not happened.

It is strongly argued that these provisions are designed to evade the policy of the law already mentioned; that the discretion vested in the trustees is equivalent to a direction, and that it was well known it would be exercised in favor of the bankrupt.

The two cases of *Twopenny* v. *Peyton* and *Godden* v. *Crow-*

hurst, above cited from 10 Sim., seem to be in conflict with this doctrine; while the cases cited in appellant's brief go no farther than to hold, that when there is a right to support or maintenance in the bankrupt, or the bankrupt and his family, a right which he could enforce, then such interest, if it can be ascertained, goes to the assignee.

No case is cited, none is known to us, which goes so far as to hold that an absolute discretion in the trustee — a discretion which, by the express language of the will, he is under no obligation to exercise in favor of the bankrupt — confers such an interest on the latter, that he or his assignee in bankruptcy can successfully assert it in a court of equity or any other court.

As a proposition, then, unsupported by any adjudged case, it does not commend itself to our judgment on principle. Conceding to its fullest extent the doctrine of the English courts, their decisions are all founded on the proposition, that there is somewhere in the instrument which creates the trust a substantial right, a right which the appropriate court would enforce, left in the bankrupt after his insolvency, and after the cesser of the original and more absolute interest conferred by the earlier clauses of the will. This constitutes the dividing-line in the cases which are apparently in conflict. Applying this test to the will before us, it falls short, in our opinion, of conferring any such right on the bankrupt. Neither of the clauses of the provisos contain any thing more than a grant to the trustees of the purest discretion to exercise their power in favor of testatrix's sons. It would be a sufficient answer to any attempt on the part of the son in any court to enforce the exercise of that discretion in his favor, that the testatrix has in express terms said that such exercise of this discretion is not "in any manner obligatory upon them," — words repeated in both these clauses. To compel them to pay any of this income to a son after bankruptcy, or to his assignee, is to make a will for the testatrix which she never made; and to do it by a decree of a court is to substitute the discretion of the chancellor for the discretion of the trustees, in whom alone she reposed it. When trustees are in existence, and capable of acting, a court of equity will not interfere to control them in the exercise of a discretion vested in them by the instrument

under which they act. Hill on Trustees, 486; Lewin on Trusts, 538; *Boss* v. *Goodsall*, 1 Younge & Collier, 617; *Maddison* v. *Andrew*, 1 Ves. Sr. 60. And certainly they would not do so in violation of the wishes of the testator.

But, while we have thus attempted to show that Mrs. Eaton's will is valid in all its parts upon the extremest doctrine of the English Chancery Court, we do not wish to have it understood that we accept the limitations which that court has placed upon the power of testamentary disposition of property by its owner. We do not see, as implied in the remark of Lord Eldon, that the power of alienation is a *necessary* incident to a life-estate in real property, or that the rents and profits of real property and the interest and dividends of personal property may not be enjoyed by an individual without liability for his debts being attached as a necessary incident to such enjoyment. This doctrine is one which the English Chancery Court has ingrafted upon the common law for the benefit of creditors, and is comparatively of modern origin. We concede that there are limitations which public policy or general statutes impose upon all dispositions of property, such as those designed to prevent perpetuities and accumulations of real estate in corporations and ecclesiastical bodies. We also admit that there is a just and sound policy peculiarly appropriate to the jurisdiction of courts of equity to protect creditors against frauds upon their rights, whether they be actual or constructive frauds. But the doctrine, that the owner of property, in the free exercise of his will in disposing of it, cannot so dispose of it, but that the object of his bounty, who parts with nothing in return, must hold it subject to the debts due his creditors, though that may soon deprive him of all the benefits sought to be conferred by the testator's affection or generosity, is one which we are not prepared to announce as the doctrine of this court.

If the doctrine is to be sustained at all, it must rest exclusively on the rights of creditors. Whatever may be the extent of those rights in England, the policy of the States of this Union, as expressed both by their statutes and the decisions of their courts, has not been carried so far in that direction.

It is believed that every State in the Union has passed statutes by which a part of the property of the debtor is exempt from seizure on execution or other process of the courts; in short, is not by law liable to the payment of his debts. This exemption varies in its extent and nature in the different States. In some it extends only to the merest implements of household necessity; in others it includes the library of the professional man, however extensive, and the tools of the mechanic; and in many it embraces the homestead in which the family resides. This has come to be considered in this country as a wise, as it certainly may be called a settled, policy in all the States. To property so exempted the creditor has no right to look, and does not look, as a means of payment when his debt is created; and while this court has steadily held, under the constitutional provision against impairing the obligations of contracts by State laws, that such exemption laws, when first enacted, were invalid as to debts then in existence, it has always held, that, as to contracts made thereafter, the exemptions were valid.

This distinction is well founded in the sound and unanswerable reason, that the creditor is neither defrauded nor injured by the application of the law to his case, as he knows, when he parts with the consideration of his debt, that the property so exempt can never be made liable to its payment. Nothing is withdrawn from this liability which was ever subject to it, or to which he had a right to look for its discharge in payment. The analogy of this principle to the devise of the income from real and personal property for life seems perfect. In this country, all wills or other instruments creating such trust-estates are recorded in public offices, where they may be inspected by every one; and the law in such cases imputes notice to all persons concerned of all the facts which they might know by the inspection. When, therefore, it appears by the record of a will that the devisee holds this life-estate or income, dividends, or rents of real or personal property, payable to him alone, to the exclusion of the alienee or creditor, the latter knows, that, in creating a debt with such person, he has no right to look to that income as a means of discharging it. He is neither misled nor defrauded when the object of the testator is carried out by excluding him from any benefit of such a devise.

Nor do we see any reason, in the recognized nature and tenure of property and its transfer by will, why a testator who *gives*, who gives without any pecuniary return, who gets nothing of property value from the donee, may not attach to that gift the incident of continued use, of uninterrupted benefit of the gift, during the life of the donee. Why a parent, or one who loves another, and wishes to use his own property in securing the object of his affection, as far as property can do it, from the ills of life, the vicissitudes of fortune, and even his own improvidence, or incapacity for self-protection, should not be permitted to do so, is not readily perceived.

These views are well supported by adjudged cases in the State courts of the highest character.

In the case of *Fisher* v. *Taylor*, 2 Rawle, 33, a testator had directed his executors to purchase a tract of land, and take the title in their name in trust for his son, who was to have the rents, issues, and profits of it during his life, free from liability for any debts then or thereafter contracted by him. The Supreme Court of Pennsylvania held that this life-estate was not liable to execution for the debts of the son. "A man," says the court, "may undoubtedly dispose of his land so as to secure to the object of his bounty, and to him exclusively, the annual profits. The mode in which he accomplishes such a purpose is by creating a trust-estate, explicitly designating the uses and defining the powers of the trustees. . . . Nor is such a provision contrary to the policy of the law or to any act of assembly. Creditors cannot complain because they are bound to know the foundation on which they extend their credit."

In the subsequent case of *Holdship* v. *Patterson*, 7 Watts, 547, where the friends of a man made contributions by a written agreement to the support of himself and family, the court held that the instalments which they had promised to pay could not be diverted by his creditors to the payment of his debts; and Gibson, C. J., remarks, that "the fruit of their bounty could not have been turned from its object by the defendant's creditors, had it been applicable by the terms of the trust to his personal maintenance; for a benefactor may certainly provide for the maintenance of a friend, without exposing his bounty to the debts or imprudence of the beneficiary."

In the same court, as late as 1864, it was held that a devise to a son of the rents and profits of an estate during his natural life, without being subject to his debts and liabilities, is a valid trust; and, the estate being vested in trustees, the son could not alienate. *Shankland's Appeal*, 47 Penn. St. 113.

The same proposition is either expressly or impliedly asserted by that court in the cases of *Ashurst* v. *Given*, 5 W. & S. 323; *Brown* v. *Williamson*, 36 Penn. St. 338; *Still* v. *Spear*, 45 id. 168.

In the case of *Leavitt* v. *Bierne*, 21 Conn. Waite, J., in delivering the opinion of the court, says, "We think it in the power of a parent to place property in the hands of trustees for the benefit of a son and his wife and children, with full power in them to manage and apply it at their discretion, without any power in the son to interfere in that management, or in the disposition of it until it has actually been paid over to him by the trustees;" and he proceeds to argue in favor of the existence of this power, from the vicious habits or intemperate character of the son, and the right of the father to provide against these misfortunes.

In the case of *Nickell et al.* v. *Handly et al.*, 10 Gratt. 336, the court thus expresses its view on the general question, though not, perhaps, strictly necessary to the judgment in that case: "There is nothing in the nature or law of property which would prevent the testatrix, when about to die, from appropriating her property to the support of her poor and helpless relatives, according to the different conditions and wants of such relatives; nothing to prevent her from charging her property with the expense of food, raiment, and shelter for such relatives. There is nothing in law or reason which should prevent her from appointing an agent or trustee to administer her bounty."

In the case of *Pope's Executors* v. *Elliott & Co.*, 8 Ben. Monr. 56, the testator had directed his executors to pay for the support of Robert Pope the sum of $25 per month. Robert Pope having been in the Rocky Mountains until the sum of $225 of these monthly payments had accumulated in the hands of the executors, his creditors filed a bill in chancery, accompanied by an attachment, to subject this fund to the payment of their debt.

The Court of Appeals of Kentucky say that it was the manifest intent of the testator to secure to Robert the means of support during his life to the extent of $25 per month, or $300 per year; and that this intent cannot be thwarted, either by Robert himself by assignment or alienation, or by his creditors seizing it for his debts, unless the provision is contrary to law or public policy. After an examination of the statutes of Kentucky and the general principles of equity jurisprudence on this subject, they hold that neither of these are invaded by the provision of the will.

The last case we shall refer to specially is that of *Campbell* v. *Foster*, 35 N. Y. Court of Appeals, 361.

In that case it is held, after elaborate consideration, that the interest of a beneficiary in a trust-fund, created by a person other than the debtor, cannot be reached by a creditor's bill; and, while the argument is largely based upon the special provision of the statute regulating the jurisdiction of the court in that class of cases, the result is placed with equal force of argument on the general doctrines of the Court of Chancery, and the right of the owner of property to give it such direction as he may choose without its being subject to the debts of those upon whom he intends to confer his bounty.

We are not called upon in this connection to say how far we would feel bound, in a case originating in a State where the doctrine of the English courts had been adopted so as to become a rule of property, if such a proposition could be predicated of a rule like this. Nor has the time which the pressure of business in this court authorizes us to devote to this case permitted any further examination into the decisions of the State courts. We have indicated our views in this matter rather to forestall the inference, that we recognize the doctrine relied on by appellants, and not much controverted by opposing counsel, than because we have felt it necessary to decide it, though the judgment of the court may rest equally well on either of the propositions which we have discussed. We think the decree of the court below may be satisfactorily affirmed on both of them.

Other objections have been urged by counsel; such as that the bankrupt is himself one of the trustees of the will, and

will exercise his discretion favorably to himself. But there are two other trustees, and it requires their joint action to confer on him the benefits of this trust. It is said that one of them is mentally incompetent to act; but this is not established by the testimony. It is said also, that, since his bankruptcy, the defendant, Amasa, has actually received $25,000 of this fund; and that should go to the assignee, as it shows conclusively that the objections to the validity of the will were well founded.

But the conclusive answer to all these objections is, that, by the will of decedent, — a will which, as we have shown, she had a lawful right to make, — the insolvency of her son terminated all his legal vested right in her estate, and left nothing in him which could go to his creditors, or to his assignees in bankruptcy, or to his prior assignee; and that what may have come to him after his bankruptcy through the voluntary action of the trustees, under the terms of the discretion reposed in them, is his lawfully, and cannot now be subjected to the control of his assignee. *Decree affirmed.*

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